



The Bill of Rights Bill

Amnesty International UK is deeply concerned that the Government plans to fully repeal the Human Rights Act 1998 (HRA) and replace it with a new Bill of Rights Act.¹ This goes far beyond the 2019 Conservative Party manifesto commitment to “update the Human Rights Act”.² In line with that pledge, in 2021 the Ministry of Justice commissioned an ‘Independent Human Rights Act Review’ (IHRAR) led by Sir Peter Gross.³ The large majority of submissions received by the Panel strongly supported the HRA⁴ and the panel proposed only modest alterations, with Sir Peter stating that the panel found that the HRA in general “worked well”.⁵

The recently introduced Bill of Rights Bill (BORB) would upend the UK’s existing model of rights. It seeks to heavily steer and control the approach that domestic courts take to human rights issues. Clause after clause either imposes new definitions of rights, closes off interpretive avenues from courts or seeks to heavily tilt the scales of interpretation away from protecting individual rights and towards protecting government policy and public authorities. Passing the BORB would set a damaging precedent internationally, hand huge powers to Government to significantly limit the judicial protection of rights and protect Ministers and public authorities from accountability for human rights violations. It also undermines the principle of universality of human rights, further limits access to justice for rights violations and potentially breaches the Belfast/Good Friday Agreement.

In its current form, the Government’s BORB casts aside almost all the IHRAR’s recommendations. The Government has also ignored the outcome of the public consultation it conducted, despite receiving well over 12,000 responses and conceding in its response document that the large majority of respondents to individual proposals (often 80% or above) rejected their proposals.⁶ Dismissing the results of both a public consultation and a government appointed independent panel, whilst also denying appropriate requests for pre-legislative scrutiny (including from four leading Committee Chairs⁷), is no way to create a new national human rights charter.

Amnesty International urges all MPs to attend the Second Reading debate and oppose the Bill of Rights Bill in its entirety.

Amnesty’s principal concerns with the BORB fall into five main areas:

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

Amnesty welcomes the UK Government’s stated commitment to remaining a signatory to the European Convention on Human Rights (ECHR). However, the Government has been upfront about its desire and intention to ‘diverge’ from the European Court of Human Rights’ (ECtHR) interpretation of the Convention.⁸ The BORB does this primarily by replacing Section 2 of the HRA with a convoluted and confused list of

¹ BORB Schedule 5 s.2

² Conservative Party Manifesto 2019, p. 48; <https://www.conservatives.com/our-plan/conservative-party-manifesto-2019>

³ <https://www.gov.uk/guidance/independent-human-rights-act-review>

⁴ Page 16, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf

⁵ Response to Q14, <https://committees.parliament.uk/oralevidence/3374/html/>

⁶ <https://consult.justice.gov.uk/human-rights/human-rights-act-reform/results/modern-bill-rights-consultation-response.pdf>

⁷ <https://committees.parliament.uk/publications/22473/documents/165604/default/>

⁸ See eg <https://hansard.parliament.uk/Commons/2022-06-22/debates/5736CBBA-A5F0-45B9-AA54-246FF57FB5EE/BillOfRights?highlight=diverge#contribution-B2EF9E20-AE55-41ED-A2C3-FD785A01687E>

considerations UK courts should apply when interpreting Convention rights, the overarching theme of which is that they will be discouraged from following Strasbourg caselaw.⁹ This includes a form of 'Originalism' reminiscent of the current US Supreme Courts' approach to rights.¹⁰

At the same time the BORB essentially repeals section 3 of the HRA, which currently gives the courts enhanced powers to interpret legislation in line with Convention rights.¹¹ Without these powers, legislation is going to more frequently be in breach of the Convention.

However, the BORB also goes much further by knowingly and fundamentally conflicting with the ECHR and ECtHR in numerous other provisions, In particular, the Bill would:

- Force UK courts to ignore any new positive obligations on public authorities to protect rights developed by the ECtHR, while limiting those that already exist.¹²
- Create a framework for assessing the compliance of deportation legislation with Article 8 of the ECHR that would compel UK courts to rule that something is compatible with Convention rights when it is evidently not.¹³
- Impose a permission stage which, although modelled on that applied at Strasbourg, was never intended to apply at a domestic level and will prevent people from being able to bring meritorious human rights cases.¹⁴
- Instruct both Ministers and UK courts to ignore any 'interim measure' ordered by the ECtHR.¹⁵

These measures simply ignore reality under international law and will mean the UK is in breach of its Convention obligations much more regularly - moving the UK from its current position as one of the leading members of the Council of Europe, in human rights terms, to joining the group of countries who are regarded as problematic 'repeat offenders', who are constantly being found in breach of the Convention because of structural faults in their systems.¹⁶

Crucially, these significant changes will prevent people from securing their human rights at home in a timely and effective way. Given the delays and costs involved in taking cases to the Strasbourg Court, many people will simply be prevented from protecting their rights at all.

2) Giving greater powers to Ministers and Reducing Public Authorities' Accountability

The justification given for the BORB's attempts to control the independent judiciary's interpretation of legislation is 'parliamentary sovereignty'. In reality the BORB reduces courts' powers to oversee the lawfulness and human rights compliance of government policy.

Beyond the measures discussed above, the BORB would also extend powers to make a declaration of incompatibility (DoI) to secondary legislation.¹⁷ Under the HRA secondary legislation could be struck down or changed if it was incompatible with Convention rights.¹⁸ However, while this power is retained in the BORB,¹⁹ the courts are also given the option of making a DoI instead. While an important judicial

⁹ BORB clause 3

¹⁰ BORB clause.3 (2) (a & b) 'The courts must interpret the rights in a way which requires the courts to have 'particular regard to the text of the right'[2] and may have regard to the preparatory work of the Convention', this latter point being a form of words that frames the Convention in terms of the perceived intentions of its drafters.

¹¹ HRA s.3 (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

¹² BORB clause 5

¹³ BORB clause 8

¹⁴ BORB clause 15

¹⁵ BORB clause .24

¹⁶ See https://www.echr.coe.int/Documents/Overview_19592021_ENG.pdf

¹⁷ BORB clause 10(1)(b)

¹⁸ HRA s.6

¹⁹ BORB clause 10(1)(b)(ii)

function, Dols were designed solely for Primary legislation, which has full Parliamentary authority. As such they do not change the legal effect of the laws they relate to, do not require the Minister responsible to rectify the incompatibility and do not give any practical remedy to the victim in the case.²⁰ Introducing them for secondary legislation, laws made by Ministers, would mean the courts allowing the unlawful exercise of Ministerial powers to stand.²¹

Ministers are granted further powers over people's human rights through the repeal of Section 3 of the HRA, which currently gives the courts enhanced powers to interpret legislation compatibly with Convention rights. This raises a question as to what will happen to all the legislative interpretations that have been made under it since it came into force in 2000. Ordinarily they would be preserved automatically,²² however the BORB throws this into doubt by specifying that the Secretary of State for Justice will have power to make regulations 'preserving' the effect of a s.3 interpretation.²³ This not only implies that any such interpretations not preserved will fall away, but grants extraordinary powers to the government to pick and choose which court judgments it approves of and which it would prefer no longer applied.

At the same time, public authorities more generally have their human rights compliance duties reduced significantly. The primary beneficiary of the proposed bar on human rights cases being taken in relation to overseas military operations will be Ministers and the MoD, who will be insulated from challenge by British service personnel. In addition, courts are to be given powers to reduce damages for human rights violations by public authorities on grounds of the budgetary situation of the public authority in question, including the potential for future awards for similar violations.²⁴ The Bill thus contemplates and encourages continued and ingrained unlawfulness by public authorities. In a similar vein, the restrictions on the application of 'positive obligations' on public authorities are worded in such a way as to hugely empower leadership figures in those bodies, in a way which is likely to encourage the return of default institutional ways of working that are not human rights compliant²⁵.

Oversight of public authorities' compliance with their legal obligations will also be reduced. As matters stand the Equality and Human Rights Commission, whose own powers to pursue human rights-based litigation are drawn with reference to the Human Rights Act²⁶ is no longer exempt from the 'victim status' test, which ordinary claimants are required to meet. Unless rectified this will gravely undermine the EHRC's function as a human rights watchdog, as it will make it almost impossible for it to bring 'own name' human rights challenges.

3) An end to Universalism

A fundamental principle of human rights, and the rule of law more broadly, is that everyone is entitled to human rights, without distinction. Individuals or groups are not to be expelled from the ambit of rights protections because they are unpopular or lack political influence. Article 1 of the ECHR, to which the UK will remain a signatory, obliges states to secure the convention rights to **everyone** within their jurisdiction. However, the BORB would introduce a range of measures that will deny or impede effective remedies for certain individuals and groups when their human rights have been violated, apparently solely on the grounds that they are politically unpopular. If human rights are to mean anything, it is surely that they protect all people from the enormous powers of the state, especially when they do not have the benefit of other political support.

²⁰ It is for this reason that the European Court does not consider them to be an effective remedy.

²¹ Under the BORB clause.12 (1) it would continue to be unlawful for a public authority, including a Minister, to act in a way which is incompatible with Convention rights.

²² Interpretation Act 1978 s.16

²³ BORB clause 40 (2) and (3)

²⁴ BORB clause.18(6) and (7)

²⁵ For a more detailed assessment of the importance of positive obligations for women's rights, for example, see <https://www.amnesty.org.uk/resources/amnesty-international-uk-briefing-womens-rights-and-human-rights-act-0>

²⁶ S.9 Equality Act 2006

Of particular concern in this regard are the BORB's provisions which target people serving a custodial sentence,²⁷ people facing deportation²⁸ and people seeking to challenge alleged breaches of human rights, or failures to investigate such breaches, by British forces overseas.²⁹ In addition, though, courts are to be empowered by the BORB to withhold damages from victims after a successful human rights claim based on an assessment of 'any conduct of the person it considers relevant',³⁰ whether or not that conduct is related to the issue in the case, let alone if the conduct was in any way responsible for the damage caused.

4) Access to Justice

The Human Rights Act sets out a clear system for access to justice which has worked well. The Convention Rights as defined in the HRA, and replicated in the BORB, does not include Article 13, the right to an effective remedy, because it was intended that the HRA was capable of providing an effective remedy itself. As discussed throughout this briefing, we have serious concerns that the BORB will fail to provide an effective remedy for rights violations. This includes the further obstacles it creates to people accessing legal redress, accessing justice, for violations of their human rights.

The BORB adds significantly to the obstacles that already exist to bringing a case. People, including service personnel, will no longer be able to take cases relating to military operations overseas, including actions taken in the UK or relating to any investigations of those actions.³¹ A new permission stage test will be introduced that will prevent cases that have merit but in which the applicant can't show a 'significant disadvantage' from being taken. This will be in addition to the permission stage test that already exists in Judicial Review, but, in a highly unusual move, also applies in other hearings where a human rights case is being brought under the rules of that court or tribunal.³² As discussed above, access to damages will be limited, which will not only affect the remedies available in a case but also has the potential to affect legal aid eligibility, preventing cases from being brought at all.³³ As noted elsewhere, as matters stand the EHRC, who do not need to qualify for 'victim status' to bring a human rights case, will lose this exemption.

5) The Bill of Rights, Northern Ireland and the Belfast/Good Friday Agreement (B/GFA)

Amnesty is concerned that the BoRB, as drafted, would breach the B/GFA and poses a real risk of destabilising the delicately balanced peace settlement.

The incorporation of the European Convention on Human Rights into Northern Ireland law is an explicit commitment of the B/GFA.³⁴ The effective delivery of ECHR rights in Northern Ireland *domestic* law through the HRA and the Northern Ireland Act 1998 ('NIA') are the mechanisms that delivered this commitment. The HRA and the NIA therefore have constitutional functions in Northern Ireland that are unique in the UK.

The Bill of Rights Bill as currently drafted would constitute a breach of two core elements of this commitment: the guarantee of 'direct access to the courts'; and the obligation to provide 'remedies for breach of the Convention'. The new permission stage, which blocks otherwise meritorious cases unless they can show the victim suffered 'significant disadvantage', would breach the obligation to provide 'direct access' to the domestic courts.

²⁷ BORB Clause 6

²⁸ BORB clauses 8 and 20

²⁹ BORB Clause 14

³⁰ BORB clause 18 (5)(a)

³¹ BORB Clause 14

³² Confirmed by the BORB Human Rights Memorandum para 23

³³ See Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.11(3)(a)

³⁴ See Belfast/Good Friday Agreement, p. 16 para 2

While there are numerous ways in which the Bill's provisions may breach the obligation to provide 'remedies for breach of the Convention',³⁵ perhaps the clearest arises from the Bill's provisions concerning 'positive obligations'. As discussed above, the Bill would prohibit the domestic courts from following any decisions of the ECtHR that occur after the Bill becomes law which develop its jurisprudence on 'positive obligations'. The domestic courts would, therefore, be forbidden from providing a remedy for a breach of the Convention. It should also be noted that the positive obligations on public authorities that have emerged from ECtHR interpretations of Article 2 and 3 have been essential in seeking progress on legacy investigations.

The B/GFA also provides that rights protections should be enhanced through a Bill of Rights for Northern Ireland.³⁶ The B/GFA sets out that the NI Bill of Rights would be a "Convention rights-plus" document. The BoRB undermines how Convention rights would apply in NI and therefore undermine the foundation for the proposed NI Bill of Rights.

Finally, beyond the practical importance of the HRA to the realisation of rights and peace settlement in Northern Ireland, there is also the crucial issue of the B/GFA being an international agreement. Any amendment of the HRA necessitates a process of review between the UK and Irish Governments in consultation with the NI Assembly parties.³⁷ It is very difficult to see how international and local agreement could be secured for such changes. Reducing access to rights would breach a carefully crafted peace agreement and upset the delicate balance that has been hard won over the years.

³⁵ See eg BORB Clause 8, Clause 3(4), Clause 4, Clause 22, Clause 7, and Clause 3(3)(a)). See also the repeal of s.3 HRA

³⁶ See Belfast/Good Friday Agreement, p. 17 para 4

³⁷ See Belfast/Good Friday Agreement, p. 26 para 7