justfair

Consultation Response

Human Rights Act Reform: A Modern Bill of Rights

March 2022

Introduction

This document forms the submission from Just Fair to consultation issued by the UK Ministry of Justice "Human Rights Act Reform: A Modern Bill of Rights".

Just Fair[1] is a UK charity that is working to realise a fairer and more just society by monitoring and advocating for economic, social, and cultural rights (ESCR) in the UK. We aim to ensure that the UK Government's law, policy, and practice comply with international and domestic human rights obligations pertaining to ESCR.

We are grateful to Liberty, the British Institute of Human Rights, Amnesty International UK and the Human Rights Consortium for the guidance and knowledge they shared and which has helped inform our response to the current consultation.

As noted in our written submission to the Joint Committee on Human Rights' Inquiry into the Independent Review of the Human Rights Act (February 2021), we believe that there is no case for a weakening of enforcement mechanisms in the Human Rights Act. The current consultation has in no way altered our position. We believe that the Human Rights Act is an important pillar of the UK constitution and we must 'Keep the Act Intact'.

Overarching issues

In addition to answering the individual questions in the consultation document, we wish to make clear that we are particularly concerned about the current proposals for the following reasons:

1. We do not believe that the consultation document or indeed the UK Government more generally, has made an effective 'case for change'. The consultation document and the report of the Independent Review of the Human Rights Act Panel illustrated a well functioning legal system where ample consideration is given to the balancing of rights, responsibilities and the role of the judiciary in a modern democracy.
2. We believe that any conversation about a UK Bill of Rights should be grounded in the protection, promotion, and fulfilment of the UK's international and domestic human rights obligations, and are not convinced that this is currently the case. Indeed, we believe that the current consultation is part of an attempt to more widely roll back mechanisms which properly hold the executive to account. Accountability is a key cornerstone of both a healthy democracy and the rule of law.
3. Furthermore, we believe that any conversation about a UK Bill of Rights should not be confined to, *"legal practitioners, experts and academics in human rights law, human rights advocates, and anyone else interested in our framework of human rights law."* [2] Instead, it

[1] https://justfair.org.uk/

[2] 'Human Rights Reform: A Modern Bill of Rights: A consultation to reform the Human Rights Act 1998', UK Ministry of Justice, December 2021, *'About this consultation'*

needs to be underpinned by a participative model[3] that allows people to have a say in their Bill of Rights. As noted by Smith, the Canadian experience illustrates that the participative model of creating a Bill of Rights increases the legitimacy of the document.[4] The current consultation document is an intensely legal one, which focuses primarily on the minutiae of the relationship between human rights, the courts, and the executive. It fails to engage those most interested – members of the public, each of whom is a rights holder.

4. We are particularly concerned that the consultation is inaccessible to disabled people. A text-only 'easy read' version was released on 12 days before the original consultation deadline.[5] We are unaware of any version that includes images or is accessible to people who have BSL as their first language. In addition, there is no flexibility in terms of the medium through which people can respond (for example sending audio responses). The UK Government must do better, including by ensuring that all members of our society can have their say on an equal basis.
5. The devolved administrations are on their own distinctive paths with relation to the incorporation of human rights. To slightly adapt the wording of the 2012 report of the Commission on a Bill of Rights,[6] we are acutely aware of the sensitivities attached to discussion of a UK Bill of Rights in the context of Northern Ireland (and Scotland and Wales) and consider that this current process should not interfere with these developments in any way and that no conclusions made should be interpreted or used in such a way as to interfere in, or delay these important national processes.
6. Implications for the future of the Human Rights Act reach beyond UK shores. While we continue to position ourselves as a world leader in human rights, the eyes of the world rightly remain upon us in terms of how we realise rights domestically. Previous attempts to alter or undermine the Human Rights Act have resulted in UN human rights bodies and other member states sending words of caution.[7] This current process is likely to garner similar warnings.

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[3] 'Developing a Bill of Rights for the UK: Executive summary', Alice Donald, with the assistance of Philip Leach and Andrew Puddephatt, 2010, p. 2

[4] Smith, A., 'Bills of Rights as Process: The Canadian Experience', *International Journal of Law in Context*, *3*(4), 343-372.

[5] See this letter from Liberty on 28 February which we were a signatory to: Liberty-open-letter-to-the-Lord-Chancellor-Feb-22.pdf (libertyhumanrights.org.uk)

[6] 'A UK Bill of Rights? The Choice Before Us', Commission on a Bill of Rights, December 2012, Volume 1, para 75

[7] Over the past number of years, multiple UN Human Rights bodies have expressed concern about the future of the UK's Human Rights Act including:

- "Ensure that any legislation passed in lieu of the Human Rights Act 1998 — were such legislation to be passed — is aimed at strengthening the status of international human rights, including the provisions of the Covenant, in the domestic legal order, and provide effective protection of those rights across all jurisdictions." Human Rights Committee, August 2015
- "The Committee recommends that the State party undertake a broad public consultation on its plan to repeal the Human Rights Act 1998 as well as on the proposal for a new bill of rights. It also recommends that the State party take all necessary measures to ensure that any new legislation in this regard is aimed at enhancing the status of human rights, including economic, social and cultural rights, in the domestic legal order and that it provide effective protection of those rights across all jurisdictions of the State party." Committee on Economic, Social and Cultural Rights, July 2016
- "The Committee is concerned that the proposal to replace the Human Rights Act of 1998 with a new British Bill of Rights may lead to decreased levels of human rights protection in the State party, which would negatively affect the situation of individuals protected under article 1 of the Convention…The Committee recommends that the State party undertake meaningful and broad public consultation on

Consultation Questions

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.

We believe that this question as presented is not clear in terms of the far-reaching implications of the proposals. In essence the draft clauses seek to move away from the current language in Section 2 of the Human Rights Act and would result in a weakening of the link between domestic UK courts and the European Court of Human Rights, going far beyond the proposals of the Independent Review of the Human Rights Act.

Currently S.2 requires the UK courts to "take into account" (but does not bind them to) the case law of the European Court. We do not believe that the UK Government has made a convincing case for why this sophisticated balance of legal interpretation, independence and precedent should be altered. Further, we believe that these proposals would frustrate the UK Government's expressed aim to, "strengthen the role of the UK Supreme Court"[8] by potentially increasing the number of applications to the European Court of Human Rights, as individuals find it increasingly difficult to realise their rights at home (as noted by Liberty).

Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

Again, we wish to register our concern that this question and its intention are not clear, and indeed potentially misleading. If this question refers to the idea of codification of issues which fall outside the competence of UK courts (as we believe it does), then we would remind the UK Government of the Independent Human Rights Act Review's (IHRAR) conclusion,[9] which was to reject such codification on the basis that prescriptive legislation would risk leading to satellite litigation and that general guidance would be unlikely to be helpful. The IHRAR conclusion that the UK courts have developed and applied an approach which is guided by "judicial restraint" and that there was no basis for departing from it seems a sensible position to us..

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

We are not opposed in principle to the right to trial by jury being recognised in a Bill of Rights; however, any provision for such a right must be substantive and effective. Without a draft clause, we

its proposal to revise its human rights legislation and ensure that any changes to the current human rights framework strengthens the protection of human rights, and in particular the rights of individuals protected under article 1 of the Convention." Committee on the Elimination of Racial Discrimination, August 2016

- "Make sure that, in case the proposals for a British Bill of Rights are realized, the current level of human rights protection provided by the Human Rights Act of 1998 is maintained and improved." Universal Periodic Review, May 2017, recommendation by Ukraine to the UK

[8] 'Human Rights Reform: A Modern Bill of Rights: A consultation to reform the Human Rights Act 1998', UK Ministry of Justice, December 2021, para 9

[9] 'The Independent Human Rights Act Review Panel Report', December 2021, p. 131

are unable to assess whether the proposal for such a right would meet this threshold. Indeed, we share the concern of Liberty that the right proposed in this question risks being "symbolism without substance", and if the qualification(s) for this right resemble those in the Human Rights Act, then this might actually make it easier for the UK Government to interfere with it.

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?

At the outset, we wish to express our concern that the following section was not considered by the IHRAR and so we have lacked the evidence base that we had for other issues. This lack of context again illustrates what we believe is a wrong-handed approach to consulting upon and drafting Bills of Rights.

This lack of an evidence base further concerns us when the consultation document makes the unevidenced claim that, *"Section 12(4) has not had any real effect on the way such issues have been determined by the courts."*[10] This has not been our experience. Section 12 of the Human Rights Act was created specifically in recognition of the importance of the right to freedom of expression and in particular the freedom to publish.

We are also concerned that the proposal is vague; for example, there is the potential for enormous variation of what constitutes 'interference', and 'the press and other publishers'. While the proposal may have been drafted with an intention to address a specific issue, the rule of unintended consequences means that a whole range of other issues may be impacted. As noted by Liberty, this could potentially include injunctions to stop foreign states from harassing journalists who have themselves sought relief from blackmailers/harassers.[11]

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?

It is important to recall that Article 10 (the right to freedom of expression) is a qualified rather than an absolute right. This means that it can be restricted, but only if it meets a strict test; that is if this restriction is prescribed by law, necessary, and proportionate to achieving one of a set of legitimate aims, including protecting national security, preventing disorder or claims, and protecting the rights and reputations of others.

When there is a conflict between freedom of expression and respect for (say) an individual's privacy, neither takes precedence over the other. Instead, the court undertakes "the ultimate balancing act"[12]: starting with an "intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary",[13] taking into account the justifications for interfering

[10] 'Human Rights Reform: A Modern Bill of Rights: A consultation to reform the Human Rights Act 1998', UK Ministry of Justice, December 2021, para 213
[11] Davies v Carter [2021] EWHC 3021 (QB).
[12] Re S (FC) (a child) (Appellant) [2004] UKHL 47 para. 17
[13] *Ibid.*

with or restricting each right; and applying the proportionality test to each. We believe that this sophisticated exercise is working well and should not be interfered with. Further, we agree with Liberty that it is unlikely that it will be possible to legislate for such a balancing exercise that is inescapably fact-specific and we are concerned that to do so would be to tie the hands of judges inappropriately.

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

We find ourselves somewhat confused by this question. This is chiefly because we would agree with the general academic consensus[14] that very particular issues are best suited to specific pieces of legislation, rather than to bills of rights, which by their nature tend to deal with broader issues and categories of persons. Further, the consultation document gives no indication of what 'protection' the UK Government is considering, nor what the definition of a 'journalist' would be.

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

We would again reiterate our concern that the current consultation document is not the best forum for taking views on what a new Bill of Rights should contain. Best practice suggests that moving towards a truly participative model of creating bills of rights can increase both the public sense of ownership of, and thus the legitimacy and effectiveness of bills of rights.

Some proactive steps that the UK Government could take to strengthen the protection for freedom of expression outside of a UK Bill of Rights would be to:

- Withdraw the Police, Crime, Sentencing and Courts Bill which represents a significant attack on the right to protest.
- Rethink proposed reforms to the Official Secrets Acts (OSA), including by following the recommendation of the Law Commission to introduce a public interest defence.
- Redraft the Online Safety Bill. The current draft defines a vague and loose new category of "harmful content" that could be subject to unprecedented forms of regulation. Other measures in the current draft (including the erosion of end-to-end encryption) could have a chilling effect on freedom of expression and of privacy.

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

The Universal Declaration of Human Rights is the foundation of international human rights law. The first lines of its preamble read,

"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."

[14] See for example: 'Constitutionalising Equality: The South African Experience' Smith, (Vol 9, Issue 4, 2008), International journal of Discrimination and the Law

It is not for governments to place barriers in the way of the realisation of human rights, indeed this is diametrically opposed to their role to 'respect, protect and fulfil' rights. It is the proper role of governments to work progressively to remove barriers to rights to ensure that they are realised in the small places close to home. The UK has taken great strides to remove barriers through the introduction of the Human Rights Act, which meant that not only did people not have to go to the European Court of Human Rights to realise their rights, but that often they would not have to go to court at all as public bodies became better equipped in understanding the benefits of the Human Rights Act as a tool for decision-making.

We reject the idea that there should be a 'permission stage' as this would be a regressive step in the realisation of rights, creating a new barrier for people seeking to access courts to realise their rights. For many people bringing claims of human rights abuse, the step of taking legal action is already onerous. We think particularly of previous claimants under the Human Rights Act, including people with protected characteristics, experiencing domestic violence and those who were terminally ill. We believe adding further impediments is cruel and unjust particularly as there is no other area of law where it is necessary to reach a threshold as high as 'significant disadvantage' in order to bring a claim.

Furthermore, we reject the framing of 'genuine human rights matters' in this question and we do not think the current consultation document has provided evidence of frivolous or spurious claims which are causing problems for the courts. As the Government is aware, defendants can already apply to 'strike out' a claim if the claimant has failed to show reasonable grounds for bringing it. We believe an appropriate balance is already being struck by UK courts and see no case for any addition of a permission stage.

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

As noted above we reject the idea of a permission stage and believe it would represent a regression in the realisation of rights in the UK. The proposal in this question would in no way go far enough to ameliorate the impact of the introduction of a permission stage. The proposal fails to recognise that our human rights framework in the UK came into existence in order to ensure that people in our society, particularly those who are most marginalised, can challenge the State for abuses of power. This is the foundation of the European human rights system. As our friends at René Cassin write,

"The European human rights framework emerged to counter the destruction of fundamental human rights during World War II and prevent a repetition of events such as the Holocaust. The European Convention on Human Rights, and through it the Human Rights Act, is a direct result of the Holocaust. Those who were murdered included Jews, Romanis, Poles, communists, homosexuals, Jehovah's Witnesses and mentally and physically disabled people. Worryingly, reducing the rights of minorities is reflected in the proposed Bill of Rights."

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

We again reject the framing of this question. While we agree that it would be desirable to reduce human rights-based claims, we would want this reduction to be as a result of rights being better realised in the first instance so that people did not have to rely upon the judicial system to assert their rights. Any reduction in human rights claims should not be because the UK Government places greater barriers in the way of access to justice.

We believe that a reduction in the number of human rights claims made could be achieved through mechanisms outside of the purview of courts. Better education and enhanced legislative scrutiny are two clear examples.

"An effective programme of civic and constitutional education in schools, universities and adult education… with a focus on questions about human rights, the balance to be struck between such rights, and individual responsibilities," was a key recommendation of the IHRAR Panel Report.[15] We would suggest that this education be extended to public authorities so that they better understand how the Human Rights Act can be used as an effective decision making mechanism and are better equipped, more confident and empowered to resolve human rights concerns as they arise so that courts become a matter of last resort.

We would further recommend that if the UK Government wishes to reduce the number of human rights cases that come before our courts, that it could implement new measures for more effective pre and post legislative scrutiny. An example of this was provided in the IHRAR Panel Report from a roundtable with the Law Society of Scotland, *"Ministers could be required to make a pre-legislative statement – not just confirming that legislation doesn't infringe on rights, but also where legislation contributes to advancement of rights and promoting positive obligations."*[16] This is similar to the proposal by the Joint Committee on Human Rights in 2008 for "reasoned statements of incompatibility".[17] The report recommended;

"To enhance democratic scrutiny of the compatibility of a Government measure with any Bill of rights, the Bill could require Ministers to provide full statements of compatibility, containing the reasons for the Minister's view that a measure is compatible with the Bill of Rights. It could also extend its application to Government amendments to Bills and to other legislative measures such as statutory instruments and Orders in Council."[18]

Another area that could be considered would be to amend the Ministerial Code to require Ministers, when exercising their functions, to pay due regard to the rights contained within the ECHR.[19]

As will be looked at below, another recommendation of the IHRAR was to examine how the role of the Joint Committee on Human Rights (JCHR) could be enhanced – this suggestion is another way in which human rights issues could be dealt with before they reach a litigation stage.

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[15] 'The Independent Human Rights Act Review Panel Report', December 2021, p.21
[16] Ibid., p.528
[17] Joint Committee on Human Rights, 'A Bill of Rights for the UK?' Twenty–ninth Report of Session 2007–08, p.62
[18] *Ibid,* p.63
[19] 'Economic And Social Rights in Northern Ireland: Models of Enforceability,' November 2020, C. McCrudden K. Boyle, B. Dickson, C. Harvey, K. McNeilly and L. Moffett, p.15

In terms of giving a greater role to Parliament, another proposal worth consideration would be to introduce a timetable for the UK Government to respond to Parliament following a declaration of incompatibility. As recommended in the 2008 JCHR report,

"However, the Bill of Rights could seek to enhance Parliament's role following a declaration of incompatibility by requiring the Government to bring forward a formal response to Parliament within a defined timetable and to initiate a debate on its response, to guarantee Parliament the opportunity to express its view."[20]

Question 11: How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons.

We are deeply concerned about the potential implication of this question. As noted by Professor Colm O'Cinneide, positive obligations "are integral to the development of international human rights law over the last fifty years and are not specific to the ECHR."[21] Indeed all rights potentially give rise to positive obligations, not just those within ECHR. We are particularly concerned that this framing of positive obligations as being in any way an 'imposition' rather than a core part of the realisation of rights could be misconstrued in terms of the UK's commitment to key pieces of international human rights treaties where positive obligations are a central tenet, including recent UN human rights treaties such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. The UK has long prided itself as being a leader in terms of human rights internationally, and it is within reason to assume that the eyes of the world are watching intently to see how we realise rights within our own borders.

Contrary to the assertion in the current consultation document that positive obligations "creat[e] uncertainty as to the scope of the government's (and other public authorities') legal duties, thereby fettering the way it can make operational decisions, determine policy in the wider public interest, and allocate finite taxpayer's resources", we believe that courts in the UK and the European Court of Human Rights already carefully consider the needs of public authorities when interpreting positive obligations. Further, as Liberty highlights, judges have stressed that serious failures are required before a breach is established (*Osman*)[22] and the courts recognise that public authorities face competing objectives when meeting their positive obligations.

As Liberty also notes, undermining positive obligations will have a much wider impact than, for example, removing Osman warnings. In practice, positive obligations have been important in:

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[20] Joint Committee on Human Rights, 'A Bill of Rights for the UK?' Twenty–ninth Report of Session 2007–08, p.63

[21] *Colm O'Cinneide* Having its (Strasbourg) Cake, and Eating It: The UK Government's Proposals for a New 'Bill of Rights', *Völkerrechtsblog,* 26.01.2022, doi: 10.17176/20220126-180053-0.

[22] "For the court, and bearing in mind the difficulties of policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in articles 5 and 8 of the Convention." Osman v United Kingdom - 23452/94 [1998] ECHR 101 [116].

- Enabling bereaved families and loved ones to seek justice for their loved ones: including enabling the families of the 97 people who died in the Hillsborough disaster to establish that their loved ones had been unlawfully killed as a result of failings by the police and ambulance services.[23]
- Ensuring that detained children are treated with humanity and dignity[24]
- Holding the police to account over failures to tackle violence against women and girls (VAWG)[25]

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

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

Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.

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

Currently Section 3 of the Human Rights Act gives UK courts the power to interpret primary legislation in a way which is compatible with the Convention rights, insofar as it is possible to do so without stretching the meaning so far that it goes against the intention of the legislation. This clause is another clear example of the sophisticated way in which the three branches of government in the UK have worked together to realise rights while protecting UK legal and constitutional traditions, in this case, the doctrine of Parliamentary Sovereignty.

As noted in the IHRAR Panel Report,

"there has been no real evidence to suggest the UK Courts have adopted an approach that arguably misuses section 3 and the intention underpinning it. On the contrary, judicial restraint could properly be said have been exercised in the use of section 3; not least demonstrated by the number of times it has been used to interpret legislation."[26]

We are therefore unclear on what basis the current consultation makes the proposals above, both of which would limit the power of the UK courts to interpret legislation and weaken the effectiveness of the Bill of Rights. We believe that the balance that has been achieved in the use of Section 3 powers strikes an unproblematic balance for the UK constitutional structure.

[23] David Conn, Hillsborough inquests jury rules 96 victims were unlawfully killed, The Guardian, 26 April 2016, https://www.theguardian.com/uk-news/2016/apr/26/hillsborough-inquests-jury-says-96-victims-were-unlawfully-killed

[24] The Queen (On the Application of the Howard League for Penal Reform) v The Secretary of State for the Home Department v Department of Health [2002] EWHC 2497 (Admin)

[25] Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents) [2018] UKSC 11 (The 'Worboys' case) https://www.supremecourt.uk/cases/docs/uksc-2015-0166-judgment.pdf

[26] 'The Independent Human Rights Act Review Panel Report', December 2021, p.213

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

The IHRAR panel suggested the following in their report,

"Another means of facilitating Parliament taking a properly more robust approach to rights protection would be through considering how the role of the JCHR could be enhanced."[27]

We suggest that this could be an interesting area for examination in order to enhance the role of Parliament in the engagement with and scrutiny of issues pertaining to human rights. As an absolute minimum, the JCHR should continue to be properly resourced to perform its vital function of scrutinising every UK Government Bill for its compatibility with human rights, including adequate provision of dedicated legal advice.

Another method considered by the IHRAR is the creation of a new database, which is considered in the question below.

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

The IHRAR panel stated the following,

"We recommend that the Courts, Government and Parliament, particularly through the JCHR, work together to put in place a system, i.e., a database, for identifying superior court[28] *judgments across the UK that rely upon section 3 of the HRA to interpret legislation compatibility with Convention rights."*[29]

We agree that such a database would allow for a better analysis of the use of the interpretive power under s.3 of the Human Rights Act and would provide an evidence base if there was any need for reform. However, we do not believe that such an evidence base for reform has been provided in the current consultation, so while we welcome the establishment of a database, we would urge against any reform of s.3 until a clear case can be made for the need for any such reform.

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?

We are concerned that this question is framed in such a way that it doesn't accurately represent the proposal in the consultation document, "providing that declarations of incompatibility are also the only remedy available to courts in relation to certain secondary legislation".

This proposal would remove the ability of courts to strike down secondary legislation that is incompatible with the Convention and in doing so would undermine an important constitutional principle of the UK that secondary legislation that breaches primary legislation (such as the HRA) is unlawful and of no effect.

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[27] Ibid., p.254

[28] That is judgments of superior courts of record and their equivalents, i.e., the High Court of England and Wales and of Northern Ireland, the Court of Session in Scotland, the Upper Tribunal, and above. Judgments of the Employment Appeal Tribunal, Competition Appeal Tribunal and Investigatory Powers Tribunal should also be included. Limiting judgments to these Courts and Tribunals would against the exercise becoming overwhelming and unmanageable.

[29] *Ibid.,* p.253

Aside from this, it is unclear why such a proposal is being put forward. As noted by Liberty, UK courts are careful not to disrupt wider frameworks and policies which surround subordinate legislation, often issuing a declaration in cases where offending provisions cannot be cleanly excised. Even when secondary legislation is quashed, it remains open to the UK Government to respond by introducing new legislation to achieve the same policy goal without violating human rights. This can be done swiftly through use of remedial orders under section 10, (although the consultation paper proposes abolishing these orders).

The IHRAR considered this option in response to a Policy Exchange proposal and comprehensively rejected it on the basis that:

1. Courts already can make a declaration of incompatibility relating to certain subordinate legislation.
2. It would be offensive to constitutional norms.
3. It would produce problems for devolution; and
4. subordinate legislation is subject to less parliamentary scrutiny, making the quashing power an important safeguard.[30]

Question 16: Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with the Convention rights? Please provide reasons

The Judicial Review and Courts Bill is not yet law and these orders are opposed by most opposition parties. The introduction of these orders is not inevitable and this discussion of whether they should be extended is premature.

Question 17: Should the Bill of Rights contain a remedial order power? In particular, should it be: a. similar to that contained in section 10 of the Human Rights Act; b. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself; c. limited only to remedial orders made under the 'urgent' procedure; or d. abolished altogether? Please provide reasons.

We would again remind the UK Government that this current consultation is very far from best practice in terms of consulting on a bill of rights and if they wish to push ahead with creating a UK Bill of Rights that they consider how they could bring about a participative model of drafting and delivery to ensure wide ownership and acceptance.

This being said, in terms of the options in the current question, we would urge option A which would retain remedial orders as they currently are. As noted by Liberty, remedial orders allow for Ministers to swiftly make simple, necessary changes to human rights-offending legislation without the need to wait for significant parliamentary time. This, along with the requirements for information on the incompatibility and reasons for using the process, provides a balance between scrutiny and speed in issuing uncontroversial corrections to human rights violations. We see no need for change.

[30] Ibid., p. 323

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 of the Human Rights Act requires Ministers in charge of Bills in either House of Parliament to make a statement, or that, although they are unable to make a statement of compatibility, the Government nevertheless wishes the House to proceed with the Bill. As a signatory of the ECHR, this mechanism allows the UK Government to live up to its obligations.

However, this is not to say that the ministerial duty could not be enhanced. Indeed, as we noted above in question 10, enhanced pre-legislative scrutiny could help the better realisation of rights in the UK. An example of this was provided in the IHRAR Panel Report from a roundtable with the Law Society of Scotland, *"Ministers could be required to make a pre-legislative statement – not just confirming that legislation doesn't infringe on rights, but also where legislation contributes to advancement of rights and promoting positive obligations."*[31]

Another option, also noted in our response to question 10, the proposal by the Joint Committee on Human Rights in 2008 for "reasoned statements of incompatibility".[32]

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?

Examining how human rights are being realised in different parts of the UK is an intricate and detailed process and we feel that relegating it to a single question suggests that the UK Government is not considering the issue in the depth that is required. As a starting point it should be borne in mind that the devolved governments and legislatures are considering ways to enhance the rights protections offered by the Human Rights Act. They are on their own journeys to better realise rights and no action should be taken by the UK Government to in anyway undermine or interfere with these processes. Rather it should be the role of the UK Government, with its duty to respect, protect and fulfil rights, to facilitate and support these advancements where possible.

We agree with Amnesty International that the UK Government should:

- Consult with the governments, legislatures, NHRIs and civil society organisations of Scotland, Wales, and Northern Ireland to reconsider these proposals and work with them to improve human rights protections, in line with international standards, in all parts of the UK.
- Engage with the Irish government as co-guarantor of the Good Friday (Belfast) Agreement
- Deliver the long-awaited Northern Ireland Bill of Rights, ensuring that these rights are supplementary to the European Convention, as provided for in the Good Friday (Belfast) Agreement.

Any amendment of the Human Rights Act necessitates a process of review between the UK and Irish governments in consultation with the Northern Ireland parties, as required by the Good Friday (Belfast) Agreement.

[31] Ibid., p.528

[32] Joint Committee on Human Rights, 'A Bill of Rights for the UK?' Twenty–ninth Report of Session 2007–08, p.62

Question 20: Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.

We do not believe that the case has been made for any alteration of the definition of public authorities. The IHRAR did not identify any problems with the definition of public authorities and the current consultation itself states that the current approach is "broadly right".

We would agree with Liberty's assessment that:

- The law is clear - the UK courts have identified a set of principles which enable a body to consider whether it will be subject to the HRA and in respect of which functions. This flexible approach avoids arbitrary outcomes from 'bright-line' rules, and benefits both individuals and bodies that exercise public functions
- Increasingly fragmented privatisation means that a more prescriptive approach would be difficult if not impossible to devise.
- The Equality Act 2010 cross-refers to the definition of "public function" in the HRA for the purpose of the Public Sector Equality Duty. Amending the HRA would have knock-on effects in other areas.

Question 21: The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer? Please explain your reasons. Option 1: Provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or Option 2: Retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.

We are again concerned that the case for the changes outlined above has not been made by the UK Government. Indeed, as the British Institute of Human Rights (BIHR) has noted; every year they work with thousands of frontline staff, management, and leaders of public authorities, and never once has the subject of the question above been raised as an issue.

We would agree with BIHR that the way section 6(2) of the Human Rights Act works currently supports staff in public authorities to navigate the complex maze of other laws in a way that upholds people's human rights. The Human Rights Act is working effectively; no change is necessary and so we would reject these proposals.

Question 22: Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.

We agree with Liberty's assessment that restricting the extraterritorial scope of the ECHR would put the UK in conflict with the Convention, require significant other legislative change, and result in an

expanded role for Strasbourg in matters of sensitive national security. The consultation document acknowledges this reality.[33]

Question 23: To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act? We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.

Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.

Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

We reject both options. These proposals risk seriously undermining human rights protection for unpopular or marginalised groups, and others who lack sufficient influence with the majority party in Parliament at any given time. This runs contrary to the foundation of human rights – their universality. We believe the proposals to be divisive and contrary to the nature of human rights and the UK Government's duty to respect, protect and fulfil them.

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.

At the outset we would like it to be noted that we reject the premise of this question. Being able to claim one's most fundamental rights - including the right not to be subjected to torture or inhuman or degrading treatment or punishment or suffer a disproportionate interference with the right to private and family life (including the rights of the children of those facing deportation) - is of paramount importance.

We reject all three proposals and agree with Amnesty International that they are contrary to the UK's duties under the European Convention on Human Rights, particularly Article 13 which creates a right to an effective remedy for a breach of human rights.

[33] 'Human Rights Reform: A Modern Bill of Rights: A consultation to reform the Human Rights Act 1998', UK Ministry of Justice, December 2021, para 280

Finally, as noted by BIHR, limiting the scope of any of our human rights (here, Articles 5, 6 and 8) for a "certain category of individuals" goes against the very point of human rights (not just the HRA) i.e., that they are universal and for all people. Any new Bill of Rights must also ensure universal human rights for all people, otherwise there would be a clear regression in our current protections.

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?

We are deeply concerned by the premise of this question and would advise the UK Government to consider carefully the implications. Upholding human rights is a key part of the fulfilment of our international obligations. As we cautioned above, the UK has long prided itself as being a leader in terms of human rights internationally, it is within reason to assume that the eyes of the world are watching intently to see how we realise rights within our own borders.

Further, we agree with Amnesty International's analysis that the question implies that people who move to the UK could be excluded from the full protection of human rights laws, by heavily curtailing independent judges' powers to adjudicate on them. This would create a situation where the law does not apply to everyone on an equal basis. Rights are universal – which means everyone has them all the time. We reject the premise of this question.

Question 26: We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include: a. the impact on the provision of public services; b. the extent to which the statutory obligation had been discharged; c. the extent of the breach; and d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation. Which of the above considerations do you think should be included? Please provide reasons.

While the question above supposes the current system for the award of damages when human rights are breached is causing problems, the UK Government has provided no evidence in their current consultation paper that this is the case. We do not believe there is a need for reform of the current system.

Further, we would agree with Liberty and BIHR that if public authorities are concerned about the potential impact of the award of a remedy on their ability to discharge their mandate, the solution is for them not to act in ways that are contrary to human rights. We have already outlined above the desirability of further education of public authorities about the Human Rights Act.

Finally, as Liberty importantly notes, where judges award damages, they are awarding compensation for a breach of an individual's human rights. It is important that there is some element of redress for individuals whose rights have been interfered with.

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.

We are again deeply concerned by the premise of this question and would again advise the UK Government to carefully consider the implications, including to its international reputation as a world leader in human rights.

Human rights are not conditional, they apply to everyone all the time, they are both inherent and universal. While some rights are not absolute and can be restricted (in clearly defined circumstances) they cannot be removed and are not relative to a person's conduct.

Question 28: We would welcome comments on the options, above, for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2.

We repeat our caution about considering how our actions as a country in relation to human rights may be viewed by others who do not enjoy the same reputation for the protection of human rights. As highlighted by Liberty, the previous Secretary General of the Council of Europe, commenting on the situation in Azerbaijan after a series of adverse ECtHR rulings in 2014, noted that "proposals to render the binding decisions of the Strasbourg court merely advisory, if enacted, will be welcomed by regimes less committed to human rights than the UK."[34] Further, in 2015, shortly after pledges on the part of the Conservative Government to scrap the Human Rights Act, Russia passed a law which enables the Russian Constitutional Court to overrule judgements from the ECtHR.[35]

Question 29: We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular: a. What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate. b. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate. c. How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.

As noted above on multiple occasions, we do not believe that the current consultation document is an appropriate way in which to formulate a Bill of rights. It is an intensely legalistic piece of work,

[34] Thorbjørn Jagland, Azerbaijan's human rights are on a knife edge. The UK must not walk away, The Guardian, 3 November 2014, https://www.theguardian.com/commentisfree/2014/nov/03/azerbaijan-human-rights-uk-tory-echr

[35] BBC News, Russia passes law to overrule European human rights court, 4 December 2015, https://www.bbc.co.uk/news/world-europe-35007059

which focuses primarily on the minutiae of the relationship between human rights, the courts, and the executive. It fails to engage those most interested – members of the public, each of whom is a rights holder.

International experience and learning on the effectiveness of drafting bills of rights exists, and points towards an increasing trend towards participative models, where people from all sections of society, and bearing all forms of different characteristics can access the discussion and have their views and opinions taken onboard.

The process of drafting a bill of rights, if done participatively, can lead to a healthy constitutional moment, where a nation can reaffirm their commitment to the rights of all, and increase their knowledge and capacity for realising these rights.

If the UK Government is serious about drafting a UK Bill of Rights, it should fundamentally rethink the current exercise. Any UK Bill of Rights should strengthen and further protect our rights, not weaken them. Indeed, no bill of rights has ever been enacted that deliberately seeks to weaken existing rights provisions.[36] In particular, the UK Government must ensure that it takes no action to interfere with the distinct national processes underway in devolved jurisdictions to further respect, protect and fulfil rights.

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[36] 'Developing a Bill of Rights for the UK: Executive summary', Alice Donald, with the assistance of Philip Leach and Andrew Puddephatt, 2010, p. 2