ONE PUMP COURT CHAMBERS

Response to consultation exercise on the Human Rights Act / Bill of Rights

One Pump Court Chambers is a set of over 80 barristers and staff. We were founded in 1978. We act in criminal, family, housing, immigration, prison, civil and public law, in cases concerning modern slavery and trafficking, and inquests, inquiries and the Court of Protection. We have a strong commitment to legally aided work. This is our response to the Consultation: 'Human Rights Act Reform: A Modern Bill of Rights'.

Introductory observation

1. The inevitable effect of the Government's stated positions, set out repeatedly through this consultation exercise, would be to reduce the rights of individuals, to increase the power of the state to interfere with those rights, and to reduce judicial supervision of that interference.

2. Events of the past two weeks have shown the fundamental importance of the rights to peaceful protest, the rights to family reunion, the right to be free from arbitrary detention and torture and inhuman or degrading treatment, the right to genuine freedom of expression, the right to freedom of religion, the right to life, and the obligation of a state to secure the enjoyment of all of these rights without discrimination, to ensure that its forces, acting extraterritorially, comply with these rights, and to ensure effective access to an effective judiciary for people affected by the actions of states. In a week when Russia's membership of the Council of Europe has been suspended, and which has emphasised the absolute need for common human rights standards to be applicable on an international, and not merely national level, we consider it to be a matter of shame that the UK government should be proposing to distance itself from our common and developing commitment to fundamental human rights with an opt-out Bill of this nature.

3. On 14 July 2015, the Russian Constitutional Court concluded that it would be "*justified*" for Russian lawmakers to set up a special judicial mechanism to guarantee

the "*supremacy*" of the Russian Constitution when Russia executes rulings issued by the European court. This ruling was criticised within Russia and beyond as representing a significant weakening of standards for the supervision of the Russian State. The proposed Bill of Rights heads in the same authoritarian direction. It is designed to permit and encourage the relativisation of fundamental rights (including the rights of unpopular minorities), in the political interests of the executive.

4. We wholly oppose any reduction in the UK's commitment to the norms set out in the European Convention of Human Rights ['ECHR'] and developed by the Strasbourg Court in dialogue with the legal traditions of the States Parties to the Convention.

5. None the less, we seek to engage with the detail of the consultation, in the hope that some of the most directly harmful effects of the proposed bill can be avoided. We take as our starting point the government's assertion that the UK is serious about its commitment to the human rights in general and to the European Convention on Human Rights (ECHR) in particular, as an international treaty which UK lawyers were heavily involved in drafting and to which the UK has been a signatory since its inception. It will be clear from our comments below that we consider the Government's positions, as recorded in the consultation, to be frequently inconsistent with that assertion.

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.

6. Domestic courts can and do already draw on a wide range of law (statutes, case law and common law judgments from this and other jurisdictions) when reaching decisions on human rights issues. Domestic courts are also presently required to take European Court of Human Rights ('ECtHR') decisions into account, but are not bound by them.

7. As a result, the proposed amendments set out in the draft clauses are unnecessary. They are also confusing. Insofar as they have the effect of driving a distance between Strasbourg and domestic interpretations of fundamental human rights concepts, they are likely to result in more applications to the ECtHR. They are also likely to impede or delay access to a remedy for individuals facing violations of their human rights, who can now raise those rights effectively in domestic courts, but will be required to exhaust domestic remedies before doing so if the two legal systems part company.

8. Historically, the ECtHR has engaged in a dialogue with the decisions of the Supreme Court of the United Kingdom, and allowed its own developing jurisprudence to be influenced by or to reflect the considered decisions of the domestic courts (see for example *Tarakhel v Switzerland* (2015) 60 EHRR 28, where the Grand Chamber of the ECtHR adopted parts of the Supreme Court's judgment in *R (EM (Eritrea)) and others v SSHD* [2014] AC 1321. The ECtHR has appreciated judgments reflecting the UK's common law tradition and been strongly influenced by them. It will be of no benefit at all for that dialogue to be dismantled.

9. In respect of the two options proposed in Appendix 2.

Option 1

(a) Clauses 1 and 2 attempt to avoid the full interpretive jurisdiction of the ECtHR. This would breach Article 32 of the Convention, whilst also being inconsistent with the asserted commitment to the Convention itself set out in the consultation paper. The wording of the current Section 2 makes clear that domestic courts are <u>required</u> to "*take into account*" the judgment, decision, declaration or advisory opinion of the European Court of Human Rights, no more and no less. We do not accept that anything less than that is consistent with the UK's obligations under the Convention. The wording of the proposed clauses (1)-(2) is unacceptable for that reason.

(b) Furthermore, if UK Courts do adopt a more restrictive interpretation of Convention rights than the ECtHR, individuals may will face delayed or restricted access to justice, and will be forced to apply to the ECtHR (if they have the time, means and legal assistance to do so) in any event.

(c) Clause (4) is unnecessary. UK Courts are already fully aware of the doctrine of precedent and its operation in respect of human rights decision-making. For example, *N v SSHD* [2005] UKHL 31 continued to be applied as binding precedent for years despite the decision of the Grand Chamber of the ECtHR in *Paposhvili v Belgium* [2017] Imm AR 867, until the UK Supreme Court changed the position in UK law in *AM (Zimbabwe) v SSHD* [2021] AC 633.

(d) Clause (5) is unnecessary. The Court already draws upon other jurisdictions or international law where appropriate in order to interpret legislation in the UK. For example, in *ZH (Tanzania) v SSHD* [2011] UKSC 4 the Court interpreted the Home Secretary's obligations under section 55 of the UK Borders Act 2007 by reference not only to case law on Article 8 of the ECHR but also the UK's obligations under the UN Convention on the Rights of the Child (UNCRC), and to decisions of other common law jurisdictions. The harm done by Clause (5) is its combination with Clause (6), which has the effect that judgments of the ECtHR are no more persuasive or authoritative than those of any other decision in a country or territory outside the UK, and which would appear to do away with the principle that a consistent approach of the ECtHR should be followed. Again, the effect of this is to undercut Article 32 ECHR; it is also to downgrade the crucial dialogue between member states of the Council of Europe, through the ECtHR, in developing a common set of human rights principles. It reflects the approach taken by the Russian Supreme Court in 2015, allowing the state to seek to persuade domestic courts to opt out of carefully established human rights principles. We consider it to be extremely damaging that the UK government is taking the Russian opt-out approach as one of its models.

(e) The ECtHR's jurisprudence itself develops in the context of wider international law. In *Neulinger v Switzerland* (2010) 28 BHRC 706, para 131, the ECtHR itself observed that "*the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken . . . of 'any relevant rules of international law applicable in the relations between the parties' and in*

particular the rules concerning the international protection of human rights" [131].

Option 2

(f) Clause (1) is again unnecessary for the reasons set out in response to question 2.

(g) In respect of clause (3), reference to the "preparatory work" of the ECHR requiring particular regard appears to be an attempt at stopping the "living instrument" doctrine of the ECtHR. This is an extraordinarily regressive approach. Rights as fundamental as the right to respect for gender identity and sexual orientation, the right to equal treatment for people born into and out of marriage, the procedural rights associated with all of the provisions of the ECHR, and many, many more, have developed through that doctrine. Given the considerable social changes which have emerged since then (including for example in the advancement of LGBTQI+ rights) the proposed approach would render the rights protected for in the convention of increasingly limited relevance.

(h) Clause (6) is, for the same reasons as set out above, in our view inevitably inconsistent with the UK's obligations under the Convention.

10. Our observations on the current operation of sections 2 -3 of the Human Rights Act 1998 are set out in our response to question 2. In summary, we do not consider the proposed Bill of Rights is necessary as either replacement or complementary legislation to the Human Rights Act 1998. We also observe that the consultation document purports to reflect and build upon the Independent Human Rights Act Review led by Sir Peter Goss QC, but we do not consider that for the most part the Consultation document presents a fair or accurate summary of the conclusions of that report.

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?

11. We believe that this question is based on a number of misconceptions about the relationship between the Strasbourg Court ("the ECtHR") and the national UK courts, including the Supreme Court. This includes (i) a mistake as to the existing relationship between the ECtHR and domestic courts; (ii) the incompatibility with the ECHR of a framework which does not recognise the supervisory jurisdiction of the ECtHR with the Convention; and (iii) a failure to appreciate the value of a supra-national Court for individuals bringing actions against state bodies.

12. The doctrine of precedent makes clear that the UK Supreme Court's decisions are binding in all instances, including claims under the HRA. IHRAR concluded that the UK courts have developed and applied an approach which is guided by "judicial restraint" and that there was no basis for departing from it. We agree. In the circumstances, the Bill of Rights cannot improve on the certainty and authority of the current position. Rather, the inevitable effect and, we fear, the purpose of the proposed amendments is to enable the state to seek to persuade courts to downgrade fundamental rights. There is no need to 'improve' the present position for the following reasons:

13. First, the Supreme Court (or formerly the House of Lords) has already shown itself to be the ultimate judicial arbiter of laws on the implementation of human rights in the UK. There is no lack of clarity in this regard, and the ECtHR will often refer to the margin of appreciation which contracting states enjoy. For example:

- In housing law, in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 the House of Lords held that Articles 8 and 14 of the Convention had to permit same sex partners benefiting from statutory succession rights applicable to those living as "husband and wife". The ECtHR had earlier refused to intervene in cases on similar points in part because the recognition of such relationships was an area in which states enjoy a wide margin of appreciation: *Mata Esteves v Spain* (App No 56501/00) ECtHR 2001-VI (admissibility decision).
- In immigration law concerning the deportation of foreign national offenders, the domestic courts have at all levels confirmed that they will determine whether a potential deportee's Article 8 rights have been breached by reference to the code set out in the Immigration Rules and Section 117C of the Nationality Immigration of Act 2002. The domestic courts have accepted, without any need for 'Bill of

Rights', that domestic statute governing the interpretation and application of fundamental rights must take into account and attach weight to the policies established by domestic statute, secondary legislation and policy (see for example *Hesham Ali v Secretary of State for the Home Department* [2016] 1 WLR 4799; *HA(Iraq) v SSHD* [2020] [2021] 1 WLR. 1327.

- We observe that the case study examples given in the Consultation paper at (for example) paragraph 131 mention the factors relied upon by the Home Secretary but not those which ultimately led to appeals being allowed. These examples are incomplete and misleading. They are of little value in demonstrating how the courts has approached the exercise of deciding even those cases. They are of no value whatsoever in showing or even illustrating any general trends.
- In criminal law, the Supreme Court itself gave a clear express explanation of its relationship with the ECtHR in *R v Horncastle* [2010] 2 A.C. 373 in relation to the admissibility of evidence given at criminal trials and allegation that the Defendants' Article 6 rights had been breached. The Supreme Court rejected both an earlier decision of the ECtHR and that the ECtHR jurisprudence was determinative. Lord Phillips PSC observed that whilst the requirement to "*take into account*" the ECtHR jurisprudence will normally result in the domestic court applying principles that are clear established by that Court "*[t]here will however be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course*" [11]. When that case came before the ECtHR it did not object to that approach, and also dismissed the applications. The Consultation document accepts that *Horncastle* shows a greater willingness to depart from Strasbourg case law[1] but describes it as a "*recent*" case. It is plainly not a "*recent*" case (it was decided within the first decade of the Human Rights Act). It reflects the approach to the ECtHR's judgments which the Government purports to support. There is no reason at all to complicate or undermine that approach.

[1] Human Rights Act Reform: A modern Bill of Rights: A Consultation to reform the Human Rights Act 1998 (Consultation Document, §190.

14. There is no lack of clarity as to the respective roles of the ECtHR and in particular the UK Supreme Court, in all material ways, being the ultimate judicial arbiter in the implementation of human rights.

15. Secondly, that the UK government cannot possibly remain "*committed to the European Convention on Human Rights*"[2] and "*continue to respect to the UK's international obligations as a party to the convention*"[3] while taking forward a proposal which deliberately seeks to deviate from the interpretative jurisdiction of the ECtHR. Section II of the Convention to which the government insists it remains committed establishes the jurisdiction of the European Court of Human Rights on "*all matters concerning the interpretation and application of the Conventions and the Protocols thereto which are referred to* it". Put simply, the government cannot on the one hand commit to the UK's international obligations on the one hand, without accepting the jurisdiction of the ECtHR on the other.

16. Thirdly, prior to the implementation of the Human Rights Act 1998, the procedure for raising a complaint in respect of a breach of a Convention Right was to do so directly with the ECtHR, a costly and lengthy procedure in which the UK courts had *no* influence or judicial input into either interpretation of the Convention or its application in a particular case. The Human Rights Act 1998 fundamentally changed that by enabling such disputes to be raised and decided in domestic courts *before* referral to the ECtHR. This not only enables those in the UK to enforce their rights more effectively and expeditiously but equally, enables the parties resisting those attempts to do so in a domestic court more expeditiously, and enables the ECtHR to see what interpretation or approach has been adopted by national judiciary.

17. We note the reference in the Consultation Paper to Lord Judge's extrajudicial comments in 2013. That reference is taken out of context: Lord Judge was referring to his concerns about the Strasbourg Court developing into a 'Supreme Court of Europe' (see paras 42 and 47 of that judgment). Subsequent events have demonstrated that those concerns were unnecessary. In particular, Protocol 15 to the ECtHR, which came into force on 1 August 2021, adds to the following to the preamble of the Convention:

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[2] Consultation Document : Foreword, Page 3.
[3] Consultation Document :Executive Summary §6.

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention

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

18. The right to a fair trial under Article 6 of the ECHR, operating alongside existent common law and domestic law, provides sufficient protection.

19. Trial by jury is a cornerstone of a just and equitable legal system. We are concerned that, by positing trial by jury as a "qualified" right in this question, the government implies that existing rights to a trial by jury will be weakened. The potential politicisation of the question of the right to trial by jury was exemplified by the short-lived intervention of the Attorney-General following the acquittal of the four defendants in the Colston statue case. Before apparently watering down extant provisions protecting the right to a jury trial, the government must make clear exactly to what extent trial by jury would be a qualified right. The current circumstances when the right to trial by jury is "qualified" are limited and, most crucially, definable. Presently, the vast majority of criminal offences are indictable only or either way. Only the least traditionally serious are "summary only". To designate jury trial as a qualified right in a similar sense as HRA rights would seriously curb the right to trial by jury.

20. The criminal justice system has suffered an onslaught in recent years. The drive to achieve "summary justice" for the sake of efficiency and cost-prevention has directly impacted the right to trial by jury. We are concerned that this question reflects a back-door attempt to restrict the established rights to trial by jury under the guise of human rights legislation.

Question 4: How could the current position under section 12 of the Human Rights Act be amended to limit interference with the press and other publishers through injunctions or other relief?

21. We do not have extensive practice in the field of media law. We believe that enhanced protection provided by to freedom of expression by section 12 of the HRA is sufficient. There is no evidence to suggest that s.12 protection is not having any real effect on the way that decisions on injunctions are being made. We do not believe that the Government has provided any evidence that the present provisions require to be amended. Raising the threshold of the test would make it more difficult for genuine applicants to get an interim order and result in serious violations of privacy.

22. We are aware of recently expressed concerns about the use of UK courts by wealthy individuals to restrict freedom of expression. We recognise that there may be a problem with equality of arms in this field, as with other fields in which we practice (such as contested family law proceedings). The answer is to increase the availability of legal aid and to ensure access to courts, rather than to undermine the rights which the courts are intended to protect.

23. We note that this not a question that was considered by the Independent Human Rights Act Review ("IHRAR'). The reasons and evidence behind this proposal are unclear.

Question 5: The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations above. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10?

24. Article 10, freedom of expression, is already a qualified not an absolute right. It can be restricted in appropriate circumstances, subject to a strict test and following a careful balancing exercise by the court, when it conflicts with another right such as a person's privacy. Specifying limited and exceptional circumstances which might justify interference with the right to freedom of expression is likely to bring about areas where

the protection under Article 10 does not apply and thus cause more harm to the right to freedom of expression.

25. We are particularly concerned that one of the aims behind this question is to remove such protections as presently exist, to protect minorities from defamatory and discriminatory statements and from incitement to hatred. We believe that the present law already provides the framework for the balance between the freedom of expression and other rights.

26. We note again that this was not a question that was considered by IHRAR, and that the reasons behind and evidential basis for this proposal are unclear.

Question 6: What further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources?

27. The issue of protection for journalists' sources is best addressed through normal legislation rather than the Bill of Rights. This was not a question that was considered by IHRAR. Hence the reasons and evidence behind this proposal are unclear.

Question 7: Are there any other steps that the Bill of Rights could take to strengthen the protection for freedom of expression?

28. We consider that the protection for freedom of expression can be strengthened by withdrawing the ongoing legislative threats to freedom of expression, for example the significant attack on the right to protest in the Police, Crime, Sentencing and Courts Bill,; by following the recommendation of the Law Commission to introduce a public interest defence to the proposed reforms to the Official Secrets Act; by redrafting the Online Safety Bill, specifically the vague and loose new category of "harmful content" which could be subject to unprecedented forms of regulation.

29. This was not, however, a question which was considered by IHRAR, and the reasons for and evidence behind this proposal are unclear.

Q8: 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.

30. We have not seen any evidence whatsoever to support the consultation's suggestion that there is a "*proliferation of human rights claims, not all of which merit court time and public resources*". In any event, we would disagree with the proposed permission stage in any circumstances because of the extremely detrimental impact this would have on access to justice.

31. The Civil Courts are well equipped with rules and procedures which enable unmeritorious claims to be dealt with early on (for example strike out claims). These are straightforward applications. Courts and Tribunals hearing judicial review claims already have an elevated 'materiality' threshold which allows permission to be refused where the tribunal considers that the outcome of claim would "*highly likely*" not to have been "*substantially different*" if the administrative body in question had not made a legal error.

32. The making of such applications is not a disproportionate burden to place on public bodies, especially given that the successful party often recovers their costs in civil claims.

33. It is already the case that a person who claims that a public authority has acted in a way which is incompatible with a Convention right may bring proceedings only if they are a "*victim of the unlawful act*". By its very nature this requires an individual to show that they are materially affected by the matter complained of. The suggestion that they should have to show more (i.e. a significant disadvantage) places an undue burden on potential claimants, and fails to appreciate the objective of claims made under the Human Rights Act, as set out by the House of Lords in the case of *Van Colle* [2008] UKHL 50 at 138:

"*Convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights…"*

34. The suggestion that there should be a mechanism to ensure that the court can focus on 'genuine' human rights cases presupposes that the courts are unable to cope with people raising unarguable human rights claims. There is no evidence of this; on the contrary, all the available evidence indicates that the courts have all the power and experience they might need to deal with unmeritorious human rights claims.

35. This suggests that the government's aim is not to grant the courts powers to deal with unmeritorious claims —which, in fact, they already have—but to redefine 'human rights case' in order to oust the jurisdiction of the courts from claims of which the executive disapproves. The vagueness of the term and the failure of the consultation document to give any guidance on when a human rights claim is not 'genuine' creates the suspicion that this is an arbitrary act of executive power which will apply to (a) individuals or categories of individual whom the government dislikes, or (b) identified rights or categories of rights which inconvenience the government. In either case, the measure is inimical to a rights-based regime of rule of law.

36. The net effect of introducing a permission stage in the proposed terms (or any terms at all) would be a profound failure to uphold minimum human rights standards, effectively introducing an elevated gravity threshold where there is no basis to do so. It would deprive individuals of an ability to bring claims through the courts on the basis of a cursory and superficial attempt to quantify their suffering before trial.

Q9: 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

37. For the reasons set out above we do not consider that a permission stage is necessary at all. The proposed second limb does not in any way address the issues brought about by the introduction of a permission stage.

38. Any instance where a public body has breached an individual's human rights constitutes an issue of overriding public importance. There is no concept of 'light breaches' or 'unimportant breaches', and nor should there be. The suggestion that an individual must plead that the breach of their rights has wider public significance again misconstrues the very purpose of these Convention rights, waters down fundamental protections and serves to act as a further barrier to access to justice.

Q10: How else could the government best ensure that the courts can focus on genuine human rights abuses?

39. The premise of this question is wholly misconceived. We do not consider that the courts are unable to focus on "*genuine*" human rights abuses, or that they fail do so. As set out above, strike out applications are the appropriate mechanism by which unmeritorious claims can be dealt with, just as strike out applications can be used to ensure that courts can focus on genuine litigation in the broader sense. This is not an issue which requires government intervention.

40. We extremely concerned that the Government, through this consultation, is setting itself as the arbiter of what a 'genuine' human rights claim is, and what is not, on behalf of the majority which returns it to power. That is an authoritarian and populist approach, disrespectful of the separation of powers, and it leads to the downplaying of rights of minorities and of people who are economically marginalised. The danger of this principle is demonstrated by the fact that many people have no doubt felt over the years that the right of gay men and lesbian women to marry the people they want to marry, or the rights of trans person to receive documentation in their true identity, were 'peripheral' rather than 'genuine'. The 'genuine' claim test, is contrary to the principle of rights for all.

Q11: 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

41. Positive obligations are an integral part of human rights and they do not, in good faith, need to be 'addressed'. An essential way to avoid costly human rights litigation is to ensure that public bodies are aware of their positive obligations and the steps that need to be taken in order to ensure that they are met. Adherence to positive obligations is a fundamental part of 'public service priorities' rather than a distraction from them. It is not the answer that the human rights of the individual should be degraded in order to ease the financial burden placed on the State by the duty to comply with those obligations.

42. The suggestion that operational duties have created disproportionate burdens or uncertainty (particularly in policing) is inadequately evidenced and unsustainable. The operational duty only arises in circumstances where the credible suspicion threshold has been met, meaning the authorities 'knew or ought to have known' of a 'real or immediate risk'. This can be a real and immediate risk to life (Article 2), risk of violence (Article 3) or a risk of re-trafficking (Article 4). The Courts have already taken explicit steps to consider whether the imposition of positive obligations place '*impossible or disproportionate*' burdens on the State (*Osman v UK* [1988] ECHR 101).

43. There no genuine need for this to be catered for in any changes brought about by the new Bill of Rights. Insofar as the true aim of this question is to elicit justifications for the reduction of scrutiny of public bodies, that is not an appropriate aim for a bill which purports to further compliance with fundamental human rights obligations.

Q12: 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 compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.

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

44. We are not aware of any evidential basis for the proposition that the Section 3 read down clause in its current form is not used well or conservatively by the Courts. We are therefore unclear as to why there are suggestions that it be repealed or amended. We do not support either of the propositions, both of which fundamentally undermine the powers of the courts to scrutinise the actions of the state and seek to ensure their compliance with human rights principles.

45. Section 3 does not enable the Courts to make interpretations which are inconsistent with the wording and overriding purpose of the legislation, and we therefore do not think that this needs to be particularised in a new provision. This exercise of statutory construction is already protected by the words "*so far as it is possible to do".*

46. Section 3 as currently drafted enables the Courts to interpret legislation flexibly in a manner which removes the need for declarations of incompatibility to be made. We do not consider that this has led to a lack of clarity over the separation of powers, as suggested in the Government consultation. On the contrary, construing ambiguous provisions of legislation is a clear function of the judiciary, however much the executive may be irritated by it. The Courts have long engaged in a range of different forms of statutory construction, all of which have value and are necessary for the hearing of cases. The leading case on section 3 (*Ghaidan v Godin Mendoza* [2004] 3 WLR 113) already instructs judges that care needs to be taken in applying section 3 so as to not trespass upon the prerogative of Parliament.

47. As set out in the Independent Human Rights Act Review report of Lord Gross (which the Government has stated it is 'minded to agree' with), since the principles in *Ghaidan* were set out "*it is difficult to identify cases where the UK Courts have strayed beyond Parliament's intention in enacting section 3" and "there is little to no evidence to support the position that the UK Courts are misusing section 3".*

48. In our view this question identifies a non-existent problem, and seeks to answer it by significantly restricting the powers to the courts to ensure that statutes are interpreted in a way which is compliant with human rights provisions. If the Government is (as it

states) committed to the ECHR, it should have no difficulty at all with the present state of the law. This is one of the many places in the consultation where the Government's avowed commitment to human rights is undermined the presumptions underlying the questions it poses.

Question 13. How could Parliament's role in engaging with, and scrutinising, section 3 judgments be enhanced?
Question 14. Should a new database be created to record all judgments that rely on section 3 in interpreting legislation?

49. By a 'section 3' judgment the consultation appears to mean any judgment in which a court rejects the statutory rationale a public body has given for its decision, where the court's reason is that the public body's reading of the relevant provision is incompatible with ECHR rights. The Independent Human Rights Act Review (IHRAR) considered this issue carefully and at length, with specific reference to decided cases of the Court of Appeal, Supreme Court and House of Lords. It observed at §188 that '*It is therefore surprising that, as pointed out to IHRAR in a number of responses… the use of section 3 has not been subject to any systemic record-keeping or analysis*", and it proposed that there ought to be an official database of relevant judgments. The IHRAR proposed the following test for inclusion on the database: "*only judgments where section 3 is used to interpret legislation and it has or could have made a difference to the Court's interpretation*".

50. As we have explained above, we consider that the Government is massively overstating the use of section 3, and its practical constitutional impact. We consider it imperative that any discussion of the operation of section 3 and the interplay between parliamentary legislation and the European Convention on Human Rights should be informed by a sufficient and authoritative evidence base to enable properly informed discussion and analysis of the section 3 decisions that have in fact been made. The lack of any such resource is one of the factors that has permitted fictions about the Human Rights Act to flourish and contributed to much of the ill-informed debate on section 3.

51. While we would support the proposal of a database along the lines suggested by the IHRAR, we are concerned that the test for inclusion risks undermining the utility of the database by catching too many decisions: it is by no means clear that *every* case in which section 3 is used in the manner described merits Parliamentary engagement.

52. Nevertheless, we acknowledge that decisions of the senior courts do merit Parliamentary engagement. We would therefore propose replacing the IHRAR test with one in the following terms:

> 'Only judgments where:
>
> (1) section 3 is used to interpret legislation;
>
> (2) section 3 has or could have made a difference to the Court's interpretation: and
>
> (3) the judgment sets a precedent for a specific interpretation of the provision in question, which:
>
> > (a) would not be self-evident from the language of the provision considered without reference to the relevant ECHR right, or
> >
> > (b) would require the public body concerned to change its general policy with respect to the issue in question in order to ensure its compatibility with an ECHR right.'

53. The IHRAR further recommended that the role of Parliament's Joint Committee on Human Rights (JCHR) could be expanded in such a way as to enhance Parliament's engagement with section 3 judgments. We agree with their proposals at §200-§202, which, for convenience, we set out below:

> ***200.*** *It was submitted to IHRAR that the JCHR's role could be enhanced. We agree that doing so could help to produce a more robust approach by Parliament to rights protection generally, and section 3 interpretations of legislation specifically. We would therefore recommend that consideration is given by Parliament as to how the JCHR's terms of reference may be expanded to enhance its scrutiny role of section 3 judgments, and how parliamentary consideration of such judgments and JCHR reports concerning them, could also properly be improved. Consideration of section 3 judgments should be as robust as scrutiny of section 4 declarations of incompatibility. It would help to ensure that mis-perceptions of the use of section 3 could be dispelled. It would*

also more effectively enable Government and Parliament to consider the practical implications of section 3 judgments at an early opportunity and (if necessary) take steps to ameliorate or reverse them.

201. *A linked recommendation is for Government to take a more robust approach to the scrutiny of section 3 judgments, perhaps through the introduction of an arrangement analogous to that which currently operates in respect of the remedial order-making process. There Government and the JCHR enter a dialogue over the content of draft remedial orders. The Government submits a copy of the draft remedial order to the JCHR, which issues a report on it; Government then takes account of that report before finalising the remedial order. A similar approach could be adopted by Government and the JCHR where section 3 judgments are concerned.*

202. *Under this option, we propose an enhanced role for Parliament by expanding the JCHR's role and, through Parliament and the Government, taking a more robust approach to the exercise of Parliament's continuing role as the primary means through which rights are protected.*

54. It is self-evident that expanding the role of the JCHR in the manner suggested by the IHRAR will increase the amount of work it has to do. It is therefore essential to ensure that it is properly resourced so that this does not interfere with the crucial role it already plays in scrutinising Government Bills for their compatibility with human rights.

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?

55. It is not clear whether this question reflects the intent of the Consultation Paper. We note that para. 250 of the paper suggests that the government wishes "*to explore whether there is a case for providing that declarations of incompatibility are also the* ***only*** *remedy available to courts in relation to certain secondary legislation*". That is a different question from that set out in question 15. The consultation paper appears to contrast that proposed situation with the present one in which *other* remedies are available, such as declaring secondary legislation invalid or disapplying the provision in question.

56. Assuming that to be question which the Consultation Paper intends to answer, we strongly disagree with any proposal to limit the powers of the courts to declare secondary legislation invalid or to disapply the provision in question. The distinction set out in the Human Rights Act, where the courts cannot strike down primary legislation, but can strike down secondary legislation, has a principled constitutional basis and reflects the division of powers between the executive, the legislature and the judiciary. The proposals significantly widen the protections available to the executive against effective judicial intervention. Already, secondary legislation is routinely passed through parliament with minimal scrutiny, all the more so when it is subject to a negative resolution procedure. To remove the power of the Courts to strike down such secondary legislation is a retrograde step and has nothing to do with any commitment to human rights.

Question 16: Should 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 Convention rights?

57. Given that we do not agree that amendments as suggested in Question 15 are necessary it follows that this would make the ability to challenge public authority action or inaction more difficult and therefore is not compatible with respect for Fundamental Rights and freedoms. It is an unnecessary amendment to legislation which already works.

Question 17: Should the Bill of Rights contain a remedial power order?

58. We do not feel that there have been difficulties with the operation of the present s.10 of the Human Rights Act in practice.

Question 18: How is Section 19 operating in practice and is there a case for change?

59. Insofar as Section 19 imposes a discipline on ministers to express a view as to the compatibility of the legislation with convention rights, it is in theory a good exercise.

It may well be that, at present, the scrutiny offered by other bodies (including the JHRC and the House of Lords at Committee State) is much more effective. We do not feel that that is a matter on which we are well-qualified to comment.

Question 19 – How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?

60. This question should be answered by people in Wales, Scotland and Northern Ireland. We do not wish to put our words in their mouths.

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

61. We consider that the definition of Public Authority is sufficiently clear. There is no need to change the definition. In light of the trend to utilise private organisations to undertake activities that would ordinarily be completed by the public authorities, it is imperative that the definition remains the same in order to ensure accountability and uniformity.

62. We consider that the narrowing of the definition would in our view be a backwards step for Human Rights. In relation to the funding and ability of public authorities to do their work, it is evident that private companies are often used to address the needs of children in Local Authority areas across the UK. Those private organisations, whether they are secure units, residential units or private foster carers are clearly performing duties which are public functions on behalf of the local government. It is evident that the possible narrowing of the definition of what constitutes a public authority could lead to diminished protection for children and families using such agencies. As such we would vehemently oppose the implementation of reform that proposes less protection for vulnerable children and their families.

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.

a. **Option 1: provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or**
b. **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**

63. As it stands, section 6(2) of the HRA makes provisos for any situation where a public body's duty pursuant to primary legislation is inherently incompatible with a Convention right. In those circumstances, the act in question will not be unlawful: in domestic law, primary legislation overrides the Convention. Whether in any case that situation has occurred is a fact to be determined by the courts.

64. Option 1 is undesirable for a number of reasons. The expression 'giving effect to' is opaque. It does not become clearer by qualifying it with the word 'clearly'. As expressed, it is circular. It appears to say a public body which is clearly acting within the law is not acting unlawfully. That much is self-evident. This is problematic because wherever a piece of drafting is on its face absurd, the courts will do their best to make sense of it. There can be no certainty about how they will interpret it. The consequence of amending it in these terms will be to replace a statutory provision which is well understood with one that is utterly unclear.

65. At one extreme, the courts may interpret the amendment by reading words in so that it means something like 'giving *proper* effect to primary legislation', which, if it is also considered that 'proper' means 'compatible with Convention rights', might produce no real change in the law at all, because that is the effect of section 6 as it stands.

66. On the other hand, the courts might perhaps reject this interpretation because the amendment to the statute would be otiose if it did not produce a change in the law. They may instead read it as meaning 'giving *a rational* effect to primary legislation', with the possible effect that, so long as the public body's interpretation of the primary

legislation is not perverse, it is invulnerable to challenge on the basis that it conflicts with an affected individual's human rights. This would be likely to generate satellite litigation on the question of how far an interpretation which conflicts with a Convention right can be rational. But it is hard to see how this would not severely undermine the protection the Convention gives to individual human rights.

67. It is possible at the other extreme that the courts may seek to interpret the amendment by reading words in so that means 'giving *some* effect to primary legislation' or '*aiming to give* effect to primary legislation.' While that would give comfort to public bodies, it would seriously undermine the protection the legislation gives to individual human rights, because it could in principle protect *any* human rights abuses a public body might purport to justify by the mere invocation of primary legislation, whether or not the act in question did in fact give proper effect to that legislation. In effect, it would greatly increase ability of the executive to abuse individuals' human rights without consequence.

68. As for Option 2, its only purpose can be to legitimise interpretations of legislation that do not give effect to Convention rights. In truth, this is not about giving public authorities 'greater confidence to perform their functions within the bounds of human rights law'. It is about giving them greater confidence to breach the bounds of human rights law when purporting to perform their functions.

69. We therefore consider that there is no justification for amending section 6(2) of the Human Rights Act in line with either Option 1 or Option 2.

Q22: Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict

70. We do not accept that the extraterritorial jurisdiction of human rights law has created legal and operational uncertainty in any material way. Our view is that it has created accountability, and that is to be fundamentally welcomed. The Baha Mousa Inquiry revealed the scale of potential violations that can occur overseas. Mr Mousa died whilst

in British army custody in Basra in 2003, having suffered asphyxiation and at least 93 injuries to his body, including fractured ribs and a broken nose. He was found to have been in a weakened state caused by lack of food and water, heat, exhaustion, fear, previous injuries, hooding and stress positions used by British troops. The imposition of extraterritorial human rights law does not create a layer of uncertainty in such cases, as a legal regime it is not difficult for UK armed forces to apply, subject to proper training.

71. Indeed, the Joint Service Manual of the Law of Armed Conflict makes it clear at ¶1.8 that "*[t]he main purpose of the law of armed conflict is to protect combatants and non-combatants from unnecessary suffering and to safeguard the fundamental human rights of persons who are not, or are no longer, taking part in the conflict (such as prisoners of war, the wounded, sick, and shipwrecked) and of civilians.*" If the purpose of the law of armed conflict is to safeguard human rights, it is nonsensical to assert there is a tension between the two bodies of law. Instead, as is widely and broadly accepted, human rights standards are, where applicable, 'read down' in situations of armed conflict and thereby consistency is ensured with the *lex specialis*.

72. The Convention is a 'living document'. It remains relevant and provides concrete protections by virtue of the fact that it develops in the manner which it does. The Consultation's stringent focus on the *Travaux Préparatoires* is therefore an inappropriate approach when considering the extraterritorial application of human rights law. Arguably extraterritorial application was not set out in the *Travaux Préparatoires* because the nature of military operations overseas has changed, and the prospect of having independent judicial oversight over military operations is a relatively novel development, that arguably began with the Nuremberg trials. It is not correct to characterise this as an overreach of the Courts, it is a natural progression in the expansion of human rights law and does not sit in conflict with the overriding aims of the Convention, or the intentions of the States that signed up to it.

73. We consider that the impact of the *Al*-Skeini case is being overstated in the Consultation document. In that case, the Court held that there is a clear margin of appreciation for decisions that are made in armed conflict, and the Court has also been very clear that

there are certain types of cases where there exist policy reasons for the Court not to intervene.

74. We consider that a government which is committed to human rights (as this government asserts itself to be) would experience no discomfort in the fact of the very limited development to the principle of extraterritoriality by the courts.

Question 23: To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act? We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.

a. **Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.**
b. **Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.**

75. There is no doubt that, in practice, the application of the principle of 'proportionality' requires real care when the outcome of individual cases is being determined. But this is not because of any conceptual difficulty with the principle of proportionality; rather, it is a consequence of the (i) the broad area of discretionary judgment which is involved in a decision about proportionality; and (ii) interaction between legislation, which, by nature, is expressed in terms of general principle, and the infinite variety of human experience, which, by nature, is particular.

76. Resolving difficulties of this kind is one of the core competencies of the judiciary, whether within the human rights framework or outside it. Courts are used to making difficult judgments and applying the law to the facts of infinitely variable cases. They are considerably more experienced than the legislature at balancing qualified and limited rights in individual cases.

77. We therefore consider that the presumption underlying this question is misconceived. The reality is that courts *already* give great weight to legislation enacted by Parliament—as, constitutionally, they must. It may well be that previous attempts by the legislature and the executive to produce codes determining the way that the courts weigh up the issues in cases before them, such as the 'public interest provisions' inserted into the Nationality, Immigration and Asylum Act 2002 Act by the Immigration Act 2014, have been of very limited assistance to the courts in carrying out their functions. They have certainly resulted in disputes about what it means to 'give great weight' in an individual case. That is no reason for extending the 'great weight' principle into ever less clearly defined areas. On the contrary, we would support a return to the circumstances prior to 2012, when the courts, directing themselves in accordance with binding precedent from the Supreme Court and the Court of Appeal, and taking account of Strasbourg jurisprudence, were able determine questions of proportionality justly and effectively.

78. As to the suggestion in Option 2 that the courts should 'give great weight to *the expressed view* of Parliament', it is not even clear what this means. Insofar as it is different from '*legislation enacted* by Parliament should be given great weight' in Option 1, it is vaguer and thus only likely to result in still further litigation. The reality is that Parliament, in the main, is concerned with abstractions, whereas courts determine issues in individual cases, which may or may not have wider application. Parliament does not and should not normally express a view of the public interest with respect to a particular case until it has already been finally determined.

79. In short, the fact that Parliament considers a particular issue to carry great weight *in general* does not mean that it will carry significant weight—let alone *determinate* weight—in an individual case. Whether or not it does so will only become evident once the court has weighed up all the relevant particulars of the case.

80. To take a current example: while the public interest in controlling immigration is in the abstract a matter to be given great weight, it can become insignificant in the face of much weightier issues like the question of offering sanctuary to people fleeing a war of aggression being perpetrated upon a country that the UK has promised to

support. The courts have been considering questions of this kind for many years and have a wealth of institutional knowledge about them. They do not need guidance of this kind, which will inevitably provoke further confusion.

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.

a. **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.**
b. **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.**
c. **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.**

81. We reject the framing of this question, which poses a false opposition between human rights and the public interest. The UK is a signatory of the ECHR precisely because it recognises that human rights *are* in the public interest; put another way, the 'public interest' in a case which engages human rights is not a factor that can be ascertained without reference to those rights. Thus the question of whether or not it is in the public interest to deport someone can only be answered *after* the human rights of the affected parties have been duly considered.

82. Options 1 and 2 are unacceptable because they seek to exclude certain people from human rights protection. This is arbitrary, because it takes no account of the particular circumstances of the case, and unjust because it violates the principle of universality of human rights. It is indirectly discriminatory, because it has the clear impact that people who are not white, or not Christian, are very much more likely to face what is inevitably experienced as an additional penal sanction. And – insofar as it creates an automatic deportation for certain offences – it is directly discriminatory because it creates a mandatory additional penalty on grounds of nationality.

83. Option 3 is unacceptable because it is designed to protect unlawful exercises of executive power. In effect, it would permit the Secretary of State to act unlawfully, so long as any flaw in the decision which would otherwise render it unlawful is not 'obvious'. This is objectionable for two reasons: because *any* statutory provision which not only permits public bodies to make flawed decisions but protects those decisions once made is necessarily objectionable *per se*, as it seeks to put executive power beyond the reach of the law; and because it is absurdly unclear. How obvious? Obvious to whom? What is obvious to an experienced judge or public lawyer, for example, may not be obvious to a junior civil servant. And it may not be 'obvious' to the person who faces deportation, or to child who faces a lifetime of separation from his/or parent.

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?

84. This question rests upon an absurdity. The Convention is intrinsic to 'our international obligations' and the Human Rights Act is dedicated to giving them proper effect. The suggestion that these instruments can somehow be watered down or bypassed while 'respecting our international obligations' is a nonsense: the former *contains* our international obligations, while the latter *is* what ensures that we respect them.

85. Furthermore, the assertion that the Convention and the Human Rights Act pose impediments to 'tackling the challenges posed by illegal and irregular migration' is fundamentally wrong. Rather than posing 'impediments', both instruments provide tools which assist in determining whether the act of migration in any particular case is unlawful. If it is not unlawful, it is neither illegal nor irregular in any meaningful sense. The *actual* impediments to tackling the challenges posed by migration include but are not limited to the following: creation of false narratives about migrants and migration; failure to challenge common public misconceptions about migrants and migration; misrepresentation of laws relating to migration; attacks on those who support the interests of migrants; frequent alteration of laws relating to migration; poorly thought-out, eccentric and expensive enforcement activity to deter migration;

poor training and supervision of those tasked with managing migration; under-resourcing; and failure of national governments to cooperate effectively at the international level.

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