

The duty to protect our human rights (positive obligations).
What will change under the Rights Removal Bill and what does this mean in real life?



HUMAN RIGHTS



Positive Obligations & the Rights Removal Bill

This briefing covers what positive obligations are and the difference they make through our [Human Rights Act](#) for people, public bodies and courts. The briefing then covers the UK Governments' plans to destroy positive obligations through their Bill of Rights Bill, better known as the Rights Removal Bill which replaces our Human Rights Act. The Rights Removal Bill is scheduled to be voted on by MPs on 12 September 2022 (it will then continue through the [Parliamentary process](#)). You can find out the latest here. This briefing covers what will change legally in relation to positive obligations if the Human Rights Act is replaced with this Bill, but the focus is on the impact of these legal changes for all of us, every day.

*Trigger warning, this briefing contains details of death in a mental health hospital, sexual assault, self-harm, abuse and neglect.

What are positive obligations?

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 their rights. This is a key form of accountability that makes us all stronger in a healthy democracy.

Positive obligations and their impact on people every day

Positive obligations are the foundation of safeguarding. They are about stepping in and saving lives and preventing serious harm to people, often when we are at our most vulnerable or marginalised. This protects all of us every day – often in ways that we are not aware of.

That could be emergency services putting in place resources and operational systems to ensure ambulances are dispatched to emergencies without unreasonable delay, or state agencies taking reasonable steps to protect us from terrorist attacks, such as ensuring intelligence is properly shared between the Security Service and the police.

Positive obligations ensure that there are investigations, accountability and lessons learnt when things go wrong. It is these detailed investigations that ensure proper scrutiny where someone's human rights have been breached and a public body has been involved. For example, it was positive obligations that meant that there was eventually some form of accountability and truth for the families of the 97 people killed due to the Hillsborough disaster. And it was positive obligations that ensured Adrian's mum Angela was able to hold the state to account for failing to protect his life.



Angela's story: shining a light on procedural and system failures that led to her son's death

After her son Adrian died two weeks after his discharge from an inpatient mental health unit, Angela had to rely on the positive obligations under the right to life (Article 2) to secure an inquest that would fully investigate what happened. The inquest concluded that Adrian's death had been contributed to by a failure to implement and communicate an effective support plan following discharge from hospital.

Angela was able to hold the NHS Trust, the Commissioning Group and the Police to account for their failures to protect Adrian's life. The inadequacies of the systems in place within local acute health services and mental health services were brought to light, and, crucially, improvements were made 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."

Positive obligations, the untold stories

At BIHR, we work with public officials who are using positive obligations every day to make rights-respecting decisions that keep people safe. Positive obligations provide public bodies with the framework through which to make decisions to step in and protect us.

The staff we work with at BIHR use positive obligations every day to 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.

These are the untold stories of positive obligations, as when rights are properly protected by public officials, we don't hear about them – it just happens. **Every time a child is protected from harm by a social worker or a teacher; every time a woman fleeing domestic violence is offered secure accommodation by the state; every time a care worker protects an older person with dementia from fraud; and every time a nurse challenges a DNAR order placed on a disabled person's file without consultation.** These are the moments when public officials are meeting their positive obligations under our Human Rights Act. Taking pro-active steps to protect people from harm either in practice or in policy is a key part of decision making for public bodies and public officials every day across the UK, but these stories don't make the headlines.



Mersey Care Trust and visiting policies

Mersey Care NHS Trust realised that it was difficult for children to visit their relatives in secure mental health settings in Liverpool. A group of children working with a local group explained that they were finding the ward unwelcoming, chaotic and frightening, which was making it difficult for families to maintain their relationships.

The Trust recognised the children's concerns as relating to their human right to family life (Article 8). The Trust looked at providing family visiting rooms and developed a specialised visiting area for families designed in consultation with children. The Trust was able to protect and uphold the children's right to family life and improve their experiences of visiting their relatives.



"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."

- Sarah an NHS worker





"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."

- Daisy Long, RITES Committee Expert and Independent Social Worker and Director of a practice consultancy organisation



The Rights Removal Bill on paper – unravelling positive obligations

The Government's Rights Removal Bill destroys positive obligations in several ways which are explained below. Essentially what the new Bill does, is prevent there being any 'new' types of positive obligations to protect people in the future and diminishes existing obligations and protections. This will reduce the responsibility of Government and public bodies to take even small measures to protect people's rights, including the right to life. In fact, the Government has said that its aim is to "restrict the application of existing obligations".

The detail can be found in Clause 5 of the Rights Removal Bill:

CLAUSE 5 (1) A COURT MAY NOT ADOPT A POST-COMMENCEMENT INTERPRETATION OF A CONVENTION RIGHT THAT WOULD REQUIRE A PUBLIC AUTHORITY TO COMPLY WITH A POSITIVE OBLIGATION.

CLAUSE 5 (3) FOR THE PURPOSES OF THIS SECTION AN INTERPRETATION OF A CONVENTION RIGHT IS A "PRE-COMMENCEMENT INTERPRETATION" IF EITHER OF THE FOLLOWING CONDITIONS IS MET.

CLAUSE 5 (4) THE FIRST CONDITION IS THAT—

(A) AT ANY TIME BEFORE THE COMING INTO FORCE OF THIS SECTION, A SUPERIOR COURT OF RECORD ADOPTED THE INTERPRETATION, AND

(B) THAT INTERPRETATION HAS NOT BEEN OVERRULED BY A SUBSEQUENT JUDGMENT OF SUCH A COURT (WHETHER GIVEN BEFORE OR AFTER THE COMING INTO FORCE OF THIS SECTION).

CLAUSE 5 (5) THE SECOND CONDITION IS THAT—

(A) AT ANY TIME BEFORE THE COMING INTO FORCE OF THIS SECTION, THE EUROPEAN COURT OF HUMAN RIGHTS ADOPTED THE INTERPRETATION, AND

(B) THAT COURT HAS NOT RESILED FROM THAT INTERPRETATION IN A SUBSEQUENT JUDGMENT (WHETHER GIVEN BEFORE OR AFTER THE COMING INTO FORCE OF THIS SECTION).

What does this mean?

This clause prevents courts in the UK from interpreting a human right as imposing a positive obligation on a public body, unless one of the top UK courts or the European Court of Human Rights has previously interpreted that human right in that way. This prevents courts from interpreting human rights as imposing 'new' positive obligations and freezes our rights protections. Freezing our human rights protections prevents our human rights from developing along with changing societal and cultural norms and means courts can only rely on interpretations that have already happened. However, new situations arise all the time, many of which are not imaginable in advance. For instance, during the Covid-19 pandemic we saw the importance of positive obligations to secure PPE for health and care staff as well as protecting the lives of clinically vulnerable people. Preventing courts from interpreting human rights as creating new obligations would mean that a judge could decide that public bodies had no legal duty to take reasonable steps to protect their staff's lives from Covid-19, reasonable steps in this case being provision of PPE which is unlikely to have been an interpretation previously made.

This will not only lead to lots of arguments in courts but is going to cause confusion for public bodies on the ground. Limiting how positive obligations work in human rights law within the UK will also likely mean that more people will have to take their legal case to the European Court of Human Rights in France if they want to access their human rights. The Government's own Impact Assessment (point 79) states: "This is likely to result in an increase in cases that are brought to the Strasbourg Court, where applicants have been unable to obtain a remedy domestically." This is very costly and for most people is just not an option. Winning a legal case is also not going to undo the failure to protect someone's human rights.

CLAUSE 5 (2) IN DECIDING WHETHER TO APPLY A PRE-COMMENCEMENT INTERPRETATION OF A CONVENTION RIGHT THAT WOULD REQUIRE A PUBLIC AUTHORITY TO COMPLY WITH A POSITIVE OBLIGATION, THE COURT MUST GIVE GREAT WEIGHT TO THE NEED TO AVOID APPLYING AN INTERPRETATION THAT WOULD—

(A) HAVE AN IMPACT ON THE ABILITY OF THE PUBLIC AUTHORITY OR OF ANY OTHER PUBLIC AUTHORITY TO PERFORM ITS FUNCTIONS;

(B) CONFLICT WITH OR OTHERWISE UNDERMINE THE PUBLIC INTEREST IN ALLOWING PUBLIC AUTHORITIES TO USE THEIR OWN EXPERTISE WHEN DECIDING HOW TO ALLOCATE THE FINANCIAL AND OTHER RESOURCES AVAILABLE TO THEM, INCLUDING

(C) IN PARTICULAR THE PROFESSIONAL JUDGMENT OF THOSE INVOLVED IN OPERATIONAL MATTERS.

(D) REQUIRE THE POLICE TO PROTECT INDIVIDUALS WHO ARE INVOLVED IN CRIMINAL ACTIVITY OR OTHERWISE UNDERMINE THE POLICE'S ABILITY TO DETERMINE THEIR OPERATIONAL PRIORITIES;

(E) REQUIRE AN INQUIRY OR OTHER INVESTIGATION TO BE CONDUCTED TO A STANDARD THAT IS HIGHER THAN IS REASONABLE IN ALL THE CIRCUMSTANCES;

(F) AFFECT THE OPERATION OF PRIMARY LEGISLATION (INCLUDING PRIMARY LEGISLATION RELATING TO SUPPLY AND APPROPRIATION).

What does this mean?

This discourages courts from continuing to see human rights as including positive obligations. The Bill says that when courts are considering how proactive a public body should have been in protecting a person's rights, the court should "give great weight" to factors, such as how the public body decides to allocate resources and the public body's ability to perform its functions. Currently, under our existing Human Rights Act, public bodies are only expected to do what is reasonable in the circumstances, which takes into account the resources available to the public body and the risks faced. There also must be an assumption of responsibility by the public body, and a real and immediate risk to someone. These tests already set a high bar for there to be a breach of a positive obligation by the state against a person. Public bodies every day must make decisions balancing competing priorities and low resources. The courts are fully aware of this and are very careful to not 'overburden' public bodies by setting unrealistic expectations of when they should act to protect us.



"The standard accordingly is based on reasonableness, which brings in consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available. In this way the State is not expected to undertake an unduly burdensome obligation."

- Lord Carswell, in Re Officer L



The changes in Clause 5 of the Rights Removal Bill try and put the balance of power heavily into the hands of the state, and more specifically the government. This could mean that when someone has lost their life in police custody a judge should give great weight to the police's "operational priorities" at that time to justify not taking steps to save that person's life. Or when a school fails to provide a disabled child which access to the playground, instead leaving the child to eat and play alone every day, a judge should consider how the school "allocates financial resources" when deciding whether or not there was a positive obligation to ensure the child was protected from emotional or physical harm.

Leaving the decision to take pro-active steps to protect rights down to public bodies operational priorities and resource allocation will cause chaos and confusion, and people will bear the brunt. It 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.

CLAUSE 5 (7) IN THIS SECTION "POSITIVE OBLIGATION" MEANS AN OBLIGATION TO DO ANY ACT.

What does this mean?

The current law sets out that public officials must take **reasonable steps** to protect people from harm. The new Bill says that public officials' obligation to "do any act" even a small act to protect a person from harm, should now be subject to the above tests around:

- whether or not a court has decided this before and
- should give great weight to what resources were available to perform any act to protect a person.

This means that before even getting to the new tests setting out when a public official has a duty to act to protect rights, the use of such a broad term as an obligation "do any act" already lowers the protection provided for a very large number of situations.

The problem is that any breach of a person's human rights by a public body will almost always involve a mixture of actions ('doing an act') and omissions ('not doing an act') by the public body.

This means that the changes at Clause 5 of the Bill will impact a lot of different situations where public bodies may be acting and making decisions that affect us.

The changes will lead to a lot of confusion and uncertainty. It is very difficult to identify what counts as being required to 'do an act' (a 'positive obligation' under the Bill) as opposed to being required not to do an act.

In isolation and combined, the changes set out in Clause 5 of the Rights Removal Bill will make it harder for people to seek justice and accountability when their rights are breached. It will weaken the culture of respect for human rights by lowering the bar of protection for people, leaving the decision to take pro-active steps to protect rights down to public bodies operational priorities. 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. The Rights Removal Bill is a shield to prevent any accountability for operational failures.

The Rights Removal Bill unravelling positive obligations in practice - the impact



The Government's own Impact Assessment acknowledges that the changes "could result in fewer protections for individuals where potential future positive obligations have afforded additional protections".



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

Amrit was placed in residential care on a short-term basis due to mental health problems. 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 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.

If the Rights Removal Bill had been law

Since the investigation would count as doing an "act", **if the Rights Removal Bill had been law, Amrit's family may not have been able to hold the care home to account and get them to investigate the bruising.** It also means that other care providers may decide not to take steps to prevent or to investigate similar situations to Amrit's as the new Bill sets out that when reviewing a breach of this kind, the court should give great weight to factors, such as how the public body decides to allocate resources and the public body's ability to perform its functions.



Two women's stories of seeking justice for police failings after they were raped by John Worboys (the "black cab rapist")

DSD (an anonymous name given to victim) was picked up by Worboys in 2003, drugged and raped. Worboys then drove her to a stranger's house thinking it was her address. This man convinced Worboys to take her to the police station. The desk officer did not take Worboys' details, and instead believed DSD was on drugs. DSD contacted the police many times, but later that year the police closed the case. Four years later, NBV (an anonymous name given to victim) was also picked up by Worboys. NBV's last memory is of Worboys forcing her to take a pill. The next morning, she called the police to report the assault and they got the taxi registration from CCTV. Worboys was arrested and interviewed, but he was released. In 2008, a routine computer check linked four assaults with similar circumstances. Worboys was arrested. By the end of the investigation, the police had 105 allegations against him.

The Human Rights Act, and its protection against inhuman and degrading treatment (Article 3), which can include a positive duty to investigate serious harm, meant that DSD and NBV were able to **hold the police to account and secure an admission from the police that they should have done more to investigate.** The Metropolitan Police also agreed to train their front desk officers in recognising signs of sexual assault – implementing steps to improve practice and reducing the risk of such failures happening again.

If the Rights Removal Bill had been law

This is the type of positive obligation which protects us all, but which the Rights Removal Bill seeks to diminish, subordinating victims' rights to the police's resources and priorities.



Melanie's story: Protecting patients at risk of taking their own lives

Melanie Rabone, a 24-year-old woman, was admitted to a hospital as a voluntary patient following an attempt to take her own life. Melanie was assessed as being at high risk of suicide and a doctor said that she should be assessed before being allowed to leave. Less than two weeks after being admitted, the hospital allowed Melanie's request home leave. The following day, while on leave, she took her own life.

The Supreme Court ruled that the hospital had failed in their duty to protect Melanie's right to life (Article 2). The hospital had a duty to take reasonable steps to protect Melanie's life, including by detaining her under the Mental Health Act to try and prevent her suicide. It did not matter that Melanie had not been formally sectioned under the Mental Health Act.

If the Rights Removal Bill had been law

From our work with frontline NHS staff in mental health settings, we have seen how this legal case provides staff with a clear legal framework and allows them to take proactive steps to protect people whose life is at risk. The Rights Removal Bill will undermine this. **It will leave staff having to make decisions as to when to take steps to protect patients' lives, without the clarity of the positive obligation to take reasonable steps to protect patients' lives.** It will be for each public body to decide itself when it considers that it should take steps to protect someone, based on factors such as resources, rather than when the circumstances meet the test set out in law. This risks more tragic cases such as Melanie's.



Zeena's story: Requiring authorities to protect a child from serious neglect or abuse of which it is (or should be) aware

Zeena and her three younger siblings lived at home with their parents. They were first referred to social services by a health visitor when Zeena, who was 5 years old, was reported to be stealing food. A neighbour then reported that the children were locked out of the home for most of the day and their grandmother complained to social services about the mother's care and discipline of the children. When investigating a burglary, the police reported that the children's bedrooms were filthy, and their mattresses sodden with urine. School teachers also reported bruising and their concerns about the children's health and behaviour. Despite these complaints and reports to social services, the children were not removed for five years, when they were placed in emergency care at the insistence of their mother.

This happened before the Human Rights Act was law, which meant the case had to go to the European Court of Human Rights. The psychiatrist who treated the children described it as "horrific". The Court said that after the local authority became aware of what was happening at home, they had a positive duty to protect the children from the inhuman treatment they knew was happening and had the power to stop.

If the Rights Removal Bill had been law

This is the kind of duty the Rights Removal Bill is seeking to destroy. Prioritising resources and avoiding accountability, over protecting children from neglect and abuse. The Rights Removal Bill will also take us backwards, since Zeena's case, with the passing of our Human Rights Act people can now take their cases to court here in the UK. However, this move to limit how positive obligations work in human rights law within the UK will mean that **more people will have to take their legal case to the European Court of Human Rights in France if they want to access their human rights.** This is very costly and is also not going to undo the failure to protect someone's human rights – in the same way that Zeena winning her case did not turn back the clock on the years of abuse and neglect she and her siblings suffered.



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. At a multi-disciplinary 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 and his right to be free from discrimination. 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 because of his heart condition before any treatment could take place.

If the Rights Removal Bill had been law

The Rights Removal Bill aims to allow public bodies to refuse to act to safeguard people, for instance due to financial resources or prioritising people in a discriminatory way. This is very dangerous and increases the likelihood of more awful stories like Bryn's occurring.



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 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 irritable bowel syndrome, 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 an advocacy service to write a letter to the local authority explaining that her circumstances were in danger of breaching the right to be free from degrading treatment (Article 3). The local authority then carried out an assessment of Balbir's needs, which recommended that an accessible downstairs bathroom with a walk-in shower should be built. The local authority made sure this happened.

If the Rights Removal Bill had been law

Under the Rights Removal Bill, the local authority could have tried to disregard its positive duty to assess and take steps to meet Balbir's needs, due to other priorities or limits to its financial resources. Balbir may then never have got the help she needed.

No evidence changes to positive obligations

The changes explained throughout this briefing are in no way supported by 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.

What actions can you take?

It is really important that everyone continues to raise awareness of the risks to our human rights from the Rights Removal Bill and stands up for our human rights! We especially need to hear the voices of people accessing services, as well as public officials themselves who use our Human Rights Act to create positive change every day. Sadly, this lived experience is rarely part of the debate in the UK, conveniently ignored by this government, and yet these are real stories of how our Human Rights Act is working for people.



Get involved!

Write to your MP to raise your concerns and show much you care about human rights (you can using our customisable template letters!)

Follow us on Twitter to keep up with what BIHR are doing to raise awareness and protect our HRA.

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

Find out more about what the reform could mean on our Rights Removal Bill hub. On this hub we will post all of our up to date resources and campaigns.

Read and share our guide for public bodies.

Sign up to our enews.