



From Joanna Cherry CQ MP

Rt Hon Dominic Raab MP
Deputy Prime Minister
Lord Chancellor and Secretary of State for Justice
Ministry of Justice

30 June 2022

Bill of Rights Human Rights Memorandum

Dear Dominic,

Human Rights Memoranda (like the human rights explanations in Explanatory Notes) are designed to inform Parliament, and in particular this Committee, of the Government's analysis and assessment of human rights compatibility of Bills that Government presents to Parliament. This analysis usually covers all human rights matters that are engaged (or potentially engaged) by a Bill – whether these rights are derived from common law, the ECHR or international human rights legal obligations.

This analysis is crucial if Parliament, and in particular this Committee, is to be properly and transparently informed of the Government's intentions in legislation; to assess the statement of compatibility made by the responsible Minister under s. 19 HRA; and so that Parliament and its members can take an informed view as to whether they wish to legislate in the manner proposed.

It is vital that Parliament is made aware of clauses that potentially risk interfering with, or even violating, the rights of people in the UK, in order for Parliament to be in a position to have all the necessary information when considering the balances to be struck when legislating.

Your Department has been the lead within Government for ensuring the promotion and protection of people's human rights in the UK, and normally this has meant that human rights Memoranda produced by the Ministry of Justice have been of a good quality with sufficient information and analysis produced to a good standard. Unfortunately, the Memorandum produced for the Bill of Rights fell far short of the standard we would expect. Whilst it described some of the clauses and asserted compliance with human rights, it contained very little analysis to back-up the Government's assertions or to enable Parliament to understand the reasoning that supported the Government's position. Moreover, some clauses of relevance to enforcing human rights were not even mentioned in the Memorandum. For example,

the Memorandum failed to address clause 24 which directs the UK courts and public authorities not to comply with interim measures of the ECtHR, which is a breach of Article 34 ECHR.

We therefore ask for an updated ECHR Memorandum containing a fuller analysis of the compatibility of the Government's Bill of Rights with the UK's international and domestic human rights obligations, including how it may affect existing enforcement of human rights in the UK, how it may affect compliance with the UK's obligations under the ECHR, and how it may affect domestic enforcement of the UK's other international human rights obligations.

As part of this we would, in particular, like the following questions to be answered:

1. Could you please provide full analysis of how Articles 1 and 13 ECHR will be complied with under the future human rights landscape of the Government's Bill of Rights? Will there be any gaps in the ability of public authorities in the UK, and the UK Courts, to give effect to the ECHR domestically?
2. Could you please provide analysis of the impact of repeal of sections 3, 11 and 19 HRA on the respect for and enforcement of human rights in the UK. Including:
 - a. How will the repeal of section 3 HRA impact on the compatibility of legislation with Convention rights? How will this repeal impact on legislation previously interpreted (whether by the courts or by public authorities) in a compatible way, having regard to section 3? Please provide us with the list of these interpretations, together with your analysis of how you propose to deal with these interpretations. Please explain why you have not retained all previous interpretations for legal certainty and have instead introduced the power in clause 40 for the Secretary of State to choose the judgments to retain at a later date?
 - b. Please provide your analysis as to how the repeal of section 3 HRA will impact on clause 12/section 6 HRA, and the extent to which it will mean that public authorities will no longer be required to act compatibly with human rights? We would like to see analysis of the sort of sections of the population that this may impact in relation to how they are treated by public authorities. We would then like to see the justification for this weakening of protections.
 - c. Please provide detailed analysis of how the repeal of section 11 HRA (and the absence of any other provision expressly saving existing rights and freedoms) will impact on existing rights, common law rights and other human rights in the UK. Please justify and explain the decision to repeal section 11 HRA.
 - d. Please provide your assessment as to how the repeal of section 19 HRA will impact on transparency and on Parliament's ability to properly consider instances where the Government of the day is asking it to pass primary legislation that may interfere with, or breach, the rights of people in the UK.

3. Clause 3 (interpretation of the Convention rights) replaces section 2 HRA with considerable changes, and we would appreciate seeing detailed analysis of the implications of these changes. This should include, in particular:
 - a. What is your assessment of the impact of clause 3 on legal certainty? How long do you estimate it will take for the Courts to clarify how clause 3 is to be interpreted, how they should approach the interpretation of the Convention rights and how they should use ECtHR judgments in assisting them in that work?
 - b. The rights protected under the Convention system, as for all systems of human rights protection, are a minimum standard of rights protection. However, we note that in paragraph 10(a) of the Government's Memorandum the Government state that the intention is for human rights, as elucidated by the ECtHR, to be "a 'ceiling' but not a 'floor'". It is difficult to understand how the confusion between human rights being a ceiling (i.e. a maximum level of basic protection) as opposed to the floor (i.e. human rights being a minimum level of basic protection) in clause 3 is compatible with respect for human rights. It is also difficult to understand how this provision would enable UK judges to undertake their role of meaningfully applying the Convention rights, having regard also to the common law and the specificities of the UK's legal and constitutional context, if they also are bound only to provide the same or lower level of rights protection as required under the ECHR system. Could you please provide detailed analysis of your reasoning in respect of clause 3 (current section 2 HRA)?
4. Please explain how granting additional weight to certain rights in clause 4 (freedom of speech) is consistent with the UK's commitment to all of the rights set out in the Convention? Please also explain why clause 4 provides that only certain forms of expression should be given "great weight", whilst others should not?
5. Please explain how clause 5 (positive obligations) is compatible with respect for human rights. The clause would introduce a barrier to UK courts imposing positive obligations on the State. How is it therefore compatible with Convention rights which can only be made practical and effective by the positive duty placed on states? Did the Government conclude that this was compatible with its international obligations? If so, please provide your legal reasoning.
6. Please explain how the requirement in clause 6 to give the greatest possible weight to public protection from persons given custodial sentences is compatible with the court undertaking an effective balancing of competing Convention rights.
7. Please provide analysis to explain how clause 7 (decisions that are properly made by Parliament) will be compatible with the requirement to conduct proportionality assessments? Please include consideration of the clear caselaw of both the ECtHR and the domestic courts, in particular in relation to proportionality assessments. In this light, we note that the Government's

Memorandum principally relies on one judgment of the Supreme Court to support its approach (*R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26) and does not address all of the wealth of caselaw that would seem unlikely to support the compatibility of this clause. Given the wealth of caselaw on these issues from both the ECtHR and domestic courts, we would like to see the Government's fuller analysis as to how this clause complies with the caselaw of both domestic courts and the ECtHR.

8. Please explain how clause 8 is compatible with the right to private and family life and, in particular, the procedural requirement of Article 8 which requires the courts to undertake a balancing exercise where there are competing rights and interests engaged. Given the extremely high threshold that clause 8 provides for FNOs to rely upon their Article 8 rights, do you consider that the courts will still be able to undertake an effective balancing exercise?
9. We note that in paragraph 15 of the Government's Memorandum, the Government asserts that the UK is not required "to follow/apply all decisions of the Strasbourg Court". Whilst it is true that the UK is not bound by all judgments of the ECtHR, it is bound by those judgments to which it is a party. Further, it is bound to secure to everyone within its jurisdiction the human rights protections contained in the ECHR, as interpreted by the ECtHR as the ultimate arbiter for determining the scope of those rights. Convention rights should be applied compatibly with the consistent and clear caselaw of the ECtHR. We are concerned that the Government's statement of compatibility and basis for asserting compatibility in relation to clauses 3-8 is based on the UK disregarding relevant ECtHR judgments and not needing to comply with the UK's international legal obligations. Could we please see detailed reasoning to justify the Government's position in para 15, and in particular how this would relate to the clear and consistent jurisprudence of the ECtHR.
10. We note that the Government considers, in paragraph 18 of its Memorandum, that the Bill of Rights will result in an "increase in declarations of incompatibility" but that the Government does "not consider those incompatibilities would be created by the Bill of Rights itself". Could the Government please explain why it considers it to be consistent with its human rights obligations to change the law so as to increase the number of incompatibilities as between UK laws and the requirements of basic human rights? Could the Government please explain how it proposes dealing with this increased number of incompatibilities?
11. A remedy needs to be effective in order to comply with Article 13 ECHR. A declaration of incompatibility (whilst a useful tool) is, of itself, not an effective remedy. We would therefore like to receive more detailed reasoning (following on from paragraph 20 of the memorandum) in relation to clause 10 (previously section 4 HRA) and how this may affect the right to an effective remedy (Article 13 ECHR).
12. Clause 14 (overseas military operations) would, without separate changes to either international law or domestic law, seem likely to breach a number of human rights, including the obligation to secure the Convention rights to

everyone within the UK's jurisdiction (Article 1 ECHR), the right to life (Article 2 ECHR), the prohibition on torture (Article 3 ECHR), the right to liberty and security (Article 5 ECHR) and the right to an effective remedy (Article 13 ECHR). We note that the Government seem to acknowledge this in paragraph 22 and that this is why this clause could not enter into force without further changes to international or domestic law. However, firstly, we would like to see the Government's reasoning as to why it is necessary to include this clause before achieving those changes under international or domestic law; and also we would like to receive further analysis as to how the Government foresees this clause being compatible with the ECHR.

13. Could you please provide analysis as to how the changes to admissibility in clauses 15-16 comply with Articles 1 and 13 ECHR? In particular, we would like to receive your analysis of whether the imposition of a threshold based on "significant disadvantage" in the domestic courts might differ from its use in Strasbourg, bearing in mind that the ECtHR's approach is premised on the basis of subsidiarity (as promoted as part of the changes introduced in Protocol 14), whereas access to the UK Courts ensures enforcement of human rights within the UK in line with the principle of subsidiarity.
14. We note that the Government asserts that clause 18 (Judicial remedies: damages) is compatible with human rights. However, we would need to see more detailed analysis. Could you please provide this analysis. Moreover, how is removing the reference to ECtHR principles in clause 18 considered to be compatible with the UK's obligations under the ECHR and the right to an effective remedy (Article 13 ECHR)?
15. Could you please provide further analysis on your assessment of how clause 20 (limits on court's power to allow appeals against deportation) will work compatibly with Convention rights? Specifically, do you consider that "nullification" would mean the same as "flagrant denial of justice", the term generally used by the ECtHR? If so, why have you not used that language? If not, how do you consider this to comply with the relevant human rights standards? Please also explain how the severely reduced ability of the courts to consider diplomatic assurances is compatible with the existing caselaw in relation to assurances – we would be grateful for a detailed analysis of the caselaw and how this clause complies with it.
16. Please explain how clause 21 (limit on court's power to require disclosure of journalistic sources) compares with the existing protections in the Contempt of Court Act 1981, and the impact that these changes will have on Convention rights, and in particular Article 10 ECHR.
17. Please explain whether you consider clause 24 (interim measures of the ECtHR) to be compatible with Article 34 ECHR and the clear caselaw of the ECtHR. Please provide detailed analysis and a clear statement whether you consider this to be compatible with the UK's international obligations.
18. Finally, we note that the Bill, in clause 28, would remove the obligation (in section 17 HRA) to regularly review the UK's reservation to Article 2 of Protocol

1 (the right to education). We note the absence of an explanation in this respect in the Explanatory Notes and would be grateful for further information in relation to the reasoning behind this change.

We note that it was open to the Secretary of State to make a section 19(1)(b) HRA statement that he was unable to say that he was satisfied that the Bill was compatible with Convention rights. This can be used in situations of ambiguity. Given the content of the Bill we are surprised that the Secretary of State made a section 19(1)(a) HRA statement of compatibility and we look forward to receiving the analysis and assessment to support this conclusion.

We would be grateful if you could respond to us by 14 July 2022.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Joanna Cherry', with a stylized flourish at the end.

Joanna Cherry QC MP

Acting Chair of the Joint Committee on Human Rights

CC The Rt Hon Liz Truss MP, Secretary of State for Foreign, Commonwealth and Development Affairs

CC Attorney General's Office