

LIBERTY'S BRIEFING ON THE HUMAN RIGHTS ACT AND THE VICTIMS AND PRISONERS BILL FOR SECOND READING IN THE HOUSE OF COMMONS, MAY 2023

1. On Monday 8 May 2023, the Times reported that Dominic Raab's Bill of Rights Bill was to be "scrapped" following his departure from government.¹ A week later to the day, MPs will debate a bill that explicitly aims to put parts of this discredited and discarded proposal into practice.
2. The Victims and Prisoners Bill contains much to be concerned about, from its odd and clumsy combining of its two very separate constituent parts, to the unwarranted power it hands to the executive, to potential compatibility issues with the European Convention on Human Rights (ECHR). This short briefing will only focus on one concern: the partial resurrection of the Bill of Rights Bill (BOR) through the disapplication of section 3 of the Human Rights Act (HRA).²

Section 3 HRA

3. Section 3 of the Human Rights Act imposes a duty upon courts and public authorities to interpret and apply laws in a way that is compatible with the ECHR, as far as it is possible to do so. It is an elegant and common-sense provision that allows for human rights abuses to be corrected or avoided in a far more nimble and expeditious manner than a declaration of incompatibility allows, while at the same time protecting and ensuring parliamentary sovereignty. Despite this, the Bill of Rights Bill would have repealed section 3 all together.
4. While the Bill of Rights Bill is believed to have been shelved, the Victims and Prisoners Bill proposes acting as if the repeal had come into force. Clauses 42-44 of the Victims and Prisoners Bill disapply s.3 HRA in relation to the full legislative framework governing release, licence, supervision and recall of offenders across England and Wales.³ As the Government states plainly in the ECHR memorandum to the Bill, this means that "if incompatibilities do arise with the new parole measures, or any of the other release measures, courts (and others) will not be under the obligation to interpret the provisions compatibility [sic] 'so far as it is possible to do so'".⁴
5. The memorandum claims that this is "to avoid courts adopting a strained section 3 interpretation, which ultimately disregards the policy intentions of the release regime". This is a strange justification, considering the finding of the Independent Human Rights Act Review (IHRAR) that there was "little to no evidence to support the position that UK courts are misusing section 3",⁵ and specifically that they have not done so "in order to misconceive Parliament's intention in enacting legislation".⁶
6. Disapplying section 3 is likely to have the effect of forcing the use of section 4 of the HRA – the making of declarations of incompatibility. Here courts state that the legislation does not comply with the Convention and leave it up to Parliament to remedy. The problem with this is that correcting incompatible legislation in this manner takes time – time in which the incompatible legislation stays in force, continuing to be applied to people even after its incompatibility has been established.

¹ Matt Dathan, Dominic Raab's bill of rights will be scrapped for a third time, The Times, 8 May 2023, <https://www.thetimes.co.uk/article/dominic-raabs-bill-of-rights-will-be-scrapped-for-a-third-time-nqgfl3sq7>.

² The Bill also replicates clause 6 of the Bill of Rights Bill on 'public protection', to be covered in a future briefing.

³ Specifically, the clauses disapply s.3 HRA from Chapter 2 of Part 2 of the Crime (Sentences) Act 1997, Chapter 6 of Part 12 of the Criminal Justice Act 2003, and section 128 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and any secondary legislation made under the provisions.

⁴ Victims and Prisoners Bill, European Convention on Human Rights Memorandum, [43].

⁵ Report of the Independent Human Rights Act Review, December 2021, [5.79].

⁶ IHRAR Report [5.126].

Repeal by stealth

7. This follows a similar provision in the Illegal Migration Bill, which provides that s.3 does not apply in relation to provision made by or by virtue of it. At second reading in the House of Lords, Home Office Minister Lord Murray of Blidworth stated as justification that “We are already proposing to repeal Section 3 of the Human Rights Act in the Bill of Rights Bill” and so “ahead of wider reforms to our human rights framework, we are implementing this disapplication to the provisions of this Bill”.⁷ This is echoed in the ECHR memorandum to the Victims and Prisoners Bill, which states that “The purpose of these clauses is to bring forward in this context the repeal of section 3 HRA, as set out in the Bill of Rights Bill”.⁸
8. Taken alongside the reported shelving of the Bill of Rights Bill (which predated Lord Murray’s statement), these statements are curious. If the Bill of Rights Bill were to be passed, there would be no need for this targeted disapplication. But if it were just a case of implementing parts of the Bill of Rights ahead of time, and then the BOR was to be officially abandoned, would the Government remove these provisions from the bills? This seems entirely unlikely.
9. The trend that is emerging appears to be a sort of repeal by stealth – not taking on the Human Rights Act directly but disapplying its provisions in relation to individual bills and individual groups, piece-by-piece. Disapplying s.3 HRA in this ad hoc way will above all else create a two-tiered system of human rights protection, whereby some people are protected by the requirement to have laws read compatibly with human rights and some are not. It is no coincidence that, should these bills be passed, the first two categories of people to be denied the protection of s.3 HRA would be migrants and prisoners. When the universality of human rights is attacked, everyone loses.

Conclusion

10. It borders on insulting to victims and survivors that the Ministry of Justice should seek to slip elements of the Bill of Rights into this Bill, considering the extreme impact that legislation would have had on people’s ability to access justice. In a foreword to a joint report from several women’s rights groups, the then-Victims’ Commissioner Vera Baird named several examples of the positive impact the HRA had on the rights of victims, before warning: “All of these uses of the state’s duty to protect our human rights will become impossible or hugely more difficult if this Bill is passed. There is no quid pro quo of benefit to anyone to set against this loss and, as ever, women will be at the forefront of the damage”.⁹
11. Victims and survivors have waited for too long for an effective Victims Bill to address their concerns. What they instead have been presented with is a Frankenstein bill, with parts of the unmourned Bill of Rights haphazardly bolted on as part of what amounts to a stealth repeal of one of the most important parts of our Human Rights Act and an attack on the very concept of universality. From John Worboys, to Spycops, to abuse in the military, to countless other stories, the HRA has been vital in protecting victims and achieving justice when nothing else can. If this Bill claims to act for victims, undermining the Human Rights Act must be nowhere near it.

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⁷ HL Deb, 10 March 2023, vol 829, col 1922.

⁸ ECHR Memorandum, [44].

⁹ Vera Baird DBE KC, Victims’ Commissioner for England and Wales, ‘Women’s rights are human rights: How the Bill of Rights harms the fight to end violence against women’, End Violence Against Women Coalition, Rights of Women, Centre for Women’s Justice, and Southall Black Sisters, September 2022, <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/2022/09/FINAL-HRA-report-080922.pdf>.