

**Scottish Women's Aid's Response to the UK Ministry of Justice Consultation - Human Rights Act Reform:
A Modern Bill of Rights**

Scottish Women's Aid (SWA) is the lead organisation in Scotland working towards the prevention of domestic abuse and plays a vital role in campaigning and lobbying for effective responses to domestic abuse. SWA is the umbrella organisation for 34 local Women's Aid organisations across Scotland; they provide practical and emotional support to women, children and young people who experience domestic abuse. The services offered by our members include crisis intervention, advocacy, counselling, outreach and follow-on support and temporary refuge accommodation.

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.

Do not change section 2 of the Human Rights Act (HRA). Domestic courts already can and do draw on a wide range of relevant case law when reaching their decisions. The European Court of Human Rights (ECtHR) has made a number of judgements which have clarified important principles in international human rights law relevant to survivors of domestic abuse. If courts across the UK do not have to take into account rulings of the ECtHR, the human rights protections that they provide is likely to be lower than that guaranteed by the European Convention on Human Rights (ECHR). This may lead to more cases being taken to the ECtHR, although many people, especially the most marginalised who are frequently women experiencing multiple forms of discrimination, will not have the resources for this, violating their right to a remedy.

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?

Do not change the current position. The HRA does not weaken the position of the UK Supreme Court. As the Independent Human Rights Act Review (IHRAR) Panel said, "The Supreme Court has now made clear, on a number of further occasions, that when considering whether there has been a rights infringement, before turning to consider the HRA and whether a Convention right (as interpreted through Section 2) applies, domestic statute and the common law are first to be considered".¹ There is no reason to change the current position since the UK Supreme Court has sometimes taken a different approach to the ECtHR, where it has considered there was a good reason for this.

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.

Do not introduce a new permission stage to bring a human rights case to court. A new permissions stage is unnecessary because anyone bringing a case already has to show that they have been directly affected by an actual or threatened breach of their human rights. It is already very difficult for women who have experienced domestic abuse and whose rights have not been upheld by public authorities to bring a human rights case. This proposal would make it even more difficult for them to hold governments or public bodies

¹ Report of the Independent Human Rights Act Review, p.62

accountable for violations of their rights. There is no evidence to suggest, as the UK government does in the consultation document, that there are large numbers of “frivolous” or “spurious” claims being brought which “devalue” the concept of human rights. The consequence of making access to accountability mechanisms more difficult is likely to be more cases having to be taken to the ECtHR, the opposite of what the UK Government wants to happen. Any introduction of additional requirements for bring cases will impact most severely on the poorest and most marginalised who are likely to struggle with paying the costs of legal assistance to bring a claim. For many women who have experienced domestic abuse, the abuse has included economic abuse. Add to that the fact that women generally earn less than men and are likely to have the main caring responsibility for children and it is likely that the financial impact of an additional permissions stage would fall disproportionately on women.

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

The assumptions behind this question do not reflect reality. There is no evidence that there is a problem with “non-genuine” or “frivolous” cases taking up the resources of courts. The human rights legal framework exists to ensure that individuals’ human rights are protected, and this includes individuals being able to access remedy through the courts when needed. Human rights cases which are unsuccessful at court often result in the clarification of important aspects of law, such as where the balance lies between competing rights. That a case is unsuccessful, does not mean that it was not genuine or that it was “frivolous”.

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

Positive obligations are essential to human rights protection. The proposals in the consultation suggest that the UK Government considers positive obligations to be “uncertain”, “expensive”, and a “burden” for public authorities but the document does not provide any evidence for this. All human rights instruments involved both negative and positive obligations on governments. Human rights protection is not something that public authorities can choose to prioritise or not; positive obligations are not an opt out.

Positive obligations are vital to ensure that public authorities take pro-active steps to uphold the rights of women experiencing domestic abuse. The ECtHR has clarified in numerous cases that governments have a positive obligation to act when they know (or should know) that someone is at risk of domestic abuse. Positive obligations are also crucial in achieving justice when there has been a failure to uphold rights. For example, following a case brought by two women who had been raped by John Worboys, the UK Supreme Court confirmed that the right to be free from inhuman and degrading treatment, imposes a positive legal duty to investigate reported crimes perpetrated by private individuals.²

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

Keep section 3 as it is. The courts should continue to interpret and apply legislation as far as possible in a way which is compatible with rights in the ECHR. The IHRAR recommended that there should be no significant changes to Section 3 and said there is no evidence that the courts are not using Section 3 properly. The UK Government should follow the IHRAR recommendation.

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?

² <https://www.bihr.org.uk/blog/victims-human-rights-must-be-protected>

The phrasing of this question is misleading. The preamble to the question shows that the UK government proposal is to remove the courts' power to strike down secondary legislation. Secondary legislation can have a significant impact on human rights, for example the family cap and related 'rape clause' under the Social Security (Restrictions on Amounts for Children and Qualifying Young Persons) Amendment Regulations 2017. Courts' powers to strike down secondary legislation do not undermine parliamentary sovereignty because secondary legislation has not received full parliamentary scrutiny.

If the possibility for Westminster secondary legislation to be declared invalid by the courts is removed, there would be an anomaly in the UK. Only devolved legislation would then be subjected to higher human rights scrutiny and the possibility of strike down. Any such development at Westminster cannot be undertaken without considering its impact on the constitutional foundation and nature of devolution.

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

The proposals in the consultation document are incompatible with the devolution settlements in Scotland, Wales and Northern Ireland. They are also out of step with political and public opinion in Scotland and the other devolved nations. The ECHR has been a core element of devolution in Scotland for over 20 years. It is the starting point and check on all Scottish Parliament law and Scottish Government policy. If, as a result of these proposals, the interpretation and application of the ECHR under the HRA starts to diverge from ECtHR case law, it will cause significant legal uncertainty and confusion around interpretation of the ECHR in Scotland. This will have a negative impact on access to justice in Scotland. In addition, the proposals would impact on areas of devolved competence. The proposals also ignore widespread support across Scotland for improving and enhancing human rights protections, including by building on the foundations of the HRA by incorporating other international treaties into Scots Law.

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 definition of public authorities in the HRA is the same as in other laws, including the Equality Act 2010. That definition recognises the need for flexibility in order to cover "hybrid" public authorities such as privately-run prisons or accommodation provided by housing associations. It is important to retain the existing flexible definition so that these "hybrid" bodies can be included. Many of the public services which have been responsible for violations of the rights of women have been these "hybrid" public authorities, for example, privately run immigration detention facilities.³

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.

From our reading of the consultation document, it seems the proposals stem from a wish on the part of the UK Government to limit the scope of people's rights by placing limits on how courts make decisions on restrictions to non-absolute rights. **Neither option is appropriate.** Proportionality is vital in human rights protection and judges need to be to interpret the meaning of legislation and apply case law independently. The proposals would mean the UK Government sets out rules on how courts make decisions on proportionality in cases about whether the UK government or a public body has restricted a non-absolute

³ [Legal challenge over Yarl's Wood women | Immigration and asylum | The Guardian](#); [Priti Patel's detention policies found to breach human rights rules | Priti Patel | The Guardian](#)

right appropriately. This would undermine rights protection, particularly for marginalised groups who are likely to lack political influence.

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.

All three options would contravene the principle of universality of human rights and are contrary to the UK's legal obligations under the ECHR. The "option" to "Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual" would exclude groups of the most marginalised and politically unpopular people from human rights protection. The UK Government has obligations to uphold the human rights of everyone under its jurisdiction and should not get to decide whose rights they uphold and whose they do not. All the "options" would undermine or remove the important role of independent judges in determining human rights law, giving that power instead to UK Government ministers and officials.

SWA notes that UK Government ministers often discuss this issue using women's safety as a justification for deportations of "foreign criminals". For example, Justice Secretary Dominic Raab often cites a single immigration case which included domestic abuse among other convictions to justify proposed changes to deportation. Yet he never points out the fact that this case is a decade old and the legal technicality was resolved many years ago without changing the HRA. We reject the UK Government's use of protection of women from abuse as a justification for weakening human rights protections. The HRA is the law which helps survivors of domestic abuse and other forms of gender-based violence to hold public authorities to account when they fail to protect them.

In addition, evidence shows that the majority of women in prison have experienced domestic abuse or other forms of gender-based violence.⁴ For some women experiencing domestic abuse, the crimes they were convicted of related directly to their experience of abuse, for example, where an abusive partner compelled them to a commit crime. The threat of deportation for women who do not have British citizenship is an additional layer of punishment that they need to be able to challenge. The results of the UK Government's proposals are likely to be discriminatory since deportation powers are currently used disproportionately against Black and Asian people. With the UK Government continuing to make access to British citizenship difficult for those who are entitled to it (including due to high fees), they remain subject to immigration control and potential deportation. Further reducing their human rights protections as each of the "options" would do, would be contrary to the ECHR.

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

Similarly to our response to question 24, SWA reiterates that human rights protections are universal and should not be removed from particular groups of people. Refugees, asylum seekers, and migrants have the right to full protection of human rights law, including having independent judges decide on matters affecting them where there has been a failure to uphold their rights. Excluding groups of people from human rights protections on the grounds of their immigration status is discriminatory.

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

⁴ A study of women in custody in Scotland in 2018 found that 70% had experienced domestic abuse.
<https://www.sps.gov.uk/Corporate/Publications/Publication-6069.aspx>

The premise of this question is, again, undermining the universality of human rights. **Neither of the “options” is appropriate.** We do not earn human rights through good behaviour, they are entitlements that belong to every human. Human rights laws protect the individual against the powers of the state. Governments can, should, and do regulate the behaviour of individuals towards each other through other types of law, for example, criminal law. Often successful human rights cases result in little or no compensation, yet the UK Government continues to contribute to misinformation about the HRA by suggesting that people bring human rights cases in order to receive compensation.

Both “options” would permit the UK Government to deny access to remedies for claimants they consider “undeserving”. The second option in particular is very broad and could allow compensation to be reduced or ruled out on the basis of a broad assessment of a person’s past behaviour. For example, a woman who had experienced domestic abuse and whose right to protection had been violated by a public body could have her compensation reduced or removed on the basis of a criminal conviction she received years or even decades earlier.

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.

Change is unnecessary. Under the HRA, the Westminster parliament is already responsible for responding to ECtHR judgments that go against the UK, if it so chooses. Very few cases at the ECtHR go against the UK. When there is an adverse ruling, the priority should be making the necessary changes in order to comply with human rights obligations rather than debating, or even voting on, the merits of the judgement in parliament.

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.

We do not see any benefits to the proposed changes to the HRA or the creation of a new “Bill of Rights”. Human rights protection is about getting the balance right between people and power by limiting the power of governments and public authorities to ensure that everyone is treated with dignity. The changes the UK Government is proposing are fundamental even though the consultation paper claims our human rights will remain the same because the new “Bill of rights” would contain the same list of rights. The proposals mean that, in practice, the balance between people and power would shift significantly with the government being less accountable and the population having reduced protection. Replacing the HRA as proposed in this consultation would reduce everyone’s access to their human rights and the impact would be particularly severe for the most marginalised since they are most at risk of their rights not being upheld.

We also highlight that the process for this consultation have created challenges for people and organisations to engage. The 100+ page consultation document published on 14th December 2021 is dense and highly technical rather than explaining the proposals in a clear and concise way. Given that human rights are of relevance to everyone in the UK, and of particular relevance to the most marginalised, we are dismayed that the only means of sharing views on the UK Government’s proposals is by answering complicated legal questions. People with disabilities have further barriers to engaging with the consultation as the easy read version was only published on 24th February, 12 days before the deadline but it is still text-only and no British sign language version is available.

We urge the UK Government to publish all responses to the consultation on its website and we recommend publication of a full and considered response to all the issues raised in responses to the consultation. We urge the UK Government keep the HRA and instead of progressing with these plans, focus its attention on how to better uphold its obligations under the HRA and ECHR.