Young Legal Aid Lawyers

Submission to the Government Consultation:

Human Rights Act Reform: A Modern Bill Of Rights

A consultation to reform the Human Rights Act 1998

8th March 2022

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About YLAL

Young Legal Aid Lawyers (YLAL) was formed in 2005 and has around 4000 members.

We are a group of lawyers committed to practising in those areas of law, both criminal and civil, which have traditionally been publicly funded.

Our members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers throughout England and Wales.

We believe that the provision of good quality publicly funded legal assistance is essential to protecting the interests of the vulnerable in society and upholding the rule of law.

YLAL was set up and operates to pursue the following objectives:

- To campaign for a sustainable legal aid system which provides good quality legal help to those who could not otherwise afford to pay for it.
- To increase social mobility and diversity within the legal aid sector.
- To promote the interests of new entrants and junior lawyers and provide a network for like-minded people beginning their careers in the legal aid sector.

Introduction

On 14th December 2021 the Ministry of Justice announced an open consultation, entitled: Human Rights Act Reform: A Modern Bill of Rights. It opens as follows:

> *'The Government is committed to updating the Human Rights Act 1998. This consultation seeks views on the Government's proposals to revise the Human Rights Act and replace it with a Bill of Rights, in order to restore a proper balance between the rights of individuals, personal responsibility and the wider public interest.'*

This Consultation was published on the same day as the Independent Human Rights Act Review (IHRAR) report. YLAL's response to the IHRAR can be found here.[1] In summary we concluded:

> *It is YLAL's view that there is no case for reforming the HRA in the ways suggested by the terms of reference or the questions in the call for evidence of the IHRAR. In our view, domestic courts have been too deferential to the executive and the legislature and the UK needs to provide increased resources to the ECtHR to improve its efficacy and to truly 'bring rights home' in the UK.*

YLAL remains fundamentally opposed to the repeal of the Human Rights Act (HRA). We believe that the Human Rights Act as it currently exists is a vital tool for protecting our clients who are often the most vulnerable in society.

Many of our clients rely on the HRA to access justice and enforce their rights. To inform our response to the Consultation, YLAL hosted a virtual roundtable on 16 February 2022 featuring a range of junior human rights practitioners and policy professionals. Our panellists were: Eilidh Turnbull, JustRight Scotland; Gabriel Tan, Wilson LLP; Jun Pang, Liberty; Marte Lund, Birnberg Pierce; and Robbie Stern, Matrix Chambers. Whilst the discussion at this event has informed our response, and the response may refer to their contributions, this submission is from YLAL and not attributable to any of the individual panellists or any organisation of which they are a member.

YLAL's position is that the HRA generally strikes a fair balance between the rights of the individual and duties to the State. YLAL also believes that it strikes a fair balance between The European Convention on Human Rights (ECHR), European Court of Human Rights (ECtHR) jurisprudence and domestic law and courts. In our view, there is no evidence to suggest that the changes envisaged within this consultation are either necessary or desirable. As such, YLAL's position is that updating or replacing the HRA should not be a priority for the Government. Instead, the Government should

[1] Young Legal Aid Lawyers, Response to the Independent Human Rights Act Review Call for Evidence, 3 March 2021 http://www.younglegalaidlawyers.org/sites/default/files/YLAL%20IHRAR%20response%2003.03.21.pdf

focus resources on addressing the crisis in the justice system which has arisen from sustained underfunding by successive Governments.

YLAL has sought to address the questions within the consultation that are relevant to our members within this response. Where a question is omitted, this was intentional. We have not sought to address all of the questions posed, as some fall outside the scope of YLAL's membership and its aims. Unless stated otherwise, a reference to Convention rights within this response is a reference to the rights set out in the ECHR.

Executive Summary

Context

It is the purpose of this response to set out YLAL's views as to this consultation specifically and attempts to reform the HRA more broadly. It has been a repeated manifesto commitment of the Conservative Party since 2006 to replace the HRA with a 'British Bill of Rights'. The HRA and how it functions has therefore regularly been on the political agenda in recent years. Most recently the current Government returned to the issue in December 2020 when the IHRAR was announced.

The IHRAR reported its findings on 14th December 2021. This was the same day as the current consultation was announced. The IHRAR made a number of limited recommendations for changes to how the HRA operates. Conversely it rejected a much larger number of proposals for change. It also strongly recommended that

'…serious consideration is given by Government to developing an effective programme of civic and constitutional education in schools, universities and adult education. Such a programme should, particularly, focus on questions about human rights, the balance to be struck between such rights, and individual responsibilities.'

YLAL considers it notable that this was the only recommendation which the IHRAR recommended *strongly* within its report.

Despite this, the current consultation goes significantly further than the IHRAR in terms of its proposals for changes to the HRA and sets out the Government intend to replace the HRA. The consultation also makes no reference to developing a programme of civic education as recommended by the IHRAR. The executive summary to the consultation states at paragraph 12:

After we have received and considered the responses, we will in due course put forward legislative proposals to Parliament to revise and replace the Human Rights Act with a Bill of Rights.

YLAL is therefore concerned that the current proposals are being made in the absence of proper consideration of what has been recommended both by the IHRAR, by those who submitted responses to the same and any responses submitted in response to this consultation.

YLAL is extremely alarmed that easy read and audio versions of the consultation were only made available on 7th March 2022 with a deadline of one day to request a limited extension for submission. Members of YLAL often represent disabled and otherwise marginalised members of society who are most at risk of having their rights infringed. It is therefore deeply concerning that accessible versions of the consultation have been so delayed. YLAL also counts a significant number of disabled and

otherwise marginalised people amongst its membership and we are concerned that such legal professionals and others with valuable insight into the current proposals have potentially been discouraged or excluded from responding.

YLAL's key recommendations are summarised below.

Summary of Responses

Question 1: The available evidence suggests that section 2 of the HRA operates effectively and does not need to be amended. In YLAL's view, UK courts are already able to draw on a wide range of law when making human rights decisions.

Question 2: It is YLAL's position that the relationship between domestic courts and the ECtHR functions well. It is clear that the HRA does not diminish the role of the Supreme Court but instead allows the symbiotic relationship between the domestic courts and the ECtHR to thrive. Domestic courts follow clear and consistent ECtHR jurisprudence to the extent that it is relevant to the matters at hand but are also able to, and often do, depart from it where appropriate.

Question 3: On the face of it this proposal appears to be an instance where the Government is suggesting a strengthening of rights protection. It is YLAL's view that this is not the case. Quite simply Article 6 of the HRA already protects this right and the proposal is unnecessary.

Questions 4-7: are omitted from this response.

Question 8: YLAL disagrees that there is a need to add a further admissibility stage to HRA cases. All legal proceedings in the UK already have such stages. It should be remembered that HRA protects everyone but it is the most vulnerable and marginalised in society who are most likely to need assistance in seeking access to justice and protecting their rights. YLAL believes that adding further barriers to accessing the courts in such cases will make it much harder for public bodies to be held accountable for possible breaches and lead to an increase in cases going to the ECtHR. This would counter the Government's stated aims within the Consultation.

Question 9: As with question 8, YLAL disagrees that a permission stage, or any additional barrier to bringing HRA cases is needed. However, in the event that such a stage was added it would be vital that there be a public importance limb included as a safeguarding measure. It is necessary to ensure the law advances with society as it develops and flexibility remains within the legislation to make this possible.

Question 10: YLAL rejects the suggestion that this is an issue requiring reform. The use of language around genuine human rights abuses is extremely concerning and suggests that the Government wishes to create a system where some people have more rights than others. YLAL notes the numerous reports and reviews that have been undertaken of human rights laws over the last decade,

none of which have suggested that this is an issue that needs to be addressed. YLAL urges the Government to take heed of the strong recommendation for the IHRAR and invest in a civic education programme to help people learn about what their rights and responsibilities are in society among other suggestions.

Question 11: YLAL believes that the Government's proposals are problematic for several reasons. Firstly, reforming existing human rights legislation in order to limit its scope undermines the intention behind the ECHR articles. The Consultation paper fails to present its proposals based on tangible evidence, and instead relies on generalities and opinion. The Consultation paper states that the obligation to use threat to life warnings '*displaces the policing resources available for serious crime perpetrated against law-abiding citizens*'. This suggests that the Police should be able to pick and choose who they protect. Not only is this contrary to the presumption of innocence that underpins the UK justice system, this is a dangerous approach to human rights protection which, in order to be effective, must be universally available. YLAL proposes increased training and guidance across public bodies on the HRA, including specific training and guidance on positive obligations; and the introduction of human rights advisers/controllers, in a similar way to the Data Protection Act 2018. This would help prevent the need for costly litigation in the first place.

Question 12: The Consultation suggests two options for repealing and/or replacing section 3 of the HRA. YLAL rejects both. The IHRAR found that UK courts approached section 3 cautiously and explicitly rejected the need for repeal. The Government stated that it was minded to agree with this recommendation. YLAL agrees that no amendment of section 3 is needed and it is far from clear why the Government is therefore proposing repeal and/or substantial amendment of this provision. Given the extremely limited evidential basis for reform, YLAL rejects both options and invites the Government to retain section 3 in its current form.

Question 13: YLAL supports the conclusions of other groups, such as JUSTICE, Liberty and IHRAR, that there is no evidence in the case law since *Ghaidan* that the boundaries of section 3 have been disrespected, nor that section 3 judgments have proven inconsistent with Parliament's intention. YLAL strongly supports greater transparency of section 3 judgments to facilitate an improved access to justice for individuals. However, we do not consider that this necessarily requires an increased role for Parliament in the scrutiny and engagement with the courts' section 3 judgments.

Question 14: YLAL would support the creation of a database to record cases that rely on section 3 HRA. YLAL believes that in order to be open and accessible to all, judgments and legislation must be freely available to all without financial barriers. We would go further than the question and suggest that all court judgments which have the potential to create precedent should be accessible online.

Question 15: YLAL supports the IHRAR's recommendation to accept "Option Three: Amend the HRA to enable UK Courts to issue suspended and prospective quashing orders". The power to issue suspended quashing orders coupled with the power to issue a declaration of incompatibility will

enable the State to issue remedies while preventing the further infringement of rights under the present secondary legislation.

Question 16: YLAL believes that limiting quashing orders in the way proposed would significantly reduce the ability of individuals to hold public bodies to account. The Judicial Review and Courts Bill currently going through parliament is controversial and YLAL do not agree that proposals within that should automatically apply to the current HRA proposals.

Question 17: YLAL views the Government's proposals to revise section 10 of the HRA in order to improve the functionality of the remedial order power as unnecessary. The suggestion that a revision could improve and enhance Parliament's role in the law-making procedure is unfounded, since the current functioning of the section allows for Parliament to play an appropriate role in legislative scrutiny. Due to insufficient evidence that a full overhaul is necessary and to the importance of protecting the mechanism to rectify legislation that is incompatible with human rights, YLAL is of the view that section 10 should be preserved in its current form but prohibited from being used to amend the Act itself.

Question 18: YLAL believes that section 19 is integral to the protection of individuals' rights and freedoms as conferred by the ECHR. YLAL supports the view that although there is no case for change in respect of its current operation, consideration could be given to a statutory extension of section 19 to subordinate legislation to provide the existing drafting requirement with legislative force. Consideration of human rights at the inception of legislation is integral to ensuring domestic legislation respects the Convention rights.

YLAL submits that requiring the Government and Parliament to scrutinise the human rights implications of proposed legislation means consideration of human rights protections should be central to ministerial policy making. It is arguable that the duality of the mechanism already provides an adequate balance between safeguarding human rights protections while at the same time recognising that there may be challenges and circumstances in which compatibility cannot be declared on the face of the legislation itself. In the latter case, this may occur as a result of existing ECtHR case law or other circumstances, and the current procedure permits the Government to justify why the implementation of a bill is unlikely to give rise to successful challenges on the basis of incompatibility.

Question 19: Omitted from this response for the reasons set out in the introduction.

Question 20: The HRA does not contain a comprehensive definition of what a public authority is. This is deliberate so that the breadth of the Act is as far-reaching as possible, both in liability and in protection. In terms of changing the current definition of 'public authority', YLAL believes that this would reduce the protections currently afforded to the public.

Question 21: Overall, YLAL considers that the broad definition of 'public authority' contained in section 6 is integral to ensuring a rights-respecting approach across public services. As concluded by the Joint Committee on Human Rights, amending the definition carries '*too many risks of further unintended consequences*'.

YLAL invites the Government to take steps to ensure that private bodies carrying out public authority functions, such as prison services, are provided with comprehensive training on the application of human rights. It is submitted that this would improve the service provided to the public and reduce the cost of litigation arising from challenges under the HRA.

Question 22: YLAL strongly disagrees with the proposed changes to section 6(2). Section 6 was created to empower people to access and exercise their rights and to '*provide as much protection as possible for the rights of the individual against the misuse of power by the State*.' The HRA creates a mechanism through which people can trust that central and local Governments (and other bodies exercising public functions) will behave reasonably, in the interests of the people they serve and ultimately be held to account when they get it wrong. Instead, the Government's current proposals explicitly attempt to limit individuals' ability to challenge exercises of state power. They seek to address a problem that the Government has not shown exists and will not create any more certainty for public authorities.

Question 23: Omitted from this response for the reasons set out in the introduction.

Question 24: YLAL is concerned by proposals to limit the use of certain rights in certain contexts, in particular Articles 5, 6 and 8 in deportation challenges. Removing fundamental human rights safeguards from specific categories of individuals is repressive and shifts the balance between human rights and Executive power. In our view, the proposals outlined in Question 24 are designed to further enhance Executive control and reduce the abilities of affected individuals to successfully challenge Executive power. YLAL rejects all of the proposals within this question and the premise on which they are based.

Question 25: YLAL believes that the term "illegal and irregular migration" is inherently problematic. The use of the term "illegal migration" has become popularised, particularly in the Government's rhetoric regarding small boat migration in the English Channel. This refers to people who are making the dangerous journey with the aim of seeking asylum, and thus to be recognised as a refugee under the 1951 Refugee Convention, with limited access to safe routes for protection.

YLAL submits that the overall effect of legislating to circumvent international obligations, particularly in the context of the Nationality and Borders Bill, further feeds into the concept of who is a "deserving migrant". YLAL does not support the argument that there is such a concept of a "deserving" claimant. If there has been a breach to a person's human rights, then they are a deserving claimant regardless.

Any changes preventing the rights that those seeking asylum or international protection can access may impact on who can rely upon the HRA, which may lead to increasing legal challenges being taken directly to Strasbourg. YLALs, by nature, work with people who may otherwise not have the tools or resources to uphold their civil or universal rights. Should the framework of these rights become discriminatory, young legal professionals will be less inclined to contribute to a system that is predetermining a person's access to vital rights based on their immigration status.

Question 26: YLAL believes that there is no case for amending or limiting access to damages for HRA breaches by the public authorities. Such awards are already limited by ECtHR protocol and HRA provisions where a number of factors are taken into account.

Question 27: YLAL is strongly against the proposal that rights should be linked to conduct of claimants. The proposal to create a tiered system for awarding remedies in human rights cases would create legal uncertainty, punish victims of crime, and discriminate between individuals based on their race, ethnicity and socio-economic background. Not only that, the proposal threatens the very principle of universal human rights.

Question 28: YLAL believes that the proposal to remove article 46 would have severe negative consequences in that it will leave very little constructive dialogue with the ECtHR, which is so important in resolving issues which arise.

We suggest that the broad oversight of the ECtHR, through the operation of article 46, has a positive impact without negating the sovereignty of Parliament, which retains ultimate power.

Question 29: YLAL is of the view that the Human Rights Act works well and that the current proposals will restrict people's rights based on flawed evidence. It is also notable that, due to the broadness and uncertain nature of the proposals, very little data is available to assess potential impacts.

As noted throughout this response YLAL is sceptical that the current proposal will have any benefits in terms of protecting our client's rights. YLAL believes that this is demonstrated when the Government's suggested benefits are considered critically.

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

YLAL's position is that section 2 HRA operates effectively and does not need to be amended. In YLAL's view, UK courts are already able to draw on a wide range of law when making human rights decisions.

Under s.2(1) HRA, domestic courts and tribunals 'must take into account' clear and consistent ECtHR jurisprudence, to the extent that it is relevant to the matters at hand. It does not require UK courts to follow ECtHR jurisprudence. The IHRAR report identified that, in human rights cases, UK courts and tribunals must first examine domestic and common law, before considering ECtHR judgments. The panel recommended a small amendment to clarify the order in which UK courts should consider domestic laws, common law, the ECHR and ECtHR judgments. This is far from the complete replacement of section 2 as proposed by the consultation.

Likewise, domestic courts have departed from ECtHR jurisprudence where it has been deemed appropriate, as outlined in YLAL's IHRAR submission. Judgments in *R (Saunders) v Independent Police Complaints Commission* and *Manchester City Council v Pinnock (No 1)* clarified that decisions of the ECtHR are not to be treated as binding precedent, leaving domestic courts and tribunals free to draw on a wide range of law. The consultation does not provide any evidence to the contrary, leaving the draft clause unnecessary, as the provisions of the Human Rights Act as currently enacted already meet the intended aim of drawing on a wide range of law when reaching decisions.

Further still, it is unclear how Option 1 and 2 would facilitate the use of a wide range of case law in reaching human rights decisions, as both options for reform require that UK courts and tribunals follow domestic decisions as binding precedent.

In Option 1, section 4 creates a mandatory requirement that courts and tribunals follow previous judgments and decisions. As such, domestic precedents take priority over section 5, which gives courts and tribunals discretion to have regard to foreign or international judgments or decisions. Likewise, Option 2 section 4 requires that courts or tribunals follow domestic precedent. This mandatory requirement takes priority over the 'other matters' mentioned in section 5.

Such mandatory directions would inhibit the ability of courts and tribunals to draw on a broader range of international law, beyond that provided by the ECtHR, in reaching human rights decisions, as it leaves no room for discretion or departure. This not only goes against common law ideas of the

development of law, but is also hard to reconcile with the consultation's supposed intention to allow courts to draw upon 'a wide range of law'.

Additionally, altering the relationship between domestic courts and the ECtHR would lead to a gap in how rights are understood and protected. Although the Government currently intends to remain part of the Convention, the IHRAR report identifies how any repeal of section 2 HRA would result in a lack of a formal link between the HRA and the Convention.

We further note that Option 2, in s.5(b), specifically requires that regard may only be had to judgments or decisions made in other common law jurisdictions. This therefore excludes those decisions made in civil law jurisdictions, which is the most prevalent legal system across the globe. Those countries which do operate under common law predominantly have their roots in English common law. We suggest that it is inappropriate to effectively give precedence to common law over the more widespread civil legal systems, as appears to be suggested within the draft clause.

Both Option 1 and 2 effectively repeal the current meaning of s2 HRA. Not only do they not require domestic courts to consider ECtHR jurisprudence, but also diminish the substantive ties between HRA and Convention rights. Option 1 specifically states that the rights or freedoms in the Bill of Rights need not be construed as having the same meaning as a corresponding right or freedom in the ECHR or the HRA.YLAL finds this particularly concerning, as it leaves room for a fundamental revision of the rights contained in the HRA.

Such repeal would create a divergence between the conditions for human rights protection in the UK and those as provided by the ECHR, and we submit this would be a degradation of these rights. If Convention rights are no longer properly incorporated through UK legislation, the only option available to aggrieved parties will be to take their cases to the ECtHR for determination. Access to justice will depend on funding being available through legal aid, and parties will encounter more barriers to bringing rights-related proceedings.

A gap in human rights protection will increase the number of cases brought to Strasburg. Therefore, the purported interference of the ECtHR on domestic human rights issues, with which the consultation is concerned, will increase. This therefore undermines the aim to 'bring rights home'.

It is of note that the UK rarely loses a case at the ECtHR — in 2020, only 2 out of 284 applications found a violation of human rights. YLAL therefore believes that the purported issues which the repeal of section 2 are said to solve are over exaggerated, with little basis in the available evidence.

Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

In order to answer this question you must first consider whether under the current regime it is not clear that the UK Supreme Court, the highest court in the UK, is the ultimate judicial arbiter of our laws.

The 'mirror principle' is often used to describe how domestic courts and the ECtHR interact. This principle states that judgments of domestic courts should match those of the judgments on similar issues that have been decided at the ECtHR, and vice versa.

It is important to note that the HRA does not require the adoption of the mirror approach in the determination of breaches of Convention rights breaches; but it is how the legislation was initially interpreted. Critics of the ECtHR say that the mirror approach weakens the UK's jurisprudence as we ultimately do not have control over the implementation of human rights, despite having the HRA 1998. YLAL disagrees with this criticism.

It has now been over 21 years since the HRA came into force. As is inherent within a common law system, over time, the way in which the HRA is interpreted and used has evolved. In the last decade, whilst the default position remains that firstly, it is important that the judgments of the ECtHR are considered and, secondly, that there would need to be good reason for the deviation, domestic courts are able to depart from ECtHR jurisprudence, and in fact, they often do so.

Case law has confirmed the way in which the courts now coexist and the move from the mirror approach to the more 'practical approach'. In *R (Saunders) v Independent Police Complaints Commission*[2] it was held by the High Court that,

> *Decisions of the European Court of Human Rights on the facts of a particular case ought not to be treated as a binding precedent, even in a case where the material facts appear to be similar.*

Further in the case of *Manchester City Council v Pinnock (No 1),*[3] Lord Neuberger held that

> *This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the*

[2] [2008] EWHC 2372 (Admin) [2009] 1 All ER 379
[3] [2010] UKSC 45, para. 48, available from: https://www.bailii.org/uk/cases/UKSC/2011/6.html

court to engage in a constructive dialogue with the European court which is of value to the development of Convention law....Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle ...it would be wrong for this court not to follow that line.

From these short excerpts alone it is clear that the common law system of precedent remains well established and that the decisions of the Supreme Court remain the highest authority upon domestic courts. If, in its judgement, a decision goes against or goes further than what has been said in the ECtHR, the judgments of the Supreme Court supersede those of theECtHR.

It is YLAL's position that the relationship between domestic courts and the ECtHR functions well. It is clear that the HRA does not diminish the role of the Supreme Court but instead allows the symbiotic relationship between the domestic courts and the ECtHR to thrive. Domestic courts follow clear and consistent ECtHR jurisprudence to the extent that it is relevant to the matters at hand but are also able to, and often do, depart from it where appropriate.

The Government consultation does not provide any feasible basis for the assertion that there is uncertainty as to who is the ultimate judicial arbiter; and it is clear from case law that the ultimate arbiter is the UK Supreme Court. It is therefore YLAL's position that any proposed amendment to, or replacement of, the current legislation does not need to go further than what is currently contained in the HRA.

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

In answering this question, one must have regard to the integral nature of jury trials to the criminal justice system in England and Wales as highlighted by Lord Devlin in 1956;

> "Trial by jury is more than an instrument of justice and more than a wheel of the constitution; it is the lamp that shows that freedom lives."

Jury trials are governed by the Juries Act 1974, which provides the structural framework from eligibility to verdicts.

However, the constitutional position of jury trials remains vulnerable due to England's unwritten constitution. Whilst jury trials remain governed by statute, it is within the purview of the Government to propose and seek amendments.

Thus, enshrining jury trials into a Bill of Rights which may be amended by Government at any given time, will not be in the spirit of Article 6 HRA, unless Government is prohibited from altering and/or abolishing the established framework.

It is unlikely that the Government would accede to a blanket protection of a fundamental fixture within the criminal justice system given its past and more recent endeavours to limit jury trials in an attempt to save costs.

For instance, the Criminal Law Act 1977 removed the right to jury trials by reconsidering and reframing summary only offences. Since 1977, there has been a gradual adjustment of offences, including driving offences and damage to property, to allow them to be dealt with under summary jurisdiction.

More recently, the Government increased the sentencing powers of magistrates courts in order to tackle case backlog across the justice system. This development in itself may further reduce jury trials where a magistrates court can accept jurisdiction.

Only 2% of criminal cases are dealt with by juries, the rest are determined by the magistrates' courts or disposed of by change of plea.

It would be incumbent upon the Government, instead of finding ways to further reduce jury trials, to embrace the diversity a jury of peers brings to the criminal justice system. Jury trials remain a pivotal safeguard to fairness and equality under the law. They are recognised under common law and inadvertently are part of the interpretation of Article 6 of the Human Rights in England.

On the face of it this proposal appears to be an instance where the Government is suggesting a strengthening of rights protection. It is YLAL's view that this is not the case. Quite simply Article 6 of the HRA already protects this right and the proposal is unnecessary.

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.

YLAL believes that repeated reference within the Consultation to 'genuine' human rights abuses, prior to the actual conclusion of a trial or civil proceeding, is highly problematic, as it seeks to filter cases without properly evaluating them. This is a tool that can be used to remove complex and difficult cases from judicial purview, merely due to a bias of what a 'genuine' (an unclarified concept) human right abuse should look like. Please see our response to question 10 for full details of YLAL's concerns regarding the use of this term.

In YLAL's view, a permission stage is not unreasonable per se, on the basis that it allows courts to filter cases and avoid potential waste of limited public resources. Admissibility stages exist for all legal cases in the UK already in part for this reason.

What is being proposed by this question goes significantly beyond a simple admissibility stage. YLAL is concerned that the need to prove a 'significant disadvantage' would lead to a legal threshold set too high. The Consultation does not offer a definition of 'significant disadvantage' to consider though this echoes the language ofArticle 35(3)(b) ECHR.

However, this Article does not allow any case to be dismissed where it has not been 'duly considered' by a domestic court.[4] When this is considered alongside the proposed additional permission stage it is likely that this change would lead to an increase in cases being taken to the ECtHR as they will not have been 'duly considered' by domestic courts.

It should be remembered that HRA protects everyone but it is the most vulnerable and marginalised in society who are most likely to need assistance in seeking access to justice and protecting their rights. YLAL believes that adding further barriers to accessing the courts in such cases will make it much harder for public bodies to be held accountable for possible breaches and lead to an increase in cases going to the ECtHR. This would be counter to the Government's stated aims within the Consultation.

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[4] ECHR Research Report - The new admissibility criterion under Article 35 § 3 (b) of the Convention: case-law principles two years on (2012)

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.

YLAL does not agree that a permission stage should be added and we would refer to our answer to question 8 above. However, in the event that such a stage was added it would be vital that there be a public importance second limb included as a safeguarding measure. It is necessary to ensure the law advances with society as it develops and flexibility remains within the legislation to make this possible. If the facts of one applicant derive no significant disadvantage for that person, it does not mean that the case is not worth looking at if there is a novel point of law to be assessed. It also does not mean that the action which was alleged as a breach would not cause significant disadvantage to a different person than the applicant at the time who has a different background or social status.

For example, it is important for Government policy in relation to public health measures to be considered and tested where it is particularly burdensome, even if it does not necessarily bring a significant disadvantage on the person bringing the case could be considered to be of "overriding public importance".

The second limb will allow the court to deal with a novel point of law without delay. This could also prevent an adverse effect on the court's caseload that could result where cases keep coming to the court because the point of law is not clear but applicants lack a significant disadvantage. In many cases, those who have been most heavily impacted by a restriction or inhibition on their rights have the fewest resources to bring a case. It's necessary that these cases can be represented, even where they lack resources, to ensure representation of those who most need it. This additional limb would provide for those people.

For the avoidance of doubt YLAL strongly disagrees that a permission stage is needed for HRA claims and additional barriers to bringing such claims should not be created.

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

YLAL rejects the suggestion that this is an issue requiring reform. The current system is designed to identify cases lacking merit before a claim is made or in its early stages. As it stands, for the large part of human rights claims, only those whose merits have already been demonstrated come before the court. This indicates that courts are already able and well-equipped to distinguish meritorious and unmeritorious claims. YLAL rejects the Consultation's suggestion that "the elastic expansion of the parameters of human rights law has created widespread uncertainty, which has encouraged patently unmeritorious claims".[5] On the contrary, the majority of cases the Consultation uses to demonstrate that "uncertainty" were struck out in their early stages.[6] The Consultation is unable to provide an example of a so-called unmeritorious claim that was successful. That indicates clarity rather than uncertainty.

YLAL is concerned by the Consultation's focus on detailing so-called unmeritorious claims made by individuals in prison. The general thrust of the argument seems to be a disdain for prisoners' rights, and a suggestion that claims of human rights abuses brought by prisoners are frivolous. For example, the Consultation apparently dismisses out of hand the claim that denying prisoners the right to vote was an infringement on their human rights, simply because the case was brought by an individual convicted of manslaughter.[7] That the Consultation seeks to highlight the crimes committed by claimants suggests that the Government seeks to distract from the real issues - that is, the widespread abuses of human rights by public authorities. YLAL cautions that the Consultation's use of language strongly indicates a position that some individuals are more deserving of their rights being protected than others. That is a clear violation of Article 1 of the European Convention on Human Rights ("ECHR"), incorporated into British Law by the Human Rights Act 1998 ("HRA"). Article 1 holds that "Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in … this Convention" (emphasis added).[8] In addition, YLAL seeks to emphasise that the proposed reforms would likely have an overreaching impact on over-criminalised minority communities' and individuals' ability to make a claim if their human rights have been infringed.[9]

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[5] Consultation, Chapter 3 – The Case for Reforming Human Rights Law, paragraph 128.
[6] Ibid, paragraphs 127-130.
[7] Ibid, paragraph 126; *Hirst v United Kingdom* (No.2) [2004] 38 EHRR 40
[8] European Convention on Human Rights, Article 1, (adopted 4 November 1950, entered into force 3 September 1953) (ECHR).
[9] "People from a Black, Asian, 'Mixed' or 'Chinese and other' background were over-represented as defendants in the criminal justice system in 2019". House of Commons Library (2020) Ethnicity and the criminal justice system: What does recent data say on over-representation? Retrieved from https://commonslibrary.parliament.uk/ethnicity-and-the-criminal-justice-system-what-does-recent-data-say/.

YLAL cautions against any reform that renders it difficult for certain individuals or groups of individuals to access justice, particularly regarding human rights claims which are fundamental. YLAL finds particularly dangerous the Consultation's suggestion that "a Bill of Rights could require the courts to give greater consideration to the behaviour of claimants and the wider public interest when interpreting the balancing of qualified rights" (emphasis added).[10] LIBERTY has warned that the Consultation's efforts to paint certain individuals as undeserving of bringing a claim against a public authority for a violation of their human rights risks "set[ting] up a division between people who are deserving of human rights and those who are not".[11] Extending human rights to all does not "bring human rights into disrepute".[12] Moreover, YLAL is mindful of the environment in which the Government seeks to make this reform. In an environment where the Government seeks to criminalise asylum-seekers[13] and peaceful protesters[14], YLAL queries the extent to which an individual's actions and characteristics could render them "undeserving" of being able to enforce their human rights.

YLAL rejects the Consultation's goal to reduce the number of human rights claims[15]. Such an aim undermines fundamental democratic rights. As LIBERTY has made clear, "the Government's desire to "reduce the number of human rights based claims being made overall", including through making it more difficult for claimants to access judicial remedies "… should not be a goal in and of itself".[16] Such a goal focuses on the inconvenience of defending human rights claims rather than on the impact on an individual if their rights are infringed. YLAL is concerned by the Consultation's emphasis on restricting individuals' ability to make claims when their human rights have been infringed rather than on preventing public bodies infringing on individuals rights in the first place.

Practical Suggestions

The 2012 Commission on a Bill of Rights concluded: "In the view of [the majority on the Commission], it is this lack of 'ownership' by the public which is, in their view, the most powerful argument for a new constitutional instrument." It is telling that the 2012 Commission's most compelling argument

[10] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights (CP 588, 2021), Chapter 3 – The Case for Reforming Human Rights Law, paragraph 131.
[11] (LIBERTY (2022) Human Rights Act Reform: A Modern Bill of Rights - A power grab that threatens us all, page 2, retrieved from https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/12/Libertys-HRA-consultation-tip-sheet-Feb-22.pdf.
[12] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights (CP 588, 2021), Chapter 3 – The Case for Reforming Human Rights Law, paragraph 224.
[13] Nationality and Borders Bill 2021, HL Bill 124.
[14] Police, Crime, Sentencing and Courts Bill 2021, HL Bill 123.
[15] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights (CP 588, 2021), Chapter 3 – The Case for Reforming Human Rights Law, paragraph 227.
[16] (LIBERTY (2022) Human Rights Act Reform: A Modern Bill of Rights - A power grab that threatens us all, page 7, retrieved from https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/12/Libertys-HRA-consultation-tip-sheet-Feb-22.pdf.

for a new constitutional instrument was not any underlying defects with the HRA but rather the public's lack of understanding and 'ownership' of the Act. It is also noteworthy that the only recommendation which the IHRAR felt able to 'strongly' recommend was investment in a programme of civic education around human rights.

Therefore:

a. YLAL proposes increased public education on the HRA by incorporating and expanding it into the national education curriculum.

b. YLAL proposes that the Independent Office of Police Conduct (IOPC) undergoes serious and needed reform to ensure its independence from police professional standards departments, has greater powers to deal with police misconduct, and actively investigates police complaints.

c. YLAL proposes that the Home Office substantially increases the recruitment and training of asylum caseworkers thereby reducing the time the courts deal with asylum appeals, in which the vast majority are accepted.

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

The Government Consultation paper suggests that the application of the HRA adversely affects public services on an operational level. It claims that the HRA framework creates '*legal uncertainty*', which in turn causes confusion and risk aversion for frontline public services, such as the Police, National Health Service, the Prison Service, and the Armed Forces.[17] The result, it claims, is that public protection is undermined.

The Government proposes that the Bill of Rights would provide '*less scope for ambiguity in interpreting claimants' rights, and less scope for judicial amendment of the statutory frameworks*.'[18] In real terms, this means that the legislature will be able to restrict the range of human rights claims brought by claimants and the capability of the judiciary to provide common law remedies in cases where no statute or precedent exists for unique legal situations. In short, there will be less accountability of both the Government and its agencies, bodies and public services.

Problems with the Government's approach

YLAL believes that the Government's proposals are problematic for several reasons. Firstly, reforming existing human rights legislation in order to limit its scope undermines the intention behind the ECHR articles. For example, Article 3 prohibits torture but also inhuman or degrading treatment or punishment. This suggests that the articles, and by extension the HRA, are meant to be applied widely for the protection of individuals.

Another problem is that the Consultation paper fails to present its proposals based on tangible evidence, and instead relies on generalities and opinion. One example is the '*legal uncertainty*' that the Government claims imposes expansive positive obligations on public services. In the Consultation, this abstract concept is not backed up by any study, survey or input from frontline workers.

Instead, the Consultation paper cites case law. The Consultation uses the example of *Rabone*[19] to demonstrate the supposed uncertainty positive obligations put on the NHS with regard to Article 2, which is the right to life. Its rationale is that the Supreme Court imposed a new obligation on public

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[17] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights (CP 588, 2021), Chapter 3 – The Case for Reforming Human Rights Law, paragraphs 133-150.
[18] Ibid, paragraph 140.
[19] *Rabone and another v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72.

bodies by expanding the 'operational duty' under Article 2 to voluntary patients as well as detained patients. To put it in context though, the impact of the Supreme Court's judgement is that, if a member of staff working on a psychiatric inpatient ward becomes aware of a real and immediate risk to a patient's life, they must take reasonable steps to avoid that risk *whatever the patient's status*. It is not a new duty; just a duty to all psychiatric patients in hospital, not some.

The Consultation paper claims that '*it is not always clear when* [the operational duty] *applies*'[20]. No evidence is given in support, except for the example of a case heard by the Court of Appeal in the same year, concerning a different statute and different set of circumstances.

The British Institute of Human Rights, on the other hand, has canvassed the views of frontline workers and reports that positive obligations provide staff with a powerful tool to take action and protect people who may be at risk of serious harm and/or loss of life.[21] Far from being viewed negatively, frontline professionals report that case law has helped to develop a framework that supports and enhances decision-making, and gives them confidence in their actions.

Paragraphs 135-137 of the Consultation are said to contain further examples of cases that illustrate that legal uncertainty has led to an expansion of rights. For example, it suggests that the *Ziegler*[22] judgement gives protestors a lawful excuse for '*deliberate physically obstructive conduct even where it prevents other users from exercising their rights to pass along the highway*'.[23] It also simplistically suggests that the protesters had their convictions set aside. In fact, the Supreme Court upheld the trial judge's order dismissing the charges against them on the grounds that the prosecution had not proved that the protesters' obstruction of the highway - which the trial judge found to be limited, targeted and peaceful - was unreasonable. The actual circumstances were that the protesters blocked one lane of entry to an exposition centre in London that was hosting an arms fair. There was no legal uncertainty in the way the trial judge approached the case, which suggests that the law on positive obligations in the protest context is not unclear. The focus on this case should instead be viewed in the context of a wider governmental policy to clamp down on peaceful protest.

It is suggested throughout the Consultation paper that some people are more deserving of human rights protection than others. In relation to positive obligations, this can be seen in the emphasis on human rights '*undermining public protection*'.[24] The Consultation relies on the case of *Osman*[25] to

[20] Consultation paper, paragraph 134.
[21] British Institute of Human Rights, Question Guide to the Consultation, p. 24.
[22] *Director of Public Prosecutions v Ziegler and others* [2021] UKSC 23, [2021] 3 WLR 179.
[23] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights (CP 588, 2021), Chapter 3 – The Case for Reforming Human Rights Law, paragraph 135.
[24] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights (CP 588, 2021), Chapter 3 – The Case for Reforming Human Rights Law, paragraphs 141-150.
[25] *Osman v United Kingdom* (2000) 29 EHRR 245.

illustrate its claim. In this case, the European Court of Human Rights held that, where the state knows of a real and immediate risk to someone's life from another person, it must take reasonable steps to avoid that risk. In the UK, this means that, where police intelligence suggests that a person's life is at risk from someone else, the Police will take steps to warn them using a 'threat to life' warning. The Consultation suggests that the European Court has placed an onerous burden on police forces and that the majority of threat to life warnings are used to safeguard people with criminal associations. Again, the Consultation's claim is poorly evidenced; it doesn't say where the statistics have come from or what police forces actually think of these measures. More importantly, however, far from undermining public protection the statistics suggest that a considerable number of lives are saved per year through Police action.

The Consultation paper states that the obligation to use threat to life warnings '*displaces the policing resources available for other serious crime perpetrated against law-abiding citizens*'. This suggests that the Police should be able to pick and choose who they protect. Not only is this contrary to the presumption of innocence that underpins the UK justice system, this is a dangerous approach to human rights protection which, in order to be effective, must be universally available. In particular, it risks removing basic human rights protection for anyone suspected of being associated with criminal organisations, which could include child and adult victims of exploitation.

Practical Suggestions

First, the expansion of positive human rights obligations for public bodies and increase in 'costly' human rights litigation misidentifies the problem of litigation under the HRA. The vast majority of litigation comes with substantial cost risks for claimants thereby putting off all but the most foolhardy claimants from bringing unmeritorious claims.

Moreover, the most common way in which claimants challenge the failure to exercise positive obligations by public bodies is by way of judicial review. In such cases, there already exists (1) a permission stage at which the court has the responsibility and opportunity to filter unmeritorious claims and (2) significant litigation cost risks are borne by the claimant. For claimants entitled to legal aid, the Legal Aid Agency already imposes a merits criteria that needs to be satisfied, including an important cost-benefit proportionality test which prevents litigation that would incur enormous costs for little benefit.

Second, YLAL proposes increased training and guidance across public bodies on the HRA, including specific training and guidance on positive obligations; and the introduction of human rights advisers/controllers, in a similar way to the Data Protection Act 2018. This would help prevent the need for costly litigation in the first place.

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

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

Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatible 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.

Section 3 of the HRA is concerned with statutory interpretation. Under section 3, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

The IHRAR panel was asked to consider whether any change should be made to the framework established by section 3. The panel's answer was that there was no case for substantive reform and stated:

> 'That any damaging perceptions as to the operation of section 3 are best dispelled by increased data as to its usage; and that, as a matter both of perception and reality, Parliament could and should take a more robust role in rights protection, a role which could sensibly be reinforced via an enhanced role for the JCHR. Further options reflect the conclusions of the entire Panel: first, that there is a need to clarify, by way of amendment to section 3 the order of priority in which UK Courts apply the normal principles of interpretation and then the particular interpretative principle set out in section 3; secondly, the desirability of introducing a discretion to make ex gratia payments where a declaration of incompatibility is made.'[26]

[26] IHRAR report (2021), p. 181, paragraph 7.

The IHRAR found that s.3 HRA was used cautiously by the UK courts and explicitly rejected its repeal. The Government 'notes' this in the Consultation papers and states, '*The Government is minded to agree*'[27].

Despite this agreement, the Consultation proposes two options for repeal of section 3; YLAL rejects both.

The role of the courts to interpret legislation

The Consultation paper suggests that,

> '[T]he Human Rights Act requires the courts to alter the meaning of primary legislation in order to make it compatible with the Convention rights [...]
>
> In practice, these provisions have given rise to a significant constitutional shift in the balance between Parliament, the executive and the judiciary – diverting the courts from their normal function in the interpretation of legislation into straightforward judicial amendment.'[28]

YLAL disagrees with this view of the courts' role. As outlined by the House of Lords in *Ghaidan v Godin Medoza*[29], a court can only imply words that are consistent with the scheme of the legislation. If that is not possible, it may make a declaration of incompatibility[30]. It is no part of the court's role to alter the meaning of legislation, only to interpret it. As explained by Lord Rodger,

> '*When the court spells out the words that are to be implied, it may look as if it is "amending" the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or*

[27] Consultation, paragraph 237.
[28] Consultation, paragraphs 116-117.
[29] *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557.
[30] Section 4 Human Rights Act 1998.

> *otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.*'[31]

The Consultation goes on to state that,

> 'Even before the Act came into force, some commentators recognised the risks that these provisions could bring. In practice, the way in which they have been given effect has justified those fears, compelling the courts to displace the role of Parliament in determining difficult questions of public policy.'[32]

This flies in the face of the Government's agreement with the findings of the IHRAR that section 3 is being used cautiously by the courts and does not require repeal. It also diminishes the role of Parliament in enacting the Human Rights Act 1998 in that, despite those reservations, the Act was passed. As outlined in the IHRAR report:

> 'The principles articulated in ***Ghaidan*** provide clear and sensible guidance to UK Courts to apply section 3's interpretative duty. Since they were set out it is difficult to identify cases where UK Courts have strayed beyond Parliament's intention in enacting section 3; to reiterate, a point illustrated by the fact that ***R v A***, which predated ***Ghaidan***, is identified as the high point of the UK Courts' suggested misuse of section 3. That is not to say that the decision in ***Ghaidan*** itself was not uncontroversial as an exercise of the section 3 power. As a matter of linguistic interpretation, it can plainly be questioned. It must, however, be recognised that, considered in practical terms, ***Ghaidan*** correctly anticipated the direction in which society was moving. It was, moreover, a decision supported by the Government at the time. And, as noted earlier, in so far as those decisions were viewed as going too far, Parliament could have legislated to reverse them; that it did not is more than suggestive of the conclusion that Parliament has not itself over the last twenty years considered that there was a systematic problem with the UK Courts' exercise of the duty imposed on them by section 3.'[33] [emphasis in the original]

The options

If passed, option 1 would restrict UK courts to only being able to make a declaration of incompatibility under section 4 of HRA 1998 thereby significantly reducing human rights protection. YLAL recognises the importance of having section 4 as a mechanism for referring Convention-

[31] *Ghaidan v Godin-Medoza,* paragraph 121.
[32] Consultation, paragraph 117.
[33] IHRAR report (2021), p.207, paragraph 64.

incompatible legislation for reconsideration. However, it is well-established that section 4 is not an effective remedy.

If passed, option 2 would enable the UK courts to interpret the meaning of legislation only where it is possible to do so within the 'ordinary reading of the words' used in the legislation thereby reducing the effectiveness of any Bill of Rights.

As outlined in our response to the IHRAR call for evidence in March 2021[34],

> 'It is worth noting that a significant volume of legislation that is interpreted by domestic courts through the lens of s3 HRA pre-dates the HRA. Parliament's intention in passing the HRA was to 'bring rights home' and the s3 interpretative obligation allows domestic courts to ensure an HRA compliant reading without requiring Parliament to revisit a vast body of legislation to ensure its compatibility with the ECHR.'[35]

In this sense, the courts' interpretative duty under section 3 avoids the time and expense of having to bring questions of compatibility back to Parliament at every turn.

Given the extremely limited evidential basis for reform, YLAL rejects both options and invites the Government to retain section 3 in its current form.

[34] http://younglegalaidlawyers.org/node/3315.
[35] Paragraph 27.

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

Section 3 of the HRA is a vital and effective mechanism which individuals can use to assert their human rights and which courts can give effect to in order to protect these rights. By reading rights contained in theECHRinto the legislation of the HRA, Courts applying section 3 help to facilitate vindications of human rights for individuals and prevent further violations of such rights, in a way that would not have been possible prior to the implementation of the HRA.

This question suggests that the Government considers that section 3 HRA reduces the influence of Parliament by giving too much power over such judgments to the courts. YLAL believes that this proposal is unfounded.

We submit that the HRA in its current form strikes the appropriate balance between the judiciary, executive and legislature, and strengthens the principle of Parliamentary sovereignty. Section 3 HRA plays a particularly important role in maintaining this balance. Parliament's role in engaging with, and scrutinising, section 3 judgements does not need to be enhanced.

The Panel taking part in the IHRAR reached the conclusion that section 3 is fit for purpose: they did not consider that section 3 HRA, as currently drafted, is disruptive to the boundaries of institutional competence, nor that section 3 reduces democratic accountability.[36]

As outlined above, principle (e) of the guidance laid out in the case of *Ghaidan* provides that when determining what interpretation of the legislation is 'possible' for the purposes of section 3 and is compatible with the Convention rights, courts "should not make decisions for which they are not equipped".[37] The House of Lords in *Ghaidan* was therefore clear about the boundaries of section 3 HRA in that courts must not exceed their institutional competence to interpret legislation to reach a conclusion contrary to Parliament's fundamental intention.

We support the conclusions of other groups, such as JUSTICE, Liberty and IHRAR, that there is no evidence in the case law since *Ghaidan* that the boundaries of section 3 have been disrespected, nor that section 3 judgements have proven inconsistent with Parliament's intention.[38] Courts have, and

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[36] The Independent Human Rights Act Review 2021 p213

[37] *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [33] (Lord Nicholls); [115] (Lord Rodger)

[38] See: Independent Human Rights Review 2021 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf p213; Liberty's Response to the Independent Human Rights Act Review Call For Evidence < https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/12/Libertys-response-to-the-IHRAR-call-for-evidence-March-2021.pdf> p.14; JUSTICE Call for Evidence Response March 2021 < The Independent

will continue to be, careful to follow principle (e) and will not go beyond Parliament's overarching intentions. We submit that reforming section 3 to facilitate greater scrutiny by Parliament is therefore unnecessary.

To enable Parliament greater freedom in scrutinising and engaging with section 3 judgements would amount to a practical weakening of the important power given to courts to preserve and uphold individuals' human rights in section 3. Courts dealing with human rights cases cannot be subject to stringent checks and scrutiny by political organs. Such an overstep of the separation of power would infringe upon the independence of the judiciary.

In addition, allowing more extensive engagement and scrutiny of section 3 judgements by Parliament will lead to delays in the release of judgements and delays in the vindication of individuals' human rights, which is not acceptable.

YLAL strongly supports JUSTICE's conclusion that "it is almost inevitable that the practical effect [of weakening section 3] would leave individuals whose rights have been breached without access to a domestic remedy."[39] We reach this conclusion because by reducing the power of domestic courts to interpret legislation and allowing Parliament to further scrutinise section 3 judgements, more pressure will be exerted onto section 4 HRA. Section 4 is not a full remedy for claimants facing human rights violations, as it does not by itself resolve the injustice faced by the original claimant, nor provide swift relief from future human rights violations.

YLAL strongly supports greater transparency of section 3 judgments to facilitate an improved access to justice for individuals. However, we do not consider that this necessarily requires an increased role for Parliament in the scrutiny and engagement with the courts' section 3 judgments. There are other methods of improving transparency and access, such as through increasing the role of the Joint Committee on Human Rights and creating a database of section 3 judgements, that can better achieve the Government's desired aims. Before establishing how Parliament should be invited to scrutinise section 3 judgements, the Government must demonstrate that there is a need for Parliamentary intervention in the first place. The Government must then show, which they have not yet done, that the best method for increased transparency and greater access to justice necessitates an increased role of intervention by Parliament.

Human Rights Act Review Call for Evidence – Response March 2021 For further information contact Stephanie Need> p.18

[39] JUSTICE Call for Evidence Response March 2021 < The Independent Human Rights Act Review Call for Evidence – Response March 2021 For further information contact Stephanie Need> p.24

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

The IHRAR report suggests that a database should be created that records all legal cases that rely on section 3. YLAL would support the creation of this database.

YLAL believes that in order to be open and accessible to all, judgments and legislation must be freely available to all without financial barriers. We would go further than the question and suggest that all court judgments which have the potential to create precedent should be accessible online.

Legal judgments are currently not widely published, save for within legal databases, which are prohibitively expensive. The British and Irish Legal Information Institute (BAILII) database has taken some steps to ensure that case law is more accessible, but this does not go far enough.

As mentioned in our answer to Question 13, this database would lead to increased transparency, which is necessary for individuals to access justice and enforce their rights. The database would also provide an evidence base for how section 3 currently works in practice which is vital for any future reforms.

The database should be maintained and updated by a well-resourced independent body.

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?

Under section 3(1), Courts have a duty to interpret legislation in line with Convention rights as far as possible. At present, secondary legislation (i.e. subordinate legislation or delegated legislation) made under powers provided by an Act of Parliament that contravene Convention rights may be remedied by the Courts during judicial review by setting aside such offending legislation that was held to be *ultra vires* in the context of the primary legislation.

A corollary to this would be the Courts setting aside secondary legislation incompatible with the Convention since the Acts of Parliament are almost certainly designed to be in line with the ECHR. Courts are also cognizant that, should they (as public authorities) give effect to subordinate legislation incompatible with Convention rights, they would be acting contrary to section 6(1). This is unacceptable and contrary to the rule of law.

Under section 4, the HRA grants courts the power to issue a declaration of incompatibility, where a piece of legislation is incompatible with Convention rights. This power, however, is used extremely sparingly. Since 2014, merely four of fourteen successful challenges led to subordinate legislation breaching the HRA being "disapplied"[40]. The Supreme Court has affirmed that where it is "clear how the statutory scheme can be applied without the offending provision", the Courts should declare subordinate legislation as invalid and award damages under s8(2) – in line with parliamentary intention. But this is obviously limited insofar as the Courts would only disapply legislation where it is incompatible "in all or nearly all cases where it applies".

[40] R (Connor) v Secretary of State for Work and Pensions [2020] EWHC 1999 (Admin); R (TD) v Secretary of State for Work and Pensions [2020] EWCA Civ 618; OA v Secretary of State for Education [2020] EWHC 276 (Admin); R (TP) v Secretary of State for Work and Pensions [2020] EWCA Civ 37; [2020] PTSR 1785; R (British Medical Association) v Secretary of State for Health and Social Care [2020] EWHC 64 (Admin); [2020] Pens. LR 10; Langford v Secretary of State for Defence [2019] EWCA Civ 1271; [2020] 1 WLR 537; Re Gallagher's Application for Judicial Review [2019] UKSC 3; [2020] A.C. 185; R (Elmes) v Essex CC [2018] EWHC 2055 (Admin); [2019] 1 WLR 1686; R (QSA) v Secretary of State for the Home Department [2018] EWHC 407 (Admin); [2018] 1 WLR 4279; R (RF) v Secretary of State for Work and Pensions [2017] EWHC 3375 (Admin); [2018] PTSR 1147; R (Carmichael) v Secretary of State for Work and Pensions [2016] UKSC 58; [2016] 1 WLR 4550; R (Hurley) v Secretary of State for Work and Pensions [2015] EWHC 3382 (Admin); [2016] PTSR 636; R (Tigere) v Secretary of State for Business, Energy and Industrial Strategy [2015] UKSC 57; [2015] 1 WLR 3820; [2016] 1 All ER 191; R (T) v Chief Constable of Greater Manchester Police [2014] UKSC 35; [2015] AC 49. The Panel thank Tomlinson et al for providing them with their list of judgments.

A clear illustration is Tigere[41], where the Supreme Court held, by a 3-2 majority, that "proper weight had to be given to the approach taken by the Minister responsible as the primary decision-maker" in line with the principle of the separation of powers, recognising differing institutional competences of the Executive and Judicial branches in considering the compatibility of the legislation with Convention rights.

The Courts' reluctance to disapply a provision in the subordinate legislation, but instead utilising the declaration of incompatibility as applied to specific individuals in the instant case, demonstrates the nuanced approach they take to ensure they respect the constitutional principles of Parliamentary sovereignty and the separation of powers.

More practically, the courts recognise that "there can be subordinate legislation which does not generally infringe Convention rights but does so in its specific application to a certain individual".[42] Therefore, it would not be appropriate for the Courts, in considering policy impacts, to disapply the provision in its entirety.

The Declaration of Incompatibility is thus critical as a compromise between the courts' judgments' limited impact being confined to the instant case and an over-inclusive complete disapplication of the subordinate legislation. The legislature would thus be able to exercise its institutional expertise and distil the offending provision instead of forcing the judiciary to "impermissibly trespass into the legislative arena".

YLAL thus supports the IHRAR's recommendation to accept "Option Three: Amend the HRA to enable UK Courts to issue suspended and prospective quashing orders". The power to issue suspended quashing orders coupled with the power to issue a declaration of incompatibility will enable the State to issue remedies while preventing the further infringement of rights under the present secondary legislation.

In sum, the moderate stance provided by the issuance of the Declaration as opposed to directly quashing provisions in the secondary legislation allow for the Courts to uphold key constitutional principles and address practical considerations necessitate the courts being able to issue a declaration of incompatibility for secondary legislation.

[41] R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57; [2015] 1 WLR 3820.
[42] JUSTICE

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

This proposal, in essence, would limit people's access to justice and reduce the protections currently available under the HRA. Quashing orders[43] do not make the law, but ultimately ensure that the law is followed. If quashing orders are limited, then people may not be able to hold public bodies to account so easily. Therefore, this proposal is unnecessary and could result in significant human rights abuses.

The first proposal is to legislate for suspended quashing orders, as recently confirmed in the Queen's Speech:

> *'The court would be able to suspend, for a specified time, the effect of an order quashing (thus rendering no legal effect) a decision or action. This gives the public authority time to rectify the identified errors. If the errors are not rectified within the specified timeframe, the quashing order would become effective.'*

As the Government points out, the introduction of suspended quashing orders was one of the (few) changes recommended by the Independent Review of Administrative Law ('IRAL').

The second policy relates to prospective quashing orders. These would treat a policy or action as void only from the time of the judgement onwards. They would not touch any past actions, including, crucially, the decisions which affected the claimant. Unlike suspended quashing orders, IRAL did not recommend this change. Regardless, the government is actively "considering whether to give discretion to judges to order a remedy to be prospective-only in nature".

[43] What is a Quashing order? - 3PB Direct - Legal Services

Reform of the law on what remedies will be available in response to a successful application for judicial review would be required if the courts are to have the option of awarding a suspended quashing order, as the possibility of issuing a suspended quashing order in a common law judicial review case was ruled out by the UK Supreme Court in Ahmed v HM Treasury (No 2)

This language is echoed in a passage in the Queen's Speech:

> *'The courts have previously considered introducing Suspended Quashing Orders but found no common law basis to do so. Such orders (if available and used by the court) could have provided the opportunity for more flexible remedies for the claimant, defendant, and individuals.'*

Whilst the IRAL Report did not recommend legislating for prospective quashing orders, the Government uses much the same language in relation to these proposals: in its Consultation it confirmed that it "is considering whether to give discretion to judges to order a remedy to be prospective-only in nature".

The view of the government appears to be: the courts do not currently have the power to issue suspended or prospective quashing orders, so we should give them this power. But to what extent is this premise true?

Suspended quashing orders

The IRAL Report recommended that the government "should legislate to reverse the UK Supreme Court's decision in Ahmed" which would "give the courts the option, in appropriate cases, of making suspended quashing orders".

However, it can be questioned whether Ahmed really stands for the position which IRAL – and the Government – suggests it does. In the case itself, the Supreme Court found that two statutory instruments were ultra vires and should be quashed. The government argued that the court should "suspend the operation of the orders" for six to eight weeks so as to allow some time for the legislature to properly respond to the judgement. The majority of the court said no.

The clearest evidence that the Court in Ahmed was determining whether the court should issue a suspended quashing order, rather than whether the Court could do so comes from Lord Hope at paragraph 18:

> *'I would hold that the Court has power to make the orders that [the government] seeks. I do not think that there is any difference of view between [the majority and minority] on that point. The more difficult question is whether it should do so. The view of the majority, as Lord Phillips has explained, is that this would not be appropriate.'*

Given the above, it is YLAL's view that the powers available to the Judiciary are wider than suggested by the Consultation.

YLAL notes and agrees with the view of Lewis Graham, a research fellow at Public Law Project:

> *'In each of the cases where the power to issue suspended or prospective quashing orders has been acknowledged, the courts have been keen to stress that the power should be exercised sparingly, because in the vast majority of cases it would result in significant unfairness to the parties.*
>
> *In Re Spectrum Plus, the House of Lords recognised the jurisdiction to issue prospective remedies, but said that they should be applied "altogether exceptionally" (Lord Nicholls), or in a "wholly exceptional case" (Lord Hope). The retrospective effect of decisions should be "normal" (a term used by Lords Hope and Nicholls), with prospective remedies applying only where it is "the only just result" (Lady Hale) or necessary to avoid "gravely unfair and disruptive consequences" (Lord Nicholls).*
>
> *This imposes a very high bar indeed, something which has been underlined in later cases in which parties have petitioned the court for such a remedy (see e.g. May LJ here and Lloyd Jones J here).*[44]

[44] Lewis Graham, Suspended and prospective quashing orders: the current picture, UK Constitutional Law Association, 7 June 2021 https://ukconstitutionallaw.org/2021/06/07/lewis-graham-suspended-and-prospective-quashing-orders-the-current-picture/

YLAL therefore believes that limiting quashing orders in the way proposed would significantly reduce the ability of individuals to hold public bodies to account. The Judicial Review and Courts Bill currently going through parliament is controversial[45] and is not yet law. YLAL do not agree that proposals within that should automatically apply to the current HRA proposals.

[45] YLAL, Submission to the Independent Review of Administrative Law, October 2020 http://www.younglegalaidlawyers.org/sites/default/files/YLAL%20submission%20to%20IRAL.pdf

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

a. Similar to that contained in section 10 of the Human Rights Act
b. Similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself
c. Limited only to remedial orders made under the 'urgent' procedure
d. Abolished altogether?

Please provide reasons.

YLAL views the Government's proposals to revise section 10 of the HRA in order to improve the functionality of the remedial order power as unnecessary. The suggestion that a revision could improve and enhance Parliament's role in the law-making procedure is unfounded, since the current functioning of the section allows for Parliament to play an appropriate role in legislative scrutiny.

The power to amend legislation that is incompatible with Convention rights is necessary in some form. There is otherwise a risk of infringing on the protection of fundamental rights by failing to provide any form of rectification for problematic and incompatible legislation.

The section as it stands, allows the Government to make necessary changes to both primary and secondary legislation in order to avoid potential human rights violations resulting from incompatible legislation. It applies where there is no available legislative means to do so quickly via primary legislation, and without needing to wait for a new bill to be passed. This procedure allows a prompt response to rights protection. It is, however, salient to recognise that it is not used as the primary go-to mechanism to remedy a declaration of incompatibility. In the majority of cases, the incompatibility is addressed through new legislation under the normal procedure. For this reason, YLAL sees a revision to the section to be unwarranted as no evidence has been provided to demonstrate any malfunctioning.

Any remedial order to be made following an identified incompatibility is subject to parliamentary approval already, either in draft or after being made. YLAL believes that Parliament has sufficient oversight and engagement in the process. Although this can be bypassed when the urgent procedure is used, such orders cease to have effect after a period of 120 days, if by that point they have not received parliamentary approval. As such, urgent orders can have only a limited effect which is unlikely to undermine constitutional values. As stated in the IHRAR, since the HRA came into force,

only 11 remedial orders have been made, 3 of which were made under the urgent procedure.[46] Inover 20 years of operation, these 3 urgent cases do not strike YLAL as sufficiently problematic to warrant an overhaul of the power granted under section 10. It is clear that Governments have been cautious in reverting to the urgent procedure without sufficient cause.

The IHRAR suggested that section 10 should be reformed to clarify that remedial orders cannot be used to amend the HRA 1998 itself. Although it has only occurred once in 2020[47] following the judgement in *Hammerton v UK*[48], the application of the remedial order has been criticised as being unconstitutional and out of the scope of section 10. It sets a bad precedent to let the Government abuse such powers. YLAL agrees that the remedial order should be used narrowly, and the power to amend the Act itself needs to be prohibited.

Due to insufficient evidence that a full overhaul is necessary and to the importance of protecting the mechanism to rectify legislation that is incompatible with human rights, YLAL is of the view that section 10 should be preserved in its current form but prohibited from being used to amend the Act itself.

[46] The Mental Health Act 1983 (Remedial) Order 2001 (SI 2001/3712); the Naval Discipline Act 1957 (Remedial) Order 2004 (SI 2004/66); and, the Terrorism Act 2000 (Remedial) Order 2011 (SI 2011/631).
[47] Human Rights Act 1998 (Remedial) Order (SI 2020/1160).
[48] [2016] ECHR 272

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

Section 19 of the HRAcontains the Parliamentary procedure by which the Government must make a statement as to whether or not their proposed bill is compatible with Convention rights. This procedure is fundamental to the application of sections 3 and 4 regarding how the UK Courts approach the compatibility of post-HRA legislation and legislation that is subsequently declared incompatible and requiring remedial action in order to achieve compatibility. The test set out in section 19 is also important to demonstrate whether the Government has considered and come to a view as to the compatibility with Convention rights.

The Government consultation proposes that there is debate as to whether section 19 'strikes the right constitutional balance between the Government and Parliament' in relation to ensuring compatibility while allowing for innovative policy making. The consultation proposes that in order to strike such a 'balance' then 'the procedural human rights framework' may need to be applied differently according to the needs and preferences of the devolved nations.

The IHRAR's consideration of section 19 identified no necessary amendments to improve the operation of this section. The review observed that this mechanism already ensures consideration of human rights protections as part of the process of developing new legislation, while also providing the Government with a means of proposing legislation that is not itself compatible. A reasonable explanation of the incompatibility must be provided, for example, where there is a principled view as to whether there should be a legal challenge on this basis if it was likely to fail

YLAL believes that section 19 is integral to the protection of individuals' rights and freedoms as conferred by the ECHR. YLAL supports the view that although there is no case for change in respect of its current operation, consideration could be given to a statutory extension of section 19 to subordinate legislation to provide the existing drafting requirement with legislative force.[49] Consideration of human rights at the inception of legislation is integral to ensuring domestic legislation respects the Convention rights.

YLAL submits that requiring the Government and Parliament to scrutinise the human rights implications of proposed legislation means consideration of human rights protections should be central to ministerial policy making. It is arguable that the duality of the mechanism already provides an adequate balance between safeguarding human rights protections while at the same time recognising that there may be challenges and circumstances in which compatibility cannot be declared on the face of the legislation itself. In the latter case, this may occur as a result of existing

[49] IHRAR, paragraph 70.

ECtHR case law or other circumstances, and the current procedure permits the Government to justify why the implementation of a bill is unlikely to give rise to successful challenges on the basis of incompatibility.[50]

YLAL agrees with the view that the section 19 procedure also facilitates transparency and accountability in requiring ministers to make a clear statement and explain and justify when a statement of compatibility cannot be provided.

The devolved nations are similarly required to consider the compatibility of legislation with Convention rights as part of their legislative competence under the legislation that established devolution in the UK.[51] Although the consultation notes that incompatible Westminster legislation remains in effect until remedied while incompatible devolved legislation is struck down,[52] incompatibility is nevertheless required to be addressed.

It is therefore YLAL's view that it is unclear how a different approach that is taken in the devolved nations, from the procedure adopted centrally in Westminster would be 'sensible or appropriate'. It is essential that human rights protections are applied universally and consistently, and variations of approach risk inconsistency in protection of these rights.

The Government consultation provides no argument or evidence for change contrary to the findings of the IHRAR or at all. For this reason, and the reasons already outlined, YLAL submits that section 19 is integral to the operation of the HRA and there should be no case for change at this time.

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[50] *The Independent Human Rights Act Review* considers the example of the Communications Act 2003 and the subsequent case of R *(Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15, [2008] AC 1312* at paragraphs 157 to 158 of the review and finds the current operation adequate in addressing such challenges.

[51] *The Independent Human Rights Act Review,* paragraph 29 referring to Sections 6(1)(c) and 24(1)(a) of the Northern Ireland Act 1998; section 29(1)(d) of the Scotland Act 1998; and section 108A(2)(e) of the Government of Wales Act 2006.

[52] *Human Rights Act Reform: A Modern Bill of Rights - A Consultation to reform the Human Rights Act 1998,* paragraph 262.

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

The Government has stated that the range of bodies and functions to which the HRA applies is '*broadly right, and intends to maintain this approach*'[53]. However, it wishes to consider whether there is alternative drafting which might achieve broadly the same application of obligations under the Bill of Rights, but in a way that would offer more certainty and clarity[54].

The HRA does not contain a comprehensive definition of what a public authority is. This is deliberate so that the breadth of the Act is as far-reaching as possible – both in liability and in protection.[55] In terms of changing the current definition of 'public authority', YLAL believes that this would reduce the protections currently afforded to the public.

In 1998, Parliament decided to leave section 6 undefined due to the ever-evolving nature of public authorities' functionality and the practice of outsourcing public functions to private companies. This was to encourage a broad approach by the courts. As stated in Parliamentary debate when a closed and comprehensive definition was first proposed:

> '[a]s we are dealing with public functions and with an evolving situation, we believe that the test must relate to the substance and nature of the act, not to the form and legal personality.'[56]

A Bill of Rights that would seek '*certainty and clarity*' by defining all bodies and functions to which section 6 could apply would be limiting and a regressive step backwards. It would erode the public's right to challenge human rights violations against private organisations carrying out public law functions, such as private care homes providing care to children and vulnerable adults.

Further, it could dismantle the culture of respect towards the HRA that influences every sphere of daily decision-making in public authorities. The current section 6 ensures that there is a positive obligation to guarantee compatibility on a daily basis. As articulated by social work educator, Jane Foggin '*…Human rights are an essential thread in legally literate decision making*'.[57] YLAL feels that this

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[53] Consultation, paragraph 266.

[54] Consultation, paragraphs 268-9.

[55] J Beatson, *The Human Rights Act and the Criminal Justice and Regulatory Process* (The Centre for Public Law at the University of Cambridge, September 1999) at 100.

[56] HC Deb, 17 June 1998, vol 314, col 433.

[57] Daisy Jackson-Bogg, *Why our Human Rights Act matters … in social work* (British Institute of Human Rights), available at: https://www.bihr.org.uk/blog/why-our-human-rights-act-matters-in-social-work

culture of positive decision-making reduces confusion for frontline workers and promotes unity in the application of the HRA.

At the moment, section 6 is drafted to ensure a flexible approach to the question of whether a particular organisation is exercising public functions. The principles that courts use were outlined by the House of Lords almost 15 years ago and remain clear[58]. *Ali v Serco*[59] is a good example of a case where those principles were applied and it was found that Serco was not covered by the obligations of the Human Rights Act[60]. Accordingly, this flexible approach benefits both individuals and bodies that exercise public functions.

In *LW v Sodexo*[61], the Secretary of State for Justice was found to have failed in its primary duty to '*monitor and supervise*' Sodexo to ensure that its staff were properly trained so that there were not systemic or widespread mistakes, which resulted in the illegal strip-searching of prisoners. It is not clear how this case supports the Consultation's claim that greater certainty is required, since it was accepted that Sodexo was exercising public functions.

Contrary to the suggestion in the Consultation paper[62], it makes sense that the Secretary of State for Justice was also held responsible in *LW* because it has a statutory duty to monitor private prisons to ensure human rights breaches do not occur as far as possible. As outlined in *Ali v Serco*,

> *'The state cannot absolve itself of responsibility for such public law duties as the provision of accommodation to asylum seekers by delegating its responsibility to private bodies*'[63]

The proposed change is deeply problematic given the outsourcing of responsibility across the public sector. In housing, Shelter reported that nearly half of social housing is now out of Local Housing Authority control; a figure which is likely to continue to increase.[64] In relation to social care, the Department of Health reports that the private sector provides 92% of care homes and 64% of contact hours of home care.[65] The intention behind section 6 is to guard against unreasonable and discriminatory actions by those acting in a public capacity. A wide definition of 'public authority' is required to ensure that there is no gap in protection for those who need it most.[66]

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[58] *YL v Birmingham City Council* [2008] 1 AC 95.
[59] *Ali (Iraq) v Serco Ltd* [2019] CSIH 54.
[60] Ibid, paragraphs 52-57.
[61] *LW v Sodexo and Secretary of State for Justice* [2019] EWHC 367 (Admin), [2019] 1 WLR 5654.
[62] Consultation, paragraph 267.
[63] *Ali v Serco*, paragraph 56.
[64] Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (2003-04, HL Paper 39, HC 382) at 20.
[65] Ibid.
[66] Joint Committee on Human Rights, *Criminal Justice Bill: Further Report* (2002-03, HL Paper 118, HC 724).

The IHRAR recommended that:

> 'serious consideration should be given by the Government to developing an effective programme of civic and constitutional education in schools, universities and adult education'.[67]

YLAL invites the Government to take steps to ensure that private bodies carrying out public authority functions, such as prison services, are provided with comprehensive training on the application of human rights. It is submitted that this would improve the service provided to the public and reduce the cost of litigation arising from challenges under the HRA.

Overall, YLAL considers that the board definition of 'public authority' contained in section 6 is integral to ensuring a rights-respecting approach across public services. As concluded by the Joint Committee on Human Rights, amending the definition carries '*too many risks of further unintended consequences*'.[68]

[67] Independent Human Rights Act Review Panel, *The Independent Human Rights Act Review: Full Report* (CP 586, December 2021) at vii.

[68] Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (2003-04, HL Paper 39, HC 382) at 3.

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

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

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

YLAL strongly disagrees with the proposed changes to section 6(2). Section 6 was created to empower people to access and exercise their rights and to '*provide as much protection as possible for the rights of the individual against the misuse of power by the State*.'[69]

The HRA creates a mechanism through which people can trust that central and local governments (and other bodies exercising public functions) will behave reasonably, in the interests of the people they serve and ultimately be held to account when they get it wrong. Instead, the Government's current proposals explicitly attempt to limit individuals' ability to challenge exercises of state power. They seek to address a problem that the Government has not proven to exist and will not create any more certainty for public authorities.

What's the problem?

As a starting point, the Government has not clearly identified the problem it aims to solve through these changes. The Consultation paper refers to the goal of giving '*greater confidence*' to public authorities to carry out their functions. The suggestion appears to be that public authorities are currently struggling to reconcile their statutory functions because of the HRA. However, the Government has not pointed to any tangible examples of that confusion. While it has identified specific decisions (such as *Rabone*[70])[71] that it apparently disagrees with, it has not described how in practice the decision creates '*operational difficulties*'. As set out in further detail below, the application

[69] See HL Deb, 24 November 1997, vol 583, col. 808.
[70] *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, [2012] 2 AC 72.
[71] Consultation, paragraph 134.

of obligations under the HRA supplements how public authorities carry out their functions rather than fundamentally changing the nature of those obligations.

The intention behind the proposals

The Government's proposals appear to be intended to limit the ability of litigants to challenge public authority decision-making through the HRA, at least where the authority is giving effect to Parliament's will[72]. YLAL considers that the application of the HRA to public authorities is crucial in ensuring the State meets its obligations to uphold human rights.

The protection afforded by section 6(2)

There is no inherent human rights protection simply because a body is fulfilling a statutory duty and there may be many different ways that such '*direction and will*' can be given effect. For example, Article 8 has supplemented primary legislation setting out functions of local authorities such as making placement orders and other duties under the Children Act 1989[73]. The Family Rights Group found that this makes a '*profound difference*' to families who trust and rely on public bodies to make fair decisions concerning the placement and removal of children by social care.[74]

It is entirely proper that litigation is brought to ensure public law decision making incorporates the rights of those who are the subject of those decisions. What compliance with primary legislation entails can vary and where there are options available, the most rights-compatible meaning should be taken. Only the '*hard-edged legal obligation*' of section 6(2) enforces that.[75]

In other examples, obligations under section 6 have facilitated better proactive decision-making by public authorities and avoided litigation altogether. Within social housing, Scotland's National Action Plan for Human Rights (SNAP) has empowered tenants to understand their rights and work *with* the council to ensure better living conditions.[76]

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[72] Consultation, paragraph 271.

[73] *Williams v Hackney* [2018] UKSC 37, [2019] AC 421.

[74] Family Rights Group, Submission to the Commission on a Bill of Rights (November 2011), available at https://frg.org.uk/policy-and-campaigns/reforming-law-and-practice/children-families-and-the-human-rights-act/.

[75] Alice Donald, *Letting public authorities loose: The dangers of repealing the Human Rights Act* (UK Human Rights Blog, 19 May 2015), available at: https://ukhumanrightsblog.com/2015/05/19/letting-public-authorities-lose-the-dangers-of-repealing-the-human-rights-act-alice-donald/

[76] Scotland National Action Plan for Human Rights, Year Two Report (December 2015), available at https://www.snaprights.info/action-areas.

A framework for improved decision-making

The HRA is a framework for interpreting often broad directives from primary legislation. It is crucial in centring the rights of those who might otherwise be overlooked, such as older people or people with learning difficulties. Overall, YLAL's view is that section 6(2) provides a framework that improves decision-making by public authorities.

The Parliamentary Joint Committee on Human Rights has noted:

> 'the Government has done nowhere near enough over the past decade to use the HRA as a tool to improve the delivery of public services. This failure has contributed to the poor public image of the Act and 'human rights' in general.'[77]

YLAL considers this applies directly to section 6(2). The proposals suggest that the HRA is a barrier to decision-making rather than a framework that can facilitate better outcomes. The examples above indicate an emerging model of a positive culture of HRA implementation which has '*transformative potential*' for the UK's public services.[78] It is important that section 6(2) is retained in order to further embed this approach.

The options

For the above reasons, YLAL does not consider that either of the proposed options for reform to section 6 are appropriate.

In respect of option 1, allowing a public authority to escape liability where it is '*clearly giving effect*' to primary legislation begs the question of what giving effect to primary legislation means. Given that primary legislation is often open-textured, the scope of the proposed exception is entirely unclear. As set out above, in these cases the HRA supplements and assists public authority decision-making and the exercise of statutory functions. It should not be reformulated to allow public authorities to avoid their most basic obligations.

For the reasons set out above in response to question 12 on section 3, YLAL rejects the proposed second option for modification of section 6(2). Again, this exception appears aimed at providing public authorities with escape clauses for compliance with human rights law.

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[77] Joint Committee on Human Rights, *The Work of the Committee in 2007 and the State of Human Rights in the UK* (2007–08, HL Paper 38, HC 270) at 7.

[78] Alice Donald et al, *Human Rights in Britain since the Human Rights Act 1998: A Critical Review* (Equality and Human Rights Commission, June 2009), at 12.

Further, the proposed changes to the HRA will not, and cannot, give public authorities complete certainty when carrying out their functions. The Government attributes much of the alleged 'uncertainty' to the fact that it cannot predict how the courts will interpret the HRA. Although YLAL does not agree with that characterisation, under this proposal the courts will still exercise supervisory powers over public authorities' compliance with the HRA. The courts will be called on to decide whether public authorities are '*clearly giving effect*' to primary legislation (or if option 2 is taken, whether there is ambiguity in primary legislation).

Public bodies are likely to experience far greater uncertainty while the boundaries of these new provisions are being tested than they currently experience applying well-established principles.

Much of the 'uncertainty' identified in the Consultation paper[79] is as much a product of the common law system that operates in the UK and the incremental development of principles through the courts. The development of different duties of care in negligence, for example, could also be said to create uncertainty for public authorities about the scope of their obligations. At the same time, negligence has been subject to more frequent judicial development and reconsideration than corresponding areas of the HRA. For example, in *Michael v South Wales Police*[80] the Supreme Court set out the law on police duties of care in negligence, shortly followed by further clarification in *Robinson*[81]. In contrast, there has been no dispute about potential Article 2 violations in the same context. The principles have been applied consistently since *Osman*[82]. The proposed changes to section 6 cannot resolve uncertainties which exist because of the process of judicial decision-making and which are a crucial part of the common law.

Similarly, concerns about the breadth of positive obligations under the HRA ignore the existence of positive obligations on the state at common law[83]. Certainly, there are no proposals to reform the common law to create greater certainty for public authorities. It should not be controversial to suggest that when the state exercises public functions, or when someone comes within its control, the state assumes a responsibility to an individual to act consistently with their rights. The proposed changes to section 6 will not change the existence of those positive obligations under European law.

Conclusion

In summary, the Consultation paper does not identify a problem which requires rectifying and the proposals do not address the generic concerns that are raised. It is simply not necessary to reform

[79] For e.g., paragraph 133 refers to the problem of '*incrementally expanding interpretations of the scope of certain rights and judicial amendment of legislation*'.
[80] *Michael v Chief Constable of the South Wales Police* [2015] UKSC 2, [2015] AC 1732.
[81] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, [2018] AC 736.
[82] *Osman v United Kingdom* (1998) 29 EHRR 245.
[83] albeit imposed in more limited circumstances, see *CN v Poole* [2019] UKSC 25.

section 6(2). The provision empowers frontline workers to take a rights-based approach to their work. It enables all people to challenge public authorities when they get it wrong. YLAL strongly opposes the suggested amendments.

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

YLAL is concerned by proposals to limit the use of certain rights in certain contexts, in particular Articles 5, 6 and 8 in deportation challenges. Removing fundamental human rights safeguards from specific categories of individuals is repressive and shifts the balance between human rights and Executive power. In our view, the proposals outlined in Question 24 are designed to further enhance Executive control. and reduce the abilities of affected individuals to successfully challenge Executive power.

The three options will be dealt with in turn.

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

Option 1 provides that certain individuals are wholly excluded from enjoying certain human rights and creates the image of the 'undeserving claimant.' This departs from the universality and inalienability of human rights as promoted by the ECHR, which is the most fundamentally important principle of human rights. Such departure from the ECHR's very essence risks paving the way for further caveats to be placed upon the UK human rights framework in the future, which is undesirable given the importance of a robust human rights system.

Whilst this option does not identify the rights to be excluded, paragraph 292 of the consultation specifically refers to the supposed ability of Articles 5, 6 and 8 to 'frustrate' public interest deportations. Such terminology portrays human rights in an adverse way and disregards the powerful judicial ability in balancing an individual's human rights and the wider public interest. It fails to recognise the appropriate and necessary safeguards the current human rights system places upon the power of the Executive.

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

Immigration laws concerning deportation of foreign national offenders have long been the subject of political focus by successive governments. The Immigration Rules governing deportation decisions were amended on 9 July 2012 as part of measures intended to reflect the Government's and Parliament's view of how Article 8 considerations should be applied, and again on 28 July 2014, to further narrow the scope of Article 8 protections afforded to migrants in the UK.

These laws set up a statutory structure whereby the public interest in deportation will be outweighed only where the deportee can demonstrate private and family life to the degree set out in the criteria laid out in the Immigration Rules, or if unable to demonstrate one of the private and family life exceptions, where they establish a very compelling case against deportation. These are high thresholds. The strength of the public interest is reflected in Laws LJ's observation that for a claim under Article 8 to prevail, it must be "a very strong claim indeed"[84].

Accordingly, the existing legislative framework ensures that deportation will be required by the public interest except where specific exceptions to expulsion are met. Decision makers are already permitted to weigh the balance in favour of the public interest when considering whether interference with a deportee's rights under Article 8 is justified. Consequently, only in exceptional circumstances will the public interest in deportation be outweighed.

The Government asserts that since the HRA, 'the UK courts have expanded the scope for challenging deportation orders under Article 8'. It relies on internal Home Office data on the number of deportation appeals allowed on human rights grounds to substantiate this claim. The data is limited and does not accurately reflect the current position of the law following changes brought into effect by the Immigration Act 2014, which introduced significant restrictions to challenging deportation on human rights grounds.

We strongly disagree with the proposition that the HRA frustrates the Government's ability to deport foreign national offenders. There is no evidence presented in the consultation to suggest the current statutory scheme does not properly balance private and family life rights on the one hand and the public interest in deportation on the other. Furthermore, the IHRAR report did not identify any concerns with substantive rights protected by the HRA in relation to deportation matters.

[84] SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550, para 54

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

Currently, once a deportation decision is made by the Secretary of State, the decision is subject to appeal at the First-tier Tribunal (Immigration and Asylum Chamber). It may then proceed to the Upper Tribunal then the Court of Appeal and the Supreme Court. The Special Immigration Appeals Commission (SIAC) is available for those who are facing deportation on national security grounds where the material is classified. Judicial review is also available in circumstances where the Home Office has refused to consider human rights as a relevant factor in an individual's deportation.[85]

Option 3 would restrict or 'oust' the power of courts to act on appeals made by those who the Secretary of State wishes to deport. The wording of the option appears to reject all forms of appeal and judicial review, eliminating the current process unless the decision is "obviously flawed". It is not clear if this is also to be applied to the Strasbourg Court.

The importance of appeal concerning potential human rights violations has been summarised by Lord Sumption in R (Lord Carlile of Berriew) v Secretary of State for the Home Department[86]:*"When it comes to reviewing the compatibility of executive decisions with the Convention, there can be no absolute constitutional bar to any inquiry which is both relevant and necessary to enable the court to adjudicate."* Option 3 would violate this statement.

Further cases, for example R (Byndloss) v Secretary of State for the Home Department; R (Kiarie) v Secretary of State for the Home Department[87] have identified the importance of an effective appeal as a right in immigration and deportation cases.

At paragraph 292, the consultation identifies deportation on the grounds of terrorism and public safety as a key concern. SIAC, the appeal court that reviews such cases, cannot "substitute" its views from that of the primary decision maker. It is not clear in the consultation how SIAC will be affected considering this.

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[85] House of Commons Constitutional Affairs Committee The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates Seventh Report of Session 2004–05 Para 25 pp14. Found at https://publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323i.pdf.
[86] [2014] UKSC 60
[87] [2017] UKSC 42

It should also be noted that the ability to appeal a decision of SIAC and higher courts is available to both the Secretary of State and the Appellant. Therefore under the current system, the Secretary of State can utilise the appeal system if they feel the decision is incorrect.

Statistics on deportation appeals from 2021 show that the Home Secretary is successful on appeal in 75% of cases[88]. This means that the wrong decision has been made in a quarter of those. The Option 3 threshold would mean that the one in four whose deportation decision is incorrectly made will simply be deported with little recourse to challenge the decision.

Option 3 does allow one form of review where the decision is "obviously flawed." A definition is provided in paragraph 296 of the consultation:

> "that deportation decisions can only be overturned if the Home Secretary has obviously failed to take account of human rights considerations when deciding that deportation is in the public interest. The courts would not be permitted simply to substitute their own views for those of the Home Secretary"

It is YLAL's position that this is an unclear and politically motivated definition. It represents an oversimplification of how the separation of powers operates within the constitution of the UK. It fails to consider or appreciate the nuances of the law, the application of the law to the facts of each case, and the careful balancing act which must be carried out by the courts. It also does not take account of the fact that appellants in deportation cases are often successful on appeal.

Further, it does not provide a threshold or guidance in relation to the extent that human rights should be considered. Whilst we have already made clear our view that Option 3 should not be implemented, it would inevitably create legal uncertainty, which would simply lead to further challenges.

Additionally, failing to adequately consider and qualify an individual's human rights is not sufficient. Previous cases where human rights have not been adequately weighed have led to violations of our international obligations to the ECtHR.

Option 3 should be rejected on the basis that it is uncertain and increases the potential for human rights violations and appeals to the ECtHR.

Raising Article 8 arguments to challenge deportation is difficult since the passing of the Immigration Act 2014. This is due to the court's statutory obligation to balance any interference of a person's right to family life with the wider public interest. Therefore, any provision in the Bill of Rights limiting

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[88] Free Movement, Rare Statistice Show Rise in Number of Deportations Orders Upheld on Appeal, 2021 https://www.freemovement.org.uk/rare-statistics-show-rise-in-number-of-deportation-orders-upheld-on-appeal/

Article 8 is insubstantial and unnecessary given that its application has already been qualified by a previous legislative scheme.

There is no evidence to suggest that under the current process the views of the Secretary of State are being "substituted". In our view, the consultation has not convincingly shown that the current system does not adequately balance the fundamental right to an appeal and the public interest in deportation nor has it provided a preferable alternative to the current system.

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

The basis of the question

The HRA provides a non-discriminatory framework for protecting the rights of all persons. YLAL condemns the premise that these protections are impediments in any context, and submits that the implication of Question 25 is to exclude people on the grounds of their immigration status from full access to their universal rights.

YLAL believes that the term "illegal and irregular migration" is inherently problematic. The use of the term "illegal migration" has become popularised, particularly in the government's rhetoric regarding small boat migration in the English Channel. This refers to people who are making the dangerous journey with the aim of seeking asylum, and thus to be recognised as a refugee under the 1951 Refugee Convention, with limited access to safe routes for protection.[89]

International treaties, such as the 1951 Refugee Convention, should be interpreted and abided to with the "same meaning by all who are party to it".[90] This means that signatories to international instruments should not legislate in a way that deviates from the purpose of the treaties, for which the 1951 Refugee Convention is to ensure basic provisions for individuals seeking international protection. This applies to any legislative restriction or criminalisation of 'irregular migration', whether that be through a Bill of Rights, the Nationality and Borders Bill, or any other attempt to avoid international obligations to people seeking asylum.[91]

YLAL submits that the overall effect of legislating to circumvent international obligations, particularly in the context of the Nationality and Borders Bill, further feeds into the concept of who is a "deserving migrant". YLAL does not support the argument that there is such a concept of a

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[89] In oral evidence to the Home Affairs Committee on 3 September 2020, the Director General of UKVI stated that of the 5,000 people who had made it to the UK in 2020 to that date, 98% had claimed asylum https://committees.parliament.uk/oralevidence/793/default/; JCWI, Safe and Legal Routes of Entry to the UK, August 2020, https://www.jcwi.org.uk/briefing-safe-routes-to-the-uk

[90] King v Bristow Helicopters [2002] 2 AC 628, 81

[91] UNHCR states that nationality and borders bill undermines the UK's obligations under the Refugee Convention - https://www.unhcr.org/uk/uk-immigration-and-asylum-plans-some-questions-answered-by-unhcr.html

"deserving" claimant. If there has been a breach to a person's human rights, then they are a deserving claimant regardless.

Using case law to demonstrate how the Convention and HRA have protected Human Rights/ UK obligations under ECHR

The UK owes international obligations under the ECHR, as defined by the ECtHR jurisprudence, regardless of the incorporation of the ECHR under the 1998 HRA or under a proposed national Bill of Rights.

Article 2 of the ECHR is a positive obligation to ensure the absolute right to life for all within its jurisdiction, including those within its territorial waters. This is an absolute right, which a state is in breach of where it knew or ought to have known about a real or immediate risk to life.[92] This duty is only heightened where the individuals are vulnerable.[93] A failure of any state official in protecting an individual's life in any crossing of the English Channel will be in breach of the ECHR.

In addition to this, YLAL reminds the Government of its international obligation within Article 3. Article 3 is a non-derogable right preventing torture, degrading or inhuman treatment or punishment. The ECtHR has recognised that the responsibility of the state may be engaged where an applicant, who was wholly dependent on State support, was faced with official indifference in a situation of serious deprivation incompatible with human dignity.[94] Where migrants crossing (or attempting to cross) are in a situation of serious distress, and experience apathy from officials, there is a real risk that the UK will be acting in breach of its obligations under Article 3.

Article 8 of the ECHR requires states to respect private and family life which, under ECtHR jurisprudence, includes the rights of migrants. However, Strasbourg case law recognises that the convention does not guarantee a right to reside in a particular country and affords a wide margin of appreciation to states, contrary to the Government's suggestions.[95] Moreover, states retain the right to expel migrants for serious criminal behaviour, though these expulsions must be in accordance with the law and necessary in a democratic society, justified by pressing social need in proportion to the legitimate aim pursued.[96] The Jurisprudence highlights that, as far as the proportionality criteria (as cited by the Court in *Boultif* and *Üner)* is adhered to, it is unlikely that the court will interfere with

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[92] Osman v United Kingdom (2000) 29 EHRR 245; *Öneryildiz v Turkey* (No 2) (2005) 41 EHRR 20; *Savage v South Essex Partnership NHS Foundation Trust* [2009] AC 681

[93] *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72; *Edwards v United Kingdom* (2002) 35 EHRR 487

[94] *Budina v Russia* (45603/05) 2008

[95] *Al-Nashif v Bulgaria* (App. 50963/99) (2003) 36 EHRR 655; *Unuane v United Kingdom* (App. No. 80343/17) 24 November 2020; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985; *Boujlifa v. France*, 21 October 1997

[96] *Unuane v United Kingdom* (App. No. 80343/17) 24th November 2020

the ruling of the domestic court unless the proportionality test has been applied incorrectly.[97] The ECtHR gives weight to illegality and criminal conduct in considering whether there is an interference by the state with the right to private and family life, in both expulsion and family reunification cases.[98] Therefore, the ECtHR provides a mere baseline for Article 8 protection. This should be built on by states to ensure greater protection for those seeking asylum, rather than being viewed as an opportunity to deviate further from the protections afforded under Strasbourg jurisprudence.

The effect on legal aid lawyers

Any changes preventing the rights that those seeking asylum or international protection can access may impact on who can rely upon the HRA, which may lead to increasing legal challenges being taken directly to Strasbourg. YLALs, by nature, work with people who may otherwise not have the tools or resources to uphold their civil or universal rights. Should the framework of these rights become discriminatory, young legal professionals will be less inclined to contribute to a system that is predetermining a person's access to vital rights based on their immigration status.

[97] Ibid.

[98] *Onur v United Kingdom* (App. No. 27319/07) (2009) 49 EHRR 38; *A W Khan v United Kingdom* (App. No. 47486/06) (2010) 50 EHRR 47; *Boujlifa v France* (App.25404/94) (2000) 30 EHRR 419; *Bouchelkia v France* (App. No. 23078/93) (1998) 25 EHRR 686; *MA v Denmark* (App. 6687/18)

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.

The proposal appears to aim to reduce the likelihood and amount of damages awarded to successful claimants in human rights cases. It aims to bring to the court's notice, again at stage of the assessment, factors like the wider public interest, which would operate as counterweights to the individual's interests in assessing damages. These counter-weights, it is likely hoped, will discourage the courts from any generous awards. It is doubtful, however, whether this is either necessary or desirable. Given recent positive developments, in light of matter such as Protocol 15, it is concerning for the UK to tighten the domestic rights to remedies because this contravenes all clarity and independence achieved through the ECtHR's most recent developments.

The proposal does not appear necessary because damages are already seriously limited under the HRA. There is no right to damages (s.8(1)). The court can make no award unless it is satisfied 'the award is necessary to afford just satisfaction'(s.8(3)). In all cases, it must take into account other remedies (s.8(3)(a)) and the consequences of the decision (s.8(3)(b)). The ability to award damages is already very narrow, therefore. Furthermore, the courts have generally treated it as a narrow right.[99] The same is evident in Strasbourg jurisprudence, which the court must take into account in assessing damages (per s.8(4)).

Given the restricted nature of the damages under the HRA, it is unlikely that they pose any problematic burden on public authorities. The IHRAR found no evidence of this, nor have academics or commentators highlighted this issue. The Consultation also offers no examples. It is, therefore,

[99] *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673 (*Greenfield*).

doubtful that, even if damages awards were to be limited further, it would have wide-ranging or significant practical effects for the public budget.

It would, however, be a strong statement of principle that, despite a finding of a breach of human rights obligations by the state, the court's conviction of a need for 'just satisfaction' is no longer sufficient to grant the claimant damages. This does not seem to be an undesirable principle, for it negates the claimant's due compensatory rights, hence, implicitly depreciating the value or weight of the human rights themselves.

It seems particularly undesirable given that the claimant, to establish a breach, usually has to show that the harm to his right outweighs all the factors proposed. The seminal *Bank Mellatt* case illustrates this. In conducting a proportionality analysis, the court will weigh many factors against the extent of the harm to the claimant [factor 'c' on the proposed list].[100] For instance, courts frequently highlight the extent of harm to the claimant in deciding whether there has been a violation.[101] So, it does not seem fair or desirable to require these factors to be raised again for the purpose of remedies, unless the court finds, on the facts, that they are particularly relevant. This is best achieved by the current discretionary approach to damages.

[100] Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) [2013] UKSC 38 & [2013] UKSC 39
[101] ibid

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

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

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

The fundamental principle that underpins all human rights is that human rights are everyone's rights. They are not rights to be earned, they are *human* rights by birth right. The new proposal stands to undermine that principle of universality, which should instead feature at the very core of the new Bill of Rights.

The proposal seeks to limit or strip away individual human rights on the basis of personal conduct, which is completely at odds with the very concept of human rights. In addition, the new proposal is likely to prejudice victims of crime, including victims of domestic abuse and modern slavery. A new tiered system which awards remedies based on the claimant's conduct, rather than the extent or type of the defendant's breach, suggests that human rights are a privilege to be earned, rather than universal rights to be protected. The responsibility for securing protection of those rights would shift on to the person seeking protection, and away from the authority which has the power, duty and resources to protect those rights. This shift in responsibility would run contrary to the rule of law, which dictates that no one is below the law.

Furthermore, it is foreseeable that a tiered system could also generate more claims for public authorities to defend, which means more resources and funds would be spent defending those claims. It is foreseeable that a tiered system may lead to *more* human rights claims, whereby an individual with a history of 'better' conduct - whatever that may mean - than a previous claimant in a similar situation, runs the same arguments to a previous claimant in court, with the intention of securing a remedy which the previous claimant was not awarded on account of their behaviour.

A further problem is that individuals who become involved in the criminal justice system on account of bias, abuse or exploitation, would be prejudiced when it comes to the protection of their human

rights. The proposal is highly likely to create an abhorrent situation where the most vulnerable in society and those who have suffered discrimination are further punished if they come to bring a human rights claim. Would a domestic abuse survivor, for example, who had counter-allegations made against her by her abuser be punished? With the number of reported domestic abuse offences on the rise,[102] and counter-allegations being a common occurrence in domestic abuse cases,[103] this is unlikely to be a hypothetical situation that rarely arises. Furthermore, owing to the ongoing existence of institutional racism within the criminal justice system,[104] it is a real concern that the same bias would be transposed into human rights cases, if individuals were treated differently based on their criminal history. This concern is heightened by the lack of representation in the judiciary, which is still predominantly white, male and middle class.[105]

It is also difficult to envisage how the proposal would work in practice. 'Conduct' is a very broad term which lacks clarity. It is submitted that there would be a lack of clarity surrounding when and to what extent remedies should be awarded if they were removed or reduced on account of personal 'conduct'. The Government proposes, it claims, "*to restore a sharper focus on fundamental rights, including by … giving the UK courts greater clarity regarding the interpretation of qualified rights*".[106] However, awarding remedies based on a claimant's ill-defined 'conduct' would do the very opposite, it is submitted - not least because the proposal appears to do away with the notion of fundamental rights altogether.

The proposal to create a tiered system for awarding remedies in human rights cases would create legal uncertainty, punish victims of crime, and discriminate between individuals based on their race, ethnicity and socio-economic background.[107] Not only that, the proposal threatens the very principle of universal human rights.

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[102] https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingseptember2021#domestic-abuse-and-sexual-offences [accessed 28 February 2022]

[103] https://www.cps.gov.uk/legal-guidance/domestic-abuse [accessed 28 February 2022]

[104] https://www.crimeandjustice.org.uk/publications/cjm/article/implicit-racial-bias-and-anatomy-institutional-racism [accessed 28 February 2022]

[105] http://www.younglegalaidlawyers.org/does-judicial-diversity-matter [accessed 28 February 2020]

[106] Consultation, paragraph 218

[107] https://www.prisonpolicy.org/reports/income.html [accessed 28 February 2022]

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

Under Article 46 of the ECHR, signatories undertake to abide by the final judgment of the court in any case to which they are parties. However, as noted above in our answer to question 1, in incorporating the ECHR into domestic legislation, the HRA took a 'soft incorporation' approach, stating simply that the domestic courts should 'take into account' decisions of the ECtHR. Therefore it remains that no binding precedent is set.

Where an adverse finding has been made and a contracting party has failed to act to resolve the human rights breach, the ECtHR has limited power to act - they can make a reference to the court for a determination of whether the state has failed to meet its obligations under the ECHR. However, there is no power to force a Government to take an action, or to refrain from an action.

YLAL echoes the concerns raised by Amnesty International, that the proposal indicates that the Government is attempting to put itself above international law.[108]

The Consultation argues that the draft clause at paragraph 11 of Appendix 2 will strengthen the Parliamentary process by adding oversight. We suggest that rather than strengthening the process this will simply further policitise the 'issue' of human rights and encourage the sacrifice of the human rights of those deemed less salubrious.

All people should be granted equal access to the protection of their human rights. This is a key principle of the rule of law, which was described by Lord Bingham as:

> *'All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefits of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.'*

The Government asserts that Strasbourg judgments interfere with Parliament's role and impinge upon Parliamentary sovereignty. We submit that this is not the case. Instead, the judgments of the ECtHR operate to hold the UK Government to account, using only political and diplomatic power, to ensure that the human rights of all people are upheld and protected.

We note that this would only arise as an issue when the UK has been found to have acted in breach of an applicant's human rights and that, in such circumstances, it is only proper for steps to be taken

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[108] Amnesty International UK, '*Consultation on Human Rights Act Reform*', page 15.

to resolve a breach, and therefore it is critical that the UK works collaboratively with the ECtHR to ensure their rights are upheld.

We support the assertion made by JUSTICE in their submission to the IHRAR consultation, that judicial dialogue between the UK Courts and the ECtHR preserves consistency in the application of the ECHR.[109] We suggest that stepping away from article 46 would remove a fundamental element which protects human rights, and risk increasing human rights violations and decreasing the recourse for those whose rights have been violated. This may also cause further issues with the backlogs of cases waiting to be heard before the ECtHR.

The case which caused significant political backlash in relation to Article 46, in relation to the obligation to implement the judgment of the ECtHR was the case of *Hirst v United Kingdom (No.2)*[110] which dealt with the rights of prisoners to vote. The government eventually proposed that they would allow those prisoners who are released on temporary licence to vote, and the ECtHR accepted this proposal and declared the case closed.[111]

The fear upon which the backlash was premised - that the ECtHR would force the Government to grant the right to vote to all prisoners - simply was not realised. This case clearly demonstrates that article 46 does not allow the ECtHR to forcibly impose decisions and actions upon states, rather it is a constructive dialogue between the parties.

YLAL suggests that the proposal to remove article 46 would have severe consequences in that it will leave very little constructive dialogue with the ECtHR, which is so important in resolving issues which arise.

We suggest that the broad oversight of the ECtHR, through the operation of article 46, has a positive impact without negating the sovereignty of Parliament, which retains ultimate power.

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[109] JUSTICE, '*The Independent Human Rights Act Review - Call for Evidence Response (March 2021)', paragraph 31.*
[110] [2005] ECHR 681
[111] House of Commons Library, 'Prisoners' voting rights: developments since May 2015' https://commonslibrary.parliament.uk/research-briefings/cbp-7461/

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

a. What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate;

YLAL is of the view that the Human Rights Act works well and that the current proposals will restrict people's rights based on flawed evidence. It is also notable that, due to the broadness and uncertain nature of the proposals, very little data is available to assess potential impacts.

As noted throughout this response YLAL is sceptical that the current proposal will have any benefits in terms of protecting our client's rights. YLAL believes that this is demonstrated when the Government's suggested benefits are considered critically.

Respecting the common law tradition and strengthening the role of the UK Supreme Court

The consideration of broader sources of law,[112] although desirable in many respects, may lead to longer and more complex judgments. This has several knock-on effects. First, judgments will not be as accessible, intelligible, and clear to the public. The proposal will also lengthen hearings and increase costs to the state and courts. It requires an increased versatility of advocates and legal representatives. Considering judgments from other countries and international courts means that more senior advocates will be required, meaning fewer junior lawyers will be able to take on this kind of work.[113] Importantly, considering case law and legislation from other countries goes against the government's motto for the proposed Bill of Rights that human rights are brought home.

The government has suggested that a potential benefit for wider society and individuals is that: *"The proposals would reinforce the supremacy of the UK Supreme Court, providing for human rights to be interpreted in a UK context."*[114] The Supreme Court already interprets rights in a UK context. It takes into account ECtHR judgments, but only insofar as it considers it relevant to the proceedings, and has in the past departed from ECtHR case law.[115] It is at best unclear how individuals and society would benefit from the proposed change. Rather, the proposal suggests enforcing on the courts a

[112] Consultation, Para 195.
[113] Consultation, Para 3 appendix 2.
[114] Consultation, Para 3 appendix 2.
[115] R v Spear [2002] UKHL 31 and Morris v UK (2002) 34 EHRR 52.

power they do not want to exercise, as they still, more often than not, apply ECtHR jurisprudence. Consistent departure from ECtHR decisions would result in the UK being non-compliant with its international treaty obligations, which would in turn "undermine the purpose of the HRA to give individuals whose rights have been breached a remedy in domestic law, without resorting to Strasbourg."[116]

Requiring UK courts to follow any binding precedent of domestic courts under the Bill of Rights in deciding human rights questions[117] not only goes against UK jurisprudence, but also other proposals made in the consultation. It also means that it would be harder for the law to develop in step with society. As other European countries' human rights protections grow, the UK's may well stagnate if not recede along with individuals' ability to uphold them. This is further exemplified by the proposal that would prevent UK courts from "running ahead" of the Strasbourg jurisprudence.[118] This proposal goes against the proposed benefit of increasing the supremacy of the Supreme Court. If Supremacy of the UK Courts is the aim, then they should be free to 'run ahead' of Strasbourg Jurisprudence.

Having different interpretations of rights means that the UK will move away from the communised system of rights in Europe.[119] The risk is that this will result in an increase of cases being communicated to the ECtHR and that future governments may use this as an excuse to leave the ECtHR, which would, in YLAL's view, have disastrous consequences for the protection of human rights in the UK.

The Government has suggested that:

> '*Changes to the way in which freedom of expression is taken into account by the courts may allow wider society to benefit from greater dissemination of information and debate. Individuals may feel more comfortable exercising their right to freedom of expression because of the legal protection provided. Journalists may also find it easier to source information should informants feel more protected.'*

While YLAL agrees that individuals should be able to exercise their right to freedom of expression, the proposal does not amount to a benefit because the right to freedom of expression is already strongly protected by the HRA. When seen in the context of other threats to freedom of expression currently being pursued by the government there is no clear benefit to the proposals. YLAL believes that it is clear from this context that proposed extension of freedom of expression is not intended to include those who cause annoyance to the government, such as Black Lives Matter protesters, women gathering in the wake of the murder of Sarah Everard, and Extinction Rebellion. This is

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[116] JUSTICE, 'The Independent Human Rights Act Review – Call for Evidence – Response' March 2021, p. 12.
[117] Consultation, Para 3 appendix 2.
[118] Consultation, Para 195.
[119] Consultation, Para 3 appendix 2.

supported by proposed curbs on the right to protest the government is currently trying to enact by way of the Police, Crime and Sentencing bill. Irreversible changes to fundamental rights, including the right to a fair trial, to private and family life and freedom of expression will significantly weaken democracy. These changes will disproportionately affect some groups. The pretence of protecting journalists seems hypocritical as the government recently rejected the law commission's proposal to include a public interest defence to the Official Secrets Act.[120]

Restoring a sharper focus on protecting fundamental rights

The proposals clearly attempt to limit the ability for individuals to remedy breaches of human rights domestically.

A key proposal is the introduction of a permission stage with a significant disadvantage requirement.[121] A potential benefit for justice and public authorities identified by the consultation is that this: *"may mean that cases are dismissed at an earlier stage or that individuals choose not to pursue trivial claims. This could lead to savings for the courts and legal aid."*

A potential cost for individuals is that: *"Certain litigants who are deemed not to have suffered a significant disadvantage, or where there is no other compelling reason for hearing the claim, would have their ability to pursue human rights proceedings constrained."*

The government has also recognised the potential costs for justice, expressing that *"There would likely be non-monetised costs to courts and tribunals from the permission stage proposals."*

There are already multiple hurdles to overcome to bring a claim before the ECtHR. These include the following: the complaint must relate to the action/inaction of a State which has ratified the ECHR, the requirement to have been directly affected by the violation alleged, the requirement of having suffered a significant disadvantage, the exhaustion of domestic remedies, and that the final domestic court decision be made within the past 6 months. Additional criteria are also considered after those steps have been complied with, which may lead to inadmissibility of the case. The significant disadvantage criterion is already considered by the ECtHR, except in cases that have been deemed admissible.[122] This requirement was introduced so that the Court may reject cases considered as "minor" pursuant to the principle that judges should not deal with such cases. Introducing this hurdle, or the alternative "overriding importance" threshold, at the domestic level would result in a further sifting of legitimate human rights abuses that are not considered important or major enough to be

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[120] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/09/6.6798-Protection-of-Official-Data-Report-web.pdf

[121] Consultation, Paras 219-221 and paras 222-223.

[122] Article 35 § 3 (b) of the Convention – Admissibility criteria.

dealt with by the courts. It also overlooks the fact that cases without merit can already be struck out by domestic courts.

Very few cases get to the ECtHR. In 2019, 7 cases against the UK were declared admissible, with only half found to amount to violations of convention rights. Increasing the number of obstacles to bring a claim domestically will mean that virtually no cases will be able to get to the ECtHR and the court will become theoretical. The process is already lengthy and complex, meaning individuals are unlikely to pursue trivial claims, or these get sifted early on. Increasing the steps to get to the ECtHR will have the effect of restricting access to justice and means individuals cannot properly enforce their rights under the ECHR.

The Consultation sets out a potential cost for individuals as follows: *"There could be extra litigation costs for individuals in certain areas, such as where a permission stage is introduced."* There is already a great inequality of arms between claimants and the state in cases involving human rights breaches. This proposal would only increase it and may even dissuade individuals from bringing actions, especially if paying privately. If claims are pursued under public law, then an inevitable increase in the legal aid budget would be necessary for those that are entitled to it. This may in turn be used as a further argument to undermine the civil legal aid system, based on alleged 'unreasonable' costs to the taxpayer. YLAL believes that this will have a negative impact on access to justice.

A potential benefit for justice and public authorities identified as flowing from the proposal that compensation awards be reduced is that it: *"could lead some litigants to decide no longer to pursue their claims, resulting in cost savings for the courts."*

A further potential benefit for justice and public authorities is that: *"The new factors in determining how damages are awarded may remove or reduce the awarded damages, leading to savings for government departments and other public bodies."*

Suggestions are made that ECHR claims are just another way to obtain compensation. However, it should be noted that this is often the only cause of action that people have. Without this last resort, people will be left without any recourse, which itself may amount to a violation of the ECHR. As noted in our response to question 26, compensation awards are rarely awarded. These depend on whether the victim has suffered a loss that the court thinks they should be compensated for, re-joining the proposal for a "significant disadvantage" requirement, and thus making it even more unnecessarily redundant.

The damages received by claimants in ECHR cases are comparatively low. It is disputed that government departments and public bodies will save costs thanks to this proposal. Indeed, the real cost is not on the side of a claimant who seeks very limited legal aid, or even their eventual compensation award, but on the side of the state. When the government alleges flimsy claims are clogging up the courts and costing the taxpayer's money, it fails to mention the hopeless cases it

insists on defending. This is evident in the many Windrush cases that are still making their way through the courts, or the unlawful detention lawsuits brought by those giving evidence before the Brook House Inquiry. Further, any reduction in damages is unlikely to save costs due to the potential increase in cases that will be brought because of the government's proposals.

Similarly, the proposal that private law claims should be pursued first are nonsensical.[123] This will dissuade individuals with legitimate claims from coming forwards which will be costly to society. Further, no legal aid is available for such claims, meaning that this represents a deliberate exclusion of a portion of the population from their ability to enforce their human rights. If it is too expensive to pursue human rights claims, or no legal aid is available, then people will end up being more likely to represent themselves which means they will be deprived of quality access to justice. This amounts to inequality before the law and is contrary to basic rules of law.

The Consultation suggests that limiting access to ECHR rights within domestic courts "*may result from a claimant pursuing an additional human rights claim in cases where the alternative cause of action has not provided a sufficient remedy. For example, litigants may have grounds to make a claim in both tort and human rights, which currently can be decided together.*" This is in direct opposition with the government's suggestion that the potential reduction in compensation awards would dissuade litigants from pursuing claims human rights cases.

Another expressed potential benefit is that: *"Restricting the scope of positive obligations may reduce litigation against public authorities and the associated administrative burden."* Restricting the scope of positive obligations means that it will be more difficult to hold public authorities to account for what had previously amounted to human rights breaches.[124] It will also create a gap in responsibility, which will in turn affect individuals who have suffered breaches. The evidence available (see our response to question 22) is that public authorities use the HRA as a helpful framework and reducing their responsibilities, while lightening their loads in this way, may increase it in other ways. Indeed, although a further proposed benefit is that: "*The procedural changes may reduce legal uncertainty over time and the expenditure by public authorities on mitigating legal risk. The procedural changes may also increase operational flexibility.";* YLAL believes that this proposed benefit is not evidenced, and it is not clear how significantly changing the regulatory framework will lead to reduced costs for public authorities.

[123] Para 224-227.
[124] Paras 230-231.

Preventing the incremental expansion of rights without proper democratic oversight

Section 3 HRA should not be weakened or repealed, as suggested in various proposals.[125] It is almost certain that the practical effect of doing so would be to leave individuals whose rights have been breached without access to a domestic remedy. Increased involvement of Parliament in the way the courts should interpret legislation or apply it, or in their discretion, threatens the impartiality of the court system.

A proposed benefit is that: *"The abolition or limitation of remedial orders will lead to incompatibilities of legislation with the Bill of Rights receiving greater scrutiny by both Houses of Parliament. That scrutiny would include consideration of how best the government should discharge its obligations in relation to human rights."*

Limiting the use of remedial orders and requiring that the only option for remedying incompatibility be to introduce a new bill hinders on the courts' power and will significantly lengthen the time it takes for any legislation found to be incompatible with fundamental rights to be addressed.[126] This means that laws which breach human rights may remain in force for a long time before any new bill is enacted, and that individuals will be hindered procedurally from bringing legal action.

The role of responsibilities with the human rights framework

Considering the extent to which a person has fulfilled their relevant individual responsibilities is dubious at best because human rights exist as such, without necessitating any action on our part.[127] They exist because we exist. The imposition of this requirement is a further bar to the exercise of human rights and entails significant discretion in examining whether responsibilities have been fulfilled. It should also be noted that some individuals may not be able to exercise the same responsibilities as others, meaning they will be disadvantaged by this proposal.

An expressed cost is that: *"The proposal that a court should be required to take account of a claimant's conduct may result in a removal or a reduction of awarded damages in some cases."*

Taking past conduct and respect of the rights of others into account when considering remedy is problematic for several reasons as set out in detail in our response to question 27.[128] The changes proposed in the consultation rest on mistaken assumptions relating to judicial overreach and overstepping courts. The proposals, taken together and individually, reduce judicial safeguards for

[125] Paras 239, 242.
[126] Para 256.
[127] Para 303.
[128] Paras 305, 307, Q.27 option 2.

the individual, narrow or close routes of redress involving courts and reduce executive accountability. These results come at the expense of individuals and society as a whole, whereas any suggestions of cost-saving are unevidenced. YLAL believes that the cost, both monetary and otherwise, of implementing the proposals, along with their future use, will be far greater than the current regime which experts agree is successful in upholding human rights.

b. What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate.

YLAL notes with some concern that in this question the Government is requesting evidence in relation to potential impacts on those with protected characteristics when it has failed to provide evidence or clear rationale for a large number of proposals within the Consultation.

The Equality Act 2010 (the 'EA 2010') protects people from discrimination (direct and indirect), harassment and victimisation via protected characteristics. There are nine protected characteristics under the EA 2010 as follows:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

The Government sets out in their Consultation that they believe their proposals are unlikely to result in people being treated less favourably because of a protected characteristic either directly or indirectly.[129]

At the outset it is important to point out the difficulty in determining any impact on individuals with protected characteristics without any of the following:

- Centrally collated statistics about those who bring human rights cases;

[129] Consultation, Para 11-17, Appendix 3

- Statistics on how human rights legislation affects people with characteristics protected under the EA 2010;
- The Government's own equality impact assessment (which they have yet to carry out in relation to their proposals);
- The statistics the Government has referenced (but not provided) on the protected characteristics of applicants granted legal aid in freestanding claims under the Human Rights Act in relation to race, sex, disability and age;
- The statistics the Government has referenced (but not provided) on the protected characteristics of UK offenders and foreign national offenders.

The Consultation also indicates the Government has "*identified the broad groups that may potentially be disproportionately impacted by specific aspects of the proposed changes, such as ethnic minority individuals, children and men*". However, unhelpfully, it does not specify if the three groups mentioned are the only ones they have identified, it does not provide any further information regarding how these groups were identified and it does not provide any information about how they believe their proposals will impact the groups they have identified.

From the information that is available YLAL believes that the proposals will have a very clear impact on two categories of people: immigrants and prisoners (or those with a criminal history). Within these categories, the protected characteristics that are most likely to be relevant are race, sex and disability. Immigrants are largely from ethnic minority backgrounds. Prison populations in the UK are disproportionately male (approximately 96%), disproportionately those from lower socio-economic backgrounds and have a disproportionate number of ethnic minorities in their number (28% of the prison population in comparison to approximately 15% of the general population). According to the Prison Reform Trust the prevalence of mental ill health and learning disabilities are also disproportionately higher in the prison population than in the general populace.[130]

The Government appears from the consultation to be critical of recent cases involving those with mental illness or disability and cites various cases as reasons for why they seek to potentially limit positive obligations placed on the state via human rights laws.

These cases included, *Rabone and another v Pennine Care NHS Trust*[131], which found that the positive obligation on the state to safeguard a person's life under Article 2 covered voluntary psychiatric patients as well as those detained for their own safety. One of the key points the court made was that regardless of whether the person was detained or in hospital on a voluntary basis, the hospital

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130 http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Summer%202021%20briefing%20web%20FINAL.pdf

131 [2012] UKSC 2

had assumed responsibility for their care and the person in question presented a real risk of suicide. The differences between detained and voluntary psychiatric patients was one of the primary considerations in the judgement and at paragraphs 28 and 29 Lord Dyson makes clear that these differences are "*more apparent than real*" as detained patients are often free to come and go in open hospitals, whilst voluntary patients often provide "consent" for treatment because they are aware they will be detained if they do not. If this positive obligation were to be rolled back there is a real possibility that this category of extremely vulnerable people would be overlooked and not properly protected by the state.

YLAL believes that restricting the positive obligations of rights under the HRA would likely have a detrimental impact on those with disabilities, particularly those with learning disabilities and severe mental health problems. These individuals are inherently vulnerable and are already at risk of being exploited or of having their rights unnecessarily restricted.

Extending declarations of incompatibility to secondary legislation

The use of secondary legislation in human rights cases is extensive and the proposal to prevent courts from being able to quash such secondary legislation deemed incompatible with the HRA (and to instead extend the use of declarations of incompatibility) is highly likely, YLAL believes, to potentially impact on individuals under all categories of the protected characteristics.

Relevant examples of secondary legislation being quashed in relation to protected characteristics are: *R (Binder, Eveleigh, Hon and Paulley) v Secretary of State for Work and Pensions* [2022] EWHC 105 (Admin), and *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53; [2009] AC 287. Whilst the power to quash secondary legislation is a power that is used sparingly by the courts, it is an important one. Restricting the court's ability to find government policies, strategies or other secondary legislation unlawful could lead to remedies for human rights claims being much more limited (and significantly delayed) as they would rely entirely on the government deciding to change the relevant legislation to make it compatible with the HRA.

Definition of public authority

The government seeks to clarify the definition of "public authority" under the HRA as there has been apparent confusion with regards to when a private company is acting as a public authority when carrying out "public functions".

The current provision allows for privately run prisons, immigration detention centres and residential care service providers to be capable of being public authorities for the purposes of the HRA. This ensures that those seeking redress for human rights abuses or infringements by such organisations are entitled to take action.

The Government's proposals, however, suggest a restriction of this definition. YLAL believes that the motivation for any change in definition is driven by a desire to prevent individuals from seeking redress under the HRA. Such a restrictive new definition would therefore be capable of impacting on the rights of those with the protected characteristics of age and race and would again be likely to discriminate against prisoners more generally. It is also likely to impact on those in the care of public authorities, including (but not limited to) those in prisons, police custody, immigration detention centres, children's homes, care homes and those sectioned under the provisions of the Mental Health Act and therefore could impact on those with the protected characteristics of disability as well.

Deportations in public interest and 'illegal/irregular migration'

Deportations of foreign national prisoners are already deemed to be in the public interest and the proposals made by the government in the consultation seek to limit the circumstances in which human rights protections can be used to prevent deportation to, effectively, only cases where the person subject to deportation would face torture or inhumane treatment if they were deported.

The current proposals therefore seek to exclude whole swathes of people from accessing human rights and would clearly impact those with the protected characteristic of race as well as potentially other protected characteristics.

Proposals seeking to limit, reduce or remove human rights protections from failed asylum seekers, visa over-stayers and foreign national prisoners will all be inherently discriminatory.[132]

Taking into account conduct of claimants with respect to damages

The government provides two proposals in this regard; either for the courts to consider the conduct of a claimant within the context of the individual case, or to consider their "wider" conduct in a general sense. The proposals are underpinned by the idea that those who have infringed the rights of others in some way, have therefore forfeited their own human rights to an extent.

Once again, YLAL is of the view that this proposed reform is targeting those with criminal convictions or those who have fallen foul of the immigration rules and seeking to severely restrict their right to an effective remedy under human rights law. However, such reform, as currently proposed, could feasibly include all manner of conduct, not necessarily limited to criminal acts, which the government considers worthy of criticism or punishment. YLAL believes this would lead to a situation whereby only those deemed morally worthy by the government would be able to have damages

[132] Amnesty International, Consultation on Human Rights Act Reform https://www.amnesty.org.uk/files/2022-02/HRA%20Consultation%20FINAL.pdf?VersionId=mRklDIRm2sPbNw2o0iDFLIEZ_F3FoZ6c

awarded to them. This entirely undermines the universality of human rights and sets a dangerous precedent.

c. How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.

YLAL believes the best way to mitigate any negative impacts of the Bill of Rights is to not introduce it.

Prior to the HRA, enforcing Convention rights was difficult, time-consuming, and expensive. Individuals wishing to bring a claim against public bodies, and/or the State, before the ECtHR faced the prospect of a £30,000 bill and a five year wait, according to a 1997 Report.[133] The HRA intended to, and has succeeded in, empowering individuals to enforce their rights. By enabling individuals to hold authorities accountable for their wrongdoings, the HRA has proven to be a vital tool in increasing access to justice. This has been long documented by the Equalities and Human Rights Commission,[134] Liberty[135] and Amnesty International UK[136], amongst many others. Our members work across the spectrum of legal aid and have many accounts of the HRA providing justice for clients against state inaction and wrongdoing. The proposals set out by the Government do not inspire us with confidence that access to justice will be strengthened if the HRA is replaced with a Bill of Rights.

For example, the role the HRA has played in facilitating easier access to the courts for individuals bringing human rights claims means that applications to the ECtHR remain low in comparison to other State's with similar population sizes to the UK. In 2021, only 118 applications were made to the ECtHR of which only 1 was admissible.[137] This demonstrates the strength of the HRA in enforcing rights domestically without the need to revert to the ECtHR.

Government proposals additionally fail to illustrate how the Bill of Rights would alter the future landscape of human rights litigation. Whilst Annexe 3 of the consultation paper envisaged cost savings because of limiting 'unscrupulous' and 'weak' claims, it fails to address procedure rules and associated costs under the new, proposed Bill of Rights for claimants wishing to assert their human rights. YLAL recognises legal aid as a vital component of access to justice, the equality of arms and

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[133] Home Office, *Rights Brought Home: The Human Rights Bill*, at 1.14 (CM 3782) (HMSO, October 1997)
[134] Equality and Human Rights Commission, *The impact of a human rights culture on public sector organisations Lessons from practice, 1 June 2009* <https://www.equalityhumanrights.com/sites/default/files/the_impact_of_a_human_rights_culture_on_public_sector_organisations_0.pdf>
[135] How I stood up to power - Liberty
[136] Eight reasons why the Human Rights Act makes the UK a better place | Amnesty International UK
[137] Analysis of statistics 2021

the rule of law. Under the current regime, legal aid may be available for those bringing human rights claims under the Exceptional Case Funding (ECF) scheme. Notwithstanding the improvements that can be made to the ECF scheme, the Government has not provided any indication that it would operate on similar terms under the proposed Bill of Rights as it currently does under the HRA. This is concerning.

The Consultation makes no reference to waiting times and how a Bill of Rights will impact these. Given the current state of our justice system relating to lack of funding and delays compounded by the Covid-19 pandemic and court closures, it is far from clear how the proposed Bill of Rights will make the situation better for claimants.

The silence on these issues suggests that the proposed Bill of Rights has been ill-thought out. YLAL believes that it is a knee jerk reaction to what the Government perceives as an 'attack' on the Executive and not a genuine attempt to improve how individuals legally enforce their rights in this country.

By proposing this Bill of Rights, we argue that the Government is attempting to fix what is not broken. By acting under the guise of 'restoring the separation of powers' and 'balancing interests between the individual and the public', the real motivations behind these proposals are being obscured. Placed within the wider political context of Bills aimed at reducing state accountability (e.g. the Judicial Review and Courts Bill), limiting civil and political rights (e.g. the Policing, Crime and Sentencing Bill) and reneging on international law obligations (e.g. the Nationalities and Borders Bill), the proposed Bill of Rights acts as an additional weapon in the Government's armoury against democracy and rule of law. YLAL acknowledges that the HRA is not perfect, as no legislation ever is, however, YLAL is in agreement with JUSTICE in their response to the 2021 IHRAR, we believe the HRA works well in striking the right balance between giving effect to, and protecting, the rights of individuals and maintaining Parliamentary sovereignty alongside balancing the different branches of Government.[138]

Change will dilute human rights protections

The Government has already indicated that the proposed Bill of Rights will prohibit certain groups within society from making human rights claims. The Consultation makes constant references to incarcerated-persons and 'foreign national offenders' 'abusing' the system. It is clear that the Government is not happy with how the HRA has empowered certain individuals to challenge unlawful decisions and now the Bill of Rights will curb this. In this regard, the Government is unequivocal in their demonisation of these individuals. It must be noted that individuals have already

[138] JUSTICE, 'The Independent Human Rights Act Review – Call for Evidence – Response' March 2021.

been punished for their crimes. We cannot engage in double-punishment by further denying them their rights.

This demonisation and 'unworthiness' is at direct odds with the essence of human rights. The Preamble to the Universal Declaration of Human Rights 1948 describes human rights as 'inalienable'. With this in mind, we argue that the proposed Bill of Rights will dilute existing protections for individuals wishing to bring human rights claims.

In the Government's attempt to cut out 'undeserving' claimants, the changes will inadvertently affect those outside of this purported category. It is a dangerous slippery slope that we should not be engaging in. As Nelson Mandela once said, 'a nation should not be judged by how it treats its highest citizens but its lowest ones'.

To conclude, YLAL would point to the contradictory nature of this question. The rationale behind the proposed Bill of Rights is to maintain human rights protections. If the question of how to mitigate any negative impacts of the proposals is raised, it should be clear to all concerned that this is not the right course of action to take.

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