



Briefing on the Bill of Rights Bill

July 2022

1. This briefing sets out the key points against the Bill of Rights Bill (the “**Bill**”), which repeals the Human Rights Act 1998 (the “**Human Rights Act**”). This briefing is sent in advance of the House of Lords debate on ‘the practical impact of the Human Rights Act 1998’ on 14 July 2022.

Practical impact of the Human Rights Act 1998

2. JUSTICE is firmly of the view that the Human Rights Act is a well-crafted piece of legislation that is functioning ably in its current form¹. It enables the courts to give effect to and protect the rights of individuals, whilst at the same time maintaining Parliamentary sovereignty and balance between the different branches of government.
3. The Human Rights Act has empowered thousands of individuals to enforce their rights in domestic courts, allowing the vast majority of human rights claims to be determined by UK judges, and enabled individuals to achieve justice without the time and expense of an application to the European Court of Human Rights (‘**ECtHR**’). It has embedded a culture of human rights protection within many of our public services which has, for example, been hugely significant in the Northern Ireland peace process where the Police Service of Northern Ireland are fully committed to acting in accordance with the Human Rights Act².
4. We would also highlight the following examples where the Human Rights Act has helped individuals from a variety of different backgrounds achieve justice:

¹ This was also the strong consensus of our expert group, convened for our response to the Independent Human Rights Act Review, which included a former High Court judge, academics, legal representatives for claimants and public authorities, a former Attorney General and representatives from Scotland and Northern Ireland. See <https://justice.org.uk/justice-response-to-independent-human-rights-act-review/>

² See, for example, the Police Service of Northern Ireland’s *‘Manual of Policy, Procedure and Guidance on Conflict Management: Legal Basis and Human Rights’* (23 April 2021)

- a. *Commissioner of Police of the Metropolis v DSD and another*³. Several victims of sexual offences committed by John Worboys sued the Metropolitan Police and were awarded compensation as investigative police failures had constituted a violation of Article 3 European Convention on Human Rights ('ECHR'); the right not to be subject to ill-treatment. This case shows how the Human Rights Act protects the victims of serious crime by imposing duties on the state to carry out competent criminal investigations.
 - b. *Rabone and another v Pennine Care NHS Foundation Trust*⁴. A patient's family successfully sued an NHS Trust after their seriously mentally unwell daughter was released from hospital, despite serious concerns, only to lose their life to suicide a day later. It was found that Article 2 ECHR (the right to life) meant that the state owed the patient a duty to take reasonable steps to protect them from the real and immediate risk of suicide.
 - c. *Vanriel and Tumi v The Secretary of State for the Home Department*⁵. Two victims of the Windrush scandal successfully challenged the Secretary of State for the Home Department for breaching their human rights when refusing their citizenship applications. The individuals were refused by the Home Office as they had not been physically present for five years in the UK, but this was a result of them being denied entry to the UK due to the Windrush scandal. Section 3 of the Human Rights Act allowed the Court to interpret the British Nationality Act 1981 as permitting a discretion in these circumstances.
5. We welcome Baroness Whitaker's debate in the House of Lords on the 'practical impact of the Human Rights Act 1998', which could not be timelier with the Government having published legislation to repeal the Human Rights Act.

Lack of evidence and scrutiny for the Government's Bill of Rights Bill

6. Sir Peter Gross' Independent Human Rights Act Review was a serious, evidence-based analysis of the workings of the Human Rights Act. The Review's panel included senior lawyers and academics with considerable experience. It received 167 total submissions from a broad range of individuals and organisations with direct experience of utilising the

³ [*Commissioner of Police of the Metropolis v DSD and another* \[2018\] UKSC 11](#)

⁴ [*Rabone and another v Pennine Care NHS Foundation Trust* \[2012\] UKSC 2](#)

⁵ [*The Queen \(on the application of Vernon Vanriel and Eunice Tumi\) v Secretary of State for the Home Department* \[2021\] EWHC 3415 \(Admin\)](#)

Human Rights Act to uphold Convention rights. Again, it must be stressed that the Government have effectively ignored this review. Its consultation barely mentions the Gross review and goes far beyond what Sir Peter Gross' team thought was required.

7. This is reflective of the Government's continued attempts to limit scrutiny of this fundamental constitutional change. The Ministry of Justice consultation only closed on 8 March 2022. However, a fully accessible version of the consultation (including an 'easy-read' version and an audio version for the visually impaired) was not published until near the end of the consultation period. The Ministry of Justice had to subsequently apologise⁶ and extend the consultation period for those who required the accessible versions until 19 April 2022⁷. It seems extraordinary that such an important piece of legislation could have then been produced in such a short period of time.
8. The Government also refused to agree to pre-legislative scrutiny of the Bill, as would be normal for legislation of such constitutional importance. In a joint letter, the Chair of the Public Administration and Constitutional Committee, the Chair of the Joint Committee on Human Rights, the Chair of the Justice Committee, and the Chair of the Lords Constitution Committee stated it was "*vital that any proposals and legislative measures are subject to the fullest amount of public and parliamentary scrutiny to ensure their appropriateness, practicality and longevity*"⁸. It is deeply regrettable that pre-legislative scrutiny was not granted. That scrutiny would have given Parliament the time to provide proper feedback on this significant, constitutional legislation before it started its parliamentary timetable.
9. The Government has justified not having pre-legislative scrutiny on the basis that the consultation contained 12,000 responses, to which they would be publishing their response.⁹ This is not a convincing argument against pre-legislative scrutiny, particularly when the Government have completely ignored the majority of the consultation responses received. There were high levels of responses against the Government's proposals: for example, 90% opposed to a permission test, nearly 90% opposed changes to section 3 of the Human Rights Act and over 80% preferred no change to the deportation test.¹⁰

⁶ Law Gazette, '[Disabled people 'given 12 days' to respond to human rights consultation](#)', (2 March 2022)

⁷ Ministry of Justice, '[Human Rights Act Reform: A Modern Bill of Rights – Consultation Response](#)' (June 2022)

⁸ House of Commons Public Administration and Constitutional Affairs Committee, House of Commons Justice Committee, Joint Committee on Human Rights and House of Lords Constitution Committee Joint Letter, '[Pre-Legislative Scrutiny of a 'Bill of Rights', \(27 May 2022\)](#)

⁹ UK Parliament, '[Bill of Rights: Question for Ministry of Justice](#)' (6 June 2022)

¹⁰ Ministry of Justice, '[Human Rights Act Reform: A Modern Bill of Rights – Consultation Response](#)' (June 2022)

However, the Government have not made any significant concessions to the proposals set out in their consultation and, in some areas, they have doubled down. This is no way to approach such a consequential constitutional change. The Bill should be rejected on this basis.

The fundamental flaws of the Bill of Rights Bill

10. It is our view that this legislation is flawed to the extent it cannot be rectified or made workable through the usual amendment process. The Bill will weaken domestic rights protection, greatly increase legal uncertainty, and put the UK on a collision course with our international obligations under the ECHR.
11. Whilst the legislation is poorly drafted and ill-prepared, the central problem with the Bill results from the exercise which it seeks to undertake. It seeks for the UK to remain a member of the ECHR; but wants to reduce domestic rights protections to below the level required by the Convention. It seeks to enforce the supremacy of UK courts, but limits UK judges' discretion. It seeks to reduce the influence of the ECtHR; but will end up with more individuals having to apply to Strasbourg to enforce their rights.
12. The following are central problems that will be caused by this legislation:
 - a. **The Bill seeks to dictate in a number of areas how UK judges must interpret the Convention rights.** For example, Section 5 of the Bill of Rights Bill seeks to restrict UK judges from imposing new positive human rights obligations on public authorities. It also raises into serious question the status of the positive obligations previously found by the courts under the Human Rights Act, such as the duty of the police to protect victims of serious crime (see the John Worboys' case in *DSD and Anor v Commissioner of Police for the Metropolis* mentioned above).¹¹
 - b. **Since the Bill restricts domestic human rights protection to below Convention levels,** it will lead to more cases being heard at the ECtHR (though it should be stressed that many will not be able to access this process due to the increased costs and time-consuming process). Rather than bring rights home, it sends rights back to Strasbourg. This is likely to occur in a number of areas including positive obligations, extra-territoriality, Article 8

¹¹ [Commissioner of Police of the Metropolis v DSD and another](#) [2018] UKSC 11

deportation cases and damages for human rights breaches.

- c. **The Bill raises serious questions, through the repeal of section 3 of the Human Rights Act, of what happens to legislation previously read in line with the UK's legal obligations under the ECHR.** Clause 40 of the Bill of Rights Bill seemingly gives the Secretary of State power to pick and choose which previous human-rights compliant interpretations should continue. As such, the Bill threatens the separation of powers and legal certainty in this country.
- d. **The Bill's new restrictive yet complicated tests would likely result in years of uncertainty and litigation through courts trying to define those tests.** The test on how to approach previous positive obligations held by the courts to impose human rights could lead to a whole series of cases being revisited, causing unnecessary legal uncertainty for public authorities. The suggested new Article 8 provisions will take years for their meaning to settle. This is visible in that the Supreme Court is only just determining the 'unduly harsh' test from the Immigration Act 2014.
- e. **The Bill would reduce human rights protections from disenfranchised minority groups.** For example, individuals with criminal convictions that suffer serious human rights violations could be denied proper compensation simply for having a criminal conviction (rather than the offence being related to the human rights breach, which is already taken into account). In addition, the Article 8 deportation provisions would prevent individuals who had been in the UK since infancy, but commit a criminal offence as an adult, even making an Article 8 argument to an independent tribunal.¹²
- f. **It seriously risks undermining our devolution settlement and the Good Friday Agreement.** The Human Rights Act is embedded within the devolution settlements. The Bill would likely undermine the Good Friday Agreement by preventing certain individuals from enforcing their Convention rights domestically. The Scottish Government urged the UK Government to "*stop this act of vandalism which will have an impact on public bodies that must adhere*

¹² The test in Clause 8 of the Bill of Rights Bill would restrict Article 8 appeals to only those with qualifying children or dependent family members.

to it".¹³ The Welsh Government are opposed and have said that they "*did not have advanced sight of the contents of the Bill*", except for five clauses shortly before publication.¹⁴ The Northern Ireland Human Rights Commissioner has said previously that repealing the Human Rights Act risks "*being divisive*" and is "*unnecessary*".¹⁵

- g. **The new permission test imposes a higher threshold that someone has to have suffered a "significant disadvantage" to raise a human rights argument.** The courts already have powers to deal with unmeritorious claims, but this test could have a chilling effect on those seeking to enforce their rights. It is also procedurally complicated to apply in our diverse appeal/ tribunal system. Further, the Government have given themselves wide discretion under Section 15 of the Bill of Rights Bill to draft the rules of enforcing this permission test (including appeal rights).

13. These are fundamental issues with the proposed legislation which cannot be solved by amendment. The only realistic way forward is to reject the Bill at Second Reading and urge the Government to think again; by properly engaging with civil society organisations, parliamentarians, and the devolved administrations.

The Salisbury Convention

14. We understand that the House of Lords takes seriously its responsibilities under the Salisbury Convention not to block legislation which was covered by a manifesto commitment. However, we strongly consider that this Convention does not apply to the published Bill. The 2019 Conservative party manifesto stated that they "*would **update** the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government*" (emphasis added)¹⁶. The language of the 2019 manifesto was carefully chosen and should be respected.

15. Even those responsible for drafting the manifesto commitment do not view it as extending to replacing the Human Rights Act entirely. Previous Lord Chancellor Sir Robert Buckland

¹³ Scottish Government, '[UK Bill of Rights condemned](#)' (22 June 2022)

¹⁴ Welsh Government, '[Written Statement: UK Government Bill of Rights](#)', (22 June 2022)

¹⁵ Northern Ireland Human Rights Commission, '[NI Human Rights Chief Commissioner Responds to Proposed Replacement of the Human Rights Act](#)' (14 December 2021)

¹⁶ The Conservative Party, '[Conservative Party Manifesto 2019](#)' (2019)

QC MP has noted since leaving office, *“I wanted to use my time before you to further develop what was in my mind as I worked to implement the Government’s 2019 manifesto commitment, which I helped to draft, of updating the Human Rights Act. Updating, not replacing, you will note”*.¹⁷

16. To help fulfil his manifesto commitment, Sir Robert Buckland QC MP commissioned an Independent Human Rights Act Review in December 2020 (led by the distinguished ex-Court of Appeal judge Sir Peter Gross) which put forward suggestions for updating the Human Rights Act in line with the manifesto. This independent review has been completely ignored by the Government and the proposals go far beyond anything in the review. Sir Peter Gross has since said the Government’s consultation (which formed the basis for the Bill) *“is not grounded in anything even approximating the exercise we conducted”*.¹⁸

17. The Bill is a drastic, radical departure from the Human Rights Act. The first line of the Bill confirms that the Human Rights Act has not been updated: it has been repealed and replaced. As Professor Mark Elliott, Professor of Public Law at the University of Cambridge, has said the *“similarities between the Bill and the HRA are largely superficial...that is so thanks to a pincer movement effected by the Bill that undermines both the ECtHR and the domestic courts”*. He goes on to state that this is *‘effected through a combination of diminishing the court’s powers – the complete removal of the section 3 interpretative power/ obligation being a prime example – and micromanagement of the domestic courts’ handling of Convention cases*.¹⁹

18. In no sense can the Bill be fairly described as an update of the Human Rights Act since it explicitly removes a number of its human rights protections. Therefore, the Salisbury Convention does not apply and the Bill should be rejected.

**JUSTICE
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¹⁷ Sir Robert Buckland QC MP, *‘Human rights reform: getting the focus right’* (UK in a Changing Europe, 30 March 2022)

¹⁸ Joshua Rozenberg, *‘Raab’s reforms under attack’* (A Lawyer Writes, 31 March 2022)

¹⁹ Mark Elliott, *‘The UK’s (new) Bill of Rights’* (Public Law for Everyone, June 2022)