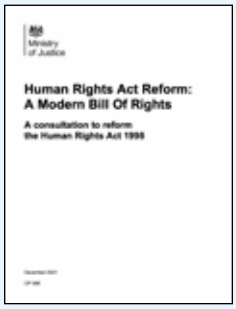
Consultation on Human Rights Act Reform

A guide from Amnesty International UK

Introduction

On 14 December 2021 the UK government launched a consultation on its proposals to replace the Human Rights Act – the law that protects the rights of all of us in all parts of the UK. In its consultation document Human Rights Act Reform: A Modern Bill of Rights the government says its aim is to 'update' the act. But these proposals would gut it. They would replace the Human Rights Act with a 'Bill of Rights' that dramatically weakens our ability to hold the government and public authorities to account and to defend ourselves when the state violates our rights.


Ministry of Justice

Human Rights Act Reform: A Modern Bill Of Rights

A consultation to reform the Human Rights Act 1998

The Human Rights Act currently works well to protect people when their rights are violated. We don't need to change it.

Please respond to the consultation, to show the government that people across the UK want to save our Human Rights Act.

Using this guide

This consultation is very technical and wide-ranging. We at Amnesty International have selected 14 questions, out of the 29 posed, that we believe are most important to answer. Feel free to answer more or fewer.

For each question, we provide a summary of our response and bullet points that give reasons for our position. Below these, we provide additional explanation and the occasional background note. We hope these will help you to formulate your comments, but please adapt and add to them: make your views and ideas count.

Please note that the wording of some of the questions is misleading and does not directly address the background proposals. We indicate below when we think that is the case.

How to take part in the consultation

Go to https://consult.justice.gov.uk/human-rights/human-rights-act-reform/consultation/

You will find links to seven sections with questions you can answer and two sections that simply give information. Some of the questions refer to detailed proposals in the consultation document.

You do not have to answer all the questions.

To save your answers and return to the form later, you will need to enter an email address in the 'About you' section.

When you have finished filling in your answers, click the 'Finish' button in the bottom right corner. You can then choose to give your email address to receive a copy of your responses. Then press the 'Submit Response' button.

Deadline You have until 8 March to submit your answers.

AMNESTY INTERNATIONAL

Overview of the consultation

There are seven sections where you can answer questions.

The first asks for details about you: **it is your choice whether to answer or not.**

The remaining six sections have questions about changes to the Human Rights Act. They cover:

1. **Common law traditions and the role of the Supreme Court**
   We suggest you answer Questions 1 and 2.
2. **Protecting fundamental rights**
   We suggest you answer Questions 8, 10 and 11.
3. **'Incremental expansion' of rights and democratic oversight**
   We suggest you answer Questions 12, 15, 19, 20, 23, 24 and 25. We have grouped our suggested replies to Questions 24 and 25 together, as the issues they raise overlap.
4. **Responsibilities within the human rights framework**
   Question 27.
5. **The relationship with the European Court of Human Rights and the proper role of parliament**
   Question 28
6. **Impacts**

SECTION I: Common law traditions and the role of the Supreme Court

Question 1: Suggested replacements for Section 2 of the Human Rights Act
Amnesty's response: KEEP SECTION 2 AS IT IS

Section 2 of the Human Rights Act does not need to be amended at all.

- The question contains the misleading claim that Section 2 limits the ability of domestic courts to draw on a wide range of law in human rights cases. Domestic courts can and do draw on a wide range of relevant case law when reaching decisions on human rights issues.
- Both options for replacing Section 2 appear specifically designed to sever the connection between the rights in this new Bill of Rights and our rights under the European Convention on Human Rights. Thus both options are likely to result in a lower standard of rights protection, and more violations.
- At present UK courts do not have to follow the rulings of the European Court of Human Rights slavishly. But taking those rulings into account enables the courts to ensure that people in the UK enjoy as good a standard of rights protection as others in Europe.
- If UK courts disregard the rulings of the European Court of Human Rights in Strasbourg, they are likely to deliver a lower standard of human rights protection than that guaranteed by the European Convention.
- As long as the UK remains a member of the European Convention, people will be able to turn to the Strasbourg court to claim their rights, but few will have the resources for this lengthy and costly process.

Section 2 of the Human Rights Act says that the UK domestic courts must 'take into account' rulings from the European Court of Human Rights when judging human rights questions. The point of the Human Rights Act is to 'bring home' the rights people are entitled to under the European Convention on Human Rights: to enable people to claim these rights in the UK courts, rather than applying to the European Court.

However, the Strasbourg court remains the ultimate guardian of the European Convention, and of the rights of everyone in all member states. Its judgments provide guidance on the proper meaning and application of the rights in question for all member states. This provides a vital safety net for people who have been unable to get their rights properly protected at home – often because they are from an unpopular or marginalised group that governments either do not care about or treat with hostility.

Question 2: The position of the Supreme Court

Amnesty's response: KEEP THE CURRENT POSITION

The current position works well and should not be changed.

- It is simply not the case that Section 2, or any other part, of the Human Rights Act, has resulted in the Strasbourg court undermining the supremacy of the UK Supreme Court.
- The UK courts are well-used to taking into account relevant judgments from Strasbourg and applying them in a way that is appropriate to the domestic context. Where there is good reason not to follow Strasbourg rulings, the Supreme Court says so. This is as it should be.

The government also asks for views on whether it should legislate to make particular policy-making areas entirely untouchable on human rights grounds by the courts (such as national security or 'where there is no social consensus'). The judiciary already defer heavily to the view of the government in certain policy areas. They do not make rulings on matters they consider as beyond the competence of the courts. But the government should not be above the law: it cannot ignore its obligations to respect human rights in areas which it has decided to remove from normal judicial oversight.

SECTION II: Protecting fundamental rights

Question 8: A permission stage for human rights claims

Amnesty's response: NO

Victims of human rights abuses should not be required to prove 'significant disadvantage' before they can seek justice.

- This would make access to justice for human rights violations harder to obtain than for any other kind of abuse or unlawfulness
- It would undermine the concept of fundamental rights protection. Genuine and proven cases of human rights abuses would be left unremedied, and the culture of rights protection damaged.
- There is no justification for reducing the accountability of the state for its actions in this way. There is simply no evidence to suggest, as the government does in these proposals, that large numbers of 'spurious' claims are being brought which 'devalue' the concept of rights.
- Judicial review cases (a common type of human rights case) already have to pass a permission test, whether they are human rights challenges or not.
- As there is a permission stage in Scots Law, this would interfere in what is usually a devolved area.

Question 10: Focus on 'genuine' human rights cases

Amnesty's response: CONTEST THE ASSUMPTIONS BEHIND THIS QUESTION

The courts do not focus on 'non-genuine' human rights cases.

- The consultation document suggests that somehow non-genuine and 'frivolous' human rights claims are being made (and won) in significant numbers. There is no evidence that is the case, and none is put forward here.
- The proposal being made seems to be that either (a) people will not be allowed 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 proposals would prevent people making genuine claims or dictate when they can do so.
- It is wholly inappropriate to try to exclude human rights claims entirely or stop people from challenging public authorities on human rights grounds. Protecting public authorities from human rights claims in this way and blocking otherwise valid claims against them would seriously damage rights protections in the UK.

Question 11: Positive obligations

Amnesty's response: POSITIVE OBLIGATIONS ARE OBLIGATIONS

Positive obligations are an essential and inherent part of effective human rights protection.

- The government makes a number of unsubstantiated, ideological statements in the text surrounding this question which suggest that positive obligations are costly, uncertain, improper and generally a burden on policy making.
- Positive obligations are an element of every human rights protection framework around the world. Failure to meet them must be open to challenge, as with any other human rights violation.
- The proposals are unclear: the intention may be that public authorities can ignore positive human rights obligations if they have other priorities; or that human rights obligations are left theoretically intact, but the authorities cannot be challenged in court for failing to meet them. Both ideas would have an inevitable and serious impact on people's lives.
- It is a standard in human rights law that positive obligations must not be interpreted in a way which puts 'an impossible or disproportionate burden' on public authorities. How to comply with a positive obligation is a decision for the authority to make, given the specific circumstances.
- Excluding positive obligations in the UK would undermine the entire architecture of rights protection that has been built up in international law.

Positive obligations make clear that respecting and protecting rights means more than the state refraining from certain actions: they must also take active steps when the circumstances demand it.

For example, the right to life (Article 2 of the European Convention) not only requires the state to refrain from taking life, except in certain limited circumstances (the negative duty), but also requires the state to investigate deaths it might have been responsible for (a positive obligation). The positive obligation includes not only a duty to have in place a legislative and administrative framework to provide an effective deterrent against risks to life, but also that where the relevant authority knows of a real and immediate risk to someone's life, it must take reasonable measures within the scope of its powers to avoid that risk.

Those positive obligations require police to take steps to protect individuals (such as domestic violence victims) from a threat of harm, and to ensure effective investigation into such things as the torture of hotel receptionist Baha Mousa by British soldiers in Iraq. When gas emissions from a landfill site were identified as a real and immediate risk to the health of the local community, the Environment Agency accepted it had positive obligations to identify the source of the problem and take steps to require the site operator to reduce the level of gas emissions. These are important and significant duties to protect fundamental rights.

SECTION III: 'Incremental expansion' of rights and democratic oversight

Question 12: Repeal or replacement of Section 3 of the Human Rights Act
Amnesty's response: OPPOSE BOTH OPTIONS

Section 3 should stay as it is: the courts should continue to interpret legislation as far as is possible in a way that accords with the rights protected by the European Convention.

- Section 3 requires the courts to interpret and apply legislation as far as possible in a way which is compatible with protected rights. Interpretation is a perfectly normal part of the judicial function. For example, in 1991, the courts read the wording of the Sexual Offences (Amendment) Act 1976 in such a way as to abolish the exemption for cases of 'marital rape', which husbands had relied on to avoid conviction for raping their wives. The courts concluded that social, economic and cultural developments had made the old reading of the legislation unacceptable, and it was their duty to act. They did not wait for Parliament to change the statute, but concluded it was possible to interpret it in a way more in tune with the times.
- Section 3 strikes a sensible balance between protection of fundamental rights and parliamentary sovereignty. It does not empower judges to re-write primary legislation, which has been fully debated by parliament. There is no evidence of judges routinely expanding the language of statutes to frustrate the will of parliament.
- The case the government cites as evidence of 'expansion' is from a time before civil partnership and same-sex marriage legislation, where the courts interpreted the word 'spouse' to include people in a same-sex partnership so that a man whose male partner had died could succeed to the tenancy of their home, as would have happened with a heterosexual couple. It is difficult to see this case (which was widely welcomed) as an impermissible interference with parliamentary sovereignty.
- Deleting Section 3 entirely would seriously damage rights protection in the UK, greatly reducing the powers of the courts to remedy rights-abusive laws. It would also drastically reduce judicial oversight and checks and balances between the different branches of government.
- Amending Section 3 to restrict the power of the courts to protect rights would protect outdated laws and government policy, not parliament. Parliament is already free to legislate to effectively overrule the courts if it disagrees with an interpretation that has been applied in a particular case.

Note: Section 3 of the Human Rights Act
Section 3 of the Human Rights Act requires judges to interpret and apply all legislation compatibly with the European Convention rights protected by the Human Rights Act, so far as it is possible to do so. If that cannot be done, the court can strike down secondary legislation (which is rarely subject to full parliamentary scrutiny). Primary legislation cannot be struck down. Instead, the courts make a 'declaration of incompatibility' under Section 4 of the Human Rights Act, which signals that parliament should fix the issue

Question 15: Declarations of incompatibility for secondary legislation

Amnesty's response: NO

When the courts find that secondary legislation contravenes protected rights, they should retain the power to disregard it or to strike it down.

- The question suggests that making a declaration of incompatibility would become merely an option in cases dealing with secondary legislation. However, the preamble to the question makes clear that the government proposal is to remove the courts' power to strike down such legislation.
- Secondary legislation does not receive full parliamentary scrutiny, so the courts' power to strike it down does not undermine parliamentary sovereignty.
- Even though it receives little parliamentary scrutiny, secondary legislation can still be very powerful and have serious implications for people's rights.
- This will create an anomaly: in legislation made by the devolved parliaments and assembly the courts will retain the power to strike down any legislation that is not compatible with the European Convention on Human Rights.

Declarations of incompatibility are a compromise between the need to enforce human rights protections and the principle of preserving parliamentary sovereignty. They leave parliament free to pass laws that contravene human rights standards, but ensure that: a) parliament is aware that it is doing this b) it has an opportunity to change course, and c) a political cost is imposed in terms of reputational damage if parliament nevertheless decides to maintain a rights-violating law.

When the Human Rights Act was written declarations of incompatibility were seen as a means of preserving the strong weight given to parliamentary sovereignty in the UK system, rather than giving judges the power to strike down rights-abusive legislation as they do in the US Supreme Court. At the moment, they can be used only with 'primary legislation' – that is, laws that have been fully considered and voted on by the full procedures of both Houses of Parliament, and therefore can be said to have full parliamentary authority.

'Secondary legislation', on the other hand, is a catch-all term for a range of laws made with very little scrutiny, and often no parliamentary voting at all. They can range from minor technical rules to issues of major public importance such as the coronavirus regulations. They are made by government ministers and subject to a range of weak oversight mechanisms. This may be necessary for day-to-day practical reasons (updating technical regulations, for example) but such legislation cannot be considered to have full parliamentary approval. There is therefore no compromise in the Human Rights Act between secondary legislation and basic human rights standards. The courts can strike it down, or simply not apply it, if it fails to comply with human rights standards.

The European Convention on Human Rights is embedded in the devolved settlements in Wales, Scotland and Northern Ireland so that legislation passed by these parliaments and assembly must comply with Convention rights. Unlike Westminster, where parliamentary sovereignty is given ultimate weight, legislation from the Senedd, Stormont and Holyrood can be struck down by a court. Replacing strike-down or amendment powers with only declarations of incompatibility for Westminster secondary legislation will create an anomaly in the UK, where only legislation passed by the devolved parliament/assemblies can be struck down by the courts.

Question 19: Reflecting all parts of the UK

Amnesty's response: RECONSIDER THE PROPOSED REFORM OF THE HUMAN RIGHTS ACT

The proposals in the government's consultation document are incompatible with the devolution settlements and out of step with political and public opinion in Scotland, Wales and Northern Ireland.

- The proposals would diminish human rights protections in Scotland, Wales and Northern Ireland.
- The requirement that legislation passed by the Scottish Parliament, Welsh Senedd and Northern Ireland Assembly must be compatible with European Convention rights and that public authorities must act compatibly with them is fundamental to the devolution settlements.
- In Northern Ireland European Convention rights run through the Good Friday (Belfast) Agreement, set the framework for post-conflict policing, and restrain the Northern Ireland Assembly and public authorities. The proposals risk undermining the peace agreement and the political and policing structures that flow from it.
- Much of the narrative and framing of the proposals is entirely based on the English legal system, with scant regard for the separate legal jurisdictions in Scotland and Northern Ireland. For example, references to 'our common law traditions' are at odds with the hybrid legal system in Scotland which draws on both common law and Roman law traditions. The government is proposing to weaken the power of the courts to interpret legislation compatibly with Convention rights and to remove the power to strike down rights-abusive secondary legislation. It is unclear how these proposals would work procedurally in Scotland, where courts currently have specific powers under the Scotland Act and Human Rights Act to ensure devolved legislation upholds Convention rights. If that changes in line with the government proposals for courts in England and Wales, it will significantly diminish rights protections.
- The proposals are in 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 the rights protections offered by the Human Rights Act.

The government should:

- consult with the governments, legislatures and civil society organisations of Scotland, Wales and Northern Ireland to reconsider these proposals and work with them to improve human rights protections, in line with international standards, in all parts of the UK.
- engage with the Irish government as co-guarantor of the Good Friday (Belfast) Agreement
- deliver the long-awaited Northern Ireland Bill of Rights, ensuring that these rights are supplementary to the European Convention, as provided for in the Good Friday (Belfast) Agreement.

Any amendment of the Human Rights Act necessitates a process of review between the UK and Irish governments in consultation with the Northern Ireland parties, as required by the Good Friday (Belfast) Agreement.

Question 20: Public authorities: Section 6 of the Human Rights Act
Amnesty's response: KEEP THE EXISTING DEFINITION

The definition of public authorities should stay the same.

- There is no real need for more 'certainty' with regards to what counts as a 'public authority' and thus has liability under the Human Rights Act.
- Attempts to bring more 'certainty' may narrow the definition of a public authority so as to free private companies from responsibilities under the Human Rights Act when they operate government contracts. This is particularly a concern given that the preamble specifies that any new definition should 'not add new burdens for private sector bodies and charities'.
- Changes to the definition of public authorities could interfere with devolved legislatures' ability to legislate on devolved matters.

It is obvious that a local council, government agency or a government department is a public authority. However, non-government organisations, including private companies, also carry out 'public' functions on behalf of the government. The courts have said that in any given case an assessment needs to be made: is the entity in question exercising the powers and fulfilling the duties of the state or is it merely fulfilling a contract on behalf of the state? For example, a privately run prison is a public authority for the purposes of the Human Rights Act because it is exercising the powers of the state to detain people. A firm of plumbers hired to conduct maintenance to local council offices is not, because it is merely a service provider that the council has agreed a contract with.

Queston 23: Qualified and limited rights

Amnesty's response: OPPOSE BOTH OPTIONS

These proposals appear to be driven by a wish to limit and reduce the scope of people's rights.

- 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.
- These proposals would seriously undermine human rights protection for unpopular or marginalised groups, and others who lack sufficient influence with the majority party in parliament at any given time. It is a core function of human rights to protect people who lack power and influence from the oppressive tendencies of governments seeking popularity by demonising or otherwise targeting minorities.

Note: Qualified rights
Qualified rights are those that the state may interfere with to achieve one of the 'legitimate aims' specified by the European Convention. For example, the right to a private and family life, protected by Article 8 of the Convention, is a qualified right. The state can interfere with it in the interests, for example, of national security, public safety or the economic wellbeing of the country.

Question 24: Deportations in the public interest

Amnesty's response: OPPOSE ALL THREE OPTIONS

All three options contravene the fundamental principles of universal human rights law and the rule of law.

- The proposal to provide that 'certain rights cannot prevent deportation of a certain category of individual' is a proposal to exclude whole classes of (politically unpopular) people from the protection of human rights laws. This would create a situation where the law does not apply to everyone on an equal basis. Rights are universal – which means everyone has them all the time. They cannot and should not be removed from particular people or in particular situations.
- All three proposals would undermine or even remove the role of independent judges in determining human rights and other questions of law. Instead, politically unpopular groups would have their rights determined by government ministers and officials.
- These proposals would be inherently discriminatory. Criminal sentencing and deportation powers are disproportionately used against black and Asian people. The growing use of powers to strip individuals of their British citizenship as a precursor to deportation is also likely to be used disproportionately against black and Asian people.
- Many people entitled to British citizenship are blocked from claiming it by Home Office fees, character requirements and failure to raise awareness of these vital rights. People in this situation are subject to immigration powers of detention and deportation. These proposals, which would further reduce or even remove the human rights protections in such circumstances, would therefore inevitably be racially discriminatory.
- These proposals are clearly contrary to the UK's duties under the European Convention on Human Rights, particularly Article 13 which creates a right to an effective remedy for a breach of human rights. They would directly remove rights that people have under the Convention, and leave them with no option but to go to the Strasbourg court to secure the protections they are entitled to.

Question 25: Illegal and irregular migration

Amnesty's response: THE PROPOSALS ATTACHED TO THIS QUESTION OVERLAP WITH THOSE IN QUESTION 24, AND SO OUR RESPONSES ALSO OVERLAP

The question implies that people who move to the UK could be excluded from the full protection of human rights laws, by heavily curtailing independent judges' powers to adjudicate on them.

- This would create a situation where the law does not apply to everyone on an equal basis. Rights are universal – which means everyone has them all the time. They cannot and should not be removed from particular people or in particular situations.
- No group of people should have their rights determined solely by ministers and government officials.
- Excluding people from human rights protections on the grounds of their immigration status is inherently discriminatory.

SECTION IV: Responsibilities within the human rights framwork

Question 27: Limiting compensation

Amnesty's response: REJECT THE ASSUMPTION BEHIND THE QUESTION

Remedies for human rights violations should depend on the harm done to the victim. If you agree, you might wish to click on 'Other' for this question.

- The question proposes two options for limiting compensation for a breach of human rights, based on the conduct of the victim. Both options are unacceptable.
- Human rights are not something you earn through good behaviour. You have them because you are human.
- There is no evidence for the claim in the consultation document that rights litigation is a vehicle for compensation. Compensation payments in human rights civil cases are considerably smaller than in ordinary civil litigation. Often, rights cases result in no compensation payment at all.
- By repeating this myth at length, the government is contributing to the misinformation that surrounds the Human Rights Act. Its proposals compound the problem by attempting to link financial compensation with unspecified 'undeserving' claimants.
- The proposals promote confusion about the role of legal human rights protections. Certainly people have responsibilities to others in society, but it is not the job of human rights laws to provide for this. Human rights laws protect the individual against the powers of the state. They are not a means for the state to regulate the conduct of individuals: that is the function of (for example) criminal law.
- The government's second option would allow compensation to be reduced or ruled out on the basis of a broad assessment of a person's past behaviour. There is no indication of what type of behaviour would be considered. In effect, this would introduce a morality test for compensation payments in human rights cases.

SECTION V: The relationship with the Europan Court of Human Rights and the proper role of parliament

Question 28: When the UK government loses a case in the Strasbourg court

Amnesty's response: THE UK GOVERNMENT MUST COMPLY WITH INTERNATIONAL LAW

The UK government should not put itself above international law.

- The government is proposing that when a Strasbourg judgment goes against the UK, parliament may debate and even vote on the judgment. If that would mean a vote in parliament on either (a) whether the government should abide by the ruling, or (b) how far it should do so, this would be deeply troubling. It suggests that the UK is willing to ignore its human rights violations and put itself above international law, and send a signal to other states that this is acceptable.
- Compliance with human rights judgments should not be a matter of choice for the parliamentary majority.

Human rights are universal: their role is often to protect a minority against a majority view, which can sometimes include protecting unsavoury or unpopular individuals. These are often the cases that the government resists all the way to the Strasbourg court, because they involve the people it cares least for, or challenge key policies.

Note: How Strasbourg judgments work
Article 46 of the European Convention on Human Rights requires that governments 'abide by' final judgments of the Strasbourg Court against them. This is enforced politically through oversight at the Council of Europe, where all member states come together to ensure judgments are implemented. It is not enforceable in domestic courts, because the UK system generally keeps international and domestic law separate.