**Human Rights Act Reform: A Modern Bill of Rights Consultation**

UNISON Briefing January 2022

The [consultation](https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights), published just before Christmas, alongside the [Independent Review of the Human Rights Act](https://www.gov.uk/guidance/independent-human-rights-act-review) (IRHRA), represents another attack on current rights and on access to justice and accountability from this government.

The proposals are constitutionally significant and the three-month consultation period, which **closes on 8 March**, means there is a lot to cover in a short space of time.

**Background**

The UK Human Rights Act has been a significant curb to this governments most excessive attempts to dismantle our democratic, and fundamental, rights and it is no surprise that they now seek to dilute the act itself.

The proposal is to replace the hard-won UK Human Rights Act with a weaker Bill of Rights.

This current attack on existing rights has been festering since the 2010 Tory manifesto which explicitly committed to replacing the act with a Bill of Rights [(Page 79](https://general-election-2010.co.uk/2010-general-election-manifestos/Conservative-Party-Manifesto-2010.pdf)). However, shortly after coming into power, the government quickly discovered that it would not be a simple matter to tear up the Act completely because devolution presented significant hurdles. The Welsh Senedd has expressed its strong opposition to undermining of current rights, Holyrood has confirmed that they will oppose any dilution of the Human Rights Act in Scotland and, more importantly, the Human Rights Act has been an essential part of the Good Friday Agreement in Northern Ireland and walking away from the Act and replacing it with a Bill of Rights would undermine that agreement.

This has hampered direct attacks on the Act because it would not be easy to have diluted rights just for England. Nevertheless, despite two significant government reviews saying change wasn’t necessary, proposals for ‘reform’ have now landed.

The government says it isn’t trying to take away or dilute the rights enshrined in the current legislation. However, it seems clear that the intention of the proposals will absolutely dilute access to our rights and has the potential to interfere with access to justice and any remedial action required where they are found wanting.

**Proposals contained in the consultation include**:

* Being able to ignore or re-interpret case law. As with the UK legal system, case law gives meaning to any ambiguity or misinterpretation of the baseline legislation – ignoring it deliberately dilutes this and could lead to the UK breaching its international obligations.
* Introducing a new subjective ‘permissions’ stage for bringing any case to court in the first place - where someone would have to demonstrate that they have been ‘significantly disadvantaged’. So, a kind of pre-trial trial?
* Restricting people from taking cases unless it was their only possible form of redress – rather than recognise that currently all other laws have to be applied in a way which is consistent with the Human Rights Act in all cases so will be necessarily intertwined.

These are clearly all deliberate hurdles to accessing human rights legislation as it currently stands despite the fact that Limiting access to UK courts will force more people to take their case to the European Court.

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But perhaps the most worrying, and populist, proposals of all is -

* That we should reconsider the importance of each right and even consider whether all human rights really do apply to all humans equally in the first place or whether political imperatives should be able to have a role to play in deciding that, for some humans, they don’t.

The government suggests that these changes are necessary because the current system is too onerous and restrictive and that the ‘balance’ between accountability and autonomy is wrong.

However, there are many checks and balances in the current system that stop the current process being too onerous which give significant autonomy for Governments to control their own responses to any case upheld at the European Court of Human Rights. The Governments Independent Commission on Human Rights published its report in June 2021 and said the [“evidence we heard has led us to conclude that there is no case for changing the Human Rights Act.”](https://committees.parliament.uk/publications/6592/documents/71259/default/).

The government’s own separate [Independent Review of the Human Rights Act](https://www.gov.uk/guidance/independent-human-rights-act-review) (IRHRA) agrees – concluding that the process should be more transparent and better understood but does not need to change.

Perversely, the effect of limiting someone’s access to justice under the current rights within the UK will only lead to more cases being heard by the European Court than ever.  Unless the UK decides to take the unlikely and dramatic decision to stop being a signatory to the European Convention that it was instrumental in drafting, then every UK citizen will still be able to access the European Courts to seek redress if they have exhausted their own government processes anyway.  Therefore, it has always made sense to try and resolve as many cases as possible at home. This was a stated purpose of the introducing the UK HRA in the first place.

**UNISON’s position**

UNISON’s current position is to retain and expand the current Human Rights Act.

UNISON is well placed to speak on this issue, UNISON members look after many people from disadvantaged groups in our society.  Therefore, we know, first-hand that the UK’s Human Rights Act safety-net is a crucial source of legal protection for people across the country. It provides a means for those who have been mistreated or failed by the system to challenge their treatment and hold authorities to account. It provides essential protection for all of us when we need it most.

Cases taken under the Act include ensuring elderly couples aren’t separated by hundreds of miles when just one of them needs care, ensuring women under threat of domestic violence are allowed to keep their recommended panic-room without having their benefits penalised under the ‘bedroom tax’ rules. There have been many cases that have secured rights for the LGBT+ community and disabled people.

Without the European Convention on Human Rights the gross negligence behind the deaths at Hillsborough would never have been uncovered.

These and many other cases have relied on the absolute full extent of the current legal systems.

UNISON’s position is that the Human Rights Act must be protected in full.

**Appendix 1** attached to this briefing is a Public Law Project briefing that goes into more detail on the concerns with the proposals and links to relevant documents for reference.

This British Institute of Human Rights (BIHR) also has suite of simple and more detailed [explainers](https://www.bihr.org.uk/explainer-the-report-of-the-ihrar-and-the-governments-consultation-on-the-human-rights-act) which are a useful resource which is regularly updated.(UNISON sits on the BIHR associates meetings).

**Appendix 1**

**Public Law Project Briefing**

PLP will mainly focus on the following five proposals that would affect how people can enforce their legal rights and hold public authorities to account.

1. Reform section 2 of the HRA (the duty to take into account Strasbourg case law)

The Government has proposed a number of amendments to the Human Rights Act 1998 (HRA) to reduce the expectation that UK courts follow the case law of the European Court of Human Rights in Strasbourg.

If this proposal results in domestic courts interpreting rights more restrictively, this may result in more individuals going to Strasbourg to seek redress. The cost and time required to do so is far beyond the means of the vast majority of people. This would create an access to justice problem and defeat the HRA’s original purpose of bringing rights home. The IRHRA report recognised this problem ([IRHRA 146, Chapter 2](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf)) and rejected any option that involved the repeal of section 2 or replacing “must” with “may”.

Moreover, this may not be quite the issue the Government suggests. The Supreme Court has already developed an approach to interpreting rights in the European Convention on Human Rights that means UK statute and common law are the first port of call before Strasbourg case law is taken into account.

The IRHRA report also makes clear that over the 20 years since the HRA coming into force, we have developed a system where domestic courts are willing to differ from Strasbourg when there is good reason to do so. The courts do not see themselves as absolutely bound to follow Strasbourg. The Government consultation accepts this ([para 114](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf)) when it concedes that the courts have retreated from the ‘maximalist’ approach. When considered alongside the risk of restricting access to justice, this means the need for reform is less clear.

This proposal also poses rule of law concerns. If the UK is not upholding Convention rights to the standard that Strasbourg has deemed necessary, the UK will be at risk of breaching its international obligations.

2. Introducing a ‘permission stage’

The Government has proposed a new permission stage before a human rights claim can be heard in court. This would shift responsibility to the claimant to demonstrate their claim merits the court’s attention and resources and that they have suffered a significant disadvantage.

The consultation does not develop specific proposals on this point. It is far from clear how this would work in practice: which types of claims would this engage, and how? The immediate concern is that a permission stage would put further obstacles between potentially vulnerable individuals and their ability to enforce their legal rights.

The suggestion ([para 222](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf)) that claimants should suffer ‘significant disadvantage’ may ultimately be redundant as section 7 of the HRA already includes the ‘victim test’ for standing provided for by Article 34 of the Convention.

3. Reforming section 3 HRA (interpreting legislation to be compatible with the Convention)

The Government’s view is that section 3 has led to a move “too far towards judicial amendment of legislation which can contradict, or be otherwise incompatible with, the express will of Parliament.” ([para 233](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf))

Among the options for reform include repealing Section 3. This would make it more difficult for courts to read legislation in conformity with Convention rights, because the section 3 duty goes further than either the presumption that Parliament will not legislate in breach of international law obligations, or the [*Simms*](https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990708/obrien01.htm) legality principle, which ensures that fundamental rights cannot be overridden by general or ambiguous words.

Repeal of section 3 could result in more people taking cases to Strasbourg. Again, this would make it harder for individuals to access justice and seek redress.

4. Reforming section 4 HRA  (declarations of incompatibility of secondary legislation)

The Government consultation document alludes to concerns around the courts’ powers to quash secondary legislation as a remedy in human rights challenges ([paras 249-252](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf)). One of the proposals is to expand the use of suspended and prospective only quashing orders (Clause 1 of the Judicial Review and Courts Bill makes provision for this – you can read [Pubic Law Project’s briefing](https://publiclawproject.org.uk/content/uploads/2021/10/PLP-Judicial-Review-and-Courts-Bill-2nd-Reading-Briefing-clause-1-and-2.pdf) on why this will undermine Government accountability).

It is worth noting that:

* The majority of the IRHRA panel rejected any option which would prevent statutory instruments from being quashed ([para 64, Chapter 7](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf))
* only 14 statutory instruments have been struck down on HRA grounds since 2014.
* Secondary legislation cannot in any meaningful way be described as giving effect to the will of Parliament; these laws cannot be amended or voted down in practice.

5. Public interest concerns and foreign national offenders

The government wants to “provide more guidance to the courts on how to balance qualified and limited rights”, to ensure that the public interests and the rights of others are given “due consideration” ([paras 289-291](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf)).

The consultation recognises the reforms in the Immigration Act 2014, attaching more weight to the public interest when considering an article 8 claim from a foreign national offender, but maintains that more “direct reform” is needed ([para 293](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf)).

A consistent theme running through the consultation in relation to these recommendations is the notion that human rights depend on good conduct, described also as “emphasising the role of responsibilities”.

Considerations here include:

* Human rights are by design universal in their application, and while a qualified right can be permissibly breached when necessary and proportionate, any option that purports to *completely* strip certain groups of their ability to rely on their Convention rights would be manifestly unjust and highly unlikely to survive scrutiny from Strasbourg.
* Through orthodox proportionality analysis, courts are already performing these balancing assessments, comparing the public interest and any misconduct of the claimant with the claimant’s Convention rights.
* Government proposals around proportionality and qualified rights suggest that the courts “must give great weight to Parliament’s view of what is necessary in a democratic society”([10, Appendix 2](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf)). How the courts will ascertain Parliament’s ‘view’ is unclear.