LIBERTY

LIBERTY'S BRIEFING ON THE BILL OF RIGHTS BILL FOR SECOND READING IN THE HOUSE OF COMMONS

JULY 2022

ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at libertyhumanrights.org.uk/policy.

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EXECUTIVE SUMMARY

The Bill of Rights Bill (BOR), widely known as the Rights Removal Bill, is unnecessary, unwanted, poorly thought through and pernicious. There is absolutely no need to repeal and replace the Human Rights Act, which has so improved the lives of people in this country over the past two decades. There is even less justification for replacing it with this Bill, which will do harm broad and specific to institutions and individuals in the name of increasing executive power, settling scores, and punishing groups of people deemed unworthy of rights.

The ramifications of this Bill will be huge. Some of the implications are doubtless intended, but much of what the Bill will do cannot be the goal of the Government. The amount of litigation that will be spawned, the legal uncertainty, the cost to the taxpayer, and the loss of control over British cases ceded to Strasbourg – and crucially, the untold and devastating impact on individuals' rights to be treated with dignity and respect – do not seem like desirable ends, but all will result from this Bill.

Over the course of this Bill's passage, hundreds of amendments will doubtless be offered in an attempt to mitigate some of the harm it will do. Even heavily amended, it is extremely difficult for us to conceive of a version of this Bill that improves upon the current human rights framework. It is therefore our strong and urgent recommendation to Government to withdraw this Bill entirely. If they will not do this, we call upon parliamentarians to act in the interests of their constituents and vote it down.

Democratic illegitimacy

The Government's evidence base for its proposals is practically non-existent, despite the access that it has to thousands of pages of high-quality legal analysis on the impact of the HRA and its proposed replacement. It has elected to ignore this entirely, discarding the report of its independent panel and the views of respondents to the Government's own consultation, and to deny Parliament an enhanced role in scrutinising a Bill of such major importance. The plans go so far beyond the manifesto commitment to 'update' the Human Rights Act that they may no longer even point to it as a mandate for their plans.

Avoiding accountability

The Bill seeks to drastically reduce the ability of courts to protect the public from human rights abuses. Declining to carry over section 3 HRA to the BOR leaves courts without the ability to interpret legislation in a rights-compatible way. More disturbing still is the Bill's suggestion that previous interpretations made under section 3 will fall unless specifically

preserved by the Secretary of State. This will undo two decades of advancements in human rights at a single stroke, and leave the rights that people depend on at the whim of a Minister.

Provisions on proportionality seek to limit courts' ability to act as a check on the Government, supposedly in the name of enhancing parliamentary supremacy. At the same time, however, the Government proposes to reduce the scope for Parliament to scrutinise legislation for ECHR compatibility. It is only the executive that wins in this equation. It is the public who will lose.

Diverging protections, closer ties

Much of the selling of the Bill has centred around a supposed 'taking back control' from European judges to our own domestic courts. This is explicitly not what the Bill does. UK courts are already under no obligation to do more than 'take into account' judgments of the European Court of Human Rights (ECtHR). This bill counterintuitively links us closer to their jurisprudence by enshrining ECtHR interpretations of rights as a 'ceiling' above which our courts may not go. This Bill imposes a limit on the human rights protections people in this country may enjoy, and hands responsibility for setting it to judges in Strasbourg.

At the same time, the weakening of rights protections and access to justice here means that more and more people will be forced into making the long and costly trip to Strasbourg when their rights have been abused by the State. In many of these cases, British courts will not have an opportunity to rule at all. The proposal to ignore interim measures of the ECtHR risks both breaching international law and emboldening other states subject to these measures to ignore them also. The measures just served on Russia to halt the execution of two British prisoners of war demonstrate just how important this is.

Subverting the devolution settlement

These changes are explicitly not wanted across the nations of the United Kingdom. The HRA and ECHR are embedded throughout the devolved settlements, engagement with the administrations has been poor and their concerns have been ignored, and each of Scotland, Wales and Northern Ireland are pursuing programmes of expanding human rights that conflict with this Bill's restrictions. It appears clear that this Bill in its current form would breach the Good Friday Agreement, raising serious concerns for stability in Northern Ireland.

Positive obligations

Among the most extreme provisions in the Bill is the attempt to dramatically restrict positive obligations, the duty upon the state to secure the protection of our human rights, by stopping

the clock on the further development of rights in response to changing conditions and turning back time on existing protections and subordinating them to public bodies' priorities. Limiting positive obligations will result in vast injustice for individuals, families, and communities across the UK. It is also fundamentally unworkable, and will result in more litigation, including at Strasbourg.

Positive obligations improve people's lives every day, in hospitals, care homes, and all our interactions with the State. They also bring us justice when things go drastically wrong. It is because of positive obligations that the families of the 97 people who died at Hillsborough, as well as the loved ones of people who have died in State custody or in other State institutions such as Zahid Mubarek[1] and Christopher Alder,[2] have been able to demand proper investigations and learning in order to prevent such abuses from occurring again. This is what the Government intends to shred.

The Justice Secretary has repeatedly claimed that replacing the HRA with the BOR will better protect women and girls. This is a galling claim, given that it was the HRA that enabled the victims of serial 'black cab rapist' John Worboys to hold the police to account for their failures to investigate him. The End Violence Against Women coalition has said, and we concur: "There is no reasonable justification for seeking to curb obligations on public authorities to protect people's human rights; this move simply seeks to absolve the state of responsibility in this area and will drastically impact victims and survivors of abuse."[3]

Attacking universality

The Bill would undermine the fundamental principle that human rights are for everyone, bestowed upon us all on the basis of our humanity. It creates groups of people deserving and undeserving of human rights, restricting the ability of people in prisons to bring human rights claims.

Eroding migrants' rights

The attack on universality also manifests in the provisions that seek to deny human rights protections to migrants. The Bill takes aim at the Article 8 right to a family life, facilitating deportations that will result in anything up to 'exceptional', 'overwhelming' and 'irreversible'

[1] The family of Zahid Mubarek, who was forced to share a cell with a racist cell mate in Feltham Young Offenders Institution and subsequently killed, relied on Article 2 to hold the prison authority to account for the failings that led to his death. See: Zahid Mubarek R v Secretary of State for the Home Department (Respondent) ex parte Amin (FC) [2003] UKHL 51.
[2] See: Wolfe-Robinson, M. and Bowcott, O., *Government to apologise to Alder family over police custody death*, The Guardian, 22 November 2011, https://www.theguardian.com/uk/2011/nov/22/government-apologise-alder-family-police-death.
[3] End Violence Against Women coalition, *British Bill of Rights is a major step back for women and survivors,* 21 June 2022: https://www.endviolenceagainstwomen.org.uk/british-bill-of-rights-major-step-back-for-women-and-survivors.

harm to a child. It also erects significant barriers to ensuring migrants' Article 6 right to a fair trial, blocking appeals and surely leading to people being deported on the basis of decisions that constitute flagrant denials of justice.

Limiting access to justice

While certain groups will be more affected than others, the Bill will make it harder for everyone in the United Kingdom to access justice and seek redress for violations of their rights. It does so by introducing new barriers to bringing proceedings and tying the remedies to which an individual is entitled to their past conduct; and removing the ability of individuals to challenge rights violations relating to overseas military operations.

Perceiving there to be too many human rights claims coming forward, the Government has elected not to ensure it does not violate people's rights, but instead intends to make it harder for people to attain justice when they have been wronged. The military proposals meanwhile are so extreme that the Bill admits significant separate legislation will be necessary to even stand a chance of their being lawful.

Government hypocrisy: free speech and jury trial

Alongside all of the restrictions and diminishments that have earnt the BOR the name of the Rights Removal Bill, the Government claims two areas where rights will supposedly be strengthened. These are the new right to a jury trial – a provision drafted in such a manner that it is unclear whether it would do anything at all – and a series of clauses relating to free speech.

Free speech organisations English PEN, Article 19, and Index on Censorship have "unequivocally rejected" the Government's claim that replacing the HRA will strengthen freedom of expression as a "false narrative". We echo their statement that "freedom of expression is too important to be used as cover for weakening the protection of human rights."[4]

The much-vaunted provision in the BOR directing courts to give 'great weight' to the importance of free speech is entirely undermined by a series of carve-outs that would have the effect of disapplying the clause in any situation where a person may want to assert their speech against the Government. This Bill does not strengthen freedom of speech. The best

[4] English PEN, Article 19 and Index on Censorship, *Bill of Rights will seriously undermine freedom of expression in the UK,* 24 June 2022: https://www.englishpen.org/posts/campaigns/bill-of-rights-will-seriously-undermine-freedom-of-expression-in-the-uk/; Siddique, H., *'False narrative': campaigners say British bill of rights could undermine free speech,* The Guardian, 22 June 2022: https://www.theguardian.com/world/2022/jun/22/false-narrative-campaigners-say-british-bill-of-rights-could-undermine-free-speech.

that could be said about it is that it does not diminish it as much as it does all our other rights – although the Government appears intent on clamping down on free expression elsewhere, whether through draconian anti-protest legislation or facilitating online censorship and eroding end-to-end encryption.

If the Government has any desire whatsoever to protect the rights of the people it serves, it must withdraw this dangerous and regressive Bill and retain our Human Rights Act in its present form.

INTRODUCTION

1. The Bill of Rights Bill (BOR, or more accurately the Rights Removal Bill) is an extremely dangerous piece of legislation. Intended to replace our Human Rights Act (HRA), it stands to do considerable harm to institutions and individuals alike. It is designed to overturn basic fundamental assumptions – such as that human rights are universal, and the State has a duty to secure our rights – and make the Government unaccountable: to the courts, to Parliament, to us.

2. At the outset, we should consider what this Bill is and is not. It is not an 'update' to the Human Rights Act, as the manifesto promised, but a full repeal and replacement. It does not "restore the balance of power between the legislature and the courts", as promised in the Queen's Speech, but relegates them both beneath the executive. It is thankfully not a withdrawal from the European Convention on Human Rights (ECHR) as desired by some, and the Convention rights are retained in a schedule as they are with the Human Rights Act. It will just become considerably harder to enforce them in domestic courts. Even calling it a 'Bill of Rights' feels deeply misleading in itself. Throughout history, the passage of bills of rights has heralded great expansions in protections for people against the power of the State. This Bill will do the opposite. It is a Rights Removal Bill, and we will all be worse off for it.

3. There is absolutely no need for this Bill to replace the Human Rights Act. Over the past two decades the HRA has given individuals a mechanism to enforce their rights in practice. It has enabled people to challenge unlawful policies, to be treated with dignity by public authorities and to secure justice for their loved ones. It has helped bring a culture of respecting human rights into hospitals, schools, care homes, and housing associations – changing the way that thousands of people are treated and supported. It is the reason why we can stand in domestic courts in our own country when something has gone wrong, rather than travelling to Strasbourg.

4. The replacement pictures something different. A society in which not everyone is equal in their access to justice; where the Government can act in ways that undermine our rights without fear of oversight from the courts, and where fewer of us will be able to rely on our own domestic legal system for justice. A place in which the state does not owe us a duty to safeguard our rights, whether in the everyday circumstances we all experience, or in the extreme situations that we hope we never will.

5. In responding to criticism of his Bill, the Lord Chancellor Dominic Raab has suggested that critics are confused and "it cannot be both ripping up human rights and a damp squib".[5] Usually, we may agree with this, but the BOR manages to do both. Alongside the cruelty is confusion; targeted rights regression sits next to seemingly entirely symbolic statements. There are broad clauses that tackle narrow situations , and others that seem to do nothing at all. In many places, it would be difficult to understand the Bill at all without a familiarity not only with the Human Rights Act, but also with the comment pages of certain newspapers and the attacks on the HRA found within them. In others, the drafting is stark in how it strips necessary protections away from the people of this country.

6. It appears very likely that this Bill was rushed to publication before it was ready. Outside of the often-confounding drafting of the Bill itself, the documents published alongside the Bill, including the Government's response to its consultation, are riddled with errors and incomplete data. One week after publication, the Ministry of Justice quietly withdrew its delegated powers memorandum from the bill page, replacing it with an updated version with more than 50 changes and corrections.[6] The consultation response at one point speaks of 3,702 respondents saying there was no case for change out of the 1,180 who responded to the question.[7] Considering the number of errors in the supporting documents, how can we sure that the Government even intends the weakening of our rights, undermining of international law, and major increase in litigation and confusion that this Bill is sure to produce?

7. The obvious answer to this would be to subject the Bill to rigorous pre-legislative scrutiny, to catch the errors and unpick the implications of this vastly consequential piece of legislation. The Government has refused to do this. If the Government wants to make this Bill the best that it can be, it should be committed to a select committee following second reading for the intensive scrutiny and vast, comprehensive amendment it requires. If, however, the Government wants to fulfil its duty to the public, to act in our interests and protect our rights, it should withdraw the Bill entirely and retain the Human Rights Act in its current form.

[5] Dominic Raab MP, Bill of Rights, House of Commons, vol. 716, col. 855, 22 June 2022, https://hansard.parliament.uk/commons/2022-06-22/debates/5736CBBA-A5F0-45B9-AA54-246FF57FB5EE/BillOfRights.
[6] Ministry of Justice, *Memorandum concerning the Delegated Powers in the Bill of Rights for the Delegated Powers and Regulatory Reform Committee*, 22 June 2022, https://publications.parliament.uk/pa/bills/cbill/58-03/0117/BillofRightsDelegatedPowersMemoFinal.pdf.
[7] Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights, Consultation Response*, 22 June 2022, [87] https://publications.parliament.uk/pa/bills/cbill/58-03/0117/consultationresponse.pdf.

I. INSTITUTIONS

8. The Bill of Rights Bill is a concerted effort to avoid accountability, centralise power in the executive, and undermine any body that may exist in order to protect the people of our country from an overweening state. It has been brought forward in its current form in spite of a manifesto commitment that promised something very different, and two consultations that have been ignored, and the Government has signalled its intention to submit its provisions to as little scrutiny as possible. The Bill discards the Human Rights Act and its elegant balance, and replaces it with an attack on accountability, on scrutiny, on international law, and on the devolved nations of the United Kingdom.

DEMOCRATIC ILLEGITIMACY

9. Before turning to the actual provisions of the Bill, it is necessary that we establish how we ended up here. This is a Bill that does not reflect the 2019 manifesto commitment, that ignores the findings of the independent panel established to determine how to fulfil that commitment, that acts entirely contrary to the views solicited by the Government themselves in their own consultation, and is being pushed through Parliament without the necessary scrutiny recommended by four separate cross-party parliamentary committees. A Bill of this constitutional importance demands a careful hand and expert guidance. In refusing these requirements, we have ended up with a dangerous Bill, whose unintended consequences may prove impossible to unpick.

<u>The manifesto</u>

10. In introducing the Bill in the House of Commons, the Lord Chancellor stated that the introduction of the Bill of Rights would allow the Government to "take the next steps to fulfil [their] manifesto commitment and deliver human rights reform across the country".[8] At this stage, the Bill itself had not been published and so the question of compatibility with the manifesto remained open. Within hours, however, it was proven to be false. The very first clause and subclause of the Bill reads "This Act reforms the law relating to human rights by repealing and replacing the Human Rights Act 1998". This is achieved by Schedule 5, Clause 2: "The Human Rights Act 1998 is repealed". This stands in contrast to the Conservative manifesto of 2019, which states, "We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of

[8] Dominic Raab MP, HC Deb, vol. 716, col. 845, 22 June 2022.

individuals, our vital national security and effective government".[9] We will deal with the question of 'balance' below. What is clear is that repealing the Human Rights Act cannot be said to be an 'update', and the Bill of Rights cannot be said to be a manifesto commitment.

The consultations

11. It should be granted to the Government that they did originally intend to fulfil their manifesto commitment. The establishment of the Independent Human Rights Act Review (IHRAR) under former Court of Appeal judge Sir Peter Gross QC was a serious attempt to update the Human Rights Act after its second decade of operation. A panel of eminent and ideologically diverse legal figures was appointed by the Government and spent nine months on a comprehensive 580-page report on the operation of the HRA and how to bring it up to date. This considerable effort was discarded almost immediately. The Government's 'follow-up' consultation largely ignored the report, far exceeding IHRAR's terms of reference, soliciting views on proposals explicitly rejected by IHRAR and ignoring the panel's specific recommendations, such as for a programme of human rights education in schools and universities. Asked by the Chair of the Justice Committee whether he considered the Government's consultation to be a 'response' to the IHRAR report, Sir Peter Gross simply responded "no".[10]

12. The Government are of course within their rights to consult more widely on potential reforms than the terms of reference they handed to IHRAR, even to the rather extreme extent to which the proposals in 'Human Rights Act Reform: A Modern Bill of Rights' went. Reading through their own consultation response, however, raises the question of the purpose of seeking the public's view at all. While more than a third of the questions are missing essential elements such as the number of respondents who answered the question or how many supported the Government's plans, where there is data available it almost all tells the same story – the Government does not have support for these proposals.

13. On the introduction of a permission stage for human rights claims, 90% of respondents told the Ministry of Justice it was a bad idea. The Government is progressing with it anyway. The proposal to repeal the interpretative duty of section 3 of the Human Rights Act received the support of only 4% of respondents against the 79% who advocated no

[9] Conservative Party, *Get Brexit Done: Unleash Britain's Potential*, Manifesto 2019, p48, https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf.
[10] Sir Peter Gross QC, Oral evidence: Human Rights Reform, HC 1087, Justice Committee, 1 February 2022, https://committees.parliament.uk/oralevidence/3374/pdf.

change. Section 3 HRA will be repealed by this Bill. In their consultation response, the Government included no support whatsoever for their proposal to limit positive obligations, referencing instead that 1,596 respondents noted that no change was required, 1,256 said that positive obligations provide protection for vulnerable people, and 874 stated that this was not a genuine issue. The Government says that it has "examined the sentiment given in responses to this question", and seemingly has decided to ignore that sentiment, as the Bill of Rights blocks new positive obligations and radically restricts those that already exist.[11] The final question of the consultation asked what the costs and benefits of the Bill of Rights might be and how any negative impacts could be mitigated. The response admits that while 359 respondents mentioned costs to wider society, "only a small proportion of responses mentioned benefits arising from the proposals". It went on, "when asked how any negative impacts might be mitigated, 1,092 respondents mentioned that [the] Bill of Rights should be withdrawn".[12]

14. This is just a very brief overview of some of the more egregious aspects of the consultation response. From the Strasbourg jurisprudence to remedial orders, from deportations to damages, from extraterritoriality to responsibilities, the Government has simply ignored the responses to its own consultation, just as it has fundamentally ignored the consultation that came before. When the Government's consultation was launched, they faced criticism for what many quarters considered a considerable lack of an evidence base for any of the proposals. Between the two consultations that have now been held, thousands of pages of expert legal analysis of the implications of these proposals have been produced. The Government has chosen to ignore it.

Pre-legislative scrutiny

15. The Government has repeatedly claimed that the Bill of Rights will help preserve and strengthen the doctrine of parliamentary supremacy. As such, its refusal to submit the Bill to pre-legislative scrutiny is confounding. In May 2022, the Chairs of the Public Administration and Constitutional Affairs Committee, the Joint Committee on Human Rights, the Justice Committee, and the Lords Constitution Committee wrote a joint letter to the Justice Secretary calling for pre-legislative scrutiny for the Bill of Rights. The letter read:

> *"As was made clear in the Queen's Speech, the Government's intent in bringing forward this Bill is to "ensure the constitution is defended" and "restore the balance*

[11] Human Rights Act Reform: A Modern Bill of Rights, Government Consultation Response, [64].
[12] Human Rights Act Reform: A Modern Bill of Rights, Government Consultation Response, [131-2].

of power between the legislature and the courts". Such proposals are therefore of supreme constitutional significance and have the potential to impact on the rights of individuals for many years to come. Thus, it is vital that any proposals and legislative measures are subject to the fullest amount of public and parliamentary scrutiny to ensure their appropriateness, practicality, and longevity"[13]

16. The Chairs – two of them Conservative MPs – concluded, "the Bill should be considered in draft by a Joint Committee". This was followed in June by a joint letter sent to the Justice Secretary from 150 civil society organisations calling for robust consideration of the Bill of Rights in draft.[14] Supporting the letter, Justice Committee Chair Sir Robert Neill MP warned that the Bill's proposals were likely to cause "considerable concern, both from a constitutional standpoint and in terms of their potential impact on the rights of individuals", and as a consequence "the fullest amount of scrutiny should follow", including pre-legislative scrutiny. He said, "It is disappointing that the Government has chosen not to go down this path and I would urge it in the strongest possible terms to reconsider."[15]

17. Despite this, the Government has indicated that no pre-legislative scrutiny will be forthcoming. What we are left with is a major constitutional change that upends human rights protections in the United Kingdom with potentially vast impacts on our legal system, the operation of public authorities, and the relation of the public to the state. This was not a manifesto commitment, runs entirely contrary to the report of the Government's appointed independent panel, is constructed of provisions systematically rejected by respondents to their consultation, and unless there is a change, will remarkably be treated like any normal piece of legislation.

AVOIDING ACCOUNTABILITY

18. If there is one single purpose of this legislation, it is to break down the careful balance between the executive, Parliament, the courts and the people that exists in this country and reconstitute it on a slanted plane. The Government speaks of 'restoring' balance and returning power – removing it from the European Court to the domestic courts, and from there to Parliament. This is not, however, what the Bill proposes. Rather, the courts,

[13] William Wragg MP, Harriet Harman MP, Sir Robert Neill MP, Baroness Drake, *Letter to Secretary of State for Justice: pre-legislative scrutiny of a 'Bill of Rights'*, 27 May 2022, https://committees.parliament.uk/publications/22473/documents/165604/default.
[14] Syal, R., *Raab urged to let parliament scrutinise Human Rights Act replacement*, Guardian, 21 June 2022, https://www.theguardian.com/law/2022/jun/21/dominic-raab-bill-of-rights-human-rights-act-replacement-letter.
[15] Liberty, *'What are they so afraid of': MPs call for pre-legislative scrutiny for proposed Bill of Rights*, 21 June 2022, https://www.libertyhumanrights.org.uk/issue/what-are-they-so-afraid-of-mps-call-for-pre-legislative-scrutiny-for-proposed-bill-of-rights.

Parliament and the public will all lose out as power is centralised and vested in an executive made ever more untouchable as routes to accountability are closed off.

Section 3 HRA

19. That this is no ordinary piece of legislation is made clear by the first subclause of the first clause of the Bill: "This Act reforms the law relating to human rights by repealing and replacing the Human Rights Act 1998". While some elements of the HRA are replicated in the BOR – in a weakened state or otherwise – and new provisions are added, which we will cover below, certain important parts of our Human Rights Act are discarded entirely. The most consequential of these is the wholesale ditching of section 3 HRA, the interpretative power whereby courts are able to read legislation compatibility with human rights.

20. A Bill of Rights containing no interpretative power would have no meaningful constitutional status. There would be no means by which the UK courts could correct human rights violations and individuals would be unable to enforce their rights through the courts. If the Government is committed to protecting rights under the BOR, it must provide a mechanism for the courts to interpret other legislation compatibly with those rights. Section 3 of the HRA was carefully constructed in a way which provides individuals facing human rights violations to gain effective relief while also preserving the proper role of Parliament. The UK courts have been cautious in their approach to s.3 HRA, using it to address narrow and specific rights violations, and issuing declarations of incompatibility where the rights violation engages more fundamental questions of policy.

21. The proposal to repeal section 3 HRA appears to be based on a perception of a democratic deficit resulting from the judicial 'amendment' of legislation. The consultation paper states that the HRA has "moved too far towards judicial amendment of legislation which can contradict…the express will of Parliament".[16] However, IHRAR concluded that there was "little to no evidence to support the position that UK Courts are misusing section 3" and that, at least since 2004, "judicial restraint could properly be said [to] have been exercised in the use of section 3; not least demonstrated by the number of times it has been used to interpret legislation".[17] We also note that IHRAR rejected the view that section 3 had "reduced democratic accountability",[18] concluding that "the majority of the Panel did not accept that the evidence supported the view that either Government or Parliament had effectively delegated responsibility in this way to the UK Courts, nor that

[16] Human Rights Act Reform: A Modern Bill of Rights [233].
[17] Human Rights Act Reform: A Modern Bill of Rights [212].
[18] Human Rights Act Reform: A Modern Bill of Rights [213].

section 3 in its current form promoted such an approach".[19] Indeed courts have many limits on their use of section 3, including those relating to the meaning of the words used,[20] the sensitivity of the issue,[21] and Parliament's view of the potential interpretation.[22] This repeal is therefore based on perception of the use of s.3 which goes far beyond its application in practice.

22. The Government has also failed to recognise that s.3 HRA does not prevent Parliament from legislating in a way which is incompatible with Convention rights and therefore does not undermine democracy. It has failed to recognise that, where the courts have read in a Convention-compatible way using section 3, it is always open to Parliament to amend the legislation to make it clear that it is intended to be read in a Convention-incompatible way. The fact that Parliament has often chosen not to do so indicates that it has generally been content with the courts' interpretation. It has also failed to heed the widespread opposition to discarding section 3, from its own independent panel, from the Justice Committee, from the JCHR, who said the move would lead to a substantial weakening in the protection of human rights in the UK – as well as significant legal uncertainty and confusion",[23] and from the respondents to its own consultation, only 4% of whom supported the repeal, with 90% rejecting either of the Government's proposals, and 79% specifically stating that no change should take place.[24]

Declarations of incompatibility

23. Without an interpretative obligation in the Bill, courts faced with legislation that infringes upon our human rights will be forced into greater use of declarations of incompatibility. This goes hand-in-hand with clause 10, which extends the use of these declarations to cover more forms of secondary legislation than was explicitly provided for before. This expansion will cause its own problems, alongside the broader issues prompted by the repeal of section 3. It should be noted first of all that the European Court of Human Rights has established that a declaration of incompatibility under the Human Rights Act (or indeed the Bill of Rights if passed in its current form) does not constitute an effective remedy (see for example *Hobbs*[25] and *Burden*[26]). On top of this however, an increase in

[19] Human Rights Act Reform: A Modern Bill of Rights [213].
[20] See: *R (Vanriel and anor) v Secretary of State for the Home Department* [2021] EWHC 3415 (Admin); *Re S (Care Order: Implementation of Care Plan* [2002] UKHL 10.
[21] See: *Bellinger v Bellinger* [2003] UKHL 21 [2003] 2 WLR 1174.
[22] See: *WB v DC* [2018] EWCA Civ 928.
[23] Joint Committee on Human Rights, *The Bill of Rights, Letter to Dominic Raab MP*, 30 June 2022, https://committees.parliament.uk/publications/22880/documents/167940/default.
[24] Human Rights Act Reform: A Modern Bill of Rights, Government Consultation Response, [69].
[25] *Hobbs v UK* (2002), no. 63684/00.
[26] *Burden v UK* (2008) 47 EHRR 38.

declarations of incompatibility will inevitably create problems for Parliament. Part of the elegance of section 3 is in its nimbleness. Where a provision of legislation is found to be incompatible with human rights, an interpretation can be read into it and the issue is solved. When declarations of incompatibility are used, nothing changes automatically. The matter is returned to Parliament

24. During the passage of the Human Rights Bill in October 1998, the then Lord Chancellor said that the expectation was that "the Government and Parliament will in all cases almost certainly be prompted to change the law following a declaration of incompatibility".[27] Given that the Government's avowed intention is that the UK should continue to respect Convention rights, we assume it remains committed to remedying the law following a declaration. It is far from clear, however, that there is any desire within Parliament for the extra drain on their time that an expansion of declarations of incompatibility would bring about. As the JCHR told IHRAR

> *"We did not receive any evidence suggesting there is an appetite from Parliamentarians for greater involvement in resolving human rights incompatibilities identified by the courts. The pressure on the Parliamentary timetable is already great. Requiring the legislature to grapple with every instance of legislative incompatibility with the Convention, whether in a recent statute or one passed many years before the HRA came into force, would put a significant additional burden on the Government and Parliament (and the Parliamentary timetable)."*[28]

25. The combined effect of repealing section 3 and expanding declarations of incompatibility will either eat into parliamentary time, result in a greatly increased use of poorly-scrutinised ministerial remedial orders, or almost certainly both. More importantly, it will create an entirely undesirable delay between a human rights violation being identified and being remedied. Let us be clear, however long it takes for a Minister or Parliament to correct an abuse that could have been put right by the Court under section 3 is a period of time in which human rights are knowingly being violated, entirely produced by this Bill.

Rights at the whim of a Minister

26. In considering why the Government has chosen to pursue a policy that is unpopular, unnecessary, and unworkable, it is likely worth considering the major, potentially unprecedented amount of power that the Bill implies will be handed to the Secretary of

[27] Lord Irvine of Lairg, HL Deb, vol.317, col. 1301, 21 October 1998.
[28] The Independent Human Rights Act Review, *Report of the Independent Human Rights Act Review,* 14 December 2021, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf [5.105].

State as a result. Repealing section 3 of the Human Rights Act would be bad enough were it subject to the normal status afforded repealed legislation under section 16 of the Interpretation Act 1978. It would be normal practice for the interpretations of laws made by courts under s.3 HRA to remain part of binding precedent, so that the impact of losing s.3 would be entirely in relation to future judgments that no longer would be possible under the Bill of Rights. Clause 40, however, confers upon the Secretary of State the power to "amend or modify any primary or subordinate legislation so as to preserve or restore (to any extent) the effect of a relevant judgment of a court", with 'relevant judgment' defined as one that "(a) decides that one or more provisions of primary or subordinate legislation are to be interpreted or applied in a particular way, and (b) appears to the Secretary of State to have been made in reliance on section 3 of HRA 1998 (interpretation of legislation)". If the implication of this clause is not clear from the drafting, the explanatory notes clarify that the intention is to allow the Secretary of State to "preserve or restore the effect of legislation that has been interpreted or applied using section 3 of the HRA *so that this is not lost on repealing the HRA"* (emphasis added).[29] Regulations relating to primary legislation will be subject to the affirmative procedure, secondary legislation to the negative procedure, and there is a sunset clause of two years after commencement.

27. What this clause and the explanatory notes appear to be saying is that, upon commencement of the BOR and repeal of the HRA, all section 3 HRA judgments will fall. No precedent based upon those decisions will remain other than where selected by the Secretary of State. The advancements in human rights protections developed by the use of the interpretative duty over the past two decades will sit entirely at the whim of a Minister. As the JCHR points out, this "has the potential to affect millions of people in the UK: those in hospitals, in care settings, those dealing with local authorities, in education, in detention settings or in social matters. Indeed, it will impact upon anyone who deals with public bodies and will likely disproportionately impact those who are the most vulnerable in society". They conclude: "We are not convinced that the significant implications of this change have been fully considered."[30] It is our strong hope that the JCHR is correct and the implications of the repeal of section 3 and the inclusion of clause 40 have not been fully considered. The alternative is that this has been thought through, and the manifold serious negative impacts it will produce have been deemed 'worth it' in

[29] Ministry of Justice, *Bill of Rights Bill, Explanatory Notes*, 22 June 2022, [264], https://publications.parliament.uk/pa/bills/cbill/58-03/0117/en/220117en.pdf.
[30] Joint Committee on Human Rights, *The Bill of Rights, Letter to Dominic Raab MP*, 30 June 2022, https://committees.parliament.uk/publications/22880/documents/167940/default.

the interests of reducing the power of the courts to ensure people's rights and vastly increasing the power of the Justice Secretary. That eventuality is much worse.

Proportionality

28. Another way in which the Bill of Rights seeks to reduce the ability of the courts to hold the Government to account is in its attempt to stick a thumb on the scale of the proportionality test. Clause 7 states that where a court is determining an incompatibility question in relation to a provision of an Act and it is necessary to decide whether how the Convention rights are secured strikes an appropriate balance as between different policy aims, Convention rights, the Convention rights of different persons, or a combination, the court must "regard Parliament as having decided, in passing the Act, that the Act strikes an appropriate balance" and "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". The intention of this clause is clear – to "draw the teeth from the proportionality test" as Chair of the Faculty of Law at the University of Cambridge, Mark Elliott put it – but the actual effect is less so. Courts will already defer to Parliament where appropriate on questions like these, and while this requirement is higher, it is unclear how a duty to "regard Parliament as having decided" something will be interpreted. If the clause is successful in undermining the courts' ability to play their role in determining proportionality, it appears that it may arrest somewhat the expected expansion in declarations of incompatibility outlined above. In these cases, we would not have the protection of an interpretation or even a declaration, but simple violation of our rights.

ECHR compatibility

29. The Bill's insistence that courts regard Parliament as having determined whether Acts strike an appropriate balance relating to human rights sits uneasily next to the exclusion of section 19 HRA from the BOR. Section 19 confers upon Ministers in charge of bills in either House of Parliament a duty to make a statement, either to the effect that in their view the provisions of the bill are compatible with the Convention, or that, although they are unable to make a statement of compatibility, the Government nevertheless wishes the House to proceed with the bill. This takes the form of a short statement on the first page of a new bill, usually accompanied by a separate human rights memorandum and/or additional elaboration on what the Minister believes to be the relevant human rights issues in the explanatory notes. The importance of this provision is that it requires the Government to set out clearly the compatibility of legislation with the Convention rights

and provide an explanation as to their reasoning, allowing Parliament to assess and consider it properly. As IHRAR stated, the aim of s.19 HRA statements was to "enhance the depth and quality of parliamentary debate and scrutiny of legislation", [31] and the process "forms an integral part of the overall scheme for giving effect to Convention rights in UK domestic law",[32] noting that "the substantive benefit of a statement of compatibility stems from the fact that it requires the Government to consider a Bill's compatibility with Convention rights and to provide a focus for parliamentary discussion on the issue."[33] The Cabinet Office *Guide to making legislation* points out that "there is no legal obligation on the minister to give a view on compatibility other than as required by section 19 nor is there a specific requirement for the minister to reconsider compatibility issues at a later stage."[34]

30. With all this in mind, the question arises as to why the Government has seen fit to exclude section 19 HRA from carryover to the Bill of Rights. The Government response to its own consultation states:

> *"The Government is of the view that reform of section 19 is needed. We will therefore not replicate the section 19 obligation in the Bill of Rights, in order to facilitate innovative policy making. The Government is proposing removing this in order to move away from the simplistic binary offered by section 19. The stigma attached to the making of a section 19(1)(b) statement risks effectively operating as a veto on innovative policy-making, even in cases where legislation may be successfully defended in court. This change will allow and encourage innovative and creative policy making which better achieves Government aims, without preventing human rights impacts from being considered during the passing of a Bill."*[35]

31. This is a quite remarkable statement to make considering that we are speaking about something that should be a given – that legislation brought forward should be compatible with the Convention rights. The concept of there being a 'stigma' about falling on the wrong side of a 'simplistic binary' as to whether the Government is being lawful or not in its legislating would be funny were the implications not so concerning. 'Innovative policy

[31] IHRAR [5.30].
[32] IHRAR [5.29]
[33] IHRAR [5.161].
[34] Cabinet Office, *Guide to making legislation,* 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1048567/guide-to-making-legislation-2022.pdf.
[35] Human Rights Act Reform: A Modern Bill of Rights, Government Consultation Response, [88].

making' may by itself sound like something that all parties would support, in this context it is clear what it means – laws that breach our human rights.

DIVERGING PROTECTIONS, CLOSER TIES

32. In the week leading up to publication of the Bill, the headlines "British Bill of Rights designed to restrain Strasbourg judges" and "British human rights overhaul set to limit power of European judges" appeared in the Times.[36] The articles spoke of "primacy" for the Supreme Court and a move to "break the formal link " between the British courts and the European Court of Human Rights. Welcoming the introduction of the Bill, Conservative MPs spoke about "taking back control" from "unelected, unaccountable foreign judges",[37] and "restor[ing] the authority of British courts".[38] It should be clear that this is not what the Bill of Rights does. Indeed, it achieves quite the opposite – providing for an ever-greater role for ECtHR judges in our cases, and a more prescriptive role for ECtHR jurisprudence in our law. In return, we will receive only greater conflict with Strasbourg, permanently weaker rights protections than are enjoyed in other Convention signatory states, important tools of international law undermined, and the reversal of the HRA's achievement of 'bringing rights home'.

Section 2 HRA

33. Section 2 HRA states that courts "must take into account" judgments of the European Court of Human Rights. It does not go beyond this, and the evidence demonstrates that UK courts are conscious of the independence afforded them and its importance both in determining questions in a UK context, and contributing to the broader jurisprudence under the Convention. As Lord Neuberger said in *Pinnock*, "This Court is not bound to follow every decision of the ECtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the ECtHR which is of value to the development of Convention law".[39] More recently in *Abdurahman*, the Court of Appeal found that it might be "right to depart even from a 'clear and constant' line of decisions if (i) it is inconsistent with some fundamental substantive or procedural aspect of our law or (ii) its reasoning appears to overlook or misunderstand some argument or point of principle", taking it further to

[36] Swinford, S., Dathan, M. & Ames, J. *British Bill of Rights designed to restrain Strasbourg judges*, The Times, 17 June 2022, https://www.thetimes.co.uk/article/rwanda-flights-grounded-tories-target-human-rights-laws-priti-patel-sq3srktwm; Dathan, M. *British human rights overhaul set to limit power of European judges*, The Times, 22 June 2022, https://www.thetimes.co.uk/article/british-human-rights-overhaul-set-to-limit-power-of-european-judges-q68fz2nh9.
[37] Sir John Hayes MP, HC Deb, vol. 716, col. 855, 22 June 2022.
[38] Jack Brereton MP, HC Deb, vol. 716, col. 684, 22 June 2022.
[39] *Pinnock v Manchester City Council* [2010] UKSC 45.

assert “Even where the Grand Chamber has endorsed a line of authority, it is not necessary for the domestic to court [sic] to conclude that it involved an ‘egregious’ oversight or misunderstanding before declining to follow it".[40]

34. In its detailed consideration of the application of section 2 of the HRA, IHRAR made the same findings. It concluded that following the “initial evolutionary phase” of *Ullah,*[41] the UK courts have retreated from the ‘mirror principle’ and developed a more nuanced approach. It is now clear that the UK courts may decide not to follow the ECtHR where there is no clear and consistent line of ECtHR case law, where an ECtHR decision is based on a misunderstanding of UK law, or where there is a failure to properly consider UK law.[42] The report states that “UK Courts can fairly be said to have continued to develop a more confident and flexible approach to ECtHR case law”[43] and explicitly rejects repealing section 2 or weakening it so that “must take into account” becomes “may take into account”.[44] IHRAR’s only recommendation in relation to section 2 was a minor amendment to clarify that domestic statute and common law be applied before ECtHR case law.[45]

<u>The living instrument</u>

35. In the Bill of Rights, section 2 HRA is replaced by clause 3, which states that, in determining a question which has arisen in connection with a Convention right, courts “may adopt an interpretation of the right that diverges from Strasbourg jurisprudence”. It also states that courts “must have particular regard” to the actual text of the right itself, and “may have regard” to the preparatory work of the Convention and common law. This clause, alongside others in the Bill, is an attempt at importing into our law US-style constitutional originalism, the legal concept that seeks to undo the ability of existing laws to reflect the changing social mores of the times and instead seeks to root our understanding in the moment they were written.

36. In maintaining his welcome opposition to leaving the European Convention on Human Rights, Dominic Raab has been explicit in his feelings regarding the development of its jurisprudence. In introducing the Bill to the Commons, Raab said that the ECHR “is a set of common-sense principles, and the problems we have encountered stem from its elastic interpretation and expansion, absent meaningful democratic oversight,

[40] *R v Abdurahman* [2019] EWCA Crim 2239.
[41] IHRAR [2.50].
[42] IHRAR [2.64].
[43] IHRAR [2.78]
[44] IHRAR [2.143-159]
[45] IHRAR [2.185-196].

particularly as a result of the procedural framework set out in the Human Rights Act."[46] Despite Raab's criticism, the development of the interpretation of the Convention over time is a vital and hugely positive component of our developing rights protections. The ECHR is intended to be interpreted purposively, that is, to give effect to its central purposes of maintaining and realising human rights and fundamental freedoms and protecting individual human rights; promoting the ideals and values of a democratic society; and maintaining the rule of law. These are dynamic goals requiring a flexible approach; hence, the Convention was designed to be a "living instrument which must be interpreted in the light of present-day conditions."[47] At the same time, Raab's picture of ever-expanding, 'elastic' interpretations coming out of Strasbourg is not reflected in the evidence. There are limits to the extent to which the ECtHR is willing to interpret the Convention, and it gives, for example, a wide margin of appreciation to States in the consideration of social and economic issues.

Divergence – sending rights back

37. If clause 3 aims to prune the 'living tree' of ECHR interpretation, it also explicitly intends that we in the UK diverge from Strasbourg jurisprudence. The surely unintended result of this appears to be many more cases against the United Kingdom being heard, and won, at Strasbourg. If the Human Rights Act brought rights home, allowing people to get justice in our own domestic courts, the Bill of Rights sends those rights – and British people wronged by the state – back across the Channel. The reason for this of course is that we are still signatories of the European Convention on Human Rights, and while the Supreme Court may be the "ultimate judicial authority on questions arising under domestic law in connection with the Convention rights", as the clause says, the United Kingdom will still be bound and its people will still be protected by the ECHR. It will just be much harder and more expensive for people to get justice, and when it comes it will be at the hands of European judges rather than our own.

38. If this divergence enhances the role of Strasbourg judges, so does another factor enshrine the importance of Strasbourg jurisprudence. Clause 3(3)(a) reads, "A court determining a question which has arisen in connection with a Convention right may not adopt an interpretation of the right that expands the protection conferred by the right unless the court has no reasonable doubt that the European Court of Human Rights would adopt that interpretation if the case were beyond it". This remarkable clause, reproduced as well in relation to damages at clause 18(3), achieves two things that it would be difficult

[46] Dominic Raab MP, HC Deb, vol. 716, col. 845, 22 June 2022.
[47] *Tyrer v UK* (1978) 2 EHRR 1, [31]; *Johnson v Ireland* (1986) 9 EHRR 203, [53].

to see many Governments actively wanting to legislate to bring about. First, it limits the protections that people in the United Kingdom may enjoy relative to the other signatories of the Convention. It states that because we are in the UK, we may receive *at the absolute most* the same level of protection that other Convention states do, but we are barred from stepping beyond it. And second, this limit, the absolute ceiling on the extent to which we may be protected by Convention rights in this country, is imposed by Strasbourg jurisprudence. The Government has written into this Bill a vastly more prescriptive role for the Strasbourg jurisprudence than exists in the Human Rights Act. Before we had only to take into account the decisions of the ECtHR and were free not to follow them. Now they will constitute the absolute outer limit of the boundaries of our rights. The explanatory notes emphasise the point:

> *"Subsection 3(b) clarifies that, beneath the 'ceiling' set out in subsection 3(a), courts may depart from Strasbourg jurisprudence: there is no 'floor' in relation to the Strasbourg jurisprudence. Courts are therefore free to adopt interpretations of rights that do not expand the interpretations of rights, regardless of the approach that would be taken by the ECtHR in the same circumstances. Courts may therefore depart from Strasbourg jurisprudence – informed, for instance, by the considerations in subsection (2) – as long as they do not adopt an interpretations [sic] of a right that confers greater protection than would be conferred by the ECtHR."*[48]

39. Specifically, the explanatory notes state, for example, that "courts cannot interpret a Convention right to expand the scope of the right to cover more circumstances, impose additional obligations on public authorities, or restrict the extent to which interferences with and limitations on the right can be justified, unless the court has no reasonable doubt that the ECtHR would adopt the same interpretation".[49]

40. This is baffling enough from a point of principle even before we consider the drafting and the practical implementation of the clause. What, legally, does "expand[ing] the protection conferred" by a right mean? How is a court to ascertain whether the ECtHR would adopt a certain interpretation of a right? Even the reference to "Strasbourg jurisprudence" itself is striking. While it is defined in the Bill, this would likely be the first Act of the UK Parliament to contain those words.[50] In the name of breaking from Strasbourg, the Bill of Rights will rather turn what has been dialogue into a monologue from the European Court. Our 'right of reply', our ability to influence the jurisprudence and decide what these

[48] Bill of Rights Bill, Explanatory Notes, [51].
[49] Bill of Rights Bill, Explanatory Notes, [50]
[50] They are defined in the Bill at clause 35.

Convention rights should mean will be reduced, and instead we will have British cases decided without touching British courts, and a ceiling placed on our rights by Strasbourg. While the Bill has been hailed as "taking back control", MPs should ask themselves upon reading clause 3 from whom control is really being taken.

Interim measures

41. While most of the Bill was carried across from the near-universally rejected proposals in the Government's consultation, clause 24 on interim measures of the European Court of Human Rights was not. It should be noted that the Bill was published in the immediate wake of attempted removals of asylum seekers to Rwanda being halted as a result of one of these orders issued under Rule 39 of the ECtHR Rules of Court. It is hard to avoid the inference that this significant constitutional step was taken in response to the judgment – hardly a sound footing on which to signal the United Kingdom's readiness to potentially break international law, and undermine a vital tool in the armoury of the Court at a time when it is most needed.

42. Rule 39 interim measures are granted "only on an exceptional basis, when applicants would otherwise face a real risk of serious and irreversible harm". Being exceptional, applications for interim measures are most often rejected. When they are granted, it is on the basis of serious need, and contracting states are under an obligation to comply with them. Interim measures are not a permanent block on an action; they are not a final judgment and nor do they prejudge any subsequent decision that the Court may make. Instead they exist to stop imminent harm. The Government is of course aware of this. In the case of *Evans v the United Kingdom*, for example, interim measures were granted to prevent the destruction of fertilised embryos requested by one member of a broken-up couple while Article 2 and 8 arguments could be heard. The Court ultimately found no violation of the Convention, and allowed the destruction of the embryos. The interim measures therefore were no indication of future judgment, but operated only to prevent irreparable damage before the case could be properly heard.

43. Should this clause be passed into law and the United Kingdom begin to ignore interim measures, we would clearly be in breach of our Article 34 ECHR responsibility not to hinder the effective exercise of individual application to the Court. As established in *Mamatkulov and Askarov v Turkey*, interim measures are a necessary tool for avoiding irreversible situations that would deny the Court a proper opportunity to examine the application and – if successful – secure the rights of the applicant. Failing to abide by these measures therefore constitutes a breach of Article 34 of the Convention.

44. What is more, this cavalier disregard for our obligations under international law is dangerous not only for our international standing, not only for the people who stand to come to "serious and irreversible harm" as a result of this clause, but also as a standard to be followed in and by other countries. On 30 June 2022, the ECtHR granted interim measures under Rule 39 in the case of two British prisoners of war sentenced to death in the so-called 'Donetsk People's Republic' separatist area of Ukraine held by Russian forces. It is, at present, unclear what the fate of these two men will be, but the case demonstrates the danger inherent in undermining international law for our own parochial purposes. There may be an exceptionalist current among some in Government who feel that the United Kingdom need not be bound by international law, but every violation we make is a signal to all other states that they may do the same. The Government should think very carefully about whether it wishes to be copied in some of these moves.

SUBVERTING THE DEVOLUTION SETTLEMENT

45. Dominic Raab's foreword to the Government's consultation claimed: "Our proposals recognise the diverse legal traditions across the UK, alongside our common heritage. We will be seeking the views of each of the devolved administrations, and across all four nations of the UK, to ensure we safeguard our human rights protections in accordance with a common framework, while reflecting our diversity and devolved competences".[51] The rest of the consultation paper did not live up to this introduction,[52] and nor does the Bill. What we have instead is a Bill that is not wanted in the devolved nations, that stands to introduce confusion into their administrations, sow conflict between the UK and its constituent parts, and even threaten peace in Northern Ireland.

Scotland & Wales

46. The Justice Secretary's commitment to seek the views of the devolved administrations was a welcome one, and those views were very clearly and comprehensively given. In response to the launch of the Government's consultation in December 2021, Scottish Deputy First Minister John Swinney wrote that he found it "difficult to view the proposals which have now been published by the UK Government other than as a pre-planned and politically-motivated attack on human rights, constitutional certainties and the rule of law".[53] Jane Hunt and Mick Antoniw, Welsh Ministers for Social Justice and the

[51] Human Rights Act Reform: A Modern Bill of Rights, p.4.
[52] See for example Human Rights Consortium Scotland's response to the consultation: https://hrcscotland.org/wp-content/uploads/2022/03/Final-joint-HRA-Reform-response-8th-March-2022.pdf.
[53] John Swinney MSP, *Human Rights Act: letter to the Lord Chancellor*, Scottish Government, 21 December 2021, https://www.gov.scot/publications/human-rights-act-letter-to-the-lord-chancellor.

Constitution respectively, issued a written statement the next month, stating that they were "disappointed by the pejorative and leading nature of the report and the consultation questions. It remains our firm view that human rights are, and should continue to be, irreducible and apply equally to all persons. The consultation, in places, seems to veer off course from this important and fundamental principle."[54]

47. Both governments responded to the consultation, with the Scottish response warning that "the UK Government has significantly misunderstood not just the importance and value of the HRA as a guarantor of human rights and fundamental freedoms in the UK but also the extent to which the rights enshrined in the HRA enjoy public support and directly benefit individuals, families and communities throughout the whole of UK society" and urging the UK Government to "abandon its plans to replace the HRA and to publicly re-commit to upholding, in full, the rights which are already very successfully protected by the HRA in its existing form".[55] The Welsh response concluded: "The proposals will have a detrimental and long lasting impact on the people of Wales, and the UK. At a time when the UK should be leading by example and making it clear that human rights are inalienable and irreducible, these proposals are regressive and undermine the core principles underpinning Convention rights. The Welsh Government, in this response and in its practice, has demonstrated there is a different way, and a way which has a positive impact not a regressive one".[56] This was accompanied by a joint letter from ministers of both nations, stating: "The Scottish and Welsh Governments are very clear that under the current constitutional settlement the interests of the peoples of Scotland and Wales are best protected by retaining the Human Rights Act in its current form".[57]

48. As the Bill was published, representatives of both Governments renewed their opposition, with Scottish Equalities Minister Christina McKelvie urging Westminster to "stop this act of vandalism", and the Welsh Ministers for the Constitution and Social Justice highlighting that "the process followed by the UK Government has been totally unsatisfactory, not least in relation to engagement with the Devolved Governments",

[54] Jane Hutt MS & Mick Antoniw MS, *Written Statement: UK Government Proposal to Reform the Human Rights Act 1998*, Welsh Government, 12 January 2022, https://gov.wales/written-statement-uk-government-proposal-reform-human-rights-act-1998.
[55] Scottish Government, *Human Rights Act reform consultation: Scottish Government response*, 8 March 2022, https://www.gov.scot/publications/human-rights-act-reform-consultation-scottish-government-response.
[56] Welsh Government, *Human Rights Act Reform: A Modern Bill of Rights, The Welsh Government's Response to the Consultation launched by the UK Government on 14 December 2021*, 8 March 2022, https://gov.wales/sites/default/files/publications/2022-03/human-rights-act-reform-a-modern-bill-of-rights_0.pdf
[57] Cabinet Secretary for Social Justice, Housing and Local Government of the Scottish Government, the Minister for Equalities and Older People of the Scottish Government and the Welsh Government's Minister for Social Justice and Counsel General and Minister for the Constitution, *Human Rights Act: joint letter to the Lord Chancellor with Welsh Ministers - March 2022*, 2 March 2022, https://www.gov.scot/publications/human-rights-act-joint-letter-to-the-lord-chancellor-with-welsh-ministers-march-2022.

specifically complaining that they had not had advanced sight of more than five clauses of the Bill, provided only a few days ahead of publication.

49. Part of the reason for this clear opposition to the proposals is that the Westminster Government's evident distaste for human rights is not shared in the devolved administrations, who have each been undergoing work aimed at expanding the protections that people in their nations may enjoy, in stark contrast to the programme of restriction and regression embarked upon in Westminster. The Scottish Government for example is committed to the incorporation of UN treaties on economic, social and cultural rights, disability rights, and the elimination of racial discrimination and discrimination against women.[58] In May 2022, the Welsh Government published a report outlining principles for a devolved justice system, including proposals for a Welsh Human Rights Bill, including as well the incorporation of UN treaties.[59]

50. Alongside this clear clash of principles, another reason for the opposition of the devolved administrations to these changes is the inevitable confusion that will arise as a result. While the Convention rights were brought into UK law by the Human Rights Act, the ECHR is also an important element of the Scotland Act, which established Scottish devolution. Section 29 of that Act provides that the Scottish Parliament cannot legislate in a manner that is incompatible with any of the Convention rights. If a court finds that an Act of the Scottish Parliament breaches this, it may declare it outside its legislative competence and strike it down in a manner similar to s.4 HRA's treatment of secondary legislation. Section 101 of the Scotland Act provides for an interpretive power similar to s.3 HRA, while section 57 provides that Ministers must act compatibly with Convention rights. In this light, the divergence in the meaning of rights outlined above would appear to bring about a very problematic level of legal uncertainty within Scotland, as two diverging sets of protections develop – the Convention rights manifested through the Scotland Act, and the corresponding rights in the UK-wide Bill of Rights, which although comprised of the same words would not necessarily mean the same thing.

51. An annex to the explanatory notes helpfully outlines the provisions that will require legislative consent to be sought. Of the 41 clauses and 5 schedules, 20 provisions will require the consent of at least one of Scotland, Northern Ireland and Wales. Considering the weight of opposition outlined above to these plans in general, and the specific proposals requiring consent themselves, it is difficult to see consent being forthcoming. Regrettably, it is equally hard to imagine this dissuading the Government, considering the

[58] Scottish Government, *New Human Rights Bill*, 12 March 2021, https://www.gov.scot/news/new-human-rights-bill.
[59] Welsh Government, *Delivering Justice for Wales*, 24 May 2022, https://gov.wales/delivering-justice-for-wales.

lack of attention they appear to have paid to the devolved administrations' entreaties regarding this Bill thus far. This therefore appears set to produce an entirely undesirable situation in which a vastly unpopular Bill of Rights that weakens rights, sows confusion, and orients itself in stark contrast to the progressive vision of enhanced protections across these nations is imposed on people who have explicitly denied it consent.

Northern Ireland

52. The biggest concern however is with Northern Ireland. Here, many of the same problems exist as with Scotland and Wales. The plans run contrary to the movement within Northern Ireland to a more expansive and progressive vision of human rights, most notably in the form of their own promised Bill of Rights, not to be mistaken for this Rights Removal Bill of the same name in Westminster. The potential for confusion to arise in relation to these proposals is, if anything, even greater than in the other constituent parts of the UK, seeing as how the HRA and ECHR are interwoven throughout the devolution settlement in Northern Ireland. To take one example, the Police Service of Northern Ireland (PSNI) has a bespoke oversight framework which is deeply intertwined with the HRA, such as in the Northern Ireland Policing Board's statutory duty to monitor the performance of the PSNI in complying with the HRA.[60] Similarly, the PSNI Code of Ethics is, to a large extent, specifically built around ensuring compliance with the HRA and ECHR. As the foreword to the Code notes, it "is not merely a disciplinary tool. It is a comprehensive human rights document".[61] A constant benchmarking of conduct to human rights (and specifically the HRA's) standard is the distinguishing feature of the Code.[62]

53. It is however the status of the Good Friday Agreement (GFA, also known as the Belfast Agreement) that is the great risk produced by the introduction of this Bill. Despite Dominic Raab's assertion that the GFA will not be affected for the reason that "we remain a state party to the convention. Not only that, but the ECHR remains incorporated into UK law through the schedule",[63] it appears clear that the proposals threaten to breach the GFA. Paragraph two of the 'Rights, Safeguards and Equality of Opportunity' section of the GFA states that: "The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to

[60] Section 3(3)(b)(ii), Policing (Northern Ireland) Act 2000.
[61] PSNI Code of Ethics, p.4, https://www.nipolicingboard.org.uk/sites/nipb/files/publications/code-of-ethics.pdf.
[62] PSNI Code of Ethics, p.10.
[63] Dominic Raab MP, HC Deb, vol. 716, col. 855, 22 June 2022.

overrule Assembly legislation on grounds of inconsistency."[64] While, as Raab says, the ECHR will remain incorporated into UK law, the ability of people in Northern Ireland to access remedies for breach of the Convention is directly threatened by these plans.

54. As covered above, the failure to carry over section 3 of the Human Rights Act to the proposed new Bill will inevitably result in more declarations of incompatibility being issued – explicitly regarded as not being a proper remedy by the European Court of Human Rights. What is more, the potentially devastating gutting of positive obligations covered in detail below, barring courts from adopting new obligations and drastically restricting the application of pre-existing ones, will also breach the GFA's requirement of remedies for breaches of the Convention. Under clause 5 of the BOR, 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". In practice, this means that should Strasbourg jurisprudence develop a new, 'post-commencement', understanding of a positive obligation in relation to a Convention right, and a public authority were to breach that obligation, a person would not be able to attain a remedy for this breach in a domestic court. With the highly controversial Northern Ireland Protocol Bill and Northern Ireland Troubles (Legacy and Reconciliation) Bill currently going through Parliament, the status of Good Friday Agreement, and with it the prospect of stability and peace in Northern Ireland, is under serious strain at this moment. In this context, this reckless and poorly-thought through Bill of Rights is the last thing that Northern Ireland needs.

II. INDIVIDUALS

55. The bedrock of a healthy society is one in which every person is treated equally and with respect and provided the conditions to flourish – regardless of who they are, where they come from, or what they have done. These are foundational values, and it is in response to the atrocities of World War II that the UK decided to help commit them to international law by helping to draft the ECHR, becoming its first signatory, and eventually bringing the rights in the ECHR home through the HRA. In seeking to restrict positive obligations, separate out certain groups of people as 'undeserving' of protection, and limit access to justice, the Bill of Rights is nothing short of an attack on the very premise of human rights: that they exist to protect and safeguard human dignity, that they are universal, and that

[64] The Belfast (Good Friday) Agreement 1998, p.16, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034123/The_Belfast_Agreement_An_Agreement_Reached_at_the_Multi-Party_Talks_on_Northern_Ireland.pdf.

we have them simply by virtue of being human. For the devastating impact it will have on individuals, families, and communities across the country, it must be resisted.

POSITIVE OBLIGATIONS

56. Intrinsic to the vision of human rights in the ECHR as incorporated by the HRA is the idea that human rights must be an effective and practical safeguard, which requires creating the conditions for people's rights to be respected as well as preventing the State from doing things that infringe on people's rights. While these are sometimes categorised separately as 'negative' and 'positive' obligations, they are effectively two sides of the same coin: both are necessary to secure to everyone in a given jurisdiction the full protection of their human rights, pursuant to Article 1 of the ECHR.

57. Clause 5 of the Bill of Rights narrows positive obligations in two ways. First, it prohibits courts from adopting a future interpretation of a Convention right that would require a public authority to comply with a positive obligation. 'Positive obligation' is defined widely, as an obligation to 'do any act'. Second, in deciding whether existing positive obligations apply, the court will be required to give "great weight" to the need to avoid applying an interpretation that would impact the relevant public body's ability to perform its functions; conflict with their ability to use their own expertise when deciding how to allocate their resources;[65] require the police to protect individuals who are involved in criminal activity or otherwise undermine the police's ability to determine their operational priorities;[66] require an inquiry or other investigation to be conducted to a standard that is higher than is reasonable in all the circumstances;[67] or affect the operation of primary legislation.[68] The Government is explicit that one of its aims is to "*restrict* the application of existing obligations" (emphasis added) by instructing courts to consider factors such as "the public interest in enabling operational experts to exercise discretion in competing priorities, and the conduct of the person whose right has allegedly been breached."[69]

58. Restricting positive obligations will result in vast injustice for individuals, families, and communities across the UK. It is also fundamentally unworkable, and will result in more litigation, including at Strasbourg. In seeking to restrict the application of existing obligations, the Government omits to mention that both domestic courts and the ECtHR already analyse the competing objectives faced by public authorities carefully in deciding

[65] Cl 5(2)(b), Bill of Rights Bill.
[66] Cl 5(2)(c), Bill of Rights Bill.
[67] Cl 5(2)(d), Bill of Rights Bill.
[68] Cl 5(2)(e), Bill of Rights Bill.
[69] Human Rights Act Reform: A Modern Bill of Rights, Government Consultation Response, [64].

when a positive obligation applies, so as not to overburden them. For example, in *Osman v UK*, the ECtHR said that the operational duty under Article 2 is not absolute, and it must be interpreted in a way "which does not impose an impossible or disproportionate burden on the authorities."[70] As Lord Carswell explained in *Re Officer L*: "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."[71] In deciding whether a duty has been breached, the courts must already have regard to the resources and competing priorities of the public body which owes the duty; and will not find a public authority to be culpable for failing to take action where that action would have imposed a disproportionate burden on the authority. The Government provides no robust evidence for what, how, and why positive obligations are overburdening public bodies.

59. Prohibiting courts from interpreting Convention rights as imposing positive obligations runs wholly counter to the general principle that the ECHR was designed to be a "living instrument which must be interpreted in the light of present-day conditions" so as to ensure that it could provide a durable source of protection for individuals' rights.[72] Many of the developments we take for granted today, such as the emergence of the internet and the rise of big data, were unimaginable in the 1950s when the Convention was signed, and the nature of the risks posed by these developments to our human rights are usually only revealed and worked out over time, at the cost of individuals who are affected. To take a more recent example, the human rights implications of vaccine passports and mandatory vaccination would not have been conceivable, much less challengeable, had our laws failed to adapt to and embrace arguments relating to the importance of bodily autonomy, data protection, privacy, and tackling systemic inequalities. This clause will effectively stop the clock on the development of human rights protections in accordance with changing social, political, and cultural norms and developments in science and technology.

60. If clause 5(1) of the Bill will stop the clock on rights protections, clause 5(2) will turn back time, by requiring courts to refrain from applying long-established positive obligations that have secured justice and accountability for individuals, families, and wider communities. The explanatory notes to clause 5(2) provide that the Government's intention is to "guide courts to consider the wider implications of their decision (rather

[70] *Osman v UK* (87/1997/871/1083), 28 October 1998 [115]
[71] *Re Officer L* [2007] 1 WLR 2135, [21].
[72] *Tyrer v UK* (1978) 2 EHRR 1, para 31; Johnson v Ireland (1986) 9 EHRR 203, [53].

than just the need to do justice in the particular case)";[73] this is puzzling, given that the wider thrust of the Bill of Rights is purportedly to restrict the courts from engaging in so-called 'judicial activism'. It is precisely the role of the courts to do justice; it is unclear why the Government is seeking to muddy the waters, by requiring the courts to consider wider social factors in making its decisions. The JCHR has criticised this proposal for being incompatible with the UK's international obligations and with respect for human rights of the people of Britain, and would be an "undesirable regression in rights protection."[74]

61. The Government's proposals restricting the application of existing obligations will make it harder for individuals to challenge violations of their rights, with disproportionate effects on those already marginalised and suffering at the sharp edge of State power. For example, victims of sexual violence and domestic abuse may not be able to hold the police to account for failures to investigate their perpetrators, on the basis that the court would have to give great weight the need to avoid conflicting with the police's "professional judgement" and "undermin[ing] the police's ability to determine their operational priorities" (clauses 5(2)(a) and (b) respectively). In the case of serial rapist John Worboys, it was precisely the police's failure to take his victims' complaints seriously that enabled him to sexually assault and rape at least 105 women, before two of his victims were able to challenge this in court. If the BOR were in place at the time, the police could have argued that their ability to determine their operational priorities should be given great weight, and thus, their decision not to investigate should not be challenged. The End Violence Against Women coalition has said, and we concur: "There is no reasonable justification for seeking to curb obligations on public authorities to protect people's human rights; this move simply seeks to absolve the state of responsibility in this area and will drastically impact victims and survivors of abuse."[75]

62. The Bill of Rights could also deprive bereaved families of people who die at the hands of the State of the ability to seek truth and accountability, by limiting the circumstances under which a higher and more comprehensive standard of inquiry (such as an inquest) can be ordered (clause 5(2)(d)). Currently, Article 2 of the ECHR as incorporated by the HRA means that in certain cases such as deaths in state custody, deaths as a result of lethal or potentially lethal force, as well as cases where a person was dependent on the state for their care and treatment, there must be an 'enhanced' type of inquest, which considers not just by what means someone died, but 'in what circumstances'. The Article

[73] Bill of Rights Bill, Explanatory Notes, [61].
[74] Joint Committee on Human Rights, *The Bill of Rights, Letter to Dominic Raab MP*, 30 June 2022, https://committees.parliament.uk/publications/22880/documents/167940/default.
[75] End Violence Against Women coalition, *British Bill of Rights is a major step back for women and survivors,* 21 June 2022: https://www.endviolenceagainstwomen.org.uk/british-bill-of-rights-major-step-back-for-women-and-survivors.

2 requirement to investigate "in what circumstances" a person died means that systems of management, organisation and training must be considered in an investigation, not just those who may have been directly responsible. In addition, bereaved families are given a more central role and a right to participate in investigations and inquests. The explanatory notes further acknowledge that cases engaging the freedom from torture and inhuman or degrading treatment (Article 3) will also give rise to an investigative obligation.

63. The right to life and to be free from torture, inhuman and degrading treatment are absolute and fundamental rights; when they are breached by a public body, it is crucial that a full investigation takes place, not only to provide justice and accountability for the person and their loved ones, but also to enable learnings for the future. It is highly concerning that the Government is seeking to limit the courts' ability to require a heightened level of scrutiny and investigation over deaths involving some level of State responsibility. This would affect people such as the families of the 97 people killed during the Hillsborough disaster, Zahid Mubarek (who was killed by a racist cellmate at a Youth Offenders' Institute), and Christopher Alder (who was killed in police custody), and many more people.

64. Other positive obligations that stand to be affected are those that enabled families to visit their relatives during the Covid pandemic;[76] ensure that children are treated with humanity and dignity;[77] that have enabled the legal recognition of gender identity for trans people;[78] that protect Gypsies' and Travellers' way of life;[79] and prevent children from suffering neglect and abuse;[80] and to protect victims of modern slavery and human trafficking[81] – though this list is far from exhaustive. It is worth noting that it is only in response to concerns that the UK was not compliant with its obligations under Article 4 that Parliament eventually created the criminal offence of holding another in slavery and

[76] Joint Committee on Human Rights, The Bill of Rights, Letter to Dominic Raab MP, https://committees.parliament.uk/publications/22880/documents/167940/default.
[77] Articles 3 and 8 have been read to impose on the Prison Service positive obligations to take reasonable and appropriate measures to ensure that children detained in Young Offender Institutions are treated by Prison Staff and fellow inmates in a way that respects their inherent dignity and personal integrity and are not subject to torture or to inhuman or degrading treatment. See: *The Queen (On the Application of the Howard League for Penal Reform) v The Secretary of State for the Home Department v Department of Health* [2002] EWHC 2497 (Admin).
[78] *Goodwin v UK* (Application no.28957/95) [90]. See also: *X v The former Yugoslav Republic of Macedonia*, (Application no.29683/16).
[79] *Connors v UK* (Application no. 66746/01).
[80] Four siblings successfully complained that their local authority had failed to protect them from inhuman and degrading treatment where social services were aware of the neglect and abuse they suffered at home before they were eventually taken into care. See: Human Rights Futures Project, *Protection of children's rights under the Human Rights Act - some examples*, LSE, May 2011, https://www.lse.ac.uk/sociology/assets/documents/human-rights/HRF16-KlugHRAChildren.pdf.
[81] Secretary of State for the Home Department, *Draft Modern Slavery Command Paper*, June 2014, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/318771/CM8889DraftModernSlaveryBill.pdf.

servitude, demonstrating the positive effect that positive obligations have had on rights protections in the UK. It is yet unclear what impact attempts to restrict positive obligations in the BOR will have on protections that have been enshrined in statute.[82]

65. Beyond the courts, the BOR's modifications of positive obligations may result in individuals losing vital rights protections. The definition of positive obligation proposed by the BOR – 'an obligation to do any act' – is an extremely low threshold. Combined with the requirement on the court to give great weight to a public body's determination of how to allocate its resources when doing any such act, this could give public bodies a get-out when it comes to safeguarding human rights, whether that is a housing authority failing to provide a disabled person with the necessary support in their accommodation or a hospital failing to conduct an assessment before someone who poses a risk to their own life is allowed on leave.[83] What will effectively emerge is a patchwork of human rights protection across the UK, whereby each public body is able to decide for itself whether it will comply with a positive obligation; this would make rights protection a postcode lottery, which would undermine their purpose and universality. For frontline workers who rely on the HRA to make rights-respecting decisions in their daily work, the confusion arising from clause 5 will force them to have to navigate a complex maze of laws, policies, and guidance in order to keep people safe, rather than being able to rely on the 'floor' provided by the HRA as developed over the past two decades.[84]

66. This clause undermines the universality of human rights. In particular, the requirement on the courts to give great weight to the need to avoid "requir[ing] the police to protect individuals who are involved in criminal activity"[85] appears to be a direct response to the case of *Osman v UK*, which established that Article 2 can imply "in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual." This case resulted in the emergence of Threat to Life notifications, which are issued if police have intelligence of a real and immediate threat to the life of an individual.[86] To this point, we simply reiterate that the act of being involved in criminal

[82] Jim Robottom, Twitter, 28 June 2022, https://twitter.com/jimrobottom/status/1541709214380351488.
[83] British Institute of Human Rights, *Rights Removal Bill: Key concerns – Limiting positive obligations on public bodies to protect rights*, 2022: https://www.bihr.org.uk/Handlers/Download.ashx?IDMF=475c9f81-b07d-48f6-a6a5-ccd8c15ea8d8
[84] British Institute of Human Rights, *Rights Removal Bill: Key concerns – Limiting positive obligations on public bodies to protect rights*, 2022: https://www.bihr.org.uk/Handlers/Download.ashx?IDMF=475c9f81-b07d-48f6-a6a5-ccd8c15ea8d8
[85] Cl. 5(2)(c), Bill of Rights Bill.
[86] Justice Secretary Dominic Raab has consistently criticised Osman warnings. In his 2009 book, *The Assault on Liberty,* Raab wrote: : "[T]hose who blight our society with drugs, human trafficking and murder – and choose the dangerous lifestyle that comes with it – should not be given a human rights guarantee that trumps the rest of society by forcing the police to prioritise protective services in their favour." See: Dominic Raab, *The Assault on Liberty: What Went Wrong with Rights*, Fourth Estate, 2009, p.146.

activity does not disqualify a person from having their fundamental rights – including their right to life – protected. Indeed, it is the whole point of the HRA that its protections apply to everyone, regardless of who they are or what they have done.

67. Not only do the Government's proposals strike at the heart of human rights, they are fundamentally incoherent and unworkable. First, it is not always easy to distinguish between the positive and negative aspects of an obligation. The Council of Europe's own guidance states that "there are situations in which this difference is not self-evident, where the boundary between the two kinds of obligation is blurred."[87] Relatedly, the Bill's definition of 'positive obligation' as "an obligation to do any act" – which the ECtHR has previously declined to endorse as a definition[88] – is vague and could encompass ostensibly any State action or inaction in relation to a right: states' obligations under the ECHR are all obligations to "do" something, i.e. to protect human rights. This contributes to the wider uncertainty about which obligations will and will not apply, and to what extent. In practice, this attempt to delimit positive obligations will give rise to significant amounts of satellite litigation in the domestic courts as the parameters of what is a positive obligation and which obligations apply in different cases in relation to each of the Convention rights is worked out piecemeal. Meanwhile, individuals awaiting these decisions could be subject to enduring violations of their human rights.

68. Second, prohibiting courts from interpreting Convention rights as imposing positive obligations – in the Government's own words, "prevent[ing] domestic courts from keeping pace with post-commencement judgments from the ECtHR"[89] – and restricting the application of existing obligations, will force more and more people to go to Strasbourg to vindicate their rights. This will come at huge cost to individuals and to the State, and will result in greater numbers of adverse rulings against the UK, while potentially further reducing the potential for dialogue between domestic courts and the ECtHR and reducing the UK's influence over ECtHR jurisprudence.

69. Finally, as mentioned above, the Good Friday Agreement commits to safeguards to ensure that the Northern Ireland Assembly and public authorities cannot infringe the ECHR. Also relevant is the Northern Ireland Protocol to the Withdrawal Agreement, which provides for 'no diminution' of certain GFA rights, including the incorporation of the ECHR,

[87] Akandji-Kombe, J., *Positive obligations under the European Convention on Human Rights,* Council of Europe, 2007, p.12, https://rm.coe.int/168007ff4d.
[88] The 'Belgian Linguistic Case' (No. 2) (1968) 1 EHRR 252.
[89] Bill of Rights Bill, Explanatory Notes, [70].

as a result of Brexit.[90] Clause 5 of the Bill of Rights will evidently – and inevitably – lead to violations of the ECHR because courts will be prohibited from interpreting Convention rights so as to impose positive obligations and their application of existing obligations will also be restricted. This is likely to undermine the GFA, as well as the wider implementation of human rights in Northern Ireland, with significant ramifications for peace.[91]

70. The Government's proposals to overhaul positive obligations were not included in IHRAR's terms of reference, and when consulted on, they were widely rejected by members of the public. 1,596 respondents to the Government's consultation noted that no change is required to the current framework. 1,265 respondents mentioned that they believe positive obligations provide protection for vulnerable people and 874 respondents considered that this is not a genuine issue. The Government provides no rationale for ignoring the negative responses to its proposal, only that it is "committed to reducing burdens on public authorities and enabling operational experts to exercise greater discretion over the allocation of resources."[92]

ATTACKING UNIVERSALITY

Public protection

71. The Bill of Rights seeks to separate out certain people as deserving and undeserving of human rights. It does this by carving out certain groups of people – namely, incarcerated people, people involved in criminal activity, and migrants – as undeserving of the same degree of protection as everyone else. This is a frightening position, and one that must be rejected at all costs. The risk with any attempt to differentiate people on the basis of who deserves human rights is not only that those most at risk of violations – that is, those who are already minoritised and marginalised – will bear the brunt, but that this will create a slippery slope for more people to be deprived of their basic entitlements and protections.

72. Clause 6 seeks to restrict people subject to custodial sentences (including if they have been released on license, are serving a period of supervision, or are subject to other release conditions) from challenging violations of their human rights. Clause 6(2) requires

[90] The CAJ has highlighted that although the Bill of Rights is not strictly related to Brexit, its passage is taking place just after Brexit, after significant conflation of the ECHR and EU during the Brexit process, and at times, a 'twin' campaign against the EU and the ECHR. See: CAJ, *Response to HRA reform consultation,* March 2022: https://caj.org.uk/wp-content/uploads/2022/03/Response-to-HRA-reform-consultation.pdf.
[91] CAJ, *Response to HRA reform consultation,* March 2022: https://caj.org.uk/wp-content/uploads/2022/03/Response-to-HRA-reform-consultation.pdf.
[92] Human Rights Act Reform: A Modern Bill of Rights, Government Consultation Response, [64].

the court to give the "greatest possible weight to the importance of reducing the risk to the public from persons who have committed offences in respect of which custodial sentences have been imposed," including (but not limited to) decisions about whether they should be released from custody or placed in a particular part of a prison.[93] The Secretary of State has the power to specify what custodial sentences would lead someone to be subject to such a carve-out.[94] This clause will not apply to rights issues arising in relation to the right to life (Article 2), the prohibition of torture (Article 3), the prohibition of slavery (Article 4(1)), and no punishment without law (Article 7).

73. This proposal, which was not considered by IHRAR nor in the Government's consultation document, appears to be rooted in the Justice Secretary's objective to make greater use of Separation Centres and his wider plans regarding parole reform.[95] In the press release accompanying the Bill of Rights, the Government claimed that restricting Article 8 and Article 11 rights to privacy and freedom of association would allow them to use Separation Centres in prisons, in the wake of Independent Reviewer of Terrorism Legislation Jonathan Hall QC's recent report 'Terrorism in Prisons'. It is worth noting that at no point in the report does Hall blame the Human Rights Act for the underuse of Separation Centres.[96] Separately, the Justice Secretary has announced that he intends to introduce reforms to parole, including to give the Government greater oversight over decisions to release serious offenders.[97] This plan has been criticised by legal experts for undermining the separation of powers, specifically, the independence of the courts and quasi-judicial bodies like the Parole Board.

74. In any case, the introduction of specific carve-outs for prisoners in the Bill of Rights completely contradicts one of the fundamental principles underlying human rights – their universality and application to each and every person on the sole and simple basis of their being human. As noted by Lord Steyn, "[e]ven the most wicked of men are entitled to justice at the hands of the state."[98] It also undermines the fundamental principle of equality before the law and will deprive individuals – who by nature of being imprisoned, will already experience vulnerability – of a crucial mechanism for seeking redress.

[93] Cl. 6(3), Bill of Rights Bill.
[94] Cl. 6(4) and (5), Bill of Rights Bill.
[95] Ministry of Justice, *Parole reform to keep dangerous prisoners off streets,* 30 March 2022, https://www.gov.uk/government/news/parole-reform-to-keep-dangerous-prisoners-off-streets.
[96] Jonathan Hall QC, *Terrorism in Prisons,* 27 April 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1071318/terrorism-in-prisons.pdf.
[97] Dominic Raab MP, HC Deb, vol. 711, col. 831, 30 March 2022.
[98] *R (Roberts) v Parole Board* [2005] UKHL30 30 45, [2005] 2 AC 738 [84] .

75. It is precisely in custodial institutions like prisons and youth offender institutions that recourse to human rights protections is most vital, because individuals are wholly under the control of the State. The coronavirus pandemic demonstrated the inherent risks and dangers posed to people by incarceration, with some people being locked up for 23 hours at a time and experiencing worsened mental health issues as a result.[99] More widely, there are well-documented human rights issues in prisons: for example, one report concerning the experiences of Muslim prisoners found that many do not receive basic care, are not treated with respect, and are not able to easily ask for help or raise complaints.[100] It is highly concerning that the Government is attempting to clamp down on already vulnerable individuals' ability to assert their rights. Given the well-established existence of racism within the criminal justice system,[101] we are concerned that the effects of clause 6 will be felt disproportionately by people of colour, especially Black people.

ERODING MIGRANTS' RIGHTS

Limiting the right to private and family life

76. Another way the Bill of Rights undermines the universality of human rights is its attempts to prevent migrants from being able to challenge violations of their human rights, to the extent that the JCHR has questioned why the Minister did not make a s.19(1)(b) statement indicating that these provisions are not compatible with Convention rights.[102] Together these proposals are the latest in a consistent and longstanding attack on the rights of migrants and a move that is set to further expand and entrench the injustices of the hostile environment.

77. Clause 8 prevents courts from finding any primary or secondary legislation relating to deportation incompatible with the right to respect for private and family life (Article 8) unless it considers that deportation would result in "manifest harm" to a "qualifying member of the person's family" (a British child or a child who has lived in the UK for a

[99] BBC News, *Prisoners locked up for 23 hours due to Covid rules is 'dangerous'*, 20 October 2020: https://www.bbc.co.uk/news/uk-54607813.
[100] Mohammed, R. and Nicholls, L., *Time to End the Silence: The experience of Muslims in the prison system*, Maslaha: https://www.maslaha.org/Project/Time-to-End-the-Silence
[101] The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System, September 2017: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf.
[102] Joint Committee on Human Rights, The Bill of Rights, Letter to Dominic Raab MP, https://committees.parliament.uk/publications/22880/documents/167940/default.

continuous period of seven years or more[103]) that is "so extreme that the harm would override the otherwise paramount public interest" in removing the person from the UK. Harm is only "extreme" if it is "exceptional and overwhelming" and "incapable of being mitigated to any significant extent or is otherwise irreversible".[104] In relation to cases not involving children family members, the courts are directed that it is only in "the most compelling circumstances" that they could consider that removing a person from the UK would cause extreme harm to a member of that person's family.[105] The overall circumstances of a case involving a family member other than a child would need to be "even more exceptional and compelling than those in relation to a qualifying child".[106] The JCHR has criticised this bar for being "so high that it essentially extinguishes the essence of Article 8 rights for FNOs facing deportation and their families."[107]

78. Clause 8 does not impact individual cases, nor does it alter the current deportation legislation.[108] Instead, it empowers Parliament to pass laws enabling the Home Office to deport individuals unless that would result in a qualifying member of an individual's family experiencing "extreme harm".[109] In the event that Parliament passes such laws (or where there is existing relevant legislation), the courts will be prevented from finding that these laws are incompatible with Article 8 – even if they are.

79. Section 117C of the Nationality, Immigration and Asylum Act (NIAA) 2002 already tightly restricts the circumstances in which appeals by foreign national offenders can succeed on Article 8 ECHR grounds. Clause 8 of the BOR deals a further, significant blow to the already limited right of individuals to challenge laws that will tear them apart from their children, loved ones, and communities in all but the most extreme circumstances. Sent to countries that they have no link to or recollection of, those subject to deportation frequently become vulnerable to exploitation, destitution, and death, not to mention being separated from vital networks of support. The organisation Detention Action estimates that tens of thousands of children have been deprived of a parent as a result of the deportation regime, with all of the corresponding impacts on their welfare and mental health.[110] In the words of one woman whose partner was deported in 2019, "I feel the way

[103] Cl. 8(5), Bill of Rights Bill.
[104] Cl. 8(3), Bill of Rights Bill.
[105] Cl. 8(4), Bill of Rights Bill.
[106] Ministry of Justice, *Bill of Rights: European Convention on Human Rights Memorandum*, 22 June 2022, [14], https://publications.parliament.uk/pa/bills/cbill/58-03/0117/HRmemo.pdf.
[107] Joint Committee on Human Rights, The Bill of Rights, Letter to Dominic Raab MP, https://committees.parliament.uk/publications/22880/documents/167940/default.
[108] Bill of Rights Bill, ECHR Memorandum, [16].
[109] Alasdair Mackenzie, Twitter, 22 June 2022, https://twitter.com/AlasdairMack66/status/1539730092829589504
[110] Detention Action, *Our response to the Human Rights Act consultation,* 21 March 2022: https://detentionaction.org.uk/2022/03/21/our-response-to-the-human-rights-act-consultation.

deportation works is unfair as it not only takes away a parent but is also breaking up a family and pushing innocent children into unhealthy circumstances."[111]

Limiting the right to a fair trial

80. Clause 20 seeks to limit individuals' ability to challenge deportation orders on the basis of potential violations of their right to a fair trial (Article 6). It directs the relevant tribunal to dismiss individuals' claims unless it considers that removing the person from the UK would result in "a breach of the right to a fair trial so fundamental so as to amount to a nullification of that right."[112] In cases where a deportation order was informed by deportation assurances – that is, assurances from the receiving State to the UK that the person will be treated in a way that complies with Article 6 – the tribunal is directed "to presume that the Secretary of State's assessment of those assurances is correct," to "treat the assurances as determinative of the appeal" and subsequently to dismiss the appeal, unless it could not "reasonably conclude that the assurances would be sufficient to prevent a breach so fundamental so as to amount to a nullification of the right to a fair trial.

81. There are already stringent restrictions on people's ability to challenge deportation decisions. Since the introduction of the Immigration Act 2014, there has been no automatic right for a person to appeal a deportation order. There is a statutory right to appeal against a decision on human rights grounds under the NIAA 2002. To resist deportation on Article 6 grounds, per both domestic courts and the ECtHR, the treatment must already amount to "a flagrant denial of justice".[113]

82. This proposal risks preventing individuals from challenging decisions that could have a significant impact on their lives by raising the threshold for the test for compliance with Article 6 ECHR from 'a flagrant denial of justice' to 'nullification' of the right. It is further highly worrying that the Bill of Rights creates such a strong presumption in favour of Secretary of State's assessment of diplomatic assurances, given the Government's questionable record in respect of such assurances. This is not only a procedural issue but also potentially one of life and death. In the case *W and others,* concerning diplomatic assurances from Algeria, evidence surfaced that the assurances had never been reliable, and this had been known by British diplomats at the time they were sought. By the time this came to light, however, the Government had already deported nine men on the basis

[111] Detention Action, *Our response to the Human Rights Act consultation,* 21 March 2022: https://detentionaction.org.uk/2022/03/21/our-response-to-the-human-rights-act-consultation.
[112] Cl. 20(2), Bill of Rights Bill.
[113] Omar Othman v Secretary of State for the Home Department [2012] EWCA Civ 3138; https://twitter.com/LewisGrahamLaw/status/1539630995577733123.

of these assurances, whom the British embassy has failed to trace.[114] The JCHR has highlighted that "these proposals seem to be in conflict with the duty to ensure that individuals are not returned or relocated to a state where they may face a flagrant denial of their right to a fair trial."[115] This is ironic, given the Government's attempt to enshrine the right to fair trial as a quintessentially British right by way of its jury trial proposals.[116]

LIMITING ACCESS TO JUSTICE

83. The Bill of Rights will limit access to justice for individuals seeking redress for violations of their rights. It does so by introducing new barriers to bringing proceedings and tying the remedies to which an individual is entitled to their past conduct; and removing the ability of individuals to challenge rights violations relating to overseas operations.

Permission stage

84. Clause 15 establishes a permission stage, so that individuals may not bring proceedings in relation to a breach of human rights by a public authority unless they have permission from the court in which proceedings are to be brought. The court may only grant permission if it considers that the person is (or would be) a victim of the act (or proposed act) and the person has suffered (or would suffer) a "significant disadvantage" in relation to the act (or proposed act). The court may disregard this requirement if it considers it is appropriate to do so for reasons of "wholly exceptional public interest". "Significant disadvantage" is given the same meaning as that under Article 35 of the ECHR, concerning the admissibility of proceedings in the ECtHR. The permission stage will apply to civil law claims with a human rights element; and judicial review proceedings in England and Wales (it will not apply to permission for proceedings brought in Scotland or Northern Ireland on a petition or application for judicial review for human rights claims).[117]

85. It is important to note that there is already a rigorous permission stage in judicial review claims which raise human rights grounds; claims which are not arguable will fall at this hurdle, and individuals must be able to show they are a victim of the unlawful act. As for civil claims, there already exist a number of mechanisms designed to filter out unmeritorious claims at an early stage. As above, claimants must already meet the 'victim test' provided by s.7(1)(b) of the HRA; it is unclear what further disadvantage they will

[114] Lock, D., *Three ways the Bill of Rights Bill undermines UK Sovereignty,* 27 June 2022: https://ukconstitutionallaw.org/2022/06/27/daniella-lock-three-ways-the-bill-of-rights-undermines-uk-sovereignty.
[115] Joint Committee on Human Rights, *The Bill of Rights, Letter to Dominic Raab MP*, 30 June 2022, https://committees.parliament.uk/publications/22880/documents/167940/default.
[116] Bill of Rights Bill, Explanatory Notes, [28].
[117] Bill of Rights Bill, Explanatory Notes, [131-32].

have to prove beyond being a victim of a violation of their rights. Further, courts already have the power to strike out claims which have no reasonable prospects or are abusive, including cases where the benefit attainable by the claimant is if such limited value that "the game is not worth the candle".[118]

86. The explanatory notes provide that the aim of clause 15 is to "ensure trivial claims do not undermine public confidence in human rights" and ensure that "courts focus on serious human rights-based claims", and "place responsibility on the claimant to demonstrate that they have suffered a significant disadvantage before a human rights claim can proceed to trial."[119] In response, we contend that it is difficult to imagine how any violation of human rights would not constitute a 'significant disadvantage' and that preventing legitimate human rights violations from proceeding to the courts is what is likely to undermine public confidence in them. It is also inappropriate to shift the burden onto individuals to demonstrate the merits of their claim (including before they have received full disclosure from the public body that has potentially violated their rights), who are already at a disadvantage in bringing claims against the state. The JCHR has expressed concern that the proposed changes run the risk of breaching the obligation to provide an effective remedy in Article 13 ECHR.[120]

87. An additional permission stage will create a barrier to access to the courts and make it harder for individuals to enforce their rights, particularly for people who already experience barriers in accessing justice as a result of having protected characteristics, as exacerbated by cuts to legal aid. There is also real risk that it would increase the resources required of the courts and create inefficiency and delay.

88. Clause 15 appears to be based on a deliberate misapplication of the admissibility criterion in Article 35(3)(b) of the ECHR, which was introduced in order to assist the Strasbourg court to focus on the most serious cases of human rights abuses across the entirety of its jurisdiction of Council of Europe states. As the Government itself provides in the ECHR memorandum to the Bill of Rights , the ECtHR's admissibility criteria provides "the route by which arguably breaches of the ECHR rights *by States* may be assessed by the ECtHR" (emphasis added). It is evidently inappropriate to apply the case management conditions of an international court to the early domestic stages where individuals seek to enforce their rights. Indeed, while subject to controversy, Article 35(3)(b) is considered an appropriate measure precisely because there are ways to enforce breaches of human

[118] *Jameel v Dow Jones and Co* [2005] EWCA Civ 75.
[119] Bill of Rights Bill, Explanatory Notes, [15].
[120] Joint Committee on Human Rights, *The Bill of Rights, Letter to Dominic Raab MP*, 30 June 2022, https://committees.parliament.uk/publications/22880/documents/167940/default.

rights at the domestic level.[121] Further, we also note that the ECtHR has chosen not to apply the 'substantial disadvantage' test in cases concerning Articles 2, 3, and 5 of the ECHR and has been extremely cautious in applying it to cases concerning Articles 9, 10, and 11.[122]

Damages

89. The BOR reproduces measures in the HRA that enable courts to grant remedies to people who have suffered human rights abuses, but introduces new obstacles for individuals seeking redress. The current starting point for the court is that no award of damages should be made, unless taking into account other relief granted, the court is satisfied that "the award is necessary to afford just satisfaction to the person in whose favour it is made."[123] In many cases a declaration that their rights have been violated will be the primary objective for claimants. However, there will be cases where damages are a vital part of affording claimants an effective remedy. One example is the recent 'Spycops' case, in which the claimant, an environmental activist, was deceived into a years-long sexual relationship with an undercover police officer which entailed a "formidable list" of violations of her ECHR rights.[124] The court ordered that the claimant be paid substantial damages in just satisfaction for the staggering breaches of her rights under Articles 3, 8, 10, 11 and 14 ECHR, over a number of years.[125] Where the wrong done to someone has affected their life so profoundly and there is no other way to compensate them for that damage other than by financial approximation, it is, of course, important that judges are free to grant damages in order to provide an effective remedy.[126]

90. Clause 18 limits the damages to which a person who has suffered loss or damage arising from an unlawful violation of their human rights is entitled. When deciding whether damages is appropriate or the amount of damages to be awarded to an individual, the court will be required to take into account a number of factors, including "any conduct of the person that the court considers relevant (whether or not the conduct is related to the unlawful act)" (clause 18(5)(a)). The court must also give great weight to "minimising the impact that any contemplated award of damages would have on the ability of the public authority to perform its functions" (clause 18(6)) and "have regard to future

[121] BID's response to the consultation *Human Rights Act Reform: A modern Bill of Rights*, March 2022: https://hubble-live-assets.s3.amazonaws.com/biduk/file_asset/file/452/220304_BID_HRA_consultation_response_.pdf.
[122] *Makuchyan v Azerbaijan* (Application no. 17247/13); Y v Latvia (Application No 27853/09), *Zelcs v Latvia* (Application no. 65367/16).
[123] Section 8(3)(b) Human Rights Act 1998.
[124] *Wilson v Commissioner of Police of the Metropolis* [2021] UKIPTrib IPT_11_167_H [344]
[125] Remedy Order (dated 24 January 2022) in *Wilson v Commissioner of Police of the Metropolis* [IPT/11/167/H].
[126] *Alseran v Ministry of Defence* [2019] QB 1251 [933].

awards of damages" (clause 18(7)) arising from similar or identical violations of individuals' rights.

91. Damages are not something one 'deserves'; they are not a 'reward'. The purpose of damages is to compensate for the damage done when a person has been wronged. A basic principle of our common law system is that people are equal before the law. Just as anyone, even the Prime Minister, can be found guilty of a crime and face a penalty for it, anyone whose rights the State has infringed can bring a claim against it, and be compensated for the injury they have suffered. The nature and extent of the injury does not depend on the prior conduct of the injured party.

92. Clause 18(5)(a) would allow the remedy given to individuals in compensation for infringements of their human rights to be reduced or withheld altogether on the basis of anything they have ever done. This conduct would not need to be criminal, let alone relevant to the case at hand. This is likely to have a particularly disproportionate effect on already marginalised groups, such as people from over-policed communities. Breaking the link between the substance of the case and the remedy given, and turning it into a wider judicial referendum on the applicant's life, is a dangerous and anti-democratic path to go down.

93. Clause 18(6) and Clause 18(7) would seek to limit the damages to which an individual is entitled by requiring the court to give great weight to the need to "minimise the impact" of any such damages on the ability of any public authority (including the one that has violated their rights) to perform its functions; and to have regard to future awards of damages that may fall to be made in cases involving similar violations of human rights that may arise in the future. This could effectively deprive current and future claimants who have suffered human rights violations from obtaining a just remedy.

94. Ultimately, the most effective way for a public body to avoid the financial consequences of a human rights claim is for public body to act in a way which does not violate those rights. In our view, it would be simply wrong to bar the courts from making damages awards where otherwise required, simply to avoid financial impact on public services. We are also concerned that hampering the ability of the court to award damages if it would impact on public services would risk providing public bodies with an incentive to take their duties and responsibilities towards individual rights less seriously. Finally, and given endemic difficulties with individuals accessing the courts system in the first place due to cuts to legal aid, we are concerned that this will further deter claimants from coming forward with their experiences and seeking justice for any harm caused. We echo

the JCHR's assessment that the introduction of a permission stage and restricting the availability of damages are both "unnecessary" changes and "seem solely designed to protect public authorities from accountability and responsibility when they have violated a person's basic human rights. That cannot be an acceptable solution for our justice system and does not comply with the right to an effective remedy under Article 13 ECHR."[127]

Overseas military operations

95. Apart from creating general barriers to individuals' bringing proceedings, the Bill of Rights also attempts to insulate public authorities that violate human rights from challenge, if such violations take place outside the British Islands in the course of overseas military operations. The way in which the Government goes about this stands out for two reasons: both the extreme and egregious nature of clause 14's attempt to close off these proceedings, and the unusual commencement clause at clause 39(3). Clause 14 would ban entirely the bringing of human rights cases in relation to overseas military operations, encompassing civilians mistreated by our Armed Forces and British soldiers let down by the Ministry of Justice alike. It would cover not only cases like *Al-Skeini*, brought by the relatives of Iraqi civilians,[128] but also *Smith*, the 'Snatch Land Rover' case brought after the deaths of young British soldiers in unsafe and insufficient equipment.[129] The clause follows not only in the wake of the Overseas Operations (Service Personnel and Veterans) Act 2021, which sought to restrict the scope for cases to be brought in relation to overseas operations, but also the Government consultation question that asked about restricting the extraterritorial scope of the proposed Bill of Rights. What was interesting about this, however, was that the Government explicitly acknowledged that this was something they were not able to do, saying:

> *"Given the extraterritorial application of the Convention, there is no unilateral domestic legislative solution to this issue and drafting the Bill of Rights to apply only on a restricted territorial basis would not resolve the issue at the international level. For example, if the extraterritorial scope of the Bill of Rights were to be restricted, other legislative changes would be required in order for the UK to continue to meet its obligations under the Convention. Additionally, if any 'gap' were created between the territorial scope of the Bill of Rights and the UK's obligations under the Convention, this would likely give rise to significant issues, including in relation to the*

[127] Joint Committee on Human Rights, *The Bill of Rights, Letter to Dominic Raab MP*, 30 June 2022, https://committees.parliament.uk/publications/22880/documents/167940/default.
[128] *Al-Skeini and Others v United Kingdom*, Application No. 55721/07 [2011] ECtHR.
[129] *Smith and Others v Ministry of Defence* [2014] A.C. 52, [2013] UKSC 41.

procedures for protecting sensitive national security information in human rights proceedings."[130]

96. Recognising as they did that restricting the Bill of Rights' territorial scope would be unworkable, unlawful and a danger to national security, it was slightly surprising to see clause 14's inclusion in the Bill. There appear to be two reasons why the Government feel able to bring forward this clause. The first is that the clause does not technically restrict the BOR's scope itself or its substantive application to British soldiers and the military machine abroad. It remains unlawful for public authorities to act in a way that it incompatible with a Convention right, whether within the borders of the United Kingdom or not. Instead what the clause does is remove the possibility for proceedings to be taken in relation to any such breaches of the Convention rights in relation to overseas operations. It therefore pictures situations in which the UK military abroad acts in ways that breach human rights and even where clear and obvious, and even admitted, there should be nothing that a victim would be able to do about it. It is therefore an immunity clause, and as the JCHR has stated in a letter to Dominic Raab, it "is clearly not compatible with the basic principles of the rule of law, access to justice or the enforcement of human rights, specifically the procedural obligations arising from the right to life (Article 2 ECHR) and the prohibition on torture (Article 3 ECHR and UNCAT), as well as other rights that may be engaged by overseas military operations."[131]

97. At the same time, this cute construction – not restricting the extraterritorial scope of the BOR but making it meaningless by blocking enforcement – does not make the clause lawful. Article 13 of the Convention requires effective remedies, and while there will always be arguments as to what exactly constitutes a remedy that is 'effective', it is difficult to see 'no possibility of remedy at all' as satisfying the requirement. The more important aspect that has allowed clause 14 to be included is clause 39(3), which states that the clause may come into force "only if the Secretary of State is satisfied (whether on the basis of provision contained in an Act passed after this Act or otherwise) that doing so is consistent with the United Kingdom's obligations under the Convention". The clause therefore will not come into force until the Secretary of State has either introduced separate legislation of some description that would provide alternative domestic remedies for enforcing human rights in relation to overseas operations, or renegotiated the extraterritorial scope of the ECHR itself. It is unclear whether the Government has legislation in mind that it considers could fulfil the requirement, or indeed

[130] Human Rights Act Reform: A Modern Bill of Rights [280].
[131] Joint Committee on Human Rights, *The Bill of Rights, Letter to Dominic Raab MP*, 30 June 2022, https://committees.parliament.uk/publications/22880/documents/167940/default.

whether it considers that it would be able to bring about such an extreme change to the scope of the Convention at the same time as disengaging with Strasbourg and weakening its application in the United Kingdom. We would point out that there is currently a law on the books that allows effective domestic remedies to be sought in UK courts in relation to overseas military operations. It is known as the Human Rights Act, and we would encourage the Government to embrace it.

98. Even leaving aside the question of how a clause like this could practically be enforced, we are clear that there is no need to 'tackle' the extraterritorial application of the Convention. It is a necessary safeguard, defining limits on action and principles to uphold that our Armed Forces are proud to adhere to. At the same time, it protects our soldiers as well, whether on the battlefield or not. Take the case of Corporal Anne-Marie Ellement, who sustained bullying, rape, and mistreatment by her colleagues and chain of command on a base in Germany. Entirely removed from the battlefield, it was the extraterritorial application of the HRA that allowed for her death to be properly investigated, for the breaches of Articles 2 and 3 ECHR to come to light, and for the resulting establishment of the Service Complaints Ombudsman, which continues to protect British soldiers across the world. As Anne-Marie's sister Sharon Hardy said in in 2021: "Accountability. Justice. Reform. These things do not happen overnight. They are the product of years of hard work by the devastated victims of state abuse – or, where the victim has not survived, their loved ones. And the HRA enabled us to do it. Without it, we would have achieved absolutely nothing. This year is the tenth anniversary of my sister's death. I can think of no worse tribute to her life than this proposal to undermine the Human Rights Act."[132]

GOVERNMENT HYPOCRISY: FREE SPEECH AND THE RIGHT TO JURY TRIAL

'Great weight' accorded to freedom of speech

99. Justice Secretary Dominic Raab has repeatedly claimed that the Bill of Rights will give the right to freedom of expression a 'trump card' status in relation to all other rights, notably the right to family and private life (Article 8). Accordingly, clause 4 of the Bill of Rights states that a court must give "great weight" to the importance of protecting freedom of speech. However, the purported strengthening of protections provided by this clause is significantly diminished when we consider the breadth of carve-outs accompanying it.[133]

[132] Centre for Military Justice, *Human Rights Stories No.1 – Cpl Anne-Marie Ellement*, 19 October 2021, https://centreformilitaryjustice.org.uk/human-rights-stories-no-1-cpl-anne-marie-ellement.
[133] Cl. 4(3), Bill of Rights Bill.

Importantly, the Bill provides that it does not apply in criminal proceedings or to the determination of whether legislation creating a criminal offence is incompatible with a Convention right,[134] nor to the determination of any question which affects national security.[135]

100. The carve-outs laid out in clause 4(3) of the Bill of Rights effectively enable the Government to decide when and to what extent the right to freedom of expression should be protected, turning free speech into a privilege rather than a right. In reality, it is often precisely when the exercise of freedom of expression is most controversial or poses a significant challenge to those in a position of power that it is most in need of protection. Free speech organisations English PEN, Article 19, and Index on Censorship have "unequivocally rejected" the Government's claim that replacing the HRA will strengthen freedom of expression as a "false narrative". We echo their statement that "freedom of expression is too important to be used as cover for weakening the protection of human rights."[136]

101. The Police, Crime, Sentencing and Courts Act (PCSC Act) and the Public Order Bill provide a good test case. The PCSC Act gives the police powers to impose conditions on protest if they believe that the noise generated by the protest results in serious disruption – a proposal that was roundly opposed by senior police leaders, parliamentarians across the political spectrum in both Houses, and over 800,000 people for being a disproportionate clampdown on the right to protest. The Public Order Bill, currently going through Parliament, will introduce Serious Disruption Prevention Orders, with the potential to subject individuals to draconian restrictions and conditions like GPS tagging, breach of which is a criminal offence; new protest-specific stop and search powers; and new offences criminalising protest tactics such as locking on – measures which, like those in the PCSC Act, have also been roundly criticised. Under the Bill of Rights, the requirement on courts to give great weight to the importance of protecting freedom of speech would not apply to the application of nor the legislation setting out these measures.

102. Another example is the case of journalist Rita Pal, who was charged under the Protection from Harassment Act 1997, after publishing a news article online and posting

[134] Cl 4(3)(a), Bill of Rights Bill.
[135] Cl 4(3)(d), Bill of Rights Bill.
[136] English PEN, Article 19 and Index on Censorship, *Bill of Rights will seriously undermine freedom of expression in the UK,* 24 June 2022: https://www.englishpen.org/posts/campaigns/bill-of-rights-will-seriously-undermine-freedom-of-expression-in-the-uk/; Siddique, H., *'False narrative': campaigners say British bill of rights could undermine free speech,* The Guardian, 22 June 2022: https://www.theguardian.com/world/2022/jun/22/false-narrative-campaigners-say-british-bill-of-rights-could-undermine-free-speech.

several tweets about an individual who subsequently complained to the police. Pal took her case to the ECtHR, which found a violation of Article 10, on the basis that it had not been established that the arresting officer, the officer responsible for deciding to charge Ms Pal, or the domestic courts had properly balanced her right to freedom of expression with the complainant's right to respect for his private life and reputation or the need to prevent disorder or crime. Under the carve-outs set out in clause 4(3), it is unclear whether Pal would have been able to benefit from strengthened protections for her right to freedom of expression; the BOR is unlikely to have changed Pal's need to go to Strasbourg to vindicate her rights.[137]

103. In June 2022, Liberty achieved a landmark victory in a legal challenge against powers used by MI5, MI6 and GCHQ to obtain individuals' communications data from telecom providers without having prior independent authorisation, when those bodies are carrying out criminal investigations.[138] We have consistently fought against surveillance powers contained within the Investigatory Powers Act 2016 (IPA), and called on the Government to introduce proper safeguards into the IPA that protect human rights, including the rights to privacy and freedom of expression. It is unclear whether individuals' right to freedom of expression would, under the BOR, be given strengthened protections in the context of bulk surveillance, given that such questions could arguably engage issues of national security. In this case, as above, the carve-outs in clause 4 would again undermine any purported strengthened protections under the BOR.

Replicating existing protections

104. Clause 22 of the Bill of Rights replicates section 12 of the HRA in relation to relief affecting freedom of expression, often arising in cases involving interim injunctions to withhold publication. No changes have been made apart from the removal of section 12(4) which requires the court to have 'particular regard' to the right to freedom of expression. It appears that clause 4 is designed to replace this subclause.

105. The courts already place a significant emphasis on the importance of the right to freedom of expression, while seeking to strike a balance when conflicts of rights arise. While it is unclear what the implications of clause 4 will be when the court is balancing different rights, such as Article 8 and Article 10, we are concerned that any attempt to tip the scales so that one right is automatically favoured over another risks creating

[137] Media Defence, *UK violated journalist's free speech rights by arresting, charging her under Protection from Harassment Act*, 3 December 2021: https://www.mediadefence.org/news/rita-pal-v-uk-harassment.
[138] *National Council for Civil Liberties (Liberty), R (On the Application Of) v Secretary of State for the Home Department & Anor* (Stage 3) [2022] EWHC 1630 (Admin)

unintended consequences. There are good reasons why in some cases, the court may find as a result of a rigorous balancing exercise that a person's Article 8 rights outweighs another's Article 10 rights, including where they might be in physical danger if their whereabouts are revealed, or if they are subject to blackmail or harassment.

Journalistic sources

106. Clause 21 of the Bill of Rights modifies the test Contempt of Court Act 1981 so that the courts will only require a person to disclose a journalistic source if disclosure is necessary in the interests of justice, national security, or the prevention of crime or disorder; and there are "exceptional and compelling reasons" why it is in the public interest for the disclosure to be made.[139] In determining whether there are such reasons, the court must give great weight to the public interest that exists in protecting journalistic sources.[140] The Government omits to mention the significant contributions of ECtHR case law to protections in this area. Indeed, it was the case of *Goodwin v UK* that established that an order of source disclosure "cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."[141]

107. We are concerned that the wider proposals in the BOR may result in diminished protections for freedom of the press. For example, the wide-ranging carve-outs in clause 4, such as in relation to any question concerning national security, could potentially exempt investigative journalists or whistle-blowers from a higher degree of protection. Any divergence between protections at the domestic and ECtHR level could also risk diminishing protections for journalists in the UK.

Right to jury trial

108. Clause 9 of the BOR states that "the ways in which the right to a fair trial is secured in the United Kingdom include, in the case of a person charged with an offence, legislation under which… the person is tried before a jury." We believe this clause is symbolism without substance; it does not appear to make any changes to how jury trials currently operate, and appears to be a superficial attempt to accord the right 'recognition' without real protection.

109. The Government omits to mention that the right to jury trial is under threat – from the Government itself. During the COVID-19 pandemic, the Government seriously considered

[139] Cl. 21(1), Bill of Rights Bill.
[140] Cl. 21(2), Bill of Rights Bill.
[141] *Goodwin v the United Kingdom* (Application no. 17488/90) [39]

suspending the right to trial by jury.[142] Following the recent trial of the Colston Four, comments from a former cabinet minister and the current Attorney General betrayed an alarming willingness to publicly undermine the finality of the jury's decision, and with it the rule of law.[143] In June 2022, Liberty intervened in the Attorney General's appeal of the Colston 4 case, arguing that jury trials are qualified and capable of making judgments on the issues of proportionality and whether a conviction would interfere with a defendant's human rights in protest-related cases.[144]

CONCLUSION

110. The Bill of Rights Bill is a remarkable piece of legislation. Following in the wake of two consultations, it ignores the report of one and the responses to the other. Sold as a 'free speech bill', it carefully carves out any way in this might protect a person's speech against the State. In the name of 'taking back control', it will send more British people to Strasbourg for justice. In an attempt to 'inject common sense' to the justice system it will introduce considerable confusion and complexity. To 'enhance the sovereignty of Parliament' it will relegate it beneath the executive, and to arrest 'undemocratic' judicial interpretation, it will hand human rights judgments to a single Minister to pick and choose as he likes. That this is a bad Bill is self-evident. It is confused, and it is cruel. It will hurt all of us, in our access to justice, in our desire to be governed in accordance with fundamental principles of human rights, and in a system of checks and balances. It will not affect us equally, however, with certain groups singled out for a more extreme reduction in the protections that they may very well expect to retain on the basis of their simple humanity. Liberty urges parliamentarians in the strongest possible terms to reject this Bill, and retain our Human Rights Act.

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[142] Rozenberg, J., *Jury's out: Reducing jury trials would reduce the legal backlog, but at what cost?,* The Critic, 25 June 2020 https://thecritic.co.uk/jurys-out.
[143] Siddique, H., *Suella Braverman accused of politically driven meddling over Colston Four*, The Guardian, 7 January 2022 https://www.theguardian.com/uk-news/2022/jan/07/suella-braverman-accused-of-politically-driven-meddling-overcolston-four.
[144] Liberty, *Liberty warns protest freedoms at risk under Attorney General's proposals*, 29 June 2022: https://www.libertyhumanrights.org.uk/issue/liberty-warns-protest-freedoms-at-risk-under-attorney-generals-proposals.

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