UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) RESPONSE TO THE MINISTRY OF JUSTICE CONSULTATION: '*HUMAN RIGHTS ACT REFORM; A MODERN BILL OF RIGHTS A consultation to reform the Human Rights Act 1998*

INTRODUCTION

1. UKELA (UK Environmental Law Association) comprises over 1,500 academics, barristers, solicitors and consultants, in both the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.

2. UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response to the consultation paper published by the Ministry of Justice: *Human Rights Act Reform: A Modern Bill of Rights. A consultation to reform the Human Rights Act 1998* has been prepared by UKELA's Environmental Litigation Working Party. It does not necessarily, and is not intended to, represent the views and opinions of all UKELA members but has been drawn together from a range of its members.

3. The response answers the specific questions raised by the consultation document. It also makes some important preliminary points which aim to inform the consultation process.

Preliminary points

4. UKELA considers that the UK government's current review of the Human Rights Act with the aim of there being a new Bill of Rights presents it with a perfect opportunity to include within it a human right to a clean healthy environment. The UK government

has positioned itself as a world leader in climate protection with the UK Climate Change Act being one of the first climate protection pieces of legislation globally. Not only would the new right add another tool that could be used in the fight against environmental degradation and climate change (which are both intrinsically linked) but a new right to a clean healthy and sustainable environment would place the UK government as one of the world leaders in this area.

5. The link between environmental degradation, climate change and violation of human rights is not in dispute and indeed was recognised as long ago as 1968 by the United Nations when it was acknowledged that human activities were accelerating the degradation of the environment which was having a consequent impact of "enjoyment of human rights". Over the past 50 years there has been a growing and wider acknowledgement. The Stockholm Declaration in 1972 through Klaus Toeper UN 2001, "Human rights cannot be secured in a degraded or polluted environment"

6. The Paris Agreement provides in its preamble that States should respect, promote and consider their respective obligations on human rights in taking action to address climate change' and on 8 October 2021 the Human Rights Council acknowledged that there should be a new right to environment. The Scottish government has appointed a National Taskforce for Human Rights and its leadership Report highlights the advantages in other countries where there has been recognition of a human right to a healthy environment. Some of the advantages have found to be

   - "a raising of awareness that human right norms require protection of the environment and highlights that environmental protection is on the same level of importance as other human interests that are fundamental to human dignity equality and freedom"

   - "raised the profile and importance of environmental protection and provided a basis for the enactment of stronger environmental laws".

7. It is not only Scotland that are making progress in this area, but European countries, Canada and the United States are also taking steps.

8. UKELA submits that it is important that the right to a clean, healthy and sustainable environment is formulated within a legal framework such as a new Bill of Human Rights. Not only will the right solidify general environmental interests and the rule of law in the UK, but it will also strengthen the protection of other human rights. On this

point, in 2018, the UN Special Rapporteur on Human Rights and the Environment outlined that the right is crucial for the realisation of other accepted rights such as the right to life and this position was reflected in UN Human Rights Council Resolution 48/13.

9. It is important that the right to a clean healthy and sustainable environment is formulated within a legal framework such as a new Bill of Human Rights and it is submitted that the obligations and duties on the UK government and other relevant state actors would not need to diverge from existing obligations and duties such as the various duties placed on the Secretary of State in the Environment Act. In fact, by incorporating it into the Bill of Rights, domestic recognition of the right to a clean, healthy and sustainable environment will supplement the UK's existing environmental legal and policy frameworks in enforcing environmental protection, addressing the impacts of climate change and preventing environmental degradation and its threats to human life and well-being.

REPLY TO SPECIFIC QUESTIONS

Q1. 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.

10. UKELA agrees that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights.

11. However there is current provision contained in Section 2 of the Act which provides for this. Section 2 allows domestic courts to 'take into account' any decision of the ECtHR or Committee of Ministers in so far as they are relevant. In addition whilst the courts are required to take all jurisprudence into account the court is not bound by it which leaves the court with a wide discretion and independence.

12. If Option 1 is implemented it is submitted it would have the effect of narrowing the interpretation and application of the Human Rights Act.

13. Option 1 would also have the potential to damage the UK internationally as well as being likely to impact upon the protection of human rights in both the UK and in Europe.

14. UKELA submits that negative perceptions about human rights are not shared by the majority of the public and that the public support the existence of laws to protect human rights. In fact UKELA submits there is overwhelming public support for the existence of laws to protect human rights in the UK and to the specify rights enshrined in the HRA appears to suggest that courts do not *have* to follow previous judgments of the HRA or ECtHR but gives little clarity as to how to interpret these.

15. UKELA considers that Option 1 if implemented could impede on the Supreme Court's interpretation of Rights and Freedoms in relation to environmental rights due to the limited UK case law available. It could lead to different standards applying in the UK than in other countries who are parties of the ECHR and could leave UK victims of human rights abuses with less access to justice and fewer courses of redress.

16. Option 1 on p96 (Interpretation of Rights and Freedoms) may fit the development of environmental rights better (particularly if Art 1 from Option 2 is brought into it) as it enables the court to consider international law and judgements.

17. Option 2A (p98) seems to impart more flexibility for reading rights, particularly if a common law-style environmental right is developing independently from primary legislation

18. Option 1 on page 100 appears to fit better with environmental rights given the reduced constraint of Parliamentary sovereignty. Consideration of the interests of a democratic society make facilitate environmental decision-making better than that of the "public interest" consideration (the latter seems to be an ongoing thorn in the side of environmental litigation, allowing adjudication to veer towards economic interests.

Q2. The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

19. UKELA considers that there should be greater clarity on the role of the court in adjudicating environmental rights, specifically the right to a clean and healthy environment. The UK is currently in the minority in terms of recognising a constitutional right to a healthy environment, or at minimum incorporating an international right into its national framework. The UNEP (2019) noted that over 150 countries recognise environmental protection or the right to a healthy environment in their constitutions. This

number has only grown in the last few years and through 2022, with constitutional incorporation by Italy in February of this year. As such, clarification is necessary as to whether such a right is open to development through decision-making of the Supreme Court or through explicit recognition in the Bill of Rights.

20. If the Bill of Rights does not incorporate the above right (a position which is strongly discouraged from both a domestic and an international perspective), greater clarity is required for how the court will adjudicate on the right to a healthy environment and develop it through the common law, given the UK's international obligations and affirmative contribution to state practice on the right (i.e. the UK's vote in recognition of the right at the UN HR Council 8th October 2021 Resolution 48/13, which encourages states 'To adopt policies for the enjoyment of the right to a clean, healthy and sustainable environment as appropriate, including with respect to biodiversity and ecosystems').

Q3. Should the qualified right to jury trial be recognised in the Bill of Rights?

21. UKELA does not have a view on a qualified right to jury to be recognised in a Bill of Rights.

Q4. 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?

22. UKELA submits that Freedom of Expression must protect opposition to decision-making, laws or policies that are put forward by the UK government (particularly where they are harmful to the environment) and must incorporate the Aarhus principles re: access to information concerning the environment and public participation in decision-making as they are crucial to ensure effective environmental protection and uphold the right to a healthy and clean environment. As such, the public interest in receiving these materials and participating in protests should be protected and effective remedies must be provided for violations of the right to freedom of expression in relation to environmental matters

23. The above points are vital for the respect, protection and fulfilment of other human rights such as the right to life and the prohibition of discrimination. The right to a healthy environment is important for the enjoyment of other human rights and conversely, the exercise of human rights, including the procedural rights outline

above, are simultaneously crucial for securing a right to a healthy environment.

24. By way of background 'The Framework Principles on Human Rights and the Environment' outlines: "At the same time, the exercise of human rights, including rights to freedom of expression and association, to education and information, and to participation and effective remedies, is vital to the protection of the environment." (p6) "The obligations of States to respect and protect the rights to freedom of expression, association and peaceful assembly9 encompass the exercise of those rights in relation to environmental matters." (p9)

Q5. 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?

25. UKELA submits that domestic courts should receive clear guidance on the obligations of the state to protect freedom of expression, which extends to the protection of these rights in the adjudication of environmental matters. These obligations also extend to limiting interferences with the accurate reporting of environmental information, ensuring timely and cost-effective public access to environmental information and justifying restrictions on misinformation given the extent to which environmental and climate misinformation impact the public interest of a democratic society. Restrictions on the exercise of these rights should not be placed where they compromise these vital procedural rights. This extends to unjustifiably onerous restrictions on or blanket bans on environmental protests where the peaceful protestors have the right to express their views and opinions through public demonstration. For example, the Framework Principles on Human Rights and the Environment, provides (p9):

> "Blanket prohibitions on protests surrounding the operations of mining, forestry or other resource extraction companies are unjustifiable (see A/HRC/29/25, para. 22)….When violence occurs in an otherwise peaceful assembly or protest, States have a duty to distinguish between peaceful and non-peaceful demonstrators, take measures to de-escalate tensions and hold the violent individuals — not the organizers — to account for their actions. The potential for violence is not an excuse to interfere with or disperse otherwise peaceful assemblies (see A/HRC/29/25, §41)."

26. UKELA submits that the Bill of Rights should not unjustifiably restrict Article 10 rights, and 'limited and exceptional circumstances' should be clearly defined in relation to Article 10.

Q6. What further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources?

27. UKELA has no views on whether the Bill of Rights should provide stronger protection for journalists' sources

Q7. Are there any other steps that the Bill of Rights could take to strengthen the protection for freedom of expression?

28. UKELA submits that other steps that the Bill of Rights could to strengthen the protection for freedom of expression, in so far as it applies to environmental rights, is to recognise/enumerate the right to a clean and healthy environment. The right to a clean and healthy environment is fundamental for the full enjoyment of all other human rights, including freedom of expression. In addition recognising that respect for freedom of expression applies to environmental matters contributes to a shared societal dialogue on environmental protect and consequently, supports the fulfilment of a right to a healthy environment.

Q8. Do you consider that a condition that individuals must have suffered a 'significant disadvantage' to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way of making sure that courts focus on genuine human rights matters? Please provide reasons.

29. UKELA does not consider that the condition would be an effective way of ensuring that the courts focus is on genuine human rights. Introducing an additional permission stage where claimants have to demonstrate that they have experienced 'significant disadvantage' is a high burden and will only serve as an unnecessary barrier to access to justice. The Act already provides that a claimant can only a bring a claim if the claimant is the 'victim' of a human rights breach. In addition there is already in existence a permission stage in the High Court which has the effect of screening out unmeritorious cases. Claimants should be able to seek to resolve an injustice through the courts without such a test applying.

Q9. Should the permission stage include an 'overriding public importance' second limb for exceptional cases that fail to meet the 'significant disadvantage' threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.

30. UKELA submits that this would depend upon the UK government's interpretation of 'overriding public importance' which is unclear from the Consultation document. Whilst this additional requirement may be of benefit to environmental public interest litigation it could also serve as an unnecessary barrier to access to justice and prevent those who have experienced valid violations of their environmental rights, including (but not limited to) the right to a clean and healthy environment, from upholding their rights in court. Overriding public importance encompasses environmental matters that impact both individuals, communities and wider British society, and this term needs to be defined broadly to accommodate this fact.

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

31. UKELA submits that defining 'genuine' and "serious" generously/expansively – need not be restricted to the most severe of cases as human (and environmental) rights abuses are systemic and happen at all levels. The aim of this should be to restrict legitimately frivolous cases without deterring those who are experiencing actual or risk of actual human rights violations. Any standards and procedures established in this respect must be non-discriminatory.

32. The key issue here is that the infringement of a right to a healthy environment cannot be pursued through private law, particularly when there are public infrastructural projects, decision-making and inaction involved. Therefore, the proposal to require claimants to pursue other claims is overtly narrow and may exclude genuine claimants who are experiencing environmental harm that directly impacts their human rights.

Q11. How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons.

33. UKELA submits that the government has not provided evidence to support its assertion that public service authorities are being impacted by costly human rights litigation due to the imposition and expansion of positive obligations. However, UKELA considers

that the development by the UK government of clear, sufficient and unambiguous standards and procedures that respect, protect and fulfil the right to a healthy environment would if this was indeed an issue of concern solve this so that positive obligations do not need to be developed through the courts.

Q12. We would welcome your views on the options for Section 3 in the Consultation document. Option 1: Repeal section 3 and do not replace it. Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation. We would welcome comments on the above options, and the illustrative clauses in Appendix 2.

34. UKELA submits that the UK government should not repeal Section 3 unless it intends to replace with an amended provision (a view that the consultation document notes aligns with the IHRAR Panel). The UK government would already be in direct violation of the common law presumption that Parliament does not intend to act in breach of international law by failing to recognise the right to a healthy environment (given it has assented to its recognition at the UN HR Council, contributing to state practice on the matter in absence of binding treaty obligations). If Section 3 were to be repealed it could mean that the power to interpret legislation could be restricted. Currently if a non-absolute right must be restricted that restriction must be proportionate or least restrictive. It appears that the UK government is suggesting that law makers cannot balance individual rights with the wider public interest and want to place further weight on the view of Parliament. This may reduce the importance of proportionality.

Q13. How could Parliament's role in engaging with, and scrutinising, section 3 judgments be enhanced?

35. UKELA considers that clarification is required in relation to how Parliament is meant to engage with these judgements. It is unlikely that a Section 3 judgement will be delivered without strong consideration of how Parliament has drafted the legislation. As such, Parliament should be seriously considering how it will proceed when a Section 3 judgement is delivered, giving weight to the court's role in ensuring the separation of powers, its decision-making and the (environmental) rule of law, all of which are long-recognised to be necessary for ensuring a democratic society and protecting the public interest

Q14. Should a new database be created to record all judgments that rely on section 3 in interpreting legislation? Please provide reasons.

36. UKELA considers that there is no evidence to support the justification of additional burdens being placed on UK taxpayers for a new database to be created to record all Judgements that rely on Section 3 in interpreting legislation. The Government's own publication 'Responding to Human Rights Judgements' noted that only 44 Declarations of Incompatibility have been made between the Human Rights Act entry force in 2000 to July 2021.

Q15. Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

37. Yes. UKELA agrees that for the purposes of adjudication of environmental rights given the Government's reliance on environmental policy and a 'softer' regulatory regime under the Environment Act 2021 and the Agriculture Act 2020. Accordingly, UKELA submits that declarations of incompatibility must extent to secondary legislation to ensure constructive alignment with the obligations relating to the right to a healthy and clean environment.

Q16. Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where subordinate legislation is found to be incompatible with the Convention rights? Please provide reasons:

38. UKELA does not agree that the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill should be extended to all proceedings under the Bill of Rights where subordinate legislation is found to be incompatible with the Convention Rights.

Q17. Should the Bill of Rights contain a remedial order power? In particular should it be:
a) similar to that contained in section 10 of the Human Rights Act;
b) similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;
c) limited only to remedial orders made under the 'urgent' procedure; or
d) abolished altogether?
Please explain your reasons:

39. UKELA considers that retaining the power in Section 10 given only 11 have been made so far under the Act or the IHRAR that the UK government's recommendation of Option B would be the best option.

Q18. We would welcome your views on how you consider section 19 is operating in practice, and whether there is a case for change.

40. UKELA considers that statements of compatibility made in Parliament are a subjective task (regardless of political leaning), given the prevalence of Parliamentary Privilege and the rules outlined in *Pickin v British Railways Board* [1974] AC 765. In relation to environmental matters, and upholding the right to a healthy and clean environment, it appears statements of compatibility have little relevance – e.g. Environment Act 2021 and Agriculture Act 2020 may indeed be incompatible for the right to a healthy environment as the right is non-existence in UK law.

41. For this reason, UKELA submits that the test in Section 19 can be improved in relation to environmental rights and protection through a) the recognition of a right to a healthy environment and b) by strengthening the minister's positive obligations to make the statement in good faith and on the basis of accepted human rights including environmental standards. Environmental standards can be effective in ensuring environmental improvements and can be formulated to be flexible enough to ensure conformity across the devolved nations (Principle 11 of the Framework Principles United Nations 2018).

42. Furthermore, the test should be revised to ensure a minister cannot make a statement

"to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill". UKELA considers this is a concern for the rule of law and separation of powers, both in relation to environmental issues and otherwise. Removal or revision of this aspect of the Section 19 test will ensure that the balance of powers will be maintained (given the Bill of Rights is an expression of Parliamentary supremacy – as opposed to direct rule by a Government of any political leaning).

Q19. 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?

43. UKELA considers that this is an opportunity to allow for input from devolved nations on the right to a healthy environment. Scotland's National Taskforce for Human Rights: Leadership Report (2021) recommends the incorporation of several economic, social and cultural rights, including the right to a healthy environment. This approach contradicts the view within the Bill of Rights consultation document and points to potential future tensions in relation to environmental rights legal and governance systems between the UK approach and that of the devolved nations. For example, expanded rights in Scotland such as the right to a healthy environment (if granted legal recognition) may be affected by matters under reserved control. In effect the Consultation paper as a whole is inconsistent in how fully it considers the devolution aspects of the proposals made. That a consultation paper of such length and detail can be prepared without thorough consideration of the impact on devolved responsibilities is a failing and falls far short of satisfying the Principles for Intergovernmental Relations set out in the Review of Intergovernmental Relations published in January 2022.

44. UKELA submits that the Bill of Rights should adopt an equitable, harmonised approach with the devolved nations and incorporate economic, social and cultural rights (including the right to a healthy environment) to ensure alignment with the Principles for Intergovernmental Relations and reduce potential tensions in relation to variations within systems of human rights, legal and environmental governance.

45. Variation in proceedings and remedies are also a relevant question for the adjudication of UK-wide environmental rights.

Q20. Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.

46. UKELA submits that the existing definition of public authorities as defined in the Act should remain. However, for the purposes of environmental rights the definition should be extended to include private bodies who are contracted by public authorities and whose role is central to the maintenance of natural capital and ecosystem services that are contracted by public authorities. For example, the intentional, negligent or reckless discharge of waste and sewage water into rivers, oceans, etc. is a major issue (in respect of environmental pollution, crime and human rights generally) that will require water and waste companies to be held to account for breaching right to a healthy environment.

47. UKELA further submits that the UK government should for the purposes of an environmental right give serious consideration to extending the obligation to protect human rights to non-state actors such as business enterprises. As part of his work on the "Protect Respect & Remedy Framework" Special Representative to the United Nations John Ruggie found that one third of cases alleging corporate related environmental degradation had affected human rights. The 2018 Report (A/HRC/37/59) of the Special Rapporteur on Human Rights and the Environment also highlights the importance of state-driven regulation in effectively enforcing environmental standards against both public and private actors and the obligations of the latter. Framework Principle 12 of this report outlines the role the Guiding Principles on Business and Human Rights plays in this context:

> "Businesses should comply with all applicable environmental laws, issue clear policy commitments to meet their responsibility to respect human rights through environmental protection, implement human rights due diligence processes (including human rights impact assessments) to identify, prevent, mitigate and account for how they address their environmental impacts on human rights, and enable the remediation of any adverse environmental human rights impacts they cause or to which they contribute."

Q21. 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.

48. UKELA queries the need to replace Section 6(2). There is no evidence presented that supports the assertion that public authorities are being restricted in carrying out their duties by human rights law.

49. Option 1. It is important to have a degree of flexibility which a hard line/blanket ban will effectively eliminate.

50. As such Option 2 to retain the current exception may be the best way forward to allow for flexibility based on the specific facts of the case – the will of Parliament is not always fully apparent/unambiguous and this needs to be taken into consideration for rights compliance.

Q22. Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.

51. In relation to extraterritorial armed conflict UKELA submits that from an environmental perspective it is not in dispute that armed conflict impacts upon the environment and causes environmental degradation which in turn impacts on the ability to enjoy human rights. Armed conflict causes damage and degradation to the environment in many ways through for example bombardment of infrastructure, and habitats, pollution of air, ground and water and misuse of natural resources or through forced human population displacement. Therefore protecting the environment during armed conflict is essential in order to protect a right to a clean healthy environment.

52. From an international perspective there is recognition of the importance of the protection of the environment in armed conflicts which is reflected not only through several International Humanitarian Treaties (of which the UK government is a signatory) but more recently by the adoption of the first reading on 6th June 2019 by the international community of the 28 draft principles by the UN International Law Commission (ILC) during its 2019 session (ILC Protection of the environment in relation to armed conflicts):

53. UKELA also draws attention to the 1997 Additional Protocol I to the 1949 Geneva Convention Article 36 which provides that parties must assess new weapons and means or methods of warfare to determine whether in their employment, they would be prohibited by the Protocol or by any other applicable rule of international law. Whilst the rule is to protect people it could equally be applied to the protection of the environment. In addition Article 56 (1) of the Protocol and 1997 Additional Protocol II Article 15 has the effect of prohibiting attacks on work and installations containing dangerous forces which include dams, dykes and nuclear power plants although Article 56(2) does provide exceptions if these facilities are being used to support significant military operations.

54. The Statute of the International Criminal Court characterises a war crime attack that is launched in the knowledge that it will cause widespread and severe damage to the natural environment which would clearly be excessive in relation to concrete and direct overall military advantage anticipated (1998 Statute of the International Criminal Court, Art. 8(2)). This provision is also included within the 1997 Additional Protocol I Article 85(3) and (5).

55. Sanctions imposed as an alternative means to direct armed conflict can and do impact on human rights with the sanctions imposed on Iraq and its impact on the Iraqi people being a prime example (CESCR General Comment No 12 1999).

56. From an environmental rights perspective, the sanctions imposed on Iran it has been reported provide a good example of sanctions causing and certainly exacerbating many of Iran's environmental problems. For example the US government under President Barack Obama imposing penalties on countries selling petrol to Iran it is alleged resulted in Iran developing its own refining and producing of petrol which contained 10 times the level of contaminants in its petrol than the imported petrol and 800 times the international standard for sulphur in its diesel than the imported diesel significantly contributing to the increase in deadly air pollution.*

57. If the UK government were to give recognition to the right to a healthy environment it presents it with the opportunity of enshrining within UK legislation some of the principles of International Law as referred to above thereby adding greater protection to the environment and to people in times of armed conflict.

58. UKELA further submits that given the extraterritorial nature of climate change (and other environmental harms such as water, pollution and the impact on group rights it

also raises a potentially complex overlap with other areas of law, particularly in the field of business and human rights (see: *Lungowe and others v Vedanta Resources plc and Kokola Copper Mines plc* [2019] UKSC 20).

59. Extraterritorial jurisdiction will improve the attainment of a right to a healthy environment. The scope of this jurisdiction could be acknowledged through a requirement of a causal link/effective control etc.

Q23. To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act?
We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.
Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.
Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.
We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

60. UKELA considers that proportionality is often weighed in the favour of "public interest" which can be construed as economic considerations (i.e. "sustainable" development). The case of *Hatton v UK* (2003) 37 EHRR. 28 is an example of this, where the court held that flights in and out of Heathrow were not in violation of Article 8 ECHR rights due to the UK Government exercising its margin of appreciation and strike a fair balance in the interests of the wider community (e.g. the economic development brought by Heathrow operating at full capacity). Although courts must inevitably engage a balancing act for qualified and limited rights and ensure decisions are proportional to intentions of Parliament, it is clear that there is a strong public interest in protecting the environment and mitigating climate change.

61. With this in mind, UKELA considers that the situation where a right to a healthy environment is incorporated as a qualified or limited right a proportionality test that fails to align with existing environmental standards/legislation and disproportionately

favours economic development as the main “public interest” exception has the potential to sustain human and environmental rights violations, as opposed to control them.

62. If Option 1 is implemented and the court have to give ‘great weight’ to legislation enacted by Parliament it will limit the courts ability to deal with cases proportionately.

63. If Option 2 is implemented and courts have to give great weight to ‘views’ expressed by Parliament undermines the rule of law and the independence of the judiciary.

Q24. 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; and/or
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.

64. UKELA submits that the Human Rights Act contains a number of qualified rights which are already subject to limitations which allows the qualified right to be over- ridden on the grounds of public interest in certain circumstances. Article 8 the right to private life is a good example “there shall be no interference with this right by a public authority except in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime.

65. There is therefore already in place provision to ensure that deportations that are in the public interest is not frustrated by human rights claims. To add any further weight to this is unnecessary and undermines the Human Rights framework.

66. Therefore UKELA rejects the proposals for Option 1, Option 2 and Option 3 and reiterates that the respect for “non-environmental” human rights is imperative for the attainment of a right to a healthy environment. This is because the human rights are

interconnected and attempting to ‘slice-off’ one from another is artificial.

Q25. 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?

67. UKELA considers that “illegal” and “irregular” migration is going to inevitably increase as climate change worsens – people from other parts of the world particularly the southern hemisphere will need to migrate elsewhere due to the impacts of climate-related changes. There is an international protection gap for these types of refugees but it needs to be clarified in the UK – particularly as it is relevant for the fulfilment of all other human rights and the right to a healthy environment at home and abroad

68. On a broader basis, there should be a level of protection for those who are making the crossing into the UK, including a codified obligation to respect international legal principles on this matter. The UK government should be working with its international partners to find solutions that respond to and address the migration issue rather than seeking to limit the impacts of “illegal” and “irregular” migration by curtailing “rights” through amendments to the Human Rights Act.

Q26. We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:
a. the impact on the provision of public services;
b. the extent to which the statutory obligation had been discharged;
c. the extent of the breach; and
d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.
Which of the above considerations do you think should be included? Please provide reasons.

69. UKELA considers from the environmental rights perspective where there has found to be a breach of a right as a result of environmental degradation that the level of damages awarded should not be influenced by the impact on the provision of public services, particularly where the way in which these services are provided are violating human rights, including the right to a healthy and clean environment. The onus must be on the public authority/body and service provider to fulfil their relevant

obligations and ensure that services provided are not detrimentally impacting upon the environment and human rights.

70. The courts already have the discretion to take into account the factors that are set out above. In addition the UK government has not provided any evidence to support a requirement that these factors should be taken into account by the court when considering the level of damages to be awarded. In fact it appears to be the opposite in that generally a court does not automatically order financial compensation even if it decides that human rights have been breached. It depends on whether the court considers that the loss suffered should be compensated for. The value of compensation in human rights cases is usually relatively low.

Q27. 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.

71. UKELA considers that some acknowledgement of environmental responsibilities can be incorporated here in very limited circumstances. Specifically there must be recognition of the need to equitably balance right to property/peaceful ownership of possessions and liberty. R (on the application of Mott) v Environment Agency is a good example of how disproportionately this is currently balanced against the environment. Here Mr Mott was awarded compensation for the Environment Agency's conditions on his licence which significantly limited his annual fishing catch to conserve the threatened salmon stock in the Special Areas of Conservation of the Rivers Wye and Usk and the Special Protection Area of the Severn Estuary. Accordingly, damages and compensation should not be paid out to those who knowingly or recklessly harm the environment, or to those who are subject to environmental licensing or other requirements that are imposed to protect the

environment from further harm and degradation.

72. However UKELA submits that in all other human rights cases that do not engage these limited circumstances, the conduct of a claimant should not be introduced with the purpose of reducing or removing an award of damages.

Q28. We would welcome comments on the options, above, for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2.

73. UKELA considers that there have been relatively few adverse Strasbourg judgements against the UK since the assent of the Human Rights Act 1998. It is noted in the Consultation document that the government of the State Party concerned is ultimately responsible for answering to the Council of Europe on the implementation of a Strasbourg judgement. UKELA considers that Parliamentary sovereignty remains supreme constitutional principle under the current state of affairs in respect of the Human Rights Act. As such the proposed legislative provision affirming Parliamentary sovereignty is considered redundant.

74. However UKELA notes that implementing a formal requirement for the government to lay notice of adverse judgments before Parliament for the purposes of enabling general Parliamentary consideration. This provision is welcomed as it may therefore mandate adherence to democratic processes including that of environmental democracy.

75. UKELA questions why the UK government is proposing a legal mechanism to 'test the temperature of Parliament' in addressing an adverse ruling, which it appears to skew established democratic and constitutional principles.

76. UKELA submits that a provision should be incorporated to mandate a Parliamentary vote on the adverse judgment regardless of the "temperature" of Parliament to ensure respect for democracy and Parliamentary sovereignty (as opposed to rule by government superseding Parliamentary supremacy.)

77. The legislative provision affirming Parliamentary sovereignty seems redundant given this reflects the current affairs under the Human Rights Act 1998. In addition to the above points, a formal requirement to lay the judgement before Parliament may be

ideal for ensuring environmental democracy.

Q29 We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular:
a. What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate.
b. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate.
c. How might any negative impacts be mitigated?
Please give reasons and supply evidence as appropriate.

78. (Q29a). UKELA submits that the right to a clean and healthy environment must be included in a proposed Bill of Rights, so the UK fulfils its domestic and international obligations. The costs of not doing so will be reflected in the amount of "frivolous" litigation that will come to the courts as the environmental and climate change impacts are felt by British society. The benefits of incorporating such a right is that it will improve ecological outcomes in the UK, solidify environmental democracy (given that the majority of the UK is concerned about climate change – ONS October 2021: 75% of the public said they were worried about the impact of climate change), uphold the rule of law, and ensure the attainment of environmental justice. These benefits have been long substantiated through empirical legal studies. For example, current Special Rapporteur on Human Rights and the Environment, David R. Boyd's expansive study, *The Environmental Rights Revolution* (2012) and studies led by Chris Jeffords et al. (2016, 2017) evidence that the constitutionalisation of substantive environmental rights positively correlate to improved ecological and human rights performance and outcomes, with a 7.25 increase in a country's overall Environmental Performance Index score and a reduction in ecological footprints and emissions. Consequently, the main benefit of recognising the right to a clean and healthy environment in the Bill of Rights is that it will bolster the UK Government's *25 Year Environment Plan*, and contribute to its ambitions of being "world leading" in environmental and climate action.

79. Incorporating such a right will also bring the UK into constructive international alignment with the majority of the world, as 'more than 155 States have recognized some form of a right to a healthy environment in, inter alia, international agreements or their national constitutions, legislation or policies' (UN HR Council Resolution 48/13). It is highly unusual that substantive environmental rights and responsibilities

(and in particular, the right to a healthy environment) find no expression though the UK's national legislation or incorporated international convention. As such, the benefits stemming from the UK's increased international cooperation, and mutual respect, in respect of securing the right to a healthy environment cannot be understated.

80. (Q29b) UKELA submits that individuals who are in minority groups will be disproportionately impacted by environmental harm, yet these groups have a higher risk of being unable to access appropriate support and funding to access the courts and remediate their human rights violations and specifically, complex environmental rights violations in absence of an autonomous right to a clean and healthy environment. The reality is this difficulty is compounded by the decline in legal aid and judicial review pathways.

81. It is imperative for ensuring equality and non-discrimination that a right to a healthy environment is recognised and codified in the Bill of Rights as it may encompass measures that combat the sources of socio-economic and environmental inequalities within the UK. Environmental harm adversely and disproportionality impacts those with vulnerabilities. Framework Principle 14 of the 2018 Report of the Special Rapporteur on Human Rights and the Environment (A/HRC/37/59) calls for States to take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, including 'women, children, persons living in poverty, members of indigenous peoples and traditional communities, older persons, persons with disabilities, ethnic, racial or other minorities and displaced persons'. As States must ensure their legal and institutional frameworks protect these vulnerable groups from environmental harm, it is necessary, now more than ever, for the right to a healthy environment to be incorporated into the UK's legal framework.

82. (Q29c) UKELA submits that negative human rights impacts (and associated economic impacts) of environmental degradation and climate change can be mitigated through a harmonised environmental law and human rights approach - through the recognition of a right to a healthy and clean environment. The reasoning for this follows from the answers outlined in A and B. Codifying a right to a healthy environment in the Bill of Rights will ensure a better and more cost-effective balance between existing individual rights, economic growth and the equitable fulfilment of environmental standards.

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