



Ministry
of Justice

Legislative Scrutiny: Bill of Rights Bill

**Government response to the Joint
Committee on Human Rights**

March 2023

CP 819



Ministry
of Justice

Legislative Scrutiny: Bill of Rights Bill

Government Response to the Joint Committee on Human Rights

Presented to Parliament

by the Lord Chancellor and Secretary of State for Justice

by Command of His Majesty

March 2023



© Crown copyright 2023

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.uk/official-documents

Any enquiries regarding this publication should be sent to us at humanrights@justice.gov.uk.

ISBN 978-1-5286-4003-9

E02885593 03/23

Printed on paper containing 40% recycled fibre content minimum

Printed in the UK by HH Associates Ltd. on behalf of
the Controller of His Majesty's Stationery Office

Contents

Introduction	3
Response to recommendations	4
Chapter 1: Ships that pass in the night – the story so far	4
Chapter 2: Approach to interpretation – Convention rights	5
Chapter 3: Approach to interpretation – domestic legislation	6
Chapter 4: The relationship between the Executive, the Legislature, and the Judiciary	7
Chapter 5: Restrictions on enforcement and remedies	9
Chapter 6: Approach to international legal obligations	11
Chapter 7: Tipping the balance and future reforms	12
Chapter 8: Human rights in the devolved nations	13
Chapter 9: Concluding views	13
Conclusion	14

Legislative Scrutiny: Bill of Rights Bill
Response from the Ministry of Justice to the Joint Committee on Human Rights

Introduction

1. The Government is grateful to the Joint Committee on Human Rights (JCHR) for its report entitled *Legislative Scrutiny: Bill of Rights Bill*,¹ the Committee's ninth report of session 2022–2023, and is grateful to all who gave evidence in the preparation of the report.
2. We have carefully considered the recommendations made by the Committee. This command paper presents the Government's response to the conclusions and recommendations set out in the Committee's report.
3. The Government wishes to use this paper to reiterate points it has made elsewhere, including in its July 2022 paper in response to the comprehensive consultation on the Bill of Rights. The Bill proudly builds on the UK's long history of liberty and individual rights. This history stretches back to Magna Carta, signed by King John in 1215, and the Bill of Rights and Claim of Right in 1689, which set out many of the basic civil liberties we enjoy today. The Human Rights Act was introduced in 1998, and despite its flaws, it has now played its own part in the development of rights in our country over almost a quarter of a century. Now is the time to take a fresh look at our human rights framework.
4. In doing so, the Government is committed to ensuring there is a proper balance between the rights of individuals, our vital national security and effective government. The Government is confident that the Bill will restore common sense to our justice system and ensure that our human rights framework meets the needs of the society it serves.
5. This command paper outlines the advantages of the reforms in the Bill of Rights. As its structure, it takes the chapters in the JCHR's report and addresses each of them, and the recommendations within, in turn. Paragraph references following each recommendation are to the JCHR's report.

¹ HC 611, HL Paper 132, published 25 January 2023

Response to recommendations

Chapter 1: Ships that pass in the night – the story so far

JCHR recommendation:

Given the significant opposition, we urge the Government to reconsider its decision to proceed with the Bill. (*paragraph 29*)

6. The Government disagrees with the Committee's conclusion that there is little case for reforming the Human Rights Act (HRA). A reformed human rights framework for the UK will protect people's fundamental rights, whilst safeguarding the broader public interest and respecting the will of our elected representatives in Parliament. The Human Rights Act has been in force for almost a quarter of a century now, and it is right that we should seek to update it, to ensure it effectively serves our society.
7. The Government is extremely grateful for the work done by Sir Peter Gross and the Independent Human Rights Act Review (IHRAR) Panel, and has carefully considered the IHRAR report in producing our consultation. The Bill takes a similar approach to that recommended by the IHRAR Panel in some areas – for instance in increasing the prominence of the common law.
8. The Government has engaged extensively on its proposals, reflecting on the responses from our national consultation. The Deputy Prime Minister has visited Scotland, Wales and Northern Ireland to discuss the proposals in detail with members of the devolved governments, legislatures, main political parties and judiciaries. The Government recognises the constitutional importance of its proposals, and we look forward to thorough scrutiny of the Bill during its passage through both Houses.
9. The Bill of Rights will retain all the substantive rights currently protected under the Convention and the Human Rights Act. The Bill of Rights will allow us to remain a State Party to the European Convention on Human Rights and fully avail ourselves of the margin of appreciation to restore some common sense to our human rights laws.

Chapter 2: Approach to interpretation – Convention rights

JCHR recommendations:

Section 2 of the HRA is not in need of amendment. Clause 3 should be replaced with a clause mirroring the current law. (*paragraph 61*)

Unless the Government is prepared to reconsider Clause 5, we would like to see this clause removed from the Bill. (*paragraph 87*)

10. The Government disagrees with the Committee's suggestion that clause 3 of the Bill should be replaced with an approach that mirrors section 2 of the HRA. Section 2 of the HRA has led to UK courts largely following the judgments of the Strasbourg Court as a matter of course. These judgments do not always accord well with the UK's distinct context and legal traditions.
11. There is no one model by which parties to the Convention are obliged to give effect to the Convention in their national law. The Bill will highlight the importance of the common law and make clear that UK courts are not required to simply follow the approach taken by the Strasbourg Court.
12. The Supreme Court has itself held that domestic courts should not take the protection of Convention rights further than they can be fully confident the Strasbourg Court would go (*R (AB) v Secretary of State for Justice* [2021] UKSC 28). The "ceiling" in clause 3 of the Bill broadly reflects this position.
13. The Government disagrees with the Committee's view that the Bill of Rights will damage the positive dialogue between UK courts and Strasbourg. By encouraging the domestic courts to look at the UK context of human rights, rather than following Strasbourg jurisprudence as a matter of course, we consider that domestic courts will be in a better position to conduct judicial dialogue.
14. The Bill of Rights aims to deliver greater certainty for public services to do the jobs entrusted to them, guarding against imposing unreasonable burdens on public authorities while still holding them to account for their actions. Clause 5 of the Bill will give operational experts greater confidence to exercise their judgement in deciding how best to serve the public, rather than having to act to mitigate against the risk of costly litigation.
15. Furthermore, positive obligations should not be imposed without proper democratic oversight, and Parliament should be empowered to decide whether and how to recognise new obligations recognised by the Strasbourg Court.

16. This Government is committed to supporting victims of crime. The Bill of Rights will strengthen our protection of victims by requiring courts to give great weight to the importance of reducing the risk to the public from those who are subject to a custodial sentence. The Bill of Rights will also set a very high 'ceiling' for considering the compatibility of deportation provisions which seek to make it harder for foreign criminals to appeal their deportation under Article 8. In addition, the Victims' Bill and accompanying measures will improve victims' experiences of the criminal justice system. It will help victims to have confidence that there is the right support available and that if they report crime, the criminal justice system will treat them in the way they should rightly expect.

Chapter 3: Approach to interpretation – domestic legislation

JCHR recommendations:

Section 3 HRA should not be repealed. If the Bill of Rights is to replace the Human Rights Act, it should be amended to include a provision equivalent to section 3 HRA. Clause 12 of the Bill must also be amended to take this provision into account, recognising that it will only be lawful for public authorities to act incompatibly with Convention rights when they are required to do so by legislation that cannot be read compatibly with the Convention. (*paragraph 106*)

We have recommended that a clause equivalent to section 3 HRA is added to the Bill. Quite apart from our concerns about its appropriateness and its impact, clause 40 would serve no purpose if section 3 HRA is not repealed. We therefore recommend clause 40 is removed from the Bill. (*paragraph 119*)

Clause 10 of the Bill should be amended to reinstate the position under the Human Rights Act: restricting the availability of declarations of incompatibility to circumstances in which the courts have identified an incompatibility with Convention rights in either a provision of primary legislation, or in a provision of subordinate legislation that cannot be removed as a result of primary legislation. (*paragraph 127*)

17. Section 3 of the HRA has, in some cases, shifted the balance of power away from Parliament towards the courts. Section 3 requires the courts to use any possible means of interpretation to read legislation compatibly with Convention rights. The Government believes the responsibility for ensuring legislation is compatible with the Convention lies with Parliament. With the repeal of section 3 of the HRA we are making clear that courts are not required to read legislation in a manner which may be contrary to Parliament's intent.

18. Under the Bill, it will continue to be unlawful for public authorities to act in a way which is incompatible with a Convention right, unless, as a result of primary legislation, they could not have acted differently, or they are acting to give effect to incompatible primary legislation or subordinate legislation where the incompatibility is necessitated by primary legislation. With the Bill of Rights, we will ultimately be delivering greater certainty for those providing our vital public services by clarifying how their duties will be interpreted by the courts. We are making clear that when public authorities are giving clear effect to the will of Parliament, they are acting lawfully.
19. The Government is of the view that reform of declarations of incompatibility is needed in order to give courts a wider ability to declare subordinate legislation incompatible. By potentially opening subordinate legislation to more declarations of incompatibility, courts will have the option of using this power rather than quashing or disapplying incompatible subordinate legislation. This will allow courts to consider this as an alternative where it is appropriate to do so.

Chapter 4: The relationship between the Executive, the Legislature, and the Judiciary

JCHR recommendations:

Clause 7 is largely unnecessary and, where it would have effect, would be inconsistent with the UK's obligations under the ECHR. Unless the Government is prepared to reconsider clause 7, we would like to see it removed from the Bill. (*paragraph 146*)

Section 19 of the Human Rights Act must not be repealed. Its provisions should instead be strengthened to require statements of compatibility to be provided upon introduction of a Bill rather than before second reading. The Bill should be amended to this effect. (*paragraph 157*)

The Government must improve the timeliness and quality of the information it provides to Parliament about the human rights implications of its legislation. The Government should also put its commitment to publishing human rights reasonings and justification for all Government Bills, which we welcome, on a statutory footing. The Bill of Rights should be amended to this effect. (*paragraph 165*)

Parliament should be informed of adverse judgements by the European Court of Human Rights. This could occur by convention rather than statute. The Government should also provide Parliament in such cases with an action plan, setting out how the Government intends to resolve the issue that led to the judgement, and its proposed timeframe for doing so. (*paragraph 171*)

We ask the Government to engage with us on agreeing a process for informing Parliament where there are declarations of incompatibility made by domestic courts. *(paragraph 173)*

Clause 26 should be amended to ensure that the remedial power is available in respect of existing incompatibilities as well as those that arise in future. *(paragraph 176)*

The Government should amend the remedial regulations provisions to ensure that there is no risk of the procedure being unavailable where declarations of incompatibility occur before the Bill becomes law. We ask the Government to consider shortening the time frames for remedial regulations as we have previously proposed. The remedial order process seems to cause difficulties for some Government departments. The drafting of the schedule should be updated to make the remedial process and its requirements easier to follow. *(paragraph 180)*

20. The Government disagrees with the Committee's conclusion that clause 7 will have limited effect. Clause 7 of the Bill will protect the position of Parliament, ensuring respect for the role of democratically-elected lawmakers to exercise their judgement in balancing complex and diverse socio-economic policies, and the wider interests of society. It therefore emphasises and protects the important constitutional principle of the separation of powers.
21. We note the Committee's recommendation to retain and strengthen section 19 of the HRA. However, the Government remains of the view that the stigma currently associated with a section 19(1)(b) statement can deter the making of bold legislation even where such an approach may be successfully defended in court. Government Bills will continue to be accompanied by analysis of human rights implications. This analysis is publicly available and assists Parliament (and in particular this Committee) in its scrutiny of the human rights implications of proposed legislation.
22. We welcome the Committee's support for informing Parliament of adverse Strasbourg Court judgments against the UK. The Bill of Rights will introduce a duty on the Secretary of State to notify Parliament of any adverse Strasbourg Court judgments against the UK, or UK unilateral declarations acknowledging a failure to comply with a Convention right. The Government believes strongly that it is appropriate for Parliament to be made formally aware when an adverse judgment or unilateral declaration is made, given Parliament's responsibility for legislation and wider role in our constitutional arrangements.
23. The Government has existing procedures in place through which it engages regularly with the staff of the Committee to discuss plans to respond to judgments identifying

incompatibilities in legislation. We believe this engagement should be sufficient to allay the Committee's concerns.

24. We note the Committee's recommendations on amendments to clause 26 and Schedule 2. This is something the Government will consider further.

Chapter 5: Restrictions on enforcement and remedies

JCHR recommendations:

The Government should reconsider whether introducing the permission stage will achieve its aims, and whether it would leave the UK in breach of its international obligations. Unless the Government is prepared to reconsider clause 15, we would like to see it removed from the Bill. (*paragraph 197*)

There is no need for domestic courts to be prohibited from, exceptionally, making a damages award that is more generous than that which would be made by the Strasbourg Court. This prohibition should be removed from the Bill in favour of the existing general obligation to take into account the principles applied by the European Court of Human Rights in relation to the award of compensation. (*paragraph 199*)

Directly legislating for previous conduct to be taken into account when awarding damages encourages the courts to make judgments on whether a victim deserves an effective remedy for a violation of their rights. Clause 18(5)(a) poses a risk to the universal nature of human rights and should be removed from the Bill. (*paragraph 209*)

We recommend that clause 18(6) is removed from the Bill. The existing obligation to take into account the principles applied by the Strasbourg Court in relation to the award of compensation should be reinstated. (*paragraph 215*)

The Bill should be amended to make clear that Convention rights can be relied on in any legal proceedings. (*paragraph 219*)

We recommend that Schedule 5 of Bill is amended to make clear that the Equality and Human Rights Commission and the Northern Ireland Human Rights Commission retain their ability to bring own motion cases. (*paragraph 221*)

25. We note the Committee's concerns relating to the introduction of a new permission stage. However, the Government remains of the view that the introduction of a permission stage will ensure trivial cases do not undermine public confidence in human rights and place the responsibility on the claimant to demonstrate that they have suffered a significant disadvantage before a human rights claim can be heard in court.

Convention rights will continue to remain enforceable in domestic courts across the UK, and a claim will still proceed to a substantive hearing if a person can demonstrate that they have suffered a 'significant disadvantage' or, if they cannot, that there is a wholly exceptional public interest in their claim proceeding. The permission stage is broadly modelled on the Strasbourg Court's own admissibility criteria.

26. Under the Bill of Rights we will refocus when and how human rights damages are provided, for example by ensuring that the courts consider the behaviour of the claimant when considering making an award. The provisions we have taken forward in the Bill will make sure that it is recognised that responsibilities exist alongside rights and ensure this is taken into account when considering damages for successful human rights claims.
27. Domestic courts and the Strasbourg Court already decide on the most appropriate remedy by considering the specific circumstances and facts of each case. The question of what remedy should be granted to a successful claimant will continue to be a matter for the courts to decide and the courts will have broad discretion to assess what particular conduct on part of the claimant is relevant to the case. For example, with regard to any conduct which stems from a person's status as a victim of abuse or exploitation, it will be for the court to consider whether such conduct is in fact relevant. Furthermore, our provisions adopt a balanced approach in requiring the courts to consider both the impact on the individual of a violation of their human rights, as well as considering the impact the award would have on the provision of services for the wider public.
28. We have sought to bring greater clarity to the different ways in which human rights proceedings could be brought under the Bill of Rights. Our intention is to reflect how section 7(1) of the HRA has operated in practice by the courts to date, and to remove the uncertainty that currently arises from the drafting of section 7(1). We note the Committee's recommendation relating to the role of the Equality and Human Rights Commission and the Northern Ireland Human Rights Commission in proceedings and can confirm that we intend to ensure that those bodies remain able to instigate and intervene in proceedings under the Bill of Rights.

Chapter 6: Approach to international legal obligations

JCHR recommendations:

Unless the Government is prepared to reconsider clause 14, we would like to see it removed from the Bill. Such a provision should only be included if and when alternative remedies are available that have been subject to parliamentary scrutiny such that Parliament (and not just the Secretary of State) is satisfied that excluding overseas military operations from the scope of the Bill of Rights would be compatible with the Convention. (*paragraph 239*)

Unless the Government is prepared to reconsider clause 24, we would like to see it removed from the Bill. In its place express provision should be made in the Bill to incorporate into domestic law our existing obligation to comply with interim measures as an essential means to secure the right to individual petition and the full enjoyment of Convention rights within our jurisdiction. (*paragraph 249*)

29. The Government disagrees with the Committee's suggestion to remove Clause 14 from the Bill. Strasbourg's approach to jurisdiction has been criticised for going beyond the intent of the Convention's drafters, and for bringing international human rights law into conflict situations that are classically governed by the laws of armed conflict. Clause 14 seeks to address this issue. Importantly, and in order to satisfy the UK's obligations under the Convention, claims will be able to be brought via alternative domestic remedies. The provisions in the Bill will be subject to the usual Parliamentary scrutiny and may not be brought into force unless and until alternative domestic remedies are in place. In addition to this, we will continue to work constructively with partners in the Council of Europe to address the Convention's extraterritorial jurisdiction at the international level.
30. We note the Committee's concern relating to clause 24. However, the clause has been developed as part of the Bill's broader objective of seeking to clarify and rebalance the relationship between courts in the UK and the Strasbourg Court. It reflects that interim measures indicated by the Strasbourg Court are not part of UK domestic law. Subsections (2) and (3) apply only to courts and establish that the domestic courts cannot have regard to any interim measure when considering an application for relief which might affect the exercise of a Convention right.

Chapter 7: Tipping the balance and future reforms

JCHR recommendations:

Unless the Government is prepared to reconsider clause 4, we would like to see it removed from the Bill. (*paragraph 264*)

Unless the Government is prepared to reconsider clause 6, we would like to see it removed from the Bill. (*paragraph 272*)

As clause 8 precludes any proper balancing exercise to be undertaken by the courts, this clause is likely to be incompatible with the procedural requirements of Article 8. Unless the Government is prepared to give serious consideration to changing its approach to clause 8, we would like to see it removed from the Bill. (*paragraph 286*)

Clause 20 should be amended to restore judicial safeguards. (*paragraph 295*)

31. The Government cannot agree to any of these recommendations.
32. Clause 4 directs the courts to give great weight to the importance of protecting freedom of speech, but this does not mean automatically that it will trump other rights and protections, such as privacy, in all circumstances. Courts will continue to undertake a balancing exercise between competing rights, and the proposal does not require courts to always find in favour of freedom of speech (regardless of the merits of any competing claim to a right).
33. The Bill of Rights in clause 6 makes clear that, in determining issues concerning the Convention rights of prisoners, the greatest weight possible must be given to the importance of protecting the public from those who have been convicted of a serious criminal offence. This provision is intended to strengthen the upcoming parole reforms and help keep our prisons free from radicalisation.
34. Clause 8 establishes a high ceiling, against which the courts will be required to consider the compatibility of deportation provisions with Article 8. Whilst the clause sets out a robust framework it will not prevent the court from conducting a balancing exercise.
35. Clause 7 will protect the ability of elected lawmakers to exercise their judgement in balancing individual rights with the wider public interest. It therefore emphasises and protects the important constitutional principle of the separation of powers.
36. The clause 20 provisions establish a high threshold for successful appeals on the basis of the right to a fair trial so that deportation can be prevented only in very limited

circumstances. It introduces a strong presumption in favour of any assessment made by the Secretary of State about assurances from the receiving state. It does not, however, prevent the court from considering whether the deportation would result in a breach of an individual's right to a fair trial, which we consider satisfies the requirements of Article 13.

Chapter 8: Human rights in the devolved nations

JCHR recommendation:

Given the significant impacts on the devolved settlements, the Government should not pursue reform of the HRA without the consent of the Scottish Parliament, the Welsh Senedd and the Northern Ireland Assembly. (*paragraph 317*)

37. Our proposals will respect the UK's diverse legal traditions, devolution settlements and will continue to meet our obligations under the Belfast (Good Friday) Agreement.
38. In the Belfast (Good Friday) Agreement, the UK committed to completing incorporation of the Convention into the law of Northern Ireland. The Bill of Rights continues to do that and as such, the UK will continue to meet our obligations.
39. We will continue to work with the devolved governments, and organisations in Scotland, Wales and Northern Ireland more broadly, to ensure that any reforms to our human rights framework benefit the whole of the UK.

Chapter 9: Concluding views

JCHR recommendation:

If this Bill is to proceed, the short title should be amended in clause 41 to better describe the purpose and contents of the Bill. We suggest the title of the Bill should be the 'European Convention on Human Rights (Domestic Application) Act', as the Bill seeks primarily to determine how the Convention is interpreted and applied in domestic law. (*paragraph 331*)

40. The concluding views in the JCHR report largely summarise the points made in chapters 1 to 8. The Government has addressed these points previously in this paper.
41. The short title 'Bill of Rights' will continue to be used. The Government believes this is a suitable title for legislation that aims to update the human rights framework in the UK.

Conclusion

42. The Government is grateful to the JCHR for its report. As outlined in this command paper, through the Bill of Rights reforms we are delivering measures to reinforce the United Kingdom's tradition of liberty.

43. We are committed to ensuring that our human rights framework meets the needs of the society it serves, and the government is confident that the Bill of Rights will deliver this.

E02885593

978-1-5286-4003-9