Health and Social Care Alliance Scotland (the ALLIANCE)

Consultation Response - Human Rights Act Reform: A Modern Bill of Rights

8 March 2022

Introduction

The Health and Social Care Alliance Scotland (the ALLIANCE) welcomes the opportunity to respond to the UK Government's consultation to reform the Human Rights Act 1998 ('the Human Rights Act').[1]

The ALLIANCE is a national third sector intermediary for health and social care in Scotland with over 3,000 members including third sector health and social care organisations, disabled people, people living with long term conditions, and unpaid carers. Throughout our work, we hear consistently from our members about the value of human rights and human rights based approaches in health and social care in Scotland. In March 2021, the ALLIANCE submitted a response to the Independent Human Rights Act Review,[2] which helped inform the Panel's final report.[3] Our response highlighted the powerful and dynamic impact that the Human Rights Act has had on the lives of everyday people, extending beyond the courtroom.[4]

We are concerned that the UK Government's proposals will weaken existing human rights protections that everyone is entitled to under the Human Rights Act, making it more difficult for people to enforce their rights. Any proposals that weaken human rights protections in the UK are not a sufficient replacement to the Human Rights Act. The Human Rights Act, in its current form, should not be diluted; any changes to the Human Rights Act must be progressive and enhance the protections that are currently offered, not regressive.

The consultation document suggests that the rights in the Human Rights Act will remain the same under a new Bill of Rights.[5] We believe that this is misleading. The consultation document sets out fundamental changes to the way that our rights work and protect everyday people. This means that while the rights may look the same on paper, they will have significant implications in practice, and public bodies and the UK Government will be less accountable.

Additionally, we are concerned that the proposals in the consultation document focus on complex, technical, legal issues which fail to recognise the implications of changes to our human rights law on people's everyday lives, and the ability to hold those in positions of power to account. We believe that the Human Rights Act is working effectively, and there is no substantive case for replacing it with a new Bill of Rights. As summarised in a recent ALLIANCE Opinion piece:

> “Human rights are not just any legal rights; they are the legal entitlements that are most directly rooted in fundamental values of universality and respect for equality and dignity. They are not civil freedoms that we enjoy at the pleasure of each passing government.”[6]

Part 1: Respecting our common law traditions and strengthening the role of the Supreme Court

Question 1: We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2, as a means of achieving this.

The ALLIANCE does not support either of the illustrative draft clauses outlined in Appendix 2. We believe that the draft clauses are unnecessary and could lead to rights being inadequately considered, addressed and protected.

The draft clauses outlined in Appendix 2 outline two options which seek to replace section 2 of the Human Rights Act, which deals with interpretation of human rights under the European Convention on Human Rights. There is a lack of detailed evidence to support the UK Government’s proposal as outlined in the consultation document. The UK courts already draw upon a diverse range of laws when making decisions, and it is therefore unclear why the draft clause is necessary.

This issue was considered at length by the Independent Human Rights Act Review. The Review Panel concluded that there was a positive relationship between UK courts and the European Court of Human Rights, but that it would be helpful to make a small amendment to section 2 to clarify the order in which courts should consider other laws.[7] Notably, the Review Panel explicitly rejected repeal of section 2:

> “The repeal of section 2 would result in there being no formal link between the Human Rights Act and the Convention. While the UK remains a party to the Convention, this option has nothing to commend it.”[8]

> “The Panel concludes that abolition of section 2 cannot sensibly be contemplated.”[9]

The UK Government has stated that it remains committed to the European Convention on Human Rights.[10] Yet, the proposals outlined in Appendix 2 would sever the link between domestic rights and Convention rights. Option 1 outlines that the courts would not be required to “follow or apply any judgment or decision of the European Court of Human Rights”.[11] It also makes clear that the “meaning of a right in the Bill of Rights is not necessarily the same as the meaning of a corresponding right in the European Convention on Human Rights”.[12] The proposals in the consultation document therefore go far beyond the recommendations of the

Independent Human Rights Act Review, which could have significant negative implications for how rights are looked at, and therefore protected, in practice.

The Independent Human Rights Act Review also cautioned that it is important to be very careful when making changes to section 2 of the Human Rights Act. Any changes to the relationship between UK courts and the European Court of Human Rights could lead to a significant gap between rights protection in the UK and the European Convention on Human Rights. This could therefore "undermine the Human Rights Act's aims and lead to an increasing number of applications, including successful applications, brought against the UK before the European Court of Human Rights".[13]

This means there is likely to be an increase in cases being heard at the European Court of Human Rights. This is in direct contrast to one of the main aims of the Human Rights Act, which is to 'bring rights home'. This could also have a practical impact on an individual's access to justice as only those who can afford to take a case to the European Court of Human Rights may be able to seek a remedy for violation of their human rights.

Moving away from the case law of the European Court of Human Rights also has significant implications in Scotland. The European Convention on Human Rights was embedded into the Scotland Act 1998. This means that individuals have been able to bring human rights cases under the Human Rights Act, the Scotland Act, or both. The proposals outlined above would risk significant confusion, complexity and uncertainty for individuals and lawyers in Scotland, which will impact the ability of people to know, understand, claim and enforce their human rights.

Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

The consultation document implies that UK courts treat case law from the European Court of Human Rights as having authority over our domestic courts, therefore undermining the supremacy of the UK Supreme Court. The ALLIANCE rejects this; we feel that there is a lack of detailed evidence to support this concern and the proposed solution.

The Human Rights Act does not contain any provisions that weaken the position of the Supreme Court in the UK. The UK Supreme Court has a longstanding and well established role in interpreting UK human rights law. The system of precedence in the UK's legal system means that all courts in the UK have to follow what the Supreme Court has said on a previous issue. This includes human rights law, even if the European Court of Human Rights has decided an issue differently to the UK

Supreme Court. As summarised in the Independent Human Rights Act Review report:

> "The Supreme Court has now made clear, on a number of further occasions, that when considering whether there has been a rights infringement, before turning to consider the Human Rights Act and whether a Convention right (as interpreted through Section 2) applies, domestic statute and the common law are first to be considered."

The Independent Human Rights Act Review report also described the UK courts as developing a "confident and flexible approach" to case law from the European Court of Human Rights, which is guided by "judicial restraint". Notably, this includes the ability to depart from European Court of Human Rights case law in a range of contexts.[14] On this basis, we feel the proposal outlined above is unnecessary, and the current approach should remain.

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

No.

We note that the Independent Human Rights Act Review did not look at this issue. It is therefore unclear what evidence the UK Government is using to support these proposals.

Under the Human Rights Act, there is already robust protection under Article 6, the right to a fair trial. [15] Additionally, this proposal may have implications for the devolved nations, which have different legal systems. For example, the jury trial system in Scotland operates differently to England and Wales. The current provisions work effectively and adding a specific right would change very little in practice. We believe that this proposal is unnecessary.

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

We note that the Independent Human Rights Act Review did not look at this issue. It is therefore unclear what evidence the UK Government is using to support these proposals.

There is existing protection under Article 10 of the Human Rights Act which recognises the importance of freedom of expression when thinking about human rights. Additionally, section 12 of the Human Rights Act gives specific protection to freedom of expression by making it clear that the UK courts need to consider this right when making orders. We believe that this proposal is unnecessary.

The consultation document states that the UK Government wants to set out guidelines on how the right to freedom should be balanced. Under the Human Rights Act, the right to freedom of expression is a non-absolute right, and there are legal mechanisms in place to ensure that non-absolute rights are not restricted unnecessarily. This means that non-absolute rights can be restricted, provided it is lawful, legitimate and proportionate to do so.

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

We note that the Independent Human Rights Act Review did not look at this issue. It is therefore unclear what evidence the UK Government is using to support these proposals.

Paragraph 215 of the consultation document states that the UK Government believes that balancing the right to freedom of expression with competing rights should not "be merely left to the courts to develop. Instead, it believes there should be a presumption in favour of upholding the right to freedom of expression, subject to exceptional countervailing grounds, clearly spelt out by Parliament".[16] As outlined in our response to Question 4**,** the Human Rights Act already provides an effective, clear and robust framework to balance competing rights. We believe that this proposal is unnecessary.

We note that the proposals under this question stand in contrast to the discussion and proposals elsewhere in the consultation document. The UK Government is seeking to provide strengthened protection for the right to freedom of expression. In contrast, on page 39 of the consultation document, it outlines that "in the light of Articles 10 and 11 of the Convention, protestors can have a 'lawful excuse' for deliberate physically obstructive conduct".[17] We are concerned that this implies that the UK Government is warranting greater protection for the right to freedom of expression for some groups of people, but not others.

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

We note that the Independent Human Rights Act Review did not look at this issue. It is therefore unclear what evidence the UK Government is using to support these proposals.

Currently, under the Human Rights Act, the right of journalists to keep sources confidential is protected by Article 10.[18] It is also protected through the Contempt of Court Act 1981.[19] We therefore believe that this proposal is unnecessary. Additional

protections can be made, if needed, through other legislation that work alongside the Human Rights Act without changing the Human Rights Act itself.

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

As noted in our response to Questions 4, 5 and 6, the Human Rights Act already provides robust protection for the right to freedom of expression under Article 10. We believe that the proposal to offer further protection under a new Bill of Rights in unnecessary.

Part 2: Restoring a sharper focus on protecting fundamental rights

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

No.

There is little evidence to show that there are a significant number of human rights cases that are not genuine. We note that the Independent Human Rights Act Review did not look at this issue. It is therefore unclear what evidence the UK Government is using to support these proposals. There is little substance to the detail of this proposal, and we believe it is unnecessary.

Currently, human rights claims are subject to a robust permission and admissibility process before being heard in court. Asking individuals to prove that they have experienced 'significant disadvantage' adds an additional burden and layer of bureaucracy to the permission stage of human rights cases. This would make it harder for people to access justice, and to hold the government and public bodies to account. Given the robust measures and processes already provided for through the Human Rights Act and legal system, we believe that this proposal is unnecessary.

This question also implies that some people are entitled to more rights than others, which directly contrasts with the principle of universality under the Human Rights Act and may create barriers in accessing remedy through the courts, and in holding the government and public authorities to account.

Additionally, the UK remains committed to the European Convention on Human Rights.[20] Under the European Convention on Human Rights, individuals are entitled to the right to an effective remedy under Article 13. This means that when a person's rights have been breached, they should be able to take action to hold the government or public body to account. The permission proposals will make accountability harder, and therefore likely to lead to more cases going to the

European Court of Human Rights as people try to access justice. This is in contrast to one of the main aims of the Human Rights Act, which is to 'bring rights home'.

Question 9: Should the permission stage include an 'overriding public importance' second limb for exceptional cases that fail to meet the 'significant disadvantage' threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.

No.

We note that the Independent Human Rights Act Review did not look at this issue. It is therefore unclear what evidence the UK Government is using to support these proposals. There is little substance to the detail of this proposal, and we believe it is unnecessary.

As noted in our response to Question 8, human rights claims are subject to a robust permission and admissibility process before being heard in court. The current mechanisms work effectively and this proposal is unnecessary.

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

We note that the Independent Human Rights Act Review did not look at this issue. It is therefore unclear what evidence the UK Government is using to support these proposals. There is little substance to the detail of this proposal, and we believe it is unnecessary. As noted in our response to Questions 8 and 9, human rights claims are subject to a robust permission and admissibility process before being heard in court.

The wording used in the consultation document, that "claimants who have abused their rights or the rights of others" is concerning and suggests that there is a problem with the courts dealing with human rights claims that are not 'genuine'.[21] This implies that some people are entitled to more rights than others, which directly contrasts with the principle of universality under the Human Rights Act and may create barriers in accessing remedy through the courts, and in holding the government and public authorities to account.

Question 11: How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons.

We note that the Independent Human Rights Act Review did not look at this issue. It is therefore unclear what evidence the UK Government is using to support these proposals. There is little substance to the detail of this proposal, and we believe it is unnecessary.

Positive obligations are an integral part of our international human rights framework. Public bodies must take proactive steps to make sure human rights are protected and safeguarded. Positive obligations are a particularly important mechanism for disabled people where public authorities are obliged to take proactive steps to eliminate barriers to disabled people's human rights. Without this duty, frontline staff would have to navigate a complex set of laws, policies and guidance to ensure people are kept safe and their rights are upheld.

Part 3: Preventing the incremental expansion of rights without proper democratic oversight

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.

We would welcome comments on the above options, and the illustrative clauses in Appendix 2.5

The ALLIANCE does not support either of the illustrative draft clauses outlined in Appendix 2. We believe that the draft clause is unnecessary and could lead to rights being inadequately considered, addressed and protected.

Section 3 of the Human Rights Act means that all UK laws have to be looked at in a way that reflects the European Convention on Human Rights. The consultation document, and the options outlined in Question 12, suggest that power is being removed from parliament and given to the UK courts. We think that this is misleading. The Human Rights Act was carefully drafted to retain parliamentary sovereignty and only parliament can make or amend laws.

Under Option 2, legislation would only have to be interpreted in line with the European Convention on Human Rights where the meaning of the law is unclear. The Independent Human Rights Act Review explicitly rejected this proposal on the basis that section 3 applies to all laws (not just some of them) and due to concerns that this option "would reduce the current level of Convention rights protection provided for by the Human Rights Act".[22] Overall, the Independent Human Rights Act Review recommended that there is "no substantive case for … repeal or amendment" of section 3.[23]

Section 3 is also an important tool for public officials to make rights-respecting decisions outside of the courtroom. If public officials apply other laws in a way that

respects human rights at the outset, this improves decision making and outcomes for people accessing public services. This also reduces the need for people to pursue legal claims in courts to challenge decisions which do not respect, protect or uphold their human rights.

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

As outlined in our response to Question 12, the Independent Human Rights Act Review outlined that there is "no substantive case for … repeal or amendment" of section 3.[24] This proposal can be achieved through existing mechanisms, and without any changes to the Human Rights Act. For example, the Joint Committee on Human Rights, could be formally expanded to include reviewing legal cases where section 3 is used.

The Joint Committee on Human Rights specialises in human rights issues and plays an important role in analysing proposed new laws to check whether they are rights-respecting.[25] The Committee also keeps track of issues related to important human rights legal cases and judgments. This was explicitly recommended by the Independent Human Rights Act Review:

> "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 [Joint Committee on Human Rights]."[26]

We would welcome an enhanced role for the Joint Committee on Human Rights, with necessary resources to continue its important work. This can be done through parliamentary process, and without any changes to the Human Rights Act.

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

Yes.

We agree that a new database would be helpful to increase understanding of the Human Rights Act, including how section 3 is operating. This would increase transparency and understanding of how the Human Rights Act is working in practice. However, this can be achieved without any changes to the Human Rights Act. It is important that any such database is well-resourced, maintained and updated regularly by an independent body.

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?

No.

The Independent Human Rights Act Review was clear that there should be no substantive changes to section 4 of the Human Rights Act.[27]

We believe that the wording of this question is misleading. As secondary legislation is subject to less democratic review by parliament, courts have the power to disapply these laws if they are not rights respecting. The courts therefore play an important role in safeguarding human rights. The proposal seeks to remove the option for courts to declare secondary legislation invalid or to disapply the provision. Removing the power to disapply secondary legislation that breaches human rights will lead to less protection than is currently available. This is unnecessary.

Additionally, this proposal has implications for legislation from the Scottish Parliament. Under the Scotland Act, if the Scottish Government, Scottish Ministers and the Scottish Parliament act in a way that is inconsistent with the European Convention on Human Rights, they are acting beyond their legislative competence.

This proposal would also have an impact on devolved nations, and this does not appear to be considered in the consultation document. Under the Scotland Act 1998, the Scottish Government, Scottish Ministers and the Scottish Parliament cannot act in a way that is incompatible with the European Convention on Human Rights.[28] To do so would beyond the legislative competence of the Scottish Parliament. In practice, this has been an important part of the Human Rights Act's operation in Scottish legislation and policymaking, which ensures that possible human rights infringements are recognised and addressed during the legislative process. Removing the option for Westminster secondary legislation to be disapplied by the courts would therefore create an anomaly in the UK where devolved legislation is subjected to a higher human rights standard than any other legislation.

Question 16: Should the proposals for suspended 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.

No.

Quashing orders are an important mechanism to ensure that the law is followed and to hold the government and public bodies to account. Additionally, the proposals put forward in the Judicial Review and Courts Bill are still going through Parliament and have been criticised as restricting human rights and access to justice.[29] We believe that the proposal outlined in Question 16 is unnecessary and will weaken existing protections under the Human Rights Act.

Question 17: 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?

Please provide reasons.

Remedial orders already exist under the Human Rights Act, and there is an effective system in place to consider laws which are incompatible with the Human Rights Act. There is also a lack of evidence about any problem with the current approach. Remedial orders already exist under the Human Rights Act but are not used often enough to be a cause for concern. Since the enactment of the Human Rights Act, there have been less than 50 declarations of incompatibility. The current system allows for a range of resolutions by Parliament,[30] and should remain. The proposal in question is unnecessary.

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.

Under section 19, the UK Government has to make a statement when a new Bill is introduced to Parliament about its compatibility with human rights. We believe that considering human rights is an important parliamentary process, maintains transparency and accountability, and ensures that human rights issues are considered and addressed when passing new legislation. Section 19 should not be changed.

This was outlined in the Independent Human Rights Act Review report, which concluded that no changes to section 19 were necessary:

> "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."[31]

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?

A proposed Bill of Rights will have substantial implications for the devolved nations. We are concerned that the consultation document does not consider these implications in detail.

The Human Rights Act provides a legal framework for protecting human rights in a way that reflects the individual circumstances, and different legal systems, across

the UK. Any changes to the Human Rights Act would therefore have a direct impact on the lives of people in Scotland. In Scotland, the European Convention on Human Rights is also a core element of the Scotland Act 1998, and has acted as a core starting point for all Scottish legislation and policy.

From a Scottish perspective, there is substantial concern about the extent to which repeal of the Human Rights Act could impact upon the ongoing human rights work and commitments to international conventions across the Scottish policy landscape. Any changes to the Human Rights Act, which incorporates the European Convention on Human Rights, could create complex constitutional issues. As Professor Nicole Busby summarised:

> *"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".*[32]

To protect, uphold and fulfil the rights of disabled people, people living with long term conditions and unpaid carers, it is vital that the journey towards embedding human rights is not disturbed, or the progress that has already been made become undone. The operation of the Human Rights Act must be maintained to ensure it links in the best way possible to the work that we are currently undertaking in Scotland.

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.

No.

The consultation document suggests that the current approach to defining public authorities is "broadly right".[33] It provides little evidence of why the definition should change. Additionally, the Independent Human Rights Act Review did not identify any problems with section 6 of the Human Rights Act, which defines a public authority.[34]

The current definition of a public authority is effective and reflects the way in which public power operates throughout the UK. Any change to the current definition could risk compromising human rights protection. No change is necessary.

The Joint Committee on Human Rights confirmed that the Human Rights Act was initially drafted to "reject a more prescriptive approach" which may limit people's ability to access an effective remedy for human rights breaches.[35] Having a flexible definition responds to the different ways that public power operates throughout the UK. We are concerned that any changes to the definition of public authority risks reducing the number of bodies who have a legal duty to uphold and protect human rights.

Additionally, the definition of a public authority in the Human Rights Act can be cross-referenced with other key laws, including the Equality Act 2010.[36] Any changes to the Human Rights Act could have implications for other legislation.

Question 21: The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer? Please explain your reasons.

Option 1: provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or

Option 2: retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.

The options outlined above propose to limit the situations in which public authorities have a legal responsibility to uphold human rights under section 6 of the Human Rights Act. This is concerning. The ALLIANCE does not support the proposals outlined in Question 21. The Human Rights Act is working effectively, and no change is necessary.

The Independent Human Rights Act Review did not identify any problems with section 6 of the Human Rights Act. Instead, the Independent Human Rights Act Review identified section 6 as an important part of the framework for protecting rights under the Human Rights Act.

The consultation document contains little evidence to support the proposals outlined in Question 21. Section 6 works effectively to support staff in public authorities to navigate legislation in a way that upholds, protects and safeguards people's human rights. There are a range of organisations across the UK working to support staff in public bodies who use the duty in the Human Rights Act to help them make rights respecting decisions.[37] Any changes to this duty will mean that it is harder for people to hold public authorities to account, including Government departments, as well as local bodies that people interact with every day.

Question 22: 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.

The Independent Human Rights Act Review report notes that of the evidence submissions that they received on extra-territorial application, there was "a strong view that no change was necessary" and that any clarifications could be made through case law development.[38] There should be no limit to the application of human rights from the Human Rights Act or the European Convention on Human Rights overseas.

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

We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.

Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.

Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

Most of the rights in the Human Rights Act are non-absolute rights, meaning they can be restricted by the government or public bodies provided the restriction is lawful, has a legitimate aim, and is proportionate. Proportionality is a key element in protecting, and balancing human rights, both to protect individuals and the wider community. Without the careful consideration that proportionality currently allows there is a risk that people's human rights – and right to legal redress – will be restricted far more than necessary.

The Independent Human Rights Act Review did not identify any concerns with the principle of proportionality. We feel there is little evidence to support the proposals outlined in Question 23. The Human Rights Act is working effectively, and no change is necessary.

Question 24: How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.

Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment.

Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights.

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.

The Independent Human Rights Act Review did not identify any concerns with deportation. There is little evidence to support the proposals outlined in Question 24.

Human rights are universal and apply to everyone. We are particularly concerned about proposals which limit the scope of human rights for "a certain category of individual" as outlined in Option 1. Human rights are universal, and any new Bill of Rights must also ensure universal human rights for all people. The proposals outlined above appear to limit the scope of rights for some groups of people, and therefore weaken our current protections. No change is necessary.

Question 25: While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?

The Independent Human Rights Act Review did not identify any concerns with 'illegal and irregular migration'. There is little evidence to support the proposals outlined in Question 25.

The ALLIANCE disagrees with the proposals set out above. Human rights are universal and for all people. The proposals outlined above appear to limit the scope of our current protections, and therefore weaken our current protections. The proposals also appear to contravene a fundamental principle which requires that people are able to secure all other rights in the Convention without discrimination.[39] No change is necessary.

Question 26: 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 on 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.

The Independent Human Rights Act Review report does not identify any concerns about this issue. We are concerned that the consultation document suggests that some people should not have access to the protection of all of their human rights. As outlined in our response to Question 24, human rights are universal, and any new Bill of Rights must also ensure universal human rights for all people. To limit the scope of rights for some groups of people would be a clear reduction in our current protections. No change is necessary.

Part 5: Emphasising the role of responsibilities within the human rights framework

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

Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or

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

The proposals outlined in Question 27 suggest that the courts should take into account someone's past behaviour when deciding what damages to award someone where their human rights have been breached. Incorporating the idea of responsibilities into a new Bill of Rights is inconsistent with human rights law, which are about obligations on the State.

The proposals in the consultation document are concerning and suggest that human rights would create a system in which people are deemed as "undeserving claimants". Human rights laws, including the Human Rights Act, are based on the idea that human rights are universal and apply to everyone. The rights in the Human Rights Act make this clear. The proposals outlined above appear to limit the scope of our current protections, and therefore weaken our current protections.

Additionally, the Independent Human Rights Act Review did not identify any concerns with this issue. The proposals are unnecessary, and there is no case for change.

Part 6: Facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role

Question 28: We would welcome comments on the options, above, for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2.

The proposals outlined above would create a formal process that Government Ministers would follow to respond to 'adverse' Strasbourg judgments. We believe that this is unnecessary. Currently, parliament is responsible for responding to negative judgment from the European Court of Human Rights if it chooses to do so. There is nothing in the Human Rights Act that forces either government or parliament to take any specific action if the European Court of Human Rights makes a judgment against the UK.

The Independent Human Rights Act Review did not identify any concerns about this issue. The report said that formal dialogue, which includes when the UK is part of proceedings in the European Court of Human Rights, should continue to "develop organically".[40]

Part 7: Impacts

Question 29: We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular:

a) What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate;

   We believe that the consultation document is divisive and would have negative implications on people's human rights. Throughout the consultation document there are damaging perceptions about how the Human Rights Act operates, and there is a lack of robust, substantive evidence to support these claims.

   The Human Rights Act – in its current form – is working effectively. The ALLIANCE believes that replacing the Human Rights Act with a new Bill of Rights, as set out in the consultation document, would have negative consequences on people's human rights. This includes disabled people, people living with long term conditions, unpaid carers, as well as people with other protected characteristics and from other marginalised groups. We reject any changes to the Human Rights Act which may reduce the ability of people to

enforce their rights, or which may weaken obligations on public authorities to take human rights seriously and to embed human rights based approaches in their work.

The Human Rights Act is a robust foundation to our human rights protections and there is clear support for human rights and the Human Rights Act in Scotland. The National Taskforce for Human Rights Leadership was established in 2019 and published its Human Rights Leadership Report in March 2021.[41] The report builds on and reaffirms the Human Rights Act and the rights provided by the European Convention on Human Rights to outline a statutory framework which brings internationally recognised human rights into domestic law.[42] The Scottish Government has committed to introducing a new Human Rights Bill for Scotland based on these recommendations.[43]

The proposed changes to the Human Rights Act would therefore have a direct impact on the positive human rights trajectory underway in Scotland, and would risk significant confusion, complexity and uncertainty for individuals and lawyers. This will impact the ability of people to know, understand, claim and enforce their human rights. In a recent ALLIANCE Opinion piece, the importance of meaningful engagement with human rights was emphasised:

> "[A] human rights based approach means little if it does not explicitly engage with and act on the requirements of the relevant rights … human rights must be consistent, intentional, and evident. This is a matter of process, certainly, but there is a real purpose at the heart of it. If the process takes the time to consider what it is told about the steps necessary to realise rights, then people should actually enjoy them in practice, without having to fight for them, without even noticing how it happened."[44]

We have outlined case studies and examples below which highlight how human rights, and a human rights based approach, make a tangible difference to the lives of ALLIANCE members and partners, and the people that they support. These everyday examples of people being able to use and campaign for their rights in all aspects of their life are at risk under the proposals in the consultation document. The proposals outlined in the consultation document stand in direct contrast to the work of the organisations below who seek to make human rights real.

Case Study: Human Rights Town App

The Scottish Commission for People with Learning Disabilities (SCLD) recently launched *Human Rights Town*, an app to empower people with learning disabilities to recognise and realised their rights.[45] People with learning disabilities are not always able to realise their human rights, and in some

cases, people's most fundamental rights such as the rights to life, can be compromised. The app aims to empower people with learning disabilities to recognise and realise their rights.

Case Study: #MyOwnFrontDoor

ENABLE Scotland, are campaigning to uphold the human rights of all adults who have a learning disability in Scotland to live in the home of their choice, in the community they like, close to the people they love by 2023.[46] The campaign seeks to challenge the human rights emergency of people with learning disabilities who are forced to live far from their families or in hospital.[47]

Case Study: Scotland's National Action Plan for Human Rights (SNAP)

Case studies from Scotland's first National Action Plan for Human Rights show how different organisations have put a human rights based approach into practice in their work.[48]

Case Study: Making Rights Real

Making Rights Real is a grassroots human rights organisation that support communities to name and claim their rights.[49] They work alongside communities experiencing human rights issues, especially those communities who have been marginalised by laws, policies, practices or public authorities.

Case Study: Scottish Sensory Hub

The Scottish Sensory Hub is a platform for people living with sensory loss, which enshrines a human rights based approach for all.[50] The Scottish Sensory Hub places core human rights principles at its heart, and advocates for the provision of accessible, inclusive communication. For example, in promoting and supporting British Sign Language (BSL) development, the Hub has advocated for 'BSL for All' which would assist inclusion for Deaf BSL users, but would also improve transitions and management of hearing loss. Other examples of work include providing training on vision loss, deafness and inclusive communication via the NHS; work on transport accessibility and access to democracy for people with vision loss or affected by deafness; and working with NHS and local authorities to ensure the provision of accessible information during COVID-19.

b) What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate; and

The proposals outlined in the consultation document would significantly undermine current protections under the Human Rights Act. The proposals will weaken protections for everyone, however they will have a disproportionate impact on marginalised groups including disabled people, people living with long term conditions, and unpaid carers, who already faced barriers in accessing and claiming their human rights.

There are well documented breaches of human rights against disabled people, people living with long term conditions, and unpaid carers. During COVID-19 there have been clear human rights infringements, including the inappropriate use of Do Not Attempt Cardiopulmonary Resuscitation forms, and the reduction and withdrawal of social care support packages.[51] An ALLIANCE member summarised the impact of COVID-19 on the rights of people with learning disabilities:

> "People with learning disabilities have been left behind in the COVID-19 pandemic. People with learning disabilities are three times more likely to die as a result of COVID-19 and we are also more likely to experience do not resuscitate orders against our will. This violates our right to life. People with learning disabilities and older people have not had their human rights protected during the pandemic."[52]

The Human Rights Act plays a vital role in making sure that people with protected characteristics have the same rights as everyone and have access to justice and accountability mechanisms. The proposed changes risk losing this protection.

We are particularly concerned about the following proposals:

- **Questions 8 – 10: permission stages**. As outlined in our response to questions 8 – 10, we are concerned that these proposals add an additional burden and layer of bureaucracy to the permission stage of human rights cases, making it harder for people to access justice, and to hold the government and public bodies to account. This will have a disproportionate impact on marginalised groups who already experience barriers to accessing justice. We are also concerned that these proposals threaten to create a 'two tier' system in which some people are entitled to more rights than others. This contrasts directly with the principle of universality, which is central to human rights law.

- **Question 11: positive obligations.** As outlined in our response to Question 11, positive obligations are an integral part of our international human rights framework. Positive obligations mean that public bodies must take proactive steps to make sure human rights are protected and safeguarded. This is a particularly important mechanisms for marginalised groups and people with protected characteristics, including disabled

people, people living with long term conditions, and unpaid carers. Without this duty, frontline staff would have to navigate a complex set of laws, policies and guidance to ensure people are kept safe and their rights are upheld.

- **Question 19:** As outlined in our response to Question 19, the proposals in the consultation document will have substantial implications for the devolved nations. In Scotland, there is particular concern about the extent to which repeal of the Human Rights Act could impact upon the ongoing human rights work and commitments to international conventions across the Scottish policy landscape. The Scottish Government has committed to incorporating four international UN treaties into Scots law through a new Human Rights Bill, which would ensure that disabled people can enjoy their human rights and that they are enforceable.[53] To protect, uphold and fulfil the rights of disabled people, people living with long term conditions and unpaid carers, it is vital that the journey towards embedding human rights is not disturbed, or the progress that has already been made become undone.

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

As outlined above, the proposals outlined in the consultation document threaten a substantial weakening of our human rights. The Human Rights Act is working effectively and there is no substantial case to reform the Act with a proposed Bill of Rights. Any negative impacts can be avoided by keeping our Human Rights Act as it is, and not making any changes to the law that dilute our current human rights protections. Any changes to the Human Rights Act must be progressive and enhance the protections that are currently offered; not regressive. We urge the UK Government to prioritise meaningful human rights leadership to ensure that the right that we currently have – and are entitled to – are respected, protected and fulfilled.

About the ALLIANCE

The Health and Social Care Alliance Scotland (the ALLIANCE) is the national third sector intermediary for a range of health and social care organisations. We have a growing membership of over 3,000 national and local third sector organisations, associates in the statutory and private sectors, disabled people, people living with long term conditions and unpaid carers. Many NHS Boards, Health and Social Care Partnerships, Medical Practices, Third Sector Interfaces, Libraries and Access Panels are also members.

Our vision is for a Scotland where people of all ages who are disabled or living with long term conditions, and unpaid carers, have a strong voice and enjoy their right to live well, as equal and active citizens, free from discrimination, with support and services that put them at the centre.

The ALLIANCE has three core aims; we seek to:

- Ensure people are at the centre, that their voices, expertise and rights drive policy and sit at the heart of design, delivery and improvement of support and services.
- Support transformational change, towards approaches that work with individual and community assets, helping people to stay well, supporting human rights, self management, co-production and independent living.
- Champion and support the third sector as a vital strategic and delivery partner and foster better cross-sector understanding and partnership.

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