

Our Human Rights Act

Proportionality: What could change and what does this mean?



HUMAN RIGHTS



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What is proportionality?

Our Human Rights Act (HRA) contains non-absolute human rights, like the Right to Liberty (Article 5) and the Right to Private and Family Life (Article 8), which can be limited, but only if the restriction is (1) allowed by law; (2) legitimate (good reason); and (3) proportionate.

Proportionality, the third part of the test, is a key part of these rights. It requires public body decision-makers to consider the individual's circumstances; choose the least restrictive option; and make a reasoned decision, including why they consider the restriction on human rights to be justifiable. There must also be a 'fair balance' between the individual's rights and the interests and rights of others (e.g. public safety). When this doesn't happen, individuals can seek justice in the courts. This is a crucial way in which our HRA ensures that human rights protections are effective and there is accountability when our rights are not respected. You can read more about proportionality [here](#).

How will the Rights Removal Bill change this?

The UK Government (which we've referred to as 'Government') in their Rights Removal Bill (which is what the new 'Bill of Rights' is since it just reduces our human rights) (at clause 7) has set out rules for how courts decide if a restriction on someone's human rights by the Government or a public body is proportionate. The Bill says that when deciding whether a law, and its application to an individual, strikes an "appropriate" balance between different human rights (of the same person or different people), or the balance between protecting human rights and other policy aims, courts must "give the greatest possible weight to the principle, that in a parliamentary democracy, decisions about how such a balance should be struck, are properly made by Parliament."

This is telling the courts to find that the law and the human rights restrictions it imposes on people, is proportionate, simply because the UK Parliament (which we refer to as 'Parliament') passed the law. This will remove any need for the public body or the Government to justify why a human right is being restricted and will prevent any independent evaluation of the proportionality question by the courts.

This goes far beyond what the public consultation told the Government. The overwhelming majority of respondents – 66% preferred no change. Only 4% (of 84 responses) supported the option this Government is pursuing.

Why this change is not needed: proportionality in the courts

Proportionality is a vital part of the way our HRA works to protect people, both inside and outside the courtroom. It is key to ensuring that people's non-absolute human rights are restricted in as minimal way as possible in a specific situation and that the state must justify any interference. Proportionality is about recognising that often rights do conflict with each other, and that in each case an individual's rights must be balanced against the interests and rights of others and/or the community. This is going to be very fact specific and depend on the individual whose rights are being breached, and the particular public body breaching them.

For instance, it was proportionality, combined with our human rights, that meant that the indefinite detention of foreign prisoners without trial or charge was unlawful; the blanket retention of innocent people's DNA profiles is no longer allowed; evictions cannot unlawfully breach social tenants' human rights; and prison officers could not read prisoners' letters from their lawyers before them and without them being present. The list goes on.

“The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity, and the balance or imbalance or benefits and disadvantages.”

Lord Mance, Kennedy v Charity Commission



The armed forces and gay service members: Smith and Grady v UK

Jeanette Smith was discharged from the Armed Forces for being a lesbian, and Graeme Grady was discharged for being a gay man. The English High Court said that it could not help because the Armed Forces' policy was not unreasonable. This was the test before our HRA was law and shows how UK law, without proportionality, was unable to protect Jeanette and Graeme from the intrusion on their private lives. However, the European Court of Human Rights found that the breach of their right to private life was not proportionate. The policy was changed, and sexuality is no longer a barrier to serving in the military.

Why this change is not needed: proportionality in decision-making

Human rights are about the decisions that are made every day by those in public power. Proportionality provides a framework for people and public bodies to have constructive discussions on respecting human rights and minimising restrictions. We hear examples of these important discussions everyday in our work, such as Ian who used the HRA to challenge blanket policies on the use of sanitary towels in an inpatient mental health setting.

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"We consider proportionality is less a 'weapon' and more a valuable tool, which is necessary to ensure that public authorities comply with Convention rights."

Joint Committee on Human Rights,
Human Rights Act Reform, para 140

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"The HRA provides us with an objective legal framework... I think consideration of the proportionality of the intervention is particularly important as it encourages us to explore other less restrictive interventions."

Sarah, NHS Worker

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There is also the self-advocate who, during the Covid-19 lockdowns, challenged the policy of her supported-living accommodation that meant she had to isolate in her bedroom for 14 days any time she went to the shops. This was a restriction of her autonomy (Article 8) and liberty (Article 5). The individual, with help, was able to argue that it was not the least restrictive option and was therefore not proportionate.

Proportionality means that ‘blanket bans’ (although they often happen in practice) are rarely allowed under our HRA. This is because individual circumstances must be considered, and a blanket ban will often not be the least restrictive option.

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"We made the human rights challenge of "lawful, proportionate, least restrictive" and the day after, that situation was overturned, and that person was able to go out."

Joe Powell, Chief Executive of All Wales People First

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Sarah's Story

For example, a local authority **only provided school transport for children with special educational needs living more than 3 miles from their school**. Sarah, a learning-disabled girl who could not travel alone, lived 2.8 miles away and was told that she should instead take two buses. An advocate supported Sarah's mum to explain to the school's head that this was a disproportionate interference with Sarah's right to private life, as Sarah's circumstances were not considered. The head teacher took the issue to the local authority, and Sarah was provided with transport.

Why this change is not needed: human rights, courts and Parliament

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"[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."

- Independent Human Rights Act Review, page 95

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Proportionality is working well in practice and respects Parliament's power to make laws. There is nothing in our HRA which allows courts to ignore or change the laws that Parliament makes. The courts recognise that there are limits to their expertise and that some issues should be left to the elected Parliament (including devolved legislatures) to decide. This means that how much the courts question the justification for a rights-restricting law, policy, decision, or other 'measure', varies depending on the context and facts of the case, including:

The type of issues – e.g. the courts' review will be more limited where a case concerns foreign policy or national security; economic or social policy/strategy (e.g. welfare benefits, housing and immigration); moral and political judgments, and financial matters.

The type of restriction – the courts will apply a less intense review to laws which restrict our human rights compared to when they consider decisions or policies of public bodies and the Government.

Whether Parliament has previously considered (or is expected to consider) the human rights issues.

But it is important to remember that these factors by themselves cannot determine the courts' decision on proportionality. Each case's circumstances, including how severe the breach of our human rights might be and the impact on the individual, must be considered.

What could the Rights Removal Bill mean in practice?

The Rights Removal Bill will undermine the importance of proportionality in decision-making and will reduce the protection of human rights in the UK. Rights protection in the UK will also be less than what the European Convention on Human Rights requires, meaning that for many people the only option will be to go to the human rights court in Strasbourg. But for most people any legal action, let alone going all the way to Strasbourg, just is not possible: it is expensive, takes a very long time, and even if they do 'win' in Strasbourg for most people it will be too late to rectify the damage to their lives the breach of their human rights has caused.

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The Bill is the Government changing the proportionality balancing exercise so that courts find in its favour more often and are prevented from making up their own minds based on the impact on individuals. But, proportionality should be about the impact of a particular decision on a particular individual. The Bill introduces 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. This is the Government wanting to 'check its own homework' and insulate itself and public bodies from any accountability for breaching our human rights – the courts have rejected this before.

This will also create **confusion and uncertainty for courts and public bodies.** 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.

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"The notion of proportionality is surely to ensure individual cases are considered on their merits, balancing against other wider considerations. Any guidance to the courts could limit the judge's ability to consider individual needs. They are already adept at doing this without Gov guidance"

[A response from BIHR's HRA Reform Survey, p. 60](#)

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"If too much emphasis is placed on the assessment of proportionality or public interest by the legislature, the court may be inhibited in its ability to carry out the proportionality assessment itself. This risks Parliament and the Executive trespassing on the Court's constitutional function, thereby damaging the separation of powers. It also risks victims being denied their rights without justification."

[Joint Committee on Human Rights, Human Rights Act Reform, para. 145](#)

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Human rights exist to protect all of us from the abuse of state power. Proportionality 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. The Bill risks us losing this.

“it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not.”
Baroness Hale, Ghaidan v Godin-Mendoza

The possible impact in practice – disproportionate care plans

Ben (we've made up his name) 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 Rights Removal Bill risks public body staff, like the social worker and hospital staff, no longer being required (or able) to take an individualised approach to people's rights. The care plan may have been allowed under mental health legislation, but just because the Parliament had provided the power did not mean that all uses of it would be proportionate.

The possible impact in the courts – Mathieson v Secretary of State

Cameron Mathieson was a child with severe disabilities. Under the Social Security (Disability Living Allowance) Regulations 1991, Cameron's family were denied Disability Living Allowance (DLA) after Cameron had been in hospital for 84 days. The Government argued that this cut-off was because the needs of children in hospital are met by the NHS.

The Supreme Court was careful to respect the role of Parliament and the Government in the “drawing of lines” (rules), but it also looked at Cameron’s individual case. There was substantial evidence that Cameron’s parents (as well as most parents of disabled children in hospital) still had a significant caring role. Given this, the decision to end DLA for Cameron could not be justified and Cameron’s right to property combined with his right to be free from discrimination had been breached. The 84-day rule was removed 11 months later for everybody under 18.

If the Rights Removal Bill had been law, it is possible that the Court would have been unable to weigh up the different factors in Cameron’s case. Instead, it would have had to find the decision to be proportionate, simply because the Regulations were the law, and the benefits of this case for the families of severely disabled children would have been lost.

What actions can you take?

We now have the Rights Removal Bill which will implement these changes (and many others we are very concerned about). It is really important that everyone continues to raise awareness of the risks to our human rights from the Bill and stand up for our human rights!

We especially need to hear the voices of people accessing services who would be impacted by the scrapping of our Human Rights Act and the new Rights Removal Bill, as well as public officials themselves who use our Human Rights Act to create positive change every day. Sadly, this lived experience is rarely part of the debate in the UK, conveniently ignored by this government, and yet these are real life stories of how our Human Rights Act is working for people.



Get involved!

[Write to your MP](#) to raise your concerns and show how much you care about human rights (you can use our customisable template letters!)

Come along to our [HRA Reform events](#) to [upskill](#) and let us know what the HRA means to you.

Follow us on [Twitter](#) to keep up with what BIHR are doing to raise awareness and protect our HRA.

Write us a blog about [Why Our Human Rights Act Matters](#) to you, email hwalden@bihr.org.uk.

Find out more about what the reform could mean on our [HRA Reform hub](#). On this hub we will post all of our up to date resources and campaigns.

Sign up to our enews.