>>SALC

Scottish Association of Law Centres

About the Scottish Association of Law Centres

The **Scottish Association of Law Centres (SALC)** is the national body for the not-for-profit legal sector in Scotland, the community legal sector, and in particular community-based law centres across Scotland.

We are an independent group, established to support the not-for-profit law sector to ensure the provision of free and accessible legal and related services to people, and communities including people experiencing discrimination and disadvantage.

Our members are law centres which are based on communities of geography and location, as well as not-for-profit legal practices that focus on communities of special interest. Together, we represent more than 15 law centres and clinics across Scotland.

We strive to be leaders in good practice, to advocate for justice and the promotion and protection of human rights, to be responsive to the needs of the not-for-profit legal sector and to maintain and strengthen the collaborative networks that allow our sector to provide holistic support to communities.

Response to the Consultation

As social justice lawyers who focus on using human rights and equalities law in Scotland in our daily legal practice – to help individuals access justice and protect their rights – we have a particular interest in contributing to this consultation on the reform of the Human Rights Act and the introduction of a new Bill of Rights.

Interpretation of Convention rights: section 2 of the Human Rights Act
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.

We believe that the relationship between UK courts and the European Court of Human Rights (the "ECtHR") in the interpretation of human rights is working well at present, and see this proposed change as unnecessary, likely to reduce access to justice for individuals and not founded in evidence.

Further, we see this question is misleading, as it implies that Section 2 of the Human Rights Act (the "Act") limits the ability of domestic courts to draw on a wide range of case law when reaching decisions on human rights issues. This is, in fact, what our domestic courts currently do.

We are concerned that both options for replacing Section 2 seem to be formulated in a way that will sever the connection between the rights in this new Bill of Rights and our rights under the European Convention on Human Rights ("ECHR"). Thus both options are likely to result in a lower standard of rights protection, and more violations.

The position of the UK Supreme Court

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?

Again, we believe that the current position works well and that there is no evidence for change. We again reiterate our concern that this question is misleadingly phrased.

Neither Section 2 of the Act, nor any other part of it, has resulted in the Strasbourg court undermining the supremacy of the UK Supreme Court.

The UK courts are used to taking into account judgments from Strasbourg and applying them in a way that is appropriate to the domestic context. The doctrine of precedent means that all lower courts in the UK require to apply legal principles set out in judgments of the UK Supreme Court in the area of human rights law.

The government is also interested in knowing whether it should legislate to exempt specific policy-making areas on human rights grounds by the courts (e.g., national security).

We are concerned at a proposal which may give government greater powers to erode fundamental protections for individual rights, such as the prohibition against torture, without transparency or accountability for its actions.

A permission stage for human rights claim

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.

We reject both the recommendation, and the framing of this question, which implies that there are "genuine human rights matters" and human rights cases that are "not genuine".

There is no evidence to suggest that large numbers of "spurious" claims are being brought, and there is no justification for reducing the accountability of the state for its actions.

Victims of human rights abuses should not be required to prove 'significant disadvantage' before they can seek justice, and it is unclear what that means in this context.

Judicial review procedure in Scotland already incorporates a permission stage for cases, whether they are human rights challenges or not. We see this proposal as an unnecessary and unwelcome interference in this devolved area of law.

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.

As set out above, we do not support amendment of the current judicial procedure for human rights claims in Scottish courts.

We are concerned that how the courts will interpret 'significant disadvantage' and 'overriding public importance' are not clear enough in these proposals. We believe the reform will create legal uncertainty, and reduce overall the number of individuals who access justice for human rights breaches in our courts.

Judicial Remedies: section 8 of the Human Rights Act

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

We again reiterate our concern about the UK Government's stated aim of reducing human rights cases and about the framing of this question that suggests there is a problem with courts dealing with human rights claims that are not 'genuine'.

The core aim of the human rights legal framework should be to ensure that individuals' human rights are protected, and this includes being able to access a remedy in the courts.

As in Questions 8 and 9, safeguards are already in place to ensure that only individuals who can show they meet the victim test will be able to go to court. At present, courts do not focus on "non-genuine" human rights cases. This consultation suggests that non-genuine claims are being made in significant numbers requiring the Government to change approach. There is no evidence in this document, or anywhere else, to back up this claim.

Positive obligations

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 an inherent and vital part of our international human rights framework. They are not, as the consultation states, "imposed" on us, but part and parcel of the rights protected in the ECHR to which the UK has been a signatory since 1951, and they are the foundation of safeguarding our rights.

Positive obligations are particularly important for some groups, where it is often not enough for Government not to do something but where they need to take active steps to eliminate barriers that prevent individuals from enjoying human rights.

The Government is suggesting that positive obligations are costly, improper and a burden on policy making. These claims are unsubstantiated.

Excluding positive obligations in the UK would put at risk the entire architecture of rights protection that has been built up in international law, it will put our rights at risk and reduce our ability to hold public authorities to account.

It cannot be up to each public authority to decide if taking action to protect human rights fits into their overall strategy and policies.

Application to Wales, Scotland and Northern Ireland

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 Human Rights Act already provides a legal framework for protecting human rights across the UK, grounded in common principles, in a way that respects the specific circumstances of each of the devolved nations, and adequately reflects the different legal systems within the UK.

We therefore submit that the best way to reflect the different interests, histories and legal traditions of all parts of the UK is to keep the Act as it is; no change is necessary.

In Scotland, the ECHR is not only given effect in UK law through the HRA but also through the Scotland Act 1998. At 'a devolved level, the ECHR plays a non-negotiable foundation – in other words a foundation on which to build and progress' and is a 'substantive pillar of the devolution settlement'. The ECHR is a core element of devolved statute and over two decades of devolution, the ECHR has been the starting point and check on all Scottish Parliament law and Scottish Government policy.

Therefore, amending the HRA which incorporates the ECHR is no small matter for the foundation and operation of devolution but instead, is a complex and constitutional-level proposal. As Professor Nicole Busby writes, 'the disturbance of any existing arrangements to the current structures within which the HRA operates risks unsettling the complex interaction between devolution and human rights which could give rise to a range of consequences for Scotland and her fellow devolved nations.'

For Scotland, these reforms would also result in a variation in substantive law and procedural human rights frameworks, which creates greater uncertainty for individuals and their lawyers seeking to redress rights violations, and which is likely to reduce the effectiveness of the courts for remedy of the breaches.

The proposals are out of step with political and public opinion, and conflict with the direction of human rights law in Scotland, Wales and Northern Ireland, where the devolved governments and legislatures are considering ways to enhance – not reduce - the rights protections offered by the Act.

For example, in Scotland, we have recently passed legislation to incorporate the UN Convention on the Rights of the Child, and are currently working towards a Scottish Human Rights Bill to incorporate five other UN treaties into Scots law.

Public authorities – section 6 of the Human Rights Act

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.

For the reasons set out above, we believe that the definition of "public authorities" should remain the same, or should be broadened to take account of the wide range of organisations that perform public functions on behalf of public bodies.

We are concerned that attempts to bring more 'certainty' may narrow the definition of a public authority, reducing the number of bodies who have a legal duty to uphold our human rights, and reducing accountability of the state and access to justice for individuals.

The Equality Act 2010 cross-refers to the definition of "public function" in the HRA. We note that amending the HRA would have knock-on effects in other important areas linked to rights protection, which also requires to be carefully considered.

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.

Section 6(2) of the HRA provides that if a public body has no choice but to act incompatibly with an individual's rights because it was required to do so by primary legislation, then it has not acted unlawfully.

These proposals extend this defence to cover more situations where a public authority might have acted unlawfully – giving public bodies greater freedom to act incompatibly with rights, without liability.

We are remain opposed to proposals, such as this, which reduce state accountability at the expense of reducing access to justice for the people who the state – through human rights legislation – is obligated to protect.

Qualified and limited rights

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.

Again, we are concerned that these proposals are unnecessary, unfounded and will operate to reduce individual access to justice and the accountability of the state.

Proportionality is a vital part of the way the HRA works to protect people. This balance is a fundamental one and yet the Government's proposals seek to restrict the ability of courts to exercise this balance, by setting rules to direct how courts make that decision.

This is concerning because it will place a limit on what should be an independent court system to make decisions based on the facts presented in each case.

Deportations in the public interest

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.

We object to the framing of a question which implies that "deportations in the public interest" are "frustrated" by human rights claims.

We are deeply concerned that the consultation paper suggests that some people, simply because they are migrants, should not be entitled to the same level of protections as other people in the UK.

These proposals are discriminatory – particularly when understood in the context of evidence that demonstrates that criminal sentencing and deportation powers are disproportionately used against black and Asian people in the UK. They contravene the fundamental principles of the universality of human rights law and the rule of law.

Illegal and irregular migration

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?

We again reject the premise of this question: framing of the European Convention on Human Rights and the Human Rights Act as "impediments" to the exercise of state powers over immigration.

We believe that the current legal framework strikes the right balance in allowing the state to exercise its sovereign powers whilst ensuring that we meet our obligations under international human rights law.

We reiterate the position that attempts to reduce rights for migrants violates the principles of the universality of human rights and the rule of law – and would be a dangerous regression in terms of how all our rights are protected, across the UK.

Emphasising the role of responsibilities within the human rights framework

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.

We are deeply concerned by a proposal to reduce damages for individuals who have suffered breaches of human rights based on their conduct, either in the circumstances of a claim, or their "wider conduct" spanning over many years.

We note that historically, damages for breaches of human rights claims in Scotland have yielded on average quite low levels of compensation. Again, we see no evidence for the proposal that damages for such claims require to be limited in any way.

We are also concerned that the reference to "wider conduct" is such a broad principle for reducing damages to nil, so as to make even a successful case in our courts entirely ineffective as a remedy for breach of rights.

Impacts

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.

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.

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

We are concerned that the UK Government's proposals will restrict the rights of some people in our society, essentially giving them the power to decide who is "worthy" of human rights protection and who is not. These changes include reducing the scope of some non-absolute rights for "certain categories of individuals" and allowing the courts to consider an individual's conduct when making decisions about their human rights case and whether they should be awarded damages.

The majority of restrictions proposed are vague and broad, creating concerns as these restrictions can start now with certain groups, but there are no clear indication of where this would stop. If the rights of some groups are limited, all of our rights are undermined.

In Scotland, we have raised specific concerns about the significant impact that reform could have on the devolution settlement here. We have outlined how this could create greater legal uncertainty, further reducing individual access to justice, and how the direction of this reform runs counter to political and public opinion in Scotland.

There are clear concerns that with these proposals the UK Government is trying to redefine their responsibilities to us all and reducing ways to hold them accountable and seek justice.

In so doing, it has taken an approach which is divisive – seeking to separate cases into those which are "deserving" and "not deserving" of rights.

We believe the Human Rights Act works well and there is no evidence to suggest a change is needed, and definitely not the changes proposed by the Government.

We are concerned that these reforms will fundamentally impact people who are most at risk of human rights breaches, the people we represent on a daily basis: survivors of gender-based violence; people who are destitute and homeless, migrants, refugees and asylum seekers; care experienced children and young people; survivors of trafficking; disabled people and all those with protected characteristics.

For these reasons, we oppose the reforms set out in this consultation document.