March 11th, 2022

UK Government's Human Rights Act Reform

Public Consultation Response

As a civil society organisation and strategic partner to the Scottish Government, CEMVO Scotland refute any changes or amendments to the Human Rights Act proposed by the UK Government under a 'New Bill of Rights'

cemvo SCOTLAND | Race For Human Rights

CEMVO Scotland is a national intermediary organisation and strategic partner of the Scottish Government Equality Unit. Our aim is to build the capacity and sustainability of the ethnic minority (EM) voluntary sector and its communities. Since being established in 2003, we have developed a database network of over 600 ethnic minority voluntary sector organisations throughout Scotland to which we deliver a wide range of programmes that provide capacity building support to the sector.

As a national organisation, we continually engage with the EM voluntary sector and its communities, which enable us to gather intelligence about the needs and issues affecting the sector. This helps our organisation to deliver tailored support to the sector, and to work strategically with public, statutory, and government agencies to tackle a range of prevalent issues such as race equality, social inclusion, capacity building and civic participation.

One of our core programmes at CEMVO Scotland is Race for Human Rights. The aim of this programme is to help public service providers increasingly embed race equality and human rights in their strategic planning and day-to-day functions. This will be achieved by adopting an anti-racist and human rights-based approach.

This response is on behalf of CEMVO Scotland.

This letter should be counted as an independent response which sets out our views, irrespective of similar letters received.

Brief Summary

The UK Government Human Rights Act Reform Consultation, published by the Ministry of Justice, was open to public consultation from December 2021 to March 2022. The public consultation paper included the UK Government's views on the human rights history and protection internationally and domestically before outlining their reasons for reform. The consultation continued by giving evidence for proposed reforms however these case studies were often outdated and out of context. The narrative of this public consultation was based on human rights being a *burden*, *frivolous* and *expensive*. It did not recognise that human rights are basic rights and freedoms every individual requires to live a life of dignity and respect. In summary, CEMVO Scotland are extremely concerned about the regressive, divisive and misleading proposals within this consultation and the real threat they pose to undermine the very foundations of human rights protection in the UK.

Response to the open consultation - Human Rights Act Reform: A Modern Bill of Rights

Thank you for the opportunity to respond to this important consultation.

CEMVO Scotland would also like to think The Human Rights Consortium Scotland and the British Institute of Human Rights for sharing resources, insight and providing space to share knowledge and expertise amongst civil society stakeholders.

I am choosing to respond to this consultation via letter as I do not believe that the consultation documents meet current Government Consultation Principles:

- ***Principle A:*** It is not 'clear and concise' or in 'plain English', the questions are not 'easy to understand'. The British Institute of Human Rights have requested Easy Read and plain language versions of the documents, which are yet to be published.

- ***Principle D:*** The only process of engagement offered publicly is through responding via the consultation document or the survey, which, as set out above, is difficult to engage with.

- ***Principle G:*** 'Consultations should take account of the groups that are being consulted'. As a person that holds an interest in 'our framework of human rights law' I am a stakeholder in the consultation, yet a way to respond that works for me has not been considered.

The Human Rights Act is based on universal human rights standards. Each of the 16 Articles set out within the Act safeguard the rights of every single person in the UK, rights that are about making sure everyone, no matter who they are, is treated with equal dignity and respect. The Act is about power and people, and getting the balance right, limiting the power of Government and public authorities. If the Government or a public authority risks our rights, ordinary people can hold them to account, both in the courtroom and in our everyday discussions with those making decisions affecting our lives. It is one of the very few laws that enables survivors of abuse or neglect to hold authorities to account for failing to protect them. As I understand it, the Government is saying that any reforms will keep the same list of 16 rights. However, I do not believe that this safeguards the current protections everyone in the UK has and the reforms will reduce the legal responsibilities the Government currently has towards us. The reform proposals set out in the Government's consultation paper would diminish accountability mechanisms under the Act leaving people with little to no access to justice should my rights be risked or breached. These include limiting the responsibilities of public bodies (including Government) to uphold human rights and even reducing who has these responsibilities through changes to definitions; dictating what proportionality means when balancing rights which will limit the ability of judges and decision-makers to look at each individual situation on the facts; putting more rules on the independent courts when they are deciding whether public bodies (including Government) have risked or breached people's human rights; and making it harder

to bring a legal case and seek justice. We believe that the changes proposed, although when looked at one-by-one may appear to be small tweaks, taken together would fundamentally reduce our ability to access our human rights in the UK.

As a civil society organisation in Scotland, we are particularly worried that the proposed changes to our Human Rights Act / the creation of a Bill of Rights does not take into account the foundational role of the Convention as a key pillar of Scottish devolution, nor consider how they would apply in practice in the Scottish judicial system. Furthermore, there is significant public support in Scotland to enhance our human rights law to bring more of our international rights home, not to push them further away.[1]

[1] Human Rights Act Reform Letter Template (bihr.org.uk)

Q1. 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 Appendix2, as a means of achieving this.

It is the view of CEMVO Scotland that the information provided within the consultation regarding the way in way in which domestic legislation, case law and Strasbourg case law interact in human rights issues is misleading. In paragraph 198 it states that 'under the Human Rights Act (HRA), the domestic courts have generally treated Strasbourg case law as having a presumptive authority, which should be followed unless there are special circumstance'. This is misleading information and not accurate. The Independent Human Rights Act Review (IHRAR) in fact found that there was a good relationship between Strasbourg and UK courts, it refuted any recommendation to replace Section 2(S.2) of HRA. Despite these findings, this consultation proposes two options to replace this integral part of the HRA. Option 1 proposes to change the language from domestic courts to have a 'duty to take account' to 'may have regard' to a judgement of ECtHR. The shift from a legal duty to reference ECtHR case law widens the gap in human rights protection and could cause an unacceptable level of divergence. The implication of this is that the scope of convention rights may be narrower for individuals in the UK. In reality, differing interpretations and application of Convention rights can result in: more UK cases being brought to ECtHR (a direct contrast of the aim of the New Bill of Rights to bring rights home); uncertainty of access to rights and a substantive change to how rights are experienced. Furthermore, the implications of more UK cases being brought to the ECtHR raises concerns of potential violations of Article 13 right to an effective remedy.

In paragraph 193 of this consultation states that the UK courts 'simply follow[ing] the distinctive and expansive case law from Strasbourg'. Again this statement is misleading and not factual. Currently, the UK Courts already reference and consult UK law and case law before thinking about ECtHR judgements. In fact, time and time again the UK Courts demonstrate that they adopt an entirely different approach to ECtHR regarding the scope of human rights protection e.g., the definition of public function (s6 HRA)[2]. This will be discussed in further depth in Q20 and 21 relating to public authorities.

When reflecting on the content and the narrative of Chapter 4 section 1 paragraph 189-197 of the consultation, it is built on the Government's own view that there is a problem with how S.2 of the HRA works and is applied despite there being no evidence to back this up. It builds on a misleading and misinformed narrative that the HRA 'doesn't work' and proposes two *reform* options to a supposed problem of which there was no public consultation on.

Q2. 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?

Much like the preceding question, this question is founded on a notion that that UK Supreme Court (UKSC) is not already the judicial arbiter of our laws and the highest court relating to human rights in the UK. This

[2] ECtHR adopts a regulatory approach while UK adopts an institutional approach.

is not true. Paragraph 198 states that 'under the HRA, the domestic courts have generally treated Strasbourg case law as having presumptive authority, which should be followed unless there are special circumstance'. CEMVO Scotland questions the validity of this statement as it offers no evidence to demonstrate any circumstance in which this has been the case. The HRA contains no provisions that weaken the position of the UKSC. Within the devolved legal system of the UK, the UKSC still maintains its power of the highest court. Currently, when addressing human rights issues, domestic courts consult UK law and common law before considering ECtHR judgements. They must follow precedent set by UKSC case law. If the ECtHR offer a differing judgement, it is up to the UKSC to decide on how to proceed, it can maintain a different judgement and it has done so on several occasions.

On the basis that the HRA offers no provisions that allow for the Strasbourg Court to intervene with the supremacy of the UKSC, there is no change required to the current system. The IHRAR support this view in their finding that 'domestic statute and the common law are first to be considered'[3] before the HRA in cases relating to possible human rights infringements.

Question 3 Should the qualified right to jury trial be recognised in the Bill of Rights? Please provide reasons.

Article 6 of the HRA protects our right to a fair trial. Amongst devolved nations, the requirement or inclusion of a jury trial varies dependent on the alleged crime. This proposal to include the right to a jury trial appears to be offering more human rights protection but fails to provide any evidence as to how this will protect our right to a fair trial more effectively. In practice, the inclusion of separate right that includes the right to a jury trial would change very little. CEMVO Scotland shares concerns raised by the British Institute of Human rights that this proposal actually serves as a distraction from the dangerous and proposed substantial weakening of existing human rights protections.

Question 4 How could the current position under section 12 of the HRA be amended to limit interference with the press and other publishers through injunctions or other relief?

The apparent purpose of this question is to allow more freedom to the press or publishers on what they share with the public. This disregards the importance of court injunctions placed on media outlets in order to protect the privacy of often extremely vulnerable individuals e.g., children, victims of domestic abuse, sexual abuse crimes, hate crime and suspected terrorism. The fact that there is a proposal within this consultation to offer more freedom to the press by using divisive and emotive topics of case law with no disclaimer offered (reference to child sex abuse crimes paragraph 206) and no inclusion or mention of the importance of protecting vulnerable individuals is disappointing. For example, *P. and S. v Poland*[4] highlighted the impact of disclosure of a young female's choice for abortion (as a result of rape) to the press has on the mental welfare of the individual and how it created further barriers to access medical treatment[5]. In this case, the young girl was subject to anti-abortion activists accosting her in public and

[3] The Government's Independent Human Rights Act Review (parliament.uk)

[4] *(Application no. 57375/08)*

[5]It is important to note that the definition of the temporal limits of human life falls within the margin of appreciation of the States Parties and It has been acknowledged in the Court's case-law that the acceptance of termination of pregnancy should be left to decisions given by the democratically elected national authorities.

having religious leaders enter her hospital room without consent to try and convince her to change her decision on abortion. The ECtHR ruled that the state had violated Article 8 right to privacy by the disclosure of medical information by a public hospital to the press. This case demonstrates the importance of injunctions. Any attempt to weaken this protection and offer more scope to media outlets is extremely dangerous for vulnerable individuals and risks further violating their right to self-determination and private and family life.

This question reaffirms this consultations narrative of proposing there is a problem without offering evidence and suggesting solutions that instead of increasing protection, they diminish and interfere with it. Furthermore, the IHRAR made no comment on this issue so it is unclear what evidence the Government is using for these proposals.

CEMVO Scotland shares concerns with the British Institute of Human Rights that these proposals and the framing of this question is misleading. Aside from the above issue that there seems to be no evidence that there is an issue with S.12 of HRA, it fails to recognise that s.12 in itself offers more protection to Article 10 freedom of expression as it requires courts to consider this right in any decisions that may limit expression. The government proposal will have a clear impact on our other qualified rights such as right to private and family life, home and correspondence which was not recognised within this consultation document.

This question also appears to be in contrast with other recent legislation proposals/ reforms by the UK Government regarding freedom of expression. For example, the Joint Committee on Human Rights (JCHR) along with numerous civil society stakeholders found that the proposals within the new Police, Crime and Sentencing Bill (part 3) raised serious concerns around individuals right to protest (freedom of expression and freedom of association). The JCHR found that the new 'noise trigger' clause is neither 'necessary nor proportionate' and should be removed from the proposal. This proposal together with the criminalisation of peaceful protesters if they are not compliant to the new *conditions* contradicts the 'very heart of why people gather together to protest – to have their voices heard'[6]. CEMVO Scotland share JCHR's concerns that the impact of this proposal would have a disproportionate impact on demonstrations and protests that have the most public support, simply because the number of people and audience it would attract.

With the proposed HRA 'reform' to freedom of expression proclaiming to be an expansion of scope of this right while other proposed legislation limits this right, it is very concerning that the UK Government plans on expanding the rights for some (e.g. press) but limiting the right for others (the public). This is in direct contradiction to one of the core human rights principles, universality.

Another concerning feature of the proposed reforms of freedom of expression is that they go in the opposite direction of expert advice on how to offer more protection of our right to freedom of expression. For example, for the UK's Universal Periodic Review recommendations have continued to call for the UK to remove their reservation of Article 4 (outlaw racist propaganda) of the International Convention on the Elimination of all forms of Racial Discrimination. This recommendation demonstrates that there is scope within the HRA to offer additional protection of freedom of expression but it is not what this consultation proposes. Given that the removal of the reservation of Article 4 of ICERD would place additional positive obligations on the state, and this consultation's objective to further limit positive obligations (discussed in more depth in appropriate Q.11), it seems unlikely that there is the will to commit to this additional protection. In this case, CEMVO Scotland rejects the regressive changes to s.12 of the HRA.

[6] BIHR's Question-by-Question Guide to the HRA Reform Consultation

Furthermore, it is of the upmost importance to recognise that at its core, this proposal questions an integral part of human rights protection in practice; absolute and qualified rights. Absolute rights are rights that prohibits any form of state interference. Qualified rights can be interfered with as long as it lawful, pursuant of a legitimate aim and proportionate (I.e. less restrictive option possible). There is a plethora of ECtHR and UK case law relating to the balance of these rights through the principle of proportionality and generally speaking the ECtHR offers a wide margin of appreciation in these areas to respect the sovereignty and individuality of state parties. It is therefore deeply concerning that within these proposed reforms, that UK Gov would like to limit the protection offered by the principle of proportionality and absolute and qualified rights.

Q5. The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the consideration above. To this end, how could clear guidance be given to the courts about the upmost importance attached to Article 10. What guidance could we derive from other international models for protecting freedom of speech?

It would be out with the scope of any court or judiciary to give an exhaustive list of 'exceptional' circumstances for freedom of expression to be restricted[7]. The government's proposal and views on freedom of expression are confusing and contradictory. On the one hand the government identifies freedom of expression as one of the rights that are problematic ('enabling physically obstructive conduct when protesting') and on the other hand it wants to *increase* the scope of this right by having an exhaustive list of exceptional reasons for this right to be restricted. As stated above, Article 10 freedom of expression is a qualified right, the HRA offers a framework of restriction to ensure it is lawful. Any government interference with a qualified right is dangerous and sets a dangerous precedent for other rights.

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

The right of journalists to keep their sources confidential is already protected under Article 10 freedom of expression HRA 1998. There are also other protections under the Contempt of Court Act 1981. Further protection to journalist sources is important but it is best placed in the review of the Official Secrets Act. This review should be rights respecting and include public-interest defences for journalists. CEMVO Scotland were disappointed that in the public consultation of the review of the Official Secrets Act it was clear that a public-interest defence would not be included and could criminalise journalists under charges of espionage carrying up to 14-year prison sentence.[8]

[7] The very same reason there is no definition of public function under s6 of HRA
[8] BIHR's Question-by-Question Guide to the HRA Reform Consultation

There is very little substance to this proposal, and it is unclear what evidence has been used to call for *reform* to freedom of interest. It therefore seems like the reform is politically motivated rather than the need for legislative reform for more human rights protection.

Q7: Are there any other steps that the Bill of Rights could take to strengthen the protection of freedom of expression?

The construction of this sentence demonstrates the clear objective of the proposed *reform* and offer 'further protection' of Article 10 freedom of expression. Any proposed reform to this right has focused on the responsibility that it places on the state, not widening the scope of the right in itself. As described above, in the recommendations published by the Committee of Elimination of all forms of Racial Discrimination and fellow state parties, continuously call for the UK to remove its reservation of Article 4 of ICERD.

Q8: 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

CEMVO Scotland consider that adding another permission stage to accessing your right to redress (Article 13) under the pretext of experiencing 'significant disadvantage' as regressive, misleading and against the very nature of human rights protection. This section of the consultation is misleading as it negates to include crucial information for a respondent- that a permission stage already exists. This is called a 'merit stage' that exists for a legal case in the UK. If a case is not actually human rights related or it does not have legal merits, then Court will not let it progress to a full case.

It is also the view of CEMVO Scotland that the proposal and the reasoning behind introducing a secondary permission stage is regressive and untrue. For example, in paragraph 221 it states that 'we believe it is wrong that the burden is on public bodies to apply to courts to strike out frivolous or spurious human rights claims' which contradicts the foundation of human rights law. It is for a court of law decide the admissibility of a case. The continuous narrative of potential human rights violation claimants being spurious or frivolous is regressive as it undermines the progress made since the enactment of the HRA. It is a well-accepted theory that for a human rights claim to make it to a court of law, something must have seriously gone wrong along the way. There should be access to redress at different levels of the accountability process for example a local authority's complaint procedure can lead to remedy. It is usually only when there are systematic errors and barriers that keep occurring or a very serious/harmful violation has occurred that a claimant must access their right to redress in a court room. Therefore, to add another 'stage' would only create more barriers and limit an individual's right to access justice.

It is also the view of CEMVO Scotland that this consultation's focus on shifting responsibility from the state on to an individual is regressive. Paragraph 221 states that 'a permission stage would shift responsibility to the claimant'. Once again this contradicts the very basis of human rights law. It is a state's responsibility to protect, promote, respect and fulfil its human rights obligations both under domestic and international law. It is not for the individual to have human rights responsibilities. This theory of rights and responsibilities has been discredited as it does not reflect the essence of human rights: our human rights are basic rights and freedoms that every individual requires in order to live a life of dignity and respect.

The consultation continues on this regressive approach in paragraph 222 when it explains that a permission stage would require claimants to 'demonstrate that they have suffered a significant disadvantage'. This claim re-introduces an outdated model of 'proving' your hardship or suffering to decision-making. It fails to put a person and an acknowledgement of their experience into legislation or policy making. For example, after much criticism[9] the Home Office introduced a DSSH model[10] to determining the validity of a person's claim in relation to asylum claims based on sexual orientation. This model has also been introduced in Sweden and New Zealand. This shift represents a step forward away from the previous 'prove' model. It would be regressive and damaging for the UK Government to introduce another permission stage that requires an individual to 'prove' their hardship and then prove that it is 'significant'. This proposal fails to recognise the experience of the individual and the barriers and potential trauma they have faced and detracts from the fact that human rights are to protect people, human beings.

Paragraph 219 also states that the publics mistrust of human rights stems from frivolous or spurious claims come before courts. This consultation offers no evidence to support this statement and fails to recognise that common misunderstanding of human rights stems from the lack of awareness and knowledge of human rights and how we use the HRA to protect our basic rights and freedoms. This was recognised at the beginning of the consultation in paragraph 123 which states 'those charged with delivering vital public services on the frontline need clarity as to what their obligations are, and what they can and cannot do within the bounds of human rights law'. It is disappointing that this was not reflected in the proposal of reform.

Finally, it is CEMVO Scotland's view that adding another permission stage would actually lead to more cases going to ECtHR and not in fact 'bring rights home', the intended aim of the proposed 'reforms' to the HRA. The caseload alone at Strasbourg in addition to the financial expense and access to get to Strasbourg for UK claimants means that redress is further removed from the individual and the human rights protection gap widens due to lack of accountability and accessibility.

Q9: 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

CEMVO Scotland rejects the proposal that there should be a 'significant disadvantage' criteria for reasons provided in the previous question. On this basis it therefore refutes any additional 'second limb' for claims concerning 'overriding public importance'.

Again, this question and section of the consultation is suggesting there is a problem when there is no evidence to suggest so, it therefore does not support the inclusion of another permission stage in accessing redress.

[9] Where individuals were having to prove their sexuality by asking private and degrading questions about their sexual preferences
Gay asylum seekers face 'intrusive' sexual questions | Immigration and asylum | The Guardian
[10] Difference, Stigma, Shame, Harm

Q10: How else could the government best ensure that the courts can focus on genuine human rights abuses?

CEMVO Scotland are very concerned about the tone and negative narrative throughout this consultation but particularly within sections about judicial remedies. The suggestion that certain people are undeserving of their rights or remedy to the violation of their basic human rights is regressive. No individual should be exempt from human rights protection. These are basic rights and freedoms that every individual requires in order to live a life of dignity and respect. There are noticeable exemptions to this rule, for example if you commit a crime, the state can interfere in your right to liberty by placing you in prison. Again, the interference of your right must be legal, proportionate and pursuant of a legitimate aim. These are very important guarantees when interfering with rights, it ensures that state cannot have a draconian rule over the people. To propose that some individuals do not have the same rights as others based on your past history or *behaviour* is unjustifiable, outrageously regressive and against the law. An example of how this would look in reality would be a young person who has experienced significant Adverse Childhood Experiences (ACES) and trauma, and due to experiencing one or more ACES has been put on an order, a tag or even in a young offenders' institute for a crime. Does this young person not 'deserve' their human rights? This is a dangerously regressive approach by the UK Government. This displays the UK Governments continuous disregard for international law and standards.

The reasoning for these regressive proposals is included in paragraph 227. This consultation proposes that by introducing a 'deserving' criterion it will reduce the number of 'human rights-based claims being made overall'. In theory, a commitment to reducing the number of human rights claims is welcomed, if it is achieved by addressing human rights issues and protecting, promoting, respecting, and fulfilling human rights. It is not welcomed under these present circumstances where it would be achieved by placing more barriers and limiting the amount of claimants who can get access to justice. Furthermore, by placing further restrictions on right to redress, the UK Government are at risk of violating Article 13 right to redress.

Q11. 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.

CEMVO Scotland are disappointed by the regressive and negative narrative of positive obligations. This proposed reform is another example of the government suggesting there is a problem with very little evidence to support their reason for reform. In fact, the case law referenced to demonstrate the 'imposition' of positive obligations is a historic positive obligation case of which there has since been a new precedent set, nullifying the credit of the case (*R. Baiai v Secretary of State*) [11]

[11] R. (Baiai and others) v Secretary of State for the Home Department [2008] UKHL 53, [2009] 1 AC 287

The consultation suggests that the state 'does too much' and is 'impositioned' by 'costly' human rights litigation. This is not the case. For example, Special Rapporteur Philip Alston published a scathing report[12] on the austerity measures and social security changes made in the UK and reported that the UK Government are failing to fulfil basic economic, social and cultural rights. Economic, social and cultural rights require more action, positive obligations, than other civil and political rights. However, to ensure that there is not an 'undue burden' placed on states, they must only ensure that the rights within the ICESCR are being 'progressively realised' rather than absolute realisation. Together with ECtHR principles of proportionality and margin of appreciation, there is adequate protection to ensure that states are not impositioned by 'costly' positive obligation and human rights litigation. To suggest otherwise is false/inaccurate. What Philip Alston's report demonstrates is that despite the wide scope offered under ECSR, the UK Government still falls shorts of meeting these basic human rights. Therefore, to state that the intention of the government is to look at ways to 'restrict the circumstances in which these obligations are imposed(para230)' is regressive, deeply concerning, dangerous and against international law.

There is a second part to the response to the proposals around the 'reform' of positive obligations. This section of the consultation focused heavily on the 'burden', 'pressure' or 'imposition' that human rights, in particular positive obligations, place on public authorities. This detracts from the very foundations of human rights outlined in the Universal Declaration of Human Rights. Human rights are basic rights and freedoms required to live a life of dignity and respect. They are found in our neighbourhoods, factories, workplaces etc[13] and are therefore protected by representatives and duty bearers of the state which in the UK are public authorities. Public authorities implement policy on legislation created by Parliament, their decisions impact every individual of society. They are vital in safeguarding human rights on behalf of the state.

It is worth noting that while human rights violations can, although this consultation offers outdated or inaccurate evidence, cost public authorities money, it is not the fault of the individual whose basic human rights have been violated. What has added 'pressure' and 'burdens' to public authorities is the continuous cuts to budgets and services imposed by the state's austerity measures by the sitting executive, it is not human rights that place this burden.

Finally, it is CEMVO Scotland's belief that positive obligations are used as tools for frontline staff to take action and protected people who may be at risk of serious harm or loss of life (*DSD v United Kingdom*[14]) . Without a clear duty, frontline staff will have to navigate through numerous and complex legislation and policies leaving decisions or policy creation at risk of violating human rights[15].

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[12] Statement on Visit to the United Kingdom, by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights. Available at: eom_gb_16nov2018.pdf (ohchr.org)

[13] Eleanor Roosevelt, Universal Declaration of Human Rights

[14] Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents) [2018] UKSC 11 On appeal from [2015] EWCA Civ 64

[15] For example, the Scottish Human Rights Commission supported a group of residents in Leith living in poor housing conditions to advocate for their right to adequate standard of living. housing-project-summary-vfinal-june-2019.pdf (scottishhumanrights.com), *Eweida and others v. the United Kingdom*

CEMVO Scotland shares similar concerns with the British Institute of Human Rights that the proposed 'reforms' to positive obligations will allow for each individual public authority to decide if protecting human rights fits into their own policies and strategic planning. This is in direct contrast with human rights law- rights and freedoms are for every individual and are the basic, minimum level of treatment required. Human rights protection should not be dependent on where you live, this in fact exacerbates and already existing protection gap of the 'postcode lottery'.

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

Option 1: Repeal section 3 and do not replace it

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 any laws in the UK must be read in a way in which is compatible with the rights enshrined in the HRA (ECHR rights). The HRA was subject to reviews and parliamentary debate before it was carefully written and then enacted in order to ensure that Parliament always has the final say and that the courts cannot overturn or change laws (Acts) of Parliament.

This is a further example of the consultation stating that there is a problem with HRA when it simply is not the case. Section 3 of the HRA does not take away power from Parliament and give it to courts. The HRA protects the role of Parliament in making and changing laws; it was deliberately designed to fit with the way the UK's system works and ensure Parliament is sovereign[16]. There is no evidence that the courts are not using S3 of the HRA appropriately.

The information provided for the reasoning for repeal or replacement of s3 of the HRA is misleading and inaccurate. In paragraph 232 it states that the government's proposal aims ensure 'democratic oversight by 'limiting the duty of the UK courts to reinterpret legislation enacted by Parliament'. The very reason we have courts to ensure legislation is compatible with ECHR is because it is a fundamental part of democratic process. To remove or change that would be un-democratic as it would allow Parliament to enact laws that may work against other laws such as HRA.

Paragraph 233 of the consultation goes on to say that the HRA in practice has 'moved too far towards judicial amendment of legislation which can contradict, or be otherwise incompatible with, the express will of Parliament'. This statement fails to take into consideration the express will of Parliament may well be against the protection of human rights due to political motivations or affiliations. Regardless of such affiliations and motivations it is imperative that the state respects both domestic and international human rights law.

CEMVO Scotland shares the British Institute of Human Rights view that 'Section 3 is also an important tool for public officials to use to make rights-respecting decisions. If public officials apply other laws in a way

[16] BIHR's Question-by-Question Guide to the HRA Reform Consultation

that respects human rights in the first place, this improves decision-making. This lessens the need for ordinary people to take legal cases to courts to challenge decisions which do not respect human rights'[17].

CEMVO Scotland is in agreement with the IHRAR and rejects any repeal or change to S3 of the HRA. Section 3 applies to all law and Parliament can already choose to bring in or keep law that is not compatible with ECHR. Similarly, we echo the concern of the IHRAR that a repeal or change to S3 would 'reduce current level of Convention rights protection'[18] and could have a negative or regressive impact on devolution and the Northern Ireland Peace Agreement[19].

Q13 How could Parliament's role in engaging with, and scrutinising, section 3 judgements be enhanced?

The inclusion of this question is confusing. The creation of a database to collate S3 cases does not necessitate any change to HRA. CEMVO Scotland agree with IHRAR Panel recommendation for the creation of such database to increase transparency in the application of S3 of the HRA however this would fall under the scope of a body that looks at human rights issues. This special body already exists, The Joint Committee on Human Rights. The creation of such database and the required resources can be achieved without any changes to the HRA as this is a parliamentary process.

CEMVO Scotland echoes the British Institute on Human Rights view that 'the issue raised here is not with the law in Section 3 but with the "damaging perceptions" about it, which the Government Consultation adds to. It is these perceptions that need to be changed, not the law'[20].

Question 14: Should a new database be created to record all judgements that rely on section 3 in interpreting legislation?

CEMVO Scotland supports the IHRAR findings that 'there is no substantive case for its repeal or amendment [of section 3] …that any damaging perceptions as to the operation of section 3 are best dispelled by increased data as to its usage; and that, as a matter both of perception and reality, Parliament could and should take a more robust role in rights protection, a role which could sensibly be reinforced via an enhanced role for the JCHR'[21].

It is surprising that such database does not exist and the support for the creation of it should not be interpreted as support for this consultation. A database should be created and monitored by an independent body such as the JCHR.

CEMVO Scotland calls on the UK Government to prioritise and action IHRAR calls to stop promoting 'damaging perceptions' about the HRA. Unfortunately, this consultation adds to these perceptions with the discussion of Section 3 based on selected cases, with little explanation of how the law currently works or the evidence of an issue that such a database would demonstrate.

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[17] BIHR's Question-by-Question Guide to the HRA Reform Consultation
[18] The Government's Independent Human Rights Act Review (parliament.uk)
[19] Human Rights Consortium Northern Ireland, Short Guide
Human_Rights_Act_Consultation_HRC_Guide_to_responding.pdf (mcusercontent.com)
[20] BIHR's Question-by-Question Guide to the HRA Reform Consultation
[21] The Government's Independent Human Rights Act Review (parliament.uk)

Question 15: Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

Currently, under Section 4 of the HRA, UK courts can declare that law made by Parliament (Act) is incompatible with the HRA. If an Act is declared incompatible, it is still lawful unless Parliament changes it. Secondary legislation is created by ministers and courts can disapply these laws if they are not rights-respecting. The government is proposing that secondary legislation shifts to only a declaration of inadmissibility rather than the disapplication of the law itself. It is of the view of CEMVO Scotland that this is a regressive proposal as it minimises the importance of scrutiny. This is most important for secondary legislation as it is created by delegated ministers who have political motivations and agenda. It is therefore paramount that these secondary legislations are scrutinised by the courts to ensure that they are rights-respecting. Failure to do so would be widen the gap of accountability in human rights protection in the UK. By changing scrutiny of secondary legislation to 'declarations' of incompatibility gives more power to Parliament and the UK Government.

The IHRAR report is clear and recommends no change to the substantive condense of sections 3 and or 4 of the HRA[22]. It goes one step further and recommends offering more protection by suggesting the introduction of an 'ex-gratia payment mechanism where a declaration of incompatibility is made. This would mean giving the courts the choice of providing a payment to people whose rights are breached by other laws, recognising that the law will remain unless and until Parliament decide to change it'[23]. CEMVO Scotland firmly supports this action and reiterates that secondary legislation should not shift to declarations of admissibility.

Question 16: Should the proposal for suspending and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with the Convention rights? Please provide reasons.

Proposals for suspended and prospective quashing orders put forward in the Judicial Review Bill are restrictive as the limit access to justice. CEMVO Scotland does not support these proposals. The proposals are restrictive as they would reduce individuals' protection and access to justice by restricting existing remedies that are in place. Currently, quashing orders are given by courts to public authorities to ensure that the law is followed. This might mean that public authorities must make a decision again and ensure it is lawful.

CEMVO Scotland rejects any changes to this part of the HRA.

Q17. Should the Bill of Rights contain a remedial order power? In particular, should it be:

a) **similar to that contained in section 10 of the Human Rights Act;**
b) **similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself**
c) **Limited only to remedial orders made under the 'urgent' procedure; or**
d) **abolished altogether?**

The proposal of reform of Section 10 of the HRA is based on the suggestion or assumption that there is a problem within the application of Section 10 HRA. The consultation then offers their preferred approach

[22] The Independent Human Rights Act Review 2021 (publishing.service.gov.uk) p.249
[23] The Independent Human Rights Act Review 2021 (publishing.service.gov.uk) p.256

with very little evidence to support the 'case for reform'. The consultation proposes the removal of the remedial orders which would see Parliament being the only avenue to change legislation to ensure that legislation is rights-respecting. Evidence from the Ministry of Justice shows that there have only been eight remedial orders between 1998 and 2020[24]. Clearly remedial orders are not used often enough to be a cause of concern. Again, the Ministry of Justice evidence demonstrates that there are a range of options already available to change the law when it is incompatible with human rights. Despite this, this consultation response does not allow for the respondent to choose an option of no change.

Question 18: We would welcome your views on how you consider section 19 is operating in practice and whether there is a case for change.

Section 19 of the HRA is a vital tool in providing confidence and gaining trust of the public that new legislation is compatible with HRA i.e., that the new legislation will not violate their human rights and instead protect, promote, respect and fulfil them. Section 19 requires the minister introducing the Bill to be transparent and accountable in their impact assessment of the new piece of legislation. Removing or changing S19 would decrease the value of human rights. CEMVO Scotland supports IHRAR findings that 'section 19 plays an important role both in helping to ensure that Government and Parliament consider the application of [the rights in the Human Rights Act] ...to new legislation … there can be no doubt that it has had a major, transformational and beneficial effect on the practice of Government and Parliament in taking account of human rights issues when preparing and passing legislation.'[25]. CEMVO Scotland therefore refutes any proposal to amend or remove S19 of the HRA.

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?

CEMVO Scotland is disappointed that the consultation has only provided one direct question to considering the implications of changing or 'reforming' the HRA on devolved settlements. This is concerning as it demonstrates lack of knowledge and understanding of the intricacies and complexities of devolution. CEMVO Scotland supports the Human Rights Consortium Scotland's view that any changes to the HRA would have significant impact on areas of devolved competence. While the HRA can only be amended by Westminster, Section 5 (1) of the Scotland Act is not reserved to UK Government and therefore falls within the competence of Scottish Parliament. The proposals within this consultation have significant implications on the protection and realisation of ECHR rights- such as the divergence from ECtHR case-law, reducing positive obligations on public authorities and the inclusion of other provisions such as a right to a jury trial and a permission stage.

CEMVO Scotland would like to reiterate that a divergence from ECtHR case law would create confusion about the interpretation of rights and a court's standard and norms for the Scotland Act and Scots Law. This confusion limits an individual's access to justice and will affect the rule of law in Scotland.

CEMVO Scotland would also like to note that the prosed reforms and introduction of a new Bill of Rights fall under areas of devolved matters and therefore, will fall under the scope of the Sewel Convention. The Sewel Convention states that UK Parliament "will not normally legislate with regard to devolved matters without the consent" of the devolved legislature. Once again CEMVO Scotland is in accordance with the

[24] BIHR's Question-by-Question Guide to the HRA Reform Consultation
[25] The Independent Human Rights Act Review 2021 (publishing.service.gov.uk) pg.244

Human Rights Consortium Scotland and Deputy First Minister, John Swinney, that 'legislative consent should be sought from the Scottish Parliament on any resulting Bill of Rights'.

Furthermore, CEMVO Scotland reaffirm and support the following statement from Scotland's Deputy First Minister:

'The Scottish Government's principled objection to the proposition that the Human Rights Act requires to be "reformed" or replaced by a "modern Bill of Rights" … "Reform", as you characterise it, is not just unnecessary, but undesirable. [It is] difficult to view the proposals…other than as a pre-planned and politically motivated attack on human rights, constitutional certainties and the rule of law.'[26]

CEMVO Scotland are also deeply concerned that the proposed reforms and new Bill of Rights will create more legal uncertainty in Scotland. The ECHR is not only given effect in the HRA but also the Scotland Act 1998. It has also been vital part of devolved statute. Furthermore, the ECHR has provided the legal framework on human rights protection for all Scottish Parliament law and Scottish Government policy for over twenty years. Changing or 'reforming' the HRA, which incorporates the HRA, is therefore a complex constitutional proposal. This is summarised effectively by Professor Nicole Busby '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'[27].

It is also extremely important to take note that human rights law and the human rights culture in Scotland is on a very different trajectory than the UK Government. There is huge appetite in civil society Scotland to increase human rights protection by building on the HRA and incorporating a further four international human rights convention into domestic legislation, improving accountability and access to redress. This comes after the unanimous support for the incorporation of United Nations Convention on the Rights of a Child. These conventions are International Convention on the Elimination of all forms of Racial Discrimination, International Covenant of Economic, Social and Cultural Rights, International Convention on the Elimination of all Discrimination Against Women and Convention on the Rights of Persons with Disabilities as well as the inclusion of an explicit right to a healthy environment and improved protection for older people and LBTQI people. CEMVO Scotland fully support this commitment by the Scottish Parliament and therefore reject any proposal to change the foundations of it, i.e., reforms of HRA or construction of 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.

Section 6 of the HRA and the lack of definition of what a public function has been subject to much academic debate since the enactment of HRA. The parliamentary papers during the time of enactment indicate a clear reasoning for not listing which bodies or function fall within the scope of S.6 and are bound by HRA; a list would be too restrictive. Additionally, it is important to remember the context of this time, the UK was beginning to see the impact of mass privatisation of public/statutory services and was on the

[26] Human Rights Act: letter to the Lord Chancellor - gov.scot (www.gov.scot)

[27] Human Rights and Devolution: The Independent Review of the Human Rights Act: Implications for Scotland. A briefing paper for the Civil Society Brexit Project, by Professor Nicole Busby
Layout 1 (hrcscotland.org)

cusp of mass globalisation which only spurred on privatisation. Twenty plus years later, it would be regressive of the UK Government to propose an exhaustive list of bodies or functions that are bound by the HRA.

There have been numerous high-profile cases relating to s.6 HRA such as *YL v Birmingham City Council*[28] and *Ali v Serco*[29]. Both of these cases pose the question of whether the UK Government can 'outsource' their human rights obligations. After *YL* decision, there was reform in other areas of social care legislation[30] in order to ensure that vulnerable persons who are placed in private care homes by statutory services still have their human rights protected. Lady Hale offered her dissenting opinion on what a public function should be defined as in *YL* however CEMVO Scotland would again reiterate that any form of list would be limiting and not reflect the ever-changing nature of society.

Despite the need to narrow the gap in the human rights protection under s6, CEMVO Scotland do not support the proposed reforms in this consultation. The constant regressive, misleading, divisive and negative narrative around human rights that this consultation has demonstrated with its proposal to diverge from ECtHR case law, introduction of a permission stage and a limit on positive obligations place on public authorities does not give CEMVO Scotland the confidence that reform of s6 would offer more human rights protection.

CEMVO Scotland therefore does not support any changes to S6 of HRA.

Q21. 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.

CEMVO Scotland is again disappointed that the proposal intends to limit to legal responsibility of public authorities upholding and realising human rights law. The suggestion that human rights law confuses public authorities when they put legislation into practice is not supported by any credible evidence. The consultation paper refers to potential problems (x 'could' happen) but provides no examples of this being any more than a hypothetical. There are also no examples of current practice. This suggest to consultation respondents that the intention of this change is politically motivated rather than a requirement to improve the human rights protection of individuals.

Furthermore, CEMVO Scotland is disappointed that this question is a closed question: the consultation is stating there is a problem and offering a choice of two alternatives without public consultation.

[28] 2007 UKHL 27
[29] [2019] CSIH A199/2018
[30] The Care Act 2014

CEMVO Scotland would like to reiterate that s.6 of HRA is used by public authorities, managers and senior decision makers to ensure that they make rights-based decisions. Please refer to examples provided in Q11.

Q22. Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.

CEMVO Scotland refutes any proposed changes to the promotion, fulfilment and respect of human rights enshrined in the ECHR within extraterritorial jurisdiction. Current protection should not be interfered with and is vital to ensuring that UK Government does not break international law. [31]

CEMVO Scotland is concerned that despite the welcomed commitment to maintaining membership of the ECHR, this question proposes there should be change. It is out with the competence of the HRA, as there is it contains no specific provision, to make changes to extraterritorial jurisdiction, this falls within the scope of ECHR and ECtHR case law. To suggest that the government plans on changing current protection, undermines and questions the UK Governments commitment to the membership of ECHR.

Q23: To what extent has the application of the principle of 'proportionality' given rise to problems, in practice under HRA?

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 and 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 welcome your views on the above, and the draft clauses after paragraph 10 of Appendix2

CEMVO Scotland is concerned about the proposal within this question. In paragraph 291 it states that 'where Parliament has expressed its clear will on complex and diverse issues relating to the public interest, this should be respected'. This statement is alarming when we read this in conjunction with the previous proposal (Q18) to remove s19 of the HRA. The implications of these two proposals together would mean that there is no guarantee that laws enacted by Parliament will respect our human rights and are compatible with the rights protected within the HRA. There will be no guarantee that the new legislation will not interfere with our basic human rights and freedoms. What this paragraph is proposing that as well as not having to have a statement of compatibility with HRA, the legislation, in practice, cannot be scrutinised by the courts under an individual complaint of violation. This further removes access to redress

[31] Al-Skeini v. United Kingdom, Al-Jedda v. United Kingdom, Hassan v. the United Kingdom

and further widens the gap in the accountability process- diminishing the value and importance of our human rights protection.

Question 23 proposes that the principle of proportionality is problematic. This is not true. In fact, the principle of proportionality was vital in the fight against COVID-19 pandemic. The Coronavirus Act 2020 was able to limit and interfere with individuals right to private and family life (Article 7), liberty (Article 5), freedom of association (Article 10) in order to protect public health and respect the positive obligation to respect right to life (article 2). This is a clear example that the principle of proportionality is key to human rights protection as it allows for the balancing the rights of all individuals to ensure decisions protect both the individual and the wider community.

Option 1 does not recognise that society evolves and changes over time and therefore the application of laws must adapt to current circumstances. CEMVO Scotland along with other civil society and international bodies supports the view that the ECHR is a living instrument.

The refusal to accept the ECHR as a living instrument is clear throughout this consultation. In fact, there is a continuous statement of commitment to relying on laws dating back to centuries, these laws are not always fit for purpose in the 21st Century. For example, although crucial in its role of developing the rights of individuals in the UK, the Magna Carta noticeably does not offer protection to all particularly 'villeins and Jewish people'[32]. Despite these shortfalls, this proposal suggests that this law amongst others, is suitable for human rights protection in 21st century UK.

Both options propose real risk of people's human rights being restricted far more than necessary. The proposals also puts limits on court's decision making, despite the fact that our courts are independent. It is important to remember that in the UK system, Government usually controls Parliament which means that much legislation and reforms are much more in line with Government ideologies and political motivations. The implications of this together with limiting court's ability to interpret to the law, gives government free reign which is not in line with our democratic society.

The context provided in this part of the consultation is misleading and the proposals are regressive. Q23 continues the approach of this consultation with stating there is a problem and offering only two solutions with no prior public consultation or credible evidence of the problem. This demonstrates that regardless of public responses, the government is committed to changing the application of proportionality. CEMVO Scotland strongly disagrees with any proposed changes to the application and interpretation of the principle of proportionality.

Q24: 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.

[32] What Magna Carta and the Race Relations Act mean to us today | Magna Carta Trust 800th Anniversary | Celebrating 800 years of democracy (magnacarta800th.com)

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.

CEMVO Scotland is again disappointed in the negative and false narrative on human rights within this question particularly the statement that human rights 'frustrate' deportation cases. This disregards the universality of human rights. All individuals regardless of status within a state, have human rights.

CEMVO Scotland are concerned that paragraph 227 proposes that 'deportation decisions can only be overturned if the Home Secretary has obviously failed to take account of human rights considerations'. This is a retrospective approach. The UK government must take steps to ensure they are always protecting, promoting, respecting and fulfilling their human rights. Retrospective approaches to human rights claims do not afford sufficient protection as it can place great risk and threat to life and or torture to an individual.

This consultation does not provide well-evidenced data or cases to necessitate the proposal under Option 1. This consultation focuses on outdated cases to feed its own false and dangerous narrative and does not take into account that since such cases[33], the law has been changed[34]. This change in legislation was achieved with no reform or overhaul of the HRA which this consultation proposes.

The consultation suggests that there is wide-spread problems or 'abuse' of human rights law to prevent deportation. CEMVO Scotland share the same view as the British Institute of Human Rights that data around the number of deportation cases that involve human rights concerns are not well collated or publicly available.

For these reasons, CEMVO Scotland strongly oppose and changes to the use or interpretation of human rights in deportation cases.

Q25. 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 HRA to tackling the challenges posed by illegal and irregular migration?

When discussing illegal and irregular migration it is imperative to remember that the journeys and experiences of these vulnerable groups engage in absolute rights, e.g., right to life. It is also important to note that the positive obligation of the UK state to protect such right covers those on UK territory and UK waters. Failure to protect the right to life, breaks human rights law. The ongoing rise of deaths of individuals seeking asylum in the UK by crossing the channel demonstrates that the UK Government are not committed to domestic and international obligations, contrary to its opening statement in this question.

[33] AP (Trinidad & Tobago) v Secretary of State for the Home Department [2011] EWCA Civ 551 (12 May 2011)

[34] Nationality, Immigration and Asylum Act 2002 (legislation.gov.uk)

CEMVO Scotland is also disappointed in the language used in this question. It refers to illegal migrants however the context provided for the question refers to asylum seekers, suggesting that asylum seekers are illegal. This is not true. The use of the word 'illegal' is the governments misunderstanding of the law.[35]

The UK Government could ensure that they meet both their international and domestic human rights obligations by providing a safe and legal route to claim asylum in the UK. Upholding international law will not be respected by current government plans (New Nationality and Borders Bill) to criminalise persons seeking asylum by entering the UK the only way possible.

Q26. We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:

A) **The impact of the provision of public services**
B) **The extent to which the statutory obligation had been discharged;**
C) **The extent of the breach; and**
D) **Where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.**

Which of the above considerations do you think should be included? Please provide reasons.

This is a further example of the government saying there is a problem and offering limiting solutions. This demonstrates the government's commitment to taking action without consultation.

CEMVO Scotland are particularly concerned about the proposal in paragraph 301. It states that 'we would expect the courts to consider the wider public interest when they look at human rights claims, limiting the potentially negative impact that individual claims will have on services which are meant to benefit the community as a whole. This statement in practice would interfere with an individual's right to redress (Article 13). Additionally, it suggests that if a decision or policy provision has violated their human rights, they do not deserve justice if it would have a negative impact on the service. This is a dangerous and regressive proposal. It is important to acknowledge the wider policy and agenda of the UK Government of cutting budgets of services and public authorities (discussed in Q11) when considering this proposal.

Both of these factors combined create a reality that public authorities cannot offer financial redress to victims of human rights violations and the state is not held accountable for it's actions. These proposals limit therefore access to justice and redress.

CEMVO Scotland strongly oppose any changes to S.8 of the HRA.

Q27. 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

[35] 2021 EWCA Crim 1958

Option 2: Provide that damages may be reduced in part or in full on account of the applicant's conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

CEMVO Scotland are seriously concerned about the dangerous and regressive proposals within this question.

Throughout this consultation there has been continuous reference to individual's responsibilities, with regards to human rights. This is not true. States have responsibilities to human rights protection, not individuals. CEMVO Scotland would like to remind the UK Government that our human rights are basic rights and freedoms for everyone.

Between pages 35-37 of this consultation it outlines the 'reasons' for reform regarding human rights responsibilities. At the outset, this chapter depicts a 'rights culture' as a something that needs to be changed. CEMVO Scotland strongly believe that a human rights culture, which does not currently exist in the UK[36], is something to be supported- to protect your rights, you need to know your rights. Research published by the Centre of Study of Human Rights at the University of Strathclyde demonstrates that the lack of knowledge and awareness of human rights of both individuals and local authorities lead to human rights violations and lack of accessibility to justice[37]. Furthermore, CEMVO Scotland are disappointed that the case law referenced within these pages were inadmissible, meaning the HRA was not used nor other legislation. It is misleading of the Government to use these cases to depict the HRA as allowing for human rights claims for those who the government describes as having a 'flagrant disregard for the rights of others.'

CEMVO Scotland are extremely concerned of the suggestion in paragraph 303, that clearly states that if a person is 'wanted' for a crime, they are not entitled to the same rights as others. This again detracts from the very foundations of human rights law- human rights are universal.

Again paragraph 305 proposes that a person is less deserving of their human rights if they are 'badly behaved' or 'poor conduct' or have been found guilty of a crime and have served their sentence. As noted in Q10, this statement fails to recognise numerous accepted sociological/psychological behavioural theories such as ACES. This statement is regressive as it reverts to a draconian model of governance. In this case, rather than focusing on the rehabilitation and re-integration of an offender or a person with 'poor conduct,' it further stigmatises and alienates persons- a complete disregard to the universality of human rights.

CEMVO Scotland reaffirms that human rights are not 'earned' or 'given' by a government. Responsibility for upholding rights lie with the government.

CEMVO Scotland strongly disagree with this proposal. We are astonished and shocked to the creation of idea that there are 'underserving claimants' of human rights violations. This goes against the very core of human rights. If the government are concerned about human right responsibilities, it should shift its focus and efforts on reducing the human rights responsibilities of the government and public bodies to increasing human rights protection.

[36] it is widely acknowledged that the lack of capacity building and awareness of human rights at the time of HRA enactment was a missed opportunity for human rights protection

[37] Collaborative research report published into self-directed support complaints processes | University of Strathclyde

Q28: We would welcome comments on the options, above, for responding to adverse Strasbourg judgements, in light of the illustrative draft clause at paragraph 11 of Appendix.

This question does not concern the HRA. The HRA does not require Parliament to take any action when the ECtHR decides the UK Government has violated human rights. The question is about the relationship of the UK and the ECHR which the government has committed to remaining a signatory to.

The Parliament can already, if it so desires, respond to negative or 'adverse' ECtHR judgements. Under Article 46 of the ECHR, state parties are required to implement final judgments of the Strasbourg Court in cases brought against them. However, they are afforded a large margin of appreciation in their interpretation of the judgement. For example, since 2005 the ECtHR has ruled that the blanket ban on prisoner voting rights violated ECHR. After public consultation, Scotland changed this blanket ban to allowing prisoners with a sentence of 12 months or less the right to vote. Over a decade later, the UK Government finally adjusted their policy and now allow prisoners on temporary remand the right to vote, satisfying the ECtHR, but still less inclusive than Scotland and the findings of the public consultation. This demonstrates that Article 46 of the ECHR does not interfere with the sovereignty of Parliament, by the application of the margin of appreciation, and ensures that all individuals rights are realised, promoting their universality.

In light of these observations, CEMVO Scotland strongly oppose and change or reform to the relationship between Strasbourg and the UK or a commitment to a regressive disenfranchisement style of punishment.

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 propose 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 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.**

CEMVO Scotland are disappointed that this consultation has not conducted any equality impact assessment on any of the protected characteristic groups. Despite the Ministry of Justice being a public body and therefore bound by the Equality Act 2010 and equality duties, it is relying on the public themselves to identify any potential adverse impacts this reform and new Bill of Rights will have. Not only does this not show leadership and commitment to achieving equality, the lack of consideration diminishes the importance and recognition of the differing and adverse experiences of protected characteristic groups.

Protected characteristic groups experience systemic and institutional barriers and are more at risk of experiencing human rights violations. For ethnic minorities, in particular, they face systemic and institutional racism impacting their human rights protection. To restrict the current human rights protection will only exacerbate the risk of violating ethnic minority's human rights.

Concluding remarks

To conclude, CEMVO Scotland refute any changes or amendments to the HRA. CEMVO Scotland acknowledges that there is a need to improve human rights protection in the UK and to make rights real for every individual. However the proposals within this consultation and the reasoning behind supposed 'reforms' demonstrate the government's motivation to weaken current human rights protection: limiting positive obligations on public authorities, adopting a 'good behaviour/conduct' test to determine if an individual deserves their human rights being protected, deviating from the ECtHR case law creating confusion and uncertainty about how we protect our rights and restricting the ability of courts and ministers to scrutinise legislation to ensure it does not violate our human rights.

These proposals are regressive, divisive, misleading and suggests that the UK Government is above the law.