Joint Committee on Human Rights
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From Joanna Cherry QC MP

Rt Hon Dominic Raab MP
Deputy Prime Minister
Lord Chancellor and Secretary of State for Justice
Ministry of Justice

30 June 2022

The Bill of Rights

Dear Dominic,

I am writing on behalf of the Joint Committee on Human Rights (JCHR) in relation to the Bill of Rights to set out our preliminary views and concerns. We intend to publish a full Report in due course.

As the Committee responsible for scrutinising the Government's human rights record, we have conducted two inquiries considering plans to reform the Human Rights Act 1998 (HRA). During our inquires we heard evidence from experts with a diverse range of views. Having considered this evidence we remain of the view, expressed in our previous reports, that the HRA is functioning as intended as it enables human rights to be enforced effectively in the UK with little recourse needed to the European Court of Human Rights (ECtHR). For that reason, based on the evidence and information we have considered, we believe the Government has failed to make the case for repealing and replacing the HRA with a Bill of Rights in the form proposed.[1]

Government engagement with experts, Parliament, and the public

The introduction of the Bill of Rights follows a commitment to update the Human Rights Act; an independent expert Review of the Human Rights Act; Parliamentary engagement and inquiries and a public consultation exercise which elicited over 12,000 responses. Whilst such extensive engagement is laudable, engagement must be genuine and must have meaning and purpose. Those who engage should be listened to.

The Government's Bill of Rights does not reflect what the Government has heard from Parliament's committees, from its own independent review, nor from its consultation exercise. It concerns us greatly that the Government has not engaged with the IHRAR report, nor our report on the IHRAR consultation. Neither received substantive responses. It is yet to respond to our report on their consultation paper, although we expect a response shortly. It also has failed to take into account a joint letter from the Chairs of this Committee, the Justice Select Committee, the Public Administration and Constitutional Affairs Committee, and the House of Lords Constitution Committee

[1] Human Rights Act Reform (parliament.uk)

which called for pre-legislative scrutiny of the Government's proposals. Given the constitutional significance of this Bill and the absence of pre-legislative scrutiny, we expect the Government to give sufficient time to Parliament to consider its proposals during the legislative process.

The Government's consultation analysis also shows that many respondees were in favour of maintaining the *status quo* and were of the view that the changes proposed therein were unnecessary. Despite this lack of support, the Government has decided to pursue reform. To give two of many possible examples:

- 79% of respondents to the Government's consultation did not want any change to s.3 HRA which requires legislation to be interpreted in a manner compatible with Convention rights, so far as it is possible to do so, (something that was also advised against by both the IHRAR and by us). The Bill of Rights will repeal this provision nonetheless.

- Less than 2% of respondents thought any changes should be made to the requirement that the Minister introducing a Bill to Parliament should make a statement as to whether the Bill was compatible with human rights (what is now section 19 of the HRA). Neither IHRAR nor this Committee, thought any such changes should be made. However, the Government's Bill repeals this useful provision that helps Parliament undertake its scrutiny.

The Government's consultation analysis provides scant to no reasoning to explain why it has decided to disregard the views of a significant number of consultees. This calls into question the integrity of the whole consultation process. In addition, the Human Rights Memorandum provided to Parliament upon introduction contains alarmingly superficial analysis of the human rights implications of this Bill – and indeed seems to ignore certain significant human rights implications entirely.

Given the overwhelming lack of support for these radical reforms the Government should consider whether repealing the Human Rights Act and replacing it with this Bill of Rights is really democratic and necessary. We think not.

International implications

Our overarching and predominant concern on the introduction of the legislation remains the same: that the Bill would weaken the protection of human rights in the UK. The serious implications of the Government's proposals on the international plane were recently highlighted to the Committee during a visit to the institutions of the Council of Europe, including the ECtHR, in Strasbourg. It was emphasised to us that the HRA is viewed internationally as 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.

Moreover, we were left in no doubt that the UK's status as a leading member of the Council of Europe and one of the founders of the ECHR means that any reforms to the HRA that suggest we are wavering in our commitment to the Convention's protections could be a green light for other, less committed nations to weaken their own human rights protections. This would be seriously damaging to the protection of human rights across Europe at a time when Russia has already shown contempt for the principles of the Council of Europe by invading Ukraine, resulting in its expulsion from the organisation. The Committee urge the Government to think carefully before proceeding with a Bill that could have such undesirable international ramifications.

More specifically, we are concerned that a number of provisions in the Bill would result in the UK not complying with its international law obligations to secure to everyone in the UK basic human rights protections. Such an approach to the rule of law is out of keeping with British values. We strongly believe that the people of the UK deserve to benefit from human rights protections that should be accorded to all people due to our inherent humanity. We also believe that the UK should comply with its international law obligations to respect the human rights of people within its jurisdiction. In this light we are concerned that a number of clauses in this Bill do not seem to comply with the UK's international law obligations to respect and enforce human rights.[2]

Returning to the domestic context, below we set out why we believe the HRA works well, our proposals for amendments designed to further strengthen the UK human rights landscape and finally, some of our initial concerns with the Bill.

The successes of the Human Right Act

The HRA has had an incredibly positive impact on human rights in the UK. In our previous work we have noted that the HRA has:

- Made it easier for individuals to enforce their rights under the European Convention on Human Rights (ECHR) before UK courts. Before the passing of the HRA an individual had to take their case directly to the ECtHR. This process was subject to long delays and on average cost an applicant £30,000.[3]

- Led to a significant decrease in the number of cases brought against the UK before the ECtHR. Since 2017, the number of cases brought against the UK per 100,000 inhabitants has been the lowest amongst the 47 states signed up

[2] For example, clauses 5 (positive obligations), 8 (deportation), 14 (overseas military operations), 20 (limits on Court's powers to allow appeals against deportation), and 24 (interim measures of the ECtHR) are of particular concern.
[3] Joint Committee on Human Rights, Third Report of Session 2021–2022, The Government's Independent Review of the Human Rights Act, HC 89/HL 31, para 14.

to the ECHR.[4] The number of successful claims brought against the UK is also the lowest amongst Council of Europe states.

- Enabled UK courts to influence the development of ECtHR case law. As highlighted by the Government's Independent Human Rights Act Review (IHRAR) there are numerous cases in which the UK courts and ECtHR have "learned from and influenced each other".[5] The ECtHR also holds judgments of the UK courts in high regard, and respect that UK judges have a better understanding of the UK legal system and policy context.

- Embedded a human rights culture in public authorities. Various witnesses, including an NHS Trust, the National Police Chief's Council and the British Association of Social Workers told us the HRA has placed human rights at the center of decision-making, and the legal framework has assisted them in making complex decisions.[6] We have also heard the HRA has been central to the successful devolution of justice and policing in Northern Ireland.[7]

JCHR proposals for amendments

While we do not consider a case has been made for replacing the HRA, the introduction of a Bill of Rights could provide both the opportunity to further promote, protect and enforce rights, and for the public to engage with human rights. However, in its current form, we do not think the Bill would achieve either of those outcomes. Our view is that the Bill would lead to an unfortunate regression in rights protection.

Moreover, the tone of the Government's rhetoric around reform gives the impression that human rights are inconvenient for public authorities and upholding them is contrary to the public interest. We think it should be an uncontroversial proposition, and hope the Government would agree, that human rights benefit everyone and must be afforded strong protection.

In any consideration of reforming human rights protections in the UK the Government should be taking the opportunity not to diminish but to strengthen the human rights landscape. Our previous and ongoing work provides many examples of positive changes that could be made. For example, the Government could:

- Enshrine the right to protest, an aspect of the right to freedom of expression which the Government proposes to give greater protection in the Bill of Rights.

- Incorporate the right to an effective remedy, as protected by Article 13 ECHR, in UK law.

[4] European Court of Human Rights (HRA0011) page 4.
[5] The Independent Human Rights Act Review, CP 586, December 2021, Chapter Four.
[6] Human Rights Act Reform (parliament.uk)
[7] Q7 [Alyson Kilpatrick, Chief Commissioner of Northern Ireland Human Rights Commission]

- Incorporate other international human rights treaties, such as the United Nations Convention on the Rights of the Child and the Refugee Convention, including a right to seek and enjoy asylum from persecution, in similar terms to Article 14 Universal Declaration on Human Rights.

- Strengthen the enforcement of human rights out of court. This could be done by ensuring ready access to an Ombudsperson for all human rights complaints and providing just and fair administrative systems for enforcing rights. Similarly, as we have previously recommended, improved enforcement of human rights out of court could be achieved by strengthening the role of the EHRC in enforcing rights by allowing them to undertake investigations into named bodies for possible breaches of the Human Rights Act and to provide legal assistance to individuals in Human Rights cases.[8]

- Make clear that the Bill of Rights does not diminish any existing rights provided by statute or the common law.

- Reference the importance of the principles of human dignity and humanity.

- Provide for more comprehensive civic and human rights education in schools, as recommended by both this Committee and IHRAR.

- Ensure that all those in care settings have their human rights protected through the operation of the Bill of Rights.

Relationship between the UK Courts and the European Court of Human Rights

The Bill would remove the obligation, in section 2 HRA, for UK courts to take into account the case law of the ECtHR when deciding human rights cases. We do not think these changes are necessary. The requirement in section 2 does not require UK Courts to follow Strasbourg case-law, only to take into account case-law that is relevant to the case before it. Having regard to relevant case-law seems eminently sensible and strikes the right balance. Moreover, as Lord Mance set out in evidence to us, the application of the ECHR rights *via* the HRA has led to many positive developments in rights protection in the UK, including "the ending of detention without trial of aliens suspected of terrorist involvement, the lifting of the ban on homosexuals in the Armed Forces or, in a civil law context, the development of a law of privacy."[9]

Clause 3 of the Bill, by amending section 2, would remove the link between the interpretation of ECHR rights from ECtHR case law as it has been adapted to evolving societal circumstances over the last 70 years. This would likely mean that the UK courts' application of human rights protected under the ECHR will be less predictable

[8] Joint Committee on Human Rights, Tenth Report of Session 2017-2019, Enforcing Human Rights, HC 669/HL 171, para 127.
[9] Q5 [Lord Mance]

and disconnected from the way that human rights are generally accepted as applying to the challenges of society today.

Moreover, the Convention system (and indeed other international human rights treaties) operate by creating a minimum level of basic respect for human rights; it is open to States to go further in protecting human rights. However, clause 3 seems to invert this logic by effectively treating the Convention system as a maximum level of protection. Under clause 3, UK courts would be able to accord UK citizens and residents weaker human rights than those protected by the Convention, but unable to accord protection that risked going further than the established case-law of the ECtHR (seemingly even where the common law, or the specificities of the UK's unique context and circumstances would require it).[10]

Clause 3 could lead to a regression in rights protection and leave individuals to pursue their case before the ECtHR, resulting in unnecessary costs both for litigants and the Government. Much will depend on how the courts decide to develop their own approach to interpreting the Convention rights under the Bill of Rights. However, at best these changes will create a period of legal uncertainty with an inevitable impact on the cost and time of litigation and legal confusion. At worst they will lead to the UK failing to implement and give effect to its international law obligations, UK courts failing to apply relevant human rights standards, and for people in the UK needing to resort more often to litigating before the ECtHR in order to have their human rights respected by the Government.

We heard from numerous witnesses that both formal and informal dialogue between the ECtHR and UK judiciary are in a very healthy state. Section 2 of the HRA is of central importance to that dialogue by enabling the courts to speak the same language.[11] This was not just the view of our Committee, but that of the IHRAR that was commissioned by the Government. The amendments proposed by clause 3 will undoubtedly weaken the formal dialogue (through judgments), and weaken the ability of the UK courts to engage in meaningful dialogue as to how human rights can best be given effect bearing in mind the specificities of the UK legal systems, thereby weakening the extent of the margin of appreciation currently enjoyed by the UK.

Interim Measures & complying with the UK's international obligations

Article 34 ECHR provides for the right of individual petition, which is what enables individuals to bring claims before the ECtHR. Article 34 specifically provides that States "undertake not to hinder in any way the effective exercise of this right". The ECtHR grants interim measures where a State's actions would otherwise prevent an

[10] This logic of treating basic human rights protections as a maximum (rather than a minimum) can be found in clause 3(3) of the Bill.
[11] Human Rights Act Reform (parliament.uk) para 30.

individual from being able to effectively access the court to enforce their human rights and would face a real risk of serious and irreversible harm. Interim measures are used rarely and are principally relevant for extradition or deportation cases. Interim measures will be issued where it is necessary to ensure that an individual is not hindered in their ability to exercise their right to bring a case before the ECtHR. Moreover, the ECtHR Grand Chamber has held that a failure to comply with interim measures would amount to a violation of Article 34 ECHR, as it would "hinder… the effective exercise" of the right of applicants under Article 34 to being their claims before the ECtHR.

However, clause 24 (interim measures of the ECtHR) would provide that UK courts and UK public authorities cannot take account of interim measures of the ECtHR, thus effectively preventing UK courts and public authorities from complying with the UK's international obligations flowing from the ECHR (and in particular Article 34 ECHR) and the rulings of an international court in relation to the UK. We cannot see how clause 24 is compatible with international law. Parliament should not be asked to approve a law expressly designed to instruct the UK courts and public authorities not to comply with the UK's international obligations. [12]

Parliamentary scrutiny of human rights

Parliament, and this Committee in particular, plays a crucial role holding the Government to account for its human rights record, and its adherence to international human rights standards. The Government's consultation suggested that the role of Parliament in scrutinising human rights should be strengthened. We are concerned that the Bill achieves the opposite and would, ultimately, decrease oversight of the Executive by weakening the role of the courts whilst simultaneously decreasing (or at least not enhancing) oversight of the Executive by Parliament.

Instead of strengthening Parliament's ability to hold the Government to account for respecting human rights, the Bill removes the obligation for the Minister responsible for introducing a Bill to make a statement as to whether or not that Bill is compatible with human rights (currently s. 19 HRA). These statements ensure that Government has internally undertaken due diligence and analysis. They, along with the Government's human rights explanations for example in Human Rights Memoranda, also assist Parliament in understanding the potential constitutional implications of Bills, and whether Parliament is being asked to pass laws that would violate the human

[12] See *Paladi v. Moldova*: "87. The Court reiterates that the obligation laid down in Article 34 *in fine* requires the Contracting States to refrain…from any act or omission which, by destroying or removing the subject matter of an application, would make it pointless or otherwise prevent the Court from considering it under its normal procedure… 88. The same holds true as regards compliance with interim measures as provided for by Rule 39, since such measures are indicated by the Court for the purpose of ensuring the effectiveness of the right of individual petition…It follows that Article 34 will be breached if the authorities of a Contracting State fail to take all steps which could reasonably have been taken in order to comply with the measure indicated by the Court."

rights of UK citizens and residents. They are a vital part of the legislative process both within Government and in Parliament and must be retained.

The Government's Explanatory Notes do not explain why section 19 is to be repealed. As noted above, the consultation response analysis makes it clear the vast majority of respondents did not support any change to s. 19 HRA. Our very clear view is that these statements and explanations should be improved (not repealed) in order to facilitate meaningful parliamentary scrutiny, including by this Committee. It is not acceptable that the Government should seek to undermine the ability of Parliament to hold it to account with regards to its human rights obligations. The Government should introduce an amendment as soon as possible to reintroduce s. 19 HRA into the Bill of Rights.

The explanations accompanying s19 statements are also crucial to enable Parliament to do its legislative role properly; we would like a reassurance that Explanatory Memoranda explaining the Government's human rights analysis will continue to be provided to the JCHR.

Moreover, whilst we note that clause 25 would ensure Parliament is adequately notified in cases where the UK Government has been found to violate an individual's human rights by the ECtHR, this is meaningless unless accompanied by practical improvements in communication between the Government and this Committee. As we recommended in our *Human Rights Act Reform* report, a more structured system should be established to ensure strong collaboration between Government and Parliament – in particular this Committee - in taking timely action to resolve human rights violations in respect of both ECtHR judgments and declarations of incompatibility from UK courts. We call on the Government to establish better and more timely systems of communication with this Committee to scrutinise the action the Government is taking to address human rights incompatibilities and violations in the UK.[13]

Interpreting and applying the law in a way that complies with human rights

The Bill will repeal section 3 HRA, which requires legislation to be read compatibly with Convention rights so far as it is possible to do so. We, like the Justice Committee, are "not convinced that the courts' existing approach has been shown to be sufficiently problematic" to justify significant changes, let alone repeal.[14] Recent case law indicates that the courts are using section 3 appropriately. The repeal of section 3 would lead to a substantial weakening in the protection of human rights in the UK – as well as significant legal uncertainty and confusion.

[13] Human Rights Act Reform (parliament.uk). See in particular the recommendations at paragraph 121 and 131.
[14] https://committees.parliament.uk/publications/9259/documents/160201/default/

The Government's intention appears to be that all s.3 HRA interpretations of legislation clarified in previous judgments would risk being cast in doubt with the legal uncertainty that entails. This would subject to a regulation-making power enabling the Secretary of State to choose certain judgments to be expressly preserved or restored (although this logic seems to run counter to the usual approach of binding precedent).[15] The Government has not produced a list of these judgments, or its intention as to how they should be handled. Such an approach lacks adequate clarity and adequate Parliamentary oversight. The Government should produce that analysis as soon as possible and in any event before Committee stage of the Bill. To ensure legal clarity, we recommend that all s. 3 interpretations be retained. If a more ad hoc approach is taken, clarity would be improved if the s.3 interpretations the Government intended to maintain were included in a Schedule to the Bill and approved by Parliament.

The repeal of s. 3 HRA, as read with clause 12 (which replaces s. 6 HRA) would also mean that public authorities no longer have to read legislation compatibly with human rights so far as it is possible to do so.[16] The duty in section 6 HRA, which requires public authorities to act compatibly with Convention rights, has been fundamental in embedding a human rights culture in public authorities. We heard evidence from public authorities who told us the HRA provides a useful framework for complex decision-making. Section 6 in its current form is thus fundamental to ensure rights are protected and enforced, yet the proposed changes would remove a significant level of protection.

This amendment 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. We are not convinced that the significant implications of this change have been fully considered.

Litigation and remedies

It is fundamental that victims of rights breaches have an effective remedy. Courts can provide both individual redress in the form of damages, and determine where the law is, more generally, incompatible with human rights obligations. This can prevent further rights breaches in the future. The proposed changes to litigation and remedies in the Bill of Rights may disincentivise individuals from seeking redress in the courts and runs the risk of breaching the obligation to provide an effective remedy in Article 13 ECHR.

[15] Clause 40.
[16] Clause 12 replaces section 6 HRA with a weaker duty on public authorities to act compatibly with human rights, in particular given the repeal of s. 3 HRA.

We have already made clear our position that the evidence for a new permission stage in human rights claims (clause 15) is unnecessary. We are also concerned at proposals to restrict the availability of damages in clause 18. Clause 18 would require courts to only grant damages at or below the level that a claimant would receive before the ECtHR (clause 18(3)), to consider an individual's wider conduct (clause 18(5)), to limit damages if that would impact on the public authority's ability to perform its function (clause 18(6)) and to have regard to potential future awards of damages in respect of the unlawful act (clause 18(7)). All of these proposals risk undermining access to justice and the enforcement of human rights – and in particular the right of a victim to an effective remedy where their human rights have been breached by the State. The well-known challenges with accessing legal aid will also interplay with these proposed changes and will further exacerbate the challenges to access to justice that these proposals imply. 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.

Duties to protect human rights: Positive obligations

The Government has taken issue with the doctrine of positive obligations, which requires public authorities to take active steps to protect people's rights against interference by others. Positive obligations have been crucial in ensuring effective investigations into deaths in police custody under Article 2 (right to life), and in the *Worboys* case the Supreme Court made clear that Article 3 (prohibition on torture and inhuman and degrading treatment) includes a duty on the police to effectively investigate allegations of sexual assault. Positive Article 8 ECHR duties can also be crucial, for example, in enabling families to stay together and we repeatedly heard of the importance of Article 8 for families trying to visit relatives during the Covid pandemic during our *Care Settings* inquiry.

Clause 5 would seek to limit the scope of positive obligations by limiting the extent and application of existing positive obligations in the UK and by providing that future ECtHR caselaw clarifying or developing the extent of positive obligations is not applicable in the UK. We cannot see how this provision is compatible with the UK's international obligations, or respect for human rights of the people of Britain. Our view is that this would be an undesirable regression in rights protection.

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From Joanna Cherry QC MP

Specific rights issues

Deportation

The Bill would significantly limit the circumstances under which human rights can be used to challenge deportation decisions of foreign national offenders (FNOs) (clauses 8 and 20). Clause 8 prohibits courts from finding deportation law to be incompatible with the right to family and private life (Article 8 ECHR), unless "manifest harm" is to a qualifying family member is "so extreme" that harm would override paramount public interest. The "extreme" harm is defined as "exceptional and overwhelming", and "incapable of being mitigated or irreversible". This bar is so high that it essentially extinguishes the essence of Article 8 rights for FNOs facing deportation and their families.

At present, a person may not be deported if they would be at risk of facing a "flagrant denial of justice" contrary to their right to a fair trial under Article 6. Clause 20 changes the test for compliance with Article 6 ECHR (right to a fair trial) in a deportation case from "flagrant denial of justice" to "nullification" of the right. Clause 20 also provides that the Courts must accept the Minister's assessment of a deportation with assurances policy unless there is no reasonable way to reach the Minister's conclusion that the assurances would be sufficient to prevent a breach of a right to a fair trial so fundamental as to amount to a "nullification" of that right. This obligation on the courts would appear to prevent them from properly assessing the risk to an individual facing deportation, as they must simply accept the views of the Secretary of State unless they reach the threshold of "unreasonable". 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.

Not only are we not convinced that clauses 8 and 20 are necessary given the strong presumption in favour of deportation that already exists (which the ECtHR has found to be compliant with the ECHR), we cannot see how any tipping of the balance further in favour of deportation would comply with the Convention. This proposal risks undermining the principle that human rights are universal and should be afforded to everyone. To ensure the deportation regime remains compliant with the Convention it is essential that courts can conduct a balancing exercise and proportionality assessment in each case. It seems to us very unlikely that these clauses of the Bill are compatible with ECHR rights.

It is therefore difficult to understand how the Minister felt able to make a statement to Parliament under s. 19(1)(a) HRA to the effect that he is satisfied the Bill is compatible with Convention rights. Given the severe rights restrictions in clauses 8 and 20 (and other provisions in Bill) the Minister should explain why he did not consider making a

s. 19(1)(b) statement (i.e. a statement that he is unable to make a statement of compatibility).

Overseas military operations

Clause 14 introduces a total ban on access to justice in respect of human rights breaches arising from overseas military/peacekeeping operations. This would impact on the ability of members of the Armed Forces, their family members, and innocent civilians to seek justice and accountability for human rights violations. This 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.

Clause 39(3) provides that clause 14 would not be commenced unless the Secretary of State is satisfied that to do so is consistent with the UK's obligations under the ECHR. We understand this to mean that the Government recognises that this provision could not enter into law unless the Government has either renegotiated the ECHR or has got Parliament to pass primary legislation providing for an alternative system for enforcing human rights and providing access to justice for human rights violations arising out of overseas military operations.[17] However, 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. We find this unacceptable. Whilst it is open to the Government to seek a mandate to introduce legislation to change enforcement mechanisms for different categories of human rights claim, or to seek changes to international law, 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. We suggest this clause is removed from the Bill.

Prisoner's rights

Clause 6 (public protection) as well as clause 18 (damages) seem to suggest different levels of human rights protection for prisoners. As Elizabeth Prochaska, barrister at 11 KBW and former Legal Director at the Equality and Human Rights Commission, said in her evidence to us on the consultation proposals, that such an approach "point us down a path of a very dangerous attempt to distinguish between good and bad

[17] Clause 39(3).

people, when we all know that these rights are meant to be universal."[18] We agree. Any efforts to categorise certain groups of people as being less deserving of human rights protection is contrary to the very concept of human rights and should form no part of our laws.

A limited right to trial by jury

The Bill introduces a new and rather heavily caveated right to jury trial. This appears to be a symbolic gesture to distinguish the Bill of Rights from the Convention and we remain unsure about the legal significance of the right. Moreover, including trial by jury in the Bill could undermine the Government's aim of creating a Bill of Rights for the whole of the United Kingdom, given the right to jury trial does not exist in Scots law.

Freedom of expression

The Bill also provides that a court must give "great weight" to the importance of the right to "freedom of speech" albeit with specific exemptions for criminal proceedings, breach of confidence and questions relating to immigration and citizenship. As we have previously stated, we remain unconvinced that this is necessary. Where freedom of speech and the right to private life come into conflict, we think it is right for the courts to conduct a balancing exercise on a case-by-case basis. Elevating freedom of speech above other rights such as the right to privacy undermines the philosophy of the ECHR which is premised on the fact that all rights contained therein are fundamental (albeit some are absolute, some limited, others qualified). Furthermore, the commitment to a more restrictive "freedom of speech" rather than to "freedom of expression" appears to be an attempt to deliberately minimise elements of the right protected under Article 10 ECHR – most obviously the right to protest. The carve out for criminal proceedings also indicates a troubling inconsistency in the protections this clause purports to provide, which is also likely to impact on those exercising the right to protest. It would prevent an individual relying on the "great weight" to be given to free speech when facing prosecution – when they might need it most.

The Human Rights Act and the devolved nations

The HRA plays a unique role in the constitutional arrangements of the devolved nations. Although the HRA is a reserved matter, the wide-reaching changes in the Bill have the potential to impact areas of devolved competence, and we note the changes to the Scotland Act 1998, Northern Ireland Act 1998, and the Government of Wales Act 2006 contained in Schedule 5 to the Bill.[19] Given the potential impact of the

[19] For example, the Scottish Human Rights Commission noted various changes would impact the administration of justice which is an area of devolved competence in Scotland. See Scottish Human Rights Commission, *Submission: UK Government Consultation to reform the Human Rights Act 1998, proposals for "A Modern Bill of Rights*, March 2022.

changes, we agree with Alyson Kilpatrick, Chair of the Northern Ireland Human Rights Commission, who told us that seeking consent from the devolved legislatures would be a "more democratic" option and would enable consideration of the specific impact in each of the devolved nations.[20]

In her evidence to us Professor Aileen McHarg, Professor of Public Law and Human Rights at Durham Law School, reminded us that there are two limbs to the Sewel convention which provides that the UK parliament will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament, Northern Ireland Assembly and the Welsh Senedd. The Sewel convention is engaged where (i) provisions of Bills could have been made by devolved legislatures and (ii) if provisions modify the legislative competence or functions of the devolved institutions. Professor McHarg also told us she had "no doubt that because of the way the Human Rights Act and the devolution statutes interact, any changes to the Human Rights Act will have knock-on consequences for the scope of devolved competence."[21] We believe that both limbs of the Sewel Convention may be engaged by the Bill. The Government should not proceed without the consent of the devolved legislatures.

There is a wide consensus that the HRA has played an important role in embedding a human rights culture in the devolved nations. The devolved nations have been working to further protect rights beyond those set out in the HRA, by incorporating other international human rights treaties (such as the United Nations Convention on the Rights of the Child). It is not currently clear how this will be impacted by the Bill of Rights and what inconsistencies may occur in rights protection across the devolved nations as a result of the proposals.

Next steps

We will engage further with the Government as the legislation continues its passage through Parliament. We would also welcome your attendance at the Committee so we can discuss these issues further.

Yours sincerely,

Joanna Cherry QC MP

Acting Chair of the Joint Committee on Human Rights

[20] https://committees.parliament.uk/oralevidence/10212/pdf/
[21] Q58.