

Rights Removal Bill*: Key Concerns



Reducing the important principle of proportionality

*We think this is a more suitable name for the Government's new "bill of rights" Bill.

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, 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. When this doesn't happen, individuals can seek justice in the courts. This is a key form of accountability and fairness that makes us all stronger in a healthy democracy.

The Rights Removal Bill seeks to tell judges how to decide if a restriction of someone's human rights by the Government or a public body is proportionate.

THE PUBLIC SAID...

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

THE GOVERNMENT SAYS...

When balancing rights the courts must..
— “ —
give the greatest possible weight to the principle, that in a parliamentary democracy, decisions about how such a balance should be struck, are properly made by Parliament.
— ” —

BIHR SAYS...

This risks gutting the important protection that proportionality and its application by the courts and public bodies, provide us.

Proportionality is a vital part of the way our HRA works to protect people both inside and outside of the courtroom. It is key to ensuring that people's non-absolute human rights are restricted in as minimal way as possible in a specific situation and that the state must justify any interference. It also provides an important framework for people and public bodies to discuss the impact of a decision or policy and ensure that human rights restrictions are minimised. We hear examples of these important discussions everyday in our work, such as Ian who used the Human Rights Act to challenge blanket policies on the use of sanitary towels in an inpatient mental health setting.

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

A response from BIHR's Human Rights Act Reform Survey

The British Institute of Human Rights

bihr.org.uk

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Rights Removal Bill: Key Concerns

Reducing the important principle of proportionality

Proportionality is about recognising that often rights do conflict with each other, and that in each case an individual's rights must be balanced against the interests and rights of others and/or the community. This is going to be very fact specific and depend on the individual whose rights are being breached, and the particular public body breaching them. However, the proposals are going to limit the ability of courts to make decisions based on the facts of each individual case.

The proposals risk a blanket approach where, if Parliament (or Government) has made a law, the courts will have to find that that law, and whatever public bodies do under that law, is a necessary and justified restriction on our human rights, without considering the people impacted. This is the Government wanting to 'check its own homework'. This will lead to more breaches of people's human rights, placing public bodies and their staff in an incredibly confusing position.

Human rights are also about protecting everybody.

As Lady Hale has said (*Ghaidan v Godin-Mendoza*): "it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not."

Proportionality recognises the value of each person's human rights and the need to balance this against considerations of the majority. This is particularly important for individuals who are already marginalised.

There is nothing in the Human Rights Act which allows courts to ignore or change the laws that Parliament makes. Currently, courts will look at laws Parliament has put in place and respect its sovereignty when making decisions, including on human rights.

Parliament 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 balance between different people's rights in every possible situation. This will just cause confusion for public bodies and courts.

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

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 its Bill. This takes us backwards.