



Bill of Rights Bill – Second Reading briefing

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 (BOR).¹ This goes far beyond the 2019 Conservative Party manifesto commitment to “update the Human Rights Act”.² The large majority of submissions received by the Government appointed ‘Independent Human Rights Act Review’ panel (IHRAR) strongly supported the HRA³, with its Chair Sir Peter Gross stating that the HRA in general “worked well”.⁴ **Amnesty International urges all MPs to attend Second Reading and oppose the Bill of Rights Bill in its entirety.**

The BOR 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 BOR would:

- Represent a hugely regressive step, deliberately making it harder for people to get justice for rights violations
- Set a damaging precedent internationally, in particular through undermining the principle of universality in a number of places, breaching the international Good Friday Agreement, and creating a major divergence from the European Court of Human Rights, **which will result in more UK cases at the Court and more adverse rulings against the UK**
- Hand huge powers to Government by significantly limiting the judicial protection of rights and protecting Ministers and public authorities from accountability

In pursuing the BOR, the Government has cast aside almost all of the IHRAR’s recommendations, ignored the outcome of the public consultation it conducted,⁵ denied appropriate requests for pre-legislative scrutiny, including from four leading [Committee Chairs](#), and rejected the advice of [Special Procedures of the UN Human Rights Council](#) and the UN [High Commissioner for Human Rights](#). This is no way to create a new national human rights charter.

The following are some key areas of particular concern:

The Interpretation of Convention Rights (Clause 3)

Clause 3(2)(a) is the government’s attempt to rebuff the ‘living instrument’ doctrine that the European Court has adopted.⁶ It compels domestic courts to apply what some proponents refer to as a ‘textualist’

¹ BOR Schedule 5 s.2

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

³ Page 16, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf

⁴ Response to Q14, <https://committees.parliament.uk/oralevidence/3374/html/>

⁵ 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 <https://consult.justice.gov.uk/human-rights/human-rights-act-reform/results/modern-bill-rights-consultation-response.pdf>

⁶ See eg https://www.echr.coe.int/Documents/Convention_Instrument_ENG.pdf

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approach,⁷ but which most commentators recognise as a form of the ‘Originalism’⁸ that has dominated conservative legal discourse in the United States, culminating recently in the overturning of constitutional abortion-rights protections.⁹ The clear intention of the clause is to require a restrictive application of Convention rights and to root any further interpretation in the intentions of their 1950s drafters.¹⁰

This clause will render the BOR increasingly irrelevant to the needs and challenges faced by people in the UK; the living instrument doctrine allows the rights in the Convention to be appropriately applied to address modern conditions, human relationships, scientific and technological developments and the realities of modern communication. In particular, an originalist approach 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 with Strasbourg. This will inevitably lead to the UK having more cases taken against it, and losing more of those cases.

Repeal of Section 3 HRA Combined with Clauses 12 and 40 BOR

Scrapping the s.3 power would be a major 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.¹¹ Here we will briefly emphasise some broader consequences of this.

The first is that, absent far greater attention being paid by Parliamentarians to the protection of rights in legislative drafting, primary and secondary legislation will more likely be incompatible with basic human rights standards, leading to more violations and more ‘Declarations of Incompatibility’ (DoI), as opposed to Courts interpreting legislation in line with human rights standards and directing public authorities to act accordingly. So DOIs will become more common, but successful claimants, who would in the current system benefit from a Convention-compliant interpretation of statute, will be denied a proper remedy.¹²

Meanwhile, Clause 40 provides the Secretary of State with the power to make regulations preserving the effect of previous s.3 judgments. It appears to be the government’s view that those section 3 interpretations that are not preserved by the powers contained in Clause 40 simply fall away. This will mean huge upheaval for the function of public authorities and the UK residents who interact with them. Moreover, 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 pick and choose which court judgments they approve of. The process by which the Secretary of State comes to decide which judgements do and don't get preserved will depend on lobbying, from parties on all sides, along with the political prejudices and interests of the relevant Minister.¹³ Such a notion is entirely contrary to the legal protections of human rights, which amongst other things are intended to protect individual rights from the whims and interests of politicians.

Positive Obligations (Clause 5)

Clause 5(1) forces UK courts to ignore ECtHR judgments that develop the law on ‘positive obligations’ and

⁷ 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>

⁸ See eg the evidence of Lord Pannick and Baroness Kennedy to the JCHR, 6th July 2022, <https://committees.parliament.uk/oralevidence/10561/pdf/>

⁹ 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

¹⁰ 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>

¹¹ Aside from the relatively weak 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.

¹³ There is no central record of s.3 judgments. See eg IHRAR Report, p 180 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf

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to refrain from developing it themselves.¹⁴ This will inevitably leave the UK in the position of regularly (and increasingly as the years go on) losing cases at Strasbourg. It also puts the UK government in breach of its obligations under the Good Friday Agreement, with regards to the availability of remedies.

This would also represent a major backwards step in the attempt to reform the conduct of public authorities. For example, the development of the operational positive obligations on police towards a duty of care to individual victims, primarily women, of rape or other serious sexual assault, has been a crucial tool in ongoing efforts to break the longstanding failings ingrained in the way the police operate in relation to these issues.¹⁵

The second limb of Clause 5 imposes a series of convoluted hurdles in front of the application of even established positive obligations. This includes legislating for a principle that the police should not protect a person's right to life if they themselves have engaged in crime,¹⁶ a notion antithetical to the protection of universal human rights. Another particular concern in this regard is the creation of a principle that courts should avoid interfering with the 'expertise' and 'professional judgment' of figures in public authority management. 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.¹⁷

Rights of Prisoners (Clause 6)

Clause 6 imposes controls of judges' assessments of qualified rights cases brought by prisoners. This clause encapsulates the BOR's most significant failings, many of them unique for a constitutional rights document in international terms. Uniquely as a constitutional rights document, the BOR singles out groups of unpopular or marginalised people; is primarily focussed on controlling and curtailing court functions and judicial capacity to protect rights; and peddles in kneejerk responses to tabloid headlines and media myths. As a result of all this, Clause 6 is one of a number of BOR clauses that will inevitably put the UK in breach of its duties under the Convention.

Proportionality Assessment (Clause 7)

Clause 7 is aimed at the courts' function in assessing the proportionality for human rights purposes of 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. Without a functioning power to determine proportionality, qualified rights lose their effectiveness. UK judges are already highly deferential to Parliament on the issues this clause addresses. However, this clause appears to be an attempt to further tip the scales away from the protection of rights and towards government policy, as expressed through legislation.

Clause 8 & 20: Deportation Powers (Clauses 8 and 20)

Please see AIUK's detailed [briefing](#) on the deportation provisions of the BOR. In summary, Clause 8 is extremely harmful, including to children and people entitled to British citizenship, and is a clear violation of the UK's duties under the Convention. It sets an extraordinarily high bar before a UK court could declare a provision of immigration law dealing with deportation to be incompatible with the right to private and family life; far beyond that set by the European Court. As such it would require the UK courts to pretend that a legislative provision is Convention compatible when it clearly is not. It also excludes large groups of people and circumstances that commonly arise in such cases from any family and private life protection at all, including; people born and/or brought up in the UK who lack citizenship, people whose children are not yet British citizens and who are aged under 7, and people with non-traditional family arrangements, such as kinship carers.

¹⁴ Positive obligations require States to not only desist from violating rights, such as the right to life, but take positive steps to protect them.

¹⁵ See eg <https://www.theguardian.com/commentisfree/2022/sep/04/my-clients-were-john-worboys-victims-the-bill-of-rights-would-undo-their-victory>; <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/>

¹⁶ BOR Clause 5 (2)(c)

¹⁷ See eg The Right Reverend James Jones, 'The patronising disposition of unaccountable power', https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655892/6_3860_HO_Hillsborough_Report_2017_FINAL_WEB_updated.pdf

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Permission Test (Clause 15)

Clause 15(3)(b) imposes a new 'significant disadvantage' permission test on all cases taken under the BOR. It singles out human rights cases for an extra hurdle not applied in any other form of domestic legal process. Courts already have ample powers to dispense with cases that stand no chance of success and/or are vexatious, including in human rights cases.¹⁸ This Clause will increase the complexity and cost of litigation and prevent victims of human rights violations who are unable to demonstrate 'significant disadvantage' from receiving legal protection for their rights. This latter effect would also breach the Belfast/Good Friday Agreement, with regards to rights of access to courts for Convention breaches.¹⁹

The Belfast/Good Friday Agreement (B/GFA)

The incorporation of the European Convention into Northern Ireland law is an explicit commitment of the B/GFA. However, this commitment is not limited to simple incorporation. The commitment also includes the guarantee of 'direct access to the courts', so that Convention rights are tangible for people, and an obligation to provide 'remedies for breach of the Convention', so that courts can properly protect peoples' rights. As discussed above, the BOR would constitute a breach of both of these core elements of the Convention Rights commitment; particularly through its 'significant disadvantage test' and its approach to positive obligations, but also potentially a number of other clauses.²⁰ Importantly, positive obligations on public authorities under Article 2 and 3 have been essential in seeking progress on legacy investigations.

Any amendment of the HRA necessitates a process of review between the UK and Irish Governments in consultation with the NI Assembly parties. It is very difficult to see how international and local agreement could be secured for such changes.

Devolution

The BOR imposes changes to the powers and duties of the devolved governments in a number of important ways. A court determining a 'Convention right' issue will be required to follow the approach of the BOR to interpretation,²¹ fundamentally altering the interpretation of the Convention rights embedded within the Devolution Acts.²² At the same time, while the removal of s.3 HRA will result in more Dols with regards to Westminster legislation (as discussed above), it will mean far more devolved legislation being struck down as 'not law'. This will require urgent Parliamentary resource to rectify. As also discussed above, the decision on whether to 'preserve or restore' a s.3 case would be for the Secretary of State, effectively giving that Minister veto power over parts of devolved legislation that require a s.3 interpretation to remain law.

The BOR does not reflect the consensus on rights protections in the devolved nations, which is looking to enhance those protections rather than weaken them.²³ As such it does not '*reflect the different interests, histories and legal traditions of all parts of the UK*' as intended.²⁴ Legislative consent for the BOR from Devolved administrations would be vital to achieve the perceived legitimacy of what would be the UK's constitutional rights instrument going forwards. However there has already been clear and unambiguous opposition from the Scottish and Welsh governments in their [joint response](#) to the proposals.

¹⁸ See eg Hussain v SSHSC [2022] EWHC 82 (Admin) (18 January 2022)

¹⁹ 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

²⁰ Eg the repeal of S.3 HRA and BOR clauses 3(3)(a), 3(4), 4, 6, 7, 8, 14 and 22

²¹ Clause 3 (2)

²² Scotland Act 1998, Northern Ireland Act 1998 and Government of Wales Act 2006

²³ This includes a 'Convention Rights+' Bill of Rights for Northern Ireland, plans to incorporate the Convention Rights alongside other international treaty rights within a Scottish Bill of Rights, and the Welsh government's commitment to incorporation of CEDAW and CRPD.

²⁴ See Modern Bill of Rights Consultation.

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