HUMAN RIGHTS ACT REFORM: A MODERN BILL OF RIGHTS

A MINISTRY OF JUSTICE CONSULTATION ON REFORM OF THE HUMAN RIGHTS ACT 1998

RESPONSE ON BEHALF OF THE CONSTITUTIONAL AND ADMINISTRATIVE LAW BAR ASSOCIATION

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INTRODUCTION

1. The Constitutional and Administrative Law Bar Association ("ALBA") is the professional association for barristers in England and Wales practising in public law, which includes human rights, administrative law, constitutional law, judicial review, and other areas of practice concerned with regulating the exercise of public powers.

2. ALBA's members are predominantly self-employed barristers in England and Wales, but also include employed barristers working in the UK Government Legal Department, local authorities, businesses, and campaigning organisations and other NGOs. ALBA's wider membership includes (as associate members) judges, solicitors, legal academics, law students, and lawyers in other jurisdictions.

3. One of ALBA's principal objectives is to provide a forum for exchanges, between practising lawyers, judges and academic lawyers, of knowledge and ideas about the development of public law, including developments in public law jurisprudence and practice across the common law world and within the European Union. Every year ALBA responds to a number of consultations by the Ministry of Justice and other organisations about matters affecting public law.

4. The members of ALBA who have contributed to this response are barristers (including Queen's Counsel) who are experts in the field of public law and human rights. They have extensive experience of appearing in human rights cases, both for claimants and for public authorities, including the UK Government, both in the domestic courts and in the European Court of Human Rights ("the ECtHR").

5. ALBA is concerned that the consultation paper fails to identify a sufficient evidence-based justification for many of the proposals, and is in parts based on an outdated and partial understanding of the current state of the caselaw. ALBA is also concerned about the general approach to the protection of rights that the proposals appear to envisage. Equally, however, ALBA recognises that it is the sovereign right of the UK Parliament to decide whether, and how, to reform or repeal the Human Rights Act 1998 ("the 1998 Act"). Nevertheless, as an association of barristers practising in the field (including many who regularly act for the Government and other public authorities), ALBA considers that it is particularly well-placed to highlight the likely impact of the proposals on human rights litigation. By "human rights litigation," ALBA means any litigation in which either the claim or the defence relies on one or more of the Convention rights currently protected by the 1998 Act or, in the future, litigation in which the claim or the defence relies upon one of more of the "British rights" under the "British Bill of Rights" proposed in the consultation paper, as the case may be. Accordingly, the focus of this response is on the *practical* difficulties that ALBA considers are likely to arise in the context of human rights litigation should the proposals set out in the consultation paper be implemented.

6. In summary, ALBA considers that the proposals will not "provide greater legal certainty" which is one of the core stated objectives of these proposed reforms (*cf* paragraph 4 of the Executive Summary and paragraph 182); on the contrary, ALBA considers that the proposals are likely to result in a high degree of uncertainty. In particular, ALBA considers that the proposals are likely to have the following consequences.

   (1) A destabilisation of the currently well-established and well-understood framework for the protection of rights in the UK, resulting in a high degree of uncertainty for public authorities, individuals and organisations (including commercial organisations). ALBA endorses the IHRAR's emphasis on the importance of certainty and predictability in this area of the law, particularly in the sphere of commercial dealings (see e.g. IHRAR Report, Chapter 1, paragraphs 36 and 39).

   (2) An increase in human rights litigation involving public authorities, something that is likely to continue for the foreseeable future.

   (3) Increased complexity in human rights litigation, resulting in increased legal costs and other demands on resources for all parties (including public authorities) and the courts.

   (4) An increase in the volume of applications made by individuals to the ECtHR, to which the Government will bear the responsibility for responding (regardless of the identity of the relevant public authority in domestic law), and an increase in the volume of applications that are successful (likely raising issues in relation to the UK's compliance with Article 13 of the Convention).

   (5) A diminution in the ability of the UK courts to influence the development of the caselaw of the ECtHR by way of judicial dialogue. ALBA endorses the IHRAR's view that care should be taken to ensure that the benefit of the current effective dialogue between the domestic courts and the ECtHR is not lost (IHRAR Report, Chapter 2, paragraph 129; see also Chapter 4, paragraph 86).

7. In light of the above, save where expressly indicated below, generally ALBA does not support the proposals set out in the consultation paper. For the avoidance of doubt, the fact that this response does not address a particular analysis or proposal set out in the consultation paper should not be taken as an indication that ALBA endorses that analysis or proposal.

8. For convenience, this response adopts the same structure and headings as the consultation paper.

SECTION I: RESPECTING OUR COMMON LAW TRADITIONS AND STRENGTHENING THE ROLE OF THE SUPREME COURT

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

9. The core proposal set out in the consultation paper is to replace the Convention rights as currently provided for by the 1998 Act, i.e. in practice the rights laid down by the European Convention on Human Rights ("the Convention") as expounded by the caselaw of the ECtHR. The proposed replacement for Convention rights is a new conception of "British rights". For convenience, we shall refer to this as "the core proposal".

10. ALBA observes that the Independent Human Rights Act Review ("the IHRAR") was not asked to consider the core proposal, or anything like it. Indeed, the IHRAR considered that its terms of reference excluded any consideration of the substance of Convention rights (IHRAR Report, Chapter 1, paragraph 5). Further, insofar as submissions were made to the IHRAR advocating the replacement of Convention rights with British rights, the IHRAR concluded that there was "no evidence to show any depth of support for [that] proposal", and that no detailed arguments were advanced in support of it (IHRAR Report, Chapter 2, paragraph 19).

11. The consultation paper envisages that the scope and content of British rights would be based on an originalist and literalist black-letter understanding of the rights laid down by the Convention. In particular, it envisages that, in order to understand the scope and content of British rights, the courts would be required to consider first, the text of the relevant British rights; secondly, any decisions of the domestic courts on the British right in question; thirdly, the *travaux préparatoires* of the Convention; and, fourthly, decisions of foreign and international courts (amongst which decisions of the ECtHR would have no greater primacy than any other decisions).

12. The fundamental difficulty with the core proposal is that it will require the courts, public authorities and individuals to grapple with what is in effect an entirely new species of rights, with virtually no positive guidance on how they are to go about ascertaining the scope and content of those rights. In this respect, the task facing the courts, public authorities and individuals will be very different to that which arises in relation to other, more conventional, pieces of legislation. The rights would be expressed at a very high level of principle, would be open-textured in nature, and would have to be applied across a multiplicity of contexts. In such circumstances, a textual approach to interpreting the rights is unlikely to provide any real assistance. Further, the exercise of interpreting the rights is unlikely to be assisted by resort to the legislative purpose. In particular, the intended scope and content of the rights will not have been elucidated by

the type of process that typically precedes the adoption of a bill of rights (such as, for example, a constitutional convention).

13. The proposal to encourage the courts to have regard to the *travaux* of the Convention does not ameliorate these problems. The IHRAR considered and rejected a suggestion that the Convention should be interpreted in its "original" form, and questioned whether it was even possible to identify what constitutes the Convention in an "original" form (IHRAR Report, Chapter 2, paragraph 154).

14. As a result, the courts, public authorities and individuals will in effect be required to start from scratch when determining the scope and content of British rights. It will likely take decades of litigation even to approach a point at which there would be equivalent certainty about the scope and content of British rights to that which currently exists in relation to Convention rights. Indeed, it is likely to be necessary to re-litigate points that are now considered to be settled in the context of Convention rights, as previous decisions on such points are likely to have been reached by taking into account the caselaw of the ECtHR in a way that is not envisaged by the proposal.

15. This situation is likely be exacerbated by the emphasis on taking into account decisions of foreign and international courts. In ALBA's view, the need to resort to such decisions is very likely to increase the complexity and costs of litigation, potentially giving rise to satellite disputes about how decisions from courts in other jurisdictions are to be understood and whether they are relevant. In particular, in order properly to understand a decision from another jurisdiction, it will be necessary to understand the background to the right addressed in the decision, as a ruling as to the scope and content of that right is likely to be influenced by the particular constitutional, social and cultural context in that other jurisdiction. ALBA endorses the conclusion of the IHRAR that this is likely to give rise to satellite litigation (IHRAR Report, Chapter 2, paragraph 175).

16. Accordingly, in ALBA's view, the core proposal is likely to result in a very high degree of uncertainty (uncertainty that would persist over a long period of time), an increase in litigation (including the re-litigation of points that are currently considered to be settled), and an increase in the resources that will be consumed by human rights litigation. ALBA endorses the conclusion reached by the IHRAR, to the effect that it "is not prudent" to replace Convention rights with some other species of rights, precisely because it would give rise to undesirable uncertainty (IHRAR Report, Chapter 2, paragraphs 16-17, 144, 148).

17. Further, in light of the fact that it is an explicit objective of the core proposal to move the domestic courts away from an interpretation of rights that follows the caselaw of the ECtHR, and to do so in a way that reflects a narrower conception of rights, it is inevitable that the core proposal will, over time, result in a divergence between the human rights caselaw of the domestic courts and that of the ECtHR. This is likely to have three main consequences. First, it is likely to result in an increase in the number

of applications to the ECtHR. Secondly, it is likely to result in an increase in the number of such applications that are successful (IHRAR Report, Chapter 1, paragraph 32; Chapter 2, paragraph 146). Thirdly, it is likely to diminish the domestic courts' ability to influence the development of the ECtHR's caselaw by way of judicial dialogue, because the domestic courts will no longer be adjudicating on the same species of rights as the ECtHR, and therefore they will no longer be "speaking the same language" as the ECtHR. This would imperil what the IHRAR found to be the "already strong" and "beneficial" judicial dialogue between the domestic courts and the ECtHR (IHRAR Report, Chapter 4, paragraph 4). As such, ALBA finds it difficult to reconcile the core proposal with the Government's stated commitment to the Convention.

18. The draft clauses set out after paragraph 4 of Appendix 2 appear to be the main mechanism by which the core proposal is to be implemented. However, neither of the draft clauses would give the courts, public authorities or individuals any real guidance on the scope or content of British rights. In particular, both clauses are primarily negative, prohibitory or permissive in nature, and they provide little by way of positive guidance (and virtually none that goes beyond conventional principles of statutory interpretation).

19. Bearing in mind the general observations above, ALBA's views on option 1 are as follows.
    (1) Subclauses (1) and (2) are negative in nature, in that they explain that the scope and content of a British right is not determined by any international treaty (including the Convention) or by any repealed enactment (including the 1998 Act). However, they give no positive guidance as to how the scope and content of a British right is to be determined.
    (2) Subclauses (4) and (8) appear to be an attempt to codify the conventional domestic rules of precedent. Other than providing an opportunity for satellite litigation, it is unlikely that they would (or are intended to) make any substantial difference to the way a court would approach the interpretative exercise. In particular, they do not give any guidance as to how a court that is not guided by a precedent should approach a determination as to the scope and content of a British right.
    (3) Subclause (5) merely restates the conventional approach to taking into account decisions of foreign and international courts where relevant, although the prominence that this subclause gives them is likely to mean that the complexities and costs referred to in paragraph 15 above will arise more frequently. Again, it gives no specific guidance as to how the scope and content of a British right is to be determined.
    (4) Subclause (6) is negative in nature and, as with subclauses (1) and (2), gives no positive guidance as to how the scope and content of a British right is to be determined.
    (5) Subclause (7) is concerned with procedure only.

20. ALBA's views on option 2 are as follows.

(1) Subclause (1) appears to be a variation on the attempt to codify the domestic rules of precedent. It does not give any positive guidance as to how the Supreme Court (or any other court, where there is no Supreme Court authority on point) should approach a determination as to the scope and content of a British right.

(2) Subclause (3) requires a focus on the text of the relevant British right. However, for the reasons set out in paragraph 12 above, a textual approach is unlikely to be of assistance when interpreting British rights.

(3) Insofar as subclause (3) refers to the *travaux préparatoires* of the Convention, it is permissive in nature, and as a result fails to explain in what circumstances and in what way the *travaux* should be taken into account. Such a provision is likely only to encourage parties to litigation (including public authorities) to trawl the *travaux* in the hope of finding something that might support their preferred interpretation of a British right, thereby increasing the costs of litigation.

(4) Subclauses (4) and (7) replicate subclauses (4) and (8) in option 1; the relevant comments on option 1 above apply equally.

(5) Clause (5) is permissive in nature, and again fails to explain in what circumstances and in what way the matters listed should be taken into account; in particular, it is left to the courts to determine whether a particular matter is "relevant". In addition, insofar as paragraph (b) is concerned, the comments on subclause (5) of option 1, above, apply equally.

(6) Clause (6) is negative in nature, and largely replicates subclause (6) in option 1; the relevant comments on option 1 above apply equally.

(7) Clause (8) is purely procedural in nature.

21. In ALBA's view, therefore, neither option 1 nor option 2 (nor a combination of the two) is likely to address the problems identified above. The fundamental problem is that there will be no positive guidance to the courts (or to public authorities or individuals) as to the intended scope or content of the British rights. As a result, the proper scope and content of British rights will have to be worked out, across a very wide range of contexts, through decisions of the courts. In ALBA's view, it is likely to require decades of litigation before a position could be reached where there is a level of certainty as to the scope and content of British rights which even approaches the current level of certainty in relation to Convention rights. Inevitably, such persistent uncertainty will adversely affect the confidence that public authorities, individuals and commercial organisations can have in their dealings, and the resultant litigation will consume large amounts of public sector and private sector resources, including the resources of the courts.

22. ALBA notes the suggestion that the caselaw of the ECtHR should be set as the outer limit beyond which the domestic courts could not go in their interpretation of British rights. ALBA has three observations on this suggestion. First, this suggestion appears to be entirely inconsistent with the proposal that the domestic courts should develop an

autonomous body of rights, without being over-reliant on the caselaw of the ECtHR. Secondly, the mischief at which this suggestion is directed is said to be the fact that public authorities cannot apply to the ECtHR if they consider that the domestic courts have adopted an over-expansive interpretation of a particular right. However, in the context of the core proposal, this is irrelevant: the ECtHR would not determine the scope or content of British rights, regardless of which party brings a case before it. Thirdly, from a practical point of view, this suggestion would require detailed consideration of ECtHR caselaw in many cases before the domestic courts, in order to ensure that British rights do not go beyond the ECtHR case law, thereby adding an additional layer of complexity to litigation.

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?

23. This section of the consultation appears to have two limbs:

    (1) The first limb envisages that the supremacy of the UK courts, specifically the UK Supreme Court, should be somehow strengthened (paragraphs 198-200).

    (2) The second asks for views on the proposal, rejected by the IHRAR Panel, that the jurisdiction of the UK courts be limited by codifying in statute the matters falling outside their institutional competence (paragraph 201).

24. In ALBA's view, pursuing either limb would be both unnecessary and potentially counterproductive.

(1) Strengthening the supremacy of the UK courts

25. The consultation proposal is based upon the premise that the supremacy of the UK Supreme Court has been indirectly undermined by the ECtHR because the latter's case law is treated by the courts as having presumptive authority which should be followed unless there are special circumstances.

26. This is a false premise. As the IHRAR Report notes, the 1998 Act was deliberately drafted to recognise that ECtHR case law is not binding on domestic courts and that domestic courts are not required to apply it (IHRAR Report, Chapter 2, paragraph 25). Indeed, the ECtHR does not consider itself bound by its own previous decisions (IHRAR Report, Chapter 2, paragraph 26). The aim of section 2 of the 1998 Act was to achieve "broad, not invariable, consistency" with ECtHR case law, to create consistency in the decision-making of the UK courts and to achieve the aim of "bringing Convention rights home" (IHRAR Report, Chapter 2, paragraphs 27- 28). A necessary corollary of this is that UK courts are and have always been entitled to depart from ECtHR decisions in accordance with their own judgement as to when it is appropriate to do so. It was recognised from the outset that on occasion that might result in the UK

violating its treaty obligations under the Convention (IHRAR Report, Chapter 2, paragraphs 29-30).

27. As the IHRAR Panel found, and the consultation document itself recognises (see paragraph 190), in recent cases the courts have shown a considerable willingness to depart from the ECtHR's case law. In particular, Lord Neuberger's judgment in *Manchester City Council v Pinnock* [2011] UKSC 6 rowed back on the earlier stricter approach that had been followed and criticised. Since then, the direction of travel has been towards greater willingness to depart from ECtHR case law in a variety of circumstances. The IHRAR Report documents this, explaining that the UK courts have "continued to develop a more confident and flexible approach" (see the examples given in Chapter 2, footnotes 81-102 and paragraphs 79-96).

28. One example of the circumstances in which the Supreme Court has consistently been willing to depart from ECtHR case law is where that case law conflicts with a fundamental principle of UK law or fails properly to consider UK law. It is therefore wrong to suggest that, unlike other countries such as Germany, the UK courts are powerless to review ECtHR case law against the UK Constitution (*cf* the consultation document, paragraph 199). There are numerous examples of the Supreme Court refusing to follow ECtHR jurisprudence, precisely because the ECtHR failed to take proper account of a fundamental principle of UK law. Equally, where UK principles are particularly well-developed, such as in the field of fair trial rights, the Supreme Court has shown particular willingness to depart from the ECtHR's position (see, for example, *R (Hallam) v Secretary of State for Justice* [2020] AC 279; see also the IHRAR Report, Chapter 2, paragraph 64 and the examples there given).

29. The confidence with which the Supreme Court has expressed and asserted its ultimate authority over the content of rights in recent cases (see, for example, *Commissioner for Police v DSD* [2019] AC 196) demonstrates that there is no need for a Bill of Rights to provide that the Supreme Court is "the ultimate judicial arbiter of our laws in the implementation of human rights" because there is currently no doubt that it is. Nor is there any need to bolster the "certainty and authority" of that position. The suggestion that the courts consider themselves effectively bound unless there are special circumstances underestimates and misdescribes the willingness of the courts to depart from ECtHR case law in a multitude of situations.

30. The fact that domestic courts may be better placed than international courts to determine our laws and to understand and give effect to the UK's history and law (consultation, paragraph 200) is properly reflected in the principle of the margin of appreciation and does not necessitate any clarification of the law of precedent.

31. Not only is there no case for reform in this regard, in ALBA's view there are very real downsides to pursuing it. The premise of the question is that the UK courts should depart more often than they currently do from ECtHR jurisprudence in pursuit of a

narrower conception of rights protection (in line with the core proposal). As already explained above (see paragraph 17), if the domestic courts diverge from the ECtHR's interpretation of Convention rights to follow new principles that reflect a narrower conception of rights protection (which is an explicit objective of the core proposal), that will have unwelcome effects that will undermine the broader aims of the reforms and the specific goal of strengthening the supremacy of the UK courts. In particular, it will result in a greater number of findings by the ECtHR that the UK, via its domestic courts including the Supreme Court, has provided inadequate rights protection. The most likely consequence of the proposed reform will thus be to give the ECtHR *more* opportunities for oversight of domestic courts than it currently has. Moreover, for the Supreme Court's judgments to be impugned by an international court in this way would damage, rather than improve, the Supreme Court's autonomy and supremacy and would threaten the high regard with which its judgments are held internationally. In other words, this proposed reform is likely to achieve precisely the opposite effect to that intended.

32. Moreover, seeking to legislate to make clear that the Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights is bound to result in greater uncertainty and a proliferation of litigation. It is notable that no concrete proposals are advanced under this question. It is unclear whether it is intended to be addressed by the proposed reforms to section 2, to which ALBA has responded above. As already explained, ALBA considers that those reforms achieve nothing other than adding further complexity and uncertainty into the law and providing opportunities for new and additional points to be taken in litigation. In particular, the attempt in both options to codify the current domestic rules of precedent and the status of foreign and international courts seem to ALBA to make no substantive changes to the current position (see the comments above on subclauses (4), (5) and (8) of option 1, and subclause (1), (4), (5) and (7) of option 2).

(2) Limiting jurisdiction by codifying institutional competence

33. The consultation invites views on the proposal, rejected by the IHRAR, that the matters that fall outside the institutional competence of the UK courts should be codified in statute.

34. ALBA agrees with the IHRAR that this option should not be pursued.

35. First, there is no problem that requires fixing. As the IHRAR notes, the Supreme Court has taken a "careful and cautious approach" to this issue; in particular the Supreme Court considers with "care" the "institutional competence in the margin of discretion, in the particular sphere of questions raising social, moral and ethical questions" (IHRAR Report, Chapter 3, paragraph 32(b), referring to *R(Nicklinson) v Ministry of Justice* [2015] AC 657).

36. Second, attempting to codify the existing position would inevitably generate disagreement over the interpretation of the new statutory provisions, resulting in more litigation and greater uncertainty (IHRAR Report, Chapter 3, paragraph 64). It would be very difficult to formulate principles at a sufficient level of specificity that they would provide useful guidance in any given case, so their true meaning would have to be elucidated in future cases, making life more difficult, rather than easier, for the courts required to apply them and litigants seeking to predict the outcome of litigation.

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

37. The right to a jury trial, in specified circumstances, is one of the foundational rights of the law of England and Wales. ALBA strongly supports the right to a jury trial, and endorses its continuation. However, in ALBA's view, recognition of this right in any Bill of Rights will not serve any practical purpose. The ordinary law already specifies the circumstances in which the right to a jury trial arises. The proposal appears to be to the effect that an individual has a right to a trial by jury where the ordinary law already provides that he or she has a right to a trial by jury, which would appear to add nothing. If the proposal is intended to mean something other than this, then its meaning is unclear. In circumstances where the ECtHR has confirmed that jury trials are consistent with the right to a fair trial protected by Article 6, it is unclear why the right to a jury trial needs to be recognised in the Bill of Rights. The risk is that this kind of legislation could give rise to one of the very problems that the Government deprecates, namely, individuals relying on it to advance unmeritorious arguments.

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?

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

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

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

38. The proposals set out in paragraphs 204 to 217 of the consultation paper appear to be intended to effect substantive changes to how the law balances the right to freedom of expression against other rights, changes that appear likely materially to impact upon

the development of the common law in this area. The consultation paper provides little, if any, analysis of why such changes are said to be required, and there is no analysis of their potential impact across the very wide range of contexts to which they would apply.

39. ALBA considers that, particularly bearing in mind the paucity of analysis in the consultation paper, this consultation is an inappropriate mechanism for addressing substantive issues relating to freedom of expression. Any legislative intervention in this field would have potentially far-reaching consequences, especially where it is likely to affect the common law. Such interventions should be undertaken only with considerable care. ALBA regrets to say that it sees no evidence in the consultation paper that such care is being exercised. The 14 paragraphs devoted to this issue are little more than an aside to the consultation paper.

40. In ALBA's view, if any proposals on freedom of expression are to be progressed, they should be properly formulated, evidenced and scrutinised, for example through the type of exercise that would be carried out by the Law Commission. Absent such a process, ALBA does not consider that it would be possible or prudent to respond to questions 4, 5, 6 and 7, and it opposes any changes.

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

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

41. ALBA observes that the IHRAR was not asked to consider a permission stage for human rights claims, and the Government therefore lacks the benefit of consideration of this topic by an independent, expert panel. ALBA has a number of concerns about this proposal, not least the fact that there does not appear to be any principled justification as to why a permission requirement should be imposed on human rights claims against the state when it is not imposed on any other type of claim, including other types of claims that can only be brought against the state (such as, for example, a claim for breach of statutory duty). ALBA also has a number of practical concerns about this proposal.

42. First, the Government's proposal is that a claimant must demonstrate they have suffered a "significant disadvantage" before a human rights claim can be heard in court. Such a threshold would be directed at the harm a claimant has suffered rather than the merits of the claim itself. Accordingly, it appears to be contemplated that unmeritorious cases could pass the permission stage, provided that what is alleged amounts to a significant

disadvantage, whereas meritorious ones would not pass if there was no significant disadvantage. A threshold based on "significant disadvantage" is therefore unlikely to have the effect of filtering out unmeritorious cases.

43. The addition of a second "overriding public importance" limb is unlikely to make a significant difference, as an unmeritorious claim which has no real prospect of success may raise points which are of public importance, and vice-versa.

44. Second, it is not clear how a permission stage would actually work in practice, either in the context of judicial review claims or outside that context. Claims for judicial review (which may of course include human rights claims) may only be brought where the court has first granted the claimant permission to bring such a claim. Permission will be granted only where the claim satisfies an "arguability" threshold. This works well because judicial review claims are "front loaded", in that the claim form must be accompanied by a detailed statement of the claimant's grounds for bringing the claim, a statement of facts relied on, and any written evidence in support of the claim. The defendant public authority has the opportunity to file an acknowledgement of service setting out a short summary of its grounds for contesting the claim (which enables the defendant to raise any 'knock out' points as to the merits of the claim) and is also under a duty of candour, requiring it to place any relevant information before the court at the permission stage. This means that the Administrative Court is well-placed to reach a view as to the arguability of any claim for judicial review at the permission stage.

45. It is not clear what permission test would apply to a human rights claim brought in the context of a judicial review claim and, indeed, whether different tests would apply to different parts of a claim. Particular difficulties are likely to arise in cases where there is no clear-cut dividing line between the human rights elements of a claim and other elements. In ALBA's view, the imposition of a discrete permission test for human rights grounds in claims for judicial review is likely to give rise to confusion and uncertainty.

46. Further, no thought appears to have been given to how a permission stage would work in civil claims where there is not the same front-loading as in judicial review, and where there is no duty of candour on the defendant. In particular, it is not clear how the court is meant to assess whether the claim satisfies the threshold for permission in circumstances where a civil claim is commenced with only a claim form and particulars of claim. Further, the proposal appears to be envisaged that all civil claims will somehow be vetted at an early stage to ascertain whether the permission requirement applies to all or part of each claim. It is entirely unclear how such a process is to work in practice, in particular, it is not clear how it is to be determined whether all or part of a claim is to be subject to the permission requirement, by whom and with what resource.

47. It is also unclear whether defendant public authorities will be entitled or expected to participate in any determination of whether permission should be granted and, if so, what the mechanism for doing so in a civil claim would be. In ALBA's view, it seems

inevitable that a permission requirement will impose additional burdens on the courts and likely that it will impose on defendant public authorities an additional burden that no other defendant in a civil claim currently faces. ALBA observes that the consultation paper does not explain how these additional burdens are to be resourced.

48. In addition, there does not appear to have been any consideration given to cases which rely on human rights in other contexts, such as defences to civil or criminal proceedings or in appeals to courts and tribunals. It is not clear whether it is anticipated that, if a defendant relies on human rights to defend a claim or criminal charge, such a defence will be required to face a permission stage. Further, it is not clear whether, if an appellant raises a human rights point on appeal, the appellant would be required to satisfy a permission threshold even in circumstances where there is otherwise an unfettered right of appeal. ALBA considers that it would be entirely inappropriate to impose a permission requirement in such cases, as it would in effect make it more difficult for an individual to rely on his or her British rights to defend himself or herself against proceedings brought by the state than to rely upon other more conventional allegations of unlawfulness.

49. Finally, if the Government proceeds with its proposals, what constitutes 'significant disadvantage' or 'overriding public importance' will require to be worked out on a case-by-case basis. For example, it is not clear whether these tests are required to be context-specific, or to what extent an infringement of rights could be regarded as a significant disadvantage by itself. This is likely to result in uncertainty and satellite litigation.

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

50. The Government has proposed amending section 8(3) of the 1998 Act to require applicants to pursue any other claims they may have first, either so that rights-based claims would not generally be available where other claims can be made, or in advance of any rights argument being considered, to allow the courts to decide whether the private law claims already provide adequate redress.

51. ALBA queries how, in our adversarial system of adjudication on pleaded claims, a claimant can in effect be required to advance a claim that he or she might have specifically chosen not to advance, or how that would be fair to or in the interests of the defendant. Even putting this objection to one side, there is no explanation of at what stage, and how, the assessment of whether a claim might have an equivalent "ordinary" claim is to be carried out, and on what basis, and by whom. What would the threshold be for determining that another claim exists? What evidence would be taken into account? Will it be left to defendants to take the point, contrary to their own interests, that another claim exists, or will the courts be expected protectively to decide what claims should be advanced? If the latter, how is this to be adequately resourced?

52. Further, there is no explanation of how this would work in practice. For example, it is not clear whether, in a case where there was considered to be an "ordinary" claim available, the trial of that claim would have to take place first, followed by a separate trial of the human rights claim, or whether there would have to be a single, longer trial which dealt with each category of claim consecutively. Further, ALBA observes that no thought appears to have been given to the obvious procedural and evidential difficulties that are likely to arise if, for example, witnesses are to be required to give evidence in relation to the same factual matters twice in successive trials (or successive parts of trials).

53. ALBA's concern is that, if implemented, this proposal is likely to increase rather than decrease litigation and is likely to generate satellite litigation about the extent to which any other ordinary claim exists and should be brought first. It is also likely to have significant resource implications both for courts and for public authorities.

SECTION II. RESTORING A SHARPER FOCUS ON PROTECTING FUNDAMENTAL RIGHTS

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.

54. It is not clear what exactly the consultation paper is referring to when it refers to "positive obligations", or how it envisaged that they could be defined with any precision in any legislation, particularly in light of the fact that the distinction between positive and negative obligations can be elusive (see e.g. *R (T) v Chief Constable of Greater Manchester* [2015] AC 49, para 26 *per* Lord Wilson).

55. In ALBA's view, this highlights the obvious practical problem to which question 11 gives rise, i.e. it is likely to be very difficult to legislate in a way that differentiates positive obligations (whatever they may be) from other elements of rights. ALBA considers that it is likely that any attempt to do so would lead to satellite litigation over where the boundary lies.

56. Further, carving out positive obligations from the scope of British rights will, inevitably, lead to a divergence from the ECtHR case law; indeed, this appears to be the intended outcome. Again, this is likely to result in an increase in the number of applications to the ECtHR, an increase in the number of such applications that are successful, and a diminution in the domestic courts' ability to influence the development of the ECtHR's caselaw by way of judicial dialogue.

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

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

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

Option 1

57. ALBA agrees with the consultation document and the IHRAR that there is no case for repealing section 3.

Option 2

58. ALBA notes that the IHRAR recommended that there be no change to the substantive content of section 3 (IHRAR Report, Chapter 5, paragraphs 180 and following), because "there is no substantive case that UK Courts have misused section 3" (paragraph 182). In contrast, the consultation envisages drastically altering section 3 in a manner that would greatly weaken the current interpretative obligation in two respects.

59. First, the new interpretive obligation would only arise where there is ambiguity in the legislation being interpreted. ALBA notes that this option was rejected by the majority of the IHRAR Panel, not least because it would "reduce the current level of Convention rights protection provided for by the HRA" and "runs the risk of upsetting the current devolution settlement, and the Northern Ireland Peace Agreement" (IHRAR Report, Chapter 5, paragraph 138-143). That section of the report also discussed wider and narrower options for this proposal (the narrower option being that the new approach would only apply to legislation enacted prior to the 1998 Act coming into force) and considered that even the narrower option ought not to be pursued.

60. Second, the requirement that 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" represents a drastic departure, not just from section 3, but from the normal principles of statutory interpretation that apply outside the 1998 Act.

61. When engaging in normal statutory interpretation (i.e. outside the context of the 1998 Act), the courts must determine Parliament's intention, which they do from a range of sources. They must always begin with the words used in the statute in question but may turn to other matters to inform the exercise further. This includes the words used in related legislation (such as the enabling Act for a piece of delegated legislation) and

extrinsic materials, such as Explanatory Notes or historical reports. Purposive interpretation is now the norm, but in construing the legislation compatibly with its purpose the court is simply seeking to ensure that Parliament's intention in enacting the legislation is not thwarted, for example by a technicality. The court may also apply a range of principles and presumptions, such as the principle of legality.

62. Either version of Option 2 would appear to limit the courts to considering "the ordinary reading of the words used in the legislation" and the "overall purpose of the legislation", which would dramatically alter the approach to statutory interpretation that has been the subject of decades, if not centuries, of case law. It leaves unclear the status of other sources usually deployed to determine Parliament's intention, including the wording of related legislation. It is entirely unclear what the "overall purpose" of the legislation means, how it is to be determined or, once identified whether it influences the interpretation in a manner different to the current approach taken to purposive interpretation (which, as set out above, is permissive rather than restrictive).

63. It also leaves uncertain the application of settled principles and presumptions of statutory interpretation, most notably the principle of legality. That principle (explained by Lord Hoffmann in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115) applies across all legislation and ensures that fundamental rights may only be overridden where there is clear Parliamentary authorisation. The courts presume that "even the most general words were intended to be subject to the basic rights of the individual" unless Parliament has language which clearly demonstrates that it was fully aware of the rights implications of its enactment. Under option 2, the rights enshrined in the Bill of Rights would seemingly have *less* protection than other fundamental rights currently have pursuant to the principle of legality.

64. It is also not clear to ALBA what the difference is between options 2A and 2B. Both suffer from the problems identified above and would be bound to generate huge volumes of litigation to settle their meaning and scope of application.

65. It is notable that the IHRAR was not asked to consider a similar option (the option it considered and rejected at paragraph 130 of Chapter 5 of its report was markedly different, in that it would have provided that UK Courts give effect to Convention rights in so far as that is consistent with "the intention of the Parliament that enacted the legislation subject to interpretation", which the IHRAR considered simply to be akin to repealing section 3 and allowing ordinary principles of statutory construction to stand in its stead).

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

66. The IHRAR Panel recommended that Parliament's role in scrutinising court judgments that deploy section 3 be improved, particularly via the Joint Committee on Human Rights.

67. ALBA agrees with the IHRAR that there appears to be a perception, not reflected in reality, that section 3 has operated so as to weaken the role of Parliament and that addressing this false perception is important and might well obviate the need for further reform of section 3.

68. ALBA agrees with the IHRAR that one way that this might be done would be to enhance the role of the Joint Committee on Human Rights, predominantly by expanding its terms of reference such that it is entrusted with scrutinising section 3 judgments (though of course its terms of reference are ultimately a question for Parliament). The precise mechanisms by which the JCHR might engage in such scrutiny are not matters on which ALBA is able to comment.

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

69. ALBA welcomes this proposal, provided the database is publicly available. ALBA considers that such a database might assist to address any damaging perceptions as to the operation of section 3 as well as assisting Parliament and the JCHR to keep the use of section 3 under review (IHRAR Report, Chapter 5, paragraph 7 and 189-192).

70. ALBA also agrees with the IHRAR that it would be most useful to maintain a database recording both the use of section 3 and the use of section 4, as the two go hand in hand (IHRAR Report, Chapter 5, paragraph 187).

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?

71. It appears to be implicit in this proposal that a declaration of incompatibility would be the *only* remedy available where a courts hold that a public authority has acted in breach of rights by making secondary legislation or that secondary legislation is otherwise incompatible with rights, and that courts would lose their current ability to quash secondary legislation for incompatibility with Convention rights. If this is correct, then ALBA strongly opposes this proposal. Its effect would be to immunise one category of unlawful executive action from quashing, thereby enabling rights-incompatible secondary legislation to be left on the statute book. It would also reduce remedial flexibility, which may be contrary to the Government's own interests, given that there may be some cases where the Government would prefer quashing as a remedy.

72. It is also not clear how this proposal would interact with section 6, under which the body that made the secondary legislation would have acted unlawfully in so doing.

73. ALBA notes that the IHRAR was not asked to consider this proposal, and recommended no changes to section 4. In particular, it noted that "there is little to support the proposition that a change in approach to section 4 would or should be adopted" (IHRAR Report, Chapter 5, paragraph 99) and that section 4 represented "a discretion of last resort, and properly so" (IHRAR Report, Chapter 5, paragraph 109).

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.

74. ALBA does not object in principle to the courts having greater remedial flexibility, but it is concerned about the prescriptive nature of the new s 29A that clause 1 of the Judicial Review and Courts Bill would introduce into the Senior Courts Act 1981. In particular, ALBA is concerned about various aspects of the factors to which the courts would be required to have regard and to the presumption in favour of making a suspended or prospective-only quashing order in certain circumstances.

75. In any event, ALBA does not understand why it is suggested that express provision is required to extend the provision for suspended and prospective-only quashing orders to a British Bill of Rights. It is ALBA's understanding that the Judicial Review and Courts Bill will (if enacted) amend the Senior Courts Act 1981 to specify the types of quashing orders that may be granted, and in what circumstances, on a claim for judicial review. Given that secondary legislation can only be quashed by way of a quashing order sought in an application for judicial review, any proceedings seeking to challenge secondary legislation under the Bill of Rights would have to be brought by way of judicial review, and the amended provisions of the Senior Courts Act 1981 (if enacted) would apply in any event.

76. It may be that the reason for this proposal is that the Bill of Rights is intended (like the 1998 Act) to have UK-wide effect, whereas the amendments to be introduced by the Judicial Review and Courts Bill only apply to England and Wales. Given that ALBA only represents public law barristers acting in England and Wales, it expresses no view as to whether these provisions should be extended to the rest of the UK, save to note that caution would be required before interfering with the current remedial jurisdiction of the courts in Scotland and Northern Ireland (of which, ALBA notes, there is no discussion in the consultation paper).

SECTION III. PREVENTING THE INCREMENTAL EXPANSION OF RIGHTS WITHOUT PROPER DEMOCRATIC OVERSIGHT

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

(a) similar to that contained in section 10 of the Human Rights Act;

(b) similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;

(c) limited only to remedial orders made under the 'urgent' procedure; or

(d) abolished altogether?

Please provide reasons.

77. ALBA endorses option (b) above, for the reasons given in the IHRAR Report. ALBA is not aware of any particular difficulties that have arisen in connection with s 10 in practice, but considers that given the constitutional status of the 1998 Act (and the likely similar status of any replacement legislation) it is in inappropriate for there to be a "Henry VIII" power available to amend it. As to amendments to other legislation, if (contrary to ALBA's position), there were to be an expanded role for declarations of incompatibility and reduced scope for the courts to quash incompatible secondary legislation, it is likely to be particularly important that there are appropriate mechanisms available to remedy the incompatibilities identified in such declarations, including speedy mechanisms where appropriate.

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.

78. ALBA is unaware of any evidence that indicates that section 19 of the 1998 Act has given rise to any difficulties in practice, and it notes that the consultation paper does not suggest that there have been any such difficulties. The only reason put forward by the consultation paper for proposing any change to section 19 is that "[t]here is a debate as to whether section 19 strikes the right constitutional balance between government and Parliament". However, ALBA is not aware of any such debate and notes that the consultation paper does not explain how section 19 could sensibly be regarded as somehow interfering with the constitutional balance between the government and Parliament. On the contrary, ALBA endorses the conclusion of the IHRAR that "[s]ection 19 of the HRA forms an integral part of the overall scheme for giving effect to Convention rights in UK domestic law" (IHRAR Report, Chapter 5, paragraph 29).

79. ALBA understands that, in practical terms, section 19 imposes an important discipline on the government, in that sponsoring Departments are required expressly to address the compatibility of their legislation with Convention rights, and the Law Officers exercise their independent judgement on the issue. ALBA opposes any changes to section 19 which would undermine this express consideration by government of the compatibility of proposed legislation.

80. Further, section 19 creates an expectation that, should the relevant legislation subsequently be found to be incompatible with rights, the government will act to remedy that incompatibility (IHRAR, Chapter 5, paragraph 32). ALBA opposes any changes to section 19 which would undermine this expectation.

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?

81. ALBA considers that any changes to the current structure of rights protection will have a substantive impact on the various devolution settlements, all of which embed a requirement not to act incompatibly with Convention rights. In this respect, ALBA endorses the conclusion of the IHRAR that the core proposal "could have a significant impact on devolution and the Northern Ireland Peace Agreement" (IHRAR Report, Chapter 2, paragraph 23). Accordingly, considerable caution will be required before attempting to make any changes to the 1998 Act which would impact on the devolution framework. ALBA is disappointed to note that there is no evidence in the consultation paper that the Government has sought to evaluate the potential implications of its proposals for the various devolution settlements.

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.

82. ALBA notes that the consultation paper does not propose that there should be any change in the substantive scope of what constitutes public authority. As such, it is not clear what is sought to be achieved by codification of the concept, and ALBA notes that the consultation paper does not advance any suggestions as to how codification could be achieved.

83. ALBA considers that codification would not produce any substantive benefits, but would introduce unnecessary complexity, giving rise to uncertainty, litigation and the risk of undesirable unintended consequences.

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.

84. These proposals again envisage a substantial weakening of current human rights protection via amendments which the IHRAR was not asked to review. Indeed, in several instances the IHRAR's reasoning was premised on the continued operation of

section 6 in its current form (see, for example, IHRAR Report, Chapter 5, paragraphs 132, 169).

85. The gist of the proposals appear to be to the effect that, even if rights-compatible interpretation of legislation is possible, public authorities are to be immunised from the consequences of acting in accordance a rights-incompatible interpretation of that legislation. In ALBA's view, this would significantly undermine the protection afforded to individuals and companies by British rights. It is also a recipe for uncertainty and litigation, as it appears to contemplate a situation where legislation can have a different meaning and effect when a public authority acts on it from the meaning and effect it has when it is interpreted by a court.

86. In ALBA's view, Option 1 is particularly problematic and is bound to give rise to uncertainty and a consequent proliferation of litigation.

87. First, it is not obvious to ALBA whether it is intended to replace both sections 6(2)(a) and (b) and whether it would apply only where the public authority is exercising a *discretion* under the legislation in question, or whether the intention is that they would also apply where the legislation imposes a *duty* to act.

88. Second, the meaning of the phrase "clearly giving effect to primary legislation" is opaque: in particular it is unclear whether (and, if so, how) it is intended to be different to the current formulation of section 6(2)(b) (which provides a defence where the authority was "acting so as to give effect to or enforce" provisions of, or made under, primary legislation which cannot be read as compatible).

89. The formulation suggested seems to ALBA to give rise to numerous issues that would have to be settled through litigation. For example, if the public authority is no longer to read or give effect to the legislation compatibly with human rights law where that can be done, it is entirely unclear what meaning of the legislation the public authority *is* supposed to be giving effect to. Presumably it must be the meaning as elucidated in any court judgments considering the provision, but that would include any judgments under section 3 (whether as amended or in its current form). This risks confusion. It also suggests that the public authority would have to take different decisions before and after a section 3 judgment is issued by a court (or even despite any section 3 judgment). It is far more coherent for the scope of the exemption to mirror the duty under section 3, as it does in the current section 6(2).

90. It seems to ALBA both that it would be wholly undesirable to introduce these complex questions into this area of law and that it would not achieve the stated objectives. The consultation suggests that this reform would "recognise that if Parliament has passed clear laws leading to incompatibility with the Convention rights, then Parliament rather than the public authority should bear the responsibility for addressing any declaration of incompatibility by the courts" (consultation document, paragraph 274). It is not clear

to ALBA what is meant by this, and it is not clear how the proposed reforms would achieve this. Moreover, if the hope is to insulate public bodies from challenges, the proposal seems to ALBA instead to *increase* the likelihood that the acts of public authorities will be challenged in the courts because of the uncertainty that would be generated by the reform. At the very least, a prudent public authority acting under this new subsection would want to obtain legal advice every time this point arises, which would place a heavy burden upon decision-makers.

91. Option 2 seems to ALBA more legally coherent than Option 1, but ALBA does not agree that section 3 needs to be amended in any of the ways discussed (as to which, see above).

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.

92. ALBA notes that the consultation paper proposes that any issues in relation to extraterritorial jurisdiction should be addressed on the international plane. As such, ALBA does not express a view on this matter.

93. However, ALBA notes that the discussion of this issue in the consultation paper includes a revealing acceptance of one of the problems inherent in the core proposal. In paragraph 280 of the consultation paper, it is accepted that, if the extraterritorial scope of any Bill of Rights were to be restricted, other legislative changes would be required in order to ensure that the UK continued to meet its obligations under the Convention. This appears to be a recognition that, insofar as the proposals would result in a lower level of rights protection than provided for by the ECtHR's case law, it would result in the UK failing to meet its obligations under the Convention. It is unclear why this logic has not been applied to the other proposals in the consultation paper.

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.

94. ALBA is not aware of any problems to which the application of the principle of proportionality has given rise in practice. The four stage proportionality test is well-established.

95. In any event, ALBA is concerned that options 1 and 2 below paragraph 10 of Appendix 2 fail to recognise the legal basis on which most decisions of public authorities are taken. The vast majority of public authorities' decisions involve the exercise of a power, usually involving the exercise of a discretion. In such cases, the relevant legislation affords the public authority a choice between potentially a very wide range of decisions; it does not prescribe the choice that the public authority must make. In such cases, it is entirely unclear how one would identify what is "Parliament's view of what is necessary in a democratic society", because generally Parliament does not express any view as to what is necessary in a particular case. On the contrary, Parliament leaves it to the relevant public authority to take a view as to what is necessary or appropriate in individual cases. Further, it adds nothing to say that "the legislation is necessary in a democratic society" or that that "Parliament was acting in the public interest in passing the legislation", because that does not help answer the question of whether a particular exercise of discretion under the relevant legislation is necessary in a democratic society.

96. Accordingly, ALBA considers that neither option 1 nor option 2 is likely to have any real practical impact on the proportionality exercise in cases involving challenges to particular decisions. As such, ALBA considers that they would merely introduce unnecessary complexity, giving rise to uncertainty, litigation and the risk of undesirable unintended consequences.

97. It appears to be implicit in subclause (2) of option 1 that Parliament might express a view as to what is necessary in a democratic society other than by way of the enactment of legislation. The consultation paper does not explain what is envisaged in this respect, but ALBA observes that it would appear to be inconsistent with the important principle that the will of Parliament finds expression solely in the legislation which it enacts (see *R (SC) v Secretary of State for Work and Pensions* [2021] 3 WLR 428, paragraph 167 *per* Lord Reed). In ALBA's view, such a provision is likely to give rise to satellite litigation as to whether Parliament has in fact expressed a view and/or as to the weight that should be attributed to it, potentially raising difficult issues under Article 9 of the Bill of Rights 1689.

98. Finally, ALBA is unclear as to any basis on which it could be appropriate to characterise subordinate legislation which has been approved by only one House of Parliament as somehow representing the view of Parliament as a whole. It plainly would not be; it would (at best) represent the view of only one House. In ALBA's view, the proposed approach would in relevant cases create an inherent inconsistency between subclauses (2) and (3) in each of options 1 and 2, an inconsistency which would create uncertainty and which would require to be worked out by litigation.

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.

99. There are generally two categories of award made by Courts to applicants who have suffered a breach of their human rights: compensation by way of *restitutio in integrum* for quantifiable loss suffered by that individual, and damages for the mere fact of the breach of a right.

100. The consultation paper does not explain how the proposed approach could apply to the former category of award, or indeed why it would be appropriate to deduct from damages in such cases, but not in (for example) ordinary negligence or breach of statutory duty claims.

101. In any event, whether or not this proposed approach is intended to apply to all or only some categories of award, ALBA has concerns about how this would be implemented in practice. How would the various factors be defined? How would they be evidenced? For example, if the public authority sought a deduction of damages on the basis that it was "trying" to give effect to the express provisions or clear purpose of the legislation, it would need to adduce evidence of the intentions and beliefs of the persons acting on its behalf. This is likely to increase the costs, complexity and length of human rights litigation.

102. Furthermore, introducing a new approach to damages would in and of itself lead to a lengthy period of legal uncertainty and the need for argument about quantum in cases where issues are currently settled.

SECTION IV. EMPHASISING THE ROLE OF RESPONSIBILITIES WITHIN THE HUMAN RIGHTS FRAMEWORK

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

103. The text of the consultation paper suggests that a claimant's conduct will be relevant in deciding whether or not there has been a breach, not just at the remedies stage, and that it will be relevant to all remedies, not just damages. If so, consideration of the claimant or applicant's past conduct is going to have to be considered in many cases at the liability stage. This is likely to increase the complexity, and costs, of human rights litigation.

104. In any event, this proposal creates obvious definitional problems which are likely to lead to uncertainty. What are an individual's "relevant responsibilities" or "relevant past conduct"? Are these intended to refer to an individual's legal responsibilities, moral responsibilities, or something else? If the former, what legal responsibilities are being referred to? Conventionally the law does not impose duties on individuals. If the latter, then this risks the courts being required to make precisely the type of moral and ethical judgements that the Government wants the courts to avoid.

105. The example of a person being "wanted for a crime" (as opposed to having been convicted of, or even charged with, a crime) as an example of someone not having discharged their responsibilities illustrates the problem here. This seems to involve a very broad conception of "relevant conduct".

106. It is also unclear how this proposal is intended to work in practice. There will presumably have to be evidence about an individual's "responsibilities" and/or "past conduct". This is likely to increase the cost, complexity and length of human rights litigation.

SECTION V. FACILITATING CONSIDERATION OF AND DIALOGUE WITH STRASBOURG, WHILE GUARANTEEING PARLIAMENT ITS PROPER ROLE

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.

107. This proposal addresses the relationship between the government and Parliament, and therefore ALBA does not express any view on it, save to note that subclause (1) of the clause set out after paragraph 11 of Appendix 2 merely restates the current position (as appears to be recognised by the use of the verb "affirms"), and therefore ALBA questions its utility. However, as noted above, ALBA is concerned that the core proposal is generally likely to increase the number of adverse judgments against the United Kingdom and to inhibit judicial dialogue between the domestic courts and the

ECtHR, thereby generally making it more difficult for the United Kingdom to respond to adverse judgments.

IMPACTS

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.

108. As set out above, ALBA considers that the proposals will not provide greater legal certainty; on the contrary, ALBA considers that the proposals are likely to result in a high degree of uncertainty. In particular, ALBA considers that the proposals are likely to give rise to the following practical impacts:

(1) a destabilisation of the currently well-established and well-understood framework for the protection of rights in the UK and a high degree of uncertainty for public authorities, individuals and organisations (including commercial organisations);

(2) an increase in human rights litigation involving public authorities, something that is likely to continue for the foreseeable future;

(3) increased complexity in human rights litigation, resulting in increased legal costs for all parties, including public authorities, and increased demands on the courts;

(4) an increase in the volume of applications made by individuals to the European Court of Human Rights ("the ECtHR"), to which the Government will bear the responsibility for responding (regardless of the identity of the relevant public authority in domestic law), and an increase in the volume of applications that are successful; and

(5) a diminution in the ability of the UK courts to influence the development of the caselaw of the ECtHR by way of judicial dialogue.

ALBA
6 March 2022