Community Policy Forum

CONSULTATION RESPONSE

THE HUMAN RIGHTS ACT REFORM A MODERN BILL OF RIGHTS

ISOBEL INGHAM-BARROW
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ABBREVIATIONS

- Bill of Rights (BoR)
- Declaration of incompatibility (DOI)
- The European Convention on Human Rights (ECHR)
- The European Court of Human Rights (ECtHR)
- The Human Rights Act 1998 (HRA)
- The Independent Human Rights Act Review (IHRAR)
- The Joint Committee on Human Rights (JCHR)

About the Author:
Isobel Ingham-Barrow is a PhD candidate at the University of Exeter and is CEO of the Community Policy Forum, having spent her career working with grassroots Muslim organisations. Her research interests centre on Islamophobia, gender, and ethnicity.

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In December 2021, the UK government launched a consultation on its proposals to overhaul the Human Rights Act 1998 (HRA) and replace it with a *Modern Bill of Rights* (BoR). Far from the proposals setting out to 'update' the HRA, they would effectively decimate the UK's existing human rights framework and drastically weaken the ability to hold the government and public authorities to account for human rights breaches.

As it currently stands, the HRA works effectively and is a pivotal tool in maintaining the protection of human rights standards in the UK. Since its enactment, the HRA has enabled the public to challenge unlawful policies, secure justice, and practically enforce their rights, as well as nurturing a culture of respect and prioritisation of human rights throughout our public institutions.

The *Modern Bill of Rights* consultation follows a nine-month investigation by the Independent Human Rights Act Review (IHRAR) and the publication of their 580-page report focused on how to fulfil the page 48 commitment made in the Conservative Party's 2019 Manifesto to update the HRA. While there are some questionable suggestions laid out in the final IHRAR report, it does offer some serious and considered recommendations (such as those aimed at increasing human rights education in schools and universities) and offers no justification for the extent of the government's proposed measures. Indeed, the IHRAR's overall conclusion is that the HRA is working well. However, the government consultation ignores specific recommendations of the IHRAR report, seeks views on proposals explicitly rejected by the IHRAR, and vastly expands the IHRAR's original terms of reference. In this context, it is arguable that the original IHRAR exercise was intended as a mere formality ahead of the government's preordained vision of the human rights framework that it wishes to enforce.

It is also worth noting that the government proposals do not invite views on whether the HRA *should* be replaced or not; it simply states that it *will* be replaced and seeks opinions on the outlined changes. Moreover, the proposals effectively fail to engage with the delicate human rights framework as it applies to the devolved powers of Wales, Scotland, and Northern Ireland.

Meanwhile, it is difficult to view the government's apparent "case for reform" as laid out in chapter three of the consultation paper as anything beyond a propaganda-driven and sensationalist misrepresentation of how human rights operate in the UK. Whilst disregarding the positive attributes and legacy of the HRA, the paper is saturated by a preoccupation with constructing and enforcing a moral divide between those deemed worthy of rights and those presented as undeserving. The result is an overarching attempt to seemingly demonise rights obligations that maintain a check on unfettered government power and overreach. Indeed, much of the government's rhetoric centres on the inconvenience of political opposition (such as protests) and the current obstacles to enforcing deportations – following the long-established political narrative of supposed 'activist, do-gooder, and lefty lawyers' frustrating the Home Office's unlawful deportation attempts. Ultimately, the entirety of the case for change asserted by the government appears to hinge on the inconvenience of current safeguards that prevent it from enacting powers without scrutiny or opposition.

If permitted to progress, the government's proposals could only result in human rights becoming a subjective concept, with those considered entitled to them being dictated by the political whims of the moment – a situation which will inevitably see the disproportionate erosion of rights for 'undesirable' groups who are often the most vulnerable in society and who are already frequently at a disadvantage when it comes to enforcing their rights.

Concerningly, government proposals to replace the HRA are not the only way in which it seems to be attempting to expand its own powers while obfuscating accountability and removing scrutiny, safeguards, and

opposition to its use of power. At the time of writing, Parliament is currently considering:

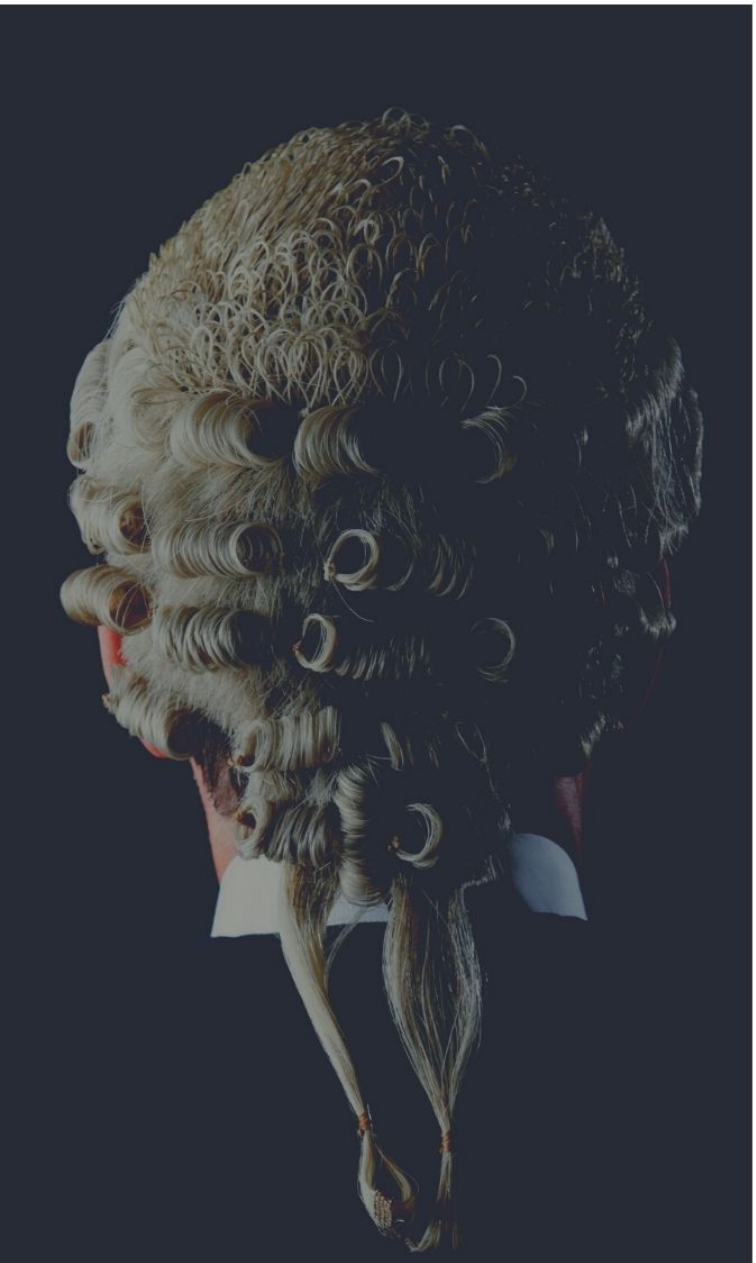
- The Police, Crime, Sentencing, and Courts Bill, which will severely obstruct the right to protest as a valuable tool of democratic engagement.

- The Elections Bill, which will enforce voter ID requirements that will restrict the abilities of many to vote, as well as enforcing changes upon the Electoral Commission that will increase government control.

- The Nationality and Borders Bill, which ignores the UK's international obligations, will increase the challenges facing the most vulnerable (such as survivors of domestic and gender-based violence) from accessing protection, and expands the government's power to unilaterally strip people of citizenship without notice.

- The Judicial Review and Courts Bill, which will remove the ability of vulnerable people to challenge unlawful decisions by the government.

In other words, the proposed BoR is but another mechanism that the Government is currently employing in an attempt to increase its unrestrained power and avoid accountability. For the sake of a functioning democracy, it is thus essential that government plans to replace the HRA with a BoR are resisted and that the HRA is protected in its current form.



Executive SUMMARY

Q1: Both draft clauses found after paragraph 4 of Appendix 2 are unnecessary and will serve only to increase the likelihood of cases ultimately being directed to the ECtHR. As such, while the HRA was specifically intended to bring rights home, the proposals for a BoR will increase the public reliance on the ECtHR to achieve justice. Instead, Section 2 should be retained as it is currently formulated.

Q2: In light of the protections currently afforded by Article 6 of the HRA, the suggestion of inclusion of trial by jury as a qualified right in a BoR will be unlikely to result in any meaningful increase in practical protections and offers no recognition of the current legal traditions in the devolved powers. If the government has a serious intention of strengthening the right to a fair trial, it will first address the serious strains to the justice system as a result of underfunding, neglect, and political malice in recent years.

Q4: Once again, while superficially appearing to expand protections, the government proposals to amend Section 12 will actually reduce the protections of ordinary people – a severe threat to Article 8 rights, as well as the potential for untold costs to personal, physical, and mental safety of individuals and families who could find themselves subject to traumatising and intrusive press practices, resulting in a violation of their privacy without adequate recourse. The Government offers no evidence to support this proposal and there are robust court processes already in place to ensure that the open justice principle is protected, with these powers applied in accordance with a careful balancing of individual rights vs the freedom of speech. Consequently, this is an unnecessary change to the carefully calibrated protections already provided by the HRA.

Q5: The government's proposed changes to Article 10 are unnecessary in light of the careful calibration of rights considerations that are currently afforded by the HRA. Any changes along the lines of those proposed would allow political interference and the potential to undermine legitimate political opposition, which on reading the consultation paper could be argued to be the very motivation for the changes proposed.

Qs8,9,&10: There is no necessity to introduce a permission stage within human rights law and the proposals to do so rest on an unevidenced, erroneous, and emotive narrative framing platforming 'ungenuine' and 'trivial' cases brought by 'undeserving' claimants – a framing that should be roundly rejected. Section 7 of the HRA and existing legal traditions provide adequate legal tests to ensure the veracity of cases brought before the court. Any changes would likely increase the

barriers to accessing justice and the number of cases being sent to the ECtHR. Instead, government attempts to "reduce the number of human rights-based claims being made overall" should focus on proactively tackling the conditions that facilitate abuses, not the ability of victims to bring claims.

Q11: Positive obligation provisions under the HRA are operating effectively and the government has produced no evidence to the contrary, with this issue remaining unexplored by the IHRAR. Changes to the current system are thus unnecessary and contradict the state's responsibility to keep its citizens safe by removing vital safeguarding tools currently used by frontline services. If the government is concerned with uncertainty surrounding these obligations, it should instead consider initiatives to better train and support public service providers.

Qs12,13,&14: The government's implication that Section 3 removes power from Parliament is unfounded and without corroborating evidence. As stated by the IHRAR, the problem can be found in the "damaging perceptions" surrounding the HRA; a situation that can be rectified through enhancing the role and resources of the JCHR through parliamentary process rather than the HRA. Consequently, changes to Section 3 are unnecessary and both proposed options for reform should be rejected as they would weaken the ability for courts to interpret legislation in a manner that is compatible with human rights, as well as the requirement for lawmakers to properly consider the UK's human rights obligations when drafting legislation.

Q15: Ultimately, the suggestion to introduce DOIs in relation to secondary legislation will only increase the unilateral power of the government and its ministers. Considering the reduced democratic review process applied to secondary legislation, the ability to strike down secondary legislation that is incompatible with human rights is an important safeguard to protect both the public, and the sovereignty of the UK Parliament.

Q18: Section 19 is an integral tool to ensure transparency and proper consideration of human rights requirements when drafting and passing legislation. As concluded by the IHRAR, changes to Section 19 are unnecessary and would deprive law-making of the benefits that the requirement to declare compatibility with human rights brings to government and parliament practice.

Q19: The HRA is working effectively across the devolved powers through providing a framework that respects the individual circumstances, legal systems, and context of each nation. Any changes will disrupt a delicate balance within the devolved nations' administration and fuel resentment amongst local communities who have a vested interest in progressive approaches to human rights that are directly contrary to the approach of the government's proposals. Therefore, maintaining the HRA in its current form is the only reliable method of reflecting the different interests, histories, and legal traditions of all parts of the UK.

Q20&21: Any tampering with the definition of public authorities or the responsibilities encompassed by Section 6 of the HRA is unnecessary and could severely limit people's access to remedies for human rights breaches, while simultaneously releasing public authorities from obligations to act compatibly with human rights. At the same time, the Equality Act 2010 uses the same definition of public functions in expounding its Public Sector Equality Duty. Therefore, any changes to Section 6 of the HRA will automatically impact other pieces of legislation that cross-reference this definition.

Q23: While seemingly framed around protecting parliamentary authority, the 'guidance' offered by proposed changes to the principle of proportionality amounts to nothing more than political interference with the independence of judicial decision making and ability to apply case law. There is no evidence of problems under the current HRA framework and changes are unnecessary. Both options provided would result in a diminishing of people's rights as courts would not be able to properly balance the competing considerations of each case.

Q24: Again relying on a lack of evidence, the government proposals to prevent the courts and the current human rights framework from acting as a safeguard against unlawful deportations should be roundly rejected, especially considering the divisive nature of the proposals that suggest some groups of people to be undeserving of human rights protection – ultimately undermining the universality of human rights. The narrative presented reduces the fundamental need for all people to have the ability to protect their rights to the unacceptable 'frustrating' of deportations, which is a shamefully disingenuous depiction.

Q25: The government proposal's framing of human rights protections as "impediments" and misrepresenting asylum seekers as "illegal" fits into a longstanding government hostility to the protections currently afforded to vulnerable people – a hostility that is exemplified by the Nationality and Borders Bill. Any

changes to the existing framework would either reduce the rights protection for everyone in society or unequally exclude asylum seekers and migrants from human rights protections – thereby undermining principles of universality and actively fomenting structural discrimination.

Q26: The inherent objective of proposals interfering with the current damages framework is to limit the consequences incurred by a court ruling against any public authority, including the government itself. Once again, it falls into a pattern of governmental attempts to reduce accountability and, if progressed, will reduce the safeguards in place acting as a deterrent to public authorities from acting in ways that are incompatible with human rights and limit the mechanisms available to ensure that victims of human rights breaches have access to effective remedies (Article 13).

Q27: The government's suggestion to make courts consider a claimant's past behaviour when making damages decisions is deeply alarming and inconsistent with the principle of universal entitlement that is embedded within human rights law. Once more, the government is suggesting a framework wherein certain groups are excluded from equal protections as they are somehow less deserving. This proposal should be wholeheartedly rejected.

Q29: This consultation paper and the government proposals contained within it should be rejected in its entirety. The language, framing, and nature of the proposals are divisive, confused, ill-evidence, contradictory to the fundamental spirit of human rights, and will have untold consequences for devolved administrations. Ultimately, if pursued, the BoR would undermine the universality of human rights, weaken protections for the public, remove vital safeguards designed to hold the government to account, and exclude people from accessing remedies to human rights breaches. The only way to mitigate against these consequences is to withdraw the proposals for a BoR and prevent it from becoming law.

Like much of the consultation paper, the wording of this question appears very misleading. It seems to imply that the HRA currently restricts the ability of courts to draw upon a wide range of law. In fact, courts can and do draw on a wide range of law, with the HRA providing ECtHR case law as an additional source of guidance, meaning that rather than broadening the range of law to be taken into account, the government is actually suggesting limiting the range of sources.

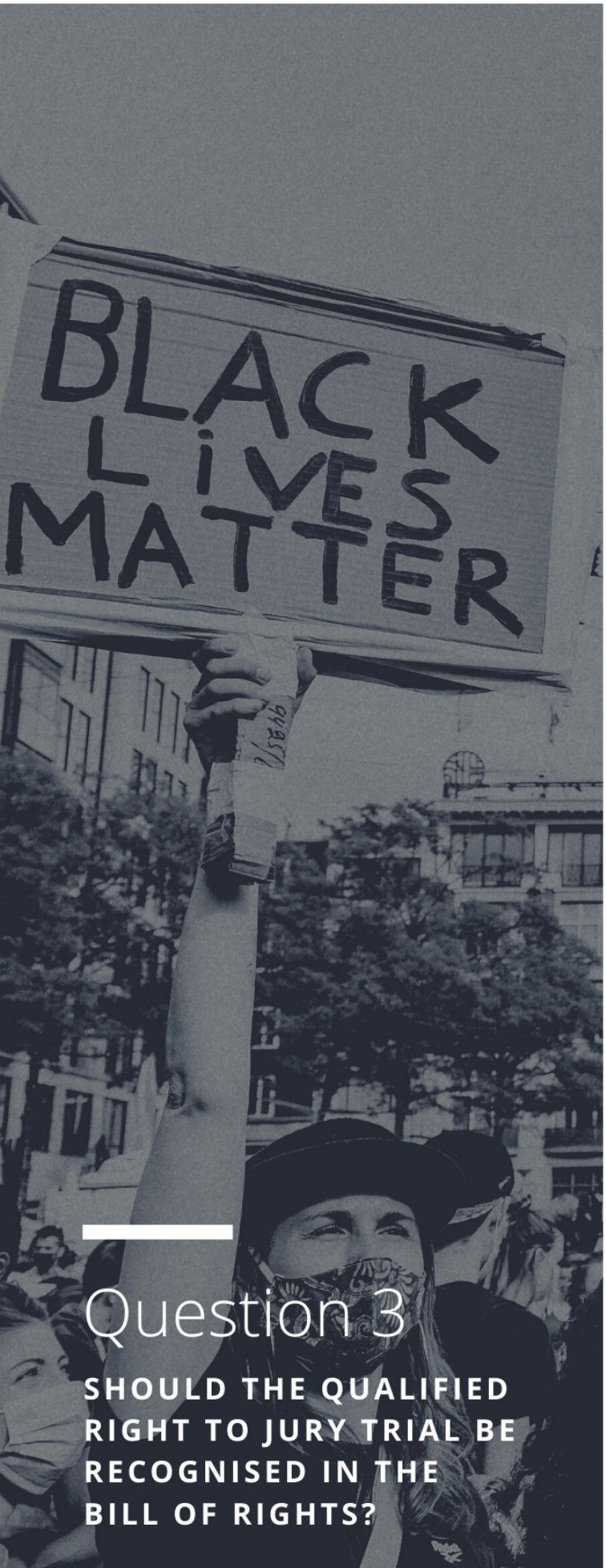
It is important to recognise that Section 2 of the HRA as it currently stands requires UK courts to "take into account" any decision of the ECtHR but they are not bound by this case law. Indeed, the HRA was intentionally drafted with very careful wording precisely aimed at retaining the independence of UK courts. However, Section 2 has often been misrepresented by detractors of the HRA to imply that UK courts are under undue foreign influence from Europe. In reality, UK courts have a broad scope of discretionary power when considering ECtHR rulings and this relationship has benefitted UK jurisprudence by facilitating constructive dialogue on how rights should be applied through examining the nuance of cases from 47 countries. As but one example, this is a tradition that is particularly useful regarding precedent setting cases in the context of an ever-developing data and technology environment where previously unseen issues arise and require careful consideration. At the same time, while considering previous cases, UK courts are able to maintain an emphasis on the UK's own unique laws, tradition, and culture.

This was an issue of significant interest of the IHRAR, which concluded that the relationship between the ECtHR and domestic courts was a fruitful one, but that it would be helpful to introduce a minor amendment to clarify the order in which courts should prioritise the consideration of differing legal frameworks (ie. UK legislation and common law, before the judgements of the ECtHR). Going far beyond the IHRAR, rather than introducing an amendment to Section 2, the government's proposals include a completely new and unnecessary clause. Moreover, the clauses suggested by the government both narrow the courts' ability to interpret how rights should be applied by removing the requirement to consider case law from the ECtHR. Considering the UK government has already signalled its commitment to remaining party to the ECHR, these new clauses can only result in the likelihood of more cases being referred to the ECtHR as they ultimately diminish UK courts' abilities to apply convention rights and, in the case of option one, actively decouple the rights in the proposed BoR from convention rights. This will inevitably create a situation wherein the most vulnerable are disproportionately excluded from justice as the time and costs required to bring a case to the ECtHR are prohibitively expensive.

Both draft clauses found after paragraph 4 of Appendix 2 are unnecessary and will serve only to increase the likelihood of cases ultimately being directed to the ECtHR. As such, while the HRA was specifically intended to bring rights home, the proposals for a BoR will increase the public reliance on the ECtHR to achieve justice. Instead, Section 2 should be retained as it is currently formulated.

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.



Question 3

SHOULD THE QUALIFIED RIGHT TO JURY TRIAL BE RECOGNISED IN THE BILL OF RIGHTS?

The government proposals suggest the inclusion of a right to trial by jury on the basis that it is an important UK legal tradition. However, Article 6 of the HRA already protects the right to a fair trial which encompasses a broad range of safeguards, including the right to representation, an interpreter, impartiality, the assumption of innocence, and a vast array of other conditions. Moreover, the broad wording of Article 6 supports the application of legal traditions as they operate across the devolved powers, with trial by jury playing a different role in the Scottish legal system, for example.

Consequently, this is one of the few suggestions presented by the government that does, when taken at face value, appear to expand protections. However, when understood in the context of the protections already available and the operation of justice across the devolved administrations, the proposal seems without substance, evidence, or necessity, as it would add little of value in practice. It could, therefore, be argued that the inclusion of this suggestion serves primarily as a symbolic veneer to distract from the overarching weakening of protections that the overarching proposals embody.

If the government has genuine concerns about protecting the right to a fair trial, it would be wise to first consider issues such as court closures, devastating financial cuts to the justice system, and the slashing of legal aid budgets that have severely hampered ordinary citizens' access to justice, as well as ongoing political attacks on the judiciary that have undermined public confidence in the justice system.

Moreover, the government's caveat of trial by jury being a 'qualified' right and the absence of a draft clause leaves further space for concern. Especially when considered in the context of extensive court backlogs, a stretched professional workforce, and chronic underfunding, a qualified right without visibility of how it might operate provides a potential avenue for government interference with the protections for a fair trial that currently exist.

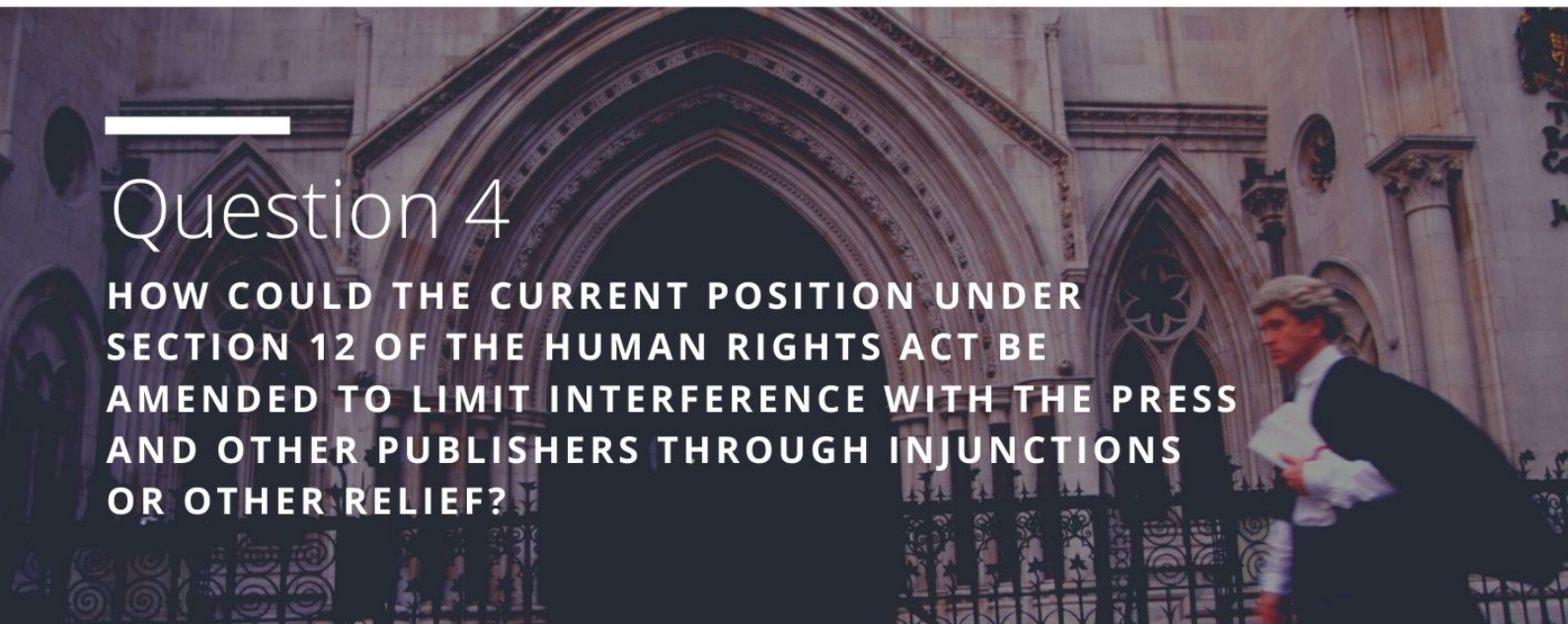
In light of the protections currently afforded by Article 6 of the HRA, the suggestion of inclusion of trial by jury as a qualified right in a BoR will be unlikely to result in any meaningful increase in practical protections and offers no recognition of the current legal traditions in the devolved powers. If the government has a serious intention of strengthening the right to a fair trial, it will first address the serious strains to the justice system as a result of underfunding, neglect, and political malice in recent years.

In posing this question, the suggestion is that there currently exists a problem of people being able to muzzle the free speech of the press through injunctions and, therefore, there needs to be a reduction in the range of reasons that people can apply for such an injunction. As the IHRAR did not investigate this issue, it is unclear where the government is sourcing its evidence to support the notion that there is a problem in this area. As the HRA has extensive provisions ensuring that domestic courts consider the freedom of expression (protected by Article 10 and Section 12 of the HRA) and balance it with other rights, it would be interesting to see the information upon which the government bases its assumption that the current system is not working effectively.

In reality, "interference with the press" under the current framework is very limited, with injunctions, anonymity orders, and other relief mechanisms being awarded only in very rare cases where they are a proportionate means to protect someone's rights. There are already robust processes in place to ensure that the open justice principle is devotedly protected and that these powers are used with great sensitivity to the balance of individual rights vs freedom of speech. For example, when it comes to interim injunctions (those that apply only for a limited period of time sufficient to secure overarching justice), there are vigorous court procedures ensuring that such decisions are regularly reviewed and discharged when the compelling reasons for their existence are no longer relevant. It is in this way that common law actively protects public interest expression and other forms of press speech from the heavy-handed application of any relief mechanisms.

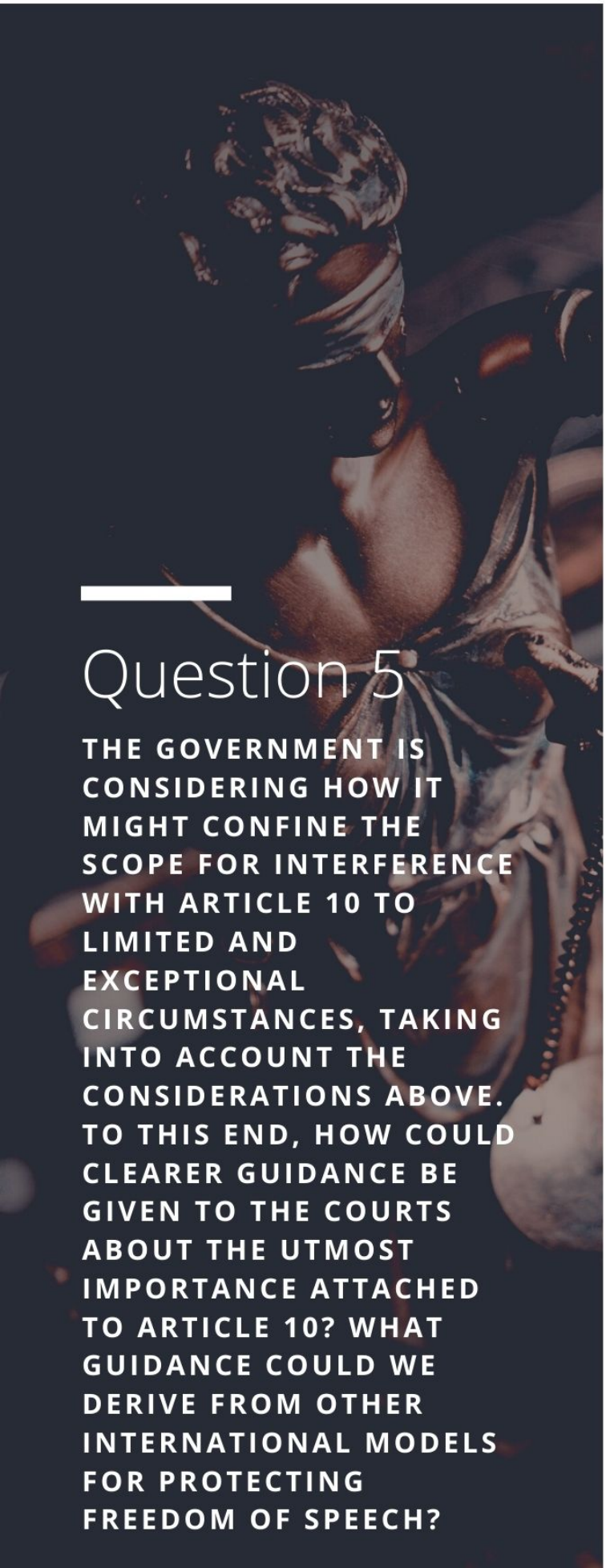
At the same time, there is no recognition within the consultation paper of the incredibly high threshold that a claimant must reach to be awarded relief, nor does it recognise the value of such mechanisms in acting as a deterrent to publishers and preventing them from engaging in intrusive practices. This is especially important as these protections are designed not only to prevent trauma to the claimant but also their families and especially children who may face emotional and physical damages as a consequence of intrusive press practices.

Once again, while superficially appearing to expand protections, the government proposals to amend Section 12 will actually reduce the protections of ordinary people – a severe threat to Article 8 rights, as well as the potential for untold costs to personal, physical, and mental safety of individuals and families who could find themselves subject to traumatising and intrusive press practices, resulting in a violation of their privacy without adequate recourse. The Government offers no evidence to support this proposal and there are robust court processes already in place to ensure that the open justice principle is protected, with these powers applied in accordance with a careful balancing of individual rights vs the freedom of speech. Consequently, this is an unnecessary change to the carefully calibrated protections already provided by the HRA.



Question 4

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



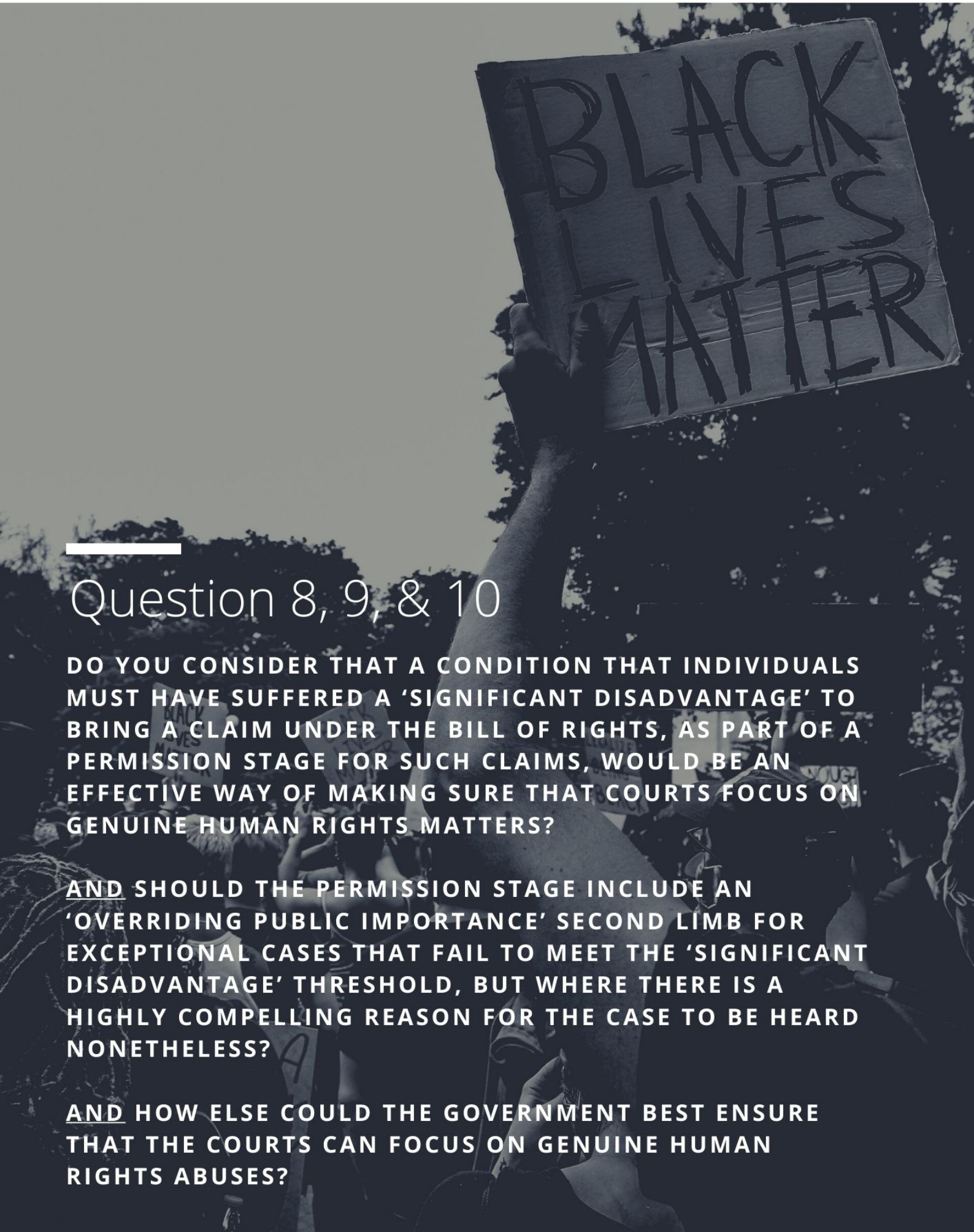
Question 5

THE GOVERNMENT IS CONSIDERING HOW IT MIGHT CONFINE THE SCOPE FOR INTERFERENCE WITH ARTICLE 10 TO LIMITED AND EXCEPTIONAL CIRCUMSTANCES, TAKING INTO ACCOUNT THE CONSIDERATIONS ABOVE. TO THIS END, HOW COULD CLEARER GUIDANCE BE GIVEN TO THE COURTS ABOUT THE UTMOST IMPORTANCE ATTACHED TO ARTICLE 10? WHAT GUIDANCE COULD WE DERIVE FROM OTHER INTERNATIONAL MODELS FOR PROTECTING FREEDOM OF SPEECH?

There seems to be an element of confusion in the government's proposals and accompanying questions. The freedom of expression is identified within the consultation paper as a problematic right, particularly when it relates to providing a "lawful excuse" for "deliberate physically obstructive conduct" relating to protesting. Yet, is also identified as a right that needs strengthening in relation to the press. This appears to be another example wherein the government seeks to present some people as deserving and others as undeserving of full rights protections. Particularly when taken in combination with the clampdown on protest found in the Police, Crime, Sentencing, and Courts Bill, it is arguable that this is also another example of attempts to restrict political opposition and accountability.

The protections afforded by the HRA already provide enhanced protection for the freedom of expression and a clear process for ensuring that any restriction is lawful, necessary, and proportionate to achieving a legitimate aim, such as protecting national security, preventing disorder, and protecting the rights of others. The government suggestions seem to aim to put greater power in the hands of Parliament to dictate the grounds upon which freedom of expression may be limited. Considering the government majority in Parliament, were the government in a position to enforce specific guidelines regarding the acceptable circumstances for the limiting of freedom of expression, it would constitute an urgent threat to our functioning democracy, especially in light of the government's repeated attacks on protest and political opposition. It would also remove the courts' ability to undertake a full analysis of the facts on a case-by-case basis and balance competing rights in the nuanced manner that is currently facilitated by the HRA.

The government's proposed changes to Article 10 are unnecessary in light of the careful calibration of rights considerations that are currently afforded by the HRA. Any changes along the lines of those proposed would allow political interference and the potential to undermine legitimate political opposition, which on reading the consultation paper could be argued to be the very motivation for the changes proposed.



Question 8, 9, & 10

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?

AND 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?

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

Section 7 of the HRA already requires that a person demonstrate that they are directly affected by an actual or threatened human rights breach. Meanwhile, all legal cases require and admissibility stage to test the legal merits of the case. Furthermore, there is once again a lack of any acknowledgement of how this proposal would interfere with devolved areas, for example the permission stage already present in Scots Law.

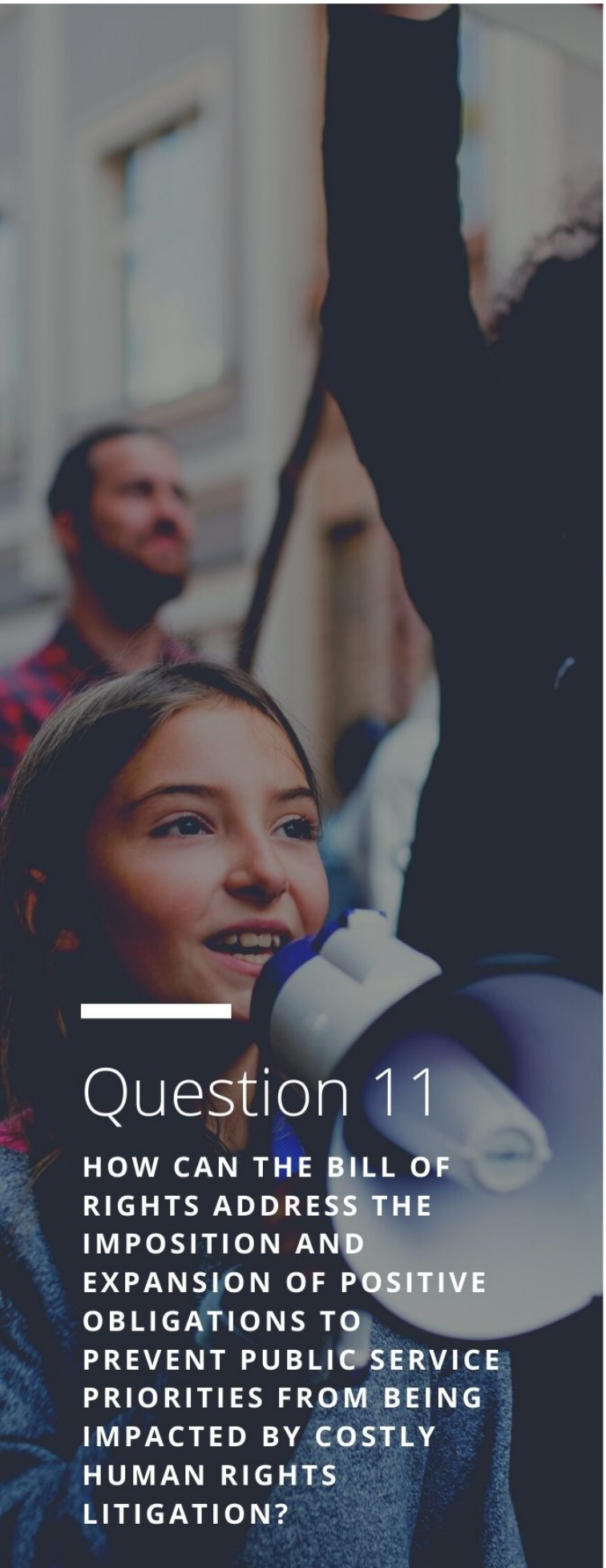
Ultimately, all that this proposed permission stage would achieve is enhancing the difficulty for ordinary people to access justice and hold public bodies to account. Indeed, it would increase the burden to prove "significant disadvantage", perhaps even before an individual has had access to legal advice, and would disproportionately impact those already facing barriers to accessing justice (for example, those with limited financial means, survivors of domestic violence, and trafficking victims). There is no other area of law where the threshold to bring a claim is this high. Meanwhile, there is no clarity on how "significant disadvantage" is to be defined. In any case, the notion that a breach must result in significant disadvantage obfuscates the fact that all human rights abuses are unequivocally intolerable. Such a change could also result in more cases being directed to the ECtHR in pursuit of Article 13 (the right to an effective remedy), but as stated previously, this will continue to disproportionately exclude many vulnerable people from justice due to the time and costs required.

It seems counter-intuitive that the solution to the government's aim to "reduce the number of human rights-based claims being made overall" would rest upon making it more difficult for claimants to access justice, when a more fruitful solution would be to enhance the prioritisation of human rights protection and eliminating violations and breaches of these rights across public service delivery and governance.

Moreover, this proposal is an example of the government's pointedly hostile approach to human rights throughout the consultation paper and their attempt to introduce a binary framing of human rights abuses as 'genuine' or 'not genuine'. This is combined with the divisive framing of the 'deserving' vs the 'undeserving'. While this is not an area examined by the IHRAR and there is no concrete evidence provided that there are problems in this area, the anecdotal examples used in the consultation paper to illustrate 'trivial' claims are largely related to prisoners or criminals. It is disingenuous to rely on this emotive framing of the 'undeserving' while failing to acknowledge both the universality of human rights and the fact that the current system actively protects the whole of society, meaning that the proposed changes would not just reduce access to justice for the 'undeserving', but for everyone, and especially the most vulnerable.

The concept of a 'trivial' human rights breach and an 'undeserving' claimant is, in itself, a misnomer. All human rights abuses are unacceptable and should be resisted, regardless of the actions or social acceptability of the claimant. Indeed, that is the fundamental principle upon which human rights are built – the universality of entitlement.

There is no necessity to introduce a permission stage within human rights law and the proposals to do so rest on an unevidenced, erroneous, and emotive narrative framing platforming 'ungenuine' and 'trivial' cases brought by 'undeserving' claimants – a framing that should be roundly rejected. Section 7 of the HRA and existing legal traditions provide adequate legal tests to ensure the veracity of cases brought before the court. Any changes would likely increase the barriers to accessing justice and the number of cases being sent to the ECtHR. Instead, government attempts to "reduce the number of human rights-based claims being made overall" should focus on proactively tackling the conditions that facilitate abuses, not the ability of victims to bring claims.



Question 11

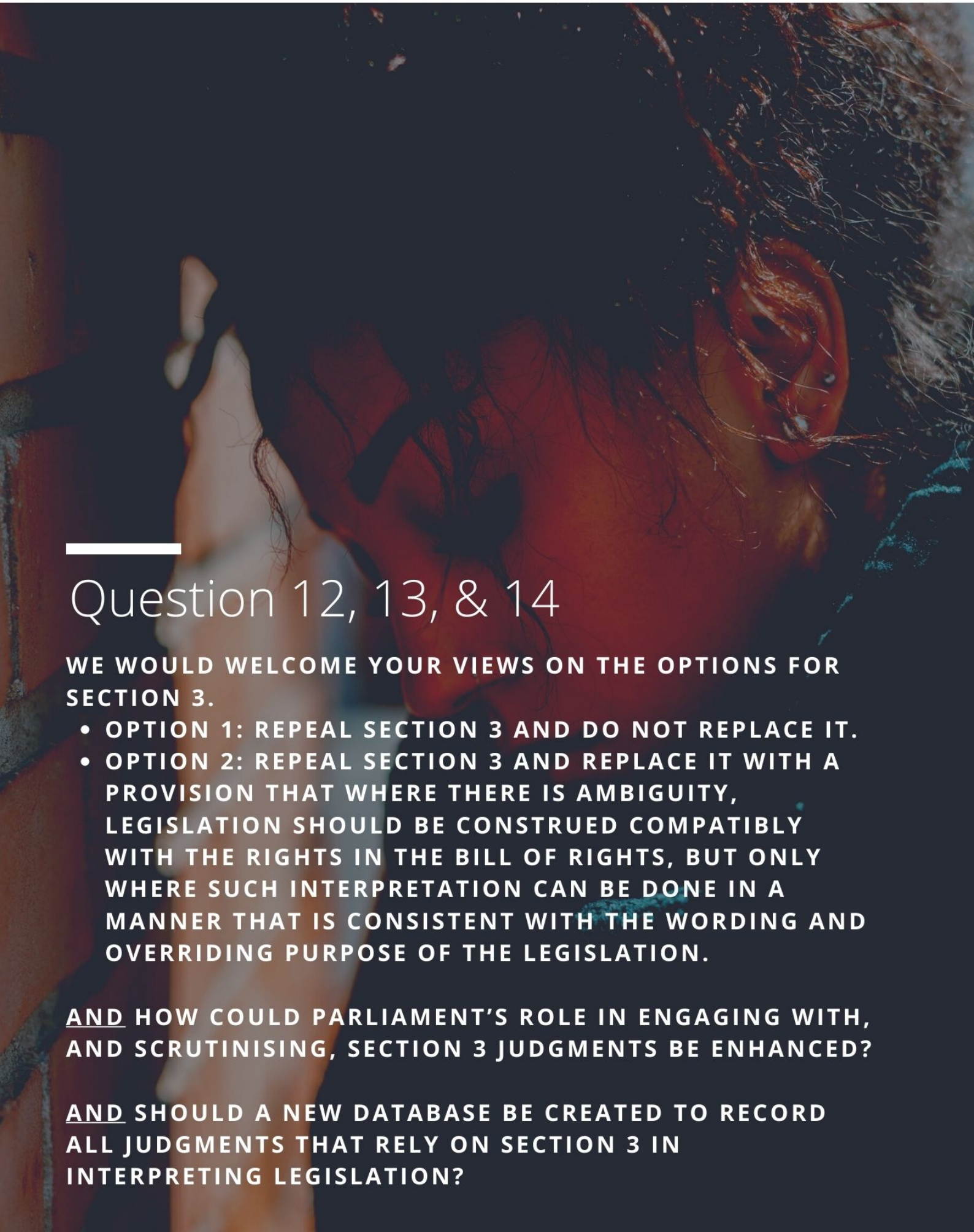
HOW CAN THE BILL OF RIGHTS ADDRESS THE IMPOSITION AND EXPANSION OF POSITIVE OBLIGATIONS TO PREVENT PUBLIC SERVICE PRIORITIES FROM BEING IMPACTED BY COSTLY HUMAN RIGHTS LITIGATION?

The overarching aim within this question is to make changes to remove the obligation of public authorities to proactively protect human rights. The HRA provides vital provisions in this regard that move far beyond common law to protect the most vulnerable in society and provide vital tools for frontline services to take action, for example, placing a requirement on police and other public bodies to take action when they know that a person's life is at immediate and serious risk (such as a domestic abuse victim or a neglected child). Similarly, if environmental issues threaten the health of local communities, relevant public authorities have the responsibility of investigating and taking steps to mitigate the threat. Positive obligations also allow bereaved families or those who have been failed by public services to seek justice. Perhaps most famously, this provision led to justice for victims of John Worboys after the police failed to protect their human rights and those of his future victims.

Far from being 'imposed', obstructive, and contrary to public service provision, these positive obligations are instrumental to public services' abilities to safeguard those that rely upon them. Both UK courts and the ECtHR recognise the limited resources and competing objectives and responsibilities of public service providers in trying to fulfil these positive obligations. Meanwhile, there has to be evidence of serious failures before a breach can be established.

Furthermore, the only anecdotal evidence that the government offers is once again built upon the divisive example of how positive obligations protect "serious criminals" in the Osman case, seemingly to the detriment of public service providers and others that rely on them. However, the neglect of examining the benefit of these provisions for the wider public (including protecting children, survivors of domestic abuse, and victims of trafficking, as well as allowing bereaved families to seek justice for loved ones) is notably absent. Again, the attempt to present a narrative centred on the unpopular and undeserving by a government tasked with protecting everyone under its jurisdiction offers a serious threat to social stability and principles of justice.

Positive obligation provisions under the HRA are operating effectively and the government has produced no evidence to the contrary, with this issue remaining unexplored by the IHRAR. Changes to the current system are thus unnecessary and contradict the state's responsibility to keep its citizens safe by removing vital safeguarding tools currently used by frontline services. If the government is concerned with uncertainty surrounding these obligations, it should instead consider initiatives to better train and support public service providers.



Question 12, 13, & 14

WE WOULD WELCOME YOUR VIEWS ON THE OPTIONS FOR SECTION 3.

- **OPTION 1: REPEAL SECTION 3 AND DO NOT REPLACE IT.**
- **OPTION 2: REPEAL SECTION 3 AND REPLACE IT WITH A PROVISION THAT WHERE THERE IS AMBIGUITY, LEGISLATION SHOULD BE CONSTRUED COMPATIBLY WITH THE RIGHTS IN THE BILL OF RIGHTS, BUT ONLY WHERE SUCH INTERPRETATION CAN BE DONE IN A MANNER THAT IS CONSISTENT WITH THE WORDING AND OVERRIDING PURPOSE OF THE LEGISLATION.**

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

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

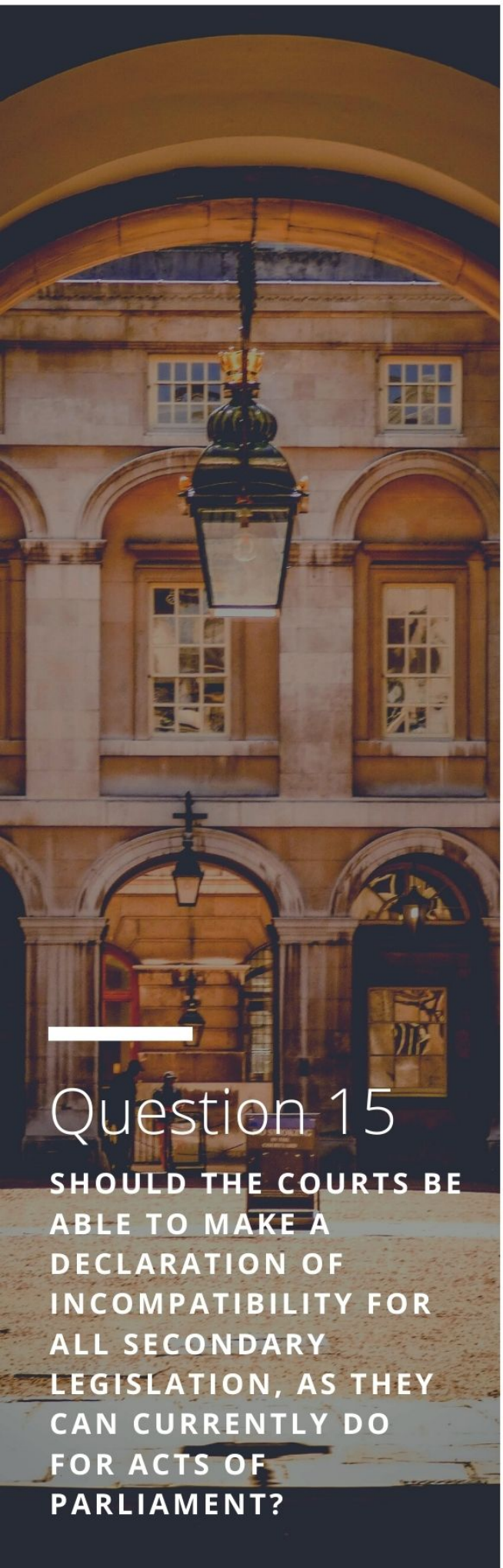
Section 3 of the HRA is a fundamental provision that ensures that UK legislation complies with our human rights duties. It works on the assumption that, unless Parliament has explicitly stated otherwise, it intends all its legislation to be compliant with human rights law and, therefore, legislation should be interpreted through this assumption unless to do so would stretch the meaning of the legislation to the point that it contradicts its original intention. Both of the proposals set out by the government in question 12 either significantly weaken the assumption of compatibility with human rights requirements or remove it entirely.

The drafting of the HRA is very deliberate in ensuring that Parliament has ultimate control over the meaning of legislation, and it is for this reason that Parliament retains the ability to declare that it wishes to exempt a piece of legislation from our human rights obligations. Courts do not have the power to amend or disapply any primary legislation that contradicts human rights requirements; they may only issue a declaration of incompatibility (DOI), after which it is for Parliament to decide whether or not the law in question should be changed. There is no evidence that judges are routinely expanding legislative language to frustrate the will of Parliament. The ultimate control that Parliament has over legislation and concern surrounding the impact of changing Section 3 on devolved administrations and the Northern Ireland Peace Agreement were amongst the reasons that the IHRAR gave for rejecting proposals to repeal or amend Section 3, concluding that there was no evidence that it is being misused by courts. Despite acknowledging this recommendation and stating that it is "minded to agree", the only options the government then offers is to repeal or to repeal and replace.

The IHRAR did note that "any damaging perceptions as to the operation of section 3 are best dispelled by increased data as to its usage; and that, as a matter both of perception and reality, Parliament could and should take a more robust role in rights protection, a role which could sensibly be reinforced via an enhanced role for the JCHR." As such, it is the "damaging perceptions" that are in need of addressing, not the reality of the operation of the HRA itself. If additional scrutiny is required, it can be achieved through parliamentary process in expanding the standing orders and resources of the JCHR. It does not require changes to the HRA.

Moreover, greater data collection when conducted independently is a laudable aim, but it is surprising that such a database does not already exist in light of the government's assertion that there are problems substantial enough to warrant such a departure from the current structure. Considering the failure to provide evidence to corroborate this claim, one must question the basis upon which the government is making such proposals.

The government's implication that Section 3 removes power from Parliament is unfounded and without corroborating evidence. As stated by the IHRAR, the problem can be found in the "damaging perceptions" surrounding the HRA; a situation that can be rectified through enhancing the role and resources of the JCHR through parliamentary process rather than the HRA. Consequently, changes to Section 3 are unnecessary and both proposed options for reform should be rejected as they would weaken the ability for courts to interpret legislation in a manner that is compatible with human rights, as well as the requirement for lawmakers to properly consider the UK's human rights obligations when drafting legislation.



Question 15

SHOULD THE COURTS BE ABLE TO MAKE A DECLARATION OF INCOMPATIBILITY FOR ALL SECONDARY LEGISLATION, AS THEY CAN CURRENTLY DO FOR ACTS OF PARLIAMENT?

The phrasing of this question is remarkably misleading as it suggests a positive expansion of court powers in approaching legislation that contravenes human rights. However, the government proposals actually reduce this power by simultaneously depriving courts of the ability to strike down incompatible secondary legislation.

Unlike primary legislation, for which courts can only issue a DOI if found incompatible with human rights, courts do have the ability to disapply or strike down secondary legislation as it has been made by government ministers or devolved assemblies and not by the UK Parliament. The reason for this is that the UK Parliament has not authorised other individuals or bodies to pass legislation that contravenes human rights – this is an ability reserved for the UK Parliament should it wish to apply an exemption. Meanwhile, the ECHR is embedded into devolved settlements, meaning legislation passed by devolved authorities must comply with convention rights.

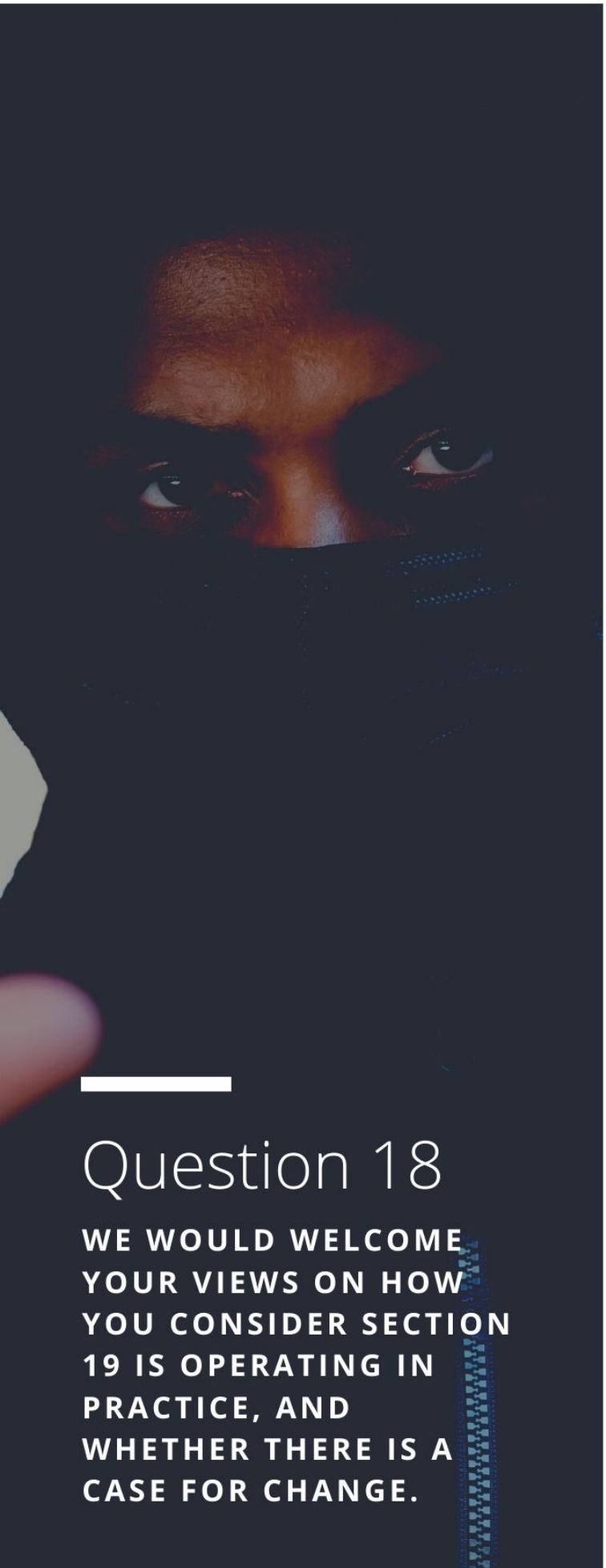
So, while the government frequently uses the principle of parliamentary sovereignty in its arguments in favour of removing courts' powers to disapply secondary legislation that is incompatible with human rights, the ability for courts to strike down secondary legislation explicitly protects the sovereignty of the UK Parliament and prevents individual ministers from enacting laws that Parliament has not expressed a desire to exempt from human rights obligations.

Furthermore, the HRA is itself an Act of Parliament, and, therefore, a piece of primary legislation. As with any piece of primary legislation, secondary legislation becomes unlawful if it stands in contradiction, thus becoming of no effect. Therefore, courts have no choice but to give the HRA precedent over any secondary legislation that is incompatible. However, even if secondary legislation is struck down, the government retains the ability to enact a remedial order under Section 10 to introduce new legislation that meets their policy aims but with fresh consideration for human rights.

The IHRAR itself rejected the proposal to introduce DOIs for secondary legislation on the further grounds that it would disrupt devolved arrangements and that quashing orders are an important safeguard as secondary legislation is subject to significantly reduced parliamentary scrutiny.

Furthermore, the government proposals seem to exclude devolved legislation from this new arrangement, meaning that courts could continue to strike down legislation made by devolved parliaments and assemblies, but not government ministers. Once again, this appears to be a mechanism designed to enhance the government's power and reduce accountability, placing it above the UK's commitment to human rights as decreed by Parliament and avoiding the reputational damage and political costs of publicly and openly pursuing laws that violate human rights.

Ultimately, the suggestion to introduce DOIs in relation to secondary legislation will only increase the unilateral power of the government and its ministers. Considering the reduced democratic review process applied to secondary legislation, the ability to strike down secondary legislation that is incompatible with human rights is an important safeguard to protect both the public, and the sovereignty of the UK Parliament.



Question 18

WE WOULD WELCOME YOUR VIEWS ON HOW YOU CONSIDER SECTION 19 IS OPERATING IN PRACTICE, AND WHETHER THERE IS A CASE FOR CHANGE.

Section 19 requires any minister proposing a bill in Parliament to make a declaration of its compatibility with the UK's human rights obligations. If the bill does not comply with human rights, Parliament can consider and pass the bill nonetheless, but with the knowledge that it is not compatible. In this way, Section 19 is an important tool for transparency.

The government argues that this requirement disrupts the ability to develop "innovative policies". However, beyond the political discomfort of publicly acknowledging that a bill being pursued does not comply with human rights, it is unclear how the government could find this procedural requirement of making such a statement problematic, unless of course the government's aspiration to innovative policies explicitly relies on violating human rights. If the true question is whether UK legislation should continue to be required to be compatible with human rights because to do so frustrates "innovative policies", this seems to be a somewhat irrelevant consideration as long as the UK remains party to the ECHR.

Section 19 is an integral tool to ensure transparency and proper consideration of human rights requirements when drafting and passing legislation. As concluded by the IHRAR, changes to Section 19 are unnecessary and would deprive law-making of the benefits that the requirement to declare compatibility with human rights brings to government and parliament practice.

The overall consultation paper provides remarkably little recognition of how the proposals will impact the devolved powers, with each devolved nation having its own legislative body and, in the case of Scotland and Northern Ireland, its own legal system. Devolution arrangements are carefully intertwined with the HRA, and each devolution settlement is explicit in their requirement that laws passed by the devolved parliaments and assemblies must comply with the ECHR. Consequently, any changes to the HRA will necessarily have significant impacts on the devolved powers.

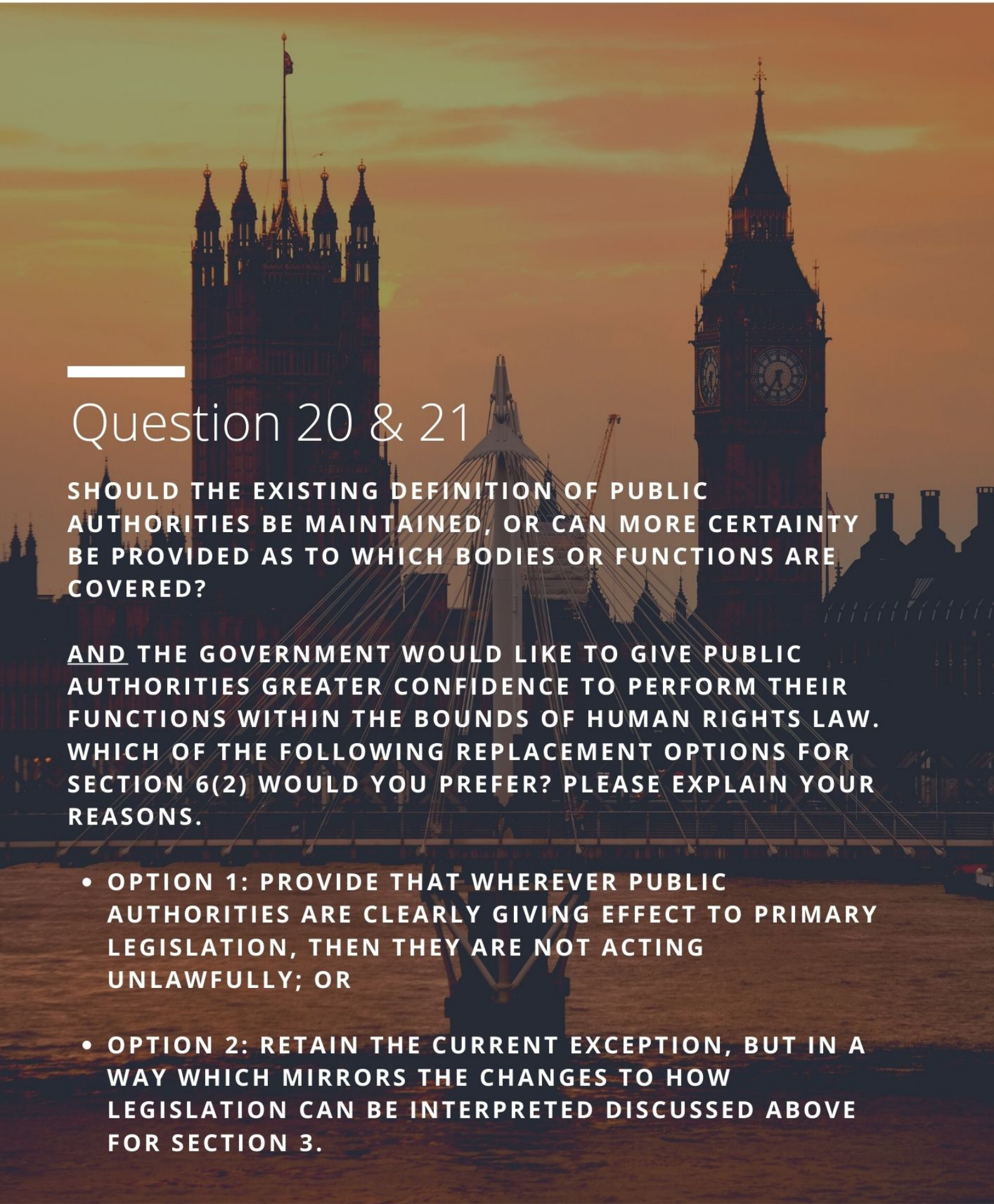
Much of the framing of the consultation paper relies exclusively on the English legal system, with little regard for the distinct legal systems in Scotland and Northern Ireland and an absence of recognition of how proposed changes are to operate procedurally. At the same time, the attempt to reduce the wide-ranging consequences of such changes into a single question is, unfortunately, a further indication of a deficit of understanding and consideration across the whole government approach regarding how the HRA operates in the devolved nations and the implications that changes will have for devolution. Indeed, the government has offered no clear outline of the practical considerations involved in replacing the HRA, whether that be questions of process in achieving legislative consent from the Scottish Parliament, or the consequences to the existing bill of rights process embedded in the Northern Ireland peace process, to name but two examples. At the same time, the Good Friday Agreement is an international treaty, meaning that the UK's international obligations and reputation as a leader in human rights protection is also at stake.

Moreover, statements made by the Scottish and Welsh governments, as well as the Chief Commissioner of the Northern Ireland Human Rights Commission, have condemned the UK government's lack of consultation with the devolved powers and highlighted the undesirability of plans to reform the HRA as an "ideologically motivated attack on freedoms and liberties". Such statements are demonstrative of public opinion and the appetite of these nations for a robust human rights culture that the current government proposals seek to undermine. Consequently, the government would be wise to fully consider the feelings of people living under devolution if it is to negotiate consent or else force a new human rights framework upon them. Indeed, it would be irresponsible to ignore issues of the Northern Ireland peace process and calls for independence in Scotland that will be inevitably tied to any changes in human rights.

The HRA is working effectively across the devolved powers through providing a framework that respects the individual circumstances, legal systems, and context of each nation. Any changes will disrupt a delicate balance within the devolved nations' administration and fuel resentment amongst local communities who have a vested interest in progressive approaches to human rights that are directly contrary to the approach of the government's proposals. Therefore, maintaining the HRA in its current form is the only reliable method of reflecting the different interests, histories, and legal traditions of all parts of the UK.

Question 19

HOW CAN THE BILL OF RIGHTS BEST REFLECT THE DIFFERENT INTERESTS, HISTORIES AND LEGAL TRADITIONS OF ALL PARTS OF THE UK, WHILE RETAINING THE KEY PRINCIPLES THAT UNDERLIE A BILL OF RIGHTS FOR THE WHOLE UK?



Question 20 & 21

SHOULD THE EXISTING DEFINITION OF PUBLIC AUTHORITIES BE MAINTAINED, OR CAN MORE CERTAINTY BE PROVIDED AS TO WHICH BODIES OR FUNCTIONS ARE COVERED?

AND THE GOVERNMENT WOULD LIKE TO GIVE PUBLIC AUTHORITIES GREATER CONFIDENCE TO PERFORM THEIR FUNCTIONS WITHIN THE BOUNDS OF HUMAN RIGHTS LAW. WHICH OF THE FOLLOWING REPLACEMENT OPTIONS FOR SECTION 6(2) WOULD YOU PREFER? PLEASE EXPLAIN YOUR REASONS.

- **OPTION 1: PROVIDE THAT WHEREVER PUBLIC AUTHORITIES ARE CLEARLY GIVING EFFECT TO PRIMARY LEGISLATION, THEN THEY ARE NOT ACTING UNLAWFULLY; OR**

- **OPTION 2: RETAIN THE CURRENT EXCEPTION, BUT IN A WAY WHICH MIRRORS THE CHANGES TO HOW LEGISLATION CAN BE INTERPRETED DISCUSSED ABOVE FOR SECTION 3.**

The IHRAR did not identify any problems relating to Section 6 of the HRA and its report points to public bodies as an important component to the protective framework of the HRA. The government's case for adjusting the definition of public authorities is unclear and seems to rest upon one case study wherein the department overseeing and proposing reforms to the HRA, the Ministry of Justice, was found not to have taken appropriate steps to ensure that a private company was not breaching human rights under their government contract to provide accommodation to asylum seekers. As the definition provided by Section 6 includes bodies (such as private companies) that perform public functions (which this company was undertaking in the case study given), it is difficult to see the source of any confusion in this case. At the same time, courts make assessments on a case-by-case basis as to whether individual bodies are performing state functions, or simply being employed by the state (for example the company in this case study was clearly performing a public function, while a privately owned cleaning company contracted to clean council offices is not).

Therefore, if there is a lack of clarity, perhaps this is an issue of training and supporting companies undertaking public contacts so that there is adequate knowledge and transparency of the responsibilities that they are undertaking.

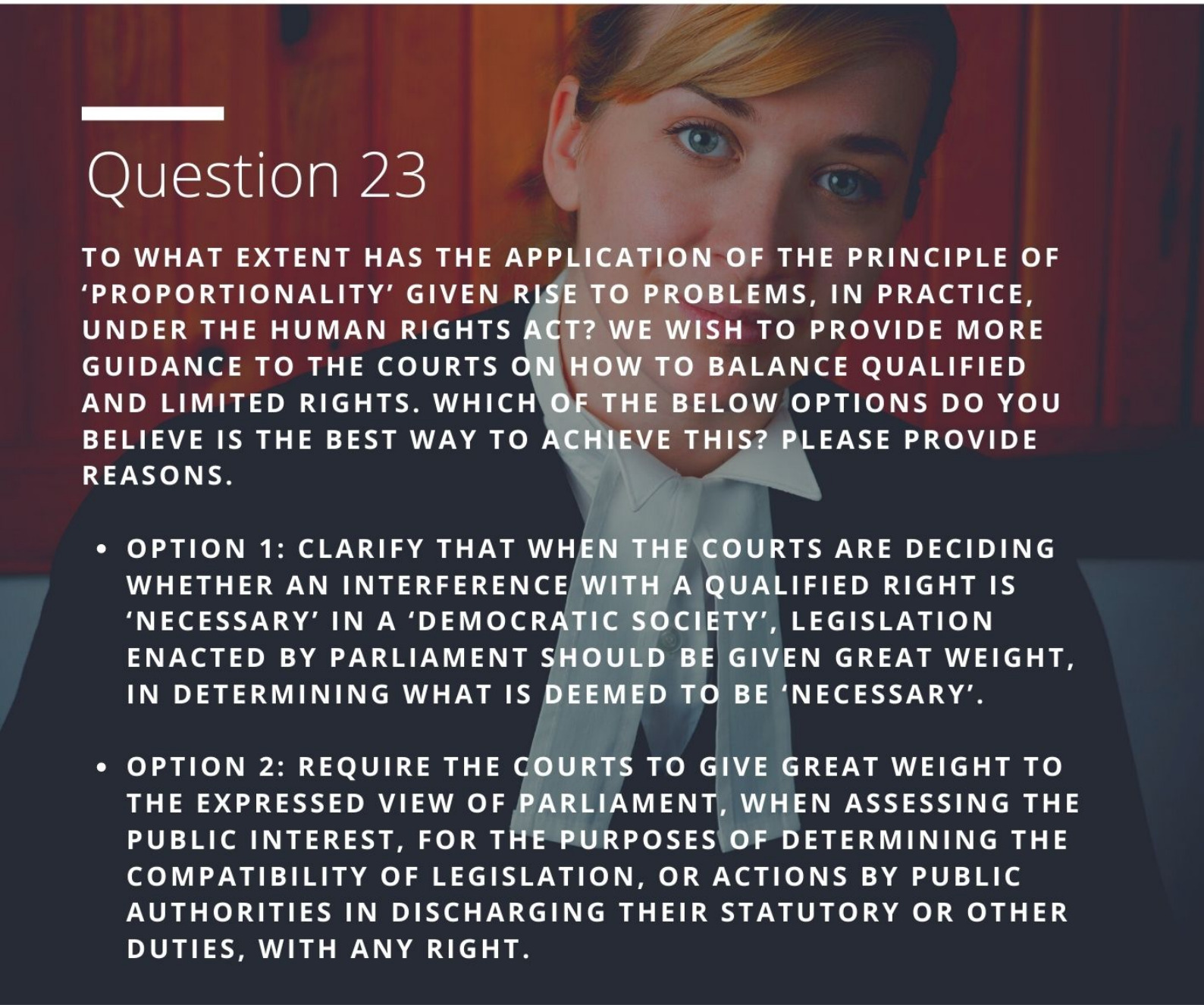
However, given the emphasis on the case study provided as evidence of apparent confusion, the implication could be an attempt to narrow the definition to exclude private companies performing public services when operating under government contracts. Certainly, the consultation paper repeatedly highlights the government's desire to limit the situations in which public authorities have an obligation to uphold human rights. Again, the reasoning given by the government is presented without any evidence and cited as the apparent confusion amongst public bodies regarding their duties – something to be rectified by greater training and support, rather than removing human rights protections altogether. Any confusion surrounding these obligations can once more be traced back to the "damaging perceptions" of the HRA that are a result of many years of political and media misinformation and attacks, for which the government should itself take its own share of responsibility and seek to address.

Any tampering with the definition of public authorities or the responsibilities encompassed by Section 6 of the HRA is unnecessary and could severely limit people's access to remedies for human rights breaches, while simultaneously releasing public authorities from obligations to act compatibly with human rights. At the same time, the Equality Act 2010 uses the same definition of public functions in expounding its Public Sector Equality Duty. Therefore, any changes to Section 6 of the HRA will automatically impact other pieces of legislation that cross-reference this definition.

Proportionality is an important facet of the HRA's ability to fully protect people's rights in a nuanced manner. The IHRAR report did not identify any concerns in this area, so (as with many of the other 'problems' identified in the government proposals) the lack of supporting evidence for the proposals makes the need for change unclear. At present, the HRA is working effectively in this regard and changes are unnecessary. As such, it is concerning that the government has already determined that changes will be made without consulting the public on whether these changes are desired.

Any kind of blanket approach setting rules directing how courts may make decisions will restrict the courts' ability to fully balance the intricacies of individual cases and potentially result in people's rights being restricted more than is appropriate. Moreover, the proposals would result in a situation where courts would be more likely to be forced to find in favour of the government.

While seemingly framed around protecting parliamentary authority, the 'guidance' offered by proposed changes to the principle of proportionality amounts to nothing more than political interference with the independence of judicial decision making and ability to apply case law. There is no evidence of problems under the current HRA framework and changes are unnecessary. Both options provided would result in a diminishing of people's rights as courts would not be able to properly balance the competing considerations of each case.



Question 23

TO WHAT EXTENT HAS THE APPLICATION OF THE PRINCIPLE OF 'PROPORTIONALITY' GIVEN RISE TO PROBLEMS, IN PRACTICE, UNDER THE HUMAN RIGHTS ACT? WE WISH TO PROVIDE MORE GUIDANCE TO THE COURTS ON HOW TO BALANCE QUALIFIED AND LIMITED RIGHTS. WHICH OF THE BELOW OPTIONS DO YOU BELIEVE IS THE BEST WAY TO ACHIEVE THIS? PLEASE PROVIDE REASONS.

- **OPTION 1: CLARIFY THAT WHEN THE COURTS ARE DECIDING WHETHER AN INTERFERENCE WITH A QUALIFIED RIGHT IS 'NECESSARY' IN A 'DEMOCRATIC SOCIETY', LEGISLATION ENACTED BY PARLIAMENT SHOULD BE GIVEN GREAT WEIGHT, IN DETERMINING WHAT IS DEEMED TO BE 'NECESSARY'.**

- **OPTION 2: REQUIRE THE COURTS TO GIVE GREAT WEIGHT TO THE EXPRESSED VIEW OF PARLIAMENT, WHEN ASSESSING THE PUBLIC INTEREST, FOR THE PURPOSES OF DETERMINING THE COMPATIBILITY OF LEGISLATION, OR ACTIONS BY PUBLIC AUTHORITIES IN DISCHARGING THEIR STATUTORY OR OTHER DUTIES, WITH ANY RIGHT.**

Question 24

HOW CAN WE MAKE SURE DEPORTATIONS THAT ARE IN THE PUBLIC INTEREST ARE NOT FRUSTRATED BY HUMAN RIGHTS CLAIMS? WHICH OF THE OPTIONS, BELOW, DO YOU BELIEVE WOULD BE THE BEST WAY TO ACHIEVE THIS OBJECTIVE? PLEASE PROVIDE REASONS.

- **OPTION 1: PROVIDE THAT CERTAIN RIGHTS IN THE BILL OF RIGHTS CANNOT PREVENT THE DEPORTATION OF A CERTAIN CATEGORY OF INDIVIDUAL, FOR EXAMPLE, BASED ON A CERTAIN THRESHOLD SUCH AS LENGTH OF IMPRISONMENT.**

- **OPTION 2: PROVIDE THAT CERTAIN RIGHTS CAN ONLY PREVENT DEPORTATION WHERE PROVIDED FOR IN A LEGISLATIVE SCHEME EXPRESSLY DESIGNED TO BALANCE THE STRONG PUBLIC INTEREST IN DEPORTATION AGAINST SUCH RIGHTS.**

- **OPTION 3: PROVIDE THAT A DEPORTATION DECISION CANNOT BE OVERTURNED, UNLESS IT IS OBVIOUSLY FLAWED, PREVENTING THE COURTS FROM SUBSTITUTING THEIR VIEW FOR THAT OF THE SECRETARY OF STATE.**

This question is once more an example of the government offering solutions to an apparent problem that they fail to properly evidence, while providing options for a change that has already been decided, with no discussion to establish whether a change is even necessary. There are only anecdotal examples presented to support the government's case for change, with one example dating back from 2009, prior to changes introduced by the Immigration Act 2014 which made it more difficult to achieve successful appeals under Article 8 of the HRA and which would change the outcome of the case in question were it to be repeated today. Meanwhile, the other cases presented remain anecdotal but are offered as examples of widespread abuse with limited reference to the background nuances of the cases that resulted in the courts ruling against deportation; nor is there an examination of data demonstrating overall numbers of cases and the rights being relied upon. It is also worthy to note that the HRA already contains significant limits on the use of Article 8 in deportation claims and the ruling referenced from 2009 was addressed by changes to other legislation, with no need to amend the HRA itself.

Furthermore, the government's rhetoric of "a certain category of individual" (option 1) is fundamentally divisive and undermines the concept of human rights as universal. It again follows the government's attempt to present certain groups people as less deserving of rights. Option 2 has the same effect by separating the meaning of human rights in the context of migrant rights from the meaning they have for the wider public. Any human rights framework, whether it is created through amendments to the HRA or its replacement with this proposed BoR, must be built upon a central foundation of human rights as universal.

At the same time, suggestions in option 3 to remove avenues for appeal to prevent "courts from substituting their view for that of the Secretary of State" is an innately dangerous position with severe consequences for a functioning democracy reliant upon the delicate separation of powers and the carefully calibrated role of the judiciary. This would remove vital checks on governmental overreach and further endanger people from deportation based upon political considerations, with politically unpopular groups having their rights decided by political actors (i.e. the government and its ministers). At the same time, this proposal follows a pattern of attempts to weaponise people's attempts to access their rights and hold the government to account. Indeed, the attacks on CART judicial review found in the Judicial Review and Courts Bill is but another example. However, removing people's access to justice will only increase Article 13 claims (right to effective remedy) at the ECtHR.

It must also be recognised that these proposals will further entrench structural discrimination within the justice and migration systems. It is well evidenced by multiple inquiries and investigations that police powers, sentencing, and deportation powers are disproportionately used against people of colour. At the same time, exorbitant Home Office fees and wider issues within the Home Office functioning disproportionately prevent many such people who would otherwise be entitled from claiming British citizenship, leaving them subject to immigration powers, including detention and deportation. At the same time, it is such groups that are less likely to have the economic resources to take a claim to the ECtHR should they require an Article 13 remedy if options to appeal are removed. Therefore, particularly considering the suggestions to give increased supremacy to political decisions and reduced judicial protections, the government proposals would further embed structural forms of racial discrimination across the system.

Again relying on a lack of evidence, the government proposals to prevent the courts and the current human rights framework from acting as a safeguard against unlawful deportations should be roundly rejected, especially considering the divisive nature of the proposals that suggest some groups of people to be undeserving of human rights protection – ultimately undermining the universality of human rights. The narrative presented reduces the fundamental need for all people to have the ability to protect their rights to the unacceptable 'frustrating' of deportations, which is a shamefully disingenuous depiction.

Question 25

WHILE RESPECTING OUR INTERNATIONAL OBLIGATIONS, HOW COULD WE MORE EFFECTIVELY ADDRESS, AT BOTH THE DOMESTIC AND INTERNATIONAL LEVELS, THE IMPEDIMENTS ARISING FROM THE CONVENTION AND THE HUMAN RIGHTS ACT TO TACKLING THE CHALLENGES POSED BY ILLEGAL AND IRREGULAR MIGRATION?

The government is arguing that it is unduly restricted in responding to certain types of migration (particularly the removal of asylum seekers and people entering the UK on small boats in the English Channel) by its responsibilities under the 1951 Refugee Convention and the HRA. It is concerning that these suggestions emerge within the context of the Nationality and Borders Bill; a legislative proposal condemned by the United Nations High Commissioner for Refugees, which (at the time of writing) ignores the UK's international obligations, increases the challenges facing the most vulnerable (such as survivors of domestic and gender-based violence) to access protection, and expands the government's power to unilaterally strip people of citizenship without notice. This pattern, combined with the widespread demonisation of migrants, and describing such vital protections as "impediments", demonstrates an open hostility to the protections currently afforded to vulnerable people and the safeguards designed to prevent the government from acting without restraint.

A key right within the HRA with which the government engages on such matters is Article 2 (the right to life). It is a vital and absolute right placing a responsibility upon public bodies to protect and respect life for all people in the UK, including anyone in UK waters. As it is an absolute right, it becomes unlawful to fail to protect a life when they are known to be in immediate danger – something especially relevant for those crossing the Channel in small boats, as well as those in situations of domestic abuse or at risk of death caused by family members or environmental factors. Any limitation of this right would either reduce the rights protection for everyone in society (including those at risk due to domestic violence and other dangers), or else create a two-tier system wherein asylum seekers and migrants are entitled to a lesser degree of human rights protections – an eventuality which contradicts the universality of human rights and is inherently discriminative in excluding people from protection on the basis of their immigration status.

Furthermore, the government has been repeatedly warned about the use of the term "illegal" in the context of this kind of migration, with a recent Court of Appeal ruling stating that someone merely attempting "to arrive at the frontiers of the United Kingdom in order to make a claim is not entering or attempting to enter the country unlawfully". As such, the government's presentation of rights obligations acting as a hindrance to their justified attempts to stem illegality is a misrepresentation.

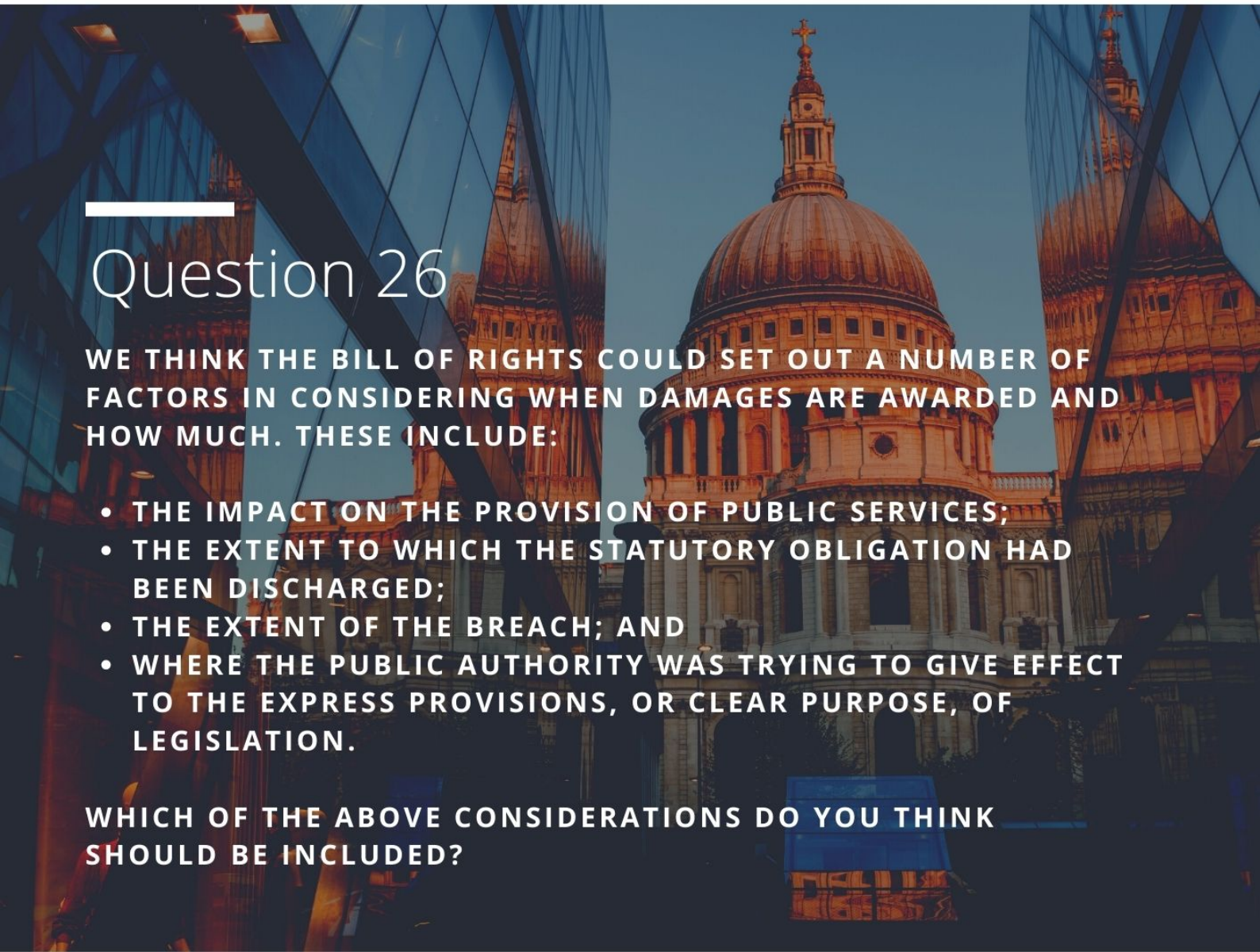
The government proposal's framing of human rights protections as "impediments" and misrepresenting asylum seekers as "illegal" fits into a longstanding government hostility to the protections currently afforded to vulnerable people – a hostility that is exemplified by the Nationality and Borders Bill. Any changes to the existing framework would either reduce the rights protection for everyone in society or unequally exclude asylum seekers and migrants from human rights protections – thereby undermining principles of universality and actively fomenting structural discrimination.

Like many of the suggestions made throughout the consultation paper, the government has again failed to provide evidence that there are problems within current system governing the awarding of damages. Further, it has again seemingly taken the decision to enact changes without investigation into the necessity of change.

The provisions for holding authorities to account under the HRA are important mechanisms for encouraging public bodies, such as the government, to positively and proactively embed human rights considerations within all of their decision-making and daily operations. Certainly, while the government's concern that the awarding of a remedy impacts a public authority's ability to fulfil its mandate, this is, in fact, exactly how such a framework should be operating as it provides a positive incentive for such bodies to proactively ensure that they do not act in ways contrary to human rights.

At the same time, it would be inappropriate for the government to set the criteria dictating how remedies are to be awarded in cases that may rule against itself. Independent courts already effectively undertake this delicate decision based upon the balance of the facts of each individual case.

The inherent objective of proposals interfering with the current damages framework is to limit the consequences incurred by a court ruling against any public authority, including the government itself. Once again, it falls into a pattern of governmental attempts to reduce accountability and, if progressed, will reduce the safeguards in place acting as a deterrent to public authorities from acting in ways that are incompatible with human rights and limit the mechanisms available to ensure that victims of human rights breaches have access to effective remedies



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:

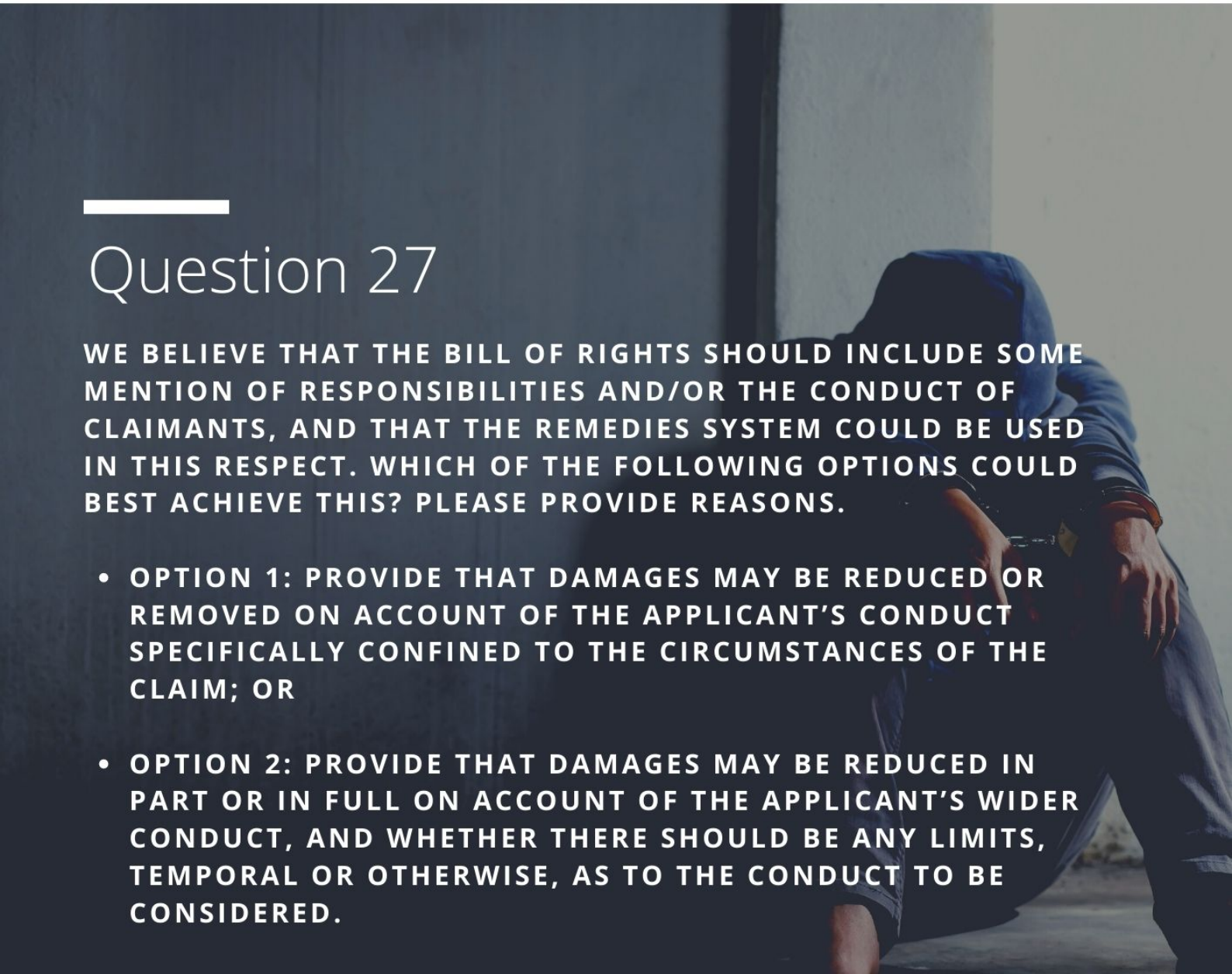
- **THE IMPACT ON THE PROVISION OF PUBLIC SERVICES;**
- **THE EXTENT TO WHICH THE STATUTORY OBLIGATION HAD BEEN DISCHARGED;**
- **THE EXTENT OF THE BREACH; AND**
- **WHERE THE PUBLIC AUTHORITY WAS TRYING TO GIVE EFFECT TO THE EXPRESS PROVISIONS, OR CLEAR PURPOSE, OF LEGISLATION.**

WHICH OF THE ABOVE CONSIDERATIONS DO YOU THINK SHOULD BE INCLUDED?

Both options presented by the government for enforcing an obligation on courts to consider the past behaviour of claimants are wholly unacceptable. Human rights are not, and should not, be 'earned' or subject to 'good' behaviour – this undermines the very foundational principle of human rights.

Meanwhile, the government provides no evidence for its claims that people use the HRA as a vehicle through which to litigate for compensation. In reality, compensation is rarely awarded, and payments are considerably smaller than other forms of litigation. The aim of human rights law is to rectify breaches and provide an appropriate remedy, which is usually the overturning of a policy or enforcing an obligation to undertake a specific action. It is only in exceptional circumstances, such as the spycops case, where the extent of human rights violations are so inescapably shocking that large compensation sums are awarded.

The government's suggestion to make courts consider a claimant's past behaviour when making damages decisions is deeply alarming and inconsistent with the principle of universal entitlement that is embedded within human rights law. Once more, the government is suggesting a framework wherein certain groups are excluded from equal protections as they are somehow less deserving. This proposal should be wholeheartedly rejected.

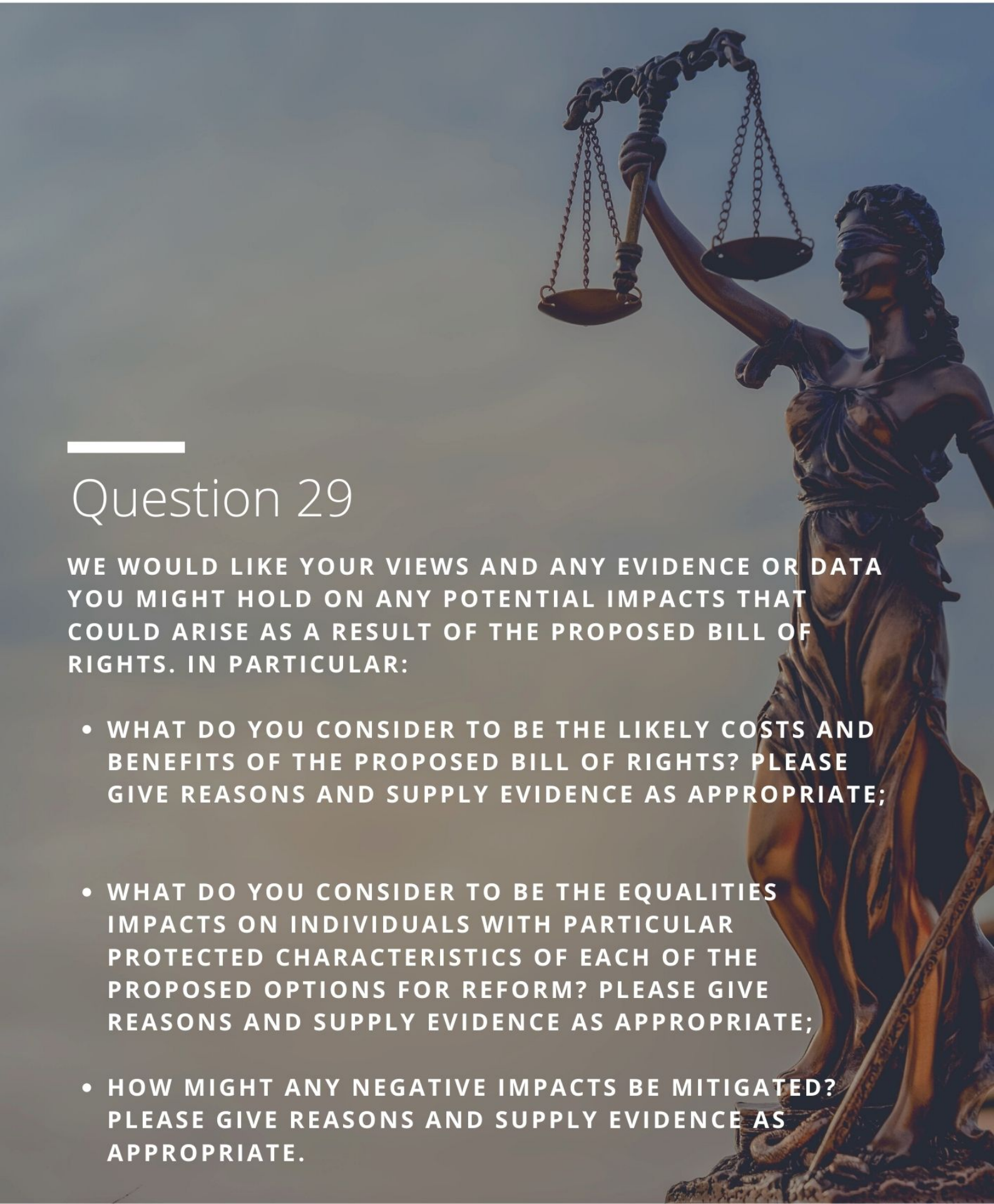


Question 27

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.**



Question 29

WE WOULD LIKE YOUR VIEWS AND ANY EVIDENCE OR DATA YOU MIGHT HOLD ON ANY POTENTIAL IMPACTS THAT COULD ARISE AS A RESULT OF THE PROPOSED BILL OF RIGHTS. IN PARTICULAR:

- **WHAT DO YOU CONSIDER TO BE THE LIKELY COSTS AND BENEFITS OF THE PROPOSED BILL OF RIGHTS? PLEASE GIVE REASONS AND SUPPLY EVIDENCE AS APPROPRIATE;**

- **WHAT DO YOU CONSIDER TO BE THE EQUALITIES IMPACTS ON INDIVIDUALS WITH PARTICULAR PROTECTED CHARACTERISTICS OF EACH OF THE PROPOSED OPTIONS FOR REFORM? PLEASE GIVE REASONS AND SUPPLY EVIDENCE AS APPROPRIATE;**

- **HOW MIGHT ANY NEGATIVE IMPACTS BE MITIGATED? PLEASE GIVE REASONS AND SUPPLY EVIDENCE AS APPROPRIATE.**

This consultation paper and the government proposals contained within it should be rejected in its entirety. The language, framing, and nature of the proposals are divisive, confused, ill-evidence, contradictory to the fundamental spirit of human rights, and will have untold consequences for devolved administrations. The costs of implementing the proposed BoR can be witnessed throughout the answers contained in this submission. Ultimately, if pursued, the BoR would undermine the universality of human rights, weaken protections for the public, remove vital safeguards designed to hold the government to account, and exclude people from accessing remedies to human rights breaches.

While the proposals undermine HRA protections for everyone in society, people with protected characteristics will be disproportionately impacted, thereby exacerbating the heightened challenges that they already face in accessing justice. As but a handful of examples taken from the answers within this submission:

- Many of the proposals will force people to direct their claims to the ECtHR in pursuit of their Article 13 rights (Qs 8, 24, & 26). This will disproportionately impact people of colour, women, people with disabilities, and others who disproportionately face economic limitations to their ability to finance such a claim.

- People of colour are also disproportionately impacted by police powers, sentencing, and deportation powers, as well as excessive Home Office fees and wider issues within the Home Office functioning that prevent them from claiming British citizenship, thereby leaving them subject to immigration powers, including detention and deportation. The proposals surrounding limiting avenues for appealing deportation decisions (Qs 24) will, therefore, disproportionately impact these groups even further.

- The suggested changes to positive obligations (Q11) will also disproportionately impact women, people with disabilities, and elderly people who rely on the state to ensure their safety.

- People of colour and other groups known to be from over-policed communities are also likely to be disproportionately impacted by proposals surrounding the consideration of a claimants past behaviour when awarding damages (Q27).

The impacts of the proposed BoR will be devastating for human rights protections across the country and will remove any international standing that the UK has a leader in human rights advancement. It will also severely impact our functioning democracy by removing integral safeguards to hold the government to account and prevent the unfettered use of power. Therefore, the only way to mitigate against these consequences is to withdraw the proposals for a BoR and prevent it from becoming law.

This consultation paper and the government proposals contained within it should be rejected in its entirety. The language, framing, and nature of the proposals are divisive, confused, ill-evidence, contradictory to the fundamental spirit of human rights, and will have untold consequences for devolved administrations. Ultimately, if pursued, the BoR would undermine the universality of human rights, weaken protections for the public, remove vital safeguards designed to hold the government to account, and exclude people from accessing remedies to human rights breaches. The only way to mitigate against these consequences is to withdraw the proposals for a BoR and prevent it from becoming law.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