The Bevan Foundation

Submission to the UK Government's Consultation on Reform of the Human Rights Act 1998

About the Bevan Foundation

The Bevan Foundation is Wales' most influential think-tank. We aim to end poverty and inequality by working with people to find effective solutions and by inspiring governments, organisations and communities to take action. We are grateful for the opportunity to respond to the UK Government's consultation on the proposed reforms to the *Human Rights Act 1998* ("HRA").

Introduction

Our response below addresses the following issues raised in the consultation document: (1) the introduction of a permission stage for allegations of human rights abuses and the proposed threshold for allowing such cases to proceed to court; (2) the divergence between the UK Government and the governments and legislatures of the UK's constituent nations in relation to concepts of human rights and social policy aims (with a particular focus on Wales); (3) the weighting of Convention rights, particularly Articles 8 and 10 of the HRA; and (4) the suggestion that one's qualification for certain qualified rights should be determined largely by their moral character and nationality.

1. Permission stage and the 'serious disadvantage' threshold (questions 8 and 9)

We do not object, in principle, to introducing a permission stage for cases of human rights allegations. Enabling judges to filter out cases that have no merit is, in our view, an uncontroversial and sensible way of ensuring that public money is not wasted on allegations that have no human rights grounds.

However, we strongly object to the idea of introducing a "serious disadvantage" threshold for allowing cases to progress to court. Frankly, we find it absurd that the UK Government proposes a change in the law that would see the State being able to violate people's rights without consequence because, in breaching those rights, they did not cause enough harm. It brings into existence a class of human rights abuses that are considered acceptable and unchallengeable. In our view it should be assumed that *all* breaches of human rights are serious and warrant judicial oversight and remedy.

Therefore, if a permission stage is introduced, we believe that the threshold for allowing cases to proceed to court ought to be the determination by the judge that it appears that a human rights breach may have occurred.

Given our opposition to the 'serious disadvantage' threshold, we feel that the follow-on question on the inclusion of a second limb concerning 'overriding public importance' is redundant.

2. Divergence between the UK Government and those of the UK's constituent nations (question 19)

It is our view that the consultation document minimises the degree to which there is divergence between the UK Government's conception of human rights and that of the devolved nations. We appreciate that the UK Government is seeking views on how the proposed Bill of Rights can "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". However, it is unclear what these "key principles" are and whether these are congruous with the devolved governments' and legislatures' domestic operationalisation of human rights.

In Wales, numerous Acts of (Welsh) Parliament include provisions which oblige public bodies to have 'due regard' to a range of international rights conventions when exercising their functions, not least the United Nations' *Convention on the Rights of the Child*; the *Convention on the Rights of Persons with Disabilities*; the *Convention on the Rights of Older Persons*; and the *Convention on the Elimination of All Forms of Discrimination Against Women*. Regardless of the effectiveness of these provisions in actually enabling greater access to human rights, the Welsh Government and Senedd's concept of human rights is clearly more closely aligned with what is described, in the introduction to consultation, as "aspirational goals to be progressively realised". This is clearly contrary to the aims set out in the consultation document to prevent the "expansion and inflation of rights".

The consultation document does state that devolved nations will continue to be free to legislate on human rights in relation to devolved policy areas. However, the proposals for reform do stand in very stark contrast with Welsh policy ambitions. It is currently unclear what complexities and legal uncertainties may arise from the increasing division between Welsh and UK approaches to human rights within the context of a single jurisdiction.

3. The weighting of Convention rights (relevant to questions 4-7 and 23-24)

We are concerned by the suggestion in the consultation document that the UK Government has already decided that some qualified Convention rights are more important than others – and that this, in part, is based on a notion of "quintessentially UK rights". For example, wanting to strengthen Article 10 but weaken Article 8. Designating some rights as intangible from "UK" tradition/culture implies that other rights are imports and foreign and that, in the UK context, it would be acceptable / expected to have less regard for those rights. The commentary on the right to family life, specifically, suggests that this right is often an impediment to various proceedings against convicted offenders, especially deportation proceedings against 'foreign nationals'. There appears to have been little thought given to how weakening this right will interact with, and possibly undermine, the duty of public authorities to make decisions in the best interests of the child, including through promoting the upbringing of children by their family.

4. Moral character and nationality as determinants of qualification for certain rights (relevant to questions 23-27)

We are deeply concerned by the implication of weakening Article 8 that some people are more equal than others before the law. It runs contrary to the common understanding of human rights, which is that they are universal and act as a guaranteed safeguard against inappropriate state action. The proposals suggest that 'foreign national offenders' should be forbidden from appealing a deportation order except in specific and narrow circumstances, or blocked from protecting their rights, without any consideration for how long they have lived in the UK, the family they have here, or their familial and social connections in the country to which they would be deported. This, according to the consultation document, is justified on the basis of their behaviour and/or public interest.

While we appreciate that legal proceedings in relation to qualified rights requires their balancing against factors such as public protection, we disagree that someone's moral conduct should be one of the factors taken into account. On the point of public protection (cited in the consultation document as one reason for further limiting the ability for offenders to make appeals against deportation on Article 8 grounds), this presents an over-simplistic view of offenders. One of the aims of our criminal justice system is to reform offenders. The crime(s) committed – which may well be serious – may be regretted, and the person may, through the criminal justice response, reform and

start making amends. They may be no longer pose a threat to the public. By failing to acknowledge this and characterising all “serious foreign national offenders” as unquestionably a risk to the public, this questions the functionality of our criminal justice system – particularly its rehabilitative functions / aims.

Bevan Foundation

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