08 March 2022

Equally Ours response to the Government's consultation on Human Rights Act Reform

Equally Ours, (formerly the Equality and Diversity Forum) is the national network of organisations committed to making a reality of equality and human rights in people's lives. Our members include Age UK, Mind, Stonewall, the TUC, the Runnymede Trust, Child Poverty Action Group, GIRES, the Traveller Movement, the Fawcett Society and Disability Rights UK.

Introduction

We believe that a good and strong society is a just and inclusive one. One where we are free from harm and can all contribute and flourish, whoever we are, whatever we believe in and whatever we do and don't have. A society that is equally ours.

Equality is about making a reality of our common humanity and the fact that we are all born equal in worth, dignity and rights. This is a human rights-based definition of equality, drawn from article 1 of the Universal Declaration of Human Rights.

The Human Rights Act is of particular importance to equality and to those most exposed to discrimination and inequality. It is an essential tool that allows the courts to find the right balance between individuals' different rights and between individual rights and the collective rights of society.

The Human Rights Act is an essential tool that empowers ordinary people to challenge governments and other public bodies when they make unlawful or harmful decisions, and hold them to account. This is at the heart of our democracy.

Our starting point in response to the government's consultation is that the Human Rights Act is working effectively and there is no evidenced-based case to replace it.

The consultation also has an inherent contradiction at its core: it states that the Government will retain all existing rights under the European Convention on Human Rights and the Human Rights Act 1998 while putting forward proposals to reduce the scope of the rights protected and limit the ability of those experiencing human rights abuses to hold those

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responsible to account. As our member René Cassin state in their submission, which we endorse:

"The human rights framework that developed in response to the horrors of the Holocaust stress that human rights are universal and indivisible. This consultation negates this."

Questionnaire

I. Respecting our common law traditions and strengthening the role of the Supreme Court

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

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.*

The proposed draft clauses do not address the consultation question and are not a rational way of achieving the stated aim. Either clause would have the effect of reducing or removing the duty on the Court to take into account the jurisprudence of the European Court of Human Rights.

The duty to "take into account" the European Court of Human Rights (ECtHR) jurisprudence has been used in an appropriate and effective way, that finds the right balance between keeping up to date with developments in the case law and applying Convention rights with sensitivity to the UK context. This has allowed for legal certainty while keeping our rights up to date.

Legal certainty
The government has agreed that we should stay a member of the European Convention on Human Rights. The ECtHR decides what the Convention rights mean in practice. If our courts were expected routinely to decide things in a different way to the ECtHR, it would be difficult for people, organisations, public bodies and governments to know what our rights and duties are.

If there are changes to section 2 of the HRA, a lot of jurisprudence from the past 20 years would also come into question, as these rulings have been decided under the obligation to "take into account" ECtHR decisions.

There is also a risk that change to section 2 would open up a gap between what the ECtHR requires and what is applied at UK level and we might not know what the courts will decide our rights mean in practice.

This wouldn't only mean more cases have to go to court, it would also make it more difficult to have constructive discussions with public authorities about how to fix or prevent breaches

of our rights. This would have a particularly negative impact on people to whom the public sector equality duty applies (see further below under question 29).

The position of the Supreme Court

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?*

The proposed draft clauses do not address the consultation question and are not a rational way of achieving the stated aim. They also introduce unnecessary uncertainty around our legal rights, in direct contradiction of one of the stated aims of the consultation.

There are, however, actions that the Government can take to further secure the role of the UK Supreme Court as the ultimate judicial arbiter of our laws.

For example, we recommend that the Government withdraw the planned changes to Judicial Review in the Judicial Review and Courts Bill currently before Parliament, to ensure that UK Courts can decide cases and remedies independently and without political constraints.

Trial by Jury

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

The right to trial by jury needs real, effective, protection, but this proposal is symbolism without substance. Without further detail we are unable to comment on what, if any, improvement such a recognition would give above and beyond the existing protection the right to trial by jury already has under the Human Rights Act 1998.

A more significant concern raised by our members are the delays being seen in the Crown Court due to the current backlog. The pandemic has exacerbated, rather than created, the backlog in the criminal courts. In early March 2020, before the first UK-wide lockdown, the total criminal courts backlog exceeded 430,000.[1] Immediate action is needed to clear the backlog which, among other things, is acting as a de-facto restriction on the right to trial by jury.

[1] See HMCTS, 'Criminal court statistics quarterly: January to March', 2020 (25 June 2020), Table C1, cited in Covid 19 and the Courts, House of Lords Select Committee on the Constitution, 22nd Report of the Session 2019 – 2021, 30th March 2021

Freedom of Expression

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?*

The consultation appears to prejudge the outcome of the consultation and does not present evidence of a need to amend the current position under section 12 of the Human Rights Act.

We would be concerned about any proposal that would upset the current balance established by the Human Rights Act – which already gives enhanced protection to freedom of expression, including as exercised by the press and other publishers.

This framework has been applied for a number of years with few difficulties to situations that are often highly fact-specific. For example, the Court of Protection has worked over the past decade to find the right balance between the right to private life of individuals who lack capacity to make decisions about aspects of their life (such as where they live or even if they can marry), with the public interest in such cases being made openly and transparently and being reported in the press and other media.[2] Any attempt to tip the balance in either direction risks creating significant uncertainty – either exposing individuals to unacceptable public scrutiny of routine private matters or preventing the press and others from bringing serious problems in care settings to light.

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?*

This question also appears to prejudge the outcome of the consultation and does not present evidence of a need to amend the current position.

For the reasons set out above, we are opposed to changes that would upset the current framework for protecting the right to freedom of expression under the Human Rights Act.

It is well established that the Courts will not give precedence to one person's rights over another, but rather undertake "the ultimate balancing act": starting with an "intense focus on the comparative importance of the specific rights being claimed in the individual case", taking into account the justifications for interfering with or restricting each right and applying the

[2] Transparency – it's all go – Mental Capacity Law and Policy

proportionality test to each.[3] It is highly unlikely that it would be possible to legislate for such a fact-specific, balancing exercise.

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

It is unclear why the Government is making this proposal or why it should be a matter for amendments to the Human Rights Act. The granular nature of ensuring protection for journalists' sources would be better served through normal legislation, with the framework of the Human Rights Act providing a strong basis for ensuring any such legislation meet the obligations of the State to protect journalists' sources' rights to freedom of expression in a proportionate manner.

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

The Government could strengthen the protection for freedom of expression by:

- Maintaining the balanced and effective framework for securing our human rights, as set out in the Human Rights Act 1998.
- Proactively raising awareness of our human rights and of relevant bodies' duties under the Human Rights Act to support better outcomes in important areas of people's lives, and to improve public administration and lawful decision-making.
- Supporting a public dialogue on how they can be fully realised that is grounded in fairness, equality and justice, recognising that human rights are at the heart of how we treat one another and live our lives.
- Withdrawing current legislative proposals that (if passed) will interfere with the right to freedom of expression, including the Police, Crime, Sentencing and Courts Bill (PCSC Bill), which represents a significant attack on the right to protest, including by giving the police the power to impose noise-based restrictions on protest, lowering the threshold for breaching a condition imposed on a protest (people can now breach a condition that they merely 'ought to have known' about, rather than actually knew about); and increasing sentences for such breaches.

[3] Re S (a child)

II. Restoring a sharper focus on protecting fundamental rights

A permission stage for human rights claims

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 proposed permission stage would add an unjustified further barrier to those seeking to rely on the Human Rights Act, who already need to demonstrate 'victim' status. This means only individuals who are or would be directly affected by a breach of rights can bring a claim. This includes a narrower group of people than those entitled to bring a judicial review of decisions by a public authority on other grounds and means that the burden of enforcing rights already falls heavily on those facing existing barriers to access to justice, which are well documented[4] – for example for disabled people,[5] victims of rape, sexual assault and domestic abuse,[6] economically-disadvantaged[7] and ethnic minority communities,[8] and others who experience extreme stigma and discrimination.

Legal Aid may be available for some human rights claims, but as with the Equality Act the existing stringent merits test already acts as a considerable barrier, especially given that most human rights claims are brought in order to change unlawful policy and practice rather than for financial compensation.[9]

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.*

The proposal to introduce a permission stage would undermine the ability of courts to hear cases of public importance and this proposal would not mitigate that in any meaningful way. While claims are brought by individuals, those brought by people facing discrimination tend to have a broader impact on causes of inequality – for example those brought by disabled people to challenge the discriminatory impact of the 'bedroom tax'. There is a strong

[4] See, for example: Access to justice | The Law Society;
[5] Disabled people 'denied access to justice by failure of judges on reasonable adjustments' – Disability News Service
[6] Police and CPS failing rape survivors, inspectorates find (endviolenceagainstwomen.org.uk); NEW REPORT: violence against women and girls snapshot report 2021-22 (endviolenceagainstwomen.org.uk)
[7] The Future of Legal Aid (parliament.uk)
[8] For example: Lammy review: final report - GOV.UK (www.gov.uk)
[9] Enforcing the Equality Act: the law and the role of the Equality and Human Rights Commission (parliament.uk), Chapter 8

argument for enabling public interest cases to be brought under both the Equality Act and the Human Rights Act. This would be better achieved by making it easier, not harder, to bring a legal challenge where a public body has acted unlawfully.

Judicial Remedies: section 8 of the Human Rights Act

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

This question misrepresents the nature of human rights. We all want to live in an equal, just and fair society, where governments and public bodies respect, protect and fulfil our human rights. The Human Rights Act, along with other legal processes, gives people the ability to hold governments and public bodies to account when they fail to uphold our rights and/or cause other types of harm. It allows ordinary people to stand up to those in power and expect that their rights are respected.

The goal should be to work towards eliminating the conditions that create violations of human rights by improving public bodies' legal literacy, governance and public service delivery, and enhancing access to justice and avenues of accountability.

Positive obligations

***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.*

This question misrepresents the nature and effect of positive obligations and appears to prejudge the outcome of the consultation and ignores evidence of where positive obligations have enabled public bodies to deliver their services more effectively.

The European Court of Human Rights has established the principle of 'positive obligations' to refer to situations where securing rights requires actions from the Government. This might be policing policy, such as putting in place systems to make sure credible threats to someone's life are investigated. Or it might mean passing a law to make certain behaviours criminal, such as physical violence against a child.

The difference between a negative and positive obligation isn't always clear. Almost every right either expressly or impliedly requires public authorities not only to refrain from infringing rights, but also to take action to prevent rights from being breached. For example,

the right to life says the state is responsible for not taking a life. It also makes the state responsible, in certain circumstances, for preventing loss of life and investigating deaths.

The concept of 'positive obligations' has been most effective at protecting minority groups, or those with protected characteristics whose needs are not always met by generic government policy made for the majority – as recognised by the public sector equality duty under the Equality Act 2010 (see further at question 29 below).

This was seen during the Covid 19 pandemic, when the guidance on daily exercise during the first lock down did not consider the particular needs of disabled people. Following a challenge from a number of disabled people and their organisations the Government acted to adapt the guidance so that disabled people were not criminalised for taking exercise in the way that they needed to. Had they not done so it is likely that the guidance would have been in breach of both the Equality Act and the Human Rights Act.

While some obligations may entail a cost, the Courts (both in the UK and the European Court of Human Rights) are very cautious about finding a positive obligation where it means the state has to spend money. The consultation does not appear to have considered this, nor that in many situations the 'cost' arises not through litigation but because of the failure of the public authority to properly consider the needs of all those affected by their decisions.

Practical examples where positive obligations have been needed to ensure that public services are properly delivered:

- The government has to make sure that people can get a fair trial, for example establishing tribunals, making sure hearing is in a reasonable time;
- Protecting the private life of people when decisions about them are made by the Court of Protection (for example, when the Court has to decide if someone should be in residential care or in their own home)
- Requiring police to act to protect someone whose life is being threatened, for example by a violent partner or a stalker
- Making sure that the law can be used to prosecute someone who assaults a child, including a parent or carer
- Requiring social housing landlords to make sure their housing is in a fit state for people to live in
- The obligations to protect the right to life and to investigate deaths is being used to hold to the Government and other public bodies to account for the decisions that led to the Grenfell fire[10]

[10] Refs for all points above

III. Preventing the incremental expansion of rights without proper democratic oversight

Respecting the will of Parliament: section 3 of the Human Rights Act

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.

We do not accept the premise of the question and do not agree that section 3 should be amended or repealed, as we made clear in our submission to the Independent Review of the Human Rights Act. The Review panel agreed with us and explicitly rejected any amendment or repeal of section 3. We therefore recommend that the Government withdraw this proposal.

As currently drafted, section 3 provides a sensible balance between implementing a law as passed by Parliament and making sure that rights are respected in practice when that law is applied to real life.

The framework set out in the Human Rights Act, including section 3, already makes sure that the intention of Parliament is respected by the courts and our courts respect this balance. For example, in *Ghai v Newcastle upon Tyne City Council* in 2010, Mr Ghai wanted to be cremated through an open-air funeral pyre when he died, in accordance with his beliefs as a Hindu. UK law only permitted cremation within a 'building' under the Cremation Act 1902. The UK court agreed that Mr Ghai's right to freedom of religion was engaged. The court decided to define the term 'building' in the Cremation Act broadly, so the law would include 'buildings' or structures which facilitated open-air cremation. This made the Cremation Act compatible with the rights in the Human Rights Act.[11]

The Government's proposal would restrict the courts ability to interpret legislation in a rights-compliant way to only a 'natural reading of the words used'. This would endanger the practice of reading references to 'religion' in often ancient laws as being inclusive of non-religious worldviews, such as humanism. This crucial power of interpretation is what has underpinned almost all positive developments in the freedom of belief and equal treatment of

[11] See submission by Rene Cassin to this consultation for further details.

humanists and the non-religious, who are estimated to comprise 53% of the population[12]. This change would undermine progress made by public authorities, make it harder for arguments around 'religion or belief' to be heard within UK courts and ultimately make it more likely that issues currently handled successfully through engagement and dialogue would end up requiring judicial intervention.

All that section 3 does is to tell our courts to assume that Parliament intends the laws it passes to respect our human rights unless Parliament itself says that they shouldn't. This is a reasonable assumption, especially when the vast majority of laws put before Parliament by the government contain a declaration, under section 19 of the Human Rights Act, that the government believes its proposed legislation to be compatible with Convention rights. Section 3 does not in any way stop Parliament from directing our courts to apply the HRA in a different way when implementing a specific piece of legislation, or not to respect our rights when applying a specific law – it just assumes that they don't and expects that Parliament, and the government, should be clear when this is what it wants to happen.

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

In our response to the Independent Review of the Human Rights Act we made clear that section 4 of the Human Rights Act gives parliament sufficient powers, and an opportunity to provide remedies in cases where the court has made a declaration of incompatibility.

We do accept that there are questions over the level of scrutiny that Parliament can give when making remedial orders, and there may be a case for the government to make additional parliamentary time available to allow greater scrutiny. This would fit with the overall balance set out in the Human Rights Act and would not require any changes to the Act as it concerns the political, rather than legal, process. However, many of the issues that are dealt with by remedial orders are quite technical or straightforward legal questions. There is a risk that increasing the level of time spent on scrutiny could over-politicise what are straightforward legal questions.

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

We agree that a new database, as recommended by the Independent Human Rights Act Review, should be created although we do not see the evidence for it being restricted to section 3 judgements. We would like to see greater understanding of the Human Rights Act among public authorities, and a publicly available database of significant public law decisions

[12] 53% of Britons are non-religious, says latest British Social Attitudes Survey » Humanists UK

would provide a useful source of examples of how the law is applied in practice that would help to support this.

When legislation is incompatible with the Convention rights: sections 4 and 10 of the Human Rights Act

Declarations of incompatibility

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?*

This question is misleadingly phrased and we urge the Government to assure themselves that respondents have understood the proposal being made before relying on consultation answers.

As we understand it, the substantive proposal in the consultation document is to introduce an exemption for human rights violations so that breach of the Human Rights Act can no longer be a ground for striking down unlawful secondary legislation so that declarations of incompatibility are the only remedy available.

It is well established that secondary legislation that breaches primary legislation is unlawful and of no effect. The Human Rights Act is primary legislation, and so secondary legislation is required to be compatible with it. To change this would be, as the Independent Human Rights Act Review panel put it "offensive to constitutional norms".[13]

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, the Human Rights Act explicitly enables Government to respond swiftly through remedial orders that achieve the same policy goal without violating human rights.

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.*

[13] The Independent Human Rights Act Review 2021 (publishing.service.gov.uk), at para 61

Prospective quashing orders have the potential to create opportunities for injustice in individual cases, disincentivise future cases, weaken the rule of law, and introduce unnecessary layers of complexity into an already functioning system.

If the new Bill of Rights follows the direction of the government's plans for Judicial Review, then there will be a statutory presumption that suspended and prospective quashing orders are used. This presumption ties the hands of judges, does not allow them discretion and would mean that people who win their cases would not gain any benefit from doing so. To extend this presumption to primary legislation whose purpose should be to protect an individual's rights would be chilling.

It should be noted that the Judicial Review and Courts Bill is not yet law and may not be passed by Parliament in its current form. The introduction of these orders is not inevitable and this discussion of whether they should be extended is premature.

Remedial orders

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.

If the Government chooses to legislate for a Bill of Rights in the format proposed, or in the future, we agree that a remedial order power such as that contained in section 10 of the Human Rights Act should be included (option A).

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. The standard procedure institutes a two-step process, laying the order before Parliament in draft for sixty days to allow for representations to be made before requiring the final version to be approved by each House. 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.

Statement of Compatibility – Section 19 of the Human Rights Act

***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 is important because it requires the Government to set out clearly whether, in its view, legislation is compatible with the Act, and to provide an explanation to this effect. Should the Government wish to introduce legislation that is not compatible with the Human Rights Act, this is an opportunity for it to explain this and set out why it believes this to be necessary. We cannot see any reason not to retain this useful exercise in transparency that can only enhance the ability of Parliament to legislate.

Application to Wales, Scotland and Northern Ireland

***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?*

Since its introduction, the Human Rights Act has provided the common underpinning for rights and protections in Northern Ireland, Scotland, Wales as well as England. This is not surprising, given that it has been applied across the varying legal and cultural traditions among members of the Council of Europe for well over half a century. The Human Rights Act was bringing home rights enshrined in the European Convention on Human Rights (ECHR).

The ECHR is not only given effect in UK law through the HRA but also through the Scotland Act 1998 and the Wales Act 1998. At a devolved level, the ECHR plays a non-negotiable foundation – in other words a foundation on which to 'build and progress' and is a 'substantive pillar of the devolution settlement'. It is also a pillar of the Northern Ireland Act 1998 and ECHR incorporation is required by the Belfast/Good Friday Agreement, and international agreement between the UK and Ireland. The Human Rights Act therefore has an enhanced constitutional role in Northern Ireland and any proposed changes directly engage international as well as UK law.

The consultation does not provide any detail about how the proposed UK Bill of Rights will interact with law and procedures at the devolved level. Even less attention is given to the potential implications for Wales than for Scotland and Northern Ireland, despite clear dissonance between the proposals' intention to limit the 'expansion of rights' and the clear intention and common desire in Scotland and Wales to strengthen and advance equality and human rights (which includes an intention to increase connections between international and domestic law).

Across the devolved administrations the Human Rights Act is used as a base for additional rights. In Scotland, the direction of travel is to enhance the human rights framework. In Northern Ireland, the Human Rights Act is part of the Belfast/Good Friday Agreement and a central tenet of the peace process. The Belfast/Good Friday Agreement envisaged a new Bill of Rights in Northern Ireland, and that process is currently under way following the 'New Decade, New Approach' agreement which restored democratic government at Stormont in January 2020. In Wales, through the Rights of Children and Young Persons (Wales) Measure 2001, a duty is placed on ministers to have due regard to the UNCRC when developing or reviewing legislation or policy.

The introduction of regressive human rights measures that stand in opposition to progressive approaches to rights across the devolved administrations, may lead to an increasingly fractious legal landscape and result in uncertainty for Courts and public authorities. The devolved administrations view human rights as dynamic and developing. This Review should ensure that this continues and there is no prospect of any regression as a result of its determinations.

Our over-riding view is that the current Review is unnecessary as the Act has worked well in 'bringing rights home' over the last 20 years in the devolved nations and in England. Any change to the Human Rights Act presents significant risks to devolution and legal certainty across the UK.

Public authorities: section 6 of the Human Rights Act

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.*

There is no case for reforming section 6. No changes were recommended by the Independent Review of the Human Rights Act. The definition of a public authority is embedded into UK law and is working well. It is used not only for the Human Rights Act but also for the Public Sector Equality Duty in the Equality Act 2010. Changes would create uncertainties in other areas of law as well as creating problems for regulatory bodies that have worked hard to embed respect for human rights into their regulatory frameworks, such as the Care Quality Commission.

There is extensive case law that provides clarity on which bodies and/or functions are covered by section 6. In the one instance that this left a gap in protection, following *YL v Birmingham City Council*, this was corrected by Parliament in the Care Act 2012. The

example given in the consultation, of the division of responsibility when the running of a prison is outsourced, could easily be dealt with through more effective contract management.

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 do not accept that s.6(2) should be amended. The question prejudges the outcome of the consultation and should offer the option of no change. We do not agree that giving public bodies the greater freedom to breach peoples human rights would give them greater confidence, rather it would increase uncertainty for those receiving and delivering services and make it harder for people to hold public bodies to account when they act unlawfully.

Extraterritorial jurisdiction

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.*

As we set out in our response to the Independent Review of the Human Rights Act, the way in which the Act applies to acts of public authorities taking place outside of the territory of the UK is a balanced and appropriate framework for securing our rights. That the State is accountable for its actions, regardless of where those actions take place, is an essential characteristic of a democratic society.

Qualified and limited rights

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.

The principle of proportionality, including to rights that are qualified or can be limited, is an essential part of the human rights framework. It is through this mechanism that the State may be able to justify an interference with an individual's human rights, where that is necessary, proportionate and in line with democratic principles. It is also the mechanism that prevents the State from acting beyond what is necessary, using a 'sledgehammer to crack a nut'. The balance as set out in the Convention rights and developed through case law by both Strasbourg and the UK courts is a careful one and should not be upset or tipped in favour of any one party. This is another reason why the Government should not amend other aspects of the Human Rights Act, such as sections 2 and 3 that support public authorities to implement the Human Rights Act in accordance with the requirements of Convention rights.

Deportations in the public interest

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.

Deportations that put an individual's human rights at risk are not in the public interest. The Human Rights framework already provides for the public interest to be taken into account when setting deportation policy and applying that policy to individual decisions. We do not accept the premise of the question or the options that are presented. Courts legitimately check decisions of the Secretary of State to ensure they are lawfully made. Removing or

limiting this in the ways suggested would undermine the rule of law. The proposal to limit the application of certain rights to deportation decisions would be discriminatory, and the proposal to use a threshold such as length of imprisonment would be arbitrary and unlawful.

Illegal and irregular migration

Question 25*: While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?*

The question prejudges the consultation by assuming that there is a need to change the Human Rights Act. No evidence of such a need is presented and no evidence of the Convention or the Human Rights Act impeding lawful action in the area of migration is put forward.

The manner in which this and other question concerning migration are framed is highly problematic and risks discrimination if proposals are implemented.

Remedies and the wider public interest

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.*

We do not object to providing the Courts with guidance on the award of damages, although we are not aware of concerns significant enough to justify amending the Human Rights Act to do so.

However, this guidance should not be prescriptive and must be in line with human rights principles. It is essential that a court's powers reflect the totality of the case and not a single factor that is not representative of the whole case, especially when that single factor is weighted in favour of a public body and not an individual whose right has been violated.

We agree with the analysis presented by the Public Law Project that the factors to include are: any other measures taken in response to a violation; the finding of a violation can

normally amount to just satisfaction itself; the degree of loss suffered by the claimant; the seriousness of the violation committed by the public body; the conduct of the public body on the facts of the case; any broader offensive conduct by the state in question, such as attempts to circumvent a previous court order; a record of previous and similar violations by the state which have gone unremedied; the conduct of the claimant on the facts of the case.

IV. Emphasising the role of responsibilities within the human rights framework

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.

The Independent Review of the Human Rights Act showed that it's working well to protect all our rights. These rights are about the values we hold dear and the way we treat one another – things like dignity, fairness, equality, tolerance and respect. The concept of 'responsibilities' as described in the question is already embedded into this human rights framework. Courts routinely take into account the conduct of parties to a case – both the applicant and the responding public authority – when assessing a claim for damages.

Changes to further recognise responsibilities are unnecessary and would send out a dangerous message that it is possible to pick and choose who is considered to be fully human. This would contradict the very foundations of human rights in a democratic society.

V. Facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role

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 do not agree that the proposed changes are either needed or desirable. As we set out in our submission to the Independent Human Rights Act Review, the existing judicial dialogue between the UK and Strasbourg is working well. The proposals made in the consultation would provide a dangerous precedent internationally and risk emboldening countries that do not wish to comply with their international obligations.

Impacts

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; and
c. How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate. Thank you for participating in this consultation exercise

The Public Sector Equality Duty (England, Wales and Scotland)
We welcome the recognition in Appendix three that the public sector equality duty applies to the proposals. However, the analysis as presented is lacking in substance and we cannot see any evidence that it was taken into account when formulating the proposals. We also disagree with the view that there is no evidence of discriminatory impact – the consultation acknowledges that there is a lack of quantitative data, but does not explain what action is being taken to remedy this. The data that is referenced (on legal aid) is not set out.

Available data
While we welcome the request for further information on the equality and other impacts of the proposals, the courts have made clear that collecting and analysing equality information is the duty of the government, which needs to collate relevant information in order to have evidence-based decision making. A body subject to the duty will need to be able to show that it had adequate evidence to enable it to have due regard and this cannot be met by this

short consultation – not least because the duty is an on-going one and the government needs to be in a position to monitor the impacts of the policy if it is taken forward.[14]

The Cabinet Office is currently developing a significant equality data programme, drawing together evidence from across Government that should be used by the Ministry of Justice to analyse the impact of the proposals in this consultation.

The following is a suggestion of the type of information that must be collected and analysed if the government is to understand and take account of the equality impacts of the policy:

- A review of the submissions to the Independent Human Rights Act Review to identify and analyse relevant information on the equality impacts of proposals with the purpose or effect of restricting the ability of individuals to access their rights or to hold the government to account, disaggregated by data on each of the protected characteristics.
- The Government may find it useful to consider parallels with the Equality Act, where similar barriers exist and have been documented by, among others, the Equality and Human Rights Commission's review of Legal Aid and the Women and Equalities Select Committee's report into Enforcement of the Equality Act.
- Collation of data on the number and types of human rights cases brought, disaggregated by protected characteristic. If this information is not available, the government should, in the short term, identify proxy information and put in place a system for collecting this data in the future.
- Analysis of the existing barriers to bringing a human rights claim, disaggregated by protected characteristic.
- Conduct an analysis of the effects of human rights claims on advancing equality in public policy – this should include both where the government has acted to correct a policy following successful legal case and where it has implemented changes on being notified that action is being considered. For example, the government responded to a planned legal challenge to its guidance during the first Covid-19 lockdown by clarifying that disabled people were able to travel for exercise. This response improved the policy, took account of equality impacts and removed the need for those affected to bring legal action. The government should seek out information on when this has happened elsewhere and use it to inform policy options.

Section 75 Northern Ireland Act 1998

The consultation does not make any reference to the Ministry of Justice's obligations under the equality duty contained in the Northern Ireland Act 1998. This is separate to that under

[14] Fir further information see EHRC, Technical Guidance on the Public Sector Equality Duty: England, paras 5.15 – 5.18

the Equality Act 2010 and explicitly requires policies that apply to Northern Ireland, even in 'excepted' matters, to be screened for equality impact. Where this is identified a full equality impact assessment must be carried out in accordance with the mechanism set out in Schedule 9 of the Northern Ireland Act. As with the Equality Act duty, this must be done at the time that policy is formulated and not as an afterthought. We can see no evidence that the impact on equality has been considered in formulating these proposals.

Evidence of equality impact

Our evidence, which we believe analysis of the above equality information will support, shows that the proposed changes to the Human Rights Act will have a negative impact on equality across all protected characteristics and in some instances may be discriminatory.

There are three aspects to the consultation proposals that would have a particularly damaging impact on equality and those may be direct or indirectly discriminatory under the Equality Act 2010:

1. **The consultation's proposals to limit the application of the 'living instrument doctrine'**

The living instrument doctrine says that Convention rights must be interpreted in the light of present-day conditions. For example, when most European countries had different ages of consent for gay men the Court held that this was part of the 'margin of appreciation' and up to countries to decide. More recently the Court has found that European societies have evolved and unequal ages of consent are now recognised as a breach of the right to private life. As society has evolved, so has the way the Convention is interpreted.

The consultation proposals states a desire to "prevent the incremental expansion of rights without proper democratic oversight" (Section III of the consultation document), and the context makes it clear that this is targeting the ability of the interpretation of Convention rights to evolve.

The doctrine of 'living instrument' has allowed a 1950's legal document to respond to current threats to human rights in modern societies, to the benefit of everyone - but particularly groups facing discrimination and disadvantage.

Practical examples:

- Equalising the age of consent for gay men
- Requiring the state to provide for legal recognition of gender reassignment in certain circumstances, for example for pensions or the right to marry
- Recognition of a child born out of marriage as having rights to family life
- Responding to new technology such as mass surveillance and the risk of racial profiling

We understand from the consultation and dialogue with departmental officials that the Government does not intend to change these rights. This is not consistent with the actual proposals, which would have the effect of removing access to these rights for people within the UK.

2. The mischaracterisation of positive obligations and proposals to limit or remove them

The European Court of Human Rights has established the principle of 'positive obligations' to refer to situations where securing rights requires actions from the Government. This might be policing policy, such as putting in place systems to make sure credible threats to someone's life are investigated. Or it might mean passing a law to make certain behaviours criminal, such as child abuse.

The difference between a negative and positive obligation isn't always clear. Almost every right either expressly or impliedly requires public authorities not only to refrain from infringing rights, but also to take action to prevent rights from being breached. For example, the right to life says the state is responsible for not taking a life. It also makes the state responsible, in certain circumstances, for preventing loss of life and investigating deaths.

The Courts (both in the UK and the European Court of Human Rights) are, however, very cautious about finding a positive obligation where it means the state has to spend money.

Nonetheless, it's arguable that the concept of 'positive obligations' has been most effective at protecting minority groups, or those whose needs are not always met by generic government policy made for the majority.

The consultation proposals state a desire to "restrain the ability of the UK courts to use human rights law to impose 'positive obligations' onto our public authorities".

Practical examples where positive obligations have been needed to make rights real, with a focus on those with protected characteristics:

- The government has to make sure that people can get a fair trial, for example establishing tribunals, making sure hearing is in a reasonable time;
- Protecting the private life of people when decisions about them are made by the Court of Protection (for example, when the Court has to decide if someone should be in residential care or in their own home);
- Requiring police to act to protect someone whose life is being threatened, for example by a violent partner or a stalker
- Making sure that the law can be used to prosecute someone who assaults a child, including a parent or carer

- Requiring social housing landlords to make sure their housing is in a fit state for people to live in
- The obligations to protect the right to life and to investigate deaths is being used to hold to the Government and other public bodies to account for the decisions that led to the Grenfell fire

3. ***The choice of rights to target for reform***

The consultation proposals state a desire to "provide a sharper focus on protecting fundamental rights".

The examples given in the consultation document of where the Government believes that rights have been interpreted too widely, or where it believes that the issues should not be decided by the courts, are concerning because they tend to suggest that rights that protect minority or other disadvantaged groups are not considered to be 'fundamental'.

One of the examples is the obligation on local authorities to safeguard children from abuse, while balancing this against the child's right to family life. This often difficult and nuanced situation is mischaracterised as 'judicial extensions' of human rights, rather than as applying the human rights framework to ensure that difficult decisions are taken properly and in a way that respects the rights of all concerned.

Another example is 'Osman warnings' – where the police know of a credible threat to an individual's life, the Human Rights Act means they must act on that information. Sometimes this takes the form of a warning, so that the individual is aware of the threat. The consultation document mischaracterises this as concerning "disputes about drugs or firearms". But this protection also applies to those under threat of violence or death from, for example, a violent ex-partner or a stalker and is fundamental to action to tackle violence against women and girls.

It was this positive obligation, and its availability in the UK Courts, that allowed victims of John Worboys the "Black cab rapist" to hold the police to account for their failure to properly investigate. In 2018 the Supreme Court the Supreme Court ruled that the Human Rights Act meant that the police had to investigate rape and violence against women and girls properly, meaning that failing to do so can be challenged in the Courts.

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Signed by:

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Children's Rights Alliance for England (CRAE)
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Discrimination Law Association
End Violence Against Women Campaign
Equality Trust
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Friends, Families and Travellers
Gender Identity Research and Education Society (GIRES)
Humanists UK
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Press for Change
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Scope
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Trades Union Congress (TUC)
Traveller Movement
UKREN (UK Race in Europe Network)
Women's Budget Group
Women's Resource Centre

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Just Fair
Refugee Council
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