

# Bill of Rights – JCHR Legislative Scrutiny Inquiry

## About Unlock

Unlock is a national, independent advocacy charity for people facing obstacles, stigma and discrimination because of their criminal record. Every year we hear from thousands of people who are unnecessarily held back in life because of their criminal record. We work at policy level to address systemic and structural issues. We listen to and consult with people with criminal records, undertake research and produce evidence-based reports to inform policy makers and the public

## Summary

The Government has published its Bill of Rights Bill, to replace the existing Human Rights Act and to change the way human rights protections are dealt with in UK courts.

Unlock does not agree that the government's proposals would solve key problems and we have grave concerns regarding some of the proposed changes. We have relevant experience in respect of judicial review cases regarding the right to privacy (article 8) so our response mostly focuses on the changes that will impact on those cases but we also cover broader concerns.

We believe that the proposed changes would have prevented a number of successful judicial reviews being brought that have been key in challenging unfair rules relating to criminal records. Cases like that heard in the Supreme Court in 2018<sup>1</sup> eventually overturned punitive rules and allowed tens of thousands of people to move on and live their lives without a prior criminal history hanging over them unnecessarily. The new rules will introduce challenges to cases like these being brought forward, limiting the opportunities to identify and therefore change unlawful or unfair processes. It is important to note that there is a clear link between people with criminal records and disadvantage due to the discrimination they face in respect of things like education and employment. In addition, certain minoritized groups (for example black people or looked after children) are shown to be disproportionately represented at all stages of the justice system and receive harsher sentences. So they are more likely to be impacted by an unfair system relating to criminal records. People with criminal records are therefore already marginalised and facing challenges to bring a judicial review, and further limitations will only reduce their access to justice.

Privacy is a key issue of our era; with more information covering more aspects of our lives being held by more bodies than ever before. Privacy is often being breached without those impacted

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<sup>1</sup> [In the matter of an application by Lorraine Gallagher for Judicial Review \(NI\); R \(on the application of P, G and W\) \(Respondents\) v Secretary of State for the Home Department and another \(Appellants\) and R \(on the application of P\) \(Appellant\) v Secretary of State for the Home Department and others \(Respondents\) \(supremecourt.uk\)](https://www.supremecourt.uk/judgments/2018-01-16.html)

even knowing that it has happened, and the distributed nature of the internet can make those breaches immediately irrevocable. It is extremely important that all citizens have the ability to challenge the government and to assert their human rights in respect of keeping personal information private.

The government has spoken a lot about the need for democratic accountability in our laws but a key part of democratic accountability is the right of the citizens to challenge the government. The role of judicial review in the modern era is as a check and balance, and a mechanism to discourage government from overstepping their authority.

## Questions

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

*Q1. 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?*

n/a

*Q2. 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?*

n/a

### *Interim measures and the UK's international obligations*

*Q3. Clause 24 would affect how UK courts and public authorities take account of interim measures of the ECtHR, prohibiting them from doing so in many circumstances. Is this compatible with the UK's obligations under the ECHR and international law?*

n/a

### *Parliamentary scrutiny of human rights*

*Q4. 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?*

n/a

*Q5. 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?*

In order to make a statement saying a particular bill is compatible with human rights, the government has to carry out an analysis on any implications in relation to human rights. This

analysis is important for identifying any unintended consequences, and providing parliament with a basis for scrutinising proposed bills.

Any future legislation relating to disclosure of criminal records should be compatible with an individual's rights and a key aspect of ensuring that compatibility is parliamentary debate. In order to ensure parliamentary debate about legislation is robust, it must be well-informed which requires the government to be transparent in relation to any analysis that has been carried out as to the implications of proposed Bills.

We therefore support the concern expressed by the JCHR on the removal of this requirement.

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

*Q6. 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?*

n/a

*Q7. 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?*

n/a

*Q8. 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?*

Unlock are concerned about UK courts considering existing positive obligations in a new light – specifically the effect it may have on the requirement for public authorities to consider the impact on individual rights when making operational decisions or allocating resources. It is obviously necessary for public authorities to have discretion in relation to operational matters, but the need to ensure compliance with existing human rights requirements is vital in ensuring the impact on individuals' rights is part of any consideration in deciding allocation of resources. Existing positive obligations include the need to ensure there is an effective framework in place to protect individuals' right to privacy which has a direct impact on people with criminal records. It is important that these rights are protected by courts, and that the courts have the tools available to ensure they remain protected.

*Q9. 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?*

n/a

*Q10. 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?*

As stated in the JCHR letter of 30 June to the Deputy Prime Minister, the current duty provides a useful framework for complex decision-making. For example, where discretion sits with the police in respect of retaining data relating to cases where there was no prosecution as well as when it might be necessary to disclose such information, without a clear framework, an individual's right to privacy and rehabilitation may be limited. In order to ensure fair and proportionate practice, this duty is invaluable in supporting compliance with individual's rights.

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

*Q11. 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)?*

Using the existing legal framework to challenge decisions relating to disclosure of information on an individual's criminal record has led to vital reform in the system.<sup>2</sup> Restricting this could prevent future reform to ensure the system is fair, proportionate and effective, and also limit an individual's opportunity to challenge an unfair decision and resolve it in a reasonable manner.

Unlock is aware that there are already significant problems with accessing justice in relation to disclosure of a person's criminal record – the legislative framework is complicated and can lead to either disclosure when it is unnecessary or checks which are illegal. Being able to access the judicial review process is often the only effective remedy available to people with a criminal record. Due to the discrimination associated with disclosure of that record, people with criminal records are often very disadvantaged, so funding any challenge is already out of reach for many. Any further restrictions will risk the whole system being unaccountable.

It is obviously preferable if issues of unfair or discriminatory practice were resolved without the need for judicial review to be brought – Unlock is calling for broader reform of the whole criminal record system to create a system that is fair, proportionate and includes easy access to appeal individual decisions. At the moment, there is no lower-level process for considering whether the continued disclosure of a criminal record is still necessary and proportional. We would certainly welcome change to the system to allow adjudication of these cases on an individual basis, but it is still important to have robust and accessible processes for individuals to challenge both specific decisions relating to their criminal record and the law governing such decisions.

*Q12. 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?*

Unlock's biggest concern is the proposal to add an additional stage to assess whether an individual has 'suffered (or would suffer) a significant disadvantage' before a case can proceed to

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<sup>2</sup> See *R (L) v Comr of Police of the Metropolis* [2010] 1 AC 410; *Re an application by Lorraine Gallagher for Judicial Review (Northern Ireland)*; *R (P, G & W) v Secretary of State for the Home Department*; *R (P) v Secretary of State for the Home Department* [2019] UKSC 3

be heard. There is a risk that this additional stage will limit the number of cases that are able to proceed, either because it can be difficult to establish disadvantage in relation to criminal records or due to the additional cost and complexity of an additional hearing.

Disadvantage can be difficult to objectively establish where disclosure (or the potential of disclosure) of a criminal record is an invasion of privacy. The true cost is counted in the loss of opportunities, and the life that a person may have been able to live if their criminal record was not disclosed. There are cases where there is a concrete financial cost, but individuals will always struggle to prove whether they missed out on a new job specifically because of their record.

As any disclosure of information held on a criminal record poses a risk of limiting an individual's opportunities (not just relating to employment but it can also impact on family, accommodation and education), it is important that disclosure is only allowed when lawful, necessary and proportionate. Therefore any assessment of disadvantage needs to be considered as part of a wider discussion of proportionality and necessity. We would argue that this is best done in a full judicial review hearing where the various issues can be examined and challenged.

It is also important to consider any wider impact of processes that are resulting in unlawful or unnecessary disclosure. They are unlikely to only affect one individual, so any discussion of the impact should take into account that thousands of people could be being disadvantaged, even if only one individual is bringing a case.

There is also the issue of the additional cost and complexity of introducing a new stage in the judicial review process. Often those most harmed by the disclosure of criminal records are those least able to fund a legal case – as the disclosure limits education and employment opportunities. Challenging unlawful or unnecessary disclosure must be accessible to those most likely to be disadvantaged so it is important that access to justice does not exclude less affluent people.

*Q13. 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?*

We are concerned that the language of clause 18(5)(a) is too broad. While it may be important to consider any conduct of the victim that is related to the claim, there is a risk that requiring consideration of relevant conduct not related to the claim may lead to the inclusion of information about an individual's prior criminal activity, even where it is unrelated to the specific claim being made. For example, the current Criminal Injuries Compensation Scheme excludes any victims of violent crime who have unspent custodial or community disposals, even where they are completely unrelated to the injury suffered by the victim.<sup>3</sup> This has led to victims of serious crime being unfairly denied compensation due to their 'bad character', and we would be extremely concerned if discrimination of this kind was further entrenched in the system.

### *Specific rights issues*

*Q14. 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*

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<sup>3</sup> [Unspent convictions and the Criminal Injuries Compensation Scheme - Unlock](#)

*risk to the public from persons given custodial sentences. What effect would this clause have on the enforcement of rights by prisoners?*

It is difficult to say how courts will respond to this change but there is a risk that prisoners' rights will be restricted beyond what the current legal framework already allows.

It is also important to note that the language does not just cover prisoners, but also those who are still subject to a custodial sentence but are not still in custody (including those given a suspended sentence). This could massively impact on the opportunities for successful resettlement on release, including access to accommodation and employment. Government policy is to help people with criminal records get into employment, and it is understood that any discrimination that limits opportunities for people released from prison to find work increases the risk of reoffending. We are concerned about a presumption being made that 'protecting the public' must mean restricting an individual's rights – when in fact the public may be safer if that individual is allowed to access stable housing and employment.

In addition, Unlock are again concerned with the language used in this clause as it infers that individuals subject to a custodial sentence are somehow not as deserving of having their human rights protected. We agree that public protection must carry great weight, and if it is proved an individual poses an immediate and grave risk to the public, then obviously it is only appropriate that their rights are restricted to keep the public safe. However, it is important that sufficient weight is also given to that individual's rights so that a balanced decision can be made that infringes an individual's rights only as much as is necessary and proportionate when compared with the risk posed.

*Q15. Clauses 8 and 20 of the Bill restrict the application of Articles 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?*

n/a

*Q16. Clause 14 introduces a total ban on individuals bringing a human rights claim, or relying on a Convention right, in relation to overseas military operations, subject to the Secretary of State being satisfied that this is compatible with the UK's obligations under the Convention. Does this comply with the UK's obligations under the ECHR and international law? If not, what would need to be amended to ensure clause 14 is consistent with the UK's obligations under the Convention?*

n/a

*Q17. The Bill introduces a limited right to trial by jury. What would be the legal significance of the right?*

n/a

*Q18. 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 strongly support the need to protect the right to freedom of speech but it must be accompanied by ensuring sufficient protections in specific areas. There is a risk that giving

certain forms of speech greater protection may restrict an individual's right to be forgotten as well as their right to privacy in relation to their criminal record being disclosed, impacting negatively on various aspects of their life. There is already wide discretion for sharing of information in the public interest, but consideration must be given to how sharing of certain information may lead to discrimination in respect of an individual having a family, a home or a job. For example; employers should be explicitly barred from looking for criminal records information on Google.

*Q19. Why do you think the Government has chosen to protect freedom of speech rather than freedom of expression, as guaranteed in Article 10, and what are the implications of treating the elements of Article 10 differently?*

n/a

### *The Human Rights Act and the Devolved Nations*

*Q20. 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?*

n/a

*Q21. Should the Government seek consent from the devolved legislatures before enacting the Bill and, if so, why?*

n/a