Amnesty International UK

BRIEFING

The Bill of Rights – Rights Removal Bill: detailed analysis

As stated in our brief headline briefing, Amnesty International is deeply concerned about the Government's plans to fully repeal the Human Rights Act 1998 (HRA) and replace it with a new 'Bill of Rights' bill (BORB). The BORB would be a hugely regressive step for the protection of human rights in the UK.

Amnesty International urges all MPs to oppose the Bill of Rights Bill in its entirety. It is a deeply flawed piece of legislation.

This briefing provides more detailed discussion of key impacts and areas of particular concern within the BORB:

- The Interpretation of Convention Rights (Clause 3)
- Repeal of Section 3 HRA Combined with Clauses 12 and 40 BORB
- Positive Obligations (Clause 5)
- Rights of Prisoners (Clause 6)
- Proportionality Assessment (Clause 7)
- Clause 8 & 20: Deportation Powers (Clauses 8 and 20)
- New Stricter Permission Test (Clause 15)
- Breaches of the Belfast/Good Friday Agreement (B/GFA)
- Implications for devolution
- Immunity for Overseas Military Operations (Clause 14)
- Limitation to damages payments (Clause 18)
- Interim measures from the European Court of Human Rights (Clause 24)

The Interpretation of Convention Rights (Clause 3)

Clause 3 replaces Section 2 of the Human Rights Act (HRA), which gives UK courts a flexible direction to 'take into account' rulings of the European Court of Human Rights (ECtHR, when considering human rights cases. Section 2 is clear, concise and ensures Convention rights in the UK are interpreted in line with the Convention's ultimate arbiter, the ECtHR, without UK courts being forced to follow Strasbourg without question.

In contrast, Clause 3 imposes a convoluted and confused list of considerations courts should apply when interpreting Convention rights, the overarching theme of which is to cause the UK courts to fall out of step with European Court caselaw.

In particular, Clause 3 (2)(a) of the BORB is of significant concern, being the government's attempt to rebuff the 'living instrument' doctrine that the European Court has adopted.[1] It compels domestic courts to apply what some proponents refer to as a 'textualist' approach,[2] but which most

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

[2] 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

commentators recognise as a form of the 'Originalism'[3] that has dominated conservative legal discourse in the United States, culminating most recently in the overturning of constitutional abortion-rights protections.[4] The clear aim of the clause is to produce a restrictive interpretation of Convention rights, by requiring them to be narrowly focussed on the wording of the right and rooting any further interpretation in the intentions of their original 1950s' drafters.[5]

This clause will render the BORB increasingly irrelevant to the needs and challenges faced by people in the UK; it will be forced to address modern conditions, human relationships, scientific and technological developments and the realities of modern communication with the intentions and political considerations of a by-gone age. 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 domestically and the Convention rights protected at Strasbourg. This will inevitably lead to the UK having more cases taken against it, and more adverse rulings against the UK.

Also of concern is Clause 3(3). What it amounts to is that in circumstances where the European Court would find a violation of a person's rights the UK courts are to be free to diverge from Strasbourg, but when the European Court wouldn't, the UK courts would have to follow that ruling. As with many other clauses of the BORB, this constitutes a significant tipping of the scales towards state interests and away from protecting individuals' human rights.

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

The BORB does not reproduce Section 3 of the HRA, which means the power it provides would be scrapped – representing a major weakening of the way human rights are protected in the UK. Section 3 requires UK courts and other public authorities to interpret legislation, so far as is possible to do so, in line with Convention rights. This in turn means that public authorities, like schools, hospitals and the police, must try to ensure legislation is followed in such a way as to respect individuals' rights. It is this Section 3 power which gives human rights protections an elevated position in our law, rather than just being another consideration in the mix when interpreting a statute.

This elevated position is important as, without it, and absent far greater attention being paid by Parliamentarians to the protection of rights in legislative drafting, primary and secondary legislation will inevitably lead to more rights violations. This was the UK's experience before the HRA, when it was regularly being found in violation of the Convention at Strasbourg. Under the BORB, though, instead of courts interpreting legislation in line with human rights standards and directing public authorities to act accordingly, 'Declarations of Incompatibility' (DoI) will become the only route open to courts when the ordinary meaning of a statute results in a violation. People who succeed in showing that their rights have been or would be violated as a result of the ordinary wording of a statute, who would in most instances currently benefit from a Convention-compliant interpretation of statute, will be denied a proper remedy, as DoIs do not affect the interpretation or application of a statutory provision and are in effect a signal to government that the provision is problematic and requiring

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

[4] 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

[5] 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

change. In turn DOIs, which are currently rare and as a result, always addressed, will become much more common and thus risk diminishing in significance.

Meanwhile, Clause 40 provides the Secretary of State with the power to make regulations preserving the effect of previous Section.3 judgments, therefore suggesting that those effects will not automatically be preserved. This will not only mean huge upheaval for the function of public authorities and the UK residents who interact with them, but hands a massive transfer of power to the Secretary of State, who will be able 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.[6] 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 50

Clause 5(1) forces UK courts to ignore ECtHR judgments that develop the law on 'positive obligations' and to refrain from developing it themselves. Positive obligations require States to not only desist from violating rights, such as the right to life, but take positive steps to protect them. 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 Belfast/Good Friday Agreement, with regards to the availability of remedies for Convention breaches (more on this below) Positive obligations have been central in many cases brought by victims of serious domestic and sexual abuse after failings by the police and other public bodies; and in obtaining properly effective public inquiries, such as those into the Government's handling of COVID, the Hillsborough tragedy and the Mid Staffs Hospital scandal7. To restrict their application so significantly would represent a major backwards step in the attempt to reform the conduct of public authorities, particularly in ongoing efforts to break the longstanding failings ingrained in the way the police operate in relation to rape and other serious sexual assault.[8] .

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,[9] 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.[10]

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[6] 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

[7] See examples of people / cases using the Human Rights Act.

[8] 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/

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

[10] 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

Rights of Prisoners (Clause 6)

Clause 6 imposes controls on judges' assessments of qualified rights cases brought by prisoners. It seeks to weight very heavily such assessments against the prisoner, making it far harder for them to secure protections against human rights violations. It also leaves it up to the Minister to determine through regulations which prisoners will be caught by this provision. This clause encapsulates the BORB's most significant failings, many of them unique for a constitutional rights document in international terms. Uniquely as a constitutional rights document, the BORB 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 BORB 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 proportionality assessments of legislation that courts conduct when challenges are brought on the basis of qualified human rights. It requires judges, regardless of the actual reality, to automatically accept that in passing a piece of legislation Parliament has decided that the legislation strikes an appropriate balance between different interests and rights, and then to give 'the greatest possible weight' to that decision.

Proportionality is a fundamental concept in human rights protection, as the application of qualified rights, such as those to freedom of expression and association or the right to private and family life, 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, particularly with regard to issues of economic and social policy, such as the recent Supreme Court case on the two-child limit to child tax-credit payments, but also issues of national security, penal policy, and matters raising sensitive moral or ethical issues. 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.

Permission Test (Clause 15)

Clause 15(3)(b) imposes a new 'significant disadvantage' permission test on all cases taken under the BORB. Permission tests already exist in judicial review cases, where a applicant must show that they have an arguable case. The new test would be an additional test on top of that pre-existing one and would also apply to all other human rights cases, which currently do not require such a hurdle.
The 'significant disadvantage' test is taken directly from Article 35 of the European Convention, requiring that a violation, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration. However the European Court has been clear that the test relates to consideration of a violation **by an international court**.'[11] Its justification at the European Court level is based on the idea that claimants will have had sufficient domestic opportunities to have their case

[11] https://www.echr.coe.int/documents/admissibility_guide_eng.pdf

heard and that 'international supervision' of rights protections should be reserved for a smaller select group of cases. The ECtHR test itself relies on the assumption that such a hurdle would not be applied at the domestic level, given it would significantly restrict opportunities for claimants to have their case heard in the UK.

Moreover, what constitutes a 'significant disadvantage' is a highly complex assessment that depends on the facts of an individual case and takes into account both subjective and objective factors. Such determinations will have to be extensively litigated if brought into domestic law. Given other clauses in the BORB intend to encourage the UK courts to move away from Strasbourg jurisprudence, there is no means of predicting how this litigation will be developed.
The clause singles out human rights cases for an extra hurdle that is 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.[12] This Clause will increase the complexity and cost of litigation and prevent victims of human rights violations who are unable to meet the relatively high 'significant disadvantage' test from receiving legal protection for their rights. This latter effect would also put the UK in breach of its obligations under the Belfast/Good Friday Agreement, with regards to rights of access to courts for Convention breaches.[13] This is because the inevitable result of the significant disadvantage test is that some people who have experienced breaches of their Convention rights will not have their cases heard in a domestic court.

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. The BOR would constitute a breach of both of these; particularly through it's 'significant disadvantage test' and its approach to positive obligations, but also potentially a number of other clauses.[14] With regards to positive obligations we would also note that the 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. Reducing access to rights would undermine and potentially breach a carefully crafted domestic and international peace agreement and upset the delicate balance that has been hard won over the years.

[12] See eg Hussain v SSHSC [2022] EWHC 82 (Admin) (18 January 2022)
[13] 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
[14] Eg the repeal of S.3 HRA and BORB clauses 3(3)(a), 3(4), 4, 6, 7, 8, 14 and 22

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,15 fundamentally altering the interpretation of the Convention rights embedded within the Devolution Acts.[16] At the same time, while the removal of s.3 HRA will result in more DoIs 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.[17] As such it does not '*reflect the different interests, histories and legal traditions of all parts of the UK'* as intended.*[18]* 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.

Other areas of significant concern

Immunity for Overseas Military Operations (Clause 14)

Clause 14 creates a complete domestic immunity against human rights challenges in cases relating to Overseas Military Operations. If brought into effect,19 it will, amongst other things, insulate the MoD and Ministers from legal action taken by British service personnel for actions and failures which impacted on their safety.

Limitation to damages payments (Clause 18)

Clause 18 seeks to limit damages payments in rights cases based on an open-ended assessment of a person's 'conduct' and the financial position of the relevant public authority. There is no guidance on what conduct is to be considered, other than that it must be considered 'relevant' and that the 'conduct' could have nothing to do with the central issue in the case. This undermines the notion of the universality of rights, as ordinarily a person's conduct is only relevant to a damages assessment insofar as they contributed to the situation complained of. It also insulates public authorities from the consequences of their unlawful actions.[20]

Interim measures from the European Court of Human Rights (Clause 24

[15] Clause 3 (2)
[16] Scotland Act 1998, Northern Ireland Act 1998 and Government of Wales Act 2006
[17] 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.
[18] See Modern Bill of Rights Consultation.

[19] Clause 39(3) requires that Clause 14 only be brought into effect once the Secretary of State is satisfied that alternative remedies are in place. It seems very unlikely that this would be possible, short of negotiating a new protocol to the Convention itself.
[20] Clause 18(6) & (7) requires a court to give great weight to financial position of public authorities and to have regard to the cumulative effect of future awards of damages which may fall to be made in cases raising the same or similar issue.

Clause 24 on interim measures from the European Court would not change the UK's international duties under the Convention, but would impose a completely unnecessary obstacle to UK courts considering the full legal picture in a given case; allow the UK government to set up further media controversy about the European Convention; and weaken the Government's position when seeking to ensure other states uphold their human rights obligations.[21]

[21] 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