By email: HRAreform@justice.gov.uk

8 March 2022

Dear Sir/Madam

**Response to the consultation - Human Rights Act Reform: A Modern Bill of Rights**

ASAP is a legal advice charity specialising in asylum support law. It was set up in 2003 with the aim of reducing the destitution of asylum seekers by protecting their legal rights to food and shelter. ASAP's work is threefold:

(1) Running a pro bono representation scheme in asylum support appeals to the First-tier Tribunal (Social Entitlement Chamber);

(2) Providing authoritative asylum support advice and training to frontline organisations, advice agencies and legal practitioners working with asylum seekers;

(3) Engaging in policy work, lobbying and strategic litigation to improve policies and procedures for asylum support.

This is our response to the consultation.

**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 [reproduced below], as a means of achieving this.**

The intention 'to establish a formulation that emphasises the primacy of domestic precedent, while setting out a broader range of case law – including, but not confined to, the Strasbourg case law – that UK courts may consider, if they so choose' is unnecessary and will cause confusion and extra expense.

It is unnecessary because the courts do not consider themselves bound to follow Strasbourg caselaw. The consultation paper (at para 192) cites Lord Reed's warning in *R(AB) v SSJ* [2021] UKSC 28 that:

> 'if domestic courts go further than they can be fully confident that the European court would go, and the European court would not in fact go so far, then the public authority involved has no right to apply to Strasbourg, and the error made by the domestic courts will remain uncorrected', but omits reference to Lord Reed's conclusion at para 59 that: 'it is not the function of our domestic courts to establish new principles of Convention law', but rather to decide human rights cases on established principles (see paras 59-60[1]).

[1] 59. It follows from these authorities that it is not the function of our domestic courts to establish new principles of Convention law. But that is not to say that they are unable to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law. In situations which have not yet come before the European court, they can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law. Indeed, that is the exercise which the High Court and the Court of Appeal undertook in the present case. The application of the Convention by our domestic courts, in such circumstances, will be based on the principles established by the European court, even if some incremental development may be involved. That approach is discussed, for example, in Rabone v Pennine Care NHS Trust (INQUEST intervening) [2012] UKSC 2; [2012] 2 AC 72, paras 112 and 121, Surrey County Council v P [2014] UKSC 19; [2014] AC 896, para 62, Kennedy v Charity Commission

It will cause confusion and increase the cost of dispute resolution because:

As Lord Carnwath stated in his lecture on Human Rights Reform:

> 'The court is invited in effect to set aside the jurisprudence developed over the years since the HRA came into effect as to the meaning of the various rights, and to start again. In doing so it is not required to give particular weight to decisions of the Strasbourg court, or even of the UK courts, on the meaning of the Convention rights, but can draw as it thinks fit from the case law of countries round the world and from international law. The court is given no assistance as to which if any it should prefer, or by what criterion. I confess that, as a judge trying to interpret the will of Parliament, I would come close to despair. Nor can I see how offering that degree of choice to the courts is expected to curb the judicial activism of which the paper complains, still less to advance the stated objective of promoting greater certainty. That particular proposal must surely not be allowed to get off the ground.'

The IHRAR was alive to this concern. It found that:

> 'if UK Courts were not to take account of ECtHR case law it would likely increase uncertainty in the law, to the detriment of public confidence in the judiciary' (at para 147).

The IHRAR also recognised the benefits of cross fertilization of law that arises when UK courts grapple with Convention jurisprudence, and the increasing openness of the Strasbourg judges to be influenced by decisions of the Supreme Court. It found:

> '[T]his option [amending section 2 to reject the House of Lords' decision in *Ullah*, but equally applicable to the current proposals] might have the unintended effect of weakening the ability of UK Courts to influence the development of decisions in the ECtHR. The Brighton Declaration explains that one of the reasons why the ECtHR has developed an approach that is more willing to extend a margin of appreciation to Convention states is an increased willingness by those States to consider the Convention and its case-law in their assessment of rights questions. That domestic courts are able to demonstrate in their judgments an analysis of ECtHR case law, even where they disagree with it, enables the ECtHR to more robustly apply the principle of subsidiarity and the margin of appreciation – a point made to IHRAR by Sir Nicolas Bratza, the past President of the ECtHR, in his Submission to the Call for Evidence: "Nevertheless, I firmly believe that the perception that the [ECtHR] has recently shown itself to be more ready to extend the margin of appreciation when national courts have already diligently applied the Convention has helped to

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[2014] UKSC 20; [2015] AC 455, paras 145-148, and Moohan v Lord Advocate (Advocate General for Scotland intervening) [2014] UKSC 67; [2015] AC
901, para 13.

60. As I have explained, however, that is not what counsel for the appellant invites the court to do in the present case. He is not inviting the court to decide the appeal on the basis of principles established in the case law of the European court, but on the basis of a principle which, he argues, ought now to be adopted in the light of a body of material concerned with other international instruments. That approach is not open to this court under the Human Rights Act, and his argument must therefore be rejected.

contribute to a new sense of stability between the national courts and [the ECtHR].' (para 159).

Lord Mance, whose judgment in *Kennedy* highlighted the desirability of UK courts considering human rights disputes first in their common law context, agreed with the IHRAR's concern about the loss of the UK courts' ability to influence Strasbourg jurisprudence in his evidence to the Parliamentary Joint Committee on Human Rights on 26 January 2022.

Indeed given the approach of the Supreme Court in AB, permitting courts to consider caselaw from other common law jurisdictions instead of Strasbourg caselaw might result in the domestic courts effectively permitting a more expansive approach to human rights than would currently be the case.

Both proposals would have adverse practical consequences:

(1) To paraphrase Lord Mance's evidence to the JCHR, if there is a simple Convention point that would dispose of a case but a complicated common law dispute, it does not make sense for the court to spend time and for costs to be expended on resolving the common law dispute first.

(2) A failure by the UK courts to have regard to Convention law is liable to open up a substantive gap between domestic rights and the Convention which would generate costly and time-consuming litigation before the EctHR.

(3) Nor will the proposed amendments to section 2 of the HRA prevent Convention arguments being raised before the UK courts, since if they were not, there is a risk that a subsequent complaint to the Strasbourg court will be ruled inadmissible on account of the applicant's failure to exhaust domestic remedies.

In conclusion therefore, the proposed amendments to section 2:

- are unnecessary;
- would cause confusion in litigation before domestic courts;
- would hinder the ability of UK courts to influence Strasbourg caselaw;
- would lead to a substantive gap substantive gap between domestic rights and the Convention will result in increased costly litigation; and
- would not hamper judicial activism, as the Government intends.

**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?**

Proposals to codify matters which lie outside the Supreme Court's competence were considered and rejected by the IHRAR. Without some engagement with the review's

conclusions it is difficult to understand the basis on which the Government considers they were wrong. Accordingly we do not consider the case for change has been made.

**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.**

It is regrettable that the IHRAR terms of reference did not include consideration of a similar proposal to that advanced in question 8.

Placing the onus on human rights claimants to demonstrate that they have suffered significant disadvantage will significantly recalibrate the scales of justice in any human rights dispute in favour of the public authority defendant.

It will lead to viable claims not being decided because some claimants will not be able to demonstrate significant disadvantage, in circumstances where evidence of significant disadvantage is in the possession of the public authority defendant.

The proposal is liable to result in applicants having to incur greater costs (in obtaining disclosure, permission and then prevailing at a substantive hearing) and increased delay in order to vindicate their human rights.

This will be particularly detrimental to the interests of disadvantaged groups whose access to justice is already impeded by lack of resources, lack of education, lack of access to technology, language barriers, and (as in the case of many of ASAP's clients) destitution. We assume the Government would agree that the protection of the human rights of all, but particularly of members of such groups should be practical and effective.

The lack of evidence and lack of engagement with access to justice concerns calls into question the extent to which 'genuine and credible human rights claims' will in practice be excluded from consideration by the courts.

No other analogous procedure of which we are aware, sets such a high standard for an applicant to meet. A comparison with the judicial review permission stage where the threshold to be met at the permission stage is arguability, is instructive.

Justification for restricting anyone's human rights must, in our view, be evidence-based. Yet the proposal is striking in the complete absence of evidence relating to the existence (let alone the extent) of the problem it is said the proposal is designed to address.

Without a proper evidence base showing the number of human rights claims that are brought, the number brought on spurious grounds, and the effect on introducing a permission stage on access to justice, it is impossible to conclude that the case for change has even begun to be made out.

**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.**

Detailed consideration of this proposal is impossible in the absence of evidence of the sort specified in our last answer. There is insufficient evidence against which to evaluate the proposal for a permission stage, and it does not make sense to us to attempt to evaluate this question in isolation, without the necessary evidence base. For this reason, we cannot say more than that the case for change has not been made.

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

To respond to this question, we need to understand in what way, and to what extent the system is currently failing. There are some individual case summaries, together with sweeping assertions in the consultation paper such as 'We have witnessed a proliferation of human rights claims under the Human Rights Act, not all of which merit court time and public resources' (para 220). But this sort of unevidenced assertion begs a number of questions, including:

- how many cases were brought 'under the Human Rights Act'?

- by what procedure (by way of judicial review or money claims in the county court, or some other procedure)?

- how many following which type of procedure are considered not to have merited court time, and why?

- were there any common features in this cohort of cases (eg in terms of subject matter, profile of the claimant, profile of the defendant)?

No answer is to be found to these questions in the consultation paper. In these circumstances, we do not believe that justification for change has been made. Without understanding the precise nature and extent of the problem, this consultation exercise will not, in our respectful view, facilitate practical policy solutions.

This flaw is evident in the proposal to amend section 8(3) of the Human Rights Act, contained in para 226 of the consultation paper.

There are clear practical problems in requiring claimants to argue (potentially complex and bad) non-human rights-based claims before arguing a good human rights claim, in terms of delay and unnecessary court time and costs being incurred arguing bad complicated points before the court. This is a matter that, in our view, is best left to the court's discretion on the facts of the particular dispute before it. No reason has been advanced to limit the court's ability to manage its own caseload in the manner proposed.

**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.**

A number of controversial (and in our respectful view, misconceived) assumptions run through the Consultation Paper, including that:

- a problem arises where the vindication of the human rights of a minority group takes place at the expense of the majority (whether it be protesters (para 135 of the Consultation Paper), or gang members (paras 148 to 150));

- this perceived problem can be solved by a Bill of Rights.

In our view, neither of these assumptions are valid. We endorse Lord Carnwath's views on the second of these propositions in his recent lecture on Human Rights Act reform. He stated:

> 'Chapter 3 of the CP sets out "The case for reforming UK Human Rights Law". This is an extensive discussion of a mixed selection of cases, European or domestic, which are said to illustrate "the problems which have distorted the proper protection of human rights in the UK, and undermined public confidence". Four particular problems are highlighted:
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> "*the growth of a 'rights culture' that has displaced due focus on personal responsibility and the public interest;*
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> *the creation of legal uncertainty, confusion and risk aversion for those delivering public services on the frontline*;
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> *public protection put at risk by the exponential expansion of rights; and*
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> *public policy priorities and decisions affecting public expenditure shift from Parliament to the courts, creating a democratic deficit."*
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> I observe another mismatch with the Gross review. The government's case for reform starts with a substantial criticism of the so-called "living instrument" doctrine, described as "the Strasbourg Court's concerted attempt to pioneer, expand and innovate human rights law beyond the rights set out in the Convention".[30] This is illustrated by reference to the jurisprudence. But the scope of Convention rights, as developed by the Strasbourg court was not within the scope of the Gross review. As they explained "… an examination of substantive Convention rights fell outside IHRAR's scope."[31] So we do not have the benefit of that panel's views on the Strasbourg court's alleged expansion of human rights law, or on what if anything could be done about it in the domestic context. Given the expertise and combined experience of the panel[32], that was surely an opportunity missed.
>
> The challenge for those promoting a new Bill of Rights is not just to point to problems with the existing case-law, but to show why matters would be improved by recasting the same rights in a new Bill. Let me take the example of a case mentioned in the paper, in which I was personally involved in the Supreme Court: the *Cheshire West* case[33] (para 159). This comes in a section of the Paper under the heading: "Public policy priorities and decision-making affecting public expenditure has shifted from Parliament to the courts, creating a democratic deficit". There follows a discussion of various cases involving challenges to aspects of the government's welfare policies, with results going different ways. One is *Cheshire West*:
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> "*In Cheshire West (and linked cases) the UK Supreme Court considered whether various placements of mentally ill individuals with foster carers or in small homes*

*constituted a deprivation of liberty under Article 5 of the Convention, even though there was no suggestion that the placements were not in the best interests of the individuals or that they would have wanted to live elsewhere. The Court concluded that it would be a breach. The minority of the UK Supreme Court thought that there should not be a 'universal test' for the deprivation of liberty…*"

The paper quotes a specialist commentator, who observed that the result would be the diversion of "substantial quantities of time, money and energy… from providing care to completing forms and engaging lawyers", and that it was "time for social policy to be liberated from the distorting influence of human rights law".

As one of the minority in that case, I have sympathy with those comments. We thought that the majority's approach went beyond any previous decision of the Strasbourg court, and beyond any ordinary understanding of the words "deprivation of liberty". But the majority[34] took the view that the meaning of those words "deprived of liberty" must be the same for everyone, regardless of their physical or mental disabilities; as Lady Hale put it in the leading judgment[35] "a gilded cage is still a cage."

The decision did indeed have dramatic and expensive consequences, of which the court had not been given any adequate fore-warning during the proceedings.[36] It led to a massive and unanticipated increase in cases requiring to be dealt with by local authorities and the courts (from 11,300 in 2013-4 to 113,300 in 2014-5) and, in due course, a Law Commission inquiry followed by legislative change to restore a degree of order.

What the Consultation Paper does not explain is why the position would have been any different under a British Bill of Rights. This after all was not an imposition from Strasbourg but a decision by our own Supreme Court, sitting as a seven-justice court. The difference between the majority and the minority lay, not in any policy disagreement, but in their differing understandings of the meaning of the simple words of article 5 – the right not to be "deprived of one's liberty".[37] We are told by the CP that all the Convention rights, including presumably article 5 or its equivalent, would be retained in the Bill. If so, why would the reasoning of those judges, or their interpretation of the critical words, have been any different if those same words had appeared in a British Bill of Rights, rather than in the HRA?

The same problem arises in relation to another concern which runs through the paper, that is the incremental expansion of convention rights to include various "positive obligations". This, it is said, has created uncertainty as to the scope of the government's duties, "fettering the way it can make operational decisions, determine policy in the wider public interest, and allocate finite taxpayer's resources" (para 230).

Reference is made to an example given earlier in the paper (para 134), the decision of the Supreme Court in the case of *Rabone*,[38] in which it was held that the state –

"*had breached the positive obligation to protect life under Article 2 in respect of a voluntary psychiatric patient who died by suicide when on medically approved leave from the hospital, and awarded the applicants damages for the breach…*"

The same section gives other examples of the financial and administrative burdens resulting from the positive duties found by the Strasbourg court. One (para 142ff) is the aftermath of the ruling in *Osman v UK* (2000)*[39]* on the duty of the police under article 2 to take reasonable steps "to avoid a real and immediate risk to life of which they have or ought to have knowledge". The CP comments that the consequent need to issue "Threat to Life notifications (previously known as 'Osman warnings')" has added considerable complexity and expense to ongoing policing operations". We are told that "In 2019, the four biggest police forces in England issued between them 770 Threat to Life notifications, with these notifications having a considerable impact on police resource".

I have some sympathy with these concerns. It is fair to note however that in the *Osman* case the court (para 116) emphasised that "bearing in mind the difficulties involved in policing modern societies" the obligations under the Convention "must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities". We are not told by the CP what attempts if any have been taken in the intervening twenty years to apply that advice through legislative or administrative measures.

On the other hand I would accept that some of the rights conferred by the Convention have been interpreted by the Strasbourg court so as to impose responsibilities going well beyond those naturally implicit in the original wording. But the CP does not, as I understand it, suggest that this problem would be solved by its proposed Bill of Rights. It simply asks for ideas (para 231). Question 11 asks:

"*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*."

This reticence is understandable. Positive obligations under article 2 did not start with *Rabone*. The simple words of article 2 of the Convention ("Everyone's right to life shall be protected by law") had been interpreted by previous case-law of the Strasbourg court as imposing on the state not only a negative duty to refrain from taking life, but also positive duties to conduct a proper investigation into deaths for which the state might be responsible; and to take reasonable steps to protect those within its care from the risk of death or suicide, including for example psychiatric patients detained in a public hospital. In *Rabone* the Supreme Court did no more than hold that the latter "operational duty" should logically apply to voluntary patients. as well as those forcibly detained.

The CP does not explain why it is thought that the equivalent right to life in the new Bill would be interpreted any differently. The hope may be that a domestic court, freed from the need to comply with Strasbourg, would develop its own more limited interpretation. But there is no certainty that this would happen, and it could take a long and expensive journey to the Supreme Court to find out. Even then, it would leave open the prospect of a later adverse ruling in Strasbourg.'

In relation to the burden on public authorities of complying with human rights duties arising from Strasbourg jurisprudence in relation to which Lord Carwath voiced some sympathy with the Government, we do not consider that that concern, as framed in the consultation paper, is

a constructive basis for change. This is because the vindication of the human rights of minority groups will inevitably be achieved (to a greater or lesser degree) at the expense of the rights of the majority.

These are already matters ultimately for the UK Supreme Court and Parliament to determine in response to the Strasbourg jurisprudence. As Lord Carnwath makes clear in his lecture, Parliament's failure to lay down clear rules in relation to Foreign National Offenders (the example Lord Carnwath gave) should not be laid at the door of the Human Rights Act and will not be rectified by a Bill of Rights.

**Clause 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 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.**

The IHRAR's terms of reference specifically included consideration of whether section 3 has been used to interpret legislation in ways contrary to Parliament's intention. The report concluded that since the *Ghaidan* decision in 2004, there was 'little or no evidence to support the position that UK courts are misusing section 3' and concluded that there was no case for repealing the provision. While the IHRAR found the no change option to be 'compelling' a limited preliminary proposal for a clarificatory (as opposed to substantial) amendment to s3 was advanced at para 185 of Chapter 5 as Option Four.

At para 238 of the Consultation Paper, the conclusions of the IHRAR on repeal of section 3 are noted, but not those on the need for amendment. The Consultation Paper is silent as to why the recommendations of the IHRAR should not be followed. The commentary at paras 116-123 make assertions about the effect of s3 (eg that is represents 'a significant constitutional shift') that were not born out by the IHRAR, and which are based on a misreading of the caselaw cited (see below).

This frankly makes a mockery of the review and consultation processes. To the extent that the Government considers that s3 represents a significant constitutional shift (we have no reason to believe it does), consultees should at least be able to expect a reasoned argument as to why the IHRAR conclusions should not be followed.

We agree with the observations of Lord Carnwath in his 9 February 2022 lecture on Human Rights reform, in which he stated:

> "The cases referred to by the CP do not to my mind support their case for amendment.
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> I will take one recent example in which I was directly involved: Gilham v Ministry of Justice[27] The CP summarises it thus:
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> "In 2019 the UK Supreme Court used section 3 to change the scope of employment rights under the Employment Rights Act 1996 by reading 'worker' much more widely than its natural meaning to include judicial office holders, to avoid incompatibility with Article 14 read with Article 10."

> I do not with respect find that a very fair reading of the case. The issue in the case was whether a District Judge qualified as a "worker" as defined in the Employment Rights Act 1996 so as to be able to take advantage of the protection given to whistle-blowers, and if not whether this involved discrimination against her in the enjoyment of her right to freedom of expression, under article 14 taken with article 10 of the Convention. We held that it did involve such a breach, but that it could properly be avoided under section 3 by a wider but still possible reading of the definition, without going against the "grain" of the legislation.[28] We bore in mind that the same wider reading had been adopted without problem in the context of EU law; and that there was no evidence that Parliament or the executive had addressed their minds to the exclusion of the judiciary from such protection, nor had any legitimate aim been suggested for such exclusion.
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> I am unpersuaded that this involved any "constitutional shift". I agree with the observation of the Gross panel (in answer to the TOR question "whether section 3 has been used to interpret legislation in ways contrary to Parliament's intention")."

Accordingly we believe that the case for change has not been made out, and we reject both Option 1 and Option 2 on the (flawed) material provided in the Consultation Paper.

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

As stated above, we are not convinced that the operation of s3 requires change, and the Government's proposals in relation to Question 12 were not supported by any evidence basis. We would not object in principle to either of the recommendations by the IHRAR, namely that there should be a database of judgments in which s3 is applied, and that the JCHR could have an enhanced role (subject to funding being made available to enable it to discharge its enhanced functions). We think such a database, if it is created, should precede consideration of any amendment to, or repeal of, s3, since it would provide an evidence base for consideration that is presently lacking.

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

See response to Q13.

**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?**

The framing of this question is inconsistent with the stated aim behind the Government's proposal, namely that the Government 'wish[es] 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' (para 250 of the consultation paper – emphasis added). This option was expressly considered by the IRAR, and robustly rejected (IHRAR chapter 7, paras 55-63).

We consider the IHRAR's reasoning to be clear and compelling. No reason has been given in the Consultation Paper why the IHRAR's reasoned and express rejection of this option

should be reconsidered. It is also disappointing that there is no reference to the IHRAR's conclusions in the framing of this option, in contrast to the framing of Question 16, where the IHRAR was supportive of the Government's proposal. Such selective use of the IHRAR's conclusions does not inspire confidence in the integrity of this consultation exercise.

**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.**

Para 80 of Chapter 7 of the IHRAR report states:

'As a matter of principle, given the reform to judicial review, UK Courts ought to be provided with the same power to issue suspended quashing orders where subordinate legislation is found to be incompatible with Convention rights. This will maintain consistency with judicial review generally.'

We see the logic in the IHRAR's recommendation on this point. However, we have serious concerns about clause 1 of the Judicial Review and Courts Bill, which is not yet law, including in relation to the presumption in favour of their use. Our concern in relation to the vindication of Convention rights, were a similar presumption to be enacted in relation to human rights challenges to subordinate legislation, is that it may be inconsistent with the practical enforcement of individuals' Convention rights. For this reason we consider that consideration of this proposal is premature, pending the passage of the Judicial Review and Courts Bill through Parliament.

**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.**

The Consultation Paper makes the following case for change to the s19 duty (at para 261):

'There is a debate as to whether section 19 strikes the right constitutional balance between government and Parliament, particularly in relation to ensuring human rights compatibility whilst also creating the space for innovative policies. In particular, is the test set out in section 19 the appropriate test, and if not, how might it be improved?'

The Consultation Paper does not give any details about the basis for such a 'debate'. It is difficult to see how the certification of a Bill by the relevant Minister as human rights compatible could affect the constitutional balance between government and Parliament in any way. We consider that the test in s19 has the advantage of clarity. We see no reason why it should confine the government's space for innovation, even innovation that is incompatible with Convention rights (which is expressly catered for by s19(1)(b)).

Accordingly, we see no case for change.

**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 Consultation Paper recognises that the definition of a public authority in section 6(3) 'has the benefit of flexibility that has allowed the application of the Act to evolve in line with changes in how public functions are delivered', but wishes to consider whether there is an alternative formulation which might 'broadly' have the same effect 'but in a way which offers more certainty or clarity', while not adding 'new burdens to private sector bodies and charities'.

Our concern is to maintain the ability of vulnerable individuals (such as ASAP's clients) to vindicate their human rights, as public functions are contracted out to the private and voluntary sector.

In relation to the stated objective to insulate private sector bodies from additional human rights obligations, we consider that where public functions are contracted out, the apportionment of risk as between private and voluntary sector organisations on the one hand and the public authorities on the other is a matter of contract, and should be secondary to the objective of ensuring that the human rights of those affected can be vindicated.

We are therefore concerned that any increase in clarity in a new definition must maintain the effectiveness of the legislation to protect human rights in response to new ways of service delivery by the private and voluntary sectors.

In the absence of comfort on this point, or of any indication in the IHRAR report that the definition in s6(3) is problematic, we do not believe the case for change has been made.

**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.**

The test of 'clearly giving effect to primary legislation' in Option 1 is imprecise, and will lead to unnecessary litigation. It will potentially cover decisions giving effect to Convention-incompatible secondary legislation made pursuant to primary legislation, thereby reducing human rights protection.

In relation to Option 2, we have rejected the proposed amendments to s3 (see our response to question 3 above).

Both options would have the effect of reducing the circumstances in which those who have suffered breaches of their human rights will have a cause of action against the responsible public authority under human rights law.

We reject both options.

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

We note the IHRAR's conclusions that issues regarding extra-territoriality should be resolved through a national dialogue and inter-Governmental level negotiations augmented by judicial dialogue between UK courts and the Strasbourg Court.

We make one observation – in our view, the concern for clarity as regards the need for members of the armed forces on active service abroad to comply with human rights law is context-dependant. We would strongly oppose any blanket human rights exceptions, that would cover, for example, the off-shore processing of asylum claims, were this to come to pass.

**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. 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'. 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. We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.**

The UK courts have grappled with the application of the principle of proportionality as applied to the decisions of public bodies for more than 2 decades, both in the context of human rights but also in wider administrative law and EU law (see Alconbury [2001] UKHL 23 at para 169). In that time, UK courts have developed its own caselaw, giving guidance to decision-makers on the proportionality exercise. See for example the decision of the Supreme Court in HA (Iraq) [2016] UKSC 60.

We consider the law relating to the proportionality exercise in relation to qualified human rights is developed and generally unproblematic. This is particularly so in relation to the application of Article 8 of the Convention to the deportation of foreign nationals following the Immigration Act 2014, which effectively codified the proportionality exercise in deportation cases.

The Consultation Paper does not explain, in light of the above developments, precisely why more guidance to the courts on how to balance qualified and limited rights is necessary.

We believe therefore that neither option for change has been shown either to be necessary, or to add clarity to the proportionality exercise. We reject them both.

**Clause 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. 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 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; and/or 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.**

The Consultation Paper makes the bold claim that without further restrictive legislation, there is a risk that 'that deportations of foreign nationals which are in the wider public interest are not incrementally and systematically frustrated by new and expanding human rights claims' (para 292).

In light of the Government's stated commitment to the Human Rights Convention, it is assumed that the Government's concern relates solely to unmeritorious human rights claims advanced by foreign nationals to resist deportation (since, were the Government's concern to relate to meritorious claims, it would call into question the Government's commitment to acting compatibly with the Convention.)

However, the examples given in the Consultation Paper on page 38 of the Consultation Paper (under the heading Foreign National Offenders (FNOs)') as evidence of a systemic problem do not make this clear. They relate to appeals which were allowed under Article 8 in circumstances where the Government clearly considered that they should have been dismissed.

We have had sight of a letter from Bail for Immigration Detainees (BID) dated 3 March 2022, in which it is stated that the 2 case studies cited at pages 38 and 39 of the Consultation Paper (AD (Turkey) and OO (Nigeria)) were selectively reported without reference to the extraordinary facts that led the Upper Tribunal to allow the appeals. Since the other case relied on was summarised but not fully cited, there is no evidence base in the Consultation Paper of a problem that requires a legislative solution.

Criticism of the Consultation Paper in this regard was not confined to BID. In his lecture of 9 February 2022 on Human Rights Act Reform, Lord Carnwath expressed the view that the summary of AD (Turkey) in the Consultation Paper seemed to him to be 'a travesty of the careful reasoning of the experienced Upper Tribunal Judge'.

Lord Carnwath had similar concerns about the cases used to justify the need for reform of s3, stating that 'the cases referred to by the CP do not to my mind support [the Government's] case for amendment', and expressly highlighting the summary of Gilham not to be a 'very fair reading of the case'.

In relation to the proposals relating to Foreign National Offenders, the BID letter makes the further observations that:

- the statistics cited in the Consultation Paper on page 45 are misleading since they do not distinguish between pre-2014 Act and post-2014 Act data;

- had they made such a distinction, the resulting data would not have supported the crucial and emotive claim that: 'The expanding human rights restrictions on the government's ability to deport serious foreign offenders engages the government in costly litigation, and puts the public at additional risk by enabling dangerous criminals to frustrate the process.'

We do not therefore accept that the case for change has been made in the Consultation Paper:

- safeguards against unmeritorious Article 8 claims already exist under the Nationality Immigration and Asylum Act 2002 enabling the Secretary of State to certify claims as clearly unfounded, and to deny the claimant an in country right of appeal.

- the changes introduced by the Immigration Act 2014 have given the courts far greater guidelines and dramatically reduced the number of claims made and allowed on appeal.

The Options proposed in the Consultation Paper are inconsistent with the Government's stated aim to act compatibly with human rights. The need for them is based on misleading case summaries and misleading data, and is otherwise unevidenced.

We reject all three options.

**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?**

We do not consider that this question engages the Convention or the Human Rights Act. The question is premised on the Government's stated intention to respect our international obligations. The only 'impediments' identified in the Consultation Paper are 'the operation of the non-refoulement principle of international law and wider international legal instruments, including the 1951 Refugee Convention which outlines the rights of refugees and the legal obligations of States Parties to protect them' (para 298).

These are precisely the international obligations that the Government claims to respect.

**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 Consultation Paper acknowledges that the court already takes the claimant's conduct into account in the award of damages for breach of human rights. No evidence is offered that the courts are not exercising their discretion appropriately, and no reason has been advanced as to why change is necessary. We reject the proposal: to the extent that it reflects the present position, it adds nothing and is unnecessary; and to the extent that it precludes the award of damages to those considered undeserving without consideration of the entire factual matrix of the case, it would violate the principle of equality before the law, since the human rights of those considered undeserving could be breached without fear of adverse consequences.

**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. In**

**particular: 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. b. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate. c. How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.**

We believe that the proposed Bill of Rights will have potential adverse impacts on our client group, but regret that we do not have the capacity to enable us to respond more fully to this question.

Yours sincerely

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ASAP