EMPLOYMENT
LAWYERS
ASSOCIATION

PO Box 1609
High Wycombe
HP11 9NG
TELEPHONE 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

ELA L&P Committee: Human Rights Act Reform: A Modern Bill of Rights

Response from the Employment Lawyers Association

8 March 2022

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INTRODUCTION

1. The Employment Lawyers Association ("ELA") is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA's role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.

2. A Working Party Co-chaired by Shantha David and Anna Dannreuther was set up by the Legislative and Policy Committee of ELA to respond to the consultation on the Human Rights Act Reform: A Modern Bill of Rights ("**HRAR**" or "**the Consultation**"). Members of the Working Party are listed at the end of this paper.

3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

EXECUTIVE SUMMARY

4. Where the human rights of a UK citizen have been violated, the Human Rights Act 1998 ("**HRA**") has enabled UK citizens to obtain a remedy directly from UK, rather than having to go to the European Court of Human Rights ("**ECtHR**" or "**the Strasbourg Court**"). The UK judiciary is tasked with adjudicating such breaches consistently with Convention Rights and the HRA. In this role, it has not only taken account of Strasbourg jurisprudence, but influenced the development of the ECtHR's jurisprudence (see ELA's response to the Independent Human Rights Act Review ("**IHRAR**") consultation). Judicial independence is the cornerstone of the UK judiciary, and it is the role of the judiciary in a common law system to interpret legislation "without fear or favour" and "according to the law" as set out in the judicial oath[1].

5. The Consultation says that UK courts have created a "*democratic deficit*" by shifting the "*law-making power away from Parliament towards the courts*".[2] ELA is concerned that this view does not accurately reflect the well-reasoned decisions made by UK courts. Instead, it focusses on a few cases that have caught the public's attention. On balance, the proposed amendments seek to narrow the effectiveness of the Convention rights by limiting or removing redress against breaches of such rights. In addition, the separate proposals to limit the ability to judicially review decisions of the state, if enacted, will in effect work together to limit access to justice.

6. The UK has a long and proud tradition of access to justice and respect for the rule of law. The Lord Chancellor when taking office swears to respect the rule of law. Lord Reed in his judgment in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] A.C. 869 ("***Unison**")* reminds that "the constitutional right of access to the courts is inherent in the rule of law".[3] Parliament, "who are chosen by the people of this country and are accountable to them", remains supreme but "exists primarily in order to make laws for society in this country". Lord Reed is clear about the purpose of the UK courts. He says: "Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced". He goes on to say:
"In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade".

[1] https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/oaths/
[2] The Consultation, at [177].
[3] See paragraph [66], available at <https://www.bailii.org/uk/cases/UKSC/2017/51.html>

7. With that in mind, ELA makes two fundamental statements: firstly, that no legislation should limit access to justice; and secondly that any new legislation should not lack legal certainty, as this would lead to a lack of clarity and result in unnecessary and costly satellite litigation.

8. In ELA's view, the HRA is working as it should in a modern democratic society. By its nature, that society is complex and evolving, and good governance requires balancing multiple competing interests. The HRA, and the public bodies and courts acting under it, are well attuned to doing so. The Government's stated aims of the Consultation, for example to ensure the HRA commands public confidence and engenders legal certainty, are, in our view already being met by the robust application of the HRA by judges and public authorities.

9. While ELA endorses the IHRAR's proposal of civic and constitutional education in schools, to ensure sufficient public understanding of constitutional laws such as the HRA, it considers that there is no good, evidence-based case for change of the HRA, and that some of the proposals in the Consultation risk severely limiting fundamental common law rights, such as the right of access to justice, as well as undermining legal certainty, which will not serve the interests of our modern democratic society.

INTRODUCTION

10. ELA welcomes the UK Government's commitment to retaining Convention rights. ELA notes the political declaration made on 22 November 2018, where the EU and the UK stated that their future relationship should be based on "shared EU and UK values" and that this included 'the UK's commitment to respect "the framework of the European Convention on Human Rights ("**ECHR**").[4]

11. ELA welcomes the recommendation from the IHRAR for a greater focus on civic and constitutional education on the HRA, not least so that it is understood that human rights "belong to everyone" and "human rights abuses can affect everyone"; but also, so that the negative view of the HRA "viewed through the prism of a few high-profile cases"[5] can be re-focused and the functions of the HRA properly understood.

[4] Political declaration made on 22 November 2018, see https://www.consilium.europa.eu/media/37059/20181121-cover-political-declaration.pdf.
[5] IHRAR at [46], available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040526/ihrar-executive-summary.pdf.

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12. As a body of solicitors and barristers, ELA makes clear its unequivocal support for the rule of law and access to justice, which is clarified where UK judges make decisions, nationally, under the provisions of the ECHR and the principles enshrined under the HRA. Convention rights are embedded in judicial decision-making as was laid bare in *Unison*, where the United Kingdom Supreme Court ("**UKSC**") referred to the "*principle of effective judicial protection as a general principle of EU law, stemming from the constitutional traditions common to the member states, which has been enshrined in articles 6 and 13 of the European Convention on Human Rights...*".

13. ELA is satisfied that it is squarely within the role of the judiciary to determine the *lawfulness* of policy decisions when asked to do so. It is for UK judges to adjudicate on breaches of the HRA or Convention rights. The Lord Chief Justice, Lord Thomas, in his lecture on "Law Reform Now in the 21st Century Britain explained the role of the judiciary in this way:

> *"If there is a gap or uncertainty in legislative provision or the provision has to be interpreted in a context for which it was never intended, the judiciary must nonetheless answer legal questions that arise in the disputes brought before the courts. Such legal questions may or may not arise in a politicised or political context, but, regardless, the judicial task is the same: deciding disputes without fear or favour and according to law, as the judicial oath demands"*

14. ELA has chosen to respond to only those questions in this consultation which are relevant to the practice areas of its members. In so doing, ELA reviews previous court decisions and focusses on the interpretation of Convention rights in the field of employment and industrial relations law.

15. Where there are overlapping or repeated requests for evidence and comments in the terms of reference and/or the questions, ELA has cross-referenced responses to avoid repetition.

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.

16. ELA's members consider that both options for reform contained in the Government's consultation paper are unnecessary, unclear, and potentially damaging. They would result in uncertainty in the law. They would generate unnecessary litigation. They would not achieve the Government's stated aims.

The Current Position

17. The current position in relation to s.2 of the HRA is clear. **First**, domestic courts and tribunals are bound to follow the domestic rules of precedent.[6] A domestic court or tribunal, when faced with a decision to make in relation to the HRA or the ECHR, must follow and apply any relevant domestic precedent.

18. **Second**, domestic courts and tribunals are not bound to follow and apply the judgments of the ECtHR, even where there is a clear and consistent approach adopted in multiple ECtHR decisions.[7] They can and do decline to follow ECtHR judgments where there is a good reason to do so.[8] This then leads to a "*valuable dialogue*" between the ECtHR and domestic courts, which gives domestic courts a role in the development of ECtHR case-law – and, in practice, has led to the ECtHR altering its approach.[9]

19. **Third**, the UK Supreme Court **("UKSC")** is the ultimate judicial arbiter of domestic law in the implementation of human rights.[10] This conclusion follows from points one and two in the preceding two paragraphs. In practice, the UKSC often follows the judgments and decisions of the ECtHR. But it is not required to do so. The ECtHR is the ultimate judicial authority on the interpretation of the ECHR in international law[11] – and the UK has undertaken to abide by any judgments of the ECtHR[12] – but the UKSC is not required to follow that interpretation. This reflects the careful balance struck between the ECtHR and the UKSC.

[6] *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465, [43]-[44].
[7] *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2022] 2 WLR 133, [101]; *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66; [2015] AC 1344, [21]; *R v Abdurahman* [2019] EWCA Crim 2239; [2020] 4 WLR 6, [110].
[8] *Abdurahman*, [114] and [120]; *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2; [2020] AC 279, [84]-[85]; *R v Horncastle* [2006] UKSC 14; [2010] 2 AC 373, [11];
[9] See *Horncastle*, in particular at [11], and then *Al-Khawaja v United Kingdom* (2012) 54 EHRR 23 807.
[10] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312, [44].
[11] *Animal Defenders*, [44].
[12] Article 46, ECHR. Recently confirmed by the UK Government in the 2012 Brighton Declaration at [3].

20. **Fourth**, domestic courts are not able to develop the law in relation to the ECHR further than they can be confident that the ECtHR would go.[13] They can develop the law on the basis of the principles established in the existing law on the ECHR.[14] This allows decisions to be made by domestic courts and tribunals without having to wait for a decision to be made on the specific issue at hand by the ECtHR.

21. **Fifth**, domestic courts and tribunals are encouraged, when faced with an issue within the ambit of the ECHR, to look at domestic law first – and, if domestic law fails to live up to the ECHR standards, then to turn to the ECHR.[15] A notable example in the employment sphere of domestic courts deciding a rights-based case under the common law (as opposed to the ECHR) is *R (Unison) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869.

22. **Sixth**, domestic courts and tribunals can, and do, have regard to decisions and judgments reached in other common law (and non-common law) jurisdictions when deciding questions in connection with human rights.[16]The ECtHR does similarly.[17]

23. These propositions of law appear to be in line with the Government's stated objectives: strengthening the common law tradition, reducing reliance on Strasbourg case law, and reinforcing the supremacy of the UKSC.[18]

24. ELA's members consider that these propositions of law are clear. Employment law practitioners and judges are aware of these propositions and apply them in practice.

25. Therefore, there does not appear to be any need to amend s.2 of the HRA.

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[13] *R (Elan-Cane)*, [63].
[14] *R (Elan-Cane)*, [63].
[15] *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115, [54]-[58]; *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455, [46], [133].
[16] *R (Hallam) v Secretary of State for Justice* [2019] UKSC; [2020] AC 279, [28] and [34]; *R (Horncastle)*, [41]-[46], [57]-[62].
[17] *Al-Khawaja*, [63]-[87].
[18] *Human Rights Act Reform: A Modern Bill of Rights (A consultation to reform the Human Rights Act 1998)*, Ministry of Justice (December 2021) (**"the Consultation"**), p.58, [189].

The Independent Human Rights Act Review – Recommended Reform of S.2

26. The IHRAR recommended amending s.2(1) of the HRA to state:[19]

> ***2 Interpretation of Convention rights.***
> *(1) A court or tribunal determining a question which has arisen in connection with a Convention right* ***must first apply relevant UK statutory provisions, common law and UK case law generally and then, if proceeding to consider the interpretation of a Convention right,*** *must take into account any:*
>
> *(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,*
> *(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,*
> *(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or*
> *(d) decision of the Committee of Ministers taken under Article 46 of the Convention,*
>
> *whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.* (emphasis added to show the proposed additions by the IHRAR)

27. As the IHRAR recognised, this would place on statutory footing what is already the case under the common law.[20] But it may, in the words of the IHRAR, "*be attractive in terms of public ownership and acceptability of the HRA*".[21] ELA's members do not consider that this change will have any significant adverse impacts. And, so, ELA's members are ambivalent about this proposed change.

28. However, it should be noted that neither of the Government's proposed options for reform includes this change proposed by the IHRAR.

[19] IHRAR, Chapter 2, p.93, [199].
[20] IHRAR, Chapter 2, p.89, [185].
[21] IHRAR, Chapter 2, p.93, [198].

The Government's Proposed Reforms

Option 1 – Clauses (1) and (2)

29. Clauses (1) and (2) in Option 1 provide:

> *(1) The meaning of a right or freedom in this Bill of Rights is not determined by the meaning of a right or freedom in any international treaty or repealed enactment.*
> *(2) In particular, it is not necessary to construe a right or freedom in this Bill of Rights as having the same meaning as a corresponding right or freedom in:*
>
> *(a) the European Convention on Human Rights, or*
> *(b) the Human Rights Act 1998.*

30. These clauses are designed to make clear "*that the meaning of a right in the Bill of Rights is not necessarily the same as the meaning of a corresponding right in the European Convention on Human Rights*".[22]

31. This desire is presumably as a result of the Government's aims of strengthening the common law tradition, reducing reliance on Strasbourg case law, and reinforcing the supremacy of the UKSC.[23] However, as outlined above,[24] these aims are already fulfilled under the current law. So, this proposed amendment is unnecessary.

32. This proposed amendment would risk having detrimental consequences. It would leave the law in an uncertain state.[25] If the meaning of a right or freedom in the Bill of Rights is not the same as the meaning of that right under the ECHR, then it is unclear what that meaning will be. Importantly, it is also unclear how judges would be expected to determine what the meaning will be. This would result in uncertainty for employment law practitioners and their clients. It would likely generate unnecessary litigation.

33. The current position strikes a careful balance. The meaning of a right in the ECHR is, in principle, uniform across the State Parties to the ECHR – regardless of

[22] The Consultation, p.95, [3].
[23] The Consultation, p.58, [189].
[24] See paragraphs 1-7 above.
[25] See the analysis of the Supreme Court in *R (Elan-Cane)*, [75], [87], [92].

whether that meaning is determined by a domestic court or the ECtHR.[26] However, it is recognised that, depending on the circumstances of the case and the rights and freedoms engaged, State Parties enjoy a margin of appreciation in how they apply and implement the ECHR.[27] Furthermore, domestic courts can, and do, decline to follow decisions of the ECtHR in certain circumstances, thereby allowing helpful dialogue between the senior judiciary in the UK and the ECtHR.[28] Finally, domestic courts and tribunals, when faced with a human rights issue, are encouraged to look to domestic law first for an answer – and if domestic law is deficient, then to look to the jurisprudence on the ECHR.[29] There are rights and freedoms in domestic law, which do not have the same meaning as similar rights or freedoms in the ECHR.[30]

34. If this amendment were introduced, then there is a risk that domestic law on the ECHR (or the Bill of Rights) would become "*unmoored*" from the case law of the ECtHR.[31] In other words, there could become "*a significant gap*" between UK and ECtHR rights protection (beyond the carefully reasoned and measured gap that can exist under the current law on a case-by-case basis).[32] In particular, the reasoning of domestic courts could cease to be "*based on the principles established in the case law of the* [ECtHR]", and instead be based on a "*distinct domestic interpretation of* [ECHR] *rights*".[33] This would be a dramatic change from the current position. It would likely have two consequences.

35. **First**, the proposed amendments would likely lead to an increase in cases being litigated before the ECtHR, as opposed to solely in domestic courts.[34] This is because: (i) individuals have the right to petition the ECtHR directly – and would retain that right under the proposed amendments;[35] (ii) under the current law, litigants can be fairly sure that, if they lose in the domestic courts, they would also lose at the ECtHR – since the meaning of the relevant rights and freedoms will, in principle, be the same before domestic courts and the ECtHR; (iii) if the proposed amendments were introduced, unsuccessful litigants would have an incentive to litigate before the ECtHR since the ECtHR may reach a different

[26] *R (Elan-Cane)*, [87].
[27] Brighton Declaration (2012), [10].
[28] See paragraph 2 above.
[29] See paragraph 5 above.
[30] For example, see *Unison*, which was a rights-based case decided on the basis of the common law, not the ECHR.
[31] *R (Elan-Cane)*, [92].
[32] The IHRAR stated at p.79, [141]: "*Any reform of section 2 ought to: guide Courts to take account of ECtHR case law effectively so that a significant gap does not arise between UK and ECtHR rights protection…*".
[33] Contrary to the current position: *R (Elan-Cane)*, [101].
[34] IHRAR, p.78, [140].
[35] Article 34, ECHR.

decision than the domestic courts. As Lord Reed stated in the UKSC's Response to a Call for Evidence produced by the IHRAR:[36]

> *If the HRA were to be amended in a way which reduced the ability of domestic courts to satisfy the* [ECHR] *rights to the standard required by the ECtHR, that would be liable to result in an increase in the flow of cases from the UK to the ECtHR, and an increase in the number of complaints which were upheld there.*

36. Similarly:[37]

> *Should there be a strong case for recommending reform, care will be needed to limit the scope for the development of a significant gap between UK and ECtHR rights protection. Any such gap would undermine the HRA's aims and lead to an increasing number of applications, including successful applications, brought against the UK before the ECtHR.*

37. **Second**, the proposed amendments would reduce the effectiveness of the dialogue between domestic courts and the ECtHR. As Lord Reed stated in the UKSC's Response to a Call for Evidence produced by the IHRAR:[38]

> *The dialogue between domestic courts and the ECtHR… is most likely to be preserved and strengthened if domestic courts are seen by the ECtHR to be seeking to apply Convention rights in the same way as they would be applied by the ECtHR, with due allowance for local conditions. If domestic courts and the ECtHR are not speaking the same language in terms of the application of Convention rights, dialogue between them is unlikely to be effective.*

38. Similarly:

> *The high regard in which UK Courts are held in the ECtHR flows … from the careful consideration and analysis of the principles set out in ECtHR case law found in UK judgments.*[39]

[36] At [5(f)].
[37] IHRAR, p.78, [140].
[38] At [14].
[39] IHRAR, p.73, [122].

> *… the* [ECtHR] *has been particularly respectful of decisions emanating from courts in the United Kingdom … because of the universally accepted high quality of the analysis of the* [ECHR] *issues in those judgments.*[40]

39. Thus, ELA's members oppose the introduction of Clauses (1) and (2) of Option 1 into s.2 of the HRA.

Option 1 – Clause (4); Option 2 – Clause (4)

40. Clause (4) in Option 1 provides:

> *(4) The court or tribunal must follow a previous judgment or other decision given in relation to this Bill of Rights by:*
>
> *(a) that court or tribunal, or*
> *(b) any other United Kingdom court or tribunal,*
>
> *if the judgment or other decision is a precedent in relation to the question being decided.*

41. Clause (4) in Option 2 provides similarly, with the words "*Bill of Rights*" replaced by "*Act*".

42. This is the position under the current law.[41] So, there is no need to make this amendment. However, the Government may consider this amendment to have a benefit in terms of public ownership and acceptability. ELA's members do not foresee any major problems resulting from this proposed amendment, and so are ambivalent towards it.

Option 1 – Clause (5); Option 2 – Clause (5)

43. Clause (5) in Option 1 provides:

> *(5) The court or tribunal may have regard to a judgment or other decision of a judicial authority made under:*

[40] Sir Nicolas Bratza, past President of the ECtHR, Submission to the Call for Evidence produced by the IHRAR, [25].
[41] See paragraph 1 above.

(a) the law of a country or territory outside the United Kingdom, or
(b) international law,

so far as the court or tribunal considers that it is relevant to the question being decided.

44. This is the position under the current law.[42] So, there is no need to make this amendment. However, the Government may consider this amendment to have a benefit in terms of public ownership and acceptability. ELA's members do not foresee any major problems resulting from this proposed amendment, and so are ambivalent towards it (subject to the proviso contained in paragraph 33 below).

45. Clause (5) in Option 2 provides:

(5) Other matters to which the court or tribunal may have regard, so far as it considers them relevant to the question being decided, include:

(a) the development of any similar right or freedom under the common law in the United Kingdom;
(b) a judgment or other decision of a judicial authority under the law of a common law jurisdiction outside the United Kingdom in connection with a similar right or freedom;
(c) a judgment of the European Court of Human Rights.

46. This clause is less clear than Clause 5 of Option 1. ELA's members therefore consider Clause 5 of Option 1 to be preferable (if an amendment is deemed necessary). In particular, it is unclear what "*the development of any similar right or freedom under the common law in the United Kingdom*" refers to. The intention of this phrase may be to encourage domestic courts and tribunals to look to the domestic law first, and then, second, to look to the law on the ECHR. If so, then the IHRAR's proposed amendment is clearer and would be preferable.[43]

47. Clause 5(b) of Option 2 is limited to common law jurisdictions. It is unclear whether the intention is to prohibit domestic courts and tribunals from having regard to judgments and decisions of judicial authorities in non-common law jurisdictions. If so, then that would be a change in the law without any apparent rationale. Domestic courts and tribunals would lose a potential resource. This change might also lead to difficulties where a non-common law country is party to the ECHR – and reference is made to a judgment of the ECtHR with respect

[42] See paragraph 6 above.
[43] See paragraphs 10-12 above.

to that country without the ability to refer to the domestic decisions which led to that ECtHR decision.

48. The proviso to the above paragraphs is that ELA's members consider it to be important that s.2 of the HRA retains its current wording which states, *inter alia*, that courts or tribunals "*must take into account*" judgments and decisions of the ECtHR. This is addressed fully in the next section. However, it should be noted here that, if this provision were reduced to a "*may*", then the proposed amendments contained in Clause 5 of Option 1 and 2 would result in uncertainty. It would be uncertain whether domestic courts and tribunals should afford the same weight to decisions and judgments of the ECtHR as to decisions and judgments of judicial authorities in other jurisdictions. This uncertainty would likely result in unnecessary litigation.[44]

49. Clause 5(c) of Option 2 is discussed in the next sub-section.

Option 1 – Clause (6); Option 2 – Clause (6); Option 2 – Clause 5(c)

50. Clause (6) in Option 1 provides:

> *(6) The court or tribunal is not required to follow or apply any judgment or other decision of the European Court of Human Rights.*

51. Clause (5)(c) in Option 2 provides:

> *(5) Other matters to which the court or tribunal may have regard, so far as it considers them relevant to the question being decided, include—*
>
> *…*
>
> *(c) a judgment of the European Court of Human Rights.*

52. Clause (6) in Option 2 provides:

> *(6) The court or tribunal is not required by any enactment, rule of construction, or other law to follow or apply any judgment or other decision of the European Court of Human Rights.*

53. ELA's members make three points in respect of these proposed amendments. The **first** point is that domestic courts and tribunals, under the current law, are

[44] Richard Clayton QC, *The Government's New Proposals for the Human Rights Act Part 2: An Assessment,* UK Const. L. Blog (13 January 2022).

not required to follow or apply any judgment or decision of the ECtHR.[45] They are required to take such judgments and decisions "*into account*".[46] As outlined above, domestic courts have, on multiple occasions, declined to follow or apply judgments or decisions of the ECtHR.[47] Thus, these proposed amendments are unnecessary – and would not provide any substantive benefits to the legal position.[48]

54. **Second**, these proposed amendments, whilst not providing any substantive benefits to the legal position, would likely result in uncertainty and a growth in litigation. There would be uncertainty as to what the status of a decision or judgment of the ECtHR is, and in what circumstances that decision or judgment should be followed.[49] There would be unnecessary litigation on that question.[50] The careful balance struck (and judicial dialogue) between the UKSC and the ECtHR could be upset – with the ECtHR paying less heed to the judgments of the UKSC.[51]

55. **Third**, the removal of the current provision in s.2 of the HRA that provides that courts or tribunals "*must take into account*", *inter alia*, judgments and decisions of the ECtHR would be detrimental. In essence, the "*must*" would become a "*may*". This would be a dramatic change in the law. The current legal position, which is the result of numerous Supreme Court and House of Lords judgments,[52] would become outdated. There would inevitably be litigation to clarify the position. And there would be uncertainty until the position was clarified.

56. Furthermore, there is a risk that domestic law on the ECHR would become "*unmoored*" from the case law of the ECtHR. This would likely result in the two consequences outlined in paragraphs 19-23 above occurring: (i) an increase in cases from the UK being litigated before the ECtHR; and (ii) a reduction in the effectiveness of the dialogue between domestic courts and the ECtHR.

[45] See paragraph 2 above.
[46] S.2, HRA.
[47] See paragraph 2 above.
[48] IHRAR, p.85, [170].
[49] IHRAR, p.85, [170]; Richard Clayton QC, *The Government's New Proposals for the Human Rights Act Part 2: An Assessment,* UK Const. L. Blog (13 January 2022).
[50] Richard Clayton QC, *The Government's New Proposals for the Human Rights Act Part 2: An Assessment,* UK Const. L. Blog (13 January 2022).
[51] IHRAR, p.85, [170].
[52] See, for example, *R (Elan-Cane)* and *D v commissioner of Police of the Metropolis* [2018] UKSC 11; [2019] AC 196 – and the cases referred to therein.

57. Thus, ELA's members are opposed to these proposed amendments to s.2 of the HRA.

58. If the Government deems it necessary to provide explicitly in the HRA that domestic courts and tribunals are not required to follow or apply any judgment or decision of the ECtHR, then ELA's members consider that the negative consequences flowing from that amendment would be reduced if the obligation on domestic courts and tribunals to "*take into account*", amongst other things, judgments and decisions of the ECtHR were retained.

Option 2 – Clause (1)

59. Clause (1) in Option 2 provides:

> *(1) The Supreme Court is the judicial authority with ultimate responsibility for the interpretation of the rights and freedoms in this Bill of Rights.*

60. ELA's members consider this to be an unnecessary and potentially unhelpful amendment to s.2 of the HRA. This is for three reasons.

61. **First**, this proposed amendment is unnecessary because, under domestic law, the UKSC is the ultimate judicial arbiter of the domestic law on human rights.[53] This follows from two propositions that hold under the current law: (i) domestic courts and tribunals are bound to follow the rules of precedent – and so, if there is a UKSC judgment on an issue, domestic courts and tribunals must follow and apply it; and (ii) domestic courts and tribunals are not bound to follow and apply the judgments of the ECtHR.

62. **Second**, the ECtHR is the ultimate judicial authority on the interpretation of the ECHR in international law[54] – and the UK has undertaken to abide by any judgments of the ECtHR.[55] Thus, the proposed amendment potentially conflicts with the position in international law.

63. **Third**, whilst the UKSC is not required to follow an interpretation of the ECHR expounded by the ECtHR (and it has not done so on multiple occasions), in practice, it often does so. This reflects the reality that the ECHR is an international instrument and therefore: (i) it should have a uniform interpretation[56]; and (ii) its

[53] See paragraph 3 above.
[54] *Animal Defenders*, [44].
[55] Article 46, ECHR. Recently confirmed by the UK Government in the 2012 Brighton Declaration at [3].
[56] *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, [20].

effectiveness depends on the political acceptance by members states of the principles it lays down.[57] It also reflects the reality that the ECtHR has the benefit of seeing cases relating to the ECHR from across the member states of the Council of Europe, whereas the UKSC only sees cases relevant to the UK – thus, the ECHR case law is particularly helpful for the UKSC where there is no previous domestic authority on an issue. And it reflects the fact that, under s.6 of the HRA, it is unlawful for a public authority (including a court or tribunal) to act in a way which is incompatible with a ECHR right.[58]

64. The proposed amendment potentially renders the current position – outlined in the preceding paragraph – uncertain. Thus, it would likely engender litigation.

Option 2 – Clause (3)

65. Clause (3) in Option 2 provides:

> *(3) The court or tribunal must have particular regard to the text of the right or freedom, and in construing the text may have regard to the preparatory work of the European Convention on Human Rights.*

66. ELA's members consider this to be an unnecessary and potentially unhelpful amendment to s.2 of the HRA. This is for three reasons.

67. **First**, domestic courts and tribunals (and the ECtHR) can (and do) have regard to the preparatory work of the ECHR when deciding questions in connection with the ECHR.[59] Thus, it is unnecessary to expressly provide for this power in s.2 of the HRA.

68. **Second**, the use of the word "*particular*" implies that courts and tribunals must pay more attention to the text, and the preparatory work, of the ECHR than they otherwise would have done. But it is unclear to what extent this is the case. It is unclear whether the text, and the preparatory work, of the ECHR should take precedence over ECtHR decisions and judgments. This would leave the law in a state of uncertainty, and it would likely generate unnecessary litigation.

[57] *Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465, [28].
[58] *Kay*, [28].
[59] *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWCA Civ 1010; [2021] 1 WLR 472, [98]; *Navalnyy v Russia* Application No. 29580/15; (2019) 68 EHRR 25, [174].

69. **Third**, this proposed amendment may be said to be "*out of step with the fundamental principle that the* [ECHR] *is a living instrument*".[60] This may then lead to a "*significant gap*" emerging between UK and ECtHR rights protection, with all the consequential problems that this would cause.[61] It should also be noted that most of ELA's members consider the "*living instrument*" principle to be a useful, and necessary, part of ECHR jurisprudence. It makes sense to interpret the ECHR "*in the light of present-day conditions*",[62] as opposed to those conditions that existed in 1953 when the ECHR came into force. In any case, as the IHRAR stated: "*… it is fanciful to suppose that, even if desirable to do so, the living tree element of the* [ECHR] *could be stripped out, leaving the* [ECHR] *to be interpreted in its 'original' form (whatever that would now be taken to mean)*".[63]

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?

70. ELA's members consider that this proposed clarification would be unnecessary and potentially unhelpful. This is for three reasons.

71. **First**, this proposed clarification is unnecessary because, under domestic law, the UKSC is the ultimate judicial arbiter of the domestic law on human rights.[64] This follows from two propositions that hold under the current law: (i) domestic courts and tribunals are bound to follow the domestic rules of precedent – and so, if there is a UKSC judgment on an issue, domestic courts and tribunals must follow and apply it; and (ii) domestic courts and tribunals are not bound to follow and apply the judgments of the ECtHR.

72. **Second**, the ECtHR is the ultimate judicial authority on the interpretation of the ECHR in international law[65] – and the UK has undertaken to abide by any

[60] Richard Clayton QC, *The Government's New Proposals for the Human Rights Act Part 2: An Assessment,* UK Const. L. Blog (13 January 2022).
[61] See paragraphs 19-23 above.
[62] *Tyrer v UK* (1979-80) 1 EHRR 1, [31].
[63] At p.81, [154].
[64] See paragraph 3 above.
[65] *Animal Defenders*, [44].

judgments of the ECtHR.[66] Thus, the proposed clarification potentially conflicts with the position in international law.

73. **Third**, whilst the UKSC is not required to follow an interpretation of the ECHR expounded by the ECtHR (and it has not done so on multiple occasions), in practice, it often does so. This reflects the reality that the ECHR is an international instrument and therefore: (i) it should have a uniform interpretation[67]; and (ii) its effectiveness depends on the political acceptance by members states of the principles it lays down.[68] It also reflects the reality that the ECtHR has the benefit of seeing cases relating to the ECHR from across Europe, whereas the UKSC only sees cases relevant to the UK – thus, the ECHR case law is particularly helpful for the UKSC where there is no previous domestic authority on an issue. And it reflects the fact that, under s.6 of the HRA, it is unlawful for a public authority (including a court or tribunal) to act in a way which is incompatible with an ECHR right.[69]

74. The proposed clarification potentially renders the current position – outlined in the preceding paragraph – uncertain. Thus, it would likely engender litigation.

QUESTION 4

HOW COULD THE CURRENT POSITION UNDER SECTION 12 OF THE HUMAN RIGHTS ACT 1998 BE AMENDED TO LIMIT INTERFERENCE WITH THE PRESS AND OTHER PUBLISHERS THROUGH INJUNCTIONS OR OTHER RELIEF?

75. The work of ELA is focussed primarily on employment law and cases involving s.12 of the HRA do not normally fall within our area of expertise. From the wording of the question and commentary provided in the Consultation[70], it appears the focus of this question is about publications by journalists. As such, ELA do not see there are likely to be many circumstances where this issue is likely to overlap with our expertise.

76. However, ELA wishes to raise one relevant employment law case on the scope of s.12 of the HRA that arose in *Thames Cleaning etc v United Voices of the World* [2016] EWHC 1310 (QB), [2016] I.R.L.R. 695, a case which involved demonstrators organised by union officials in support of an industrial dispute.

[66] Article 46, ECHR. Recently confirmed by the UK Government in the 2012 Brighton Declaration at [3].
[67] *R (Ullah)* [20].
[68] *Kay*, [28].
[69] *Kay*, [28].
[70] The Consultation, at [205]-[217].

77. The employer sought an interim injunction to regulate the picketing. It was held that a higher standard of proof must be applied because some of the actions the Claimant wanted to restrain involved speech or other forms of expression. That standard of proof was that the claimants would 'probably succeed at trial' which is derived from the threshold in s.12(3) of the HRA (as considered by Lord Nicholls in *Cream Holdings Limited v Banerjee* [2004] UKHL 44) rather than the usual American Cyanamid principles, because the attendees were exercising their right to freedom of expression.

78. This shows how the HRA protects freedom of expression. ELA considers that the HRA approach where Courts use greater scrutiny of an alleged interference with rights that are protected by the ECHR, is an important example to show the way courts routinely approach employment law cases which engage Convention-based rights. As such, while a number of potential scenarios still stand to be determined fully to understand the scope of s.12 HRA 1998 and Articles 10 and 11 ECHR in employment law, we see little need for the current law to be changed. In fact, *Thames Cleaning* helpfully illustrates the versatility in which UK employment law already works to address and manage claims about Convention-based 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 ATTACHED TO ARTICLE 10? WHAT GUIDANCE COULD WE DERIVE FROM OTHER INTERNATIONAL MODELS FOR PROTECTING FREEDOM OF SPEECH?

79. The qualified right under Article 10 does not operate in a vacuum and some important employment law considerations would be affected by any changes to the current scope of Article 10. In particular, ELA wish to highlight issues relating to matters of equality, unfair dismissal, whistleblowing and trade unions.

Equality Matters

80. The right to freedom of expression will likely be engaged in cases which involve disputes on the freedom to hold a belief and freedom to manifest a belief. Employment law in this area is relatively settled after the tests placed upon the definition of 'philosophical belief' in *Grainger plc v Nicholson* [2009] UKEAT/09/0311, [2010] 2 All E.R. 253. A further case in point would be the Court of Appeal's recent decision in *Page v Lord Chancellor* [2021] EWCA Civ 254,

[2021] ICR 912, in which it was held that the reasons for alleged victimisation was separable from the 'protected act' of expressing views on the rights of same-sex couples to adopt children.

Unfair dismissal

81. A number of cases have considered the position for workers who were disciplined or dismissed for exercising their right to freedom of expression outside work. For example, see *Ezelin v France* (1992) 14 EHRR 362 where the ECtHR held that the imposition of a disciplinary reprimand imposed on a barrister for participation in a public demonstration, without any consequences on his ability to practise, could not be justified by the legitimate aim of the prevention of disorder. More recently, the ECtHR's judgment in *Herbai v Hungary* (2020) 70 EHRR 35 held that the dismissal of a journalist who contributed to a knowledge-sharing website on human resources policies had infringed his right to freedom of expression under Article 10. The Hungarian judicial authorities, in dismissing his claims, had failed to balance his right to freedom of expression against his employer's right to protect its legitimate business interests.

Whistleblowing

82. ELA recognises the vital importance that freedom of expression has in ensuring greater transparency and accountability, preventing corruption and protecting the public interest. English courts have long recognised in the common law the fundamental importance of the right to hold and express opinions, and this right has influenced various decisions where judges have been tasked with considering competing rights or public interest considerations. In ELA's view the approach used by courts has been measured and appropriate.

83. In the case of *Attorney General v Observer* [1990] 1 AC 109, [1988] 3 WLR 776, Lord Keith observed, "I can see no inconsistency between English law on this subject and article 10 of the European Convention on Human Rights. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world" at [283].

84. Freedom of expression plays an important role within employment law, particularly concerning the rights of whistleblowers. The right to both receive and impart information has important implications for workers who wish to raise public interest concerns. By its very nature, whistleblowing involves individuals exercising their rights of freedom of expression through the act of speaking up or sharing information of wrongdoing, risk, or malpractice. In exercising this

fundamental right, whistleblowers play a crucial role in highlighting misconduct, upholding democracy, and safeguarding the public interest.

85. However, there is widespread acknowledgement that the Public Interest Disclosure Act 1998 (PIDA) sometimes fails those it was intended to protect. This can be put down to the fact that PIDA is struggling to reflect the changing landscape of work in the UK. Such gaps in the legislation have occasionally risked justice not being properly served where whistleblowers who have done a public service in raising their concerns face retaliation in their workplace for doing so, but do not come under the scope of statutory protection.

86. This has led to situations where the courts have been left to read in or interpret the law in such a way as to ensure that the legislation functions to protect those that raise concerns in the public interest. The statutory rights of whistleblowers can be enhanced by freedom of expression which provides a vital additional layer of protection.

87. For example, in the case of *Gilham v Ministry of Justice* [2019] UKSC 44, [2019] 1 WLR 5905, the Supreme Court read down s.230(3) of Employment Rights Act 1996 in a manner to include judicial officeholders (as opposed to just employees and workers) and read words into s.47B of the ERA, to extend whistleblowing protection to judicial officeholders. In doing so, the court cured the complainant's breaches of unlawful interference with her rights under Article 10 and Article 14.

88. While the Consultation states that the Supreme Court read the term 'worker' "much more widely than its natural meaning to include judicial office holders",[71] and considers that the courts under the HRA "falsify the meaning of other Acts of Parliament",[72] in ELA's view this case demonstrates the positive application of freedom of expression in enhancing the rights of whistleblowers, maintaining justice, and ensuring that individuals are supported and encouraged to speak out about wrongdoing. This signals the importance of whistleblowing as an exercise of this fundamental human right.

89. However, as a qualified right, the court must carefully balance freedom of expression against competing rights and legal obligations.

90. Whistleblowing inevitably involves speaking up about concerns or sharing information which may be, in some respect, controversial, and where organisations or individuals may have an interest in interfering with the disclosure. For instance, it may involve revealing confidential information, it may impact on an organisation or individual's reputation, or it may raise data

[71] The Consultation, at [119].
[72] The Consultation at [122], citing Francis Bennion.

protection issues. Information that could impact on national security is also protected by other laws such as the Official Secrets Act which makes it a criminal offence to disclose some sensitive information.

91. It is a difficult balancing act to determine whether the public interest in the information and/or the fundamental right to hold and express opinions outweighs any potentially legitimate interference with those rights.

Instances where the Strasbourg Court may not have struck the right balance in whistleblowing matters

92. In the case of *Halet v Luxembourg* App no. 21884/18 (ECHR, 11 May 2021), the Strasbourg Court found that the courts in Luxembourg did not violate Article 10 by convicting a whistleblower for disclosing confidential tax documents to a journalist during the Luxleaks scandal.

93. In its decision in *Heinisch v Germany* 28274/08 [2011] ECHR 1175, the ECtHR ruled that the 'employee's right to freedom of expression by signalling illegal conduct or wrongdoing on the part of her employer [must be weighed] against the latter's right to protection of its reputation and commercial interests' [64].

94. In *Halet*, the Strasbourg Court applies this by suggesting that where information has been disclosed, there needs to be a proportionate balance between the whistleblower's freedom of expression and any harm to the employer. The Court accepted that the information disclosed by Halet was in the public interest but because it was not "vital, new, and previously unknown" (due to previous disclosures made by Antoine Deltour), the Court determined that the criminal prosecution did not constitute a breach of his rights to freedom of expression. (This case has been referred to the Grand Chamber of the ECtHR to be heard in February 2022).

95. Some employment law professionals argue that this case sets a dangerous precedent and weakens the protection of whistleblowers, highlighting the Strasbourg Court's ambivalence between public interest disclosures and employers' interest in secrecy. The position also seems to be sharply in contrast with how the Court of Appeal formulated its tests on how a worker's reasonable belief in the wrongdoing ought to apply in *Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] ICR 1026. Indeed, it requires would-be whistleblowers independently to evaluate the contribution of their disclosures to the public debate – a near impossible task. There should be no first-come-first-served whistleblowing protection under the law.

96. This case demonstrates that clear guidance is needed for courts when they are balancing freedom of expression against other competing rights and offences to serve the interests of justice properly and fairly.

How the government might confine the scope for interference with Article 10 to limited and exceptional circumstances

97. The government proposes that the Bill of Rights provide more general guidance on how to balance the right to freedom of expression with competing rights or wider public interest considerations.

98. When weighing the rights of an individual to exercise their rights of freedom of expression against any competing civil or criminal claim lodged against them, the public Interest should be paramount to avoid overly restrictive measures.

99. The UK courts have experience of developing principles which define the public interest. After the implementation of the Enterprise and Regulatory Reform Act (ERRA) in 2013 (section 17 ERRA), the Public Interest Disclosure Act 1998 was amended to include a public interest requirement (section 43B(1) Employment Rights Act 1996). No guidance or additional information was given to courts as to how the public interest requirement was to be applied, leading to confusion for would-be whistleblowers and legal professionals alike.

100. The Court of Appeal was forced to set out its own guidance for determining the public interest and established relevant factors for future courts to consider when determining the public interest of a protected disclosure in *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed* [2017] EWCA Civ 979, [2018] 1 All E.R. 947.

101. The government may look to international examples such as the Tshwane Principles on National Security and the Right to Information[73]. The Principles were influenced by both national and international law and practices to establish concrete guidance for those engaged in drafting, revising and implementing relevant laws and policies "on the appropriate limits of secrecy, protections for whistleblowing, the parameters of the public's right to information about human rights violations and other issues."

102. Principle 43 outlines criteria for prosecutors and judges in criminal proceedings to consider when deciding whether the public interest in disclosure outweighs the risk to national security. Similar criteria could be applied in cases where the public

[73] https://www.justiceinitiative.org/publications/tshwane-principles-national-security-and-right-information-overview-15-points#:~:text=June%202013-,The%20Tshwane%20Principles%20on%20National%20Security%20and%20the%20Right%20to,and%20national%20law%20and%20practices.

interest in exercising freedom of expression is being weighed against civil wrongdoing:

a. whether the extent of the disclosure was reasonably necessary to disclose the information of public interest;

b. the extent and risk of harm to the public interest caused by the disclosure;

c. whether the individual had reasonable grounds to believe that the disclosure would be in the public interest;

d. whether the individual has raised their concerns internally or with an external oversight body;

e. the existence of other demanding circumstances justifying the disclosure.

103. Since not every piece of legislation will necessarily benefit from an express consideration as to how it restricts freedom of expression, having a more systematic approach such as clear public interest guidance supplementing the Bill of Rights, will protect against overly restrictive measures ending up on the statute books without an ability for the courts to judge their proportionality.

Trade union matters

104. In the context of employment and trade union law, the ECtHR has consistently found that the right to freedom of expression overlaps with the right to freedom of association and that it is an essential foundation of democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. An overriding consideration is that the means used by the state to limit the right should be proportionate to the end to be achieved. See, for example: *Steel and others v United Kingdom* App no. 24838/94 (1999) 28 EHRR 603

105. In relation to picketing, there are two specific deficiencies in UK employment law that arguably fail to meet Article 10 rights. Both are legally complex arguments, but can be summarised as follows:

a. The current provisions of s.220 of the Trade Union Labour Relations (Consolidation) Act 1992 ('TULRCA 1992') have been interpreted to mean that peaceful secondary pickets (i.e. workers who picket somewhere away from their place of work) cannot rely on any statutory defence under s.219 TULRCA 1992 if they successfully persuade others to their point of view and commit one of the 'economic torts'. This potential tortious liability of the

peaceful secondary pickets may arise from the individual's attendance in exercising their right to freedom of expression and peaceful assembly.

b. The government's Code of Practice on Picketing, provided for under s.207 TULRCA 1992, offers guidance to pickets and their organisers to ensure that '…in general the number of pickets does not exceed six'. The point being that the Code appears incompatible with Article 10 because the 'seventh picket' will have the same rights to freedom of expression and peaceful assembly.

106. The qualified rights under Article 10 stand to be viewed in light of the UK's margin of appreciation on the matter in dispute. In the context of industrial action law, which engages both Article 10 and Article 11, the margin of appreciation has been a relevant consideration for how UK law must be applied. In *RMT v UK* App No.31045/10 [2014] ECHR 366, the ECtHR held the UK's ban on secondary action was justified due to a wide margin of appreciation. However, it made different findings about the width of the margin on matters that relate to 'core' aspects of Convention rights. This point was more fully explained in *Mercer v Alternative Future Group Limited* UKEAT/0196/20/JOJ, [2021] IRLR 620, where the President of the Employment Appeal Tribunal held that individual sanctions imposed on striking workers engages the core of the right to peaceful assembly and so must be subject to a narrower margin of appreciation.

QUESTION 7

ARE THERE ANY OTHER STEPS THAT THE BILL OF RIGHTS COULD TAKE TO STRENGTHEN THE PROTECTION FOR FREEDOM OF EXPRESSION?

107. In the context of employment law, one area which could strengthen the protection for freedom of expression relates to whistleblowing law.

108. Whistleblowers are a vital source of information for journalists. As the eyes and ears of an organisation, employees and workers are in a unique position to witness and challenge wrongdoing within their workplace.

109. Whilst it is hoped that in most cases this could be raised internally with the appropriate person in their department or organisation, there will be times when this is not feasible. This may be because, for example, the whistleblower raised concerns internally but was ignored, they have little confidence in the internal processes, or they have been victimised for raising the concerns. In such circumstances, a whistleblower may decide to exercise their rights of freedom of expression to raise their concerns, if significant, to an external body, such as to journalists/the media.

110. Whistleblowing cannot work effectively without having these external routes available to raise concerns. However, doing so presents a number of risks to a whistleblower such as dismissal, victimisation or other forms of employment-related detriment. This is where current UK whistleblowing protection, the Public Interest Disclosure Act 1998 (PIDA), provides a cause of action.

111. However, whistleblowing protections say nothing of detriments outside of the scope of employment such as the threat of being pursued through a civil or criminal court for blowing the whistle against the employer. This threat may discourage whistleblowers from raising legitimate concerns, thus leading wrongdoing to go unprevented, unaddressed or even to escalate.

112. A Bill of Rights Could address this gap by including a defence to civil proceedings or criminal prosecutions for those who "blow the whistle" or make 'protected disclosures' in accordance with the PIDA. Such a defence for whistle-blowers would do much to reassure those coming forward with concerns about wrongdoing or corruption.

113. For example:

    a. "No cause of action in civil proceedings shall lie against a person in respect of the making of a protected disclosure.

    b. In a prosecution of a person for any offence prohibiting or restricting the disclosure of information it is a defence for that person to show that, at the time of the alleged offence, the disclosure was, or was reasonably believed by the person to be, a protected disclosure."[74]

114. As explained above, in the context of trade union law, ELA see the right to freedom of expression under Article 10 as being linked to rights under Article 11 for workers who participate in industrial action. In UK employment law, there is currently no express statutory protection for workers who suffer detriment by reason of participation in industrial action. Therefore, ELA considers the existing protections for freedom of expression in this context require strengthening.

[74] Wording taken from Protect's Draft Whistleblowing Bill adapted from sections 14 and 15 of Protected Disclosures Act 2014 in Ireland.

EMPLOYMENT LAWYERS ASSOCIATION

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.

115. ELA's view is that the current system available to individuals to pursue violations of their human rights strikes the correct balance between preventing spurious claims and ensuring that the framework of claiming for such breaches is not unduly inhibited.

116. Sufficient safeguards already exist by virtue of the relationship between domestic and international enforcement of human rights, through the concept of a 'victim' under the HRA and the 'significant disadvantage' criterion under the ECHR (see an explanation of this below).

117. Therefore, whilst there may be an argument for increased clarity within the current legislation, ELA is of the opinion that a permission stage for such claims is not required.

118. The proposal does not specifically define what constitutes a 'significant disadvantage' so the extent of this proposed criterion under the Bill of Rights is not entirely clear. However, there is reference to individuals suffering a 'significant disadvantage' under Article 35 of the ECHR in relation to the admissibility criteria for making an application to the Strasbourg Court, and so ELA assumes that the proposal is attempting to mirror that criterion.

119. Given that there is insufficient clarity around how the permission stage would be drafted in the Bill of Rights and given that there are already thresholds that apply to individuals intending to allege violation of their human rights both under the HRA and ECHR, ELA does not consider that this proposal is required.

VICTIM STATUS

120. Section 7 of the HRA currently enables an individual who claims that a public authority has acted incompatibly with their human rights to either (i) bring proceedings against that authority under the HRA or (ii) rely on Convention rights in any legal proceedings. However, in order to invoke their Convention rights

before the courts that individual must be (or would be) a 'victim' of the unlawful act.[75]

121. The concept of a victim is not specifically defined in the HRA. Section 7(7) states that an individual is a victim of an unlawful act only if they "would be a victim for the purposes of Article 34 ECHR if proceedings were brought in the European Court of Human Rights in respect of that act".[76]

122. Article 34 in turn refers to the requirement for an applicant to be a victim in order to bring an application before the Strasbourg Court for a breach of their Convention rights, and that parties to the Convention "undertake not to hinder in any way the effective exercise of this right".

123. Whilst referencing 'victims' of a violation, Article 34 does not provide any further definition as to what that status entails (save that only individuals, groups of individuals, and NGOs can bring applications and therefore be victims) and so reference must therefore be made to the findings of the Strasbourg Court in relation to this concept.

124. As a general rule, the person or group must be directly personally affected by the alleged violation (see *Tanase v Moldova* app no. 7/08 (2011) 53 EHRR 22). However, the Strasbourg Court has confirmed that victim status also extends to applicants that can establish the status of 'indirect victim' (for example, the next of kin of a deceased would-be applicant).[77]

125. The question of whether an individual is a victim is often closely intertwined with the merits of the case itself, as the Strasbourg Court has highlighted.[78]

ADMISSIBILITY CRITERIA

126. In determining whether a case has merit, the Strasbourg Court will often consider the admissibility criteria under Article 35 ECHR, which creates a threshold for applications to meet.

127. Article 35(1) highlights that the Strasbourg Court will only intervene and deal with matters once all domestic remedies have been exhausted (and within six months of the final decision). Therefore, this Article reaffirms the principle of subsidiarity and confirms that the Strasbourg Court is to be deemed the court of last resort.

[75] The Human Rights Act 1998, section 7
[76] Ibid, section 7(7)
[77] Valliantos and Others v. Greece (2013) 59 EHRR 519 at [47]. See also European Court of Human Rights, Practical Guide on Admissibility Criteria (updated 1 August 2021) at [23].
[78] Siliadin v France app no. 73316/01 (2006) 43 EHRR 16.

The objective of this rule is to provide domestic authorities, such as the courts, with the opportunity to review alleged violations of the Convention before an application is made to the Strasbourg Court.

128. Article 35(3) initially provided that the Strasbourg Court shall declare inadmissible any application which is not compatible with the provisions of the Convention, is 'manifestly-ill founded', or abused the right of individual application under Article 34.

129. Article 35(3)(b), which introduces the concept of "significant disadvantage" of the applicant to the Convention was then introduced by Protocol 14 to the ECHR on 1 June 2010 in light of the ever-increasing workload of the Strasbourg Court and to ensure that alleged violations of human rights attain a minimum level of severity.[79]

130. The Strasbourg Court held in the employment case of *Smith v United Kingdom* (application no. 54357/15) that Article 35(3)(b) raises three main questions that must be considered with each application:

    i. Has a significant disadvantage been suffered by the applicant?
    ii. Does respect for human rights compel the Strasbourg Court to examine the case in any event?
    iii. Has the case been duly considered by a domestic tribunal? [80]

131. Whilst discussing whether the applicant had suffered a 'significant disadvantage' under Article 11 ECHR, the Strasbourg Court in *Smith v United Kingdom* held that an assessment of all the relevant facts and circumstances of the case is required. The severity of an alleged violation should be considered by taking account of both the applicant's subjective perceptions and what is objectively considered to be the disadvantage. This can include analysis of the financial impact of the matter or the importance of the case for the applicant.[81] This approach has also been followed in the employment-related wages claim of *Zivic v Serbia* app no. 37204/08 (ECHR, 13 September 2011)

132. Although the Strasbourg Court has noted that the application of the 'significant disadvantage' criterion is not limited to any particular Convention right, the Strasbourg Court is aware of, and will place weight on, the important role that

[79]Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, CETS 194 – Convention for the Protection of Human Rights (Protocol No. 14), 13.V.2004, Article 12. See also: European Court of Human Rights, Practical Guide on Admissibility Criteria, page 79.
[80] Smith v The United Kingdom, 54357/15, [43-45]
[81] Ibid, [46]

particular rights hold in society. For example, in *Obote v Russia* app no. 58954/09 (ECHR, 19 November 2019), the Strasbourg Court held that the right to freedom of assembly under Article 11 is a 'fundamental right' and 'foundation' of a democratic society. As a result, when determining whether an individual has suffered a significant disadvantage, the Strasbourg Court will exercise a 'careful scrutiny' of all the facts and circumstances. In this case, the Strasbourg Court held that a significant disadvantage had been suffered as a result of administrative proceedings being enforced against the individual, regardless of the relatively modest financial penalty they faced.[82]

133. The Strasbourg Court also exercised a 'careful scrutiny' when examining an alleged violation of Article 10 in *Sylka v Poland* app no. 19219/07 (ECHR, 3 June 2014), as it deemed that freedom of expression was also 'one of the essential foundations of a democratic society' and central to an individual's 'self-fulfilment'.[83] However, on assessment of the subjective perceptions and objective findings, the Strasbourg Court found that a significant disadvantage had not been suffered. One can therefore conclude from the case law that the significant disadvantage criterion involves a high level of detailed and comprehensive analysis, with the resulting judgment on admissibility being reliant on the specific facts and circumstances. Even if a Convention right is a foundation of a democratic society, analysis will turn on whether the alleged violation concerns 'important questions of principle'.[84] Therefore, much like the Convention itself, a significant disadvantage is a 'living' criterion which develops and is moulded according to the principles of a democratic society at that time.

134. If a domestic criterion for 'significant disadvantage' were introduced, the principle of subsidiarity may be undermined, as claims that ought to be heard at state-level may be prevented from being heard. In turn, claimants who were deemed at national-level not to have suffered a 'significant disadvantage' would exhaust their domestic remedies early on (by the refusal of the UK courts to hear the case) and they may have to go to Strasbourg to determine (i) whether they meet the admissibility criteria and (ii) whether their rights have been violated. This would subvert the principle of subsidiarity whereby national courts must have the opportunity to consider and redress alleged violations, before the involvement of any supranational court.

135. There would also likely be divergence between the way 'significant disadvantage' is interpreted by the UK courts and by the Strasbourg Court. This could create problems for the UK as a signatory to the Convention and could result in UK citizens bringing applications to the Strasbourg Court to request rulings on these

[82] Obote v Russia app no. 58954/09 (ECHR, 19 November 2019), at [31].
[83] Sylka v Poland, app no. 19219/07 (ECHR, 3 June 2014), [28]
[84] Obote v Russia app no. 58954/09 (ECHR, 19 November 2019), at [31].

divergences and inconsistencies, arguing, for example, that the UK's divergence from the Strasbourg Court case law on significant disadvantage was itself a breach of Convention rights and or Article 1 ECHR (obligation on state parties to respect the Convention rights, which is not a Convention right in the HRA).

136. Therefore, a key objective of a proposed Bill of Rights, that of 'domesticating' Convention rights, would be undermined, as multiple issues relating to the 'significant disadvantage' criterion would be outsourced to the Strasbourg Court. For example, issues relating to the UK's interpretation of this criterion, as well as complaints that legitimate claims should have been heard at national level, thereby thwarting the subsidiarity principle. The suggested cost savings under the Bill of Rights would not in fact be realised if individuals were to bring such applications to the Strasbourg Court, which the UK government may have to defend.

137. Further, if the aim of the proposal is to mirror the admissibility criteria within Article 35, then it raises a question as to why the other elements of the Article have not been included within the proposal. The 'significant disadvantage' criterion under Article 35 ECHR forms just one part of the overall assessment to admissibility at the international level. However, as has been shown from the case law above, determining a 'significant disadvantage' involves the judicial exercise of assessing all of the circumstances and the objective and subjective conditions attaching to the applicant.

138. If the details of the provision restricted this approach by focusing on the concept of 'significant disadvantage', ELA is of the opinion that this would impede the ability of UK courts to freely assess violations of human rights, which would restrict access to justice at the domestic level.

139. As has been shown above, under the current approach the HRA requires courts to assess 'victim' status in the same way as the Strasbourg Court. Case law of the Strasbourg Court demonstrates that victim status is often closely linked to the merits of the case (which the Convention discusses under Article 35). Therefore, judgments by the Strasbourg Court on the admissibility criteria, including whether the applicant has suffered a 'significant disadvantage' will naturally flow into the reasoning of the domestic courts, due to the requirement to take such decisions into account.

140. Therefore, whilst the Consultation argues that a Bill of Rights would 'empower domestic courts to apply human rights in the UK context'[85], ELA is of the view that this is already being sufficiently fulfilled under the current framework.

[85] Human Rights Act Reform: A Modern Bill of Rights (December 2021), pg 6

141. As a result, the ‘significant disadvantage’ proposal will not advance the current position of human rights claims any further than is established currently under the existing framework. It may in fact impede the current position if the proposal aims to determine the full range of characteristics required for a ‘significant disadvantage’, when this is clearly a fact-finding and case-specific judicial exercise, entitling judges to undertake a broad-brush enquiry. It may also increase costly satellite litigation about divergences between the national and supranational courts in relation to the meaning of ‘significant disadvantage’ and applicants may be forced to bring their cases at an early stage in Strasbourg, once permission were refused, contrary to the principle of subsidiarity. Therefore, ELA does not support the proposal to introduce this criterion into a Bill of Rights.

142. However, we accept that there is another constituency which would support the alignment of ‘significant disadvantage’ to the ECHR test. That constituency would argue that such a test would bring consistency between the domestic and the ECtHR approach and could reduce the Courts’ workload, as it has done with the ECtHR.

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.

143. In light of the responses above, ELA is not of the opinion that a permission stage should be introduced in any event, and it therefore follows that ELA does not support the further inclusion of an ‘overriding public importance’ test.

144. Unlike the proposal for there to be a ‘significant disadvantage’, an ‘overriding public importance’ provision is not currently provided for in the ECHR. Instead, Article 35(3)(b) states that the Strasbourg Court shall declare inadmissible applications in which the applicant has not suffered a significant disadvantage ‘unless respect for human rights as defined in the ECHR and the Protocols thereto requires an examination of the application on the merits’. The ECHR therefore already provides a mechanism by which the Strasbourg Court can admit cases of importance to the rights set out in the ECHR. In the absence of a permission stage, as advocated by ELA above, there is no need to provide an ‘overriding public importance’ stage, which, in any event would be captured by Article 35(3)(b) ECHR if domestic remedies failed and the case proceeded to the Strasbourg Court.

145. Further clarification surrounding this proposal and an example of how it would be included in a Bill of Rights would therefore be needed to review the full implications. It would be important to understand how an assessment of what is of 'overriding public importance' would be undertaken, and whether this would be left to the discretion of the UK courts, or whether specific criteria would be taken into account.

146. ELA would therefore not support the introduction of an 'overriding public importance' criterion given the perceived difficulties in being able to define this with any meaningful precision. It would also carry the same risk of inconsistency with the approach of the Strasbourg Court to cases in which a 'significant disadvantage' criterion is applied, as discussed above.

147. Furthermore, there is a lack of clarity about the extent to which the 'overwhelming public importance' analysis should be taken into account at the merits stage, and introducing this criterion at the outset (i.e. permission stage) of a case may cause confusion and – without further guidance – it may unduly privilege the rights in question. For example, if a court is tasked with balancing Article 8 and Article 10 rights (for example, a newspaper's desire to publish a supposed public interest story about a celebrity), it may unduly take into account what was said at the permission stage about 'overriding public importance', and whether one or both of those rights renders the case of high public importance. It may also impact the court's Article 8(2) balancing exercise (i.e. whether an alleged violation is justified on public health, national security or other grounds) as undue weight could be given to the 'overwhelming public importance' of the alleged violation of the Article 8 right. In any case, the proposal makes no mention of what weight (if any) the 'overriding public importance' factor would be given at the merits stage or whether it should be completely ignored for the merits purposes.

148. Given the above, ELA does not support the proposal to introduce a statutory 'overriding public importance' criterion into a Bill of Rights.

149. Again however, ELA accepts that there is a constituency that favours a 'significant disadvantage' test and a permission stage. If that route were to be taken then an 'overriding public importance' test would be vital to the effectiveness of a domestic Bill of Rights.

QUESTION 10

HOW ELSE COULD THE GOVERNMENT BEST ENSURE THAT THE COURTS CAN FOCUS ON GENUINE HUMAN RIGHTS ABUSES?

150. ELA does not consider that there is any principled means of separating out 'genuine' human rights cases from others that would be more effective than the existing method of adjudication of individual cases by the Courts. ELA considers that the proposition that this exercise should be undertaken involves a flawed understanding of how human rights law is applied by the Courts.

151. The assumptions behind this question, as set out at paragraphs 224 – 227 of the Consultation are[86]:
    a. that the concept of human rights is brought into disrepute when human rights claims are brought for 'trivial matters', or by claimants who have abused their rights or the rights of others;
    b. claims for breaches of human rights should be limited to serious cases involving genuine injustice;
    c. human rights claims should not provide a 'fall-back route' to compensation on top of other private law remedies;
    d. this could be achieved by strengthening section 8(3) HRA so that not only would other claims be considered when damages were awarded, but claimants would be required to exhaust other claims and remedies before being able to pursue claims based on breaches of ECHR rights.

152. ELA members do not consider that there is a case for limiting access to claims based on the ECHR rights in the way the Consultation suggests. It considers that there are potential dangers in doing so. The way the assumptions are set out furthermore confuses the question of whether there has been an infringement of a right with the questions of if and how any infringement should be remedied.

153. ELA does not accept that there is evidence of large numbers of claims being adjudicated by the Courts on 'trivial' grounds or compensation being awarded in respect of claims that lack merit. Cases involving challenges to the actions of public authorities on the grounds of Convention rights violations will often cause controversy or their outcome may not be universally accepted or understood, as the Consultation acknowledges. Such cases involve extremely complex questions of where the boundaries of state power should lie, what is intended by Parliament when it confers such powers in legislation, and how state power should be balanced with individual rights. Creating the right balance between the province of the Courts and province of Parliament in resolving these complex questions is a delicate and nuanced exercise. The fact that in a small number of

[86] See the Consultation at [224-227].

cases it might be said that a decision has fallen on the wrong side of the line, or does not command universal support, does not amount to a compelling case for disrupting the mechanisms set out in the HRA (including s 8(3)), which otherwise work well and allow the correct balance to be struck. The fundamental nature of human rights and their universality (and consequent human interest), inevitably results in a certain number, albeit small number, of publicised and controversial cases.

154. The question of whether the conduct of an applicant should be a relevant factor in determining whether a claim of a breach of the ECHR should be allowed to proceed in considered elsewhere in this response (see question 27).

155. A decision about whether a case is a 'serious' case involving 'genuine injustice' cannot easily be separated from the exercise of determining whether there has been a breach of an ECHR right. ELA considers that the Courts are best placed to makes these determinations on a case-by-case basis, taking account of the specific factual matrix in which a claim is made, the applicable UK case law, and in so far as the Court considers relevant, the case law of the Strasbourg Court (as it is required to do under s.2 HRA). It is exceptionally difficult even on straightforward matters, for a Court to evaluate the prospects of a claim before hearing all the relevant facts and considering the relevant legal arguments. The introduction of any permission stage may therefore increase cost and duplicate efforts to try the case, as many issues would need to be effectively tried at the permission stage and would then be re-tried at the merits stage. Where the issues involved are as fundamental to a democracy as infringements of rights guaranteed by the ECHR, the Courts will be particularly slow to make determinations without a rigorous analysis of the circumstances in which the alleged infringement arose.

156. There is therefore a prospect of real injustice and a real and damaging curtailment of the rights conferred by the ECHR if an approach were adopted of limiting claims to those identified in legislation as 'serious' or 'genuine'. It is difficult to see how any agreement could be reached about what these thresholds of 'seriousness' and 'genuineness' should be, or how they could be encapsulated in legislation without codifying measures that are themselves potential infringements or curtailments of ECHR rights by the UK Government, which may themselves be subject to challenge through the Strasbourg Court.

157. Turning to the question of compensation (discussed more fully in our answer to question 27), under s 8(4) HRA, the court must take into account the principles applied by the Strasbourg Court in relation to the award of compensation under Article 41 of the ECHR. But the Court is obliged only to ‘take into account’ the European principles and is not obliged to apply them. That said, the Lord

Chancellor, Lord Irvine, on the second reading of the Bill in the House of Lords on 3 November 1997 said: "*Our aim is that people should receive damages equivalent to what they would have obtained had they taken their case to Strasbourg*." It was thus the intention of Parliament at the time the HRA was enacted, that there should be a degree of alignment between the approach of the Strasbourg Court and that of the domestic Courts.

158. In practice, the UK Courts have taken a flexible approach. In *Ali v Headteacher and Governors of Lord Grey School* [2006] UKHL 14, [2006] 2 AC 363, at [82] Lady Hale observed: "*The great advantage of the scheme laid down in the Act is its flexibility. It enables the courts to mark violations of the Convention rights in whatever way it considers just and appropriate. Damages are an available remedy, but only if necessary to afford just satisfaction to the claimant*." Section 8(3) is explicit in already requiring the Courts to take account of all the circumstances of the case, including any other relief or remedy granted, or order made in relation to the act in question. The power of the Court to make other awards is unaffected and it will only make an award of damages for a breach of an ECHR right if it is clear that that is necessary to afford 'just satisfaction' to the person in whose favour it is made.

159. A court will first ask itself whether other remedies (for example, a quashing order and a declaration) suffice. In *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 2 All ER 240 at [9], Lord Bingham (for the Appellate Committee) approved the Court of Appeal's observations in *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] QB 1124 at [52–53] that "[t]he remedy of damages generally plays a less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages" and "*[w]here an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance*". In practice awards of damages made in cases where an infringement of rights has been identified are relatively low.[87]

160. In ELA's view, the carefully constructed and balanced regime under section 8 of the HRA (as discussed more fully in our answer to question 27) gives the right degree of discretion to the UK Courts, consistent with the UK's obligations as a signatory to the ECHR. There is no evidence furthermore that claims based on infringements of the ECHR are creating "a fall-back route to compensation on top of other private law remedies". The main purpose of claims under the HRA is not to secure damages, but to hold the state to account for failing to uphold universal

[87] See for example *R (on the application of Faulkner) (FC) (Appellant) v Secretary of State for Justice and another* [2013] 2 AC 254

rights, to highlight institutional failings, and to remedy such failings in a way that is conducive to the future protection of fundamental rights.

161. The fourth premise set out above suggests that the Consultation envisages a degree of decoupling of the decision making of the UK Courts from the principles set out in the ECHR. ELA would not support this approach, which would be in danger of leading the UK back to the situation in which it found itself before the HRA was introduced, that is, subject to proceedings in the Strasbourg Court where it was alleged that it itself had infringed or failed to make provision for an ECHR right or had failed to provide an effective means of enforcement. As noted, individuals do not only pursue claims in pursuit of compensation. They also do so in order that the infringement may be remedied, for their own benefit and that of others who may be affected by the infringement and to hold the state to account for failures to uphold fundamental rights. That is a principle of vital importance in a democracy and particularly so in any democracy that purports to uphold individual rights as a principle of the first importance.

162. If the UK is to remain a signatory to the ECHR as envisaged by the Consultation (as indicated by, for example, paragraphs 7, 70 and 96), it will remain subject to the jurisdiction of the Strasbourg Court. If legislation implementing a UK Bill of Rights contained limiting provisions that effectively ousted the jurisdiction of the UK Courts on any matter in which an ECHR right was engaged, a claim could be made to the Strasbourg Court instead to vindicate that right. It is not clear how this would benefit the parties involved (including the UK Government itself) and it would be more likely to lead to increased costs, uncertainty and complexity to both individual claimants whose rights had been infringed and the public authorities implicated.

163. It is also unclear how legislative measures of the nature suggested by this question would be incorporated into or reflected in the decision making of the Courts in private law disputes, where the Courts are themselves bound to act in accordance with ECHR rights in the way that they apply and interpret the law.

164. Furthermore, it is difficult to see how additional uncertainty and complexity could be avoided if, in addition to having to take account of a range of rights in their decision making, the Courts also needed to consider whether the potential infringement was 'serious' or involved 'genuine injustice'.

Case-Study – A human rights case in the employment context, and how a 'serious' or 'genuine injustice' evaluation could take place:

165. Let us take as an example the Court of Appeal decision in *Steer v Stormsure Ltd* [2021] EWCA Civ 887, in which the Claimant ("**C**"), who was supported by the

Equality and Human Rights Commission, brought a number of discrimination claims arising from complaints of sexual harassment, a unilateral reduction in working hours that she claimed amounted to a dismissal in law, and also sex discrimination and victimisation for having done protected acts. She sought an order for interim relief in respect of both discrimination and whistleblowing.

166. The employment tribunal declined to list the interim relief application in respect of the discrimination allegations, as the Equality Act 2010 contains no right to interim relief in a discrimination claim. C appealed to the EAT where she submitted that the failure of domestic law to provide interim relief in discrimination/victimisation cases relating to dismissal contravenes the EU law principles of effectiveness and equivalence. The EAT dismissed those arguments but accepted that there was an infringement of the non-discrimination principle in Article 14 ECHR when read with Article 6 - although there was no discrimination on the ground of sex, C had a relevant 'status' for the purpose of Article 14 – namely, the status of being an individual who wished to claim discrimination or victimisation arising from dismissal. However, that it was not possible to interpret the Equality Act as allowing interim relief and, since the EAT lacked the power to make a declaration of incompatibility under the Human Rights Act 1998, it was unable to grant S a remedy. S appealed to the Court of Appeal.

167. The Court of Appeal dismissed the appeal, holding that the claim did not fall within the ambit of Article 6, which is concerned with the procedural fairness and integrity of a state's judicial system, not with the substantive content of its national law. As for 'other status', the Court accepted that the overwhelming majority of claimants alleging sex discrimination are women but did not consider that this meant that the unavailability of interim relief in such claims, when the same remedy is available in whistleblowing claims, constitutes a difference of treatment on the ground of sex or some form of indirect discrimination against women.

168. In reaching that conclusion the Court considered the judgment of Lord Hoffman in *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681, [2006] 1 All E.R. 487. That case was a claim by widowers that the denial to them of certain benefits payable to widows was a breach of their rights of Article 14 read together with Article 8 or Article 1 of Protocol 1. Widowers who had petitioned the Strasbourg Court before the Human Rights Act 1998 came into force had had their claims settled by the UK Government, but the Government had declined to pay off those who only petitioned Strasbourg after the 1998 Act came into force or who had not petitioned at all. Lord Hoffmann, with whom the other members of the House of Lords agreed so far as relevant on this issue, said at [65] that the Article 14 argument failed for a number of reasons, including the fundamental question of whether discrimination by reference to whether or not someone has started legal proceedings is covered by Article 14 at all.

169. The Court held that “the reason why a claimant in a discrimination case cannot claim interim relief is because she has not brought one of the small and select group of substantive claims in which Parliament has conferred jurisdiction on the employment tribunal to grant interim relief. The fact that a particular remedy is available in litigation of type A but not of type B does not constitute discrimination against the claimant in a type B case on the ground of her status as a type B claimant.” Otherwise, this would lead to a comparison between every form of litigation brought approximately equally by men and women with sex discrimination claims. The Court therefore did not accept that being a litigant in one type of case constitutes a relevant ‘status’ for the purposes of Article 14.

170. C raised numerous points of law of considerable complexity. Ultimately the claim based on Article 14 ECHR failed and it might have been argued that given the eventual reasoning of the Court of Appeal, that was bound to happen.

171. However, an evaluation of whether the infringement was 'serious', or whether 'genuine injustice' had arisen had no place in the analysis and it is difficult to see how it could have been incorporated. The Courts arrive at their decisions concerning infringements of ECHR rights by a careful analysis of fact and applicable law that is predicated on an inherent assumption that all infringements of ECHR rights are potentially serious – that is the nature of a fundamental right. Where there has been an infringement, consequences must follow, (although those consequences can be adjusted to the circumstances to achieve a just result, including no award of compensation, and taking into account remedies that have already been granted, including private law remedies). The Courts therefore treat allegations of infringements with great care, as this case demonstrates. To require the Courts to exclude such issues from consideration without the ability to undertake this careful analysis and weighing of competing arguments, would undermine the rights protection set out in the ECHR itself.

172. It follows from this analysis that ELA considers that that there is no case for separating out 'genuine' human rights cases from others, or any principled means of doing so that that would be more effective than adjudication of individual cases by the Courts.

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.

173. The assumptions behind this question are set out at paragraphs 133-150 of the Consultation.

174. For reasons that overlap with those set out in answer to question 10, ELA does not accept that there is any means of limiting the expansion of positive obligations in the way suggested. The uncertainty described in the Consultation is an unavoidable consequence of the universal application of the ECHR in a complex and evolving modern democracy.

175. It is also difficult to see how legislation restraining the ability of the Courts to make decisions with positive consequences for public authorities could be drafted.

176. The identification of a positive obligation on the UK Government or other public authority as part of the adjudication of a claim derived from an infringement of a right set out in the ECHR cannot be limited in the way suggested without the risk of claims to the Strasbourg Court that UK law itself contains inadequate or ineffective measures for the upholding and enforcement of ECHR rights.

177. The Consultation cites as one example of the undesirable expansion of positive obligations, the case of *Rabone and another v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72. This was a difficult and tragic case that concerned the scope of the right to life in Article 2 of the ECHR and the nature of the duty it imposes on an NHS Trust. The case involved the suicide of a 24-year-old woman, Melanie Rabone, who was admitted to hospital on an emergency basis following a suicide attempt. Ms Rabone was assessed as being at a high risk of a further suicide attempt but was not detained under the Mental Health Act 1983, instead remaining a voluntary or 'informal' patient. She asked for a short period of home leave during her treatment and her doctor agreed. The following day, and while still on leave, she killed herself.

178. Case law from the UK courts and the Strasbourg Court identifies four different aspects of the duty under Article 2:

    a. A duty not to take life save in the exceptional circumstances set out in Article 2(2);
    b. A duty to conduct a proper and open investigation into deaths for which the state might be responsible;
    c. A duty to protect life by putting in place a legal and administrative system that provides effective deterrence against threats to life;
    d. An 'operational duty' in certain circumstances to take positive steps to prevent the death of an individual who is under threat, the foundation of which is generally considered to be the case of *Osman v United Kingdom* (2000) EHRR 245.

179. It was this last aspect that was under consideration in *Rabone*. The Supreme Court, overturning the Court of Appeal, found that the operational duty was engaged. In doing so it decided that the case was closer to a line of cases including *Osman* and *Savage v South Essex Partnership NHS Foundation Trust* [2009] AC 681 than a line of cases including *Powell v UK* (2000) 30 EHRR CD 36. Powell is accepted as authority for the proposition that, in the context of care of patients in hospitals, something more will be required to establish a breach of the Article 2(1) positive obligation to protect life than, simply, a failure on the part of the hospital to meet the standard of care of the patient required by the common law duty of care.

180. The Court of Appeal had found in *Rabone* that a clear line could be drawn between cases in which an individual was detained under the Mental Health Act and those who were not, finding that the 'operational duty' was engaged only in relation to patients who were detained. In overturning this decision, the Supreme Court weighed up a number of specific features of the case, including the fact that Ms Rabone was plainly a suicide risk and was very vulnerable and the Trust had accepted responsibility for her and was in control of her treatment. Had she insisted in leaving the care of the hospital without consent from her doctors (it having been accepted by the Trust that it was negligent to allow her to do so) she could and should have been detained under the Mental Health Act. The Supreme Court decided that taken together, these factors pointed to the application of the operational duty, Lord Dyson holding, 'I am in no doubt that the trust owed the operational duty to her to take reasonable steps to protect her from the real and immediate risk of suicide.'

181. The facts of this case and the complexity of the issues it raised illustrate the difficulty of trying to devise ways in which restraints on the ability of the courts to reach decisions on positive obligations could be codified. Even if the Court of Appeal's approach had been upheld, it is difficult to see how in practice a distinction could be drawn in legislation that would capture a wide enough range of factual circumstances to encompass the difference between patients detained under the Mental Health Act and patients who were not so detained in all the circumstances in which such a distinction could be relevant.

182. In overturning the Court of Appeal decision and declining to base its judgment on whether Ms Rabone did or did not fall into a particular category ('detained' or 'not detained') the Supreme Court was declining to place the requirement of legal certainty above individual rights and the particular circumstances of the individual that characterised this case. Lady Hale, in concurring with Lord Dyson's leading judgment, stressed that their decision – and that of the House of Lords in *Savage*, was not seeking to carve out an exception to the general rule that the State is not

responsible for the deaths of hospital patients, but to consider what principles applied to the operational duty and apply those to the particular case before them (see paragraph 94 of the judgment).

183. The case thus illustrates how the Courts approach the task of considering whether the state has a positive obligation to uphold and protect certain rights. They do so on a principled basis after careful consideration of all the relevant facts and circumstances of the case. ELA's view is that adopting any other approach in a Bill of Rights would risk undermining the UK's adherence to the principles set out in the ECHR and the universality of ECHR rights in the UK.

184. For all the reasons set out above ELA does not agree that an attempt should be made in a Bill of Rights to restrain the UK Courts from identifying positive obligations when it appears from the facts and circumstances that such obligations are necessary to give effect to individual ECHR rights. Such a change would likely breach the UK Government's Convention obligations and lead to enforcement action in the Strasbourg Court.

QUESTION 12

PROVIDE VIEWS ON THE PROPOSED OPTIONS FOR SECTION 3 HRA (INTERPRETATION OF LEGISLATION): WE WOULD WELCOME YOUR VIEWS ON THE OPTIONS FOR SECTION 3.

a. Option 1 - Repeal it and do not replace it

b. Option 2 - Repeal it and replace it with a provision that where there is ambiguity legislation should be construed compatibly with the BoR but only where such interpretation can be done in a manner that is consistent with the wording and the overriding purpose of the legislation.

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

Introduction

185. Section 3 of the HRA gives effect to the purpose of the HRA itself, in assisting the judiciary with the necessary discretion it requires to interpret legislation so as to ensure UK citizens and residents have access to the same rights in the UK which they would have in the ECtHR. That was the clear intention of the HRA.

Use of Section 3 HRA by the courts

186. Paragraph 233 of the Consultation states that the HRA "has given rise to much debate" as to the balance between Parliament making law and how that law is interpreted by the courts. The concept of separation of powers is fundamental to the workings of the UK's democracy. It is ELA's view that the balance is not under threat with regard to section 3 of the HRA and that section 3 does not infringe on the separation of powers. Since the ECHR form the very foundation on which the HRA is based, it would not make sense to completely repeal s.3. It has served as an important mechanism in keeping the number of adverse judgments in the ECtHR against the UK government low. As a result, fewer cases have been referred to the ECtHR.

187. A recent study concluded section 3 is little used to interpret legislation that would otherwise be incompatible, with just 25 cases over an 8-year period using section 3 to interpret legislation[88]. The writers concluded, following a review of cases, that where section 3 was considered, it tended not to be used for reasons including:

    a. To use it would be an overreach, opting instead to issue a declaration of incompatibility or disapplying regulations;
    b. There was no breach of the Convention rights;
    c. Ordinary principles of interpretation could be used; or
    d. Section 6 was applied.

188. The consultation paper also states that the government is "minded to agree" with the IHRAR Panel that a repeal of section 3 is not warranted. Given that there is no evidence to accept the premise that the courts have taken an expansive approach to their interpretive duty, we do not agree with either option proposed. Please also refer to our response to question 23, which proposes an adoption of a Code of Practice, approved by Parliament, to provide additional guidance to the Courts and citizens of the UK.

189. ELA's view remains that the framework in sections 3 and 4 of the HRA strikes a proportionate balance between Parliamentary sovereignty and permitting ECHR rights to be exercised fairly. Case law illustrates that courts are mindful and cautious in exercising their duties under section 3 of the HRA. The hierarchy of the judicial structure is such that the Courts in which binding decisions are made usually involve more than one decision maker. The chances of an inconsistent or absurd interpretation are thus considerably lower at this level.

[88] F. Powell and S. Needleman, 'How radical an instrument is Section 3 of the Human Rights Act 1998?', U.K. Const. L. Blog (24th. Mar. 2021)

190. For the same reason, appeal courts are well-placed to consider whether Tribunals/courts of first instance have incorrectly applied section 3 in a manner that is inconsistent with the intention of Parliament. In any event, Tribunals and lower courts have no powers to make declarations of incompatibility, and this is reserved for courts at the equivalent level of the High Court (but excluding the Employment Appeal Tribunal) and the appeal courts. ELA is of the view that the power to make declarations of incompatibility remain with the appeal courts.

191. Judicial officers do not have the power to change legislation and section 3 simply places the duty on them to interpret legislation in a manner which is consistent with the intention of the 1998 Parliament, to give effect to compatibility with Convention Rights. The judiciary have been careful not to overstep the mark, and in instances where they have been unable to read in or interpret particular legislation in a manner to ensure compatibility with Convention Rights, they have made a declaration of incompatibility; leaving it up to Parliament either to remedy the offending provision or indeed, to do nothing at all.

192. As the ECHR forms the foundation on which the HRA is based, it would not be a logical step to repeal section 3. It has served as an important mechanism in keeping the number of adverse judgments in the ECtHR against the UK government low. As a result, fewer cases have been referred to the ECtHR. In the past decade there has been a significant decline in the number of cases which have been brought against the UK government in the ECtHR, with a mere 4 judgments in 2020.

193. A key factor underpinning the Convention Rights is democracy, and the ability of an individual tangibly to access such rights. Lord Justice Reed stated that: “the emphasis placed by the Strasbourg Court [is] on the protection of rights which are not theoretical and illusory, but practical and effective. That is consistent with the recognition in domestic law that the impact of restrictions must be considered in the real world”.

194. This judgment goes further to state that access to justice is not a European ideal, but a fundamental principle long entrenched in our common law.

195. With that in mind, ELA notes that in instances where a conforming interpretation is not possible by lower courts and/or Tribunals, individuals may experience delay as well as incur substantial costs before a declaration of incompatibility is made, whilst their claim works its way up the judicial chain.

196. If there is an inclination to repeal section 3, we would note that all legislation post-implementation of the HRA has been drafted with section 3 in mind, given the required statement on compatibility. Accordingly, the only sensible option is to

replace it with a provision that where ambiguity occurs, 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.

197. Where legal proceedings have already commenced or are in the appeal stages, and it would be impossible for retrospectivity to apply in such instances, there would need to be clear guidance as to how such matters would be dealt with. In light of the fact that the government has confirmed that there is no intention to leave the Convention, the existing case law and past interpretations will continue to provide helpful insight to the judiciary when adjudicating matters involving human rights, and the law should simply develop onwards in the usual way, from the implementation of any amendments.

Case Examples

198. The issue of Parliamentary Sovereignty and Rule of Law has been entrenched within the UK legal system with the judiciary successfully scrutinising parliamentary intention for many years. Lord Diplock *in Duport Steels Ltd v Sirs* [1980] 1 WLR 142 navigated the issue of separation of powers and the court's obligation to follow the meaning of legislation where it is not subject to ambiguity.

199. In *Ghaidan v Godin-Mendoza* [2004] UKHL 30 the House of Lords recognised a need to give effect to Parliamentary intention that enacted the HRA. Section 3 is the "prime remedial remedy and that resort to s.4 must always be an exceptional course" (paragraph 49). *Ghaidan* has given clear guidance to the UK courts as to its interpretative duty, so as not to trespass on Parliament's prerogative and that decision was supported by the government of the time.

200. Historically, the UK courts have balanced interpretation of legislation and case law from higher courts successfully. The hierarchy of the UK courts allows scrutiny of apparent conflicts between the ECtHR and UK law giving appropriate balance where required in extending rights to remedy any breaches of Convention rights. The case of *Gilham v Ministry of Justice* [2019] UKSC 44 demonstrates this and is set out in more detail in response to our question 23.

201. *Fessal v Revenue and Customs* [2016] UKFTT 285 involved tax payments and reading UK legislation without use of s.3 would have meant a need to pay tax twice on income received. This could not be seen to be the correct intention of Parliament. Courts are required to strike a balance between individual rights and those of the greater community and interpret the actual meaning of legislation to achieve a legitimate aim.

202. Obiter comments by Underhill LJ in *Rowstock Limited and another v Jessemay* [2014] EWCA Civ 185, noted the approach taken by courts where s.3 of the HRA is engaged. In a case extending victimisation claims under the Equality Act 2010 to include incidents occurring after employment had been terminated, he concluded that where legislation contains drafting errors it needs to be read purposively, similar to the approach in *Ghaidan*.

203. The consultation sets out 2 options for clauses to interpret legislation and ELA does not agree with either of options proposed. However, ELA notes that option 2B is preferable to 2A in that it recognises that legislation may be ambiguous but allows for the same rule of interpretation regardless of ambiguity.

QUESTION 13

HOW COULD PARLIAMENT'S ROLE IN ENGAGING WITH, AND SCRUTINISING, SECTION 3 JUDGMENTS BE ENHANCED?

204. ELA understands that the IHRAR recommendation was to enhance the role of the JCHR in order to "produce a more robust approach by Parliament to rights protection generally, and section 3 interpretations of legislation specifically".

205. ELA notes this recommendation and considers that scrutiny of section 3 decisions arising from the courts (whether the court uses section 3 or decides not to) may assist Parliament in reviewing the implications of the decisions, and whether steps need to be taken in response to a ruling. This process should only take place after the court has had an opportunity to consider and make a decision on a case.

QUESTION 14

SHOULD A NEW DATABASE BE CREATED TO RECORD ALL JUDGMENTS THAT RELY ON SECTION 3 IN INTERPRETING LEGISLATION?

206. ELA agrees that a database would assist the JCHR in engaging with and scrutinising relevant case law.

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?

207. Yes, but not if this is the only remedy available to Courts in respect of secondary legislation.

208. UK Courts may issue a declaration of incompatibility where an Act of Parliament is incompatible with Convention rights. However, the Courts have no similar power for subordinate or secondary legislation. Where secondary legislation contains breaches of Convention rights, judicial remedies exist in s. 8 of the HRA. The Government at the time of drafting the HRA relied on existing powers available to the courts to remedy the situation where secondary legislation was incompatible with Convention rights. The relevant remedy here is one of judicial review, such as the ability to quash secondary legislation that is for example, ultra vires or unlawful.

209. This consultation seeks to limit a Court's powers so that a Court's only remedy in relation to "certain secondary legislation" is a declaration of incompatibility, removing the court's extant ability to strike down or set aside secondary legislation where it is incompatible with Convention rights. Such action would be unlawful under s.6(1) of the HRA as it is unlawful for a court as a public authority to act incompatibly with Convention rights. ELA does not think that a Court's abilities should be limited in this way.

Background

210. Under s.3 of the HRA, courts are afforded a discretion to interpret Acts of Parliament compatibly with convention rights [89]. Where they cannot do this, they may use their discretionary powers under s.4 of the HRA to declare Acts of Parliament or any secondary legislation to be incompatible with the ECHR. The legislation is not invalidated, and Parliament can simply ignore this declaration[90]. Parliament is not required to take any remedial action.

211. Acts of Parliament are subject to rigorous checks, but the same level of parliamentary scrutiny does not exist for the promulgation of secondary legislation. It follows therefore that the UK Constitution has retained this ability for the greater levels of checks and balances in respect of secondary legislation via the Courts.

[89] Lord Irvine LC, Hansard, HL, 24 November 1997, vol. 583, col. 795 in J. Cooper & A. Marshall-Williams at 50

[90] "Parliamentary sovereignty remained intact as a declaration of incompatibility could be ignored by parliament and the government" New Law Journal 164 NLJ 7623, p22 " **Lord Neuberger on judging & human rights"**

212. With regards to secondary legislation, UK Courts may, following a judicial review, quash or set aside secondary legislation where it is incompatible with Convention rights. This is because "Government ministers cannot, except where required to do so by another Act of Parliament, make subordinate legislation that is incompatible with Convention rights"[91]. It is not enough to declare incompatibility as a Court may not give effect to subordinate legislation that is incompatible with Convention rights as this would be contrary to s. 6(1) of the HRA.

213. The thinking behind the current remedies in respect of the incompatibility of secondary legislation with Convention rights can be noted in Hansard[92], where Lord Irvine's comments:

"Clause [later section] 6(1) of the Bill, by making it unlawful for a public authority to act in a manner inconsistent with Convention rights, will make it unlawful for a Minister to exercise a power to make subordinate legislation which is incompatible with the Convention."

214. The then Home Secretary, Jack Straw commented that this was acceptable because it:

"does not affect the sovereignty of Parliament, because it is open to Ministers to try to put the subordinate legislation right by simply introducing further regulations. That happens quite often, as any Minister who has held office in the Department of Social Security can testify."

215. The exception to this is where secondary legislation is incompatible with Convention rights because the incompatibility was a necessary consequence of the Act of Parliament under which it was made. Here UK Courts would make a declaration of incompatibility and leave it to Parliament to remedy or not as the case may be.

The exercise of declarations of incompatibility by the Courts

216. Ministry of Justice[93] figures show that since the HRA came into force on 2 October 2000 until the end of July 2020, 43 declarations of incompatibility have been made. Of these 10 have been overturned, five had already been amended by primary legislation prior to the declaration with 15 similarly addressed by primary or secondary legislation post-declaration. 8 have, and 2 are proposed to be

[91] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf at 304
[92] Lord Irvine LC, Hansard, 18 November 1997, vol. 583, col. 544 in J. Cooper & A. Marshall-Williams at 95.
[93] Responding to Human Rights Judgments (2019-2020) at 30.

addressed by remedial orders. According to the response to IHRAR 2021[94], this means only 28 declarations have been made in respect of legislation in force at the time it was made, which translates to 1.5 declarations of incompatibility per year[95].

217. The IRHRA 2021 conclude that "these figures strongly suggest that UK Courts have treated section 4 as a matter of last resort"[96] or as an "exceptional course" of action[97.]

218. In context, on average there are 3000 new statutory instruments a year[98,] but since 2014, according to research by Tomlinson, Graham and Sinclair[99], there have been only 14 successful challenges subordinate legislation based on the HRA were recorded in the UK Supreme Court and the Courts of England and Wales.

219. As set out in the Independent Human Rights Review 2021[100], "…Magna Carta 1215[101] … established the principle that the Executive is required to have a legal basis for exercising power". Limiting the Courts so that there is no judicial remedy available in respect of secondary legislation (which does not have the same level of scrutiny as Acts of Parliament) would be dangerous. The lack of redress in this scenario is not consistent with the norms of the UK Constitution where, whilst Acts of Parliament are rightly supreme, the rule of law requires that a different approach is taken to secondary legislation for the reasons set out above.

[94] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf p.218.
[95] Professor Aileen Kavanagh, Submission to the Independent Review of the Human Rights Act Call for Evidence, at 56.
[96] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf p.218.
[97] Lord Steyn in Ghaidan v Godin-Mendoza [2004] UKHL, [2004] 2 AC 557 [51].
[98] House of Commons, Library Briefing Paper, Acts and Statutory Instruments: the volume of UK legislation 1850 to 2019, (CBP 7438) (4 November 2019) at 8, 'This then rose to an annual average of 3,200 in the 1990s, 4,200 in the 2000s, and fell to around 3,000 a year on average during the 2010s (to June 2019).'
[99] Tomlinson, Graham and Sinclair, Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive lawmaking?, (UK Constitutional Law Association Blog, 22 February 2021).
[100] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf.
[101] Chapter 39 and 40.

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 BOR WHERE SECONDARY LEGISLATION IS FOUND TO BE INCOMPATIBLE WITH CONVENTION RIGHTS?

220. In light of the answer to question 15 above, no. If secondary legislation is found to be incompatible with convention rights, it should be quashed with no delay. ELA would also say that given the infrequency of quashing orders since the inception of the HRA, this seems to be an unnecessary step.

221. ELA notes that these amendments in the Judicial Review and Courts Bill have been heavily scrutinised. Whilst the interplay between judicial review and human rights legislation is appreciated, one should be cautious in adopting a one-size fits all approach. Especially in circumstances where the Judicial Review and Courts Bill is yet to be finalised and promulgated.

222. UK Courts have exercised their discretion with "judicial restraint" and do no more than is necessary in the circumstances for the individual/s affected.[102] The overwhelming preference of UK Courts is to interpret secondary legislation to "give as much effect to the approach of the primary decision-maker consistently with giving effect to the duty imposed on them to act compatibly with Convention rights and to ensure that subordinate legislation where, and to the extent that it is, incompatible with those rights, is disregarded. That rarely results in subordinate legislation being quashed."[103] The approach by UK Courts is therefore already consistent in limiting the effect of quashing orders by using them as mechanisms of last resort.

223. It seems that the recommendation of prospective or suspended quashing orders has come about through reference to the Scotland Act. There is a clear distinction between the circumstances in which the Scotland Act was implemented compared with the backdrop of the HRA. The purpose of section 102 of the Scotland Act is primarily to deal with a devolution situation. It also (unlike the Judicial Review and Courts Bill) contains protective mechanisms for third parties who may be adversely affected by the suspended or prospective order.

224. If this is going to be implemented, it should be within the discretion of the judicial officer to decide whether the quashing order ought to have conditions such as prospective or suspended application attached. The ability to make a quashing order without restriction should remain.

[102] The Independent Human Rights Act Review 2021 p 318.
[103] The Independent Human Rights Act Review 2021 p 321 at para 38.

225. The focus should be on the rights of the individuals involved opposed to providing Parliament with time to amend legislation. As above, there is no positive obligation on Parliament to act following a quashing order. Conversely, a suspended quashing order may have the immediate effect of delaying an individual's remedy or a confusing effect on the judgment.

226. ELA also considers that the time it takes for an individual to pursue matters and reach judgment stage is not insignificant. A suspended quashing order only delays matters further. This goes against the principles of (timely) access to justice.

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?

227. The power to make a remedial order is a fundamental aspect of the HRA. It is the mechanism to amend legislation that has been held to not comply with Convention rights, following a declaration of incompatibility by the relevant court under s.4 of the HRA.

228. While the potential use of so-called 'Henry VIII' powers by Ministers to amend primary legislation creates legitimate concern, due to the lack of proper parliamentary scrutiny, the wording of s.10(2) of the HRA provides important restrictions against political abuse. It is designed to be used only where there are compelling reasons to do so. Additionally, a remedial order requires approval by an affirmative resolution of both the House of Commons and the House of Lords.

229. ELA considers that the time taken to address legislation that breaches Convention rights is of critical importance. In the context of employment rights, the process for addressing alleged unlawfulness will often take too long. As highlighted recently by the Law Gazette, the backlog in employment tribunals deciding cases has been adversely affected by the impact of COVID and the

lockdowns that have taken place during the pandemics. This has ramifications for the process to obtain a declaration of incompatibility under s.4 of the HRA (which is not a remedy available to the Employment Tribunal or Employment Appeal Tribunal) and any further delay before a remedial order could be made under s.10 of the HRA.

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 WHENEVER 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.

OPTION 1

Option 1 is not preferable to Option 2. Option 1 raises the question of when actions of a public authority could be said to be '*clearly giving effect'* to primary legislation. It would not shield the public authority against litigation as the battleground would simply shift from ECHR compatibility to a new question, the meaning of '*clearly giving effect',* requiring a whole new area of jurisprudential study to define the circumstances in which a public authority can be said to be '*clearly giving effect*' to that primary legislation.

OPTION 2

230. Option 2 would be preferable to Option 1. It would give *scope* for the interpretation of primary legislation in a manner that gives effect to the Bill of Rights,[104] giving it a degree of primacy over primary legislation that offends the principles of the Bill of Rights. It would not offer the same level of protection against such legislation that the HRA provides, but it would provide scope for some protection.

231. The benefit of this approach is that mirroring the changes proposed for Section 3 of the current HRA would mean that public authorities would need to have

[104] See the Consultation at [239] for an explanation of its proposals on Section 3.

regard to the principles in the Bill of Rights in implementing primary legislation to avoid the risk of litigation, as under the proposed section 3, legislation would still need to be construed compatibly with the Bill of Rights (where such interpretation is consistent with the wording and purpose of the legislation).

232. For the reasons above, option 2 is the 'least worst' proposal put forward by the Government; it is a watering down of the protection afforded under Section 6(2), as opposed to the option one approach of the protection being substantially eroded.

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 where an interference with a qualified right '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 action 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

233. ELA is not clear what the question is asking, as the question asks whether the test of "proportionality" has given rise to problems. Dependent on whether the relevant party is on the successful or losing side will influence any persons' view on whether the test is considered to be problematic.

234. Within the employment context, the test of proportionality is well understood from both within human rights and equality legislation. Indirect discrimination (as well as direct age discrimination, and disability arising from discrimination) can be justified if it is a proportionate means to achieve a legitimate aim. The concept of proportionality is familiar to employment law practitioners. Article 14 also

requires objective and reasonable justification to be established by way of defence.

***Gilham v Ministry of Justice* [2019] UKSC 19**

235. We understand from the consultation paper (at paragraph 119) that the case of *Gilham* was given as an example of where the court apparently overreached their remit in applying section 3 HRA "to change the scope of employment rights under the Employment Rights Act 1996 by reading 'worker' much more widely than its natural meaning to include judicial office holders, to avoid incompatibility with Article 14 read with Article10".

236. However, a proper reading of the UKSC's decision in *Gilham* emphasises that the Court did recognise the need to "defer to the considered opinion of the elected decision maker" but:

> *"the …problem is that in this case there is no evidence at all that either the executive or Parliament addressed their minds to the exclusion of the judiciary from the protection of Part IVA. While there is evidence of consideration given to whether certain excluded groups should be included (such as police officers), there is no evidence that the position of judges has ever been considered. There is no "considered opinion" to which to defer."* (para 35)

237. Further, the UKSC did not move on to consider proportionality as the Respondent had failed to put forward a legitimate aim, which is the first point of enquiry.

238. The UKSC was able to read in limb (b) worker rights for judicial officer holders precisely because it would not go against the grain of the legislation, and that given equality rights have been given to judicial office holders under the Equality Act 2010, extending rights under the Employment Rights Act 1996 did "not offend against any fundamental constitutional principle".

239. Separately, although it became unnecessary for the UKSC to decide the point, it held that the margin of appreciation in social and employment policy cases are narrower than in welfare cases.

***Eweida and Others v UK*, app nos. *48420/10, 59842/10, 51671/10 and 36516/10)* [2013] ECHR 37**

240. Ms Eweida's case and that of Ms Chaplin involved the wearing of religious items at work.

241. The UK courts had found that even if she had established indirect discrimination, it would have been a proportionate means to achieve a legitimate aim.

242. Ms Eweida asked the ECtHR to consider her case under Article 9. The ECtHR held that the domestic courts had not balanced the interests between Ms Eweida's right to manifest her religious beliefs and that of the employer's right to protect its corporate image. The employer prohibited Ms Eweida from wearing a cross around her neck, and the ECtHR concluded that whilst the employer's interest to keep up its corporate image was important, the wearing of a discreet cross (where other employees could wear their religious symbols and garments) ought to be permitted. Thus, in considering the competing rights and interests of the parties, the ECtHR held that the balance favoured Ms Eweida and that even though wearing a cross was not mandated by her Christian faith, she had a right to manifest such belief and bear witness to her faith through the wearing of this item. Proportionality was further under question following Ms Eweida's change in policy allowing her to wear a cross.

243. It is ELA's view that the principle of proportionality in this case was not problematic, rather it sought to clarify the factors to be taken into account when a court considers whether the interference with a right is proportionate. The UK courts approach to proportionality was limited to consideration of how many people had previously complained about the employer's policy, rather than whether it was possible for the employer to change the policy.

244. The UK rightly recognises that an individual is free to manifest their religion or belief; it is not problematic to qualify that to ensure that any limitation on that right must be necessary in a democratic society in pursuit of a legitimate aim.

245. In the case of Ms Chaplin, which was heard alongside that of Ms Eweida by the ECtHR, the proportionality issue favoured the position of the UK. It was decided that the wearing of a cross interfered with the health and safety in the hospital ward where Ms Chaplin worked. The health and safety risk therefore tipped the balance in favour of the hospital and the margin of appreciation played a role in that "hospital managers were better placed to make decision about clinical safety than a court" and that "the interference with her freedom to manifest her religion was necessary in a democratic society" (paras 99-100).

Guidance to the Courts

246. Should the government wish to provide additional guidance to the courts on the test of proportionality, it may wish to introduce a code of practice approved by Parliament similar to that used to aid interpretation of the Equality Act 2010, which also assists on interpretation of objective justification.

247. The court is required to give effect to Parliament's purpose behind the legislation. Any guidance to the Court must be aligned to that purpose to assist the court in giving effect to the legislation. Asking the court to put: "great weight to Parliament's view" (option 1) or "great weight to the fact that Parliament was acting in the public interest in passing the legislation" (option 2) will still require interpretation and evidence to be assessed to ensure that the court is satisfied as to Parliament's view.

248. By way of example, the case of *McCloud v Ministry of Justice* [2018] EWCA Civ 2844 demonstrates this point well. The MoJ, in reliance on secondary legislation, protected older judges by retaining them in their more beneficial pension. The government department argued that their actions were proportionate and necessary and in accordance with the transitional protections but failed to provide any evidence to justify the transitional protections.

249. Further, both options imply that a Parliamentary drafter can anticipate all of the different situations to which the statute may apply. Giving "great weight" to the statute is not synonymous with taking a purposive approach, and it seems that the latter approach to interpretation is more consistent with the remit of the courts to retain Parliamentary sovereignty and in protecting the Rule of Law.

250. Please also see our answers to questions 12-14.

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.

251. ELA's members consider that the current position on the award of damages under the HRA and the ECHR is sufficiently flexible and clear. Therefore, this proposed change is unnecessary. See our response to question 27.

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.

252. The IHRAR Call for Evidence did not seek evidence about damages under the Human Rights Act, and damages are considered only tangentially in their review. As such, neither ELA nor the IHRAR has previously considered this question or a question similar to it.

The current position

253. An award of damages under the HRA is at the discretion of the court. Under section 8 of the HRA, a "*court which has power to award damages, or to order the payment of compensation, in civil proceedings*" **may** award damages where it finds that a public authority has acted (or proposes to act) incompatibly with Convention rights.[105]

254. Under section 8(3) – (4) of the HRA:

> *(3) No award of damages is to be made unless, taking into account all the circumstances of the case, including:*
> *(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and*
> *(b) the consequences of any decision (of that or any other court) in respect of that act,*
> *(c) the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.*

[105] Human Rights Act 1998, s 8 (1) and (2)

(4) In determining –
(a) whether to award damages, or
(b) the amount of an award,
(c) the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

255. In determining whether to grant a monetary remedy (and if so, how much), the court seeks to place the claimant in the position he or she would have been in had the infringement not occurred.[106] Sums awarded under the HRA are typically modest, and the court will have regard to any other relief or remedy awarded when determining the amount.[107]

256. Under section 8(4) of the HRA, the quantum of damages in human rights claims will be guided by the principles found in the practice of the European Court of Human Rights, meaning "*the factors which lead it to make an award of damages or to withhold such an award, and its practice in relation to the level of awards in different circumstances.*"[108] In *DSD v Commissioner of Police for the Metropolis* [2014] EWHC 2493 (QB); [2015] 1 W.L.R. 1833 at [16]–[41], Green J explored these principles. Leggatt J further explored them in *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB) where he set out eight principles that should be applied (below extracts from [901]-[916]):

- *First, the award of just satisfaction is not an automatic consequence of a finding that there has been a violation of a Convention right. The Court may decide that, for some heads of alleged prejudice, the finding of a violation constitutes in itself sufficient just satisfaction.*

[106] See *Anufrijeva v London Borough of Southwark* [2004] 2 W.L.R. 603, at [59], per Lord Woolf ("*Despite these warnings it is possible to identify some basic principles the ECtHR applies. The fundamental principle underlying the award of compensation is that the Court should achieve what it describes as restitutio in integrum. The applicant should, insofar as this is possible, be placed in the same position as if his Convention rights had not been infringed. Where the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded. The awards of compensation to homosexuals, discharged from the armed forces, in breach of Article 8 , for loss of earnings and pension rights in Lustig-Prean and Beckett v United Kingdom (2001) 31 EHRR 601 and Smith and Grady v United Kingdom (2001) 31 EHRR 620 are good examples of this approach. The problem arises in relation to the consequences of the breach of a Convention right which are not capable of being computed in terms of financial loss*.")
[107] Richard Burnett-Hall & Brian Jones, *Burnett-Hall on Environmental Law* (3rd edn, Sweet & Maxwell, 2012), at [26-067].
[108] *R. (Sturnham) v Parole Board for England and* Wales [2013] UKSC 47; [2013] 2 A.C. 254 at [31]. See also discussion in: His Honour Judge Christopher Walton, Professor Stephen Todd, District Judge Philip Kramer, Daniel Edwards, Roger Cooper, *Charlesworth & Percy on Negligence* (14th edn, Sweet & Maxwell, 2021) at [2-381].

- *Second, a clear causal link must be established between the damage claimed and a violation found by the Court.*

- *Third, where it is shown that the violation has caused 'pecuniary damage' (i.e. financial loss) to the applicant, the Court will normally award the full amount of the loss as just satisfaction.*

- *Fourth, it is also the practice of the Court to award financial compensation for 'non-pecuniary damage', such as mental or physical suffering, where the existence of such damage is established.*

- *Fifth, the purpose of an award under article 41 is to compensate the applicant and not to punish the state responsible for the violation.*

- *Sixth, in deciding what, if any, award is necessary to afford just satisfaction, the Court does not consider only the loss or damage actually sustained by the applicant but takes into account the 'overall context' in which the breach of a Convention right occurred in deciding what is just and equitable in all the circumstances of the case.*

- *Seventh, as part of the overall context, the Court may take account of the state's conduct.*

    - *Eighth, the Court also takes account of the applicant's conduct and may find reasons in equity to award less than the full value of the actual damage sustained or even not to make any award at all.*

257. In relation to the eighth principle, Leggatt J further explained:

> *"This may be the case if, for example, the situation complained of or the amount of damage is due to the applicant's own fault: see Practice Direction para 2. A striking example is the case of McCann v United Kingdom (1995) 21 EHRR 97, in which the European Court found that the killing of IRA gunmen in Gibraltar by British soldiers involved a breach of article 2 but declined to make any award under article 41 "having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar."*

258. The Consultation refers to the *McCann* case as demonstrating that "*the Strasbourg Court allows compensation to be reduced for 'undeserving' claimants, acknowledging the responsibility that a claimant has towards others.*"[109]

[109] BoR Consultation, at [306].

259. The European Court of Human Rights has issued a practice direction on Article 41 (Just Satisfaction).[110] This confirms that the award of just satisfaction (i.e. damages) is not an automatic consequence of a finding by the European Court that there has been a violation of a right guaranteed by the ECHR or its Protocols. It further states as follows:

> *1…The wording of Article 41, which provides that the Court shall award just satisfaction only if domestic law does not allow complete reparation to be made, and even then only 'if necessary'…makes this clear.*
>
> *2. Furthermore, the Court will only award such satisfaction as is considered to be 'just' (équitable in the French text) in the circumstances. Consequently, regard will be had to the particular features of each case. The Court may decide that for some heads of alleged prejudice the finding of violation constitutes in itself sufficient just satisfaction, without there being any call to afford financial compensation. It may also find reasons of equity to award less than the value of the actual damage sustained or the costs and expenses actually incurred, or even not to make any award at all. This may be the case, for example, if the situation complained of, or the amount of damage or the level of the costs is due to the applicant's own fault. In setting the amount of an award, the Court may also consider the respective positions of the applicant as the party injured by a violation and the Contracting Party as responsible for the public interest. Finally, the Court will normally take into account the local economic circumstances.*
>
> *…4. Claimants are warned that compliance with the formal and substantive requirements deriving from the Convention and the Rules of Court is a condition for the award of just satisfaction.*

260. As is plain from the HRA and domestic case law, as well as Strasbourg case law and practice, an applicant's conduct is quite rightly **already** a factor the courts may take into account when determining whether to award damages and if so, how much.

261. The consultation states that "*the government believes that our new human rights framework should reflect the importance of responsibilities*", referring specifically to individuals' responsibilities within society, i.e. to obey the law and pay taxes, and to our families and to people around us. The Consultation acknowledges that both domestic courts and the Strasbourg Court take into account a claimant's

[110] European Court of Human Rights, *Rules of Court* (1 February 2022), Practice Direction on Just Satisfaction claims, available at <https://www.echr.coe.int/documents/rules_court_eng.pdf>

wider behaviour when determining damages. Yet it seeks to engender a sense of 'responsibility' within the proposed Bill of Rights.

262. The particular question asked by the Consultation is whether there should be an *explicit* element of responsibility incorporated into the Bill of Rights, in the form of reductions to damages on account of a claimant's conduct. The Consultation says that: "*The court will be invited to hear about the lawfulness of the claimant's conduct in the circumstances surrounding the claim but could also be empowered to consider relevant past conduct, such as whether the claimant has respected the rights of others.*"[111] It continues:

> *"By clearly linking the remedies available under the Bill of Rights to how the claimant has lived by its underlying principles, the courts will be expressly guided to think critically about the redress they offer and avoid rewarding undeserving claimants who may themselves have infringed the rights of others. This will serve to put on a statutory footing those considerations which the courts have already recognised as being relevant to the determination of remedies.*"[112]

263. In ELA's view:

a. The court's ability to take into account the claimant's conduct when deciding whether to award damages is already on a statutory footing by virtue of section 8(3) of the HRA. Under this provision, courts must consider "*all the circumstances of the case*" before they award any damages at all, including whether the award is necessary to afford just satisfaction to the person in whose favour it is made. Furthermore, under section 8(4) of the HRA, the court must take into account "*the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention*". These principles make clear that it will not always be necessary to award damages to undeserving claimants or where the claimant's conduct militates against this.

b. In relation to the proposed clauses, Option 1 is the less concerning of the two options. This would "*provide those damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim*", which would almost replicate the current position, although it could be more limiting than the current position, which allows for "*all the circumstances*" to be taken in account.

   Option 2 is less attractive as it would invite the court to consider the applicant's "*wider conduct*", i.e. beyond the circumstances relating to the claim, which may

[111] The Consultation, at [307].
[112] The Consultation, at [308].

be temporally and materially wide or unlimited in scope. While the "*'overall context' in which the breach of a Convention right occurred*" is already taken into account when determining the question of damages (see Leggatt J's sixth principle above), which invites the court to consider a broad array of circumstances when determining damages, there is a concern that a focus in the legislation on the applicant's 'wider conduct' (potentially without any temporal or material limits) could have a chilling effect on legitimate claims being brought, as Claimants may legitimately be concerned that their entire history (i.e. whether they had lived their life in accordance with human rights principles) would be 'on show'. That said, it is acknowledge that to an extent their conduct is 'on show' through human rights litigation as it currently stands. ELA is of the view that s.8 of the HRA and related case law captures the right balance of allowing a claimant's conduct to be taken into account when determining relief as part of the 'overall context', but not unduly focussing on their 'wider conduct'. If Option 2 were enacted, ELA considers that the question of the applicant's 'wider conduct' ought to be limited (temporally or otherwise) to what is relevant to make a just and equitable award in all the circumstances.

c. ELA endorses the IHRAR's proposals regarding legal literacy and proposes enhancing legal literacy in order to engender a sense of 'responsibility' in citizens. It is likely that the British population is largely unaware of how the HRA operates, what the core Convention rights are, and how they interact. In order to engender a 'responsible' culture, ELA suggests embedding (i) an understanding of the HRA and (ii) its underlying values (including historically British values such as liberty, access to justice and the rule of law) at school level. This could include an explanation of the way damages under the HRA works, and that 'undeserving' Claimants or Claimants whose conduct warrants it may not be awarded damages under the HRA. This recommendation is in line with the IHRAR's conclusions, which stated that:

> *"Serious consideration should be given by Government to developing an effective programme of civic and constitutional education in schools, universities and adult education. Such a programme should, particularly, focus on questions about human rights, the balance to be struck between such rights, and individual responsibilities*." [113]

d. Such civic and human rights education could be placed on statutory footing or in the Key Stages of the curriculum, and it could be made clear that the above point on damages is taught to pupils.

[113] IHRAR, page vi

EMPLOYMENT LAWYERS ASSOCIATION

Members of the ELA Working Party

Shantha David	UNISON	Co Chair
Anna Dannreuther	Field Court Chambers	Co Chair
Lorraine Bremner	Inverness Badenoch & Strathspey CAB	
Kiran Daurka	Leigh Day	
Daniel Fox	Essex Court Chambers	
Kathryn Meir	Ashton Bond Gigg	
Christina Morton	Withers LLP	
Rhiannon Plimmer-Craig	Protect Advice	
Bruce Robin	UNISON	
Jane Russell	Essex Court Chambers	
Paman Singh	Law at Work Ltd	
Jennifer Sole	Curzon Green	
Blair Wassman	Brahams Dutt Badrick French LLP	
Adam Wheal	Paris Smith LLP	