Submission to

Joint Committee on Human Rights

Bill of Rights Bill

August 2022

Introduction

Amnesty International UK Amnesty International UK is a national section of a global movement of over seven million people who campaign for every person to enjoy all rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. We represent more than 670,000 supporters in the United Kingdom. We are independent of any government, political ideology, economic interest or religion.

In this submission AIUK has answered all the questions set by the Committee. As will become clear, we have very serious concerns regarding most of the major operative parts of this Bill. Our overarching concerns relate to the impact of the Bill of Rights Bill (BORB) on the role of Parliament, the courts, public bodies, individuals, the devolved nations and the UK's international standing.

Summary

In our view the following impacts of the BORB are of grave concern:

Parliament

1. Reduced Parliamentary scrutiny of legislation for human rights compatibility.
2. More declarations of incompatibility, therefore increased pressure on Parliament to rectify incompatible legislation.

The courts

3. Diminishing the crucial role played by courts in holding the state to account and assessing compliance with international obligations.
4. Micro-managing how judges conduct human rights cases; interfering with the independent judicial process and upsetting the separation of powers within the UK.
5. Compelling courts to adopt a weaker interpretation of Convention rights, and to play a more limited role in effectively balancing private and public interests.
6. Legal uncertainty which will take years of necessary litigation to unravel.

Public bodies

7. Confusion for public bodies over human rights standards
8. Reduction of public bodies' human rights duties, including their positive obligations to protect human rights.

Individuals

9. Diminished stature and usefulness of the Bill of Rights as a tool for defending human rights.
10. Reduced remedies and solutions for rights violations
11. Negative impact on access to justice in the domestic courts.
12. More cases will have to be taken to Strasbourg for a remedy, deepening inequalities as not everyone has the support and resources to do so.
13. European Court judgments will become the ceiling of rights protection in the UK, rather than the floor.
14. Undermining of the universality of human rights.
15. Conflict with the 'living instrument' principle which means that the Convention must be interpreted in light of present- day conditions

The UK's international obligations

16. Divergence between the rights protected by the BORB domestically and the Convention rights protected at Strasbourg.
17. The UK will have more cases taken against it.
18. Strasbourg will make more findings against the UK.
19. Areas of fundamental incompatibility with the UK obligations under international law.
20. Diminished international standing of the UK as a world leader in human rights.

The devolved administrations

21. Breaching core elements of the Good Friday Agreement.
22. A more restrictive interpretation of Convention rights being imposed on their jurisdictions.
23. Causing confusion and undermining how the ECHR is observed and implemented, with clear implications for devolved matters.
24. Limiting access to justice in the devolved courts.
25. Holding back programmes to expand human rights protections.

Questions and Answers

1. Clause 3 of the Bill states how courts must interpret Convention rights, including by requiring them to have "particular regard to the text of the Convention right." What would be the implications of clause 3?

Clause 3(3) will be dealt with in question 2 below. To deal briefly with Clause 3(2)(b), the UK courts already have all the powers they need to consider common law rights, including relevant case law from other jurisdictions.[1] This element of clause 3 appears to add nothing of legal substance. As with many other elements of the bill discussed below, it may be thought by government to represent a symbolic distinction between a 'British' Bill of Rights and the Human Rights Acts' links to the European Convention system. It therefore has more rhetorical and political purpose than legal significance.

Turning to Clause 3(2)(a), this is a very serious concern. It represents the government's attempt to rebuff the 'living instrument' doctrine that the ECtHR has adopted.[2] In its place

[1] See eg Lord Reed, Comparative Law in the Supreme Court of the United Kingdom, 13 October 2017, https://www.supremecourt.uk/docs/speech-171013.pdf

[2] See eg https://www.echr.coe.int/Documents/Convention_Instrument_ENG.pdf

clause 3(2)(b) seeks to develop what some proponents refer to as a 'textualist' approach,[3] but which most commentators recognise as a form of the 'Originalism'[4] that has dominated conservative legal discourse in the United States, culminating most recently in the overturning of constitutional abortion-rights protections.[5] The clear intention of the government given in the background literature is to require a restrictive and narrow application of the wording of the right in question and to root any further interpretation in the intentions of the men who drafted and signed the Convention in the early 1950s.[6]

If this agenda is successful, it will render the Bill of Rights increasingly irrelevant to the needs and challenges faced by people in the UK; it will simply not be equipped to address modern conditions, human relationships, scientific and technological developments and the realities of modern communication, and this problem will be exacerbated as time goes on. In particular, it will reduce rights protections for women, people of colour, LGBT+ people and other groups who were socially and politically marginalised, sometimes to the point of criminalisation, when the Convention's drafters were doing their work. In turn, it will cause increasing divergence between the rights protected by the Bill of Rights domestically and the Convention rights protected at Strasbourg. As with multiple other clauses in the BORB, this will inevitably lead to the UK having more cases taken against it, and the UK losing more of those cases.

2. Clause 3 also provides that the courts may diverge from Strasbourg jurisprudence but may not expand protection conferred by a right unless there is no reasonable doubt that the ECtHR would adopt that interpretation. What are the implications of this approach to the interpretation of Convention rights?

This appears to be an attempt to codify the most conservative possible interpretation of the current Supreme Court caselaw on the relationship between the rights in the HRA and the ECHR and the role of domestic courts in applying those rights.

Supreme Court jurisprudence on these issues remains to an extent unresolved, but as part of its conservative turn under Lord Reed's presidency it has found that where the ECtHR has expressly considered and found an issue to be compatible with the Convention (including through the margin of appreciation) then UK courts should not find differently.[7] At the same time it also found that there was still room for UK courts to develop rights protections where an issue has not yet been directly considered by the ECtHR, 'on the basis of the principles established in [European Court] case law.'[8] However, the relevant parts of clause 3 impose on this reference to the principles established in the ECtHR caselaw the notion that the likelihood of a future ECtHR judgment can be discerned 'beyond reasonable doubt'.[9] The end result of this is, as the government accepts in its notes on the Bill, that European Court

[3] See ADF International, 'Submission to the Independent Human Rights Act Review', 4th March 2021, https://www.gov.uk/guidance/independent-human-rights-act-review#call-for-evidence-responses
[4] See eg the evidence of Lord Pannick and Baroness Kennedy to the JCHR, 6th July 2022, https://committees.parliament.uk/oralevidence/10561/pdf/
[5] See Dobbs, State Health Officer of the Mississippi Department of Health, et al. v. Jackson Women's Health Organization et al., US Supreme Court, https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf
[6] See Bill Of Rights Bill Explanatory Notes, https://publications.parliament.uk/pa/bills/cbill/58-03/0117/en/220117en.pdf; and Human Rights Act Reform: A Modern Bill of Rights Consultation Response, June 2022, https://publications.parliament.uk/pa/bills/cbill/58-03/0117/consultationresponse.pdf
[7] See Elan-Cane v SSHD [2021] UKSC 56
[8] See Elan-Cane v SSHD [2021] UKSC 56, para 101; and AB v SSJ [2021] UKSC 28 para 59
[9] BORB Clause 3 (3)(a)

judgments will become the ceiling of rights protection in the UK, rather than the floor.[10] When the European Court would find a violation of a person's rights the UK courts are to be free to diverge from them, but when the Court wouldn't, no such freedom is to be available.

As with many other clauses of the BORB, this constitutes a significant tipping of the scales towards state interests and away from individual rights protections. Moreover, the purpose of the European Convention system as a whole is to provide *minimum standards* of rights protections across Council of Europe member states.[11] The Convention was never intended to act as the height of what residents of the Council of Europe could expect from their states regarding the protection and promotion of their human rights. Member states are entitled to go beyond the protections that the Convention and Court provide.[12] It is therefore a wilful act on the part of the UK government to choose to legislate to restrict UK residents' rights protections in this way.

3. **Clause 24 would affect how UK courts and public authorities take account of interim measures of the ECtHR, prohibiting them from doing so in many circumstances. Is this compatible with the UK's obligations under the *ECHR and international law?***

No.

Article 1 of the Convention requires states to secure to everyone within their jurisdiction the rights and freedoms under the convention. Article 34 prohibits parties from hindering in any way the effective exercise of the right to make an individual application. Rule 39 of the Rules of Court allows the Court to indicate interim measures. In practice this is only done where there is an imminent risk of irreparable damage. Two Grand Chamber judgments have clarified that failure to take all reasonable steps to comply with an interim measure can amount to a failure to comply with article 34 of the Convention.[13] Interim measures are indicated sparingly. Amnesty agrees with JCHR's analysis that this step could damage the UK's reputation internationally and weaken the Government's position when seeking to ensure other states uphold their human rights obligations.[14]

4. The Government's consultation suggested that the role of Parliament in scrutinising human rights should be strengthened. Would the Bill of Rights achieve this? How could this be achieved?

While greater human rights-focussed scrutiny of legislation is always to be welcomed, the BORB does nothing to achieve this. As will be discussed in Question 5, in key respects it reduces Parliamentary scrutiny. The BORB appears more focussed on reducing the powers of courts to defend individuals' rights against violations, including those caused by legislation. The domestic courts already operate a significant doctrine of deference, in particular in relation to matters of social and economic policy, national security and moral or political judgment.[15]

[10] See Bill Of Rights Bill Explanatory Notes, para 51 https://publications.parliament.uk/pa/bills/cbill/58-03/0117/en/220117en.pdf
[11] See ECHR Article 53
[12] See ECHR Article 53
[13] Mamatkulov and Askarov v Turkey 46827/99, Judgment of 4th February 2005 and Paladi v Republic of Moldova 39806/05, Judgment of 10th March 2009
[14] See for example the interim measures against Russia in relation to the death sentence for two British prisoners of war, Application numbers 31217/22 and 31233/22
[15] See, for example, R (SC and others) [2021] UKSC 26 para 143- 144 and IHRAR para 66

What is being packaged as restoring the proper role of Parliament is, in fact, a means of prescribing the Court's approach to proportionality in qualified rights cases, eroding appropriate judicial discretion and undermining the crucial role of the Courts in the separation of powers, as a check on the powers of the other arms of the state and the lawfulness and human rights compliance of government policy.

5. The Bill removes the requirement in section 19 HRA for Ministers to make a statement as to whether a Government bill is compatible with human rights. What impact would this have on Parliamentary scrutiny of human rights?

If a Court is required to 'regard Parliament as having decided that an Act strikes an appropriate balance' between a number of factors including different Convention rights, in terms of clause 7,[16] it is essential that the Government must be able to robustly account to Parliament for Convention compatibility.

Ministerial Statements of Compatibility under s.19 normally bring with them a human rights memorandum, setting out the Government's case for why it considers a piece of legislation to be compatible with Convention rights.[17] As the Committee will know, these are then used by Parliamentarians to conduct the very human rights scrutiny that the BORB purports to strengthen. These will be lost if the s.19 duty is removed.

6. The Bill removes the requirement in section 3 HRA for UK legislation to be interpreted compatibly with Convention rights "so far as possible". What impact would this have on the protection of human rights in the UK?

Scrapping the s.3 power would be a weakening of the way human rights are protected in the UK. S.3, along with s.6, were the parts of the HRA that elevated human rights above ordinary law, and therefore made the HRA function as a Constitutional rights document.

Without this elevation, human rights will not be prioritised in law.[18] This in turn will cause many practical consequences across a range of issue areas. Other specialist organisations will no doubt highlight examples of this to the Committee. Here we will emphasise two broader consequences.

The first is that far greater attention will need to be paid by Parliamentarians to legislative drafting that has the potential to violate basic human rights standards, as there will be very little capacity for the courts to address these once legislation is passed.

The second consequence we would highlight is that the removal of s.3 threatens to diminish the importance of 'declarations of incompatibility', the remaining power left to courts once s.3 is removed. As a substitute for a full strike-down power, DoI's depend to a large extent on their normative force to bring about legislative change. However, removing section 3 may diminish that normative force. This may occur partly by making DoI's much more common; their present rarity value aids in maintaining the political consensus established over the last 20 years that

[16] See BORB Clause 7 (2)(a)

[17] See eg Evidence of Paull Evans and Murray Hunt to the JCHR, Wednesday 6 July 2022 https://committees.parliament.uk/oralevidence/10560/pdf/

[18] Aside from the relatively weak interpretive rule that UK courts will generally favour an interpretation that accords with the UK's international obligations. This is a general principle of interpretation and is not specific to the UK's human rights obligations. The rule pertained in the pre-HRA years and was found insufficient, thus necessitating the introduction of the HRA.

DoIs are serious matters that are always addressed. It may also occur because DoIs at the moment happen *despite* the enhanced powers courts have under s. 3. Thus, part of their force comes from the fact that the courts have gone as far as possible to make the original legislative scheme work with the UK's human rights commitments, but have ultimately been unable to do so. This will be gone without the enhanced s.3 power.

7. Clause 40 enables the Secretary of State to make regulations to "preserve or restore" a judgment that was made in reliance on section 3. Do you agree with this approach? What implications does it have for legal certainty and the overall human rights compatibility of the statute book?

We are very concerned by this clause.

The correct interpretation of the consequences of this clause will likely be the subject of early and extensive litigation.[19] If it is correct that those section 3 interpretations that are not preserved simply fall away, it will mean huge upheaval for the function of public authorities and the UK residents who interact with them. All other legislation that doesn't benefit from a Ministerial saving provision under Clause 40 will need to be relitigated. Aside for the cost, waste and barriers that this will put up to individuals seeking to vindicate their human rights, this will also do nothing good for the legal certainty that the BORB's proponents say they are concerned about.

Of perhaps even greater concern both from a human rights and wider rule of law standpoint, is that this clause would constitute a massive transfer of power to the Secretary of State. This would be a new form of Henry 8th power, in that it would allow government ministers to not only amend primary legislation through regulations, but in doing so to pick and choose which court judgments they do and don't approve of. Such a notion would be bad enough in general rule of law terms, but it is anathema to the legal protections of human rights, which amongst other things are intended to protect individual rights from the whims and interests of politicians.

In this regard we would note that there is no central record of s.3 judgments[20] and it is not even always entirely clear in the caselaw if and when a s.3 interpretation is being made.[21] The process, then, by which the Secretary of State comes to decide which judgements do and don't get preserved will depend on them being brought to the Minister's attention. This in turn will render human rights protections susceptible to lobbying, from parties on all sides, along with the political prejudices and interests of the relevant Minister.

[19] There is debate as to the legal affect of this clause, given the ordinary role of the Interpretation Act 1978 in these circumstances. See eg Robert Craig, Bill of Rights: An unexpected surprise in relation to the s 3 HRA duty to interpret, June 2022, https://legalresearch.blogs.bris.ac.uk/2022/06/bill-of-rights-an-unexpected-surprise-in-relation-to-the-s-3-hra-duty-to-interpret/

[20] See eg IHRAR Report, p 180 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf

[21] See eg Robert Craig, Bill of Rights: An unexpected surprise in relation to the s 3 HRA duty to interpret, June 2022, https://legalresearch.blogs.bris.ac.uk/2022/06/bill-of-rights-an-unexpected-surprise-in-relation-to-the-s-3-hra-duty-to-interpret/

8. Clause 5 of the Bill would prevent UK courts from applying any new positive obligations adopted by the ECtHR following enactment. It also requires the courts, in deciding whether to apply an existing positive obligation, to give "great weight to the need to avoid" various things such as requiring the police to protect the rights of criminals and undermining the ability of public authorities to make decisions regarding the allocation of their resources. Is this compatible with the UK's obligations under the Convention? What are the implications for the protection of rights in the UK?

With regard to clause 5(1), this would lead to the UK courts, and other public authorities, being forced by statute to ignore ECtHR judgments, which will inevitably leave the UK in the position of regularly (and increasingly as the years go on) losing cases at Strasbourg.

This would also represent a major missed opportunity to reform and improve the conduct of public authorities and their capacity to protect the human rights of people in the UK. Take the example of the Worboys case, which was at the time it was promulgated a 'new positive obligation' within the meaning of Clause 5(1). It is clear that the development of the operational positive obligations on police towards a duty of care to individual victims, primarily women, with regards to investigations in cases of rape or other serious sexual assault, has been a crucial tool in ongoing efforts to break the longstanding ways of working and attitudes ingrained in the way the police operated in relation to these issues.[22] An arbitrary and sweeping ban on any future developments along these and similar lines, involving the police or other public authorities of concern, will lead to serious failings and, ultimately, human rights violations.

The established case law on positive obligations has been essential for individuals across the UK seeking protection of their rights in relation to a wide range of issues. Some are very well known, such as the second inquest into the Hillsborough Stadium disaster.[23] Others are less so. These include:

(i) the rights of a complainer in domestic abuse proceedings to be heard and represented in an application to recover her medical records,[24]

(ii) the rights of a woman with Asperger's Syndrome to have her allegation of rape properly investigated by the police,[25] and

(iii) the failure to fully investigate the deaths of those who died following their infection with hepatitis C during the course of receiving blood products and transfusions.[26]

Yet, the second limb of clause 5 imposes a series of convoluted hurdles in front of the application of these established positive obligations. This includes legislating for an apparent principle that the police should not protect a person's right to life if they themselves have engaged in crime,[27] a notion antithetical to the protection of universal human rights. These principles will also undermine the progressive role that legal duties to protect human rights play in reforming institutions of state power. Of particular concern in this regard is the creation of a principle that courts should avoid interfering with the 'expertise' and 'professional

[22] See eg https://www.endviolenceagainstwomen.org.uk/british-bill-of-rights-major-step-back-for-women-and-survivors/; https://www.standard.co.uk/comment/comment/why-the-bill-of-rights-is-a-threat-to-women-b1001141.html; and https://constitutionallawmatters.org/2022/08/why-the-bill-of-rights-undermines-womens-safety/

[23] See eg https://www.bihr.org.uk/blog/hillsborough-inquest

[24] WF v Scottish Ministers [2016] CSOH 27, para 27 - 28

[25] C v Chief Constable of Northern Ireland [2020] NIQB 3, paras 78-79, 92

[26] Kennedy and Black v Lord Advocate 2008 S.L.T. 195, para 125 - 126

[27] BORB Clause 5 (2)(c)

judgment' of figures in public authority management.[28] Cases brought under the Human Rights Act have repeatedly shown that public authority leadership must be subject to rigorous oversight, including the enforcement of binding legal duties, and that without it, as the Right Reverend James Jones KBE memorably said in his report on the outcome of the Hillsborough inquests, institutions have 'closed ranks, refused to disclose information, used public money to defend its interests and acted in a way that was both intimidating and oppressive.'[29]

9. Clause 7 of the Bill requires the courts to accept that Parliament, in legislating, considered that the appropriate balance had been struck between different policy aims and rights and to give the "greatest possible weight" to the principle that it is Parliament's role to strike such balances. In your view, does this achieve an appropriate balance between the roles of Parliament and the courts?

Clause 7 is aimed at the courts' function in assessing the proportionality for human rights purposes of legislation and action taken under legislation. Proportionality is a fundamental concept in human rights protection, as the application of qualified rights almost always involves a proportionality assessment of one kind or another.[30] Without a functioning power to determine proportionality, qualified rights lose their effectiveness.

What practical effect this clause will have remains to be seen; as noted above UK judges are already highly deferential to Parliament on the issues this clause addresses. However, as an attempt to further tip the scales away from the protection of rights and towards government policy, as expressed through legislation, we do not consider that it achieves an appropriate balance.

10. Clause 12 would replace the current duty, in section 6 HRA, on public authorities to act compatibly with human rights unless they are required to do otherwise as a result of legislation. In the absence of the obligation to read legislation compatibly with Convention rights, what impact would clause 12 have on (a) individuals accessing public services and (b) public authorities?

The removal of the duty to read legislation compatibly with convention rights from the clause12/s.6 duty to act compatibly with Convention rights would significantly diminish rights protections in the UK. The nature of public authority finances are such that, particularly in relation to local government services, frequently the only services that are provided are those that are legally required. Public authority provision will inevitably be reduced as a result, as areas are deprioritised or scrapped entirely.

Meanwhile, individuals accessing public services or, crucially, being subject to state power as exercised by public authorities (such as the police, prisons and hospitals including psychiatric facilities), will have their means of redress for rights violations substantially reduced.

[28] BORB Clause 5 (2)(b)

[29] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655892/6_3860_HO_Hillsborough_Report_2017_FINAL_WEB_updated.pdf

[30] See eg Lord Justice Singh, Making Judgments on Human Rights Issues, Human Rights Law Centre Annual Lecture 2016, March 2016, https://www.judiciary.uk/wp-content/uploads/2016/03/Singh_HumanRights8March2016.pdf

11. Does the system of human rights protection envisaged by the Bill ensure effective enforcement of human rights in the UK, including the right to an effective remedy (Article 13 ECHR)?

For the reasons discussed throughout this submission, our answer is no. In addition, we would note the following.

A right of access to a court requires a clear and practical opportunity to challenge an act that is an interference with rights alongside effective enforcement mechanisms.[31] We are concerned that the Bill could place significant and unnecessary obstacles in the way of litigants which may collectively limit how effectively human rights cases are brought, including:

- The introduction of an additional permission stage[32]
- The possibility of limiting which courts or tribunals human rights cases are to be brought in, to be determined by further rules made under the relevant part of the Bill[33]
- Limiting access to damages, which may in turn limit access to legal aid for a 'low value' case. This is because:
    - the person will now have to establish loss or damage arising from the conduct in most cases, rather than the broader 'just satisfaction' test,[34]
    - There is a prescribed list of factors the courts must take into account in awarding damages, further limiting judicial discretion,[35]
- The EHRC will no longer exempt from the 'victim status' test for standing to bring rights-cases.[36] Unless rectified this will make it near impossible for EHRC to bring 'own name' human rights challenges.
- A complete ouster of rights cases in relation to overseas military operations (see answer 16)
- The prescriptive approach directed at the Courts, which limits their discretion to find a violation.

12. Do you think the proposed changes to bringing proceedings and securing remedies for human rights breaches in clauses 15-18 of the Bill will dissuade individuals from using the courts to seek an effective remedy, as guaranteed by Article 13 ECHR?

In our view the issue is not so much a question of people being 'dissuaded' from going to court to seek a remedy, but of people being prevented from doing so. The BORB, including clauses 15-18, represents a conscious attempt by government to make it harder, and thus prevent, UK residents from getting court protection for their rights.

13. Do you agree that the courts should be required to take into account any relevant conduct of the victim (even if unrelated to the claim) and/or the potential impact on public services when considering damages?

No.

[31] See for example, Bellet v France, 23805/94, 4th December 1995, para 36

[32] BORB Clause 15

[33] BORB Clause 13 (3) (b)

[34] BORB Clause 18

[35] BORB Clause 18(5)-(7)

[36] The Equality Act 2006, s.30(3) of which exempts the EHRC from the need to be a 'victim' to bring proceedings under the Human Rights Act does not appear in the 'Consequential and Minor Amnedments' listed in BORB Schedule 5

The ECtHR already takes a cautious approach to awarding compensation for 'just satisfaction' under the Convention,[37] largely followed by domestic courts. The conduct of the applicant is only relevant insofar they contributed to the situation complained of.[38] Clause 18 of the BORB is a step away from this approach and contributes to the BORB's undermining of the principle of the universality of human rights.

14. Clause 6 of the Bill would require the court, when deciding whether certain human rights of prisoners have been breached, to give the "greatest possible weight" to the importance of reducing the risk to the public from persons given custodial sentences. What effect would this clause have on the enforcement of rights by prisoners?

Other specialist organisations will be better placed than us to respond to this question in detail. We would note that, this clause represents a further example of the ways in which the Bill a) undermines the principle of the universal nature of human rights, b) limits the discretion of the Courts and c) will necessitate increased applications to Strasbourg, which the UK will likely lose.

15. Clauses 8 and 20 of the Bill restrict the application of Articles 8 (right to private and family life) and 6 (right to a fair trial) in deportation cases. Do you think these provisions are compatible with the ECHR?

Please see AIUK's separate detailed submission on these points.

16. Clause 14 introduces a total ban on individuals bringing a human rights claim, or relying on a Convention right, in relation to overseas military operations, subject to the Secretary of State being satisfied that this is compatible with the UK's obligations under the Convention. Does this comply with the UK's obligations under the ECHR and international law? If not, what would need to be amended to ensure clause 14 is consistent with the UK's obligations under the Convention?

This provision creates a form of domestic immunity from jurisdiction. As such it is a very concerning proposal. It will, amongst other things, insulate the MoD from actions taken by British service personnel for actions and failures which impacted on their safety.

Until the effectiveness of any proposals for alternative remedies are fully considered, it remains to be seen whether this position will be capable of being made consistent with the UK's obligations under the Convention. It seems very unlikely, short of negotiating a new protocol to the Convention itself.

17. The Bill introduces a limited right to trial by jury. What would be the legal significance of the right?

The clause will do nothing in practice to either preserve jury trials or protect fundamental fairness. It merely refers to the legislation that already governs jury trials and states that this constitutes a fair trial for Article 6 purposes. That legislation could of course, be amended.

[37] Article 41

[38] Practice Direction in Just Satisfaction Claims, paragraph 12

The clause is an attempt to salvage something positive for what is otherwise an almost entirely regressive piece of legislation. It relies on, and perpetuates, a myth that the European Convention is any kind of threat to jury trial in the UK. This is a clause designed to look like a win when there is no contest in the first place.

18. The Bill strengthens protection for freedom of speech, with specific exemptions for criminal proceedings, breach of confidence, questions relating to immigration and citizenship, and national security. Do you think these changes are necessary? What would be the implications of giving certain forms of speech greater protection than other rights?

We do not consider these changes to be necessary.

Protection of freedom of expression is primarily about protecting forms of speech and the exchange of ideas from the powers of the state. The carve outs for this 'enhanced' protection for free speech are illustrative of its real function. It will do nothing to protect forms of speech that are criminalised by the state, the ultimate form of state interference, but will assist media organisations to publish material that would otherwise be found to be a disproportionate interference with an individual's right to privacy because of a lack of public interest value. This enhanced protection merely serves to protect government interests, in providing no assistance to those targeted by the government's wider legislative agenda while currying favour with certain sections of the media.

HRA section 12 as currently drafted already provides enhanced protection for the freedom of expression of the press and other publishers, but this is appropriately balanced against individuals' rights to privacy as set out in Article 8. The courts have devised a coherent and widely understood framework for determining issues where the two rights come into tension with each other.[39] A reasoned assessment of where the balance lies between the two rights, based on the specific facts of the case, is a far more coherent way of making a rights adjudication than imposing an artificial weight on the scales.

19. Why do you think the Government has chosen to protect freedom of speech rather than freedom of expression, as guaranteed in Article 10, and what are the implications of treating the elements of Article 10 differently?

It appears that 'freedom of speech' has been chosen to indicate a distinction between the full rights to freedom of expression as defined in the ECHR and a subset of particular forms of expression that are to benefit from the BORB's enhanced protection. Given the political background of this clause, this is partly to indicate something distinctly 'British' about this enhanced protection and to give the impression of creating a positive advance in rights protections unavailable through the previous European model.

In practical terms, the definition of what elements of expression will attract this enhanced protection omits the right to 'freedom of opinion' and the right to 'receive information and ideas',

[39] See Bloomberg LP (Appellant) v ZXC (Respondent) [2022] UKSC 5; Campbell v MGN Ltd [2004] UKHL 22; and Douglas v Hello! Ltd (No 3) [2007] UKHL 21

both of which are integral parts of the ECHR definition of expression.[40] The reasons for these omissions are unclear. The government's explanation of this aspect of the clause in the bill documents claims that it excludes 'other physical acts, including those that interfere with the ability of others to do as they wish.'[41] This appears to be a reference to protest, but it is not clear how the excluding the right to freedom of opinion and to receiving information and ideas relates to 'physical acts that interfere with the ability of others to do as they wish'. What appears uncontroversial is that the intention is to create enhanced protections for forms of speech favoured by the government while excluding, as far as possible, forms of speech the government disapproves of. The exclusions could include, for example, various forms of protest, but also requests for information inconvenient to the government; and challenges to other parts of the government's agenda, such as the implementation of parts of the Prevent duty.

20. How would repealing the Human Rights Act and replacing it with the Bill of Rights as proposed impact human rights protections in Northern Ireland, Scotland and Wales?

Good Friday Agreement (B/GFA)
The incorporation of the ECHR was an explicit commitment of the B/GFA.[42] It has proved vital to peace-building efforts, both in terms of building post-conflict institutions and the confidence of communities in Northern Ireland and as a mechanism to help address human rights violations over thirty years of the conflict, and indeed since.

The BORB restrictions on access to justice (see Answer 11) will constitute a breach of the B/GFA obligation to provide 'direct access' to the domestic courts.[43] The clearest breach of the obligation to provide 'remedies for breach of the Convention' arises from the provisions in the BORB restricting 'positive obligations' (see Answer 8) preventing the domestic courts from providing a remedy, but there are potentially many others depending on how BORB clauses are interpreted and applied. The positive obligations that have emerged from article 2 and 3 have been essential in seeking progress on legacy investigations,[44] amongst other issues.

'Convention Rights,'
A court determining a 'Convention right' issue must follow the approach of the BORB to interpretation,[45] fundamentally altering the interpretation of the Convention rights embedded within the Scotland Act 1998, Northern Ireland Act 1998 and Government of Wales Act 2006.

[40] Article 10(1) ECHR: 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
[41] Bill Of Rights Bill Explanatory Notes, Para 56 https://publications.parliament.uk/pa/bills/cbill/58-03/0117/en/220117en.pdf
[42] See Good Friday Agreement, p. 16 para 2, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034123/The_Belfast_Agreement_An_Agreement_Reached_at_the_Multi-Party_Talks_on_Northern_Ireland.pdf
[43]See Goof Friday Agreement, p. 16 para 2, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034123/The_Belfast_Agreement_An_Agreement_Reached_at_the_Multi-Party_Talks_on_Northern_Ireland.pdf
[44] See https://reparations.qub.ac.uk/assets/uploads/FINAL-HRC-QUB-response-to-NIO-consultation.pdf
[45] Clause 3 (2)

A provision of an Act of the Northern Ireland Assembly,[46] Scottish Parliament[47] and Welsh Senedd[48] is 'not law' if it is outside legislative competence, e.g. incompatible with the Convention Rights. Convention rights are assessed in the context of scrutiny of Bills.[49] Powers of the Welsh,[50] Northern Ireland[51] and Scottish[52] Ministers are similarly limited.

Courts in devolved nations interpreting 'Convention rights' may have no option but to diverge from the approach of Strasbourg (see Answers 1,2, 6 and 8). This will upset 20 years of embedded case law and standards, causing confusion and undermining how the ECHR is observed and implemented in devolved areas.

In the absence of s.3 HRA, where a court has found devolved legislation to be incompatible with a Convention right, the outcome will not be a declaration of incompatibility, as it would be in for Westminster legislation. Instead, the legislation would be 'not law,' requiring urgent Parliamentary resource to rectify. The decision on whether to 'preserve or restore' a s.3 case would be for the Secretary of State (see answer 7).

Access to justice
As outlined above, the BORB will negatively impact access to justice across the UK. Many of these provisions will impact on court procedures which are devolved to Scotland and Northern Ireland.

Incorporation of human rights
The BORB will hinder the programmes of expanding human rights across the devolved nations, including:

- *The B/GFA* provided that ECHR rights should be enhanced through a Bill of Rights for Northern Ireland- a "Convention rights-plus" document.
- Plans to incorporate the Convention Rights alongside other international treaty rights within the Scottish Bill of Rights.
- The Welsh Programme for Government commits to incorporation of CEDAW and CRPD and a holistic Bill of Rights is also being considered.

21. Should the Government seek consent from the devolved legislatures before enacting the Bill and, if so, why?

Overall the BORB does not *reflect the different interests, histories and legal traditions of all parts of the UK* as intended.[53] It is profoundly Westminster-centric. The establishment of a country's constitutional rights document is normally a unifying process of establishing common basic norms that benefit from broad acceptance from across society, and which establish a baseline from which that society's governmental structures will operate going forwards. Proceeding without legislative consent would contradict this approach. The Sewel convention not only has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures, but in this context would be vital to the perceived legitimacy of what would be the UK's constitutional rights instrument going forwards.

[46] S.6
[47] S.29
[48] S.94
[49] S.31SA, Part II NIA, s.110 GOWA
[50] S.81
[51] S.24
[52] S.57
[53] See Modern Bill of Rights Consultation.