

# Free Speech Union briefing

## The Bill of Rights

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Following a consultation procedure to which the Free Speech Union [contributed](#), the Government has introduced a [modern Bill of Rights](#) (BoR/"the Bill") in the form of a Parliamentary bill. If passed, it would repeal the Human Rights Act 1998 (HRA) and introduce a new framework for domestic implementation of the European Convention on Human Rights (ECHR). The Free Speech Union (FSU) is pleased that the Government clearly took into account several of our recommendations and intends to re-establish freedom of speech as the foundation of all other rights. However, we have reservations about the way in which the Government proposes to safeguard that right. The Bill's proposed exceptions to the application of the right, and the effective immunity from scrutiny granted to legislation are areas for potential improvement.

### **Background**

The ECHR is an international initiative wholly separate from the European Union which was spearheaded by the United Kingdom as a way to safeguard liberty in Europe in the wake of World War II. Freedom of expression was heralded as the "[the touchstone of all freedoms](#)" by the authors of the ECHR and took the form of Article 10:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The text goes on to specify that this right is not unqualified, i.e., restrictions may be placed on it by state legislatures if it is "necessary in a democratic society" to do so – for example, for the purposes of "protecting the rights of others" or "national security". The ECHR's contracting states vary in history, culture and custom and it is therefore expected that they will each strike a different balance when deciding what is "necessary in a democratic society". It is expected that the European Court of Human Rights (ECtHR) should grant a healthy "margin of appreciation" to States in deciding how to strike this balance. The ECtHR's role is, as recently affirmed, subsidiary to that of contracting states and the Court should strive only to **maintain the parameters** within which they may diverge, giving them "a wide margin of appreciation", without eroding the fundamental freedoms upon which European liberal democracies stand (See: [Preamble of the ECHR; Protocol 15](#)).

To that end, in the context of Article 10, the ECtHR has many times reiterated that because freedom of expression is an "essential foundation"

of all democratic societies, exceptions to the right must be “narrowly interpreted” (*Sunday Times v The United Kingdom (No.1)*, App. No. 6538/74 (1979)). Hence, when appropriate, the national margin of appreciation must be circumscribed – for example, in the interest of ensuring and maintaining a free press (*Case of Du Roy and Malaurie v France*, App. No. 34000/96 (2000)).

### **Domestic implementation**

One way in which contracting states may assert their own “balance” is via domestic legislation that makes an international agreement such as the ECHR part of the law of the land. In the UK, this was achieved via the Human Rights Act 1998 (HRA), which granted individuals the opportunity to assert their ECHR rights before domestic courts which were tasked with adjudicating such matters according to the rules embedded within the HRA and within the parameters set by the ECtHR.

Parliament did provide some direction within the HRA about how the balance should be tipped in cases relating to freedom of expression: Section 12 says that domestic courts must have “particular regard” to the right to freedom of expression when considering an action which might encroach on that right (e.g., an injunction).

Despite this direction, the domestic judiciary has often failed to give freedom of expression adequate weight when called upon to adjudicate on an issue which touches upon this important right. In addition, the ECtHR itself has shown a worrying tendency to prioritise Article 8 ‘personality rights’ (privacy, reputation and personal autonomy) over freedom of expression. In light of this, [The Free Speech Union’s Submission](#) to the consultation regarding the Bill of Rights asked the Government to emphasise the paramountcy of freedom of expression whenever the right needs to be balanced against other rights, and to direct the judges to expand the remit of Article 10 so that it can be applied in all circumstances.

### **The Bill**

#### Status

The Free Speech Union (FSU) is pleased that **the Bill clearly intends to take on board this key recommendation** by way of clause 4 of the Bill, which provides that, when a question arises before a domestic court in connection with freedom of speech, “**great weight**” must be given to the protection of the right.

### Interpretation

Additionally, while section 3 of the HRA directed judges to make sure legislation “so far as it is possible to do so” is compatible with *all* ECHR rights, **the Bill goes further than this, as we recommended, and makes freedom of speech a paramount concern**, by providing at clause 4 that the right to free speech alone merits “great weight” when judges are interpreting legislation.

### Application

Finally, we are pleased that the domestic expansion of the right to privacy (Article 8 of the ECHR), which we wrote about at length [in our submission](#), will be restrained by this Bill, which directs domestic courts not to expand rights beyond the parameters set by the ECtHR (clause 3(3)(a)). On the other hand, however, in relation to freedom of speech the Bill *does* explicitly allow judges to extend the scope of the right beyond the parameters set by the ECtHR (clause 3(4)). Read alongside clause 5, which only prohibits the application of positive obligations on public authorities, this Bill seems to open the space for an argument that Article 10 obligations should be extended to private employers and social media platforms (“horizontal application”). The FSU pushed for this [in our submission](#) as we see cases every day relating to disciplinary action for legitimate and lawful speech in private companies.

In addition, the Bill will protect freedom of speech by steering judges away from ECtHR case law where the Court has expanded other rights, principally the Article 8 right to privacy, at the expense of freedom of speech. It does this by directing judges’ attention away from ECtHR judgments, which often depart radically from the agreed text of the Convention, and back toward the Convention text itself.

### Issues

#### 1) Definition

The Government’s commitment to freedom of speech is placed in doubt, however, by the fact that the above “enhanced protection” provisions only apply to a curtailed instance of the exercise of freedom of speech. Specifically, Section 4 of the Bill relates to “free speech” as opposed to “freedom of expression” (which can include artistic expression), and establishes that the enhanced protection offered by clause 4 only applies in circumstances where the question before the judges relates to someone’s

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ability to impart opinions, information or ideas (clause 4(2)). The right to hold or receive opinions, information or ideas is excluded. This is concerning for several reasons. Firstly, this divergence from Article 10 rights could lead to case law that prioritises one type of free speech above another. This brings into question the whole principle upon which clause 4 stands: the paramountcy of the right to freedom of expression. Secondly, on a more practical level, we are concerned that this blunting of the Article 10 right anticipates the censorship enabled by the Online Safety Bill, which will be harder to challenge by appealing to the ECHR which includes a right to “receive information”.

## 2) Exceptions

We are also concerned that the enhanced protection for free speech explicitly doesn't apply in circumstances relating to criminal matters, confidentiality agreements and the right to enter or remain in the UK (Section 4(3)(a-c)). In fact, **these are circumstances where the paramountcy of free speech should carry the most weight** if the principle is to have any legitimacy. Police should be on notice that when they decide, for example, to make an arrest on suspicion of criminal harassment under s.2 of the Protection from Harassment Act 1997 that they must give “great weight” to the alleged perpetrator's freedom of expression. Such direction might avoid [shocking cases like that of Dr Pal](#): she was handcuffed and detained on the basis of the above provision, with the arresting officers believing that the right to freedom of expression carries no weight when it “unfairly affects [someone's] privacy”.

Equally, a blanket ban on application of the enhanced free speech protection to all confidentiality agreements is undesirable. The FSU knows from experience that confidentiality clauses in employment agreements are often weaponised to silence ordinary people from speaking out about the detriments they suffer (e.g. distressing internal procedures, dismissal, bullying) as a result of using politically incorrect but legally permissible language in the workplace. Judges should be instructed to give great weight to freedom of speech in interpreting whistleblowing legislation.

Finally, the FSU believe clause 4 should apply to determinations made relating to the right to enter or remain in the UK. Again, this is a question of consistency. The UK should distinguish itself as a country which welcomes free thinkers and “heretics” such as Karl Marx and Ai Wei Wei.

## 3) Separation of powers

Considering the vast amount of cases in our domestic courts that have

demonstrated improper judicial activism, we understand the Government's impulse to restrain the judiciary. We are concerned, however, that in attempting to do this the Bill infringes on the proper separation of powers and thereby hobbles courts when it comes to scrutinising legislation. Specifically, clause 7(2) states that courts must "regard" an Act of Parliament as having struck an appropriate balance between different rights or policy aims and "give the greatest possible weight" to the principle that in a Parliamentary democracy such a balance is best struck by Parliament.

That must be right as a matter of democratic principle – and it may be right too with regard to the limited institutional competence of the courts as compared to Parliament. However it raises uncomfortable questions. Will a court be compelled to find that the Online Safety Bill strikes the appropriate balance between freedom of speech and the right not to be 'harmed'? Perhaps the clause 4 requirement to give "great weight" to freedom of speech will save the day, but that is not clear. What will happen when a court has to consider two separate Acts of Parliament that strike *conflicting* balances – say the Equality Act 2010 versus the forthcoming Higher Education (Freedom of Speech) Bill? Will the court have to find that Parliament is right even when it disagrees with itself? It is unlikely that any court would be willing to come to such a strikingly absurd conclusion – this comes close to saying that Parliament is not just supreme but also infallible. The Bill should do more to guide judges in how to avoid this absurd conclusion.

Clause 7(3) seems to render public decisions essentially unreviewable as well, although its meaning is unclear. On one reading of its ambiguous wording, any public authority trying to comply ("so as to comply") with a statutory duty will largely be exempt from judicial review. Parliamentary sovereignty is the cornerstone of our constitution, but parliament does not legislate in a vacuum. As [posited by Lord Steyn in 1998](#), "Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law." Such a democracy does not operate on majority rule only, but rather recognises that Parliamentary democracy is underpinned by fundamental rights as set out in the common law for centuries and, more recently, in the ECHR. An overreach such as that proposed in clause 7 will dilute the meaningful exercise of these rights and fundamental freedoms and render the Bill's enhanced free speech protections barely enforceable. In light of that, we urge the Government to amend and clarify this clause.

