August 26th, 2022

CEMVO Scotland's Briefing on the Bill of Rights Bill for Second Reading in the House of Commons

Submitted to the Joint Committee on Human Rights

As a civil society organisation and strategic partner to the Scottish Government, CEMVO Scotland are alarmed at the repeal and removal of our rights proposed by the UK Government under the new 'Bill of Rights', commonly known as the #RightsRemovalBill.

cemvo SCOTLAND | Race For Human Rights

CEMVO Scotland is a national intermediary organisation and strategic partner of the Scottish Government Equality Unit. Our aim is to build the capacity and sustainability of the ethnic minority (EM) voluntary sector and its communities. Since being established in 2003, we have developed a database network of over 600 ethnic minority voluntary sector organisations throughout Scotland to which we deliver a wide range of programmes that provide capacity building support to the sector.

As a national organisation, we continually engage with the EM voluntary sector and its communities, which enable us to gather intelligence about the needs and issues affecting the sector. This helps our organisation to deliver tailored support to the sector, and to work strategically with public, statutory, and government agencies to tackle a range of prevalent issues such as race equality, social inclusion, capacity building and civic participation.

One of our core programmes at CEMVO Scotland is Race for Human Rights. The aim of this programme is to help public service providers increasingly embed race equality and human rights in their strategic planning and day-to-day functions. This will be achieved by adopting an anti-racist and human rights-based approach.

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CEMVO Scotland are extremely alarmed by the regressive nature of this Bill and the limiting effect it has on accountability measures. We firmly believe that human rights protection can only be achieved by strengthening our accountability measures, not limiting or removing them. Several aspects of this proposed bill will weaken human rights protection, such as: transferring powers from courts to Parliament; introducing a new 'permission stage' to complain about human rights violations; limiting the scrutiny of new legislation; limiting the scope of interpretation of our human rights; and furthering the notion that human rights are only for those who are 'deserving'. Furthermore, repealing HRA would alter the Scotland Act 1998 and human rights protection in general in Scotland, where the latter falls within devolved competence. If the UK Parliament chooses to do so without consent of the Scottish Parliament, this would be an affront to devolution and unconstitutional. As such, this proposed new piece of legislation is extremely dangerous for all in the UK, especially those most at risk of human rights abuses, such as ethnic minority communities.

Introduction

On the 22nd of June 2022, the UK Government published their new Bill of Rights. According to the 2019 Conservative Party Election Manifesto, they promised to 'update' the Human Rights Act 1998 (HRA). Along with other civil society organisations, CEMVO Scotland is deeply disappointed and concerned that this 'update' has shifted to a complete repeal and replacement of the HRA. Despite Independent Reviews[1] and outcries from civil society[2], the UK Government has proceeded with their plans to limit and remove our human rights, making it a #RightsRemovalBill.

CEMVO Scotland would like to reiterate that they do not support this #RightsRemovalBill and oppose any changes to our HRA.

This response is a submission of evidence requested by the Joint Committee on Human Rights regarding legislative scrutiny of the Bill of Rights Bill.

This submission of evidence should be counted as an independent response which sets out our views, irrespective of similar letters received.

1. Relationship between UK Courts and European Court of Human Rights

[1] The Independent Human Rights Act Review 2021-2022. Available at: The Government's Independent Human Rights Act Review (parliament.uk)

[2] In June 2022, 125 civil society organisations across Scotland published a joint statement calling for the Rights Removal Bill to be stopped. Available at: The Government's Independent Human Rights Act Review (parliament.uk).

Out of the 12,000 responses received for the public consultation on A Modern Bill of Rights:Human Rights Act Reform, the majority of respondents did not support the proposed reforms (approx 80-90%). Available at: Human Rights Act reform: a modern bill of rights consultation – Law Society response | The Law Society

The UK Government have rejected the recommendations by the Joint Committee on Human Rights

In the introduction of this Bill, the UK Government sets out it's reasoning for 'reforming'/removing our HRA. In Clause 1(2) it states that this new Act will clarify 'and re-balance the relationship between courts in the United Kingdom, the European Court of Human Rights and Parliament'. However as highlighted within our consultation response[3], there is no evidence to support this 're-balancing' of power. In fact, the Independent Human Rights Act Review (IHRAR) found that the existing relationship between United Kingdom Supreme Court (UKSC) and the European Court of Human Rights (ECtHR) is working well and there is no need for reform or change. Alarmingly, this establishes one of the core themes of this new Bill: moving power from the courts to Parliament in attempt to immunise Parliament from scrutiny.

Notably, this Bill then continues to state *how* it will re-balance this power through the interpretation of the rights with the European Convention on Human Rights (ECHR/Convention), although the statements are contradictory. For example, this new relationship between UKSC and ECtHR will ensure that it is the UKSC and not ECtHR that 'determines the meaning and effect of Convention rights for the purpose of domestic law'. However, the very next statement takes away said power being given to the UKSC: 'the courts are no longer required to read and give effect to legislation... in a way which is compatible with Convention rights'. What this means in reality is that there will no longer be a duty of consistent/compatible interpretation which completely repeals and nullifies Section 3 of the HRA. This is a classic case of judicial micromanagement: giving power to UKSC but in reality taking it away. Removal of Section 3 of the HRA also means that when making decisions about people's lives, public bodies will no longer be required to, or able to, apply other laws such as child protection or mental health laws in a way that respects human rights.[4]

Clause 3(1) states that the UKSC is the 'ultimate judicial authority on questions arising under domestic law in connection with Convention rights'. However, Clause 3(3) again curtails the power of UK courts by stating they cannot 'expand on the protection' conferred by Convention rights but can 'diverge from Strasbourg jurisprudence'. This will have a negative effect on the realisation of rights if UK courts cannot expand protection but can only diverge and weaken protection.

2. Relationship between UK Courts and Parliament

[3] Available at: CEMVO_R4HR_Publication_Reform-merged-compressed.pdf (cemvoscotland.org.uk)
[4] This is an example of a mother using section 3 of the HRA to challenge the inhuman treatment of her son in a mental health facility: Kirsten's Story | British Institute of Human Rights (bihr.org.uk)

As mentioned in Clause 1(2), the aim of this Bill is to 're-balance' the relationship between the ECtHR, UK courts and Parliament. However, there is no evidence to suggest that a 're-balance' is needed[5].

Clause 7 evidences this and is an example of the government's plans to remove power from the courts and place it within Parliament. Clause 7(2) specifically refers to 'appropriate balance' which, in the human rights realm, is known as the principle of proportionality and is a tool developed by the ECtHR and used by courts in their determination of a violation of qualified Convention rights. Clause 7(2) states that courts must 'regard Parliament as having decided' that an appropriate balance has been struck between legislation and Convention rights. It then states that courts must 'give the greatest possible weight' to the fact that in a 'Parliamentary democracy', decisions about how a balance should be struck are made by Parliament. This attempt to shift power from the courts to Parliament is not only unconstitutional but is worryingly authoritarian and draconian. Once again, the UK Government's reflect their plan to remove the power from the courts and place it with Parliament whilst eliminating it from scrutiny. This clause is extremely regressive and a dangerous move in terms of democracy in the UK.

Clauses 20-24, titled "Limits on powers of court", set out further restricting measures on UK courts and may be seen as another attempt to diminish human rights protection. For example, appeals against deportation can only be upheld if removal from UK would involve breach of right to fair trial "so fundamental as to amount to a nullification of that right"[6]. These clauses are another example of the contradiction very apparent in this Bill between on one hand supposedly empowering UK courts and on the other, taking that power away. Clause 24(3) states courts, "may not have regard to any interim measure issued by the European Court of Human Rights." These interim measures have been particularly important in preventing potential human rights violations for reasons already mentioned[7], and is yet another example of the UK Government seeking to avoid any scrutiny or accountability.

From a constitutional point of view, it is important to remember that it is the Government that usually controls Parliament. This enables any legislation and reforms passed through Parliament to be in line with the Government's ideologies and political motivations. This is a key feature of our democracy, however this power wielded by Government should not be a free reign immune from legal and constitutional restraint: Government should not be allowed to pass anything through Parliament without any accountability measures whatsoever. By diminishing the power of the courts and legally obliging them to give way to Parliament is a clear attempt to concentrate Government power. This is in our view unconstitutional.

[5] The Independent Human Rights Act Review 2021-2022. Available at: The Government's Independent Human Rights Act Review (parliament.uk)
[6] Clause 20(2)
[7] For example, interim measures issues against the UK Seeking to deport refugees to Rwanda

3. Universality of Rights

A core principle of international human rights law is universality, in other words, human rights are inalienable to be enjoyed by everyone equally. Thus, Clause 4 of the Bill which gives more weight to freedom of expression is, in our view, superfluous. Clause 4(1) states that UK courts must, "give great weight to the importance of protecting the right". However, this clause is undermined by numerous carve-outs that disapply this protection8, particularly in the case of an individual wanting to protest and assert their rights against the government, for example due to the new Police, Crime and Sentencing Act. Furthermore, this may be seen as an attempt to create a hierarchy favouring freedom of expression when balanced with other human rights (for example, the right to privacy), which is at odds with the universality of rights. The UK Government also fails to provide any adequate evidence as to why freedom of expression should be regarded in this way when it does not afford other Convention rights the same privilege. The Government argues that the Rights Removal Bill will strengthen freedom of expression, but by repealing the HRA (in particular section 2 and 3 which have been crucial in allowing individuals to realise their rights at domestic level), this has the opposite effect. It is CEMVO's view that the HRA has enhanced the protection of freedom of expression by providing a basis for UK case law and legislation to be developed, for example the Defamation Act 2013 which is highly influenced by the HRA. Furthermore, by requiring UK courts to depart from Strasbourg jurisprudence and creating additional barriers for individuals to enforce their rights in UK courts (i.e. through the "significant disadvantage" admissibility requirement), it is hard to see how the Bill of Rights improves protection of freedom of expression at domestic level.

Furthermore, CEMVO Scotland is particularly concerned about the disproportionate impact Clause 4 will have on ethnic minorities. The UK raised an interpretative declaration in relation to Article 4 of ICERD when ratifying that Convention which the UN's Committee on the Elimination of Racial Discrimination has repeatedly condemned. They were "seriously concerned at the sharp increase in the number of racist hate crimes" around the EU membership referendum in June 2016 which was peddled by "divisive, anti-immigrant and xenophobic rhetoric" by politicians in the UK[9], and concerned about "the negative portrayal of ethnic or ethno-religious minority communities, immigrants, asylum seekers and refugees by the media"[10]. As such, they have called upon the UK to: lift its interpretative declaration in relation to Article 4 of ICERD; to investigate and punish reported racist hate crime offences; and take effective measures to combat racist media coverage.

It is against this backdrop that CEMVO believes Clause 4 of the Rights Removal Bill is in direct contradiction to ICERD and the concluding observations provided to the UK by the UN

[8] Available at: English PEN, Article 19 and Index on Censorship, 'Bill of Rights will seriously undermine freedom of expression in the UK' (24 June 2022) https://www.englishpen.org/posts/campaigns/bill-of-rights-will-seriously-undermine-freedom-of-expression-in-the-uk/

[9] United Nations Committee on the Elimination of Racial Discrimination, CERD/C/GBR/CO/21-23, p.4 Available at: Microsoft Word - UK_COBs FINAL VERSION 26Aug16.doc (ohchr.org)

[10] ibid

Committee. Supposedly strengthening freedom of expression in this Bill and calling upon UK courts to give that right "great weight" will provide a free pass for racist politicians and media outlets to argue that their freedom of expression outweighs the right to non-discrimination held by ethnic minorities. This argument, however flawed, would theoretically be consistent with the approach taken in the Bill by the UK Government which seeks to create a hierarchy of rights placing freedom of expression above other Convention rights. Again, CEMVO reiterates that this directly contradicts the universality of human rights and international human rights law. Thus, any attempt to bolster freedom of expression over other rights is likely to have a negative and disproportionate impact on ethnic minorities, which CEVMO wholeheartedly condemns.

Clause 6 continues with Government views that human rights are not for the 'underserving' such as those serving custodial sentences. This clause states that those serving custodial sentences who allege human rights breaches, courts must give 'greatest possible weight' to public protection in Article 2,3,4 and 7 cases. This does not reflect the universality of human rights and once again CEMVO Scotland will remind the UK Government that human rights are for all individuals. As previously noted in our consultation response[11], no individual should be exempt from human rights protection. These are basic rights and freedoms that every individual requires in order to live a life of dignity and respect. There are noticeable exemptions to this rule, for example if you commit a crime, the state can interfere in your right to liberty by placing you in prison. Again, the interference of your right must be legal, proportionate and pursuant of a legitimate aim. These are very important guarantees when interfering with rights, it ensures that state cannot have a draconian rule over the people. To propose that some individuals do not have the same rights as others based on your past history or behavior is unjustifiable, outrageously regressive and against the law. An example of how this would look in reality would be a young person who has experienced significant Adverse Childhood Experiences (ACES) and trauma, and due to experiencing one or more ACES has been put on an order, a tag or even in a young offenders' institute for a crime. Does this young person not 'deserve' their human rights? This is a dangerously regressive approach by the UK Government. This displays the UK Governments continuous disregard for international law and standards.

Clause 8 of this Bill focuses specifically on Article 8, right to private and family life and deportation. Just like the public consultation of this Bill, this clause suggests that Article 8 cases are being 'overused/abused' by persons facing deportation. Section 1 of this clause states that in relation to deportation cases, although framed around a scenario of a 'foreign criminal' that 'no deportation provision may be found to be incompatible with the right for private and family life'. CEMVO Scotland are alarmed by this section of the Bill as it breaks international law and UK treaty obligations such as the Refugee Convention. Furthermore it amplifies the Government's view that some individuals are 'less deserving' of rights than others. Section 3 of this case also uses subjective terminology such as 'exceptional' and 'overwhelming' harm and fails to recognise the experience of the individual who has experienced a violation of their right to private of family life and reverts back to an outdated system of 'proving' your hardship or suffering to decision-making. It fails to put a person and an acknowledgement of their experience into legislation or policy making. Finally, this clause

[11] Available at: CEMVO_R4HR_Publication_Reform-merged-compressed.pdf (cemvoscotland.org.uk)

fails to recognise the rights of the child of the 'deportee' as it constrains their right to private and family life which is central to the UNCRC.

4. Interim measures

Furthermore, CEMVO Scotland are extremely concerned that Clause 1(3) builds on the narrative that the bill takes power away from the ECtHR and UKSC and gives it to Parliament. It states that, 'the judgements, decisions and interim measures of the ECtHR are: a) not a part of domestic law and b) do not affect the right of Parliament to legislate'. In recent weeks we have seen the importance of judgements, decisions and interim measures when the flight carrying asylum seekers from the UK to Rwanda was halted due to an interim measure from ECtHR[12]. Interim measures are only granted by the ECtHR when there is a real risk of 'irreversible harm' to ensure that vulnerable individuals are protected, such as the case of sending UK asylum seekers to Rwanda and the measures served on Russia in June 2022 to prevent the execution of two British prisoners of war. In the case of sending UK asylum seekers to Rwanda, the importance of these measures cannot be underestimated as they ensure international law will not be breached[13] and vulnerable individuals are protected from harm[14]. Not only does this Clause 1(3) seem reactionary to recent ECtHR decisions, but section 'b' seeks to remove the accountability process for Parliament, insulating it to legislate in a way that disregards international law (ECHR).

5. Accountability: public bodies/authorities

Clause 5(2) this Bill once again proscribes less accountability to violations of human rights. In the case of a complaint of a human rights violation, and when interpreting this right, this Bill states that 'more weight' should be given to the public authority if such complaint may interfere with its functions, rather than the complaint of violation in itself. This section also states that courts should avoid an interpretation that interferes with public authorities using their 'own expertise' and 'professional' judgement. These are not only subjective terms but are also deeply concerning as it again removes any accountability by taking power away from the courts: public authorities could state that actions were made pursuant to their 'own expertise' and the courts would then have to defer. Additionally, CEMVO Scotland are increasingly concerned around giving more powers to public authorities while removing scrutiny/accountability measures when numerous bodies of such have notably scorned for their lack of expertise in their functions and findings of institutional racism within such structures, most notably the MET Police only recently being placed on 'special measures' due to their numerous systematic failures.

[12] N.S.K. v. the United Kingdom (application no. 28774/22, formerly K.N. v. the United Kingdom.

[13] The 1951 Refugee Convention

[14] These measures are only placed in exceptional circumstances where the is a real risk of irreversible harm. N.S.K. v. the United Kingdom (application no. 28774/22, formerly K.N. v. the United Kingdom),

CEMVO Scotland are shocked at this Bill's proposal to remove 'public inquiries or other investigations' in relation to positive obligation human rights complaints to public authorities contained in Clause 5(2)(d). Not only have these tools been integral to our democratic society for decades but their power in achieving social justice is ever more pertinent in our society today, such as the inquiry into the death of Sheku Bayoh while in custody[15] or the COVID-19 Care Home Inquiry[16].

The implications of shifts in power come into direct effect when reading Clause 12 regarding acts of public authorities (similar to Section 6 of HRA). While this clause maintains that public authorities must act in accordance with Convention rights, such obligation is undermined due to the provisions within this Bill which constrains UK courts' capacity to interpret the Convention coupled with the removal of section 3 of the HRA (the obligation of consistent interpretation). Together with earlier clauses, this provision diminishes the overall scope of the duty on public authorities.

6. Access to Justice

By removing the accountability measures mentioned above, the UK Government will in fact not 'bring rights home' which is at the heart of their manifesto but instead results in more people looking for redress at the ECtHR in Strasbourg, France. This is long and costly trip to ECtHR will have a disproportionate impact on those who already face existing barriers to justice. CEMVO Scotland are deeply disappointed of this clause weaking human rights protection rather than strengthening it, and indeed perfectly exemplifies the fact that this new piece of legislation is not an 'update' of our human rights but in fact at Rights Removal Bill.

CEMVO Scotland are increasingly concerned about what appears to be one of the main aims of this Bill, to remove or limit state accountability or scrutiny. Clause 14 does not allow an individual who is 'overseas' to bring a human rights claim against a military operation or military presence. Not only does this go against established ECtHR and UKSC case law regarding the extraterritorial applicability of the ECHR[17] but is extremely dangerous and regressive. Furthermore, it fails to recognise the lessons so clearly learned from the invasion of Iraq by both the UK and USA. This can be seen as another example of the UK Government failing to respect the universality and indivisibility of human rights, applicable at all times and not just at its choosing.

CEMVO Scotland once again reiterates[18] that adding another permission stage to accessing your right to redress (Article 13) under the pretext of experiencing 'significant disadvantage' is regressive, misleading and against the very nature of human rights protection. Clause 15 of

[15] More information regarding the public inquiry is available at: Welcome | Sheku Bayoh Inquiry
[16] More information about the inquiry is available at: COVID-19 Inquiry - gov.scot (www.gov.scot)
[17] Al-Skeini v UK (2011) 53 EHRR 18 and Smith v Ministry of Defence [2013] UKSC 41)
[18] ibid (3)

the Bill is misleading as it negates to include crucial information for a respondent- that a permission stage already exists. This is called a 'merit stage' that exists for a legal case in the UK. If a case is not actually human rights related or it does not have legal merits, then the Courts will not let it progress to a full case. The Clause continues in section 3(b) by stating that the person must only be granted permission to redress if they have suffered a 'significant disadvantage'. As mentioned above, this caveat relies on an outdated model of 'proving' your hardship and does not actually recognise some of the policy progress under this government in recognition of a person's experience. For example, after much criticism[19] the Home Office introduced a DSSH model[20] to determining the validity of a person's claim in relation to asylum claims based on sexual orientation. This model has also been introduced in Sweden and New Zealand. This shift represents a step forward away from the previous 'prove' model. It would be regressive and damaging for the UK Government to introduce another permission stage that requires an individual to 'prove' their hardship and then prove that it is 'significant'.

This clause of the Bill fails to recognise the experience of the individual and the barriers and potential trauma they have faced and detracts from the fact that human rights are to protect people, human beings. Most concerningly, this clause goes one step further than in the public consultation as it states that if a person is refused permission under this section they 'may not appeal to any other court against any decision made on an appeal'. This further limits a person's right to redress and weakens accountability measures.

7. Regression

CEMVO Scotland are equally concerned about Clause 2 of this Bill. While this clause may seem to confer the same rights as currently provided in the HRA and could be seen as maintaining the same standard of human rights in the UK, this is superficial. The same rights may be adopted within this new Act but in reality their interpretation, applicability and enforceability will drastically change for all, having a disproportionate impact on those most at risk, including ethnic minorities.

Clause 3 of this Bill contradicts one of the core principles of human rights law, non-regression. Clause 3 (2)(a&b) places an emphasis on the exact 'text' of the Convention on Human Rights (Convention/ECHR) right, in question, and the 'preparatory work' of the Convention. One of the heralded features of the Convention is that it is a living instrument, i.e. the Convention is interpreted and developed by the ECtHR in light of present-day conditions. CEMVO Scotland raised concerns around this interpretation in our consultation response and will reaffirm our view that not recognising the Convention as a living instrument does not reflect the fact that

[19] Where individuals were having to prove their sexuality by asking private and degrading questions about their sexual preferences. Available at:
Gay asylum seekers face 'intrusive' sexual questions | Immigration and asylum | The Guardian
[20] Difference, Stigma, Shame, Harm

society evolves and changes over time and therefore the application of laws must adapt to current circumstances.

8. Positive Obligations

CEMVO Scotland are increasingly concerned about the regressive nature of this Bill. This is exemplified in Clause 5 of the Bill, discussing positive obligations. Positive obligations are steps that the state must take in order to fulfil our basic human rights. Clause 5 starts by stating that any further positive obligations on states (as a result of Strasbourg jurisprudence) will not be adopted by UK Courts and therefore public authorities will not be required to comply with this positive obligation. This is extremely concerning as positive obligations are used as tools for frontline staff to take action and protect people who may be at risk of serious harm or loss of life (DSD v United Kingdom)[21] . Without a clear duty, frontline staff will have to navigate through numerous and complex legislation and policies leaving decisions or policy creation at risk of violating human rights[22]. These dangerous changes to positive obligations will allow for each individual public authority to decide if protecting human rights fits into their own policies and strategic planning. This is in direct contrast with human rights law- rights and freedoms are for every individual and are the basic, minimum level of treatment required. Human rights protection should not be dependent on where you live, this in fact exacerbates and already existing protection gap of the 'postcode lottery'.

Not only do these new measures limit the protection of human rights through the interference of the accountability process, this Bill goes one step further and limits a public authority to comply with positive obligations on certain groups of society. CEMVO Scotland is deeply concerned that this Bill wants to limit human rights protection by stating that if such complaint required 'the police to protect individuals who are involved in criminal activity'. This is a blatant disregard for those most vulnerable in our society, specifically those who are involved in drug trafficking, human trafficking, modern slavery and people who have experienced Adverse Childhood Experiences. CEMVO Scotland reiterate our views on this notion of 'underserving' rights-holders in our consultation response.

This section of the Bill also states that where a positive obligation interferes or 'undermines' 'the police's ability to determine their operational priorities', the obligation is not upheld. In reality what this means is that in situations where the police are required when exercising our right to protect us, e.g. freedom of expression during a protest, this protest could potentially not be allowed to take place as the police could state that it 'interferes with their operational priorities'. This is a dangerously regressive clause within this Bill but not surprising given the new Police and Sentencing Act which received royal assent April 2022. Once again CEMVO Scotland will reiterate that freedom of expression is a fundamental and basic human rights

[21] Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents) [2018] UKSC 11 On appeal from [2015] EWCA Civ 64

[22] For example, the Scottish Human Rights Commission supported a group of residents in Leith living in poor housing conditions to advocate for their right to adequate standard of living. housing-project-summary-vfinal-june-2019.pdf (scottishhumanrights.com), Eweida and others v. the United Kingdom

we all have and can only be interfered with if it is 'pursuant of a legitimate aim, the least restrictive interference and legal. Introducing this Bill into domestic legislation would cross the final hurdle for the government in their aim to restrict this right. Finally, freedom of expression is a right that also is used for societal change and to raise awareness of issues that society are concerned about or to promote social change such as the Sarah Everard demonstration and the Black Lives Matter demonstrations across the world. The new Rights Removal Bill can be seen interfering with civil and political rights which the UK Government wishes to reassert, and thus in direct contrast with the Government's own aims.

9. Impact on Devolution

It is CEMVO Scotland's view that repealing the HRA without consent of the Scottish Parliament is an affront to devolution which will propel the UK into unchartered constitutional territory. The HRA and the Scotland Act 1998 (hereafter, "SA 1998") work in tandem to enhance human rights protection in Scotland, where the former is built into the latter. As a result of the HRA, it allows people in Scotland to seek redress in a more accessible, timely and affordable way than was possible before incorporation of the ECHR rights into domestic law. The HRA has been an invaluable tool to ensure public bodies and duty bearers in Scotland respect Convention rights but has also acted as a safety net when things go wrong.

It is well established that Acts of the UK Parliament are non-justiciable in UK courts due to the constitutional principle of parliamentary sovereignty. As a devolved institution, the Scottish Parliament does not enjoy the same legislative competence and can only legislate on devolved matters. Any Act of Scottish Parliament out with this conferred legislative competence, i.e. relating to matters reserved to the UK Parliament, is simply "not law"[23]. This includes Convention rights in the ECHR[24], but not 'human rights' overall. It is worthwhile noting that the principle of the SA 1998 and overall spirit of devolution is that if a matter is not listed as reserved in the SA 1998, then it is devolved. Therefore, given that human rights *overall* are not listed as a reserved matter either in section 29 or Schedule 5 of the SA 1998, CEMVO Scotland agrees with the Law Society of Scotland that human rights fall within devolved competence of the Scottish Parliament[25].

CEMVO Scotland argues that in order to legislate within the devolved competence of human rights in Scotland, consent would be needed from the Scottish Parliament. An attempt to repeal and replace the HRA with the Rights Removal Bill (which subsequently alters the SA 1998) means the UK Parliament must obtain this consent via a legislative consent motion. Legislative consent motions are enshrined in the Sewel Convention which states that the UK Parliament will "not normally" legislate in devolved matters without consent of the relevant

[23] S29(1), Scotland Act 1998
[24] S29(2)(d), Scotland Act 1998
[25] Available at: House of Lords - The UK, the EU and a British Bill of Rights - European Union Committee (parliament.uk)

devolved institution[26]. This has been entrenched in Section 2 of the Scotland Act 2016. Although the Sewel Convention is non-justiciable given that conventions are creatures of the political world[27], we agree with the UK Supreme Court that the decision to codify this in UK law was to recognise the convention as a "permanent feature of the recent devolution settlement"[28]. As such, it is true that the UK Parliament retains legal sovereignty to alter human rights protection in Scotland by repealing the HRA but this does not imply that it is free from any political or constitutional restraint[29].In fact, to repeal the HRA and replace it with the Rights Removal Bill without consent goes against political constitutionalism in the UK and the foundations of devolution which recognise that political power in Scotland rests with the Scottish Parliament.

Even if the UK Parliament sought a legislative consent motion from the Scottish Parliament via the Sewel Convention, it is highly unlikely that consent would be given. The Scottish Parliament backed the HRA by 100 votes to 10 in 2014 when the UK Government's plans to repeal the HRA were debated[30]. More recently, Ministers of the Scottish Government and Welsh Government issued a joint statement on HRA reform noting that, "it would be a matter of the gravest concern if the UK Government was to contemplate acting in this area without the agreement of all of the UK's national legislatures".[31] It is also worthwhile noting that the Scottish Government has chosen to chart a different path regarding human rights protection and will soon introduce the Human Rights (Scotland) Bill to the Scottish Parliament. The new Bill aims to make Scotland "a world leader in human rights"[32] and will incorporate four international conventions into Scots Law to enhance protection of: economic, social and cultural rights; women's rights; disability rights; and rights for ethnic minorities. Furthermore, the Bill will recognise environmental rights and will increase protection for LGBTQ+ individuals. Thus, it is very evident to CEMVO Scotland that there is a stark difference in the human rights agenda north and south of the border and extremely unlikely that a legislative consent motion would be granted by the Scottish Parliament.

In sum, it is CEMVO Scotland's strongly held view that an attempt to repeal the HRA and replace it with the Rights Removal Bill requires consent, without which is politically and constitutionally bankrupt and an affront to the foundations of devolution.

[26] Available at: https://www.parliament.uk/site-information/glossary/sewel-convention/
[27] *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [146].

[28] Ibid, [148].
[29] For example, the rule of law which is "the ultimate controlling factor on which our constitution is based" as per Lord Hope in *Jackson v Attorney General* [2005] UKHL 56, [107].
[30] Evidence provided to the House of Lords Select Committee, available at: House of Lords - The UK, the EU and a British Bill of Rights - European Union Committee (parliament.uk)
[31] Available at: Joint statement on Human Rights Act reform - gov.scot (www.gov.scot)
[32] Available at: https://www.gov.scot/news/new-human-rights-bill/

Conclusion

To conclude, CEMVO Scotland firmly oppose this #RightsRemovalBill and urges the new UK Cabinet to strongly reconsider enacting this Bill.

It is of CEMVO Scotland's opinion that the proposed changes to human rights protection within this Bill is based on unfounded 'need for reform' exemplified by the suggested changes to the relationship between the ECtHR and UKSC. This demonstrates that this Bill is more aligned to political objectives rather than public need, evidenced by the reactionary changes to the protection that interim measures offer in domestic legislation for those at 'risk of irreversible harm'.

One of the core themes of this new Bill is moving power from the ECtHR and UK courts to Parliament. CEMVO Scotland believes the real purpose of this Bill is to concentrate Government power in Parliament in an attempt to immunise it from scrutiny and accountability. In doing so, it is acting unconstitutionally.

Furthermore, this Bill intends to limit not only judicial scrutiny of Government in Parliament, but also limit scrutiny of public authorities. Public authorities make decisions and implement policies that affect our everyday lives, thus if there is a removal of accountability of these bodies, such as the proposed removal of public inquiries, there is a real risk of regression in human rights protection and also violation of basic human rights.

Provisions in the Bill also directly contradict the universality of human rights and international human rights law. The principle of universality applies both to rights itself and to rights-holders. All rights are interdependent, interconnected, indivisible and all rights-holders should have access to these rights as they are basic fundamental freedoms and rights that are required to live a life of dignity. Any interference with this principle will have a disproportionate negative impact on those most at risk in, including EM communities.

CEMVO Scotland recognise that there are already significant barriers to access to justice in the UK that we believe this Bill will exacerbate due to the outlined inclusion of a new permission stage. Once again CEMVO Scotland are disappointed that the proposed changes are not evidence-based and disregards the existing admissibility criteria of the UK Court systems.

The changes to human rights protection included in this #RightsRemovalBill are regressive. It reverts to an outdated mode of 'proving' your hardship or disadvantage to access justice. The Bill also fails to take into account a basic principle of human rights law that the Convention is a living instrument and is not confined to the original text.

Another example of the Bill's regressive nature is its failure to recognise new positive obligations that arise from the Convention. This is concerning given that positive obligations

have been a useful tool to tackle societal issues and for frontline staff, who without which would be required to navigate a complex legal and policy framework.

Furthermore, it is CEMVO Scotland's view that any attempt to repeal the HRA and replace it with the #RightsRemovalBill will not only alter human rights protection in Scotland which falls within devolved competence but will also alter the Scotland Act 1998 itself. This will require consent from the Scottish Parliament, without which is unconstitutional and contrary to the devolution settlement.