Written evidence from Dr Hélène Tyrrell and Professor Alison Young (HRR0001)

Supplementary Written Evidence from Dr Hélène Tyrrell, University of Newcastle and Professor Alison Young, University of Cambridge

1. Dr Tyrrell is a Lecturer at the University of Newcastle and Professor Young is the Sir David Williams Professor of Public Law at the University of Cambridge. Both have extensive experience of teaching and researching in human rights law, specifically looking at the European Court of Human Rights and the operation of the Human Rights Act 1998.

2. This evidence is provided to supplement the oral evidence provided to the Committee on 26 January 2022. We are focusing in particular on the questions that we were not able to fully cover in that evidence session.

Interpretation of Convention rights: section 2 of the Human Rights Act

Q1. The Government have taken issue with the "living instrument" interpretation of the Convention, which requires case law to be interpreted in the light of changing social, ethical, and political conditions. Do you think this has led to, as the Government says, an "inflation of rights without democratic oversight and consent"?

3. The 'living instrument' interpretation of Convention rights provides that the scope of the Convention evolves over time, taking into account evolving social conceptions common to the signatory States. Concerns about the 'living instrument' interpretation of the Convention tend to be framed as an objection to the UK being bound to standards of rights protection that were not anticipated: 'going well beyond what the drafters and original signatories had intended or could have reasonably anticipated'.[1] It is said that the UK committed and so consented to a certain understanding of human rights when becoming a signatory to the Convention and that it should not be held to standards that were not part of that original package.

4. It is difficult to argue that these evolutions happened without the consent of the UK given that the concept of interpreting the European Convention on Human Rights (ECHR) as a 'living instrument' was well established in the Convention case law before the Human

[1] Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights* (2021) [47].

Rights Act 1998 was passed. The concept could even be said to predate the Convention.[2] As the Government's consultation document recognises, the European Court of Human Rights (Strasbourg court) first made explicit reference to the Convention as 'a living instrument' in the 1970s, in a case about corporal punishment to which the UK was a party.[3] A few years later, in another case to which the UK was a party,[4] the doctrine was applied in a case concerning the prohibition of homosexuality in Northern Ireland.

5. Further, the Government has indicated that it does not intend to withdraw from the ECHR. Remaining signatory to the ECHR necessarily implies consenting to the living instrument interpretation of Convention rights, as a matter of international law, since the doctrine is operated by the international court. An evolutive interpretation to treaty interpretation is also in keeping with the general rules of interpretation set out in the Vienna Convention on the Law of Treaties 1969 ('the Vienna Convention'). Article 31 of the Vienna Convention provides that an international treaty should be interpreted in accordance with the ordinary meaning … in their context and in light of its object and purpose'.[5]

6. The idea that this doctrine has inflated rights without 'democratic oversight' may relate to the fact that states are taken to have consented to the living instrument interpretation of the Convention and that these interpretations are a product of an apparently undemocratic judicial body.[6] Other arguments relate to the way that the 'expansion' of rights take effect in domestic law through the interpretative powers that the Human Rights Act 1998 (HRA) gives courts. In taking into account the development of Strasbourg jurisprudence according to section 2 Human Rights Act 1998, UK courts might conclude that a legislative provision is now incompatible with the Convention where it may not have been at an earlier time. According to section 3 HRA, courts may proceed to read that

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[2] In the early 20th Century, the Judicial Committee of the Privy Council described the Canadian Constitution as 'a living tree capable of growth and development': *Edwards v AG of Canada* [1930] AC 124.
[3] *Tyrer v United Kingdom* (1978) 2 EHRR 1 [31].
[4] *Dudgeon v United Kingdom* (1982) 4 EHHR 149.
[5] Vienna Convention on the Law of Treaties 1969, Article 31(1). Article 31(3) adds that subsequent agreements between the parties regarding the interpretation of the treaty or any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation should also be taken into account.
[6] See e.g. Lord Hoffmann, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, 19 March 2009 (subsequently published at (2009) 125 Law Quarterly Review 416), arguing that the Strasbourg Court lacks 'constitutional legitimacy' as a result of the imbalance in judicial appointments and the process by which judges are elected.

legislative provision to render it compatible with the Convention. Thus sections 2 and 3 may effect changes in domestic law, based on the 'living instrument' principle of interpretation, without 'democratic oversight'. The argument comes undone when it is recalled that Parliament itself instructed the courts to operate in this manner, by enacting the HRA. Further, cases concerning the expansion of rights tend also to be cases that attract a margin of appreciation. Domestic courts have been mindful of their institutional competence in such cases, giving weight to democratic deliberation.[7]

7. It remains possible for Parliament to legislate in a way that is incompatible with Convention rights. Parliament can also 'correct' what the courts have done through legislation. For example, amendments to the offence of wilful obstruction of the highway in the Police, Crime, Sentencing and Courts Bill address some difficulties of policing protests arising from the judicial interpretation of s137 Highways Act 1980 in the *Ziegler* case.[8] It is possible to conceive ways to assist Parliament with democratic deliberations when concerns about domestic judicial determinations or adverse Strasbourg judgments arise (discussed further in Q2(a) below).

8. Finally, an arrangement which seeks to maintain membership of the ECHR while instructing domestic courts to resist following or anticipating the evolution of Convention rights would cultivate ever greater disparity between the UK and Strasbourg, make it more difficult for victims of Convention violations to access remedies in domestic courts, and make adverse Strasbourg judgments more likely.

(a) Do you think the application of the margin of appreciation has been applied in a way that provides sufficient respect to the unique constitutional and legal traditions of the UK when giving effect to Convention rights?

9. The margin of appreciation is a doctrine of the Strasbourg court. The doctrine affords a degree of latitude to states in how they protect Convention rights. It is a doctrine which recognises and gives force to the principle of subsidiarity, recognising that the primary

[7] *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, discussed below. See also *R (Z) v Hackney London Borough Council* [2020] UKSC 40; *R (Chester) v Secretary of State for Justice; McGeoch v The Lord President of the Council and another (Scotland)* [2013] UKSC 63; [2014] AC 271: the Supreme Court recognised the incompatibility of the blanket ban on prisoner voting but was reluctant to make a declaration of incompatibility in part because the matter was under review in Parliament.

[8] *Director of Public Prosecutions v Ziegler and others* [2021] UKSC 23, [2021] 3 WLR 179.

responsibility for the protection of Convention rights lies with the states party to the Convention and respecting the fact that different states will give effect to Convention rights according to their own cultural, social, and legal traditions.

10. The Strasbourg court is generous with the margin of appreciation and a number of cases make clear that it has been applied in a way that respects the constitutional and legal traditions of the UK. A useful example is *Animal Defenders International,*[9] concerning a ban on political advertising. The Strasbourg court attached considerable weight to what it called 'exacting and pertinent reviews' by both parliamentary and judicial bodies in the UK,[10] finding that the broadcasting ban did not constitute a violation of Convention rights even though the margin of appreciation was very narrow.

11. The generosity with which the doctrine is applied is sometimes obscured by the noise around cases where there has been an adverse finding against the UK despite a margin of appreciation. The prisoner voting saga is an example. The political and media reception of *Hirst v UK* might have given the impression that the Strasbourg court had declared any ban on prisoner voting incompatible with Convention rights. It was the indiscriminate nature of a blanket ban that was the problem: 'a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be'.[11] This is made more obvious by the fact that a very small change, granting the vote to an estimated 100 or so offenders released on temporary licence, was eventually taken to comply.[12]

12. A related but different question surrounds the way that domestic courts decide cases where the Strasbourg court affords, or would be likely to afford, the UK a margin of appreciation. Where the issue would be likely to fall within the margin of appreciation, the concern is that the HRA permits domestic courts to interpret and apply Convention rights to go further than that the Strasbourg court. The well-known example is the *Re G* case,[13] concerning whether unmarried couples in Northern Ireland could be excluded from consideration for adoption. The House of Lords was prepared to find that a

[9] *Animal Defenders International v UK* (2013) 57 EHRR 21.
[10] ibid [115]-[116].
[11] *Hirst v UK (No 2)* (2005) ECHR 681 [82].
[12] Council of Europe, Committee of Ministers 1324th meeting, 7 September 2018.
[13] *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173.

Convention right had been violated, even though the decision to ban adoption by unmarried couples could have fallen within the margin of appreciation (at that time). This approach to the margin of appreciation seemed to influence later cases. The obvious example is *Nicklinson*,[14] concerning the legality of assisted suicide. The point would fall within the margin of appreciation, but a majority of the judges felt it was within the jurisdiction of the court to decide whether the law was or was not compatible with the Convention rights recognised by UK law and that it was in principle open to the court to make a declaration of incompatibility (although only 2 of the 5 would have actually made the declaration). More recent examples suggest that the Supreme Court is settling on a more conservative approach. *Elan-Cane* concerned whether being required to declare gender as either male (M) or female (F) in UK Passports was compatible with the Convention.[15] The Supreme Court held that it was and evidenced a more cautious attitude to the idea that domestic courts could find a violation of the convention where a matter would be likely to fall within the margin of appreciation.

Q2. Would the Government's draft clauses amending section 2 impact the UK's obligation to give effect to and abide by the final judgments of the Strasbourg court in Article 46(1) of the Convention?

13. The obligation in Article 46 is on the state. It means that a judgment of the Strasbourg court in a case to which the UK is a party is binding on the UK. Section 2 HRA is a provision of domestic law, passed by the domestic legislature, which directs domestic courts to take relevant jurisprudence of the Strasbourg court into account. Thus section 2 has no bearing on the international obligation. However, while a domestic UK court adjudicating in litigation about a domestic 'Convention right' is not bound by a decision of the Strasbourg court, domestic courts are able to play a part in discharging the Article 46 obligation by following or critically engaging with Strasbourg judgments against the UK.

14. Although the draft clauses amending section 2 make explicit that there is no requirement to follow Strasbourg jurisprudence, both options accept that courts may take such cases into account and would do so where the jurisprudence is 'relevant'. Difficulties may arise

[14] *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2014] UKSC 38; [2015] AC 657
[15] *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56.

if courts are required to specifically pay attention to the wording of the Convention and the Travaux Préparatoires (the proposed option 2) which may provide a different interpretation of a Convention right than the interpretation found in the relevant judgment of the Strasbourg court. The result of directing UK courts to prioritise these materials over a judgment specifically addressed to the UK could be to place the UK in breach of its obligations under Article 46.

(a) The Government is also proposing changes to how the UK Government involves Parliament in responding to adverse Strasbourg judgments generally. It would seek to have a better system for informing Parliament of adverse judgments and would potentially organise motions within Parliament. Do you think the process is in need of reform? If so, how? How could such a system be devised without offending Article IX Bill of Rights 1689?

15. Parliament could be more involved in democratic deliberations in relation to adverse Strasbourg judgments but also in relation to potential adverse judgments and the result of domestic judicial deliberations where incompatibilities between UK law and Convention rights have been identified.

16. Adverse Strasbourg judgments are already considered by the Joint Committee on Human Rights (JCHR) which makes a valuable contribution through legislative scrutiny of Bills and remedial orders, as well as the publication of thematic reports. There may be scope to create more regular debates on JCHR reports and to extend the remit of the Committee to enable it to propose motions for debate.

17. In addition to debates that are reactive to adverse Strasbourg judgments, there may be value in establishing regular prospective debates in relation to developments in the Strasbourg jurisprudence which could indicate incompatibility between UK law and the ECHR. As the JCHR has previously suggested,[16] there could be more systematic democratic consideration of Strasbourg judgments finding Convention violations by other States. This may create the opportunity for democratic leadership on matters of compatibility, enabling Parliament to pre-empt future adverse Strasbourg judgments through legislation or through the mere fact of democratic deliberation. As the Independent Human Rights Act Review (IHRAR) report noted, Parliamentary discussion

[16] Joint Committee on Human Rights, 'Enhancing Parliament's role in relation to human rights judgments' (2010) https://publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/85.pdf

about the application of Convention rights can play an important role in helping the Strasbourg court to determine the appropriate margin of appreciation to be afforded to the UK and, consequentially, may help to avoid adverse Strasbourg judgments. This is because the Strasbourg court feels able to review debates in the UK Parliament (unlike domestic courts which are constrained by parliamentary privilege and the prohibition on questioning or impeaching parliamentary proceedings under Article IX Bill of Rights). *Animal Defenders International* is again a useful example: the Grand Chamber of the European Court of Human Rights examined the quality of parliamentary pre-legislative scrutiny and attached 'considerable weight' to the reviews conducted by the UK Parliament when judging the proportionality of the UK's legislative prohibition on political advertising.[17]

18. Parliament could also be given greater opportunity to consider the result of domestic judicial deliberations where incompatibilities between UK law and Convention rights have been identified. These measures could help to address concerns about constitutional imbalance resulting from the operation of the HRA. The Ministry of Justice database of declarations of incompatibility and reports published by the JCHR have played a valuable part in creating transparency around the Government's response to section 4 declarations. This could be supported by the recommendations made in the IHRAR report for increased transparency and record keeping in relation to judgments where section 3 has been used to read and give effect to legislation in a manner that is compatible with Convention rights. The creation of a database of section 3 judgments could support legislative scrutiny of judicial determinations and facilitate parliament in 'correcting' judicial interpretations of legislation where necessary.

19. Article IX Bill of Rights would not be offended unless there was an expectation of courts reviewing parliamentary deliberations. UK courts can and do take into account the fact of prior or prospective parliamentary consideration on matters of Convention compatibility. This may influence the degree of weight given to Parliament's assessment when applying the test of proportionality. However, courts are not able to review or make judgments about the accuracy or cogency of legislative discussion.[18] Greater parliamentary involvement in responding to adverse Strasbourg judgments may therefore provide

[17] *Animal Defenders International v UK* (2013) 57 EHRR 21 [114]-[116].
[18] *R (SC and CB) v Secretary of State for Work and Pensions* [2021] UKSC 26.

evidence about legislative deliberations but would neither inform nor supplant the courts' own assessments on questions of compatibility.

The Position of the Supreme Court

Q3. The IHRAR Panel considered, but did not recommend, clarifying in statute matters that fall outside the institutional competence of the UK courts – however the Government is seeking views on this proposal. Do you think there is a case for replacing the doctrine of judicial restraint with a statute clarifying matters that would fall outside the institutional competence of the UK courts? What would be the risks and unintended consequences of such an approach?

20. We do not think that there is cause for replacing the doctrine of judicial restraint with a statute intended to clarify matters that would fall outside the institutional competence of the court. We are concerned that it would be difficult, if not impossible, to provide a specific account of those areas that would provide greater or sufficient clarity. Moreover, providing a new statute risks giving rise to greater legal uncertainty. Furthermore, an unintended consequence of this legislation is that it could upset the delicate constitutional balance in the United Kingdom through which we aim to uphold the sovereignty of Parliament and the rule of law.

21. It is very difficult to provide a precise list of every issue that falls outside of the competence of the courts. Current law tends to rely on a series of principles to draw this distinction. First, issues are considered beyond the competence of the courts when there are no rules of domestic law governing that subject. For example, UK courts will not determine the legality of acts of foreign states,[19] or of international treaties that have not been incorporated into UK law.[20] These issues are non-justiciable as they are not regulated by UK law. In a similar manner, UK courts have also recognised that some issues are regulated by politics as opposed to law, and so are non-justiciable. The distribution of honours by the Monarch, for example, is non-justiciable as an honour is a gift from the Monarch.[21] The decision is not determined by legal principles. Similarly,

[19] *Belhaj v Straw* [2017] UKSC 3 and "*Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela* [2021] UKSC 57.

[20] *Rayner (JH) (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418. See also, more recently, *SC*.

[21] *Graham Nassau Gordon Senior-Milne v Advocate General for Scotland* [2020] CSIH 39; '[W]e are of opinion that the decision of the Queen to grant or withhold an honour cannot be the subject of judicial review, in view of its fundamentally discretionary nature.',[20]

courts recognise that constitutional conventions are distinct from law and cannot be enforced by courts.[22]

22. Second, issues may be non-justiciable because to render them justiciable would undermine constitutional principles or the inter-institutional respect that underpins the UK constitutional settlement. One example is Article IX Bill of Rights 1689, which makes clear that courts may not question proceedings in Parliament. This recognises the importance of democracy and ensures freedom of speech within Parliament. This and other examples of parliamentary privilege recognise the need for Parliament to regulate its own affairs. If courts were allowed to trespass too greatly into areas within the exclusive cognisance of Parliament, the balance of power may be tipped in favour of courts, who may then be able to curtail Parliament's powers. However, this principle also recognises that MPs are not above criminal law.[23]

23. A more comprehensive piece of legislation that aimed to list areas that were beyond the competence of the court – i.e. that were non-justiciable – could take one of two forms. First, it could provide a set of principles to help determine areas that should be beyond the jurisdiction of the court. It is likely that any such legislation would replicate current principles. Whilst this codification may provide some legal certainty, it may also give rise to uncertainty as courts determine whether any new legislation is intended to change the interpretation of these principles, or whether new legislation merely intends to codify the existing law. This potential for legal uncertainty may give rise to more litigation on these issues, which would undermine the Government's aim of ensuring that administrative departments are able to achieve their policy objectives without having to waste time and money dealing with what may ultimately be frivolous human rights claims.

24. Second, the legislation could aim to provide a specific list of issues that were non-justiciable. However, it may be difficult to provide a comprehensive list of these areas. There is a risk that any detailed list would be over or under inclusive. Further problems may arise as regards areas that were not included on a list of non-justiciable issues, but which were similar to issues that had been specifically designated as non-justiciable – and vice-versa. Either legislative option is likely to increase legal uncertainty and potential litigation, at least in the short-run.

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[22] *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41, [2020] AC 373.
[23] *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684.

25. In addition to legal uncertainty, to create a specific list of non-justiciable subject matters runs contrary to recent legal developments and runs the risk of undermining the protection of the rule of law. Courts are sensitive to the separation of powers and to the proper scope of their jurisdiction. This can be illustrated not only through the recognition of non-justiciable issues, but also through the exercise of deference when determining the law. For example, while recognising that it is justiciable for courts to determine whether legislation regulating socio-economic rights has breached human rights, UK courts will exercise deference when making this determination.[24]

26. Non-justiciability and deference function in different ways. When an issue is non-justiciable, courts recognise that the matter is one that is not governed by UK law and so is not suited to the courts. When courts exercise deference, they recognise that an issue is suitable to be determined by the courts but there are also reasons to grant a wider area of discretion to the executive or legislature, for example because this matter also deals with complex social or economic issues.

27. It is not clear whether any proposed legislation would aim to codify, or determine, areas that are currently recognised as non-justiciable, or whether it would specify areas that are justiciable. A further possibility is including and designating matters about which the courts exercise deference as beyond the institutional competence of the court. The latter runs the risk of transferring issues that the court currently regards as justiciable into those that are not justiciable, with consequences for the rule of law and a potential diminution in the legal protection of human rights. This may also give rise to further uncertainty as courts may regard this as an ouster clause – a clause that effective removes judicial review from an area that was previously reviewed by the courts. Courts interpret ouster clauses narrowly to uphold the rule of law.[25]

28. There is a further possible unintended consequence of legislation designed to provide an account of issues that are beyond the competence of the court. The UK is almost unique in the world as it does not have a codified constitution. It relies on a principle of parliamentary sovereignty, which means that Acts of Parliament are recognised as the

[24] *R (SC and CB) v Secretary of State for Work and Pensions* [2021] UKSC 26.
[25] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147; *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

highest form of law in the UK. The UK constitution also recognises the rule of law as a constitutional principle.[26] The balance between these two fundamental principles is maintained through inter-institutional comity. Each institution respects its own constitutional role and that of the other institutions of government. As discussed above, parliamentary privileges can be understood in this manner, limiting the constitutional powers of the court in order to protect the constitutional role of the legislature. Legislation which aims to provide a comprehensive list of areas that are unsuited for the courts may upset this delicate constitutional balance. This imbalance would be exacerbated if such legislation were to empower Ministers to add issues to the list of those considered unsuitable for the courts, tipping the balance of power away from the legislature towards the executive.

The relationship between the UK Courts and Parliament: sections 3 and 4 of the Human Rights Act

Q4. Has the obligation in section 3, which requires courts to interpret legislation compatibly with Convention rights "so far as it is possible to do so", shifted the role of the judiciary, as the Government states, from "their normal function in the interpretation of legislation into judicial amendment"?

29. The obligation in section 3 HRA requires courts to read legislation in a way that is compatible with Convention rights, where 'possible'. Working out what 'possible' means has been a difficult balance to strike. An interpretation that amounts to re-writing legislation starts to feel like judges taking on the role of the legislature, while being overly restrained risks frustrating the aim of section 3 and leaving victims of rights violations without remedy. Section 3 created a strong interpretative obligation but does not extend to judicial amendment.

30. It is true that the first two decades of HRA jurisprudence make clear that judges consider themselves under a strong obligation to try and construe legislation to achieve compatibility with the Convention.[27] It is also true that *R v A* was illustrative of a radical

[26] Constitutional Reform Act 2005, section 1.

[27] *R (L) v Commissioner of Police of the Metropolis* [2009] UKSC 3; [2010] 1 AC 410 [74] (Lord Neuberger): courts are 'bound to try, if possible, to construe legislation in such a way as to achieve compatibility with the Convention'; *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 [50] (Lord Steyn): There is a 'strong

application of section 3, but the case does not represent the current approach to section 3. Even the government consultation document acknowledges that this was the 'high-point' of the so-called expansive approach to section 3.[28]

31. Much of the judicial discussion of section 3 revolves around respecting the boundary between judicial interpretation and legislation. The courts recognised early on that the HRA 'reserves the amendment of primary legislation to Parliament'.[29] In later cases the judges have clarified that section 3 could not be used where a Convention compliant interpretation would 'violate a cardinal principle of the legislation', be 'incompatible with the underlying thrust of the legislation', [30] or 'call for legislative deliberation'.[31]

32. The government proposals imply that when courts stretch legislative language to make it compatible with Convention rights, that they do so contrary to the will of the government. In reality, an interpretative solution via section 3 is often made with the agreement from government counsel.[32]

33. Judges do not come to their decisions on these points in a vacuum. There was an interesting use of section 3 in a recent case decided in the Administrative Court: *Vanriel and Tumi*.[33] Two victims of the Windrush scandal had secured the right to stay in the UK long term but were denied citizenship on the basis that The British Nationality Act required people applying for citizenship to have been physically in the UK on the exact date five years before their application and there was no discretion to waive this 5-year rule. The judge found that the lack of discretion or flexibility was incompatible with their Convention rights and that it was possible to use section 3 to read and interpret the offending provision as if it contained a discretion to disapply the 5-year rule in cases such as theirs. That would appear to be a recent example of a judge apparently re-writing legislation under section 3 but even this seems much less radical when it is recalled that the five-year rule was about to be amended in the Nationality and Borders Bill.

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rebuttable presumption' in favour of an interpretation consistent with Convention rights.

[28] Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights* (2021) [118].

[29] *Re S* [2002] UKHL 10 [40] (Lord Nicholls)

[30] *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 [121] (Lord Rodger).

[31] ibid [33] (Lord Nicholls).

[32] e.g. *Principal Reporter v K and others (Scotland)* [2010] UKSC 56; [2011] 1 WLR 18.

[33] *R (Vanriel and Tumi) v Secretary of State for the Home Department* [2021] EWHC 3415 (Admin).

Q5. The courts are currently able to quash secondary legislation that can't be read compatibly with Convention rights. Should they be limited to making declarations of incompatibility in those circumstances – a possibility raised in the Government consultation?

34. We do not agree that courts should be limited to making declarations of incompatibility in respect of secondary legislation that cannot be read compatibly with Convention rights. The proposal risks removing an important check on executive power, is likely to dilute the protection of rights, and may create inconsistencies which are difficult to justify.

35. The problem to be inferred by the government's suggested change to the treatment of secondary legislation may be illusory. Despite the volume of secondary legislation, there are not actually many successful challenges to delegated legislation based on the HRA.[34] Even if courts do find secondary legislation to be incompatible with the Convention, it is not necessarily the case that a quashing order always follows. A quashing order is a discretionary power and courts already can and do sometimes choose to make a declaratory order in respect of secondary legislation, leaving it to the government to exercise judgement about the best way to respond.[35]

36. The proposed change also risks upsetting the balance of powers between the institutions of state by removing an important check on executive power. If Parliament delegates to the executive the authority to make legislation, it is an uncontroversial role of the courts to supervise the exercise of that delegated authority and to be able to constrain the executive to their proper jurisdiction where they purport to exceed it. Judicial supervision is especially important where there is limited opportunity for legislative scrutiny. A large body of secondary legislation is made each year and is subject to much less scrutiny than primary legislation and, as Tomlinson et al have put it, 'the scrutiny a piece of delegated legislation receives when it is judicially reviewed is not infrequently the first substantial scrutiny it has ever received, and almost always the most rigorous scrutiny'.[36] The

[34] J. Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?', *U.K. Const. L. Blog* (22nd Feb. 2021) (available at https://ukconstitutionallaw.org/))

[35] E.g. *R (TD) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618.

[36] J. Tomlinson, L. Graham and A. Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?', *U.K. Const. L. Blog* (22nd Feb. 2021) (available at https://ukconstitutionallaw.org/))

difference between the scrutiny given to primary and secondary legislation makes it difficult to justify enforcing a more deferential approach in respect of latter.

37. Limiting courts to declarations of incompatibility in respect of secondary legislation would also forcibly reduce the ability of domestic courts to provide immediate remedies for violations of Convention rights. A declaration of incompatibility is discretionary in its effect. It triggers a power, rather than a duty, for a government minister to amend incompatible legislation. Further, unless and until declarations of incompatibility are treated as binding obligations, the Strasbourg court has held that the declaration of incompatibility is not an effective remedy.[37]

38. Limiting courts to making a declaration of incompatibility in respect of secondary legislation would create inconsistency. It would be a strange outcome if secondary legislating violating human rights could not be quashed while secondary legislation which runs into unlawfulness based on ordinary public law principles could be. In this eventuality, the courts may be open to hearing challenges in relation to relevant secondary legislation based on ordinary public law principles and the courts have generally been rigorous in their review of secondary legislation which would assume the power to diminish the scope of fundamental rights. The obvious example is *Ahmed v HM Treasury*,[38] concerning asset freezing measures, in which the Supreme Court concluded that the statutory instrument that had the effect of significantly curtailing the human rights of affected individuals was beyond the powers of the 'parent' Act of Parliament.

39. Limiting courts to declarations of incompatibility in respect of secondary legislation would also risk creating troubling disparities between Westminster and the devolved nations. Any legislation passed by a devolved legislature which is not compatible with the Convention can be quashed on the basis that it is not within the competence of that body to create such law.[39] Restricting courts to a declaration of incompatibility in respect of secondary legislation would augment the status of secondary legislation made by Ministers in Westminster above legislation passed by the devolved legislatures.

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[37] *Burden and Burden v United Kingdom* App no 13378/05 (ECtHR, 12 December 2006) [37].
[38] *Ahmed v HM Treasury* [2010] UKSC 2; [2010] 2 AC 534.
[39] Scotland Act 1998, s28(2)(d); Government of Wales Act 2006, s94(6)(c); Northern Ireland Act 1998, s6(2)(c).

40. Finally, the proposal may have unintended consequences for the declaration scheme as a whole. A declaration of incompatibility is a discretionary remedy. A court is free to decline to make a declaration even where an incompatibility is identified. The legislature is also free to ignore any declarations that are made. Yet, while parliamentarians do not consider themselves bound to respond to declarations of incompatibility, the evidence suggests that considerable weight is given to these judicial determinations.[40] It could be argued that the weight of a declaration of incompatibility comes in part from the potential for judicial restraint.[41] Making declarations of incompatibility the only remedy available for secondary legislation that is incompatible with Convention rights might make resort to declarations of incompatibility more automatic and may dilute the impact of declarations of incompatibility where made.

41. It is important to recognise, however, that quashing delegated legislation may give rise to further consequences for third parties who have relied on the delegated legislation, as well as public bodies who may have exercised discretionary powers granted to them by delegated legislation. Courts are sensitive to these issues, taking this into account when exercising their discretion as to the appropriate remedy for unlawful delegated legislation. Courts will sometimes issue a declaratory order rather than quashing delegated legislation.[42] Moreover, courts recognise that, whilst a general measure – such as delegated legislation – may be unlawful, this does not mean that a specific measure applying that general measure is also unlawful. For example, if rules give rise to systemic unfairness, it may still be possible for a specific application of that rule to have been fair in the circumstances. Where this is the case, the court has concluded that quashing a general measure need not automatically render individual measures applying that general measure to also be quashed. [43] A better means of dealing with these issues, therefore, would be to reinforce the remedial discretion of the court, perhaps by clarifying the ability of courts to issue suspended and prospective only quashing orders.

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[40] Jeff King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act' in Hayley Hooper, Murray Hunt, and Paul Yowell (eds.), *Parliaments and Human Rights* (Hart 2015).
[41] Conall Mallory and Helene Tyrrell, 'Discretionary Space and Declarations of Incompatibility' (2021) 32(3) Kings Law Journal 466.
[42] *R (Tigere) v Secretary of State for Business, Education and Skills* [2015] UKSC 57, [2015] 1 WLR 3820.
[43] *R (TN (Vietnam)) v Secretary of State for the Home Department* [2021] UKSC 41, [2021] 1 WLR 4902.

How would the impact of such a change be affected if section 3 were scrapped or amended as proposed?

42. The section 3 interpretative obligation is an important remedy in respect of secondary legislation. Any change to section 3 must be considered in light of the duty on any public authority to act compatibly with Convention rights. The section 3 interpretative duty is laid upon everyone, not just the courts. There are many laws which are capable of being operated both compatibly and incompatibly and section 3 empowers public authorities to resolve upon Convention compatible interpretations wherever possible (subject to the defence in S6(2)(b) if primary legislation prevents removal of the incompatibility). Removal or dilution of the section 3 interpretative duty may make it more difficult for public authorities to act compatibly with Convention rights and may result in more litigation before the courts.

43. For courts, tipping the balance towards declarations of incompatibility and away from Convention compatible interpretations of legislation is likely to mean that people whose Conventions rights have been violated through the operation of some primary or secondary legislative provision will not receive a remedy in domestic courts. That is because the declaration of incompatibility does not actually affect any change (and does not require legislative response) while the interpretive power in section 3 changes the operation of the law and so gives an immediate remedy. In the absence of an ability to construe legislation compatibility with section 3, it would be difficult for courts to avoid resorting to quashing secondary legislation that is incompatible with Convention rights, which may give rise to difficulties for third parties whose actions are regulated by the legislation in question.

44. Finally, scrapping section 3 has the potential to generate considerable uncertainty. On a practical level, since s3 interpretations are not followed (or not necessarily followed) by corresponding amendments to legislation, there is the possibility that past interpretations pursuant to section 3 could be subject to reconsideration in new litigation covering the same ground.

The relationship between the UK Courts and Parliament: sections 3 and 4 of the Human Rights Act

Q6. The Government has proposed revisiting the obligation on Ministers to make a statement of compatibility under section 19 HRA in respect of Bills they introduce into Parliament. Do you think there is a case for change? What would improve this arrangement?

45. In its consultation exercise, the Government expresses concern as to whether section 19 strikes the 'right constitutional balance between Government and Parliament, particularly in relation to ensuring human rights compatibility whilst also creating the space for innovative policies'.[44] We would argue that any imbalance is currently tipped in favour of the Government and that any modification should be one that enables Parliament to debate human rights issues more effectively when enacting legislation.

46. Section 19 requires a Minister to make a statement either as to the compatibility of legislation with Convention rights, or to the effect that, even when the Minister is not in a position to make this statement, the Government nevertheless wishes to proceed with enacting the legislation in question. The operation of this provision within Government can be discerned through the provisions of the 'Guide to Making Legislation' published by the Cabinet Office.[45] The Guide places the responsibility on departmental lawyers to check on a proposed Bill's compatibility with Convention rights. They may also liaise with lawyers in the Ministry of Justice. Information about a Bill's compatibility, or otherwise, with Convention rights is also included in the explanatory memorandum accompanying a Bill and potentially also the legal issues memorandum included with a proposed Bill that is sent to the Parliamentary Business and Legislation Committee (a Cabinet Committee), which determines which proposed Bills will become part of the Government's legislative programme.

47. We would argue against making a section 19 statement discretionary as opposed to mandatory. The requirement to make a statement of compatibility ensures that ministerial departments scrutinise potential legislation for Convention-compatibility. This is overseen by the Joint Committee on Human Rights when performing their role of legislative scrutiny. Section 19 does not prevent Ministers from introducing policies

[44] Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights* (2021) [261].
[45]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1048567/guide-to-making-legislation-2022.pdf

which may contravene Convention rights. Rather, it requires human rights scrutiny and ensures that any desire to legislate contrary to Convention rights has been debated and that it has the backing of Parliament. The provision, therefore, already provides sufficient flexibility to create innovative policies.

48. However, problems may arise if section 19 is regarded purely as a means of ensuring Convention-compatibility, rather than as a means of facilitating debate as to the best way in which innovative policies can be achieved in a manner that recognises and furthers human rights. This is particularly the case when an issue falls within the margin of appreciation. A check to ensure Convention-compatibility is designed to ensure that legislation does not undermine the minimum level of rights required by the Strasbourg court, rather than encouraging parliamentary deliberation as to the best way of facilitating a protection of human rights which takes account of British values, including those that would provide a stronger protection of rights within a wide margin of appreciation. Thus a focus on legal compatibility may do little to support the development of a human rights culture within Parliament.

49. Modifications to section 19 alone might not achieve the objective of facilitating more debates about rights. Rather, this may require modifications to the Standing Orders in the House of Commons that could be used to facilitate more debates on the content of human rights rather than merely focusing on whether proposed legislation is compatible with Convention rights. This may be achieved, for example, by empowering the Joint Committee on Human Rights to propose a motion in Parliament regarding legislative scrutiny of a particular Bill when the Committee recognises that a Bill complies with Convention rights, but where there is a wide margin of appreciation which may provide an opportunity for Parliament to discuss whether there is a desire to provide a stronger protection of a right than the minimum protection provided by the Convention.

50. Modifications could also be made to the Cabinet Guide to Making Legislation which could recognise that explanatory memorandums could include accounts not only of Convention compatibility, but also of whether a wide margin of appreciation was afforded to a particular Convention right. This could afford more space for innovative policy making and provide an opportunity for the UK Government and Parliament to focus on a British definition of the right within that margin of appreciation.

Proportionality and qualified rights

Q7. The Government consultation states that "the application of the principle of proportionality by the courts has created considerable uncertainty and impinged on the ability of elected lawmakers to balance individual rights with due respect for the wider public interest." Do you agree with that assessment?

51. Whilst we recognise that the application of the principle of proportionality may not be perfect, we do not think that this has created considerable uncertainty. We are also not of the opinion that this has impinged on the ability of elected lawmakers to balance individual rights with due respect for the public interest.

52. The principle of proportionality applies to the non-absolute rights, found in Articles 8 to 11 ECHR, and to Article 14 (preventing discrimination in relation to the application of Convention rights). Proportionality is also used when determining the scope of positive obligations. When applying the test of proportionality, courts apply a four-point test. First, courts determine whether the restriction of the Convention right pursues a legitimate aim. Second, they assess whether the legislation is necessary to achieve this aim. Third, the courts assess whether the legislation is suited to achieve this aim. Finally, in the fourth stage, the courts balance the restriction of the right against this justification.[46]

53. When applying this test, courts also use deference, a means of giving weight to the balance made by the government or the legislature when restricting the Convention right. Deference is used to determine how stringently courts apply all four stages of the proportionality test. There are three main situations in which courts will be more deferential to the Government or Parliament. First, courts recognise that the Government and Parliament are better able to balance some rights than the courts. This is the case, for example, with socio-economic rights.[47] Parliament is more able to have regard to a wider range of competing interests that need to be balanced when determining socio-economic issues, whereas courts only see the parties before the court. Second, courts will grant more deference when it recognises that the Government or Parliament have greater expertise than the courts – for example as regards issues of national security. Third,

[46] *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, *Her Majesty's Treasury v Ahmed (No 2)* [2010] UKSC 5.
[47] *R (SC and CB) v Secretary of State for Work and Pensions* [2021] UKSC 26.

courts grant greater deference when there is evidence of Parliamentary engagement in determining how a right is balanced.[48]

54. Whilst it may not always be easy to predict how the proportionality test will be applied, some of this lack of certainty stems from the difficulties that surround applying this test in a manner that is sensitive to the need to recognise those areas where more weight should be given to the Government or Parliament when making this assessment. One way of improving clarity here would be to encourage more informal dialogue between courts and governmental departments in order to facilitate a better understanding of how the proportionality test applies in practice.

55. It is also worth bearing in mind that the proportionality test stems from decisions of the Strasbourg court. Any modification of this test in order to facilitate greater clarity may run the risk of more cases being taken to the Strasbourg court, which may result in more adverse decisions against the UK.

Public authorities and positive obligations

Q8. The Government is proposing changes to section 6 of the Human Rights Act, which makes it unlawful for a "public authority" to act in a way which is incompatible with a Convention right. Is the law sufficiently clear for bodies to determine when they are exercising functions of a public nature for the purposes of section 6? Should Parliament seek to clarify the definition of public authorities in legislation, or should this be left to the courts?

56. Practical difficulties have arisen with the application of the definition of a public authority in section 6 of the Human Rights Act 1998. Section 6 distinguishes public from private bodies based on their functions. However, it can be difficult to distinguish between public and private functions, especially where public services are performed by a private individual or company as opposed to an institution that is part of the State. These difficulties do give rise to a lack of clarity when determining whether a body is

[48] *R (Z) v Hackney London Borough Council* [2020] UKSC 40, where Lord Sales stated that; 'The margin of appreciation to be afforded to Parliament when it has sought to strike a balance between competing interests varies depending on context. Where, as here, Parliament has had its attention directed to the competing interests and to the need for the regime it enacts to strike a balance which is fair and proportionate and has plainly legislated with a view to satisfying that requirement, the margin of appreciation will tend to be wider. A court should accord weight to the judgment made by the democratic legislature on a subject where different views regarding what constitutes a fair balance can reasonably be entertained.' (at para [107]).

performing a public function so as to fall within the definition of a public authority for the purposes of section 6 HRA.

57. It is important to recognise, however, that UK law has developed a relatively narrow definition of the scope of a public body for the purposes of the HRA. This can be seen in the leading case of *YL*, which concerned whether care homes were public authorities when they were providing care for those for whom a public authority had a duty to organise care.[49] The Supreme Court concluded that care homes were not public authorities. The legislation only required the public authority to arrange for care, rather than to provide the care. Moreover, when providing care, private care homes were primary concerned with commercial decisions. The provision of accommodation was also not a public function in and of itself. The legislature responded to this decision by a specific enactment in legislation which expressly recognised that care homes were public authorities for the purposes of the HRA.[50]

58. One possibility would be to continue to apply the current legal test, which tends to err on the side of a narrower definition of a public authority. The test has now been clearly established, even if its application may not always be precise, and there is the ability for Parliament to intervene when necessary (as it did following *YL*) to ensure an effective protection of human rights.

59. Another possibility would be to legislate to provide a clearer definition of a public body. However, as with the delineation between issues that are and are not suitable for judicial resolution, this could be difficult to achieve. Legislation would either have to incorporate general principles, which may not improve legal clarity, or provide a list which runs the risk of being overly complicated (and therefore could give rise to legal uncertainty) as well as potentially being over or under inclusive.

60. A further option would be to reverse the assumption that a private body performing a function that a public body is under a duty to provide is not, therefore, a public authority. This would provide greater clarity for private bodies with whom public bodies enter into contracts by making clear the assumption that they would be treated as a public body if performing a function that the public body was under a duty to provide. It would then be

[49] *YL v Birmingham City Council* [2008] 1 AC 95.
[50] Care Act 2014, section 73.

possible for Parliament to provide a list of exceptions to this assumption. However, as this is reversing the current law, this would also require a detailed assessment of those bodies that may become public authorities for the purposes of the HRA. Legislation may need to scrutinise this list, and enact exceptions where required, or would have to empower the executive to enact regulations. Any legislation would require a transition period. This may give rise to uncertainty in the short term which would have to be balanced against any long-term improvement in legal certainty.

61. Given that issues of legal certainty arise not from the definition of a public authority, but its application to the wide range of functions that public authorities have contracted out to private bodies to perform, it may be wiser to leave the definition as it is while ensuring awareness of when this may give rise to problems in specific areas and (as with *YL*) to legislate accordingly to resolve these difficulties. It may also be wise for the Government and Parliament, when enacting legislation that creates new bodies which may perform a public function, to consider whether to include a specific provision in the legislation clarifying that this particular institution should or should not be considered a public body for the purposes of section 6 HRA.

Is there any justification for broadening the defence available in section 6(2) to provide that wherever public authorities are clearly giving effect to primary legislation, then they cannot be found to be acting unlawfully?

62. Section 6(2) currently provides a defence to a public authority when it is obliged by primary legislation to act in a manner which breaches Convention rights. The scope of its application is linked to section 3 HRA. When it is possible to interpret primary legislation in a manner compatible with Convention rights, then this may limit the application of section 6(2). This is because a Convention-compatible interpretation of primary legislation may mean that a public body is no longer required to act in a manner that is incompatible with Convention rights.

63. We do not think that there is a justification for broadening this defence. This is for three reasons. First, it may weaken human rights protections. It is important to recognise that section 6(2) concerns the behaviour of public authorities and not of the legislature. It is designed to ensure that public authorities are not placed in an impossible situation, where primary legislation requires them to act in a manner that contravenes Convention rights

and section 6 HRA makes it unlawful to act in a manner that is incompatible with Convention rights. To broaden the defence would change the purpose of section 6(2), essentially empowering public authorities to act in a manner that is incompatible with Convention rights when they are clearly giving effect to primary legislation. It may also undermine the culture developing in public authorities to focus on Convention rights when determining their actions, shifting this focus instead to interpreting primary legislation governing their actions, rather than checking whether primary legislation obliges them to act in a manner incompatible with Convention rights. This would weaken the obligation on public authorities to act in a manner compatible with Convention rights, which could potentially undermine the protection of human rights more generally.

64. Second, any modification to section 6(2) has to take account of the proposed modifications to section 3 HRA. The consultation paper asks whether courts should only interpret legislation in a manner compatible with Convention rights when faced with ambiguous legislation, alongside proposing changes such that Convention-compatible interpretations must be in line with the wording and purpose of legislation. These changes are designed to reduce situations in which it is possible to interpret legislation so as to comply with Convention rights. This means that there will be more circumstances in which a public authority would be required by primary legislation to act in a manner that breached Convention rights. The impact of any modification to section 6(2), therefore, must be considered in tandem with the modification to section 3. This provides a further justification for caution, given the potential for a reduction in human rights protections.

65. Third, to modify section 6(2) in this manner may have the effect of transferring to public authorities the decision to determine whether to comply with Convention rights or to follow legislation. The proposed modification to section 6(2) requires public authorities to determine the clear meaning of legislation. However, it may be difficult to determine what the clear meaning of a legislative provision requires in practice. Whilst legislation may appear clear, it may nevertheless not be clear as concerns its application to a novel situation. Consequently, public authorities, some of whom are not governmental bodies which are accountable to Parliament for their actions, may be able to choose whether to uphold Convention rights, or to justify their action not to adhere to Convention rights because they believe this interpretation of legislation is clear. This flexibility may give rise to greater litigation, as applicants argue that the legislation was not clear and

therefore the public authority should, instead, have acted in a manner compatible with Convention rights. This creation of further litigation may contradict a further aim of the Government's proposed legislation which is to reduce the costs that fall on public authorities, both in time and money, defending what eventually turn out to be frivolous cases.

Q9. Do you think requiring public bodies to actively take steps to protect Convention rights, known as "positive obligations", has led to courts deciding questions of public policy? Is there any case for introducing legislative changes to limit the scope of "positive obligations" on public authorities?

66. It is important to recognise the way in which Convention rights give rise to positive obligations in order to assess whether the law relating to positive obligations has led to courts questioning issues of public policy, as well as recognising that not all Convention rights create positive obligations. When these elements are considered, we would argue that there is no case for introducing legislative changes to limit the scope of positive obligations. Uncertainty may arise when trying to determine what is meant by a positive obligation. Any legislation risks being under or over inclusive – either including restrictions on positive obligations that do not pose a risk of courts determining public policy or failing to recognise situations when there is a risk that courts are determining aspects of public policy that are not classified as imposing a positive obligation. Moreover, we would argue that it is not the case that courts are imposing positive obligations that interfere with public policy. Rather, courts determine situations in which the Government or the legislature are required to establish an administrative or legislative framework for the protection of a Convention right. This framework provides sufficient flexibility for the Government or the legislature to determine issues of public policy whilst facilitating the protection of important human rights.

67. First, positive obligations arise when a public body is required to act in order to facilitate the achievement of Convention rights. For example, the Strasbourg has recognised that Article 10 ECHR not only requires that States do not act to harm freedom of expression, but also that the State takes measures to ensure freedom of expression is facilitated by ensuring individuals can exercise their right to peaceful protest. This may require, for example, that the State ensures that protests are policed effectively to balance the right to peaceful protest and to maintain public order.

68. Second, positive obligations may occur in order to ensure that Convention rights are not harmed through the actions of private individuals as well as by public bodies. Articles 8 and Articles 10 ECHR, for example, have been interpreted to ensure that privately-owned newspapers do not publish stories that harm the privacy rights of individuals, while respecting the newspapers' right to freedom of expression. It is not clear how these obligations mean that courts are interfering with issues of public policy. It is perfectly feasible in these situations for legislation to be used to determine this balance rather than, as has been the case in the UK, relying on courts to balance these rights through their application of the case law.

69. Where issues may arise is with regard to the first type of positive obligations. Two of the examples provided by the Government in their consultation paper are examples of this form of positive obligation: *Rabone*[51] and *Osman*.[52] Both concern the right to life, protected by Article 2 ECHR. The Strasbourg court has recognised two ways in which the right to life may create positive obligations for the state. First, Article 2 imposes a positive obligation on the State to carry out an investigation into deaths for which the State is responsible. Second, Article 2 imposes a positive obligation on the State to establish a legislative or administrative framework to provide effective deterrence against threats to the right to life. In *Rabone* this extended to a framework as regards the protection of voluntary patients in hospitals who may be at risk of taking their own lives. In *Osman*, this concerned a framework as regards those whose life was at threat from the actions of others.

70. Any legislation designed to regulate positive obligations would need to distinguish between these types of positive obligation. Problems may arise as regards positive obligations of the type set out in *Osman* and *Rabone,* insofar as they require an administrative or legislative framework which may place obligations on public authorities. However, the same problem does not arise as regards situations in which a positive obligation may require States to create a legislative framework for the purpose of ensuring that private individuals do not harm the rights of other private individuals.

71. Moreover, administrative burdens, and potential policy decisions, can also arise in cases that do not create positive obligations. These arise through the requirement to ensure that

[51] *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72.
[52] *Osman v United Kingdom* [1998] ECHR 23452/94, (1998) 5 BHRC 293.

a public authority does not act in a manner that undermines Convention rights, as the Government's consultation paper recognised in is discussion of *Pinnock* (which required courts to have regard to Article 8 rights when determining actions for possession brought by a local authority with regard to a demoted tenancy).[53] In addition to giving rise to legal uncertainty, focusing on legislating to restrict positive obligations may fail to regulate all situations in which Convention rights may impose administrative burdens on public authorities and indirectly interfere with policy choices.

72. It is also important to recognise that, whilst positive obligations impose administrative burdens on public authorities, a choice is provided to public authorities regarding how these obligations are to be achieved in practice. These choices could also be achieved through legislation as well as through regulations. It is possible, therefore, for there to be direct parliamentary input into positive obligations, or for there to be parliamentary oversight of these obligations. Courts are not setting policy. Rather, they are recognising when administrative or legislative frameworks are required to prevent harm to human rights often, as in the case in *Rabone* and *Osman*, with regard to important Convention rights such as the right to life.

73. Whilst court decisions may give rise to uncertainty, this is due to the recognition by courts of their proper constitutional role. Courts protect rights in extreme circumstances where a positive obligation has clearly been breached. It is for the executive or the legislature to determine a clearer framework to ensure positive obligations are upheld. Uncertainty arises when this framework is not enacted, or where the framework is enacted through measures that have little or no democratic oversight. This is the case, for example, with regard to 'threat to life notifications' arising from the *Osman* decision. Guidance as to when the police are required to issue a threat to life notification can be found in provisions of College of Policing. If there are concerns as to the extent to which these notices are being issued, it would be possible for the Government to enact regulations or legislation to set out when 'threat to life' notices should be issued in order to protect the right to life, whilst also taking account of the administrative costs for policing and policy choices as to policing priorities.

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[53] *Manchester City Council v Pinnock* [2010] UKSC 6.