ASYLUM AID
protection from persecution

HELEN BAMBER FOUNDATION
strength to fly

Response to the consultation 'Human Rights Reform: A Modern Bill of Rights'

March 2022

The Helen Bamber Foundation (HBF) is a specialist clinical and human rights charity that works with survivors of trafficking, torture and other forms of extreme human cruelty and believes that all survivors should have safety, freedom and power. Our work alongside survivors shows us that, with early and appropriate care and support, they build the strength to move on with their lives. Our multidisciplinary and clinical team provides a bespoke Model of Integrated Care for survivors which includes medico-legal documentation of physical and psychological injuries; specialist therapeutic care; a medical advisory service; a counter-trafficking programme; housing and welfare advice; legal protection advice; and community integration activities and services. Asylum Aid, part of the Helen Bamber Foundation group, provides high quality legal representation to some of the most vulnerable people seeking asylum in the UK: children, survivors of trafficking, and stateless people.

HBF's work began with the belief that all people must be treated fairly, regardless of where they were born, and, as stated the Universal Declaration on Human Rights, "all human beings are born free and equal in dignity and rights." Helen Bamber was a British psychotherapist and human rights activist who worked with Holocaust survivors in Germany after the concentration camps were liberated in 1945. She later returned to Britain and continued her work with the most marginalised, including refugees, survivors of genocide, torture and trafficking. In 2005, she created HBF to help survivors of extreme human cruelty and we continue her legacy by doing all we can to support and protect human rights.

As HBF and Asylum Aid we are appalled that the government is seeking to introduce a Bill of Rights that would significantly reduce the protections afforded to certain groups, including refugees and survivors of trafficking. The government's proposals will not only harm the most marginalised but will undermine the human rights protections available to us all.

Introduction

The European human rights framework emerged to counter the destruction of fundamental rights during World War II and prevent a repetition of events such as the Holocaust. The first task of the Council of Europe, founded after the Second World War to protect human rights, democracy and the rule of law, was to draw up a treaty to secure basic rights for anyone within their borders, including their own citizens and people of other nationalities. The European Convention on Human Rights (ECHR) was based on the United Nations' Universal Declaration of Human Rights and came into force in 1953.

For over two decades, the Human Rights Act 1998 has 'brought home' the rights contained in the ECHR by enabling individuals to enforce those rights in the UK. It has significantly advanced the protection of human rights in the UK by allowing those whose rights have been violated to bring cases to the domestic courts and obtain a form of remedy for those violations. It has helped further entrench human rights considerations in decision-making and ensure that systemic failings are investigated and addressed.

On 14th December 2021, the UK government published the long-awaited independent report on the Human Rights Act,[1] written by the Panel of the Independent Human Rights Act Review (IHRAR), along with its own consultation, 'Human Rights Act Reform: A Modern Bill of Rights'.[2] The IHRAR, commissioned by the government and established in December 2020, found the Human Rights Act on the whole to be effective in ensuring that the government acts lawfully, transparently and reasonably but highlighted the need for more education on the Human Rights Act to help create a culture of human rights. The Joint Committee on Human Rights also conducted a parallel inquiry and in June 2021 concluded that the "there is no case for changing the Human Rights Act."[3]

Regardless of these two expert reports, the government's consultation provides a partial and one-sided view of the functioning of human rights protections in the UK, disregarding the positive impact of the Human Rights Act and setting up a division between people who are 'deserving' of human rights and those who are not. The suggested proposals to be included in a new 'Bill of Rights' would weaken the whole human rights framework by reducing the responsibilities of government and public bodies to uphold people's human rights; limiting the actions that courts can take in the face of violations; and reducing protections offered to certain groups, including refugees and migrants.

A basic principle of international human rights law is that human rights are universal. That all people are equal before the law has also been part of our common law for centuries. These proposals would undermine that basic principle and have a terrible impact on the people that Asylum Aid and the Helen Bamber Foundation serve – those fleeing persecution and survivors of

---

[1] The Independent Human Rights Act Review 2021

[2] Ministry of Justice Human Rights Act Reform: A Modern Bill Of Rights

[3] The Independent Human Rights Act Review 2021

trafficking, torture and extreme human cruelty. History has shown us that the weakening of protections for certain groups of people, whether based on race, religion, nationality, criminality, or those who have exhibited any 'poor' behaviour in the past, has always been the precursor for the restrictions of protections for everyone. If you start eroding the rights of one group, you undermine the system of protection for us all.

The government has failed to provide evidence of any significant abuse of the current system and the proposed Bill of Rights to replace the Human Rights Act will only weaken our rights and protections in the UK, not strengthen them. It would weaken domestic remedies for human rights protection; undermine access to justice; reduce the accountability of public bodies; and put the UK's international reputation at risk for failing to comply with international law obligations. It is crucial to recognise that at the same time as undertaking this consultation, the government is also rushing multiple oppressive Bills through Parliament, including 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.

In this consultation response we address those questions most relevant to our work. Our not answering the other questions should not be taken as agreement with the proposals being put forward in those sections. We fundamentally disagree with the whole premise of the consultation and do not believe that the Human Rights Act should be replaced with a Bill of Rights.

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

Question 1: We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2, as a means of achieving this.

We do not agree that section 2 requires any amendment.

Section 2 requires UK courts to "take account" of Strasbourg case law (case law of the European Court of Human Rights). They are not bound by that case law and can – and do - depart from it if the UK context calls for it.[4] There is a real danger that if the UK courts do not take account of Strasbourg case law, domestic interpretation of ECHR Convention rights will diverge significantly from the approach of the Strasbourg Court. This will lead to an increase in (successful) applications to the Strasbourg court but will also leave many who are unable to pursue an application to the Strasbourg court without redress.

In practice, UK courts already consider existing statutory and common law rights as well as Convention rights. They often do so before any consideration of Convention rights and may decline to consider arguments under the Convention where the common law provides a satisfactory answer. This allows account to be taken of jurisprudence from other common law jurisdictions and

[4] We adopt the analysis in the Public Law Project's response to the Independent Human Rights Act Review's Call for Evidence, paras 2-14

our broader international human rights obligations. Sometimes the protections of the common law may go further than the Convention. However, while this is desirable it does not detract from the importance of UK courts taking account of the case law of the Strasbourg court when interpreting Convention rights.

It is also already the case that UK courts are bound by our existing law of precedent. They are already bound to follow UK Supreme Court or Court of Appeal authority in preference to an inconsistent decision of the Strasbourg court.

A permission stage for human rights claims

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

No.

Section 7 of the Human Rights Act requires any person who wishes to bring a legal case against the government or public body to show that they are victims of a human rights breach: they must show they have been directly affected by an actual or threatened breach of their rights.

We do not believe that individuals should have to prove they have suffered a 'significant disadvantage' to bring a claim under the Bill of Rights as part of a permission stage. In fact, we do not agree with the framing of the question in its reference to the need for Courts to focus on 'genuine' human rights matters'. The consultation provides no evidence to support the argument that large numbers of 'spurious' claims are being brought which 'devalue' the concept of rights.

In judicial review cases (a common way of challenging human rights violations) it is already necessary to pass a permission test, whether the case concerns human rights or not – this permission stage operates to filter out 'trivial' or 'unmeritorious' claims. Most other forms of legal proceeding, including both non-judicial review human rights claims and general tort claims against public authorities, have no permission stage but the courts can be asked to strike out spurious claims or issue 'summary judgment'.

Introducing a permission stage in human rights claims places a greater burden on claimants who may have to demonstrate the merits of their claim before they have received full disclosure from the defendant public body. It 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, such as survivors of trafficking. 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.

There is no other area of law where it is necessary to reach a threshold as high as 'significant disadvantage' in order to bring a claim. Furthermore, what might be regarded as a minor harm that violates rights is still a violation of rights. This proposal would simply make access to justice for human rights violations harder to obtain than for any other kind of abuse or unlawfulness.

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.

No.

As outlined above, we do not believe that a permission stage should be introduced at all, 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, including survivors of torture and trafficking.

Positive obligations

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

We do agree with the framing of the question.

Positive obligations are an essential and inherent part of every effective human rights protection framework. Respecting rights involves more than the government and public bodies refraining from certain actions: they must also take proactive steps to uphold and protect rights. By agreeing to secure to individuals the rights and freedoms defined in the ECHR, the UK has bound itself to any duties that are inherent in ensuring those rights and freedoms are not infringed, whether those duties entail positive or negative obligations.

The consultation presents positive obligations as an expensive burden on public services and proposes that the Bill of Rights should "restrain the ability of the UK courts to use human rights law to impose 'positive' obligations onto [the UK's] public authorities".[5] However, it is not accurate to say that positive obligations are 'imposed' by the judiciary. Positive obligations are a necessary part of ensuring that individuals have recourse to practical and effective safeguards of their rights and freedoms in certain circumstances. Limiting public authorities' compliance only to negative obligations (i.e., by only prohibiting direct action by the State authorities that breach human rights) would erode those rights and freedoms.[6]

For example, in relation to the right to be protected against torture and inhuman treatment, the European Court of Human Rights has recognised that where an individual raises an arguable claim of ill-treatment by agents of a State or private individuals, then the State's duty to secure the rights and freedoms of the individual requires that there be an effective official investigation leading to the identification and punishment of those responsible.[7] Depriving the judiciary of the ability to

---

[5] Ministry of Justice Human Rights Act Reform: A Modern Bill Of Rights , paras 9 and 150.

[6] *Siliadin v France* (2006) 43 EHRR 16, para. 89.

[7] See for example, *Assenov v Bulgaria* (1999) 28 EHRR 652, para. 102; *Commissioner of Police of the Metropolis v DSD* [2018] 3 All ER 369 (SC), para 48.

review whether UK public authorities have complied with their positive obligations would erode rights and freedoms.

Positive obligations are also important in securing individuals' rights to be protected against slavery and human trafficking, another basic value in the ECHR from which no derogation is permissible.[8] In that context, it is not enough that a State simply refrains from infringing that right to show that it has complied with its obligations,[9] particularly since slavery and human trafficking are likely to be perpetrated by private individuals. Rather, in order to ensure the practical and effective protection of these rights, the State is required to put in place safeguards in national legislation, including a legislative and administrative framework to prohibit and punish such acts,[10] and measures to prevent trafficking and to protect victims.[11] These include, in particular, a procedural obligation to conduct an independent investigation of situations of potential trafficking which is capable of leading to the identification and punishment of the individuals responsible.[12] Again, depriving the judiciary of the ability to review whether UK public authorities have complied with their positive obligations will have the effect of profoundly eroding the rights and freedoms that a new Bill of Rights would be intended to protect.

The government has also failed to provide concrete evidence that 'the imposition and expansion of positive obligations' has created 'costly human rights litigation'. When imposing positive obligations, the courts already recognise that public authorities face competing objectives, including "operational choices which must be made in terms of priorities and resources", such that "such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities".[13] As a result, positive obligations are not absolute, but only apply where they are necessary to enable protection of an individual's rights. For example, in relation to preventing modern slavery and human trafficking, public authorities are not required to act on a specific case until they are aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been or was at real and immediate risk of being trafficked.[14]

Limiting positive obligations in any proposed Bill of Rights would not achieve the government's purpose of reforming the Human Rights Act to "[develop]… the UK's tradition of upholding human rights",[15] but would instead erode the UK's commitment to those rights.

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

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

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

---

8 *Siliadin v France* (2006) 43 EHRR 16, para. 112.

9 Ibid, para. 77.

10 *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, para. 285; *Siliadin v France* (2006) 43 EHRR 16, para. 112.

11 *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, para. 285; *V.C.L. and A.N. v. the United Kingdom* (App. Nos. 77587/12 and 74603/12), Judgment of 16 February 2021, para. 151.

12 *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, para. 288.

13 *Osman v United Kingdom* (1998) 29 EHRR 245, para. 116; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, para. 287.

14 *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, para. 286.

15 Ministry of Justice Human Rights Act Reform: A Modern Bill Of Rights , p. 3.

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

We do not agree that section 3 of the Human Rights Act requires amendment.

Section 3 means that any laws in the UK must be read in a way which is compatible with the rights in the Human Rights Act. The IHRAR panel concluded, following careful consideration of the evidence submitted to it, that "there is no substantive case for its repeal or amendment other than by way of clarification or for altering either the balance between sections 3 and 4 achieved by the HRA".[16] The government's consultation notes this conclusion but does not explain why it nonetheless considers that repeal or replacement are justified.

We agree with the IHRAR panel: the case for reform of section 3 has not been made out. We do not agree that section 3 has led the courts to go too far in interpreting legislation in a human rights compliant manner. The case set out by the government at paras 116-123 of the consultation paper does not identify problems with the functioning of section 3 such as would justify the proposed repeal or replacement of section 3. It is right that in interpreting legislation passed by Parliament, there should be a strong presumption that Parliament did not intend to breach human rights unless it expressly states this intention (by way of a section 19 statement) and confronts what it is doing. This is what section 3 achieves.

In our view, the proposals to repeal and/or replace section 3 would shift the balance between section 3 and section 4 (declarations of incompatibility). Option 2, by requiring courts to interpret legislation in a manner consistent with both its wording and its overriding purpose, risks making it harder for UK courts to protect human rights. This would make it harder for individuals to get an effective remedy when their human rights have been breached. Instead of the UK courts being able – so far as is possible – to interpret legislation in a way that respects human rights, they would be forced in more cases to declare legislation to be incompatible. This would undermine the effective protection of human rights and would be a regressive step. It would also lead to more (successful) applications being made to the Strasbourg court because people would be unable to obtain an effective remedy for their human rights in the UK courts.[17]

Section 3, together with section 4, preserve Parliamentary sovereignty: the UK courts can only interpret legislation compatibly with the Convention if it is possible to do so given the words used by Parliament. If Parliament disagrees with the interpretation adopted by the courts, it can legislate to reverse that interpretation.[18] The options proposed by the government in its consultation would weaken the protection of human rights in the UK by privileging a literal interpretation of the words used by Parliament.

---

[16] The Independent Human Rights Act Review 2021, chapter 5, para 7.

[17] See e.g. The Independent Human Rights Act Review 2021, chapter 5, para 20.

[18] See e.g. The Independent Human Rights Act Review 2021, chapter 5, paras 18, 62 and 112-114.

If, despite the views of the IHRAR and the reasons set out above for retaining the approach in section 3 HRA, the government intends to replace section 3, we would favour Option 2(b) which does not require statutory words to be ambiguous in order for a human rights compliant interpretation to be adopted.

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

Question 15: Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

No. This question is misleadingly framed.

The High Court (and other senior courts) already have the power to make a declaration (or even simply a finding) that secondary legislation is incompatible with human rights, leaving it for the government and/or Parliament to decide how to respond to that finding. However, in appropriate cases, the courts can presently go further with secondary legislation because they can quash or disapply it where it is incompatible with human rights. In the case of primary legislation, however, courts can ordinarily *only* make a declaration of incompatibility.

What is therefore being proposed by the government is to *remove* remedial powers (to quash or disapply incompatible provisions) from the courts when they are reviewing secondary legislation. We do not agree with that proposal. It is appropriate that courts can quash or disapply secondary legislation which is incompatible with Convention rights. Unlike primary legislation, secondary legislation is made under powers delegated to Ministers by Parliament. It is subject to varying degrees of Parliamentary scrutiny, but even the most 'enhanced' forms of scrutiny are limited: in particular, Parliament can only approve or reject the whole instrument, it cannot amend it. Thus, secondary legislation is made by the executive branch of government rather than the legislative branch.

It is the proper function of the courts to ensure that when exercising powers to make delegated legislation, as with all other powers, the executive stays within the four corners of the powers delegated to it by Parliament. This includes -but it is not limited to - the requirement imposed by section 6 of the Human Rights Act to act compatibly with Convention rights. This allows the courts to give an effective remedy to people whose Convention rights are breached as a result of secondary legislation made by government.

If the courts were deprived of the power to quash or disapply secondary legislation on human rights grounds, this would give our human rights lesser protection than other legal principles. Limiting the options available to making a declaration of incompatibility risks leaving people whose human rights have been violated without an effective remedy.

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.

No.

It is assumed that this is an alternative to the proposal in Question 15 whereby the court, when it makes a 'quashing order', would have the option to either delay the quashing order or be able to say that any decisions made before the quashing order were lawful.

It is vital that people whose human rights have been breached have an effective remedy. The proposals for suspended and prospective quashing orders risk leaving people without an effective remedy. For example, delaying a quashing order could mean that a person might not benefit from the verdict of the court because decisions made by a public authority before the order would still be lawful. This may be just as bad as only allowing declarations of incompatibility as it would only have effect for the future and would not allow the victim of a human rights violation a remedy for breaches before the date on which the order has effect.

Public authorities: section 6 of the Human Rights Act

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

We do not believe that there is a need to reform the existing definition of public authorities.

Section 6 of the HRA places a duty on all public authorities to act in a way that is compatible with the rights in the Act. Public authorities are defined as central or local government departments and public bodies, courts and other bodies (like businesses or charities) that perform public functions. When the Human Rights Act was being passed by Parliament, it was noted that Section 6 was written as it is to "provide as much protection as possible for the rights of the individual against the misuse of power by the State".[19]

The IHRAR did not identify any problems with the definition of public authorities[20] and the consultation itself recognises that that the current approach is "broadly right" and only identifies one case to support its argument that there is a ned for "greater clarity" of the dividing line between the public and private spheres.

The current approach recognises that many different types of body exercise governmental power, and that the duty to uphold human rights cannot be 'contracted away'. The Human Rights Act therefore includes both core public authorities (like an NHS hospital) and hybrid public authorities (organisations carrying out an act of public function like those running immigration removal centres or accommodation for people seeking asylum). While it is clear that a local council, government agency or a government department is a public authority, non-government organisations, including private companies, also carry out 'public' functions on behalf of the government and should not escape liability for breaching an individual's rights.

To give an example – Brook House Immigration Removal Centre is run by the private company G4S. In September 2017 the BBC's Panorama programme aired a documentary entitled

[19] Human Rights Bill [H.L.] (Hansard, 24 November 1997) (parliament.uk)

[20] Ministry of Justice Human Rights Act Reform: A Modern Bill Of Rights , paras 266-269.

"Undercover: Britain's Immigration Secrets" which showed footage recorded secretly by a Detention Officer working there of the degrading treatment of detainees by employees, including physical assault and mental abuse. After this, two former detainees brought a judicial review to challenge the failure of the Secretary of State for the Home Department to order an investigation in compliance with his duty under Article 3 of the ECHR. The Home Secretary then asked the Prisons and Probation Ombudsman (PPO) but when the case was finally heard Mrs Justice May declared that the investigation failed to meet the requirements of an investigation compliant with Article 3. There was found to be "a real risk amounting to an overwhelming probability that former G4S staff will not attend voluntarily to give evidence".[21] In November 2019 the Secretary of State, under Section 15 of the Inquiries Act 2005, converted the PPO's special investigation into an independent statutory inquiry.

The courts have taken the approach that it needs to be determined whether the entity is exercising the powers and fulfilling the duties of the state or is it merely fulfilling a contract on behalf of the state. This reflects the fact that private organisations are delivering services that would originally have been delivered by a public authority and the flexible approach avoids arbitrary outcomes from 'bright-line' rules. In light of the diverse ways in which governmental functions are now discharged (including increasingly fragmented privatisation), any attempts to bring more 'certainty' risk narrowing the definition of a public authority to such an extent that private companies are freed from responsibilities under the Human Rights Act when they operate government contracts.

It is also important to note that any changes would have consequences in other areas - for example, the Equality Act 2010 cross-refers to the definition of "public function" in the HRA for the purpose of the public sector equality duty.

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.

Neither: we do not believe that any change is needed to section 6(2)

With these proposals, the government is attempting to limit the situations in which public authorities have a legal responsibility to uphold human rights on the basis that the duty under section 6 duty creates confusion for public authorities, especially when they are putting laws made by Parliament into practice. Yet again, there is little evidence for this assertion, but the question is written as if it is already accepted that a change is needed.

[21] *MA, BB v Secretary of State for the Home Department* [2019] EWHC 1523

We disagree that a change is needed. The legal duty in section 6 of the Human Rights Act helps staff in public bodies ensure that their actions when using these laws or policies respects human rights, helps them to connect laws and duties, and ensure they are treating people with equal dignity and respect. For example, a human rights approach is a fundamental part of ensuring that staff in the NHS respect diversity, promote equality and make sure that everyone using health and social care services receives good quality care.[22]

Our fundamental concern is that any further change would give public bodies more freedom to act incompatibly with rights, without any justification to do this. In some situations, it would also make it harder to challenge decisions by public bodies.

Extraterritorial jurisdiction

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

We do not believe the government should restrict the territorial scope of the Bill of Rights.

The IHRAR report notes that from the evidence they received on extra-territorial application, there was "a strong view that no change was necessary"; that any clarifications could be made through case law development; and that "any reform that limited the Human Rights Act's extraterritorial jurisdiction would result in the creation of an unsatisfactory gap" in rights protection between the UK courts and the European Court of Human Rights (ECtHR). This would result in "more cases being brought against the UK before the ECtHR".[23]

The government itself has acknowledged that, given that the UK is bound by the scope of territoriality under Article 1 of the ECHR, restricting the territorial scope of the Bill of Rights unilaterally would simply create a gap between the territorial scope of the Bill of Rights and the UK's obligations under the ECHR.[24] So, any solution would need to be negotiated at the level of the Council of Europe, rather than legislated into the Bill of Rights.

The Human Rights Act's extraterritorial scope is already limited and should not be eroded in the Bill of Rights. Otherwise, it risks creating a situation in which "public authorities are bound by human rights obligations at home, but free to violate them elsewhere".[25] Two particular scenarios merit specific consideration.

---

22 See, for example, Care Quality Commission, Human Rights Approach summary (cqc.org.uk)

23 Chapter 8, page 372, para 80

24 Ministry of Justice Human Rights Act Reform: A Modern Bill Of Rights, para. 280. *See R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 (HL), paras 56–59, in which the House of Lords confirmed that the territorial effect of the HRA should be interpreted as being consistent with the territorial effect of the ECHR.

25 Independent Review of the Human Rights Act, para. 174.

First, reducing the extraterritorial application of the Bill of Rights may undermine the prohibition on torture and inhuman treatment in cases of British overseas military operations. According to ECHR jurisprudence, whenever a State (through its agents) exercises control and authority over an individual in a foreign territory, it exercises jurisdiction, and is under an obligation to secure the rights and freedoms of that individual.[26] This extension of the territorial scope of the UK's obligations provides a basis for civilians who are mistreated by UK troops to seek remedies under the Human Rights Act for breach of the prohibition on torture and inhuman treatment, among other rights. If the territorial scope were narrowed to exclude this basis of jurisdiction, then the UK would provide no domestic remedy for such civilians for the acts of British soldiers when conducting overseas operations, putting the UK in breach of its obligation to provide an effective remedy under Article 13 of the ECHR.[27] It would also appear to signal that the UK government considers that British agents engaged in overseas military operations should be able to breach fundamental rights with impunity, which may affect the UK's international standing, making international coalition parties less likely to engage with the UK.[28] Parliament also recently rejected attempts to decriminalise torture and other crimes against humanity carried out by British soldiers contained in the Overseas Operations Act.[29]

Second, reducing the extraterritorial scope of the Bill of Rights may undermine the rights of asylum seekers, particularly in light of the UK's proposed legislation to push back migrant boats at sea[30] and to send asylum seekers to a third country for offshore processing.[31] Under ECHR jurisprudence, State authorities are considered to be exercising jurisdiction over individuals on ships on the High Seas where they exert effective control over the individuals.[32] Where authorities of a State carry out executive or judicial functions on the territory of another State, the State exercising those functions may be responsible for breaches of the ECHR as long as the acts in question are attributable to it rather than the territorial state.[33] This extraterritorial scope of protection provides a necessary safeguard, requiring UK authorities to comply with the rights enshrined in the ECHR and be held accountable for any breaches where they exercise relevant powers and control. If the territorial scope were to be narrowed in a Bill of Rights, there is a danger of a legal "dark zone" being created that will lead to uncertainty and litigation.

---

26 *Al Skeini v United Kingdom* (2011) 53 EHRR 18, para. 137, cited with approval by the United Kingdom Supreme Court in *Smith v The Ministry of Defence* [2014] 1 AC 52 (SC), para. 46.

27 *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 (HL), para. 57.

28 The Independent Review of the Human Rights Act, para. 177.

29 Peers vote to halt plans to limit UK soldiers' accountability for war crimes | Military | The Guardian

30 Nationality and Borders Bill, clause 44 and Schedule 6.

31 Nationality and Borders Bill, clause 28 and Schedule 3.

32 *See for example*, *Medvedyev v France* (2010) 51 EHRR 39, para. 67; *Hirsi Jamaa v Italy* (2012) 55 EHRR 21, paras 74 and 81.

33 *Al Skeini v United Kingdom* (2011) 53 EHRR 18, para. 135.

Qualified and limited rights

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

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

Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right. We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

Neither: there no justification for codifying the approach that should be taken to assessing proportionality and doing so in the way proposed would add nothing to the approach that is already being taken by the UK courts.

The government wants to set out rules on how courts make decisions about proportionality in legal cases about whether the government or public bodies have restricted a non-absolute right in the correct way. This is another example in the consultation of an issue being presented as a problem and the government clearly have decided already that change is needed, despite the IHRAR report not identifying any concerns with proportionality.

Proportionality is a vital part of the way the Human Rights Act works to protect people individually *and* the public interest. It means that when looking at whether a restriction to someone's non-absolute right is allowed, it must be the least restrictive option possible and must pursue a legitimate aim. This is an important balance, enabling public bodies to make restrictions that may be needed in the public interest, but ensuring they do not go too far and that some element of the person's right remains.

Without the careful consideration that proportionality currently allows, which looks at the facts of each situation rather than trying to apply an unfair blanket approach, there is a significant risk that people's rights will be restricted far more than necessary. The government's proposals are seeking to restrict the ability of courts to make this important balancing exercise, by setting rules to direct how courts make that decision. We would argue that further 'guidance' from politicians about how to balance qualified rights would amount to political interference in the fundamental duties of independent judges: to interpret the meaning of legislation (and rights) and apply case law.

These proposals would seriously undermine human rights protection for unpopular or marginalised groups, and others who lack sufficient influence with the majority party in parliament at any given time. It is a core function of human rights to protect people who lack power and influence from the oppressive tendencies of governments seeking popularity by demonising or otherwise targeting minorities.

It is also important to note that in cases concerning the deportation of foreign nationals specifically, Parliament has already expressed its clear will on complex and diverse issues relating to the public interest considerations in Article 8 cases by enacting Part 5A of the Nationality, Immigration and Asylum Act 2002 through the 2014 Immigration Act. This provides a complete legislative framework for the assessment of proportionality in Article 8 claims, including the weight to be given to public interest considerations in all cases (section 117B) and additional considerations in cases involving foreign national criminals (section 117C). Whilst the government recognises that the above legislation has helped address the use of the Human Rights Act to prevent the deportation of foreign national offenders, it is still calling for further curtailment of judicial proportionality assessments to tackle the 'expanding scope for challenging deportations orders'.[34]

Deportations in the public interest

Question 24: How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.

Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment.

Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights.

Option 3: Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State

We do not believe that any of these options should be pursued.

Limiting the scope of any of our human rights (here Articles 5, 6 and 8) for a "certain category of individuals" goes against the fundamental principles of human rights protection - that human rights are universal and for all people. Any new Bill of Rights must also ensure universal human rights protection. Rights cannot and must not be removed from particular groups of people or in particular situations.

The consultation presents examples of various cases concerning the potential deportation of people convicted of crimes and uses this to suggest there is a widespread problem or "abuse" of human-rights law to prevent deportations, but does not back this up with any evidence to demonstrate that this is the case. Further data provided subsequent to the consultation document shows that just 11% of appeals brought by foreign national offenders against their deportation were successful on human rights grounds (mainly Article 8)[35] – and, even then, this does not show 'abuse' of human rights law: rather, it shows the prevention of violations of human rights by the Tribunal. One of the case examples cited in the consultation document involved a Nigerian (aged 28 at the time) who was born in the UK, had not been to Nigeria since he was a small child, had

[34] Page 45 of the consultation

[35] Foreign national offenders appeals on human rights grounds: 2008 to 2021 - GOV.UK (www.gov.uk)

"known only life in" the UK and was socially and culturally integrated to the UK. Six years had passed between the offence and the hearing before the First-tier Tribunal, during which time the appellant had made "every effort" and had been rehabilitated. Furthermore, in both of the cases relied on in the consultation (where the judgments are publicly available),[36] the Upper Tribunal judges outline the extent to which these cases are exceptional, rare, and not representative of the general approach to appeals by 'Foreign National Offenders' against deportation.

That said, the proposals are seeking to address a 'problem' that has already been addressed. As outlined in our answer to question 23, there are already significant restrictions regarding deportation cases in law via the Immigration Act 2014 – yet, despite these, in communications, the government continues to use an outdated example (which is often repeated by Ministers) from a legal decision in 2009 to justify its proposals.[37]

All three options contravene the fundamental principles of universal human rights law.

Option 1 would mean that for some categories of people (based on a certain threshold such as length of imprisonment) they could never resist deportation on Article 8 grounds. This would be inconsistent with the fact-sensitive approach required to Article 8 proportionality assessment which needs to allow for exceptional cases where, despite the strong public interest in deportation, the consequences for the individual and their family members – who may be British citizens or have lived all their lives in the UK – will be so severe that deportation should not proceed.

As proposed in Option 2, there already is a legislative scheme expressly designed to balance the strong public interest in deportation against human rights claims: Part 5A (Sections 117A-117D) of the Nationality, Immigration and Asylum Act 2002 and the Immigration Rules under Paragraphs 398, 399 and 399A. The scheme, which has been heavily litigated over the recent years, is designed to strike the right balance between the strong public interest in deportation and individuals' human rights. There is no need for further amendment to this scheme in order to achieve the government's objectives.

Option 3 seems intended to leave the courts with a judicial review-like function in relation to Article 8 cases rather than being able to make the proportionality assessment themselves – this would be a massively regressive development to which we would be opposed. It is vital to the effective protection of human rights that there be a full review by an independent judicial decision maker of the proportionality of deportation, while paying due respect to the views of the executive and legislature as to the weight to be attached to the public interest.

These proposals are clearly contrary to the UK's duties under the European Convention on Human Rights, particularly Article 13 which creates a right to an effective remedy for a breach of human rights. They would directly remove rights that people have under the Convention, and leave them with no option but to go to the Strasbourg court to secure the protections they are entitled to.

---

[36] Ministry of Justice Human Rights Act Reform: A Modern Bill Of Rights, para 131

[37] Ministry of Justice Human Rights Act Reform: A Modern Bill Of Rights , para 131

Illegal and irregular migration

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

We reject that suggestion that existing human rights protections are an 'impediment' to government action.

The consultation makes clear that the government wishes to be able to address "illegal" and "irregular" by freeing itself of the need to consider human rights and other legal obligations when removing of unsuccessful asylum seekers and responding to migrants who enter the country on small boats in the English Channel.

We wholeheartedly reject that suggestion that existing human rights protections are an 'impediment' to government action. Excluding people from human rights protections on the grounds of their immigration status is inherently discriminatory. Human rights are universal and if a law (including any new Bill of Rights) is actually about protecting human rights, then the government cannot begin to choose whose rights it will uphold and whose it will not.

For the reasons set out above we do not support the proposals in question 24 which would restrict the protection of Article 8 rights and lead to the UK being in breach of the Convention despite the government's stated commitment to respecting our obligations under the Convention. The points made above in relation to deportation on public interest grounds apply with even greater force to those who have been refused asylum and those who have overstayed their leave, where the public interest in their removal is lower and where they may have forged strong connections to the UK during a period of lawful residence or while waiting for a decision on their asylum claim (a process which can take many years).

A key right that the government engage with when responding to migration across the English Channel is the right to life (Article 2). All public bodies must respect, protect and fulfil the right to life for all people in the UK, this includes those who are in UK waters. Under the Human Rights Act, this right is an absolute right, and any breach of this right is unlawful. This includes failing to protect someone's life when they are known to be at immediate risk, such as those in danger when crossing the channel.

We welcome the commitment of the government to respecting our international obligations towards those who are forced to seek sanctuary, including respect for the prohibition of refoulement and for other breaches of human rights. The Convention and the Human Rights Act should not be seen as impediments to tackling irregular and illegal migration but as providing a framework for ensuring that any measures taken by the UK to tackle these issues are compatible with our international obligations, fundamental principles and respect for our fellow human beings.

In our view, the best way to tackle the challenges posed by illegal and irregular migration in this context is by:

(1) Ensuring that there are adequate safe and legal routes for seeking sanctuary in the UK so that people are not forced into the hands of traffickers and people smugglers. There are many legitimate reasons why people may seek asylum in the UK rather than other countries and at present there are very few safe and legal routes to arrive in the UK and resettlement is only an option for a limited number of people.
(2) Processing protection claims fairly and promptly, ensuring that those seeking protection are treated with dignity and respect throughout the process and that the special needs of survivors of torture, trafficking and other serious human rights violations are met throughout the process.
(3) Prioritising the fight against human trafficking and other forms of modern slavery. This includes timely and correct identification of victims of trafficking; enabling their recovery and rehabilitation; and supporting them to engage in police investigations and prosecution of perpetrators.

Remedies and the wider public interest

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

No change is required to the principles applicable to the award and assessment of damages under the Human Rights Act

Section 8 of the Human Rights Act means that if courts decide that someone's human rights have been breached, they can grant a 'relief' or a 'remedy'. This could mean that they order a public authority to take a certain action, such as reviewing the decision, but it might also include ordering an amount of money to be paid as damages. What type of remedy is awarded is a decision for the courts looking at all the facts of each case individually to decide what is 'just and appropriate'. There is no automatic right to damages.

This is also another example of the government's consultation presenting a solution to a problem that is not well-evidenced. The consultation simply states that the government 'believes' this is a problem, without evidence to back up this assertion.

We believe it is inappropriate to require judges to consider the factors set out above when they are considering the amount of damages to award. Any attempt to place a limit on compensation simpler gives public bodies a freer rein to abuse people's rights – the solution to concern about the impact of a potential damages award on a public authority if that authority 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.

Neither. The question proposes two options for limiting compensation for a breach of human rights, based on the conduct of the victim. Both options are unacceptable.

It is well established across the world that human rights are not 'earned' through good behaviour or given by governments. Rather, human rights are universal: you have them because you are human and the responsibility for upholding them lies with the government. While people have responsibilities towards others in society, but it is not the job of human rights laws to regulate the conduct of individuals: that is the function of (for example) criminal law. The government is contributing to the misinformation that surrounds the HRA and pushing the false and dangerous idea that they are those who are 'deserving' and 'undeserving' of human rights protection.

Remedies for human rights violations have nothing to do with past conduct and should be based on the harm done to the victim.

It is also important to note that there is no evidence for the claim in the consultation document that rights litigation is a vehicle for compensation. Compensation payments in human rights civil cases are considerably smaller than in ordinary civil litigation. Often, rights cases result in no compensation payment at all.