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Submitted to Human Rights Act Reform: a Modern Bill of Rights
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c Type of organisation or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)

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If other, please specify::

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

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d What region are you in?

Region:
North East

If other, please specify::

e Company name/organisation (if applicable):

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

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

Question 1:

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

Question 2:

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

Not Answered

Please provide reasons::

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

Question 4:

While we agree that the UK should be proud of freedom of speech as an historic freedom enjoyed by UK populations and upheld by the UK courts and legislature, the government raises the prospect of altering a delicate balance, struck by UK judges interpreting relevant common law and statutory provisions, between allowing publication of material and restraining it where material is, for example, inaccurate and harmful to an individual's reputation, or physical/psychological integrity. Especially in light of the relatively low number of injunctions granted (according to MoJ figures, in the first six months of 2021, there were just 3 proceedings where the High Court considered an application for a new interim privacy injunction), a proposed amendment to s12 as per Q4, risks simply encouraging litigation without achieving any concrete result (which we believe is a fair assessment of the impact of the original section).

In 2012 the Joint Committee on Privacy and Injunctions explicitly considered the right to freedom of expression and how best to balance the Article 10 right with the Article 8 right to respect for private life, finding that the majority of witnesses considered the courts were striking the balance between the two rights correctly. Whilst the Committee recognised the importance of free expression, and supported the freedom of the press, acknowledging that the vitality of national and local media, in all its forms, is essential to the good operation of democracy, it also emphasised that the right to privacy should be considered equally important, that it is a universal right and should only be breached if there is a public interest in doing so.

If the government disagrees with a particular approach to the balancing of the fundamental rights of two bodies on a particular issue – such as that of a celebrity and a newspaper – it has the option to initiate legislation addressing the specific balance that it favours which, if it is passed by Parliament, would achieve the desired goal. It is true that such legislation could be challenged under s4 or interpreted compatibly under s3 under the HRA as it is, but given the broad margin of appreciation at Strasbourg on this issue (as in Von Hannover (no 2)) the courts are bound to take a deferential approach and cannot challenge legislation that explicitly degrades the rights of UK populations when these conflict with speech-interests.

We propose the retention of s12 or an equivalent provision.

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

Question 5:

The adoption of an alternative speech model for Article 10 (in q5), if that means departing from the rights-framework of the ECHR, would be a radical departure from the current approach under s12, depending on the model adopted. If a US model was adopted, then freedom of speech would be an absolute right and countervailing interests which Britain has long protected under its common law may result in substantially altering protection of fundamental rights where these conflict with speech-interests. We believe that such a change to the foundation of the rights of the UK population is not justified at this time. If such a change were to be made it should not, in any event, be made by standard legislative enactment, but rather as part of an explicit case to be made by the government which can be endorsed directly by the people, perhaps in the form of a citizens assembly or referendum.

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

Question 6:

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

Question 7:

II. Restoring a sharper focus on protecting fundamental rights

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

Not Answered

Please provide reasons::

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

Not Answered

Please provide reasons::

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

Question 10:

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

Question 1:

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

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

Question 12:

We agree with the finding of the Independent Human Rights Act Review that there is no basis on which to amend section 3 of the HRA, given the restraint that the courts have shown in using the section, and respect for Parliamentary sovereignty that runs through sections 3 and 4. Repeal of section 3 would

require courts to adopt the pre-existing common law test, which would result in a period of uncertainty and unnecessary litigation. Neither of the proposed amendments to s3 would do more to respect to Parliamentary sovereignty than do the current rules of interpretation.

Therefore we propose:
• that section 3 be retained unamended;

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

Question 13:

In relation to Parliamentary engagement, while we agree that Parliament should engage with s3 judgments (qs 13 and 14) in order to consider whether further revision of legislation is needed to achieve rights-compatibility, we suggest that such engagement or database should encompass s4 judgements also. Section 4 judgments identify areas of UK law that have been identified by UK judges as failing to respect the fundamental rights and freedoms of the UK population, so it is particularly important for Parliament to be aware of the reasons for these judgments and for Parliament to have an initiating role, separate to the government as under the s10 procedure currently, in any legislative debate as to whether revision of impugned legislation in order to achieve compatibility is needed as Parliament may well wish to go beyond government proposals to remedy legislation that has been found to violate the ECHR rights of the UK population. In agreement with the independent review, we further suggest that it is important that the engagement extend beyond Parliament, to general civic education as to legal protection of human rights, including areas in which those legal protections are deficient, as in cases where courts have had to resort to the use of s3 or s4. Any database should be broken down by fundamental right (ie Article 2, 3 etc), by legal area (eg defamation etc) and should state clearly why the existing law was found to be deficient and why it was (or was not) able to be read compatibly with the right. Reference to the contents of, and familiarity with, the database should be made an aspect of existing citizenship courses for state schools and should be referred to in Ofsted guidance on British values for schools and higher education institutions.

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

I have another answer

Please provide reasons::

See answer to Q13. For the reasons given above (q13) we propose that a database of section 3 and 4 judgments be made available to the public and to Parliament as part of a general drive to encourage awareness of judicial and legislative protection of fundamental rights.

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

Not Answered

Please provide reasons::

16 Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where subordinate legislation is found to be incompatible with the Convention rights?

Not Answered

Please provide reasons::

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

Not Answered

Please explain your reasons::

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

Question 18:

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

Question 19:

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

Question 20:

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

Not Answered

Please explain your reasons::

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

question 22:

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

Question 23:

We object to the underlying premise of question 23 and the government proposals on this point. The government asks what problems are created by the application of proportionality as an aspect of the qualified rights of the ECHR and proposes to restrict judicial assessment of the extent to which an interference with such rights has, even if potentially legitimate, been demonstrated to be necessary. The government suggests that there should essentially be a presumption that the legislature has correctly balanced the public interest covering the situation of an applicant whose qualified ECHR right has been interfered with. In so far as the question, and accompanying explanation by the government, imply that UK judges are not constitutionally competent to address questions as to the public interest factors that justify interreferences with the qualified ECHR rights of the UK population – that is contrary to both the UK's Article 13 obligation to provide an effective remedy for violations of ECHR rights and to the fundamental rationale of the HRA. If the government wishes to render the qualified ECHR rights unenforceable then it must do so explicitly, and attempts to dilute rights-protection that lack an explicit statement that such is intended could be subject to legal challenge and possibly re-interpretation to restore the current position (the existence of such principles of interpretation precede the HRA).

A fundamental principle of legally enforceable human rights it that the government which enforces the law must be the one to demonstrate that it respects human rights. Qualified rights reflect the fact that even a legislature operating in good faith to achieve human rights compliance will sometimes have to enact a policy that interferes with the rights of a particular applicant in order to achieve an outcome that respects the rights of all. If it was accepted that the government was not required to demonstrate that a law which prima facie interfered with an applicants' qualified ECHR right was justified on the basis of a Parliamentary assertion of compatibility due to countervailing legitimate public interest, then there would be no way (before domestic courts) to legally assess whether the risk to the rights of others was genuinely in good faith. Such public interest concerns, though popular, may be spurious, as is illustrated by historic case-law on the ECHR rights of minorities: many European legislatures asserted that tolerance of homosexuality would lead to the moral corruption, dissolution of families (etc) – these notions, though difficult for courts to assess, proved to be false and the UK judiciary should be proud of its role in subjecting such ideas to scrutiny.

If the government is, rather, implying that deference should be shown to the notion of the public interest advanced by the government in its arguments in particular cases, then – while we do not necessarily endorse such dilution to the ECHR rights of UK populations – the UK courts, sensitive to the incipient nature of the protection of certain ECHR rights (especially Article 8), have already arrived at such a deferential position. For example, the approach of the courts to Article 8(2), demonstrates that the courts frequently accord great weight to the views of Parliament on legitimate public interests capable of justifying interferences with Article 8(1). While not every decision will be met with the deference the government believes its position merits, the HRA and indeed ECHR both emphasise the importance of judicial restraint and the UK judiciary have embraced restraint. This restraint is well illustrated in relation to litigation on assisted suicide – there the courts recognised exceptional limits to 'institutional competence' to allow the government to claim, with virtually no substantiation from the primary evidence of the operation of assisted dying regimes, that even the narrowest of legal permission would create an unmanageable risk to vulnerable populations. Therefore, if the government is not arguing for constitutional restraint its proposal are simply otiose.

Finally, we suggest that the government's proposal on proportionality is too broad, as it may have the effect of diluting protection of ECHR rights that are currently robustly defended in the UK, such as freedom of expression. As we currently see in Russia, superficially plausible accounts of public interest in restrain on types of expression, such as protests, must be challenged and UK populations deserve to continue to live under a jurisdiction where UK judges can vindicate these rights.
Therefore we propose:
• that there be no change to proportionality.

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

Question 25:

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

Question 25:

26 We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. Which of the below considerations do you think should be included?

Please provide reasons::

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

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

Not Answered

Please provide reasons::

Impacts

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

What do you consider to be the likely costs and benefits of the proposed Bill of Rights? (Please give reasons and supply evidence as appropriate) :

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

How might any negative impacts be mitigated? (Please give reasons and supply evidence as appropriate) :

30 Please upload any evidence for Question 29 here:

Question 30:
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Confidentiality