Human Rights Act Reform: A Modern Bill of Rights

The Welsh Government's Response to the Consultation launched by the UK Government on 14 December 2021

Ministerial Foreword

The Welsh Government is opposed to the proposal to replace the Human Rights Act 1998 with a "Bill of Rights". This, and many of the accompanying proposals set out in the UK Government's consultation document are directly at odds with the Welsh Government's commitment, reflected in our policy and practice, to strengthen and advance equality and human rights in Wales. It is the view of the Welsh Government that these are not discrete or self-contained proposals, rather, viewed as a whole and in the context of other Bills, it represents a concerted effort to dilute the rights of the people of Wales and the UK.

Despite these strong and unqualified objections, the Welsh Government has nonetheless engaged constructively with this consultation, despite the unhelpful timing of its publication just before Christmas and the disappointing lack of any prior engagement with the Devolved Governments. Our engagement has included a meeting with the Deputy Prime Minister on 10 February and discussion with our own stakeholders, other Devolved Governments and Civil Society across the UK. Having set out our initial concerns in a Statement on 12 January, we have been consistent in making clear our firm view that human rights are, and should continue to be, irreducible and apply equally to all persons.

We know that our views are widely shared, including by, among others, the Scottish Government, Liberty, Amnesty and the Law Society. Welsh and Scottish Ministers set out our shared concerns in a letter to the Lord Chancellor on 2 March. This response, as well as re-emphasising those concerns, focuses primarily on the implications of the proposals for Wales and the Welsh Government's policy aims.

We believe that now is the time to be taking a stand, to strengthen and advance human rights. In 2022, the Human Rights Council of the United Nations is undertaking the fourth Universal Period Review (UPR) of how the UK is fulfilling its international human rights obligations. The Welsh Government will be contributing positively to this process, highlighting the progress that has been made in Wales since the last UPR in 2016, some of which is outlined in this response. The regressive proposals in this consultation risk overshadowing this very important process, at a time when it is more vital than ever that the UK as a whole is seen to be united in defending human rights around the world.

Mick Antoniw MS – Counsel General & Minister for the Constitution

Jane Hutt MS – Minister for Social Justice

Executive Summary

The Welsh Government's response to the UK Government consultation on replacing the Human Rights Act 1998 has four main sections:

The importance of human rights in Wales.

This introductory section highlights the failure of the consultation document to recognise and address devolution issues and sets out how human rights in general, the Human Rights Act and European Convention on Human Rights (ECHR) have been at the heart of devolution in Wales. Successive Welsh governments have viewed Convention rights as a fundamental cornerstone of devolution. The Welsh Government continues to embrace, celebrate and build upon the Convention rights and protections bestowed on each and every person in Wales.

Human rights are embedded across a wide range of Welsh legislation, including:

- The Well-Being of Future Generations (Wales) Act 2015.
- The Social Services and Well-being (Wales) Act 2014.
- The Additional Learning Needs and Education Tribunal (Wales) Act 2018.
- The Rights of Children and Young Persons (Wales) Measure 2011.
- The public sector duty on socio-economic inequalities was brought into force in Wales on 31st March 2021.

Policies and practice across Wales

Building on this legislative foundation, the Welsh Government has introduced a range of policies, programmes and guidance which also builds on the Human Rights Act and Convention rights. Our response highlights the following examples:

- Our Race Equality Action Plan (REAP) – An Anti-Racist Wales is built on the values of anti-racism, and calls for zero tolerance of racism in all its guises.
- Locked Out: Liberating disabled people's lives and rights in Wales beyond COVID-19, builds on our existing Framework for Action on Disability and highlights the impact of the pandemic on disabled people.
- The Access to Elected Office Fund reflects our commitment to increasing diversity across all aspects of public life.
- Wales has a vision to be a Nation of Sanctuary. The Welsh Government is committed to doing all we can to provide a warm welcome to refugees and asylum seekers, strongly supported by all Welsh local authorities.
- The EU Citizens Advice Service has been extended to March 2022.
- Our Community Cohesion Programme has participation in Afghan resettlement and asylum dispersal in recent months.
- The Violence against Women, Domestic Abuse & Sexual Violence (VAWDASV) Strategy aims to make Wales the safest place in Europe to be a woman.

We intend to go further. Our Programme for Government commits us to incorporate the UN Convention on the Rights of Disabled People (UNCRDP) and the Convention

on the Elimination of all Discrimination against Women (CEDAW). Our research into Strengthening and advancing equality and human rights in Wales research, explored related issues and points the way forward. Our response to this report will inform all of our future action in this area.

The Welsh Government's six main concerns about these proposals.

First, the UK Government's proposals represent a failure of vision. The consultation document is a missed opportunity to explore the extension of social and economic rights. It also ignores one of the main recommendations of the Independent Human Rights Act Review (IHRAR) led by Sir Peter Gross, that what is needed is not repeal of the Human Rights Act but rather an effective programme of civic and constitutional education in schools, universities and adult education, focussing on human rights.

Second, devolution has not been adequately or sufficiently considered. It is wholly unacceptable that the consultation contains very little on devolution in general, and Wales in particular. The Government of Wales Act 2006 is only mentioned once in the consultation document, despite the importance of human rights to the devolution settlement. Our response explores three particular proposals which would be likely to impact on devolved matters: the meaning of "Convention rights", public authorities and interpreting legislation and remedies.

Third, the positive contributions of the Human Rights Act and Convention have been downplayed. We are disappointed that the UK Government seems to have ignored much of the positive evidence gathered during the IHRAR. Instead, the evidence included in the consultation document is very one sided.

Fourth, the consultation proposals seem designed to further restrict access to justice, tipping the scales even more than they already are against the powerless and vulnerable. It is also important to view these proposals in the context of other proposed legislative changes, for example the Nationality and Borders Bill and the Police, Crime, Sentencing and Courts Bill. Taken together they present a very concerning direction of travel.

Fifth, vulnerable and disadvantaged people are being unfairly targeted by these proposals, which appear to weaken or reduce the rights of some groups. They also seek to distinguish between "deserving" and "undeserving" people or cases.

Sixth, many of the proposals are not supported by evidence, or use evidence unfairly or inappropriately, relying on extreme cases to justify change and misrepresenting how UK courts have overwhelmingly acted proportionately and responsibly in applying international human right laws with full respect for the laws of the UK.

Responses to the questions in the consultation document

We have responded concisely to the questions posed in the consultation document, mainly to reinforce the key messages in the other parts of our response.

The Importance of Human Rights in Wales

The UK Government is proposing, in the consultation, to repeal the Human Rights Act 1998 and replace it with a UK Bill of Rights. Changing the Human Rights Act 1998 goes to the very heart of the devolution settlement. A space where democratic devolution and human rights have been intertwined for two decades.

It is wholly unacceptable and a gross failure that, despite this importance, the consultation contains very little on devolution in general, and Wales in particular. The Government of Wales Act 2006 is only mentioned once in the consultation document, and the Senedd and Welsh Ministers are not referred to at all, despite the importance of human rights to each of the Devolved Governments.

To correct this imbalance, the Welsh Government believes it is of critical importance to set out the context in Wales.

Human rights and the devolution settlement

Over the last 20 years, human rights have been at the heart of devolution in Wales. As explained by the Counsel General for Wales "The Human Rights Act is fundamental to Welsh democracy".[1] Successive Welsh governments have not only championed human rights but have also sought to strengthen and advance them in Wales.

Human rights have taken pride of place in the Welsh devolution settlement. From its origins in 1998, the first devolution settlement in the form of the Government of Wales Act 1998 made it clear that legislation must be compatible with Convention rights.[2] When that settlement was replaced by the Government of Wales Act 2006, Convention rights retained pride of place in the legislative competence test. Accordingly, a provision was outside of the then Assembly's legislative competence if it was incompatible with Convention rights.[3] When that settlement was amended to alter the devolution settlement from a conferred to a reserved powers model, the position on Convention rights remained unchanged, as reflected in section 108A(2)(e) of the Government of Wales Act 2006. The importance of Convention rights in Wales cannot, therefore, be underestimated. As Professor Thomas Glyn Watkin put it, Convention rights are "an essential reference point in defining the scope of the powers of the National Assembly".[4]

Successive Welsh governments have viewed Convention rights as a fundamental cornerstone of devolution that has underpinned, and continues to underpin, the legislative and policy approach in Wales. The Welsh Government continues to embrace, celebrate and build upon the Convention rights and protections bestowed on each and every person in Wales.

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[1] Written Statement: UK Government Proposal to Reform the Human Rights Act 1998 (12 January 2022) | GOV.WALES

[2] Section 107 of the Government of Wales Act 1998, which is now repealed.

[3] Section 108(6) of the Government of Wales Act 2006, which is now repealed.

[4] As set out in his briefing for the British Academy entitled "Human Rights from the perspective of devolution in Wales."

The wider legislative context

Human rights are already embedded across a wide range of Welsh legislation, including:

- The Well-Being of Future Generations (Wales) Act 2015, which places sustainability at the heart of public decision making, a move heralded by the United Nations as a 'model for other regions and countries.'
- The Social Services and Well-being (Wales) Act 2014 makes provision about the well-being outcomes for people who need care and support, and carers who need support. The Act places a duty to have "due regard" to the United Nations Principles for Older Persons on those who are carrying out functions in relation to adults with care and support needs, and indeed, for adult carers who need support. There is a corresponding duty in relation to the care and support needs of children and young carers – to have "due regard" to Part 1 of the United Nations Convention on the Rights of the Child. In addition, the Part 2 Code of Practice (General Functions) requires those exercising social services functions in relation to disabled people who need care and/or support, to have "due regard" to the United Nations Convention on the Rights of Disabled People.
- The Additional Learning Needs and Education Tribunal (Wales) Act 2018 delivers a new legal system which enshrines the rights of children and young people, giving effect to the principles of the same UN Convention.
- The Rights of Children and Young Persons (Wales) Measure 2011, which places the Welsh Ministers under a duty to have due regard to the requirements of the UN Convention on the Rights of the Child whenever they exercise their functions.
- The public sector duty on socio-economic inequalities, in Part 1 (socio-economic inequalities) of the Equality Act 2010, was brought into force in Wales on 31st March 2021.[5] The Duty requires relevant public bodies, including Welsh Ministers, to have due regard to the need to reduce inequalities of outcome which result from socio-economic disadvantage when taking strategic decisions. A wealth of information has been developed to support implementation of the Duty, and a dedicated website page has been developed to host this information.

Policies and practice across Wales

Building on this legislative foundation, the Welsh Government has also introduced a range of policies, programmes and guidance which also builds on the Human Rights Act 1998 and Convention rights.

- Eradicating racism and promoting race equality have always been priorities for the Welsh Government. **Our Race Equality Action Plan (REAP) – An Anti-Racist Wales** is built on the values of anti-racism, and calls for zero tolerance

[5] See article 2(a) of the Equality Act 2010 (Commencement No. 15) (Wales) Order 2021.

of racism in all its guises. We continue to work closely with key stakeholders to co-construct the final Race Equality Action Plan. The Plan is due to be published later this year.

- In the light of mounting evidence, the Minister for Social Justice commissioned members of our Disability Equality Forum to examine the severe impact that the pandemic has had on disabled people. The resulting report, Locked Out: Liberating disabled people's lives and rights in Wales beyond COVID-19, builds on our existing Framework for Action on Disability. The First Minister has now established a Minister-led Taskforce to work to address the inequalities highlighted by the report, in conjunction with our partners across the public, private and voluntary sectors.
- **Access to Elected Office Fund.** The Welsh Government is committed to increasing diversity across all aspects of public life. This includes tackling the barriers which prevent disabled people's active participation in local democracy through standing for elected office. With over 8,000 councillors within 735 community and town councils the expansion of the AEO Fund will provide a greater number of opportunities for disabled people to achieve their aim of participating in local democracy to support their communities.
- Wales has a vision to be a **Nation of Sanctuary**. The Welsh Government is committed to doing all we can to provide a warm welcome to refugees and asylum seekers in the short-term, recognising our communities will, no doubt, be enriched by their skills and experiences. This is all the more important in the context of current events in Ukraine. All local authorities in Wales are already participating in the Afghan Relocation and Assistance Policy, or ARAP, and the Afghan Citizens Resettlement Scheme and have offered their support and assistance to the Afghan citizens who are being resettled in the UK.
- The Welsh Government has extended the **EU Citizens Advice Service** until March 2022. This extension will ensure that both citizens who have missed the EUSS deadline and those who need to make an application for settled status having previously obtained pre-settled status, continue to have access to the support they may need.
- Our **Community Cohesion Programme** funds eight teams across Wales to provide front-line support to communities, including more direct engagement to help monitor and mitigate tensions, as well as ongoing awareness raising around hate crime. The work of the Cohesion Programme has been essential in helping us to build local government commitments to participate in Afghan resettlement and asylum dispersal in recent months.
- The Welsh Government Programme for Government commits to strengthening and expanding the **Violence against Women, Domestic Abuse and Sexual Violence (VAWDASV) Strategy** to include a focus on violence against women in the street and workplace as well as the home in order to make Wales the safest place in Europe to be a woman. Our Live Fear Free helpline is a free, 24/7 service for all victims and survivors of domestic abuse and sexual violence and those close to them, including family, friends and colleagues.

These actions, already complete or well underway, are by no means the full extent of our ambitions with regard to strengthening and advancing human rights in Wales. Our Programme for Government commits us to incorporate both the UN Convention on the Rights of Disabled People (UNCRDP) and the Convention on the Elimination of all Discrimination against Women (CEDAW).

We are exploring a holistic approach, such as a Welsh Human Rights Bill, as well as other possible actions in relation to distinct areas, including the rights of children, older people and disabled people. Our research into Strengthening and advancing equality and human rights in Wales research report, commissioned on 2 January 2020 and published on 26 August 2021, explored a range of related issues. The research was led by Swansea University, in collaboration with Bangor University, Diverse Cymru and Young Wales. The report points the way in relation to safeguarding and promoting equality and human rights of individuals and communities in Wales and can help inform our future work. Our response to the recommendations is currently being developed and will inform all of our future action in this area.

The main concerns of the Welsh Government

First main concern: A failure of vision

Whilst the Welsh Government acknowledges the commitment that the UK will remain party to the European Convention on Human Rights, the Welsh Government is deeply disappointed that the UK Government will not "seek to add broad new categories of rights, in areas such as economic or social policy".[6]

The consultation document represents a missed opportunity to explore the extension of social and economic rights. The Welsh Government is committed to safeguarding the rights of the people of Wales, by strengthening existing rights as well taking fresh action to protect the vulnerable, tackle poverty and foster community cohesion.

The consultation document also fails to address one of the key recommendations in the IHRAR. In Chapter 1 of that document, there is a recommendation that "serious consideration should be given by Government to developing an effective programme of civic and constitutional education in schools, universities and adult education. Such a programme should, particularly, focus on questions about human rights, the balance to be struck between such rights and individual responsibilities."[7] The Welsh Government fully supports this recommendation and has introduced changes in Wales.

In Wales, human rights education is a cross-cutting theme in the Curriculum for Wales and provides an important contribution in supporting learners to become ethical, informed citizens, one of the four purposes of the curriculum. It supports learners to understand the sources of their rights; develop prosocial values and attitudes towards others and apply their rights and respect those of others. Learning about, through and for human rights also encourages inquiry, analysis, forming arguments, making decisions, cooperation, evaluation, and developing behaviours informed by values.

Second main concern: Devolution is not adequately or sufficiently considered

Over the last 20 years, human rights have been at the heart of devolution in Wales. The previous section has explained the importance placed on human rights in Wales. The Welsh Government is deeply disappointed that devolution has not been adequately or sufficiently considered in the consultation document. The Welsh Government expects more.

The consultation document is lengthy. The main body of that document contains 318 paragraphs. Yet only 15 of those paragraphs relate to devolution, and only 10 apply to Wales and Scotland. Turning to those paragraphs, sadly they are empty of content. The first heading, on page 13, is entitled "Human rights under the UK's devolution settlements". Yet only 8 paragraphs are included, half of which are only concerned

[6] See para 185 of the consultation document.

[7] See page 7 of the document at the following link: The Independent Human Rights Act Review 2021 (publishing.service.gov.uk)

with the position in Northern Ireland. The second heading, on page 78, is entitled "Application to Wales, Scotland and Northern Ireland". Only 5 short paragraphs appear, again with scant detail.

The Counsel General for Wales has already made clear that there is "an important constitutional issue at stake" and that the consultation document appears to raise significant issues in respect of "the rule of law and the role of the Courts in the application of the law relating to human rights."[8]

The IHRAR, unlike the consultation document, has recognised the importance of human rights in the context of devolution. The Welsh Government concurs with the quote from Professor Jeff King cited in that document "My conclusions are … that weakening the overall scheme of the Act risks upsetting devolution arrangements at an already delicate time."[9]

There are three proposals, which are likely to have an impact as regards devolved matters: the meaning of "Convention rights", public authorities and interpreting legislation and remedies.

The meaning of "Convention rights"

It is proposed that the starting point for the courts' interpretation of rights should be the text of the rights themselves, and courts could be directed explicitly to consider first other statutory provisions and the common law.[10] Further, under option 1, domestic courts would not be required to follow or apply any judgment or decision of the European Court of Human Rights or, under option 2, the courts would be required to follow case law of the domestic courts or tribunals but may have regard to the development of any similar right under common law in the UK or a judgment or decision from any other common law jurisdiction or the European Court of Human Rights.[11]

In respect of qualified and limited Convention rights, the document proposes that where "Parliament has expressed its clear will on complex and diverse issues relating to the public interest, this should be respected."[12] Further that the UK Government should provide guidance to the courts on how to balance qualified and limited rights and outlines two options. Firstly, 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 'necessary'". Secondly it is proposed that "the courts give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the

[8] See https://www.deeside.com/welsh-government-raises-significant-concerns-over-plans-to-replace-the-human-rights-act/

[9] See page 27 of the report at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf

[10] See paragraph 195 of the consultation document.

[11] See para 4 of Appendix 2 to the consultation document.

[12] See para 291 of the consultation document.

compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right."[13]

Whilst the jurisdiction of courts is reserved as per paragraph 8 of Schedule 7A to the Government of Wales Act 2006, these proposals are considered likely to have an impact as regards devolved matters. If these proposals result in domestic courts interpreting rights more restrictively than the European Court of Human Rights, this may have implications as to the meaning of sections 81 and 108A of the Government of Wales Act 2006. Section 108A(2)(e) currently provides that an Act of the Senedd is not law if "it is incompatible with Convention rights" and section 81 provides that Welsh Ministers have no power to make, confirm or approve any subordinate legislation which "is incompatible with any of the Convention rights." The consultation envisages that there may well be a divergence in the meaning of right in paragraph 3 of Appendix 2:

"Option 1 makes clear that the courts are not required to follow or apply any judgment or decision of the European Court of Human Rights and 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."

The natural question that arises from such circumstance is what would be meant in sections 81 and 108A by incompatibility? Would it be that defined by domestic courts or that defined by the European Court of Human Rights? While this question may not be of prime importance to the UK Government because, as explained in the consultation document, "the government intends to include a legislative provision that affirms Parliamentary sovereignty in the exercise of the legislative function, in the context of adverse Strasbourg rulings"[14] it is of critical importance to the Senedd and Welsh Ministers. Neither can legislate so far as it is incompatible with Convention rights. Further, if the UK is not upholding Convention rights to the standard that the European Court of Human Rights has deemed necessary, then as identified by the Public Law Project, "the UK will be at risk of breaching its international obligations"[15], which also has implications for the Government of Wales Act 2006.

Turning to qualified and limited Convention rights, the consultation document appears to be UK Government-centric. It provides that when considering the question of proportionality, when the UK Parliament has expressed its clear will on "complex and diverse issues relating to the public interest" or what is deemed to be "necessary" in a democratic society, the courts should give it great weight. Nothing is said about the equivalent democratic views of the Senedd, or legislation in respect of devolved matters. If the UK Government legislates so as to specify what is in the public interest or necessary in a democratic society more generally, and a court is required to give due weight to the same, even in respect of devolved legislation, this may be regarded as altering the intended effect of Welsh legislation by the back door.

[13] See page 81 of the consultation document.
[14] See para 315 of the consultation document.
[15] See https://publiclawproject.org.uk/events/the-human-rights-act-government-consultation/

In a similar vein, the UK Government also proposes that the Bill of Rights should provide more general guidance on how to balance the right to freedom of expression with "competing rights (such as the right to privacy) or wider public interest considerations" and that there should be "a presumption in favour of upholding the rights to freedom of expression, subject to exceptional countervailing grounds, clearly spelt out by Parliament".[16]

Public authorities and interpreting legislation

Currently section 6 of the Human Rights Act 1998 provides a degree of certainty to public authorities. Accordingly, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. There is a very limited exception that applies if the public authority could not have acted differently as a result of provisions of primary legislation or provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights. This exception has to be read together with section 3, which provides that "so far as it is possible to do so" legislation must be read and given effect in a way which is compatible with the Convention rights.

Plainly any change would apply to, and have an effect on, public authorities in Wales which is a matter in relation to which the Senedd and the Welsh Government have responsibility. The consultation document contains two proposals on pages 77 and 78 in respect of public authorities. The first option is that wherever public authorities are clearly giving effect to primary legislation, they cannot be deemed to be acting unlawfully. The second option is that the current exception in section 6 is retained, but in a way which mirrors the changes to how legislation can be interpreted. However in respect of how legislation can be interpreted this will depend upon which, if any, of the options outlined in the consultation are taken forward. In that consultation document there are two options presented. Firstly repeal section 3 or secondly replace that section with more limited provision, so that a court is only permitted to construe legislation compatibly with Convention rights where there is ambiguity and only if it can be done in a manner that is "consistent with the wording and overriding purpose of the legislation".[17]

Again very little is said about how this would apply to Welsh legislation. If it is proposed that the change will only apply to legislation that is reserved, then this will undoubtedly place public authorities in Wales in a very difficult position. Any proposed act of a public authority in Wales pursuant to reserved legislation would have to be considered applying different principles to any action under devolved legislation. This would be unclear and lack certainty. If however what is proposed is that any changes would apply to primary legislation not only of the UK Parliament but the Senedd as well, this would plainly have regard to devolved matters. In the case of the Senedd this is not as straightforward as the UK Parliament, who can rely upon the principle of Parliamentary sovereignty. In the case of Welsh legislation, in section 108A(2)(e) of the Government of Wales Act 2006, a provision is outside of competence if it is incompatible with the Convention rights and according to section 81 of the same Act,

[16] See para 215 of the consultation document.
[17] See para 237 of the consultation document.

Welsh Ministers have no power to make, confirm or approve any subordinate legislation so far as the subordinate legislation is incompatible with any of the Convention rights.

In February, Welsh Ministers convened a special meeting of our Strengthening and Advancing Equality and Human Rights (SAEHR) Steering Group to discuss the UK Government consultation. Members at that meeting were in clear agreement, with none dissenting, that the proposals amounted to regression in human rights in the UK which would make it harder for people to seek redress if public authorities acted in ways which were not compatible with the Convention.

Remedies available to the court

The UK Government, in the consultation document, is seeking views on whether there is a case for providing that "declarations of incompatibility are also the only remedy available to courts in relation to certain secondary legislation."[18] It is important to unpick this proposal. Currently according to section 4 of the Human Rights Act 1998, if a court is satisfied that a provision of primary legislation is incompatible with a Convention right and the primary legislation concerned prevents removal of the incompatibility, the court is only permitted to make a declaration of incompatibility. Such a declaration does not affect the validity, continuing operation or enforcement of the provision. This does not extend to secondary legislation. Secondary legislation can be quashed by the Court if it is found to be incompatible with Convention rights.

This proposal is referred to in passing, on page 71, and lacks detail. It is entirely unclear what is meant by "certain secondary legislation". Whilst the jurisdiction of the court is reserved pursuant to paragraph 8 of Schedule 7A to the Government of Wales Act 2006, this proposal could extend to Welsh legislation. That plainly has an impact with regard to devolved matters. Further this proposal is not really made with an eye to devolution. It negates the fact that in the Welsh context, incompatibility of a Convention right goes to the heart of the powers of the Senedd and Welsh Ministers to legislate. It would not simply be a question of whether or not legislation is incompatible, if a court finds that Welsh legislation is incompatible, this means that it is outside of competence and/or ultra vires.

The majority of the IHRAR rejected any option which would prevent secondary legislation from being quashed.[19] More specifically, at paragraph 62, reference is made to the critical point made by Cambridge University's Centre for Public Law:

> "… it would… upset the current devolution settlement if subordinate legislation which contravened Convention rights could not be quashed when primary legislation of the devolved legislatures which contravenes Convention rights can be quashed as beyond the scope of power of the devolved legislatures."[20]

[18] See para 250 of the consultation document.

[19] See para 64 in Chapter 7 of the Independent Human Rights Act Review

[20] Cambridge University, Centre for Public Law, Submission to the Independent Human Rights Act Review Panel, at, Submission to the Independent Human Rights Act Review Panel, at [92].

The consultation document also includes proposals on expanding the use of suspended and prospective only quashing orders. Again the points made above apply equally to this proposal too. It is interesting to note the Public Law Project research cited in the IHRAR and also in their response to the consultation that "only 14 statutory instruments have been struck down on HRA grounds since 2014." [21]

Third main concern: The positive contribution of the ECHR and the Human Rights Act 1998 has been downplayed

The European Convention on Human Rights was formally drafted in Strasbourg during the summer of 1949. The United Kingdom was the very first nation to ratify the Convention in March of 1951. The Human Rights Act 1998 incorporates the rights and fundamental freedoms set out in the European Convention on Human Rights into domestic law. The view of the Welsh Government is that the Human Rights Act does not need to be replaced and should be retained.

We are disappointed that the UK Government seems to have ignored much of the evidence gathered during the IHRAR, which affirmed the positive benefits that derive from the Human Rights Act 1998. Our collective efforts would be better focussed on working with the UK Government to increase understanding of human rights in general and the Human Rights Act in particular throughout the UK, in line with the first recommendation of the IHRAR "that serious consideration is given by Government to developing an effective programme of civic and constitutional education in schools, universities and adult education"[22]. The consultation document refers to a consensus that the Human Rights Act 1998 is not widely understood in the UK, citing the IHRAR panel in particular, but ignores their proposed solution, which is for Government to invest in education and public awareness of the Human Rights Act, the Convention and the European Court of Human Rights.

The consultation document cites a number of cases in support of reform. However some of those cases may be regarded as contentious, and one-sided.

There are other cases not referred to in the consultation that demonstrate the positive impact of the European Court of Human Rights. Some of those cases are outlined below.

- As far back as 1978, in its landmark judgment in the case of **Ireland v The United Kingdom**[23], the European Court of Human Rights ruled that the British army's use of certain interrogation techniques, that now seem alien, including forcing detainees to remain in a stress position for hours at a time, hooding, subjection to continuous loud noise, deprivation of sleep and food and drink, amounted to a breach of Article 3 (prohibition of torture). The case was significant in establishing the principle that the cumulative effect of mistreatment can amount to a breach of this Article.

[21] https://publiclawproject.org.uk/latest/human-rights-act-5-concerns-with-new-consultation/
[22] IHRAR report p.21
[23] Application no. 5310/71

- Another important case the following year was **The Sunday Times v The United Kingdom**[24]. A court injunction imposed reporting restrictions on the Sunday Times to prevent them publishing an article about the civil proceedings brought by parents of children born with severe deformities because of thalidomide taken during pregnancy. The case considered not only the freedom of the press to inform the public but also the right of the public to be properly informed, noting "In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions.". The European Court of Human Rights declared a violation of Article 10 (freedom of expression).

- Another landmark judgment is the case of **Lustig-Prean and Beckett v The United Kingdom**[25]. The applicants in that case were British Royal Navy personnel, who had been subjected to an intrusive investigation and were discharged for being gay. The European Court of Human Rights held that there had been a violation of Article 8 (right to respect for private life) for these two British servicemen. This momentous case led to a change in UK law and the ban was lifted.

- The European Court of Human Rights has also upheld the rights of children suffering severe neglect and abuse. In the case of **Z and Others v the United Kingdom**[26], the applicants, four siblings, alleged that the local authority had failed to take adequate protective measures in respect of the severe neglect and abuse which they were known to be suffering due to their ill-treatment by their parents and they had no access to a court of effective remedy in respect of this. The European Court of Human Rights found that the neglect and abuse suffered by the four applicant children reached the threshold of inhuman and degrading treatment and there was a failure of the system to protect them from serious, long-term neglect and abuse, and accordingly there had been a violation of Article 3 (prohibition of torture). Similarly, in the case of **E and Others v the United Kingdom**[27], the European Court of Human Rights held that in the case of the children who had been subjected to sexual abuse, that the lack of investigation, communication and co-operation by the relevant authorities must be regarded as having had a significant influence on the course of events and accordingly there had been a breach of Article 3 (prohibition of torture).

- Another landmark judgment considering the rights of vulnerable people is the case of **HL v The United Kingdom**[28]. In that case, the applicant had suffered

[24] Application no. 6538/74
[25] Applications nos. 31417/96 and 32377/96
[26] Application no. 29392/95
[27] Application no. 33218/96
[28] Application no. 45508/99

from severe autism since birth and lacked capacity. He was admitted to hospital as an "informal patient" because he was deemed to have complied, even though he was incapacitated. Thereafter he was under "continuous supervision and control and was not free to leave". The European Court of Human Rights reflected that "the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention, especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action." The European Court of Human Rights found that the absence of procedural safeguards for people who lack capacity was a violation of Article 5 (right to liberty and security). This case led to a change in the law and protections afforded to those who suffer from a disorder or disability of the mind.

- The European Court of Human Rights has also upheld the rights of vulnerable women subjected to domestic servitude. In the case of **C.N. v The United Kingdom**[29], the European Court of Human Rights held that there was a failure by the police to properly investigate her complaints, and there was a failure to have specific legislation in place which criminalised domestic slavery. Accordingly there was a breach of Article 4 (prohibition of slavery and forced labour).

Fourth main concern: Restricting access to justice

The consultation documents states that "the government remains committed to the European Convention on Human Rights – and, indeed, the UK's tradition of human rights leadership abroad." This claim is, however, repeatedly undermined by the detailed proposals which, if implemented, could make it harder for people to access justice.

There are a few proposals, which may have implications for access to justice. If a permission stage is introduced and the standard required to proceed is "significant disadvantage", this could result in people in Wales and the UK being denied access to justice.

There are other proposals, already referred to, that may result in domestic courts construing rights more narrowly, which could lead to an increase in cases before the European Court of Human Rights. This could create access to justice difficulties in two respects:

a) Generally, it can take up to 5 years from bringing a case through to judgment. This is longer than the domestic courts; and
b) The European Court of Human Rights has a limit on remedies and enforcement. Following a judgment, it would be for the State to interpret and implement.

[29] Application no. 4239/08

Finally, depending upon which proposals are implemented and importantly how they are implemented, complex constitutional questions could arise, which could have an impact on access to justice. Complex constitutional arguments may make it is harder for someone to obtain advice and the right advice. Such cases may become long and protracted, which could be especially problematic for those who face immediate and difficult circumstances. This could, for example, arise in respect of the rights of children.

Fifth main concern: Unfairly targeting vulnerable and disadvantaged people

Rights should apply to all, whereas these proposals appear to weaken or reduce the rights of some groups, including the most marginalised and disadvantaged. The proposals also seek to distinguish between "deserving" and "undeserving" people or cases.

The UK Government is proposing that applicants must pursue any other claims they may have first. This would have the consequence that such persons could either be prevented from also asserting incompatibility with a Convention right or could receive no compensation on the basis that they have already been provided with "adequate redress".[30]

Later on, on page 83 (question 26), the UK Government sets out a number of factors that a court could consider 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."

Then, most controversially, the consultation distinguishes between "deserving" and "undeserving" claimants. In particular, it recommends "by clearly linking the remedies available under the Bill of Rights to how the claimant has lived by its underlying principles, the courts will be expressly guided to think critically about the redress they offer and avoid rewarding undeserving claimants who may themselves have infringed the rights of others."[31] The consultation document does not define who may constitute an "undeserving claimant" nor any conduct that could be deemed to be "undeserving".

The Welsh Government is deeply concerned by the paragraphs, especially the language used, in the consultation document, which could result in the dilution of the rights of foreign nationals and illegal and irregular migrants. The Welsh Government has already spoken up about the Nationality and Borders Bill. By Written Statement dated the 6 November 2021, the Welsh Government has made clear its view on that Bill.[32] To quote directly from that statement:

[30] See para 226 of the consultation document.
[31] See para 308 of the consultation document.
[32] https://gov.wales/written-statement-uk-nationality-and-borders-bill

> "The UK Government's New Plan for Immigration and its Nationality and Borders Bill, which is currently making its way through the Houses of Parliament, severely undermine our vision of Wales as a Nation of Sanctuary.
>
> …
>
> We believe many of the provisions in the Bill will breach international conventions, violate basic principles of justice and will place ultimately extreme and insurmountable conditions on people who seek our protection.
>
> Many of the Bill's provisions will impact on the operation of devolved responsibilities – and we will bring forward a Legislative Consent Motion in relation to these – and it will affect our ability to exercise functions relating to equality, planning, social services, community cohesion and migrant integration.
> …
>
> In Wales, we are proud to be a Nation of Sanctuary. We are proud of all the agencies and individuals which work together to create a unified and welcoming experience for people who have been resettled here.
>
> Wales is a welcoming nation and we will always stand with those who need us the most. We want the UK Government to change course and to advance – not diminish – the legal, equitable and moral standing of the United Kingdom."

The proposals have the potential to weaken the rights of the people of Wales and the UK as a whole and especially those who are already some of the most disadvantaged. The proposals would make it harder for the people without substantial resources to gain access to justice; make it harder for the rights of people with protected characteristics to be enforced; and enable or even encourage some groups to be discriminated against. The disproportionate focus on deportation is especially regrettable, both because refugees and asylum seekers deserve to have their rights protected and because the wider implications of the proposals are at risk of being obscured.

Sixth main concern: Lack of evidence to support the proposals

Welsh Civic Society stakeholders have told us that they consider the consultation document to be unbalanced, and marred by politically motivated characterisation of HR issues, the cases cited and distorted representation of recent Human Rights history in the UK. In their view, many key proposals are not supported by evidence, or use evidence unfairly or inappropriately, relying on extreme cases to justify change and misrepresenting how UK courts have overwhelmingly acted proportionately and responsibly in applying international human right laws with full respect for the laws of the UK.

Again, the consultation document contrasts sharply with the IHRAR, which gathered and has made available a much wider and more balanced range of evidence, which the UK Government has either ignored or used very selectively to support its proposals.

The consultation document is critical of section 3 of the Human Rights Act 1998 but does not provide evidence. During discussions with civil society representatives, there was a general view that it works well because it enables domestic courts to interpret legislation compatibly with Convention rights.

Courts do take account of the “ordinary meaning” of legislation and can take into account the legislative context. Section 3 only really comes into play when a provision is ambiguous.

Also during discussions with civil society representatives, there was a shared view that Courts exercise their discretion justly. From the consultation document it reads as though the courts are using their power to quash an enormous quantity of secondary legislation. However no figures or evidence is provided in the consultation.

Similarly the consultation does not reflect on the fact that the court has powers to quash regulations on other public law grounds. Therefore to isolate a human rights challenge would put it out of step with other public law principles and there is no rationale or justification in the consultation document for doing so.

Responses to the consultation questions

Section I - Respecting our common law traditions and strengthening the role of the supreme court

Q1. We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2 of the consultation document, as a means of achieving this.

The Welsh Government response:

The Welsh Government does not recognise the problem cited by the UK Government. The UK courts are already able to apply a wide range of law in human rights cases. Both options provided in the illustrative draft clauses suggest there is a problem with how UK courts have used the Human Rights Act; this is not supported by evidence or by the IHRAR, which suggests only a minor amendment to Section 2 of the Human Rights Act to clarify the order in which courts should consider other laws.

The proposals in the consultation documents would undermine the UK's commitment to international law and our existing obligations, seriously weakening the link between UK courts and the European Court of Human Rights, creating the potential for divergence which would call into question the substance of our continuation as an ECHR signatory. Since UK citizens would still be able to take cases to the European Court of Human Rights there is a risk that more cases would end there and take a longer time to get justice and the remedies are limited. This could potentially widen inequality and reduce access to justice for most people.

Q2. The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights.

How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

The Welsh Government response:

The Welsh Government considers the change unnecessary. The Supreme Court is already recognised as the ultimate arbiter for UK courts, unless (very rarely) the European Court of Human Rights has taken a different view. The consultation document does not provide evidence to demonstrate the need for this change and ignores evidence gathered by the IHRAR which suggests it is unnecessary. The UK Government should recognise and affirm its continuing commitment to international law, and not seek to undermine long-established human rights principles.

Q3. Should the qualified right to jury trial be recognised in the Bill of Rights? [Yes / No / I have another answer / Prefer not to answer]. Please provide reasons.

The Welsh Government response:

The Welsh Government recognises, and will always defend, the right to a jury trial. However the Welsh Government does not view the Human Rights Act 1998 nor the Convention as being in conflict with it. This question is out of kilter with the rest of the document.

Q4. 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?

The Welsh Government response:

The Welsh Government supports the freedom of the press and freedom of expression but is concerned that this section of the consultation document is very selective and unbalanced in its references to the European Court of Human Rights and UK case law. The Human Rights Act 1998 already contains protections. In general, this balance works well

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

The Welsh Government response:

Our view on this question is covered by our answer to Q4.

Q6. What further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources?

The Welsh Government response:

Our view on this question is covered by our answer to Q4.

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

The Welsh Government response:

Our view on this question is covered by our answer to Q4.

Section II. Restoring a sharper focus on protecting fundamental rights

Q8. Do you consider that a condition that individuals must have suffered a 'significant disadvantage' to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way of making sure that courts focus on genuine human rights matters? [Yes / No / I have another answer / Prefer not to answer]. Please provide reasons.

The Welsh Government response:

This section raises substantial cause for concern about regression in human rights. The proposals are not supported by evidence. A permission stage could make it harder to access justice, especially if the threshold is high, as proposed in the consultation document.

Q9. Should the permission stage include an 'overriding public importance' second limb for exceptional cases that fail to meet the 'significant disadvantage' threshold, but where there is a highly compelling reason for the case to be heard nonetheless? [Yes / No / I have another answer / Prefer not to answer]. Please provide reasons.

The Welsh Government response:

In line with comments above and the previous answer in particular, the Welsh Government does not consider a permission stage to be necessary or desirable.

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

The Welsh Government response:

The Human Rights Act 1998 is effective in protecting the rights of people in the UK. The Welsh Government is concerned by the language used in the consultation document, such as 'Unmeritorious cases', 'genuine human rights matters'; 'abusing rights'. The UK Government should look again at the findings of the Independent Human Rights Act Review.

Q11. How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons

The Welsh Government response:

We do not agree with the assumptions which lie behind this question. Positive obligations are essential to public services, are already balanced, and are necessary for safeguarding people in all walks of life. Undermining positive obligations has the potential to have far wider ramifications than suggested by the proposals, by potentially weakening existing duties in respect of protecting children, guarding against modern slavery and preventing violence against women and girls, to offer a few important examples. The Human Rights Act 1998 has played a vital role in this area, for example enabling victims of the rapist John Worboys to hold the Metropolitan Police to account for serious failings. It must not be for people with responsibilities to decide for themselves which duties they choose to fulfil.

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

Q12. 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 of the consultation document.

The Welsh Government response:

The Welsh Government notes that the introduction to this section begins by stating that “The government wants to strengthen the UK’s long tradition of protecting human rights” but considers the proposals to be largely inimical to that aim.

The selection of cases and examples in this section of the consultation document is particularly partial, unrepresentative and misleading. This includes references to the IHRAR. We note that that IHRAR did not agree with the repeal of section 3.

The Welsh Government does not agree with either option in question 12, or with the underlying assumption of this section which are also at odds with the Welsh Government’s desire and intention to strengthen and advance human rights in Wales. Although UK Government affirms its intention to remain signatory to the European Court of Human Rights, changes to section 3 could limit the courts’ ability to ensure compatibility with the Convention. Section 3 should be retained.

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

The Welsh Government response:

For the reasons given by the IHRAR, the Welsh Government is supportive of the proposals put forward in that Review.

Q14. Should a new database be created to record all judgments that rely on section 3 in interpreting legislation? [Yes / No / I have another answer / Prefer not to answer]. Please provide reasons.

The Welsh Government response.

A new database should be created. This was recommended by the IHRAR and it is surprising that such a database does not already exist. Such a database, properly resourced and independently managed, could play a useful role in improving public understanding of human rights and how such rights are used in the courts. There is, of course, no reason why such a database could not be created without the Human Rights Act 1998 being repealed.

Q15. Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament? [Yes / No / I have another answer / Prefer not to answer]. Please provide reasons.

The Welsh Government response:

No, the courts should not be restricted to only making a declaration of incompatibility. The courts exercise their discretion justly, and there is no evidence to the contrary. Courts are able to quash secondary legislation on public law grounds, and it is entirely unclear why the UK Government believes this should no longer be the case for a human rights challenge. There is also no evidence presented to suggest that secondary legislation is quashed on a widespread scale.

The Welsh Government is also concerned that reference is made generically to secondary legislation and there is no regard to the position in Wales nor Welsh law, especially the fact that all Welsh law must be compliant with Convention rights. The Welsh Government is very concerned that any change could cause confusion and legal uncertainty in Wales.

Q16. 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 subordinate legislation is found to be incompatible with the Convention rights? [Yes / No / I have another answer / Prefer not to answer]. Please provide reasons.

The Welsh Government response:

As pointed out in answer to question 15, the Welsh Government is concerned that reference is made generically to secondary legislation and there is no regard to the position in Wales, nor Welsh law. The Welsh Government is concerned that any change could cause confusion and legal uncertainty in Wales.

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

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

[Prefer not to answer / I have another answer.] Please explain your reasons.

The Welsh Government response:

It is the view of the Welsh Government that if legislation is incompatible with Convention rights, it should be dealt with expeditiously. In Wales, legislation must be compatible with Convention rights, and rightly so.

Q18. We would welcome your views on how you consider section 19 is operating in practice, and whether there is a case for change.

The Welsh Government response:

It is the view of the Welsh Government that legislation in draft and in practice should be compatible with Convention rights. That is certainly the position in Wales, a position fully supported by the Welsh Government.

Q19. 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?

The Welsh Government response:

The Welsh Government greatly regrets that this is the sole question which appears to recognise the devolved nature of the UK and the democratically elected legislatures and governments. As set out in the preface to this response, the failure to recognise or understand the extent to which Convention rights are embedded in Welsh law is

concerning. We have no confidence that a Bill of Rights based on these proposals would reflect the interests, history and legal traditions of Wales (or the other nations of the UK).

Q20. Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.

The Welsh Government response:

The consultation document itself recognises that the approach to defining public bodies is "broadly right". We see no reason to change this and are concerned that doing so in the context of reforming the Human Rights Act 1998 might be used to reduce the responsibilities of bodies acting on behalf of the Government, thereby reducing important safeguards against abuse of power.

Q21. The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer?

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

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

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

Option 1 / Option 2 / None of these options / Prefer not to answer / Other. Please explain your reasons.

The Welsh Government response:

Neither option. In line with our answers to Q11 and Q20, the Welsh Government opposes any changes which would weaken the responsibility of public authorities to uphold human rights.

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

The Welsh Government response:

The Welsh Government believes that Convention rights should be inalienable and irreducible.

Q23. To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act? We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this?

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

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

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

The Welsh Government response:

The Welsh Government considers that the consultation document exaggerates and distorts the extent of the alleged problems in this area, and overlooks or misrepresents a wide body of other evidence which does not fit its politically motivated preconceptions. We repeat our concerns about the risks of interference by the executive in the work of the courts and therefore do not support either option.

Q24. How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.

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

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

Option 3: Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.

The Welsh Government response:

The Welsh Government regrets the disproportionate focus on deportations in the consultation document as a whole, as well as the partial and misleading use of evidence relating to this topic, some of which is out of date. We do not support any of these options, which seem designed to ensure that some people's rights could be disregarded to serve the UK Government's interests. Limiting the scope of human rights for some categories of people strikes at the heart of human rights principles.

Q25. While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?

The Welsh Government response:

In line with our answer to Q22, the priority should indeed be to respect the UK's international obligations and to challenge disinformation about how the Human Rights Act works in relation to refugees, asylum seekers and other migrants. Regrettably the consultation documents tends to do the opposite.

Q26. We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. Which of the below considerations do you think should be included?

a) The impact of the provision of public services.
b) The extent to which the statutory obligation has been discharged.
c) The extent of the breach.
d) Where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.

Prefer not to answer / I have another answer. Please provide reasons.

The Welsh Government response:

The consultation document does not provide evidence to support the view that there is a problem in this area. Therefore none of the options are appropriate.

Section IV. Emphasising the role of responsibilities within the Human Rights Framework

Q27. We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this?

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.

Option 1 / Option 2 / None of these options / Prefer not to answer / Other. Please explain your reasons.

The Welsh Government response:

This section and question raise further substantive concerns about the risk of regression of rights in the UK. References to 'claimant conduct' and 'wider behaviour' could have far wider implications that suggested by the proposals. The proposals seem tantamount to victim blaming and would disproportionality impact certain groups of individuals; they would open the door to highly subjective assessment, open to prejudice. Claimant conduct could be strategically used by public authorities to avoid their HR responsibilities. Taken as whole, the proposals suggest an entirely new definition of human rights that runs counter to the rights cultures in devolved nations.

SECTION V. FACILITATING CONSIDERATION OF AND DIALOGUE WITH STRASBOURG, WHILE GUARANTEEING PARLIAMENT ITS PROPER ROLE

Q28. We would welcome comments on the options for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2 of the consultation document.

The Welsh Government response:

Any efforts to dilute or disregard rulings of the European Court of Human Rights in UK runs counter to the Welsh Government's ambitions and to UK Government policy to promote human rights internationally. Moves in this direction are likely to encourage and empower anti-human rights movements in countries where rights are less developed or are under threat.

Impacts

Q29. 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:

Note, evidence can be uploaded at Question 30 below.

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)

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).

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

The Welsh Government response:

The proposals will have a detrimental and long lasting impact on the people of Wales, and the UK. At a time when the UK should be leading by example and making it clear

that human rights are inalienable and irreducible, these proposals are regressive and undermine the core principles underpinning Convention rights.

The Welsh Government, in this response and in its practice, has demonstrated there is a different way, and a way which has a positive impact not a regressive one.