



House of Commons

House of Lords

Joint Committee on Human
Rights

Legislative Scrutiny: The United Kingdom Internal Market Bill

Eighth Report of Session 2019–21

*Report, together with formal minutes relating
to the report*

*Ordered by the House of Commons
to be printed 21 October 2020*

*Ordered by the House of Lords
to be printed 21 October 2020*

Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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[Fiona Bruce MP](#) (*Conservative, Congleton*)

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House of Lords

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[Lord Trimble](#) (*Conservative*)

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publication

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Committee staff

The current staff of the Committee are Miguel Boo Fraga (Senior Operations Manager), Chloe Cockett (Senior Specialist), Alexander Gask (Deputy Counsel), Zoë Grünewald (Media Officer), Katherine Hill (Committee Specialist), Eleanor Hourigan (Counsel), Lucinda Maer (Commons Clerk), Dan Weedon (Lords Committee Assistant), and George Webber (Lords Clerk).

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Summary

This report focuses on the human rights implications of Part 5 of the UK Internal Market Bill. This part of the Bill gives the Government the power to make regulations concerning (a) the application of exit procedures to goods travelling from Northern Ireland to Great Britain and (b) EU State Aid in Northern Ireland. The Bill as originally introduced provided that regulations made under Part 5 would be effective notwithstanding their inconsistency with any domestic or international law 'whatsoever'. During its passage through the Commons, the Government amended the Bill, which now acknowledges that this reference to domestic or international law does not include the Convention rights guaranteed by the Human Rights Act 1998 (HRA). The Committee welcomes this development. However, the Bill seems to envisage Ministers not being bound by the HRA duty to act compatibly with Convention rights when legislating under it. It also purports to prevent the courts from striking down regulations that are incompatible with human rights. These changes would amount to a wholesale undermining of human rights protections that is very hard to reconcile with Government statements that the Bill itself is compatible with human rights. The Government ought to be explicit and upfront if these are their intentions. The Bill requires amendment to ensure that human rights are protected.

1 Introduction

Background

The Bill

1. The United Kingdom Internal Market Bill was introduced into the House of Commons on 9 September 2020, received its second reading on 14 September and, following a committee stage of the whole House, received its third reading on 29 September. At the time of writing the Bill is before the House of Lords.

2. The aim of the Bill “is to preserve the UK internal market, providing continued certainty for people and businesses to work and trade freely across the whole of the UK” following the end of the EU withdrawal transition period on 31 December 2020.¹ The Bill has been controversial for a number of reasons that fall outside the scope of this short report. This report is focused on the human rights implications of Part 5 of the Bill. Part 5 concerns the Northern Ireland Protocol to the EU Withdrawal Agreement and gives Ministers the power to make regulations making provision for (a) the application of exit procedures to goods travelling from Northern Ireland to Great Britain and (b) EU State Aid in Northern Ireland.

3. Such regulations would have the potential to interfere with rights guaranteed under the Human Rights Act 1998 (HRA), particularly the right to peaceful enjoyment of possessions (Article 1 to the First Protocol of the European Convention on Human Rights (the Convention)), which extends to protect a variety of property rights, and the right not to be discriminated against in the enjoyment of other Convention rights (Article 14 of the Convention).

4. The Bill as originally introduced provided that regulations made under Part 5 would be effective notwithstanding their inconsistency with any domestic or international law ‘whatsoever’. On its face, the Bill appeared to disapply all human rights law and to exclude the jurisdiction of the courts to adjudicate on breaches of that law.

Amendments to Part 5

5. Amendments to part 5, introduced by the Government at committee stage and now forming part of the Bill, remove the Convention rights guaranteed by the HRA from the list of “relevant international and domestic law” with which the regulations need not comply. The amendments made also confirm that judicial review would be available in respect of the regulations. While the Bill still purports to exclude the effect of other international human rights instruments, these were welcome developments.

6. However, the Government’s amendments to Part 5 also appear to have the effect of:

- a) Excluding Ministers making Regulations under Part 5 from their HRA obligation to comply with Convention rights;² and

1 [Explanatory Notes to the United Kingdom Internal Market Bill](#) [Bill 135 (2019–21) –EN]

2 Under Human Rights Act 1998, [section 6](#). See [United Kingdom Internal Market Bill](#), Clause 47(2)(a) [Bill 185 (2019–21)]

- b) Requiring Regulations made under Part 5 to be treated like primary legislation for the purposes of the HRA.³

7. The Committee were troubled by these effects and the Chair wrote to the Secretary of State for Business, Energy and Industrial Strategy on 29 September 2020 setting out our concerns.⁴ In his response dated 10 October 2020 the Secretary of State failed to provide reassurance in respect of the key issues raised.⁵ The Committee remains troubled by the consequences for human rights protection of Part 5 of the Bill in its current form.⁶ The Committee also acknowledges the concerns raised jointly by the Northern Ireland Human Rights Commission, the Equality Commission for Northern Ireland and the Irish Human Rights and Equality Commission that these consequences risk undermining human rights commitments made in the Belfast (Good Friday) Agreement and the EU Withdrawal Agreement.

3 [United Kingdom Internal Market Bill](#), Clause 47(3)

4 Letter to Rt Hon Alok Sharma MP, Secretary of State for Business, Energy and Industrial Strategy, [dated 29 September 2020](#)

5 Response from Rt Hon Alok Sharma MP, Secretary of State for Business, Energy and Industrial Strategy, [dated 10 October 2020](#)

6 The Committee notes that similar concerns to those it raised with the Minister by letter and those set out in this Report appear in the House of Lords, Report of the Select Committee on the Constitution, Session 2019–21, [HL Paper 151](#), paragraphs 183–190.

2 Removal of Ministerial duty to comply with human rights

8. Clause 47(2)(a) of the Bill provides (in parentheses):

“[...] (and section 6(1) of the Human Rights Act 1998 does not apply in relation to the making of regulations under section 44(1) or 45(1))”

9. Section 6(1) of the Human Rights Act makes it unlawful for public authorities, including Ministers, to act incompatibly with Convention rights.⁷ Normally this duty to act compatibly with Convention rights would apply to the act of making regulations. By stating that s.6 of the Human Rights Act does not apply to the making of regulations under clauses 44 and 45, the Bill appears to have been carefully and deliberately drafted to avoid liability for Ministers who make regulations that violate human rights.

10. The Committee is unable to see why this provision would be necessary unless the Government was indeed contemplating making regulations that do not comply with human rights. It is very hard to reconcile this with the statement on the face of the Bill on introduction in the House Lords, made by Lord Callanan under s19(1)(a) HRA, that “in my view the provisions of the United Kingdom Internal Market Bill are compatible with the Convention rights”.

11. It is entirely improper for the Government to seek to grant itself permission to make regulations that breach human rights by the back door. If the Government considers it necessary to make regulations that are incompatible with Convention rights, then the power to do so should be set out clearly in the Bill. Furthermore, the reasons why such a power is considered necessary must be explained clearly to Parliament in the course of debates.

12. The inclusion of the part of clause 47(2)(a) in parentheses appears to be an attempt to remove barriers to Ministers wishing to breach human rights standards when making delegated legislation, and therefore cannot be compatible with Convention rights. This is not consistent with the statement under s19(1)(a) HRA on the face of the Bill.

13. *The Bill should be amended to make clear that Ministers making regulations must comply with the rights recognised in the Human Rights Act 1998.*

⁷ That is, the rights of the European Convention on Human Rights that are set out in [schedule 1](#) to the Human Rights Act

3 Treating regulations as primary legislation for Human Rights Act purposes

14. Clause 47(3) states that:

“Regulations under section 44(1) or 45(1) are to be treated for the purposes of the Human Rights Act 1998 as if they were within the definition of “primary legislation” in section 21(1) of that Act.”

15. Part of the careful balance struck in the HRA between respect for human rights and respect for Parliamentary sovereignty is that there is no power for the courts to strike down primary legislation made by Parliament if it is incompatible with human rights. The courts may only make a ‘declaration of incompatibility’ (s.4 HRA) which has no effect on the continuing operation of the legislation. By way of contrast, the courts do have a power under the HRA to strike down regulations made by Ministers that are incompatible with human rights.

16. The Committee does not consider that it is constitutionally acceptable for clause 47(3) to require delegated legislation to be treated as if it was primary legislation for the purposes of the HRA. If clause 47(3) were effective, however, it would insulate regulations made under clauses 44 or 45 from the usual effect of a successful legal challenge to secondary legislation on human rights grounds. All a court would be permitted to do were a human rights claim in respect of the regulations to be successful, and a Convention compatible interpretation of the regulations under s.3 HRA not possible, would be to make a declaration of incompatibility - handing the matter back to a Minister to consider whether to take remedial action under s.10 of the Human Rights Act or to otherwise remedy the incompatibility with Convention rights through amending Regulations.

17. The combined effect of clauses 47(2) and 47(3) would appear to remove the usual obligation on ministers not to make regulations that violate Convention rights, together with granting any such regulations a special status preventing them being struck down if they do violate Convention rights. This significantly undermines the benefits of removing Convention rights from the list of “relevant international and domestic law” with which the regulations need not comply. It also suggests again that, contrary to the s.19(1)(a) HRA statement on the face of the Bill, the Government envisages these regulations breaching basic human rights.

18. The Business Secretary’s response to the Chair’s letter of 29 September 2020 noted that public authorities acting under regulations made under clauses 44 or 45 would still have to comply with human rights, as s.6 HRA would still apply to them. However, under s.6(2) HRA (again respecting Parliamentary sovereignty) a public authority will not be acting unlawfully if they only act incompatibly with the Convention because primary legislation requires them to or because they are acting to give effect to primary legislation which cannot be interpreted compatibly with the Convention.

19. By purporting to give regulations made under clauses 44 or 45 the status of primary legislation for the purposes of the HRA, were clause 47(3) effective it would excuse public

authorities from liability under the Human Rights Act as long as they: (a) had no choice but to act in the way they did under the regulations; or (b) were acting so as to give effect to a provision that could not be read compatibly with the Convention. Given that in clause 47(2)(a) the Government appears to have removed obstacles to making regulations that violate Convention rights, and in clause 47(3) prevented those regulations being struck down by the courts, there appears a real risk that regulations could be drafted in such a way as to permit public authorities acting under them to act incompatibly with Convention rights.

20. The Committee does not consider that it is constitutionally acceptable for ordinary delegated legislation to be treated for the purposes of the Human Rights Act as if it were primary legislation passed by Parliament. Nevertheless, if effective clause 47(3) would undermine the protection provided by the Human Rights Act by depriving the court of the power to strike down regulations made by Ministers under clause 44 or 45 that breach human rights. It would also open up the opportunity for those regulations to be drafted so as to excuse public authorities acting under them from having to comply with Convention rights.

21. The Bill should be amended to remove clause 47(3) and to maintain the balance between respect for human rights and respect for Parliamentary sovereignty established in the Human Rights Act.

Annex: Proposed Amendments

Remove the disapplication of s.6 HRA:

In Clause 47(2)(a) omit:

“(and section 6(1) of the Human Rights Act 1998 does not apply in relation to the making of regulations under section 44(1) or 45(1))”

This amendment removes the disapplication of the obligation to comply with Convention rights in respect of Ministers making regulations under section 44(1) or 45(1).

Treatment of regulations as secondary legislation:

Omit clause 47(3)

This amendment ensures that regulations made under sections 44(1) or 45(1) would be treated like secondary legislation, not primary legislation, for the purposes of the Human Rights Act 1998.

Declaration of Interests

Lord Brabazon of Tara

- No Interests declared

Lord Dubs

- No relevant interests to declare

Baroness Ludford

- No Interests declared

Baroness Massey of Darwen

- No relevant interests to declare

Lord Singh of Wimbledon

- No Interests declared

Lord Trimble

- No Interests declared

Formal minutes

Wednesday 21 October 2020

Virtual Meeting

Members present:

Ms Harriet Harman MP, in the Chair

Ms Karen Buck MP	Lord Brabazon
Joanna Cherry MP	Lord Dubs
Dean Russell MP	Baroness Massey of Darwen
	Lord Singh of Wimbledon

Draft Report (*Legislative Scrutiny: The United Kingdom Internal Market Bill*), proposed by the Chair, brought up and read.

Ordered, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 21 read and agreed to.

Annex and Summary agreed to.

Resolved, That the Report be the Eighth Report of the Committee.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

[Adjourned till 4 November at 2.30pm.]

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website.

Session 2019–21

First Report	Report Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report	HC 149 HL 37
Second Report	Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report	HC 148 HL 41
Third Report	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing	HC 343 HL 59
Fourth Report	Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report	HC 256 HL 62
Fifth Report	Human Rights and the Government's response to COVID-19: The detention of young people who are autistic and/or have learning disabilities	HC 395 HL 72
Sixth Report	Human Rights and the Government's response to COVID-19: children whose mothers are in prison	HC 518 HL 90
Seventh Report	The Government's response to COVID-19: human rights implications	HC 265 HL 125
First Special Report	The Right to Privacy (Article 8) and the Digital Revolution: Government Response to the Committee's Third Report of Session 2019	HC 313