The British Institute of Human Rights
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STANDING FIRM ON OUR HUMAN RIGHTS ACT AND REJECTING THE NEW RIGHTS REMOVAL BILL – BRIEFING FOR THE JOINT COMMITTEE ON HUMAN RIGHTS

18th July 2022

Standing firm on our Human Rights Act and rejecting the new Rights Removal Bill – Briefing for the Joint Committee on Human Rights

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> "A new Bill of Rights is not needed because it will make it harder for the ordinary person to make public bodies and the government accountable [and] make it harder to bring a case to court. It will ultimately give government the power to decide what human rights they will allow us to have." - **Respondent to BIHR's Plain Language survey.**

At the British Institute of Human Rights (BIHR), we see the value of the Human Rights Act (HRA) every day in our work with people accessing services, community and advocacy groups and staff working in public services. Together we use our HRA to secure social justice in small places, close to home. We all want to live safe and well, knowing that the authorities will support our rights; our Human Rights Act helps make this happen. Without it, and **with the Rights Removal Bill in its place, we would see the reduction of everyday human rights protections, taking the UK backwards and putting people at risk of serious harm**.

The Rights Removal Bill does not create new rights or strengthen existing protections; it only removes access to and weakens the ones we already have. **It 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. The Bill is **unprincipled, unevidenced** by the Government's own Independent Human Rights Act Review and public consultation (as well as reports from the Joint Committee on Human Rights), and **unworkable**. It will cause **uncertainty and chaos** for public bodies and courts, and, most importantly, people will bear the brunt.

The Bill completely fails to account for devolution, disregarding the different court systems in Scotland, Northern Ireland and Wales, all of which have different structures, powers & laws to interpret which do not align with the 'Bill of Rights'. The Bill ignores devolved voices; both the Scottish and Welsh Governments issued strongly worded statements outlining their concerns with the UK Government's proposals for reform yet they push ahead with them anyway.

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 Bill **will have a significant impact on everyone who relies on, or may rely on, their human rights – i.e. everyone in the UK**. However, despite these significant constitutional changes, the Government has failed to engage in any effective, accessible and legitimate process of consultation – instead preferring to exclude voices, ignore evidence and avoid scrutiny. The Government's public consultation was inaccessible and excluded those most likely to be impacted by the changes, such as people with learning disabilities. The Government then either completely disregarded or ignored most responses it did receive. Whilst within the parliamentary process, the Government has consistently sought to avoid any proper scrutiny of the Bill. See our briefing on our concerns here.

Human rights are universal, they belong to all of us, this is at the heart of our Human Rights Act, which has supported people across the UK, both in and outside the courtrooms, ensuring the government and those with public power are accountable. The Rights Removal Bill, on the other hand, belongs to the UK Government – and it gives power to them by taking it away from people.

Contents

This briefing has 3 parts, all of which we hope can support the Joint Committee of Human Rights work to protect our Human Rights Act.

The Human Rights Act in practice: the positive impact of our Human Rights Act

Drawing on BIHR's work, this section provides practical examples of how the Human Rights Act benefits people across the UK to live with dignity and respect. Please use these examples when speaking up to protect our HRA. If you are looking for a specific example linked to a particular consequence of the Rights Removal Bill please do not hesitate to get in touch with our Head of Policy, Carlyn Miller on cmiller@bihr.org.uk. We have many more everyday examples ready to share and would welcome a discussion.

At the British Institute of Human Rights (BIHR), we see the value of the Human Rights Act (HRA) every day in our work with people accessing services, community and advocacy groups and staff working in public services. The HRA is, in its current form, an incredibly powerful tool which has the power to create a culture of respect for human rights in the UK. Without the HRA, and with the Rights Removal Bill in its place, we would see the reduction of everyday human rights protections, taking the UK backwards and putting people at risk of serious harm.

Our Human Rights Act makes sure that public bodies apply other UK laws in a way the respects our Human Rights

Kirsten used our HRA to challenge the restrictive practices her autistic son was subjected to in mental health hospitals under the Mental Health Act.

The Government's Rights Removal Bill would erase Section 3 of the HRA, thereby removing the legal duty for human rights to be respected when staff apply other laws.

Our Human Rights Act ensures the authorities step in and protect people's rights, including the risk of serious harm or loss of life (positive obligations)

Bryn's advocate used our HRA to challenge decisions about his physical health which risked his right to life (protected by Article 2 in the HRA) and his right to be free from discrimination (protected by Article 14 in the HRA).

The Government's Rights Removal Bill would limit positive obligations on public bodies and Government to take proactive action to protect people's rights where they are at risk.

Our Human Rights Act helps staff in public bodies to positively support people

Sarah, an NHS worker, says our HRA has given her a legal, objective decision-making framework to ensure rights are protected and people and staff are safe.

A housing association used our HRA to reduce violent incidents in residential support for people with complex mental health needs.

Laura used the HRA to raise concerns about blanket restrictive practices in a nursing home.

The Rights Removal Bill will complicate decision-making processes for public authorities and reduce the duty on them to act compatibly with our human rights.

The right to private and family life, home and correspondence (Article 8, HRA): the everyday impact beyond immigration and asylum

Our HRA was used to advocate for Alfie, a gay disabled man, to be supported to go to a gay pub, just as heterosexual services users were supported to attend pubs of their choice.

Tim & Sylvia, a couple with learning disabilities, used our HRA to challenge social services' decision to install CCTV in their bedroom at night.

Yolande raised her and her children's right to respect for family life when they were fleeing domestic violence, after social services decided to place the children in foster care.

The Rights Removal Bill seeks to curtail the protections provided by the right to private and family life, under the guise of restricting immigration.

Other stories of practical change the HRA has supported:

At BIHR, we hear real stories of people, groups and frontline workers using the Human Rights Act every day. Click below for a wealth of perspectives on why the Human Rights Act matters...

- To the rule of law
- For ending violence against women and girls
- To a mental health nurse
- To members of the armed forces and their loved ones
- To children
- To LGBTQ+ people in Northern Ireland
- To people with dementia
- In advocacy
- To Dates-n-Mates members (learning disability relationships group)
- In social work
- To people in Scotland
- To a Christian
- To the Jewish community
- To an ex-patient on a CAMHS ward
- To a parent of a child with a disability

BIHR's key concerns with the Rights Removal Bill alongside cases and real-life stories which explain the impact these changes will have on people

Below we outline some of the things we are particularly worried about within the Rights Removal Bill, alongside links to more detail, cases and real-life stories which explain the impact these changes will have on people.

2.1. Applying laws in a way that respects people's human rights is part of a strong democracy: Parliament cannot let Government remove the section 3 duty

Our current protections are worth securing

We all want to be able to live well, knowing that authorities will make decisions that support our rights; our Human Rights Act helps make this happen.

A key legal duty (Section 3[1]) in our Human Rights Act means that the Government and the public bodies making decisions about our lives, such as social workers, doctors, teachers, and police officers, must apply other laws and policies in a way that upholds our rights so far as possible. When this doesn't happen, individuals can seek justice in the courts. Whilst courts can never overrule an Act of Parliament, where possible they can apply other laws compatibly with human rights. This is a key form of accountability that makes us all stronger in a healthy democracy.

[1] Human Rights Act 1998, Section 3(1): "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights"

Kirsten's story, a parent who advocated for improved practice and protection of rights in mental health settings

Kirsten is a single parent of an autistic son who, from the ages of 14-18, was held in mental health hospitals under the Mental Health Act. He was subjected to restrictive practices, including mechanical restraint, such as handcuffs, leg belts, and being transported in a cage, and long periods in seclusion.

It was the duty to interpret other legislation compatibly with our human rights, combined with the duty on public bodies to act compatibly with human rights and the human right of her son to be free from inhuman and degrading treatment, that meant Kirsten could challenge how her son was treated and secure his release.

The Government's power grab

Kirsten: "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."

The Government's Rights Removal Bill will remove the legal protections we all have by removing the duty on public decision-makers to apply laws in a way that supports our human rights, and preventing judges from reviewing this when people seek justice.

The Government's new Bill of Rights Bill, better called a Rights Removal Bill, will remove the duty to interpret laws to support people's human rights and scrap section 3 of our Human Rights Act.[2]

The Government has stated it wants to scrap the section 3 duty to make sure that "the balance between our domestic institutions is right, by repealing section 3 to ensure that UK courts can no longer alter legislation contrary to its ordinary meaning and the overall purpose of the law". **This a deliberate misrepresentation of how our Human Rights Act currently works and will result in more power for the executive (who are the ones with legal responsibilities under human rights law), not parliament, and at the expense of people being able to live with dignity and respect.**

Unsupported by the public and the Government's independent experts

This goes so far beyond what the public consultation told the Government: 79% said there should be no change to the section 3 duty to interpret other laws to uphold people's human rights. Only 4% supported scrapping the duty. The Independent Human Rights Act Review (IHRAR) set up by the Government also found no evidence that the courts are not using section 3 properly: "**there is no substantive case for its repeal or amendment [of section 3]** … any damaging perceptions as to the operation of section 3 are best dispelled by increased data as to its usage". (Chapter 5 p181)

Ian Penfold, RITES Committee Expert who has worked with BIHR, NHS and CQC as a Lived Experience Expert and a parent and carer for his wife: "Once this Bill of Rights becomes law, public authorities providing health and care services will only have to consider our rights rather than comply with human rights which may mean that our right to family life will be diminished making it much harder for us to be involved with our precious son and his life."

[2] Bill of Rights Bill Clause 1(2)(b): that courts are no longer required to read and give effect to legislation, so far as possible, in a way which is compatible with the Convention rights (see paragraph 2 of Schedule 5, which repeals section 3 of the Human Rights Act 1998);

Misunderstands the current law

Under our Human Rights Act, courts can not alter the law. When a court thinks that a law should be relooked at, to bring it in line with human rights, it is up to Parliament to choose to do that (it is different in the devolved nations). The courts cannot fundamentally change an Act of Parliament and must always respect what Parliament 'intended' when it made the law. This ensures the separation of powers and the sovereignty of Parliament.

In line with the role of the courts to look at the unlawfulness of actions and decisions, they do have a crucial role in ensuring other laws (often laws which were written a long time ago) are applied in a way which respects everyone's human rights. This is fundamental to ensuring the legal protection of people's human rights is "living", applied by the courts in a way reflective of the times. **Imagine a world where the courts are not able to interpret legislation from 30 years ago compatibly with how we live now and with our human rights as the lens through which to do that. This is the world envisaged by the Government's new Bill of Rights.**

This is also especially important when the wording of a law isn't clear or when the chosen wording excludes certain people or groups, where that was not the intention. Whether that be, ensuring that an error in paperwork did not prevent a consenting deceased man's sperm being stored and used by his widow, providing employment law whistle-blower protections to judges, or giving mental health inpatients a say in who their designated 'nearest relative' should be.

Luke's story: Ensuring protections for SEND children

Luke (we've made up his name) is autistic and has anxiety. His school did not meet his needs and he was excluded for behaving aggressively. However, the Equality Act 2010 (Disability) Regulations 2010 excluded protection people with a "tendency to physical abuse" from the law's (the Equality Act's) protection against discrimination.

The court (in C&C v Governing Body of a School 2018) used section 3 of our Human Rights Act to interpret the regulation so that it did not apply to children in education who have a recognised condition that makes them more likely to be physically abusive. This filled a gap in legal protection and ensured non-discrimination: schools now cannot exclude a disabled pupil without first providing reasonable support to try and manage their behaviour – benefitting Luke and other children.

The impact on people and removing their control

The section 3 duty is central to the protection of human rights in people's everyday life. Section 3 ensures that when officials are making decisions about a person's care, education, detention, housing, or health recovery, that human rights are the lens through which other legislation, like mental health or child protection law, is applied, as can be seen in Kirsten's story above. This improves our interactions with public bodies and lessens the need for legal challenge in the courts.

Catriona Moore, **Policy Manager at Independent Provider of Special Education Advice**: "Any move to weaken the Human Rights Act will make it harder for children and young people with SEND to hold public authorities accountable, which undermines their rights and the protective environment the Act aims to foster.

Removing section 3 removes this duty and will have serious consequences affecting all of us every day, especially at our most vulnerable moments when we have to rely on the support or actions of the State.

If Parliament scraps the Section 3 duty, this will do nothing to improve rights protections for people and everything to increase the power of the Government and reduce their accountability for how they treat people interacting with public services.

Creating uncertainty and confusion, and taking us backwards

Once a court determines that Section 3 should be used to interpret a law in a particular way, this provides legal clarity. Laws then continue to be applied by courts and by public bodies in that human rights respecting way. However, the Government's Rights Removal Bill seeks to remove this legal certainty and positive practice. **The Bill means courts will no longer be able to (or required to) interpret laws in a way that respects human rights**. Worse still, Clause 40 means laws that have previously been applied in a way that respects our human rights by courts and public bodies using section 3 HRA, will no longer be applied in that way. (The only exception is if Ministers decide to 'save' a human rights compatible court interpretation of a law under Clause 40).

This means lots of laws which could be human rights respecting and have been applied in a human rights respecting way by public bodies, suddenly will be applied in a way that breaches our human rights. **This will lead to more breaches of people's human rights, placing public bodies and their staff in an incredibly difficult and confusing position**. From our work at BIHR, we know that public body staff want to respect human rights in their decision making when they apply other laws, but this is rarely common practice unless they are able to call on the section 3 duty. Clarity is crucial for officials, knowing what laws to apply and how to interpret them for the situation they are facing.

The Government's Rights Removal Bill jeopardises the ability of public body staff to make human rights-respecting decisions every day. Laws will suddenly have to be interpreted in different and unknown ways, creating chaos. It will leave people who rely on services like health, education, housing in a hugely uncertain position, with less control over their lives, removing the ability to practically challenge decisions that put their rights at risk. This takes us backwards.

Click here to jump to our questions for the Justice Secretary on this issue.

2.2. Safeguarding people's human rights is part of a strong democracy: Parliament cannot let Government remove positive obligations to protect people

Our current protections are worth securing

We all want to be able to live well, knowing that authorities will take action to protect us when we're at risk of being harmed; our Human Rights Act helps make this happen.

A key way the rights in our Human Rights Act work is through the use of positive obligations. This means that the Government and the public bodies involved in our lives, such as social workers, doctors, teachers, and police officers, must take reasonable steps to protect us when we're at risk of serious harm or loss of life. This includes protecting victims of crime, people detained in hospitals, and children at risk of abuse. When the authorities don't act, individuals can hold them to account for failure to protect. This is a key form of accountability that makes us all stronger in a healthy democracy.

Bryn's story: Challenging discriminatory treatment decisions towards a learning-disabled man which put his right to life at risk

Bryn was 60 years old and lived in supported living. He had learning disabilities, epilepsy, was non-communicative and blind. Staff at the home became concerned that Bryn had a heart condition and called a doctor from the local NHS surgery who came to visit. Bryn had an Independent Mental Capacity Advocate who was supporting him. The advocate attended a multi-disciplinary meeting to represent Bryn. At this meeting the GP stated that he would not be arranging a heart scan (i.e. refusing to do an "act") for Bryn as 'he has a learning disability and no quality of life'.

Bryn's advocate challenged this by raising Bryn's right to life (protected by Article 2 in the Human Rights Act) and his right to be free from discrimination (protected by Article 14 in the Human Rights Act). The advocate asked the doctor if he would arrange a heart scan if anyone else in the room was in this situation, and the GP said yes, he would and agreed to arrange a scan. Sadly, Bryn passed away as a result of his heart condition before any treatment could take place.

The Rights Removal Bill aims to allow more public bodies to refuse to act to safeguard people's lives, safety and human rights. This is very dangerous and increases the likelihood of more awful stories like Bryn's occurring.

The Government's power grab

The Government's Rights Removal Bill seeks to remove future positive obligations to protect people, and unravel previous protections, reducing the responsibility of Government and public bodies to take even small measures to protect people's rights, including the right to life.

The Government's new bill of rights bill, better called a Rights Removal Bill, will remove positive obligations: the duty to actively safeguard people's human rights (Clause 5).[3] The Government have stated the Bill "will ensure that courts are unable to adopt new interpretations that impose positive obligations on public authorities. It will also restrict the application of existing obligations".[4]

Unravelling previous positive obligations will make the duty to protect us depend on how those with duties (Government and public bodies) decide to allocate their resources and whether protecting a person would be too burdensome. This is not just; the point of any 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.

[3] Bill of Rights Bill Clause 5: Positive Obligations.
[4] Ministry of Justice Human Rights Act Reform: A Modern Bill of Rights Consultation Response (June 2022)

Unsupported by the public and the Government's independent experts

This is in no way supported by the what the public consultation told the Government: **all the evidence published supported keeping positive obligations. 1,596 responses** noted **no change is required to the current framework. 1,265 responses** noted **positive obligations provide protection for vulnerable people. 874 responses** noted **this is not a genuine issue**. The attempted removal of positive obligations to protect people is one of many examples of how the Government's proposals depart so drastically from the Independent Human Rights Act Review (IHRAR) they set up. The IHRAR found that the Human Rights Act was working well.

Daisy Long, RITES Committee Expert and Independent Social Worker and Director of a practice consultancy organisation: "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' management approach will be adopted across our pressurised public services, leaving those unable to speak up voiceless, including children and young people."

Misunderstands the current law

Under the Human Rights Act, **positive obligations**[5] **are quite literally about stepping in and saving lives and preventing serious harm to people**. The test for action on the ground is to take reasonable steps to protect people from a known and immediate risk (or one the public body ought to have reasonably known). Positive obligations are the foundation of safeguarding people.

Importantly, what counts as a positive obligation under the Rights Removal Bill is a far lower bar than the system we currently have. The Government goes far wider than the reasonable steps test: it means "an obligation to do any act". This could mean, for example the positive obligation of a social worker to call a child's teacher to follow up on safeguarding concerns raised by a neighbour, or of a mental health nurse to ensure safety protocols when someone who poses a risk to their own life wants to take home leave.

In making its points about positive obligations the Government fails time and again to highlight the importance of these protections for people in everyday life. Positive obligations are the legal protection which enables victims of crime to hold authorities to account for failing to protect them, and which supports hospital staff to take action to protect the lives of patients at risk of suicide.

[5] Positive obligations come with the European Convention on Human Rights and apply through the Human Rights Act. Seeking to change international obligations through via law is highly problematic and likely to lead to cases in the European Court of Human Rights.

Positive obligations are also the means by which investigations occur when sadly things have gone wrong, and to ensure that lessons are learnt for the future. For example, Angela has spoken about how the right to life meant that there was a full inquest after her son, Adrian, committed suicide a couple of weeks after his discharge from an inpatient mental health unit. Adrian's inquest concluded that his death had been contributed to by a failure to implement and communicate an effective support plan following discharge from hospital. Improvements were then made to the procedures and systems of the health services to prevent future deaths.

> Angela: "We're now helping lots of people and preventing unnecessary deaths, and thankfully, we were able to do that because of applying Article 2."

Amrit's story: Investigating unexplained bruising on a boy living in a care home

Amrit is a young man who was placed in residential care on a short-term basis due to mental health problems. During a visit, his parents noticed bruising on his body which no one seemed to be able to explain. They raised the issue with the managers at the home, but their concerns were dismissed. They were also told that they were no longer permitted to visit Amrit.

After participating in a BIHR training session, the parents approached the care home once again and invoked Amrit's right not to be treated in an inhuman and degrading way (Article 3) and their own right to respect for family life (Article 8). As a result, the ban on their visits was revoked and an investigation was conducted into the bruising on their son's body.

The impact on people and removing their safety

Ultimately, positive obligations are about protecting people, often at our most vulnerable moments, such as when we're victims of crime or being abused, when we have to rely on the support or actions of the State. **Removing positive obligations removes the system for authorities to protect people and will have serious consequences affecting all of us every day.**

> **The End Violence Against Women Coalition**: "The Human Rights Act is a critical tool in upholding women's rights and challenging failures by the State in how it responds to and prevents violence against women and girls."

The Government's own Impact Assessment acknowledges the changes they are making "could result in fewer protections for individuals where potential future positive obligations have afforded additional protections".[6]

If Parliament scraps positive obligations on Government and public bodies to protect people from harm, including risks to life, this will reduce rights protections and reduce their accountability for how they treat people interacting with public services.

Creating uncertainty and confusion, and taking us backwards

This Bill prevents any development of future positive obligations to protect rights.[5] At BIHR, during the pandemic we saw the importance of positive obligations to secure PPE for health and care staff as well as protecting the lives of clinically vulnerable people. Importantly, the Bill also means that when courts look at whether a previously established positive obligation should continue to apply (such as the duty to investigate, established by the victims [7] of black-cab rapist John Warboys) these can now be reduced or even removed, depending on whether the body responsibly chooses to allocate its resources elsewhere. **Only those with public power benefit from the Bill.**

The Government's Impact Assessment suggests that these changes will allow "public authorities to feel more confident about how they exercise their discretion over operational decision-making."[8] However, we know that positive obligations on public authorities are the foundation of safeguarding. **At BIHR, we work with public officials who are using positive obligations every day to make rights-respecting decisions that keep people safe.**

Sarah an NHS worker: "In short, the 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."

Staff in health, social care, housing and more frequently share how the positive obligations within the Human Rights Act framework mean they can challenge the public bodies they work within to rethink decisions made on the basis of funding or policy which they know, working on the ground, would put people at risk of harm.

[6] Impact Assessment on Draft Bill of Rights Bill; para 260
[7] Commissioner of Police of the Metropolis v DSD [2018] UKSC 11: Two women survivors relied on our HRA and the positive obligation to protect against inhuman and degrading torture, to hold the police to account for failing to protect them from the rapist John Worboys.
[8] Impact Assessment on Draft Bill of Rights Bill; para 75

Without positive obligations public officials will lose their compass to navigate the complex maze of other laws, policies, and guidance for decision-making to keep people safe.

Balbir's story: Securing adequate housing for a disabled woman to live with dignity

Balbir lived in a small council house with her two teenage sons. She suffered a major stroke, leaving her with severe physical disabilities. She was no longer able to use the stairs to reach her bedroom or bathroom. The local authority refused to build Balbir a downstairs bathroom and toilet. They said Balbir could strip-wash in the kitchen and use the commode in her living room, which had also become her bedroom. As Balbir had IBS, she had to rely on carers to come and empty the commode. Also, as a Muslim, she relied on her carers to bring her a bowl to perform ablution so she could pray, Balbir felt embarrassed and distressed. Balbir lived like this for over a year.

Balbir was helped by a local advocacy service to write a letter to the local authority explaining that her circumstances were humiliating and in danger of breaching the right to be free from degrading treatment (Article 3). As a result, the local authority decided to carry out an assessment of Balbir's needs. This recommended that an accessible downstairs bathroom with a walk-in shower should be built, and the local authority made sure this happened.

The Bill would have meant that the local authority would have been able to argue that it could, in effect, disregard its positive duty to act to assess and take steps to meet Balbir's needs, due to other priorities or limits to its financial resources. Balbir may never have got the help she needed.

The Government's proposed removal of positive obligations on themselves and public bodies to protect people will lead to more human rights breaches, risking people's lives and safety. This takes us backwards.

Click here to jump to our questions for the Justice Secretary on this issue.

2.3. Accessing justice: Parliament cannot let Government reduce ordinary people's access to justice when their rights have been risked

Our current protections are worth securing

We all want to live in a country where ordinary people can seek justice in the courts when authorities have overstepped and put their rights at risk; our Human Rights Act supports this, enabling people to seek a judicial ruling on their human rights cases.

Legal accountability is a key part of our Human Rights Act. It means that the Government and the public bodies making decisions about our lives, such as social workers, doctors, teachers, and police officers, need to uphold our human rights as a matter of law, not simply as good practice. When ordinary people believe their rights have been risked, they can ask a court to review the situation. Where all the usual tests for bringing a legal case are met, the courts will then look at the situation, and decide if human rights have or have not been breached. This is a key form of accountability and fairness that makes us all stronger in a healthy democracy.

The Government's power grab

The Government's Rights Removal Bill creates a new permission stage, singling out human rights cases, by putting an additional barrier in the way of people seeking justice when their human rights may have been risked by the Government or public bodies exercising government power.

The Government's Bill of Rights Bill, better called a Rights Removal Bill, will introduce a permission stage to "ensure that trivial claims do not undermine public confidence in human rights more broadly". It "will place responsibility on the claimant to demonstrate that they have suffered a significant disadvantage before a human rights claim can be heard in court. If a claimant cannot demonstrate that they have suffered a significant disadvantage, a claim could still proceed if a court considers there is a highly compelling reason to do so on the grounds of exceptional public interest. The permission stage for judicial review will only apply in England and Wales." [9]

[9] See Government's Response to the Bill of Rights consultation para 53-56; Bill of Rights Bill: Clause 15 in full.

There are already criteria for bringing a legal case against the Government or public body, and the Human Rights Act already requires the person to show they meet the specific legal criteria of being a "victim" of a human rights breach. The Government is deliberately misrepresenting the current law and seeking to make it harder for ordinary people to access justice and hold them to account. **There is no need for an additional permission stage, it seeks only to reduce governmental accountability and seize power from the individual into the hands of the state.**

Unsupported by the public and the Government's independent experts

> **Ian Penfold, RITES Committee Expert who has worked with BIHR, NHS and CQC as a Lived Experience Expert and a parent and carer for his wife**: "The impact of this Bill, for anyone receiving State funded health or care services, will be challenging and with care services and budgets so stretched, pressure on commissioners to save money will ultimately mean lower standards of care, less choice and without the HRA, fewer rights to challenge".

This goes so far beyond what the public consultation told the Government. The Government's response shows that the **overwhelming majority of respondents, 90%, said there should not be a significant disadvantage criteria in a new bill of rights.** In addition, **24.5% specifically stated that "there is no evidence that the current system is being abused or that spurious claimed are being brought"**. And **21.5% also specifically stated that there is "already a permission state for judicial review cases"** (a primary type of legal case for human rights issues). Only 10% of respondents supported adding a significant disadvantage criteria. When the Government set up the Independent Human Rights Act Review (IHRAR) they did not ask them to investigate the use of proportionality, further calling the evidence base for change into question.

Misunderstands the current law

Currently, the Human Rights Act already requires any person who wants to bring a legal case against the Government or public body to show that they have been the victim of a human rights breach (section 7 of the Human Rights Act). This cross-refers to Article 34 of the European Convention on Human Rights, which the Government claims the UK will continue to part of. This means that if a case is not actually human rights related or it does not have "legal merits", then the courts will not let it progress to a full case. This is in addition to general criteria to bring a legal case against the Government or public body, and the stages where they can argue the case should not proceed.

The impact on people and removing their control

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 this is a legal duty which can result in legal action if it is not met, strengthens their position to uphold rights, especially in the face of lots of complex and conflicting priorities. However, **this new permission stage effectively undermines the legal requirement to uphold human rights by significantly reducing the likelihood that there would ever be any legal accountability and therefore the need to comply with the law.**

Human rights are not about demonstrating a hierarchy of harm, and only providing accountability for what the Government considers to be the most serious breaches. Human rights are universal - they are for everyone and matter for everyone. It should not matter what the impact is on a particular individual of a breach of their human rights or if there is a 'wholly exceptional public interest' - **it is important simply because that individual's human rights have been breached.**

Susan's story: Securing justice for a learning-disabled woman who suffered inhumane treatment in hospital

Susan is an older woman with severe learning disabilities. After a fall, she was taken into hospital and she took her doll with her, which she loved as though it was her own child. However, the hospital team failed to understand Susan's specific needs, and she was not assisted with washing. Susan was punished when she did not do what staff asked and her doll was found on the floor with its arm severed and a chunk of its hair missing. When her family pointed out how distressed they and Susan were by this treatment, the hospital offered to replace the doll, but denied any other wrongdoing.

It was only when Susan's family sought legal advice that the allegations of inhumane and degrading treatment (prohibited by Article 3) were investigated. Thanks to our Human Rights Act, Susan was provided with the resources to enable her to recover from the cruelty that she suffered in hospital.

Introducing a test that means courts can only step in when a human rights breach has caused 'significant disadvantage' risks serious injustice. We are all different and what might seem trivial to some, such as Susan's doll being damaged, could be life-changing to somebody else. Our Human Rights Act makes sure that each of us is valued as an individual, recognising that officials should place the person at the centre of decision-making. A permission stage risks us losing this.

If Parliament allows additional criteria to bring legal cases on human rights, this will do nothing to improve rights protections[6] for people and everything to increase the power of the Government and reduce their accountability for how they treat people interacting with public services.

Creating uncertainty and confusion, and taking us backwards

It is ordinary people who bring legal cases in the courts[5] when the Government or public bodies have risked their human rights. Sometimes these cases have wider implications for the public, and sometimes the impact may only be for the person bringing the case, though ensuring accountability helps ensure the same thing does not happen again. Either way, addressing the human rights breach for the person bringing the case is vital. Whether that be parents of a disabled child[7] trying to get the financial support they need, or orthodox Jews and Muslims trying to hold funerals in accordance with their beliefs. Introducing additional criteria for bringing a human rights legal case will make it harder for ordinary people to access justice and hold the Government and public bodies to account.

Adding a further permission stage (on top of the current criteria) is also likely to mean more cases having to go to the European Court of Human Rights. This is because one of the rights in the ECHR (which the Government have committed to remaining within) is the right to an effective remedy (Article 13). This means that when a person's rights have been breached, they should be able to take action to hold the Government or public body to account. The additional permission stage in the Rights Removal Bill will make holding the state to account in the UK harder and is therefore likely to lead to more cases going to the ECtHR as people try to access justice. This also (ironically) means less cases being decided by UK courts, and instead end up going to the ECtHR to be decided. Indeed, the Government's own Impact Assessment admits that the new permission stage will likely lead to more cases going to the ECtHR[1]. This is completely against the Government's stated aim with this Bill. But just because people whose human rights have been breached may be able to try and go to the ECtHR does not mean that they will be able to. Going to the court in Strasbourg is very expensive and takes a very long time. For most people it is practically and financially impossible.[10]

[10] Impact Assessment on Draft Bill of Rights Bill; para 179

BIHR's practical work shows people and staff in public bodies rely on human rights having legal accountability to help make positive changes in practice and avoid the need for taking court cases. In reality, the practical effect of this permission stage is going to prevent people getting near any court, or, in fact, having any of their arguments listened to. It will leave people who rely on services like health, education, housing in a hugely uncertain position, with very little chance to hold the Government to account, when needed.

Click here to jump to our questions for the Justice Secretary on this issue.

2.4. Making fair and balanced decisions when upholding people's human rights: Parliament cannot let Government reduce the important principle of proportionality

Our current protections are worth securing

We all want to live in a country where authorities make fair and balanced decisions about our rights; our Human Rights Act supports this, only allowing proportionate restrictions on rights.

Proportionality is a key part of a range of rights in our Human Rights Act. It means that the Government and the public bodies making decisions about our lives, such as social workers, doctors, teachers, and police officers, can limit these rights, but this must be in the least restrictive way possible. This includes ensuring a 'fair balance' between the person'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. The courts will then look at whether the proportionality test has been applied correctly, looking at all the facts of the individual case. This is a key form of accountability and fairness that makes us all stronger in a healthy democracy.

The Government's power grab

The Government's Rights Removal Bill seeks to tell judges how to decide if a restriction of someone's human rights by the Government or public body is proportionate. This will limit the protection we all have by requiring public decision-makers to apply laws in a way that supports our human rights, and by preventing judges from reviewing this when people seek justice.

The Government's bill of rights Bill, better called a Rights Removal Bill, will "provide guidance to courts, stating that where Parliament has expressed its view on the public interest through primary legislation, courts should give deference to that view. This would apply whenever public interest considerations arise (whether in respect of proportionality or, more broadly, the scope of a right)".[11]

[11] Bill of Rights Bill: Clause 1(2)(c): courts must give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about the balance between different policy aims, different Convention rights and Convention rights of different persons are properly made by Parliament AND Clause 7 in full.

The Rights Removal Bill is trying to limit the courts' ability to make decisions on proportionality. The Bill says that when courts are considering whether a law and its application to an individual strikes an 'appropriate' balance between different human rights or the balance of protecting other policy aims, they should conclude that the ways in which that law restricts someone's human rights is proportionate, simply because Parliament passed that law. This can never cover all the situations where that law may be relevant.

Unsupported by the public and the Government's independent experts

This goes so far beyond what the public consultation told the Government. The Government's response did not publish any evidence which supports the assertion that proportionality has caused any practice problems. The **overwhelming majority of respondents – 66% preferred no change.**

> **Charli Clement, RITES Committee Expert and Lived Experience Expert for BIHR's Human Rights in Children's Inpatient Mental Health Services Programme:** "The Human Rights Act is key to accountability of public bodies."

Only 4% (of 84 responses) supported the option this Government is pursuing. When the Government set up the Independent Human Rights Act Review (IHRAR) they did not ask them to investigate the use of proportionality, further calling the evidence base for change into question.

Misunderstands the current law

Proportionality is a vital part of the way our Human Rights Act works to protect people and balance the interests of the wider public, both inside and outside the courtroom. It is key to ensuring that people's non-absolute human rights are restricted as minimally as possible in a specific situation, and that the Government must justify any interference. Courts always consider the wider public interest or societal concerns, and they can do so as part of the proportionality analysis – which is a legal question.[12]

The proposals risk a blanket approach where if Parliament (or Government for 'secondary legislation') 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.**

[12] e.g. R. (on the application of Cockburn) v Secretary of State for Health [2011] EWHC 2095 (Admin), where the court decided that gender discrimination of the treatment of the spouses of GPs under the NHS pension scheme was justified because it had been introduced to help address the disadvantaged position of women.

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 importance of proportionality: 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 making 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 peaceful enjoyment of possessions (Article 1, Protocol 1 of the Human Rights Act) combined with his right to be free from discrimination (Article 14 of the Human Rights Act) had been breached. The 84-day rule was removed 11 months later for everybody under 18.

If the Rights Removal Bill had been law, the Court may not have been unable to weigh up the different factors in Cameron's case. Instead, it would have had to find the decision to end DLA 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.

There is nothing in the Human Rights Act which allows courts to ignore or change the laws that Parliament makes. Currently, the function of the courts is to look at laws Parliament has put in place and to respect its sovereignty whenever making decisions, including on human rights. The courts regularly recognise that there are limits to their expertise and some issues need to be left to Parliament (including the devolved legislatures) to decide. The Independent Review recognised this is working well. For example, in national security or foreign policy issues the courts will be careful not to question too much the justification for the restriction on people's rights, as other institutions such as Parliament (or a public body like the police), will be best placed to make such decisions.[13]

[13] See Bank Mellat v Her Majesty's Treasury (No. 2) [2013] UKSC 39; and BIHR's briefing on proportionality for many more examples.

The importance of proportionality: Mathieson v Secretary of State

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The Government's approach is a deliberate misrepresentation of how our Human Rights Act currently works. As Parliament's Joint Committee on Human Rights has said, the Government's proposals risk "trespassing on the Court's constitutional function, thereby damaging the separation of powers. It also risks victims being denied their rights without justification."

The impact on people and removing the power to discuss change with officials

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 wider community. This will be fact specific. However, the proposals seek to limit the ability of courts to make decisions based on the facts of each individual case. This will reduce the vital framework that proportionality currently provides for people and public bodies to discuss the impact of a decision or policy and ensure that human rights restrictions are minimised. At BIHR we see the impact of these important discussions, for example:

Joe, the Chief Executive of 'All Wales People First', has shared how a self-advocate 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.

Ian a family-carer has shared how he used the HRA to challenge blanket policies on the use of sanitary towels in an inpatient mental health setting.

Sarah, **a learning-disabled girl, was able to challenge a local authority's refusal to provide her with school transport.** The local authority only provided school transport for children with special educational needs living more than 3 miles from their school. Sarah, could not travel alone, but 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 headteacher that this was a disproportionate interference with Sarah's right to private life, as Sarah's circumstances were not considered. The headteacher took the issue to the local authority, and Sarah was provided with transport.

Creating uncertainty and confusion, and taking us backwards

The Government confidently asserts that this change will lead to a "more flexible approach to the delivery of public services".[14] But what this actually means, and as laid out in its own Impact Assessment, is that removing the vital framework for decision making will lead to "reduced legal certainty"[15] for public authorities and other stakeholders. Ultimately, the Government's aim to reduce accountability is clear when they state that by limiting courts' decisions on proportionality, "the will of elected lawmakers is not thwarted".[16]

[14] Impact Assessment on Draft Bill of Rights Bill; para 93
[15] As above, para 98
[16] As above, para 94

The role of Parliament is vital to our democracy; but it cannot and does not consider what could and should happen in every possible individual case under each law it passes. It puts Parliament in an impossible position to try and do this and determine the appropriate balance between different people's rights in every possible situation flowing from a law. The proposals are suggesting a blanket rule preventing the courts engaging in any true rights-balancing exercise. **This risks completely gutting the effectiveness in the UK of our human rights. This will lead to more breaches of people's human rights, placing public bodies and their staff in an incredibly difficult and confusing position.** Clarity is crucial for officials, knowing what laws to apply and how to interpret them for the situation before them.

Rights protection in the UK will also be less than what the European Convention on Human Rights (ECtHR) 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 the ECtHR, is simply not possible: it is expensive, takes a very long time, and even if they do 'win' in the ECtHR for most people it will be too late to rectify the damage the breach of their human rights has caused.

BIHR's practical work shows that people and staff in public bodies use proportionality for decision-making every day, outside the courts, to ensure fair and balanced decisions about people's human rights, which also consider the rights of the wider community. This will be lost under misrepresentations of the Government and it's Bill. It will leave people who rely on services like health, education, housing in a hugely uncertain position, with less control over their lives, removing the ability to practically challenge decisions that put their rights at risk. This takes us backwards.

Click here to jump to our questions for the Justice Secretary on this issue.

2.5. Having a say over our own lives matters to all of us: Parliament cannot let the Government dilute our Article 8 rights

Our current protections are worth securing

We all want to live in a country where our wellbeing is protected, and we can be involved in the decisions that directly affect us; our Human Rights Act helps make this happen.

Our right to respect for private and family life, home and correspondence (Article 8 in the Human Rights Act) goes to the heart of what it means to live in society in the UK. It is about respect for us as individuals, our relationships with others, and the decisions that public bodies make about us every day, from NHS staff and social workers to local councils and the police. If those public bodies or Government have not considered this right, we can use the law in conversations to change this, providing everyday fairness. Should it be needed, the Human Rights Act means we can ask a court to review the situation. This a key form of accountability and fairness that makes us all stronger in a healthy democracy.

Alfie's story: Participating in the community as a gay disabled man

Alfie, a gay disabled man, was being supported by the local authority to participate in social activities. Alfie's request to be accompanied by a social worker to a gay pub was denied, even though heterosexual service users were supported to attend pubs and clubs of their choice. Alfie's advocate was able to use Alfie's right to respect for private life, which includes being able to participate in the community, along with Alfie's right not to be discriminated against, to successfully challenge and change the local authority's decision without going to court.

The Government's power grab

The Government's Rights Removal Bill seeks to cut off certain groups of people from accessing their Article 8 right. This is an extraordinary limitation on the right to respect for private and family life, which goes against a foundation of human rights – that they are universal.

Clause 8 in the Government's Bill of Rights Bill, better called a Rights Removal Bill, will force UK courts to find that the use of a law to deport someone is not incompatible with their Article 8 right, unless it would cause 'exceptional and overwhelming' harm that is incapable of being avoided or is 'irreversible' to a person's child or dependent. The dependent must be a British citizen, have 'settled status' in the UK or, if they are the individual's 'child', have lived in the UK continuously for seven years.

This a deliberate misrepresentation of how our how human rights work, which is that they are universal. It will completely eradicate the Article 8 right of the individual being deported and will virtually remove the Article 8 right to family life of that individual's children and dependents.

Unsupported by the public and the Government's independent experts

77% of respondents to the Government Human Rights Act Reform consultation did not believe the current deportation framework should change and **82% were opposed to all of the Government's suggested changes**. When the Government set up the Independent Human Rights Act Review (IHRAR) they did not ask them to consider Article 8 and deportations, further calling the evidence base for change into question.

The "evidence" the Government refers to about the need for this change is outdated, selective and presents a distorted picture.[17]

Daisy Long, RITES Committee Expert and Independent Social Worker and Director of a practice consultancy organisation: "This government has sought to minimise awareness of what the 'Bill of Rights' will mean in practice beyond the scope of immigration, courts, and criminal justice procedures."

[17] The data the Government refers to is before a change in the law changed in 2014, making it harder to challenge deportations of foreign national offenders. Read more in BIHR's briefing here.

Misunderstands the current law

The Government's plans actively misunderstand what human rights mean and how they work. The very purpose of human rights laws is that the **Government should not get to pick and choose whose rights they uphold and whose they do not**.

The Government's proposals completely misunderstand the UK's current international obligations and how our human rights consequently work in a domestic context. We are currently signed up to the European Convention on Human Rights (ECHR). There is no provision under Article 8 of the ECHR that says that this right can be completely removed from certain groups of people in an immigration context. Decisions about any restriction of Article 8 under the ECHR must be made on a case-by-case basis in which the courts should look at the circumstances of the individual in question and as well as drawing on previous case law. **If the Government goes ahead with the Rights Removal Bill as it is, it is very likely to result in breaches of the ECHR because it does not offer the courts the possibility of being able to assess and balance each case on its individual facts.**

The impact on people and removing their rights

Through the Rights Removal Bill, the Government is attempting to directly cut off some groups of people from accessing their Article 8 right to respect for private and family life. Parliament's Joint Committee on Human Rights has said that the Rights Removal Bill "essentially extinguishes the essence of Article 8 rights" for some individuals who are being deported.[18]

The Government's own Impact Assessment repeats the harmful narrative that we have seen in their sweeping changes to immigration law through the Nationality and Borders Bill (known by human rights campaigners as the Anti-Refugee Bill) that deportations of individuals have "an inherent benefit to society and the victims of their crimes" ,[19] including public authority funds spent elsewhere.[20] The assessment openly acknowledges that individuals' Article 8 and Article 5 rights are likely to be curbed, as well as "negative impacts on the deported individuals' families",[21] without acknowledgement of the case-by-case balancing exercise that courts currently engage in. The Impact Assessment does not consider the wider impacts of restricting Article 8 for all of us, every day.

Preventing courts from engaging in a case-by-case balancing exercise considering the individual's rights and the wider public interest for or against deportation will also create an arbitrary and unfair framework.

[18] Letter to Secretary of State for Justice from Joint Committee on Human Rights, p11
[19] Impact Assessment on Draft Bill of Rights Bill; para 112
[20]As above, para 111
[21] As above, para 105

S's story, a family carer who used Article 8 to avoid the serious impact that his deportation would have on his younger siblings' and mother's mental health

Example from JCWI – JCWI's response to Ministry of Justice's Consultation

S was brought to the UK from Jamaica at the age of four. S did not register as a British citizen because the fees were too high for his family. He lived with his mother and cared for his younger siblings, with whom he had a relationship more akin to that of a father and son. In 2018, S was sentenced to 15 months in prison for possession with intent to supply cannabis, and subsequently was to be deported. S's younger brother suffered while S was in prison and exhibited behavioural problems, which were resolved when S returned. S's mother's mental health also suffered, and she was unable to care for S's younger siblings without his support.

The court found that deporting S would have a serious negative impact on the lives and health of S's family. S had also made considerable efforts to rehabilitate, including ending the misuse of cannabis, and was at low risk of reoffending. The deportation order was therefore overturned.

Under the Rights Removal Bill however, it is very possible that S would have been deported, with the resulting negative impacts on S's family and, by implication, the public bodies who may have had to then step in to support S's siblings.

History tells us that the moment human rights stop being universal, the effectiveness and extent of human rights protections for everyone will be undermined. **Limiting Article 8 in one context risks limiting it in all the other important contexts across people's lives in the UK, from health care to housing to policing.**

Yolande's story: A woman fleeing domestic violence who used Article 8 to stay with her children

Yolande and her children were fleeing domestic violence, and her husband's attempts to track them down. When they arrived in London, social workers told Yolande that the constant moving of her children meant she was an unfit parent, that she had made the family intentionally homeless, and that the children would be placed in foster care. With a support worker's help, Yolande raised the need to respect her and her children's right to respect for family life. Social services reconsidered the issue. They all agreed that the family would remain together, and that social services would cover some of the costs of securing rented accommodation. This was an essential step for Yolande and her children to rebuild a new life in safety.

Creating uncertainty and confusion, and taking us backwards

Our human rights are universal. They protect everyone equally from the abuse of state power, whatever that abuse and whoever the individual is. **Limiting human rights for any group of people is not only discriminatory, but undermines the very point of human rights.**

Article 8 is about respect for us as individuals and our relationships with others. Having a human right that can protect these fundamental elements of our everyday lives when we find this threatened should be celebrated. Weakening Article 8 in any context risks a chilling impact – discouraging individuals from raising it and public officials from considering and respecting it.

Ultimately, the Rights Removal Bill will cause confusion; undermine the public interest; and, crucially, will have serious impacts on people's human rights with corresponding serious negative consequences for their and their family's lives.

Rather than pursue an unprincipled, unevidenced and unworkable solution to a non-problem with the Bill, we should preserve what we have, keeping our human rights, including Article 8, universal and for everyone.

Click here to jump to our questions for the Justice Secretary on this issue.

2.6. Picking and choosing who gets accountability for human rights breaches: Parliament cannot let Government decide who gets rights remedies and who does not

Our current protections are worth securing

We all want to live in a country where ordinary people can seek justice in the courts and receive an appropriate remedy; our Human Rights Act helps make this happen.

Responsibilities are at the core of human rights law, including our Human Rights Act. Government and the public bodies making decisions about our lives, such as social workers, doctors, teachers, and police officers, need to uphold our human rights as a matter of law, not simply as good practice. These legal duties create responsibilities: responsibilities to respect, protect (positive obligations) and fulfil the rights of those accessing or trying to access public services. When this doesn't happen, ordinary people who believe their rights have been risked, can ask a court to review the situation. If the court finds that rights have been breached, they can award remedies to help address the harm people have experienced. This includes financial damages and orders, such as telling the public body to remake a decision that caused the breach. It is true that rights cannot exist without responsibilities, the responsibilities under human rights law simply sit on those in positions of power, this is how it should be. This a key form of accountability and fairness that makes us all stronger in a healthy democracy.

The Government's power grab

The Government's Rights Removal Bill seeks to create different categories of people; those who are entitled to have full remedies for human rights breaches by the Government and public bodies, and those who are not.

The Government's Bill of Rights Bill, better called a Rights Removal Bill, will tell courts how they should award remedies when they, the Government, or public bodies exercising governmental power, breach people's human rights. The new Bill would make courts consider a person's past conduct, regardless of whether it is related to the case being heard (Clause 18(5a)).

The court will also be required to consider and give "great weight" to the importance of minimising the impact that any potential award of damages would have on the ability of the public authority (or any other one) to perform its functions.

The Government says the Bill "will enshrine a set of principles in statute for awarding damages independent of that of the Strasbourg Court … [with] provision for courts to take account of the public interest when making an award, by expressly considering certain factors such as the impact on a public authority's ability to continue provide services to society as a whole." [22]

The Rights Removal Bill is an attempt to weaken Government's responsibility by restricting independent courts' ability to look at each case on its facts and award the appropriate remedies for breaching people's human rights. It is the Government trying to set the rules on how they provide justice to people when they, or a public body, has breached a person's human rights. They are also trying to set the rules on what remedy should be given to the person whose rights were breached, stating that this should depend not only on what has happened to the person, but also on the person's past actions, which could be completely unrelated to the issue being considered. **This is the Government trying to mark their own homework.**

Unsupported by the public and the Government's independent experts

This goes so far beyond what the public consultation told the Government. The Government's response shows that the **majority of respondents (53%) said that each case should be looked at on a case by case basis, as currently happens with the Human Rights Act**. When the Government set up the Independent Human Rights Act Review (IHRAR), they did not ask them to investigate the awards of remedies, further calling the evidence base for change into question.

> **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**: "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".

[22] See Government's Response to the Bill of Rights consultation para 53-56; Bill of Rights Bill: Clause 18 in full.

Misunderstands the current law

Currently, the Human Rights Act enables courts to look at each case on its facts and to only provide a remedy that is "just and appropriate" (section 8). Sometimes this will include financial remedies called damages, and sometimes it will not.

Our Human Rights Act does consider relevant personal conduct; it needs to ensure our rights are balanced with the rights of others. There is a carefully considered framework within our current Act where some rights can be limited in certain situations to protect the person or the wider community. For example, our right to liberty (Article 5 of the Human Rights Act) or our right to confidentiality (Article 8 of the Human Rights Act) can be restricted if there is a risk of harm to ourselves or others. Additionally, there are other laws, like criminal laws, which can be used by Government when individuals need to be held to account. We live our whole lives governed by various pieces of law which set our responsibilities as individuals in society. For example, when you get in your car or when you enter a public place there are laws which govern our conduct.

Human rights law is meant to be about putting checks on the conduct of the Government and public bodies, not on the conduct of ordinary people.

The impact on people and reducing accountability

The Government has produced no evidence for why awarding damages to victims whose rights have been violated is a problem. It is ordinary people who bring legal cases in the courts when the Government or public bodies have risked their human rights. Currently the courts might look at a person's conduct when it is linked to the case, e.g., if this contributed to the impact of the rights restriction on them. But this is not an automatic requirement; context is everything. **For example, an autistic person who is regularly restrained and secluded in hospital which amounts to inhuman treatment (protected by Article 3, HRA) 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 and tells the court to look at anything the individual may have ever done. Essentially, the Bill says that a judge should decide whether a person is good or bad and how much resource the public body has and use that to discern how much of a financial remedy a victim is awarded.

Moreover, the Bill asks judges to consider the resources of the Government or public body, suggesting 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.

The Government's own Impact Assessment admits that this will sometimes by done wrongly, acknowledging that "there is a risk that claimants who have had damages reduced undertake satellite litigation in relation to the standard of proof to be applied to claimant conduct where there is not criminal conviction or finding by the court". **The assessment also acknowledges that accountability will ultimately be reduced, and that "individuals who have meritorious claims may be discouraged from pursuing them through the introduction of these requirements".**

Steven's story: Getting justice after being unlawfully deprived of his liberty

In 2011, Hillingdon council were ordered to pay damages to Steven Neary and his family after it was found that the council had unlawfully deprived him of his liberty (Article 5, HRA) and his family life (Article 8, HRA) from 5 January to 23 December 2010. The damages awarded cannot undo the rights breach, but they did contribute to Steven being able to live independently following the case and to the council acknowledging that they needed to review their practices and staff training to ensure what happened to Steven will not happen again.

Under the Bill, the court would have had to consider Steven's past conduct in determining what damages he should receive, even if this conduct was not relevant to the issue being looked at.

If Parliament allows additional criteria to be introduced which restricts when courts can award damages for breaches of people's human rights, this will do nothing to improve rights protections for people and everything to increase the power of the Government and reduce their accountability for how they treat people interacting with public services.

Creating uncertainty, confusion and taking us backwards

Human rights protections (whether in the Human Rights Act or other laws) are universal precisely to prevent the Government having the power to determine who is deserving of rights and damages when things go wrong and who is not. **Under the law everyone deserves minimum standards of how they are treated, regardless of whether those with power think they deserve them.** It is a fundamental part of human rights law that protections are not earned or based on an individual's conduct; they exist simply because someone is human. This is the very foundation upon which the European Convention on Human Rights was developed following the horrors of World War Two, where the world saw what happened when a government decided who deserves rights and who does not.

Human rights do involve responsibilities: the responsibilities of Government and public bodies to uphold people's human rights. This Government's Bill seeks to limit the state's responsibilities, whilst suggesting individuals' responsibilities should carry more weight. This is not only a contradiction, but runs counter to the very core of human rights: their universality.

Click here to jump to our questions for the Justice Secretary on this issue.

2.7. Removing the duty to interpret in line with the European Court of Human Rights: more UK cases going to Strasbourg, not less. Parliament should stop us from moving backwards.

Our current protections are worth securing

We all want to be able to live in a democracy where each person can access their human rights and seek justice in the UK courts, knowing that we will not have worse protections than if we had to go the European Court of Human Rights (ECtHR). Our Human Rights Act helps make this happen.

A key part of our Human Rights Act is the section 2 duty on UK courts to "take into account" how similar cases have been decided in the ECtHR. This is not an absolute duty, but it helps make sure our human rights protections are consistent and certain, and it reduces the need for cases to have to go to the ECtHR because they can be decided by UK courts. This is a key form of accountability that makes us all stronger in a healthy democracy.

The Government's power grab

The Government's Rights Removal Bill does not strengthen the role of UK courts, it limits them and reduces our human rights protections.

Clause 3 of the Government's new Bill of Rights Bill, better called a Rights Removal Bill, removes the duty to "take into account" the ECtHR's decisions. It specifically states that UK courts can interpret the rights in the Bill differently, but not more expansively (so not in a way that provides more protection), than the ECtHR. The 'power' this Bill gives to UK courts is essentially to allow lower levels of protection to people. These changes are designed to limit and reduce our human rights protections in the UK, and make it harder for ordinary people to access their human rights.

Unsupported by the public and the Government's independent experts

This goes so far beyond what the public consultation told the Government. The Government's response shows that **56% of people said there should be no change to section 2**, and 20% did not think either of the Government's proposed options for change should be used.

The **Independent Human Rights Act Review** (IHRAR) recommended a small amendment to section 2 to clarify the order in which courts should consider other laws, but said that scrapping section 2 "**would result in there being no formal link between the HRA and the Convention. While the UK remains a party to the Convention, this option has nothing to commend it**".

Kirsten Peebles, RITES Committee Expert and Lived Experience Expert for BIHR's Human Rights in Children's in Inpatient Services Mental Health Service Programme: "The Human Rights Act is a living breathing daily law. This is about removing so many requirements to respect our rights".

Misunderstands the current law

The HRA section 2 duty to "take into account" decisions of the ECtHR draws a careful line between making sure our legal protections in the UK are consistent with that court, whilst also respecting the UK Parliament's sovereignty and the expertise of UK courts to make decisions about UK issues. Currently the Human Rights Act says the UK Supreme Court can decide not to follow ECtHR cases, such as where the ECtHR's case law on the issue was not "coherent or settled" (Hallam v Secretary of State for Justice). The Human Rights Act also means there is a 'judicial dialogue' between the UK courts and the ECtHR, where the UK courts will sometimes disagree with the ECtHR. This can influence how the ECtHR interprets human rights when it looks at similar cases or looks at the issue again (see the UK Supreme Court case of R v Horncastle and the ECtHR decision in Al-Khawaja v UK).

In the UK, our courts will always follow what the UK Supreme Court decides on an issue (regardless of what the ECtHR has said) because our system is based on precedent (following the example of the highest court). However, the rights in the Human Rights Act (and in the Government's Bill) come from the European Convention on Human Rights (ECHR), which the UK is signed up to. It is clear that, under international law, the ECtHR has the ultimate say on how the rights in the ECHR are interpreted. A UK law, including the Government's Bill, cannot change international law. However, 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.

Dunja Mijatović, Commissioner for Human Rights at the Council of Europe: "It sends the wrong signal beyond the country's borders at a time when human rights are under pressure throughout Europe." [23]

The impact on people and removing their control

The ECtHR's decisions have been pivotal in improving human rights protections in the UK and ensuring that they have evolved with a changing society over the last 70 years, from ensuring protection of journalists' sources to lifting the ban on gay men and lesbians serving in the UK armed forces. The Bill seeks to 'freeze' our human rights protection in time, and, if anything, take them back to the 1950s when the ECHR came about (e.g., it requires courts to look at the preparatory work that was done at the time).

The Bill seeks to remove the link between what the ECtHR says about human rights and how human rights work in the UK, whilst also introducing a 'ceiling' of our rights protections based on what the ECtHR has previously said. This will result in UK public bodies and the Government having to provide less respect and protection of our human rights, compared to what the UK is signed up to under the ECHR. **It will take human rights protections in the UK backwards: disconnecting human rights from society today and in the future.**

The Government's own Impact Assessment acknowledges the changes will "encourage human rights to be interpreted more distinctively in the UK context".[24] The same report suggests that the "reduced elasticity of the parameters of human rights law will create greater legal certainty and a clear separation of powers".[25] However, we know this not to be the case. With this change, there will be an increase in the number of people having to take a case to the ECtHR if they want their human rights respected as UK courts will not necessarily be able to protect them. It is difficult, expensive, and time consuming to take a case to the ECtHR, so we will be moving backwards to a two-tier system with human rights, justice and accountability only for those who can afford it. This is exactly what our HRA was designed to avoid. **This will reduce the UK's accountability to respect our human rights: both in our UK courts and on an international level.**

[23] United Kingdom: backsliding on human rights must be prevented - View (coe.int)
[24] Para 62
[25] Para 61

Melanie Rabone's story: Accountability for a failure to take steps to protect life

Melanie Rabone was 24 years old and was voluntarily admitted onto a psychiatric ward. Although her admission was voluntary, it was noted by her doctor that if she attempted or demanded to leave, she should be assessed for detention under the Mental Health Act. Melanie was released for home leave, without a full risk assessment despite the concerns of her parents, and the next day took her own life. The UK Supreme Court found that the NHS Trust had not complied with its positive duty to protect Melanie's life (staff knew, or ought to have known, about a real and immediate risk to her life and had failed to undertake reasonable steps, e.g. not assessing Melanie under the MHA). This allowed Melanie's parents to obtain accountability within the UK without going to the ECtHR, and has improved practice in mental health hospitals, helping both staff and patients.

In its decision, the UK court held that the existing decisions from the ECtHR on the operational duty to protect life applied equally to voluntary patients as it did to those detained in hospital. The ECtHR had not decided this particular point yet, but there was a clear direction of travel in its case law, and the ECtHR then confirmed that the duty did apply to patients hospitalised on a voluntary basis. The Bill however tries to constrain the UK courts from reaching such decisions.

Creating uncertainty, confusion and taking us backwards

Since the Human Rights Act was passed, the ECtHR has considered (on average) fewer cases from the UK and has tended not to find the UK in breach,[26] with the UK normally rectifying the situation when it is. This is due to the UK's international standing as a rights-respecting country, but also because the Human Rights Act helps ensure that UK laws, Government and public bodies respect our human rights.

However, the Bill will mean more cases going to the ECtHR as it allows for lower or inconsistent levels of protection in the UK compared with the rights in the Convention which the UK is required to respect. This is likely to breach the Convention right to an effective remedy within the UK (Article 13) for any breach of our rights. This, in turn, will almost certainly result in more decisions against the UK by the ECtHR. It will tie UK courts' hands and prevent them from being able to engage in the useful judicial dialogue with the ECtHR about how human rights should apply in the UK.

[26] From 2011 to 2021 the ECtHR delivered a judgment finding at least one violation of human rights by the UK on average 5 times a year. Applications to the ECtHR against the UK have also been on a general downward tend over the last 10 years, dropping to 210 in 2021. (https://echr.coe.int/Documents/CP_United_Kingdom_ENG.pdf; https://www.echr.coe.int/Documents/Facts_Figures_2021_ENG.pdf; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038220/human-rights-judgments-response-2021.pdf).

Instead of the ECHR providing a minimum level of basic human rights protection for people in the UK, the Rights Removal Bill flips this. It limits the ability of UK courts to provide better protection and allows them to provide less protection. Trying to disconnect human rights in the UK from the ECHR will do nothing to change the UK's obligations under the Convention, instead signalling the green light to other states seeking to undermine international respect for human rights law. In the UK, the Bill will do everything to limit people's access to their human rights every day, and thus accountability of the Government and public bodies when our human rights are breached.

Click here to jump to our questions for the Justice Secretary on this issue.

2.8. Freedom of speech - Section 12 of our Human Rights Act already gives particular weight to this: Parliament should support keeping our Human Rights Act

Our current protections are worth securing

We all want to be able to live well, knowing that the authorities will make decisions that support our rights; our Human Rights Act helps make this happen.

Freedom of expression is protected under Article 10 in our Human Rights Act. and given particular weight under Section 12. Section 12 of our Human Rights Act says courts must "have particular regard to the importance of…freedom of expression" when making decisions or granting orders which may impact someone's freedom of expression. Freedom of expression includes both the right to receive and pass on information.

Chris' story: Enabling journalists to protect their sources

Chris Mullins wrote about the wrongful conviction of six innocent men known as the "Birmingham Six". His book was a crucial part of having their convictions overturned and contained anonymous interviews. The police tried to make Mullins reveal his sources, but he said the interviewees only spoke to him because they were promised confidentiality. If Mullins hadn't promised this, he said "no one would have talked to me" and innocent men "might still be in jail". The Court recognised that Mullins' journalism and his Article 10 right to freedom of expression, including the right to protect his sources, was "of the highest public interest value, exposing serious failings on the part of the criminal justice system" and so did not order him to reveal his sources.

The Government's power grab

The Government's Rights Removal Bill does not strengthen freedom of expression; it limits it.

Clause 4 of the Government's new Bill of Rights Bill, better called a Rights Removal Bill, says courts do not have to give great weight to protecting "freedom of speech" **in relation to criminal proceedings, confidentiality agreements or professional relationships, or immigration cases.** The Bill's explanatory notes also specify that Clause 4 is limited to "speech" and does not extend to freedom to receive information. **The Rights Removal Bill therefore provides that a court must give "great weight" to freedom of speech, except when the Government's thinks it shouldn't.**

This would mean that if someone was facing criminal proceedings for protest (all the more likely since the passing of the Police, Crime, Sentencing and Courts Act) they wouldn't be able to rely on the 'great weight' of freedom of speech. But isn't this when a person would need this most? So, freedom of speech according to the Government is the most important right, except when it's not.

This is reflective of much of the content within the Rights Removal Bill. **Clause 4 is being sold by the Government as strengthening freedom of speech, when in fact it strengthens it for no one.** Clause 4 gives some of us, in some situations, the same protections we already have under our Human Rights Act whilst removing them from others in specific situations.

The Government's own Impact Assessment acknowledges that the "provision on freedom of speech will not place a new responsibility on public authorities, given their existing responsibility to ensure that any restrictions place on Article 10 are appropriate and proportionate". **The Rights Removal Bill will not introduce anything new, but the Government admits the proposals "may affect an individual's enjoyment of their right privacy under Article 8"**, as well as provide more work for the Courts "working through how to balance the new weight to be given to freedom of speech".

Unsupported by the public and the Government's independent experts

This goes so far beyond what the public consultation told the Government. The Government's response shows the overwhelming majority of respondents they counted, **74%, said no change is needed to freedom of speech protections**. Even more, **84%, said no change is required** on whether "clearer guidance could be given to the courts". Finally, **878 of the 1156 responses said no change was needed** to strengthen freedom of expression. When the Government set up the Independent Human Rights Act Review (IHRAR) they did not ask them to investigate the use of proportionality, further calling the evidence base for change into question.

Charli Clement, RITES Committee Expert and Lived Experience Expert for BIHR's Human Rights in Children's Inpatient Mental Health Services Programme: "The Human Rights Act needs to be enforced more, not eroded."

Misunderstands the current law

Our Human Rights Act is grounded in universality, this is the very nature of human rights protections. There can be limits of our right to freedom of expression under our current Human Rights Act, for example where there is a need to keep others safe from harm. But this limit is rightly applied by public bodies and courts on a case-by-case basis and freedom of speech is carefully balanced against our other rights, like our right to private and family life.[27]

The Rights Removal Bill does not recognise the additional protection section 12 of our Human Rights Act provides for freedom of expression, and in fact seeks to recreate it but with new restrictions to protect only speech, and to exclude speech about certain topics like immigration cases.

The Justice Secretary has suggested that the Rights Removal Bill will stop "free speech… being "whittled away" by "wokery"". However, as Professor of Journalism Chris Frost, writing on Why Our Human Rights Act Matters to Journalists, explained, "the right to offend gives others the right to respond. That may involve boycotting their meetings, withdrawing support from their organisation or challenging them at public meetings… suggesting that wokery, political correctness or cancel culture are good reasons to be concerned only suggests that you don't understand what freedom of expression means."

[27] 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".

The impact on people and removing their control

Giving freedom of speech great weight over our wellbeing or our family's privacy (or the wellbeing or privacy of our neighbours) in law as a blanket approach, is not a positive thing; human rights protections need to be assessed depending on the situation and the related harm to others. For example, in the case of Norwood v UK, the right to freedom of expression was limited for Mark Norwood who had put up an Islamophobic poster in the window of his flat. A member of the public raised their concern with the police who charged Mark under the Public Order Act (1986) for displaying hostility towards a racial or religious group. Mark argued that it was his right to freedom of expression but the Judge ruled that the expression amounted to "a public expression of attack on all Muslims in the United Kingdom" and can therefore be limited by the state. We have the right to freedom of expression in the UK and it is given particular regard by section 12 of our HRA but it still must be balanced on a case by case basis against the rights of others to be free from serious harm. This is the foundation of a fair and equal society.

The European Convention on Human Rights, and more recently our Human Rights Act, have a long history of strengthening and balancing freedom of expression in the UK. The Rights Removal Bill, by putting in place a blanket approach and reducing the protection provided to some people/circumstances (see below) risks undermining all this.

The freedom of the press to inform, and the right of the public to be informed

The UK Government tried to stop the Sunday Times publishing an article on the drug thalidomide, which was prescribed to pregnant mothers and caused many children to be born with disabilities. The article covered how it was introduced in the UK and the proposed settlement of the claims against its manufacturers. The government got an injunction and stopped publication of the article on the grounds that it would be in 'contempt of court'. The Sunday Times took a case to court, arguing that the injunction violated its right to freedom of expression. The Court agreed that there had been a breach of freedom of expression: in this case, the public interest and right to receive information and be informed was more important.

This is an example of how our current Human Rights Act already gives particular regard to freedom of expression. In this case the Court decided that the right of the public to receive this information was more important than the Government's claims that this would be in contempt of court.

Suzanne's story: Protecting journalists' sources

After publishing stories about the murders of two British soldiers, investigative journalist Suzanne was issued a court order to hand over her mobile telephone, computer records and notes on the Real IRA. As Northern Ireland editor of the Sunday Tribune, Suzanne argued that handing over the notes would put her and her family's life at risk. She also argued that it would compromise the protection of her sources.

The court (in Breen v Police Service of Northern Ireland, 2009) recognised that complying with the court order would have threatened Suzanne and her family's lives, and compromised the protection of her sources. The judge concluded that "the concept of confidentiality for journalists protecting their sources is recognised in law", including under the Human Rights Act.

This is another example of how our Human Rights Act currently works but with a different outcome. This time the court decided that weighting freedom of expression over the right to confidentiality could cause serious harm to Suzanne and her family. This balance works and is just and appropriate, the Rights Removal Bill doesn't strengthen these protections, it's completely unnecessary.

Freedom of speech is the most important right, except when it's not.

Instead of the ECHR providing a minimum level of basic human rights protection for people in the UK, the Rights Removal Bill flips this. It limits the ability of UK courts to provide better protection and allows them to provide less protection. Trying to disconnect human rights in the UK from the ECHR will do nothing to change the UK's obligations under the Convention, instead signalling the green light to other states seeking to undermine international respect for human rights law. In the UK, the Bill will do everything to limit people's access to their human rights every day, and thus accountability of the Government and public bodies when our human rights are breached.

Click here to jump to our questions for the Justice Secretary on this issue.

2.9. Right to jury trial – Article 6 of our Human Rights Act already does this: Parliament should support keeping our Human Rights Act

Our current protections are worth securing

We all want to be able to live safely with fair processes which support our rights, including when we're involved with the courts; our Human Rights Act helps make this happen.

A key right in our Human Rights Act is the right to a fair trial (Article 6). It means that if we're charged with a criminal offence, or if a public body is making decisions that impact our rights and obligations this must be fair. When this doesn't happen, individuals can challenge unfair trials and processes. This is a key form of accountability in a healthy democracy.

England and Scotland have different legal systems and jury trials are used differently in the devolved nations. In Scotland, for example you do not have a right to a trial by jury. Whether you have a jury trial in Scotland depends on a number of factors. **Our Human Rights Act is carefully crafted to take account of the different ways just trials work across the UK; ultimately requiring that all trials even when they work differently from each other are fair.**

The Government's power grab

The right to a jury trial is not an additional right. The Government's Rights Removal Bill does not provide us with any new human rights protections.

Clause 9 of the Government's new Bill of Rights Bill, better called a Rights Removal Bill, says that the right to a fair trial under Article 6 is secured through jury trials. This right would be a qualified right, which means it can be limited if certain exceptions are met. This right would be subject to the framework set by Parliament and the Scottish and Northern Ireland legislatures. **This means there will be little change as to how the right to a fair trial (and our access to jury trials) already works across the UK under the Human Rights Act.** In England and Wales under Section 44 of the Criminal Justice Act 2003, the right to access jury trials is only limited in extreme circumstances. The Bill could in fact restrict access to a jury trial by expanding these limitations.

The Government claims it is providing us with a new right when in reality there will be no significant change. The Joint Committee on Human Rights describes this clause as a "symbolic gesture" [28] and expresses doubts over its "legal significance".[29] **This is nothing more than a distraction from the fact that the Government's Bill removes our existing human rights protections rather than adding to them.**

Unsupported by the public and the Government's independent experts

The Government has not provided any strong evidence for its proposals because it is not creating any additional protections to those we already have under our Human Rights Act. **When the Government set up the Independent Human Rights Act Review (IHRAR) they did not ask them to look at jury trials in their report.** In response to the Government's public consultation, **25% of the respondents said that the right to jury trial is already recognised and no change is needed.**

Misunderstands the current law

We already have a right to a jury trial in England and Wales and the Government are not prepared to change the law relating to jury trials in Scotland as this is a devolved matter.

> R v Twomey (John): "[i]n this country trial by jury is a hallowed principle of the administration of criminal justice."

The Human Rights Act respects different legal systems across the UK, including differing attitudes to jury trials. This is another instance of the Government suggesting that the new Bill gives us more rights, when in reality there is no change. This proposal will do nothing to improve our right to a fair trial.

The impact on people and removing their control

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"[30] and therefore it did not analyse the impacts of this proposal. It is clear, that the suggestion of a right to a jury trial does not lead to new or increased rights for the public. **It simply serves as way to distract from the Government's erosion of our existing human rights protections.**

Furthermore, the Government's Rights Removal Bill makes changes which would put the right to a fair trial (Article 6) at risk for some groups of people. Under our current human rights law, a person cannot be deported to another country if this would place them at risk of a "flagrant denial of justice" which would be a breach of their right to a fair trial.

[28] Letter to Secretary of State for Justice from Joint Committee on Human Rights, p13
[29] As above, p13
[30] The Government's Impact Assessment for Draft Bill of Rights 19/06/22. p15

Under the Rights Removal Bill, the Government intends to change this so that a deportation could only be prevented under Article 6 grounds if it would be a "nullification" of this right. Under Clause 20 of the Rights Removal Bill, it would be the Secretary of State who decides if a deportation would result in the "nullification" of the person's right to a fair trial. This means that courts will not be able to decide on the risk to Article 6 on a case-by-case basis and must accept the view of the Secretary of State unless it can be shown that this view is "unreasonable". **Ultimately, this would mean that some individuals will have almost no access to their Article 6 right to a fair trial despite the fact that human rights are and must always be universal.**

Creating uncertainty, confusion and taking us backwards

Essential elements of the right to a fair trial include ensuring that a trial takes place within a reasonable time frame and that legal representation is provided when needed. Successive governments have demonstrated that they are not interested in improving the right to a fair trial within the criminal justice system through cuts to legal aid and a massive backlog of cases, with average delays for the completion of a case reaching 708 days in January 2022. This suggests that the Government is not actually interested in strengthening our right to a fair trial, but rather just want to appear as though they are enhancing our rights to get a new human rights law through which takes power from people and gives it to Parliament.

This change will likely have no positive practical impact on the criminal justice system. What it does do is reinforce the Government's lack of consideration for devolved nations and creates uncertainty. This is an unevidenced and unnecessary solution to a problem that doesn't exist.

Our Human Rights Act already provides us with a right to a fair trial under Article 6, ensuring consistent protections that take account of different legal systems in the UK. Rather than creating a Rights Removal Bill with empty promises of increasing rights, we should instead focus on protecting the Human Rights Act we already have.

Click here to jump to our questions for the Justice Secretary on this issue.

2.10. Creating rights-respecting laws using statements of compatibility: Parliament should support keeping our Human Rights Act

Our current protections are worth securing

An important part of human rights mechanisms is that they are integrated into the state's decision-making processes. For example, when laws are being made. It is not enough to think about human rights only when those laws or policies are ready to be implemented, human rights considerations should happen at every stage of decision-making which affects our lives.

Section 19 of our Human Rights Act means that the UK Government when it suggests a new law must make a statement saying either that it considers that the law is compatible with the rights in the Human Rights Act, or that it does not (a Section 19 statement). This means that the Government must think about how any new law will impact our human rights. In practice, this operates as a "human rights assessment" and usually, the responsible Government department will publish an analysis of their assessment.

The Section 19 statement is important for good governance and transparency. It lets everyone know that the Government has thought about the human rights implications of their proposals. This is a key form of accountability that protects our rights in a healthy democracy.

The Government's power grab

The Government's Rights Removal Bill does not include the obligation to make statements of human rights compatibility under Section 19. Removing this requirement reduces accountability and weakens the role of human rights in the law-making process.

Section 19 encourages law makers to be thinking about human rights while they are making new policies. It then helps ensure that the Government is transparent about any potential human rights concerns with its proposed laws. The Section 19 statement the Government must make helps Parliament review the law and, when the Government is unable to say that the law is compatible with human rights, it can help draw attention to any human rights concerns.

This helps ensure that a new law is properly scrutinised by Parliament and is an important transparency tool. However, **the removal of Section 19 demonstrates how the Government are seeking to reduce human rights scrutiny and therefore its accountability to Parliament and the public.**

Statements of Incompatibility and the Communications Act 2002

When the Government introduced the Communications Bill in 2002 to Parliament, it was the first time that a Bill was accompanied by a statement of incompatibility with human rights under Section 19. This was because the Bill contained a clause which banned political advertising in the broadcast media. The European Court of Human Rights had previously ruled that a blanket ban on broadcasting political advertising in Switzerland violated Article 10, the right to freedom of expression.

The Section 19 statement, even though it said that the Bill was not compatible with human rights, ensured that the issue was flagged. It meant that the Joint Committee on Human Rights, when they looked at the Bill, were able to fully scrutinise the issue and the Government had to fully explain why they couldn't include a more proportionate restriction. Parliament did still pass the ban on political advertising (S319((2)(g) of the Act), so section 19 did not stop Parliament but it made sure human rights were properly considered.

Unsupported by the public and the Government's independent experts

The IHRAR panel decided that Section 19 did not need to be amended. It concluded that: "**Section 19 plays an important role both in helping to ensure that Government and Parliament consider the application of [the rights in the HRA]…to new legislation. In that respect, there can be no doubt that it has had a major, transformational and beneficial effect on the practice of Government and Parliament in taking account of human rights issues when preparing and passing legislation**" (Chapter 5, page 244).

This removal of Section 19 is in no way supported by what the public consultation told the Government: all the evidence published supports keeping Section 19. **3,702 respondents mentioned that they did not believe there was a case for change**. Less than 7% of people who responded to the question of whether to remove Section 19 supported the Government's suggestion.

Daisy Long, RITES Committee Expert and Independent Social Worker and Director of a practice consultancy organisation: "The impact of the rights removal bill is far reaching and will have many (unintended) consequences that will be felt across health and social care sector for generations to come."

Misunderstands the current law

Section 19 does not discourage "innovative policy making," as the Government suggests. Instead, it ensures that human rights are considered in policy and law making. This is a positive: human rights should not be a victim of innovation, and, in any event, "innovative" policies can, and should, be human rights compliant. This is both because our government should want to respect our human rights, which improves policy-making and lessens the likelihood of laws being challenged in courts, but also because under international law, the UK is under an obligation to comply with the human rights in the ECHR, which includes the laws which Parliament makes.

Section 19 is advisory only. This means that the government can always say that a proposed law is not compatible with human rights and Parliament could still pass this law. This is because Parliament has ultimate authority; the Human Rights Act does not change that.

Section 19 does however provide a much-needed tool for human rights-based law and policy, and a tool for reconsideration when Bills falls short of compliance with human rights law. They allow the JCHR to gain an early understanding on whether a Bill is compatible with human rights and gives them the opportunity to explore further any areas which are not compatible. **The removal of Section 19 is an attempt to remedy a problem which does not exist in order to prevent scrutiny.**

The impact on people and removing their control

Encouraging law makers to properly consider human rights implications before legislation is introduced is a key way our Human Rights Act improves respect for all of our human rights. It is part of the mechanism to ensure that all other laws work in a way that reflect these rights. If a policy maker wants to create a new law but is discouraged to do so because they don't believe it would be compatible with human rights, this can only be a good thing.

One of the main purposes of our Human Rights Act is to create a culture of respect for human rights. This means that duty bearers are thinking about human rights in whatever they do, the idea being that this prevents breaches of human rights and court is a last resort.

The removal of Section 19 statements will mean that how laws impact our human rights will not be properly considered until people are already victims of human rights breaches. This will lead to more laws being challenged in UK courts and subsequently more cases going to the European Court of Human Rights (ECtHR). **This takes us backwards in human rights protections.**

Unsupported by the public and the Government's independent experts

By removing this obligation, the UK Government is telling law-makers that human rights can be a last-minute consideration. In contrast, **the Government's own guide to making legislation states that "consideration of the impact of legislation on Convention rights is an integral part of the policy-making process, not a last-minute compliance exercise".**

Removing Section 19 statements demonstrates the attitude this Government has towards human rights: that they are a burden rather than a tool for positive decision-making. This is the opposite of what we hear from the staff in public bodies we work with who use the Human Rights Act as a framework to make rights-respecting policies and decisions to keep people safe.

The Government's Impact Assessment suggests that "the net impact of repealing the requirement for Section 19 statement of compatibility is expected to be positive as the removal of the binary declaration should encourage bold and innovative policy making." [31]

At BIHR, it seems clear to us that "bold and innovative" are no more than euphemisms for unlawful and incompatible with human rights.

Our Human Rights Act already provides us with a right to a fair trial under Article 6, ensuring consistent protections that take account of different legal systems in the UK. Rather than creating a Rights Removal Bill with empty promises of increasing rights, we should instead focus on protecting the Human Rights Act we already have.

Click here to jump to our questions for the Justice Secretary on this issue.

[31] Para 139

BIHR's questions for Justice Secretary Dominic Raab

Below we list some of our key questions about specific issues in the Rights Removal Bill and the process by which it has been introduced.

BIHR's questions for Justice Secretary Dominic Raab on...

the process:

Q) People were only given 6 weeks to respond to the accessible versions of the Human Rights Act Reform Consultation. The Government released its Bill just 8 weeks after it closed - despite receiving over 12,000 responses. Why is this Bill being rushed through?

Q) Sir Peter Gross said the Government's proposals do not "respond to [the Review]" and "is not grounded in anything approximating the exercise we conducted". What was the purpose of the IHRAR if its recommendations and findings have not been utilised?

Q) The Code of Practice on Consultation says, "there is no point in consulting when everything is already settled". Can you point to any examples of where the Government's stance has changed following, and as a result of, receipt of the Consultation responses?

Q) Last year, the Office for Statistics Regulation wrote to the MOJ about its concerning use of statistics in judicial review reform. The MOJ said it would "review how the data are presented in its publications and the associated caveats" but the Human Rights Act Reform documents have been criticised by organisations like the British Institute of Human Rights for its use of statistics. What steps have the Government taken to ensure it is not misrepresenting statistics?

the Bill:

2.1. Remove the legal duty on courts and public bodies to interpret other laws compatibly with human rights

Q) How will you ensure human rights are protected in the UK if other laws can be applied in a way that breaches them?

Q) The Devolution Agreements already require devolved nations to make laws compatible with human rights. How do you plan to remove the interpretative obligation without creating uncertainty and disparity in the ways laws are applied and interpreted across the nations of the UK? What research was done into this before the Bill was published?

Q) In the public consultation on the Human Rights Act reform, 79% of people said there should be no change to the Section 3 duty. Why has the Government pushed ahead with these changes anyway?

2.2. Destroy the positive obligation on public bodies to take proactive steps to protect people from harm.

Q) What evidence do you have to suggest positive obligations put an unjustifiable burden on public bodies?

Q) The Government seems to be basing its changes on complaints about Osman warnings (which require police to tell people if they have intel about a threat to their life). If the Government thinks the requirement to warn people when their lives are at risk is a burden, why have they not addressed this through guidance, which would not require scrapping our Human Rights Act and risking protection for all people?

Q) Positive obligations also include the obligation to investigate cases where the right to life may have been put at risk, or not protected, by public bodies. How will the Government ensure important lessons are learnt and practices improved if it removes this obligation?

Q) 100% of respondents to the Government's Human Rights Act Reform Consultation supported positive obligations, saying they "provide protection for vulnerable people". How can you ignore this unanimous support from the British public?

2.3. Limit access to justice for breaches of human rights

Q) Anyone bringing a human rights claim already has to show they have been the victim of a human rights breach. Why should their lives be made harder by having to face additional barriers to accessing justice?

Q) The Impact Assessment recognises that a permissions stage that prevents people having their claim heard in UK courts will mean their only option is to go to the ECtHR. Does this not go against the goal to make UK courts supreme?

Q) 90% of the respondents to the public consultation said not to add a permission stage for human rights claims. How can the Government justify proceeding anyway?

2.4. Legislate for an imbalance of power in favour of the state

Q) The Government tried to limit factors the court is allowed to consider in proportionality assessments when it brought in the 2014 Immigration Rules. This was ruled unlawful in the case of Izuazu - so why is the Government attempting to do so again?

Q) The overwhelming majority of respondents to the Government's consultation on Human Rights Act reform wanted no change to the principle of proportionality. Why is the Government proceeding anyway?

2.5. Fundamentally weaken our right to respect for private and family life (Article 8)

Q) The law changed in 2014, making it harder to challenge deportations of foreign national offenders - yet the Government has consistently cited cases from before this change to justify its plans to reduce private and family life rights protection (Article 8). What robust evidence does the Government have from after 2014 that Article 8 is causing an issue for the deportation of foreign national offenders?

Q) According to the Government, 77% of respondents to the Human Rights Act Reform consultation did not believe the current deportation framework should change and 82% were opposed to all the Government's suggested changes. What robust evidence do you have of public support for these plans?

Q) Why has the Government's rhetoric focused only on deportations when the right to private and family life belongs to us all?

2.6. Create different categories of people- those deserving and undeserving of rights

Q) Doesn't creating categories of people who are "deserving" and "undeserving" of damages go against the very point of the universality of human rights and the reason that the UK, and other countries, pushed for the ECHR after WW2?

Q) If you are concerned about fairness, why is the conduct to be considered not limited to conduct relevant to the human rights breach rather than “any” conduct from someone’s past?

Q) Our Human Rights Act provides protection for patients like Luke, who felt staff in a mental health ward used restraint to punish him during a challenging episode and injured him in the process. How will you ensure that the Bill does not reduce the responsibility of public bodies to protect people like Luke by reducing the consequences when human rights are breached?

2.7. Result in more UK cases going to Strasbourg, not less

Q) The Bill stops courts considering ECtHR decisions except to ensure they aren’t offering greater rights. Does this mean the UK can offer fewer rights than Europe but not more?

Q) Our Human Rights Act does not require UK courts to follow decisions of the ECtHR. Why is the Government suggesting that this is an improvement to the current law?

Q) The Government's analysis on the Human Rights Act Reform Consultation says 1,763 people said they shouldn't change Section 2 but does not report a single person saying they should change it. How does the Government justify proceeding with changes anyway?

2.8. Set limits to the right to freedom of expression (Article 10), rather than strengthening it

Q) You say our freedom of speech should be given extra protection as it is the "liberty that guards all of other freedoms". If this is the case, why does the Rights Removal Bill not protect this freedom in relation to immigration cases or criminal proceedings - where people are likely to need it most?

Q) In its Impact Assessment, the Government acknowledges the "provision on freedom of speech will not place a new responsibility on public authorities, given their existing responsibility to ensure that any restrictions placed on Article 10 are appropriate and proportionate." Why is the Government focusing on this if it won't make any practical difference?

2.9. No new human rights protections, including in respect of jury trials

Q) The Government's Impact Assessment says the Rights Removal Bill's "recognition of trial by jury is not a change to the law as it stands". Why is the Government suggesting that it is somehow a change or improvement to the law?

2.10. Make human rights an afterthought (if that) in the law-making process

Q) Section 19 does not prevent Parliament from passing laws and policies which are incompatible with human rights – so what problem is the Government trying to solve by getting rid of it?

Q) Does the Government accept that getting rid of Section 19 together with plans to get rid of the requirement for UK courts to interpret laws compatibly with human rights wherever possible will ultimately lead to more cases being taken to the ECtHR because of the lack of alternative options?