

State of the Rule of Law in Europe in 2022

Reports from National
Human Rights Institutions

Great Britain



Great Britain

Equality and Human Rights Commission

Independence and effectiveness of the NHRI

International accreditation status and SCA recommendations

The Equality and Human Rights Commission (EHRC) was re-accredited with A-status in November 2015 (1).

The SCA was of the view that the selection and appointment process currently enshrined in the Equality Act 2006 was not sufficiently broad and transparent. The SCA encouraged the EHRC to advocate for the formalization and application of a process that includes requirements to publicize vacancies broadly; maximise the number of potential candidates from a wide range of society groups; promote broad consultation and participation in the process; assess applicants on the basis of pre-determined objective criteria; and select members to serve in their individual capacity.

Additionally, the SCA encouraged the EHRC to advocate for changes to its enabling law to provide for remunerated full-time members in its decision-making body, with a term of between three and seven years, with an option to renew once. Moreover, it encouraged the EHRC to advocate for appropriate amendments to its enabling law in order to ensure the adequacy of the NHRI's funding and safeguard its financial independence.

While acknowledging the activities of the EHRC to encourage ratification or accession to international human rights instruments, the SCA encouraged the NHRI to advocate for changes to its enabling law to explicitly mandate it with this responsibility.

Additionally, the SCA acknowledged that EHRC Commissioners can only be dismissed for a very narrow range of reasons, and that the dismissal could be challenged by judicial review or in an employment tribunal. However, the SCA emphasized that, in order to address the requirement for a stable mandate, which is important in reinforcing independence, the enabling law of a NHRI must contain an independent and objective dismissal process similar to that accorded to members of other independent State agencies.

Finally, the SCA noted that it would be preferable for the EHRC to have the explicit power to table reports directly in the legislature, rather than through the Executive.

References

- (1) <https://www.ohchr.org/Documents/Countries/NHRI/GANHRI/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf>

Regulatory framework

There is no single UK-wide NHRI and EHRC operates in the UK's devolved context. EHRC is the NHRI and NEB for Great Britain, with its human rights powers in Scotland extending to reserved matters that fall within the competence of the UK Parliament. The Scottish Human Rights Commission (SHRC) has a mandate to promote and protect human rights in Scotland that fall within the competence of the Scottish Parliament. The EHRC can work on specific devolved matters with the consent of SHRC.

The national regulatory framework applicable to the Equality and Human Rights Commission has not changed since last year. The British NHRI continues to function on a legislative basis as there is no written Constitution in the UK. The creation of the EHRC was by primary legislation enacted by the UK Parliament. The EHRC has the mandate to contribute to access to justice for individuals, including through providing legal assistance to individuals, strategic litigation before courts, and awareness-raising.

The EHRC recognises that its independence, effectiveness and efficiency as a National Human Rights Institution (NHRI) and national Equality Body could be further strengthened in line with the Paris Principles. One key outstanding issue is that the Commission's equality and human rights enforcement powers are asymmetrical. While it can provide legal assistance to individuals in the UK's Equality Act (2010) proceedings, the Commission cannot do so in human rights cases unless the claimant is also complaining of a breach of the Equality Act (2010). There have been several instances where the EHRC has been unable to provide financial support for a meritorious and potentially strategic case because of this limitation on the cases that can be funded. Similarly, although EHRC has the power to undertake an investigation where it is suspected that an organisation has committed an unlawful act under the Equality Act (2010), this power does not extend to human rights breaches. The lack of an investigation power limits the EHRC's ability to tackle suspected breaches of human rights law.

A further limitation to the EHRC's power to undertake an investigation is that it cannot compel the disclosure of evidence without first triggering a formal process, with all the cost and risk that this entails. The power to compel the disclosure of evidence before triggering a formal investigation process would improve EHRC's enforcement powers as it would enable EHRC to issue an unlawful act notice or apply for an injunction or interdict in

cases where a full-blown investigation would be disproportionate, or to establish whether an investigation is merited.

References

- <https://www.legislation.gov.uk/ukpga/2006/3/section/28>

Enabling and safe space

The institution takes the view that the relevant state authorities have good awareness of the EHRC's mandate, independence and its role. The British NHRI has adequate access to information and to policy makers and it is involved in all stages of legislation and policy making with human rights implications.

There are legal measures in the EHRC's enabling act (Equality Act 2006) which, in specific circumstances, require addressees of the EHRC's recommendations to provide a timely and reasoned reply. This includes instances where: an unlawful act notice has been issued where there has been a breach of the Equality Act 2010 (section 21); an organisation has entered into a legal agreement with EHRC to not commit a specified unlawful act or to refrain from specific actions (section 23); or where a compliance notice has been issued relating to the Public Sector Equality Duty (section 32). In the event that addressees fail to adhere to the requirements to respond to the recommendations, there are effective legal mechanisms in place to tackle this and the EHRC can apply to the relevant court for an order requiring the addressee to reply (section 24 of the Equality Act 2006). (1)

The measures necessary to protect and support the EHRC, the Chair person and Commissioners, and staff against threats and harassment and any other forms of intimidation (including SLAPP actions) are in place. The UK's Protection from Harassment Act 1997 provides for protection of persons against threats and harassment and any other forms of intimidation (there are no specific measures relating to staff of NHRI). An injunction (i.e. "a restraining order") can be applied for from the Courts where required. The UK also has protection against 'vexatious litigants'. Vexatious litigants are individuals who persistently take legal action against others in cases without any merit. These individuals are forbidden from starting civil cases in courts without permission. However, there are no formal provisions or measures to prevent the targeting of SLAPP actions aimed at the NHRI, the head of the institution or staff members. (2)

References

- (1) <https://www.legislation.gov.uk/ukpga/2006/3/contents>
- (2) <https://www.legislation.gov.uk/ukpga/1997/40/introduction>

Developments relevant for the independent and effective fulfilment of the NHRIs' mandate

The EHRC continues to engage with Government departments, Parliamentary Committees, civil society, other stakeholders and the media, to advocate for changes to our arrangements to enhance our mandate, increase our effectiveness and efficiency and strengthen compliance with the Paris Principles.

For example, the EHRC has been engaging with its sponsor department, the Equality Hub, part of the Cabinet Office, to improve its financial autonomy by being allocated its own budget, independently, rather than having a budget line within that of its sponsor department. This is an ongoing process but if secured would enhance transparency and parliamentary oversight of EHRC's budget and potentially simplify the process of negotiating the budget, strengthening the NHRI's real and perceived independence.

NHRI's recommendations to national and regional authorities

1. Increasing the EHRC's budget to increase impact and effectiveness

As of January 2022, the EHRC's baseline resource budget was £17.1m. and has seen a budget reduction of 67% since 2010. It has managed this through focussing on priority outcomes and delivering considerable efficiency savings. Given the institution's broad remit, the EHRC prioritises what issues to address based on where the biggest impact can be achieved. Taking the current 2021/22 allocation as a baseline, the EHRC's submission to the ongoing UK Government Spending Review process requested a tiered increase in funding over the three-year Spending Review period to a final uplift of 5% from our current baseline of £17.1m.

This tiered increase in funding, along with further efficiency savings, will be invested in the EHRC's capabilities and capacities, allowing to strengthen its litigation, enforcement, and compliance activity and deliver a strong programme of work across the whole equality and human rights agenda, ensuring everyone in Britain gets a fair chance at life. (1)

2. Strengthening the EHRC's powers to increase effectiveness and efficiency

The EHRC continues to call for the power to support individual cases under the Human Rights Act (1998), and to be able to undertake investigations under Section 20 of the Equality Act (2006) on human rights grounds. The lack of these powers can limit its ability to tackle breaches of human rights law. Achieving these changes would increase its effectiveness in advancing issues of strategic importance and enhance its compliance with the Paris Principles. (2)

Moreover, the impact and effectiveness of the NHRI could be further enhanced by a power to levy fines against individuals or bodies in certain circumstances. Such a power would enable the institution to take swift and decisive action where a binary legal requirement is breached, such as a failure to publish required information.

3. Making administrative changes to enhance the independence of the NHRI

The EHRC requested specific administrative changes that would enhance its independence and strengthen its compliance with the Paris Principles. For example, in 2022 the EHRC advocated for a change in its relationship with Government in relation to the UK's Freedom of Information Act 2000 (FOIA). The Act gives people the right to request information from public authorities but certain types of information can be withheld from disclosure if a nominated decision-maker agrees. The EHRC is calling for its independence to be strengthened by securing a change to allow the Chair of EHRC to determine whether such information can be withheld from disclosure, rather than this decision being made by a Government Minister on advice from EHRC. (3)

References

- (1) <https://www.legislation.gov.uk/ukpga/1998/42/contents>
- (2) <https://www.legislation.gov.uk/ukpga/2006/3/section/20>
- (3) <https://www.legislation.gov.uk/ukpga/2000/36/contents>

Human rights defenders and civil society space

Laws and practices negatively impacting on civil society space and/or on human rights defenders' activities

The EHRC closely monitors the development of legislative proposals that could have implications for equality and human rights and seeks to engage policy makers at an early stage. There are currently particular proposals being brought forward by Government in relation to the Police Crime and Sentencing Court Bill (PCSC) which include a number of provisions that could significantly restrict and limit the right of assembly and protest across England and Wales. EHRC has provided expert advice on the proposals in the Bill, including on those that sought to limit these rights.

Part 3 of the PCSC Bill proposed by the UK Government in 2021 includes a number of provisions aimed at increasing police and sentencing powers in relation to protests. It introduces increased provisions by which police can impose conditions on protests, lowers thresholds by which charges can be brought against protesters, while also amending

existing offences of failing to comply with conditions imposed by the police, making it easier to convict someone of the offences and increasing the maximum penalties available.

After the second reading in the House of Lords, the Home Office added a number of amendments regarding protests aimed at national infrastructure such as roads and printing presses, while also expanding the police's stop and search powers to seize items intended to cause serious disruption. Due to the scope of these amendments, a person carrying glue or locks who are in the vicinity of a proposed protest could be searched by police if the officers have reasonable suspicion. The amendment also includes the creation of Serious Disruption Prevention Orders (SDPOs), which enables the police to impose orders on those with protest-related convictions or a history of causing serious disruptions at protests to prevent them from continuing to commit such acts. Significant concerns and criticism regarding the bill and the method by which these amendments were laid to avoid scrutiny in the House of Commons have been raised by civil society, including CSOs, campaigners and legal professionals.

References

- <https://www.gov.uk/government/news/government-cracking-down-on-highly-disruptive-protest-tactics>
- <https://bills.parliament.uk/publications/43970/documents/1042>

Threats and attacks, including strategic litigation against public participation (SLAPPs)

Numerous SLAPP actions have been brought before the British courts, even though those cases have often little connections to the UK and concerns were raised over an appropriate jurisdiction in such cases. For example, in 2021:

- Journalist Catherine Belton and her publisher faced numerous legal actions including defamation and alleged breaches of data protection from Russian billionaires for her book 'Putin's People: How the KGB took back Russia and then took on the West'. The case was settled when the publisher agreed to subsequent amendments and an apology.
- Swedish business and finance publication Realtid was due in High Court in London after Swedish businessperson, Svante Kumlin, and his group of companies Eco Energy World (EEW) brought a legal action against them for eight articles they had published. The case was brought before the British court even though Swedish investigative journalists were publishing in Swedish and for Swedish readership.

References

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- <https://corporate.harpercollins.co.uk/press-releases/putins-people-settlement-reached-in-roman-abramovich-v-harpercollins-and-catherine-belton/>
- <https://www.article19.org/resources/uk-19-organisations-condemn-the-lawsuits-against-catherine-belton-and-harpercollins-deeming-them-slapps/>
- <https://rsf.org/en/news/solidarity-swedish-media-outlet-realtid-ahead-uk-defamation-case-hearing>
- <https://www.indexonensorship.org/2020/12/slapp-lawsuit-against-swedish-magazine-realtid-filed-in-london/>

NHRI's role in promoting and protecting civil society space and human rights defenders

The Police, Crime, Sentencing and Court Bill (PCSC) includes a number of provisions that could significantly restrict and limit the right of assembly and protest across England and Wales. EHRC provided expert advice on the proposals in the Bill, including on those that sought to limit these rights.

In July 2021, the EHRC submitted a briefing calling on the UK Government to reconsider the expansion of powers to police peaceful protest, which the Commission considers inconsistent with Articles 10 and 11 of the European Convention on Human Rights (ECHR). In this submission, the Commission highlighted that there is no express requirement on the face of the Bill for conditions placed on protest to be necessary and proportionate, only that conditions 'appear to [the officer] necessary'. Further to this, the Bill would expand on the Public Order Act, which includes an offence of knowingly failing to comply with a condition imposed on a procession or assembly in England and Wales to include individuals who act contrary to police conditions in cases where they 'ought to know' they have been imposed. In Scotland, it would remain a requirement that a person knows of the conditions, creating a further discrepancy in the law across the UK.

The proposal to impose criminal liability without the need for knowledge of wrongdoing creates a risk that a protester may unwittingly commit an offence and so could have a chilling effect on the right to protest. The risk is particularly high in a context where the law itself does not specify the conditions that may be imposed on a protest.

This bill formed the basis of an intervention from the Council of Europe Commissioner for Human Rights, Dunja Mijatović. The Commissioner called on the Houses of Parliament to

reject restrictions on peaceful demonstrations contained in the PCSC Bill. After engaging with the EHRC, the Commissioner's letter referenced the EHRC's intervention to the Joint Committee on Human Rights. Further to this, during the 48th session of the United Nations Human Rights Council, in partnership with the Scottish Human Rights Commission (SHRC), EHRC contributed analysis of the PCSC Bill to the submission for a HRC panel discussion on the promotion and protection of human rights in the context of peaceful protests. In January 2022, EHRC prepared a further briefing that was shared with Parliament covering a number of proposed amendments including locking on, wilful obstruction of a highway, obstruction of major transport routes, stop and search, and SDPOs. On 17 January, the Government lost 14 divisions related to the protest provisions in the PCSC Bill in the House of Lords. This included preventing the introduction of SDPOs, suspicion-less stop and search, and blocking new police powers to stop noisy and disruptive protests in England and Wales. While a number of these provisions can be amended and reintroduced by the Government, due to the nature by which other amendments were introduced to the House of Lords, others have been removed from the Bill.

References

- <https://www.coe.int/en/web/commissioner/-/united-kingdom-parliamentarians-should-reject-restrictions-on-peaceful-demonstration-and-the-new-criminal-offence-of-trespass-with-the-intent-of-resid>
- https://www.scottishhumanrights.com/media/2226/un-hrc-48thsession-peaceful-protest_shrc_ehrc.pdf

NHRI's recommendations to national and regional authorities

All restrictions that are in place for protests must be necessary and proportionate and in line with domestic and international human rights standards, especially Article 11 of the European Convention on Human Rights.

Checks and balances

There have been developments in the UK that affect checks and balances which the EHRC is monitoring closely.

The uncertainty about the status of the Human Rights Act following the Independent Human Rights Act Review (IHRAR), as well as the Government proposals announced in December 2021 raises concerns regarding the role of established international human rights standards within the UK.

The UK Government has proposed changes to the Human Rights Act (HRA) (1998), which have the potential to reduce human rights protections in the UK. The ECHR is given effect in the UK through the Human Rights Act 1998 (HRA), which enables individuals to access remedies where their human rights have been breached. Since the introduction of the HRA, cases being taken to Strasbourg from the UK have become the lowest of all state parties to the ECHR, due to the ability of claimants to access remedy in the domestic courts, and the valuable judicial dialogue created between the UK and Strasbourg Courts.

The UK Government launched an Independent Human Rights Act Review (IHRAR) in 2021. In its response, the EHRC stated that there is no compelling case to change or reform the Act, which is working as intended to protect the human rights of all people across the UK. The NHRI also recommended the Government take steps to improve awareness and understanding of human rights among the public, media, politicians, and public authorities, and seek to counter negative narratives about human rights. The IHRAR report was released in December 2021 together with Government proposals to replace the HRA. The Government proposals go significantly beyond the scope of the IHRAR. They include a commitment to remain party to the ECHR. However, some of the proposals risk reducing rights protections for certain groups, making it harder to bring human rights claims to the courts and access a remedy, and creating a divergence between human rights case law in the UK and in Strasbourg.

In December 2021, the Public Administration and Constitutional Affairs Committee (PACAC) published its report on the Elections Bill. While the Bill includes provisions requiring voter ID, evidence from Northern Ireland identified the existing requirement for voter ID as the cause for a 2.3% drop in voter turnout. This, along with the lack of a 'more robust evidence base from Government ministers' led the committee to call for the provision to be dropped. The Bill also limits the powers of the Electoral Commission by removing its ability to bring criminal prosecutions in England, Wales, and Northern Ireland. Further to this, the Bill amends the Commission's oversight body, the Speaker's Committee on the Electoral Commission (SCEC) by expanding membership to ministers or MPs appointed by the Prime Minister. The PACAC states the SCEC 'must itself be seen to exercise its powers impartially and with cross-party support'.

The Judicial Review and Courts Bill includes provisions to restrict Cart judicial reviews, which involve an application for judicial review of the Upper Tribunal's decision to refuse permission to appeal the decision of the First Tier Tribunal on error of law grounds. The Government has confirmed that removing Cart judicial reviews will result in 'some injustice'. Its impact assessment states '[t]he majority of Cart cases relate to Immigration and Asylum, therefore those who lose out as a result of this option are more likely to have

particular protected characteristics, for example in respect of race and/or religion or belief.' This means that this could impact on the right to life, the absolute right to freedom from torture, inhuman and degrading treatment and the right to respect of a private and family life (Articles 2, 3 and 8 of the ECHR), as well as the right against return to persecution protected by the Refugee Convention.

References

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NHRIs as part of the system of checks and balances

A key way that EHRC participates as part of the system of checks and balances is by submitting parliamentary briefings to the relevant actors as bills process through the legislative process, as well as through direct engagement with key stakeholders, including governments, parliamentarians and other regulators or arms-length organisations, as appropriate. For scrutiny of the Elections Bill, EHRC has been engaging with Electoral Commission and Cabinet Office directly to raise concerns on the implications of the proposals to introduce voter ID.

NHRI's recommendations to national and regional authorities

- The EHRC considers that Cart judicial reviews provide a necessary procedural safeguard to protect against breaches of a person's ECHR and Refugee Convention

rights. Therefore, it recommends the Government give further consideration to the human rights and equality implications of the ouster of Court judicial review challenges, including collecting and publishing data on success rates, the protected characteristics of Tribunal users and the human rights engaged in relevant challenges.

- Due to the concerns raised from the experiences in Northern Ireland, as well as the differing rates of accessible identification for members of different protected groups, the EHRC recommends that data should be collected and analysed through to 2023 to understand the impact of voter ID on electoral participation, with an explicit focus on disaggregation for protected groups. This should inform whether the provision is maintained in line with the UK's commitment to a diverse franchise and connected commitments to international human rights standards.
- Ensure any and all amendments to the HRA increase human rights protections and the public's ability to access them. The Bill of Rights (the proposed replacement for the HRA) should not allow for the regression of any rights that could further deepen any divergence between UK and Strasbourg courts.

Functioning of the justice system

Throughout the COVID-19 pandemic, the UK Government brought forward measures that provided for the use of live link across a broad range of criminal proceedings in England and Wales. This was given legal basis through the Coronavirus Act (2020). However, these measures have been incorporated into the PCSC Bill to place them on a permanent footing. The PCSC bill would expand the law to allow juries to attend trials by live link and make provision to facilitate police station-based video remand hearings. Before the pandemic, most police stations operated without video remand hearings and the use of live link in criminal proceedings was limited.

While these measures can contribute to a more accessible and efficient justice system, permanently expanding the use of live link in criminal proceedings without further interrogating its impact on persons with disabilities, children in the youth justice system, and on access to justice more broadly raises significant concerns. The 2020 EHRC inquiry into the treatment of disabled defendants in the criminal justice system found that the court reform programme, including an increased reliance on live link, was not informed by sufficient evidence about the needs of defendants with cognitive impairments, mental health conditions and/or neurodiverse conditions. While progress has been made against EHRC's recommendations, the Commission remains concerned that the Bill provides for a significant and permanent expansion of live link before the impact of existing measures on

disabled defendants is properly understood and an effective data collection programme implemented.

Further to this, the Judicial Review and Courts Bill includes provisions that would establish automatic online conviction processes for any summary, non-imprisonable offences specified by the Lord Chancellor in regulations. Automatic online conviction involves a person entering a guilty plea online (in response to a charge received in the post), being automatically convicted and paying a fine online. The Bill requires that a defendant is 'offered, and accepts, the automatic conviction option'. Although regulations will be made by Statutory Instrument, full Parliamentary scrutiny is merited due to the potential risk to fundamental rights.

The EHRC is concerned that an increased reliance on online and paper-based processes and the associated reduction of in-person hearings, will remove opportunities to identify impairments, which may have a bearing on a person's understanding of a charge and their ability to navigate the criminal justice system. The EHRC welcomes the inclusion of a requirement that an individual opt into the automatic online conviction process, but notes that the vast majority of these individuals will not be legally represented or have access to legal advice and may not have the understanding they need to make an informed choice about proceeding, or not proceeding, with the online process.

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Role of the NHRI in contributing to the effective functioning of the justice system

In 2020, as outlined above, EHRC led an inquiry under Section 16 of the Equality Act (2006) to understand the experiences of disabled defendants and accused people in the criminal justice system. The EHRC recommended that gaps in the collection, monitoring, and analysis of disability data be addressed and advised the Courts and Tribunals Service (HMCTS) and the Ministry of Justice to establish a clear evidence base around the impact of court reforms on disabled defendants. The NHRI identified the need for early and effective screening and better information sharing on identified need and recommended

adjustments. It recommended that these existing issues be addressed before further measures are introduced.

The Ministry of Justice has responded positively to the EHRC's recommendations and an overarching evaluation of the impact of the court reform programme is underway. The NHRI further understands that HMCTS has commenced work on the collection of more consistent, higher quality data on the protected characteristics of defendants, including disability data.

As outlined in our response to question 12, in July 2021 the EHRC prepared a briefing related to the PCSC Bill, which included its recommendations regarding the Bill's provisions to make permanent the ability for juries to attend trials by live link and make provision to facilitate police station based video remand hearings.

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NHRI's recommendations to national and regional authorities

- The EHRC calls on the Government to implement the recommendations of our Criminal Justice Inquiry before permanently expanding the use of live link in criminal proceedings.

Media freedom, pluralism and safety of journalists

There are issues that could negatively impact media freedom, freedom of expression and journalists' access to information, namely:

- The legal framework penalising the unauthorised disclosure of Government information does not include an exception for such a disclosure of a leaked information made by journalists in the public interest. Therefore such regulation may not be compatible with freedom of expression enshrined in the Article 10 of the European Convention on Human Rights;

- Freedom of information legislation is not sufficiently observed by state authorities when handling journalists' requests for public information, therefore it restricts access to information by media;
- The absence of legal provisions in relation to SLAPP actions and threats to journalists that also emanate from state authorities (including police).

Against this background, it is worth noting that the National Committee for the Safety of Journalists was launched in July 2020. It brings together representatives from Government, journalism, policing, prosecution services, and civil society to work in collaboration to make sure that journalists in the UK are able to operate free from threats and violence. In March 2021, it published the National Action Plan for the Safety of Journalists. In partnership with organisations including the NUJ, National Council for the Training of Journalists (NCTJ) and state bodies such as police forces and the different UK prosecution services, provisions were outlined to expand the data collected regarding threats to journalists, as well as the resources that can further protect them.

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