



8th March 2022

Human Rights Act Reform: A Modern Bill of Rights – A consultation to reform the Human Rights Act 1998.

NATIONAL AIDS TRUST RESPONSE

1. National AIDS Trust is the UK's HIV rights charity. We work to stop HIV from standing in the way of health, dignity and equality, and to end new HIV transmissions. Our expertise, research and advocacy secure lasting change to the lives of people living with and at risk of HIV.
2. The Human Rights Act should not be replaced with the proposed Bill of Rights. The Human Rights Act has played a profoundly important role in advancing and protecting the rights of people living with HIV. HIV is a highly stigmatised condition, and widely misunderstood. The legal framework of human rights has proved vital in a range of settings where the actions of public authorities have infringed the rights of people living with HIV. These rights include access to medication, informed consent, patient confidentiality, equal rights for people in same sex relationships, fair access to housing and employment and the chance to challenge discriminatory behaviour.
3. The case for change in this document is in our view unconvincing. It is extremely worrying that these proposals seek to set out circumstances where the government decides who is deserving or undeserving of human rights that are in essence, universal. No evidence has been put forward that the framework is being misused, or that it does not function correctly. It is clear that where a claim that rights have been infringed has not been substantiated, the law as it stands is entirely capable of making those judgements. Allowing governments to override the proper functioning of the courts is a dangerous step that risks undermining the entire basis on which the human rights framework rests.
4. The stigma that has dogged HIV since the first AIDS cases were reported forty years ago has not gone away. The Human Rights Act has proved critical in holding public authorities to account where misinformation, misunderstanding, prejudice or racism have threatened the rights of people living with HIV. There is a direct correlation between the quality of life of people living with HIV and their engagement in care, and between the mistreatment of people living with HIV and a reluctance to test for HIV. This government has made clear its laudable commitment to end all new HIV transmissions by 2030. It will not achieve this until underlying health inequalities are addressed, and stigma is tackled. Diluting the human rights framework at this stage, leaving

people less able to challenge poor treatment by public authorities on the basis of their HIV status will directly impede the government's ability to reach this goal.

Interpretation of Convention rights: section 2 of the Human Rights Act

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.

5. Since 2009, there has been a marked departure from the so-called 'mirror principle' as laid down by Lord Bingham in the *Ullah v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, in which he said: "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less." Section 2 does not need to be amended and the duty to "take into account" ECtHR jurisprudence has been applied well.
6. Section 2, as it is currently applied, allows for dialogue between the ECtHR and the UK courts. There is a well-founded understanding and acceptance that it would be impractical to follow every decision from Strasbourg because it would not allow for dialogue between the two courts; this sentiment was summarised by Lord Neuberger when he said "Where ... there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this (Supreme) court not to follow that line." (*Manchester City Council v Pinnock* [2011] UKSC 6; [2011] 2 W.L.R. 220, para.4)
7. Successful dialogue between Strasbourg and the UK's legislature and courts is evidenced by *Animal Defenders International v. The United Kingdom* [2013] in which the former decided to revisit its earlier approach, taking on board the considered views of the latter. This process of dialogue ultimately supports the development of better laws that support wider public good.
8. It is hard to see how we can water down this duty to follow Strasbourg jurisprudence. When the judges want to, they can be quite comfortable departing from Strasbourg, and that is currently permissible under section 2 as it stands.
9. The case of *AM Zimbabwe v Secretary of State for the Home Department (SSHD)* was heard in the Court of Appeal in 2019. The Supreme Court was asked to consider whether returning AM, an individual living with HIV who had been in the UK since 2000, to Zimbabwe would violate his right under Article 3 of the European Convention on Human Rights not to be subjected to inhuman treatment by reason of his HIV positive status, in light of the decision of the ECtHR in *Paposhvili v Belgium* [2017] Imm AR 867.
10. AM has been receiving antiretroviral therapy (ART) since 2012 when his CD4 count had started to fall. He experienced severe side effects and so was prescribed a different drug, namely Eviplera which did not give rise to significant side-effects and which enabled his CD4 blood count to increase and his HIV viral load to become undetectable. AM's case hinged on the fact that it was doubtful whether he could access specific ART regimens that would be successful in managing his HIV in Zimbabwe, without which his CD4 blood count would fall again. In that event he would be prey to opportunistic infections which, if untreated, would lead to his death.

11. In April 2020, five justices unanimously ruled the case must be reconsidered in full, departing from previous UK case law *N v United Kingdom* [2008] ECHR 453 by reference to *Paposhvili* and to remit his application for rehearing by reference to Article 3.
12. We believe that the above example of *AM Zimbabwe v SSHD* demonstrates the effectiveness of section 2 in protecting the rights of people living with HIV who are at risk of removal to a country where medication is either not available or accessible, risking their health, and ultimately, their life. It shows how the UK Supreme Court appropriately took into account the ruling in *Paposhvili* when determining a question that has arisen in connection with a Convention right.

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.

13. The introduction of a permission stage for human rights claims, requiring a claimant to demonstrate ‘significant disadvantage’ before a case can be brought to court, is both dangerous and risks undermining the protections of an independent human rights framework. There are already significant obstacles to ordinary people in bringing a human rights case to court. The process is complex, and costs prohibitive. Burden to prove significant disadvantage would fall disproportionately on the claimant.
14. Additionally, claims made under the Human Rights Act do not just benefit the individual bringing the claim. The HRA exists to ensure public authorities respect and honour the rights of individuals. Changes in practice resulting from caselaw benefit a much wider group of individuals, many of whom would not have had the means to challenge the practice themselves. The purpose of a human rights framework is not just to provide an avenue of redress but to prevent ‘significant disadvantage’ from impacting on wider groups of people.
15. Section 7 of the Human Rights Act is entirely sufficient. It already establishes the necessary conditions for cases to go to court. The criteria that would determine ‘genuine human rights matters’ and ‘significant disadvantage’ have not been set out or explained either. There are no details or explanation of how this would work in practice. We cannot support a system that introduces this level of arbitrariness, uncertainty and subjectivity into the conception of human rights in the UK.

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

16. National AIDS Trust is deeply concerned about the use of the term ‘genuine’ human rights abuses. Section 7 of the HRA already sets out very clear admissibility criteria that claimants must meet to take a case to court. Moreover, it is the role of the courts, not of the Government, to decide on the admissibility or merit of a human rights case.
17. The role of the Human Rights Act is to protect and uphold rights infringed upon by the state. It is therefore entirely inappropriate for the state to determine what human rights abuses are ‘genuine’ and what are not.

18. For example, successive governments have sought to introduce increasingly severe restrictions on migrant access to healthcare. Policy-making in relation to asylum seekers and migrants is heavily politicised. The Human Rights Act has been essential in ensuring that ever more punitive legislation does not breach the human rights of migrants. For migrants living with HIV, these checks and balances have proved essential to ensuring access to treatment. People living with HIV on effective treatment cannot pass the virus to others. Therefore, access to treatment, as well as being essential to the individual to avoid serious illness, has a vital public health benefit. We therefore reject the notion that the government needs to play a bigger role in assessing which cases are 'genuine' and those that are not.

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.

19. Positive obligations demand the Government retain a proactive role in protecting people's human rights. They require public services to take proactive steps to uphold their human rights obligations. Done correctly, this should mean they are less, not more, likely to be the targets of litigation.
20. Positive obligations set out expectations for how public authorities should protect individual human rights. For people living with HIV, this involves a range of important protections, for example the right not to have their HIV status shared without their consent, the right to access free treatment and the right to access treatment while in state detention.
21. This proposal seems to present the Government's duty to preserve and uphold human rights as a financial burden. This carries negative consequences in terms how the UK understands, handles and protects human rights violations.
22. It is our view that the societal 'cost' of human right abuses be the primary concern of the Government, rather than the economic cost of such litigation. For example, a greater number of people living with HIV will require residential care or support in their own homes. Due to effective treatment, people living with HIV can now expect a normal life expectancy. Historically many people living with HIV did not live into old age so this is not an area where many older people's services have experience. People living with HIV have expressed anxiety about whether they might face discrimination from providers who misunderstand the condition and there are unfortunately examples of poor practice in social care.
23. In response to these concerns, we produced a Guide for Care Providers to ensure care services for older people are 'HIV ready'. This guide includes key points for managers and care workers on how to protect and promote the rights of people living with HIV in their care. The HRA helps us to advocate with and for people to ensure they are treated well in the context of their care. Article 2 (right to life) ensures that HIV treatment is taken as prescribed and Article 3 ensures that people living with HIV are not subject to inhuman and degrading treatment, for example, by not being provided with proper care because of misplaced fears around transmission or HIV-related stigma. The realisation of these rights has wider benefits, improving understanding of HIV and affected communities amongst care providers, supporting prevention and a reduction in stigma and improving health outcomes.

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.

24. Section 3 is central to how the Human Right Act works on the ground as it makes clear to decision makers, whether they be social workers, police or local authority staff, that when they apply legislation in their work, they must make sure they are protecting and respecting people's human rights.
25. National AIDS Trust is not aware of instances where, because of domestic courts and tribunals seeking to read and give effect to legislation compatibility with the Convention rights, legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it. We therefore do not think that section 3 should be amended or repealed.
26. Section 3 is essential to us as organisation seeking to protect the rights people living with HIV, which is classed as a disability pursuant to paragraph 6(1), Schedule 1, Equality Act 2010. In 2017, we challenged a proposed law aimed at introducing coercive HIV testing following assaults on emergency workers. The Assaults Against Emergency Workers Bill was proposed in England in July 2017 by a Member of Parliament with Government support. The legislation included clauses allowing police to test persons suspected of spitting on or biting emergency workers for blood-borne viruses (BBVs) and made refusal to test an offence, effectively introducing coerced BBV testing. Voluntary testing is a cornerstone of an ethical, evidence based and effective response to infectious disease. The enforcement of an offence of refusal to provide a sample for testing amounts to coercion, undermining this long-standing approach and undoubtedly violating the right to private life, as protected by Article 8 of the HRA.
27. We did not oppose the bill, and fully support efforts to protect emergency workers from assault. However, we do believe the Bill required important amendments before passing into law, specifically to sections 4, 5 and 6. Working in partnership with the Terrence Higgins Trust, the British HIV Association (BHIVA), and British Association for Sexual Health and HIV (BASHH), we argued that the proposed law was a violation of rights; would increase stigma and misinformation, further validating misconceptions of risk from spitting and biting (there are no recent recorded cases of HIV transmission from biting or spitting in the UK and this is not a route for the transmission of HIV) and would not benefit but harm victims of assault. Government officials in public health and law enforcement were convinced to remove support for the clauses which were removed from the Bill in April 2018.
28. In this case it was clear that the proposed policy was inconsistent with the HRA and was therefore unlawful, but this was not the only reason why this policy was harmful. By upholding the HRA principles, it was ensured that harmful policy was not implemented and that instead the Government considered more effective ways to address the problem that the proposed policy aimed to solve. It was ultimately accepted that testing of accused perpetrators of assault

would not provide useful information to protect emergency workers from infection. It would not identify recent acquisitions of BBVs and it served only to enhance misinformation and unnecessary anxiety about risk of BBV infections following assaults such as spitting and biting, that are largely non-existent. It increased stereotyping and misconceptions relating to HIV and other BBVs and increased mistrust in the police amongst people living with HIV. It has been more effective to address misunderstanding amongst emergency workers so that they are not harmed by unnecessary concerns relating to HIV following assaults. This shows how interrogation through the lens of the HRA leads to better public policy and policy outcomes.

Question 15: Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

29. With regards to section 4, the provisions under section 3, whereby primary legislation and subordinate legislation must be read and applied in a way which is compatible with the Convention rights as far as it is possible to do so, gives ample opportunity for Parliament to identify potential incompatibility. There is no need for declarations of incompatibility under section 4 to be considered as part of the initial process of interpretation.
30. There are two reasons for this: Declarations of incompatibility are rare (since the Human Rights Act 1998 (HRA) came into force on 2 October 2000 until the end of July 2019, 42 declarations of incompatibility have been made), and not all take place when the primary or subordinate legislation is subject to the initial process of interpretation. An example of this is the declaration of incompatibility made in June 2018 by the UK Supreme Court finding that the Civil Partnerships Act 2004 is incompatible with the ECHR. Of course, a declaration of incompatibility does not require Parliament or the Government to take any action to change the law and so Parliament still has the main role in determining how the incompatibility should be addressed. Declarations of incompatibility respect the constitutional roles of parliament, the executive and the courts and the process does not need to change.

Question 17: Should the Bill of Rights contain a remedial order power?

31. The remedial order process should not be modified as Parliament already plays a paramount role in amending legislation which has been found incompatible with the ECHR. After draft remedial orders are considered by the Joint Committee on Human Rights, they then need to be approved by both the House of Commons and the House of Lords to become law. Although urgent orders may be made without advance scrutiny, they will stop being law if they are not approved by both Houses within 120 days of being laid before Parliament. The remedial order process allows for sufficient parliamentary scrutiny whilst also acknowledging the need to amend legislation to remedy the incompatibilities quickly.
32. The HRA does not need to be amended or repealed. Instead, the Government should focus on ensuring the rights we currently have are respected, protected, and fulfilled and harmful narratives about the HRA must be stopped so that everyone knows their rights and how to assert them, and those with legal duties to uphold rights are encouraged and supported to do so. Steps taken to ensure people have full access to their human rights are also steps taken to lessen the impact of HIV and end new HIV transmissions.

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.

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.

33. It is concerning to us that the Government views the human rights of the individual as an obstacle to deportation or removal. In our view, the decision to deport an individual must be weighed against their rights under the ECHR. Any attempt to water down the rights of the individual could have devastating consequences. As described above, the case of *AM Zimbabwe v Secretary of State for the Home Department (SSHD)* was heard in the Court of Appeal in 2019. The Supreme Court was asked to consider whether returning AM, an individual living with HIV who had been in the UK since 2000, to Zimbabwe would violate his right under Article 3 of the European Convention on Human Rights not to be subjected to inhuman treatment by reason of his HIV positive status.
34. In April 2020, five justices unanimously ruled that removing AM to Zimbabwe, where he would not be able to access the medication he needed, would be a breach of Article 3 of the ECHR, and required the case to be reconsidered in full.
35. We therefore see the Human Rights Act as providing an essential check on decisions to deport and would not support any watering down of this crucial safety net.

Question 27: 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? Please provide reasons. 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.

36. National AIDS Trust is concerned by the intention to weigh up the 'conduct' of claimants against any reparations they may receive following an abuse of their rights. Section 8(1) of the Human Rights Act already confers a broad power on the courts to consider the context of a case when determining the appropriate remedy. Having found that a public authority's act is unlawful, a court "may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate." National AIDS Trust is very concerned that damages adjusted on the basis of 'conduct' could leave certain individuals more vulnerable to human rights abuses where authorities believe the consequences are likely to be minimal.

Question 29: 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:

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.

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

37. HIV is classed as a disability under the Equality Act 2010. People living with HIV are likely to have additional protected characteristics relating to age, sexual orientation, gender identity and race. There is a higher prevalence of people living with HIV among LGBT+, Black and migrant communities. The reforms as proposed suggest increased vulnerability of these groups to infringements of their rights, reduced access to the courts and reduced access to effective remedy.

38. For example, in August 2021 the High Court ruled the Home Office failed to put in place systems to protect people living with HIV after a man was denied his HIV medication for four days at Harmondsworth immigration removal centre (IRC) in August 2019. The ruling found the Home Office had breached article 3 of the European Convention on Human Rights which states “no one shall be subjected to inhuman or degrading treatment or punishment.”

39. The judge ruled the events of August 2019 “demonstrate the lack of sufficient systems” to care for people living with HIV in immigration detention. He noted that staff at the intake unit where the claimant was initially detained “did not know how to obtain the necessary medication” and the staff at the intake unit at Harmondsworth “failed to appreciate the need to administer it without delay.” Adherence to HIV medication is incredibly important; missed doses compromise the efficacy of therapy and can lead to drug resistance which limits future treatment options.

40. The state has a positive duty to put in place a legislative and administrative framework to secure the health and well-being of those in detention so as to avoid harm of a kind that would engage article 3. In this case, the judge ruled that the lack of legislative and administrative framework put the claimant at risk of harm.

41. Under the current proposals, we are concerned that individuals in immigration detention, along with many other people living with HIV, are very likely to fall foul of watered-down protections, reduced positive obligations, and a human rights framework that is based on a heavily politicised understanding of who is deserving of human rights protections and who is not. We therefore reject the proposals.

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