The British Institute of Human Rights: The RITES Committee

LEGISLATIVE SCRUTINY: BILL OF RIGHTS BILL

British Institute of Human Rights' (BIHR) RITES Committee (standing for real-life insights, tips, experiences and stories) is made up of Experts with a diverse range of experience of using our Human Rights Act (HRA) to achieve change for themselves, the people they work with or their loved ones. RITES Experts comprise individuals, public officials and charity workers who are using their insight and understanding to stand up for our HRA.

This submission responds to questions Experts have identified as being particularly relevant to their experience and is particularly designed to **amplify the voices of public officials**. BIHR has supported the committee in the writing of this submission, which contains many direct quotes from Experts and has been reviewed by them.

BIHR will also be submitting a separate organisational response which should be read in conjunction with this submission.

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6. The Bill removes the requirement in section 3 HRA for UK legislation to be interpreted compatibly with Convention rights "so far as possible". What impact would this have on the protection of human rights in the UK?

Our Human Rights Act says that public body staff must make decisions in a way that respects human rights, wherever possible. This guiding principle provides staff with clarity as they navigate a complex maze of laws and regulations.

Removing the obligation to uphold human rights wherever possible risks increasing legal uncertainty and reducing person-centred care.

Case study: Mersey Care NHS Trust

Mersey Care NHS Trust realised it was difficult for children to visit their relatives in secure mental health settings in Liverpool. They found the ward unwelcoming, chaotic and frightening, which was making it difficult for families to maintain relationships.

The Trust recognised the children's concerns as relating to their human right to family life (Article 8). They provided developed a specialised visiting area for families designed in consultation with children to improve their experiences of visiting their relatives.

"[T]he Human Rights Act has given us a legal, objective, decision making framework, provided by no other law or policy, to ensure rights are protected and people and staff are safe … In its current form, the law is powerful and a framework for positive change for people and families accessing Trust services."
- Sarah Dallal, an NHS worker

That public officials are under a legal obligation to uphold human rights wherever possible, and failure to do so could result in court action, helps them justify rights-respecting decisions. Removing this obligation may make it harder to resist pressure to give greater weight to other factors such as time and budgetary constraints and risk aversion. Current human rights laws give staff more courage to balance risks with rights, leading to more person-centred care.

"**Human rights are an essential thread in legally literate decision making.** Rights must be in that decision making equation, carefully weighed up in each unique situation."
- Social Work Educator, "Why Our Human Rights Act Matters for Social Work and Legal Literacy"

"As social workers, [following human rights training] **we are now challenging "do not resuscitate' orders when they are made without following the proper legal safeguards** to protect the right to life and the right to be involved in decisions affecting private life."
- Social Worker, Participant in BIHR's Delivering Compassionate Care Project

"**Recourse to the HRA, and ultimately the ECtHR, enables our members, as service providers, to speak up and challenge poor practice or provision on behalf of service users** to enable them to provide a better, HRA compliant, service. Teaching assistants, social workers and care workers are often at the front line of delivering or managing heart-breaking situations. Their ability to raise the human rights issues at play in these decisions can directly lead to important changes in policy that might otherwise be dismissed."
- UNISON, Human Rights Act Reform – Consultation Response

"[The Human Rights Act] has helped us express our concerns as being relevant as a matter of law, something concrete. It has helped, in difficult times, to give us back our social work values in a meaningful way."

- Social Work Practitioner, Participant in BIHR's Delivering Compassionate Care Project

8. Clause 5 of the Bill would prevent UK courts from applying any new positive obligations adopted by the ECtHR following enactment. It also requires the courts, in deciding whether to apply an existing positive obligation, to give "great weight to the need to avoid" various things such as requiring the police to protect the rights of criminals and undermining the ability of public authorities to make decisions regarding the allocation of their resources. Is this compatible with the UK's obligations under the Convention? What are the implications for the protection of rights in the UK?

Our Human Rights Act means public body staff must take proactive steps to uphold rights. It also means decisions can be challenged if they are made based on funding or policy, despite staff knowing the decision would put people at risk.

Employers also have positive obligations to protect public body staff at work, which was particularly relevant during Covid.

Weakening positive obligations will make it harder for staff to challenge decisions that put themselves or people they support at risk.

Case study: PPE for NHS staff

NHS Trusts had a positive obligation to protect the right to life of their staff by providing adequate PPE when they were treating patients with Covid-19. This obligation led to the inquest into the death of Mark Woolcock – an NHS worker who died of Covid – which asked whether he was appropriately protected from the virus (and ultimately concluded that he was).

“Removal of positive obligations…will make our LA and NHS bodies less accountable to both citizens and the system of justice…If public bodies are no longer required to act in these circumstances, instead adopting a reactive duty, **it is likely that a ‘he who shouts loudest’ (or who’s carers or parents shout loudest) management approach will be adopted across our pressurised public services**, leaving those unable to speak up (or have someone to speak up for them) voiceless, including children and young people.”
- Daisy Long, RITES Committee Expert and Independent Social Worker

“The positive obligations in the Human Rights Act underpin my work as a Best Interests Assessor when I complete Deprivation of Liberty Safeguards assessments with people living in care homes. My role is much more than simply checking that any restrictions on the person's liberty are lawful, legitimate and proportionate. It is also about ensuring that steps are being taken by the care home and adult social care services to support the person to regain their liberty, and to help them gain or maintain meaningful contact with their loved ones, wherever possible. If the duty on public bodies to protect people's rights changes under the Rights Removal Bill, **it will be harder for me to push the practitioners involved in someone's care to proactively support the person's rights to liberty and family life, as the law will no longer be on my side.”**
- Annie Smith, Independent Social Worker & Best Interests Assessor

9. Clause 7 of the Bill requires the courts to accept that Parliament, in legislating, considered that the appropriate balance had been struck between different policy aims and rights and to give the "greatest possible weight" to the principle that it is Parliament's role to strike such balances. In your view, does this achieve an appropriate balance between the roles of Parliament and the courts?

The principle of proportionality (i.e. when there's a genuine need to restrict a non-absolute right, decision-makers must look all the options and choose the least restrictive one) allows staff to make difficult decisions on a case-by-case basis. Limiting the application of proportionality will make it harder for staff to provide individualised support.

The Human Rights Act is also one of the few pieces of legislation that allows staff to take into account multiple people's rights at once and strike the appropriate balance. Getting rid of this risks focusing on one person's rights to the exclusion of others.

Case study: The St Aubyn Centre

The St Aubyn Centre is a Tier 4 service. Young people are admitted from all over the country, potentially separating them from their family and friends for many weeks. An ongoing problem for staff, common to many mental health in-patient services, has been managing access to mobile phones and the internet. There are additional concerns with young people around internet grooming, exploitation and inappropriate usage. Following human rights training, the service reviewed its policies and young people were given access to the internet and their mobile phones with **safety concerns managed on an individual basis.**

Case study: Ben's story

A man known as "Ben" was detained under the Mental Health Act. He was discharged from hospital with an aftercare plan with four home visits a day. Ben refused to consent to the plan as he felt it was too much. **A social worker pointed out that it would be a disproportionate interference with Ben's right to respect for family and private life, and the plan was amended,** with the hospital staff's agreement, to one visit per day. The care plan may have been allowed under mental health legislation, but just because Parliament had provided the power did not mean that all uses of it would be proportionate.

"The Human Rights Act matters to me because it puts services users at the heart of everything we do – we should always be asking the question about patient safety alongside what is in the best interests of that individual, what that person wants, is that what they need, what do they think, how would you like to be treated in a similar situation. Using a rights-respecting approach, supports practitioners to hold the Human Rights Act in mind when we deliver care and this enables patients to be safe from harm without using a blanket restrictions."
- Mental Health Nurse, "Why Our Human Rights Act Matters to a Mental Health Nurse"

When patients are safe from harm, staff are able to do their jobs, focussing on improving outcomes for the person, which improves outcomes for the staff members and the service.

"The HRA provides us with an objective legal framework for examining those decisions and ensuring that what we are doing and how we are doing it is a lawful, legitimate and proportionate restriction of Articles 8 (psychological and physical integrity) and 5 (liberty) and that we don't risk breaching people's Article 3 rights freedom from inhuman and degrading treatment. **I think consideration of the proportionality of the intervention is particularly important as it encourages us to explore other less restrictive interventions.** So, for example we can restrain someone in a compassionate, caring way by talking to them when they are well about how to do it, talking to them all the way through the restraint and debriefing with them afterwards."

- Sarah Dallal, NHS worker

10. Clause 12 would replace the current duty, in section 6 HRA, on public authorities to act compatibly with human rights unless they are required to do otherwise as a result of legislation. In the absence of the obligation to read legislation compatibly with Convention rights, what impact would clause 12 have on (a) individuals accessing public services and (b) public authorities?

Section 6 of our Human Rights Act puts human rights into action by requiring public body staff to uphold human rights wherever possible. This is even more important when services are under pressure. A mental health nurse says, "holding the Human Rights Act in mind helps us to avoid falling into…delivering [mechanical and task oriented rather than individual] care especially to those who are most vulnerable."

Clause 12 would mean public body staff are not required to uphold human rights when interpreting other laws – even if possible to do so. This would be incredibly confusing and could lead to inconsistency in the way services are delivered. Staff would struggle to know when or how they could apply human rights and could end up breaking the law without realising it.

For individuals accessing services, this means decisions could be made without any regard to their human rights.

"I had a client with learning difficulties who needed an operation. I was able to assist the doctors in thinking through all the human rights implications. I was able to show that it was not just about the right to life, but the broader impact of the procedures and the need to treat the patient in a way that respected her dignity. **A human rights approach allowed me to open up a dialogue about how to carry out this operation in a less intrusive and less distressing way**".

- Community Learning Disability Nurse

Case study: RR v SOS for Work and Pensions

In 2013, RR lived in a two-bed home with his partner, using the second bedroom for medical supplies. The Government said that he only needed one room and applied the "bedroom tax" regulations, which meant he would receive less housing benefit for the second bedroom.

These regulations were changed by the Supreme Court in 2016. They said that not catering for people who needed extra space because of their disability was an interference with their Article 8 right to family life and Article 14 right to be free from discrimination.

In 2019, RR applied for a back-payment of the housing benefit payments reduced before the regulations were changed. The Court considered whether the Government was right to apply the regulations as they were in 2013 but ultimately decided that they were not. Even though the regulations at that time said to deduct money from RR's housing benefits, decision-makers have a duty not to follow subordinate legislation that breaches human rights. RR was entitled to the full payment.

This ruling was hugely significant not just for RR but for the 130 couples with similar cases which were postponed until this case was decided.

Clause 12 would mean that subordinate legislation, like the bedroom tax regulations, can be imposed despite breaching people's human rights – **restricting the power of public authorities to make decisions that improve people's everyday lives and communities.**

"Removal of interpretation of legislation for public authorities will mean that **citizens have limited redress and opportunity to challenge determinations and decisions taken for/about them.** There will be lesser requirements by these authorities to consider individual rights in their processes and procedures."
- Daisy Long, RITES Committee Expert and Independent Social Worker

"**Balancing conflicting human rights are at the heart of social work.** Through their legal responsibilities social workers are involved in child protection (balancing the rights of the child with the right to family life), the compulsory detention of people in hospital with severe mental health problems (balancing the right to liberty with the right to safety for individuals and the community) and liberty protection safeguards (balancing the need for protection and care with the need for autonomy and self-determination)."
- Chair of the Policy, Ethics and Human Rights Committee at the British Association of Social Workers, "Guest blog: Social Work and Human Rights"

13. Do you agree that the courts should be required to take into account any relevant conduct of the victim (even if unrelated to the claim) and/or the potential impact on public services when considering damages?

Human rights apply to everyone equally. Making damages for a human rights breach dependant on "behaviour" risks creating a two-tier system with some deemed "deserving" of rights and others not. It has particularly concerning implications for people accessing services whose behaviour is deemed "challenging" and who may have difficult relationships with staff who are already working under pressure. The Rights Removal Bill allows for subjective interpretation of "relevant conduct" and the weight it should be given, which would be hard to apply fairly and even harder to challenge.

Case study: Luke's story

Luke sometimes experiences mental health problems. Luke had been restrained before and told his advocate he knew it was sometimes necessary for his safety and other's. The most recent time though he thought the restraint had been done to punish him. His arm and thumb were pushed in a way that was very painful and needed medical treatment.

Luke wanted the ward manager to reassure him this sort of restraint would not happen again. His advocate told the manager Luke's treatment might have breached Article 3 of the Human Rights Act. This led to a formal investigation. Although it found the restraint Luke had experienced was reasonable in the circumstances, this prompted staff to think more carefully about the rights of service users. **A new training programme was brought in to ensure restraint was used safely.**

"The proposals are going to start taking away rights – saying some people are more important than others…and people with learning disabilities are sometimes left at the back of the queue. **Every life has equal value.**"
-Ian Penfold, RITES Committee Expert and Parent and Carer

"It's very important that public services are held to account by the Human Rights Act and can't blame or partially blame the victim – we work with people whose behaviour can be very challenging and it's our responsibility to do that well."
- Sarah Dallal, NHS worker

14. Clause 6 of the Bill would require the court, when deciding whether certain human rights of prisoners have been breached, to give the "greatest possible weight" to the importance of reducing the risk to the public from persons given custodial sentences. What effect would this clause have on the enforcement of rights by prisoners?

This change also risks undermining universality and creating a two-tier system. Weakening rights for any of us weakens rights for all of us. Reducing the human rights of people in prison will also make it harder for staff supporting them to deliver important services.

Staff raised concerns about what this would mean for secure inpatient services and patients held under custodial provisions of the Mental Health Act. They worried the power to "discriminate with impunity" against people deemed "undeserving" could send the UK backwards, with cost being prioritised above all else. This risks a return to the type of inhuman and inadequate mental health care that has been rightfully challenged in the past.

Case study: Szuluk v UK

Edward was serving a prison sentence. Prior to his imprisonment he suffered a brain haemorrhage and underwent surgery. He needed monitoring and had to see a specialist every 6 months. The prison doctor read letters between Edward and his specialist on the orders of the governor.

Edward wanted his medical communications to remain private and took a human rights case to court. The court decided **communications between patients and doctors deserve special protection because of the risk to a patient's life if they do not feel they can be open with a doctor.** Edward only corresponded with a single doctor, so the prison could easily verify his identity. The court decided reading Edward's medical letters was a disproportionate interference with his right to correspondence. It was agreed the doctor would clearly mark the envelopes of his letters to identify them as private.

"The people I support already feel as though we don't have any rights. It is very worrying they want to change things to be about whether you have done something in your past. **It is saying for addicts for example or people have been or are in prison that they are less entitled to rights than the next person - but they are actually still human beings with rights".**

- Kerryanne Clarke, RITES Committee Expert and Team Leader at North Lanarkshire Recovery Community

20. How would repealing the Human Rights Act and replacing it with the Bill of Rights as proposed impact human rights protections in Northern Ireland, Scotland and Wales?

Our Human Rights Act applies across the UK and devolved legislation can be struck down if it does not comply with human rights. Repealing our Human Rights Act would lead to uncertainty as to how laws are made and applied across different nations in the UK.

"The UK Government's proposals for reform are out of step with political and public opinion in Scotland. **There is overwhelming support across Scotland to go forwards and not backwards on human rights**, for a strong human rights legal framework and not one that is watered down."
- A joint statement on the Rights Removal Bill with Scottish organisations

"UNISON members in Northern Ireland and across the entire UK have repeatedly and publicly supported the creation of a Bill of Rights for Northern Ireland... The basis for a Bill of Rights for Northern Ireland was to enhance and build upon ECHR rights. Instead, **these proposals would seek to undermine how such rights would apply in Northern Ireland."**
- UNISON, "Blog: Help us fight back against the government's 'Rights Removal Bill"

"From a Northern Irish perspective...we have used the Human Rights Act to challenge abuses such as the ban on blood donation and abortion. This will be a big loss to us and our ability to challenge... **We don't want a Bill of Rights that removes the Human Rights Act as a protection of rights** but a Northern Irish Bill of Rights as promised in the Belfast/Good Friday Agreement."
- Danielle Roberts, RITES Committee Expert and Senior Policy Officer at Here NI

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