

## **Evidence to the Independent Human Rights Act Review**

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### **Executive Summary**

- The Human Rights Act 1998 is designed to give Parliament a leading role in human rights protection.
- The Human Rights Act 1998 thus ensures an appropriate balance of constitutional labour in-keeping with the constitutional principles of the United Kingdom.
- In areas of rights-related complexity, Parliament has not always discharged its role in ensuring human rights protection, as exemplified by evidence from the Covid-19 pandemic.
- In seeking to ensure the proper functioning of our human rights system, the review should focus on enabling Parliament to fulfil its role under the Human Rights Act 1998 more effectively.
- We propose a number of straightforward measures that might be employed for this purpose.

### **Focus of our submission**

This submission provides a response to the following section of the Independent Human Rights Act Review's 'call for evidence:

*We would welcome any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change.*

## **1. The Human Rights Act 1998 (HRA) gives Parliament a leading role in protecting rights**

1.1 The HRA gives Parliament a leading role in developing human rights protections. When the Bill was introduced, the White Paper stated in clear terms that 'Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy'.<sup>1</sup> In presenting the Bill to Parliament, the then Home Secretary emphasised that new legal framework 'enhances parliamentary sovereignty in practice, and the scheme that we have chosen ensures that the judiciary will not be involved in politics'.<sup>2</sup> The Bill was also said to be 'carefully drafted and designed' to respect the UK's 'traditional understanding of the separation of powers'.<sup>3</sup>

1.2. The HRA's statutory provisions reinforce this intention. It is Parliament that is given statutory responsibility to decide what human rights protections should be enacted in law. Section 3(2)(b) of the Act ensures that any judicial interpretation of legislation 'does not affect the validity, continuing operation or enforcement of any incompatible primary legislation'. Section 4(6)(a) ensures that any 'declaration of incompatibility' issued by a court 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given'. Furthermore, should Parliament consider it appropriate, a judicial interpretation of legislation can be effectively reversed by the passage of amending legislation that clarifies Parliament's position on human rights issues that arise. Similarly, where a Declaration of Incompatibility is issued Parliament has discretion to respond to it as it sees fit. The key consequence of these provisions is to preserve the constitutional role of Parliament in law-making.

1.3 Parliament's leading role is also indicated by section 19 of the HRA, which requires the relevant Minister to issue statements of compatibility in respect of proposed legislation. This means that when introducing legislation to Parliament, the Minister must present Parliament with a statement that the legislation is compatible with the protection of human rights provided for under the HRA or, if no such statement can be made, that the Minister considers Parliament should nevertheless proceed with the Bill. The requirement to provide such a statement in order to inform (but of course not to bind) Parliament is further evidence of Parliament's ultimate

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<sup>1</sup> HRA white paper at para 3.6: "Bringing Rights Home suggested that "Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy".

<sup>2</sup> Jack Straw MP Hansard HC, vol 307, cols 779-780.

<sup>3</sup> Lord Irvine Hansard HL, vol 582, cols 1128-1229.

responsibility for the extent to which human rights are protected through domestic law. This statement is supplemented by a dedicated human rights memorandum in any bill's explanatory notes. This is precisely to provide additional information so that Parliament can form its own view on rights-related matters.

1.4 Parliamentary sovereignty is also protected in the sense that parliamentary activity is expressly excluded from obligations imposed on other public bodies by the HRA. Section 6(2)(b) of the Act makes clear the obligation for public bodies to act compatibly with the Convention does not apply to 'either House of Parliament or a person exercising functions in connection with proceedings in Parliament'. The consequence of this provision is that Parliament is assigned a unique freedom to be free from constraints imposed by the Act, and to prevent its being obstructed in carrying out its will. Notably, Parliament is also expected to be involved in any reservations to the European Convention on Human Rights (ECHR) any government seeks to designate. Section 17(3) requires Ministers to lay five-yearly reports reviewing reservations before Parliament. This gives Parliament an important role in overseeing any modifications made to the UK's relationship with the ECHR.

1.5 Parliament taking a leading role in developing rights protections is not only an integral feature of the functioning of human rights framework as established by the HRA. It is also crucial for ensuring that the constitutional labour of rights protection is appropriately balanced between the different branches of state.

*a. Complexities of developing human rights protections*

1.6 Human rights protection is a complex task that involves weighing different public interests and monitoring policy impacts on society. The complexities associated with this task means that the protection of human rights should be underpinned by ongoing and informed deliberation. As a deliberative body with the power to call on any expertise it requires, Parliament is in a strong position to carry out such ongoing and informed deliberation. It is therefore in the best position to navigate and lead the way in the development of general human rights protections in the UK. This includes by passing legislation and monitoring the status of human rights protections in the UK.

### *b. Benefits of democratic input*

1.7 As the body meant to represent the interests of the UK public, Parliament taking a leading role in developing human rights protections generally enables it to imbue human rights protections with democratic legitimacy. As a democratic body, Parliament is also usually uniquely placed in its proximity to society to monitor and understand the human rights impacts of policy and legislation. Lessons learned on the basis of this proximity are an important source for the further development of human rights protections.

### *c. Ensuring a balance of constitutional labour*

1.8 Parliament taking a leading role in protecting human rights helps to ensure a balance of constitutional labour. Parliament's role supports both the Government and the judiciary in carrying out their roles under the HRA. Government's constitutional role is to enact legislation and develop a legislative program for the country. A crucial aspect of ensuring human rights are protected in the UK is empowering the Government to carry out its role in a manner protective of human rights. The Government being able to achieve this is in part dependent on it being guided by Parliament on the development of human rights protections. This includes Parliament monitoring the human rights impact of the Government's actions in order to hold it to account, and insisting that policy is developed in line with human rights protections. As well as adjudicating on disputes, the judiciary's constitutional role is to interpret legislation and ensure that individuals or groups in society have their rights protected. Parliament's engagement with the human rights implications of legislation supports the judiciary in this task. Such engagement offers guidance to judges as to how legislation can be interpreted in light with the UK's human rights obligations under the HRA.

## **2. Parliament's Inadequate Engagement with Rights: COVID-19 as Exemplar**

2.1 A substantial body of research exists to suggest that, at least in respect of complex policy fields, Parliament does not always engage with rights in a manner that reflects its central role in rights protection and development under the HRA.<sup>4</sup> For example, academics have argued that Parliament rarely intervenes with substantial

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<sup>4</sup> For example, see Lydia Morgan and Fiona de Londras, 'Is there a 'Conservative' Counter-Terrorism?' (2018) 29 (2) *King's Law Journal* 187 – 215; Jessie Blackbourne, Fiona de Londras, and Lydia Morgan, *Accountability and Review in the Counter-Terrorist State* (2019; Bristol University Press).

amendments to counter-terrorism legislation to protect human rights.<sup>5</sup> Others argue that Parliament's role in the development of law protecting the right to non-discrimination has also been limited.<sup>6</sup> More generally, research shows there to be a 'democratic deficit' in the development of rights protections due to a lack of Parliamentary engagement with rights.<sup>7</sup>

2.2 Research carried out by the CVRO suggests that similar patterns are discernible in the context of the COVID-19 pandemic. We note that human rights were mentioned in the Parliamentary debates concerning the Coronavirus Act 2020, although rights were not leveraged in such a way as to underpin substantive amendments to the proposal legislation.<sup>8</sup> Furthermore, the sense of urgency that prevailed around the passage of this Act closed off avenues for protracted and detailed legislative scrutiny and debate, in turn highlighting the importance of integrating rights in ongoing processes of parliamentary scrutiny that followed the introduction of the Coronavirus Act 2020, such as committee inquiries and PMQs. This is further reinforced by the heavy reliance on the Public Health (Control of Disease) Act 1984 to underpin many restrictions introduced as part of the pandemic response. We note observations that Parliamentary scrutiny of regulations passed under the Public Health (Control of Disease) Act 1984 during the pandemic has been weak.<sup>9</sup> Such weak scrutiny is not conducive to Parliament ensuring that adequate human rights protection in the response to the COVID-19 pandemic.

2.3 Such inadequacy is also discernible from a detailed analysis of two of the key modes of accountability and scrutiny in Parliament: inquiries by parliamentary committees and Prime Minister's Questions (PMQs). Although these two modes of accountability are clearly different, with inquiries usually being more detailed and expertise-led and PMQs being a mode of 'accountability by spectacle' not renowned for meaningful scrutiny, they are both critical and productive parts of parliamentary work in which, if Parliament were effectively engaged with rights protection and

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<sup>5</sup> See Alexander Horne and Clive Walker, 'Parliament and National Security' in Alexander Horne and Andrew Le Sueur (eds), *Parliament: Legislation and Accountability* (2016; Hart Publishing).

<sup>6</sup> See Colm O'Connell, 'How the Human Rights Act has functioned as a vehicle for protecting equality and non-discrimination rights – and the rights of vulnerable groups more generally' (22 February 2021) *Human Rights in Action Blog* available at <https://human-rights-in-action.blogspot.com/2021/02/how-human-rights-act-has-functioned-as.html>.

<sup>7</sup> See, for example, Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (2017; Hart Publishing).

<sup>8</sup> See HC Deb (23 March 2020) vol 674 cols 35 -177; HL Deb (24 March 2020) vol 802 cols 1649 – 1682, 1739 – 1778. See also the six-month review of the Act: HC Deb (20 September 2020) vol 681 cols 388 – 415.

<sup>9</sup> See Tom Hickman, 'Abracadabra aw-making and accountability to parliament for coronavirus regulations' in *Parliaments and the Pandemic*, Study of Parliament Group (January 2021).

deliberation, we should expect to see recourse to human rights as framing, justificatory, and analytical aides. As already mentioned, the speedy passage of the Coronavirus Act 2020 and the heavy reliance on regulations rather than primary legislation have reduced opportunities for robust legislative scrutiny of pandemic responses. In such circumstances, these quotidian modes of scrutiny are a crucial mode of understanding the complex questions that arise when considering the response to the pandemic against human rights standards.

*a. Engagement with human rights by parliamentary committees under COVID-19*

2.4 CVRO has carried out an analysis of all committee inquiries on COVID-19 matters since 30 January 2020, the date on which the WHO first declared the transmission of COVID-19 to constitute a global health emergency. As part of this analysis, we have collected the terms of reference for each inquiry considering matters related to COVID-19, and assessed engagement with human rights in these terms of reference. Our findings are as follows:

- Out of fifty-nine COVID-19 related committee inquiries launched since the beginning of the pandemic, only two of the inquiries mention human rights in their terms of reference.
- Both inquiries were carried out by the Joint Committee on Human Rights (JCHR).
- Both inquiries carried out by the JCHR engaged very broadly in considering the impact of human rights by the pandemic and the Government's response to the pandemic, and both focused primarily on rights protected via the HRA as well as international human rights law.

2.5 These findings show that, to date, the JCHR is the only parliamentary committee carrying out human rights assessments of the pandemic and responses thereto. This is notwithstanding the fact that inquiries that have clear connections to rights have been undertaken by other committees. For example, the Public Accounts Committee has recently carried out an inquiry on 'COVID-19: Supporting the vulnerable during lockdown'. This issue has clear rights implications, related to the Government's positive obligations to protect the right to life under article 2 of the ECHR. The Women and Equalities Committee has carried out a human rights-related inquiry on the unequal impact of the pandemic, such as the impact on 'disability and access to services', with clear implications for the right to non-discrimination in conjunction with, for example,

the right to family and private life under Articles 14 and 8 of the ECHR, as well as general international human rights law. The lack of human rights framing in the terms of reference for these inquiries meant that the rights-related dimensions of the phenomena under consideration were inadequately attended to.

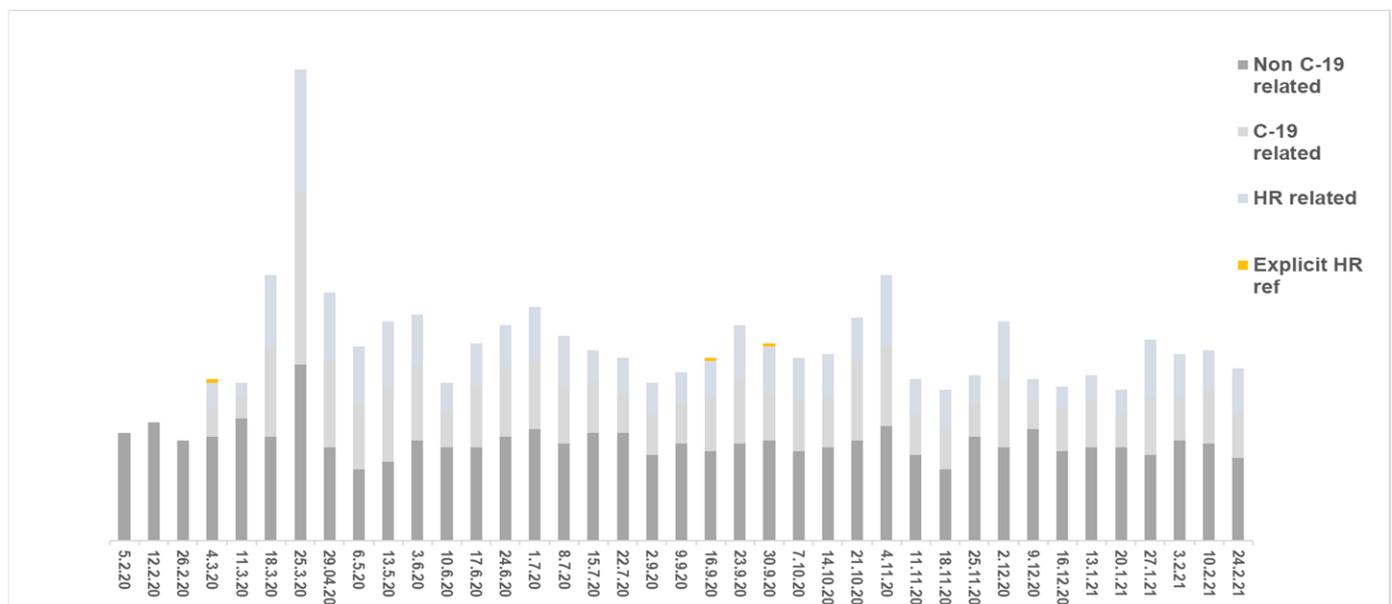
2.6 The failure to engage with rights at all in the Terms of Reference of these inquiries, and indeed in resultant reports, suggests that such inquiries contribute in only a very limited way to Parliament's monitoring of human rights in the pandemic. We also note that the breadth of each JCHR inquiry suggests the committee is currently facing a large burden of work as the only committee explicitly considering human rights impacts during the pandemic. This raises the possibility of fragmentation in terms of understanding in the fullest way possible the impact of the pandemic, including its impact on rights, with a holistic insight into the multi-factored and inter-related impacts of the pandemic and responses thereto being difficult to acquire. This limits Parliament's insight into and engagement with rights as regards continuing or new pandemic responses. This raises the possibility of rights-related inadequacies coming before courts that would in turn have limited guidance on Parliament's views on the appropriate balance to be struck in between individual rights protection and the pursuit of public health in determining such claims.

*b. Engagement with human rights during PMQs under COVID-19*

2.7 In addition to analysing committee inquiries, the CVRO has assessed Parliament's engagement with human rights in all PMQs since 30 January 2020. In carrying out this analysis we applied a number of categories to the questions asked of the Prime Minister. First, we distinguished between 'COVID-19 related' and 'non COVID-19 related' questions. A question was considered to be COVID-19 related if the questioner expressly framed an issue by reference to the pandemic. We excluded questions that may have some relevance to the pandemic but which did not mention it. We then identified the COVID-19 related questions that were 'human rights related'. In light of the potential breadth of the term 'human rights' we adopted a conservative approach in identifying where questions were human rights related, only including questions that either related to particular rights protected under the ECHR or were very clearly linked to specific, internationally-protected economic and social rights. Finally, we identified those questions that explicitly referred to human rights out of the human rights related ones. In identifying such questions we adopted an inclusive approach so that any reference to 'rights' or 'liberties' was counted.

2.8 The results of our analysis are set out in Figure 1 below and were as follows:

- Out of approximately one thousand questions asked at PMQs, around half of the question were 'COVID-19 related'.
- Of these questions, approximately three quarters of questions were 'human rights-related'.
- Of these questions, making up just over four hundred questions, only three questions explicitly referred to human rights.



**Figure 1: PMQs under COVID-19**

2.9 Notwithstanding the well-accepted 'political' nature of PMQs (which limits their usefulness as a mode of scrutiny), the scarcity of rights-engagement in PMQs is striking. This lack of engagement has taken place across more than twelve months during which there have been substantial limitations on rights enjoyment and during which the state has had to discharge its obligations to protect life, public health, education and other rights.

2.10 The findings presented above support the view that Parliament's engagement with the human rights impact of the pandemic has been inadequate. Despite the well-

documented human rights implications of the pandemic and responses thereto, MPs have not generally referred to human rights or civil liberties in holding the Government to account. This suggests that, during the pandemic, Parliament has not adequately discharged its role under the HRA and, should cases arise in which the adequacy and/or permissibility of government responses arise, rights-related questions will be left almost exclusively to the judiciary to determine without the benefit of very much insight from Parliament as to its judgement on the rights-appropriateness of the pandemic response. In such a circumstance, any adverse findings from court proceedings could not properly be attributed to 'imbalanced' divisions of constitutional labour under the HRA, but should instead be understood in the context of parliamentary failure substantively to engage with rights.

### **3. Enabling Parliament to fulfil its Envisaged Role under the HRA**

3.1 Rather than considering ways the judiciary might be disempowered in protecting individual rights, we respectfully submit that the Review should focus on developing means by which Parliament can be enabled to discharge its envisioned role in developing human rights protections. As demonstrated in section one above, the HRA was specifically designed to give Parliament this role. It is not necessary to amend the HRA in order to 'rebalance' constitutional labour between Parliament, the judiciary, and the Government. Rather, Parliament needs more fully and consistently to engage with rights in its pre- and post-legislative work responding, where appropriate, to identified rights-implications of law and policy. Such engagement would reinforce Parliament's envisaged role under the HRA, while respecting the courts' role in adjudicating individual cases under the Act. In this respect, we submit that Parliament might adopt a number of straight forward practices to enhance and support its role with respect to rights, particularly through the work of parliamentary committees, as well as to encourage rights framing in parliamentary debates and questions.

3.2 General engagement with human rights can be encouraged in Parliament through the promotion of the wide array of human rights expertise that is available to Members of Parliament (MPs). In particular, we note that MPs have an excellent resource for such expertise in the form of the House of Commons Library, House of Lords Library, and Parliamentary Office of Science and Technology, and their staffs. In terms of empowering MPs further to engage with human rights, we also note that Parliament could produce general guidance to assist MPs in identifying key human rights issues when carrying out legislative scrutiny. This would help MPs in factoring

in human rights considerations when reading draft legislation, particularly bearing in mind the pressures of time that most MPs experience.

3.3 Parliamentary committees are the primary mode through which parliamentarians engage in in-depth scrutiny of issues related to legislation and their societal impacts. In the main, the work of rights-related analysis is left primarily to the JCHR. However, other committees' remits contain space for them to engage in at least some level of human rights analysis, and to understand rights compliance as an all-of-government obligation and activity. By means of example, we note that the remit of the Public Accounts Committee is the 'examination of the accounts showing the appropriation of the sums granted by Parliament to meet the public expenditure, and of such other accounts laid before Parliament as the committee may think fit'.<sup>10</sup> Integrating human rights considerations into the Committee's work is clearly within this remit. Obligations under the HRA apply to all government activity, including the arrangement of public expenditure. In practice, this means that in making resource-allocation decisions the Government is expected to take into account its human rights obligations. Thus, it is well within the remit of the Public Accounts Committee to engage in some form of human rights analysis. Similar rights-based understandings of remit can be adopted across most parliamentary committees. However, not all committees have human rights expertise, which may operate as a constraint. Building committees' capacity to engage with human rights would be an important step towards ensuring Parliament fulfils its envisaged role under the HRA. In this respect, a number of straightforward initiatives might be adopted:

- A 'human rights checklist' - The precise human rights implications of a committee's remit may not always be obvious. We propose the development of a template 'human rights checklist' that can be used by each committee to identify rights-related issues relevant to their remit, and plan inquiries and/or terms of reference that integrate these rights-related concerns. Implementation of such a checklist would be efficient and should be effective in surfacing relevant human rights issues across committees' work, avoiding fragmentation without overburdening committees.
- Presumption of human rights section in every committee report - The work of considering human rights should be fairly shared across committees to maximise democratic involvement in the development of human rights

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<sup>10</sup> See Standing Orders of the House of Commons - Public Business 2015, Rule 148 (1).

standards. There should be a practice that all committee reports contain a section containing a human rights analysis. Where committees do not include an analysis, a brief statement articulating why no human rights analysis has been set out should be included in the report. This would complement, rather than supplement, the work of the JCHR and enable systematic engagement with rights protection as a core principle of accountability across government activity.

- Committees sharing expertise and resources for human rights analysis - Particularly in light of the complexities that can be involved in human rights analysis, committees should be empowered to work together, including working with the JCHR, to share the load of navigating difficult questions raised by human rights. This may include conducting joint inquiries where appropriate, and ensuring complementarity and the pooling of relevant expertise. Furthermore, committees might engage in peer learning and the sharing of best practice in informal settings with likeminded select committees operating in the devolved legislatures, such as the Scottish Equalities and Human Rights Committee and the Welsh Equality, Local Government and Communities Committee.

## **Conclusion**

The purpose of this submission has been to show that, if there is an imbalance in institutional roles in rights protection, that is not a product of the HRA. Nor does it require reform or amendment of the HRA to 'resolve' it. As set out above, the HRA is specifically designed to preserve Parliamentary sovereignty and in line with the constitutional principles of the United Kingdom. There is evidence, however, that Parliament has not to date fully embraced its envisaged role as a primary actor in rights protection. We therefore submit that enhancing parliamentary practice in order to enable it more fully to engage with rights in pre- and post-legislative scrutiny as well as its general accountability work ought to be the focus of any 'rebalancing' work that might be proposed by this Review.

## **About Us**

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The **COVID-19 Review Observatory** is a UKRI-funded (AHRC) research initiative located at Birmingham Law School, University of Birmingham. It tracks, assesses, and engages with parliamentary reviews of responses to the COVID-19 pandemic with a view to ensuring effective consideration of rights protection, and to enhancing accountability and legitimacy by supporting parliamentary review.