Amnesty International UK
BRIEFING

Women's Rights and the Government's Human Rights Act proposals

Since December 2021 the UK Government has been consulting on plans to scrap the Human Rights Act (HRA) and replace it with a new 'Bill of Rights' (BoR).[1] The consultation document contains a large number of proposals for a range of changes to how the Act works, that would be implemented in the new BoR. Amnesty International UK opposes plans to scrap the HRA and is very concerned by the bulk of the proposals being consulted on. It is our view that they will do nothing to protect human rights and will instead hand greater power to the Executive, reduce accountability for rights violations and put the UK in conflict with its international commitments.

This briefing will address a particular aspect of Amnesty's concerns; the damage that these proposals would do to the protection of women's rights in the UK. A number of the proposals listed in the Government's Queen's Speech briefing on the BoR (suggesting these are proposals the Government is intending to pursue), would damage the protection of women's rights. These include amending the relationship with the European Court of Human Rights/originalism; restricting positive obligations; and excluding certain marginalised groups from rights protections.

What can Parliamentarians do:

The Government has consulted on a range of proposals that could be included in the BoR; some of those proposals were listed in the Government's Queen's Speech briefing. Influencing the Government before a Bill is actually published is critical. **Amnesty urges Parliamentarians to press the Government to abandon these proposals.**

Abortion Rights

Litigation using the HRA was an integral part of the movement towards finally overturning Northern Ireland's near total abortion ban, decriminalisation and securing lawful access to the healthcare. A case taken by the Northern Ireland Human Rights Commission, in which Amnesty UK and Sarah Ewart were key intervenors, reached the UK Supreme Court in 2018 and a further case in 2019 taken in the Northern Ireland High Court by Sarah Ewart proved critical. Sarah had been refused an abortion in Northern Ireland despite her pregnancy being diagnosed with a fatal foetal impairment. The case established that Northern Ireland abortion law as it stood at the time[2] was incompatible with Article 8, the right to respect for private life.[3]

While the law has changed there remains issues with implementation. The Department of Health in Northern Ireland has not commissioned or funded abortion services, nor issued related guidance to health and social care trusts on the provision of abortion services. The Secretary of State has directed the commissioning of abortion services, however, political failure to establish and embed commissioned services is ongoing. While a judicial review in May 2021 found that Article 8 had not

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[1] See Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights, https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights

[2] The law criminalised abortion in all circumstances unless there is a risk to the life of the mother or of serious long-term or permanent injury to her physical or mental health

[3] https://www.supremecourt.uk/cases/docs/uksc-2017-0131-judgment.pdf; https://www.judiciaryni.uk/sites/judiciary/files/decisions/Ewart's%20(Sarah%20Jane)%20Application_0.pdf

yet been breached,[4] the ongoing logjam on the issue indicates that the need for further litigation cannot be ruled out.

The HRA helped ensure abortion rights were realised. However, the Government's proposals would mean individuals like Sarah wouldn't be able to hold Government accountable for rights breaches in the same way. The Government intends to amend Section 2 of the HRA and change or end the relationship between the UK courts' interpretation of the meaning of the rights and the European Courts', potentially replacing it with a form of 'originalism'.[5] Originalism, the view that rights must be interpreted in line with the original understanding of the drafters, or signatories at the time they were adopted, is the judicial philosophy that is currently a fundamental threat to abortion rights in the USA.[6] In the context of the UK and the ECHR, it is very hard to see how an originalist interpretation of Article 8, based on the meaning of 'private life' as understood in the early 1950s, could encompass abortion rights when abortion was criminalised across the UK (and remains so in England, Scotland and Wales), and in much of the rest of Europe.

Ending Violence Against Women and Girls

The European Convention on Human Rights (ECHR) does not limit human rights to negative constraints on State action (such as the Article 3 right not to be subject to torture). It also places positive obligations on states to take steps to protect certain rights (such as the Article 2 right to ***protection*** of life). As the End Violence Against Women Coalition have stated, these positive obligations have been crucial to progress in tackling violence against women and girls in the UK, as through the HRA public authorities such as the police have duties to abide by these positive obligations and can be held to account for their failings. However, under the new BoR, the Government proposes to cut these obligations.

The Government's consultation document focuses particularly on what are termed 'Osman warnings'. These are an operational obligation on police and other agencies to warn individuals if the police are aware of a threat to the person's life or serious harm or injury. The consultation characterises these warnings as being focussed on those engaged in serious organised crime and suggests that police time is being wasted issuing warnings to people mixed up in criminal gangs. However, Osman warnings have also been crucial in compelling the police to take a more proactive approach to issues of domestic abuse, stalking and harassment, 'honour based' violence and child exploitation.[7]

One such instance in which this more proactive approach from the police could have been life-saving was the case of Maria Stubbings. In 2009 Maria was murdered by her ex-partner, a violent man who had already served 15 years of a life sentence in Germany for murdering a previous partner. Essex Police had assessed Maria as being at high risk of death or serious harm from her ex-partner but missed a series of opportunities to intervene, including instances of escalating violence and aggressive behaviour and repeated calls from Maria for help. Following her murder, it was only thanks to positive obligations under the HRA that her daughter, Celia, was able to hold the police to account for their failures. After Maria's ex-partner was convicted, the coroner initially refused to continue an inquest. However, because of the positive obligation to investigate imposed by the HRA, Celia had a legal basis for challenging the coroner's decision and the inquest jury had to consider whether any police failings contributed to Maria's death. The jury said Essex Police had made a catalogue of errors and had failed in almost every part of its investigation.

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[4] https://www.judiciaryni.uk/sites/judiciary/files/decisions/Application%20by%20The%20NIHRC%20for%20JR%20-%20In%20the%20matter%20of%20the%20failure%20by%20the%20SoS%20and%20others.pdf

[5] The proposals call for UK courts to interpret rights to 'have particular regard to the text of the right or freedom, and in construing the text may have regard to the preparatory work of the European Convention on Human Rights.'

[6] See eg

[7] See eg https://eprints.mdx.ac.uk/15343/1/evaluating_the_impact_of_selected_cases_under_the_human_rights_act_on_public_services_provision.pdf

While the consultation is keen to keep focus on Osman warnings to gangsters, Ministers have also referenced the Worboys case as another example of what they regard as problematic impositions on the police by the courts. The Worboys case was a judicial review under the HRA of the police's failures in properly investigating the serial sex offender John Worboys, who went on to attack at least 105 women. Such a case was only possible under the HRA because under the common law there is no duty of care on the police to individuals in relation to the conduct of their investigations. It may be hard to believe, but even at the Supreme Court hearing the police sought to argue that either there was no legal duty on them to investigate at all, or if there was a duty, it was limited to a 'systems' duty but that women should not have a legal right to enforce compliance with such policies or systems in their individual cases. Thankfully this position was rejected by the Supreme Court and the police now have a duty to carry out an effective investigation into offences such as Worboys.

In a time when it has become clear that concerted pressure needs to be maintained on the police to properly address violence against women and girls, attempts by the Government to reduce legal obligations to do just that, and reference a case such as John Worboys to justify it, are deeply concerning.

Criminalised and Migrant Women

Various of the Government's proposals are aimed at excluding unpopular groups from the full benefits of human rights protections, either by preventing or severely curtailing their ability to pursue human rights cases at all or by limiting or removing their compensation after a successful case. These proposals will particularly affect women in the criminal justice and immigration systems, including trafficked women, and migrant women more broadly.

The consultation includes proposals to strip or severely limit migrants with criminal records, visa overstayers and failed asylum seekers' ability to raise human rights issues as a means of challenging their deportation or removal from the country. In many cases, human rights grounds are the only available means of appealing against such decisions, as other appeal grounds have been removed.[8] However, migrant women are recognised as being at higher risk of becoming criminalised or overstaying or otherwise breaching the terms of their visas because of domestic violence, exploitation and other abuse.[9] Having been subject to this abuse they would then be stripped, or seriously impeded, from making any arguments against being deported because of it.

Criminalised women more generally are also statistically likely to have been victims of domestic abuse,[10] and women trafficked or otherwise coerced into sexual and labour exploitation are frequently caught up in the criminal justice system rather than identified as victims and offered support.[11] Yet the government proposes to limit or remove damages payments after a successful human rights claim based on a vaguely defined assessment of the claimant's 'conduct', which it is implied would include any criminal history and potentially other concerns such as 'anti-social behaviour'. Women in such circumstances who, for example, successfully take a case against the police for failing to investigate their abuse or exploitation effectively, would be at risk of being deprived the proper damages they are entitled to as just satisfaction for the breach of their rights.

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[8] See Immigration Act 2014, s.15

[9] See eg https://www.gov.uk/government/consultations/domestic-abuse-act-statutory-guidance/domestic-abuse-draft-statutory-guidance-framework ; https://domesticabusecommissioner.uk/wp-content/uploads/2021/10/Safety-Before-Status-Report-2021.pdf

[10] http://www.prisonreformtrust.org.uk/Portals/0/Documents/Domestic_abuse_report_final_lo.pdf

[11] See eg https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082873