BIG BROTHER WATCH

Submission to the Ministry of Justice's 'Human Rights Act Reform: A Modern Bill of Rights' consultation

March 2022

About Big Brother Watch

Big Brother Watch is a civil liberties and privacy campaigning organisation, fighting for a free future. We're determined to reclaim our privacy and defend freedoms at this time of enormous technological change.

We're a fiercely independent, non-partisan and non-profit group who work to roll back the surveillance state and protect rights in parliament, the media or the courts if we have to. We publish unique investigations and pursue powerful public campaigns. We work relentlessly to inform, amplify and empower the public voice so we can collectively reclaim our privacy, defend our civil liberties and protect freedoms for the future.

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Big Brother Watch rejects the Government's case for reform of the Human Rights Act 1998 ('HRA'). There is no need for a new 'Bill of Rights' ('BoR') which, if introduced in line with the government's proposals in the consultation, will seriously weaken the ability of individuals to challenge the government and have their rights upheld in court.

The government's consultation provides little evidence for the necessity of its proposed reforms. Its approach to the HRA lacks balance, cherry picking case law and distorting the role of the judiciary, while ignoring the great benefits the HRA has had in improving access to justice and rights. It also largely ignores the recommendations of the Independent Human Rights Act Review ('IHRAR') in favour of a politicised misrepresentation of how the HRA works.

Big Brother Watch will respond in brief to questions 4-9, 11, 12, 20-23, 27 and 29.

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

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?

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

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

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

Questions 4-7 seek responses in relation to the protection of Article 10 under the HRA and the potential BoR. Currently, the HRA affords Article 10 distinct protection, requiring judges to have "particular regard to the importance of the Convention right to freedom of expression"(section 12(4)) when balancing rights.

In announcing the consultation, the Justice Secretary sought to frame Article 10 as under threat from "continental-style privacy rules".[1] The consultation similarly implies that Article 8 has taken primacy over the right to freedom of expression under the European Court of Human Rights ('ECtHR'), citing one case as a purported example.[2] However, no evidence is provided to support this incorrect assertion. Article 8 does not have primacy over Article 10, nor would it be appropriate for Article 10 to have primacy over Article 8. Rather, courts are responsible for carefully balancing these rights where both are engaged.

Furthermore, British courts are not obligated to follow the rulings of the ECtHR. The Government's proposal to restrict the ability of domestic courts to refer to ECtHR jurisprudence (Question 1) is relevant. However, the consultation presents a skewed understanding of the HRA and its relationship with the ECtHR. The assertion that UK courts are "gold-plating" ECtHR case law entirely misrepresents the careful balancing work undertaken by the judiciary.[3] The IHRAR found that:

> "The UK Courts have, over the first twenty years of the HRA, developed and applied an approach that is principled and demonstrates proper consideration of their role and those of Parliament and the Government."[4]

Law Society president I. Stephanie Boyce said:

> "The powers government purports to introduce for the most part already exist: British judges deliver British justice based on British laws, looking closely at how judgments fit into the national context, and disapplying them if there is good reason to do so. UK courts do not, as government suggests, "blindly" follow case law from the European Court of Human Rights."[5]

The consultation also states that section 12(4) is having "no great effect" in protecting freedom of expression. This is not evidenced in the consultation, nor was it raised by the IHRAR. Balancing Articles 8 and 10 can be complex, subtle and is specific to the facts of the case in question. We consider that the HRA provides for the right balance between these rights. It gives judges the appropriate powers of discretion, while emphasising the importance of freedom of expression.

1 HC Deb (14th January 2022), vol. 705, col. 913: https://hansard.parliament.uk/Commons/2021-12-14/debates/4235318A-10FB-4485-8743-50BF677E929A/details
2 Human Rights Act Reform: A Modern Bill Of Rights – Ministry of Justice, GOV.UK, 14th December 2021: https://consult.justice.gov.uk/human-rights/human-rights-act-reform/supporting_documents/humanrightsreformconsultation.pdf
3 Plan to reform Human Rights Act – Ministry of Justice, GOV.UK, 14th December 2021: https://www.gov.uk/government/news/plan-to-reform-human-rights-act
4 The Independent Human Rights Act Review 2021 - The Independent Human Rights Act Review Panel, 14th December 2021: https://www.gov.uk/guidance/independent-human-rights-act-review
5 'Permissions stage' to intercept frivolous human rights claims – Michael Cross, Law Gazette, 14th December 2021: https://www.lawgazette.co.uk/law/permissions-stage-to-intercept-frivolous-human-rights-claims/5110932.article

The Justice Secretary's assertion that current human rights law has led to an "incremental narrowing of the scope for respectful but rambunctious debate in politically sensitive areas" is not supported by evidence. It is ironic that this Government is simultaneously seeking to bring the Online Safety Bill through Parliament, which will result in the genuine curtailment of freedom of expression online by supporting speech restrictions in accordance with the vague nation of "harm", far beyond the limitations on free expression under the HRA, likely stifling "rambunctious debate". Similarly, the Police, Crime, Sentencing and Courts Bill contains unprecedented protect restrictions and will significantly limit freedom of speech on the streets.

Ultimately, the Government's attempts to stress the "importance" of Article 10 are undermined by its other proposals to amend proportionality assessments for qualified and limited rights and to limit the positive obligations of public authorities. The introduction of a BoR would undermine the protection of freedom of expression, not strengthen it.

If the Government is serious about fortifying Article 10 rights, it should abandon plans to reform the HRA, and significantly reform the Police, Crime, Sentencing and Courts Bill and the Online Safety Bill, both of which pose a significant threat to freedom of expression.

II. Restoring a sharper focus on protecting fundamental rights

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

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?

Questions 8 and 9 concern the proposed introduction of a permission stage for human rights claims. The Government's consultation proposes that a claimant will have to demonstrate that they have suffered a significant disadvantage in order to bring a claim under human rights law, with the possibility of a secondary test of whether the

claim is of overriding public importance. The IHRAR did not recommend the introduction of a new permission stage.

The Government claims this is required to prevent "spurious cases" going thorough the courts. However, mechanisms already exist to filter out unmeritorious cases. Section 7 of the HRA already stipulates that only "a victim of an unlawful act" may bring proceedings against a public authority. This ensures that only those directly impacted can bring a human rights claim. Courts are also able to 'strike out' cases which have no prospect of success. Furthermore, there is already a strict permission stage for judicial review applications involving the Human Rights Act.

The new proposed permission stage and "overriding public importance" test would represent an unnecessary additional obstacle between potentially vulnerable individuals and their ability to seek justice. The HRA protects the rights of individuals and in this way Britain has long respected the fundamental rights of individuals as a public good in and of itself, regardless of whether those individuals represent the minority or majority of the public. The "overriding public importance" test would distort the essential value of the HRA by positioning the interests of the majority as an obstacle to the rights of the individual.

We oppose the introduction of a new permission stage and/or a new "public importance" test for human rights claims.

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 have not been 'imposed' on the Government by courts – they are a vital part of upholding human rights in practice. In many instances, rights can only be meaningfully expressed through a mixture of negative and positive obligations. They are instrumental to the provision of public services which respect and uphold the rights of citizens.

The Government consultation makes detailed reference to Osman v UK, in which the ECtHR found that Article 2 can

> "imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."[6]

The Government's consultation states that this ruling "risks skewing operational priorities and requiring public services to allocate scarce resources to contest and mitigate legal liability". The Justice Secretary also made reference to the Osman case when announcing the BoR consultation to Parliament, stating that the ruling had the "broader effect of skewing public service priorities and allocation of precious public resources".[7]

However, the Osman ruling also explicitly states:

> "[B]earing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities."[8]

Positive obligations confer reasonable duties on public authorities to protect individuals' fundamental rights, and must be interpreted in a way that does not create too onerous a burden on a public authority.

The Government's concerns about positive obligations are unfounded. The suggestion by the Justice Secretary that positive obligations prevent public authorities from investing resources into "law-abiding members of our society" is a concerning attempt to distinguish between those who are deserving of rights and those who are not (see Question 27).[9] Human rights must be upheld for all members of society, not just those the Government considers worthy of them.

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

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

Option 1: Repeal section 3 and do not replace it

6 *Osman v UK* (87/1997/871/1083), 28th October 1998 [115] (emphasis added)
7 HC Deb (14th January 2022), vol. 705, col. 915: https://hansard.parliament.uk/Commons/2021-12-14/debates/4235318A-10FB-4485-8743-50BF677E929A/details
8 *Osman v UK* (87/1997/871/1083), 28th October 1998 [115]
9 HC Deb (14th January 2022), vol. 705, col. 915: https://hansard.parliament.uk/Commons/2021-12-14/debates/4235318A-10FB-4485-8743-50BF677E929A/details

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.

Section 3 of the HRA requires courts to interpret legislation in line with human rights obligations, so far as it is possible to do so. The Government's consultation states that section 3 has led "too far towards judicial amendment of legislation which can contradict, or be otherwise incompatible with, the express will of Parliament." The Government proposes either to remove section 3, or to amend it to ensure that where there is "ambiguity", interpretation must give greater weight to the "wording and overriding purpose of the legislation".

The IHRAR explicitly rejected the repeal of section 3, stating that there is "little to no evidence to support the position that UK Courts are misusing section 3".[10]

Option 1 would would strip the courts of their interpretive power, meaning rights-abusive legislation could not be challenged. It would drastically reduce judicial oversight, and the checks and balances between the different branches of government.

Option 2 seeks to fundamentally undermine the balance between the courts and Parliament, by weakening the ability of courts to interpret legislation. Parliament is already free to legislate to overrule the courts if it disagrees with an interpretation in a particular case.

Both proposals would effectively strip Britain's human rights framework of its constitutional status, rendering it an illusory and ineffective set of principles. The Government has not made a coherent case for repealing or replacing section 3.

As stated by Landmark Chambers, section 3 in fact preserves the sovereignty of parliament:

> "It might be thought that properly understood, sections 3 and 4 of the Human Rights Act 1998 achieve precisely the balance which the Paper describes as desirable. Sections 3 and 4 preserve respect for the primacy of the legislature."[11]

10 The Independent Human Rights Act Review – The Independent human Rights Act Review Panel, 14th December 2021: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf

11 Human Rights Act Reform: A Modern Bill of Rights A consultation to reform the Human Rights Act 1998 – Alex Goodman, Landmark Chambers, 3rd February 2022: https://www.landmarkchambers.co.uk/wp-content/uploads/2022/02/A-consultation-to-reform-the-Human-Rights-Act-1998-AG.pdf

We oppose both options. Section 3 should be retained in its current form.

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 Government's consultation states that it can be "difficult (...) to predict with certainty whether particular functions are of a public nature between public authorities and private companies" and therefore knowing who holds obligations under the HRA. Given that the consultation finds that the definition of a public authority is "broadly right" and that it "intend[s] to maintain this approach", it is not clear why the Government is seeking responses on this topic. The IHRAR did not find any issue with the definition and did not recommend any changes.

Attempts to 'clarify' which bodies constitute public authorities under the HRA could seriously restrict the ability of the HRA to hold those responsible for human rights violations accountable. The Joint Committee on Human Rights' report into "the meaning of public authority under the [HRA]" states that there was a "deliberate and considered decision [when drafting] to reject a more prescriptive approach and list those bodies subject to the [HRA]".[12] The Committee noted that such an approach would "potentially [limit] the access to remedy".

Ensuring that those who have responsibility for public services are required to respect human rights standards strengthens the principle of accountability. It also ensures equal treatment between those whose public services are provided by public authorities directly and those whose public services are outsourced. For instance, it ensures an individual receiving care at a private hospital on behalf of the NHS can be confident that the hospital has the same obligation to respect human rights as an NHS hospital.

Given the increasing privatisation of public services, restricting the definition of a public authority could lead to individuals being unable to seek justice if their rights have been infringed upon. It could also lead to governments outsourcing contentious projects to private companies, using them as a shield for any rights violations.

Big Brother Watch recommends that the current definition of public authority is maintained.

12 Seventh Report of Session 2003–04: The Meaning of Public Authority under the Human Rights Act – joint Committee on Human Rights, HC 382, 3rd March 2004: https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf

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?

> **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.**

Which of the following replacement options for section 6(2) would you prefer?

Under section 6 of the HRA, it is unlawful for public authorities to act "in a way which is incompatible with a Convention right". However, section 6(2) states this does not apply where public authorities were compelled to act in that way by primary legislation or were acting to enforce provisions (but not being compelled) in primary legislation which cannot be read "compatibly with Convention rights". The Government believes this is problematic as courts are still able to "compel the public authority to act in a way that is contrary to the clear will of Parliament." The Government's consultation appears to omit that the HRA is also primary legislation and therefore the courts are enforcing "the clear will of Parliament" when interpreting legislation in line with its provisions.

Both proposals would effectively strip Britain's human rights framework of its constitutional status, rendering it an illusory and ineffective set of principles. The Government has not made a coherent case for changes to section 6(2).

Option 1 appears to remove the possibility of a public authority ever acting unlawfully when giving affect to primary legislation. This would seriously limit access to a remedy for victims of human rights abuses and would entirely undermine the purpose of human rights law. It would certainly lead to more people being forced to bring their claims to the ECtHR, as they would be denied a domestic remedy.

Option 2 is designed to reform section 6(2) in a way which mirrors the suggested reform of section 3. As we previously stated, the proposed reforms to section 3 would have the effect of removing any meaningful interpretative power and would result in the courts being unable to uphold human rights standards.

Section 6(2) should not be replaced.

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?

> **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 of the consultation document.

The principle of proportionality requires courts to balance the rights of a claimant with those of the wider community and other rights, allowing interference with qualified and limited rights (which include Articles 8, 9, 10 and 11) so long as the interference is no more than necessary to pursue the legitimate interest of the State. What is considered a legitimate interest can include national security, the safety or the economic well-being of the country, the prevention of disorder or crime and the protection of health or morals.

We concur with the assessment of Amnesty international UK:

> "The courts do not require 'guidance' from politicians about how to balance qualified rights. Although dressed in a veneer of parliamentary respectability, such 'guidance' would amount to political interference in the fundamental duties of independent judges: to interpret the meaning of legislation (and rights), and apply case law."[13]

The Government's proposals to interfere with the balancing required for qualified and limited rights would reduce the ability of courts to effectively protect these rights. UK

13 Consultation on Human Rights Act Reform – Amnesty International UK: https://www.amnesty.org.uk/files/2022-02/HRA%20Consultation%20FINAL.pdf?VersionId=mRkIDIRm2sPbNw2o0iDFLIEZ_F3FoZ6c

courts already give "great weight" to Parliament's view (SC v SSWP) but the Government's proposals, whereby Government legislation would become almost synonymous with "necessity", would tip the scales in favour of the Government of the day even further.

It can be difficult for Parliament to foresee the rights implications of the legislation it passes – this is what makes judicial interpretation important. Balancing legislation, rights and 'the public good' is highly specific to the facts of the case. Any attempt of the Government to steer the courts' decisions in this area is dangerous overreach and should be resisted in order to preserve the balance of power between the executive, legislative and judicial branches of government.

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

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

> **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.**

These proposals are a deeply chilling attempt to divide the population into those who are deserving of basic rights and those are undeserving. They imply an erosion of the constitutional principle of equality before the law that could lead to some groups (such as prisoners or migrants) facing human rights abuses without hope of an appropriate remedy.

Measures which undermine the universality of human rights undermine their entire purpose. The European Convention on Human Rights (ECHR) was introduced in the wake of the treatment by European governments of those they considered to be "undeserving". It is integral to the human rights framework that rights apply to everyone, without favour or prejudice.

It is disturbing for the Government to suggest that a court should be required to effectively adjudicate on a claimant's wider behaviour in awarding damages for rights

abuses they have suffered. Such considerations would be wholly inappropriate - damages are awarded as compensation for breaches of an individual's rights, meaning that the conduct being assessed is that of the State, not that of the individual. The individual's behaviour, history or character has no bearing on whether or not a public authority failed in its duty to uphold fundamental rights.

We entirely reject the these proposals, which would create a two-tier rights system. A core function of human rights law is to protect people who lack power and influence from the oppressive tendencies of governments. These are often people who may not be meaningfully represented in parliament or the executive. It is crucial that under-represented people can rely on the protection of the HRA.

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?

By our assessment, there are no benefits of the proposed Bill of Rights.

The proposed BoR represents a significant cost to the liberty, security and rights of the British public. It threatens to undermine the legal systems of the devolved administrations and concentrate power in the hands of the government of the day.

Many of the Government's proposals will limit access to justice, making it harder for individuals to seek remedies and making it more likely that they are required to bring their cases to the ECtHR. This is burdensome for the claimant and will only be accessible to those with ample resources and time. This could also prove more costly for public authorities than domestic claims.

It is also likely that there will be a considerable amount of litigation seeking to define the new principles contained within the BoR. This again is likely to be costly to public authorities.

It is hard to envision how the UK could remain party to the ECHR if the proposals contained within the Government's consultation pass into law. Leaving the ECHR would

come at great cost to the protection of rights in the UK, as it would dilute standards of protection and shut off an route to justice via the ECtHR. It would also be damaging to European rights norms. If the UK signals that it is no longer committed to upholding high standards of rights protections, other European countries could follow suit. The UK should strive to be a global leader in respecting and upholding human rights standards by retaining the HRA and remaining party to the ECHR.

b) What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform?

The Government's assessment of the equality impacts of its proposals is wholly inadequate. It claims that it is "difficult to assess exactly how individuals sharing different protected characteristics may be positively or adversely affected" but, absent of evidence, claims that "proposed changes are not likely to result in direct discrimination". It does acknowledge that the proposals could indirectly discriminate against "ethnic minority individuals, children and men", but states that this is an inevitable side effect of "the legitimate aim of balancing the rights of individuals with the wider public interest". This is the limit of the Government's analysis.

Limiting access to justice will harm those with protected characteristics, some of whom may already encounter difficulties accessing their rights and justice. Proposals to consider the 'prior conduct' of claimants could have a particular impact on traditionally over-policed and over-surveilled groups, such as black people, Muslims, the Gypsy, Roma and Traveller community, other minority ethnic groups and migrants.

We also consider the Government's belated publication of a test-only 'easy read' version of its consultation just 12 days before the close of the consultation period to be unsatisfactory. At the time of writing, the Government has also failed to publish an audio version of the consultation. This will make it difficult for people with certain disabilities to respond adequately, or at all, to the consultation. We believe the deadline for a response should be extended to give everyone the chance to respond to these significant proposals.

c) How might any negative impacts be mitigated?

In order to mitigate the myriad of significant negative impacts of the government's proposals, plans to scrap the HRA and replace it with a BoR should be abandoned.