



Response to Ministry of Justice Consultation

Human Rights Act Reform: A Modern Bill of Rights

About Rights of Women

Rights of Women is a legal rights organisation which specialises in supporting women who are experiencing – or at risk of experiencing – all forms of Violence Against Women and Girls (VAWG), including domestic and sexual violence. In our approach, we recognise the additional barriers posed by the intersection of gender-based abuse, racism, structural inequality and other forms of discrimination and oppression that impact on women’s vulnerability, exclusion and marginalisation.

By offering a range of services – including specialist telephone legal advice lines, legal information and training for professionals – we aim to increase women’s understanding of their legal rights and improve their access to justice. We empower women to make informed choices where they come into contact with the criminal, family, employment or immigration and asylum legal systems so they can lives free from violence.

Rights of Women is a registered charity 1147913 and Company Limited by Guarantee.

Introduction

The Ministry of Justice (MOJ) has called for views on the Government's proposals to revise the Human Rights Act (HRA) and replace it with a Bill of Rights, following a pledge made in the 2019 Conservative manifesto to "[...] update the Human Rights Act and administrative law to ensure there is a proper balance between the rights of individuals, our vital national security and effective government"¹. The proposals, by the Government's own admission, represent an "overhaul"² of the HRA.

Rights of Women (ROW) is under no illusion that this is an attempt to weaken the rights to which we are all entitled, and we reject the case for change in the strongest possible terms. Our human rights are not disposable, and these proposals represent an inappropriate, unwelcome, and unnecessary control of the functions and powers of the judiciary by the executive.

Any suggestions that these changes will support survivors of violence against women and girls (VAWG) are disingenuous and ill-founded – instead, they represent a regressive step, eroding a cornerstone of our democracy as the Government systematically shuts down avenues of accountability through a series of rushed and oppressive bills. Such attacks on our rights are most keenly felt by those who are minoritised by society and the state.

The consultation process is a clear attempt to not only undermine our rights but to prevent meaningful and diverse engagement and alienate the people most likely to need to rely on the HRA to secure their rights.

Human rights and VAWG

The United Nations describes VAWG as "one of the most widespread, persistent and devastating human rights violations in our world today"³. Given the disturbing prevalence of VAWG in our society, in which the state is always complicit and frequently the aggressor, this move to weaken the rights protected under the HRA – one of the few tools women can seek to rely on the secure recognition of the injustices they have experienced – is disturbing.

Gender-based violence is a breach of women and girls' human rights and is reflected in the HRA through Article 2 (right to life), Article 3 (freedom from torture and inhuman or degrading treatment), Article 4 (freedom from slavery and forced labour), Article 8 (right to privacy and family life) and Article 14 (freedom from discrimination). The VAWG sector are united in their concern about the changes posed by the Government, and the way in which these protections will be undermined.⁴

As a small legal advice organisation, we have limited capacity for policy work and would point to other women's rights organisations, as well as organisations with a wide-ranging focus on human rights, for a fuller and more detailed response to this consultation. However, we submit

¹ Ministry of Justice (December 2021). *Human Rights Act Reform: A Modern Bill of Rights – consultation*. Available at: <https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights/human-rights-act-reform-a-modern-bill-of-rights-consultation>

² Ibid.

³ United Nations (2021). *International Day for the Elimination of Violence against Women 25 November*. Available at: <https://www.un.org/en/observances/ending-violence-against-women-day>

⁴ We refer to the joint response of the End Violence Against Women and Girls coalition and Southall Black Sisters for a detailed examination of the ways in which these rights protect women

the following short response, confined to question 29, identifying the proposals as an unacceptable and significant threat to women's rights and access to justice, with minoritised women being particularly at risk.

Rights of Women (ROW) response to Question 29 of the consultation

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

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

Rights of Women questions the legitimacy of identifying the benefits of the proposed changes in light of the concerns referenced above and outlined in more detail below. In our view, the changes suggested by the MOJ will allow Parliament – and, as such, the Government of the day – to wield inappropriate power and influence over the judiciary and the application of our rights, and there are no benefits to this autocratic approach.

We begin by noting that the Independent Human Rights Act Review (IHRAR), the body established in December 2020 to examine the framework of the HRA, has put forward a positive assessment of the HRA and clearly stated that there no case for significant changes of the nature being proposed.⁵ It is therefore concerning to see the approach of the Government, which seemingly ignores the findings of the body it established for the very purpose of considering “how the Human Rights Act is working in practice and whether any change is needed”.⁶ Again, this speaks to the disingenuousness of the consultation process and suggests the changes the Government seeks to make are both self-serving and a foregone conclusion – a particularly disturbing state of affairs given the protective nature of the HRA.

It is immediately apparent in the course of ROW's work that state institutions are inherently misogynistic. Media coverage has recently highlighted police brutality at the Black Lives Matter protests and the peaceful vigil for Sarah Everard – but there is a long and sorry history of police violence against women, and particularly minoritised women, a small percentage of which is discussed below. It is therefore vital that institutions such as the police are open to robust legal challenge through the use of human rights.

ROW resists any and all changes which result in additional barriers to holding public authorities to account, including survivors of VAWG and minoritised women. For example, we oppose the following proposals:

- A new permissions stage for HRA cases, which would add an additional barrier to taking a case against a public authority to court (i.e. by requiring additional funds for legal advice).
- A condition that individuals must have suffered a ‘significant disadvantage’ to bring a claim. We, along with many other experts and organisations, discern the Government's clear desire to restrict access to human rights through the use of

⁵ MOJ (October 2021). *Independent Human Rights Act Review*. Available at: <https://www.gov.uk/guidance/independent-human-rights-act-review>

⁶ Ibid.

patently loaded terms such as “significant disadvantage” (without proper definition) and “genuine claim”.

- ROW does not share concerns around spurious HRA claims – quite the contrary, our concerns lie with the Government’s attitude toward human rights claims and the state’s long and continuing history of dismissing the abuse of women. The judiciary are well able to deal with any cases that are without merit.
- Implicit is the suggestion that there will exist an ‘acceptable’ range of human rights abuses (i.e. those deemed not to have caused “significant disadvantage”). As an organisation that works to protect the rights of women, we are dismayed that any form of human rights abuse could be considered tolerable in our democratic society – particularly given the people and communities that are so often on the sharp edge of such abuses. We must all be able to enforce their rights.
- The introduction of ‘responsibilities’ under a Bill of Rights. This is a cynical attempt to categorise particular people as more or less deserving of rights, undermining their universality.
- Limiting claims for compensation for confirmed rights violations by public authorities, and introducing immunity from rights challenges if they are deemed to be giving effect to legislation passed by Parliament. This is an authoritarian measure that must be rolled back. The idea that the government will shield its machinery regardless of the impact on the rights of individuals is unfathomable.
- Limiting positive obligations (see example of the importance of positive obligations in the VAWG context below). It is outrageous that the Government refers to “overly prescriptive” obligations in specific reference to police forces given the understandable and widespread lack of trust in the police in dealing with, or being implicit in, gender-based violence.
- Recent examples are disturbing in their number – the kidnap, rape and murder Sarah Everard, the IOPC investigation identifying discrimination, misogyny and harassment among officers in a particular police operation and two officers being sentenced for misconduct in public office for taking photographs of murdered victims Bibaa Henry and Nicole Smallman.

ROW runs specialist telephone legal advice lines, aiming to increase women’s understanding of their legal rights and improve their access to justice where they come into contact with the criminal, family, employment or immigration and/or asylum legal systems. Below, we examine each of these contexts and the human rights issues which regularly arise within them.

Human rights in the criminal law context

We regularly advise women on their rights in a criminal law context via our criminal law advice line. Many of the women who contact us have been retraumatised and revictimised by a criminal justice system that purports to protect them. Article 3, which imposes a positive legal duty to investigate reported crimes perpetrated by private individuals, allows women to challenge the discriminatory way they are dealt with by criminal justice institutions.

In 2018, two women, survivors of rape by John Worboys, won their legal fight to hold the police accountable for breaching their human rights because of failures to properly investigate reports of his crimes.⁷ The Supreme Court confirmed that the right to be free from inhuman and degrading treatment, as set out in Article 3 of the HRA, imposes a positive legal duty to investigate reported crimes perpetrated by private individuals – an example of an essential “positive obligation”.

In the case of *Opuz v Turkey*⁸ the European Court of Human Rights (ECtHR) found that Turkey had violated Article 2, the right to life, as they had not acted prior to a man murdering his wife’s mother, despite clear evidence that he had been violent towards both her and his wife. The Court also found that there was a violation of Article 3 (as above) and Article 14 (the right not to be discriminated against, because the approach of the authorities was found to be reflective of widespread gender discrimination).

ROW is clear that those who have experienced VAWG must be able to use human rights to hold state institutions to account, unimpeded – but those who have been accused or convicted of offences must be afforded the same protections. ROW is deeply concerned about the suggestion that those who have been convicted of an offence may not be able to access their rights. No one should be left vulnerable to abuse by the state. It is notable that most women in prison have been victims of much more serious offences than those they are accused of committing, and there are strong links between women’s offending behaviour and their experience of domestic abuse both physical and emotional, coercive control and sexual abuse.⁹ Notwithstanding this fact, this proposal is very much at odds with what should be expected in a democratic society.

Human rights in the family law context

Our family law legal advice lines respond to over 1500 calls annually are extremely busy with calls from women seeking to protect their family and their right to a family life.

The right to family life, enshrined in the HRA under Article 8, is often of particular importance to survivors of domestic abuse, who may see child contact being used as a tool for perpetuating abuse after a relationship has ended. Any interference with family life must be in accordance with the law, pursue a legitimate aim and be necessary and proportionate. Most applications to the courts involving children engage Article 8.

The British Institute of Human Rights also reports on the experience of Yolande, who used human rights to keep her family together after fleeing domestic abuse.¹⁰

⁷ *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11. Available at: <https://www.supremecourt.uk/cases/uksc-2015-0166.html>

⁸ *Opuz v. Turkey*, Application no. 33401/02, Council of Europe: European Court of Human Rights. 9 June 2009. Available at: https://www.refworld.org/cases_ECHR_4a2f84392.html

⁹ Prison Reform Trust (2017). “There’s a reason we’re in trouble”: Domestic abuse as a driver to women’s offending. Available at: http://www.prisonreformtrust.org.uk/Portals/0/Documents/Domestic_abuse_report_final_lo.pdf

¹⁰ British Institute of Human Rights. *Yolande’s Story*. Available at: <https://www.knowyourhumanrights-domesticabusesurvivors.co.uk/experiences-stories/yolandes-story-using-human-rights-to-keep-a-family-together-after-fleeing-domestic-abuse/>

Yolande and her children were fleeing domestic violence, and her abuser's attempts to track them as they moved across the UK. The family was regularly uprooted, moving each time he discovered their whereabouts.

Eventually, they arrived in London, and were referred to social services. Social workers told Yolande that the constant moving of her children meant she was an unfit parent and that she had made the family intentionally homeless. They said that they had no choice but to place her children in foster care. However, a support worker helped Yolande to challenge social services' decision. Yolande said she thought the decision had failed to respect her own right to respect for family life, and the right to family life of her children.

Looking at the situation from a human rights perspective helped change the conversation. Social services reconsidered the issue, taking the family's human rights into account, and worked with Yolande and her children to find a suitable solution. They all agreed that the family would remain together, and that social services would help cover some of the essential costs of securing private rented accommodation.

Human rights in the immigration law context

Human rights are by their very nature about how we live, work, speak, raise our children safely and function as human beings. Immigration advice brings in all of these issues.

The HRA has allowed individuals to challenge decisions made by public bodies such as the Home Office. At the heart of an appeal is that a decision is in breach of the Section 6 of the Human Rights Act.

For example, Rosa called our advice line because she was experiencing violence in her relationship with her boyfriend, a British citizen. She had originally come to the UK as a student 5 years ago, but had begun a relationship with someone on her course.

Her boyfriend had become controlling and verbally abusive and his behaviour had meant that she felt unable to continue studying. When she stopped attending her course, her student visa was cancelled and she remained in the UK without valid leave. Rosa became pregnant, and this led to an increase in verbal abuse from her boyfriend. There had been some physical abuse but Rosa felt that she did not have any options but to stay in the relationship because she had no immigration status. After her baby was born Rosa called us because the violence continued and she was worried for her safety and the safety of her daughter. She explained to our Advice Line Gateway Assistant that she had called the service because it was anonymous and she felt sure that she would not get into trouble for not having a valid visa.

One of our legal advisers telephoned Rosa back within two days and spoke to her about her immigration options. She discussed with her whether she wanted to remain in the UK or to return to her country of origin. Rosa did not feel safe to return as an unmarried mother. Our adviser outlined her options for her, including claiming asylum, or making an application based on her family and private life. Our Advice Line Gateway Assistant had previously sent Rosa a copy of our legal guide Women, Families and Article 8 and so our adviser was able to talk with Rosa in more detail about making an application.

Our adviser explained to Rosa that without access to legal aid to make a family life application, she would need to complete her own application and signposted her to charities and legal

clinics that could assist her. The adviser also spoke to her about her options for financial support, whether she wanted to stay in her boyfriend's property or leave, and advice on approaching her local authority for assistance. The adviser advised Rosa on her baby's nationality and how to make an application for her baby's passport.

With regards to the consultation's focus on 'foreign national offenders', there are already very robust provisions within the 2014 Immigration Act that ensure the public interest is central to the deportation question and that proportionality is key.

The success rates of appeals and judicial reviews provides ample evidence that the UK Courts are exercising their independent judicial functions and have regard to the very powerful jurisprudence that has come from the ECtHR. To now seek to blame and restrict how the law is applied and interpreted to correct unlawful decisions is not only flawed but dangerous.

It is better for this Government to properly reflect based on clear assessments on what the Human Rights Act has provided instead of wanting to argue for a replacement that will fall very short of what is required for the United Kingdom to uphold instead of dispose of its duties.

Human rights in the employment and discrimination law context

The costs of the proposed Bill of Rights on individual workers will be wide-ranging, and ROW sees no evidence that it would provide any benefit to workers, or indeed anyone other than the Government itself.

The HRA protects the human rights and freedoms for workers in the public sector. This covers a range of rights relevant to experiences of employment, including protection from discrimination and the right to privacy and family life. The HRA has been pivotal in establishing trade union protections, such as the right to be accompanied to disciplinary and grievance hearings, as well as curtailing discrimination by public authorities.

Women already experience a significant imbalance of power in the UK workforce, and the positive obligations safeguarding Convention rights go some way towards addressing this. For example, the public sector equality duty under section 149 of the Equality Act 2010 reflects Article 14 and the protection from discrimination. The Government has also made a recent commitment to introduce a positive duty on employers to prevent sexual harassment in the workplace. Limiting positive obligations only serves to foster an environment conducive to human rights abuses – something the Government should seek to avoid. The importance of positive obligations at the intersection of employment law, discrimination and VAWG cannot be overstated – prevention, rather than belated and inadequate reaction, must be considered paramount in our response to VAWG.

The effect of the proposed Bill of Rights would not address the very real human rights issues in the UK public sector workforce, particularly affecting marginalised women. It would, however serve to mask the issues by increasing the already numerous barriers to justice for women in the UK public sector workforce, including the lack of discrimination legal aid provision and the fact that between 2013/14 and 2017/18 only 10 application were made for exceptional case funding (ECF) which is granted to avoid a breaches of an individual's human rights and none

were granted¹¹, despite equality law being a fundamental foundation of human rights. This does not suggest any abuse of the system, but rather lack of access to those who are in need of it.

If this Government wishes to lessen the number of human rights claims at work in the public sector, it would do better to address the root cause of the issues, particularly systemic inequality and discrimination, through preventative policies and practices.

Other

Outside of ROW's specific remit, we are also made aware that the women who call our service may need to rely on human rights arguments elsewhere to secure access to basic services (i.e. securing housing after fleeing domestic abuse using Article 3).

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

It is not for our organisation, or any other respondent to this consultation, to undertake an equalities impact assessment with regard to these proposals. Suffice to say that they could have a devastating impact on people with protected characteristics, including – but not limited to – women who are survivors of domestic abuse. See above for an outline of the ways in which they may be impacted – for example, the breach of Article 14 successfully argued in the Worboys case.

It is essential to recognise the intersection of gender-based abuse, racism, structural inequality and other forms of discrimination and oppression that impact on women's vulnerability, exclusion and marginalisation. For example, Black and minoritised women, disabled women and LGBTQ women are more likely to experience sexual violence.

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

ROW would seek for these proposals to be withdrawn and for the Government to focus on promoting and protecting the existing HRA.

Rights of Women

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¹¹ EHRC (June 2019). *Access to legal aid for discrimination cases*. Available at: <https://www.equalityhumanrights.com/sites/default/files/access-to-legal-aid-for-discrimination-cases-our-legal-aid-inquiry.pdf> (page 10)