

Call for written evidence

# CIVIL SOCIETY SHADOW REPORT OF ENGLAND AND WALES FOR THE 2023 PRE-SESSIONAL WORKING GROUP REPORT TO THE UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

At BIHR, we work across the whole range of internationally defined human rights. We use the power of our domestic legislation, our Human Rights Act (HRA), to bring these rights to life in people's everyday lives. We are committed to enabling people to make the best use of their protections and the duties of public officials under our HRA, using this legal framework to create social change beyond the courtrooms. We are also committed to defending our HRA and the rights it both directly and indirectly protects, and to raising awareness of the threat posed by the UK Government's recent and ongoing attacks on human rights law in the UK.



Our HRA applies to all our interactions with public bodies, which covers a range of issues. In fact, at BIHR, the vast majority of our change through human rights work focuses on areas traditionally seen as economic and social, such as health, housing, education, care provision and social support. Any weakening of our HRA would make it harder for people to access these essential rights and harder for public body staff to support them.

We therefore believe it is essential that the shadow report to the UN Committee on Economic, Social and Cultural Rights reflects the importance of our HRA and the risk to economic, social and cultural life posed by the UK Government's attempts to dismantle it.

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## The Current Law

The UK's Human Rights Act brings 16 rights from the European Convention on Human Rights into our law. It puts legal duties on the UK Government and public bodies to respect, protect and fulfil these rights and means people can challenge any failure to do so through the UK courts.



Human rights are sometimes thought about as being about as covering two areas: civil and political rights (protecting our freedoms), and economic, social and cultural rights (protecting our rights to live with dignity, safety and health).

Traditionally our 16 HRA rights have been called civil and political. However, it is really important to remember that our HRA is a “living instrument”. This means the way it is interpreted and the protections it offers needs to adapt and develop in line with our society's progress e.g. the right to private life has helped people challenge the use of CCTV cameras, even though these weren't around in 1950 when the rights were first written. We've also seen, for example, how the right not to be treated in an inhuman or degrading way has been found to mean that some people who would otherwise be destitute are entitled to housing and financial support. Cases like this demonstrate that even economic, social and cultural rights that are not explicitly named in the HRA can benefit from its protection and, as the European Court of Human Rights has itself noted, “there is no watertight division separating” economic, social and cultural rights away from the rights in the HRA (and Convention).

However, on 22nd June 2022, the UK Government published a new Bill that would get rid of our Human Rights Act. They're calling it the Bill of Rights but it's exactly the opposite. This is a Rights Removal Bill and represents the latest step in the UK Government's plans to reduce their responsibilities to uphold the human rights protections people rely on every day across the UK. On 9th September 2022, the UK Government confirmed that the Bill has been shelved – but its future remains uncertain. If this Bill is allowed to continue – either in its current form or any other that weakens our HRA – it will put all our human rights at risk.

## How the Human Rights Act protects economic, social and cultural rights



### ICESCR Article 2: Rights Exercised Without Discrimination

How our HRA protects people from discrimination

Laurie was a 51-year old man with Down's syndrome and dementia. During a hospital stay he had a 'Do Not Resuscitate' order put on his file without him or his family being consulted. A 'Do Not Resuscitate' order, also known as DNR, DNAR or DNACPR, is an instruction to the medical team not to give medical treatment if a person's breathing or heartbeat has stopped.

The reasons written on the order by the doctor were: "Down's syndrome, unable to swallow... bed bound, learning difficulties". Their reasons were based not on a clinical analysis of chances of survival or the medical impact of attempting resuscitation but on assumptions about Laurie's quality of life. As his life was at stake, he was able to challenge this as discrimination linked to (or "piggy-backing" onto) his right to life (Article 2). He started a human rights legal case, but it was settled out of court and the NHS Trust apologised.

The law gives doctors the power to make decisions about our care but, under Section 3 of our HRA, they must interpret those laws in ways that are compatible with the human rights in the Act. However, the UK Government wants to remove this interpretive obligation, as demonstrated through Schedule 5 of the Rights Removal Bill (and explained in our Section 3 briefing). This would make it harder to challenge discriminatory decisions like the one that led to a DNAR being placed on Laurie's file.



## ICESCR Article 3: Equal Rights of Men and Women

### How our HRA protects gender equality

In 2003, environmental activist Kate Wilson met Mark Stone at a protest meeting. They started dating and lived together for two years. They split up on good terms when Kate moved to Spain. However, in 2010, Kate discovered that Mark was an undercover police officer whose job was to gather information about what protest groups were planning. He did this by taking on a fake identity and pretending to be part of the group.

The police were found to have breached Kate's rights to be free from inhuman and degrading treatment (Article 3), to private and family life (Article 8), to freedom of expression (Article 10) and to freedom of assembly and association. They also failed to protect women from discrimination (Article 14) because undercover police officers were more likely to enter into relationships with women and women were at risk of becoming pregnant so the relationships could have a greater impact on them. The police were ordered to pay Kate £229,471.96 in compensation and the UK Government commissioned the ongoing Undercover Policing public inquiry.



**Our HRA is also an essential tool for challenging the State's failures relating to violence against women and girls. In 2018, two women, survivors of rape by John Worboys, won their legal fight to hold the police accountable for**

breaching their human rights because of failures to properly investigate reports of his crimes. The UK Supreme Court confirmed that the right to be free from inhuman and degrading treatment, as set out in Article 3 of the Human Rights Act, imposes a positive legal duty to investigate reported crimes perpetrated by private individuals.

Under our Human Rights Act, public bodies like the police must take proactive steps, called "positive obligations", to protect our human rights. However, the UK Government wants to get rid of this responsibility, as demonstrated by Clause 5 of the Rights Removal Bill (and explained in our positive obligations briefing). This would make it harder for women to challenge failures to implement proper training and supervision, as in Kate's case, or to investigate serious risks, as in the Worboys case.



## ICESCR Articles 6 & 7: The Right to Work in Just and Favourable Conditions

How our HRA protects people's right to work

Arthur was a bus driver in Bradford. He worked for Serco Ltd, who provided services for Bradford City Council. Whilst he was working for Serco, Arthur was elected as a Councillor for the British Nationalist Party (BNP). After six months employment, Arthur was dismissed from work – the reasons were about his membership of the BNP, including the health and safety of his colleagues and passengers and risk the reputation of his employer. Under the rules in the UK, Arthur couldn't claim unfair dismissal because he had not been working for Serco for more than a year when he was dismissed. Whilst this waived in some cases, it wasn't for discrimination on political grounds. The Court said that the rules in the UK should be compatible with human rights, so they should create further exceptions so that people like Arthur could claim unfair dismissal on the grounds of political opinion or affiliation, when they had worked for their employer for less than one year.

**Without the obligation to interpret other laws, including employment laws, compatibly with our HRA (as would be the case under Schedule 5 of the Rights Removal Bill), it would be harder for workers like Arthur to challenge unfair dismissal.**

### How our HRA protects working conditions



Our HRA is particularly key for the protection of staff working in public bodies. For example, NHS Trusts had a positive obligation to protect the right to life of their staff by providing them with adequate PPE when they were treating patients with Covid-19. This obligation led to the inquest into the death of Mark Woolcock – an NHS worker who died of Covid – which asked whether he was appropriately protected from the virus (and ultimately concluded that he was).

Our HRA was also found to protect the right for trade unions to be consulted about significant changes to working conditions. Trade union UNISON brought a case against London Borough of Wandsworth after two of its members were made redundant. The Borough was found to have breached the Article 11 right to assembly and association by failing to consult UNISON over the collective redundancies and the court further confirmed that employers should consult unions on issues such as working hours and pay.

More widely, our HRA has been used to protect everyone's right to fair wages. For example, Patience was brought to the UK as a domestic worker and nanny and forced to work for little or no money and was subject to physical and mental abuse. Her 'employer' took away her passport. When Patience managed to escape with the help of a neighbour and reported her experiences to the police, they refused to take her allegations seriously and closed the case.

Human rights organisation Liberty supported Patience to argue that the police had failed to protect Patience's Article 4 right to be free from slavery or forced labour. While the Modern Slavery Act 2015 wasn't in place at the time, the police could have pursued Patience's 'employer' for criminal abuse. The police reopened Patience's case and issued her with an apology, compensation and a promise to improve training given to officers on cases like hers.

**Without the positive obligations placed on public bodies by our HRA, essential investigations like the ones into Mark's death and Patience's mistreatment may not be undertaken and important lessons and opportunities for improvement would be lost.**



## ICESCR Article 8: The Right to Form Trade Unions

How our HRA protects trade unions

Mr Wilson was a journalist at the Daily Mail and a member of the National Union of Journalists trade union (NUJ). The NUJ and the Daily Mail agreed on a collective bargaining agreement which is a contract setting out the terms and conditions that apply to all members' employment. However, Daily Mail decided to stop cooperating with NUJ and offered members an increase in pay to switch to individual agreements instead. The individual agreements got rid of the employees' right to be represented by the union in negotiations and to take part in trade union activity during work hours.

Mr Wilson decided not to sign the new agreement and stayed on the collective bargaining agreement. His salary never increased to the same level as those who signed the new agreements.

He brought a case in the UK courts, saying this was a breach of employment law but the UK courts found in his employer's favour. He then took his case to the European Court on Human Rights, which found the UK courts had failed to protect Mr Wilson's Article 11 right to freedom of assembly and association by allowing employers to use financial incentives to "induce employees to surrender important union rights".

The UK Government's plans to discourage courts from applying existing positive obligations, such as the one that required courts to uphold Mr Wilson's right to participate in a trade union, would make it harder to enforce rights protections in the UK.



It is also important to remember that many union members are public body workers who rely on our HRA to do their job effectively and support the people they work with. In their response to the UK Government's Human Rights Act Reform Consultation, UNISON said

*"Recourse to the HRA, and ultimately the ECtHR, enables our members, as service providers, to speak up and challenge poor practice or provision on behalf of service users to enable them to provide a better, HRA compliant, service. Teaching assistants, social workers and care workers are often at the front line of delivering or managing heart-breaking situations. Their ability to raise the human rights issues at play in these decisions can directly lead to important changes in policy that might otherwise be dismissed."*

They have described the Rights Removal Bill as "another ambush from the Westminster government on our basic rights, and it'll hit the most vulnerable hardest."



### ICESCR Article 9: The Right of Everyone to Social Security

How our HRA protects social security

Our HRA was used by two carers and someone receiving care to successfully challenge the discriminatory impact of the benefit cap. One carer had been evicted from her home as she was unable to keep up with rent payments due to the cap and was no longer going to be able to provide her granddaughter with vital support.

Another was very close to becoming destitute as a result of deductions to his housing benefit. The Court found the cap was in violation of all the claimants' right to enjoyment of possessions (Article 1, Protocol 1) and non-discrimination (Article 14). This was because the benefit cap did have some exemptions, but this was based on an unreasonably narrowly defined definition of household. After this judgment, people in receipt of Carer's Allowance, the underlying entitlement to Carer's Allowance or a Carer Element within Universal Credit were made exempt from the benefit cap – a decision that has had a profound impact on many carers' lives.

**Under our HRA, courts can disapply secondary legislation like the Benefit Cap Regulations if it does not respect human rights and is not required by an Act of Parliament. Through Clause 10 of its Rights Removal Bill, the UK Government has demonstrated its plans to get rid of this option, making it harder to challenge unfair and unworkable systems.**



Our HRA was also used by Steve (pseudonym), who had been living with his partner for ten years and they had two young daughters together. Devastatingly his partner, and the girls' mum, died of breast cancer in 2018. But when Steve applied for Bereavement Support Payment (BSP), it was refused because Steve and his partner were not married or in a civil partnership.

This support is worth almost £10,000 and provides vital income and security to families during an immensely difficult period.

In 2020, Child Poverty Action Group (CPAG) supported Steve and another bereaved family to challenge this. They used the Human Rights Act to argue that grieving children's needs were the same whether or not their parents were married. Co-habiting is very common in our society – the majority of babies born in England and Wales in 2021 had unmarried parents. The Court held that treating grieving families differently based on marital status was a breach of their Article 8 right to private and family life and Article 14 right to be free from discrimination. CPAG said, "Had the Rights Removal Bill been in place, it's likely we wouldn't have won this case."



Another recent challenge to BSP conditions was brought by Mr Jwanczuk, who was denied BSP following the death of his wife Suzzi. The Pensions Act says that for a person to qualify for BSP, their deceased spouse or civil partner must have paid a minimum number of National Insurance contributions or be exempt for a specified reason.

Suzzi was severely disabled and unable to work, meaning that she never paid National Insurance contributions. Mr Jwanczuk was initially refused BSP because Suzzi had not paid any contributions and was not counted as exempt. However, the Court said that the Pensions Act should be interpreted as including Suzzi in the exemptions to avoid breaching Mr Jwanczuk's rights to possessions and non-discrimination. This means the surviving partners of those unable to work throughout their working life through disability can receive BSP. Mr Jwanczuk said,



*"The case has validated Suzzi's existence as a human being."*



### ICESCR Article 10: The Right to Family

How our HRA protects families

Yolande and her children were fleeing domestic violence, and her husband's attempts to track them down as they moved from town to town across the UK. They were referred to Social Services in their borough, but social workers told Yolande that the constant moving of her children meant she was an unfit parent and that she had made the family intentionally homeless. They said that they had no choice but to place her children in foster care. A support worker helped Yolande to challenge Social Services' decision as it failed to respect her and her children's right to family life. Social Services reconsidered the issue, taking the family's human rights into account, and agreed the family would remain together, and that Social Services would help cover some of the essential costs of securing private rented accommodation.

*(BIHR human rights practice example)*

Our HRA empowers public body workers to make rights-respecting decisions that support the people they work with. Removing the obligation on public bodies to uphold human rights would make it harder for staff to have the courage to balance risks with rights and deliver person-centred care.

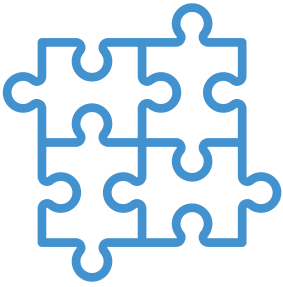
Our HRA also supported a man who was a long-term resident patient in a mental health hospital and wished to marry his partner. His consultant was unsure whether the marriage should be allowed as he felt that he may lack capacity to consent to marriage. Staff at the hospital approached this by considering whether any human rights issues were involved. They realised that not allowing him to marry could have implications under the right to respect for private and family life and the right to marry and found a family (Article 12). Once they had identified which human rights were involved, they felt better equipped to support him, and agreed that it was in his best interests to support him to marry. **In BIHR's experience of training public authorities, providers of public services often find that human rights can be a very useful tool to assist them in making decisions, and can lead to improved outcomes for service users. For example, the right to marry and to found a family is a non-absolute right and can be limited e.g. where a person does not have the capacity to consent to marry. However, the Human Rights Act requires decision-makers to consider the full circumstances before making a decision. In this case, the Human Rights Act was important in ensuring the medical staff examined the person's capacity in a way that took his human rights into consideration.**



## ICESCR Article 11: The Right to an Adequate Standard of Living

How our HRA protects standard of living

In RR v SOS Work & Pensions it was found that decision-makers should have disapplied the “bedroom tax” in the case of a disabled person that needed extra room for medical supplies because it breached the Human Rights Act right to private life (Article 8) and right to be free from discrimination (Article 14). This “tax” cuts housing welfare payments where a local authority classes a person or family as having a “spare” bedroom. This had wide-ranging reach, which failed to consider many of the reasons why someone may need an additional room. This ruling was hugely significant not just for RR but for the 130 couples with similar cases which were postponed until this case was decided.



The rights in our HRA are "living instruments", which the ECtHR has made clear throughout its judgments. This means the human rights in it need to be interpreted and applied in light of the present-day conditions. A range of elements of the Rights Removal Bill seek to remove this flexibility, for example by removing the ability to disapply secondary legislation such as the "bedroom tax", making it harder to ensure rights are fit for purpose.



### ICESCR Article 12: The Right to Physical and Mental Health

How our HRA protects people's right to healthcare

Moira was in her 40s and had suffered with severe tinnitus and deafness in one ear for three years. This caused an incessant loud noise in her head which was having a significant impact on her mental health. Moira's consultant thought that she could benefit from a cochlear implant and was willing to perform the operation but the Clinical Commissioning Group (CCG) repeatedly refused to fund it. Moira and her family were really upset by the situation. Moira felt that her life was no longer worth living, and at one stage attempted to take her own life. Using her right to be free from inhuman and degrading treatment, Moira told her GP that it would be inhuman to leave her suffering when treatment was available. The GP eventually managed to secure funding for her treatment from an alternative source.

*(BIHR human rights practice example)*

Our HRA means that each case has to be considered on its own merits. The UK Government's suggestion that public bodies should give great weight to specified factors, including financial resources, when making decisions about people's human rights (as explained in our briefing on Clause 5 of the Rights Removal Bill) would make it harder for public body staff to deliver rights-respecting care.



## ICESCR Article 12: The Right to Education

How our HRA protects people's right to education

L is a child with autism, anxiety and Pathological Demand Avoidance. He was excluded from school because of aggressive behaviour. His family brought a case to court, saying L had been discriminated against as a disabled person under the Equality Act 2010. The court initially said that the Equality Act Disability Regulations said a "tendency to physical abuse" was not protected as a disability. However, the family appealed and the Upper Tribunal then said that the Regulations should be disapplied as they breached L's Article 2 Protocol 1 right to education and his Article 14 right to be free from discrimination. As a result, schools are no longer allowed to exclude a pupil with disabilities who has unmet needs or for whom reasonable adjustments have not been made.

**Removing the requirement to interpret laws compatibly with our HRA wherever possible (as in Schedule 5 of the Rights Removal Bill) would make it harder to challenge policies like the one that led to L being unfairly excluded.**



## The Right to Take Part in Cultural Life

How our HRA protects people's right to participate in cultural life

Robert is a disabled gay man who receives support from the local authority. His support team had a policy of assisting the people they worked with to participate in social activities. Robert asked if a support worker could accompany him to a gay pub. His request was denied even though other heterosexual service users were regularly supported to attend pubs and clubs of their choice. During a BIHR training session, Robert's advocate realised that Robert could challenge the decision by invoking his right to respect for private life (Article 8) and his right not to be discriminated against on grounds of his sexual orientation.

*(BIHR human rights practice example)*

The UK Government has repeatedly asserted intentions to weaken our Article 8 rights, including in the Rights Removal Bill (as explained in our Article 8 briefing). Diminishing Article 8 rights would make it harder to challenge public body decisions like the one that limited Robert's ability to participate in cultural life.

## Recommendations

- The report to the Committee must acknowledge the fundamental role of our Human Rights Act as a foundation for protecting all human rights in the UK, including economic, social and cultural rights.
- The report to the Committee must highlight the Rights Removal Bill as the culmination of the UK Government's clear intentions to reduce their accountability to people and their duty to uphold fundamental rights including policing, protest and immigration law but also a range of other areas, including disability policy and educational provision. While the Rights Removal Bill may currently be paused, if allowed to go further, it risks destroying the foundations for protection of economic, social and cultural rights in the UK.

The British Institute of Human Rights (BIHR) is a charity working in communities across the UK to enable positive change through the practical use of human rights law beyond the courts, sharing this evidence of change and people's lived experiences to inform legal and policy debates. We work to support people with the information they need to benefit from their rights; with community groups to advocate for social justice using human rights standards; and with staff across local and national public bodies and services to support them to make rights-respecting decisions. This enables us to call for the development of national law and policy which truly understands people's experiences of their human rights. Established in 1970, with a focus on supporting a culture of respect for human rights since the passing of the Human Rights Act in 1998, we work with over 2,000 people each year.

