Human Rights Act Reform: A Modern Bill of Rights – consultation response from the National Union of Journalists, March 2022

The National Union of Journalists is the voice for journalism and journalists in the UK and Ireland. It was founded in 1907 and has more than 28,000 members working in broadcasting, newspapers, news agencies, magazines, book publishing, public relations, photography, videography and digital media.

Since the ECHR was incorporated into domestic law as the Human Rights Act (2000), the NUJ believes the balance of evidence is that its benefits have significantly outweighed any disadvantages. The Consultation document has chosen to detail some cases that have occasioned comment and criticism beyond legal circles. The instances where the Human Rights Act has proved beneficial dramatically outweighs these, in our assessment. We do not agree that this intended "update" to the Act will achieve that stated aim, and instead it seems clear it would diminish the rights and protections currently afforded to journalists and the wider public.

We note the report of the Independent Human Rights Act Review, prepared by an expert panel assembled by the current Government. It is regrettable that almost none of the well-considered recommendations of that Report are included in this Consultation. Nor – despite its report being submitted to the government in October 2021 – does its remit and terms of reference reflect the structure of this Consultation, which seems strangely out of synch. It also therefore constitutes a missed opportunity to elicit the panel's independent views on this newly framed Consultation questions and content.

We further note that the Consultation speaks exclusively of the operation of the Human Rights Act in respect of higher court decisions. Just as important is its effect as a guide and check on all statutory bodies. The Consultation entirely overlooks this impact.

We are also concerned that the Consultation does not give consideration to how the proposed reforms would be compatible with our international obligations – most notably as a signatory to the ECHR. The creation of a new human rights 'permission stage', for example, could prevent some cases being considered by UK courts, that will subsequently succeed when heard by the Strasbourg Court. This would increase the difficulty and expense for some claimants. Any growth in Declarations of Incompatibility with the provisions of the ECHR would lead to lengthy delays in human rights concerns being addressed, and restrict access to justice.

At this time in particular, promoting the stability of a rules-based international order seems far more important than the unevidenced benefits promised by this Consultation.

In responding to the Consultation we have broadly addressed those questions we consider pertinent to our members as journalists and as trade unionists.

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

There are many instances where the ECHR has been beneficial to journalists and journalism. Strong examples include important cases which have firmly established the unequivocal right of journalists not to disclose their sources. Without clear and effective protection, sources may be deterred from sharing information with the press that they believe should be in the public domain, and the vital public watchdog role of the press in a democratic society would be undermined. This includes interference and seizures of journalistic material and production orders. Goodwin v. UK (1996) and FT v. UK (2009) are obvious examples.

The ECHR has previously found against the government in terms of surveillance powers, including cases brought by David Davis MP and former MP Tom Watson. Surveillance powers also pose risks to journalistic newsgathering work and the ability of a reporter to adequately protect the identity of their sources.

There are also instances where the ECHR has benefitted journalists as workers, for example Wilson and Palmer v. UK (2002) where the Court enforced and NUJ member's Article 11 rights to join and be represented by a Trades Union.

The decoupling of rights granted by the ECHR from domestic law implicit in these proposals are potentially damaging to journalists and journalism.

Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights.

The key question is how can the Bill of Rights best achieve this with greater certainty and authority than the current position? Why dismantle something that isn't broken?

The suggestion here is that access to the court in Strasbourg will become more difficult. For an individual, this will make access to its jurisdiction almost impossible. Even for an organisation such as the NUJ, it will mean that our ability to pursue meritorious cases on behalf of members will have to be weighed against resources. We would strongly oppose any changes that have the impact of making access to justice slower to attain, more challenging and more costly.

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

Except in harassment cases, the test for granting interim injunctions should be raised, so that they are granted only when a court considers that it would be highly likely that an injunction would be granted following trial.

Question 5: The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into

account the considerations above. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?

While there is a tension between Article 8 and Article 10 in respect of news, it is by no means the most concerning limitation on the right to report that currently affects the media. The implications of Bloomberg v ZXC (2022) are such that it is a clear and serious issue that requires swift and decisive legislative attention. Allowing privacy to those who are under investigation, or who have been arrested but not charged, is a dramatic new restriction on reporting that risks obscuring public understanding of the work of law enforcement agencies. Steps should be taken at once to restore the right to report.

We also note that in the Consultation, paragraph 216, the Government states: "Likewise, when a court is applying the freedom of expression to the particular facts of any case, the government believes that, where Parliament has expressed its clear will on issues relating to the public interest and the exercise of public functions, this should be given great weight." This appears to indicate an approach that would dilute all rights granted under the convention, including that to free expression. Although posited as a 'rebalancing', this risks lessening the protection for free expression and privacy.

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

The introduction of journalists sources at this point in the Consultation comes without preamble or examples in respect of the issues that it seeks to address. It is our view that the Contempt of Court Act (1981) and case law in this area provides strong protection for journalists sources in most cases – notable that of the NUJ-backed landmark case Goodwin v. UK (1996) and FT v. UK (2009). In both cases, the ECtHR beneficially enforced rights that are enshrined in the ECHR. Anything that reduced the ability of journalists to enforce the law as it stands would increase the risks to journalist sources, weaken the ability of journalists to carry out their work, and undermine the vital role of the press as public watchdog in a democracy.

The ECHR was also used by Sally Murrer to argue that she should not give up her sources, as well as Suzanne Breen, who relied on Article 2 to resist an application that she hand over her material.

Notwithstanding this, explicit legal protection for journalistic sources would be beneficial. This might cover the following areas.

All journalistic material should be protected and its surrender should require a Production Order obtained in open court. Where journalistic material is seized during the course of criminal investigations it should be sealed and access to it allowed only upon the granting of a Production Order. The presumption of the Court should be that journalistic material is protected, save where there is high degree of probability that it includes material pertinent to a serious live criminal investigation or terrorist threat.

Access to journalists' communications data should require that a journalist be given prior notice of an application and that an order be made in open court.

Public authorities should be required to establish binding rules to ensure that technologies that might be used to reveal journalists sources, such as live facial recognition technology, are not used in this way.

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

This seems a curious question in the context of this Consultation. Two simple steps, however, are available in the ongoing programme to reform the Official Secrets Act. The proposal to treat journalists in receipt of classified information as though they were hostile spies should be dropped, and the Law Commission's recommendation of a formal public-interest defence adopted.

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

The instinct to filter out what might be considered trivial, or pointless cases is obvious. While a 'permission stage' might stop certain egregious cases taking up judicial time needlessly, it would also create an additional hurdle for the far greater number of deserving cases. The handful of cases cited in the Consultation do not make the case on their own, that this is a proportionate response; there is no evidence provided here that large numbers of spurious cases are being brought, or that their impact is to devalue the concept of rights.

No-one should be required to prove 'significant disadvantage' before they can access justice, and attempts to build in this barrier would only make it harder to challenge human rights violations. It is also already the case that judicial review cases have to pass a permission test.

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

This is a very loaded question, behind which lies an unevidenced assumption that currently the courts are focussed on frivolous or non-genuine cases. Protecting public authorities from human rights claims, or blocking valid claims, would seriously diminish rights protections in the UK.

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

Given that positive obligations are an element of all human rights protection frameworks around the world, it is clear that the failure to meet them must be open to challenge, and of course reported on. The proposals here are unclear, and risk undermining what are important and significant duties to protect fundamental rights.

Question 12: We would welcome your views on the options for section 3.
Option 1: Repeal section 3 and do not replace it.
Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation. We would welcome comments on the above options, and the illustrative clauses in Appendix 2.

The NUJ believes rejects both options and believes that Section 3 should stay as it is. It is vital that UK courts continue to interpret legislation as far as is possible in a way that accords with the rights protected by the European Convention.

Question 19: How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?

The proposals in the Consultation are incompatible with the reality of devolution settlements in Scotland, Wales and Northern Ireland, and if effected would diminish protections in those countries. The requirement that legislation passed by the Scottish Parliament, Welsh Senedd and Northern Ireland Assembly must be compatible with European Convention rights and that public authorities must act compatibly with them is fundamental to the devolution settlements. In Northern Ireland European Convention rights are clear through the Good Friday (Belfast) Agreement – any amendment of the Human Rights Act would require a process of review between the UK and Irish governments in consultation with the Northern Ireland parties under the terms of that agreement. Changes would risk undermining the peace agreement and the political and policing structures that flow from it.

Question 20: **Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.**

The NUJ believes the definition should stay the same, and there is no need for greater "certainty". Any change that narrowed the definition could risk freeing private companies from responsibilities and scrutiny when they are in receipt of government contracts. It is important that entities exercising powers and fulfilling duties of the state are deemed to be public authorities.

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

We wish to provide more guidance to the courts on how to balance qualified and

limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.
Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.
Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.
We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

We would oppose both options, and believe either change would reduce the scope of people's rights and guidance would risk inappropriate political interference in the duties of independent judges.

Question 24: How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.
Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment;
Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights; 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.

We would oppose all three options – such changes would diminish the rights of whole classes of people; undermine the role of judges, with rights determined by government ministers and officials; and be fundamentally discriminatory.

ENDS