Written Evidence by Mr. Michael Lane (BOR0013)

Introduction

1. I am a doctoral researcher and visiting lecturer at Birmingham City University's School of Law. My research examines the United Kingdom's engagement with the international human rights mechanisms, notably the United Nations Universal Periodic Review (UPR). More information about my research and publications can be found here. This is a written submission to inform the Joint Committee on Human Rights ('the Committee') and its legislative scrutiny of the Bill of Rights Bill (2022-23) [117] ('the Bill'). The views herein do not reflect the position of my institution or funding body.

Reason for Submitting Evidence

2. The aim of this submission is to address question five, as set out in the Committee's call for evidence:

> *The Bill removes the requirement in section 19 HRA for Ministers to make a statement as to whether a Government bill is compatible with human rights. What impact would this have on Parliamentary scrutiny of human rights?*

3. Evidence suggests that s 19 has been a useful mechanism for enabling dialogue between Government and Parliament on the human rights implications of bills. It ensures that both institutions reflect carefully on a bill's compatibility with the European Convention on Human Rights and may prevent litigation and judicial censure later down the line. I do not, therefore, recommend its removal. To this end, my submission a) sets out s 19 and its impact on the scrutiny of human rights in Government and Parliament; b) dismisses the Government's case for its removal; and c) makes recommendations for the Committee to consider.

Human Rights Act 1998 s 19: Statements of Compatibility

4. s 19 Human Rights Act 1998 requires all Government bills to be accompanied with a statement, by the Minister in charge of that bill, which either affirms its compatibility (s 19(1)(a)) or incompatibility (s 19(1)(b)) with the European Convention on Human Rights ('ECHR' or 'the Convention'). Though not required under s 19, the Cabinet Office's *Guide to Making Legislation* requires the explanatory notes provided with bills to set out

the reasoning for the statement made (see pg. 101). Where this would be too lengthy, a separate 'ECHR memorandum' should be supplied alongside the bill and submitted to the Committee.

5. This process facilitates compliance with the Convention in two ways. First, its forces ministers and their departments to consider the rights implications of proposed legislation. The *Guide to Making Legislation* (pg. 105-106) explains that formal advice to ministers on s 19 statements is provided by departmental legal advisers, in consultation with the Ministry of Justice's human rights division, and Law Officers. This is advantageous as it makes it more likely that the Committee and other actors will be satisfied with a bill's compliance with the Convention. In turn, that bill should experience a smoother passage through Parliament (and, indeed, be open to less scrutiny post-passage). Moreover, it should reduce the risk that a bill is subject to judicial challenge in the form of a declaration of incompatibility (s 4 HRA 1998).

6. The second way that the s 19 mechanism promotes compliance with the Convention is by opening of a dialogue between Parliament, other actors, and the Government on the human rights implications of a bill. This reflects the Lord Chancellor's comments, during the passage of the HRA 1998, that s 19 statements would invariably stimulate debate and the questioning of ministers. By involving multiple voices and ensuring a consensus on the contents the bill, and its human rights compatibility, s 19 strengthens the policymaking process. Moreover, the sharing of information, such as a minister's reasoning for adopting the statement of compatibility, facilitates accountability before Parliament. This is important because greater transparency in this regard is associated with greater levels of human rights compliance. Democratic debates around the compatibility of a bill can also influence litigation before domestic courts and the European Court of Human Rights. In both cases, the judiciary appear more inclined to find that legislation is compatible if this matter was considered in Parliament (Hunt, Hooper & Yowell, 2012: 54-58).

7. It is also worth noting that s 19 is just one of many arrangements that facilitates parliamentary accountability. It has been routine practice for some time that the Foreign, Commonwealth and Development Office notifies Parliament, primarily the Committee, about adverse judgments against the UK. Furthermore, since 2009, the Government has reported annually to the Committee on its responses to these judgements. These

arrangements were previously praised by the Committee in its 2015 *Human Rights Judgements* report, in which its observed 'a very significant improvement in the information provided to Parliament about human rights judgments'.

The Bill and the Removal of s. 19

8. The Bill, as per Schedule 5, para 2, repeals the HRA 1998. Though the Bill does replicate some of the HRA's provisions, s 19 HRA is not among them. This means that the Bill, as introduced, would have the effect of removing the requirement for ministers to make statements of compatibility.

9. It is response to the Consultation for the Bill, the Government suggested that the replication of s 19 in the Bill is not necessary. This is because, the Government claims, s 19 is 'simplistic' and 'binary' and does not reflect the 'complexity of determining Convention compatibility'. There is also a supposed 'stigma' attached to the making of s 19(1)(b) statements which operates as a 'veto on innovative policy-making'. The Government suggests that removing s 19 would not prevent Parliament from considering the human rights implications of bills and assures that 'proposed legislation will still be accompanied by analysis of human rights implications'. These claims do not, however, stand up to scrutiny.

10. On s 19(1)(b) statements, it is unclear how these prevent so-called 'innovative policy-making'. On one hand, it might be argued that the 'stigma' associated with these statements might deter governments from pursuing rights-incompatible legislation. Yet, as highlighted above, this is the *very purpose* of s 19 – to have the Government think about the rights implications of its bills. If the effect of s 19(1)(b) is to make it think twice before proposing legislation that is incompatible with human rights, then I would suggest it is fulfilling its purpose. It bears repeating, that it is in the Government's interest to do this at the pre-legislative stage to avoid encountering judicial censure later down the line.

11. Nevertheless, even if a bill is declared incompatible under s 19(1)(b), there is nothing preventing the Government from still proceeding with it: The Local Government Bill 2000, Communications Bill 2003, and the House of Lords Reform Bill 2012 are all examples of bills introduced alongside 19(1)(b) statements. The Government has not

provided any examples of the 'innovative' policies that could be realised in the absence of s 19, that cannot already be done so.

12. On s 19's binary nature, there is some substance to this view. The wording of the section means that ministers have only two options available to them: they can either declare that a bill either is compatible with the ECHR, or that it is not. One respondent to the Independent Human Rights Act Review, Prof. Guglielmo Verdirame QC, proposed a third category of statement of 'qualified compatibility' which could be made in the event that a minister 'cannot certify compatibility on the balance of argument based on the case-law at the time'. However, as the Review pointed out, and as alluded to above, the present mechanism under s 19 enables a bill to proceed even if it is incompatible. The binary wording of s 19 does not, therefore, have any bearing on what policies can be introduced.

13. On the assurance that s 19 would not affect Parliament's scrutiny, to some extent this might be the case. With the Committee having routinely carried out legislative scrutiny for so long, the human rights implications of bills will, in all likelihood, continue to be raised in its reports and by parliamentarians in absence of s 19. It is also notable that the Government is assuring proposed legislation would continue to be accompanied with an 'analysis of human rights implications'. However, this assurance can only be met with scepticism. The side-lining of Parliament and the Committee has been a frequent occurrence under the present administration. Of note is the failure, by the Government, to make the Bill of Rights Bill available for pre-legislative scrutiny. If the Government wished to put beyond doubt its commitment to working with Parliament, then it could do so by maintaining s 19.

14. It should also be considered the impact that removing s 19 might have on the scrutiny that presently happens within Government. Prior to the HRA 1998, it was common for departments to assess bills for their compatibility with the Convention with help from the 'Judge Over Your Shoulder' (JOYS) guidance published since 1987. However, practice is known to have varied across Government departments. s 19 is known to have made the process much more sophisticated and increased the immediacy and regularity with which issues of compliance are discussed in policymaking (Hiebert and Kelly, 2015). Without s 19, departmental scrutiny will no doubt continue, but it is debateable whether these processes would be as robust. This would ultimately be to the detriment of the Government who would be risking the potential for costly litigation at a later stage.

Furthermore, it could lead to a decline in the quality and/or quantity of information supplied to Parliament and the Committee, and hinder accountability.

15. Finally, it is important to note that neither the Government's consultation, nor its response to that consultation, made any reference to the positive ways in which s 19 has affected policymaking, not least those noted above. Furthermore, there are divergent views as to whether s 19 should be changed. In fact, the response to the consultation reveals that respondents were overwhelmingly of the opinion that s 19 should remain: Only 81 of the 1,180 (7%) that responded directly to the issue believed there was a case of change. The Independent Human Rights Act Review, equally, reviewed various options to reform s 19 but rejected them. Instead, its report emphasised 'the major, transformational and beneficial effect' that s 19 has had on 'the practice of Government and Parliament in taking account of human rights issues'. To push forward with the removal of s 19 is questionable, especially when there is no consensus on the matter.

Recommendations

16. Reforms to the domestic human rights framework, whether through the Bill or otherwise, should be used as an opportunity to strengthen the mechanisms in Government and Parliament for scrutinising human rights. Yet, it is debatable whether the removal of s 19 achieves this.

17. I therefore make the following recommendations:

    a. An amendment to the Bill should be tabled which replicates s 19 HRA and/or puts the Government's commitment, to publish human rights memoranda alongside bills, on a statutory footing;

    b. If Parliament does not support this amendment, the Committee should ask the Lord Chancellor whether, and if so how, the process of reviewing bills for their rights implications will be changing across Government;

    c. The Government should continue its practice of routinely reporting to the Committee on its responses to human rights judgments. As I have argued elsewhere, the Government should also publish to Parliament its reports to the United Nations human rights mechanisms to prompt further debate and scrutiny.