

Questionnaire

We would welcome responses to the following questions set out in this consultation paper. You can [respond to the following questions online](#) or by email to HRAReform@justice.gov.uk

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

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

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

A concern which Liberation has about both options is that they would further weaken links between the ECtHR and UK law. Option 1 would mean that the definition of a right in the Bill of Rights need not correspond to the ECHR's definition. Option 2 gives the Supreme Court the final responsibility for interpreting rights set out in the Bill of Rights. We are opposed to both options, therefore.

The position of the Supreme Court

Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights.

How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

The government's actual question seems to be whether there are some matters which should not be decided by the judiciary. However, no sound evidence has been provided that there should be further limits on matters decided by the UK courts.

Trial by Jury

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

What needs to be protected is the right to trial by jury. Liberation is concerned about question 3 because the government's proposal seems to allow for the government having increased power to prohibit a trial by jury.

Freedom of Expression

Question 4: How could the current position under section 12 of the Human Rights Act be amended to limit interference with the press and other publishers through injunctions or other relief?

The government has provided no evidence that s.12 is failing to have a 'real effect'. Unless such evidence is provided, amendments run the risk of being unjustified, or even detrimental.

Question 5: The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations above. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?

Because Article 10 protects the right to freedom of expression, the question posed here is an important one. However, the risk of being over-specific is that this might have a detrimental effect: prevent the courts from evaluating cases on a very individual basis which takes full account of the particular circumstances involved in any one case. This sort of evaluation is often vital.

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

It would have been helpful to know what the government has in mind here and how it links with existing legislation, in particular with s.10 of the Contempt of Court Act 1981. In addition, it is hard to feel confident that the government would like to protect journalists and their sources further given its current refusal to adopt the Law Commission's proposal that reform of the Official Secrets Acts includes a public interest defence. This refusal leaves journalists and their sources at risk of being treated in the same way as people committing serious espionage and means that it will be harder to call the government to account when this is needed.

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

In order for further steps to prove possible under the Bill of Rights, the government needs first to deal with aspects of planned legislation which will seriously undermine freedom of expression:

- The failure to include a public interest defence in the Official Secrets Acts. (See Liberation's response to Q.6 above)
- The serious undermining of the right to protest contained in the Police, Crime, Sentencing and Courts Bill. For instance, if this is enacted, police will then have the authority to impose noise-based restrictions, the threshold for breaching a protest condition will be lowered and sentences for breaches will be increased. Such restrictions will have a particularly serious impact on groups of people who have the greatest need to protest because they experience particular discrimination, for example mental health service users and other Disabled people, still more so those of us who experience multiple forms of discrimination
- Parts of the Online Safety Bill which run the risk of seriously undermining freedom of expression and privacy, for example the introduction of a vague, new category of 'harmful content' and unparalleled regulation related to this.

II. Restoring a sharper focus on protecting fundamental rights

A permission stage for human rights claims

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

This proposal is not necessary; a claim under the Human Rights Act can already be struck out if the claimant is deemed not to have reasonable grounds for bringing it. In addition, the proposal is highly unacceptable because it will make it still harder for already disadvantaged people to exercise rights which they have under the existing Act. Quite apart from the fact that using vague wording such as a 'significant disadvantage' could in itself result in miscarriages of justice, it is already very difficult for disadvantaged people to take legal action against discrimination and injustice. It is hard to bring a claim when you are struggling to keep going at all. Cuts in legal aid already mean that disadvantaged people often cannot afford to bring a claim. For mental health service users, a major additional factor is that they are often not believed and that, even if a case does reach court, court proceedings are often weighted against them because of a failure to make reasonable adjustments¹. A 'permission stage' could only compound these problems.

Question 9: Should the permission stage include an 'overriding public importance' second limb for exceptional cases that fail to meet the 'significant disadvantage' threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.

This proposal is also unacceptable. It will not adequately address the problems inherent in the proposal put forward in Q.8. Rights-based legislation should significantly increase disadvantaged people's ability to bring action against powerful institutions and groups. However, the Human Rights Act itself has significant weaknesses, not least the fact

¹ Carr, S. *et al.* (2019) "Keeping control". A user-led exploratory study of mental health service users' experiences of targeted violence and abuse in the context of adult safeguarding in England', *Health and Social Care in the Community*, 27 (5), pp. e781-e792. Available at: <https://doi.org/10.1111/hsc.12806>. (Accessed 6 March 2022).

that it is not fully compatible with the UN Convention on the Rights of Persons with Disabilities (UNCRPD). The proposed Bill of Rights appears to be weaker still and to represent a regression in the rights that are currently endorsed through the Human Rights Act.

Judicial Remedies: section 8 of the Human Rights Act

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

The terminology 'genuine human rights abuses' is ill-chosen, still more so because the government has made it clear in its proposals for a Bill of Rights that it wishes to reduce the number of human rights claims. As has been indicated in Liberation's response to Q.8 above, it is already very difficult for disadvantaged people to bring rights abuse cases to court. All too often, too, the issue is that discrimination is discounted, or played down. Thus, last year's report from the Commission on Race and Ethnic Disparities seriously underestimated the reality and prevalence of structural racism. For Disabled people, including people who use mental health services, the best way for the government to ensure our rights is by fully implementing the UNCRPD and providing the resources to achieve this. As part of this, planned reform of the Mental Health Act 1983 and the incoming Mental Capacity (Amendment) Act will need to be made compliant with the UNCRPD. It is highly concerning that, although the UK government signed up to this Convention as long ago as 2009, successive governments have persistently held back from enshrining it in overall domestic law.

Positive obligations

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

It will be very worrying if cost is used as a justification for making public bodies less responsible than they are at present for taking proactive steps to protect people's human rights. The onus should be on public bodies to act in such a way that people do not have cause to resort to the law, not on people being less able to do so when a public body has failed them. In addition, positive obligations are not an

'imposition', but related to the European Convention which the UK government itself has endorsed. A particular concern, too, is that there are already serious shortfalls in safeguarding systems; the study by Carr *et al* (2019) again provides evidence of this in relation to people given mental health diagnoses². If public bodies' safeguarding responsibilities are reduced, people who are already particularly likely to experience human rights issues, for instance people with protected characteristics, will be especially badly affected. For these reasons, Liberation will not be putting forward suggestions in response to question 11.

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

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

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

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

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

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

Both options will reduce human rights protection, particularly in the case of people with protected characteristics. Therefore, Liberation does not think that either should be adopted.

² *ibid*

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

Currently, it is difficult to feel confidence in the government's commitment to human rights; the proposed Bill of Rights itself seems to stand for a weakening of human rights. For that reason, it is also difficult to feel confidence in an enhanced role for the government in engaging with and scrutinising s.3 judgements. What is needed is a strong judiciary which operates effectively within a human rights framework.

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

It is quite true that there is inadequate data at the moment about times when UK court have made use of s.3 of the Human Rights Act to interpret law in a way which is compatible with the European Convention. The key factor here is whether the government would use such data to enhance human rights, or to detract further from them in line with the weakening of human rights in its proposed Bill of Rights.

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

Declarations of incompatibility

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

This question reads oddly, because, in the consultation document the proposal seems to be that courts should now only have the option to make a declaration of incompatibility between secondary laws and the European Convention and would no longer be able to strike out those which are incompatible with the Convention. Because that would be a concerning development, could well weaken human rights further, Liberation is not in support of it.

Question 16: Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where secondary

legislation is found to be incompatible with the Convention rights?
Please provide reasons.

Adopting these proposals would again run the risk of causing injustice. Therefore, Liberation would not be in favour of them.

Remedial orders

Question 17: Should the Bill of Rights contain a remedial order power? In particular, should it be:

- a. similar to that contained in section 10 of the Human Rights Act;
- b. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;
- c. limited only to remedial orders made under the 'urgent' procedure;
or
- d. abolished altogether?

Please provide reasons.

Option A seems the best choice, given that remedial orders allow Ministers to make changes to laws which breach of human rights without their being undue delay and already to serve a relevant purpose.

Statement of Compatibility – Section 19 of the Human Rights Act

Question 18: We would welcome your views on how you consider section 19 is operating in practice, and whether there is a case for change.

Liberation regards s.19 as having an important role, because, without it, the Government would have no legal obligation to state whether, in its opinion, a piece of legislation is compatible with the Human Rights Act and to give an explanation of this. It is worrying that the government appears to be questioning s.19 on the basis that it might restrict 'innovative policies'. If s.19 were no longer maintained, there seems an increased risk of the government having greater scope to initiate policies which are not compatible with human rights.

Application to Wales, Scotland and Northern Ireland

Question 19: How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?

Because Liberation's particular work is in England, we are not best placed to answer this question in detail. However, serious concerns are that the draft Bill of Rights currently runs the risk of undermining devolution in Scotland and Wales, causing unacceptable disruption to current legislation in these two countries, and seriously undermining the peace process in Northern Ireland because the Human Rights Act is an intrinsic part of peace maintenance there. These issues need to be addressed urgently.

Public authorities: section 6 of the Human Rights Act

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

The government has not supplied any substantial grounds for concluding that the existing definition is unsatisfactory. There seems no good reason, therefore, to introduce a change.

Question 21: The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer? Please explain your reasons.

Option 1: provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or

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

Neither of these options would be satisfactory. That is because, in both cases, it seems that it would be easier for public bodies to act in ways that are not compatible with human rights.

Extraterritorial jurisdiction

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

Liberation is not best placed to answer this question.

Qualified and limited rights

Question 23: To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act?

We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.

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

Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

Because there do not appear to be sound grounds for making either change, Liberation would not advocate implementing either option.

Deportations in the public interest

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

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

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

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

The imputation in this question, that human rights can be set on one side in some cases, sets a dangerous precedent, one which could all too readily be extended to other situations. The suggestion that some people should be allowed human rights and others should not and/or that human rights for immigrants and people at risk of deportation should differ from other people's is again deeply concerning. Because all three options reflect these flaws, Liberation does not support any of the three.

Illegal and irregular migration

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

Liberation has the same, major unease about this question as that set out in response to Q.24. It is completely unacceptable to portray the human rights represented in the European Convention and the Human Rights Act as 'impediments'. This sort of conceptualisation demonstrates a highly concerning lack of government empathy towards the desperate circumstances which often lead people to try to enter the country in whatever way they can. It reflects the hostile environment towards immigrants which seems linked to a worrying extent with government messaging about them. A highly prejudiced attitude towards immigrants also seems apparent in both the Nationality and Borders Bill and the Judicial Review and Courts Bill.

For all these reasons, Liberation will not be putting forward suggestions in answer to this question.

Remedies and the wider public interest

Question 26: We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:

- a. the impact on the provision of public services;
- b. the extent to which the statutory obligation had been discharged;
- c. the extent of the breach; and
- d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.

Which of the above considerations do you think should be included? Please provide reasons.

The important point is that, if a person's rights have been breached, s/he receives fair compensation. It would be entirely unjust for the amount of compensation to be affected by its impact on the provision of services (consideration a). The onus should be on public bodies to comply with human rights in the first place. In addition, there could be a risk of increased human rights breaches among less good public bodies because the consequences would be lighter. As regards consideration (d), it would again be unfair for an individual not to receive compensation purely on the basis that a public body had tried to meet its human rights responsibilities; the individual's human rights would still have been breached. For these reasons, Liberation would not support the inclusion of considerations (a) and (d) in reforms. Considerations (b) and (c) are reasonable. However, because any competent judge would allow for these when deciding on a compensation amount, it does not seem necessary to specify them in reform documentation.

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

Question 27: We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons.

Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or

Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

The thinking behind this question is very concerning. Human rights are intrinsic, not contingent on a person's behaviour. People retain their human rights, whether or not they have committed crimes themselves. In addition, if claimants have themselves been in trouble with the law, they will already have paid the penalty for that and so should not be punished twice over.

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

Question 28: We would welcome comments on the options, above, for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2.

A serious concern is that, if the government's proposal is implemented, this may pave the way for decisions by the Strasbourg court to have advisory status only, with all the implications of that for human rights.

Impacts

Question 29: We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular:

a. What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate;

For the reasons set out above, it seems that the main result will be not only a weakening of current rights which people have under the Human Rights Act, but a still stronger regression from Disabled people's rights under the UNCRPD. This is extremely concerning in a country which likes to regard itself as a leader in the field of human rights.

b. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate; and

As has been illustrated in a series of responses above, the Bill of Rights is likely to cause a comprehensive weakening of current human rights. By definition, this will have a particularly serious impact on people with protected characteristics as a whole, including people given mental health diagnoses. That is because people with protected already experience additional disadvantages. A further issue is that the reference to protected characteristic is insufficiently wide; for instance, socio-economic disadvantage is not a protected characteristic, but has major human rights implications. In addition, question 29b omits any reference to intersectional issues. However, many people have more than one protected characteristic and so will be still more disadvantaged by a regression in human rights.

A further, major issue is the government's failure to give any adequate voice to organisations led by Deaf and Disabled people when planning the Bill of Rights and when setting up the consultation about it. Not only are the consultation questions so complex and set out in such technical language that it is very difficult for members of the general public to take part in the consultation, but there have been additional obstacles put in the way of participation by Disabled people.

For example, whilst easy read and audio versions of the consultation have finally been produced and a certain amount of extended time given for responses from people who need to make use of them, this has only occurred after strong protests about the lack of accessible copies. Even now, there are serious questions about the quality of the latter; for example, the easy read version does not come across in a balanced way, but portrays the planned changes in an unduly positive fashion that appears misleading. A further issue is that Disabled people have been given no opportunity to influence the content of the consultation and so to ensure that it covers human rights issues which are particularly important to them.

It is shocking that many of the people who will be particularly affected by a diminishment of human rights have been marginalised in this way and can only underline our concerns that planned changes will undermine our human rights still further.

c. How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.

Because the plans for a Bill of Rights seem likely to have a seriously negative impact on human rights, because the Human Rights Act itself has some serious weaknesses and because it has been made difficult for particularly disadvantaged people to have a meaningful influence over proposed changes, it seems vital that the latter are abandoned. Instead, the focus needs to be put on strengthening the Human Rights Act, in particular on making it fully compliant with the UNCRPD. To ensure the effectiveness of this, Disabled people, including people who experience mental distress/trauma, should have a key role in influencing these changes, still more so Disabled people who are disadvantaged in more than one way.

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

| | |
|--|--|
| <p>Full name</p> <p>Dorothy Gould</p> <p>Type of organisation or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)</p> | <ul style="list-style-type: none">• Academics• Associations• Governmental Departments / Agencies• Member of the Public / as an Individual• Health and Disability Group• Devolved Administrations• Equalities Organisation• Human Rights Organisation• Law Firm / Legal Group• Unions • Political parties• Military, police or prisons• Voluntary organisations<ul style="list-style-type: none">• If yes, how best describes your organisation [e.g. national, local, community, by and for]?• Other (please specify) |
| <p>Date</p> | <p>08/03/2022</p> |
| <p>What region are you in?</p> | <ul style="list-style-type: none">• North East• North West• Yorkshire / Humberside• East Midlands• West Midlands• Wales• East Anglia• South East• South West• Greater London• Scotland |

| | |
|--|---|
| | <ul style="list-style-type: none"> • Northern Ireland • Other (please specify): We are a nationwide group, based in London, but working across England • Don't want to say |
| Company name / organisation (if applicable): | Liberation |
| Address | PO Box 49677 London |
| Postcode | N8 8WQ |
| If you would like us to acknowledge receipt of your response, please tick this box | <input checked="" type="checkbox"/> Yes please (please tick box) |
| Address to which the acknowledgement should be sent, if different from above | liberationrights@gmail.com |

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent:

Liberation is a user-led, grass-roots group representing people with experience of mental distress/trauma (mostly, but not always people given a mental health diagnosis). Our particular aim is to promote the full human rights for Disabled people which are set out in the UN Convention on the Rights of Persons with Disabilities. We work within England, but also have links with other parts of the UK and international links.