PRISON
REFORM
TRUST

Prison Reform Trust evidence to the Ministry of Justice consultation Human Rights Act Reform – February 2022

About the Prison Reform Trust

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All-Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families
- promote equality and human rights in the criminal justice system.

www.prisonreformtrust.org.uk

Introduction

The Prison Reform Trust welcomes the opportunity to respond to this consultation. However, we reject the entire premise of the exercise, and do not believe there is need for a Bill of Rights to replace the Human Rights Act (HRA). The human rights framework established by the HRA and the European Convention on Human Rights (ECHR), and upheld by judgements in the domestic courts and the European Court of Human Rights (ECtHR), has played a vital role in helping to ensure that people in prison and their families are treated according to basic principles of dignity and respect.[1] By bringing the rights established in the ECHR into UK domestic law, the HRA has played a significant role in giving individuals, including those held in prison, the power to enforce their rights in practice. We are extremely concerned that the

[1] For instance, cumulative ECtHR judgments against the unjust indeterminate sentence of imprisonment for public protection (IPP) contributed to the eventual abolition of the sentence by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Betteridge v UK and James, Wells and Lee v UK have led to improvements in the process for review of the lawfulness of detention and access to rehabilitative courses of IPP prisoners. Cases taken under the Human Rights Act, which brings the European Convention into British law, have helped establish the right of most prisoners to an oral hearing by the Parole Board (Osborn, Booth and Riley v The Parole Board); to highlight the degrading practice of “slopping out” (Napier v Scottish Ministers [2004] SLT 555); the inadequate investigation of deaths in custody (R (on the application of Amin) v Secretary of State for the Home Department [2004] 1 AC 653); and the rights of prisoners’ children and dependents (R (on the application of P and Q v Secretary of State for the Home Department).

proposals in this consultation will severely limit the ability of people in prison to seek redress when their human rights have been violated. Indeed, many of the proposals in the consultation seem to have been devised with this explicit intention in mind.

We note that prior to this consultation the government established an independent human rights act review (IHRAR) tasked with fulfilling the 2019 Conservative manifesto pledge to "update" the HRA. The independent panel tasked with IHRAR worked for nine months to produce a 580-page report. We do not agree with everything suggested by IHRAR, but they are serious recommendations, arrived at through careful consideration. As Liberty has stated: "The consultation document largely ignores the report, far exceeding IHRAR's terms of reference, soliciting views on proposals explicitly rejected by IHRAR and ignoring specific recommendations, such as for a programme of human rights education in schools and universities. The IHRAR report found no justification for the 'overhaul' now on the table."[2]

We are extremely concerned by the language and tone adopted by the consultation in respect of the human rights of people in prison. As the least visible of our public services, it is vital that prisons can be held accountable for the treatment of the people in their care. England and Wales, along with Scotland, have the highest rates of imprisonment in western Europe.[3] Prison in the UK is the punishment of last resort and is the highest form of legally sanctioned coercive intrusion into an individual's liberty. A prisoner is dependent on the prison for virtually every aspect of their existence. Prison determines a person's confinement, movement, association, work, level of contact with the outside world, accommodation, education, recreation, healthcare and even the food they eat. As such, people in prison need to be able to ensure their rights are respected and protected through our domestic laws.

It is deeply concerning that there is no acknowledgement in the consultation of the importance of a robust human rights framework for the protection of individuals subject to imprisonment by the state. Furthermore, there is no acknowledgement of the positive contribution of judgments made by domestic courts and the ECtHR in cases taken under the HRA and ECHR to safeguarding the fundamental human rights of prisoners. Instead, the consultation makes selective use of individual cases taken by prisoners in order to paint a misleading picture of how the HRA operates in practice as "evidence" of a case for reform (see for instance paragraphs 126-130). It is impossible to escape the conclusion that, with respect to the treatment of prisoners, the government would rather deny their legitimate rights than accomplish a long overdue reform of the conditions in which they are held.

It is extraordinary that the Government should consider that having to pay prisoners £7m in compensation because it has subjected them to "a combination of negligence, inhuman and degrading treatment (under Article 3), and the violation of the right to a privacy (under Article 8) and discrimination (under Article 14)" represents an argument for reducing legal protection. The solution surely lies in delivering a prison system that does not inflict such suffering and is therefore not forced to settle claims it cannot defend. As successive inspection reports and other

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[2] Liberty. (2022). *Human Rights Act Reform: A Modern Bill of Rights - A power grab that threatens us all. Liberty's short guide to responding to the consultation on Human Rights Act Reform*. https://www.equallyours.org.uk/wp-content/uploads/2022/02/Liberty-HRA-consultation-tip-sheet-Feb-22.pdf

[3] Institute for Crime & Justice Policy Research. (2022). *Highest to lowest - prison population rate*. World Prison Brief. https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=14

independent evidence repeatedly demonstrates, the sad reality is that our prisons fail to reach even the most basic standards of lawful and decent detention.

The Prison Reform Trust is not a legal charity, but we share many of the concerns raised by a number of expert human rights bodies regarding the potential impact of these proposals. We are particularly concerned by the potential implications of the provisions consulted on in question 27 to link rights to responsibilities, and reduce damages awarded in human rights cases according to an individual's previous conduct. This and the other divisive provisions put forward in the consultation have the potential to exclude whole categories of individuals, including those in prison or with criminal convictions, from any form of effective redress when their human rights have been violated. It is all too easily forgotten that the ECHR—and the Universal Declaration of Human Rights before it—were prompted in large part by the unspeakable treatment of imprisoned people. Prior to that Declaration, both Governments and very substantial portions of the public had acted on the belief that such treatment could be justified on the basis that whole categories of people were less deserving of equal treatment on the grounds of shared humanity.

If enacted, these proposals would send a dangerous message to those working in the prison system that the rights of those held in their care do not count. This could undermine respect for the importance of a culture of human rights in prisons, which in the absence of any statutory foundation of minimum standards is vital for ensuring that people in prison are treated with a minimum of decency and respect. It could also undermine the work of scrutiny bodies who work to uphold human rights standards in prisons such as HM Inspectorate of Prisons and the Prisons and Probation Ombudsman. These bodies already struggle within their existing powers to ensure that their recommendations are taken forward and enacted.

Our response to the consultation questions below draws extensively on the model submission made by the British Institute of Human Rights,[4] including the repetition of recommendations made by the organisation in response to specific questions. We ask that the Ministry of Justice treats our submission as a full and separate response to the consultation. We have chosen to answer questions relating to proposals which are likely to have a particularly significant impact on people in prison.

Consultation questions

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

The Government is suggesting a problem and stating their preferred solution, with little evidence to back this up. The UK courts can already draw on a range of range of laws when making decisions, as identified by the IHRAR. The draft clause is unnecessary.

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[4] The British Institute of Human Rights. (2022). *The question-by-question guide to the government consultation on Human Rights Act reform: 'A Modern Bill of Human Rights'*. https://www.bihr.org.uk/Handlers/Download.ashx?IDMF=258f6576-158d-47b8-bb07-bace3bf20d44

Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

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

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

This looks like a suggested improvement in protections; however, there is little substance to this proposal. There is already protection under the right to freedom of expression (Article 10) within the HRA plus an additional protection in Section 12 which requires courts to consider this right in making any orders that may limit expression. This proposal is unnecessary.

Furthermore, the Government's proposals would have a clear impact on the right to privacy protected by article 8, including the right to private and family life, home and correspondence, which has not been considered. These rights are of particular importance for people with criminal convictions, who require protection from the unnecessary disclosure of their criminal records. The Ministry of Justice has recently legislated to reform the Rehabilitation of Offenders Act to shorten the disproportionate length of rehabilitation periods attached to some sentences. Weakening protections for people with convictions in other areas, by strengthening the hand of the media and other publishers to disclose private information about an individual such as a criminal conviction, therefore appears contradictory.

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

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

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

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

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

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

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

This looks like the Government suggesting a problem with little evidence to back this up. The HRA already operates effectively. The proposal in this question is unnecessary.

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

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

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

- **Option 1: Repeal section 3 and do not replace it.**
- **Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.**

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

This looks like the Government is suggesting that the HRA somehow removes power from Parliament and gives it to the courts. This is not the case. The HRA was carefully drafted to ensure Parliament remains sovereign, only Parliament can make or change laws. The HRA already operates effectively to ensure rights protection within the UK's democratic traditions. The proposal in this question is unnecessary.

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

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

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

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

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

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

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

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

Please provide reasons.

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

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

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

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

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

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

- **Option 1: Provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or**
- **Option 2: Retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3**

The Government appears to have determined there is a problem, again with little evidence, and has predetermined that one of the solutions presented will be put in place. According to BIHR, "every year [it] works with thousands of frontline staff, management and leaders of public authorities, and never once has this been raised as an issue. In fact, the way section 6(2) of the Human Rights Act works currently supports staff in public authorities to navigate the complex maze of other laws in a way that upholds people's human rights. The Human Rights Act is working effectively; no change is necessary."

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

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

- **Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.**
- **Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.**

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

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

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

- **Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment;**
- **Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights; and/or**
- **Option 3: provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.**

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

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

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

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

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

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

- **Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or**
- **Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.**

The Government has predetermined that there is a problem before considering evidence that people may want to submit as part of the Consultation. The Government's proposals are alarming because they suggest human rights would no longer be universal and would create a system in which people deemed as "underserving claimants" would not be able to access remedies if their human rights have been breached. This has the potential to place whole categories of individuals, including those held in prison or with criminal convictions, without recourse to legal remedy when their human rights have been breached. We strongly disagree with the Government's proposals.

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

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

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

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

We reject the premise of the consultation; and find it extraordinary that the government is consulting on these proposals without itself having conducted an impact assessment of them. The supposed benefits of the proposals it highlights are no more than conjecture, and it ignores the negative impacts they will have on all individuals (and vulnerable groups in particular) and their ability to seek redress when their rights have been violated. The consultation also fails to account for the potential implications of undermining respect for human rights in wider society, including among professions who exercise coercive authority over individuals in the name of the state, such as prison staff.

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

People with protected characteristics are significantly over-represented in the prison system:

- Over a quarter (27%) of the prison population, 21,537 people, are from a minority ethnic group.[5]
- Over a third of people (34%) were identified as having a learning disability or difficulty following assessment on entry to prison in 2017–18.[6]
- 67% of women and 43% of men surveyed by inspectors in prison reported having mental health problems.[7]
- 36% of people in prison are estimated to have a physical or mental disability. This compares with 19% of the general population.[8]

People in prison are among the most socially and economically disadvantaged groups in society. Therefore, any provisions which undermine their ability to seek legal redress when their rights have been violated are likely to have disproportionate equality impacts.

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

The only way to mitigate the wide ranging and negative impact of these proposals is to withdraw them and stop them becoming law.

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[5] Table 1.4, Ministry of Justice. (2021). *Offender Management Statistics quarterly: April to June 2021* [Dataset]. Ministry of Justice. https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-april-to-june-2021

[6] Skills Funding Agency. (2018). *OLASS English and maths assessments by ethnicity and learners with learning difficulties or disabilities: participation 2014/2015 to 2017/2018* [Dataset]. Skills Funding Agency. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765597/OLASS_English_and_maths_assessments_by_Ethnicity_and_disability_201415_to_201718.xlsx

[7] Ministry of Justice. (2018). *A Review of Self-inflicted Deaths in Prison Custody in 2016*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/747470/review-of-deaths-in-custody-2016.pdf

[8] Cunniffe, C., van de Kerckhove, R., Williams, K., & Hopkins, K. (2012). *Estimating the prevalence of disability amongst prisoners: results from the Surveying Prisoner Crime Reduction (SPCR) survey*. Ministry of Justice. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/278827/estimating-prevalence-disability-amongst-prisoners.pdf