Amnesty International UK

BRIEFING

Replacing the Human Rights Act – profound implications for human rights

On 14 December 2021, the Deputy Prime Minister and Secretary of State for Justice launched a 12-week consultation on proposed plans to effectively replace the *Human Rights Act 1998* (HRA) with a 'Bill of Rights'. The consultation, which concluded on 8 March, was published alongside the long-awaited report from the 'Independent Human Rights Act Review', though the Chair of this Panel has since stated that the consultation is not a response to his report and the two do not work together.

Amnesty International UK (AIUK) is deeply concerned about the proposals outlined in the consultation. They seek to upend the UK's existing model of rights, and in doing so:

- Dramatically weaken people's ability to access their rights under the European Convention on Human Rights (ECHR) and protect themselves from violations by the State
- Set up conflict with the European Court of Human Rights (ECtHR) including through defining rights differently to the ECtHR, likely leading to an increased number of UK cases heard in Strasbourg and even risking non-compliance with the ECHR.
- Be at significant odds with the human rights protections enjoyed within the devolved nations and risk breaching the Belfast/Good Friday Agreement.

The international human rights framework was created and has been developed by countries – like the UK – with the aim of ensuring all individuals are equally entitled to the same protections, and that governments and politicians of the day should not be able to determine what those are. The Universal Declaration of Human Rights in 1948 and enforceable regional treaties like the ECHR were developed in the wake of the horrors of World War II – and in direct response to those horrors being inflicted by democratically elected governments and parliaments. This model ensures all people may live their lives freely, equally and in dignity, no matter what the political desires of their Nation State governments may be.

These proposals – along with the misrepresentation and unjust criticism of human rights protections in the dialogue surrounding this consultation – may also have significant implications internationally as well as domestically. The UK prides itself as a global leader on human rights and the rule of law, however by seeking to curtail protections domestically and raise doubts about its commitment to international obligations – the UK risks setting a dangerous precedent to other governments, particularly across Europe.

It is for all these reasons, AIUK is strongly opposed to any of the current plans put forward to replace, overhaul or 'reform' the HRA. This briefing outlines five key areas of concern found throughout the consultation proposals.

1) Setting up conflict with the European Court and Convention itself

AIUK welcomes the UK Government's stated ongoing commitment to remain a signatory to the ECHR. We strongly believe it to be a vital safeguard that ensures member states make a legal commitment to abide by certain standards of behaviour and to protect the basic rights and freedoms of ordinary people.

The ECtHR in Strasbourg is the ultimate guardian of the ECHR itself. Its judgements in individual cases act as a safety net to protect people's rights and in so doing provides guidance on the proper meaning and application of these for all member states. While there is some limited room for appropriate divergence in

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practice, the ECtHR is widely understood to have the last word on what is or is not a violation of the ECHR. The government in question **must** abide by that ruling.

Intentional and inevitable conflict

AIUK profoundly disagrees however with the claims that these proposals will not create direct conflict with the ECHR. The collective impact of points 2 – 5 below will see existing Convention rights in the HRA watered down and made harder to enforce when abuses happen.

Protections in the UK may bear little resemblance to what the ECtHR says they are or should be. They will also discourage domestic courts from enforcing what will then be the higher ECHR standards of the ECtHR. The latter will be primarily achieved by deleting or effectively repealing *section 2* of the HRA, which requires the domestic courts to '*take into account*' relevant Strasbourg rulings. This will leave the ECtHR with the same merely persuasive status as other foreign courts (like in Australia and Canada) when interpreting people's rights and/or a form of originalism (a US conservative doctrine) will be introduced to replace the ECtHR's 'living instrument' approach to rights – that is, current-day judges interpretating the ECHR under present day conditions. Indeed, the proposals specifically state that the meaning of the rights in the new BoR will not be determined by the meaning of the rights in any Convention, particularly the ECHR. The words may look the same, but these will not be Convention rights. They will be something else, and likely less protective.

The proposals – entrenched in the belief that there is an '*over-reliance on the Strasbourg caselaw'* and that that case law has gone too far – will create divergence from, and therefore conflict with, ECtHR case law. People will have to go directly to Strasbourg if they want to get the full rights they remain entitled to under the ECHR and with that, the ECtHR will find more often against the UK. The reality is, though, that given the time frame and cost issues with bringing a case to Strasbourg, many people will go without their human rights being protected by a court at all.

The new 'Bill of Rights' could also introduce a formal mechanism – referred to as a '*democratic shield*' – that would allow Parliament to debate and vote on all adverse judgments against the UK from the Strasbourg Court. It is unclear whether these would be votes on the means of compliance, or instead to endorse disagreement, or even non-compliance or only partial compliance. The language of a 'democratic shield' is suggestive of the latter. If that is the case, it could leave rights violations unremedied while also putting the UK directly in breach of international law. These cherry-picking proposals are deeply concerning and echo similar ones introduced in recent years in Russia.

2) Making and interpreting legislation: making Government the arbiter

Currently, the HRA encourages Ministers to ensure all proposed legislation is consistent with the ECHR. It also allows the UK Courts to interpret this legislation's compatibility with the Convention and make a 'declaration of incapability' when necessary.

However, these proposals will substantially alter how human rights are dealt with in the legislative process and how the courts are able to apply human rights standards when interpreting legislation. When drafting primary legislation, Ministers will no longer have to outline to Parliament whether a Bill meets human rights standards (which necessitates them giving consideration to that during its preparation). The UK Courts will also no longer be required to interpret newly passed or existing Acts in line with the ECHR where possible and consistent with the legislation's purpose, nor empowered to edit or cancel rights-violating secondary legislation. In circumstances where the Courts do find incompatibility – the removal of the HRA's special corrective procedure will inevitably lead to legislation passing that could result in violations.

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3) Reducing rights in practice: politicians redefining rights and who has them
The HRA encourages 'public authorities' (such as central and local governments, schools, police forces and hospitals) to ensure any policies or decisions they make are compliant with the ECHR rights. The proposals seek to redefine 'public authorities' by (apparently) narrowing who is bound by rights duties and thus insulating certain bodies from some types of challenge.

They would also strictly define and narrow what the rights mean by leaning in favour of Parliament's view of the 'public interest' around the issue, and even allow the claimant's behaviour to be taken into consideration when deciding if a violation has occurred. Whole classes of people will be excluded from fundamental rights protections altogether in certain situations.

While the proposals claim that the list of rights covered under the HRA will remain the same in a new 'Bill of Rights' – AIUK is concerned that the content of these, or the level at which they protect someone, will not. First, these will (explicitly) not be Convention rights, incorporated into domestic law. Instead, under the new proposed model, the new Bill of Rights rights themselves will be narrowed and weakened, and their interpretation tilted towards the views of politicians.

Lastly, the proposals would (in a way that makes little conceptual or legal sense, and would place the UK's approach at odds with all international human rights law) attempt to cut away the positive obligations on 'public authorities' to take steps to protect rights therefore weakening effectiveness in a wide range of areas – from holding inquiries into state wrongdoing, to the police actively protecting individuals from known imminent threats to life.

4) New barriers to bringing legal challenges
Getting access to justice will already have been made harder in some situations by the Nationality and Borders Bill, and the Judicial Review and Courts Bill. The consultation goes further by outlining plans to introduce a set of new obstacles which would complicate – and in turn, make less effective – the procedure for bringing a human rights case. First, they would introduce a new additional permission stage for human rights act cases where claimants will have to show the rights violation had put them at 'significant disadvantage'. They would also remove the ability to rely on human rights at all in some civil cases, or require non-rights-based arguments to be made first, blocking access to rights, substantially increasing the time cases take to resolve and potentially significantly increasing cost. Collectively, these changes will inevitably make it harder for people to bring human rights challenges – and where they are taken, make it harder to win.

5) Reducing remedies and the impact of bringing a case
For the limited number of claimants who manage to win their human rights case under the new provisions, there will be a significant reduction in the power courts have to remedy the violation. This will go directly against the ECHR's requirement that an 'effective remedy' must be given. Like *point 3* above, it is also deeply concerning that remedies such as compensation payments are to be balanced with the claimant's behaviour and 'wider public interest' – once again, potentially putting whole groups of people on unequal footing to others. Lastly, this overall reduction in remedies will inevitably have a negative impact on the actions of 'public authorities' – including the Government – who will see little incentive to comply with the few duties that do remain, given the lack of penalty.

Devolution settlements and the Belfast/Good Friday Agreement Amnesty's assessment is that egression in the enjoyment of rights, as accessed in Scotland, Wales and Northern Ireland since 2000, would also have profoundly negative consequences for devolution and risk undermining the Belfast / Good Friday Agreement. For more information on this please see Amnesty's separate briefing analysing the impact on the devolved nations.

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