The British Institute of Human Rights
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THE BRITISH INSTITUTE OF HUMAN RIGHTS' RESPONSE TO THE GOVERNMENT CONSULTATION ON HUMAN RIGHTS ACT REFORM: 'A MODERN BILL OF HUMAN RIGHTS'

March 2022

Executive Summary

"A new Bill of Rights is not needed because it will make it harder for the ordinary person to make public bodies and the government accountable [and] make it harder to bring a case to court. It will ultimately give government the power to decide what human rights they will allow us to have."
(Respondent to BIHR's Plain Language Survey)

At BIHR, we see the value of the Human Rights Act (HRA) every day in our work with people accessing services, community and advocacy groups and staff working in public services. The HRA is, in its current form, an incredibly powerful tool which has the power to create a culture of respect for human rights in the UK. Since the passing of the HRA, for over 20 years, we at BIHR have been supporting the operation of the Act with rights-holders and duty-bearers. Our experience shows us that there is still a long way to go until a culture of respect for human rights becomes a reality for all of us, here in the UK.

Our submission to the Independent Human Rights Act Review (IHRAR) in March 2021 made it clear that the way to improve human rights protection in the UK is not through legislative review but through human rights leadership, at all levels, ensuring that the HRA is understood and implemented every day, in every interaction a person has with public services.

Our submission to this Consultation, which proposes not reforming our HRA but instead replacing it with a modern Bill of Rights, sets out in no uncertain terms that these proposals have no democratic legitimacy, no clear evidence base and would have wide-ranging effects, making it harder for all of us across the UK to access our rights. Far from supporting a culture of respect for human rights in the UK, these proposals (which sit in the context of multiple other pieces of rights-regressing legislation passing through Parliament) are a power-grab by the UK Government - a power-grab disguised as “restoring control”, which would decrease accountability of the state, increase reliance on the European Court of Human Rights (ECtHR) and make it harder for people to access their rights and to access justice when rights are risked.

Our key findings

*When we say people, we mean the people who responded to our data gathering processes.

On the proposals for a new Bill of Rights

95% of people were not satisfied with the evidence provided by the UK Government on the need for a new Bill of Rights

95% of people are worried about the Human Rights Act being changed into a Bill of Rights

85% of people are not sure or do not believe the Human Rights Act needs to change

100% of people are concerned about democratic processes and accountability in the UK

On the detail of the proposals which would make up a new Bill of Rights

87% of people do not think a new permissions stage is necessary

96% of people think that adding extra criteria in order to bring a human rights case to court will make it harder for ordinary people to access justice and hold the Government and public bodies to account

83% of people think that it is not necessary for the state to be altering their own positive obligations to protect people's human rights

63% of people do not think changes to the Section 3 duty on public bodies are necessary

82% of people do not think that the Government's consultation pays an appropriate amount of attention on the complexities of replacing the Human Rights Act for devolved nations

75% of people did not think a new Bill of Rights is necessary in England, Scotland, Wales or Northern Ireland

77% of people do not think it is necessary to change the definition of public authority

80% of people do not think new guidance on proportionality is necessary

88% of people do not think that there should be further rules or guidance to the courts telling them to give "great weight" to the views of Parliament

Our key points

On replacing Section 2, this question was asked and answered in the recent IHRAR, which concluded that there is a good relationship between our domestic courts and the ECtHR. There is not a strictly binding duty on UK courts; they do not have to interpret the rights in the Convention the exact same way the ECtHR has before. This proposal is therefore unnecessary, lacking in democratic legitimacy and counterproductive. As has been highlighted in our response as well as the responses of many legal experts across the UK, the changes proposed would result in more so-called 'interference' from the ECtHR, not less.

On the position of the UK Supreme Court, the Supreme Court already has a clear, primary role in interpreting human rights laws; it is the highest court in the UK, and even if the ECtHR decides an issue differently, all UK courts have to follow what the Supreme Court says. This proposal suggests a problem and states your preferred solution, with little evidence to back up either that there is an issue or that the solution proposed would address it.

On freedom of expression, the Consultation is confused. On the one hand, the Consultation identifies freedom of expression as one of the rights that is problematic (enabling "physically obstructive conduct" (p.39) when protesting) and yet, on the other hand, suggests it wants to provide extra protection for this right. This proposal is unnecessary as Section 12 of the HRA is a provision which means that UK courts must ensure that they consider the right to freedom of expression (Article 10) in any orders that they make. As the UK Government, you would do better to ensure the review of the Official Secrets Act is rights-respecting, and that public interest defences for journalists are included.

On adding extra criteria, this proposal would make it harder for ordinary people to access justice and hold the Government and public bodies to account. It would add a further burden on individuals to prove that they have experienced 'significant disadvantage', often before having access to legal advice and without the resources of the public bodies and the Government. Again, this proposal suggests a problem, doesn't evidence what the problem is and then puts forward your preferred solution. This is unnecessary and undemocratic, an attempt to seize power from the individual into the hands of the state. For the HRA to protect rights in the way it was intended, people need to be able to challenge the state through legal process. This proposal would add an unnecessary and unevidenced barrier to doing that.

Our key points

On limiting positive obligations, the HRA already operates effectively to ensure the positive protection of people. Positive obligations are a vital part of this because they place a duty on public authorities to protect our human rights, by taking proactive actions. It cannot be up to each public authority to decide if taking action to protect human rights fits into their overall strategy and policies. The point of any human rights law (including any new Bill of Rights) is to ensure a minimum level of treatment for all people, not a pick and mix system depending on what those with responsibilities choose to do. Once again, this proposal is unnecessary, unevidenced and designed to limit the accountability of the state.

On Section 19 statements, If the Government is seeking to remove the requirement that they make a human rights compatibility statement about any new laws they propose, this is unacceptable. The purpose of Section 19 statements is to ensure that the Government is transparent about any potential human rights concerns with new legislation. It is a small procedural requirement which if removed would have serious implications for human rights in the UK. Again, there is no evidence provided in your consultation for the need to remove this requirement giving it no democratic legitimacy.

On application to Scotland, Wales and Northern Ireland, to reduce the huge issues of how changing our human-rights laws would impact three separate devolved nations to one single question out of 29 is astonishing. This suggests a significant lack of knowledge and understanding of how the HRA works in devolved nations, and how each of the other questions in the consultation also have various implications for devolution. The HRA is working effectively, within the devolved contexts and UK-wide; no change is necessary, nor has it been evidenced, or risk assessed. Any changes to the HRA would have serious implications on the work to increase human rights protections in Scotland, on the peace process in Northern Ireland and is completely opposing to public opinion in Wales.

On the definition of public authorities, the Consultation itself suggests that the approach to defining public authorities is “broadly right” and provides little evidence of why this should change, aside from noting an example where the Ministry of Justice was held accountable. When Parliament first debated the definition of public authorities, there was a deliberate and considered decision to reject a more prescriptive approach and list those bodies subject to responsibilities under the Act. There is no evidence provided as to what has since changed to justify altering this definition. Again, this proposal is unnecessary and unevidenced.

Our key points

On deportation, you appear to have decided that there is a problem, again with little evidence, and have predetermined that one of solutions presented by yourselves will be put in place. The data used as evidence for this proposal does not accurately reflect the law as it is now, as it includes data from before the Immigration Act 2014 which made it harder to win appeals using Article 8. Limiting the scope of any of our human rights goes against the very point of human rights; that they are universal and for all people. It also doesn't accurately reflect how our HRA works, limiting the scope of Article 8 for one group, limits the scope of Article 8 for us all. We strongly disagree with these proposals.

On remedies and responsibilities, if you are concerned about responsibilities, you would be better to focus efforts on not reducing the responsibilities of Government and public bodies to uphold people's human rights, which appear to be at the heart of so many of the consultation proposals. There is a contradiction here, the proposals overall are about limiting the responsibilities, where they are the responsibilities of the state that is. Where they are of individuals, it is suggested that they should carry more weight. Again, this is about weighting the balance of power in favour of the state and goes against the very nature of human rights law.

"Quite simply, we cannot go backwards and the Government should absolutely not be the only decision makers. It is dangerous for our democratic society."
(Respondent to BIHR's Plain Language Survey)

About BIHR & Our Policy Submission Methodology

The British Institute of Human Rights (BIHR) is a charity working in communities across the UK to enable positive change through the practical use of human rights law.

BIHR was established in 1970 with the specific focus on bringing the fundamental protections in the European Convention of Human Rights 1950 (ECHR) into UK law, so people could benefit from their rights at home, and not solely by taking cases to the ECtHR (with the recognition of the importance of a final judicial arbiter in many cases).

By creating a set of domestic legal duties to make 16 rights from the ECHR enforceable in the UK, the HRA creates a vital safety net for us all, especially when we're in vulnerable positions or interacting with public power.

At BIHR we work across the UK to enable positive change through the practical use of human rights law beyond the courts, sharing this evidence of change and people's lived experiences to inform legal and policy debates. We work with three main stakeholder groups:

People interacting with public bodies and services, supporting them with the information they need to benefit from their human rights in daily life (e.g., being able to raise right to family life and non-discrimination issues in discussions with housing officers).

Community and voluntary sector groups to support them to advocate for social justice using human rights standards (e.g., using the HRA Section 6 duty and the right to not be treated in an inhuman way to call for better responses to domestic abuse).

Staff across local and national public bodies and services to support them to make rights-respecting decisions (e.g., skilling up staff to understand what upholding the right to liberty means when supporting the care needs of people with mental capacity issues to ensure dignity, respect and equality is at the heart of decision-making and policy).

Our direct work enables us to call for the development of national law and policy which truly understands people's experiences of their human rights. We work with over 2,000 people across our stakeholder groups each year, across the UK, including devolved countries. Our submission, analysis and recommendations are directly informed by our organisation's unique expertise of human rights law and practice, and people's real-life experiences of the issues, together with a programme of public engagement to collect data and experiences specifically for this consultation.

The Government's Consultation on Human Rights Act Reform

This Consultation does not propose to reform the HRA. Instead, it wants to replace it with a Bill of Rights. This will result in less human rights protections for all of us.

Our HRA safeguards the rights of every single person in the UK. Rights are about making sure that everyone, no matter who they are, is treated with equal dignity and respect. These proposals indicate that these rights are now at great risk.

The suggestion that the rights in the HRA will remain the same in the proposed new law is misleading. This is because, crucially, the Government is proposing fundamental changes to the way our rights work and protect us. This means that on paper the rights look the same, but in practice, every person in the UK will have less protection, and the Government will be have less responsibility to be accountable for our rights.

In isolation, each of the proposals might seem vague or only about small changes, but when combined, these proposals set out substantial changes to our human-rights laws.

These proposals make many references to the roles Parliament and courts play in our democracy, giving the impression that changing the balance of power is somehow about "restoring" control. In fact, our HRA was carefully written to make sure that Parliament always has the last say; the courts cannot overturn Parliament.
These proposals, with the focus on legal complexity, fail to recognise that human rights are about people and power, ensuring those with power are accountable to people, not only the courts but in everyday life. Across the UK, our HRA is protecting people in quiet, often ordinary ways, that do not make the headlines, but which help each one of us live with dignity and respect.

This Consultation must be seen within the wider political context. There are currently a number of other Bills progressing through Parliament, including the Nationality and Borders Bill, the Police, Crime, Sentencing and Courts Bill, the Elections Bill, and the Judicial Review Bill. These Bills, as well as this attempt to replace the HRA, suggests a Government power-grab from rights-holders and the courts. The HRA exists to put limits on the State's power. These proposals will decrease the accountability of the state. They also suggest a watering down of public authorities' legal duties, specifically "positive obligations".

This is the duty to step in protect people from harm; a duty which meant that two women, survivors of rape by John Worboys, were able to hold the police accountable for failing to protect their human rights because of failures to properly investigate reports of his crimes. This duty helped the families of the Hillsborough tragedy to get justice through holding the police to account and providing the ability to ask for investigations when something has gone wrong.

Additionally, we have serious concerns about the process of this Consultation, including why it is taking place when the same UK Government Ministry commissioned the IHRAR last year. That review heard from people across the UK via written evidence and publicly documented meetings, and its findings do not support the subsequent, unnecessary consultation by the UK Government. As the Chair of the Independent Review, Sir Peter Gross, recently confirmed in evidence to parliament's Justice Committee "you cannot put ours [Review findings] down here, the Government's Consultation down there and say that the two work together" (Justice Committee Oral evidence: Human Rights Act Reform, HC 1087 Tuesday 1 February 2022).

Then there is the highly technical nature of the exercise, which will exclude many people whose human rights protections are being, this includes people who face communication barriers, as well as the wider general public. The lack of context throughout the document, with very little explanation of how the HRA works now to ensure the impact of suggested changes is understood. The lack of evidence for the changes being suggested, including very little reference to the evidence that generated a report of more than 500 pages from the IHRAR. Where legal cases are used these are partial, cherry-picked, and lack clarity about the fact that a significant number of those identified as "problematic" were in fact won by the Government. The approach of having set the options already in most questions and asking for a preference, rather than engaging with premise of the questions is problematic.

The lack of public engagement on a profoundly important consultation about the relationship every person in the UK has with the State and public power (publishing a consultation on a website, with a survey, and a series of last-minute roundtables on which there has not even been transparency with attendees on who their fellow participants are, is not public engagement) is problematic.

We are therefore deeply concerned by the whole consultation exercise, from substance to process. Despite the highly dubious nature of this Government Consultation, we have had to respond to this Consultation, as the very future of our human-rights protections in the UK depend on it.

To have not responded would have silenced not only BIHR's expert concerns, but also those of the thousands of people we support each year and the many who have requested our support to heard in a consultation which makes their participation difficult. In this response, we set out our answers to each of the 29 Questions asked in the consultation. As noted above, we provide these for completeness, they should not be taken to endorse this consultation exercise.

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Our engagement with the Consultation

When this Consultation was published on 14 December 2021, we considered the potentially far-reaching impact of these proposals. We were inundated with requests from people, communities, staff working in public services, and policy groups asking for support to know:

1.	What the proposals mean, and concerns about their impact; and
2.	How to respond to the highly technical and inaccessible Consultation.

Our aim was to enable as many people as possible to know about the HRA and how it works, to understand the proposals and their potential impact, and to have their say in some way. To achieve this, we created written resources, delivered online information sessions, and spoke at numerous civil society meetings attended by people across the UK.

We ran workshops and created surveys about the proposed reforms to provide a forum where people could share their views with us. This was driven not only by BIHR's approach to policy work, but by the need to offer alternative ways of contributing to this Consultation for those who were excluded from responding with no alternative formats offered. Please refer to our answer to Question 29 of the Consultation for our views on the accessibility of this Consultation.

Over **250 people** attended our workshops or completed our surveys; their voices are amplified throughout BIHR's response to this Consultation.

In addition to this, we have participated in a range of other events and Consultation engagements hosted by other organisations, networks, meetings etc. and have provided written opinion pieces for others. This includes engaging with journalists, Trusts and Foundations, interested members of the public, people receiving and working in health and social care, and specific work in the devolved nations. We have not quantified these engagements below, but they involved working with several hundred people. It is important to note that our analysis is also informed by this wider, substantial engagement foundation.

All BIHR's engagement activities, resources, and documentation are publicly available, stored on our Human Rights Act Reform Hub, and shared on our social media.

Our Information and Research Workshops

We held two online interactive workshops in January and February 2022, one Plain Language and one Easy Read with closed captions and British Sign Language interpretation.

81 people attended across these workshops in total. Quotations and statistics found in this report are gathered from the chat, notetaking, and live polls.

Our Surveys

We created two online surveys about this Consultation. These included a Plain Language survey focusing on the nature of the proposals and their potential impact on people, and an Easy Read survey focusing on people's ability to take part in the Consultation itself. There were 178 individual responses to these surveys by 7 March 2022.

In this submission, we have combined, analysed, and presented the data from across our workshops and surveys along with our own experience of supporting the practical use of the HRA over the last 20 years. We have also included data gathered (using a similar methodology to the one outlined above) as part of our response to the IHRAR, which draws on our direct engagement with over 400 people as part of that process.

The context

The Human Rights Act

The HRA is the UK law that exists to ensure that everyone's rights are respected and protected here at home. Our HRA takes 16 of the fundamental human rights, which the UK helped write, in the European Convention on Human Rights (ECHR) and pulls them down into our law here at home.

The HRA was passed with cross-party support by the UK parliament; it does not belong to any one particular political party. The HRA's principal aim was to "bring rights home", by taking 16 of the fundamental human rights in the ECHR and putting them into our law here at home.

There are 16 rights in the HRA, called Articles.

Under the HRA:

The Government proposes laws and tells Parliament whether they think it upholds human rights or not (Section 19).

Parliament makes laws and can debate any human-rights issues with draft laws or change passed laws to make them human-rights-compliant.

The courts can review whether laws or the actions of public bodies (national or local) are complying with the HRA. Judges cannot overturn laws made by UK Parliament. This helps to ensure the principle of parliamentary sovereignty.

The HRA, and the rights included in it, belong to everyone in the UK. The rights set out in the HRA are not gifts from the Government or rewards that you can earn.

The rights within the HRA, brought into UK law from the ECHR, are interwoven into the devolution arrangements in Northern Ireland, Scotland, and Wales. The Scotland Act 1998, the Wales Act 1998, and the Northern Ireland Act 1998 (which is part of an international peace process) established devolved legislatures and administrations. Each devolved nation has a range of issues for which it is responsible, many of which impact on human rights.

All the devolution arrangements prevent the parliaments/assemblies in devolved nations from passing laws which may be incompatible with Convention rights, as set out in the HRA. If a court in the devolved nations finds a law to be incompatible with human rights, it can be disapplied, because such a law would be outside the powers delegated to those bodies ("ultra vires"). This is not the same for the UK Parliament, which is sovereign. The mechanisms in the HRA and its position in devolution arrangements are part of what makes the HRA such an innovative, distinct piece of legislation. In devolved nations, like Scotland, the HRA is a crucial building block for increased rights protections.

There are 3 main ways the HRA helps us all to uphold people's human rights:

Human rights legal cases are vital to helping seek accountability when things have gone wrong, but it is important to remember this is only one of the ways the HRA works. The other legal duties mean the HRA can be used in everyday life and work to make sure we are all treated with dignity and respect.

The Independent Human Rights Act Review

In December 2020, the UK Government set up the IHRAR Panel to see how the Act is working and whether it needs to change. In January 2021, the Panel published a "call for evidence" – a set of questions about the HRA that any people or organisations could answer. The review asked narrow legal questions about the HRA in the courtrooms and the relationship with Parliament.

In March 2021, we submitted our response to the IHRAR. At BIHR, we created a large programme of work to support people to share their evidence with the panel, directly working with over 400 people with lived experience of our HRA in its current form. Our recommendations centred around accessibility, accountability, the importance of the HRA to devolution agreements and the need to address the practice barriers, funding barriers, support barriers, awareness barriers, and resource barriers that prevent a culture of human rights being created in the UK.

The evidence that we gathered clearly demonstrated that overwhelmingly, the HRA in its current form is important to the people who use it every day and there was no case for change.

The IHRAR received over 150 responses. When the Report of the IHRAR was published on December 14th 2021, we were pleased that the impact of the HRA was acknowledged outside of the courts.

> "The vast majority of submissions received by IHRAR spoke strongly in support of the HRA. They pointed to its impact in improving public administration for individuals, through developing a human rights culture. Thus, the HRA was not, or not just, to be viewed through the prism of a few high-profile cases or indeed with a focus on litigation at all."
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> Report of the IHRAR, page 16, para 46

The Report was mostly very positive about the HRA and stated that there was no case for any large changes. One recommendation they did make was to increase education and awareness of the HRA.

Below we set out our answers to each of the 29 Questions asked in the consultation. **As noted above, we provide these for completeness, they should not be taken to endorse this consultation exercise.**

Question 1: Interpretation of the Convention Rights: Section 2 of the HRA

Q **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.**

Our response

KEY POINT: This proposal suggests a problem and states your (the Government's) preferred solution, with little evidence to back this up. The UK courts can already draw on a range of laws when making decisions, as identified by the IHRAR. The draft clause is unnecessary.

Under Section 2 of the HRA, when a UK court is deciding a human rights question, it must "take into account" any "judgment, decision, declaration or advisory opinion of the European Court of Human Rights". This not a strictly binding duty on UK courts; they do not have to interpret the rights in the rights in the Convention the exact same way the ECtHR has before.

The question of replacing Section 2 was asked and answered in the recent IHRAR, **which concluded there is a good relationship between our domestic courts and the ECtHR.**

88%

of people think the Human Rights Act is important because our country should have a law which says that governments and public bodies or services should protect our rights, and courts should be able to look at cases about rights.

Data from BIHR's IHRAR research

When considering human-rights cases, the UK courts already start by looking at UK law and common law before thinking about judgments from the ECtHR.

> If the Government has previously obtained relevant information from the same audience, consideration should be given as to whether this information could be reused to inform the policymaking process. (Consultation Code of Practice)

What did we tell the IHRAR about Section 2?

This duty is about consistency and certainty, ensuring that decisions about rights in the UK courts are not completely different from the judgments of ECtHR. Legal certainty is a long-established principle of English law.

The Government has committed to the UK still being signed up to the ECHR. This means people will still be able to take their case to the ECtHR. Therefore, if a UK court decides a question relating to a human right in a way that is very different to previous decisions and judgments of the ECtHR, it is likely the decision will be referred to the ECtHR and may be overturned.

This means there is likely to be an increase in cases being heard at the ECtHR. This would result in more so-called 'interference' from the ECtHR, not less. This is in direct contrast to one of the main aims of the HRA – of bringing rights home, so we can have more court decisions in the UK as there is less need to go to the ECtHR.

Currently, the UK rarely loses a case at the ECtHR, and therefore there is nothing to gain by making this change to Section 2 of the HRA.

Between 2016 and 2019, there were 21 cases against the UK heard by the ECtHR

In 2020, there were only 4 cases against the UK heard by the ECtHR

- Of 284 applications, 280 were struck-out
- 2 found no violation of human rights

What did the IHRAR say about this?

The IHRAR looked at Section 2 and the relationship between domestic courts and the ECtHR in detail and gathered a wide range of evidence about how this section works.

The IHRAR concluded that there was a good relationship between our domestic courts and the ECtHR but that it would be helpful to clarify the order in which courts should consider other laws e.g. other UK laws, common law and then the rights in the ECHR and judgments from the ECtHR.

The review panel suggested making a small amendment to Section 2 to do this. The IHRAR **did not recommend replacing Section 2 with an entirely new clause**.

Option 1 in the Government's proposals would completely take away the current meaning of Section 2 of the HRA. It would mean that courts would not need to consider any judgments from the ECtHR at all. The IHRAR rejected this proposal for reform saying: "**The repeal of section 2 would result in there being no formal link between the HRA and the Convention. While the UK remains a party to the Convention, this option has nothing to commend it**" (p79).

The IHRAR also said that it is important to be very careful when making changes to section 2 of the HRA. This is because changing the relationship between our domestic courts and the ECtHR could lead to a big gap between how rights are looked at and therefore protected. The IHRAR said "**Any such gap would undermine the HRA's aims and lead to an increasing number of applications, including successful applications, brought against the UK before the ECtHR.**" (p78)

Question 2: The position of the Supreme Court

Q **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?**

Our response

KEY POINT: This proposal is suggesting a problem and stating your preferred solution as the Government, with little evidence to back this up. The UK Supreme Court already has a clear, primary role in interpreting human rights laws; it is the highest court in the UK, and even if the ECtHR decides an issue differently, all UK courts have to follow what the Supreme Court says. This proposal is unnecessary.

The Supreme Court already has a clear and long-standing role in interpreting UK human rights law. The system of precedence in the UK's legal systems means that all courts in the UK have to follow what the Supreme Court has said on a previous issue. This includes human rights law. Even if the ECtHR has decided an issue differently to the Supreme Court, UK courts will follow the Supreme Court's decision unless and until it makes a different decision.

Currently, when the Supreme Court looks at a human rights case, it starts first with UK laws and common law before thinking about judgments from the ECtHR. The Supreme Court has shown that they are open to choosing a different approach to the ECtHR in some cases if there is a good reason for this (IHRAR, [para 105 p. 64]).

"...although the duty takes the Strasbourg's jurisprudence into account, it is well established by now that it is not a duty to follow it. [...] The very recent Elan-Cane case is very interesting, because, as Lord Mance said, to some extent it settles the question of how far the courts can go in the interpretation of the convention beyond what the Strasbourg court has indicated might be necessary, because there exists what is called a margin of appreciation."
(Dr Tyrrell, JCHR Oral Evidence Sessions, 26th January 2022)

Case study: R (Christie Elan-Cane) v Secretary of State for the Home Department

Christie Elan-Cane identifies as non-gendered but was informed by the Passport Office that it is not possible to obtain a UK passport without making a declaration of being either male or female. They brought a claim for a breach of their Article 8 right to private life and Article 14 right to be free from discrimination. Elan-Cane relied on a number of ECtHR cases, but the Supreme Court ultimately said, "the matter is one in relation to which the member states should be permitted a wide margin of appreciation, having regard to the absence of any consensus within the member states, the complexity and sensitivity of the issue, and the need for a balance to be struck between competing private and public interests." It said there is no obligation for the Secretary of State to provide Elan-Cane with a non-gendered passport.

What did we tell the IHRAR about the position of the Supreme Court?

We have seen how, when there may be conflicts with domestic case law and ECtHR decisions on a similar issue, UK courts correctly follow the UK decisions rather than those of the ECtHR.

For example, in the UK case of **Leeds v Price**, the Court of Appeal was faced with decision of the UK's superior court (at the time the **House of Lords in Qazi**) which permitted council eviction actions, in contrast to a later decision by the ECtHR involving the UK (**Connors v UK**) which meant that Qazi might have to be reconsidered. The Court of Appeal decided it must follow the UK superior court decision and that the ECtHR decision did not over-rule the UK one. It also referred the case to the UK superior court to reconsider it in the light of Connors.

The UK superior court confirmed that this was the correct approach; the leading case in UK law is binding, and lower courts must follow that to ensure legal certainty. It also recognised that ECtHR decisions are often very fact-specific and the margin of appreciation may be relevant. The Leeds case itself went to the ECtHR and was then reconsidered in the UK Supreme Court in the case of **Pinnock**. The Supreme Court confirmed that it is not bound to follow a decision of the ECtHR; where there is a clear and consistent line of authority, that should be followed.

What did the IHRAR say about this?

The IHRAR said: "The Supreme Court has now made clear, on a number of further occasions, that when considering whether there has been a rights infringement, before turning to consider the HRA and whether a Convention right (as interpreted through Section 2) applies, domestic statute and the common law are first to be considered" (p62).

Question 3: Trial by Jury

Q **Should the qualified right to jury trial be recognised in the Bill of Rights?**

Our response

KEY POINT: This is presented as a suggested improvement in protections; there is, however, little substance to this proposal. There is already protection under the right to a fair trial (Article 6) within the HRA, which operates well within the devolved context, as different nations have different approaches. This proposal is unnecessary.

Adding trial by jury as specific right would change very little in practice. Article 6 in the HRA already protects our right to a fair trial, which has strong protection. The inclusion of this issue serves more as a distraction from the substantial weakening of our existing human rights structures.

Case study: CZ & Kirklees Council

Aneta and Bobbie, who both have mild learning difficulties, had a baby together. On the day Aneta and the baby were due to be discharged from hospital, a social worker from the Local Authority visited Aneta while Bobbie wasn't there. The social worker applied to a Family Court for permission to remove the baby from their care and place them with Bobbie's parents. The order was granted and the child was removed, before eventually being returned to Aneta and Bobbie's care two months later. The Local Authority told the Court that Aneta and Bobbie agreed with the plan to remove the baby from their care, but Aneta said she was not told about the plan, and Bobbie was not present when the social worker visited Aneta and the baby in hospital. The Court agreed with Aneta and Bobbie and ordered the Local Authority to pay them damages. *Names fictionalised

Case study: DG v Secretary of State for Work and Pensions

Daniel applied for Employment and Support Allowance (ESA) but was refused after a medical examination. Daniel had asked the Jobcentre Plus to contact his GP to help gather evidence, but they did not. Daniel appealed the decision but chose not to have an oral hearing on advice from the Jobcentre Plus. Considering that Daniel had received bad advice from the Jobcentre Plus, his mental health issues, and the fact his GP had not been contacted, the Upper Tribunal found Daniel did not have a fair hearing of his appeal, as was his right under the HRA.

It is also important to recognise that the jury trials have different impacts in the devolved nations across the UK. For example, Scotland has a very different jury trial system than England and Wales.

> Throughout these proposals, there appears to have been a total lack of consideration of how they impact Scots law and its operation. They would bring fragmentation; they would lead to confusion for people accessing justice; they would bring legal uncertainty in particular issues such as the right to jury trial. (Mhairi Snowden of Human Rights Consortium Scotland, BIHR's Ask the Experts event, 26th January 2022)

What did the IHRAR say about this?

The IHRAR did not look at this issue, so it is unclear what evidence the Government is using for these proposals, aside from asserting its opinion.

Question 4: Freedom of Expression

Q **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?**

Our response

KEY POINT: There is already protection under the right to freedom of expression (Article 10) within the HRA, plus an additional protection in Section 12 which requires courts to consider this right in making any orders that may limit expression. This proposal in unnecessary.

Section 12 of the HRA is a provision which means that UK courts must ensure they consider the right to freedom of expression (Article 10) in any orders that they make. This means there is already a specific part of the HRA which recognises the importance of freedom of expression when thinking about other human rights.

Case study: Sunday Times v UK

The Sunday Times wanted to publish an article on the drug thalidomide and the proposed settlement of the claims against its manufacturers taken by children affected by the drug. The Government got an injunction and stopped publication of the article on the grounds that it would be 'contempt of court'. The Sunday times took the case to court and the Court found there had been a breach of freedom of expression. It said that, in this case, the public interested was more important than being in 'contempt of court'.

The Consultation says the Government wants to set out guidelines on how the right to freedom of expression should be balanced. The HRA already sets out these guidelines. The right to freedom of expression is a non-absolute right, which means it can be restricted but it must be lawful, legitimate, and proportionate. It should also be noted that proposals elsewhere in the Consultation to change what "proportionate" means would limit the ability to look at all the facts in each situation to make the least restrictive restriction.

The proposals would have a clear impact on our right to privacy as currently protected by Article 8, the right to private and family life, home and correspondence. This has not been considered.

Case study: Bloomberg LP v ZXC

A media company published an article about a company CEO under investigation for bribery and corruption. The Court considered section 12 of the HRA, and that when applying the balancing test between the rights to free expression and to privacy, there must be consideration of how their judgement will impacts expression. The Court cited *Murray v Express Newspapers Plc* in saying they are both "vitally important rights. Both lie at the heart of liberty in a modern state and neither has precedence over the other." The Court concluded that the article would have a negative effect on the Claimant's reputation and therefore his private life and his business activities were not sufficient to make publication of the article in the "public interest".

What did the IHRAR say about this?

The IHRAR did not look at this issue, so it is unclear what evidence the Government is using for these proposals, aside from asserting its opinion.

Question 5: Freedom of Expression

Q

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?

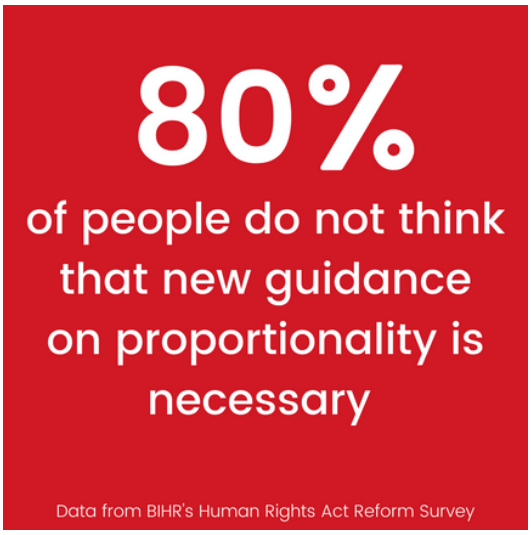
Our response

KEY POINT: This proposal is confused. On the one hand, the Consultation identifies freedom of expression as one of the rights that is problematic (enabling "physically obstructive conduct" (p.39) when protesting) and yet, on the other hand, suggests it wants to provide extra protection for this right. The proposal in this question is unnecessary.

The discussions and proposals about this right are confused and contradictory. On the one hand, it advocates for less restrictions of this right but on the other, when setting out the case for human rights reform, it criticises "that in the light of Articles 10 and 11 of the Convention, protestors can have a 'lawful excuse' for deliberate physically obstructive conduct" (p39 of the Consultation). It really is not clear - does the Government want greater protections for the freedom of speech of some people but not others?

The HRA already protects the right to freedom of expression. This is a non-absolute right and can be restricted BUT there is a process that must be followed to make sure that any restriction is lawful. This means there are already rules to follow to make sure that unnecessary restrictions of this right should not happen.

Decisions about this right are often complex and involve careful balancing of other rights, such as people's rights to privacy or wellbeing. Protecting the right to freedom of expression should not come at the expense of our other human rights; the HRA provides an effective process to make balanced decisions.



Case study: Norwood v UK

Mark put a poster up in the window of his flat, showing a picture of the Twin Towers on fire, a caption reading "Islam out of Britain - Protect the British People" and a symbol of the crescent and star in a prohibition sign. Mark convicted of the aggravated offence of displaying a writing/sign that was threatening, abusive or insulting, and that showed hostility towards a racial or religious group. He argued that he had the right to freedom of expression, which includes speech that may be provocative and contentious. The Court ruled however that freedom of expression can be limited to protect the rights of others, and in this case Mark's poster was a "public expression of attack on all Muslims in the United Kingdom".

Any changes to the process of restricting a non-absolute right set a dangerous precedent. If the Government interferes with this guidance about this right, what does this mean for the rest of our non-absolute rights?

What did the Independent Human Rights Act Review say about this?

The IHRAR did not look at this issue, so it is unclear what evidence the Government is using for these proposals, aside from asserting its opinion.

Question 6: Freedom of Expression

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

Our response

KEY POINT: This looks like a suggested improvement in protections; there is, however, little substance to this proposal, especially when viewed in the wider context. There is already protection under the right to freedom of expression (Article 10) within the HRA. The proposal in this question is unnecessary; the Government would do better to ensure the review of the Official Secrets Act is rights-respecting, and that public interest defences for journalists are included.

> We have been told there will be a new Official Secrets Act which will water-down protections for whistle-blowers and that the Government wants to overhaul the Freedom of Information Act which is one of the crucial tools by which ordinary citizens can get information about what's going on in the corridors of power. (Martha Spurrier of Liberty, BIHR's Ask the Experts event, 26th January 2022)

This is one of the few points in the Consultation where it looks like the Government is suggesting some kind of new or "additional" protections rather than reducing our protections and their responsibilities to us. This is not the case – there is little substance to the proposal.

Journalists do play a very important role in our society, and this includes holding those in power to account. The right to freedom of expression in the HRA, alongside other laws, provides protection for this already.

It is especially important to view this in the wider context, where other Government proposals to change the law threaten journalism. For example, the next steps for changes to the Official Secrets Act have not yet been confirmed, but the Consultation made it clear the Government did not think a public-interest defence for publishing certain protected information was needed (which would protect journalists, as recommended by the Law Commission). Without such a defence, journalists would be treated the same as a person committing espionage, which could result in prison sentences of up to 14 years.

Case study: Breen v Police Service of Northern Ireland

After publishing stories about the murders of two British soldiers, investigative journalist Suzanne was issued a court order to hand over her mobile telephone, computer records and notes on the Real IRA. Suzanne argued that handing over the notes would put her life at risk and those of her family as well. She also argued that it would compromise the protection of her sources. The court agreed, saying "the concept of confidentiality for journalists protecting their sources is recognised in law", including under the HRA.

What did the IHRAR say about this?

The IHRAR did not look at this issue, so it is unclear what evidence the Government is using for these proposals, aside from asserting its opinion.

Question 7: Freedom of Expression

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

Our response

KEY POINT: Looking at this question in isolation it looks like the Government's Consultation is suggesting improvements in protection rather than reducing our protections and their responsibilities to us. This is not the case, there is little substance to the proposal, missing any examples of how the Government will do this, and what would be different. The reason for this is because this right is already protected under Article 10 of the HRA. This proposal is unnecessary.

As noted above in Questions 4, 5, and 6, the HRA already provides protection for the right to freedom of expression under Article 10. Section 12 of the Act also requires courts to make sure they consider this right when making any orders that might limit freedom of expression e.g. in cases about privacy.

Discussions about protecting the right to freedom of expression serve as a distraction from Government proposals to weaken human rights protections for all of us.

What did the IHRAR say about this?

The IHRAR did not look at this issue, so it is unclear what evidence the Government is using for these proposals, aside from asserting its opinion.

Question 8: A permission stage for human-rights claims

Q **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.**

Our response

KEY POINT: This proposal would make it harder for ordinary people to access justice and hold you, the Government, and public bodies to account. It would add a further burden on individuals to prove that they have experienced 'significant disadvantage', often before having access to legal advice and without the resources of the public bodies and the Government. The proposal in this question is unnecessary and we do not think human-rights law should be amended to include a permission stage.

This is an example of the Consultation suggesting there is a problem and stating the Government's preferred solution, without much evidence to back up the concern in the first place. No evidence is provided to back up concerns about cases which are not genuine to suggest this is actually a problem.

Human rights law should not be amended to include a permissions stage. Not only is there no evidence of a problem, but this ignores the fact there are already criteria that people have to meet to bring a legal case against the Government (or public body). Section 7 of the HRA already requires any person who wants to bring a legal case against the Government or public body to show that they have been the victim of a human-rights breach if they want to bring their case to court. This means they must show they have been directly affected by an actual or threatened breach of their human rights.

There are admissibility stages for all legal cases in the UK. If the case is not actually human rights related or it does not have "legal merits", then the courts will not let it progress to a full case.

This proposal to add another layer to seeking access to justice will ultimately make it even harder for ordinary people to hold the Government and public bodies accountable (like many of the other proposals in the Consultation).

96%

of people think that adding extra criteria will make it harder for ordinary people to access justice and hold the Government and public bodies to account

Data from BIHR's Human Rights Act Reform Survey

Adding a further permissions stage (on top of the current criteria) is also likely to mean more cases having to go to the ECtHR. This is because one of the rights in the ECHR (which we note you have committed to remaining within) is the right to an effective remedy (Article 13). This means that when a person's rights have been breached, they should be able to take action to hold the Government or public body to account. The permissions proposals will make this accountability harder, and it therefore likely to lead to more cases going to the ECtHR as people try to access justice.

"I am fighting for disability rights. I know I have good friends and someone I can turn to for help, but other people with learning disabilities may not have that security and stability. They may not have the confidence to speak out. It can be scary, but I know there is always a way to make our voices be heard."
(Fiona Dawson, Why Our Human Rights Act Matters to People with Learning Disabilities)

What did the IHRAR say about this?

The IHRAR did not look at this issue, so it is unclear what evidence the Government is using for these proposals, aside from asserting its opinion.

Question 9: A permission stage for human-rights claims

Q **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.**

Our response

KEY POINT: You, the Government, have provided little evidence to show that there a significant number of human rights cases which are not genuine. We do not think human rights law should be amended to include a permission stage. There should not be any additional barriers to bringing a human-rights case to court. This proposal is unnecessary.

As noted in our response to Question 8, this is an example of the Consultation suggesting there is a problem and stating their preferred solution. No evidence is provided to back-up concerns about cases which are not genuine to suggest this is actually a problem.

We do not think human rights law should be amended to include a permission stage. This is because it just creates additional barriers, to deal with a concern that is already dealt with by Section 7 of the HRA (showing the person is a victim) and the UK court's admissibility process. There should not be any additional barriers to bringing a human-rights case to court.

What did the IHRAR say about this?

The IHRAR did not look at this issue, so it is unclear what evidence the Government is using for these proposals, aside from asserting its opinion.

Question 10: Judicial remedies: Section 8 of the HRA

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

Our response

KEY POINT: This proposal suggests a problem with little evidence to back this up. The HRA already operates effectively. The proposal in this question is unnecessary.

This is another example of the Consultation suggesting there is a problem and stating the Government's preferred solution, without much evidence to back up the concern in the first place. The Consultation provides no evidence of cases which are not genuine to suggest this is actually a problem.

We are concerned with the way in which Question 10 has been worded, as "claimants who have abused their rights or the rights of others," feeds into to the tone of many of the proposals which amount to a system in which some people have more rights than others.

As noted in our answers to Questions 8 and 9, there are already safeguards in both the HRA and the UK's court system to make sure that only people who can show they meet the victim test, and whose case is admissible, will be able to go to court. It is concerning that the Government is seeking to further redefine what it considers to be "genuine" cases, especially when the point of human rights law is to hold the Government (and their public authorities) to account.

Section 8 of the HRA means that if courts decide that someone's human rights have been breached, they can grant a 'relief' or a 'remedy'. What type of remedy is awarded is up to 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. The HRA also contains Article 17, which means that people cannot use their human rights to abuse the rights of others. This may be relevant in ensuring cases are not seeking to undermine rights.

Damages under the HRA (which are different to compensation in negligence claims) are usually symbolic and rarely the main reason for someone bringing a case to court under human rights law.

This puts up yet another unnecessary barrier for ordinary people seeking access to justice, on the basis of an issue that is already dealt with by the Human Rights Act and current UK system.

What did the IHRAR say about this?

The IHRAR did not look at this issue, so it is unclear what evidence the Government is using for these proposals, aside from asserting its opinion.

Question 11: Positive obligations

Q **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.**

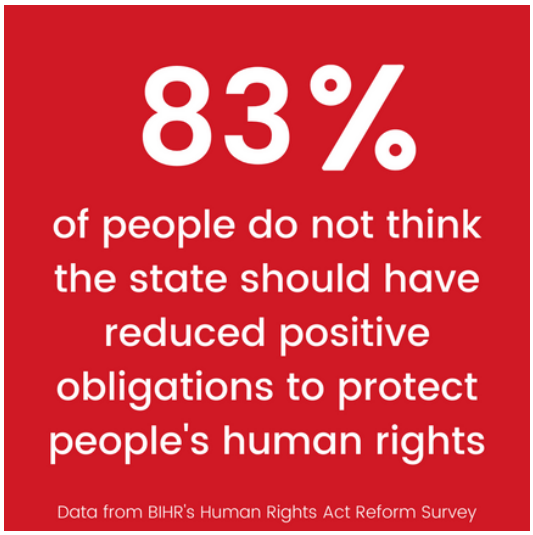
Our response

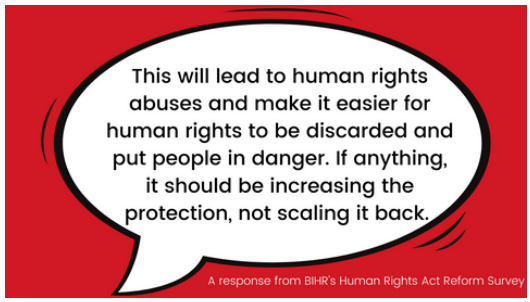
KEY POINT: The Consultation is suggesting a problem with little evidence to back this up. Positive obligations are vital to the protection of people's human rights; this is the duty which means that the Government and public officials must take active steps to safeguard us when we are at known risks. The HRA already operates effectively to ensure this positive protection of people. The proposal in this question is unnecessary.

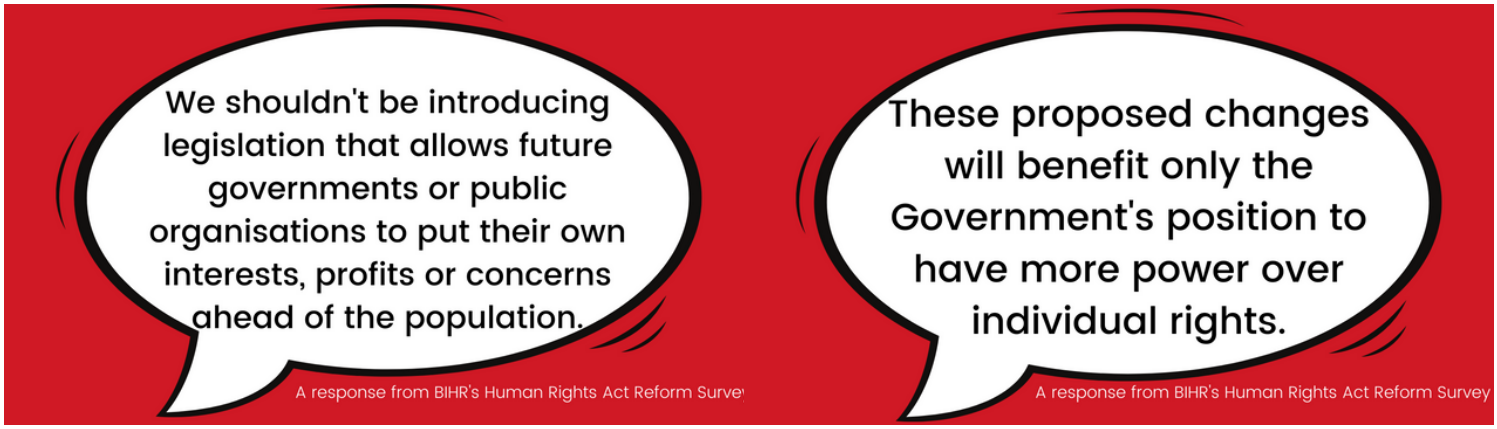
This is an example of the Consultation suggesting there is a problem and stating the Government's preferred solution, without much evidence to back-up the concern in the first place.

The HRA means that everyone has the power to hold public authorities to account. Positive obligations are a vital part of this because they place a duty on public authorities to protect our human rights, by taking proactive actions. For example, this could mean taking action when someone's life is known to be at serious and immediate risk (or the public body ought to know of the risk), such as a woman experiencing domestic abuse from a partner who has threatened to kill her.

This is different to the law before the HRA (or "common law" developed through cases) because it is not simply about the Government leaving people alone. It is about taking actions to protect when people are at risk of serious harm.







Positive obligations under the Human Rights Act have been crucial in achieving justice for some people whose rights were not looked after. For example, the HRA meant that two women, survivors of rape by John Worboys, were able to hold the police accountable for failing to protect their human rights because of failures to properly investigate reports of his crimes. Others, such as Angela, have used the HRA to hold public services to account for their failures to protect the lives of their loved ones.

Case study: Commissioner of Police of the Metropolis v DSD and another

Two women, survivors of rape by John Worboys, won their legal fight to hold the police accountable for breaching their human rights because of failures to properly investigate reports of his crimes. The Supreme Court confirmed that the right to be free from inhuman and degrading treatment, as set out in Article 3 of the HRA, imposes a positive legal duty to investigate reported crimes perpetrated by private individuals. This means it is not enough to simply have the right processes and policies in place, failures in investigations can also breach the law. This case is extremely important for work to end violence against women.

BIHR works with thousand of frontline staff in public bodies each year, including police and emergency services, health and care workers, social workers, etc. We know that far from the vague assertions in this Consultation, that positive obligations provide staff with a powerful tool to take action and protect people who may be at risk of serious harm and/or loss of life.

It cannot be up to each public authority to decide if taking action to protect human rights fits into their overall strategy and policies. The point of any human rights law (including any new Bill of Rights which says it is about human rights) is to ensure a minimum level of treatment for all people, not a pick-and-mix system depending on what those with responsibilities choose to do. Any changes to this framework puts all of our rights at risk and reduces our ability to hold public authorities to account.

Positive obligations on public authorities are the foundation of safeguarding. Without this clear duty, staff will have to navigate a complex maze of other laws, policies and guidance in decision-making to keep people safe.

What did the IHRAR say about this?

The IHRAR did not look at this issue, so it is unclear what evidence the Government is using for these proposals, aside from asserting its opinion.

Question 12: Respecting the will of Parliament: Section 3 of the HRA

Q

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.

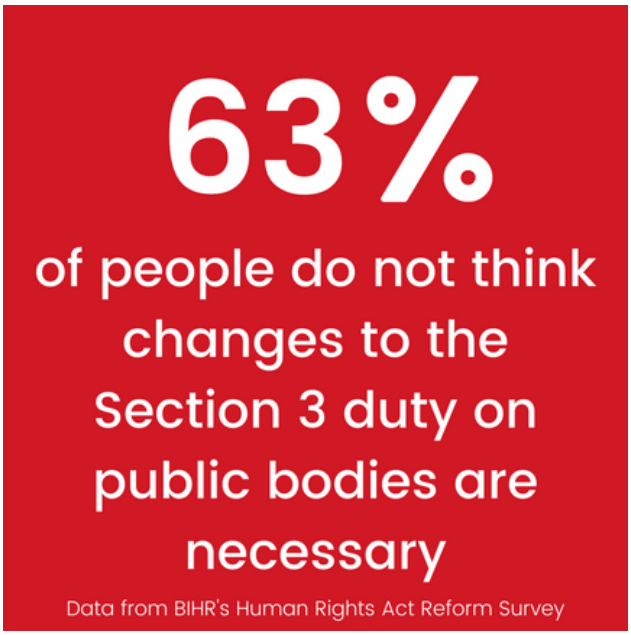
We would welcome comments on the above options, and the illustrative clauses in Appendix 2.

Our response

KEY POINT: This proposal suggests the HRA somehow removes power from Parliament and gives it to the courts. This is not the case. The HRA protects the role of Parliament in making and changing laws; it was deliberately designed to fit with the way the UK's system works and ensure Parliament is sovereign. (You can read our short Guide about these issues here). The proposal in this question is unnecessary.

Section 3 of the Human Rights Act means that any laws in the UK must be read in a way which is compatible with the rights in the Act (which come from the European Convention on Human Rights). Our Human Rights Act was carefully written to make sure that Parliament always has the last say; the courts cannot overturn or change laws (Acts) passed by Parliament.

It is important to remember that whilst section 3 is usually about courts making decisions in legal cases, it also an important tool for public officials to use to make rights respecting decisions. If public officials apply other laws in a way that respects human rights in the first place, this improves decision-making. This lessens the need for ordinary people to take legal cases to courts to challenge decisions which do not respect human rights.



What did we tell the IHRAR about Section 3?

We do not believe the framework in sections 3 and 4 need to be changed. Taken together, these sections are examples of finely balance, nuanced drafting which enables the protection of human rights in practice and within the courts, whilst respecting the UK's constitutional principle of parliamentary sovereignty (Written evidence from Judge Robert Spano, President of the European Court of Human Rights and Judge Tim Eicke (HRA0011) (February 2021)).

As Lord Nicolls noted in Ghaidan: "Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights 'so far as it is possible to do so'. This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention."

He went on to note "that under the 1998 Act the use of the interpretative power under section 3 is the principal remedial measure, and that the making of a declaration of incompatibility is a measure of last resort" (para 39). By passing the HRA, Parliament has acknowledged that there must be a mechanism to allow rights-respecting interpretations of the other laws, but this comes with the important qualification in Section 3 is the requirement that laws be interpreted compatibly with human rights only "so far as it is possible to do so". An interpretation cannot be at odds with the law itself, so the courts cannot fundamentally change a provision to make it rights-respecting if that would conflict with the wider law that the provision sits within.

What did the IHRAR say about this?

The IHRAR looked at the idea of changing Section 3 of the HRA so that a law only has to be looked at in a way that corresponds with the rights in the ECHR if the meaning of the law is unclear.

The IHRAR rejected this idea. Their reasons for this included:

- The aim of Section 3 is that it applies to all laws, not just some of them.
- Parliament can already choose to bring in or keep a law that is not compatible with the rights in the ECHR.
- Concerns that this option would "reduce the current level of Convention rights protection provided for by the HRA". (p239)
- Concerns about the impact on devolution and the Northern Ireland Peace Agreement.

The IHRAR recommended that there should be no significant changes to Section 3. They said that there is no evidence that the courts are not using Section 3 properly. Their recommendation was to amend Section 3 slightly to clarify the order in which the courts use other laws and cases to make their decisions.

Question 13: Respecting the will of Parliament: Section 3 of the HRA

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

Our response

KEY POINT: This proposal is suggesting that the HRA somehow removes power from Parliament and gives it to the courts; this is not the case. Parliament already has the Joint Committee on Human Rights (JCHR), whose role could be formally expanded to include reviewing legal cases where Section 3 is used. This is about the standing orders related to the JCHR, which is a parliamentary process; it has nothing to do with the HRA and can therefore be amended without any change to the HRA. The proposal in this question does not necessitate any change to the HRA.

This an example of the Consultation suggesting that the HRA takes power away from or reduces the role of Parliament. This is not the case, it was deliberately designed to fit with the way the UK's system works and ensure Parliament is sovereign and can make or change laws, including when they think the law has been wrongly applied.

> "The Human Rights Act is itself a product of parliamentary sovereignty."
> (Lord Mance, The Joint Committee on Human Rights Oral Evidence: Human Rights Act Reform, 26th January 2022)

Parliament has already set up with a special body to look at human rights issues, called the Joint Committee on Human Rights (JCHR). The JCHR plays an important role in analysing proposed new laws to check whether they are rights-respecting, and also keeps track of issues related to important human rights legal cases/judgements. We would welcome an enhanced role, with the necessary resources, for the JCHR to continue its important work. This can be done without any changes to the HRA as this is a parliamentary process.

The issue raised here is not with the law in Section 3, but the "damaging perceptions" about it, which this Consultation adds to. It is these perceptions that need to be changed, not the law.

What did the IHRAR say about this?

In addition to what was noted in Question 12, the IHRAR report says “there is no substantive case for its repeal or amendment [of section 3] …that any damaging perceptions as to the operation of section 3 are best dispelled by increased data as to its usage; and that, as a matter both of perception and reality, Parliament could and should take a more robust role in rights protection, a role which could sensibly be reinforced via an enhanced role for the JCHR.” (Chapter 5 p181).

Question 14: Respecting the will of Parliament: Section 3 of the HRA

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

Our response

KEY POINT: We agree with the IHRAR that gathering more information on how the HRA is used would be useful, including a database on the use of Section 3. It is surprising that one does not already exist, especially as the Consultation seems to suggest there is a concern with the use of Section 3. This calls into question the evidence for that assertion. Any such database should be independent. The proposal in this question does not necessitate any change to the HRA.

We agree with the IHRAR that gathering information on how the HRA is used would increase transparency – this should not be taken as endorsing this Consultation in any way. It should be a surprise that such a database does not already exist, especially given the Consultation is raising concerns about the operation of Section 3; it is hard to understand the evidence for this if no such database exists.

As noted in Question 13, the IHRAR panel noted "any damaging perceptions as to the operation of Section 3 are best dispelled by increased data as to its usage" (chapter 5 p181).

We strongly agree that it is time to stop promoting 'damaging perceptions' about the HRA. Sadly, this Consultation is adding to these with the discussion of Section 3 based on selected cases, with little explanation of how the law currently works or the evidence of an issue that such a database would demonstrate. The creation of a database would help give us clear data on this; this should be maintained and updated regularly, by a well-resourced independent body.

What did the IHRAR say about this?

In addition to what was noted in Question 12, the IHRAR report says "there is no substantive case for its repeal or amendment [of section 3] …that any damaging perceptions as to the operation of section 3 are best dispelled by increased data as to its usage; and that, as a matter both of perception and reality, Parliament could and should take a more robust role in rights protection, a role which could sensibly be reinforced via an enhanced role for the JCHR." (Chapter 5 p181).

Question 15: Incompatibility

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

Our response

KEY POINT: This proposal would reduce people's protections and access to justice by removing the power to disapply secondary legislation that breaches human rights (as is currently the case). The proposal in this question is unnecessary and will lead to less protection than is currently available.

Secondary legislation is used a lot in the UK, both for the devolved nations, and for UK law, because so much law needs to be made, and it is not possible for Parliament to debate, scrutinise and make every law. That is why law-making powers are often delegated to Government Ministers. The trade-off is a less democratic review by Parliament. Ensuring that these laws do not breach human rights, and the power to disapply them when they do, is an important safeguard for us all.

The laws setting up the devolved parliaments/assemblies have added protection against this, by repeating the requirement that they cannot pass laws which breach human rights. There is no similar additional protection for law-making powers given to UK Ministers/bodies to create secondary legislation, only the protection we currently have in the HRA.

Case study: RR v Secretary of State for Work and Pensions

The court's ability to overturn secondary legislation is very important and part of the way that the HRA provides protections for us all. For example, the Supreme Court decided in a case brought by a man living with his disabled partner challenging the reduction of his housing benefit (because of the so called bedroom tax) that the local authority must disapply this secondary legislation as it breached human rights. The proposals from the Government will simply result in increase of power for the UK Government.

Case study: Adath Yisroel Burial Society v HM Senior Coroner for Inner North London

"When, in 2018, the Inner North London Coroner considered each case in chronological order of deaths (the cab rank rule) this conflicted with both Muslim and Jewish law to bury people within 24 hours. The Adath Yisroel Burial Society took the Inner North London Coroner to court claiming this was against the Human Rights Act. The judge agreed, declaring that this policy was unlawful as it was against religious freedom and had to be changed. The national Coroners' guidance was consequently amended to accommodate Muslim and Jewish religious law so that their burials could be expedited. This is a good example of how the Human Rights Act allows for laws and guidance to be reconsidered if they turn out to be incompatible with the Human Rights Act."

Source: Deborah Singer, What the Human Rights Act Means to the Jewish Community

What did the IHRAR say about this?

The IHRAR report is clear that it recommends there should be "**no change to the substantive contents of sections 3 and/or 4 of the HRA.**" (Chapter 5, page 249).

In fact, the IHRAR additionally recommended "introducing an ex-gratia payment mechanism where a declaration of incompatibility is made". This would mean giving courts the choice of whether to provide a payment to people whose rights are breached by other laws, recognising that the law will remain the same unless and until Parliament decides to change it. (Chapter 5, pages 256-7).

Question 16: Incompatibility

Q **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**

Our response

KEY POINT: This proposal would reduce people's protections and access to justice, by restricting the remedies that are currently available to people whose rights have been breached. The proposal in this question is unnecessary and will lead to less protection than is currently available.

This is an example of the consultation suggesting proposals which would limit people's access to justice.

Quashing orders are very important. They do not change the law, but rather, it makes sure that the law is followed. The court does not make decisions on behalf of a public authority – instead it simply says that the decision needs to be made again but that the process must be lawful.

Delaying a quashing order, for example, might 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 compromises access to justice for any ordinary person trying to ensure they have been treated fairly by a public body.

Limiting quashing orders reduces the ability of people to hold public bodies to account.

What did the IHRAR say about this?

The IHRAR report recommended changing the HRA to enable UK courts to issue suspended and prospective quashing orders. (Chapter 7, page 327). However, it is important to note they have done so on the basis that the Government's Judicial Review and Courts Bill, which contains the same provision, will be passed by Parliament. The IHRAR recommendation is therefore about ensuring consistency.

However, the Judicial Review and Courts Bill is still going through Parliament and the Government's proposals are not yet law. It is important to note these proposals have been heavily criticised as a restricting rights and access to justice, both by organisations (see, for example, Liberty) and by the House of Lords.

Question 17: Remedial Orders

Q **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?

Our response

KEY POINT: This proposal suggests a problem with little evidence to back this up. Remedial orders already exist under the HRA and, as other relevant publications from the Ministry of Justice show, this is part of an effective system for Parliament to look at whether laws that are incompatible with human rights should be changed (or not). There have been less than 50 declarations of incompatibility in over 20 years of the HRA's operation, and the current system allows for a range of resolutions by Parliament. The proposal in this question is unnecessary.

This is an example of the Consultation suggesting there is a problem and stating the Government's preferred approach, without much evidence to back up the concern in the first place. It is also suggesting that there is currently a limited role for Parliament, which is not the case.

Remedial orders are not used often enough to be a cause for concern. For example, the Ministry of Justice's own information says that there have only been 8 remedial orders between 1998 and 2020 (Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020" Dec 2020, CP 347).

The same information says that in 20+ years there have only been 43 declarations of incompatibilities from the courts, that 15 of these have been changed using other law-making processes, and the rest were overturned by the courts on appeal or resolved before an appeal court made a decision or are being considered. As the Ministry of Justice's own information shows, there are a range of options already available to change law which is incompatible with human rights.

There is clearly a lack of evidence about any problem with the current approach; it is important for human rights law to provide options for changing laws that are not compatible with the Human Rights Act quickly if this is necessary. The current approach should remain.

What did we tell the IHRAR about remedial orders?

Draft remedial orders are considered by the Joint Committee on Human Rights and then need to be approved by both the House of Commons and the House of Lords to become law; thus, operating within the principle of sovereignty. Additionally, enhancing the role of parliament would require parliamentary time and resources. Given that governments control both, there would certainly be questions about partisan influence, as opposed to the current approach with the JCHR which is cross-party and cross-House and utilises expert legal advice.

Urgent orders may be made without advance scrutiny, but they will stop being law if they are not approved by both Houses within 120 days of being laid before Parliament. According to the Home Office: "The decision to use a Remedial Order strikes an appropriate balance between the need to remedy the incompatibilities quickly without further delay and the need to allow parliamentary scrutiny of the measures proposed" (Lady Hale, RR v Secretary of State for Work and Pensions (2019) UKSC 51 para 27).

What did the IHRAR say about this?

The IHRAR recommended that remedial orders should be changed to make it clear that Section 10 cannot be used to change the HRA itself, and to help improve parliamentary scrutiny. It is important to note that they rejected keeping Section 10 as it is because of the potential that this power may be abused by the Government (this is therefore not the same reason as the Consultation proposals).

The IHRAR report also rejects getting rid of Section 10 or making a rule that passing a new Act of Parliament is preferred over remedial orders to change incompatible laws. The IHRAR recommendations to improve parliamentary scrutiny of remedial orders is about the JCHR looking at the principles they use to analyse these orders. The IHRAR believe this can be done through a "non-statutory approach," which means they think there is no need to change the law. (Chapter 9, page 422)

Question 18: Statements of Incompatibility: Section 19 of the HRA

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

Our response

KEY POINT: This proposal suggests a problem with a small procedural requirement which ensures that the Government is transparent about any potential human rights concerns with their proposed laws. This statement helps Parliament review the law and is an important transparency tool. The current system under the HRA is working effectively and there is no case for change.

Currently, Section 19 of the HRA means the UK Government must think about the compatibility of any new law with the rights in the Act.

In practice, this operates as a "human rights assessment" when Government is considering a new law. Usually, the responsible Government department will publish an analysis of why they think their proposed law is compatible (or not) with the HRA. This is not required under the HRA, but it is a positive practice, which shows transparency and accountability.

If the Government is seeking to remove the requirement of making a human-rights compatibility statement about the new laws they propose, this is unacceptable. Ensuring our human rights are protected is about the HRA and ensuring all other laws work in a way that reflect these rights.

The Section 19 statement is important for good governance and transparency. It lets everyone know that the Government has thought about the human rights implications of their proposals.

What did the IHRAR say about this?

The IHRAR considered various options to tweak Section 19 which would give more options/scope for its use (so this is different to the Consultation's proposals which suggest there is some sort of problem with Section 19, without identifying what that is). The IHRAR decided these were not necessary.

The report says, "section 19 plays an important role both in helping to ensure that Government and Parliament consider the application of [the rights in the HRA]...to new legislation ... there can be no doubt that it has had a major, transformational and beneficial effect on the practice of Government and Parliament in taking account of human rights issues when preparing and passing legislation" (Chapter 5, page 244).

Question 19: Application to Wales, Scotland and Northern Ireland

Q **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?**

Our response

KEY POINT: To reduce the huge issues of how changing our human-rights laws would impact three separate devolved nations to one single question is astonishing. This suggests a significant lack of knowledge and understanding of how the HRA works in devolved nations, and how each of the other questions in the Consultation also have various implications for devolution. The HRA is working effectively, within the devolved contexts and UK-wide; no change is necessary.

The Human Rights Act already provides a legal framework for protecting human rights across the UK in a way that respects the individual circumstances of each of the devolved nations, and reflects the fact there are different legal systems within the UK. The best way to reflect the different interests, histories, and legal traditions of all parts if the UK is to keep the Human Rights Act as it is.

83%

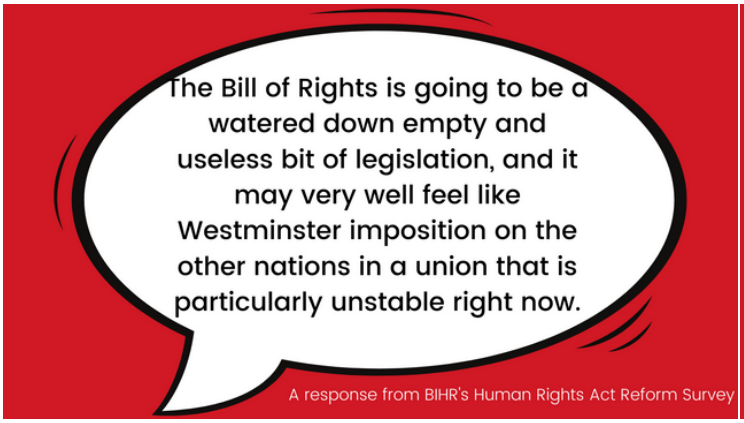
of people think that the consultation does not sufficiently focus on the complexities of replacing the Human Rights Act for devolved nations

Data from BIHR's Human Rights Act Reform Survey

The consultation paper has not evidenced any detailed thinking about what it would mean in practical terms for devolution to replace the Human Rights Act with a new Bill of Rights.

For example, has the Government considered that it is likely to require legislative consent from Scottish Parliament for a new Bill of Rights that would apply for all of the UK? Or that there is a specific bill of rights process which is relevant to Northern Ireland, which was supposed to have progressed as part of the international peace process?

> "We had a 30-year violent political conflict during which the State committed numerous and deep human rights violations in addition to atrocities by illegal armed groups. Part of the deal to end the violence was that the state be reformed and human rights were to be protected in a whole variety of ways."
> (Brian Gormally, BIHR's Ask the Experts event, 26th January 2022)



The human rights culture in Scotland, Northern Ireland and Wales reflects an appetite for more human rights protection, not less which is what the consultation proposals set out. The governments of these nations have issued strongly worded statements to the UK Government about both their lack of consultation and the unnecessary and damaging nature of the UK Government's proposals.

"We are disappointed by the pejorative and leading nature of the report and the consultation questions. It remains our firm view that human rights are, and should continue to be, irreducible and apply equally to all persons. The consultation, in places, seems to veer off course from this important and fundamental principle...The UK Government's proposals raise significant concerns."
(Welsh Government Minister for Social Justice, Written Statement: UK Government Proposal to Reform the Human Rights Act 1998, 12 January 2022)

""The Human Rights Act has a 20-year track record of delivering justice, including for some of the most vulnerable people in our society. Expert evidence gathered by the UK government's own Independent Review demonstrates beyond argument that replacing the Act is not just unnecessary, but undesirable. The UK government's plans are ill-judged and irresponsible,"
(Scotland's Deputy First Minister, DFM condemns 'irresponsible' attack on human rights, 21 December 2021)

Similar concerns have been raised by experts across Northern Ireland.

"The 'problems' identified by the UK Government are not problems created by the Human Rights Act; quite the contrary." (NI Human Rights Chief Commissioner Responds to Proposed Replacement of the Human Rights Act, 14 December 2021)

70%

of people on a BIHR workshop said they were concerned that the proposed Human Rights Act reforms would jeopardise the Belfast/Good Friday Agreement

Data from BIHR's Plain Language Workshop

"For example the NI Human Rights Commission case on Adoption which relied on the right to family and private life (Article 8) and to non-discrimination (Article 14) in our Human Rights Act, means that same-sex couples, those in civil partnerships and unmarried couples have the same right to apply to adopt a child." (Here NI, Why the Human Rights Act Matters for LGBTQ+ people in Northern Ireland)

100%

of people on a BIHR workshop said that greater consideration should be given to how proposed HRA reforms might affect devolved powers

The HRA is working effectively, within the devolved contexts and UK-wide; no change is necessary.

What did we tell the IHRAR about application to devolved nations?

The mechanisms in the HRA and its position in devolution arrangements are part of what makes the HRA such an innovative, distinct piece of legislation. Any move to change the HRA or any Review into its operation must give full consideration to the HRA's distinct role in each devolved nation. In devolved nations, the HRA is a crucial building block for increased rights protections; removing that block or changing its contents could be hugely detrimental.

The Human Rights Act in Scotland

Professor Nicole Busby, in a briefing paper for the Civil Society Brexit Project, flags: "Whilst the scope of the Review appears to preclude repeal of the HRA, it is not known how extensive its recommendations for reform will be. If adopted by the UK Parliament, the current devolution arrangements could prove to be problematic for any such reform, in the most extreme case requiring amendments to be made to the relevant statutes including the Scotland Act. Perhaps more likely, even in the case of relatively minor amendment, is the potential for any proposed reform to disturb the progressive and ongoing development of a human rights-based approach and corresponding culture within Scotland's political institutions with resulting impacts felt by its wider society."

At BIHR's event on Human Rights Day 2020, "70 years of the European Convention on Human Rights, 22 years of the UK's Human Rights Act: Human rights in the UK, Covid-19 response and recovery", Professor Alan Miller, the Independent Co-chair of the Scottish Government's National Taskforce for Human Rights, spoke about the Taskforce's work. He described the situation in Scotland as the opposite of regression, a dynamic movement, together with civil society towards the realisation of rights. Professor Miller stated that, by March 2021, a Bill will be presented to the Scottish Parliament which aims to establish a new human rights framework for Scotland. The Bill includes restating and reinforcing the Human Rights Act and the Equality Act, and to go further by including incorporation of many UN Treaties. Professor Miller highlighted that consent from the Scottish Government and Parliament to agree reforms from Westminster that undermine the HRA would not be forthcoming. The Human Rights Consortium Scotland make the impact of the HRA and their concerns about changes at UK level clear:

"The HRA has had significant impact on the courts, law, policy, practice, and culture within devolved Scotland, as well as giving vital legal protection for individuals. The HRA is the underpinning, starting point for the major human rights law reforms in Scotland -any change to this foundational human rights law will detrimentally impact the strengthening of human rights law at devolved level."

The Human Rights Act in Wales

A similar approach to human rights, one of progression rather than regression, can be seen in Wales. One example of this is through the Welsh Government's approach to children's rights and the commitment to the principles of the United Nations Convention on the Rights of the Child (UNCRC). Wales. Through the Rights of Children and Young Persons (Wales) Measure 2011 a duty is placed on Ministers to have due regard to the UNCRC when developing or reviewing legislation and policy. This means that Ministers must give the appropriate weight to the requirements of the UNCRC, balancing them against all the other factors that are relevant to the decision in question. The measure also makes Ministers responsible for ensuring that people in Wales know about, understand, and respect the rights of children and young people as outlined in Article 42 of the UNCRC. To ensure compliance the Welsh Government also developed the Children's Rights Impact Assessment (CRIA).

The Human Rights Act in Northern Ireland

In Northern Ireland, the Human Rights Act is part of the 1998 Belfast/Good Friday Agreement, part of the international peace process. Any change to the HRA could have a significant impact on Northern Ireland's peace process.

Following the New Decade, New Approach Agreement in Northern Ireland in early 2020, the Ad Hoc Committee on a Bill of Rights for Northern Ireland was set up. The Committee is tasked with considering the creation of a Bill of Rights for Northern Ireland. The Agreement set out that a new Bill of Rights should be in line with the intentions written in the Belfast/Good Friday Agreement, meaning that a new Bill of Rights for Northern Ireland's intention would be to build on the rights set out in the ECHR and HRA. The Human Rights Consortium in Northern Ireland has a clear position on the HRA:
"For the past 15 years the Human Rights Act has been successful in protecting the rights of people with disabilities, older people in care homes, people's rights to a fair trial, protection of family and private lives."

Northern Ireland is moving towards the creation of their own Bill of Rights, using the HRA as the building block for this. Should the UK Government make changes to the HRA without consideration of the Act's significance in devolved nations, this risks at best undermining the progressive work of devolved nations towards greater protections of rights for everyone in society and at worst destabilising a peace process. This Review must consider all responses raising concerns about the Human Rights Act and devolution.

What did the IHRAR say about this?

The IHRAR, rather than looking at devolution in isolation sought to think about devolution across their report and recommendations: "devolution considerations form part of the mainstream of IHRAR's work. Such considerations are important due to the role that the HRA and Convention rights play in the legislative devolution arrangements in Scotland, Wales, and Northern Ireland" (Chapter 1, page 2).

Question 20: Public authorities: Section 6 of the HRA

Q **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.**

Our response

KEY POINT: The Consultation itself suggests that the approach to defining public authorities is "broadly right" and provides little evidence of why this should change, aside from noting an example where the Ministry of Justice was held accountable. We reject any tampering with the definition of public authorities. It was deliberately drafted this way to recognise that many different types of body exercise governmental power, and that the duty to uphold human rights cannot be contracted away. The HRA is working effectively; no change is necessary.

This is one of the few points in the consultation which appears to suggest a "positive" proposal, rather than reducing people's human-rights protections, or Governmental accountability. However, close inspection of the proposal shows this is not the case. There is little substance to the proposal, the consultation itself states the current approach is 'broadly right.' (Para 266)

We strongly reject any attempt to change the definition of a public authority. Through our work with thousands of people and public bodies staff each year, we see how section 6 is vital to ensuring human rights are accessible and usable by people in their everyday lives. This is because it is the legal duty to uphold human rights which is placed on public bodies (like NHS, local councils, and government departments). This means that human rights are not only about taking legal cases but are about the everyday decisions public bodies make about our lives, and how we interact with them.

77%

of people do not think it is necessary to change the definition of public authority

Data from BIHR's Human Rights Act Reform Survey

"It is the Human Rights Act that means inpatients still have a right to access education, to ask for reviews on their care or possessions and more. It means there are responsibilities to look at patients individually and empower them to make sure that those from marginalised communities are getting equal care." (Charli Clements, Lived Experience Expert Consultant, BIHR's Human Rights Day event, 10 December 2021)

"I have come to see human rights compliance as a fundamental standard needed to provide effective services to people on the margins of society who, due to social and economic factors such as stigma and the demands upon public funds, could end up with services that are actually doing such people more harm than good."
(Paul Holden of St Martin of Tours, Mental Health Accommodation Support: making human rights everyone's job)

When Parliament first debated the definition of public authorities when passing the HRA in 1998, it was recognised that a flexible definition was needed, to cover the different ways that public power works in the UK. For example, some prisons are run by private companies and some housing services are provided by housing associations, etc. The HRA therefore includes both core public authorities (like an NHS hospital) and hybrid public authorities (organisations carrying out an act of public function like a housing association). This definition is needed to reflect our society e.g., private organisations delivering services that would originally have been delivered by a public authority.

"There was a deliberate and considered decision to reject a more prescriptive approach and list those bodies subject to responsibilities under the Act. Such an approach was recognised as potentially limiting the access to remedy of the citizen in ways which might be incompatible with Article 13 [which is the right to an effective remedy]."
(JCHR, The Meaning of Public Authority under the Human Rights Act, para 18)

Given that the proposals are not about expanding human rights protections, we are very concerned that the Government is seeking to change the definition of a public authority, which risks reducing those bodies who have a legal duty to uphold our human rights.

Additionally, the definition of a public body in the HRA is cross referenced with other laws, notable the Equality Act. Changing it for the HRA would have additional consequences for other laws.

64%

of people think that the Government amending the scope of the definition of public authorities included in Section 6 would reduce human rights protections

Data from BIHR's Human Rights Act Reform Survey

What did the IHRAR say about this?

The IHRAR did not identify any problems with Section 6 of the HRA. The references to this section in the IHRAR report are about this duty on public bodies is an important part of the framework for protecting rights under the HRA.

Question 21: Public authorities: Section 6 of the HRA

Q **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

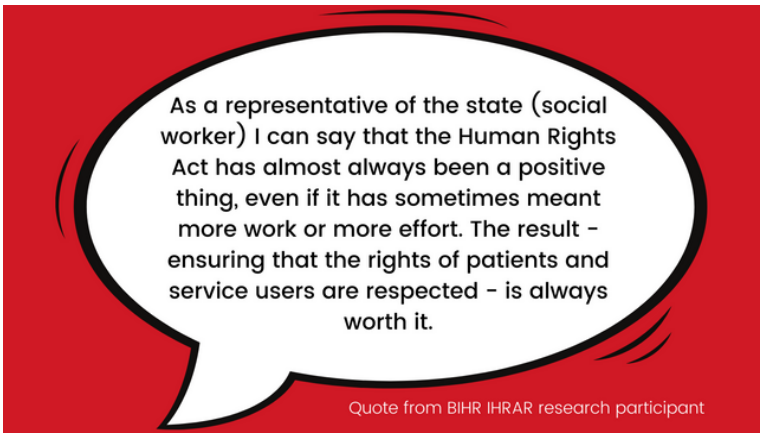
Option 2: retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.

Our response

KEY POINT: This proposal appears to have determined that there is a problem, again with little evidence provided, and has predetermined that one of the solutions presented will be put in place. We reject this; every year BIHR works with thousands of frontline staff, management, and leaders of public authorities, and never once has this been raised as an issue. In fact, the way Section 6(2) of the HRA works currently supports staff in public authorities to navigate the complex maze of other laws in a way that upholds people's human rights. The HRA is working effectively; no change is necessary.

This is an example of the consultation suggesting there is a problem and asking for people to pick between one of several options; the decision has already been made that action will be taken without considering the evidence that people may want to submit.

The Consultation refers to potential problems (x 'could' happen) but provides no examples of this being any more than a hypothetical. There are also no examples of current practice, and how Section 6 is working effectively; we have many (many) examples of this which are publicly available, and we provide a selection in Question 29.



BIHR strongly disagrees with the UK Government about this; each year we work with thousands of staff in public bodies across the UK who are using the duty in the Human Rights Act to help them make rights-respecting decisions. The often-used rhetoric that staff working in public services see the Human Rights Act as a hindrance to decision-making, has, in our experience, not been the case. Indeed, when decision makers are supported to understand and apply the HRA they see it as an incredibly helpful and practical tool for policy and practice.

"The HRA provides us with an objective legal framework for examining those decisions and ensuring that what we are doing and how we are doing it is a lawful, legitimate and proportionate restriction of Articles 8 (psychological and physical integrity) and 5 (liberty) and that we don't risk breaching people's Article 3 rights freedom from inhuman and degrading treatment."
(Sarah, NHS Worker)

Any confusion that does exist arises from the continued misinformation about human rights from the media and politicians – the "damaging perceptions" identified by the IHRAR. This consultation and the Government rhetoric around it is promoting these damaging perceptions, rather than seeking to address them and provide an informed, balanced understanding of how the HRA operates.

Section 6 is an integral way of making sure people can access their rights. It is the legal duty which makes it clear that those who have public power to make decisions about our lives must do so in a way that respects our rights.

"As a service user, I would want to know what my rights are so I can try to challenge decisions made about my care. I would also want staff to know what they are so they aren't breaching my rights without knowing. As a member of staff I want to know more about human rights so I can be sure that I myself and my colleagues are respecting and protecting people's human rights in line with the law. And importantly, so that we are all working towards the same framework."
(Anonymous mental-health professional and lived experience expert)

Any changes to this duty will mean that it is harder for people to hold public authorities to account, this includes Government departments, as well as more local bodies that people interact with every day, e.g., the council, NHS, police forces, state schools etc.

Additionally, our evidence shows that the legal duty in Section 6 of the Human Rights Act helps staff in public bodies navigate the complex maze of other laws and policies they have to use. Ensuring that their actions when using these laws or policies respects human rights, helps them to connect up laws and duties, and ensure they are treating people with equal dignity and respect.

What did the IHRAR say about this?

The IHRAR did not identify any problems with Section 6 of the HRA. The references to this section in the IHRAR report are about this duty on public bodies is an important part of the framework for protecting rights under the HRA.

Question 22: Extraterritorial jurisdiction

Q **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.**

Our response

KEY POINT: There should be no change in the application of the HRA or the ECHR by those exercising UK governmental power abroad, including during armed conflict.

The UK has signed international treaties which protect rights, including under the ECHR and our HRA. The legal obligations under these laws include ensuring that British people or bodies who are exercising the power of the British Government abroad also have responsibilities to meet human rights standards. There should be no limit to application of human rights from the Act or the Convention overseas.

There is much misinformation about the HRA and armed forces. It is important to remember that the HRA, as it currently is, also protects members of the armed forces and their families.

"Human Rights Act reform is concerning for military personnel and their loved ones because our service personnel are both bound by and protected by the HRA. Any moves to dilute its protection, either at home or overseas, makes service personnel more vulnerable to serious state failings themselves and makes it harder for them to do what is already a very difficult job."
(Emma Norton, Centre for Military Justice)

What did we tell the IHRAR about extraterritorial jurisdiction?

The Human Rights Act can apply to acts of a UK public authority performed outside its territory only where the victim was within the jurisdiction of the UK for the purposes of Article 1 of the ECHR. One way that courts have said that the HRA might apply outside the UK is when the state, through its representatives (such as a soldier working for the UK army), exercises 'effective control' over an area or a person. This does not apply to active combat. We believe this is appropriate.

What did the IHRAR say about this?

The IHRAR report notes that of the evidence submissions that they received on extra-territorial application, there was "a strong view that no change was necessary" and that any clarifications could be made through case law development. Evidence suggested "any reform that limited the HRA's extraterritorial jurisdiction would result in the creation of an unsatisfactory gap" in rights protection between the UK courts and the ECtHR. This mean "more cases being brought against the UK before the ECtHR" (Chapter 8, page 372, para 80). The IHRAR recommended this issue should be "addressed by a national conversation" to decide what further measures are needed (Chapter 8, page 336).

Question 23: Qualified and limited rights

Q

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.

Our response

KEY POINT: The Consultation is stating that there is a problem, again with little evidence, and has predetermined that one of the solutions presented will be put in place. We reject this; proportionality is a vital part of the way human rights are protected. It is key to balancing the rights of all people to ensure decisions protect both the person and the wider community, inside and outside the courtrooms. The HRA is working effectively; no change is necessary.

This is an example of the consultation suggesting there is a problem and asking for people to pick between one of several options; the decision has already been made that action will be taken without considering the evidence that people may want to submit.

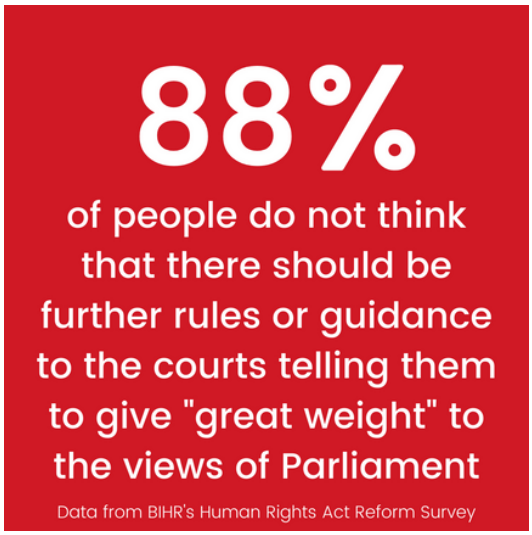
Proportionality is a vital part of the way the HRA works to protect people, both inside and outside the courtrooms. It means that when looking at whether a restriction to someone's non-absolute right is allowed, it must be the least restrictive option possible. This is an important balance, enabling public bodies to make restrictions that may be needed, 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 real risk that people's human rights will be restricted far more than necessary.

You can read more about how proportionality currently works in our short guide.

The Consultation 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. This will place a limit on what should be an independent court system to make decisions based on the facts of each case.

It is not clear what is meant by requiring greater consideration of the views of Parliament; courts already consider this as part of the process. We also note that in our democratic system, Government usually holds the parliamentary majority, and therefore appeals to sovereignty will often equate to increased executive control, rather than the perceived democratic check of parliamentary sovereignty. The proposals would mean that when the courts are balancing human rights, greater weight is given to the Government, who will either directly be party in the case (or indirectly a public body exercising governmental power).



The Consultation also gives little consideration to how this change will impact people's everyday lives outside of the courts. All our work at BIHR shows the importance of the proportionality principle in supporting people and public bodies to have constructive discussions about how decisions can be made differently to ensure the least restrictive approach to any limits on non-absolute rights. This is about real-life issues, such as Ian, who used the HRA to challenge blanket policies on the use of sanitary towels in an inpatient mental health setting or the self-advocate who, during the Covid-19 lockdowns, used our HRA to challenge the policy of her supported-living accommodation that meant she had to isolate in her bedroom for 14 days any time she went to the shops.

Case study: Joe Powell, Chief Executive of All Wales People First

"We had one member who lived in a supported living situation in Wales who, every time she went out, when she came back, she was forced to stay in for two weeks, which was unnecessary and way over-the-top […]. We made the human rights challenge of "lawful, proportionate, least restrictive" and the day after, that situation was overturned, and that person was able to go out."

What did the IHRAR say about this?

The IHRAR report does not identify any concerns with proportionality.

Question 24: Deportations in the public interest

Q **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.

Our response

KEY POINT: This proposal sets out that there is a problem, again with little evidence, and has predetermined that one of the solutions presented will be put in place. The data the Consultation uses as evidence does not accurately reflect the law as it is now, as it includes data from before the Immigration Act 2014 which made it harder to win appeals using Article 8. Limiting the scope of any of our human rights goes against the very point of human rights; that they are universal and for all people. We strongly disagree with these proposals.

The Government appear to have already decided that they will take action without considering the evidence that people may want to submit as part of the Consultation. The suggested "problem" is also not well-evidenced. The Consultation presents examples of various cases about 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.

What is presented is a selection of cases, without evidence of how much of an issue this is. As we understand it, data was not made publicly available to demonstrate how many cases there are in which human rights are relied upon to prevent deportation, nor to provide the nuance of details on whose rights are relied upon, e.g., the person subject to the deportation attempt or dependent children who may be British citizens.

It is unfortunate that 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. There was a significant change in the law in 2014 which means this situation should no longer occur. This change was made without needing to change the HRA. It is also important to note that this example relies on a woman's experience of domestic abuse but fails to acknowledge that it is the HRA which means survivors can hold authorities like the police or CPS to account when they fail to protect them from violence.

> "[The Justice Secretary's press release] appears to be a reference to [AP (Trinidad & Tobago) v Secretary of State for the Home Department] – and, if so, it is to a decision from 2009. A decision twelve years old, and from before the current government. It is not even a recent case. Furthermore, a significant change in the law in 2014 already provides for how courts should approach such Article 8 family life cases."
> (David Allen Green, We will overhaul the Human Rights Act" – What this means, and why the case cited by Raab for doing so may not be a sound example, 5th October 2021)

Part 5A(117C), Nationality, Immigration and Asylum Act 2002

"(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

Limiting the scope of any of our human rights (here Articles 5 Liberty, 6 Fair Trial and 8 Private and Family Life) for a "certain category of individuals" (as proposed in the Consultation) goes against the very point of human rights (not just the HRA) i.e., that they are universal and for all people. Any new Bill of Rights, if it is to be a human rights law, must also ensure universal human rights for all people. Otherwise, it is not a human rights law, and this is clearly a reduction in our current protections.

Limiting rights for some people weakens our protections overall and can very quickly lead to limits on human rights protections for others. The Government, who are the ones with responsibilities under human rights laws, should not get to pick and choose whose rights they uphold and whose they do not.

What did the IHRAR say about this?

The IHRAR report does not identify any concerns with deportation.

Question 25: Illegal and irregular migration

Q **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?**

Our response

KEY POINT: A key right that the Government engages with when responding to migration across English Channel is the right to life (Article 2). Any attempts by the Government to change human-rights law so as to limit duties to protect the right to life towards refugees and migrants under this right would endanger the protections of the right to life for us all. This same right and duty is what protects people at risk of death in mental health hospitals, or people whose family or partner may threaten their life.

The HRA protects the rights of everyone. It is universal. This is what makes it so important and so effective. 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.

Case study: Lola's Story

Lola was a pregnant woman and had just been refused asylum. She was living in government arranged accommodation and was issued a 'termination of support' notice while she was giving birth in hospital, telling her she would no longer be receiving housing support from the Home Office. She was a lone parent, and this was her second child. Lola got some support from a local charity who said to the housing provider that evicting the family in these circumstances might breach their right not to be treated in an inhuman and degrading way (Article 3, Human Rights Act). The provider decided to amend the status of the notice, giving Lola and the charity time to apply for accommodation support for the family.

A key right that the Government engage with when responding to migration across 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 HRA, 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.

Any attempts by the Government to change human rights law to limit duties to protect the right to life towards refugees and migrants would endanger the protections of the right to life for us all. For example, this same right and duty, is what protects people at risk of death in mental health hospitals, or people whose family or partner may threaten their life.

Case study: Bryn's Story

Bryn had severe learning disabilities, epilepsy, was non-communicative and blind. He showed symptoms of a heart condition, but his GP stated that he would not be arranging a heart scan as 'he has a learning disability and no quality of life'. Bryn's advocate raised Bryn's right to life and right to be free from discrimination under the Human Rights Act. The advocate asked the doctor if he would arrange a heart scan if anyone else in the room was in this situation, and the GP said yes, he would. This led to a change in decision, and it was agreed that Bryn would have a heart scan. However, the advocate had to raise this three more times before it took place. Sadly, Bryn passed away as a result of his heart condition before any treatment could take place.

We note the wider context of the Government's Nationality and Borders Bill, which is currently being considered in Parliament. The House of Lords have rejected key elements of the Government's proposals which would reduce people's human rights protections. These proposals have been criticised by both the United Nations High Commissioner for Refugees and other UN experts.

We also note the recent case in the Court of Appeal concerning asylum-seekers who arrived in the UK by small boats in the Channel.

> "An asylum seeker who merely attempts to arrive at the frontiers of the United Kingdom in order to make a claim is not entering or attempting to enter the country unlawfully".
> (Bani and others v The Crown)

This suggests the Government's use of the term "illegal" here is based on "misunderstanding of the law" (para 6).

What did the IHRAR say about this?

The IHRAR report does not identify any concerns about this issue.

Question 26: Remedies and the wider public interest

Q

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?

Our response

KEY POINT: This proposal sets out that there is a problem, and that action needs to be taken, without giving evidence to support these suggestions. The consequence of being held to account under the HRA is a key driver for ensuring public bodies (including the Government) make decisions that uphold people's human rights. This is a positive practice and a very effective way of encouraging public bodies to embed human rights within everything that they do every day. The HRA is working effectively; no change is necessary.

This is an example of the Consultation suggesting there is a problem and asking for people to pick between one of several options; the decision has already been made that action will be taken without considering the evidence that people may want to submit.

This is also another example of an ill-evidenced proposal in the consultation. The paper simply states that the Government 'believes' this is a problem, without a single example or evidence to back up this assertion.

There is no case for changing the current situation; the consequences of being held to account in law are a key driver for ensuring public bodies (including the Government) make decisions that uphold people's human rights in accordance with the law. This is a positive practice.

64%

of staff in public bodies and services have used the Human Rights Act to help change decisions or policies so they can better support people

Data from BIHR's IHRAR response

I'm particularly concerned with the aspects that would allow for "the public interest" to be given precedence over the individual's rights.

A participant on BIHR's Easy Read Workshop

"Without the requirements of the HRA I can guarantee that unfair and unjust policies would be in place, affecting some of the most vulnerable in society."
(Social Worker, BIHR's IHRAR research)

Case study: Susan's Story

Susan was an older woman with learning disabilities who was taken into hospital. Susan had a doll which she loved and took it with her, but her family believes this was damaged deliberately by staff to punish Susan for not doing as she was told. The hospital would not apologise or investigate what had happened until Susan's family contacted lawyers who helped her argue that her treatment was inhuman and degrading (Article 3 of the HRA). This was settled out of court and the hospital made a financial award to enable Susan to move out of the hospital and help her continue her life. The hospital also agreed to investigate the incident to make sure it did not happen to anybody else.

Certainly, the Government should not be setting criteria for how the courts make decisions about what remedies are awarded when a court finds that public bodies (including the Government) have breached human rights. Our independent courts are best placed to make these decisions, on the basis of the facts of each case.

"A human rights culture is one that fosters basic respect for human rights and created a climate in which such respect becomes an integral part of our way of life and a reference point for our dealing with public authorities... in which all our institutional policies and practices are influenced by these ideas... The building of a human rights culture... [depends] not just on courts awarding remedies for violations of individual rights, but on decision-makers internalising the requirements of human rights law, integrating to standards into their policy and decision-making processes, and ensuring that the delivery of public services in all fields in fully informed by human rights considerations."
(JCHR, The Case for a Human Rights Commission, HL Paper 67-1)

What did we tell the IHRAR about remedies?

78% of respondents said that the Human Rights Act is important for them and/or the people they care about as it helps to raise concerns with public bodies or services when they feel their rights are not being upheld.

A culture of respect is fundamental for every person, in their everyday life. The legal duties imposed by our Human Rights Act require that when people are interacting with public bodies and services, as so many of us do in our everyday experiences (e.g., housing healthcare, social care, education, etc.) the officials involved should respect, protect, and secure the full enjoyment of human rights. Essentially, human rights should be the reference point for every person's dealings with those who hold public power.

What did the IHRAR say about this?

The IHRAR report does not identify any concerns about this issue.

Question 27: Roles and responsibilities

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.

.

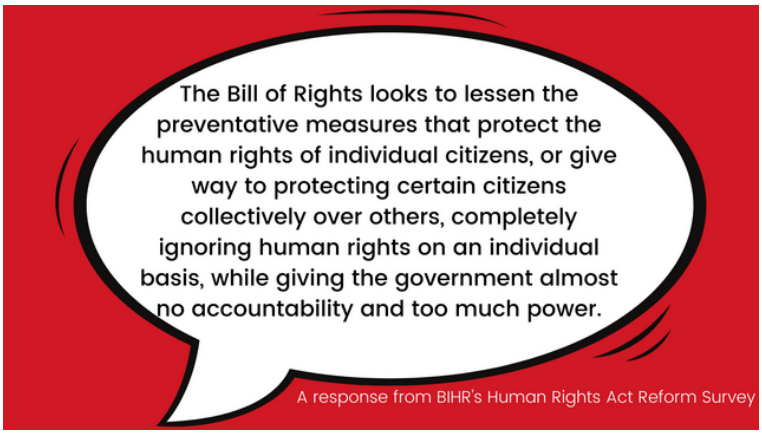
Our response

KEY POINT: The Consultation suggests the Government has predetermined that there is a problem before considering evidence that people may want to submit as part of the Consultation. The Consultation's proposals are alarming because they suggest human rights would no longer be universal and would create a system in which people deemed as "underserving claimants" would not be able to access remedies if their human rights have been breached. We strongly disagree with these proposals.

This is an example of the Consultation suggesting there is a problem and asking for people to pick between one of several options; the decision has already been made that action will be taken without considering the evidence that people may want to submit.

The proposals are alarming because they suggest human rights are no longer universal, for everyone. Human rights are not rewards. They are not something that we earn for good behaviour.

We all have human rights because they are universal – this is not specific to the HRA; this underpins all human rights law. If a new Bill of Rights seeks to change this, then it is not a human rights law and weakens all of our protections.



"People with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of their disabilities, but the **starting point should be the same as that for everyone else.** This flows inexorably from the **universal character of human rights**, founded on the inherent dignity of all human beings...Far from disability entitling the state to deny such people human rights; rather it places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities."
(Lady Hale, P v Cheshire West and Chester Council and P & Q v Surrey County Council)

We strongly disagree with the Government's proposals to create a system in which the people they deem "underserving claimants" cannot access remedies if their human rights have been breached.

Making changes to limit the rights of some people can very quickly lead to limiting the rights of us all.

If the Government is concerned about responsibilities, you would be better to focus efforts on not reducing the responsibilities of Government and public bodies to uphold people's human rights, which appear to be at the heart of so many of the consultation proposals.

What did the IHRAR say about this?

The IHRAR report does not identify any concerns about this issue.

Question 28: Extraterritorial jurisdiction

Q **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.**

Our response

KEY POINT: This question is asking people to look at solutions to a problem that is not well evidenced. Parliament is already responsible for responding to negative judgments from the ECtHR if it wants to. There is nothing in the HRA that forces the Government or Parliament to take any specific action if the European Court makes a judgment against the UK. The HRA is working effectively; no change is necessary.

This is another example of the consultation both suggesting a solution to a problem that is ill-evidenced, and that the Government has already decided it will take action and is simply asking people to look at the option presented rather than considering evidence on the issue.

This issue is not about the HRA; the Act does not require Parliament to take any specific action when the ECtHR decides the UK Government has breached human rights. The HRA is working effectively; no change is necessary.

Case study: Hirst v UK

Parliament is already responsible for responding to negative judgments from the ECtHR if it wants to. There is nothing in the HRA that forces the Government or Parliament to take any specific action if the ECtHR makes a judgement against the UK (and the person who took the case). This was demonstrated with the discussion around prisoner voting. Despite the Court's decision (which is often misrepresented as a sweeping demand for change, rather than identifying the need for a more proportionate approach), it was for Parliament to decide whether they did (or did not) change the law in response to the judgment. Over a decade after the issue was brought to the ECtHR, a small change was made to the rules around prisoner voting which meant a small number of prisoners would be able to vote. This brought the UK in line with the decisions by the European Court of Human Rights without a large change in the UK's law. The important thing to note is that it is Parliament's decision whether they do or don't change the law in response to a judgment.

Moreover, there are several examples of judicial dialogue – with positive benefits - occurring across a range of issues between the UK courts and the ECtHR. For example, in the UK case of R v Horncastle, the Supreme Court had to consider the admission of hearsay evidence when a witness could not attend court in person. The Supreme Court declined to follow the ECtHR Chamber decision in Al-Khawaja , which took a limited view of when hearsay evidence could be relied on. The UK's Supreme Court found that the common law and statutory safeguards prevented the trial being unfair and the ECtHR's approach would lead to difficulties for English criminal procedure. Al-Khawaja was later heard by the ECtHR, and the Court reversed its the earlier finding, not least in light of the view taken by the UK Supreme Court in Horncastle and held that in principle English law contains sufficient safeguards to comply with the right to a fair trial (Article 6).

It is also worth noting important information to place the consultation in context. The UK Government loses very few cases at the ECtHR; there are in fact only a small number of cases involving the UK and the Government wins most of them. For example, in 2020 there were 284 applications to the ECtHR concerning the UK. The vast majority of these cases were struck out (280) and only two of these applications found a violation of human rights. You can find more statistics about the UK and the ECtHR in the United Kingdom Country Profile.

Table 1. Applications against the UK allocated to a judicial formation[13]

1959–2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	Total
14,092	1,127	2,745	1,542	1,702	908	720	575	372	415	354	**24,552**

What did the IHRAR say about this?

The IHRAR did not look at this issue, so it is unclear what evidence the Government is using for these proposals, aside from asserting its opinion.

Question 29(1): Impacts

Q **What do you consider to be the likely costs and benefits of the proposed Bill of Rights?**

At BIHR, we firmly believe that there are only costs associated with the proposed Bill of Rights. There are no benefits to dismantling the Human Rights Act and cost will be vastly weakened human rights protections for all of us and fewer mechanisms for holding the state to account.

Throughout our response, we have provided evidence to support our concerns about the negative impacts of the proposed Bill of Rights. This includes the first-hand perspectives from people, communities, and staff in public services gathered in our recent workshops and surveys, in addition to our own experience of supporting the practical use of the HRA outside of the courtrooms, over the last 20 years.

We will not repeat this in full here but instead will summarise the key costs arising from the reform proposals.

Reducing state accountability

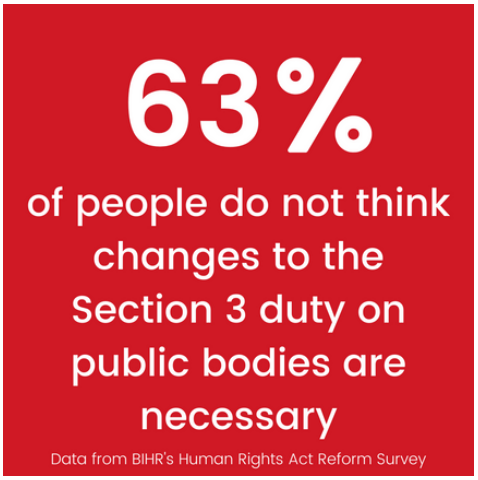
We believe many of the proposals outlined in this Consultation would lead to a reduction in the accountability of public authorities (or put another way, a reduction in the responsibilities of those with public power). For example:

Question 8: Introducing a 'permission stage' for bringing a human rights case to court. We believe this would make it harder for ordinary people to access justice and hold the Government and public bodies to account.

Question 11: Limiting the positive obligations on public authorities under the HRA. This is the duty on staff to take proactive steps to protect the rights of the people they support. Changes to this framework would put all of our rights at risk and reduces our ability to hold public authorities to account. For those staff who use this law in practice every single day (not simply police officers, but social workers, health and care staff, welfare and housing professionals, etc.), losing this clear duty means they will have to navigate a complex maze of other laws, that policies and guidance without an overarching framework, when making decisions to keep people safe.

Creating legal uncertainty

The Consultation claims that Bill of Rights proposals will restore legal certainty in the UK judicial system. However, we believe many of the proposals will have the opposite effect, causing greater legal uncertainty for courts examining human rights claims.

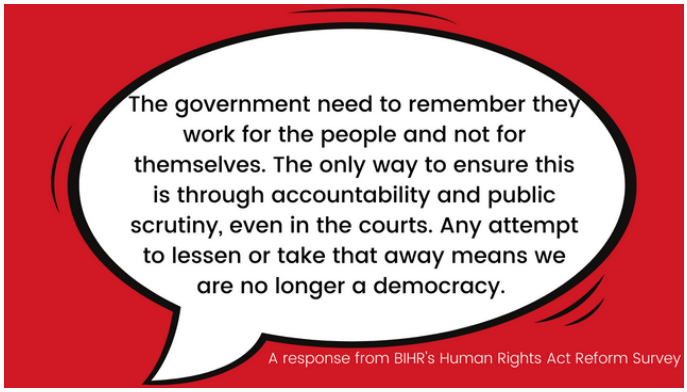


Many of the proposals would narrow the interpretation and application of the HRA for judges in UK courts, ultimately leading to an increase in cases being heard at the ECtHR. This includes:

Question 1: Replacing Section 2 of the HRA with the requirement that domestic courts use UK law to decide on human rights cases rather than following legal decisions in the ECtHR. The IHRAR recommended making a small amendment to Section 2 to clarify how it works; it did not recommend what is being proposed here.

Question 12: Changing Section 3 of the HRA, which means that any UK laws must be read compatibly with the rights in the Act. The IHRAR recommended that there should be no significant changes to Section 3. They said that there is no evidence that the courts are not using Section 3 properly.

Not only will these proposals create legal uncertainty for the courts, they will result in more people being unable to achieve justice in the event a public authority violates their rights. The Consultation does not appear to have considered that this will then impact how human rights legal protections and duties are applied in practice, outside courtrooms, creating further uncertainty in people's everyday interactions with public bodies.



A move away from universality

The proposed Bill of Rights will undermine one of the fundamental principles of human rights: universality. Every person is entitled to their rights, regardless of who they are or what has happened in their lives.

Proposals for the Government's new Bill of Rights suggest measures that would dilute this core principles of human rights include:

Question 24: Limiting the scope of certain rights for certain individuals wishing to pursue human rights claims, namely people at risk of deportation.

Question 27: Introducing individual 'responsibilities' when judges consider human rights cases and taking into account people's 'past conduct' when deciding about remedies.

Not only would these proposals lead us down a sinister path in which a government decides whose rights are more important, but a watering down of one groups' rights would also lead to a reduction in rights for everyone. This is simply unacceptable.

The wider context of accountability in the UK

These are just three of our key concerns about the impact of the proposed Bill of Rights. However, as damaging as these reforms would be, they must be seen within a wider context of numerous Bills which are currently progressing through Parliament.

The Police, Crime, Sentencing and Courts Bill, the Nationality & Borders Bill, the Elections Bill, the Judicial Review and Courts Bill, and others all pose threats to human rights and to democracy in their own ways.

If the proposed Bill of Rights on its own came to be, the costs of this would be extensive and far-reaching. If it came to be alongside the raft of other Bills we are currently faced with, the rights of every person in the UK will suffer.

The importance of evidence

This Consultation invites respondents to evidence the potential impact of the proposed Bill of Rights. Whilst we are willing and able to provide this, and have done so throughout our response, we must highlight that throughout the Consultation, the evidence base for proposals is severely lacking.

The Consultation questions are based on statements which rely heavily on the Government "believing" something is an issue, without research or evidence (or if such exists not making it publicly available in a timely fashion) or quoting cherry-picked cases.

The Consultation document provides very little context explaining how the HRA currently works. It is therefore unfair to ask people to provide evidence of the costs and benefits of these proposals, when a clear and robust evidence base for suggesting them has not been provided in the first place.

As we have noted, this Consultation follows the IHRAR, which was established to "examine how the Human Rights Act is operating 20 years on". According to the IHRAR's final report, it received over 150 responses, as well as running a number of roundtable meetings to hear directly from different groups of people. At BIHR, we created a large programme of work to support people to share their evidence with the panel, directly working with over 400 people.

Overall, the IHRAR was mostly very positive about the HRA and stated that there no case for any large changes. Notably, the Review's report acknowledges that:

> "The vast majority of submissions received by IHRAR spoke strongly in support of the HRA. They pointed to its impact in improving public administration for individuals, through developing a human rights culture. Thus, the HRA was not, or not just, to be viewed through the prism of a few high-profile cases or indeed with a focus on litigation at all." (p.16, para 46)

It is therefore extremely concerning that this Consultation largely ignores the IHRAR's recommendations and goes much further with these proposals. This is particularly true in light of the UK Government's own Code of Practice on Consultation, which sets out in Criterion 5.1 that "If the Government has previously obtained relevant information from the same audience, consideration should be given as to whether this information could be reused to inform the policymaking process."

We believe the compliance of this Consultation with the "Gunning criteria" are questionable at the very least. As was established in the case of R v Brent London Borough Council, ex p Gunning ((1985) 84 LGR 168), consultations must:

Take place when the proposal is still at a formative stage – yet here the very foundational question of whether the HRA should be replaced with a new Bill of Rights is not even asked and was clearly rejected in the previous Independent Review which found no case for change beyond minor procedural tweaks. Additionally, many of the proposals already indicate the Government's position on the issue and your chosen path.

Sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response – yet, as we note above there is a significant lack of evidence across the entire Consultation, beyond assertions of the Government's opinion or thoughts.

Adequate time must be given for consideration and response – it is difficult to see how a written consultation paper published on a website, with a 12-week consultation period, issued in mid-December with the intervening Christmas and New Year breaks, is adequate for a consultation which will fundamentally change the relationship every person in the UK has with the state, and the way our state bodies interact. The inadequacy of the Government's approach to ensuring people with learning disabilities and other communication needs are able and have the time to engage with this consultation is so poor as to risk being unlawful. We note that we are part of a groups of organisations who instructed solicitors to write to the Secretary of State on the 3 March 2022 outlining this and requesting a resolution and compliance with the law.

The product of consultation must be conscientiously taken into account – it remains to be seen whether and how this will happen, and BIHR will remain fully engaged in this process.

Question 29(2): Impacts

Q **What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform?**

The HRA currently provides protections for us all, no matter who we are. The HRA plays a vital role in ensuring that people with protected characteristics such as disability, age and ethnicity have the same rights as everyone. As outlined in the first part of this question, the proposed Bill of Rights will lead to a reduction in people's ability to hold public authorities and Government to account if their rights have not been upheld. As human rights law is a rulebook for how the state treats people, these proposals would have a significant impact on those who access, or try to access, public services frequently. People who use health and social care services, survivors of domestic abuse, migrants and people seeking asylum, and many other groups who often interact with public authorities will find it much harder to use human rights in their lives as a result of the planned reforms.

"People with learning disabilities like my wife and son continue to experience significant disadvantage in their lives and I am worried about the proposed Bill of Rights because the consultation proposes a number of changes which could introduce further conditions, thresholds and criteria that will have to be met before raising a human rights issue … The Human Rights Act is there to ensure that high standards are maintained for the benefit of every citizen. It seems to me that one of the chief aims of the Bill of Rights is to limit access to justice for the benefit of the State. This is not right. The HRA does not need amending or replacing, please don't make our lives harder than they already are."
(Ian Penfold, Parent, Carer, NHS England Expert-by-Experience and Volunteer)

Accessing this Consultation

It is impossible to speak about the equalities impacts on individuals with protected characteristics without commenting on the accessibility of this consultation. We have repeatedly stated throughout this response that the HRA protects every person in the UK. Because of this, any proposed changes to human rights law, especially a plan to replace the HRA with a new Bill of Rights, should be widely consulted on in an accessible way.

The full version of this Consultation has been available since the 14 December 2021. The full Welsh version has only been available since 1 February 2022 – 35 days before the deadline. A 'word only easy read version' was not published until 24 February – 12 days before the deadline. Many self-led groups of people with learning disabilities have stated that they do not recognise this as an Easy Read document and cannot use it to respond to the consultation. On 3 March 2022 over 200 people and groups have raised this with the JCHR (here), and a further group of organisations led by and for people with learning disabilities (and supported by BIHR) instructed solicitors to raise this directly with the Secretary of State (here). At the time of writing (3 March 2022), no other accessible versions (e.g., British Sign Language, audio, Braille, Makaton) have been made available.

In our Easy Read survey (which opened before the 'word only easy read version' and continued after its publication), we invited people to share their views on the accessibility of this Consultation:

93% of people are worried about the way the UK Government is getting people's views on changes to the Human Rights Act.

The length of the consultation document put 82% of people off responding.

90% of people are not sure or cannot easily understand the Consultation document.

Only 2% of people heard about the consultation from the Government.

Accessibility was the most common concern raised about this consultation across all of our workshops and surveys. Below is just a fraction of the comments shared with us by people expressing their frustrations about the way this consultation is being run:

You can find more comments on accessibility here.

“Under this format, I feel as though I am being patronised and 'gas-lit' by the government.”

“The consultation document is not promising. It is long, vague, convoluted, and seems to be designed to put citizens off from responding to it.”

“They haven't listened to us before, they don't feedback after we have our say, disabled people are often forgotten in decision making (for example during the pandemic)."

“The nitty-gritty in combination with the length make for brain-weariness.”

"I thought I understood the HRA, but this consultation confuses me!"

“My mum is a deaf woman with learning disability – she would not be able to answer the consultation, yet it is exactly the type of policy change that she should be asked about as it is people like my mum who will be most affected. There is clearly a lack of accessibility, which is a major concern.”

The inaccessibility of this Consultation risks discriminating against deaf and disabled people, and people who face other communication barriers, under both the Equality Act 2010 and, ironically, the HRA itself, as well as common law principles such as the Gunning principles, noted above. It may also have a disproportionate impact on people for whom English is a second language, who may be unable to access the long and highly technical full version.

If the Ministry of Justice wanted to find out the equalities impact of the proposals on people with protected characteristics, the Consultation should have been made accessible to all from the beginning to enable a wide range of people to share their views.

Question 29(3): Impacts

Q **How might any negative impacts be mitigated?**

The simplest way to mitigate the significant negative impacts of the vast majority of proposed reforms is to abandon the plan to replace the HRA with a Bill of Rights. If the changes proposed in this Consultation came to pass, this would result in a dilution of human rights protections for every person in the UK, and a corresponding dilution of the accountability (or responsibilities) of the Government and public bodies.

When responding to the IHRAR's call for evidence in early 2021, we asked people what they thought about the review. The most common response was "unnecessary".

Scotland Session

Equally Ours Session

Over one year later, this sentiment continues to be the case. Not only are these proposals unnecessary, they are harmful.

Our Human Rights Act is working well, supporting people across the UK to live with equal dignity and respect, and when needed, enable us all to hold public bodies and Government to account, ensuring they fulfil their responsibilities to us all. There is no case to change our Human Rights Act.

At BIHR, we hear real stories of people, groups and frontline workers using the Human Rights Act every day. Click below for a wealth of perspectives on why the Human Rights Act matters...

·To the rule of law
·For ending violence against women and girls
·To a mental health nurse
·To members of the armed forces and their loved ones
·To children
·To LGBTQ+ people in Northern Ireland
·To people with dementia
·To Dates-n-Mates members
·In social work
·To people in Scotland
·To a Christian
·To the Jewish community
·To an ex-patient on a CAMHS ward
·To a parent of a child with a disability
·In advocacy
·To the CEO of Scottish Care
·Every day