JUSTRIGHT SCOTLAND

About JustRight Scotland

JustRight Scotland is a registered charity (SC047818) established by an experienced group of human rights lawyers. We use the law to defend and extend people's rights, working collaboratively with non-lawyers across Scotland towards the shared aims of increasing access to justice and reducing inequality.

We provide legal advice and representation on human rights and equalities issues across a range of legal areas including: women's legal justice, trafficking and labour exploitation, EU citizen rights, migration and citizenship, disability and trans legal justice.

Whilst our work is specific to Scotland, our work covers both devolved and reserved policy areas, and as such we endeavour to respond to policy consultations across both Scotland and UK, where appropriate.

As public lawyers for people who face systemic inequalities, discrimination and disadvantage, we use the provisions of the Human Rights Act 1998 (HRA) in our work, daily.

In addition to providing direct legal advice to clients, we also run outreach legal surgeries and helplines, deliver rights information, training and legal education, and contribute to research, policy and influencing work.

Our response to the Human Rights Act Reform consultation

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

Question 1: JustRight Scotland 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 as 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

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case law when making decisions on human rights issues. This is, in fact, what our domestic courts currently do.

The options proposed for replacing Section 2 appear to suggest changes that will separate the connection between the rights in this new Bill of Rights and our rights under the European Convention on Human Rights ("ECHR"). Both options are likely to result in a lower standard of rights protection, and more violations.

If UK courts dismiss the rulings of the ECtHR in Strasbourg, they are likely to deliver a standard of human rights protection that is lower than that guaranteed by the ECHR. As long as the UK remains a member of the ECHR, people will be able to take claims to the Strasbourg court, but because of the costly and time-consuming process, increasingly fewer people will be able to take cases there. This will, in turn, create a significant and unnecessary barrier to access to justice. This is in contrast with one of the main aims of the Act, that of bringing rights home, and making rights justiciable in the UK, resulting in fewer cases requiring to be adjudicated in the ECtHR.

Case law provided by the ECtHR provides clarity and legal certainty around the interpretation and implementation of rights in Scotland and the UK.

Separation from that will result in uncertainty around rights and norms in the UK.

We are also concerned that a reform that breaks the link between ECtHR case law and UK courts has significant implications for Scottish devolution. The ECHR in Scotland was not only given effect in the HRA but is also embedded in the Scotland Act 1998. We are concerned that divergence by Scottish Courts from ECtHR jurisprudence risks significant confusion for individuals and their lawyers in Scotland, in determining what rights and principles apply in enforcing their rights – again, potentially reducing individual access to justice.

We are also concerned that this could lead to legal uncertainty around ECHR principles and norms as they apply to different parts of legal human rights protections in Scotland, to the point where this proposal may be unworkable within the devolved make-up of the UK.

Question 2: 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 considering 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 note that the judiciary is already required to take into account the powers of the government to legislate and believe that judicial powers are adequately balanced by the principle of judicial deference.

But the Government should not be above the law, and it cannot disregard its responsibilities to respect human rights in areas which has decided to remove from normal judicial oversight – nor has the Government made a compelling case for doing so.

For example, Article 3 of the ECHR contains an absolute prohibition against state torture. The government's proposal to exempt specific policy-making areas on human rights grounds by the courts could be applied to sanction state torture where the government believes that doing so would further the interests of national security. Whilst we recognise that human rights can be limited or qualified for different reasons (including in the interests of national security, or public health or safety) – at present, some rights – including the prohibition against torture – cannot be limited in this way. We are concerned about a proposal that may give the Government greater powers to erode fundamental protections for individual rights, such as the prohibition against torture, without transparency or accountability for its actions.

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?

Restoring a sharper focus on protecting fundamental rights

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?

No

Please provide reasons:

JRS rejects both the recommendation to amend the principles that apply at a permission stage for human rights claims 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, causing problems for the courts and there is no justification for reducing the accountability of the state for its actions. On the contrary, our experience as human rights lawyers in Scotland is that individuals who have suffered serious breaches of their human rights still face significant barriers to accessing justice under the current system – and we are more concerned that not enough is being done to ensure that these claims reach our courts.

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

This would make access to justice for human rights violations harder to obtain than for any other kind of abuse or unlawfulness, especially for people who already experience barriers in accessing justice (e.g., children and young people, survivors of gender-based violence, survivors of trafficking, and other individuals with protected characteristics). To that extent, this proposal is deeply regressive and specifically seeks to limit access to justice for human rights claims.

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 interference in a devolved area of law, without adequate justification.

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?

No

Please provide reasons:

As set out above, we do not support the amendment of the current judicial procedure for human rights claims in Scottish courts. We believe the framing of these questions around genuine human rights claims is dangerous and problematic, and these proposals fail to recognise that the aim of the Act should be the protection of individuals' human rights, not reducing the number of claims.

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.

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

JRS again reiterates 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 central aim of the human rights legal framework should be to ensure that individuals' human rights are protected, and this includes being able to access an effective remedy in our courts. The right to an effective remedy is a fundamental part of a human rights framework, and we are increasingly concerned that the reforms proposed in this consultation – as well as in parallel legislation before this UK Parliament – pose new and unnecessary barriers that make it harder for individuals to achieving an effective remedy in our courts.

As in Questions 8 and 9, safeguards already exist to ensure only individuals who can show they meet the victim test will be able to bring their claim 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 its approach.

There is no evidence in this document, or anywhere else, to back up this claim.

The proposal appears to suggest that either:
(a) individuals will not be permitted to make rights-based claims at all if 'other claims can be made' or that
(b) they will have to make non-rights-based claims first.
Both options would stop people from making genuine claims or dictate when they can do so.
We reckon that it is inappropriate to try to reject human rights claims entirely or prevent people from challenging public authorities on human rights
grounds.
Excluding valid human rights claims against public authorities to protect them would seriously damage rights protections in the UK.

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 the Government not to do something but where they need to take active steps to eliminate barriers that prevent individuals from enjoying human rights. This is particularly the case, for example, for many of the client groups we work with, including: survivors of human trafficking and exploitation, for care experienced children and young people and for disabled people.
The Government is suggesting that positive obligations are expensive, improper and a burden on policy-making. These claims are unsubstantiated.
If positive obligations in the UK are excluded, that would constitute a breach of international human rights law. Excluding them would compromise the entire framework 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 decided by each public authority to determine if taking action to protect human rights is in line with their overall strategy and policies. Rather, it is for the UK Government to ensure a robust, transparent, and consistent approach to protecting our rights which sets a clear minimum standard for all public authorities to meet.

Preventing the incremental expansion of rights without proper democratic oversight

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

We note that the Joint Committee of Human Rights ("JCHR") already holds the remit to examine human rights issues on behalf of the UK Parliament.

We would recommend that the Joint Committee should continue to be adequately resourced to perform its functions of scrutinising all Government Bills for compatibility with our international human rights obligations.

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?

We are concerned about this consultation's approach to exploring the impact of these reforms in three separated devolved nations, in this single question.

We again reiterate that the 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. These proposals are either incompatible with the devolution settlements in Scotland, Wales and Northern Ireland, or would cause significant legal uncertainly, leading to an erosion of effective rights protection in these countries.

For example, the requirement that legislation passed by the Scottish Parliament, Welsh Senedd and Northern Ireland Assembly must be compatible with ECHR rights,

and that public authorities must act compatibly with them, is fundamental to the devolution settlements.

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 the 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 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 is likely to reduce the effectiveness of the courts for remedy of the breaches.

For Northern Ireland, reform of the Act and weakening links to ECtHR jurisprudence and the substantive rights set out in the ECHR will diminish rights protections and have a destabilising effect for a community still recovering from decades of conflict and rights violations.

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.

In Scotland, there is widespread support for human rights. Contrary to what stated in this consultation that human rights have gone too far, amongst Scottish civil society organisations there is growing consensus that human rights have not gone far enough and that more work is needed.

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.

Finally, we note that amendment of the HRA will impact significantly on areas of devolved competence. Whilst the UK Parliament retains the power to amend the HRA, under Schedule 5-part 1 Scotland Act 1998, the following is devolved to the Scottish Parliament: 'observing and implementing international obligations, obligations under the Human Rights Convention'.

Given the significant potential impact of these reforms, we concur with the view of the Deputy First Minister, who stated in a letter to the Lord Chancellor on December 21st, 2021, that legislative consent should be sought from the Scottish Parliament to implement these reforms and substitute the HRA with a new Bill of Rights.

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.

To ensure that our human rights framework provides adequate remedy to individuals, we believe that it is important that our legal procedure allows the right bodies to be held accountable for breaches of human rights by the state, regardless of how the activity leading to the breach was contracted and delivered. In our experience, the definition of "public authorities" can be overly narrowly construed, barring human rights claims that should be justiciable, in the circumstances.

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 the 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?

None of these options

Please explain your reasons:

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 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.

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

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. It means that when looking at whether a restriction to someone's non-absolute right is allowed, it must be the least restrictive option possible.

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.

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.

As human rights lawyers who specialise in working with migrants, including asylum seekers and refugees, we object to the framing of a question that implies that "deportations in the public interest" are "frustrated" by human rights claims. We believe that, at present, our legal framework strives to ensure just outcomes in deportation cases. To the extent that Government is not able to carry out the deportation of an individual because a successful human rights argument has been raised, an alternative view is that Government's decision to deport was unlawful and should not have been carried out – and that the system is working as it should to remedy flawed Home Office decision making and protect individual rights.

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 protection as other people in the UK. As highlighted in a consultation response submitted by JustCitizens, our migrant advisory panel, we see these proposals as unnecessary and divisive – seeking to divide people in those "deserving" and "undeserving" of rights protections.

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.

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: the framing of the European Convention on Human Rights and the Human Rights Act as "impediments" to the exercise of state powers over immigration.

As practising human rights lawyers who regularly represent migrants, asylum seekers and refugees, 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 are opposed to the demonisation of migrants that recurs throughout this consultation, and concurrently in reforms proposing to reduce protections for migrants, asylum seekers and refugees set out in the Nationality and Borders Bill and the Judicial Review and Courts Bill.

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?

None of these options

Please provide reasons:

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.

Again, we reiterate that human rights protections set out obligations on the State to uphold the rights of individuals – they are not about 'responsibilities' of individuals, and there should be no suggestion of courts or the State making judgments about 'conduct' in order to determine the quantum of remedies when an individual's rights have been breached.

We are also concerned that the reference to "wider conduct" - including conduct which is not linked to the specific circumstances of a claim or limited in time or place – 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.

Facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role

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:

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):

The Human Rights Act safeguards the rights of every single person in the UK.

The Government claims that it wants to bring human rights closer to home, but this is what the HRA already does. The drop in cases brought against the UK Government to the European Court of Human Rights since 2004, means that the HRA has been successful in embedding human rights into domestic law in the UK.

The 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.

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

The Government is tacitly suggesting that our human rights will remain the same, as their new law will contain the same list of rights. There is no evidence to believe this to be true as the Government is proposing fundamental changes to the way our rights work and protect us. Because of these changes, we will be worse off, there will be fewer ways to hold the Government accountable and limited positive obligation on public authorities to protect our human rights.

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.

It is clear from this document that the Government has not presented detailed evidence on how it proposes to make these reforms work in Scotland, Wales and Northern Ireland. Devolved governments in Wales and Scotland have each issued

strongly-worded statements outlining the concerns about the UK Government's proposals.

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 that is divisive – seeking to separate cases into those which are "deserving" and "not deserving" of rights. The proposals openly consult on the removal of rights from some people – migrants, asylum seekers and refugees – in violation of the principles of the universality of rights and the rule of law.

Of equal importance, the HRA is also vital to all the people working in public services: it is the Act that helps them make human rights real. Radical, unnecessary changes to the HRA will result in their jobs being inherently harder and the law even more complex to navigate.

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.

Based on the proposals contained in this consultation, we believe that replacing the HRA with a new Bill of Rights would fundamentally reduce everyone's access to their human rights, and this would particularly impact people who are most at risk of rights breaches.

This includes people who we at JustRight Scotland represent daily: survivors of gender-based violence; migrants, refugees and asylum seekers; care experienced children and young people; survivors of trafficking and exploitation; disabled people and all those with protected characteristics.

As human rights exist to guarantee a basic standard of living for all, we strongly oppose the changes proposed in this consultation.