BIHR's submission to the Joint Committee on Human Rights' Call for Evidence on Legislative Scrutiny: Bill of Rights Bill

This response answers the questions posed by the Joint Committee on Human Rights (JCHR) in the call for evidence closing 26 August 2022. This should be read alongside the response by our RITES Committee. More detail on the concerns raised here can be found in our briefing sent to the JCHR in July 2022.

The British Institute of Human Rights (BIHR) is a charity working across the UK to enable positive change and social justice through the practical use of our Human Rights Act (HRA). We work with people accessing services, community and advocacy groups and staff working in public bodies every day. You can read more about BIHR here.

Replacing our HRA with the Bill of Rights, which we consider to be a Rights Removal Bill, would mean the reduction of everyday human rights protections, taking the UK backwards and putting people at risk of serious harm. The Bill is unprincipled, unevidenced by the Government's own Independent Human Rights Act Review (IHRAR) and public consultation (as well as reports from the JCHR), and unworkable. It will cause uncertainty and chaos for public bodies and courts, and, most importantly, people will bear the brunt.

BIHR has concerns spanning across the Bill, and we have produced detailed briefings setting out these concerns, here.

The Bill seeks to replace people's universal rights with those gifted by government, whilst removing the legal responsibilities of government and those exercising government power to be accountable to people for their rights. In doing so, it guts the protection that the rights under the European Convention on Human Rights (ECHR) provide people in the UK, and completely fails to account for the devolved nations and will jeopardise the Good Friday Agreement.

Carlyn Miller, BIHR's Head of Policy

Everybody named in this submission has given permission for the Joint Committee on Human rights to share their contributions, including, but not limited to, through the publication of this response. Individual contact details can be obtained by emailing cmiller@bihr.org.uk.

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Relationship between the UK Courts and the European Court of Human Rights

Question 1. Clause 3 of the Bill states how courts must interpret Convention rights, including by requiring them to have “particular regard to the text of the Convention right.” What would be the implications of clause 3?

Clause 3 seeks to 'freeze' our human rights protection in time, preventing them from developing with societal and cultural norms, and, if anything, take them back to the 1950s when the ECHR came about. However, human rights are only effective if they reflect the world we live in. This is why the ECHR is a ‘living instrument’ that is intended to be interpreted to match the modern day.

Clause 3 will lead to an increase in people having to take a case to the European Court of Human Rights (ECtHR). The implications of this include but are not limited to:

- Likely to be a breach the ECHR right to an effective remedy (Article 13).
- Almost certainly result in more ECtHR decisions finding against the UK.
- Will create a to a two-tier system with human rights, justice and accountability only for those who can afford it. This is because it is difficult, expensive, and time consuming to take a case to the ECtHR,

Further, the Bill’s attempts to ignore the ECHR and ECtHR risks giving confidence to those countries who have a growing reputation for not respecting human rights. Removing the requirement at s.2 HRA for UK courts to ‘take into account’ ECtHR jurisprudence also risks excluding them from the effective and important judicial dialogue with the ECtHR on how the ECHR should apply.

Question 2. Clause 3 also provides that the courts may diverge from Strasbourg jurisprudence but may not expand protection conferred by a right unless there is no reasonable doubt that the ECtHR would adopt that interpretation. What are the implications of this approach to the interpretation of Convention rights?

Instead of the ECHR providing a minimum level of basic human rights protection for people in the UK (as is normal in any international human rights convention), the Bill does the opposite. It limits the ability of UK courts to provide more protection than what the ECtHR has previously said and allows them to provide less protection. The implications of this approach to the interpretation of Convention rights include but are not limited to:

- Will prevent human rights developing in the UK creating a ceiling not a floor.
- Risks public bodies and the Government providing less respect and protection of our human rights, compared to what the UK is signed up to under the ECHR.
- Will create confusion (including where courts are considering both a Convention right and a similar right at common law)
- Will breach the requirement to provide an effective remedy, and risks taking human rights protections in the UK backwards.

Parliamentary scrutiny of human rights

Question 4. The Government's consultation suggested that the role of Parliament in scrutinising human rights should be strengthened. Would the Bill of Rights achieve this? How could this be achieved?

The Bill places more power in the hands of the Government, taking the ability to effectively scrutinise executive action away from the courts and Parliament. There is nothing in the Bill that increases Parliament's role in scrutinising human rights. Instead, changes such as removing s.19 HRA statements, will directly reduce it.

It is entirely up to Parliament to scrutinise compliance with human rights as much as it wishes. The HRA does not limit this. If Parliament's scrutiny is to be strengthened (and we note the suggestions from IHRAR, such as increasing the role of the JCHR or producing a database of s.3 HRA judgments, appear to have been ignored so far by the Government), the solution does not lie in repealing the HRA.

Question 5. The Bill removes the requirement in section 19 HRA for Ministers to make a statement as to whether a Government bill is compatible with human rights. What impact would this have on Parliamentary scrutiny of human rights?

The HRA sought to create a culture of respect for human rights. This means that duty bearers, including the Government, are required to think about human rights in whatever they do, helping prevent breaches of human rights in the first place. The s.19 statement is part of this. It requires the Government to consider and address how any new law will impact our human rights, and allows Parliament to identify and properly scrutinise any human rights implications.

Removing s.19 HRA risks the human rights impact of laws not being properly considered until people are already victims of human rights breaches. This will lead to more breaches of human rights, more laws being challenged in UK courts and subsequently more cases going to the ECtHR. Ultimately, the Government's accountability to Parliament will be diminished.

Interpreting and applying the law compatibly with human rights

Question 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?

Question 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 3 HRA (s.3) ensures that laws are interpreted and applied in a way that respects our human rights, as far as possible. This (combined with s.6 HRA) ensures that the Government and the public bodies making decisions about our lives every day, such as social workers, doctors, teachers, and police officers, must apply other laws and policies, in a rights respecting way. This is crucial for any human rights protections to be effective in people's lives. There is little point having a law setting out our human rights, if other laws are interpreted and applied in a way that runs rough shod over them. The impact of the loss of s.3 on human rights protections include but are not limited to:

- Will lead to more laws being applied in a way that breach our human rights, even where that is because of how the law is written and was not the direct 'intention' of Parliament.
- In turn, this will lead to more declarations of incompatibility and the only option for people whose human rights have been breached to try and go to the ECtHR.
- Will diminish the accountability of public authorities to respect our human rights, as well as removing a very important tool that allows public authorities to make rights-respecting decisions.

Both public authorities and individuals accessing public services, who are often at their most vulnerable moments, will suffer as a direct result of this change.

> **"The Mental Health Act gave legal powers to put my child in a seclusion cell for weeks at a time. It gave powers to put my child in metal handcuffs, leg belts and other forms of mechanical restraints. It gave powers to transport him in a cage from one hospital to another...**
> **As a parent, the Human Rights Act gave me the legal framework to challenge decisions. This was so important for me as a parent facing the weight of professionals who seemed to have so much power over mine and my son's lives. I used the Human Rights Act to make timely and meaningful change to my own son's care and treatment."**
>
> Kirsten's Story

Question 7. Clause 40 enables the Secretary of State to make regulations to "preserve or restore" a judgment that was made in reliance on section 3. Do you agree with this approach? What implications does it have for legal certainty and the overall human rights compatibility of the statute book?

It appears that all previous interpretations of legislation which used s.3 will no longer apply unless expressly preserved by the Secretary of State. All these previous interpretations and human rights protections will be unravelled and will need to be reargued in courts. This means that how lots of laws should apply and whether our human rights should be respected, will suddenly be unclear. This legal uncertainty will create chaos which

ultimately will lead to more breaches of people's human rights and place public bodies and their staff in incredibly difficult and confusing positions.

There is no indication as to how the Government would identify which judgments used s.3 HRA (judgments are rarely clear on the specific relevance of the s.3 duty), let alone which judgments it wants to "preserve or restore" and what criteria would be used for this. This also effectively provides a minister with the extraordinary power to decide what our human rights protections should be, with no proper scrutiny or accountability.

Question 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?

There are countless examples of positive obligations protecting us, often when we are at our most vulnerable. Whether that be the ambulance service dispatching without unreasonable delay or the police properly investigating allegations of rape and sexual assault. When rights are properly protected, we don't hear about them - it just happens. Every time a child is protected from harm by a social worker or a teacher; every time a woman fleeing domestic violence is offered secure accommodation by a council; and every time a nurse challenges a DNAR order placed without consultation. The staff we work with use positive obligations every day to challenge the public bodies they work within to rethink decisions made based on funding or policy which they know, working on the ground, would put people at risk of harm. Clause 5 will jeopardise this. In short, it guts positive obligation, impacting everyone's human rights and the public bodies who are meant to protect them.

Preventing UK courts from applying any new positive obligations adopted by the ECtHR following enactment of the Bill 'freezes' our human rights protections in time. New situations arise all the time. For instance, during the Covid-19 pandemic we saw the importance of positive obligations to secure PPE for health and care staff as well as protecting clinically vulnerable people. It is reductionist and dangerous to seek to prevent our human rights applying in new situations. This will also directly lead to breaches of the UK's obligations under the ECHR, which will continue to be interpreted and applied by the ECtHR to new issues with UK courts being preventing from keeping up.

Leaving the decision to take pro-active steps to protect rights down to public bodies' operational priorities and resource allocation, along with the Government's view of who is deserving of protection, will cause confusion and breach the UK's ECHR obligations. It is not just, and people will bear the brunt. The point of human rights law is to ensure a minimum level of treatment for all people, not a 'pick and mix' system depending on what those with responsibilities choose to do. You can read our longer briefing on Clause 5 here.

Question 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?

Proportionality, including the need for courts to balance different rights and policy aims, already achieves an appropriate balance between the roles of Parliament and the courts.[1] The courts recognise that there are limits to their expertise and that some issues should be left to the elected Parliament to decide. No change is needed.

Clause 7 is the Government seeking to insulate itself. To change the proportionality balancing exercise so that courts find in its favour more often, rather than allowing courts to consider a case on its circumstances, merits and the impact on an individual. It risks a blanket approach where, if Parliament (or Government) has made a law, the courts will have to find that that law, and whatever public bodies do under that law, is a justified restriction on our human rights, without considering the people impacted.

However, when it passes a law, Parliament does not (and cannot) decide what should happen for each individual case and it is not able to consider every possible human rights breach the law could lead to. A law applied equally, does not always have equal affects. The HRA in it's current form accounts for this. Crucually, Clause 7 forgets that human rights exist to protect all of us from the abuse of state power. Proportionality is key to this – it recognises the value of each person's human rights and the need to fully weigh and balance this against considerations of the majority. This is particularly important for individuals who are already minoritised and marginalised. Clause 7 undermines this.

Enforcement of Human Rights: Litigation and remedies

Question 11. Does the system of human rights protection envisaged by the Bill ensure effective enforcement of human rights in the UK, including the right to an effective remedy (Article 13 ECHR)?

The Bill will prevent the effective enforcement of human rights in the UK. The introduction of a new permission stage (Clause 15) will create an additional barrier preventing individuals whose human rights have been breached from accessing the courts. Thus, preventing effective enforcement, accountability or remedy. Making damages contingent on an individual's past conduct and the interests of public bodies (Clause 18), will prevent individuals from accessing an effective remedy which reflects the impact of the human rights breach. The numerous provisions in the Bill which mandate, or encourage,

[1] As the IHRAR said: "[t]he UK Courts have, over the first twenty years of the HRA, developed and applied an approach that is principled and demonstrates proper consideration of their role and those of Parliament and the Government."

divergence between domestic protection of our human rights and what is required under the ECHR, will likewise prevent the effective enforcement of ECHR human rights in the UK.

This will affect everyone interacting with public bodies in the small and large decisions that affect our lives. From our work we know that an effective human rights legal framework is a clear motivator for public bodies to respect human rights. Without this everyone will suffer.

Question 12. Do you think the proposed changes to bringing proceedings and securing remedies for human rights breaches in clauses 15-18 of the Bill will dissuade individuals from using the courts to seek an effective remedy, as guaranteed by Article 13 ECHR?

The new permission stage (Clause 15) will not only "dissuade" individuals from using courts to seek any remedy but will prevent people from doing so. If people are unable to prove that they have "experienced significant disadvantage" or that there is a "wholly exceptional public interest" reason for their case to be heard – both likely impossible to show without legal support and the time, ability and money to gather evidence – they will be shut out of justice. This is particularly going to impact those who already experience barriers to justice.

There already exists numerous filtering mechanisms for human rights claims which ensure that only claims with "merit" proceed. The changes are not needed. They will only make it much harder for ordinary people to access justice.

This will have impacts beyond courts. At BIHR, we know from our work that public bodies want to respect people's human rights because they care about the people they support. The fact that there is a legal duty which can result in legal action, strengthens their position to uphold rights, especially in the face of complex and conflicting priorities. However, the proposed permission stage, by significantly reducing the likelihood that there would ever be any legal accountability, effectively undermines this.

Question 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?

The Bill creates different categories of people: those who are entitled to full remedies for human rights breaches, and those who are not. This undermines the founding principle of human rights: universality. Remedies for human rights breaches, are not 'earned', they are provided because of what has happened to an individual due to actions of the Government/public bodies. Human rights law is not about punishing people or protecting the resources of public bodies.

A court may consider conduct where it is relevant to the case: for example, if a person's conduct contributed to the impact of the rights restriction on them. But context is everything. For example, an autistic person who is regularly restrained and secluded in hospital in an inhuman manner may well fight against the staff who are pinning them down. Our current approach has the flexibility to look at each case on its facts. The Bill goes much further.

The Bill also suggests that there should be less accountability for breaching people's rights if resources are tight. When in fact, it is even more important in difficult times to make decisions that uphold people's rights, ensuring resources are used fairly. Overall, this is an attempt to weaken the Government's responsibility by restricting the courts' independence in deciding remedies.

> **What does this mean for a person in recovery? The people I support already feel as though we don't have any rights. It is very worrying that 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 and Rights in Recovery Leadership participant with lived experience of the prison system

Specific rights issues

Question 15. Clauses 8 and 20 of the Bill restrict the application of Articles 8 (right to private and family life) and 6 (right to a fair trial) in deportation cases. Do you think these provisions are compatible with the ECHR?

Clause 8 will allow, if Parliament passes the relevant laws, the Government to deport individuals regardless of the impact on that person and their family, unless the deportation would result in a qualifying family member experiencing "extreme harm". The courts would be preventing by the Bill from finding that this is incompatible with the right to private and family life (Article 8), even if it is. This is, in effect, going to extinguish the Article 8 right for people facing deportation and their families. For instance, for individuals like S[2], a family carer who used Article 8 to avoid the devastating impact his deportation would have had on his younger siblings' and mother's mental health. This goes against the universality of human rights. It will have disastrous impacts for individuals, families, and communities.

Under Clause 20, a deportation can only be prevented on Article 6 grounds if it would be a "nullification" of this right. Further, where the deportation decision is informed by assurances from another country that rights won't be breached, courts will be under a strong presumption to accept this (despite such assurances often being found to be very unreliable). Ultimately, this means that, contrary to the ECHR, some individuals will have almost no access to their right to a fair trial.

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[2] See JCWI response to the Ministry of Justice's Consultation - Human Rights Act Reform: a modern Bill of Rights, page 8.

Question 17. The Bill introduces a limited right to trial by jury. What would be the legal significance of the right?

Clause 9 does not appear to make any change as to how the right to a fair trial, and access to jury trials, already operate across the UK – something the Government has recognised.[3] The HRA respects different legal systems across the UK, including different access to trial by jury, ultimately requiring that all trials are fair. Clause 9 will simply create uncertainty. It is a distraction from how the Bill removes our human rights protections rather than strengthening them.

Question 18. The Bill strengthens protection for freedom of speech, with specific exemptions for criminal proceedings, breach of confidence, questions relating to immigration and citizenship, and national security. Do you think these changes are necessary? What would be the implications of giving certain forms of speech greater protection than other rights?

Given its wholesale attack on human rights, the Bill is not going to strengthen freedom of speech for anyone.[4] Instead it identifies situations where freedom of speech is to be weakened, such as those concerned with criminal offences or immigration cases. However, it is in these areas where freedom of speech is often most controversial, e.g. protest, that it is most needed. This is a further example of the Bill reducing human rights protections and undermining universality, rather than granting any greater protection.

Significant weight is already provided by the courts to freedom of expression, and s.12 HRA (Clause 22) provides additional protection when courts are considering relief. However, human rights need to be assessed on a case-by-case depending on the situation and the related harm to others.[5] A blanket approach risks unintended consequences, jeopardising other human rights that also need to be protected. For example, to keep others safe from harm or cases such as Norwood v UK, where the right was limited for Mark Norwood who had put up an Islamophobic poster in the window of his flat.

Question 19. Why do you think the Government has chosen to protect freedom of speech rather than freedom of expression, as guaranteed in Article 10, and what are the implications of treating the elements of Article 10 differently?

It appears that the Government has excluded elements of the right to freedom of expression, as guaranteed in Article 10. In particular, it appears that Clause 4's 'protection' excludes the freedom "to hold opinions" and to "receive ... information and ideas". It is not clear why elements of Article 10 have been excluded. It is, at best, likely to cause confusion, and, at worst, could allow the Government to insulate itself from disclosing information to the public. It is also unclear if the version of freedom of speech at Clause 4

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[3] In its Impact Assessment, the Government states that the "legislative recognition of the trial by jury is not a change to the law as it stands" Draft Bill of Rights, Impact Assessment, 19/06/22, page 15.

[4] Bill of Rights will seriously undermine freedom of expression in the UK - English Pen.

[5] As the court said In Re S (A Child) [2004] UKHL 47: courts must undertake "an intense focus on the comparative importance of the rights being claimed in the individual case, taking into account the justifications for interfering with or restricting each right".

includes ‘expressive conduct’, being behaviour designed to convey a message, such as, strikes and blockades. Again, it is concerning that the Government is seeking to prioritise only certain forms of expression, whilst limiting other forms, perhaps those which are less convenient for the Government.

The Human Rights Act and the Devolved Nations

Question 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?

The HRA and the ECHR are deeply embedded throughout the devolved settlements and the Good Friday Agreement. Yet, despite the significant constitutional changes the Bill brings, both the contents of the Bill and the process leading to the Bill completely fail to account for the impact on human rights protections in Northern Ireland, Scotland and Wales. There has been no effective consultation process with devolved nations in order to understand what the implications of the Bill will be.

What we do know, is that the Bill completely disregards the different court systems in devolved nations all of which have different structures, powers and laws to interpret which do not align with the Bill. Changes, such as the removal of s.3 HRA which is reflected in the devolved settlements, risk significant divergence in approach between jurisdictions. The Bill also sits in direct contrast to the work across all three devolved nations to progress human rights protections, not regress them, and the years of work to embed a culture of respect for human rights. For example, the work being done in Scotland’s to expand human rights protections; the work in Northern Ireland to integrate human rights into policing and in Wales where the Welsh Government formally adopted the United Nations Convention on the Rights of the Child as the basis for policy making.

Both the Scottish and Welsh Governments issued strongly worded statements outlining their concerns with the UK Government’s proposals for reform. In Northern Ireland, by undermining ECHR rights within the UK, the Bill risks jeopardising the Good Friday Agreement and the political and policing structures which ensure peace and stability. This cavalier attitude to the impact on devolved settlements risks legal chaos and confusion and people will bear the brunt. The Government must listen to the voices in devolved nations before pushing ahead with a Bill which they reject.

Question 21. Should the Government seek consent from the devolved legislatures before enacting the Bill and, if so, why?

The Bill not only repeals the HRA and changes our human rights mechanisms, it also fundamentally undermines the ECHR’s application across the UK – directly impacting the devolved settlements and devolved matters. The Scottish Government has been clear that it “believes that no changes affecting Scotland should be made without the explicit consent of the Scottish Parliament,” and the Welsh Government has clearly set out its opposition to the Bill and its view that “the process followed by the UK Government has been totally unsatisfactory, not least in relation to engagement with the Devolved Governments.”

Attempting to force through the Bill without consent from the devolved nations would be wholly unacceptable and would show a complete disregard for the devolved nations.[6]

[6] As the EU Justice Sub-Committee of the House of Lords reported on a previous Government proposal to repeal the HRA and replace it with a new Bill of Rights, "were the UK Government to proceed without … consent [from the devolved legislatures], it would be entering into uncharted constitutional territory."