Ministry of Justice consultation: "Human Rights Act Reform: A Modern Bill of Rights"

Response from the Law Centres Network

About us

The **Law Centres Network** is a charity that is the national membership body for Law Centres. Each Law Centre is a not-for-profit law practice specialising in social welfare law. They have been operating in the UK for over 50 years and there are currently 41 member Law Centres across the country, each serving disadvantaged people in its community. Law Centres employ expert lawyers and caseworkers to provide free legal advice and representation to people who would otherwise struggle to access them. They help clients protect their homes, lives and livelihoods and play an important role in upholding the rule of law in the UK.

Overarching remarks

Law Centres target their services at people living in poverty and disadvantage in order to level the legal playing field for them, so they would no longer fight an uphill battle to have their rights and legal entitlements upheld. Our work focuses on areas of practice such as welfare rights, housing, debt, employment, immigration and discrimination. These are areas where our clients often face public authorities – local councils, government departments and their agencies – with outsized impact on their freedoms and rights. Through this work, we see every day where human rights are engaged, as Eleanor Roosevelt had put it in 1958, "in small places close to home… the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination." Our purpose is to help them assert these.

Human rights are in essence about preserving human life and dignity. Therefore, instruments such as the UK Human Rights Act (HRA) have a benign, protective function: put simply, for those in vulnerable circumstances or those least able to assert their rights through their own means, it sets an essential standard for basic freedoms and rights, their protection and fair treatment. Such a 'safety net' function is of particular value in a common law legal system in which those rights and freedoms are not otherwise clearly specified and the constitution is unwritten. To people like Law Centre clients, whose circumstances make them more reliant on public provisions and therefore on interacting and sometimes differing with public bodies, HRA is of particular significance.

In Law Centres' experience, HRA functions well in its own right and therefore we oppose the government proposal to replace it with a Bill of Rights. HRA is not 'broken' and therefore requires no fixing, as Lady Hale, Lord Neuberger and Sir Dominic Grieve QC have

told the Joint Committee on Human Rights last year.[1] In fact, HRA could be made even more effective on current terms by improving access to justice provisions, such as legal aid, so more people would be able to make use of it in more circumstances, thereby increasing its deterrent effect and virtuous impact.

Also last year, Sir Peter Gross' Independent HRA Review (IHRAR) has largely agreed with the former Supreme Court presidents and Attorney General, concluding that HRA broadly works as intended, that there is no case for comprehensive reform and that changes, where recommended, should be modest.

We are particularly concerned by the absence of IHRAR and its expert analysis from the current consultation and its proposals. In place of a careful consideration of empirical evidence, we are presented with bold assertions, unsubstantiated claims and vague aspirations. Thus, **the government fails to properly argue its case for change**, especially for such a comprehensive and highly consequential change.

We are also concerned that the proposals in the consultation, even those with draft clauses, still **do not form a clear picture of the so-called Bill of Rights**, its constitutional status and whether it would fully continue the UK's adherence to the European Convention on Human Rights (ECHR). This makes it difficult for respondents to comment on the adequacy of each proposal. A cursory, makeshift attempt in Appendix 3 at **assessing only the "potential high-level impacts"** of proposals, does not help matters.

In line with the context and approach of Law Centres' work set out above, we remain gravely concerned about the proposals in this consultation. **Our greatest concern is that the proposals would reduce access to justice**, especially for disadvantaged people, **thereby weakening effective human rights protections and remedies** for them. In turn, this would further shield public bodies from accountability, weakening the rule of law, public trust and ultimately social cohesion. We strongly urge the government to pause and reconsider its approach before it damages vital protections for the most vulnerable in society.

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

Q1. We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2, as a means of achieving this.

We believe that s.2 HRA functions well as it is and needs no amendment. We also dispute the claim implicit in the question's wording, as if s.2 limits UK courts' ability in human rights cases to draw on a wide range of law – it does not. Our domestic courts must 'take into account' ECHR case law, but they **are not compelled** to follow it and can take other approaches when justified to do so. As for the draft clauses referred to, both proceed in the same worrying vein of disconnecting domestic rights in a potential Bill of Rights from UK citizens' ECHR convention rights, thereby weakening protection for the latter. The

[1] Quoted, with others, in Joint Committee on Human Rights, *The Government's Independent Review of the Human Rights Act*, HC 89/HL Paper 31, 23 June 2021, available at https://committees.parliament.uk/work/962/the-governments-independent-human-rights-act-review/publications/.

Strasbourg court would still remain the final arbiter of convention rights but the government's proposals would mean that, when UK citizens seek remedy for breach of their ECHR rights, they would face new hurdles in the form of longer waits and costlier proceedings, in effect new hurdles on their access to justice.

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

We believe that the current position functions well and does not need to be replaced. The status of the UK Supreme Court is already clear and the need to 'take into account' Strasbourg rulings already does **not compel** the UK Supreme Court to follow all Strasbourg rulings. As for putting some matters beyond the competence of UK courts, IHRAR has examined this issue last year and rejected the option of reform through legislation or guidance, favouring instead the current approach of 'judicial restraint'. We agree and would add that certainly with human rights **no matters should be by definition 'off limits' of accountability and justiciability**.

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

The right to jury trial should be protected effectively, but we are not clear how a Bill of Rights would ensure this, especially as no draft clause has been provided for consideration. It is ironic that this proposal should come from the same government that, less than two years ago, with the onset of the pandemic, considered suspending jury trials.

<u>Section II: Restoring a sharper focus on protecting fundamental rights</u>

Q8. Do your 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 strongly oppose a permission stage for human rights claims, and in particular the proposed 'significant disadvantage' condition, regardless of how it would be defined. We believe such a condition would create a new impediment to people's access to the courts to seek redress for violations of their human rights and, through this, would also reduce the accountability of public bodies. The premise of the question, that suggests there are 'genuine' (read: deserving) human rights cases and therefore that there are 'undeserving' human rights cases, or that some human rights matters are too trifling for the court's attention, is surely incorrect. Are there, for example, 'insignificant' discrimination claims, whatever their nominal value? In any case, the government has presented no evidence to support its bold assertion that there is some surfeit of spurious human rights claims that distract the courts. As things stand, **the courts already** regularly apply their power to assess cases on their merits and **throw out claims that cannot show reasonable grounds**. As no objections have been raised to this test, we see no reason to impose a much higher claim threshold of 'significant disadvantage'.

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

As above, we strongly oppose a permission stage for human rights claims and the imposition of a 'significant disadvantage' condition. Therefore, we are also opposed to an associated 'overriding public importance' provision. Two wrongs do not make a right: bundled this way, this provision still supports the wider false dichotomy of genuine/deserving vs. spurious/trifling/undeserving claims. Some claims may indeed have 'overriding public importance', but we are concerned that in context such a provision **would limit rather than protect access to justice** for all human rights claims.

Q10. How else could the government best ensure that the courts can focus on genuine human rights abuses?

The courts already focus on genuine human rights abuses, and the consultation document provided no evidence that this is not the case. We believe that the government is making the wrong assumptions about human rights claims and therefore arriving at wrong proposals for them. As above, we reject the distinction of genuine/deserving claims from ones that are not, as well as the unsupported assertion that the courts are overrun with the latter sort. Rather than seeking to address the conditions that give rise to human rights violations, the government prefers to make the problem go away, planning to "reduce the number of human rights-based claims being made overall" (para. 227 of the consultation document) by making them harder to pursue. In turn, this would make it more difficult to update the standards of protecting human rights through UK common law, further weakening domestic human rights provisions.

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

We reject the claim implied in this question, that positive human rights obligations are somehow 'imposed' on the UK and, related or not, have an inferior status to the UK government's public service priorities. In fact, the UK played a major role in the drafting of these obligations, has entered into them freely, has continued to adhere to them over the years and the current consultation assumes that this adherence to ECHR should be maintained. UK courts are already careful to not overburden public bodies with new obligations. There is also no evidence given of the 'costly human rights litigation' or other 'significant problems' that this gives rise to. Even if there were, surely there is an intrinsic value to human rights and their daily beneficial impact on public conduct and people's ability to live their lives with dignity, that cannot be reduced to the unsubstantiated financial burden they are said to introduce.

Section III: Preventing the incremental expansion of rights without proper democratic oversight

Q12. 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 oppose both options presented. As we have argued in our response to IHRAR, we believe that **s.3 works well and does not need to be changed**; not by amending it to restrict judges' power to protect rights, which would not serve Parliament but government; and certainly not by repealing it. Indeed, IHRAR itself has considered and rejected the idea of repealing s.3. Amending or repealing s.3 would impair the courts' interpretive function, which they have exercised for over 20 years. A repeal in particular would also be an unwelcome change to our constitutional settlement, because it would throw the separation of powers off kilter, weakening the important checks and balances offered by judicial oversight.

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

No. We believe that if a court finds that secondary legislation breaches HRA-protected rights, they should be able to strike it down or disregard it. Declarations of incompatibility (DOIs) do not impinge on Parliament's legislative role, but they do enable courts to flag up legislation that clashes with human rights, again leaving it to Parliament to decide whether or not to amend this legislation. IHRAR has already considered the idea in the question and rejected it, reasoning that **courts are already able to make DOIs** about some subordinate legislation, and that their ability to quash secondary legislation is all the more important because this class of legislation, while at times of great impact, still receives only reduced parliamentary scrutiny.

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

The Judicial Review and Courts Bill not only provides for suspended and prospective quashing orders but includes a presumption in favour of using them. We continue to oppose these proposals because **they restrict judicial discretion** and create strong disincentives for people to bring claims, as they may not benefit even if the court finds in their favour. As the Bill is still making its way through the legislative process, it is very early indeed to count on any of its clauses, which could still be amended or withdrawn; and earlier still to extend their application to new areas, which we would expect to follow a period of initial implementation and lesson-learning.

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

We consider that the obligation on a minister to state on the face of a new bill whether they consider it is compatible with HRA to be operating satisfactorily, as combined with remarks on the human rights issues in the bill in its Explanatory Notes or in a human rights memorandum. We do not think that there is a case for changing this.

Q19. How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?

It is hard to see how the proposed reform, in the shape of a so-called 'Bill of Rights', can be reconciled with devolution settlements, legal traditions and interests of Wales, Scotland and Northern Ireland. These devolved administrations themselves are highly critical of the proposals and, in a recent open letter to the Lord Chancellor, Welsh and Scottish ministers have left no doubts about their governments' views: "Disregarding [IHRAR's] weight of evidence and expertise to press ahead with plans can only be interpreted as *an ideologically motivated attack on the freedoms and liberties* protected by the Human Rights Act."[2] The ministers call on the Lord Chancellor to reverse his proposals and listen to evidence from the legal profession and from civil society. We agree with their call.

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

We believe that the current definition is **sufficiently clear and should be maintained**; we note that IHRAR has considered the matter and has not flagged up any problems with it. Further 'clarification' of what counts as a 'public authority' runs the risk of disregarding breaches of HRA rights by external organisations operating in the name of the state. Inasmuch as these external organisations fulfil the duties of the state and exercise its powers, as in the case of a private company running an Immigration Detention Centre on behalf of government, courts are already clear that they have responsibilities under HRA and can be held accountable for them.

Q21. The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer? Please explain your reasons.

We **reject both options** presented, as both are likely to broaden the room for public bodies to act in ways that incompatible with human rights. Consequently, both would also make it much harder for people to mount human rights challenges to public bodies' decisions.

[2] Emphasis added. See full letter: https://www.gov.scot/publications/human-rights-act-joint-letter-to-the-lord-chancellor-with-welsh-ministers-march-2022/.

Q23. To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under HRA? 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.

We consider that **neither of the options presented is needed**. **There is no compelling evidence** to suggest that judges are somehow muddled about their proper role, to interpret legislation and apply case law. Certainly, where Parliament has expressed its view, the courts already seek out this intention and defer to it (judicial deference), acting within margins of discretion. Attempts to further 'guide' judges in how to balance limited and qualified rights risk executive overreach, interfering not just with the role of courts but with their independence.

Q24. How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.

We reject all three options. We also object to the government's suggestion that human rights 'systematically frustrate' deportation. By definition, **human rights are universal**, yet Option 1 essentially proposes to exclude some people or classes of people from human rights protection. Option 2 tries to exclude the context of deportations from the universal protection of human rights. Option 3 suggests putting certain deportation decisions beyond challenge, thereby restricting Art. 6 and 13 rights. All three options, then, would be discriminatory as they would put migrants threatened with deportation at an unfair disadvantage. They would also mean that those threatened with deportation would need to turn to the Strasbourg court in order to seek equitable protection of their human rights – an unlikely possibility for many due to cost, timeliness and access to expert legal assistance. Human rights-based challenges to deportation decisions are already difficult and the consultation paper does not evidence sufficient need for the proposals in question.

Q25. While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and HRA to tackling the challenges posed by illegal and irregular migration?

As with the previous question, we find the positing of HRA and ECHR as 'impediments' tendentious and objectionable. **Any commitment to human rights is inherently a commitment to their universal application**. It would be discriminatory to exclude a group of people from their protection based on immigration status. It would be likewise discriminatory to not apply them to certain circumstances, or to restrict judicial oversight of these circumstances. If the government is keen to respect the UK's international obligations, it could start by comprehensively re-examining its Nationality and Borders Bill, which the UN High Commissioner for Refugees believes would break international law.[3]

[3] https://www.unhcr.org/uk/news/press/2021/9/614c163f4/unhcr-uk-asylum-bill-would-break-international-law-damaging-refugees-and.html.

Section IV: Emphasising the role of responsibilities within the human rights framework

Q27. We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons.

We reject the premise behind the proposals in this question, that there are 'deserving' claimants who are due full damages and 'undeserving' claimants who are only due reduced damages, if at all. Similarly, we object to the bold but unsupported assertion in the consultation document, that human rights claims are primarily aimed at getting compensation. This kind of narrative obscures not just the difficult circumstances and real reasons that have people bring human rights claims, but also the origin of human rights, their defining tenets and their purpose. Human rights were conceived in order to provide a basic standard of protections for people's dignity and liberties – protection largely from the might of the state. Human rights are intrinsic as they are universal: all people have them by virtue of being human, meaning that **they are not 'earned', and that their protection or remedies for their breach should not be conditional on 'good behaviour'**, however defined. We strongly oppose the proposals in this question.

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

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

The UK is part of the ECHR framework and thus recognises the authority of the Strasbourg court. It is generally important that our government comply with this and its other international obligations. On the rare occasions when the Strasbourg court finds that the UK government has breached human rights, it is important that it does not try, or appear to try, to use its parliamentary majority to ignore the ruling or play it down. The political inconvenience of this is far outweighed by the **wider importance of compliance for the rule of law in the UK and for strengthening respect for international law** further afield, by governments less committed to the rule-based international order.

Q29. We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular: a. [likely costs and benefits of the proposed Bill of Rights]; b. [equalities impacts]; and c. [mitigation of negative impacts].

Law Centres are intimately familiar with the many hurdles placed before ordinary people, especially those experiencing disadvantage, when they come to seek legal protection or redress. Over the past decade we have seen the sharp decline in public spending on access to justice provisions such as legal aid and the devastating effect that it has had on the effective protection of individual rights. This consultation suggests further ways of restricting people's access to justice, using coded language like 'making sure only serious cases are brought' – by restricting access to the courts – or 'sharper focus on protecting fundamental rights' – thus suggesting that some rights, or some disadvantaged groups whom they protect, are not as 'fundamental'. The consultation often bases its **proposals on**

little or no evidence, or on certain bold assertions and value judgments that frame them; as we have argued throughout, we object to this tendentious approach to public policymaking, especially on such a vital issue with far-reaching implications. For this reason, we see no point to engage in considering the likely costs and benefits of the proposed, and still quite vague, Bill of Rights.

Replacing HRA, particularly along the lines of the proposals consulted on, would have a **disproportionately adverse effect not just on people and groups with protected characteristics but on people experiencing poverty and disadvantage more generally**. In the already decimated ecology of access to justice supports, they would struggle even more than currently to bring claims, needing to prove 'significant disadvantage' to them from 'genuine' human rights abuses and prior good behaviour that would make them 'deserving' of remedies. The strength of the UK's human rights provisions is tested in the way that they effectively protect all people; the clear move to restrict access to the courts makes it patently clear to us that the proposed Bill of Rights would weaken domestic human rights protections.

A population singled out in the consultation for dedicated measures is migrants, in particular those with irregular status. This would **disproportionately affect** groups with protected characteristics, namely people of **non-White British ethnicity**. These proposals cannot be considered in isolation from similarly problematic government policies, such as the current Hostile Environment policies, that were already found to be in breach of the Public Sector Equality Duty, and the prospective Nationality and Borders Bill, many parts of which continue to be contested in Parliament.[4]

Migrants would also be disproportionately affected by a reconsideration of 'proportionality' in the application of qualified rights, chiefly the article 8 right to private and family life. This shift would also likely affect other groups with protected characteristics, such as **disability**: recent Law Centres cases have relied on **article 8 to ensure appropriate personal care plans**, housing for those sleeping rough during the pandemic lockdown and end of life benefits support for people with terminal diagnoses.[5]

Such disproportionate weakening of human rights protections would not only be in breach of domestic laws, such as the Equality Act but, like any retrogression on human rights, it would breach the UK's international commitments via several UN treaties, such as the Convention on the Rights of People with Disabilities (CRPD) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). As such, it would likely weaken efforts to improve human rights adherence around the world. The consultation question asks for mitigation measures for any negative effects; we believe that in this case the best course of action would be to prevent adverse impacts from the outset by the government reconsidering its approach based on concrete evidence.

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This response is submitted on 7 March 2022 by Nimrod Ben-Cnaan, head of policy and profile, on behalf of Law Centres Network, 1 Lady Hale Gate, Gray's Inn, London WC1X 8BS.

[4] The finding of non-compliance with PSED was made not by an international body but by the UK's statutory human rights watchdog itself, the Equality and Human Rights Commission: https://www.equalityhumanrights.com/en/inquiries-and-investigations/assessment-hostile-environment-policies.

[5] See https://www.lawcentreni.org/news/high-court-decides-different-treatment-of-terminally-ill-claimants-is-discriminatory-1.