CBA Response to Ministry of Justice Consultation entitled

"Human Rights Reform: A Modern Bill Of Rights"

2nd March 2022:

Introduction

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.

2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

3. The CBA is the largest specialist Bar association and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

Consultation Response

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 clause found after paragraph 4 of Appendix 2, as a means of achieving this?

4. The domestic courts can and do draw on a wide range of laws when reaching decisions on human rights issues. Those laws include instruments of international humanitarian law and the judgments of the domestic courts of other jurisdictions in particular within the common law world. There is nothing within section 2 of the Human Rights Act 1998 in its current form that prevents the domestic courts from taking those laws into account when making their decisions.

5. Clearly, the government's objective with its proposed reforms to section 2 of the HRA is to dilute the obligation on the domestic courts to take account of the decisions of the European Court of Human Rights (ECtHR). The government has put forward two options for achieving that objective.

6. Option 1 refers to the ECtHR once and only to state that domestic courts are not required to follow or apply the decisions of the ECtHR, which they are not obliged to do under section 2 of the HRA either.

7. Option 2 contains the same statement but also provides that domestic courts may have regard to the judgments of the ECtHR, which is more reflective of the permissive approach under the HRA.

8. The risk with Option 1 is that domestic courts will be encouraged to marginalise the decisions of the ECtHR even though they may offer a valuable tool for the interpretation of equivalent rights in domestic law.

9. For this reason Option 2 is to be preferred, we suggest. It invites the domestic courts to consider the broadest range of views from around the world on contentious issues of human rights law without excluding the rich stream of jurisprudence that flows from the ECtHR.

Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate 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?

10. Option 2, referred to above, achieves this objective in its first clause. It does not seem to us that anything more is required.

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

11. The Foreword to the Consultation document describes the right to trial by jury as one of the "quintessentially UK rights". This must mean that the government views the right to trial by jury as one of the most perfect or typical rights recognised by the different jurisdiction of the UK.

12. Of course, some continental European legal systems also recognise the rights of their citizens to be tried by a jury and so while the jury is a very important part of our system of criminal justice, it is not unique to the jurisdictions of the UK.

13. One unanswered question is whether placing a right to trial by jury within the Bill of Rights is intended by the government to be merely symbolic or whether the government would expect such a clause to confer enforceable rights on those charged with criminal offences.

14. We observe that only adults charged with either-way offences have a right to a trial by jury. Those charged with summary-only offences have no such right, and those charged with indictable-only offences are obliged to be tried by a jury. It obviously follows that any right to trial by jury inserted into the Bill Rights would need to be heavily qualified to ensure that it does not extend the right to more defendants than presently enjoy it at the moment.

15. We also observe that the creation of a right to trial by jury within the Bill of Rights may have unintended consequences. It could prompt defendants to argue that the right is only meaningful if it is interpreted as a right to trial by an *impartial* jury, and that could lead to attempts to develop the law by inviting the courts to afford the parties powers to vet jurors on the basis of their race or religion, or to require juries to give reasons for their decisions to ensure that a conviction is not based on unacceptable prejudice against a defendant. We doubt that the government would wish either of these consequences to flow from the insertion within a Bill of Rights of a right to trial by jury.

16. We can understand why the government would wish to include within the Bill of Rights a right that is not recognised in the Convention and that has an element of 'Britishness' to it, and we certainly do not oppose the creation of such a right, but at the same time it will have to be drafted with real care to avoid the risk of that right becoming something more than the government intends it to be. The inclusion of a right to trial by jury in the Bill of Rights would certainly underscore the importance of that right, and serve as a riposte to the occasional calls for the abolition of jury trials altogether.

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?

17. The right to freedom of expression is not absolute either under the common law or under the Convention. If the government desires to limit the range of circumstances in which injunctions or other forms of relief can be obtained against the press or those who would consider themselves to be publishers then it *may* be appropriate to do that by making amendments to those provisions (including the Civil Procedure Rules) that allow the courts to grant these forms of relief rather by inserting a clause into the Bill of Rights.

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 of Article 10? What guidance could we derive from other international models of protecting freedom of speech?

18. To describe freedom of expression as a principle of the utmost importance rather relegates other rights to a lesser status, and we cannot imagine that is the impression the government intended to convey in drafting this question. Does the government intend, for example, that the Bill of Rights should *strengthen* the ability of those accused of causing criminal damage to statutes to raise a defence to such a charge on the basis that only in limited and exceptional circumstances should the criminal courts seek to interfere with a person's right to freedom of expression? We rather suspect that is not the government's objective, in which case we wonder whether any further guidance could be given to the criminal courts to assist them in the application of the right to freedom of expression to the cases that routinely come before them.

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

19. We have no views.

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

20. We have no views.

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.

21. The consultation does not explain what "bringing a claim under the Bill of Rights" would look like. Convention rights are pervasive and raised in a variety of jurisdictions in different ways: asylum claims, judicial review, criminal appeal. Each of the various jurisdictions in which convention rights are routinely cited have their own tests, such as summary judgment, leave or permission stages. The consultation does not set out how the proposed "significant disadvantage" test would interact with the filters currently in place across jurisdictions. It would be invidious to introduce an additional, higher hurdle, for example, for an applicant who believes that their *fundamental* rights have been affected which an applicant bringing a claim concerning other (less fundamental) legislative provisions did not face.

22. Whilst the consultation cites the fact that "significant disadvantage" is a test applied by ECtHR itself (under Article 35), this one of the few filters by which the ECtHR limits the claims it can hear, beyond the need for applicants to exhaust domestic remedies. Introducing this filter into domestic courts as an *additional* barrier for applicants in a system which already has such filters, is very different, particularly if the domestic court now is to become the court of last resort. In terms of how this filter works in practice within the ECtHR, the explanatory note to Article 35 suggested that the "significant disadvantage" test was really designed to prevent unmeritorious claims reaching the Court, rather than claims

which were meritorious but on one view, not particularly serious. This explanatory note was cited within the case of Y v Latvia – 21 October 2014 application 61183/08 in which it was said at paragraphs 41 to 44 that *"the Court finds it difficult to envisage a situation in which a complaint under Article 3 of the Convention which would not be inadmissible on any other grounds, and which would fall within the scope of Article 3 (which means that the minimum level of severity test would be fulfilled), might be declared inadmissible because the applicant has not suffered significant disadvantage"*.

23. Claims involving convention rights are likely to involve disadvantages that may be cumulative or intangible and as such assessing "significant disadvantage" is likely to be difficult and to create its own jurisprudence: the disadvantage caused by pay discrimination cannot be calculated in terms of terms of the diminished wages of any individual female applicant but in terms of the broader social disadvantage caused by policies which do not uphold Article 14 rights. The consultation does not set out how significant disadvantage would fall to be assessed or engage with the jurisprudence on the ECtHR which suggests that the ECtHR has in fact applied Article 35 and "significant disadvantage" restrictively.[1]

24. It is of particular concern to the Criminal Bar Association that this consultation does not recognise the way in which convention rights pervade the criminal law and are relied upon by those who are not, in any conventional sense, "bringing a claim", but who are relying upon those rights in their defence and in appellate proceedings. The discussion of the case of *Ziegler* at paragraph 135 of the consultation is particularly concerning, with the Government noting *"in this case, it* (convention rights) *enabled a group of protestors to disrupt the rights and freedoms of the majority"*. Two important points appear to have been omitted. Firstly, even if one concluded that those attending the DSEI arms exhibition, who were found to be the sole targets of the protest, represented *"the majority"*, it is of concern that

[1] See a summary of such case-law at R. Clayton, 'The Government's New Proposals for the Human Rights Act Part 2: An Assessment', U.K. Const. L. Blog (13th January 2022) (available at https://ukconstitutionallaw.org/)

the Government does not recognise that a consideration of proportionality involves more than counting the number of people on each side of the argument. The protection of minority rights is a fundamental part of convention jurisprudence. Secondly, and crucially for question 8, nowhere is it noted that the protestors did not "bring a claim", but instead relied upon convention rights as part of effectively a criminal appeal. The protestors did so in circumstances where the state decided to judicially review the decision of a District Judge to dismiss charges laid against them for an offence under section 137 of the Highways Act 1980 for obstructing a highway when no other offences could be brought given the "e*ntirely peaceful…limited in duration'* action which *'did not involve the commission of any offence beyond the allegation of the section 137 offence'* and which was *'related to a matter of general concern"*.[2] The CBA makes no contention here about the merits of the judgment of the Supreme Court but notes a literal reading of the consultation document would suggest that the state intended to undercut the rights of those it elected to prosecute.

25. The Criminal Bar Association is of the view that a "significant disadvantage" test would not be an effective way of making sure that courts focus on genuine human rights matters. It would likely be a confusing addition to the permission systems which already exist and might prevent meritorious claims being brought because an applicant cannot put a monetary value on their fundamental rights or because the disadvantage they feared had not yet materialised. The CBA seeks an assurance that in any event, the Government would not seek to legislate in such a way as to prevent or inhibit any individual from relying upon convention rights as part of their defence to criminal charges or in appellate proceedings, including a commitment from the Government that they will not seek to introduce any additional permission stages for reliance on such rights, beyond those already in force.

[2] DPP v Ziegler [2021] UKCC 23 paragraph 21

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.

26. This appears to be an attempt to create a safety valve if the significant disadvantage test were to be adopted. For the reasons set out at Question 8, adopting such a test would not assist in ensuring a focus on meritorious claims but would lead to a confusion between an assessment of the merits of a claim and its impact on an individual. The proposal at Question 8 is not cured by creating a category of exceptional cases of public importance: such a system might potentially still deprive individuals who brought a meritorious claim of importance to themselves only of any remedy because they could not prove that a significant disadvantage had crystallised. Significantly, from the point of view of the CBA, the ability of defendants and appellants to rely upon convention rights risks being under-cut by a literal reading of these proposals.

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

27. It is difficult to understand what is meant by "genuine". In questions 8 and 9, the consultation referred to "genuine" human rights claims, which we understand to mean meritorious rather than vexatious or frivolous. Here, the government appears to merge "genuine" and "serious". The Government could not fairly seek to limit the ability of individuals to rely upon their interpretation convention rights in their defence on the basis that the offence was too minor, given the huge social impact of a criminal conviction in addition to the potential restriction of liberty that may follow. It would be particularly unfair for the Government to reserve to itself the ability to rely on their own interpretation of convention rights to overturn acquittals, as they sought to do in *Ziegler*. Removing the ability of defendants to rely on convention rights in what the

Government regards for some purposes at least as "minor" cases taken individually, would have far-reaching consequences, for example, in relation to the right to protest.

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.

28. It is concerning to the CBA that the Government has selected as examples of those who may "skew" public service priorities some of the most marginalised people in society. The Government notes in a box on page 40 that over the course of 6 years, the Prison Service lost 600 claims from prisoners who relied on convention rights in relation to obtaining adequate treatment for drug addictions. This example does not tend to demonstrate that public services are currently over-responsive to messages from the courts in terms of setting their priorities. The figure of £7 million in costs is cited, with no break-down either in terms of how much amounts to legal costs rather than compensation, or how much of this cost was incurred by the Government challenging first-instance decisions which did not go in its favour.

29. It is difficult to know what the purpose of including this information in the consultation is unless to provoke some sort of outrage that prisoners sought medical treatment. The costs were presumably largely incurred as the Government unsuccessfully challenged those claims. The CBA firmly believes that prisoners do not forfeit all their other rights when they forfeit their liberty, and that the rights they retain include their right to adequate medical care whether for addiction or for any other medical problem. Those in prison have often been failed by state agencies: a Ministry of Justice study found that 24% of prisoners had previously been in care; 41% had observed violence in their home; 63% had been suspended or excluded from school.[3] The Public Accounts Committee in 2017 produced a report into mental health in prisons which set out

[3] Prisoners' childhood and family backgrounds (publishing.service.gov.uk)

both the complex mental health problems prisoners face, how prisons exacerbate those problems, and the continued failings of the prison service to provide adequate care for the most vulnerable.[4]

30. The CBA would urge the Government not to diminish the ability of already marginalised people to hold the state to account simply because it is said that public bodies are struggling to discern the scope of their obligations. If police forces are thought to interpret *Osman* too broadly in terms of Threat to Life warnings, perhaps new policies should be developed which are more workable and proportionate but respect the Court's judgment: to suggest that any whole class of people (suspected criminals, for example) should not be allowed to rely on convention rights in relation to Threat to Life warnings is obviously disproportionate. It may be thought that dismantling the legal infrastructure that already exists in relation to the Human Rights Act and building a new edifice is not going to create greater legal certainty for public bodies about how best to discern their obligations in the near future.

Question 12: We would welcome your views on the options for section 3.
Option 1: Repeal section 3 HRA 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.

31. The CBA agrees with the conclusions of the IHRAR Panel to not support repealing section 3. Repeal of section 3 without replacing the provision would risk increasing uncertainty, contrary to the intention of the Bill. Further the

[4] Mental health in prisons (parliament.uk)

common law presumption that Parliament does not intend to act in breach of international law would not sufficiently address the void left from repealing section 3 without replacing it. As the Public Law Project[5] notes, repeal of section 3 may lead to more cases being taken to Strasbourg, risking reducing individuals' access to justice.

32. Of the proposed Options, Option 2 is preferrable in providing more certainty. Option 2 does not require legislation to be ambiguous in order for the provision to apply – requiring the provision to be ambiguous risks over-complicating interpretation by adding a preliminary hurdle. The CBA is also concerned that the Options provided seek to reduce the remit of section 3 rather than clarify it.

33. However, it is the view of the CBA that there is no need to limit the power to interpret from 'so far as it is possible to do so' or amending section 3. It is notable that there have been relatively few declarations of incompatibility, a last resort when section 3 interpretation is not possible. It is further noted that in enacting the Human Rights Act 1998, Parliament chose to give the courts the powers they exercise under section 3[6], and that Parliament decides what action if any to take once declarations of incompatibility are made[7]. The CBA notes the significant

[5] https://publiclawproject.org.uk/latest/human-rights-act-5-concerns-with-new-consultation/

[6] See Lord Bingham, [A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) [2004] UKHL 56at 42 "The 1998 Act gives the courts a very specific, wholly democratic, mandate" and Nicklinson v Ministry of Justice [2014] UKSC 38

[7] See Lady Hale R (on the application of Nicklinson and another) (Appellants) v Ministry of Justice (Respondent) [2014] UKSC 38 [at 300, "Like everyone else, I consider that Parliament is much the preferable forum in which the issue should be decided. Indeed, under our constitutional arrangements, it is the *only* forum in which a solution can be found which will render our law compatible with the Convention rights. None of us consider that section 2 can be read and given effect, under section 3(1) of the Human Rights Act 1998, in such a way as to remove any incompatibility with the rights of those who seek the assistance of others in order to commit suicide. However, in common with Lord Kerr, I have reached the firm conclusion that our law is *not* compatible with the Convention rights. Having reached that conclusion, I see little to be gained, and much to be lost, by refraining from making a declaration of incompatibility. Parliament is then free to cure that incompatibility, either by a remedial order under section 10 of the Act or (more probably in a case of this importance and sensitivity) by Act of Parliament, or to do nothing. It may do nothing, either because it does not share our view that the present law is incompatible, or because, as a sovereign Parliament, it considers an incompatible law preferable to any alternative".

divergence between the IHRAR's recommendation for only minor amendment to section 3, and the Government proposals including repealing section 3. If there is amendment or repeal of section 3, it should be prospective only.

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

34. The CBA agrees that the Joint Committee on Human Rights and Parliament more widely can scrutinise section 3 judgments – legal protection for human rights should be promoted by Parliament and the executive as well as the judiciary. Parliamentary scrutiny of section 3 judgments can assist in a democratic culture of justification[8]. The CBA further agrees that this can be achieved by a judgments database. A judgments database may assist in increasing accessibility of section 3 judgments for Parliament and the public, see answer to question 14.

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

35. As above, the CBA agrees a judgments database can assist in understanding and accessing section 3 judgments. Such a database can take a similar form to the Supreme Court Latest Judgments website, providing simple links to cases and executive summaries.

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?

36. An advantage of permitting declarations of incompatibility to be made in relation to secondary legislation is it may simplify matters, no longer would it be relevant in which way the legislation was made. However, the current situation

[8] See Murray Hunt, Parliaments and Human Rights, p15

is perhaps more consistent with parliamentary sovereignty.[9] Any change in approach can be facilitated by an additional section in the Bill of Rights setting out that s.4 applies to all forms of secondary legislation. However, the CBA questions the necessity of this proposed change. The Government seem concerned at the level of court power over secondary legislation, but the amount of intervention of this kind has been low[10]. Case law further suggests the judiciary are careful when dealing with cases of this type, declaring rights have been violated and leaving matters open for the Secretary of State[11].

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.

37. The CBA recognises the importance of quashing orders as a form of remedy. However, we note the Judicial Review and Courts Bill's suggested provision for the quashing not to take effect until a date specified. The CBA is concerned that this again seeks to limit judicial oversight without evidential basis.

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[9] R(T) v Chief Constable of Greater Manchester Police [2014] UKSC 35 Lord Reed [at 140 "That approach leads to the somewhat unattractive conclusion that whether a failure to make subordinate legislation falls within the scope of section 6 of the Human Rights Act depends upon the particular way in which the legislation must be made: an order made by the Secretary of State subject to annulment by a resolution of either House, for example, would not on any view involve the laying before Parliament of a "proposal for legislation". On the other hand, it is consistent with the respect for Parliamentary sovereignty found throughout the Human Rights Act that the decision of a member of either House whether to lay a legislative proposal before Parliament, whether in the form of a Bill or a draft order, should not be the subject of judicial remedies".]

[10] See https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/ research advises 14 cases subject to successful challenge from 2014-2020, during which time statutory instruments increased. As a result, only 4 of the 14 cases were quashed or disapplied.

[11] See R (TD) v Secretary of State for Work and Pensions [2020] EWCA Civ 618 Singh LJ [at paragraph 94 "a matter for the Secretary of State to decide how to respond to a declaration by this Court that there has been a violation of these Appellants' rights… that may or may not lead to a scheme being designed which benefits other people, who are not before this Court, but the design of any such scheme will in the first instance be for the Secretary of State".]

Question 17:

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

1. similar to that contained in section 10 of the Human Rights Act;

2. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;

3. limited only to remedial orders made under the 'urgent' procedure; or

4. abolished altogether?

Please provide reasons.

38. The Bill of Rights should contain a remedial order power similar to that contained in section 10 of the Human Rights Act. The CBA sees no evidence as to why that provision needs to be amended. As the consultation notes, remedial orders are relatively uncommon "eleven remedial orders have so far been made under the Human Rights Act since it came into force in 2000; only three of those cases involved the use of the urgent procedure" [paragraph 225].

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.

39. We have no views.

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?

40. We have no views.

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.

41. S.6 of the HRA 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The definition of public authority as set out in sections 6(3) to 6(6) HRA is deliberately broadly defined. Although not expressly referred to in the Act, the HRA effectively differentiates between two different types of public authorities: (i) a "core" public authority and (ii) a "hybrid" public authority. A claim can be brought against a "core" public authority in respect of all of its actions. An act or omission by a "hybrid" public authority is not unlawful under the HRA unless the person or company has at least some functions of a public nature (s6(3)(b)) and the nature of the action in question was not a private one (s6(5)). It has been for the Courts to determine whether a particular body is a public authority or performs functions of a public nature. In the past, the Courts have applied what has been termed a 'restrictive' approach to the meaning of public authority.

42. Clearly, any uncertainty over the application of the HRA has the potential to create unequal outcomes, and unintended, outcomes; and a restrictive interpretation potentially deprives vulnerable persons (e.g. those placed by local authorities in long-term care in private care homes[12]) of the protection afforded by the HRA. However, the uncertainty created by the application of the HRA in circumstances where it is for the Courts to determine whether the provisions of the Act apply to a particular body must be balanced against the restrictive nature of a provision which would limit its application to certain, named bodies. This factor is particularly acute in the current climate. There are now private markets for public services which did not exist when the HRA was brought into effect; the recent COVID-19 pandemic has highlighted our reliance on the private sector to perform public services in various areas.

[12] Later resolved by the introduction of primary legislation

43. In our view, more certainty should be provided as to the definition of public authority, but not at the cost of a 'closed list' which, we consider, will create more problems than it might solve, and which will lose the flexibility which has the potential to allow the application of the Act to change in line with changes in the delivery of public services. An enhanced, statutory, definition of "public function" would be one way of providing more certainty.

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*

44. We note that the Government has stated, at §276, that under option 2, whichever approach is taken to section 3 would also be mirrored in how section 6(2) operates. We note that the Government has stated, at §237, that it is minded to agree with the IHRAR which did not support the repeal of s.3. We agree with that position, as set out above.

45. Section 3, as an interpretative provision, works in conjunction with section 6, which imposes the duty on public authorities not to act in a way that is incompatible with Convention rights. Clearly, in the event of reform, Option 2 is preferable given that it makes provision for Section 6(2) to mirror the provisions of section 3.

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.

46. The HRA has limited, but significant, extra-territorial effect. It is our view that it should not be abrogated. The extra-territorial application of the HRA and the ECHR applies in two main contexts: in British Overseas Territories; and during overseas military action. This application has been developed in a series of cases primarily involving the actions of British troops. The UK must either have effective control over people or territory, be exercising public powers to a sufficient degree or both, for HRA obligations to apply, importantly Article 2 and 3 duties.

47. The current position provides potential victims of human rights abuses overseas (including members of the British armed forces) a means by which they can hold public authorities to account. Attempting to limit responsibility for acts of public authorities taking place abroad undermines the broader object of the promotion of protection for human rights. The Courts have already imposed limits on the State's obligations, stating that those will only extend to what is practical, for example. To be seen to abrogate the extra-territorial effect of the HRA as it is at present is optically unattractive to say the least and would be detrimental to the UK's reputation as an upholder of human rights.. Attempts to restrict the extra-territorial effect of the HRA may well result in a greater number of cases being taken directly to the ECtHR (or the ICC), which may have the effect of placing policy considerations in the hands of the ECtHR.

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 para 10 of Appendix 2.

48. The Convention seeks to achieve a fair balance between the sometimes conflicting rights of the community and those fundamental rights of the individual guaranteed by the various articles of the Convention. Central to achieving this balance is the doctrine of proportionality. This requires that any restriction of a Convention right (where this is permissible) must be proportionate to the legitimate aim being pursued. In order to satisfy this requirement, the public body interfering with a Convention right must show to the court that the restriction:
    - pursues a legitimate aim;
    - is suitable, in the sense of being rationally connected to the aim;
    - is necessary, in the sense that a less intrusive restriction could not have been used without compromising the achievement of the objective;
    - there must be proportionality between the effects of the restriction on countervailing rights or interests and the objective to be achieved.

49. This structured approach has been borrowed from the jurisprudence of other jurisdictions, on domestic charters of rights. The four stage test calls for a detailed analysis of the factual case advanced in defence of the restriction. The stages at (a) and (b) do not tend to pose difficulty for the Courts. Stages (c) and (d) may well pose difficulties. The judgements required to be made at (d) in particular may be difficult, involving the consideration of various factors in order

to reach a conclusion whether the interference strikes a fair balance, but they are judgements which involve the assessment of competing interests and on which Courts and Tribunals have, in the last 15 – 20 years, become well accustomed to adjudicating. The fact, which is accepted, that the answers to those questions are fact-sensitive, call for the exercise of judgement and that there may be disagreements as to what the particular outcome should be in a given case after applying the principles does not, without more, mean that the doctrine is ripe for reform, or that further guidance is required. The Courts in different spheres are well placed to evaluate competing factors.

50. We consider that Draft Clause 10 is unnecessary, and, potentially unhelpful. Courts have experience of performing the balancing exercises required in a 'proportionality' case. It may well add nothing to the context to enact a provision which states that in passing a piece of legislation, Parliament was acting in the public interest and that its view was that such legislation was necessary in a democratic society. The draft clause will create uncertainty as to the meaning of "great weight". Is that to add a further threshold to a Claimant who asserts his Convention right has been breached? Is that to suggest that such a breach is justifiable (because of the primacy of Parliament's will), unless the Claimant can show it was not? And where does the Draft Provision(s) leave the proportionality test as set out above? Does it have the effect of diluting that test, and if so, how; or does it have the effect of reversing the burden of proof?

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. 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. 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

51. We defer to other specialist associations.

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?

52. We defer to other specialist associations.

Question 26: We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include: a. the impact on the provision of public services; b. the extent to which the statutory obligation had been discharged; c. the extent of the breach; and d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation. Which of the above considerations do you think should be included? Please provide reasons.

53. We defer to other specialist associations.

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.

54. The CBA is concerned that whilst this question is targeted at *remedies*, the consultation itself makes broader suggestions that the way one has lived one's life might affect one's ability to rely on convention rights, saying for example at paragraph 303 "*when a court is considering the proportionality of an interference with a person's qualified rights, it will consider the extent to which the person has fulfilled*

their own relevant responsibilities. For example, where a person is wanted for a crime, there should be no question of limiting the publication of their name and photograph because of their right to a private life."

55. This proposition is followed by the citation of R v Chief Constable of the Essex Police [2003] EWHC 1321 (Admin), [2003] 2 FLR 566, although this case was not about a person being "wanted" for a crime, but about whether a convicted criminal could be "named and shamed" as a part of a scheme to deter individuals from committing crime and to offer the public reassurance. Although the High Court did not make a declaration that this scheme could not be operated lawfully, it did note that further information was needed to make sure that structured risk assessments took place before an individual's image was published. They noted that some offenders may in fact be *encouraged* to commit crime because publication of their image removed the opportunity for legitimate work, and that the publication of such images could have disastrous consequences for offenders' families. It is concerning that the bold proposition at paragraph 303 is advanced as bearing any sort of relationship to this careful and measured judgment, which made it quite clear that offenders do continue to have rights and that a proportionate response to the question of balancing qualified rights such as the right to privacy is required. It might be entirely legitimate to publish the picture of someone "wanted" for a serious crime if there is a real risk of that person infringing others' rights in a significant way: it might not be legitimate to publish the picture of a shoplifter who was known to be at risk of domestic violence when the publication of such an image might lead to their being assaulted by their partner.

56. Whilst the CBA defer to other specialist organisations on the question of remedies, the CBA urge the Government to move away from assuming that anyone who commits a crime automatically forfeits at least some of their rights. If only those adjudged by the state to be good citizens are allowed to bring claims against the state or to otherwise to rely on their convention rights, human rights will become meaninglessly dilute.

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

57. The UK cannot withdraw from the binding jurisdiction of the ECtHR while remaining a party to the ECHR, unless the ECHR was amended, which amendment would require the consent of all 47 contracting parties. In those circumstances, it is difficult to see how the UK might alter the externally binding character of the ECtHR judgments without withdrawing from the ECtHR, despite the provisions in Draft Clause 11(1). The Draft Clause, in our view, seeks to provide the UK with a means by which it need not implement the final judgment of the Strasbourg Court, in circumstances where the Government has declared its commitment to the UK remaining a party to the Convention, which includes the obligation to implement judgments from the ECtHR.

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

58. Other than the particular dangers and unintended consequences of some of the amendments proposed, and the concern that constructing a 'reformed' approach to Human Rights will generate less legal certainty, the CBA are not in a position to comment on this question.