LIBERTY

Human Rights Act Reform: A Modern Bill of Rights - A power grab that threatens us all
Liberty's short guide to responding to the consultation on Human Rights Act Reform

About this resource
Liberty has produced this resource for civil society groups who are considering submitting to the Ministry of Justice's consultation *Human Rights Act Reform: A Modern Bill of Rights*. It is not intended to be a comprehensive guide, but to raise some areas of concern and issues for further exploration.

We strongly encourage you to submit to the consultation to make your voice heard, either via email (HRAReform@justice.gov.uk) or the online survey. The deadline is Tuesday 8th March. Please note that you do not have to respond to every question!

If you are lacking in capacity to respond to the consultation but would like to make a statement to the Government about the Human Rights Act, its importance in your work, and the effect these plans may have, question 29 asks about costs, benefits and equalities impacts of the new Bill of Rights.

This is just an overview of the consultation, highlighting threats and suggesting things to consider for each question. If you would like to discuss any of it in greater detail, or have any questions, please email Charlie Whelton (charliew@libertyhumanrights.org.uk), Katy Watts (katyw@libertyhumanrights.org.uk) and Jun Pang (junp@libertyhumanrights.org.uk).

Glossary of terms

BoR	Bill of Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights (also *Strasbourg*)
GFA	Good Friday Agreement
HRA	Human Rights Act 1998
IHRAR	Independent Human Rights Act Review
JCHR	Joint Committee on Human Rights
MoJ	Ministry of Justice

*The British Institute of Human Rights (BIHR) has put together a useful explainer on the concepts of the separation of powers, parliamentary sovereignty and the rule of law that may also be helpful.

Introduction and overarching concerns

Following on the back of the Independent Human Rights Act Review (IHRAR), this 123-page consultation contains some of the greatest threats to human rights in the UK we have seen in recent history. Below are a few starting points that might be helpful:

- We entirely reject this exercise. There is no need for a Bill of Rights to replace the Human Rights Act. Over its two decades in operation, the Human Rights Act has played a significant role in giving individuals the power to enforce their rights in practice. It has enabled people to challenge unlawful policies, to be treated with dignity by public authorities and to secure justice for their loved ones. It has helped bring a culture of respecting human rights into hospitals, schools, care homes, and housing associations – changing the way that thousands of people are treated and supported.
- The supposed 'case for change' set out in chapter 3 of the consultation document is nothing of the sort. It provides a sensationalist and slanted understanding of the operation of human rights in the UK, disregards the positive impact of the HRA, and sets up a division between people who are deserving of human rights and those who are not. The proposals, if passed, would enforce this division. Everybody would lose out were this Bill of Rights to become law, but certain groups would be more negatively affected than others. It is only the Government and public authorities who stand to gain, at the cost of us all.
- The independent panel tasked with IHRAR worked for nine months to produce a 580-page report on how to fulfil the 2019 Conservative manifesto commitment to 'update' the Act. We do not agree with everything suggested by IHRAR, but they are serious recommendations, arrived at through careful consideration. The consultation document largely ignores the report, far exceeding IHRAR's terms of reference, soliciting views on proposals explicitly rejected by IHRAR and ignoring specific recommendations, such as for a programme of human rights education in schools and universities. The IHRAR report found no justification for the 'overhaul' now on the table.
- The consultation paper also effectively ignores the differing legal, social and rights context in the devolved administrations, relegating consideration of Scotland, Wales and Northern Ireland to one throwaway question.
- The Human Rights Act was introduced less than 25 years ago in order to "bring rights home" and enable individuals to enforce their rights in the UK. These proposals both weaken those rights, and make enforcing them more difficult. A Bill of Rights that weakens human rights protections in the UK is a very poor replacement for the HRA.
- At the same time as undertaking this consultation, the Government is rushing multiple oppressive Bills through Parliament, including the Police, Crime, Sentencing and Courts Bill, which will shut down protest and extinguish the protected way of life of Gypsy and Traveller communities; the Elections Bill, which will make it harder to make our voices heard at the ballot box by introducing voter ID; the Judicial Review and Courts Bill, which will erode access to justice; and the Nationality and Borders Bill, which will fundamentally undermine the asylum system and renege on the UK's international obligations. The Government is rewriting the rules so as to make itself untouchable.

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.

- **This question is misleadingly phrased.** What the government is actually proposing to do is to move away from the language in s.2 of the HRA, which requires the UK Courts to take account of, but not be bound by, European Court of Human Rights (ECtHR) case law. Instead, the government makes two proposals which weaken the link between the ECtHR and the UK.

- **There is little justification for doing so**. The HRA was carefully constructed to retain the independence of the UK courts. In recent years the UK courts have shown an increasingly flexible approach to ECtHR case law, and does not feel bound by the ECtHR where there are context-specific reasons for taking a different approach.
- IHRAR made the limited recommendation of amending s.2 HRA to require UK courts to apply domestic statute and case law *before* taking into account ECtHR case law in the interpretation of a Convention right. The Government proposes two options, which both go far beyond the IHRAR recommendation.
    - **Option 1** makes it clear that UK courts are not required to follow decisions of the ECtHR. It also decouples the rights in the new Bill of Rights from the rights protected by the Convention by providing that the meaning of a right in the Bill of Rights is not the same as the meaning of a corresponding right in the Convention.
    - **Option 2** provides that the Supreme Court has ultimate responsibility for interpreting rights under the new Bill of Rights. When deciding a human rights question, the UK courts must have particular regard to the text of the right, and may have regard to the preparatory work of the Convention.
- **These proposals are a radical change of approach**. Severing the link between domestic rights and Convention rights will lead to a divergence in rights protection and leave the UK out of step with other members of the Council of Europe. It is also likely to result in an increasing number of applications to the ECtHR, as individuals seek to challenge rights which are no longer protected by UK law. One practical effect is that only those who can afford to take a case to Strasbourg may be able to seek a remedy for violations of their human rights.

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?

- **This question is misleadingly phrased**. What the government is actually asking is whether there are some matters which are beyond the 'competence' of the UK courts.
- The context to this question is IHRAR's consideration of the judicial restraint shown by the UK courts when considering certain matters of national security, social policy, and moral issues that it considers are best left to Parliament.
- IHRAR considered, and rejected the codification of the kinds of issues which fall outside the UK courts' competence. Reform was rejected on the basis that prescriptive guidance would be likely to lead to satellite litigation, while general guidance would be unlikely to be beneficial.
- IHRAR concluded 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. Liberty agrees.

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**. It risks diffusing the political will to substantively protect the right to a jury trial against the threats it faces (e.g. Government proposals to suspend jury trials for either-way offences in 2020; comments from lawmakers on the fallout from the Colston Four verdict, etc.), in a fanfare alone.
- The Government has proposed that this will be a qualified right, although it has not provided a draft clause. If the qualification(s) for this right resemble those in the HRA, this might actually make it easier for the Government to interfere with it. This seems particularly true of economic or public interest-related

qualifications in the context of the pandemic and the vast backlog due to Government cuts to the courts system.

Freedom of expression

- The following questions function as 'positive' proposals offering what appears to be an expansion of protections for people's human rights, where almost all of the other questions stand to do the opposite. They are collectively a carrot among the sticks.
- None of these questions were considered by IHRAR, which not only makes it difficult to discern the reasons and evidence base for these proposals, but means that they lack detail and are difficult to evaluate.

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?

- **Freedom of expression is given enhanced protection by the HRA.** Section 12 of the HRA - created precisely in recognition of the importance of the right to freedom of expression and in particular the freedom to publish - protects the publication of material that might otherwise be subject to an injunction or other court order restraining publication. It provides that no order is to be made affecting the exercise of the right to freedom of expression against a party who is neither present nor represented, unless the court is satisfied that the applicant has taken all practical steps to notify him or there were compelling reasons not to take that step (12(2)). Furthermore, no interim order (i.e. an order preventing publication before a case proceeds to full trial) may be made to stop publication before trial 'unless the court is satisfied that the applicant is *likely* to establish that publication should not be allowed' (12(3)). What this means is that the applicant must show that it is more likely than not they will win at trial (though in some cases a lesser degree of likelihood will be enough). Finally, S.12(4) requires the courts to 'have particular regard' to the freedom of expression.
- The Government's claim that the protection provided by s.12 is having "no real effect" on the way that decisions on injunctions are being made is presented without evidence and appears to be false.[1] The s.12(3) test applies to every hearing for an interim injunction to restrain publication (i.e. an injunction to prevent the publication of certain information).
- **This proposal is also vague.** It is unclear what constitutes 'interference', and 'the press and other publishers' conceals enormous variation. The issue here is that in appearing to try and address a particular issue - celebrity injunctions - there are a wide range of others that may be affected, e.g. injunctions to stop foreign states from harassing journalists who have themselves sought relief and blackmailers/harassers.[2]
- **Furthermore, raising the threshold of this test could be problematic.** First, it may make it more difficult for an applicant to secure an interim order, even though the consequences of *not* granting an order might be extremely serious, such as the publication of confidential information or other serious violations of privacy. As noted by the House of Lords in *Cream Holdings,* "Confidentiality, once breached, is lost for ever."[3] Failure to secure an order could even result in personal injury, for example if someone who has given evidence in a trial has their whereabouts disclosed. Second, a 'more likely than not' test would mean that a court might not be able to consider arguments from both the parties by granting a temporary stay, given that the press would be able to publish unless an applicant could show that their case would probably succeed.[4]

[1] Human Rights Reform: A Modern Bill of Rights, [213]
[2] Davies v Carter [2021] EWHC 3021 (QB).
[3] Cream Holdings Ltd & Ors v Banerjee & Ors [2004] UKHL 44 [18]
[4] Eric Barendt, *Freedom of speech (Second edition)*, 2005, p.127.

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?

- Article 10 protects the right to freedom of expression. This is a qualified right, meaning that it can be restricted 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.
- The Government's aim appears to be to further restrict the circumstances under which Article 10 can be interfered with, especially in situations of "competing rights (such as the right to privacy) or wider public interest considerations".[5]
- It is well-recognised that under the HRA, neither freedom of expression and respect for an individual's privacy have precedence over the other.[6] Where the values under these rights conflict, the court undertakes "the ultimate balancing act": starting with an "intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary", taking into account the justifications for interfering with or restricting each right; and applying the proportionality test to each.[7] It is unlikely that it will be possible to legislate for such a fact-specific, balancing exercise. This question proposes to **tip the balance**.
- The Government's proposal appears to suggest a new category of "wider public interest considerations" that might justify interference with Article 10, that currently does not exist under the HRA. Again, it is difficult to see how it will be possible to set out guidance on such a potentially wide-ranging set of issues.
- Delineating the 'limited and exceptional circumstances' could actually do **more to harm freedom of expression**, because it could appear to specify areas where Article 10 protections *do not* apply, and then remove the court's ability to undertake careful evaluations, including undertaking balance of rights analyses, on a case-by-case basis.

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

- This 'positive' proposal is **not one for a Bill of Rights** and runs counter to other current Government proposals that **threaten journalism**.
- The protection of journalistic sources was not in the IHRAR terms of reference, and the BoR consultation document does not provide any indication of what 'protection' the Government may have in mind.
- Journalists' sources are currently protected under s.10 of the Contempt of Court Act 1981 (CCA). This and Article 10 of the HRA are said to have "common purpose in seeking to enhance the freedom of the press by protecting journalistic sources".[8]
- Section 10 CCA and the Convention right to freedom of expression work in concert to protect journalists' sources.[9] Article 2 has also been used to protect journalists' sources where revealing them could be a threat to life.[10]

[5] Human Rights Reform: A Modern Bill of Rights, [215]
[6] Campbell (Appellant) v. MGN Limited (Respondents) [2004] UKHL 22.
[7] In re S (FC) (a child) (Appellant) [2004] UKHL 47.
[8] Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29, [2002] 1 WLR 2033 [38]
[9] See: Mersey Care NHS Trust v Ackroyd [2007] EWCA Civ 101 and Financial Times Ltd & others v. the United Kingdom (Application No. 821/03).
[10] In the Matter of an Application by D/Inspector Justyn Galloway, PSNI, under Paragraph 5, Schedule 5 of the Terrorism Act 2000 [2009] NICty 4.

- It is unclear why this should be a matter for a BoR. The granular nature of ensuring protection for journalists' sources would be better served through normal legislation. Attempting to recognise this through a BoR may also push the Government into difficult consideration of what a 'journalist' is.[11]
- If the problem is not with the courts compelling source disclosure but the number of production orders served on journalists, then the appropriate reform would be to the legislation that gives the police that power.[12]
- It is notable that this consultation has come while we wait for the result of another on reforming the Official Secrets Acts, including proposals to treat journalists in the same manner as people committing espionage, including 14-year prison sentences. The Law Commission proposal for a public interest defence under the Official Secrets Acts appears to be a much more specific and effective protection than anything in this consultation, and yet the Home Office has so far declined to take it forward.

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

- This is a **vague question** and we do not recommend engaging with it in good faith given the multiple legislative threats to freedom of expression that are ongoing. The Government could strengthen the protection for freedom of expression by withdrawing these proposals:
    - **Police, Crime, Sentencing and Courts Bill (PCSC Bill):** The PCSC Bill 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.
    - **Reform of the Official Secrets Acts (OSA):** The OSA makes it a criminal offence for anyone - including journalists - to publish leaked information covered by the legislation. In its upcoming reforms to the OSA, the Government has indicated that it does not intend to follow the recommendation of the Law Commission to introduce a public interest defence. A public interest defence is vital to ensure there is effective accountability in sensitive areas of Government activity. Refusal to introduce a public interest defence poses a risk to journalists and their sources – often whistleblowers – who are in danger of being viewed in the same way as those committing serious espionage.
    - **Online Safety Bill**: The draft Online Safety Bill defines a vague and loose new category of "harmful content" that will be subject to unprecedented forms of regulation. It also threatens to erode end-to-end encryption. This could have a chilling effect on freedom of expression and of privacy.

Access to justice

- The following questions introduce new barriers to individuals accessing justice.
- We reject the binary framing of human rights abuses as either 'genuine' or 'not genuine' - any *abuse* of human rights is unacceptable and must not be tolerated. We also reject the consultation's highly derogatory tone towards human rights claims, for example, the reference to claims brought for "trivial matters, or by claimants who have abused their rights or the rights of others".[13] Human rights are universal and exist for everyone.

[11] See Hourani v Thomson & Ors [2017] EWHC 173 (QB).
[12] Sch 1, Police and Criminal Evidence Act 1984.
[13] Human Rights Act Reform: A Modern Bill of Rights, [224-225].

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.

- We reject both the suggestion for a permission stage and the framing of 'genuine human rights matters' (see also Q10). The consultation does not provide any evidence of frivolous or spurious claims which are causing problems for the courts.
- It is unclear what 'significant disadvantage' means in this context. In any case, it is **entirely inappropriate** to introduce a permission stage in human rights claims. A permission stage will create a barrier to accessing the courts, and make it harder for individuals to enforce their rights, especially people who already experience barriers in accessing justice (e.g. those with protected characteristics,[14] survivors of domestic abuse, victims of trafficking etc.).
- A permission stage places a greater burden on claimants. They may have to demonstrate the merits of their claim before they have received full disclosure from the defendant public body. In cases where there is a parallel criminal investigation or an inquest, it may be years after the claim is issued that full disclosure is revealed.
- Defendants can already apply to 'strike out' a claim if the claimant has failed to show *reasonable grounds* for bringing it. 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.

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.

- We **reject the proposal** to introduce a permission stage, and this proposal does not go far enough to mitigate the impact on access to justice that a permission hurdle would have.
- Human rights claims are meant to provide individuals with redress for breaches of their rights. Some claims will also raise issues of overriding public importance, but this exemption fails to recognise that the fundamental purpose of human rights protection is to protect individuals from abuses of state power. This is particularly important for individuals who are already minoritised and marginalised in society, for whom protection against the majority or mainstream is particularly important (and indeed this is rooted in the post-war origin of the ECHR which undergirds the HRA).

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

- **Reject the framing:** We note with concern the Government's desire to "reduce the number of human rights-based claims being made overall",[15] including through making it more difficult for claimants to access judicial remedies, which should not be a goal in and of itself. The goal should be to work towards eliminating the conditions that create violations of human rights by improving governance and public service delivery, and enhancing (rather than stripping away) access to justice and avenues of accountability.

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.

[14] Section 4, Equality Act 2010.
[15] Human Rights Act Reform: A Modern Bill of Rights, [227].

- We **reject the framing** of this question. Positive obligations require the state to take proactive steps to protect people's human rights. They are not, as the consultation states, "imposed" on us, but part and parcel of the rights protected in the ECHR to which the UK has been a signatory since 1951; and they are not contrary to, but instrumental to, the provision of public services. Positioning the fulfilment of human rights as a financial burden, rather than an essential avenue of redress for individuals, is to completely ignore their value. It is also a mistake to consider human rights only from the perspective of litigation; every day, the HRA is used by public bodies and frontline workers to provide essential services and support. For example, social workers use the HRA in decisions involving capacity and detention in order to ensure that any restriction of the right to liberty is lawful, legitimate and proportionate.[16]
- When imposing positive obligations, both Strasbourg and UK courts already carefully consider the needs of public authorities. Judges have stressed that serious failures are required before a breach is established (*Osman*)[17] and the courts recognise that public authorities face competing objectives when meeting their positive obligations.
- The examples cited in the Government consultation do not actually support its argument that positive obligations have created "significant problems".[18] The claim 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" is presented without any evidence.
- The one positive obligation that is raised by the Government is the Article 2 duty to take preventative operational measures to protect an individual whose life is at risk, which the Government argues is "creating uncertainty as to the scope of the government's (and other public authorities') legal duties". In particular, the Government argues that the scope of Article 2 positive obligations is uncertain;[19] and that the *Osman* duty in particular has "added considerable complexity and expense to ongoing policing operations" such that "substantial police time and effort is engaged in carrying out measures for serious criminals", i.e. by requiring the police to issue "Threat to Life" notifications.
    - We do not agree with the claim that positive obligations are legally uncertain; if they are unclear, what is needed is greater training of frontline service providers as to how human rights can support their work.
    - We are highly concerned about the Government's second claim. Human rights are universal; they apply regardless if one is 'law-abiding' or not, and to cordon off their protection on this basis - and worse, to scapegoat a wider regime of rights protections (i.e. positive obligations) because they benefit a certain group - takes us into extremely dangerous territory.

[16] British Institute of Human Rights, Fazeela's Story, 2021, https://www.bihr.org.uk/fazeelas-story.

[17] "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].

[18] Human Rights Reform: A Modern Bill of Rights [229]. Paragraph 134 raises the case of *Rabone*, a case involving a voluntary psychiatric patient who died by suicide when on medically approved leave from the hospital. In *Rabone*, the Supreme Court held that the state had breached its positive obligation to protect life under Article 2. The Government's consultation uses the example of *Rabone* to justify its claim that the scope of the obligation under Article 2 remains uncertain, and portrays the judgment in a negative light, though it does not actually delineate how *Rabone* is uncertain nor does it explain why it considers the positive obligation to protect a voluntary patient from the risk of suicide to be problematic.

[19] The application of the duty to hospital authorities caring for voluntary psychiatric patients in Rabone v Pennine Care NHS Trust [2012] 2 AC 72 and to local authorities caring for children in need in R (Kent County Council) v HM Coroner for Kent (North West District) and others [2012] EWHC 2768 (Admin) was the only "evidence" cited of this uncertainty.

- Undermining positive obligations will have a much wider impact than, for example, removing *Osman* warnings. In practice, positive obligations have been important in:
    - **Enabling bereaved families and loved ones to seek justice for their loved ones:** Article 2 imposes on a state an "investigative duty" to investigate the circumstances of any death that occurs at the hands of the state, in state custody,[20] or with a nexus to state involvement, via a Coroner's inquest. This enabled 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.[21] In another case, a mother whose son died two weeks after being discharged from a mental health unit relied on Article 2 to highlight the inadequate support across local acute and mental health services that contributed to her son's death.[22]
    - **Ensuring that detained children are treated with humanity and dignity:** Articles 3 and 8 have been read to impose on the Prison Service positive obligations to take reasonable and appropriate measures to ensure that children detained in Young Offender Institutions are treated by Prison Staff and fellow inmates in a way that respects their inherent dignity and personal integrity and are not subject to torture or to inhuman or degrading treatment.[23]
    - **Holding the police to account over failures to tackle violence against women and girls (VAWG):**[24] Article 3 creates a positive obligation to conduct a proper inquiry into behaviour amounting to breach of this right. The victims of the 'black cab rapist' John Worboys, with VAWG organisations intervening, were able to use Article 3 to hold the police to account for failing to properly investigate his past serious crimes of violence against women at the Supreme Court.[25]
    - **And much more...** including protecting children from neglect and abuse,[26] protecting victims of modern slavery and human trafficking,[27] fighting for legal recognition of gender identity for trans people,[28] and requiring the State to facilitate Gypsies' and Travellers' way of life.[29]

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.

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[20] Maya Wolfe-Robinson and Owen Bowcott, Government to apologise to Alder family over police custody death, *The Guardian*, 22 November 2011, https://www.theguardian.com/uk/2011/nov/22/government-apologise-alder-family-police-death.
[21] 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.
[22] BIHR, Angela's Story, 2021, https://www.bihr.org.uk/angelas-story.
[23] 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)
[24] Nogah Ofer et al., Violence against women and girls: Protecting women's human rights and holding the state to account, *End Violence Against Women Coalition*, October 2017, https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/Human-Rights-Act-report-Oct-2017.pdf.
[25] End Violence Against Women Coalition & Southall Black Sisters, Human Rights Act an "essential tool" for women's protection, 2 November 2017, https://www.endviolenceagainstwomen.org.uk/human-rights-act-an-essential-tool-for-womens-protection/.
[26] Human Rights Futures Project, Protection of children's rights under the Human Rights Act - some examples, *LSE*, May 2011, https://www.lse.ac.uk/sociology/assets/documents/human-rights/HRF16-KlugHRAChildren.pdf.
[27] See: "The Human Rights Act – Patience Asuquo", Youtube, 18 Dec 2012, available at: https://www.youtube.com/watch?v=zGlaUDh_BJ4. Under Article 4 of the HRA, Liberty forced the police to investigate a report of threats and violence against an employee, whose passport and wages had been withheld in breach of the prohibition on slavery and forced labour. Also See: Siliadin v France; VCL and AN v. UK (Applications nos. 77587/12 and 74603/12).
[28] Goodwin v UK (Application no.28957/95), X v The former Yugoslav Republic of Macedonia, (Application no.29683/16).
[29] Connors v UK (Application no. 66746/01).

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

- Section 3 HRA gives UK courts the power to interpret primary legislation in a way which is compatible with the HRA. The UK courts can interpret the meaning of legislation to ensure that it doesn't breach Convention rights, as long as it is possible to do so without stretching the meaning so far that it goes against the intention of the legislation.
- IHRAR found that s.3 HRA was used cautiously by the UK courts and **explicitly rejected its repeal**. The Government 'noted' this in the consultation document and suggested they were "minded to agree", before offering two options for an outright repeal or a repeal and replacement.[30]
- The government proposes two options: **Option 1** would remove the interpretative power altogether. This would drastically weaken the effectiveness of any Bill of Rights, and mean that the UK Courts would be restricted to making a declaration of incompatibility. **Option 2** proposes replacing the section 3 power with a weaker power that would enable the UK courts to interpret the meaning of legislation only where it is possible to do so within the "ordinary reading of the words" used in the legislation. It would limit the power of the UK courts to interpret legislation, and weaken the effectiveness of the Bill of Rights.
- Both options reduce rights protections and hamper the ability of the UK courts to interpret legislation in a way which ensures it is compatible with the rights contained in the Bill of Rights.

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

- As well as the recommendation (see below) to create a database of section 3 judgments, IHRAR also suggested that the role of the Joint Committee on Human Rights (JCHR) could be enhanced in order to increase Parliamentary engagement with the interpretation of legislation by the UK courts.
- The JCHR should continue to be **properly resourced** to perform its vital function of scrutinising every Government Bill for its compatibility with human rights.

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

- This proposal follows IHRAR's suggestion that the government maintain a record of all judgments where the UK courts have relied on s.3 HRA to interpret legislation in a way which makes it compatible with Convention rights.[31] A database would enable better analysis of the use of the interpretative power under s.3 HRA, and would provide an evidence base for any need for reform. It would also enable Parliament to take remedial action where necessary following a s.3 decision.
- This question reminds us of the **lack of evidence** supporting the Government's proposal to repeal section 3.

Remedies

- The following proposals will limit the remedies for people claiming their human rights, and are to be resisted for their impact on people's access to justice.

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 very **misleadingly phrased**. The actual proposal in the consultation document is for "providing that declarations of incompatibility are also the only remedy available to courts in relation to certain

[30] Human Rights Act Reform: A Modern Bill of Rights, [237].
[31] IHRAR, [6.187].

secondary legislation".[32] In other words, depriving courts of their ability to strike down secondary legislation that is incompatible with the Convention.

- It is well established that secondary legislation that breaches primary legislation is unlawful and of no effect.[33] The HRA is primary legislation, and so secondary legislation is required to be compatible with it.[34]
- 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 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 (Q17).
- 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.[35]
- Devolved legislation appears carved out from this change, which is an important safeguard but would also have the effect of according the decisions of individual ministers more deference than legislation passed by the devolved legislatures. When experts at an oral evidence session of the Human Rights Joint Committee were asked about this issue on 26 January 2022, there was broad consensus.[36] Professor Alison Young said that this would be "very concerning", a view that was endorsed by ex-Justice of the UKSC, Lord Mance. He added that it would be "strange, unexpected and inappropriate" if courts could strike down legislation passed by the devolved administrations but not that issued by ministers, and "a real backwards step".

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.

- This was an IHRAR recommendation, with the justification that "UK courts' approach to subordinate legislation under the HRA was supposed to be consistent with their approach to the judicial review of subordinate legislation generally",[37] and so the Bill of Rights should be brought into line with the Judicial Review and Courts Bill, which makes provision for quashing orders to come into date at a specified future date or without retrospective effect.
- The JR Bill not only provides for suspended and prospective quashing orders but also imposes a presumption in favour of their use. This fetters judicial discretion and is likely to lead to the use of these orders when it is not in the best interests of justice.
- 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.

[32] Human Rights Reform: A Modern Bill of Rights [250].
[33] See, for example, F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry [1975] AC 295 and Boddington v British Transport Commission [1999] 2 AC 143.
[34] See A & Others v Secretary of State for the Home Department ([2004] UKHL 56).
[35] IHRAR, [7.55-7.64].
[36] Joint Committee on Human Rights, Human Rights Act Reform, 26 January 2022, https://parliamentlive.tv/event/index/5ed39248-aab4-45fb-b2c3-0517e7ddce7e.
[37] IHRAR, [7.75].

- It should be noted that the JR Bill is not yet law and these orders are opposed by all opposition parties other than the DUP. The introduction of these orders is not inevitable and this discussion of whether they should be extended is premature.
- See briefings from Liberty,[38] Justice,[39] and Public Law Project.[40]

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.

- **Option A** would retain remedial orders as they currently are. **This is our recommended option.** 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.
- **Option B** would retain remedial orders but keep them from being used to amend the BoR itself. This was IHRAR's recommended option. Only once has a remedial order been used to amend the HRA,[41] after a person wrongly committed to prison was denied damages under s.9(3) HRA, which was held to breach Article 13 ECHR.[42]
- **Option C** proposes restricting remedial orders only to those made under the 'urgent' procedure. This would undermine parliamentary scrutiny significantly. The urgent procedure is very rarely used – only three times since the Act came into force[43] – and it is correctly viewed as a last resort. Making it the only version would be a regressive step, with no real utility seeing as the urgent procedure is already an option open to Ministers when the situation demands it.
- **Option D** would abolish remedial orders entirely, abolishing a tool that works well and performs a necessary function in resolving legislation to correct human rights violations. IHRAR specifically rejected this option.[44] The consultation document says there should be "a strong presumption in favour of using more commonly used parliamentary procedures when legislating to address legislative incompatibilities with Convention rights".[45] This is already the case. There have been 44 declarations of incompatibility issued since the HRA came into force (as of July 2021), ten of which were overturned on appeal. The majority of the rest were addressed by primary or secondary legislation. Ministers already have these alternatives open to them, there is no need to deny them of a useful tool.

[38] Liberty's briefing on the Judicial Review and Courts Bill for report stage in the House of Commons, January 2022, https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/12/Libertys-briefing-on-the-Judicial-Review-and-Courts-Bill-report-stage-HoC-Jan-22.pdf.
[39] JUSTICE, Judicial Review and Courts Bill resources, https://justice.org.uk/judicial-review-and-courts-bill.
[40] Public Law Project, JR and Courts Bill briefings and case studies, https://publiclawproject.org.uk/resources/jr-and-courts-bill-briefings-and-case-studies.
[41] Human Rights Act 1998 (Remedial) Order (SI 2020/1160).
[42] Hammerton v UK – 6287/10 [2012] ECHR 562.
[43] Mental Health Act 1983 (Remedial) Order 2001 (SI 2001/3712); the Naval Discipline Act 1957 (Remedial) Order 2004 (SI 2004/66); the Terrorism Act 2000 (Remedial) Order 2011 (SI 2011/631).
[44] IHRAR, [9.27-9.31].
[45] Human Rights Act Reform: A Modern Bill of Rights, [256].

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 HRA requires Ministers in charge of Bills in either House of Parliament to make a statement, either to the effect that in their view the provisions of the Bill are compatible with the Convention (s.19(1)(a) HRA); or that, although they are unable to make a statement of compatibility, the Government nevertheless wishes the House to proceed with the Bill (s.19(1)(b) HRA).
- In practice, s.19 HRA operates through the issuing of a short statement on the part of the relevant Minister on the first page of a new Bill, which is usually accompanied by a separate human rights memorandum and/or additional elaboration on what the Minister believes to be the relevant human rights issues in the Explanatory Notes to the Bill.
- Section 19 HRA is important because it requires the Government to set out clearly whether, in its view, legislation is compatible with the HRA, and to provide an explanation to this effect. The Cabinet Office states in its *Guide to making legislation* that "[t]here is no legal obligation on the minister to give a view on compatibility **other than as required by section 19** nor is there a specific requirement for the minister to reconsider compatibility issues at a later stage (emphasis added)."[46]
- The Government claims there is a debate about whether s.19 HRA "strikes the right constitutional balance between government and Parliament, particularly in relation to ensuring human rights compatibility whilst also creating the space for innovative policies".[47] It is hard to see how the exercise of issuing a declaration and providing a human rights analysis under s.19 HRA has any effect on this relationship. What this question actually appears to be getting at is the issue of whether Bills should be required to be compatible with the ECHR (and how that might somehow impinge on the "space for innovative policies"),[48] which, given that the UK remains a signatory to the ECHR, is moot.

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?

- This question is a highly superficial way of asking about proposals that appear to fundamentally undermine devolution (e.g. changing the relationship between the UK and Strasbourg) and may have a significant and differentiated impact on the operation of human rights in Scotland, Northern Ireland, and Wales.
- **Scotland:**
    - **Ignorance of Scots law:** The extensive proposals within this Bill would undermine devolution all the while bringing fragmentation, confusion for people accessing justice, and wide-ranging legal uncertainty in relation to rights protections in Scotland.
    - **Ignorance of devolution:** The convention of devolution provides that the UK Parliament will not normally legislate on devolved matters without the consent of the Scottish Parliament. The Scottish Government states that the consultation "intrudes, whether directly or indirectly, into matters which lie firmly within the devolved competence of the Scottish Parliament."[49]

[46] Cabinet Office, *Guide to making legislation,* 2022, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1048567/guide-to-making-legislation-2022.pdf.
[47] Human Rights Act Reform: A Modern Bill of Rights, [261].
[48] Human Rights Act Reform: A Modern Bill of Rights, [261].
[49] Deputy First Minister John Swinney, Human Rights Act: letter to the Lord Chancellor, 21 December 2021, https://www.gov.scot/publications/human-rights-act-letter-to-the-lord-chancellor.

- **Ignorance of wide support for human rights:** Support for human rights is embedded in many areas of Scottish civil society and there are demands to enhance protections through policy and legislation, including by incorporating the UN Convention on the Rights of the Child and the International Covenant on Economic and Social Rights.[50]

- **Northern Ireland:** Taken together, these proposals represent a material threat to the ongoing peace process, of which the HRA is a crucial and constituent part. The Northern Irish Human Rights Commission said: "The Human Rights Act has long protected the rights of all people in Northern Ireland and it has done so in a way that is reasonable and balanced."[51] Many of the implications around the re-centring of power and diminishing of accountability that apply in the other devolved nations apply also to NI. But there are added considerations. Key institutions in Northern Ireland post-GFA have developed around the HRA.
  - **ECHR incorporation required by GFA:** The incorporation of the ECHR into NI law, as well as direct access to the courts and remedies for breach of the Convention, are commitments in the Good Friday Agreement. This was achieved by the HRA and the Northern Ireland Act 1998. The HRA therefore has an enhanced constitutional role in NI. If two parallel but increasingly divergent sets of rights (BoR rights and actual ECHR rights) develop, Northern Ireland may be deprived of the direct access to the courts and remedies for breach of the Convention to which they are entitled.
  - **ECHR at core of GFA safeguards:** Two of the five safeguards in the GFA "to ensure that all sections of the community [...] are protected" are also directly contingent on the ECHR (public bodies cannot infringe it & key decisions and legislation are proofed for ECHR compliance). Again, if parallel and divergent rights develop, this could lead to a fracturing of human rights protections in the UK into a two-tier system, where all NIA matters are held to the higher standard of the ECHR but acts of the UK Government generally only held to BoR standards.
  - **Reversing NI BoR process:** The GFA anticipates a Bill of Rights for Northern Ireland, "supplementing" the ECHR's complete incorporation in domestic law, not replacing and diminishing it. The NI Bill of Rights process is currently underway. 'New Decade, New Approach', the agreement which restored democratic government at Stormont in January 2020, set up a committee to consider a NI Bill of Rights, "that is faithful to the stated intention of the 1998 Agreement [the GFA] in that it contains rights supplementary to those contained in the European Convention on Human Rights (which are currently applicable)". The Committee will report by 28 February 2022. This British Bill of Rights proposal does not just cut across that Northern Irish process, but reverses its direction. The sum total of the proposals is to make fewer rights accessible to fewer people in fewer circumstances.
  - **Ignoring the nature and importance of the consensus in Northern Ireland:** The above is a clear statement of the direction and discourse around human rights in Northern Ireland is reflected in a wide range of comments from civil society groups. It is clear that the debate in NI is how to build on the HRA platform, rather than how to weaken it. The Chief Commissioner of the Northern Ireland Human Rights Commission commented that "In all our engagement with the public, we learned that what people want is greater and more effective protection, not less. That is increasingly so in the midst of a pandemic."
  - **Consent & Consultation with NIA**: These changes could engage the Sewel Convention, that the Government will not usually legislate on devolved matters (such as the implementation of human

[50] Kasey McCall Smith, Incorporation of International Human Rights Briefing Series: The International Covenant on Economic, Social and Cultural Rights, *Human Rights Consortium Scotland*, November 2021, https://hrcscotland.org/wp-content/uploads/2021/11/Final-ICESCR-briefing-Nov-2021.pdf.

[51] Alyson Kilpatrick, NI Human Rights Chief Commissioner responds to proposed replacement of the Human Rights Act, *Northern Ireland Human Rights Commission*, 14 December 2021, https://nihrc.org/news/detail/ni-human-rights-chief-commissioner-responds-to-proposed-replacement-of-the-human-rights-act.

rights), without consent from the devolved legislature. Given the prevailing attitude towards human rights in general and the HRA in particular in Northern Ireland, it is unlikely to be given. Even if the Government determined it did not technically need to seek consent from the NIA, to ram through these changes without consulting one of the regions on which they are likely to have the biggest impact, would be not just callous and cavalier, but extremely irresponsible.

- **Concerns raised by civil society & IHRAR**: The Government been warned by civil society groups across the island of Ireland that these proposals threaten the peace process. But it has also been warned, repeatedly, by the IHRAR report, on which this consultation paper is supposedly based. On Q12 (repealing/replacing s.3 HRA), IHRAR repeatedly warned of the risk of an adverse impact on the GFA of repealing s.3 or dramatically limiting it, yet the Government included as their two 'options' for reform, two approaches which IHRAR rejected, citing concerns over the GFA.
- **GFA is also an international treaty:** The GFA is not only a peace agreement, but an international treaty, lodged with the UN.[52] The implications of these proposals will therefore play out not just on the national, but international, stage, undermining the UK's stated desire to be a world-leader in the arena of human rights protections.
- **Impact on policing**: These proposals would be detrimental to confidence in and practice of policing and the oversight framework that has been set up around the PSNI. One of the key functions of the Northern Ireland Policing Board, as set out in s3(3)(b)(ii) of the Policing (Northern Ireland) Act 1998, is to monitor compliance with the Human Rights Act 1998. The PSNI Code of Ethics, provided for under s52 of the same Act is also designed around the framework of the ECHR as provided for by the HRA 1998.
- **Positive obligations**: The nature of the *McKerr* group of cases also makes the Government's proposals around Question 11 particularly galling in a NI context. The *McKerr* cases were decisions of the ECtHR handed down between 2001-2003, in which findings were made that the UK government had not complied with its obligations under Article 2 to properly investigate a series of killings which may have been linked to the actions of state agents.

- **Wales**
  - **Lack of consultation:** The Welsh Government was not consulted or involved in the preparation of the consultation.[53]
  - **Devolution:** In response to the consultation, the Welsh Government has said: "The requirement that legislation passed by the Senedd must be compatible with the Human Rights Act means that the Act is fundamental to the Welsh devolution settlement (as it is to the other devolution settlements of the UK). As such, it would be a matter of the gravest concern if the UK Government was to contemplate acting in this area without the agreement of all of the UK's national legislatures."[54]

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.

- **No case for reform:** IHRAR did not identify any problems with the definition of public authorities.
- The consultation itself states that the current approach is "broadly right" and only identifies one case to support its argument for "greater clarity".[55]

[52] UK Treaty Series no. 50 Cm 4705.
[53] Jane Hutt MS & Mick Antoniw MS, Written Statement: UK Government Proposal to Reform the Human Rights Act 1998, 12 January 2022, https://gov.wales/written-statement-uk-government-proposal-reform-human-rights-act-1998.
[54] Ibid.
[55] Human Rights Reform: A Modern Bill of Rights [266-269].

- **Sufficient clarity:** 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.

- Section 6(2) of the HRA provides that if a public body has no choice but to act incompatibly with an individual's rights because it was required to do so by primary legislation, then it has not acted unlawfully.
- The government makes two proposals which extend this defence to cover more situations where a public authority might have acted unlawfully. **Option 1** provides that where public bodies are "giving effect to" primary legislation - as opposed to being required by it to act - they will not be acting unlawfully. **Option 2** echoes the proposals in question 12, providing that where there is ambiguity in legislation, public bodies should choose the rights-compliant approach. Where there is no ambiguity, they must follow the "clear intentions of Parliament".
- In Liberty's view, these proposals would give public bodies more freedom to act incompatibly with rights. In some situations they would also make it harder to challenge decisions by public bodies, and would require individuals to challenge primary legislation instead.

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.

- Restricting the extraterritorial scope of the BoR 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.[56]
- However, there have long been calls for change from right-wing think tanks[57] and Conservative MPs,[58] with a duty to consider derogating from the ECHR in 'significant' overseas operations proposed as part of the Overseas Operations Act, which passed without that provision last year.

[56] Human Rights Reform: A Modern Bill of Rights [280]
[57] See Tom Tugendhat MP & Laura Croft, The Fog of Law: An introduction to the legal erosion of British fighting power, *Policy Exchange*, 18 October 2013, https://policyexchange.org.uk/publication/the-fog-of-law-an-introduction-to-the-legal-erosion-of-british-fighting-power/ and Richard Ekins, Jonathan Morgan & Tom Tugendhat MP, Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat, *Policy Exchange*, 29 March 2015, https://policyexchange.org.uk/publication/clearing-the-fog-of-law-saving-our-armed-forces-from-defeat-by-judicial-diktat/.
[58] Overseas Operations (Service Personnel and Veterans) Bill, second reading, House of Commons, 23 September 2020, https://hansard.parliament.uk/commons/2020-09-23/debates/BE01763F-2480-4C4B-9FAA-E36AC7158566/OverseasOperations(ServicePersonnelAndVeterans)Bill.

- Jurisdiction under Article 1 ECHR is interpreted as "primarily territorial" but also applies where a State exercises effective control over an area outside its territory,[59] or physical control or authority over a person.[60] So while this does apply for example to detention centres, a person does not need to be formally detained to be within a State's jurisdiction.[61]
- The extraterritorial application of the HRA also imposes positive obligations to protect soldiers abroad. The establishment of the Service Complaints Ombudsman as a result of the inquest into the death of Corporal Anne-Marie Ellement was made possible by extraterritorial application, as the allegations of breaches of Articles 2 and 3 related to her time working on a UK base in Germany.[62]
- Liberty's view is rather that the current position does not go far enough and leaves a protection vacuum in situations where states exert force but do not have territorial control. We endorse the UN Human Rights Council position on the International Covenant on Civil and Political Rights (ICCPR) that control over a person's "enjoyment of their right to life" is the key consideration in whether they are subject to a State's jurisdiction.[63] This is not a question for a domestic BoR though, but for the ECtHR, and we are clear that there **must be no weakening** of the HRA's extraterritorial application.
- IHRAR recommended addressing the question with a "national conversation" together with "Governmental discussions in the Council of Europe, augmented by judicial dialogue between UK Courts and the ECtHR".[64] This again is not a matter for a BoR.
- Any attempt to water down the UK's responsibility over people outside their territorial boundaries must also be seen alongside proposals in the Nationality and Borders Bill, currently going through Parliament, to provide for offshore processing of asylum claims.

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 is the exercise that the UK courts carry out when considering whether 'qualified' rights can legitimately be interfered with. The qualified rights include Articles 8, 9, 10 and 11: each of these rights can be lawfully restricted if the interference is prescribed by law, is necessary in a democratic society and is in pursuit of the public interest. In order to balance the relevant rights and interest the UK courts must determine whether the interference is proportionate.

[59] Ilas cu and Others v. Republic of Moldova and Russia (Application No. 48787/99).
[60] Al-Skeini v United Kingdom (Application No. 55721/07).
[61] Al-Saadoon v Secretary of State for Defence and Rahmatullah v Secretary of State for Defence [2016] EWCA Civ 811
[62] Centre for Military Justice, Human Rights Stories No.1 - Cpl Anne-Marie Ellement, 19 October 2021, https://centreformilitaryjustice.org.uk/human-rights-stories-no-1-cpl-anne-marie-ellement/.
[63] Human Rights Committee, General Comment 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, para 63.
[64] IHRAR, [8.4].

- The Government proposes providing guidance to the courts on how that balancing exercise should be carried out and provides two draft clauses for comment.
- **Option 1:** This draft clause requires the court to give "great weight" to Parliament's view when reviewing a decision made by a public body in accordance with primary or secondary legislation. However, where public bodies are required to act in a certain way by primary legislation, section 6(2) HRA already provides that they cannot be in breach of the HRA, and so this clause does not affect the ability of the court to review their decision. Alternatively, if a public body has discretion awarded by the legislation, it follows that the legislation has not prescribed how to act in particular circumstances, and does not help the court in assessing the proportionality of that decision. Further, the UK courts already give "great weight" to Parliament's view (see SC v SSWP).
- **Option 2:** This draft clause adds a requirement to give "great weight" to the fact that Parliament has passed legislation in the public interest. As with Option 1, simply because Parliament has legislated to give a certain power to a public authority, it does not follow that great weight should be given to a context-specific decision to exercise the power.

Migrants' rights

- We reject the fundamentally divisive nature of these proposals, which essentially amount to a statement that some people deserve rights, and others do not.
- We note the Government's repeated cynical attempts across multiple pieces of legislation to weaponise people's attempts to access their rights - which can involve issues of life and death, and/or their right to respect for their family life - in order to justify weakening protections for everyone, but which will evidently have disproportionate effects on the targets of such proposals.

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.

- In general, we **reject the framing** that human rights claims "frustrate" deportations. Being able to claim one's most fundamental rights - including the right not to be subject to torture, or one's right to private and family life - is of paramount importance.
- We are highly concerned by the Government's specific targeting of the right to liberty and security (Article 5), the right to a fair trial (Article 6), and the right to respect for private and family life (Article 8) as fuelling "new and expanding human rights claims" that "systematically frustrate" deportations.[65]
- It is worth noting that there are already significant restrictions on claimants who seek to rely on Article 8 in their deportation claims.[66]

[65] Human Rights Reform: A Modern Bill of Rights [292]
[66] See: Matthew Fraser, Deportation and Article 8 ECHR, *Landmark Chambers*, 3 October 2018, https://www.landmarkchambers.co.uk/wp-content/uploads/2018/10/Deportation-and-Article-8-ECHR-MF.pdf and Richard Turney, Article 8 and deportation: Changes to the rules and

- **Option 1** would appear to set a 'cut-off point' after which people would not be able to challenge their deportation based on the number of years they have been imprisoned; this is plainly arbitrary and unjust, going against the universality of human rights.
- **Option 2** appears to seek to separate out human rights in the migrants' rights and deportation contexts from the general human rights framework. Under this proposal, human rights in the migrants' rights and deportations context would mean something different to what human rights mean to the general public, as set out in "specific legislative schemes"; certain rights would only afford protection against deportation if they were also circumscribed by legislation. Yet again, this is totally contrary to the basic principle that everyone has the same human rights.
- **Option 3** appears to be a form of 'ouster clause' that would preclude a certain sub-set of decisions from challenge (i.e. by judicial review), effectively locking swathes of people out of access to justice, on issues engaging their fundamental rights, and in some cases, life or death.

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 **reject the premise** of this question: the framing of the European Convention on Human Rights and the Human Rights Act as "impediments" and the demonisation of migrants that recurs throughout the HRA consultation, and concurrently in the Nationality and Borders Bill and the Judicial Review and Courts Bill.
- The consultation paper suggests applying options 2 and 3 from Q24 to asylum removals. Our same concerns apply as above.
- We note the Nationality and Borders Bill, currently undergoing its passage through Parliament, which the United Nations High Commissioner for Refugees,[67] multiple UN Special Rapporteurs,[68] and legal experts[69] have all stated the Bill is likely to violate the UK's international obligations, with devastating consequences.

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.

areas of challenge, *Landmark Chambers*, 25 October 2012, available at: https://www.landmarkchambers.co.uk/wp-content/uploads/2018/07/ARTICLE_8_AND_DEPORTATION-_RT-1.pdf

[67] UNHCR, UK asylum bill would break international law, damaging refugees and global co-operation, September 2021: https://www.unhcr.org/uk/news/press/2021/9/614c163f4/unhcr-uk-asylum-bill-would-break-international-law-damaging-refugees-and.html

[68] OHCHR, United Kingdom Nationality and Borders Bill undermines rights of victims of trafficking and modern slavery, UN experts say, 14 January 2022: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28027&LangID=E; Electronic Immigration Network, United Nations Special Rapporteurs express concerns over impact of Nationality and Borders Bill on the human rights of victims of trafficking, 15 November 2021: https://www.ein.org.uk/news/united-nations-special-rapporteurs-express-concerns-over-impact-nationality-and-borders-bill

[69] Raza Husain QC, Jason Pobjoy, Eleanor Mitchell, Sarah Dobbie, Joint Opinion, Nationality and Borders Bill, *Freedom from Torture*, October 2021: https://www.freedomfromtorture.org/sites/default/files/2021-10/Joint%20Opinion%2C%20Nationality%20and%20Borders%20Bill%2C%20October%202021.pdf, Stephanie Harrison QC, Emma Fitzsimons, Ubah Dirie and Hannah Lynes, Nationality and Borders Bill: Advice to Women for Refugee Women, *Women for Refugee Women*, 23 November 2021,: https://www.refugeewomen.co.uk/wp-content/uploads/2021/11/Garden-Court-legal-opinion-on-Nationality-and-Borders-Bill.pdf

- 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.
- In Liberty's view it is **inappropriate** to require judges to consider the factors set out above when they are considering the amount of damages to award. In particular, we note that damages awards provide an incentive to public bodies to act compatibly with human rights, and should provide an incentive for lawful decision-making. Any attempt to place a limit on compensation gives public bodies a freer reign to abuse people's rights.
- If public authorities are concerned about the potential impact of the award of a remedy on their ability to discharge their mandate, the obvious solution is for them not to act in ways that are contrary to human rights.

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.

- This is a **deeply concerning idea,** with which we fundamentally disagree. Human rights are not relative to a person's conduct. The entire concept is that everyone, even those we disagree with, or dislike, or who have committed crimes themselves in the past, still deserve protection. This proposal really would punch a fundamental hole in our understanding of what human rights are.
- To a large extent, it is also a white elephant. People don't generally bring HR claims for damages awards. However, in exceptional cases, large awards can be made: such as in the recent *Spycops* case, when the Claimant was awarded over £225,000 in recognition of the truly staggering breach of her rights conducted continually over a number of years by the police. [70]
- **Option 2** asks whether there should be "any limits, temporal or otherwise" to the conduct to be considered, suggesting that conduct potentially years in the past and entirely unconnected to their abuse by a public authority could be used to deny compensation. This is a dark path to go down.

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.

- This proposal aims to create a formal process that follows a decision by the ECtHR that the UK has breached Convention rights.
- The draft clause creates a requirement that when the UK loses a case in the ECtHR, the relevant minister must give notice of the judgment to Parliament. The draft clause also asserts that decisions by the ECtHR cannot affect the right of Parliament to legislate and do not affect Parliamentary sovereignty.
- This proposal, if passed, will have **wider international implications**. 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."[71] In 2015, shortly after pledges on the

[70] Remedy Order (dated 24 January 2022) in *Kate Wilson v (1) Commissioner of Police of the Metropolis; (2) National Police Chiefs' Council* [IPT/11/167/H]: https://www.ipt-uk.com/docs/Remedy%20Order%2024%20Jan%202022.pdf
[71] 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

part of the Conservative Government to scrap the Human Rights Act,[72] Russia passed a law which enables the Duma (Russia's lower house of parliament) to overrule judgements from the ECtHR.[73]

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.

- **29A:** We **reject the premise** of this consultation into the HRA, which is highly divisive, and seeks to restrict people's rights and access to justice on the basis of flawed, or in some cases, no, evidence. We therefore do not consider it appropriate to consider the costs and benefits of the proposed BoR.
    - For organisations not planning to answer most of the questions in the consultation, however, this may be a useful place to outline the many costs discussed above.
- **29B:** The undermining of the protections in the HRA - which the proposals in this consultation seek to do - will affect everyone, but will have a disproportionate effect on people with protected characteristics who may already encounter difficulties accessing their rights and justice. The below is a non-exhaustive list, but for example:
    - Q4/5: **Privacy** - the undermining of privacy rights stands to affect LGBT+ people who have relied upon these rights to resist being outed.[74]
    - Q8-10: **Permission stage and 'genuine human rights' abuses**- It is well-known that people with protected characteristics already experience barriers to accessing justice, especially in the aftermath of legal aid reforms.[75] Lack of effective access to justice undermines the rule of law and good administration and governance, and has a severe impact on people seeking to assert their rights. Creating new barriers will entrench these problems, with disproportionate effects on people with protected characteristics.
    - Q11: **Positive obligations** - these proposals could have a potentially catastrophic effect on people with protected characteristics, including but not limited to women who are survivors of domestic abuse, disabled people, LGBTQ+ people.
    - Q12: **Section 3** - section 3 of the HRA has been vital in the protection of rights for people with protected characteristics, for example relating to sexual orientation[76] and religion and belief.[77]
    - Q23: **Qualified and limited rights** - the undermining of Article 8 in particular could deprive many people with protected characteristics of necessary protections, for example relating to gender reassignment,[78] sexual orientation,[79] and disability.[80]

[72] Owen Bowcott, Cameron's pledge to scrap Human Rights Act angers civil rights groups, *The Guardian*, 1 October 2014, https://www.theguardian.com/politics/2014/oct/01/cameron-pledge-scrap-human-rights-act-civil-rights-groups

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

[74] BVC v EWF [2019] EWHC 2506 (QB).

[75] Equality and Human Rights Commission, Following Grenfell: Access to justice, 2019: https://www.equalityhumanrights.com/sites/default/files/following-grenfell-briefing-access-to-justice.pdf.

[76] See for example Ghaidan v Godin-Mendoza [2004] UKHL 30.

[77] For example in reading into Article 9 to encompass non-religious views.

[78] See: Goodwin v United Kingdom (2002) 35 EHRR 18.

[79] See: BB v United Kingdom (2004) 39 EHRR 30.

[80] See: Bernard v LB Enfield [2002] EWHC 2282 (Admin).

- Q24/25: **Deportations and asylum** - these proposals will have a disproportionate impact on people with protected characteristics. Not only do these proposals explicitly target people with people with protected characteristics, for example, people of colour; they will also have secondary effects, such as the further entrenchment of the hostile environment. This will have knock-on effects, for example negative health impacts on families and wider communities.[81] The EHRC has previously found that the Home Office has acted unlawfully, as a result of its failure to comply with its duties under the Public Sector Equality Duty while developing, implementing, and monitoring its hostile environment policies.[82]
- Q27: **Claimants' conduct** - linking rights to responsibilities and limiting remedies for claimants on the basis of their conduct is likely to disproportionately impact individuals from over-policed communities, particularly people with the protected characteristic of race.

- **29C:** The only way to mitigate the wide-ranging and devastating impacts of the proposals within this consultation is to withdraw them and stop them from becoming law.

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[81] Sophie Weller and Rob Aldridge, The UK government's "hostile environment" is harming public health, *The BMJ Opinion*, 23 July 2019, https://blogs.bmj.com/bmj/2019/07/23/the-uk-governments-hostile-environment-is-harming-public-health.
[82] Equality and Human Rights Commission, Assessment of hostile environment policies, 26 November 2020, https://www.equalityhumanrights.com/en/inquiries-and-investigations/assessment-hostile-environment-policies.