JOINT COMMITTEE ON HUMAN RIGHTS: BILL OF RIGHTS BILL CALL FOR EVIDENCE

Response from Humanists UK, August 2022

ABOUT HUMANISTS UK

At Humanists UK, we want a tolerant world where rational thinking and kindness prevail. We work to support lasting change for a better society, championing ideas for the one life we have. Our work helps people be happier and more fulfilled, and by bringing non-religious people together we help them develop their own views and an understanding of the world around them. Founded in 1896, we are trusted to promote humanism by 100,000 members and supporters and over 100 members of the All-Party Parliamentary Humanist Group.

We are leading experts in the religion or belief human rights strand. Our charitable objects include 'The promotion of equality and non-discrimination and the protection of human rights as defined in international instruments to which the United Kingdom is party, in each case in particular as relates to religion and belief'. Our commitment to human rights has seen us organise a coalition over the last year of more than 250 charities, trades unions, human rights organisations, and religion or belief groups in opposition to any weakening of the Human Rights Act (HRA) or judicial review. [1] An identical petition has been signed by over 7,000 people. We also responded to the Independent Human Rights Act Review (IHRAR) Panel consultation on reform of the HRA and the Ministry of Justice's consultation on a Modern Bill of Rights.[2]

OVERVIEW

While we have concerns about many of the proposals outlined in the Government's Bill of Rights Bill, we wish to draw attention to two areas where these proposals would especially affect the human rights of non-religious people: namely, those related to sections 3 and 6 of the Human Rights Act which have no equivalents in the new Bill. Given the word limit, we have therefore somewhat focused our response on the questions relevant to these sections. However, it should be noted that we generally oppose the Bill and all clauses within it and strongly support the more comprehensive responses provided by Liberty, Amnesty UK, and the British Institute of Human Rights.

We are seriously concerned that plans to remove sections 3 and 6, i.e. to remove the power of public bodies or the courts to make 'readings in' to legislation to ensure that it is human rights-compliant, will undermine human rights protections for non-religious people such as humanists.

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[1] Available at https://humanrightsact.org.uk/

[2] *Independent Human Rights Act Review: Call For Evidence – Response from Humanists UK*, February 2021. https://humanists.uk/wp-content/uploads/Independent-Human-Rights-Act-Review-response-from-Humanists-UK.pdf and *Human Rights Act Reform: A Modern Bill of Rights – Response from Humanists UK*, March 2022.https://humanists.uk/wp-content/uploads/2022-01-11-V2-RTR-PUBLIC-version-Consultation-response-Human-Rights-Act-Reform.pdf

RESPONSE TO THE CALL FOR EVIDENCE

RELATIONSHIP BETWEEN THE UK COURTS AND THE EUROPEAN COURT OF HUMAN RIGHTS

1. Clause 3 of the Bill states how courts must interpret Convention rights, including by requiring them to have "particular regard to the text of the Convention right." What would be the implications of clause 3?

It is obvious that in interpreting any legal instrument you must have regard to its text. But clause 3 will be seen as encouraging courts to depart from Strasbourg jurisprudence. The need to pay 'particular regard to the text of the Convention right' contravenes the well-established living instrument doctrine.[3] As a 'living instrument', the European Convention of Human Rights (ECHR) can and should be interpreted in line with constant, sometimes drastic, changes in the circumstances of human life which could not reasonably be foreseen by the original drafters. For example, references to homosexuality are entirely absent from the ECHR, yet Strasbourg's dynamic interpretation of article 8 to find a breach in the continued criminalisation of 'acts of gross indecency' in private between consenting men in Northern Ireland is indisputable.[4]

2. Clause 3 also provides that the courts may diverge from Strasbourg jurisprudence but may not expand protection conferred by a right unless there is no reasonable doubt that the ECtHR would adopt that interpretation. What are the implications of this approach to the interpretation of Convention rights?

This clause would discourage UK courts from interpreting Convention rights in line with current and evolving attitudes and developments. Clause 3 makes it more likely that UK court decisions will move in a different direction from those of the ECtHR, making it more likely that cases are subsequently taken to Strasbourg for human rights to be upheld. This would place time and cost burdens on both the individual litigant and the UK Government which the HRA has largely removed.

PARLIAMENTARY SCRUTINY OF HUMAN RIGHTS

4. The Government's consultation suggested that the role of Parliament in scrutinising human rights should be strengthened. Would the Bill of Rights achieve this? How could this be achieved?

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[3] George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', 15 March 2012, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836

[4] Dudgeon v United Kingdom, (Application No. 7525/76) Judgment 22 October 1981. Furthermore, Strasbourg's outdated finding that the age of consent for male homosexual relations need not be the same as heterosexual and female homosexual relations is further evidence of the necessity for humans rights instruments to be interpreted dynamically. Alse see: David Torrance, '40 years since court case led to reform of same-sex laws in Northern Ireland, 22 October 2021, https://commonslibrary.parliament.uk/40-years-since-court-case-reformed-same-sex-laws-in-northern-ireland/

It is difficult to see the Government's intention in the Bill as to strengthen the role of Parliament when it has twice lost cases in the Supreme Court after attempting to exclude Parliament from significant constitutional decisions. Rather, the Bill must be seen in the context of the Government almost always getting its way in Parliament and of often failing adequately to respond to reports from the JCHR and other Parliamentary committees.

With that said, the Bill would not achieve the aim of strengthening Parliament's scrutiny of human rights, but would require significantly more time on individual cases rather than general principles. The Bill makes changes that would impact many people seeking immediate resolutions to rights infringements that can currently be addressed through the interpretive obligation under section 3 of the HRA. Such issues, which public bodies can resolve without referral to the courts or the Government or Parliament, will now require more time, cost, and effort to reach the right conclusion.

5. 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?

The removal of section 19 runs contrary to the Government's alleged aim of strengthening parliamentary scrutiny. If Ministers are no longer required to set out how proposed legislation is compatible with human rights, it would become harder and more time-consuming for Parliament to scrutinise the impact of that legislation on human rights.

INTERPRETING AND APPLYING THE LAW COMPATIBLY WITH HUMAN RIGHTS

6. The Bill removes the requirement in section 3 HRA for UK legislation to be interpreted compatibly with Convention rights "so far as possible". What impact would this have on the protection of human rights in the UK?

One consequence of particular importance to non-religious people in removing section 3, together with proposed changes to the provisions of section 6 (outlined in question 10), is that public authorities would no longer be required to interpret 'religion' in policy and legislation as being inclusive of the non-religious.

There are many examples where religion has been interpreted to be inclusive of non-religious beliefs and these interpretations would not be possible without a replacement for sections 3 and 6 of the HRA, which the Bill of Rights does not contain. Some examples are:

- In 2005, humanist marriages became legally recognised in Scotland after the registrar general established that he had to make just such a reading in. Similarly in 2017, legally recognised humanist marriages in Northern Ireland were brought about after a judge read into existing

marriage law an interpretation that humanist marriage should be understood to be included.[5] This has allowed humanist couples to have wedding ceremonies that are uniquely tailored to them and reflect their deeply held worldviews, just as their religious counterparts can. Since these changes, humanist marriages have become popular in both jurisdictions.[6]

- In 2018, the Welsh Government concluded that humanism had to be equally included in Religious Education (RE) for this reason. The same law also applies in England, and dozens of local authorities have made exactly the same 'reading in' in their RE provision.[7] The Welsh Government subsequently introduced what became the Curriculum and Assessment (Wales) Act 2021, to put this into primary law.[8] This has allowed children across Wales to learn for the first time about non-religious worldviews and has made RE reflective of the wider beliefs held within our society, which these children may hold or at least will encounter in their daily lives. Similar reasoning underlay the landmark 2015 judgment in *Fox*,[9] which requires RE to be inclusive of humanism and to be objective, critical, and pluralistic, in order to comply with ECHR Article 9.
- We also have been involved in multiple cases where local authorities have refused humanists membership of local statutory bodies responsible for overseeing religious education on the basis that humanism is not a 'religion'. Again, these have invariably been resolved through such a 'reading in'.[10] And again, such inclusion has also found its way into the 2021 Wales Act.
- The same 'reading in' interpretation has allowed prisons and NHS Trusts to ensure that their chaplaincy and pastoral support teams provide like-minded and appropriate care for non-religious prisoners and patients. Such support has had a large impact upon the individuals who receive it, who previously were not served through an entirely religious service.

In all these examples, the ability to argue that 'religion' must be interpreted to include analogous non-religious worldviews, such as humanism, has been vital in ensuring humanists and other non-religious people are not unlawfully discriminated against. This crucial power of interpretation is what has underpinned almost all positive developments in the freedom of belief and equal

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[5] *Smyth* [2017] NIQB 55, https://www.judiciaryni.uk/sites/judiciary/files/decisions/Smyth%27s%20%28Laura%29%20Application.pdf. This decision was later overturned by *Smyth* [2018] NICA 2, https://www.judiciaryni.uk/sites/judiciary/files/decisions/Smyth%27s%20%28Laura%29%20Application_1.pdf , where the Court of Appeal held that other statutory provisions meant that legal recognition of humanist marriages could be brought about without recourse to the Human Rights Act at all. But this proved unworkable in practice due to problems with these provisions that the Court did not consider. So the result was that in 2020 the Finance Minister chose to use section 6 to revert to the line of reasoning employed in the High Court decision.

[6] Steven Brocklehurst, 'Scottish humanists to overtake Kirk weddings', BBC News Online, 18 June 2015. https://www.bbc.co.uk/news/uk-scotland-33146226

[7] 'Welsh Government to change law on school RE to include humanism', Humanists UK, 28 January 2019. https://humanists.uk/2019/01/28/welsh-government-to-change-law-on-school-re-to include-humanism/

[8] Curriculum and Assessment (Wales) Act 2021 https://www.legislation.gov.uk/asc/2021/4/contents/enacted

[9] Fox v Secretary of State for Education [2015] EWHC 3404 (Admin), http://www.judiciary.uk/wp-content/uploads/2015/11/r-fox-v-ssfe.pdf

[10] See for example 'Humanist parent in High Court challenge to exclusion from local religious education body', Humanists UK, 2017: https://humanism.org.uk/2017/07/19/humanist-parent-in-high-court-challenge-to-exclusion-from-local-religious-education-body/; and 'English council backs down after legal challenge to exclusion of humanist from RE body', Humanists UK, 2019: https://humanism.org.uk/2019/08/02/english-council-backs-down-after-legal-challenge-to-exclude-humanist-from-re-body/.

treatment of humanists and the non-religious in the last twenty years.[11] This is now fully accepted by Government departments but, under the Bill, we could not rely on the courts taking the same view. The non-religious comprise about 53% of the population.[12] Further, a YouGov poll commissioned by Humanists UK in 2019 found that 7% of British adults primarily identify with the term 'humanist' (other options included atheist, agnostic, spiritual, naturalist, none of these, and don't know). The removal of section 3, reinforced by the comparable changes to section 6, would make it much harder for the courts and public authorities, in the face of extensive inherited legislation and practice, to treat the non-religious equally with religious people. It would therefore tend towards reversing the repatriation of rights that was the object of HRA, necessitating resort to Strasbourg.

The consequences of removing section 3 are not limited to the non-religious. The charity JUSTICE identified 24 cases where section 3 has been used to effectively interpret legislation that would have otherwise been incompatible with Convention rights.[13] These cases address protection for individuals in a broad range of circumstances. Section 3 has been used to ensure adopted children can access inheritance on equal terms with biological children.[14] It has been used to recognise the parents of children born as the result of surrogacy arrangements to enable those children to have the social and emotional benefits of that recognition.[15] Section 3 has been used to ensure that a child with a recognised condition that gave rise to enhanced tendency to physical abuse could not be excluded from school without the provision of support that might enable them to manage their behaviour.[16] It has also been used to find that judicial officers cannot be subject to a lower standard of protection in whistleblowing cases.[17]

We support the recommendation of IHRAR to drop plans to reform section 3: 'there is no substantive case for [section 3's] repeal or amendment… any damaging perceptions as to the operation of section 3 are best dispelled by increased data as to its usage; … as a matter both

[11] Humanists UK began representations to Government departments on this basis immediately after the HRA came into force. It is unclear exactly what is meant by 'a natural reading of the words used.' However, we believe that it is unlikely that the interpretation of 'religion' as 'religion or belief' would continue to be protected, as we suggest that it means one that is within the range of plausible understandings without reading in additional words.

[12] 'Latest British Social Attitudes survey shows huge generational surge in the non-religious', Humanists UK, 1 April 2021. https://humanists.uk/2021/04/01/latest-british-social-ttitudes-survey-shows-hugegenerational-surge-in-the-non-religious/

[13] The Independent Human Rights Act Review Call for Evidence – Annex to Response from JUSTICE, March 2021,https://files.justice.org.uk/wp-content/uploads/2021/03/09152051/Annex-to-response-to-IHRAR-call-for-evidence-JUSTICE.pdf

[14] Hand v George [2017] EWHC 533

[15] A (Surrogacy: s.54 Criteria) [2020] EWHC 1426 and X (Parental Order: Death of Intended Parent Prior to Birth) [2020] EWFC 39

[16] C v Governing Body of a School [2018] UKUT 269 (AAC)

[17] Gilham v Ministry of Justice [2019] UKSC 44

of perception and reality, Parliament could and should take a more robust role in rights protection, a role which could sensibly be reinforced via an enhanced role for the JCHR.' [18]

We also believe the Government should drop plans to reform section 6 of the Act. Failing the above, we believe the Government should introduce primary legislation to put the interpretation of 'religion' as inclusive of non-religious beliefs on a statutory footing.

7. Clause 40 enables the Secretary of State to make regulations to "preserve or restore" a judgment that was made in reliance on section 3. Do you agree with this approach? What implications does it have for legal certainty and the overall human rights compatibility of the statute book?

Clause 40 suggests that the repeal of the HRA is intended to not only prevent dynamic interpretations of future rulings, but also to unravel interpretations previously made under section 3 as standard practice unless the Secretary of State makes regulations otherwise. This provision has no legal certainty as it will rely on the whims of the particular Secretary of State in post. If every judgment made in reliance on HRA section 3 requires the Secretary of State to make a specific regulation to preserve or restore it, there could be a significant impact on existing interpretations, not least because it is not always clear to what extent an ECHR-compliant interpretation has been made because of section 3.

Furthermore, Clause 40 is silent on the impact of 'readings in' readily made through non-judicial public bodies under section 6. For example, in England the Government has left it to individual local authorities to determine whether or not humanists should be represented in RE through local bodies called Standing Advisory Councils on Religious Education (SACREs) and Agreed Syllabus Conferences (ASCs), and if humanism should be included alongside religions in the syllabuses the latter set. Over 60 local authorities in England have incorporated humanists as full members through such an interpretation of 'religion' without the need for litigation. By relying solely on case law, Clause 40 appears to only grant the Secretary of State the power to preserve the most contested readings-in that have required litigation to resolve, while remaining silent on those readings in which are better established – a patently ridiculous outcome.

Regardless of the outcome of the proposed Bill, we support the recommendation of IHRAR to create a database of section 3 judgments. It would allow for better analysis of its use, providing evidence of any areas needing reform.

[18] *The Independent Human Rights Act Review*, p15.

8. Clause 5 of the Bill would prevent UK courts from applying any new positive obligations adopted by the ECtHR following enactment. It also requires the courts, in deciding whether to apply an existing positive obligation, to give "great weight to the need to avoid" various things such as requiring the police to protect the rights of criminals and undermining the ability of public authorities to make decisions regarding the allocation of their resources. Is this compatible with the UK's obligations under the Convention? What are the implications for the protection of rights in the UK?

All human rights invoke both positive and negative obligations for their enjoyment. The presentation of positive and negative obligations as a dichotomy is widely criticised.[19] To prevent UK courts from applying positive obligations is fundamentally opposed to the enjoyment of human rights. By placing limits on 'new' positive obligations, Clause 5 also contravenes the living instrument doctrine, described in question 1.

Requiring courts to avoid placing requirements on police to protect the rights of 'those involved in criminal activity' contravenes the very concept of human rights as applying to everyone merely by virtue of their being human. It is besides not clear whose rights the Government wishes to restrict – those convicted of a current crime, those merely under suspicion, or all those with a past criminal record.

Alongside the proposed reforms to HRA sections 3 and 6, Clause 5 risks undermining public authorities as they will no longer be free to make their own rights-compliant interpretations. If UK courts are limited to restrictive interpretation of rights, more claims are likely to fail. This will subsequently force to more claimants to take their cases to the ECtHR – with all the associated cost and inconvenience – but only where claimants have the funds to support this action. If such claims proceed and succeed at the ECtHR, the UK Government will be publicly found in breach of its international law obligations under the Convention.

9. Clause 7 of the Bill requires the courts to accept that Parliament, in legislating, considered that the appropriate balance had been struck between different policy aims and rights and to give the "greatest possible weight" to the principle that it is Parliament's role to strike such balances. In your view, does this achieve an appropriate balance between the roles of Parliament and the courts?

Clause 7 significantly impedes the courts' ability to produce declarations of incompatibility. The UK constitution depends on an unwritten balance between the Government, Parliament and the courts. In most circumstances Parliament is powerless to check a determined government. The Bill seeks to hobble the courts in a way that would tend to give untrammelled power to the executive.

[19] Frans Vilijoes, 'International Human Rights Law: A Short History', Journal of Humanitarian Medicine, January-March 2012, http://www.iahm.org/journal/vol_12/num_1/text/vol12n1p4.pdf. 'The dichotomy of positive/negative obligations no longer holds water. It seems much more useful to regard all rights as interdependent and indivisible, and as potentially entailing a variety of obligations on the State. These obligations may be categorized as the duty to respect, protect, promote and fulfil.'

Clause 7 also creates concern for the principle of proportionality which is widely accepted in human rights cases. The proportionality structure allows courts to respect the expertise of Parliament whilst promoting an environment in which interference with human rights must be publicly justified.[20] Clause 7 would seriously impair such an environment.

10. Clause 12 would replace the current duty, in section 6 HRA, on public authorities to act compatibly with human rights unless they are required to do otherwise as a result of legislation. In the absence of the obligation to read legislation compatibly with Convention rights, what impact would clause 12 have on (a) individuals accessing public services and (b) public authorities?

We disagree with this proposal. It is a reasonable expectation that a public authority performing a public function is aware of and keeps up with the legal requirements placed on it, whether by Acts of Parliament or by judgements of the courts, for example under section 3 powers. (Where confusion might arise in this regard it would be reasonable for the public authority to take legal counsel before reaching a decision on how to carry out its functions.) It would be very odd if the obligation on public authorities was less than that imposed on companies in cases of negligence insofar as they are deemed to be aware of advancing knowledge as soon as it is adequately published. Thus, removing section 6(2) would mean that public authorities would, inter alia, no longer be required to take account of the need to interpret 'religion' in legislation as being inclusive of the non-religious. Our answer to question 6 provides examples of 'religion' being interpreted as inclusive of non-religious beliefs. Section 6 has also been invoked inter alia to ensure a child with autism, excluded from school for behaving aggressively towards others, remained protected under the Equality Act 2010.[21]

Section 6 has had a normative impact on society without invoking the powers bestowed on the courts. Indeed, the mindset behind section 3 has arguably permeated governmental and local decision-makers and engendered a fundamental respect for human rights at all levels of decision making. For example, when the Welsh Government announced in 2019 its intention to amend the law on RE to explicitly include non-religious worldviews, putting them on an equal footing with major religions, its White Paper explicitly stated that its reason for changing the law was 'to take account of the effect of the Human Rights Act 1998'.[22]

The purpose of the amendment was to make explicit in education law what the Government already saw a duty flowing from section 6. In other words, the HRA successfully cultivated a culture where rights were protected by providing a lens through which the Government and all other public bodies assessed their decision-making, without the need for litigation.

ENFORCEMENT OF HUMAN RIGHTS: LITIGATION AND REMEDIES

[20] See application of proportionality in Judicial Review *ex p Brind* [1991] 1 AC 696
[21] C v Governing Body of a School [2018] UKUT 269 (AAC)
[22] 'Welsh Government to change law on school RE to include humanism', Humanists UK, 28 January 2019. https://humanists.uk/2019/01/28/welsh-government-to-change-law-on-school-re-to include-humanism/

11. Does the system of human rights protection envisaged by the Bill ensure effective enforcement of human rights in the UK, including the right to an effective remedy (Article 13 ECHR)?

No, as established by all our other answers.

12. Do you think the proposed changes to bringing proceedings and securing remedies for human rights breaches in clauses 15-18 of the Bill will dissuade individuals from using the courts to seek an effective remedy, as guaranteed by Article 13 ECHR?

Yes – but only those who are unable to afford the costs of litigation.

SPECIFIC RIGHTS ISSUES

18. The Bill strengthens protection for freedom of speech, with specific exemptions for criminal proceedings, breach of confidence, questions relating to immigration and citizenship, and national security. Do you think these changes are necessary? What would be the implications of giving certain forms of speech greater protection than other rights?

We note with alarm that the exceptions to freedom of speech proposed are significantly wider than those in the Convention.

THE HUMAN RIGHTS ACT AND THE DEVOLVED NATIONS

20. How would repealing the Human Rights Act and replacing it with the Bill of Rights as proposed impact human rights protections in Northern Ireland, Scotland and Wales?

With respect to the rights of non-religious people living in all areas of the United Kingdom, the HRA has been fundamental in securing, for example, legal recognition of humanist marriages in Northern Ireland and Scotland as well as inclusive education and local education committees in Wales. These changes should be implemented across the UK but without equivalent provisions to sections 3 and 6 of the HRA, the Bill of Rights could in fact undermine our human rights.

Specifically in respect to Northern Ireland, the Good Friday Agreement requires the ECHR to be incorporated into the law of Northern Ireland and stipulates that the Northern Ireland Assembly should lack authority to infringe the ECHR. If the Bill of Rights infringes the ECHR, this would be a major problem.

21. Should the Government seek consent from the devolved legislatures before enacting the Bill and, if so, why?

Consent from devolved legislatures is vital given their moves to address incompatible legislation to date, and that devolved matters will be impacted by the Bill in its current form, or indeed by any substantial change to the HRA. Furthermore, in many ways, in the devolved legislatures, our human

rights framework acts as a form of constitution. To change this without their consent would therefore have a significant effect.

For more details, information, and evidence, contact Humanists UK:

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