Human Rights Act Reform Consultation

February 2022

About this response

1. This consultation response is being submitted by Wales Council for Voluntary Action (WCVA) and Wales Governance Centre (WGC) as part of their collaborative project – The Wales Civil Society Forum. This project aims to stimulate informed discussion amongst civil society stakeholders in Wales on legal, constitutional and administrative changes following the UK's withdrawal from the European Union. For further information or any questions on this response, please contact the project coordinator, Charles Whitmore at whitmorecd@cardiff.ac.uk.

2. WCVA is the national membership organisation for the voluntary sector in Wales. Its vision is for a future where the third sector and volunteering thrive across Wales, improving wellbeing for all. Our purpose is to enable voluntary organisations to make a bigger difference together.

3. The WGC is a research unit sponsored and supported in the School of Law and Politics, Cardiff University. It undertakes innovative research into all aspects of the law, politics, government and political economy of Wales, as well the wider UK and European contexts of territorial governance.

4. We are pleased to have the opportunity to participate in the consultation on the proposed UK Bill of Rights. We hosted an engagement event on the consultation in February 2022. This response provides an account of the views expressed by stakeholders throughout the course of the project's engagement activities on the proposals.

5. As a result of those discussions we believe these proposals will have a profoundly negative impact on the wide range voluntary organisations, sectors and stakeholders that WCVA works with.

6. At our event stakeholders agreed that **the proposals are unnecessary as the Human Rights Act 1998 does not need replacing**. The Joint Committee on Human Rights has concluded as much as well in their response to the Independent Human Rights Act Review (IHRAR). Their response notes that there is no compelling case to reform the HRA.[1] This was also reflected in the

[1] Joint Committee on Human Rights, Evidence submitted to the Independent Human Rights Act Review, 3 March 2021. Available here: https://www.gov.uk/guidance/independent-human-rights-act-review#call-for-evidence-responses

Independent Human Rights Act Review report which even made recommendations which run counter to the UK Government proposals.

Executive summary of main points

In our engagement with the voluntary sector in Wales we have found there to be a general agreement that the UK Government's proposals to replace the HRA 1998:

- Are unnecessary as the HRA 1998 is working well.
- Are likely to lead to regression in the protection and fulfilment of human rights in the UK.
- Have the potential to interfere with progress on human rights in Wales.
- Will reduce access to justice and the accountability of the UK Government and public authorities.
- Are based on a selective and partisan account of available evidence which often misrepresents the way in which the HRA 1998 operates in practice.
- Are contrary to the findings of the Independent Human Rights Act Review (IHRAR).
- Should not apply in Wales.

Introduction

1. A UK Bill of Rights should be an opportunity to strengthen and enhance the role of human rights in the UK. The UK Government's proposals would have the opposite effect and would weaken enforcement of human rights in the UK and in Wales and would result in fewer people being able to seek redress for violations of their rights.

2. The UK Government's proposals would limit access to justice, reduce the accountability of public authorities and government at all levels for compliance with human rights and would disproportionately impact on people with protected characteristics who are likely to face the greatest barriers to accessing justice.

3. A number of the UK Government's proposals would undermine the separation of powers, create tensions with devolution and undermine the very notion that human rights are universal.

4. The consultation exercise is of questionable legitimacy. The content of the consultation document is often biased toward a particular perception of human rights, the European Convention on Human Rights (ECHR or Convention) and the HRA 1998 which is not recognisable in Wales. It fails to provide a balanced view of how human rights currently operate in the UK and at times even misrepresents the law. For example, in discussing migrants' rights it confuses the status of the law today with the legal position 15 years ago.

5. The IHRAR gathered a substantial body of evidence which the UK Government's consultation fails to properly acknowledge or reflect. The proposals for reform often disregard recommendations made by the IHRAR and in some instances puts forward options that were clearly rejected by the panel of experts.

6. The changes are profoundly constitutional and will have serious implications for human rights in the UK – the consultation exercise does not acknowledge or reflect the likely severity of the impact of the UK Government's proposals on the arrangements for and conduct of democratic governance in Wales.

7. There has not been any engagement with the Welsh Government over the formulation of the proposals, even though compliance with the ECHR is a fundamental aspect of Welsh devolution.[2] The consultation does not provide any detail about how the proposed UK Bill of Rights will interact with law and procedures at the devolved level. Even less attention is given to the potential implications for Wales than for Scotland and Northern Ireland, despite clear dissonance between the UK Bill of Rights' intention to limit the 'expansion of rights' and the clear intention and common desire in Wales to strengthen and advance equality and human rights (which includes an intention to increase connections between international and domestic law).

8. As no concrete proposals are put forward and no engagement has taken place with the Welsh Government, there is a great deal of uncertainty around how the UK Bill of Rights will interact with Welsh legal innovations in this space, including: the introduction of the Socio-economic Duty, the Well-being of Future Generations (Wales) Act 2015, the due regard duties in the Social Services and Well-being (Wales) Act 2014 and the Rights of Children and Young Persons (Wales) Measure 2011. The introduction of regressive human rights measures that stand in opposition to Wales' progressive approach to rights may lead to an increasingly fractious legal landscape and result in uncertainty for Courts and public authorities.

9. There are numerous instances where terminology used is inappropriate. Some examples include the notions of 'genuine injustices', that human rights are being 'misused', that ECHR judgments are 'adverse', that the 'expansion' of human rights is an issue or a problem, that human rights 'frustrate' government action, that there are 'deserving' and 'underserving' individuals and that certain categories of people should not be able to avail themselves of their human rights.

10. There are substantively vague concepts that would likely lead to a period of legal uncertainty, like the notion of 'substantial disadvantage' and the 'wider behaviour of claimants'.

11. The proposals to give guidance to the courts on how to conduct complex judicial balancing exercises would substantially undermine the separation of powers between the executive and judiciary and would lead to a system of 'Executive Sovereignty' rather than 'Parliamentary Sovereignty'. The IHRAR found that reform of the HRA 1998 arrangements to preserve Parliamentary Sovereignty was not necessary as the UK Courts already pay heavy regard to parliamentary sovereignty and exercise judicial restraint.

12. The consultation is not participative, nor is it a genuine attempt to gather views on the need for reform of the HRA 1998. The document was only made available in Welsh with five weeks to the deadline and an inadequate text only version was misleadingly released as an 'Easy Read'

[2] Compliance with the ECHR is not only 'hard-wired' into the devolution settlement, but the power to observe and implement the UK's international obligations and the ECHR is expressly provided to the Senedd in the Government of Wales Act 2006 (as amended by the Wales Act 2017, see Schedule 7A). The UK's international obligations include human rights treaties to which the UK is a State Party. It is unclear how the UK Government's proposals might interfere with this competence. One potential impact is that regression in human rights protection under the ECHR will have a 'chilling effect' by discouraging the courts from taking a proactive approach to protecting other human rights.

version with less than two weeks remaining. The deadline for responses does not permit time to gather views and to prepare evidence to address the issues raised.

Question responses

1 - Respecting our common law traditions and strengthening the role of the UK Supreme Court (Q. 1-7)

Proposal on the Interpretation of ECHR Rights – replacing section 2 of the HRA (Q1)

1.1 This proposal will weaken the link between UK courts and the European Court of Human Rights (ECtHR). Over time, this could lead to divergence between domestic UK and international human rights law which would result in more cases being taken to the ECtHR – ultimately having a negative impact on the domestic enforceability of rights. This would also create a risk that the UK would eventually distance itself from the wider UN Human Rights Committee system which has had a progressive influence on international human rights law. Distancing the UK from these processes risks limiting the scope for domestic human rights law to take account of changing economic and social conditions. These outcomes stand in contradiction with the UK's stated ambition to champion human rights internationally.

1.2 It is highly questionable to juxtapose provisions stating that UK Courts may have regard to judicial decisions made in other countries and international law with another provision stating that they are not required to follow ECtHR judgments. The ECtHR should not be given lower standing than foreign and wider international law.

1.3 Devolution allows for differences in approach at the UK and devolved level. However, central and devolved ambitions that are substantively incompatible may lead to an unduly complex legal landscape for judges and public authorities. Tensions with these proposals are likely as civic society stakeholders, the Senedd and the Welsh Government are seeking to follow progressive trends like the growing importance of socio-economic rights. For example in parallel to the ECtHR's expansion into this area, Wales has now introduced the socio economic duty.

1.4 The Welsh Government and the Senedd are currently exploring options to strengthen domestic connections with international human rights mechanisms. The UK Government's proposals stand in clear opposition to devolved policy ambitions.

1.5 Due to the lack of detail, it is unclear from the consultation document how the proposals will interact with Wales' devolved legislation and policy or indeed how the UK Government proposes to navigate these sharply different territorial views.

Proposals on the position of the Supreme Court (Q2)

1.6 There is little to no evidence in the consultation document that the position and role of the UK Supreme Court is unclear. The Court's first port of call is already domestic legislation and case law, and as such the IHRAR limited its recommendations to clarifying this point. It further rejected proposals to codify matters which fall outside of UK Courts' competence for fear that this would have the opposite effect of introducing uncertainty and leading to additional litigation.

1.7 The IHRAR further found that UK Courts already apply the principle of judicial restraint, further indicating that reform in this area is not justified.

Proposals on trial by jury (Q3)

1.8 The right to a trial by jury is already recognised in the ECHR and Article 6 of the Human Rights Act. No meaningful justification for reform in this area is advanced in the proposals.

Proposals on the freedom of expression (Q4-7)

1.9 There is no evidence presented in the proposals to suggest that section 12 is not functioning. Furthermore, the IHRAR was not given a mandate to consider this change, further limiting the evidence base against which these proposals might have been assessed.

1.10 The proposals risk introducing legal uncertainty as they are vague and offer no definition of the following concepts: 'interference with the press'; 'other publishers'; 'wider public interest'; and 'limited and exceptional circumstances'. Furthermore, there is no evidence of a need to provide guidance to the Courts in this area. On the contrary, it would be questionable to do so as cases where there is a question of limiting the freedom of expression are often highly fact specific with potentially significant consequences for people's wellbeing.

2 - Restoring a sharper focus on protecting fundamental rights (Q. 8 – 11)

Proposals to introduce a 'permission stage' for human rights claims (Q8-9)

2.1 The proposals draw a problematic distinction between 'genuine' and spurious breaches of human rights. The corollary assumption that not all breaches of human rights result in 'genuine suffering' is equally worrying. It should be assumed that all breaches of human rights are serious and warrant judicial oversight and remedy.

2.2 The IHRAR was not asked to consider this proposal and there is no evidence provided that the current requirements for a claim require reform. The introduction of a permission stage requiring evidence of 'significant disadvantage' would disproportionately impact groups like disabled people and victims of domestic abuse. As evidenced by the pandemic, these individuals are more likely to experience human rights breaches and already face significant barriers to accessing justice. The proposals would create increased procedural burdens and legal costs resulting in additional barriers and disincentives to bringing claims that may have otherwise met admissibility criteria. This would place vulnerable groups at an even greater disadvantage – a clear attack on justice. Furthermore, reducing access to justice may have the effect of sending more cases to the ECtHR under article 13 (right to an effective remedy).

2.3 Contrary to the stated objective of increasing clarity and certainty, introducing the substantively unclear concepts of 'significant disadvantage' and 'overriding public importance' would create further legal uncertainty while the Courts work out the meaning of these terms. Furthermore, the concept of a public importance exception fails to understand that the primary purpose of human rights litigation is to protect individuals from state actions that violate their rights and to hold the State to high standards of conduct.

2.4 Reducing access to justice for people with protected characteristics and other vulnerable groups would run counter to the Wellbeing of Future Generations (Wales) Act 2015 goal of creating a 'A More Equal Wales' and a 'Globally Responsible Wales'.

Proposal to change judicial remedies so as to reduce the number of human rights based claims being made. For example, by amending section 8(3) of the HRA to require applicants to exhaust other claims first (Q10).

2.5 The proposals under this heading make several inappropriate and unevidenced assumptions claiming that 'trivial matters' are causing problems for courts and the administration of justice in the UK. The IHRAR did not look into this proposal and there is no evidence of issues arising for the Courts as a result of claimants 'abusing their rights and the rights of others' – indeed Article 17 of the HRA already safeguards against this.

2.6 The very purpose of this proposal is to reduce the number of human rights claims and as such should be rejected. The suggestion that a refocus on 'genuine injustice' is necessary is extremely worrying as it suggests a vague, subjective and entirely new approach to how human rights violations are to be assessed on their merits.

Proposal to limit positive obligations placed on the Government and public authorities (Q11)

2.7 Positive obligations are essential to the discharge of public functions and in safeguarding people and their human rights. They also encourage public authorities to think about the human rights implications of their actions and have been a significant driver of progress in this area. Any new limitations will have a negative impact on future public authority human rights practice. Furthermore, examples cited in the proposals like the *Rabone* case,[3] show that judicial expansion of positive obligations by UK courts can be in the public interest.

2.8 In any event, the recent Supreme Court decisions on the UK Government's welfare reforms confirm well-established UK and ECtHR case law, that the courts should take a deferential and cautious approach to the expansion of the ECHR into the terrain of socioeconomic policy.

2.9 The intention behind this proposal, again, runs counter to Welsh legislation and therefore risks creating a contradictory and confusing legal landscape for public authorities and legal practitioners. For example, the Social Services and Well-being (Wales) Act 2014, the Rights of Children and Young Persons (Wales) Measure 2011, the Well-being of Future Generations (Wales) Act 2015 and the recent enactment of the Socio-economic Duty, all seek to place new obligations on public authorities to think about the human rights and wellbeing implications of their decisions.

[3] *Rabone and another v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72.

2.10 The example cited by the UK Government in support of these proposals at paragraphs 148 and 149 is worrying and extremely one sided. In suggesting that the public obligation to take preventive measures to protect human life are unwarranted for certain categories of individuals (serious criminals), the proposals misunderstand that human rights are universal and unconditional, and that this is ultimately to the benefit of all humans. Furthermore, limiting public obligations would also have numerous wider implications for people with protected characteristics or who are otherwise in vulnerable positions. This was clearly illustrated by the experience of disabled people during the pandemic. There are numerous other examples, including for instance around the safeguarding of children and supporting survivors of domestic abuse.

3 - Preventing the incremental expansion of rights without proper democratic oversight (Q. 12-26)

Proposals on limiting the courts' ability to interpret legislation in line with the ECHR – replacing section 3 of the HRA (Q12)

3.1 The proposed changes reflect a regressive approach that conflicts with views in Wales where the progressive interpretation of rights by the judiciary and internal human rights law is seen as a positive.

3.2 In line with the IHRAR recommendations, neither of the proposed changes to section 3 should be implemented. The IHRAR considered these changes in chapter five of their report and concluded that there was no substantive case for repealing section 3. The panel made only very minor recommendations to clarify the order of priority of interpretation, noting that any potential negative perceptions should be first addressed by increased data around section 3 usage by the Courts and that a more robust role for Parliament, and in particular the Joint Committee on Human Rights, could be considered.

3.3 Substantively, the proposed changes would limit courts' ability to ensure compatibility with human rights, prevent rights from progressing in line with social change and ultimately weaken rights protections.[4] An example of the important role played by section 3 can be found in the *Ghaidan* case,[5] where it was used to protect a same-sex partner from being discriminated against prior to the introduction of same-sex marriage, by the phrasing 'as his husband or wife' in the Rent Act 1977. Section 3 has similarly been used to develop the mental capacity protections we currently use. The uncertainty around the concept of 'ordinary reading' would also likely lead to a period of legal uncertainty for the courts and litigants.

3.4 The proposed changes are unnecessary as section 3 already places appropriate limits on judicial interpretation in 3(1) with the condition '*so far as it is possible to do so*…' Additionally, as the IHRAR noted, UK courts have been guided by judicial restraint and institutional respect in this area.

Proposal to enhance the role of the UK Parliament in engaging with section 3 judgments (Q13-14)

[4] The IHRAR concluded as much in their report p.239.
[5] Ghaidan v Godin-Mendoza [2004] UKHL 30.

3.5 Given the significant body of work carried out by the IHRAR on this topic, it is appropriate to defer to those recommendations. The IHRAR report recommended the creation of a section 3 judgments database and increasing the role of the Joint Committee on Human Rights as means of enhancing parliamentary scrutiny of section 3 interpretations. It recommended this because there are misperceptions around the use of section 3 that require further data to be understood.

Proposals to prevent courts from quashing secondary legislation where it is incompatible with the ECHR (Q15)

3.6 The IHRAR looked extensively at section 4 and found that it had no adverse effect on the UK Parliament's constitutional power to enact legislation.[6] It explicitly rejected the idea of preventing the Courts from being able to quash secondary legislation that is incompatible with ECHR rights.[7]

3.7 There are numerous reasons why it would be inappropriate to prevent Courts from quashing secondary legislation that is incompatible with Convention rights:

a. There are already mechanisms built into the HRA to ensure Parliamentary sovereignty as Courts are limited to declarations of incompatibility for secondary legislation that violates Convention rights where this is required by primary legislation.

b. It would be offensive to constitutional norms and the rule of law as it would treat secondary legislation which is subject to far less scrutiny, as on par with primary legislation.

c. It would be incompatible with devolution as primary devolved legislation in violation of the Convention could be quashed, while secondary legislation could not.

d. It would lead to the very questionable outcome whereby secondary legislation could be quashed on other grounds, but not because of human rights.

e. It would lead to an unwarranted increase in the power of the executive within our system of Separation of Powers.

3.8 The proposals on quashing and remedial orders would further reduce the remedies available where Convention rights have been violated and for this reason are not recommended.

The question on whether section 19 HRA declarations of compatibility should be changed (Q18)

3.9 Declarations of compatibility are an important part of giving effect to the ECHR in domestic law. They contribute to ensuring that new legislation is assessed for human rights compatibility and thus serve to enhance parliamentary scrutiny. There is no reason to consider changes to this process.

The question on how the proposed UK Bill of Rights can be made compatible with devolution while retaining its key principles for the whole of the UK (Q19)

[6] The Independent Human Rights Act Review – executive summary, p.17

[7] The Independent Human Rights Act Review, ps. 322-324.

3.10 It is unclear from the consultation document how the UK Government proposes to deal with the inevitable impact of its proposals on constitutional devolution. This makes it difficult to engage with the question on devolution and raises serious questions about scrutiny if the UK Government later clarifies its intentions post-consultation. This is particularly problematic as insufficient engagement with the Welsh Government has taken place prior to the publication of the consultation. As an example of this lack of detail – the proposals ask specifically whether there is a need for variation in Scotland and Northern Ireland but fail to consider potential complexities arising in the Welsh context. Although Wales and England share a jurisdiction, the implications of these proposals require serious and lengthy discussion as they will, if passed, introduce policy that is fundamentally incongruous with how Wales is seeking to operationalise human rights domestically. Furthermore, the potential consequences of this are currently unclear and are unexplored in the consultation document.

3.11 These proposals would not appear to prevent the Welsh Government from proceeding with its plan to incorporate international human rights instruments as a means of strengthening and advancing human rights in Wales. In fact, given that they would generally weaken human rights enforcement domestically, devolved action will likely be more essential than ever. However the proposals do stand in very stark contrast with Welsh policy ambitions – essentially moving the landscape at the UK and England level in a diametrically opposite direction. While devolution facilitates and encourages the emergence of different approaches to law-making, divergence of this nature in an area as fundamental as human rights may lead to complexities, legal uncertainties and unforeseen consequences later. It is currently unclear what challenges may arise from the increasing division between Welsh and UK approaches to human rights within the context of a single jurisdiction – the outcome in the long term is likely to be a complex one for judges and public authorities.

3.12 It is difficult to reconcile these proposals' intention with the Welsh ambition to strengthen and advance equality and human rights in Wales. Furthermore, compatibility with ECHR rights is written into the Government of Wales Act 2006. As such it must be assumed that passage of this Bill will require legislative consent of the Senedd. Without further engagement and consideration, it is hard to see how this consent will be given.[8]

Proposals to limit the human rights duties placed on public authorities (Q20-21)

3.13 The IHRAR did not raise any concerns or make any recommendations for reform of section 6 and the consultation document itself considers the current approach 'broadly right'. Furthermore, the definition of 'public function' is also present in the Equality Act 2010 and would therefore raise considerations that are not discussed in the proposals. No change here is recommended.

3.14 Extending the circumstances under which public authorities can breach ECHR rights will result in regression of rights and is detrimental to the individuals' interests. Experience and research conducted in the context of the Covid-19 pandemic has also evidenced that this will have a disproportionate impact on those most at risk of having their human rights violated. See for example the report **Locked Out** on the experiences of disabled people during lockdown.[9]

[8] See footnote 1.

[9] Locked Out: Liberating Disabled People's Lives and Rights in Wales Beyond Covid-19, 2 July 2021.

Overall these changes will reduce the enforceability of human rights and are therefore not recommended.

Views on the extra-territorial jurisdiction of the ECHR (Q22)

3.15 The IHRAR looked into this question as a part of its work and concluded that a national conversation and intergovernmental dialogue was necessary. This is because any unilateral changes at the UK level would risk placing the UK in conflict with the ECHR internationally. As such there is no case for reform as a part of a UK Bill of Rights.[10]

Proposals on weighting the proportionality test used by courts when limiting qualified rights in favour of the UK Parliament and Government (Q23)

3.16 No evidence is offered that the Courts' current approach to determining when non-absolute rights can be restricted is problematic. The proportionality test ensures that decisions to restrict people's qualified rights are grounded in the specific facts of the situation and that this is done in the least restrictive manner possible. It is unclear how the suggested changes will impact on this process as the Courts already give weight to the view of Parliament, though it does risk weighting the decision in favour of Government views. This is a concern for the separation of powers. Placing undue emphasis on one aspect of a proportionality test could also make the process less sensitive to the specific details of each situation under consideration and result in more restrictions to human rights than otherwise would have been the case. Given these concerns, no change to how the Courts conduct the balancing of qualified rights is recommended.

Proposals to limit access to certain rights under the UK Bill of Rights for migrants faced with deportation (Q24-25)

3.17 These changes should be rejected on both substantive and procedural grounds. The framing of these questions is based on deeply divisive assumptions and terminology which fundamentally misunderstand that human rights are universal and act as an essential guarantee against inappropriate action by the State. As such human rights claims do not 'frustrate' any state action – they are an essential safeguard.

3.18 Furthermore, not only is there a lack of evidence in support of these changes given that the IHRAR did not consider the topic, but the proposals are misleading as they rely on cases that were decided prior to the Immigration Act 2014. As such they reflect a legal position that is 15 years out of date from a time when a more standard proportionality test was used by the Courts. The threshold for blocking deportations today is already extremely high and there is no case for making this more challenging.

3.19 The fact that the Welsh Government was not engaged prior to publishing these proposals is of particular concern in this area given that Wales is a Nation of Sanctuary. The Welsh Parliament also recently withheld consent for the Nationality and Borders Bill further signalling territorial disagreement with these proposals.

Proposals to introduce new factors to be considered by courts to limit the financial awards made for breaches of human rights (Q26)

[10] See the Independent Human Rights Act Review report, p.337.

3.20 Breaches of human rights should be assumed to have a deeply negative impact on the individual whose rights have been breached. Any attempt to place limits on the possible financial redress awarded in these cases will limit access to justice by introducing new disincentives against bringing cases and increase public authorities' ability to breach human rights. These changes will disproportionately impact on individuals who already face the highest barriers to enforcing their rights and who are most likely to have their rights violated. Therefore these proposals should be rejected.

4 - Emphasising the role of responsibilities within the human rights framework (Q. 27)

Proposal to introduce the concepts of 'responsibilities' and 'claimant conduct' as means of reducing redress provided where a person's human rights have been breached (Q27)

4.1 If these proposals are introduced, they would place the UK out of step with the internationally accepted basic principle that human rights are universal and not conditional on individual behaviour. The distinction the UK Government suggests between people who are 'deserving' and 'undeserving' of human rights is extremely divisive and one-sided. The proposals focus on criminality which in and of itself is inappropriate, but they are also misleading in their failure to consider the wider implications for everyone's rights. In some regards, the process could be tantamount to victim blaming and holding people accountable for their own discrimination. If this wasn't problematic enough, the proposals suggest that there could be very few limits on how individual conduct could be used against claimants. For example option 2 questions whether there should be any temporal limits on the conduct to be considered. This suggests that actions far in the past could prevent claimants in the present from obtaining redress for violations of their rights. This will reduce public authority accountability and create new barriers to accessing justice.

4.2 Furthermore, these changes would risk introducing significant legal uncertainty. Not only is the assessment of a person's conduct likely to be highly subjective, but the potentially very wide scope of actions that could weigh against a claimant, in conjunction with other legislative proposals like the Police, Crime, Sentencing and Courts Bill, could result in significant injustice.

4.3 There is a risk that these changes could also heighten geographical inequality in access to justice – for example the extent to which people make use of rights in Wales is much lower than some other parts of the UK.

5 - Facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role (Q. 28)

Proposal to include a procedure in the UK Bill of Rights to respond to ECtHR judgments handed down against the UK (Q28)

5.1 These proposals are unnecessary as the UK Parliament can already respond to judgments handed down by the ECtHR. Furthermore, the framing of the question is inappropriate as judgments of the ECtHR are not 'adverse' in that they are enforcing individuals' human rights under internationally agreed norms.

5.2 While likely limited in actual effect, on a principled level these proposals seek to downplay the effects of ECtHR rulings in the UK and provide support to potential Governmental breaches of human rights. This may have a negative effect internationally as it may galvanise similar movements in countries where there is less respect for human rights to begin with.

6 - Impacts

Impact on people

The proposals will have a negative impact on the accountability of public authorities and on access to justice. This will disproportionately impact on people with protected characteristics who are the most at risk of having their rights infringed and who already face the greatest barriers to enforcing their rights.

The introduction of the permissions stage (theme II – questions 8-9) will introduce new procedural and financial hurdles. These will restrict access to justice for minority groups who already face significant barriers, including but not limited to disabled people, victims of domestic abuse, people living in poverty and care experienced people. Not only will these groups be placed at an even greater disadvantage but further restricting access to justice could have the effect of requiring more cases to be seen by the ECtHR.

The proposals to reduce positive obligations on public authorities (theme II - question 11) and to increase the circumstances where they can breach human rights (theme III - questions 20 and 21) will likely result in regression. This will also have greater negative impact on those who are the most reliant on public services. Experience and research conducted in the context of the Covid-19 pandemic has evidenced that in times of crisis the rights and wellbeing of minority groups are particularly at risk - this justifies increasing rather than limiting the human rights duties placed on public authorities. See the report **Locked Out** on the experiences of disabled people during lockdown for example.[11] This would be compounded by the proposal to limit redress for breaches of human rights by considering the financial impact this would have on the public authority responsible for the breach as it will further limit access to justice by introducing new disincentives against bringing claims (theme III – question 26).

Impact on Devolution

The Government of Wales Act 2006 makes compliance with the EHCR a fundamental aspect of Welsh devolution (section 81(1)) and makes the observation and implementation of international obligations including the ECHR a devolved matter (schedule 7A). As such it must be assumed that passage of this Bill will require legislative consent of the Senedd.

Despite this there has not been any engagement with the Welsh Government, the proposals lack any substantive detail on how the proposed UK Bill of Rights will interact with law and procedures at the

[11] Locked Out: Liberating Disabled People's Lives and Rights in Wales Beyond Covid-19, 2 July 2021.

devolved level and risk introducing significant legal uncertainty. Even less attention is given to the potential implications for Wales than for Scotland and Northern Ireland, despite clear dissonance between the UK Bill of Rights' intention to limit the 'expansion of rights' and the clear intention and common desire in Wales to strengthen and advance equality and human rights. The proposals are fundamentally incongruous with the view of human rights and policy ambitions in Wales. Successive pieces of Welsh legislation have sought to strengthen public authority human rights practice. Meanwhile the Senedd and Welsh Government are seeking to follow progressive trends like the growing importance of socio-economic rights and to increase connections between international and domestic human rights law.

It is currently unclear what challenges may arise from the division between Welsh and UK approaches to human rights within the context of a single jurisdiction that these proposals would create. In the long-term they will likely result in complexity, uncertainty and unforeseen consequences for judges and public authorities. However, given the clear intersections with devolved competencies and the scale of the changes, the Welsh Government should be fully engaged in their formulation. As they currently stand, it is hard to see how legislative consent will be given by the Senedd.

Finally, the proposals to prevent the courts from quashing secondary legislation where it is incompatible with the ECHR would result in a paradoxical situation whereby primary Welsh legislation could be quashed for incompatibility with the ECHR while secondary UK legislation could not.