

## **Submission from Just for Kids Law and the Children’s Rights Alliance for England to the Joint Committee on Human Rights call for evidence on legislative scrutiny of the Bill of Rights Bill**

### **About us**

1. **Just for Kids Law (JfKL)** works with and for children and young people to hold those with power to account and fight for wider reform by providing legal representation and advice, direct advocacy and support, and campaigning to ensure children and young people have their legal rights and entitlements respected and promoted and their voices heard and valued.
2. Just for Kids Law hosts the **Children’s Rights Alliance for England (CRAE)**, which works with over 100 members to promote children’s rights and monitor Government implementation of the UN Convention on the Rights of the Child and other human rights treaties.

### **Introduction**

3. This Bill, if enacted, will significantly weaken respect for children’s human rights and the ability of children to hold the UK Government and public bodies to account where their rights have been infringed. Given the impact the proposals will have on children, we have urged the Government to carry out a child rights impact assessment (CRIA) but this has not happened.<sup>1</sup>
4. Since the Human Rights Act (HRA) came into force, it has provided important protections for some of our most vulnerable children such as children in care, child witnesses, children in custody, and refugee children. Such protections must remain in place.

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

**Question 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?**

5. These changes are not necessary and undermine the principle that the European Convention on Human Rights (ECHR) is a living instrument. This clause could lead to a divergence in the interpretation of these rights and mean that more children need to appeal to Strasbourg to protect their rights. This will be a particularly unsuitable route for under-18s given the time it takes for cases to be heard and the greater effect that the passage of time can have on them; as well as the costs involved. This will have a disproportionate effect on children who already experience barriers to justice.

**Question 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**

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<sup>1</sup> The Department for Education published a template for civil servants to facilitate policy makers to carry out a CRIA in November 2018. For more information on CRIs see Children’s Rights Alliance for England (2021) [Using Children’s Rights Impact Assessments to improve policy making for children](#)

**ECtHR would adopt that interpretation. What are the implications of this approach to the interpretations of Convention rights?**

6. Clause 3 will limit the protections that children in the UK are able to enjoy compared to those in other Convention states. This is because it allows for a divergence from Strasbourg jurisprudence but does not allow courts to be able to expand protection unless there is “no reasonable doubt” that the ECtHR would also adopt that interpretation.

**Parliamentary scrutiny of human rights**

**Question 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?**

7. The Bill of Rights will not enhance the role of Parliament in scrutinising human rights, instead, it will place more power in the hands of the executive. In particular, repealing Section 3 will cause the courts to make a greater number of declarations of incompatibility, adding pressure on parliamentary time and leaving breaches of rights to be left unresolved for longer, causing unnecessary delay and hardship to children. The result may be the greater use of ministerial remedial orders which are subject to less scrutiny.
8. The HRA is a vital tool for parliamentarians to scrutinise the human rights implications of legislation. Parliamentary scrutiny of human rights could be further strengthened through a number of practical actions, particularly if all Parliamentary Committees considered compatibility of children’s human rights in inquiries and legislative scrutiny. We have long encouraged parliamentary committees to carry out [Child Rights Impact Assessments](#) (CRIAs).

**Question 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?**

9. The removal of section 19 HRA will reduce the ability of Parliament to scrutinise the human rights implications of different legislation. Given that a wealth of legislation has an impact on children’s rights it has an important role to play in ensuring that consideration is given to these rights by both Government and Parliament in the development and scrutiny of new legislation. This view was supported by the Independent Human Rights Act Review: *“There can be no doubt that it [section 19] has had a major, transformational and beneficial effect on the practice of Government and Parliament in taking account of human rights.”*<sup>2</sup> Section 19 is particularly important given there is no statutory requirement to carry out a CRIA of new policy and legislation by the Westminster Government and these are not carried out by the majority of Parliamentary Committees.

**Interpreting and applying the law compatibly with human rights**

**Question 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?**

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<sup>2</sup> The Independent Human Rights Act Review (2020) *The Independent Human Rights Act Review Final Report* p244

10. The Independent Human Rights Act Review concluded *that “there is no substantive case for its repeal or amendment [of section 3].”*<sup>3</sup> We agree. Section 3 is a necessary tool to allow courts and public bodies to interpret and apply legislation in a manner that is compatible with the Convention. We consider this an important measure that ensures that legislation complies with children’s human rights.
11. Courts have a long-established role in interpreting legislation, so this is not a new nor a controversial power. In interpreting legislation, a court seeks to give effect to the will and intention of parliament; the courts rightly assumed that parliament intends its legislation to be compliant with the HRA, and therefore section 3 does not radically alter the usual principles of statutory interpretation. It does, however, enhance the importance of compliance with the Convention.
12. The removal of section 3 will also weaken public bodies’ obligations to comply with human rights when navigating and applying other laws. This will inevitably mean that public services will be less likely to act in a way which respects children’s human rights.
13. The removal of section 3 will therefore significantly reduce human rights protection for children.

**Question 7: Clause 40 enables the Secretary of State to make regulation to “preserve or restore” a judgement 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?**

14. We’re seriously concerned that Clause 40 will mean that a wealth of judgements which previously protected children’s human rights will no longer apply unless the Secretary of State decides to “preserve or restore” them. This could also cause considerable legal uncertainty given the time it will take to identify the relevant judgements, decide which to “preserve or restore” and lay regulations before parliament. This will also centralise power in the hands of a Minister who will decide which interpretations should or should not continue to apply.

**Question 8: Clause 5 of the Bill would prevent UK courts from applying any new positive obligation 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 obligation under the Convention? What are the implications for the protection of rights in the UK?**

15. Courts no longer having to apply any new positive obligations adopted by the ECtHR will mean that children will no longer be able to benefit from additional rights protections and will mean further divergence between the UK and the ECtHR.
16. Clause 5 also places limits on whether existing positive obligations should apply to public authorities. This is extremely alarming because this safety net is particularly important for children. Positive obligations ensure that public bodies take proactive steps to safeguard children’s rights and also importantly enables redress when a public body has not fulfilled its

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<sup>3</sup> The Independent Human Rights Act Review (2020) *The Independent Human Rights Act Review Final Report* p181

human rights obligations. This is demonstrated by the Deepcut Barracks case<sup>4</sup> where the families used the HRA to get justice for their children who had died at the barracks. Using Article 2 and Article 6 of the European Convention as incorporated by the HRA they successfully argued that the court should quash the findings of the previous coroners and ordered fresh inquests.

17. It is imperative that positive obligations are not weakened in any way - to do so will put children at risk of harm.

**Question 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 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 roles of Parliament and the courts?**

18. This clause will severely undermine the ability of children to hold the Government to account where legislation has breached their human rights. As stated above, courts have a long-established role in interpreting legislation. This clause is therefore not necessary.

**Question: 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 compatible with Convention rights, what impact would clause 12 have on (a) individuals assessing public services and (b) public authorities?**

19. Despite Clause 12 (1) making it unlawful for a public authority to act in a way which is incompatible with Convention rights, the absence of the obligation for public authorities and courts to read and give effect to legislation in a way which is compatible with Convention rights (through the repeal of section 3) will result in a weakening of a rights respecting delivery of public services.
20. Positive human rights obligations on public bodies provide the foundation for safeguarding children and protecting them from abuse and neglect. This safety net is particularly important for children in institutional settings. Section 6 has helped to ensure that public authorities comply with the ECHR and that children have their rights respected without the need to go to court, but where public bodies fail to respect and protect rights, children and their families can use the HRA to take action in the courts.

### **Enforcement of Human Rights: Litigation and remedies**

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

21. No, the Bill of Rights will hinder effective enforcement of human rights in the UK, including an effective remedy guaranteed by Article 13. This will be particularly acute for children who already struggle to access justice (see below).

**Question 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?**

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<sup>4</sup> <https://centreformilitaryjustice.org.uk/human-rights-stories-no-4-deepcut-how-the-families-used-the-human-rights-act-to-get-access-to-the-states-evidence-about-their-children-and-to-get-fresh-inquests-exposing-abuse-ill-treat/>

22. We're extremely concerned about the effect introducing a conditionality would have on a child's right to bring a claim under the ECHR. There are already the necessary checks in place to ensure that spurious claims cannot proceed. Section 7 HRA already requires a child, or anyone else, who wants to bring a claim under the HRA to show that they are a victim of a human rights breach and there are admissibility stages for legal cases in the UK which prevent frivolous, academic or unmeritorious cases from proceeding.
23. Clause 15 will make it much harder for children to access justice if they have to prove they have experienced 'significant disadvantage', an extra test likely to complicate, delay and add cost to proceedings. We know from our work that children already struggle to access justice, are already disadvantaged by the lengthy time taken in court proceedings, and can be far less willing to litigate breaches of their human rights as they are more reliant on their parents or carers to assist them in making such decisions. Clause 15 will have a chilling effect which will be particularly detrimental to children.

**Question 13. Do you agree that the courts should be required to take into account any relevant conduct of the victim (even if unrelated to the claim) and/or the potential impact on public services when considering damages.**

24. We strongly disagree that courts be required to consider the conduct of the victim when considering damages. Children, like adults, want to see justice being done and any infringements of their rights to be recognised as such. What type of remedy is awarded depends on the facts of each case and a decision on what is 'just and appropriate'.
25. These changes could undermine how seriously public bodies take human rights obligations towards children. Courts currently decide on whether damages are necessary looking at the facts of the individual case – in reality this results in very few children being awarded damages. Nonetheless, knowing that this possibility exists is an important driver to ensure that public bodies respect human rights and it is also important that children receive compensation where it is deemed necessary, which will generally only be where significant harm and distress has been caused.
26. All children should be entitled to the same human rights, and any corresponding remedies, regardless of previous conduct. Such a proposal undermines the fundamental principle behind human rights which is that they are universal and must be applied to everyone equally. It is particularly troubling that something which someone did as a child could be taken into account as part of the damages they receive for a breach of their rights.

**Specific rights issues**

**Question:14. Clause 6 of the Bill would require the court, when deciding whether certain human rights of prisoners have been breached, to give the "greatest possible weight" to the importance of reducing the risk to the public from persons given custodial sentences. What effect would this clause have on the enforcement of rights by prisoners?**

27. We're extremely concerned by clause 6 of the Bill, which will apply to children in prison as well as adults. Although the Clause exempts certain Convention rights, it could significantly undermine the ability of these children to enforce many others. This proposal again goes against the universality principle of human rights and sends out a dangerous message that this group of children are not entitled to the same treatment as other children.

28. Children in contact with the criminal justice system are some of the most vulnerable in society and this is particularly the case for children in prison.<sup>5</sup> In 2017, the Youth Custody Improvement Board and the Youth Justice Board concluded that Young Offenders Institutions and Secure Training Centres weren't capable of caring for or rehabilitating children and pandemic compounded the harm caused to children in prison.<sup>6</sup> Clause 6 could further exacerbate ill treatment. Given that more than half of children in prison are Black or from other ethnic minority groups<sup>7</sup> this clause will also disproportionately impact children from racialised groups.

**Question 15: Clauses 8 and 20 of the Bill restrict the application of Article 8 (right to private and family life) and 6 (right to a fair trial) in deportation cases. Do you think these provisions are compatible with the ECHR?**

29. Clause 8 could substantially limit the right to private and family life for the children of individuals being deported and young adults who have lived in the UK for most of their lives and again is not compatible with the universality of human rights. We're very concerned about cases we have seen where the Secretary of State has attempted to deport young adults who have lived in this country most of their lives, based on crimes they committed as children. We are currently assisting one young person subject to deportation who has lived here since he was 12 and another young person who has lived here since he was two.

30. Where deportations are based on crimes that were committed as children, the courts have a vital role in ensuring all relevant information is taken into account in deciding whether or not deportation is necessary. The time spent in this country as a child and growing up here will always be relevant in deciding whether to deport someone, and therefore allowing such people to bring Article 8 claims is necessary. We are concerned that clause 8 will pave the way for the Government to further limit our clients' right to challenge their deportations.

**Question 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?**

31. Freedom of expression is an important right in any democracy, but we have serious concerns about proposals to introduce a presumption in favour of upholding Article 10 rights, and thus tipping the balance in its favour, against privacy rights set out in Article 8. These changes are not necessary.

32. In particular we are concerned that it has the potential to be harmful to children in contact with the criminal justice system where it's crucial that their identities are not revealed in the media. This can be extremely damaging, detrimental to their mental health, and hinders rehabilitation.<sup>8</sup>

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<sup>5</sup> Research carried out by HM Inspector of Prisons found that 52% had been in the care of a local authority, 25% reported having a disability and 36% reported having a health problem, including mental health issues. HM Inspectorate of Prisons (2021) *Children in Custody 2019–20 An analysis of 12–18-year-olds' perceptions of their experiences in secure training centres and young offender institutions*

<sup>6</sup> Goodfellow, P., and Harris, M., (2021) *The Youth Justice System's Response to the COVID-19 Pandemic Literature Review*, Manchester Centre for Youth Studies at the Manchester Metropolitan University and the Alliance for Youth Justice.

<sup>7</sup> Youth Custody Report: June 2022 <https://www.gov.uk/government/publications/youth-custody-data>

<sup>8</sup> Standing committee for Youth Justice (2014) *What's in a name? The identification of children in trouble with the law*

33. We're concerned that any reforms to Article 10 could make existing case law, which sets out the balance which must be struck between Article 8 and 10, redundant and therefore reduce protection for this group of children.

**Just for Kids Law and the Children's Rights Alliance for England**

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