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By ,
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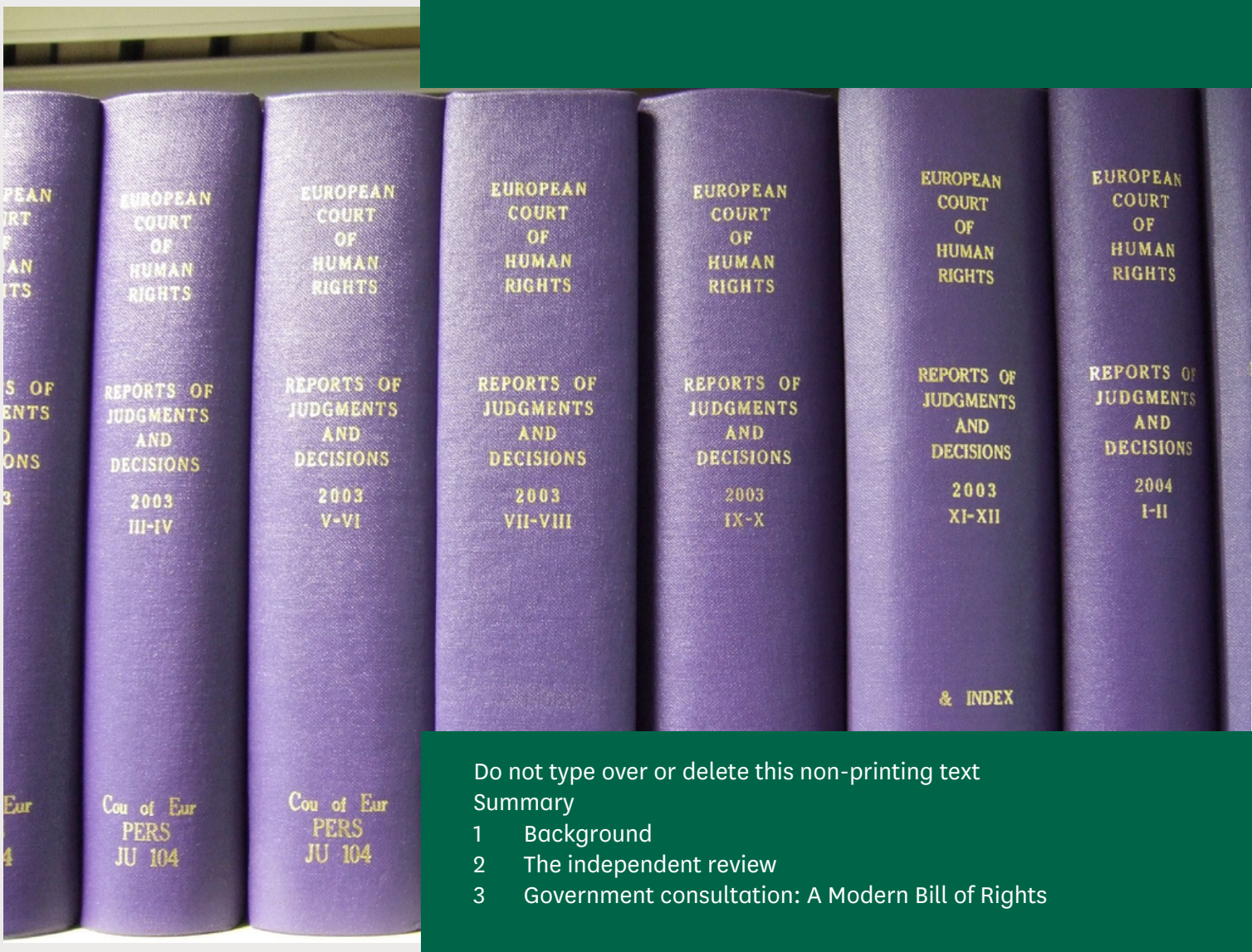
Reform of the Human Rights Act 1998



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Summary

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In December 2021, the Government published a consultation on its proposals to replace the Human Rights Act with a Bill of Rights. The consultation will run for three months, closing on 8 March 2022. It follows the publication of the Independent Human Rights Act Review (IHRAR) findings, which were submitted to the Government earlier in the autumn.

The proposals fulfil a Conservative manifesto commitment (4.7 MB, PDF) to "update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government".

What is the Human Rights Act?

The Human Rights Act 1998 (HRA) effectively incorporated the European Convention on Human Rights (ECHR) into UK law. The UK has been signatory to the ECHR since 1953.

The HRA enables people to bring claims relating to breaches of their human rights in the UK courts, and requires public bodies to act compatibly with human rights.

The rights in the ECHR include the right to life; to be free from torture; to liberty; privacy; and to freedom of speech and assembly.

Why is it under review?

The independent review mainly focused on the **operation** of the HRA and not the substantive Convention rights or the question of whether the UK should remain signatory to the Convention.

It followed several reviews into the HRA carried out by previous governments, none of which led to detailed proposals for reform. Underlying these reviews is a concern that the HRA may have drawn UK courts into ruling on issues better suited to political resolution. There are also concerns the Act undermines parliamentary sovereignty by requiring the courts to interpret UK legislation compatibly with Convention rights where possible.

Previous reviews have met with hostility from legal experts and human rights campaigners, who have argued that the rationale put forward for reform is

not well founded in evidence. They state that amending or repealing the HRA would undermine the protection of human rights in the UK.

Government proposals for a Bill of Rights

Since his appointment as Justice Secretary and Lord Chancellor, Dominic Raab has indicated that HRA reform is a priority for his department. As a Minister and a backbench MP he has been involved in the debate about reform of the HRA for many years.

The Government's consultation sets out proposals to replace the HRA with a Bill of Rights, (1,377 KB, PDF) which would retain the aspects of the HRA which the Government believes work well, while addressing concerns about the separation of powers between the courts and Parliament; the authority of the UK courts; and the balance between rights and responsibilities. It would also seek to address what the Government perceives to be a longstanding difficulty deporting foreign national offenders. It would give greater weight to "quintessentially UK rights" such as freedom of speech and trial by jury and restrict access to the courts for "unmeritorious" claims. The proposals would not involve withdrawing from the ECHR, and the Government has said it's committed to remaining in the Convention.

The consultation states it is informed by IHRAR's findings. However, it does not set out a detailed response to all the review's findings, nor does it seek views on all of its recommendations.

Overall, the Government's proposals are significantly more wide-ranging than those made by IHRAR, which concluded in several instances that problems with the HRA were more to do with perception than reality and recommended a focus on human rights education.

Reaction to the review and consultation

IHRAR's focus on technical issues rather than substantive rights, was welcomed by critics of previous reform proposals. As the Government's commitment to remain part of the ECHR has been.

However, it has also been noted that the review assumed there is a problem with the HRA, and did not offer scope for examining the positive impact it has had.

Parliament's Joint Committee on Human Rights (JCHR) conducted its own inquiry into the HRA, prompted by the Government's announcement of IHRAR. The JCHR took evidence from legal experts, public authorities, academics, and former ministers and senior judges. The Committee's response to IHRAR, concluded that the HRA had had an "enormously positive" impact on the

protection of human rights in the UK, and that no case for reform had been established. Its final report recommended that the Government should not put the UK's constitutional settlement and the enforcement of rights at risk by amending the HRA.

The Opposition responded to the announcement of the Government's consultation by suggesting that it was the wrong priority at a time when the criminal justice system is in crisis, and that many of the proposals are unnecessary.

Legal experts and campaigners are concerned about how the proposals could affect access to justice and the enforcement of human rights.

Next steps

The consultation will run until 8 March 2022. The Government has said it intends to introduce legislation to implement the resulting proposals in this Parliament.

1 Background

1.1 The European Convention on Human Rights

The European Convention on Human Rights (ECHR) came into force on 3 September 1953. When the Council of Europe adopted the Convention, it marked the first step in implementing the UN's Universal Declaration of Human Rights of 1948.

By ratifying the Convention, Member States accept international legal obligations to guarantee certain civil and political rights to people within their jurisdiction. These rights are set out in a series of Articles of (and Protocols to) the Convention. They include the right to life; the right to be free from torture and inhuman and degrading treatment; the right to liberty; and the right to freedom of expression, among others.

The European Court of Human Rights (ECtHR) is an international court, based in Strasbourg, France. It rules on applications from individuals or states, that allege violations of the civil and political rights set out in the ECHR. The ECtHR was established in 1959 by the Member States of the Council of Europe, to ensure they were observing the obligations they had committed to. It seeks to ensure that the 47 Member States who ratified it, representing 800 million people, are complying with the Convention.

The UK ratified the Convention in 1951 and in 1965 declared it would accept the jurisdiction of the ECtHR in relation to individual complaints.

1.2 The Human Rights Act 1998

The HRA effectively incorporated the ECHR into UK law.

The Act was intended to 'bring rights home' and does so in part by allowing human rights claims to be brought in UK courts, as well as, for example, through a culture shift in the approach taken by requiring public authorities to embed human rights into their policy-making and operational actions.

The central provisions of the Act, which came fully into force on 1 October 2000, are as follows:

- **Section 2** ensures that the courts "must take into account" the judgments and decisions of the European Court of Human Rights that are relevant to their proceedings.

- **Sections 3 and 4** require legislation to be interpreted compatibly with Convention rights "so far as it is possible to do so" and allow courts to make a "declaration of incompatibility" if a compatible interpretation is impossible, when dealing with primary legislation.[1]
- **Section 6** requires public authorities to act compatibly with Convention rights. This applies to all bodies carrying out "functions of a public nature", including central government and the courts. However, section 6 does not apply to the House of Commons and the House of Lords "or a person exercising functions in connection with proceedings in Parliament" in recognition of Parliament's role in the constitution.
- **Sections 7 and 8** give people the right to bring proceedings and get remedies in UK courts, rather than having to go to Strasbourg to have their rights enforced.
- **Section 10** allows for Parliament to address findings of incompatibility with Convention rights through remedial orders.
- **Section 14** allows for the UK to temporarily derogate from parts of the Convention in times of emergency, in accordance with Article 15.
- **Section 19** requires the Minister in charge of a Bill to make a statement before second reading to say the Bill is compatible with the Convention rights, or that they are unable to make such a statement, but the Government wishes Parliament to proceed with the Bill nonetheless.

Schedule 1 to the HRA contains the substantive ECHR rights, including:

- Article 2: right to life
- Article 3: prohibition of torture
- Article 4: prohibition of slavery and forced labour
- Article 5: right to liberty and security
- Article 6: right to a fair trial
- Article 7: no punishment without law
- Article 8: right to respect for private and family life
- Article 9: right to freedom of thought, conscience and religion
- Article 10: freedom of expression
- Article 11: freedom of assembly and association
- Article 12: right to marry
- Article 14: prohibition of discrimination

Article 2 and 3 are absolute rights, meaning that state interference can't be justified. They may also place positive obligations on the state, for example to protect life, and to investigate suspicious deaths.

[1] This also applies to secondary legislation if the parent legislation makes a compatible reading impossible

The others are 'limited' or 'qualified' rights, meaning that state interference may be justified in some circumstances. Any interference with qualified rights must nonetheless be necessary and proportionate in pursuit of a legitimate aim, and prescribed by law.

UK's obligations before the HRA

Before the HRA's entry into force, the UK was already bound by the ECHR as a matter of international law. This meant the Convention had the following effects in UK domestic law:

- The ECHR helped the interpretation of domestic legislation, but only where there was ambiguity (it was assumed in cases of ambiguity that Parliament intended to legislate compatibly with the UK's international human rights obligations).[2]
- Where judges were exercising discretion, they would take account of the Convention.
- It assisted in establishing the scope of the common law (which is law made by judicial interpretation and precedent) where it was developing and uncertain or incomplete.[3]

An individual in the UK could enforce their ECHR rights, but only by petitioning the European Court of Human Rights directly. Taking a case to Strasbourg was time-consuming and expensive. The white paper that preceded the Human Rights Bill said that:

> For individuals and for those advising them, the road to Strasbourg is long and hard. Even when they get there, the Convention enforcement machinery is subject to long delays.[4]

It added that, at that time, it took an average of five years to exhaust all domestic remedies and cost an average of £30,000.

The white paper argued that the HRA could improve this situation. Apart from reducing delay and costs to UK courts, it said:

> the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled

[2] R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696.

[3] See for example Lord Bingham in R v Lyons [2003] AC 976 [13]. See also Dr Jacques Hartmann (Reader in Law at University of Dundee); Mr Samuel White (Postdoctoral Research Assistant at University of Dundee) (HRA0016) at paragraph 3.

[4] Home Office, Rights brought home: the Human Rights Bill, Cm 3782, October 1997, para 1.14

> to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.[5]

Article 13: The right to an effective remedy

Article 13 requires the UK to provide an "effective remedy" (a legal outcome to a complaint, such as damages) before a "national authority" for any person whose rights have been violated.

Since the HRA came into force, anyone can access an effective remedy for a breach of ECHR rights in the UK. This has been principally through section 7, which entitles "a person who claims that a public authority has acted (or proposes to act) in a way which" is incompatible with an ECHR right, to bring proceedings in the appropriate court or tribunal, or to rely on the ECHR rights in any other legal proceedings.

Before the HRA, enforcement in the UK was more piece-meal and relied on discreet context-specific mechanisms for those seeking an effective remedy, such as relying on police investigations for compliance with Article 2 (right to life) procedural obligations.

Some pre-HRA mechanisms met the requirements of Article 13 that people whose human rights had been violated should have an effective remedy. Other mechanisms were either not available or were insufficient, for example if they lacked independence or if they lacked the power to make legally binding decisions.

Any future efforts to exclude certain areas from the scope of the HRA, or to limit the way people can access effective remedies or enforce their rights under the HRA, would risk creating gaps in individuals' ability to enforce their human rights. These gaps would risk placing the UK in breach of its duty under Article 13 to provide any person whose rights have been violated with an effective remedy at the national level.

1.3 Previous proposals for a British Bill of Rights

Plans to reform or replace the HRA have evolved over the past 15 years. As Leader of the Opposition, David Cameron proposed a modern British Bill of Rights in 2006. He argued that:

> … the time has now come for a new solution that protects liberties in this country that is home-grown and sensitive to Britain's legal inheritance that enables people to feel they have ownership of their

[5] Home Office, Rights brought home: the Human Rights Bill, Cm 3782, October 1997, para 1.14

> rights and one which at the same time enables a British Home Secretary to strike a common-sense balance between civil liberties and the protection of public security.[6]

The July 2007 Governance of Britain Green Paper, published shortly after Gordon Brown became Prime Minister, set out proposals for constitutional reform. These came under the headings of: 'limiting the powers of the executive', 'making the executive more accountable' and 're-invigorating our democracy' before considering 'Britain's future: the citizen and the state'. The green paper said

> A British Bill of Rights and Duties could provide explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others. It would build on the basic principles of the Human Rights Act, but make explicit the way in which a democratic society's rights have to be balanced by obligations.[7]

These proposals did not progress further under the Labour Government. Discussion of the issue recommenced in the 2010-15 Parliament, through the deadlocked Commission on a Bill of Rights, which produced a divided report, reflecting disagreement on the issue between the coalition partners.[8]

At the 2014 Conservative Party Conference, David Cameron recommitted the party to a Bill of Rights. He said:

> When that charter [the ECHR] was written, in the aftermath of the Second World War, it set out the basic rights we should respect. But since then, interpretations of that charter have led to a whole lot of things that are frankly wrong. Rulings to stop us deporting suspected terrorists. The suggestion that you've got to apply the human rights convention even on the battle-fields of Helmand. And now – they want to give prisoners the vote. I'm sorry, I just don't agree. Our Parliament – the British Parliament – decided they shouldn't have that right.[9]

In October 2014, the Conservative Party published a paper called Protecting Human Rights in the UK. It proposed to repeal the Human Rights Act and replace it with a British Bill of Rights. The European Court of Human Rights would "no longer [be] able to order a change in UK law" and would become "an advisory body only"[10].The Conservative Party's 2015 manifesto gave a clear commitment to repealing the Human Rights Act, promising to "scrap

[6] David Cameron, Balancing freedom and security – A modern British Bill of Rights, 26 June 2006

[7] Ministry of Justice, The Governance of Britain, Cm 7170, July 2007

[8] A UK Bill of Rights? The Choice before us, 2012

[9] David Cameron speech to Conservative party conference 2014

[10] Protection human rights in the UK: the Conservatives' proposals for changing Britain's human rights laws, 2014

the Human Rights Act and curtail the role of the European Court of Human Rights, so that foreign criminals can be more easily deported from Britain".[11]

By contrast, Labour's manifesto had promised that the party would stand up for individual rights and protect the HRA.

The Liberal Democrat and SNP manifestoes also promised to retain the HRA.

In the 2015 Queen's Speech, the Government said it would propose to replace the Human Rights Act with a British Bill of Rights.[12]

In November 2015, the Sunday Times published details it claimed came from a leaked draft of the Government's plans. The article suggested that the UK would remain a member of the ECHR, but that judges would be told they do not have to follow rulings of the ECtHR. It also claimed that soldiers and journalists would be given "greater protection from people using human rights law to sue for damages", and that the new law would apply only in Britain, to prevent actions against the military in relation to overseas operations.[13]

Then Justice Secretary Michael Gove subsequently wrote to the Chair of the JCHR explaining that the proposed Bill of Rights would "remain faithful to the basic principles of the Convention" while "preventing abuse of the system", "restoring common sense" to UK human rights laws and clarifying "where the balance should lie between Strasbourg and British courts".[14]

In April 2016, Theresa May made a speech as Home Secretary calling for the UK to withdraw from the ECHR, arguing that it:

> [C]an bind the hands of Parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals – and does nothing to change the attitudes of governments like Russia's when it comes to human rights.[15]

Alistair Carmichael then asked an urgent question, seeking clarification of Government policy. In response, the Attorney General reiterated the manifesto commitment and explained the Government's position:

> Our preference, though, is to seek to achieve reforms while remaining members of the European convention. Our reforms will focus on the expansionist approach to human rights by the Strasbourg court and under the Human Rights Act, but although we want to remain part of the ECHR, we will not stay in at any cost. We have been clear that if we cannot achieve a satisfactory settlement

[11] Conservative manifesto 2015, page 58

[12] Queen's Speech 2015

[13] 'Human rights law to be axed', Sunday Times, 8 November 2015

[14] Letter from Rt Hon Michael Gove, 2015

[15] Home Secretary's speech on the UK, EU and our place in the world, 25 April 2016, gov.uk

> within the ECHR, we may have no option but to consider withdrawal.[16]

1.4 Wider debate about reform of the HRA

The Judicial Power Project

Policy Exchange, through the Judicial Power Project (JPP), has for some time argued that the HRA should be reformed or repealed.[17] The JPP considers the scope of judicial power within the British constitution. It does so based on the proposition that there is a problem of judicial overreach that needs to be addressed. Policy Exchange has said:

> The ongoing expansion of judicial power increasingly corrodes the rule of law and effective, democratic government. The Project seeks to address this problem – to restore balance to the constitution – by recalling and making clear the good sense of separating judicial and political authority.[18]

The JPP submitted evidence to the JCHR's 20 Years of the Human Rights Act Inquiry in 2018. It suggested that three mistakes were commonly made in defences of the HRA.

The first was to confuse the merits of the HRA with the question of whether the law should respect, promote and secure human rights. The second was the assumption that, prior to the enactment of the HRA, there was no protection for human rights in the UK. The third was to think that the HRA was the main way in which rights are now secured in the UK.

The JPP argued that human rights are primarily secured through "the ordinary law";[19] that the UK had a long and enviable record of securing rights prior to the HRA; and that those arrangements were preferable, given that the HRA had, in their view, compromised important constitutional principles.

The submission was critical of the domestic courts' approach to following Strasbourg case law. It suggested judges had used the HRA to "impose obligations on Government and Parliament which go well beyond" ECtHR standards. It suggested this was a "misuse of the structure of the HRA", which

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[16] HC Deb 26 April 2016, c1289-90

[17] Policy Exchange is a think tank which aims to promote new policy ideas. The views expressed by the Judicial Power Project, on the HRA and on judicial overreach more generally, have been contested by academics, practitioners, and members of the judiciary. Nonetheless, the influence of Policy Exchange's ideas can be seen in Government policy. Sir Stephen Laws, Senior Research Fellow at the Judicial Power Project, is a member of the Government's Independent Human Rights Act Review panel.

[18] Written evidence from Policy Exchange's Judicial Power Project (HRA0033), 20 years of the Human Rights Act Inquiry

[19] By which the JPP are presumed to mean the common law and statute law, other than the HRA

had led judges to "intervene gratuitously in political controversy … to advance their own views".

The JPP rejected the suggestion that this was an example of the UK courts contributing to European rights jurisprudence. It further criticised the courts for trying to "get ahead of Strasbourg", by anticipating and adopting a "problematic development" in the law before the ECtHR had done so itself.

The JPP conceded that there had been a rational case for "bringing rights home" through the HRA to minimise the prospect of adverse ECtHR rulings. It also said the mechanisms in sections 3 and 4 are best understood as a way to maximise conformity to the ECtHR's case law and signal to Parliament that a law was likely to be held incompatible by the ECtHR. However, it argued the HRA had become an "engine for political litigation" and had enabled UK courts to expand their power.

The submission concluded that there was a case for repealing the HRA, but the question rested on the dynamics of Brexit and the implications for the devolutionary settlements. It suggested that an alternative would be to amend the HRA, including amending section 3 to rule out "radical misinterpretations" of legislation, and amending section 4 "to make clear that [a declaration of incompatibility] does not establish that the impugned legislation is neither unlawful nor necessarily unreasonable".

The submission also suggested that Parliament should require the courts to "confine themselves to interpretations of convention rights that are consistent with the text of the ECHR and the intentions of the signatory states", in order to prevent UK courts from "going beyond Strasbourg".

Arguments for the Human Rights Act

Many stakeholders and experts have refuted these arguments. Other submissions to the JCHR inquiry noted that important benefits of incorporating the HRA into domestic law had been to allow people to enforce their rights in the domestic courts and to access immediate remedies. It also establishes positive duties on public bodies; and effects wider changes in policy in relation to human rights.

Professor Merris Amos, of Queen Mary University of London, said that British courts can now exert strong influence on the case law of the ECtHR changing the interpretation of Convention rights for all Contracting states, and helping to ensure that the UK is able to maintain a distinct position on important issues far more than it would have been able to otherwise … this is far more possible than might have otherwise been the case.[20]

[20] Twenty years of the Human Rights Act: Extracts from the evidence

The campaign group Liberty, suggested that concerns about a shift in power away from Parliament were misplaced, and that the mechanisms provided for by sections 3 and 4 retain parliamentary sovereignty:

> … neither power undercuts the political freedom of Parliament to either legislate to reverse a decision under section 3 or to simply ignore or take no action where there has been a declaration of incompatibility under section 4.[21]

The Human Rights Consortium suggested that the HRA allowed Parliament and the judiciary to work in a symbiotic manner and hold each other to account. It argued that parliamentary sovereignty is retained because Parliament has the final say on whether to amend incompatible legislation, and because it was Parliament that had decided this should be the process for dealing with incompatibilities.[22]

Some members of the judiciary have rejected the suggestion that the HRA has drawn the courts into political decision making. For example, Lord Dyson told the JCHR in 2020 that often when judges in human rights cases are criticised for making political decisions, they are in fact making decisions with political consequences, and "they are well aware of where the line is".[23]

Baroness Hale, former President of the Supreme Court, addressed the charge of judicial overreach in human rights cases, saying in Prospect magazine that there were "very good reasons" why Parliament was better placed to address difficult and controversial issues, than the courts:

> Judges do have to decide the case before them on the evidence before them; they cannot engage in a comprehensive study of the relevant facts and opinions; they are not accountable in the way that parliamentarians are accountable. But, unlike parliamentarians, judges have no choice. If a case is brought before them, they have to do their best with it. If their parliament has enacted a Charter of Fundamental Rights, which may well contain some rather abstract terms, they have to interpret and apply them; and if parliament does not like what they have done, there are usually … ways in which parliament can prevent or undo it.[24]

[21] Ibid

[22] Ibid

[23] Oral evidence session, 12 October 2020, Q3

[24] B Hale, 'My rights, your wrongs: Nigel Biggar's flawed attack on 'human rights fundamentalism'', Prospect, 22 January 2021

1.5 Human rights and the devolution statutes

Northern Ireland

In the 1998 Good Friday Agreement between the UK and Ireland, the UK Government committed to incorporating the ECHR into Northern Ireland law. This included Northern Ireland having direct access to the courts and to remedies for breaches of the Convention, and the power for the courts to overrule Assembly legislation on the grounds of inconsistency[25]. The HRA currently fulfils this part of the Agreement in Northern Ireland.

The Northern Ireland Act 1998 (NIA), which provides for the devolution arrangements in Northern Ireland, also references the ECHR. The NIA limits the powers of the Northern Ireland Assembly and Executive by reference to Convention rights.

Section 6 of the NIA states that an Act is outside the competence of the Assembly if it is incompatible with Convention rights. Section 24 provides that a Minister or department has no power to act, including making subordinate legislation, in a way that is incompatible with Convention rights.

Scotland

As in Northern Ireland, the powers of the Scottish Parliament and the Executive are limited by the requirement to act compatibly with human rights obligations under the Scotland Act 1998 (SA). Under section 29, legislation that is incompatible with Convention rights, defined by reference to the HRA, is outside the competence of the Scottish Parliament. Section 57 provides that Scottish Ministers have no power to act incompatibly with Convention rights.

The Government of Wales Act 2006 recognised Convention rights in a similar way to the SA and NIA. Section 81 provides that Welsh Ministers cannot make subordinate legislation or act in way which is incompatible with Convention rights. Section 108A(2)(e) provides that a provision of an Act of the Senedd is not law if it is not compatible with Convention rights.

[25] The Belfast Agreement 1998, Rights, Safeguards and Equality of Opportunity

2 The independent review

The Government launched an Independent Human Rights Act Review (IHRAR) in December 2020. This was the first step towards fulfilling a manifesto commitment to "update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government".

The terms of reference (ToR) set out three issues for the review to consider:

- The relationship between the domestic courts and the European Court of Human Rights (ECtHR). This includes how the duty to 'take into account' of ECtHR case law has been applied in practice, and whether dialogue between our domestic courts and the ECtHR works effectively and if there is room for improvement.
- The impact of the HRA on the relationship between the judiciary, executive and Parliament, and whether domestic courts are being unduly drawn into areas of policy.
- The implications of the way in which the Human Rights Act applies outside the territory of the UK and whether there is a case for change.[26]

A call for evidence was published on 13 January 2021.[27] It stated that the Review was "explicitly independent and contains a robust panel of eminent lawyers and academics". The Review was mainly focused on the operation of the HRA and not the substantive Convention rights or the question of whether the UK should remain signatory to the Convention.[28] It proceeded on the basis that the UK will remain signatory to the Convention. It further stated that the terms of reference were drafted in neutral terms and the Review has "no pre-conceived answers".

The call for evidence set out two themes for the review to consider and asked for general views on each as well as a number of detailed questions:

- Theme One: the relationship between domestic courts and the European Court of Human Rights (ECtHR), including:

[26] Ministry of Justice, Government launches independent review of the Human Rights Act, 7 December 2020

[27] IHRAR Call for evidence

[28] although the final limb does seem to question Article 1 ECHR as read with Article 13 ECHR given that it questions the enforcement of Convention rights where the UK is exercising effective control over individuals outside the territory of the UK

a) How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?
b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?
c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

- Theme Two: the impact of the HRA on the relationship between the judiciary, the executive and the legislature, including

a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

ii. If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

iii. Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?
c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?
d) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What

are the implications of the current position? Is there a case for change?

e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?[29]

Review Panel

The panel was chaired by Sir Peter Gross, a retired Court of Appeal judge. The other members were:

- Simon Davis, former partner at Clifford Chance, specialising in the resolution of disputes;
- Alan Bates, barrister specialising in EU relations law;
- Professor Maria Cahill, Professor of Law at University College Cork specialising in constitutional law;
- Lisa Giovannetti QC, barrister specialising in public law, particularly human rights, asylum and national security;
- Sir Stephen Laws QC, Senior Research Fellow with Policy Exchange's Judicial Power Project and former First Parliamentary Counsel;
- Professor Tom Mullen, Professor of Law at the University of Glasgow, specialising in constitutional law, human rights law, administrative law and housing law;
- Baroness Nuala O'Loan, qualified solicitor and Member of the House of Lords, former Police Ombudsman for Norther Ireland

2.1 What did the review look at?

Section 2

Section 2 of the HRA governs the relationship between the judgments of the European Court of Human Rights in Strasbourg and the domestic courts of the UK. It provides another example of a careful balance being struck in the drafting of the HRA between respect for the ECHR, and particularly the institutions that uphold it, and respect for the pillars of the UK constitution – in this case the judiciary.

Within the UK judicial system, courts are strictly required to follow the judgments of more senior courts even if they disagree with them. Those judgments set a binding precedent. The HRA specifically provides that the same system of binding precedent does not apply to the judgments of the European Court of Human Rights (ECtHR). Section 2 states that any court or tribunal considering a question that has arisen in connection with a

[29] IHRAR Call for evidence

Convention right "must take into account" of both past and future judgments, decisions or opinions of the European Court of Human Rights but only "so far as… relevant to the proceedings in which that question has arisen". This phrase determines that domestic courts are bound to consider relevant Strasbourg case law when making any decision that relates to Convention rights, but they are expressly not bound to follow it.

Since the HRA came into effect in October 2000 the courts have interpreted the effect of section 2. In a 2003 judgment of the House of Lords, Lord Slynn stated that while section 2 "does not provide that a national court is bound by" the decisions of the ECtHR,

> [i]n the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights.[30]

This approach to ECtHR case law has remained the orthodoxy ever since.

The reason for this approach was not simply deference to the Court with the most experience of interpreting the Convention. It also reflects the fact that if a claimant were to rely on their human rights in the UK courts and have their claim rejected despite there being clear ECtHR case law supporting their claim, that claimant would simply apply to the ECtHR once the domestic proceedings had concluded where they would likely succeed and obtain a judgment by which the UK would be bound. Since the aim of the HRA was to 'bring rights home' there was little to be gained from taking a position likely to lead to increased appeals to Strasbourg.

Sections 3 & 4

Sections 3 and 4 of HRA provide the mechanisms for the courts, the Government and Parliament to resolve inconsistencies between domestic law and the European Convention on Human Rights

Section 3 HRA requires all legislation to be read and given effect in a manner that is compatible with the rights guaranteed by the European Convention on Human Rights "so far as it is possible to do so". Previously the courts could consider the ECHR to help them resolve ambiguities in legislation, but section 3 goes further, allowing the courts to interpret legislation in a manner that is not obvious from the language used by Parliament, as long as it does not run counter to the underlying thrust of the statute or SI. Arguably this increased the power of the judiciary at the expense of the legislature (although, as the IHRAR report noted, section 3 is itself an expression of the will of Parliament).

Where a Convention compliant read down of primary legislation is not possible, the court can make a declaration of incompatibility under section 4 HRA. This does not affect the validity or continuing operation of the legislation

[30] R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295

under scrutiny. It puts the onus on Government and Parliament to remedy the incompatibility. Section 4 thus aims to respect the sovereignty of Parliament and limits the power of the judiciary.[31]

Extra-territorial application of the HRA

Extra territorial application of the HRA was included within theme two in the call for evidence, although it is in fact a distinct issue.

The call for evidence asked:

> In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

It is a general principle of statutory interpretation that Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom, unless a contrary intention is indicated.

However, in *Al Skeini*,[32] the House of Lords confirmed that the territorial effect of the HRA should be interpreted as being consistent with the territorial effect of the ECHR.

This decision confirmed that the s6 HRA obligation on all public authorities to act compatibly with Convention rights applied not only within the physical territory of the UK, but also when the public authority was outside the physical territory of the UK but still deemed to be responsible for the purposes of the ECHR.

In *Al Skeini v UK*, the ECtHR held that the primarily territorial nature of ECHR jurisdiction has exceptions based on control over individuals, as well as control over territory.[33]

The UK Supreme Court followed *Al-Skeini v UK* in *Smith v Ministry of Justice* [34]. This case concerned the extent to which the HRA applied to protect British soldiers when operating overseas.

Lord Hope took from *Al-Skeini* a principle of general application that "extraterritorial jurisdiction can exist whenever a state through its agents exercises authority and control over an individual". He reasoned that the exercise of such authority and control by the armed forces of the state over local inhabitants must presuppose that the state also has authority and control over its own armed forces, which therefore brings them also within the state's jurisdiction under Article 1 ECHR. Thus, the Supreme Court concluded

[31] By comparison with other jurisdictions, such as the USA, where the Supreme Court can strike down primary legislation

[32] R (Al-Skeini) v Secretary of State for Defence [2007] UKHL 26

[33] *Al-Skeini v United Kingdom* (Application No. 55721/07) (2011)

[34] [2014] AC 52

that the UK owed duties under Article 2 of the Convention to its own armed forces serving outside its territory.

The approach taken in *Al-Skeini* is now well established: jurisdiction under the ECHR remains primarily territorial – defined by the geographical borders of the contracting state. However, there are exceptions to that territorial limit (a) where a state has effective control of an area outside its territory, in which case the must secure to everyone within it the full range of Convention rights; or (b) where agents of the state exercise control and authority over an individual, in which case they must secure to that individual the rights that are relevant to them.

Any changes to the extra-territorial effect of the HRA would not impact on the underlying extra-territorial effect of the European Convention on Human Rights (ECHR) by which the UK would remain bound.

2.2 Outcome of the review

The findings of the review were finalised and submitted to the Government in Autumn 2021. They were published on the same day as the Government's consultation.

All responses to the review's call for evidence have been uploaded to the IHRAR website.[35]

The panel also held a number of online Roundtables, the minutes of which are set out in Annex VIII of the report.

According to the report, "the vast majority of submissions … spoke strongly in support of the HRA", however, persistent hostility in some quarters was noted suggesting much needs to be done to dispel negative perceptions and increase a sense of public ownership.[36] The review did not find that extensive reform of the HRA was necessary.

The review panel's conclusions and recommendations included the following:

- There should be a strong focus on civil, constitutional education on the HRA and rights more generally;
- **Section 2** should be amended to clarify the priority of rights protection by making UK legislation, common law and other case law the first port of call, before ECtHR case law is taken into account.[37] Tensions need to be resolved between the need to avoid "an ECtHR straightjacket" on the one hand, or a significant gap between rights protection by the UK courts

[35] The Independent Human Rights Act Review, CP586, December 2021
[36] Executive summary, para 14
[37] Ibid, para 20

and the ECtHR on the other. There is an important interest in developing a distinctive British contribution to ECtHR case law, while avoiding going beyond it and creating free-standing rights.[38]

- **Section 3** should be amended only to clarify the order of priority of interpretation. There should be no change to the balance between sections 3 and 4. Although concern about section 3 is understandable, as it raises the risk of the courts reaching an interpretation that differs from the apparent view of Parliament, there is little evidence of a problem in the way it operates, with the most controversial case being 20 years old. Further, there is now relatively settled restraining guidance on the use of section 3, and any amendment to narrow the section would risk uncertainty. A database of section 3 judgments and an enhanced role for the JCHR in scrutinising them would improve understanding of the operation of section 3 and might help to dispel concerns.[39]
- Where **secondary legislation** has been found to be incompatible, there should be a power to suspend, or make prospective only, an order quashing that legislation.[40] This would provide the Government with an appropriate period of time within which to consider how to rectify the defect. There should also be a database of judgments where secondary legislation has been disapplied or quashed, to enhance Government and parliamentary scrutiny, and dispel concerns.[41]
- The current position on the HRA's **extraterritorial application** is unsatisfactory. There is a clear case for change but the question of how to do so is far more difficult. It should be addressed via a national conversation, together with Governmental discussions in the Council of Europe, and judicial dialogue between the UK courts and the ECtHR.[42]
- **Section 10** should be amended to clarify that remedial orders cannot be used to amend the HRA itself. As a matter of principle, the HRA ought only to be capable of amendment by an Act of Parliament, reflecting its constitutional status and the need to take account of devolution issues. The JCHR should revisit its 2001 principles, which were devised to guide Government and Parliament's approach to the remedial order process, to consider if they need to be updated or expanded.[43]

[38] Ibid para 22
[39] Paras 42-54
[40] As currently proposed in judicial review proceedings generally in the Judicial Review and Courts Bill
[41] Paras 64-66
[42] Para 77
[43] Paras 86-91

2.3 Joint Committee on Human Rights Inquiry

In January 2021 the JCHR launched its own inquiry into the independent review, seeking views to inform its response to the review itself and its outcome. The call for evidence asked for views on the following issues:

- Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their Human Rights?
- How has the operation of the Human Rights Act made a difference in practice for public authorities? Has this change been for better or worse?
- What has been the impact of the Human Rights Act on the relationship between the Courts, Government and Parliament?
- Has the correct balance been struck in the Human Rights Act in the relationship between the domestic Courts and the European Court of Human Rights? Are there any advantages or disadvantages in altering that relationship?
- Are there any advantages or disadvantages in seeking to alter the extent to which the Human Rights Act applies to the actions of the UK (or its agents) overseas?[44]

As well as the call for written evidence, the Committee held five oral evidence sessions, hearing from former presidents of the Supreme Court, Chairs of the UK's Human Rights Commissions, the former Attorney General Dominic Grieve, parliamentary officials, public bodies, practitioners, and academics. The Committee also held a private meeting with the President and current UK judge of the ECtHR.

The Committee submitted a response to IHRAR in March 2021, in order to comply with the review's deadline, although it continued with its own inquiry and published a final report in July 2021.

The response to IHRAR explained that through the evidence the Committee had received, it had found that the HRA:[45]

- Respects parliamentary sovereignty;

[44] committees.parliament.uk

[45] JCHR submission to IHRAR, 3 March 2021

- Does not draw the UK courts into making decisions which are not for the courts but should be made by Parliament and Government;

- Provides an important mechanism which allows individuals to enforce their rights which would be impossible for most people, were it to require the great expense and years of delay of going to the European Court of Human Rights (ECtHR) in Strasbourg;

- Reduces the likelihood of the UK Government being found in breach of the Convention by the ECtHR by enabling the UK courts to rule on Convention rights, which they do in a way which is respected by and helpful to the ECtHR;

- Helps the ECtHR by providing greatly valued UK judicial input into European Convention on Human Rights (ECHR) jurisprudence;

- Improves the work of the criminal justice system and other agencies by instilling a "human rights culture" in training and guidance

It concluded that there was no compelling case for reform.

The Committee's final report, published in July 2021, concluded that the positive impact of the HRA should be welcomed and protected, and that amending it could constitute a risk to the UK's constitutional settlement and to the enforcement of human rights.[46] On the basis of evidence received, it found that

> As a result of the Human Rights Act, human rights cases are now heard first by UK judges in UK courts. Cases are heard sooner; court action is less prohibitively costly and UK judges are able to take better account of the UK's national context. … as a result, the enforcement and accessibility of human rights in the UK has improved.
>
> Parliamentary sovereignty is kept intact by the Act as courts cannot overturn primary legislation even if they find it incompatible with ECHR obligations. Public authorities must act compatibly with ECHR rights, embedding human rights in the delivery of public services. The Act is also a central part of the devolution settlement in the UK.[47]

[46] The Government's Independent Review of the Human Rights Act, 8 July 2021, HC89, Joint Committee on Human Rights

[47] JCHR, 8 July 2021, parliament.uk

The Chair, Harriet Harman, said that as a result of these findings there was "absolutely no justification for any changes along the lines mooted".[48]

The Government has not yet responded to the Committee.

[48] Ibid

3 Government consultation: A Modern Bill of Rights

On 14 December 2021, the Government published a consultation on its plans to reform the HRA – Human Rights Act Reform: A Modern Bill of Rights (1,377KB, PDF).

The consultation, which is due to close on 8 March 2022, contains questions and draft clauses for consideration.

The foreword describes the consultation as marking "the next step in the development of the UK's tradition of upholding human rights", and is informed by the work of IHRAR.[49]

It notes the Government's ongoing commitment to the ECHR and "the UK's tradition of human rights leadership abroad", but also the need for a system that strikes "the proper balance of rights and responsibilities, individual liberty and the public interest, rigorous judicial interpretation, and respect for the authority of law makers".[50]

It states that the Government intends to replace the HRA with "a modern Bill of Rights … which reinforces our freedoms under the rule of law, but also provides a clearer demarcation of the separation of powers between the courts and Parliament".[51]

3.1 International context

Setting the human rights framework within its international context, the consultation explains that the ECtHR's adoption of the 'living instrument' doctrine, which means the Convention must be interpreted in the light of present day conditions, has been a source of particular tension in its relationship with the UK.

This is because it means that "the Strasbourg Court can develop and expand the scope of rights through it own case law, without any means for national parliaments to debate or define those rights in the context of their own legal systems". It suggests that this approach has led to the development and

[49] Human Rights Act Reform: A Modern Bill of Rights, Ministry of Justice, December 2021, CP 588, page 3
[50] Ibid
[51] Ibid

expansion of implicit 'positive obligations' on governments to act in certain ways.[52]

The consultation also highlights the importance of the countervailing concept of the 'margin of appreciation'. This means the ECtHR respects the different approaches to implementing and interpreting the Convention in different countries. This is linked to the principle of 'subsidiarity', whereby the ECtHR's role in implementing and protecting the Convention is subsidiary to that of national authorities.[53]

It notes that the relationship is intended to enable a dialogue between national courts and governments and the ECtHR, and that states may take a different stance and "are entitled to 'push back'" against the Court's approach.[54]

Further, under Protocol 15, which came into force on 1 August 2021, and was "inspired by and negotiated under the UK's stewardship" there is now a reference to the margin of appreciation and the principle of subsidiarity in the Preamble to the Convention. According to the consultation:

> These reforms, inspired by and negotiated under the UK's stewardship, send a clear message that the Strasbourg Court should not usually be reconsidering cases already dealt with properly by domestic courts in Council of Europe countries, unless they raise important questions about the interpretation of rights set out in the Convention. They create space for State Parties to assert the margin of appreciation over matters which, particularly in a mature liberal democracy, should be left to national courts and elected legislatures.[55]

3.2 The case for reform

The consultation sets out the Government's case for reforming the HRA, stating that it has seen:

- the growth of a 'rights culture' that has displaced due focus on personal responsibility and the public interest;
- the creation of legal uncertainty, confusion and risk aversion for those delivering public services on the frontline;

[52] Ibid, paras 49-51

[53] Human Rights Act Reform: A Modern Bill of Rights, Ministry of Justice, December 2021, CP 588, paras 53-54

[54] Para 56

[55] Para 67

- public protection put at risk by the exponential expansion of rights; and
- public policy priorities and decisions affecting public expenditure shift from Parliament to the courts, creating a democratic deficit. [56]

Expansion of rights: The 'living instrument' doctrine

In support of this contention, the consultation cites several cases as examples of problems arising because of the 'living instrument' doctrine (that the Convention must be interpreted in the light of present day conditions), including:

- *Abu Qatada*[57] – in which the ECtHR found for the first time that the Article 6 right to a fair trial could be asserted to defeat a deportation order, by contrast with the House of Lords. [58] The consultation paper states that although "the facts were specific to the particular case, the ruling opened up the case law to further incremental judicial expansions in the use of Article 6 to frustrate deportation orders, well beyond the terms of the Convention, or previous case law from Strasbourg". [59]
- *Hirst* – in which the ECtHR found that the right to vote (guaranteed by the obligation on States to hold free elections under Article 3 of Protocol 1 to the Convention) extended in principle to prisoners. The UK's general, automatic and indiscriminate ban on all convicted prisoners in custody was incompatible with this right. [60]
- *Hatton* - in which the ECtHR found that the Article 8 right to a private and family life could be used where an individual was directly and seriously affected by noise or other pollution, although there is no explicit right to a clean and quite environment. [61]

According to the consultation paper:

> Far from merely applying the Convention, these judicial extensions of human rights have enabled the Strasbourg Court to prescribe

[56] Chapter 3 summary, page 28

[57] Othman (Abu Qatada) v United Kingdom (2012) 55 EHRR 1

[58] *RB (Algeria) (FC) and another v Secretary of State for the Home Department and OO (Jordan) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110. However, it is worth noting that the House of Lords accepted in principle that Article 6 could be used to resist a deportation order.

[59] The issue in the case was that the claimant's Article 6 rights would be undermined by the use of evidence at his criminal trial in Jordan obtained through the use of torture. The Government ultimately obtained reassurances from Jordan that this would not happen and he was deported.

[60] *Hirst v UK (No 2)*, App no. 74025/01 (2005)

[61] *Hatton v UK*, App no. 36022/97 (2003)

domestic principles and rules in a wide range of social policy areas, without any meaningful democratic mandate or accountability.[62]

The influence of Strasbourg: Section 2

The consultation states that section 2 of the HRA has led the courts to conclude that Parliament had "instructed them to keep up with, and match, the Strasbourg Court's case law, rather than apply the Convention rights in a UK context, and within the margin of appreciation that the Convention allows".[63]

It suggests that although "the courts have retreated a little from this maximalist position", section 2 continues to give rise to legal uncertainty and contributes to an over-reliance on ECtHR case law. This comes at the expense of case law tailored to the UK's tradition of liberty and rights.[64]

Statutory interpretation: Section 3

The paper states that the requirement in section 3 of the HRA, that the courts read legislation compatibly with Convention rights if possible, has caused a "significant constitutional shift in the balance between Parliament, the executive and the judiciary" which had led to the judicial amendment of legislation.[65] The result, the Government argues, has been the courts displacing Parliament in determining questions of public policy.

Consequences of systemic issues

The consultation suggests that these systemic problems have manifested themselves in various ways, which the Government's proposals seek to address, namely:

- The "increasing reliance on human rights claims" has led to rights being decoupled from responsibilities and the wider public interest, in conflict with the UK tradition of liberty. Many claims under the HRA have been brought by people who have shown "a flagrant disregard for the rights of others", such as foreign national offenders (FNOs) and other convicted prisoners. Dealing with unmeritorious claims from these people requires spending public money and therefore undermines public confidence in the HRA.[66]
- The application of the HRA by the courts has led to the imposition of 'positive obligations' on public bodies. An example given is the obligation

[62] Human Rights Act Reform: A Modern Bill of Rights, Ministry of Justice, December 2021, CP 588, para 109

[63] Ibid, para 114

[64] Human Rights Act Reform: A Modern Bill of Rights, Ministry of Justice, December 2021, CP 588, para 114

[65] Ibid, para 117

[66] Paras 124-131

to protect the Article 2 right to life of those in the custody of the state. It says Judicial interpretation of the scope of certain rights has led to legal uncertainty as to the extent of public bodies' positive obligations, which sometimes leads them to take a cautious approach, for fear of legal challenges.[67]

- The courts have developed principles which have implications on how some public authorities carry out their duties. This may add to the cost and complexity of operations carried out by public authorities responsible for public protection, such as the police and the armed forces, and constrain their ability to determine the allocation of resources based on professional judgement and priorities.[68]
- The expansion of fundamental rights beyond their irreducible core has led the courts to determine questions of public policy, such as those relating to social welfare. This involves balancing competing considerations and the allocation of finite public funds. Such decisions should be taken at a political level, by those accountable to taxpayers. The recognition of 'positive obligations' on public authorities by the courts has contributed to the courts becoming involved in questions of public policy, resulting in additional burdens in the delivery of public services. Such decisions being taken by the courts rather than Parliament has created a "democratic deficit", and blurred the boundaries between the legislature and the judiciary.[69]

3.3 Government proposals

Chapter 4 of the consultation paper sets out the Government's proposals and asks several specific questions.

It states that the Government wants to introduce a Bill of Rights, while remaining a party to the ECHR. The Convention rights, as set out in Schedule 1 HRA, would remain under the proposals, and thus there would be no conflict with the ECHR and no need to withdraw.

The following is an overview of the main questions and proposals.

Section 2 and common law rights

The first section is focused on proposals to "strengthen our common law tradition, reduce our reliance on Strasbourg case law and help to reinforce

[67] Paras 132-140

[68] Human Rights Act Reform: A Modern Bill of Rights, Ministry of Justice, December 2021, CP 588, paras 141-150

[69] Paras 151-176

the supremacy of the UK Supreme Court in the interpretation of human rights".[70]

- **Question 1** asks for views on two alternative draft clauses, which would replace section 2. The Government wishes to emphasise the primacy of UK precedent and set out a wider range of case law for the courts to consider, with the aim of correcting the perceived "over-reliance on Strasbourg case law"[71] and mitigating the "incremental expansion of rights driven by the Strasbourg Court".[72]

  - **Option 1** would provide that the rights in the Bill of Rights do not have the same meaning as those in the ECHR or HRA (or any other treaty or repealed legislation), and that when determining a question under the Bill of Rights, courts must follow UK case law Under the proposal, courts **may** take into account decisions by other judicial authorities, whether international or in other jurisdictions.
  - **Option 2** would provide that the UK Supreme Court is the ultimate arbiter of the Bill of Rights, and sets out what a court of tribunal must take into account when determining a question under the Bill of Rights, namely it:
    - Must have particular regard to the text of the right or freedom and the 'preparatory work of the European Convention on Human Rights';[73]
    - Must follow UK precedent;
    - May have regard to common law rights; Commonwealth case law and ECtHR case law.

- **Question 2** asks how the Bill of Rights can make clear that the UK Supreme Court is the ultimate arbiter of human rights law with greater certainty and authority than at present.

  It reflects the Government's concern that the courts currently tend to treat the ECtHR as having presumptive authority and this has undermined the supremacy of the Supreme Court. Views are sought on a proposal considered but ultimately rejected by IHRAR, to "clarify in statute the matters that fall outside the institutional competence of the UK courts".[74]

[70] Para 189
[71] Para 190
[72] Para 197
[73] This is a reference to the 'traveaux preparatoire' of the ECHR – a record of the negotiations from which the intentions of the parties can be inferred
[74] Para 201

- **Question 3** asks whether a qualified right to trial by jury should be included in the Bill of Rights, "given its significant historical place in our legal traditions".[75]
- **Questions 4 to 7** ask how freedom of speech could be better protected, including:

  — Limiting interference with the press and other publishers through injunctions;

  — Emphasising the importance attached to the Article 10 right to free speech; and

  — Providing stronger protection for journalists' sources

  This reflects the Government's belief that the ECtHR has given insufficient emphasis to the importance of free speech, particularly when balancing it against other rights, such as the Article 8 right to privacy. Section 12 of the HRA currently requires the courts to have particular regard to its importance, however the Government believes this has not had any real effect, and that the Bill of Rights should contain a more effective provision.[76]

Restricting access to the courts for human rights claims

The next section contains proposals which, according to the consultation paper, are aimed at restoring "a sharper focus on fundamental rights, including by ensuring unmeritorious cases are filtered earlier, and giving the UK courts greater clarity regarding the interpretation of qualified rights and imposition by implication of 'positive obligations'".[77]

- **Question 8** asks whether there should be a 'permission stage' for human rights claims, at which claimants would need to establish that they had suffered 'significant disadvantage', to divert trivial and unmeritorious cases away from the courts early in the process. This reflects the Government's concern that such cases create a perception that human rights are being deliberately misused, and thus devalues the concept of human rights.[78]
- **Question 9** asks whether the permission stage should include an exception for cases which cannot meet the 'significant disadvantage' test but which are of 'overriding public importance', thus giving the courts discretion to allow such cases to proceed.

[75] Para 203
[76] Para 213
[77] Para 218
[78] Paras 219-223

- **Question 10** asks how else the Government can ensure that the courts focus on genuine human rights abuses. It appears to relate to a proposal to require applications to pursue any other claims they have before a human rights claim, so that the courts can decide whether an alternative remedy would provide adequate redress.[79]
- **Question 11** asks how the Bill of Rights can address the imposition and expansion of positive obligations to protect public authorities from costly human rights litigation. The reflects the concern outlined above, that the imposition of positive obligations on public bodies has fettered the way they make operational decisions, determine priorities and allocate resources.

The role of Parliament and the courts

The next set of questions are focused on the role played by Parliament and the courts in interpreting and implementing human rights law.

- **Question 12** asks for views on three alternative options for replacing section 3 of the HRA:

  – **Option 1** would be to repeal section 3 without replacement;
  – **Option 2A** would be a replacement clause, which would provide that where a provision of primary or secondary legislation is ambiguous, it should be interpreted compatibly with the Bill of Rights;
  – **Option 2B** would be a replacement clause, providing that legislation should be read compatibly, if that interpretation was "an ordinary reading of the words" and "consistent with the overall purpose of the legislation".

  This would address the Government's concern, outlined above, that section 3 "compels the court to expand the interpretive duty beyond what is appropriate for an unelected body".[80] The Government believes that a duty to interpret legislation, which was less expansive would provide "greater legal certainty, a clearer separation of powers, and a more balanced approach to the proper constitutional relationship between Parliament and the courts on human rights issues".[81]

  The Government favours Option 2A or 2B, which would aim to put the existing common law presumption that Parliament does not intend to act in breach of international law on a statutory footing.

[79] Para 226
[80] Para 235
[81] Para 236

- **Questions 13 and 14** ask how Parliament's role in engaging with and scrutinising section 3 judgments could be enhanced, and whether a database should be created to record all such judgments.

  This reflects IHRAR's recommendation for the creation of a database to increase transparency in the application of section 3, and to make it easier for Parliament, including the JCHR, to monitor its use.

- **Question 15** asks whether the courts should be able to make declarations of incompatibility for all secondary legislation.

  Declarations of incompatibility under section 4 HRA can currently only be made in relation to secondary legislation if the primary legislation under which it is made requires it to be applied in a way which is incompatible. The courts therefore use general powers (not specific HRA powers) to quash incompatible secondary legislation. The Government believes that declarations of incompatibility are an effective way of recognising the democratic role of Parliament and facilitating dialogue with the courts. It therefore wishes to explore whether this should be the only remedy available with respect to incompatible secondary legislation.

- **Question 16** asks whether proposals for suspended and prospective quashing orders (currently in the Judicial Review and Courts Bill) should be available as remedies in relation to incompatible secondary legislation in legal proceedings brought under the Bill of Rights.

  The proposals in the Judicial Review and Courts Bill would mean that an order that quashes secondary legislation in judicial review proceedings could be suspended for a period of time, or could be limited in its retrospective effect, in order to allow the Government time to resolve the problem. The Government is seeking views on the IHRAR recommendation that these powers be extended to all proceedings that challenge secondary legislation on the basis of human rights compatibility.

- **Question 17** asks whether the Bill of Rights should have a remedial power equivalent to that in section 10 HRA, or whether it should be:

  - Limited so that it cannot be used to amend the Bill of Rights;
  - Limited to remedial orders made under the urgent procedure;
  - Abolished

  This reflects the Government's belief that there should be "a strong presumption in favour of using more commonly used parliamentary procedures" (such as primary legislation) to remedy incompatibilities.

This is because, as a power to amend primary legislation via secondary legislation, "remedial orders arguably reduce the role of Parliament in the legislative process", and given the complexity of the non-urgent procedure, they "offer limited benefits in terms of speed".[82]

- **Question 18** asks an open question about how the section 19 process for making statements of compatibility works in practice and whether there is a case for change.

  This reflects the Government's belief that there is "a debate as to whether section 19 strikes the right constitutional balance between government and Parliament, particularly in relation to ensuring human rights compatibility whilst also creating the space for innovative policies".[83]

How a Bill of Rights should be applied to different parts of the UK

- **Question 19** asks how the Bill of Rights for the whole UK can best reflect the different interests, histories and legal traditions of all parts of the UK.

  The consultation acknowledges the interconnected nature of the existing human rights framework with the devolution arrangements in Scotland, Northern Ireland and Wales, as discussed above. It states that

  > The Bill of Rights will seek to strike the correct balance between guaranteeing rights protection to all people across the United Kingdom, and allowing for difference in the application and implementation of the rights framework according to the needs and preferences of the nations of the UK.

  The Government believes that it will be possible to build a consensus for reform which would fulfil its mandate while including all parts of the UK.

Section 6: The duty on public authorities to act compatibly

- **Question 20** asks whether the existing definition of public authorities should be maintained or clarified.

  The Government believes that the current approach to defining public authorities is broadly correct and that the formulation in the HRA is

[82] Paras 254-255
[83] Para 261

flexible . However, it is concerned that there is uncertainty pver which functions will constitute functions of a public nature, and therefore wishes to explore whether alternative drafting might offer more clarity

- **Question 21** asks for views on two alternative replacements for section 6(2)(b)

  – Option 1 would provide that whenever public authorities are clearly giving effect to primary legislation, they cannot be deemed to be acting unlawfully;

  – Option 2 would retain the current exception, but would reflect any changes to the approach to legislative interpretation under section 3.

  These proposals reflect similar concerns on the part of the Government as those relating to section 3 of the HRA, namely that section 6(2)(b) requires public authorities to act in accordance with a compatible reading of legislation, even if that were "contrary to the clear will of Parliament".[84]
  The paper suggests that the proposed changes to section 3 would help to give public authorities confidence about how their duties will be interpreted by the courts. However, the proposed amendments to section 6(2)(b) provide alternative ways of addressing the perceived problem. Option 1 would remove the qualification that section 6(2)(b) only applies when legislation cannot be read compatibly. Option 2 retains the exception but amends it so the obligation to act in accordance with a compatible reading of legislation would only apply where there was ambiguity, for example.

Extraterritorial jurisdiction

- **Question 22** asks for 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".[85]

  This reflects the Government's concerns about the extension of extra-territorial jurisdiction to the Convention and the HRA, as outlined above. The consultation acknowledges that, given the extra-territorial application of the ECHR, there is no unilateral domestic solution, and restricting the territorial application of the Bill of Rights would not solve the problem at an international level. The Government agrees with

[84] Para 272
[85] Para 281

IHRAR's conclusion that it is an issue which would need to be addressed in Strasbourg.

Proportionality and qualified rights

- **Question 23** asks for views on two different options which seek to require the courts to give greater weight to the view of Parliament when balancing qualified and limited rights:

  – **Option 1** would require the courts to give great weight to legislation enacted by Parliament when determining whether interference with a qualified right is necessary in a democratic society. The fact that Parliament had enacted the legislation should determine that Parliament views it necessary;

  – **Option 2** would require the courts to give great weight to the fact that Parliament was acting in the public interest in passing legislation, in any case where it was required to consider the public interest in determining whether legislation or a decision made in accordance with legislation was compatible.

  The Government believes that the HRA does not provide sufficient clarity as to how the courts should determine whether the infringement of a qualified right is necessary and proportionate. This has resulted in inconsistency and uncertainty, according to the Government, and has "impinged on the ability of elected lawmakers to balance individual rights with due respect for the wider public interest".[86] It thinks that where Parliament has expressed a clear view on "complex and diverse issues relating to the public interest" this should be respected by the courts.

Deportation

- **Question 24** asks for views on how to curtail human rights challenges to deportation orders. It provides three options:

  – **Option 1** would provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example a foreign national offender with a sentence above a certain threshold;

  – **Option 2** would provide that certain rights can only prevent deportation. These would be provided for in a legislative scheme

[86] Para 289

designed to balance the public interest in deportation against the right to remain;

- **Option 3** would provide that an order could only be overturned by the court if it was "obviously flawed"

The Government wishes to make it harder for foreign national offenders to use human rights, and Article 8 in particular, to challenge deportation. The consultation suggests that public confidence in the human rights framework is damaged when

> … foreign criminals and others who present a serious threat to our society – including those linked with terrorist activity – can evade deportation, because their human rights are given greater weight than the safety and security of the public.[87]

The Immigration Act 2014 set out how the courts should balance Article 8 against the public interest in immigration cases, but the Government believes that more needs to be done to address the issue.

- **Question 25** asks an open question as to how the "impediments arising from the Convention and the [HRA]" to tackling irregular and illegal migration could be more effectively addressed at both the domestic and international levels, while respecting international obligations.

The consultation suggests that the proposals relating to the deportation of foreign national offenders could also apply to the removal of failed asylum seekers and those who overstay their right to remain.

It further suggests that other proposals in the consultation could facilitate asylum removal, referring to "those that constrain the expansion of rights outside democratic control".[88] However, it also acknowledges that there may be constraints in international law which prevent it from taking further legal action against illegal migration "particularly via small boats in the English Channel".[89]

Remedies

- **Question 26** asks for views on several factors that the courts could be required to consider in human rights claims, when awarding damages:
  - The impact on the provision of public services;

[87] Para 292
[88] Para 297
[89] Para 298

— The extent to which any statutory obligation had been discharged;

— The extent of the breach;

— Whether a public authority was trying to give effect to the express provisions, or clear purpose, of legislation.

These proposals reflect the Government's belief that the courts should seek to protect the wider public interest as well as individuals' rights when awarding compensation, by considering the impact of the award on the public authority's ability to discharge its duties.

This, it says, would limit "the potentially negative impact that individual claims will have on services which are meant to benefit the community as a whole".[90]

- **Question 27** asks for views on two options on how the courts might take account of the responsibilities or conduct of claimants in human rights claims when awarding damages:

  — **Option 1** would provide that damages could be reduced or removed in light of the claimant's conduct specifically in relation to the circumstances that gave rise to the claim;

  — **Option 2** would provide that damages could be reduced or removed in light of the claimant's wider conduct. Views are sought as to whether there should be any temporal or other limits to the conduct that would be relevant.

  This reflects the Government's belief that the new human rights framework "should reflect the importance of responsibilities" notwithstanding the fact that "everyone holds human rights whether or not they undertake their responsibilities, particularly the absolute rights in the Convention such as the prohibition on torture".[91]

  Alongside the proposal to require courts to consider claimants' "wider behaviour" when awarding remedies, the Government would like to recognise the importance of responsibilities in an overarching provision of the Bill of Rights. It also intends that the courts should consider the extent to which a person has fulfilled their own relevant responsibilities when considering the proportionality of an interference with a person's qualified rights.[92]

[90] Para 301
[91] Para 302
[92] Paras 303-305

Under the proposals, courts would be able to hear about the lawfulness of the claimant's conduct in the circumstances surrounding the claim, but could also consider relevant past conduct. This aim of this would be to link "the remedies available under the Bill of Rights to how the claimant has lived by its underlying principles".[93]

Responding to ECtHR judgments

- **Question 28** asks for views on a draft clause which would provide for a parliamentary process for considering ECtHR judgments against the UK .[94] It would affirm that such judgments are not part of UK law and "cannot affect the right of Parliament to legislate or otherwise affect the constitutional principle of Parliamentary sovereignty". It would require the Secretary of State to notify Parliament of any adverse judgment within 30 days, and provide that a debate on the judgment may be tabled by a Minister.

  The consultation notes that under Article 46 of the ECHR, the UK is required to implement final judgments of the ECtHR brought against it and the Government coordinates this, including any operational or administrative response, and proposing legislative amendments. However, the power to legislate lies with Parliament, and the Government believes that this should be reflected in the arrangements for responding to Strasbourg judgments.

  The Government believes that the proposed measures would "show respect for our international obligations" and "provide a clear and explicit shield to defend the dualist system in the UK by making clear that Parliament, in the exercise of the legislative function, has the last word on how to respond to adverse rulings".[95]

Impact

- **Question 29** asks for views, with reasons and evidence, on any potential impacts of the proposals, including:

  – The costs and benefits
  – Equalities impacts on individuals with particular protected characteristics; and
  – How any negative impacts might be mitigated

[93] Para 308
[94] Annex 2, para 11
[95] Para 316

The Government's initial assessment of the impact of the proposals is set out in Annex 3, however it invites views to help inform a full impact assessment.

3.4 Initial reaction

The reaction from the Opposition has focused on the Government's decision to prioritise HRA reform at a time when there are more pressing issues concerning the criminal justice system.

Responding to the announcement in the House of Commons, Shadow Justice Secretary Steve Reed question why the Government was "choosing to fiddle with the [HRA] instead of stretching every muscle and sinew to make sure that rapists and violent offenders are banged up behind bars where they belong".[96]

He described HRA reform as a "dead cat distraction tactic" designed to divert attention from the damage done to the criminal justice system. In response to the suggestion that the proposals would restore the role of Parliament and the UK courts in interpreting rights, he said: "they already have those powers under the margin of appreciation … so he is offering nothing new".[97]

Brendan O'Hara, on behalf of the SNP, asked for a guarantee that nothing would be done without the Scottish Government's permission, and stated that the Scottish Government would oppose any attempt to erode the HRA.[98]

Several Members, including Chair of the JCHR Harriet Harman, welcomed the Government's commitment to remain party to the ECHR.

Several backbench Conservative MPs responded positively to the announcement but suggested that the Government should go further.

The announcement has had some positive reaction in the press. In particular, the proposal to make it harder to assert privacy rights has, unsurprisingly, been welcomed.[99]

However, an editorial in the Times suggested that the proposals would make little difference, because the Government was not planning to withdraw from the ECHR. It noted that introducing a Bill of Rights would not affect the ability of individuals to seek redress at the ECtHR, and that it is already the case that ECtHR rulings are not binding in UK law. It suggested that the Justice Secretary may have a more decisive break with Strasbourg in mind but noted

[96] HC Deb 14 Dec 2021, c 916
[97] Ibid
[98] Ibid, c919
[99] Raab's human rights proposals will make it harder for stars to gag press, The Times, 15 December 2021

that the UK's membership of the ECHR underpins other treaties, including the post-Brexit Trade and Cooperation Agreement with the EU.[100]

Legal commentator, Joshua Rozenberg, describes the proposals to revise section 2, in order to require the courts to consider what the original drafters of the Convention had in mind when interpreting the law, as "unusual, to say the least".[101] He also questions the proposal for a statutory provision asserting the Supreme Court's "ultimate responsibility" for interpreting rights. He notes that in terms of the UK legal system, "this is no more than a statement of the obvious" but given the Government's commitment to remaining party to the ECHR "it's simply not true". The ECtHR would continue to have ultimate responsibility for deciding whether the UK has complied with the Convention.

On the proposal to have a permission stage for human rights claims (to prevent unmeritorious claims proceeding), Joshua Rozenberg points out that human rights arguments are often raised in claims for judicial review "and there is already a rigorous but flexible permission stage". He describes the suggestion that unmeritorious claimants, such as prisoners, would find it more difficult to bring claims, as "disturbing" and notes that several of the proposals would make it harder to bring claims against public bodies.

Overall, Joshua Rozenberg suggests that the Government's response to IHRAR constitutes cherry-picking proposals that can be seen as endorsing its position and ignoring those it does not like. The proper response would have been, he suggests, to set out each recommendation alongside the Government's response to accept in full, in part, or reject.

The Public Law Project highlighted how five of the Government's proposals would affect how people can enforce their legal rights and hold public authorities to account, namely:[102]

- **Reform of section 2:** the proposed reforms may result in more individuals going to Strasbourg, the cost and time of which is beyond the means of most people. It said: "This would create an access to justice problem and defeat the HRA's original purpose of bringing rights home."
- **Introducing a 'permission stage'**: this raises concern that further obstacles would be put between potentially vulnerable individuals and their ability to enforce their rights.
- **Reforming section 3**: one of the options under consideration is repeal of section 3, which could result in more people having to take cases to Strasbourg.

[100] The Times view on Tory proposals for the Human Rights Act: Rights and Wrongs, The Times, 14 December 2021

[101] Joshua Rozenberg, A bill of rights?, 17 December 2021, rozenberg.substack.com

[102] Human Rights Act: 5 concerns with new consultation, 16 December 2021, publiclawproject.org.uk

- **Reform of section 4**: expanding the use of suspended and prospective only quashing orders in relation to incompatible secondary legislation could undermine Government accountability.
- **Public interest concerns and foreign national offenders**: human rights are universal and any proposal to completely strip certain groups of Convention rights would be unlikely to be compatible with the ECHR. In practice, the courts already balance the public interests and any misconduct of the claimant against the claimant's rights.

A group of civil society organisations, including Citizens Advice, Stonewall, the TUC, and the Fawcett Society, issued a statement responding to IHRAR, which described it as "deeply disappointing" and bearing "little relationship to the weight of evidence submitted to it". It called on the Government to maintain the HRA and proactively raise awareness of human rights.[103]

[103] The Human Rights Act: Statement from UK civil society organisations on the Independent Human Rights Act Review, equallyours.org.uk

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