Community Policy Forum

BRIEFING

THE BILL OF RIGHTS: UNDOING TWO DECADES OF HUMAN RIGHTS PROGRESS

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ABBREVIATIONS

- Declaration of incompatibility (DOI)
- The European Convention on Human Rights (ECHR)
- The European Court of Human Rights (ECtHR)
- The Human Rights Act 1998 (HRA)
- The Independent Human Rights Act Review (IHRAR)
- The Joint Committee on Human Rights (JCHR)

Community Policy Forum

The Community Policy Forum is an independent think-tank seeking to promote evidence-based and community-centred approaches to issues concerning Islamophobia and structural inequalities facing British Muslim communities. We attempt this through connecting policymakers with academic research and experts and through providing platforms for engagement with diverse Muslim voices on areas of contemporary importance.

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2022 has been a busy year for the Government attempting to reduce the rights of the public, avoid accountability, and increase its own powers. In the last six months, we have seen the Policing Bill, the Elections Bill, the Nationality and Borders Bill, and the Judicial Review and Courts Bill all become law. Each of them damage our democracy and remove the rights of the public.

June 2022 saw celebrations as the first Rwanda deportation flight was cancelled. However, within hours, an intervention by the European Court of Human Rights (ECtHR) was being used to bolster Conservative attacks on the UK's human rights framework.

Six days later, the Government tabled its 'Bill of Rights' (or the Rights Removal Bill, as it has become known) to repeal the Human Rights Act 1998 (HRA).

Meanwhile, deportation and human rights have become a seemingly central feature of the Conservative leadership contest, with Suella Braverman (who has now left the race) stating that the Rwanda policy "is vulnerable to claims based on human rights... and we simply will not be able to remove [people] in significant numbers... unless we eliminate those kinds of claims against our actions and that's why we do need to leave the European Convention on Human Rights (ECHR)." At the same time, Kemi Badenoch, Liz Truss, Rishi Sunak, and Nadhim Zahawi all reportedly said that they would be prepared to leave the ECHR for the Rwanda policy to succeed.

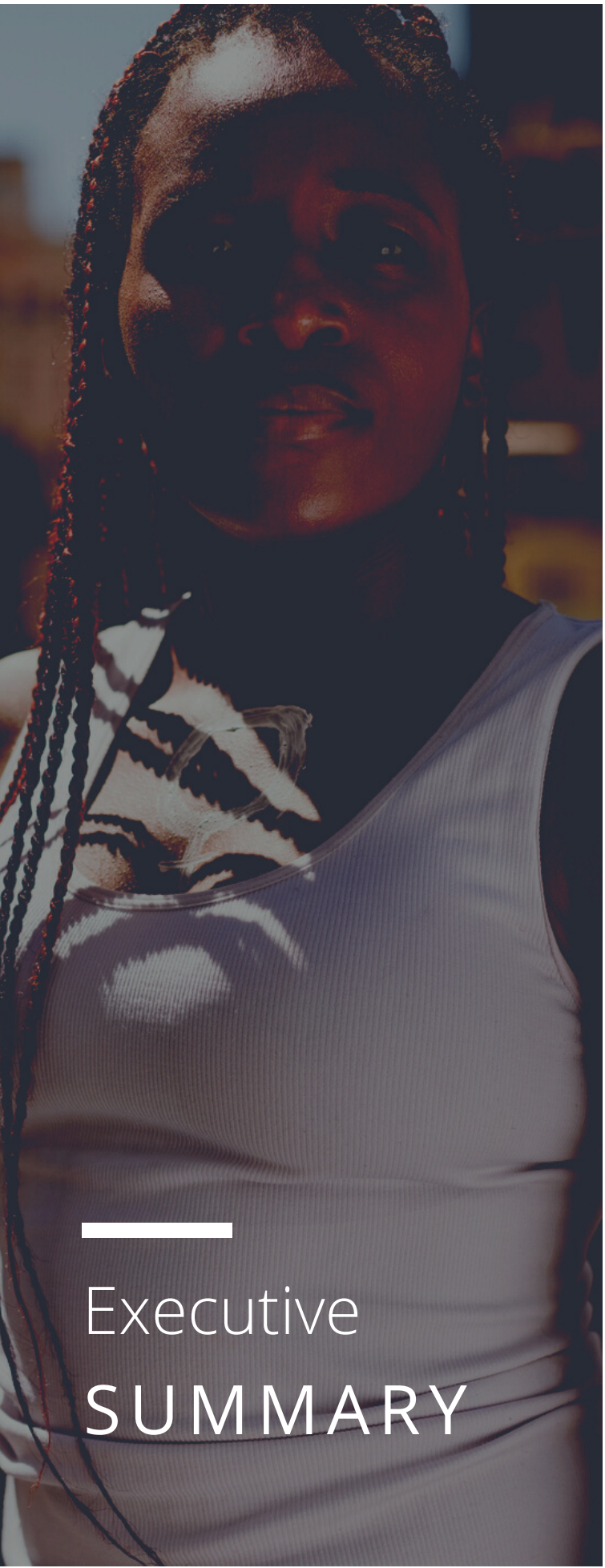
In this context, it is possible for the Rights Removal Bill to become positioned as the 'moderate' and middle ground within political debates on human rights as it stops short of removing the UK from the ECHR. However, to understand it as a moderate position is to ignore its devastating impact on our human rights framework and the ability of victims of human rights breaches to access justice. It is unavoidably a dangerous piece of legislation that will remove our rights and increase the Government's power to ignore and abuse human rights without accountability.

Introducing THE RIGHTS REMOVAL BILL

The bill will likely be hotly contested when Parliament returns in the autumn. For that reason, it is essential that policymakers, academics, and community activists mobilise to fight this bill.

This briefing is intended to provide a cursory overview of the vital contribution of the HRA to the UK's domestic human rights framework over the twenty years since its enactment, before examining the origins of the new Rights Removal Bill, its contents, and its implications. This briefing ends by recommending policies that would provide a better basis for strengthening our Human Rights framework.

Due to its fundamental flaws and the vast number of problematic clauses contained within the bill, no amount of amendments can temper its damage. The bill has failed to undergo appropriate pre-legislative scrutiny and will irreparably damage the UK's rights protections, create legal uncertainty, and violate our international obligations. Thus, the only solution is for it to be scrapped in its entirety.



Executive SUMMARY

The HRA has played a vital role in nurturing a culture of respect for human rights across the UK's political, legal, and institutional practices and policies. It has allowed countless victims of human rights abuses to access their rights in domestic courts without the expense and time previously required to take a case to the European Court of Human Rights (ECtHR). It has thus served as an essential mechanism for scrutinising and holding public authorities to account for human rights breaches.

However, recent years have seen an onslaught of political and media criticisms of the HRA that largely centre around a series of carefully calibrated myths designed to distract from the main governmental objection to the HRA; it holds the Government to account and safeguards against executive overreach and the enactment of policies that violate our human rights obligations.

Following its pledge in the 2019 Conservative Manifesto to "update" the HRA, the Government commissioned the Independent Human Rights Act Review (IHRAR) in 2021, which concluded that the vast majority of the evidence that they received was supportive of the current functioning of the HRA and recommended prioritising initiatives to awareness of the HRA amongst the public.

On the same day that the IHRAR report was published, the Government published its 123-page consultation paper laying out its proposals to replace the HRA with a 'Bill of Rights'.

However, there were severe problems with the Government's consultation process, including its inaccessibility to those most reliant on the HRA, its complete departure from the IHRAR exercise, and its lack of recognition of a report from the Joint Committee on Human Rights (JCHR) that was published only a few months before, and

which had concluded that there “is no case for changing the Human Rights Act”. Moreover, the Government has seemingly refused to publish the consultation responses. From reading its response to the evidence submitted to the consultation, it appears that the vast majority of responses to the Government’s proposals were overwhelmingly negative. However, the Government is determined to implement them regardless.

The Government’s refusal to meaningfully engage with the IHRAR, the opinions of parliamentary committees, or even the responses of its own consultation invalidates the entire process that has preceded the bill's tabling. However, the Government continues to use the consultation responses as justification not to submit the bill for pre-legislative scrutiny. It is difficult to conclude that the Government’s public and expert engagement on this bill has thus been performed in anything other than bad faith.

The Contents of the Rights Removal Bill

Repealing the HRA.

Clause 1 of the Rights Removal Bill repeals the HRA, which goes far beyond the Conservative pledge to "update" the Act.

Creating a disconnect between domestic courts and the ECtHR.

Clause 3 of the bill removes the obligation contained in Section 2 of the HRA which requires courts to take into account case law from the ECtHR. The result of this change will be a disconnect between how rights are applied in domestic courts vs the ECtHR. Consequently, it is inevitable that more cases will be taken to the ECtHR as they will not achieve remedy in UK courts.

Removing the responsibility to apply laws compatibly with human rights.

Despite declarations from both the JCHR and the Justice Committee that Section 3 of the HRA is being used appropriately and that significant changes are unjustified, the bill repeals the responsibility to read legislation compatibly with the EHRC as far as it is possible. This will limit the ability of the courts to rectify human rights breaches and leave a Declaration of Incompatibility (DOI) as the only route to change, albeit a change that could take years to come to fruition.

This change will also create tremendous legal uncertainty, with Clause 40 giving the Secretary of State the power to dictate which past judgements are to be preserved or overridden. The Government has, to date, not provided any clarity surrounding the judgements that are to be affected, nor how they will be approached. Without a clearly defined approach, there is a significant risk that the process will be politicised and arbitrary, thus presenting a highly concerning expansion of unfretted executive power.

Disrupting the balance of freedom of speech.

While the HRA goes to great lengths to *balance* conflicting rights, Clause 4 of the Rights Removal Bill will prioritise free speech over other rights, except in a range of instances which largely involve the ability for individuals to assert their right to free speech to the disadvantage of the Government. This clause will hinder courts' abilities to approach each case with nuance and proportionality.

Removing positive obligations.

Clause 5 of the Rights Removal Bill limits existing positive obligations and precludes any further expansion of these obligations. Positive obligations are the foundations of safeguarding and are instrumental to public services' abilities to serve those that rely upon them. However, the bill removes the "obligation to do any act", which could foreseeably include acts such as a medical practitioner performing a risk assessment on a patient who poses a risk to their own life, or the police investigating a death, or a social worker communicating with teachers to liaise about safeguarding concerns.

Creating a hierarchy of 'acceptable' victims.

Clauses 6 and 18 create a dichotomy between prisoners (those seen as 'bad' and 'undeserving' of human rights) and the 'good' and 'deserving' members of wider society. Such a change undermines the universality of human rights and will exacerbate structural inequalities and disproportionately impact Muslims and people of colour who are already overrepresented in the criminal justice system.

Limiting the grounds to challenge deportation orders.

Clauses 8 and 20 of the bill limit the grounds upon which deportation decisions can be challenged and the ability to appeal. In practice, Clause 8 will effectively remove the ability to use Article 8 (right to family life) in preventing Government deportation orders. Meanwhile, Clause 20 dictates that the court must accept that the Secretary of State's assurances (such as that the destination country is safe) are correct and dismiss an appeal, unless to do so would "result in a breach of the right to fair trial so fundamental as to amount to a nullification" of the right to fair trial. The threshold of a "nullification" goes far beyond the principle that all breaches of human rights are unacceptable. Moreover, in recent times, the Secretary of State's assurances have proven to be far from infallible.

Meanwhile, police powers, sentencing, and deportation powers are disproportionately used against people of colour and inordinate Home Office fees and wider issues within the Home Office functioning disproportionately prevent many people who would otherwise be entitled from claiming British citizenship, leaving them subject to immigration powers, including detention and deportation. At the same time, it is such groups that are less likely to have the economic resources to take a claim to the ECtHR should they require an Article 13 remedy if options to appeal are removed.

Introducing a limited right to a jury trial.

Clause 9 of the Rights Removal Bill introduces a limited right to a jury trial. This is a painfully symbolic gesture. Article 6 of the HRA already protects the right to a fair trial and supports the application of legal traditions as they operate across the devolved powers, with trial by jury not existing in Scots Law. Therefore, any enactment of this clause would provide no additional value to the protections currently in place and could destabilise devolved settlements.

Removes the obligation for public bodies to act in accordance with human rights.

Section 6 of the HRA requires public bodies to interpret legislation compatibly with human rights and makes it unlawful for them to act in violation of these rights. It is, therefore, a vital provision for ensuring that a culture of respect for human rights is embedded across public bodies. However, Section 6 is to be replaced by Clause 12 of the Rights Removal Bill, which when combined with the repealing of Section 3 of the HRA will remove the obligation for public bodies to read legislation compatibly with human rights and prevent claims being made against such bodies even if they are enforcing laws in a way that violates human rights. Consequently, Clause 12 is removing a fundamental layer of protection that currently ensures that human rights are a primary consideration within the decision-making, policy, and practice of public bodies.

Limiting claims against overseas military operations.

Clause 14 of the bill effectively removes the ability for people to bring cases against overseas military operations on human rights grounds except in very limited circumstances. In real terms, this amounts to a complete ban on access to justice regarding such breaches. This change will have devastating consequences for members of the armed forces and their families, as well as for innocent civilian populations who will be prohibited from seeking justice.

Introducing a permission stage.

Clause 15 of the bill introduces a permission stage when bringing cases, ultimately enhancing the difficulty for ordinary people to access justice by increasing the burden to prove “significant disadvantage”, perhaps even before an individual has had access to legal advice. Meanwhile, the idea that a breach must result in significant disadvantage ignores the fact that all human rights abuses are intolerable.

Requiring courts to take into consideration the conduct of claimants.

The Rights Removal Bill introduces changes demanding that courts take into account the conduct and behaviour of the victim in cases involving damages, regardless as to whether that conduct is in relation to the unlawful act under examination (Clause 18(5)). Under this change, courts must also give great weight to the inconvenience damages being awarded could cause public authorities (Clause 18(6)) and the potential for other public authorities to become liable in similar cases (Clause 18(7)). All of these changes will undermine the public’s access to justice and impact a claimant’s right to effective remedy (Article 13 of the ECHR) and, again, will likely result in more cases being taken to the ECtHR.

Furthermore, requiring courts to examine claimants' previous behaviour accentuates the Government's accusation that some people are undeserving of human rights.

Removing consideration for interim measures from the ECtHR.
Clause 24 of the Rights Removal Bill requires UK courts to ignore all interim measures of the ECtHR, thereby preventing courts from complying with international law and the UK's international obligations.

Undermining parliamentary scrutiny.
Throughout the bill, there are numerous mechanisms that remove scrutiny of the Executive by decreasing the oversight of Parliament and weakening the powers of the judiciary. The bill removes the current obligation under Section 19 of the HRA for the Minister responsible for introducing a bill to make a statement declaring its compatibility with human rights. The requirement for a Minister to make such a statement is an important safeguard as it ensures those responsible for introducing a bill undertake due diligence and legal advice during the drafting of the bill.

The Consequences of the Rights Removal Bill

Ultimately, the Rights Removal Bill will:

- Make it harder for victims of human rights abuses to access justice.
- Increase Government powers to disregard human rights and avoid accountability.
- Undermine the universality of human rights.
- Reduce the UK's international standing.
- Disrupt devolved arrangements and the Good Friday Agreement.
- Lead to unnecessary legal uncertainty.
- Entrench structural discrimination across society.

Wider Recommendations

Due to its fundamental flaws and the vast number of problematic clauses, the only solution is for the bill to be scrapped in its entirety. If the Government is genuinely committed to strengthening the UK's human rights framework, there are a number of policies that it could more positively pursue, including:

- Sufficiently funding the justice system to allow victims access to justice.
- More effectively incorporating international rights treaties into domestic law, such as the UN Convention on the Rights of the Child and the Refugee Convention.
- Prioritising human rights education to raise awareness amongst the public.
- Expanding access to out-of-court remedies, including enhancing the powers of the Equalities and Human Rights Commission.

The Human Rights Act, 1998.

Since the 1950s, the UK has been party to the European Convention on Human Rights (ECHR), meaning that cases of human rights breaches can be heard in the ECtHR in Strasbourg. However, the process of taking a case to the ECtHR was expensive and time-consuming (an average of five years at a cost of £30,000, according to the Government's 1997 white paper). So, the HRA was designed to enshrine the ECHR into domestic law, meaning that cases can be heard in UK courts without the need to go the ECtHR. However, cases can still be heard in the ECtHR if they have exhausted the UK court process. As noted by the Joint Committee on Human Rights (JCHR), the HRA has made it easier for claimants to enforce their rights and led to a significant decrease in cases being brought against the UK before the ECtHR.

However, the HRA does more than simply allow cases to be heard in domestic courts. It is the foundation upon which the UK's human rights framework is built. It serves as a vital check on government power and ensures that public bodies are accountable for protecting human rights by:

- Ensuring that public bodies (such as the Government, police, schools, councils, hospitals etc) uphold and protect human rights.

- Requiring UK courts to take into account any decisions, judgments, or opinions of the ECtHR when deciding similar cases.

- Ensuring legislation is compatible with the ECHR by interpreting it, as far as possible, in a way which is compatible with ECHR rights. In other words, allowing courts to assume that Parliament intends legislation to comply with human rights unless it has explicitly stated otherwise (for example, in instances of national security or public health) and, therefore interpret it under that assumption.

The Origins of the Rights Removal Bill

- Nurturing a culture of human rights throughout political, legal, and institutional practices and policies. Throughout institutions and agencies such as the NHS, social workers, and the police, the legal framework expounded by the HRA provides a valuable tool in making complex decisions and ensuring that human rights considerations are prominently featured throughout all policies, actions, decisions, and practices.

- Providing a central framework for peace and the devolution of policing and justice in Northern Ireland.

Criticisms of the Human Rights Act.

Despite the importance of the HRA in protecting the public, Conservative politicians and elements of the press have spent many years demonizing it for its impacts in restraining Government power in areas such as deportations, the criminal justice system, and national security.

The criticisms surrounding the HRA largely rely on four broad myths:

- ***It gives too much protection to criminals and people who don't deserve it:*** The point of human rights is that they are universal. To designate certain groups as unworthy or undeserving undermines the very principle of human rights.

- ***It gives the ECtHR too much foreign influence:*** Section 2 of the HRA requires courts to take into account ECtHR case law when faced with similar cases. However, this case law does not set a precedent that UK courts are required to follow. Section 2 thus provides clarity in how the ECHR rights apply in practice and in different circumstances, but lets the UK apply rights in ways that are compatible with our own laws and traditions. With examples from 47 other countries to draw from, this is especially beneficial in navigating uncertain and previously unexplored issues, such as privacy laws in the context of technological advances and adapting to changes in socio-political climates, for example, lifting the ban on LGBTQI+ serving in the armed forces. Moreover, the HRA has been shown to have enabled UK courts to positively influence the development of ECtHR case law, with the ECtHR and UK courts having "learned from and influenced each other".

- ***It gives judges too much power and disrupts the sovereignty of Parliament:*** Under the assumption that Parliament wishes all its legislation to comply with our human rights commitments unless it states otherwise (which Parliament is free to do), courts interpret legislation through this lens. If they cannot interpret the legislation in a way that doesn't breach human rights, they can issue a Declaration of Incompatibility (DOI). However, many have criticised this ability to read legislation through a lens of human rights obligations and declare legislation incompatible with human rights when this is not possible as courts 'overriding' the will of Parliament. This is an (often wilfully) incorrect representation, as a DOI

simply tells Parliament that the legislation doesn't comply with human rights – it does not overturn the legislation. Parliament retains the power to ignore the DOI (although, in practice, DOIs are virtually always addressed due to the public and political pressure to do so) and Parliament is equally capable of declaring its intention for a piece of legislation not to adhere to human rights obligations when it is passed.

- ***Human rights considerations are unnecessary drains on public resources:*** The current Government rhetoric surrounding the HRA is that human rights are being manipulated by undeserving groups (including prisoners and migrants), are inconvenient, and fighting human rights cases or having to comply with positive obligations (the responsibility for authorities to actively seek to uphold and protect human rights) are unnecessary hindrances for the Government and public bodies, and, therefore, not in the public interest.

The real problem with the Human Rights Act.

These myths are specifically calibrated to detract from the underlying objection that the Government has regarding the HRA; it holds executive power to account. A court issuing a DOI or ruling against the state by interpreting legislation through the lens of human rights can obviously cause great embarrassment to the Government and present significant barriers to its ability to enforce its desired policies that breach these rights.

The HRA is a vital mechanism for scrutinising executive power and holding it to account through mitigating and rectifying state actions and policies that breach human rights in every area of daily life, including privacy, the freedom to hold political and religious beliefs, protection from abuse, and access to healthcare. However, the current Government has consistently demonstrated its hostility to both political and judicial opposition and has taken significant steps to reduce opposition through a series of legislation designed to restrict judicial scrutiny and undermine democratic principles. Indeed, recent years have witnessed Government attacks against court rulings and powers of the judiciary to scrutinise executive decisions – conflicts which are exemplified by depictions of judges as "enemies of the people" surrounding issues of Brexit, the controversy surrounding the unlawful advice of Boris Johnson leading to the proroguing of Parliament, the unlawful handling of PPE contracts during the pandemic, and discussions of "activist lawyers" representing the rights of vulnerable people to remain in the country.

As such, the intention underlying the Rights Removal Bill is the Government's desire to remove judicial barriers to the enactment of policies that breach human rights. The bill is in no way designed to increase rights protections in the UK. Instead, it is intended to remove Government accountability and undermine the rights that protect us all.

The Independent Human Rights Act Review and the Government's Human Rights Act Reform Consultation.

In December 2020, the Government set up the Independent Human Rights Act Review (IHRAR), which took evidence in early 2021. It published its 580-page report in December 2021, highlighting that the vast majority of the evidence that they received was supportive of the current functioning of the HRA and concluding that there was a need for increased education and awareness of the HRA amongst the public.

On the same day that the IHRAR report was published, the Government published its 123-page consultation paper laying out its proposals to replace the HRA with a 'Bill of Rights.'

However, there were severe problems with the Government's consultation process, including its inaccessibility to many of the most vulnerable people who rely on the HRA the most. This has led the British Institute of Human Rights (BIHR) to conclude that the consultation had "failed to follow the Government's own Consultation Principles".

Moreover, as noted by the Justice Committee and Sir Peter Gross (who chaired the IHRAR), the Government's consultation paper seemed to bare very little relation to the IHRAR exercise and failed to respond to their final report. Nor did the consultation paper seem to recognise the JCHR report that was published only a few months before and which similarly concluded that there "is no case for changing the Human Rights Act".

Perhaps one of the most concerning parts of the consultation process was the Government's apparent refusal to publish the consultation responses. Instead, it simply published its own response to the consultation submissions. However, from reading the document, it appears that the vast majority of responses to the Government's proposals were overwhelmingly negative. However, the Government is determined to implement them anyway. As but two examples:

- The Government admits that 90% of responses to Question 8 were against plans for a permission stage making it harder for people to bring claims. Despite 90% rejecting the plans, the Government "remains convinced that introducing a permission stage is necessary."

- Likewise, 79% of respondents rejected the proposals to change Section 3 of the HRA (the ability for courts to interpret legislation in a manner that is compatible with human rights) – a proposal that was also rejected by both the IHRAR and the JCHR. Again, against the findings of the IHRAR, the JCHR, and the public consultation, the Rights Removal Bill will repeal Section 3.

Pre-Legislative Scrutiny.

In the words of the JCHR, "engagement must be genuine and must have meaning and purpose. Those who engage should be listened to." The Government's refusal to meaningfully engage with the independent review, the opinions of parliamentary committees, or even the responses of its own consultation invalidates the entire process that has preceded the tabling of the bill. This led over 150 organisations to write to Dominic Raab demanding that the proposed bill undergo proper pre-legislative scrutiny, as well as triggering severe criticism from the JCHR. However, the Government and Dominic Raab continue to use the consultation responses as justification not to submit the bill for pre-legislative scrutiny.

It is difficult to conclude that the Government's public and expert engagement on this bill has thus been performed in anything other than bad faith.

The Contents OF THE RIGHTS REMOVAL BILL

Repealing the HRA.

Clause 1 of the Rights Removal Bill repeals the HRA. This goes far further than the pledge outlined in the Conservative Party's 2019 manifesto, which, as observed by the former Lord Chancellor, Sir Robert Buckland, promised "updating" the HRA, "not replacing, you will note". It is from this pledge that Buckland commissioned the IHRAR, which the Government subsequently ignored. As such, this bill is such an unequivocal departure from the Government's election promise that the Salisbury Convention (wherein the House of Lords has a responsibility not to block legislation contained in a manifesto commitment) cannot be seen to apply.

Creating a disconnect between domestic courts and the ECtHR.

Clause 3 of the bill removes the obligation contained in Section 2 of the HRA which requires courts to take into account case law from the ECtHR. Under the HRA, domestic courts must take into account rulings from the ECtHR but do not have to abide by them. Under the Rights Removal Bill, the obligation to take case law into account is removed, and the emphasis is placed on domestic courts' ability to adopt an interpretation that diverges from the ECtHR.

The result of this change will be a disconnect between how rights are applied in domestic courts vs the ECtHR. Consequently, it is inevitable that more cases will be taken to the ECtHR as they will not achieve remedy in UK courts. Considering the aforementioned costs and time commitments needed to take a case to Strasbourg, many of the most vulnerable people will, therefore, be excluded from accessing justice.

Moreover, as highlighted by the JCHR, the logic grounding ECHR rights seems to be inverted by the Rights Removal Bill. While the ECHR system

operates by creating a minimum level of respect for human rights while encouraging individual states to go beyond this basic level, the Rights Removal Bill seems to instead treat the ECHR system as the maximum level of protection that should be considered. As such, it is foreseeable that under Clause 3, domestic courts would be able to enact protections that are significantly weaker than those afforded by the ECHR and simultaneously prohibited from enacting protections that are stronger than those found in ECtHR case law.

Furthermore, as previously mentioned, both the IHRAR and the JCHR have concluded that Section 2 of the HRA benefits the dialogue between the ECtHR and the UK courts. Therefore, Clause 3 will weaken this dialogue and make it difficult for the UK to meaningfully engage with the ECtHR on issues of the margin of appreciation (the scope provided to individual member states to ensure that the application of human rights fits with their own unique culture, laws, and traditions).

Removing the responsibility to apply laws compatibly with human rights.

The Rights Removal Bill removes the responsibility to read legislation compatibly with the EHRC as far as is possible (Section 3 of the HRA). This is despite declarations from both the JCHR and the Justice Committee that recent case law indicates that Section 3 is being used appropriately and, therefore, they cannot find justification for significant changes to the current approach taken by the courts. However, the bill goes beyond changes and repeals this duty completely.

Section 3 of the HRA has been vital in allowing individuals to protect their human rights through domestic courts by allowing legislation to be read "restrictively or expansively" as long as it does not alter "the underlying thrust of the enacted legislation." For example, the Rent Act 1977 protects a person's tenancy if their spouse dies (survivorship). In the case of *Fitzpatrick v Sterling Housing Association Ltd,* where the original tenant, Mr Thompson, died in 1994, prior to the HRA coming into effect, the courts ruled that the Rent Act provisions did not include people in same-sex relationships under the legal understanding of a spouse. Consequently, Mr Fitzpatrick, the surviving partner in this case, was not protected despite having lived together for eighteen years in a "close, loving and faithful, monogamous, homosexual relationship" and giving up his job to act as Mr Thompson's full-time carer for eight years following an accident from which he never recovered. However, Section 3 of the HRA allowed the courts to interpret "spouse" as including same-sex relationships and protect survivorship rights in the case of *Ghaidan (Appellant) v. Godin-Mendoza*, where Mr Godin-Mendoza's partner died in 2001, just three months after the HRA came into force.

If the courts are unable to interpret legislation compatibly with ECHR rights, they will only have the option of issuing a DOI. While DOIs are valuable, they can only achieve future change by signalling to Parliament that a change is needed. As parliamentary business can lead to delays of months and even years for a change to be enacted, a DOI cannot provide immediate remedy for current breaches.

Moreover, this change in the bill will create tremendous legal uncertainty, with the Government's seeming intention to cast all previous Section 3 rulings in doubt. Contrary to principles of binding precedents, under Clause 40 of the Rights Removal Bill, the Secretary of State would essentially be able to dictate which past judgements are to be preserved or overridden. As just one example, in the above case of Mr Godin-Mendoza and provisions under the Rent Act, the Secretary of State could choose whether such precedents will be carried forward with the enactment of the Rights Removal Bill – in other words, it would be for the Secretary of State to decide whether certain relationships are to continue to be recognised under the legislation. Moreover, the Government has, to date, not provided any clarity surrounding the judgements that are to be affected, nor how they will be approached. Without a clearly defined approach, there is a significant risk that the process will be politicised and arbitrary, thus presenting a highly concerning expansion of unfretted executive power that could undo twenty years of valuable human rights progress.

Disrupting the balance of freedom of speech.

The ECHR rests on the assumption that, while some rights are qualified and others absolute, all rights contained within the Convention are fundamental. Therefore, the HRA focuses on balancing rights when they come into conflict (for example, if a newspaper wants to publish your private information, the courts must balance free speech with your family's right to privacy). Consequently, the HRA has extensive provisions ensuring that courts consider the freedom of expression (as protected by Article 10 of the ECHR and Section 12 of the HRA) and balance it with other rights.

However, under Clause 4, the Rights Removal Bill will prioritise free speech over other rights, except in instances including:

- When arguing that a criminal offence beaches human rights – for example, if arguing against protest offences.
- When used as an argument to prevent citizenship striping or deportation cases.
- Concerning issues of national security.

This is a flawed approach in a variety of ways. Firstly, the ability of the HRA to balance rights is a valuable tool in understanding the intricacies and competing variables in complex cases; thus, it allows courts to approach each case with nuance and proportionality. The requirement to prioritise freedom of speech over other rights will remove this nuance.

Secondly, the Government's language choice of "freedom of speech" rather than "freedom of expression" has been observed as indicating a deliberate attempt to "minimise elements of the right protected under Article 10 ECHR – most obviously the right to protest." This is compounded by the exclusion of criminal proceedings under this clause and certainly seems to fit with the Government's attitude towards protest and civic opposition embodied by the Policing Bill.

Again, the Government presents its changes surrounding the freedom of speech as an expansion of rights. However, in reality, the Rights Removal Bill removes the ability to robustly and proportionately examine cases in some situations and removes rights completely in other situations, specifically those where individuals may seek to assert their freedom of speech against the Government. It is thus very difficult to understand how this approach can be interpreted as expanding rights in any way.

Removing positive obligations.

The HRA enforces a positive obligation on public authorities to protect human rights. For example, the state must actively protect someone if their life is at risk, whether that be the police protecting a victim of domestic violence, schools highlighting at-risk children to social services, or mental health services performing a risk assessment before discharging a patient. These provisions have also been vital in achieving justice for victims and their bereaved families in instances including the Hillsborough disaster and deaths in police custody (such as the death of Zahid Mubarek at the hands of a racist cellmate), and the John Worboys case.

Clause 5 of the Rights Removal Bill:

- Limits existing positive obligations by discouraging courts from enforcing them through demanding that they give greater weight to the inconvenience such a ruling will inflict upon a public body.

- And precludes any further expansion of these obligations through stating that future ECtHR case law developing the positive obligation framework is not applicable in the UK.

Much of the Government's argument for this change centres around it being a drain on resources for public authorities to actively protect the 'undeserving', e.g., criminals and migrants. Clause 5(2)a specifically demands courts avoid enforcing positive obligations on police to protect those involved in criminal activity – something that is directly contrary to the universal principle of human rights and once again fits into the Government's narrative that some people are undeserving of human rights.

In reality, these positive obligations are the foundations of safeguarding and are instrumental to public services' abilities to serve those that rely upon them. However, this bill removes the "obligation to do any act", which could foreseeably include the aforementioned risk assessment on a mental health patient who poses a risk to their own life, or the police to investigate a death, or a social worker to communicate with teachers to liaise about safeguarding concerns. As such, beyond the Government representation of this change primarily impacting the 'undeserving' criminals and 'illegal' migrants, in reality, this change undermines the benefit of the current protections for the public in the broadest terms (including protecting children, victims of stalking and sexual assault, survivors of domestic abuse, and victims of trafficking, as well as allowing bereaved families to seek justice for loved ones). Thus, there is no way to interpret this change as anything other than a stark regression of rights protections in the UK.

Creating a hierarchy of 'acceptable' victims.
Clauses 6 and 18 (which will be discussed in greater depth below) create a dichotomy between prisoners (those seen as 'bad' and 'undeserving' of human rights) and the 'good' and 'deserving' members of wider society. Clause 6 restricts people who are serving custodial sentences from challenging breaches of their human rights with the exception of Articles 2 (right to life), 3 (prohibition of torture), 4 (prohibition of slavery), and 7 (no punishment without law). This is especially in relation to when considering releasing prisoners from custody (which is arguably a symptom of the Government's wider attempts to undermine the independence of the Parole Board) or where they should be housed while in custody (e.g., solitary confinement, sex-segregated settings).

Again, the singling out of prisoners undermines the universality of human rights. Moreover, this move will further exacerbate structural inequalities and disproportionately impact Muslims and people of colour who are already overrepresented in the criminal justice system.

Limiting the grounds to challenge deportation orders.
Clauses 8 and 20 of the bill limit the grounds upon which deportation decisions can be challenged and limit the ability to appeal. Clause 8 prevents Article 8 (right to family life) being used to prevent Government deportation orders, except where a dependent or child under 18 for whom the claimant is parentally responsible would be subject to 'exceptional and overwhelming harm' that cannot be mitigated. If the dependent is not a child under 18 for whom the claimant is parentally responsible, there is an additional requirement for the "most compelling circumstances" to be proven before a court may consider Article 8 as the basis to prevent a deportation order.

It would appear that there is no precedent within UK statutes for a threshold as high as this one. In practice, it will effectively remove the ability to challenge deportation orders on Article 8 grounds.

At the same time, the Government has offered no evidence for the necessity of this change. In their consultation paper, the Government provided only anecdotal examples presented as widespread abuse but with limited insight into the background context of each case. For instance, one example dated back to 2009, prior to changes introduced by the Immigration Act 2014, which made it more difficult to achieve successful appeals under Article 8 of the HRA and which would change the outcome of the case in question were it to be brought today. The Government has also failed to provide an examination of data demonstrating the overall number of cases relating to deportation challenges and the rights being relied upon.

Furthermore, the HRA already contains significant limits on the use of Article 8 in deportation claims, and the ruling referenced from 2009 was addressed by changes to other legislation, with no need to amend the HRA itself.

Meanwhile, Article 6 of the ECHR protects the right to a fair trial, and a person cannot currently be deported if to do so would risk a "flagrant denial of justice". However, Clause 20 of the Rights Removal Bill dictates that the court must accept that the Secretary of State's assurances (such as that the destination country is safe) are correct and dismiss the appeal unless to do so would "result in a breach of the right to fair trial so fundamental as to amount to a nullification of that right." It is vital that courts are able to robustly consider the merits of any case and apply an assessment of proportionality. However, these changes create a situation wherein courts are prevented from properly assessing the merits of the case, instead being forced to accept the assurances of the Secretary of State – assurances that recent years have proven are far from infallible. At the same time, it is entirely possible that an individual's right to a fair trial could be breached, but a court would be forced to rule in favour of the state because the right hasn't been completely nullified.

These changes represented by Clauses 8 and 20 will further entrench structural discrimination within the justice and migration systems. As argued by the Community Policy Forum in responding to the Governments initial proposals for the bill, it is well evidenced that police powers, sentencing, and deportation powers are disproportionately used against people of colour. Meanwhile, inordinate Home Office fees and wider issues within the Home Office functioning disproportionately prevent many such people who would otherwise be entitled from claiming British citizenship, leaving them subject to immigration powers, including detention and deportation. At the same time, it is such groups that are less likely to have the economic resources to take a claim to the ECtHR should they require an Article 13 remedy if options to appeal are removed.

Introducing a limited right to a jury trial.

Clause 9 of the Rights Removal Bill introduces a limited right to a jury trial. However, this is a painfully symbolic gesture. Article 6 of the HRA already protects the right to a fair trial which encompasses a broad range of safeguards, including the right to representation, an interpreter, impartiality, the assumption of innocence, and a vast array of other conditions. Moreover, the broad wording of Article 6 supports the application of legal traditions as they operate across the devolved powers, with trial by jury not existing in Scots Law. Therefore, any enactment of this clause would severely destabilise devolved settlements.

Consequently, while seeming to expand protections, these changes would add little of value in practice beyond acting as a symbolic veneer to distract from the overarching weakening of protections across the bill. If the government has genuine concerns about protecting the right to a fair trial, it would be wise to first consider issues such as court closures, devastating financial cuts to the justice system, and the slashing of legal aid budgets that have severely hampered ordinary citizens' access to justice in recent years.

Limiting claims against overseas military operations.

Clause 14 of the bill effectively removes the ability for people to bring cases against overseas military operations (including overseas military prisons) on human rights grounds except in very limited circumstances. In real terms, this amounts to a complete ban on access to justice regarding such breaches. This change will have devastating consequences for members of the armed forces and their families, as well as for innocent civilian populations who will be prohibited from seeking justice. Indeed, it will exclude UK courts from hearing cases such as *Smith and Others v Ministry of Defence*, wherein the courts ruled in favour of families of dead and injured service people who alleged that the Ministry of Defence failed to provide suitable equipment, thereby breaching their Article 2 rights (right to life).

It is interesting to note that Clause 39(3) introduces a caveat to Clause 14, which means that it cannot be commenced unless it complies with the UK's ECHR obligations. The JCHR has interpreted this to mean that the Government recognises that Clause 14 violates our current international obligations, so would require the ECHR to be renegotiated (or the UK to withdraw from the convention) or primary legislation to be passed by Parliament that provides a framework for enforcing human rights in such situations.

Indeed, before this conflict with our international obligations is rectified, the only outcome would be more cases being challenged (and the UK losing) in the ECtHR, for example, the case of Al-Skeini v United Kingdom, in which the ECtHR ruled against the UK in its conclusion that Iraqi citizens who had died as a result of the actions of UK Armed Forces in Iraq were under the jurisdiction of the UK and its responsibilities under the ECHR.

As the JCHR notes;

> *"the Government is, in effect, asking Parliament to grant it a blank cheque to pass a provision into law that does not respect the UK's international law obligations to respect human rights and to remove enforcement of human rights for these categories of people, before the Government has negotiated those changes... the correct process is to first find those solutions before asking Parliament to agree a clause disapplying human rights enforcement for certain categories of people. We cannot see how the Minister considered this provision to be compatible with the UK's international law obligations to respect human rights, including the right to access an effective remedy."*

Introducing a permission stage.

Clause 15 of the bill introduces a permission stage when bringing cases, wherein someone must prove they've experienced "significant disadvantage" before they can bring a claim. Ultimately, this will enhance the difficulty for ordinary people to access justice by increasing the burden to prove "significant disadvantage", perhaps even before an individual has had access to legal advice. This would disproportionately impact those already facing barriers to accessing

justice (for example, those with limited financial means, survivors of domestic violence, and trafficking victims). Meanwhile, the idea that a breach must result in significant disadvantage ignores the fact that all human rights abuses are intolerable.

Ultimately, the aim of this change is to limit the ability of the courts to scrutinise the Government and statutory authorities, thereby removing an essential mechanism in holding them to account. This change will likely only result in more cases being directed to the ECtHR in pursuit of Article 13 (the right to an effective remedy). However, being forced to take cases to the ECtHR will continue to disproportionately exclude many vulnerable people from justice due to the time and costs required.

Requires courts to take into consideration the conduct of claimants.
The Rights Removal Bill introduces changes demanding that courts take into account the conduct and behaviour of the victim in cases involving damages, regardless as to whether that conduct is in relation to the unlawful act under examination (Clause 18(5)). Under this change, courts must also give great weight to the inconvenience damages being awarded could cause public authorities (Clause 18(6)) and the potential for other public authorities to become liable in similar cases (Clause 18(7)). All of these changes will undermine the public's access to justice and impact a claimant's right to an effective remedy (Article 13 of the ECHR) and, again, will likely result in more cases being taken to the ECtHR.

Under the HRA, awarding damages is exceptionally rare. The emphasis is on correcting abuses and providing an effective remedy. They are usually applied in extreme circumstances to rectify the disadvantage experienced by a claimant appropriately and to act as a deterrent from future cases occurring, for example, in the spycops case. Giving greater weight to the inconvenience of authorities undermines the benefit of damage awards and falls into the Government narrative that those bringing human rights claims are greedy and undeserving, resulting in the suffering of the tax-payer. Requiring courts to examine claimants' previous behaviour also accentuates the Government's implication that some people are undeserving of human rights on an equal footing.

In the words of the JCHR;

"The courts already have a range of mechanisms for preventing unjustified human rights claims being pursued and are already required to consider the overall context when awarding damages. Our view is that these changes are unnecessary 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."

Moreover, once again, this change is going to disproportionately impact Muslims, people of colour, and other over-policed communities who already face considerable structural discrimination in the application of policing powers and judicial procedures.

Removing consideration for interim measures from the ECtHR.
Clause 24 of the Rights Removal Bill requires UK courts to ignore all interim measures of the ECtHR, thereby preventing courts from complying with international law and the UK's international obligations. Furthermore, it is reasonable to assume that this clause has come about as a consequence of the ECtHR's interventions regarding the first failed Rwanda flight. As such, we are provided with a clear example of the vulnerable people that the bill seeks to target in removing their protection against abuse.

The ECtHR can only issue interim measures in rare cases where someone would otherwise face irreparable harm. Cases of deportation often fall into this category as the failure to recognise interim measures from the ECtHR could be catastrophic for individuals and their families. As witnessed by the first failed Rwanda flight, without the intervention from the ECtHR, individuals would have been deported and may have been completely prohibited from fighting an appeal in a foreign country to which they had no connection.

Undermining parliamentary scrutiny.
Throughout the bill, there are numerous mechanisms that remove scrutiny of the Executive (the Government) by decreasing the oversight of Parliament and weakening the powers of the judiciary. The bill removes the current obligation under Section 19 of the HRA for the Minister responsible for introducing a bill to make a statement declaring its compatibility with human rights. The requirement for a Minister to make such a statement is an important safeguard as it ensures those responsible for introducing a bill undertake due diligence and legal advice during the drafting of the bill. Once again, the significant majority of respondents to the Government's consultation did not support changes to Section 19 of the HRA, and the Explanatory Notes attached to the bill do not provide clarity as to why this change is to be made. As suggested by the JCHR, the provisions under Section 19 should be strengthened and improved to support a robust system of accountability and scrutiny when a bill is tabled. Repealing Section 19 achieves the direct opposite.

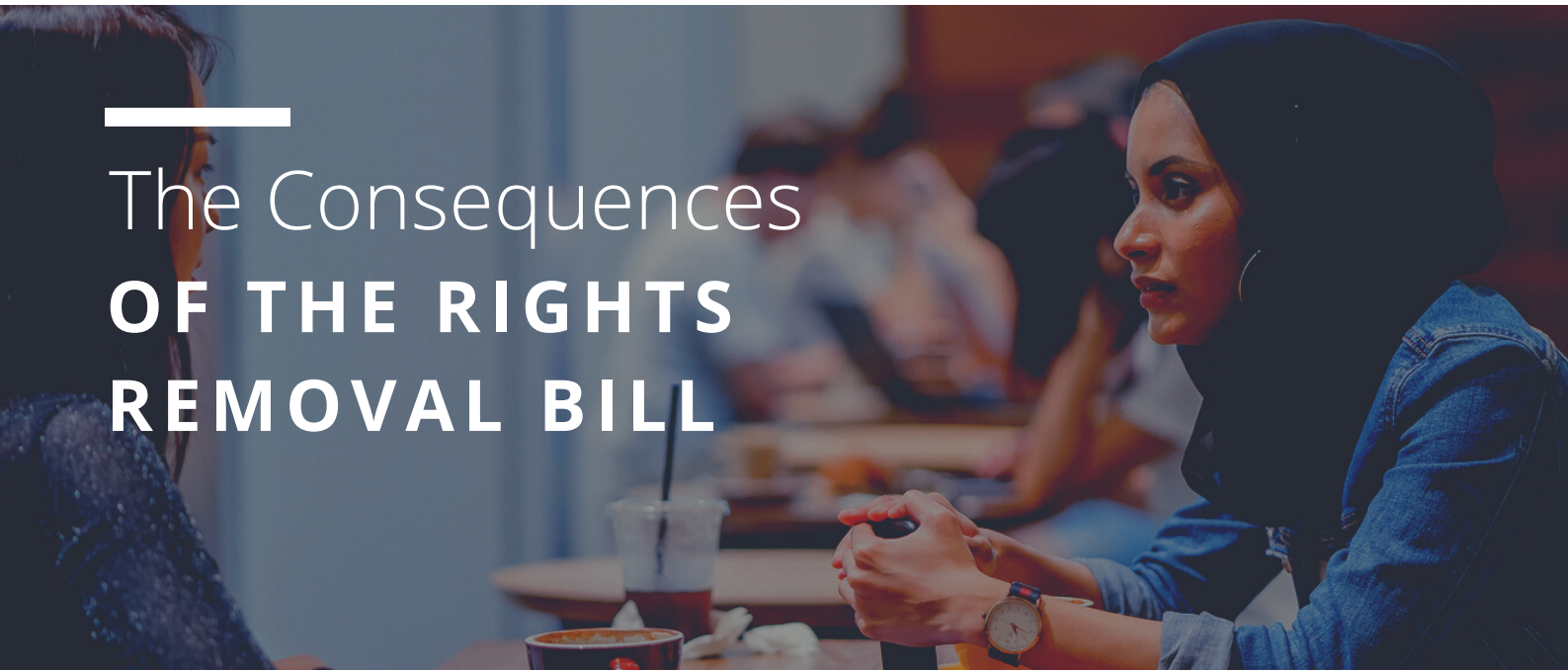
Ultimately, the Rights Removal Bill will:

- ***Make it harder for victims of human rights abuses to access justice:*** With victims being unable to achieve remedies in the domestic courts, they will be forced to direct their claim to the ECtHR in Strasbourg. This is an expensive and time-consuming endeavour which will effectively prohibit many from pursuing their case. Moreover, many of those most likely to face financial and time-limiting barriers will be amongst the most vulnerable for whom the need is most severe, which will likely lead to discriminatory access to justice, with women, the elderly, disabled people, and sexual, racial, and religious minorities being disproportionately impacted.

- ***Increase Government powers to disregard human rights and avoid accountability:*** The bill is built upon the apparent aim to undermine scrutiny and avoid accountability of Government actions. Whereas the HRA was carefully calibrated to foster and nurture a culture of human rights across public authorities, the Rights Removal Bill dismantles two decades of progress.

- ***Undermine the universality of human rights and create a hierarchy of those deemed entitled to human rights:*** A number of provisions within the bill create a dichotomy between those deemed "deserving" and "undeserving" of human rights. As stated previously, this approach directly contradicts the principle of universality of humanity upon which human rights are centred. Such rights are not earned or subject to a person's character but are afforded by virtue of our collective humanity.

- ***Reduce the UK's international standing:*** Dunja Mijatović, the Council of Europe's Commissioner for Human Rights, has condemned the Rights Removal Bill for its weakening of "human rights protections at this pivotal moment for the UK, and [sending] the wrong signal beyond the country's borders at a time when human rights are under pressure throughout Europe." Indeed. as observed by the JCHR, the HRA "is viewed internationally as



The Consequences **OF THE RIGHTS REMOVAL BILL**

a gold standard and a model example of how human rights can be effectively embedded into domestic law and practice. Any weakening of the mechanisms in the HRA could damage the UK's reputation internationally and weaken the Government's position when seeking to ensure other states uphold their human rights obligations."

- ***Disrupt devolved arrangements and the Good Friday Agreement:*** The HRA is a foundation underpinning the devolution settlements and is an integral component of the peace settlement in Northern Ireland. The Scottish and Welsh governments, as well as the Northern Ireland Assembly, have condemned the Government's plans, with the Scottish Government describing the bill as an "act of vandalism".

- ***Lead to unnecessary legal uncertainty:*** Particularly in light of the limitation on positive obligations and the repeal of Section 3 of the HRA, the UK will likely face years of legal upheaval where previous cases are revisited. In a courts system already overwhelmed by financial cuts and backlogs, this will cause unnecessary harm to anyone seeking justice.

- ***Entrench structural discrimination across society:*** Several of the clauses within the bill will disproportionately impact people of colour, women, the elderly, religious communities, disabled communities, and the LGBTQI+ communities – often including the most vulnerable who are most likely to require the protections currently provided by the HRA. These groups are also the least likely to have the resources to pursue their cases in the ECtHR should it be required.

Wider RECOMMENDATIONS

Due to its fundamental flaws and the vast number of problematic clauses contained within the bill, no amount of amendments can temper its damage. The bill has failed to undergo appropriate pre-legislative scrutiny and will irreparably damage the UK's rights protections, create legal uncertainty, and violate our international obligations. Thus, the only solution is for it to be scrapped in its entirety.

If the Government is genuinely committed to strengthening the UK's human rights framework, there are a number of policies that it could more positively pursue:

Sufficiently funding the justice system: Over the last decade, government cuts to funding the justice system has wreaked untold devastation on victims of crime, those accused of crime, legal practitioners, and human rights claimants. Without efficient funding, it is increasingly difficult for individuals to access justice.

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Incorporate international rights treaties into domestic law: There are international treaties, such as the Refugee Convention and the UN Convention on the Rights of the Child, that could be more effectively incorporated into domestic law.

Prioritise human rights education: As observed by both the IHRAR and the JCHR, much of the confusion surrounding the HRA could be overcome by enhancing civic and human rights education and training in schools and across public institutions.

Expanding access to out-of-court remedies: Expanding provisions and resources to increase access to an Ombudsperson and the powers of the Equalities and Human Rights Commission to investigate human rights breaches would increase the public's access to justice without having to go through the courts.


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