SHRC
Scottish
Human Rights
Commission

Joint Committee on Human Rights Legislative Scrutiny: Bill of Rights Bill

August 2022

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006 and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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Executive Summary

The Scottish Human Rights Commission has consistently voiced its opposition to the UK Government's proposals to replace the Human Rights Act (HRA) with a new Bill of Rights.[1]

We consider the Bill of Rights relies on false premises instead of evidence, has been developed without adequate consultation or scrutiny[2], and will deliver primarily negative outcomes for the people and institutions of the UK, including Scotland.

We are clear in our view that the HRA works well as it stands, an opinion shared by others across the UK and Scotland, including this Committee, the devolved administrations, many civil society organisations and the UK Government's own Independent Human Rights Act Review, which concluded there was no case for widespread reform.

We note that the Bill as introduced reflects most of the proposals set out in the Ministry of Justice's consultation paper of December 2021. Where the Bill differs from the previous proposals, the likely impact is to curtail rights and water down protections even further.

As Scotland's UN-accredited A-status National Human Rights Institution (NHRI), we will continue to fulfil our role as a 'bridge' between the international and domestic frameworks, to support Scotland's developing human rights culture and challenge regressive measures such as those contained in the Bill.

We previously provided a detailed written response as well as oral evidence to the Committee's ongoing inquiry concerning Human Rights reform. Here, to remain within the stipulated word count, we have focused on answering those questions we feel are most significant to our mandate. Where we have not answered a question, this should not be read as acceptance of the proposed change, nor do we prioritise some changes over others.

We reject the Bill in its entirety and will continue to advocate strongly for its withdrawal.

Questions 1& 2 – Clause 3 BoRB, concerning the relationship between the UK Courts and the European Court of Human Rights.

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?

This change is an attempt to undermine the 'living instrument' principle, which is well established in international human rights law and allows the Convention to be interpreted in light of changing conditions in society.

The 'living instrument' principle was first articulated in the case of *Tyrer*[3] which considered whether the 'birching' of a 15-year old boy amounted to 'degrading punishment' so as to violate Article 3. In finding that it did, the European Court of Human Rights (ECtHR) recognised that concepts such as 'inhuman and degrading treatment' are liable to change over time and so Convention rights must be interpreted with a degree of flexibility to ensure they continue to be practical and effective.

Similarly, the principle has allowed the Strasbourg court to take account of changing societal attitudes towards sexual orientation in finding that criminalisation of homosexual acts was not 'necessary in a democratic society'[4].

But by giving primacy to the text of the Convention, Clause 3 seeks to discourage UK courts from interpreting Convention rights dynamically so as to keep pace with societal changes, even if that means 'falling behind' the ECtHR interpretations of the same rights.

It is difficult to see how a Bill which restricts the scope of Convention rights to the terms of a final text drafted in the early 1950s could in any sense be a 'modern' Bill of Rights.

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?

The Commission opposes this proposal, which aims to prevent national courts from going 'further' than the ECtHR in protecting rights, turning the extent to which the ECtHR has interpreted and applied rights into a 'ceiling' for domestic rights protection.

In fact, national courts already apply judicial restraint in matters of policy and the importance of incremental development in applying the principles of the ECtHR has been noted by the UK Supreme Court.[5]

If UK courts exercise the widened discretion afforded in Clause 3 by declining to follow developing Strasbourg jurisprudence there is a risk that the Bill of Rights delivers what has been described as a "Convention minus" position.[6]

The Commission is concerned the suggested approach could create a situation in which individuals may no longer be able to access Convention rights in full before national courts. This means that victims of human rights breaches would have to take their case all the way through our national courts and then make an application to the ECtHR to determine an outcome.

Should the case law of national courts diverge from ECtHR jurisprudence, public authorities would no longer be clear how a Convention right should be interpreted. This lack of clarity would undermine a human rights compliant culture. Where human rights standards are not consistently or coherently applied across all public sector decision-making, this risks leaving people vulnerable to poorer outcomes.

The proposal to legislate to prevent national courts from ever going further than the ECtHR in protecting rights is an inappropriate interference with the role of the judiciary and represents a significant

shift in the distribution of powers between executive and judicial pillars of state.

Question 3: Interim measures and the UK's international obligations.

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?

This clause did not feature in the consultation paper and appears to reflect the UK Government's stated concerns regarding the role of interim measures in 'grounding' the first flight chartered through the Migration and Economic Development Partnership with Rwanda on 14 June 2022.

We understand this Clause as a direct instruction to UK judges to ignore the binding judgments of an international court. We share the view expressed by Lord Pannick in his recent evidence to the Committee that the power to grant interim orders "is inherent in the Convention" and "contracting states are obliged under the convention to comply with them." He concluded that "it is almost impossible to understand how Clause 24 could be consistent with our obligations under the Convention."[7]

On a practical level, it is important to recognise the very limited and extreme circumstances in which interim measures may be indicated by the Strasbourg Court since, according to the Court's well-established practice, these can apply only where there is an 'imminent risk of irreparable harm'[8]. As well as asylum seekers fearing persecution, ill-treatment or other serious harm, interim measures have also been used to safeguard people at risk of being sentenced to death or life imprisonment if extradited.

In this context, we consider that the instruction to ignore interim measures is likely to put lives at risk.

Question 6: Interpreting and applying the law compatibly with human rights.

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?

We outlined the merit and utility of s3 HRA in our consultation response at paras 159-178. In summary, removing Section 3 would mean courts would no longer be able to protect rights to the extent that they currently do, by reading incompatible legislation in a human rights compliant way.

As the Government has acknowledged, "removing the duty to interpret legislation compatibly with rights currently found in section 3 would likely lead courts to find more legislation incompatible with those rights, thereby resulting in more declarations of incompatibility."[9]

It would leave individuals whose rights have been breached without a remedy unless, or until, Parliament decided to address the resulting declaration of incompatibility. This delay - during which Convention-incompatible provisions remain in force, enabling or requiring breaches of others' rights - is also acknowledged in the Government's own impact assessment.[10]

If Parliament does not resolve the incompatible legislation quickly it would mean more cases being taken to the ECtHR, with resources (both time and cost) being expended unnecessarily by both individuals and the UK Government.

The repeal of section 3 has particular implications for Scotland, discussed below at Q20

Question 7: Preserving existing judgements made in reliance on section 3 HRA

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?

The relevant Explanatory Notes refer to a "power to amend primary or subordinate legislation to preserve or restore the effect of legislation that has been interpreted or applied using section 3 of the HRA so that this is not lost on repealing the HRA[11]."

We therefore understand Clause 40 to be a type of 'saving provision', which entails that – unless explicitly preserved by the Secretary of State – all past judgements made in reliance of section 3 cease to be 'good law'.

The Independent Review noted the absence of a definitive public record of the use of section 3, suggesting that there was a lack of transparency to its application in past decisions.[12] This means that it may not be obvious which previous judgements require to be preserved, and clarity as to the status of a significant body of human rights case-law will only be achieved through case-by-case litigation.

Aside from this ambiguity and uncertainty, given our views on the merit and utility of s3 HRA, we view the measures as regressive in terms of domestic human rights protections.

The fact that the Clause applies to primary legislation has led academics to warn of executive overreach, describing Clause 40 as "a remarkably broad and extensive Henry VIII power [which] usurps the traditional role of Parliament and of the courts."[13] As Amnesty International have pointed out, the Clause appears to grant "extraordinary powers to the government to pick and choose which court judgments it approves of and which it would prefer no longer applied."[14]

These measures do not support the rule of law and are fundamentally unsuited to a legal framework for the protection of rights.

Question 8: Positive obligations and the UK courts.

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?

Restricting positive obligations is a regressive measure which we strongly oppose and we have set out our reasoning at paragraphs 148 – 158 of the consultation response.[15]

We note the Government's analysis of the consultation exercise is unable to evidence any support for these proposals[16], and that many of the written responses provided powerful evidence and case studies to show their value in protecting disadvantaged groups. For example, the Runnymede Trust voiced concern "that any attempt to reduce the scope and use of positive obligations could disproportionately put at risk the lives and well-being of Black and ethnic minority people,[17]" while Belfast's Children's Law Centre highlighted their role in ensuring that detained children are treated with humanity and dignity, and protecting children everywhere from neglect, abuse and physical violence.[18]

More recently, the Domestic Abuse Commissioner and Victims' Commissioner for England and Wales wrote to Dominic Raab to warn that "the restriction of positive obligations in the proposals would disproportionately hinder victims and survivors of domestic abuse and sexual violence from being able to enforce their rights to support, as it

would place a greater burden on victims who already face significant barriers to justice and struggle to access support services."[19]

As striking as this outcome is given the UK Government's stated commitment to tackling Violence Against Women and Girls, the reduced level of rights protection and accountability will reach much further and affect a wide range of vulnerable groups.

Questions 9: Giving the "greatest possible weight" to Parliament's role to strike balances.

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?

As we said in our consultation response at pages 74-76, the UK courts currently give "great weight" to Parliament's view[20] so this goes beyond the claimed purpose of codifying present case-law and creates a presumption that rights interferences arising from primary legislation must always be proportionate.

It is not clear what circumstances would outweigh the 'greatest possible weight', so as to overturn the presumption of proportionality, or whether such circumstances could ever exist.

The direction that courts should treat Parliament - in passing an Act - as having decided that it strikes an appropriate balance between different policy aims, Convention rights, or the competing Convention rights of different persons rests on the questionable assumption that these matters are adequately explored and debated during the Bill's passage through Parliament.

Whereas courts can currently explore the effects of legislation in specific cases, by giving Parliament the 'final word', the Bill of Rights framework

won't adequately address any unintended consequences of primary legislation, where impacts on different groups are only discovered after the Act has come into force.

If Clause 7 effectively removes judicial power to review the proportionality of an impugned measure and decide whether it strikes an appropriate balance between rights and policy aims, then it is a significant redistribution of power between the branches of the State, the constitutional significance of which requires much greater scrutiny than it has received to date.

Questions 11, 12 and 13: Enforcement of Human Rights: Litigation and remedies

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)?

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?

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?

As we noted in our consultation response at paras 122-138 and 305-312, the cumulative effect of introducing a permission stage (per clause 15) and adjusting awards of damages to reflect past conduct (per clause 18) would be to limit routes to remedy and redress. This would prevent and/or dissuade people from pursuing valid claims, and designate some breaches of rights "insignificant", and some holders of rights "undeserving".

These measures offend the principles underlying the Convention, the overall message being that rights are optional or negotiable, partial or exclusive to only certain people, rather than universal, international legal standards that protect everyone and in relation to which we all must have access to an adequate and effective remedy.

We also note that several clauses are designed to open up a gap between the interpretation of Convention rights at domestic and international (i.e. Strasbourg) levels.

Wherever such a gap exists, it is likely to result in failure to provide an effective remedy in breach of Article 13 ECHR since the remedy in question relates to the full content of the rights as determined by ECtHR, not the narrower, weaker interpretations likely to be produced under the Bill of Rights framework.

We share the concerns recently outlined by a group of Special Rapporteurs to the UN High Commissioner for Human Rights that "some of the amendments would run the risk of essentially creating a form of domestic immunity from jurisdiction for certain cases, while, on the other hand, deterring individuals from bringing human rights cases to domestic courts, hindering UK courts from exercising their normal and well-established gatekeeping function, and limiting the power of UK courts to grant effective remedies."[21]

Questions 20 and 21: The Human Rights Act and the Devolved Nations

In the paragraphs below, we speak only to the impacts in Scotland. We understand that the Bill will have significant impacts in the other devolved nations and acknowledge the role and mandates of our sister NHRIs to speak to these in detail.

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?

The Human Rights Act is a pillar of the constitutional framework of devolution in Scotland and Convention rights are protected under both the Human Rights Act and the Scotland Act 1998 (SA).

Where a human rights issue arises, claims may be taken under either or both Acts. While the rights applied through both statutes are the same, the remedies provided by the courts may differ.

Under the HRA, actions of public authorities that are incompatible with Convention rights are unlawful and can be subject to Judicial Review.[22] Where UK legislative provisions are found to be incompatible with Convention rights they can be declared as such, providing Ministers with the opportunity to amend the incompatible provisions.[23]

However, under the Scotland Act, the Scottish Government, Scottish Ministers and the Scottish Parliament do not have the power to act inconsistently with Convention Rights. To do so is beyond their competence, or *ultra vires*. Acts which are *ultra vires* have no legal effect.

An Act of the Scottish Parliament (ASP) is therefore "not law" so far as it is incompatible with any of the rights contained in the Convention.[24] An ASP that is found by a court to be incompatible with Convention rights can be, in effect, struck down or prevented from coming into force under the Scotland Act.

Therefore, in relation to devolved legislation and executive actions, the Scotland Act affords greater rights protection for the people of Scotland than is available under the Human Rights Act, where court declarations of incompatibility have no effect on UK legislation, and it is a matter for the UK Parliament to decide if it will replace or amend the legislation.

While the Scotland Act provides a greater degree of human rights protection for the people of Scotland, this is to a degree contingent on the Human Rights Act, which has been described as a 'dictionary' for certain phrases of the Scotland Act[25].

Where the Bill of Rights proposals 'water down' the protections provided in the Human Rights Act[26], this changes the parameters of the

competence of the Scottish Government and Scottish Parliament, significantly undermining rights protection for people in Scotland under the SA, as well as under the HRA.

It is also significant that - just as with UK legislation – ASPs are more likely to be held incompatible with Convention rights once courts lose the interpretative powers in s3 HRA. But since compatibility with Convention rights is a pre-requisite of devolved legislative competence[27], the likely consequence will be an increase in the number of ASPs struck down, requiring parliamentary action to revise the offending measures.

Beyond protection through litigation, we consider that the HRA has contributed to fostering an evolving human rights culture in Scottish public bodies over the last 20 years. For example, it has encouraged them to mainstream human rights considerations throughout decision making, to ensure fairer outcomes for people.

Work is now well underway in Scotland to incorporate into law the human rights contained in a number of other international human rights treaties, covering: economic, social, cultural and environmental rights, and stronger protections for the rights of women, disabled people, black and ethnic minority people, older persons, LGBTI people and children.

It is critical that this progress is not undermined by proposals to reduce Convention rights protection, introducing confusion and uncertainty for Scotland's public authorities.

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

As a matter of constitutional convention, the UK Parliament will not normally legislate about matters devolved to Scotland without the consent of the Scottish Parliament.[28]

The UK Government has already identified the specific clauses of the Bill which they acknowledge require legislative consent[29] and has committed to seeking it from the Scottish Government[30].

We further understand that the Scottish Government strongly opposes the Bill and anticipate that the Scottish Parliament will refuse consent.

Previously, both the *EU (Withdrawal) Act 2018* and *EU (Withdrawal Agreement) Act 2020* were passed in circumstances where the UK Government acknowledged the constitutional convention was engaged, but then proceeded to legislate despite consent being withheld.

Given this precedent and the political discourse around the Bill, we do not expect that the UK Parliament will recognise the Sewel Convention as preventing the passage of the Bill in its current form.

Any consequences for such action will be political rather than legal, the Supreme Court having made it clear that the requirement for legislative consent was *only* a convention and was therefore not legally enforceable[31].

Conclusion

Although we have only been able to address a small selection of the flaws in this Bill in the limited space of this response, these comments are drawn from our comprehensive analysis of the Bill's effectiveness as a framework for the protection and promotion of the rights protected by the Convention.

From that analysis, we are clear that - contrary to the UK Government's claims - the Bill of Rights Bill provides a significantly weaker mechanism for securing those rights for people in the UK than the Human Rights Act it is intended to replace.

We also share the Committee's concerns that a number of clauses in this Bill[32] would place the UK in breach of its international law obligations to respect and enforce human rights.[33]

Recalling the preamble to the Convention, we consider that the intent and effect of the Bill run contrary to the aim of "securing the universal and effective recognition and observance of the Rights therein declared."[34]

[1] See Annex to Explanatory Notes
[2] We share concerns outlined in the joint letter from Chairs of The House of Commons Public Administration and Constitutional Affairs Committee, the House of Commons Justice Committee, the Joint Committee on Human Rights and the House of Lords Constitution Committee, dated 27 May 2022
[3] *Tyrer v. UK* (no. 5856/72)
[4] *Dudgeon v United Kingdom* (1981)
[5] *R (on the application of AB v Secretary of State for the Home Department* [2021] UKSC 28 as per Lord Reed at para 59.
[6] Richard Clayton QC: The Government's New Proposals for the Human Rights Act Part 2: An Assessment – UK Constitutional Law Association
[7] https://committees.parliament.uk/oralevidence/10561/pdf/ Q20
[8] See ECtHR Factsheet on Interim Measures for examples of circumstances in which they have previously been granted.
[9] bill-of-rights-impact-assessment.pdf (publishing.service.gov.uk) @ para 124
[10] Of repeal of s3 HRA, it says that "where previously the issue may be solved immediately and directly at the resolution of the case under the proposals, it is much more likely that a declaration of incompatibility will be issued and resolution – through Parliament – will take much longer." bill-of-rights-impact-assessment.pdf (publishing.service.gov.uk) @ para 296
[11] Bill of Rights (parliament.uk) @ para 265
[12] The Independent Human Rights Act Review 2021 (publishing.service.gov.uk) Chapter 5, para 36
[13] Stefan Theil: Henry VIII on steroids – executive overreach in the Bill of Rights Bill – UK Constitutional Law Association
[14] Amnesty International UK Briefing - The Bill of Rights Bill 2022-07-13.pdf
[15] Submission to UK Gov Consultation on Reform of the Human Rights Act (scottishhumanrights.com)
[16] Human Rights Act Reform: A Modern Bill of Rights (parliament.uk) at para 63
[17] FINAL Runnymede Bill of Rights Briefing.docx (website-files.com)
[18] Download.ashx (bihr.org.uk)
[19] 2022.06.10-Bill-of-Rights.pdf
[20] Per Lord Reed in *R (SC) v Secretary of State for Work and Pensions, Equality and Human Rights Commission intervening* [2021] UKSC 26
[21] OL GBR (12.2022) (ohchr.org)
[22] Human Rights Act 1998, Section 6.
[23] *Ibid.* Section 4.
[24] Scotland Act 1998, Section 29(1).
[25] *Somerville v The Scottish Ministers* [2007] UKHL 44 per Lord Hope at paragraph 22
[26] For example, the provisions contained in Clause 3 concerning the *Interpretation of the Convention rights* are intended to make Convention rights a less stringent constraint on legislative or executive competence than under HRA.
[27] Scotland Act 1998 s29(2)(d)
[28] Scotland Act 1998 s28(8), also known as the Sewell Convention
[29] See Annex to Explanatory Notes
[30] "We want to work with all the devolved Administrations on these essential reforms, so we will be seeking legislative consent motions." Domenic Raab, House of Commons, 22 June 2022; Bill of Rights - Hansard - UK Parliament @ Column 847
[31] R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) and 2 Judicial Reviews (supremecourt.uk)
[32] Of the Clauses considered in this submission, the most concerning in terms of international obligations are clauses 5 (positive obligations) and 24 (interim measures of the ECtHR).
[33] Letter to the Lord Chancellor relating to the Bill of Rights human rights memorandum, dated 30 June 2022
[34] European Convention on Human Rights (coe.int)