LIBERTY

WRITTEN EVIDENCE TO THE PUBLIC BILL COMMITTEE FOR THE VICTIMS AND PRISONERS BILL, JUNE 2023

The Victim and Prisoners Bill attempts to revive parts of the much criticised, and now shelved, Bill of Rights Bill. Any attempt to disapply Section 3 of the Human Rights Act 1998 (as put forward in Clauses 42-44) will undermine the universality of human rights. It will create a two-tiered system of human rights protection, whereby some people can – and others cannot – benefit from the full protections of the HRA.

Liberty urges Parliamentarians to rethink Part 3 of the Victims and Prisoners Bill and oppose the motion that clauses 42-44 of the Bill stand part.

DISAPPLYING SECTION 3 OF THE HUMAN RIGHTS ACT

Section 3 of the HRA 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 parliamentary sovereignty.

Clauses 42-44 of the Victims and Prisoners Bill disapply section 3 HRA in relation to the full legislative framework governing release, licence, supervision and recall of people in prison across England and Wales.[1] 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'".[2]

The Explanatory Memorandum to the VPB makes clear that this proposal has been carried over from the aborted Bill of Rights Bill (BORB), which sought to repeal section 3 HRA altogether. A similar measure also appears in the Illegal Migration Bill, also currently going through Parliament. As noted by the Joint Committee on Human Rights (JCHR) in its report on the Illegal Migration Bill, the Human Rights Act does not "provide for a 'pick and choose' approach [on section 3 HRA] and the disapplication of section 3 HRA to the provisions of this Bill is unprecedented."[3] It said:

> *"We have previously recommended against the repeal of section 3 HRA and we are equally unconvinced and troubled by its piecemeal disapplication... We are concerned that, by denying those affected by this Bill access to part of the human rights protective framework, [this] runs counter to the principle that those rights are universal. It also gives rise to concerns in respect of the prohibition on discrimination under Article 14 ECHR. The Bill should be amended to remove the disapplication of section 3 HRA."*

We concur with this assessment, which we believe applies analogously to the VPB. For this reason, we urge Parliamentarians to oppose the motion that clauses 42-44 of the VPB stand part.

[1] 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.
[2] Victims and Prisoners Bill, European Convention on Human Rights Memorandum, [43].
[3] Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill,* 6 June 2023: https://committees.parliament.uk/publications/40298/documents/196781/default/

UNEVIDENCED, UNWORKABLE, UNWANTED

The Explanatory Memorandum to the VPB claims that disapplying section 3 aims "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",[4] and specifically that they have not done so "in order to misconceive Parliament's intention in enacting legislation".[5]

There is no clear evidence presented for why section 3 HRA needs to be disapplied for the extensive powers contained within Clauses 42-44. The Government has failed to explain with which section 3 interpretations it takes issue, nor has it provided a comprehensive account of the impact of these proposed changes. Indeed, the Government refused IHRAR's general recommendation to create a database for section 3 HRA interpretations, to enable better understanding of how this power is used in the courts. This uncertainty is exacerbated by the fact that Part 3 of the VPB did not benefit from pre-legislative scrutiny given that this Part did not form part of the original draft Victims Bill.

Disapplying section 3 HRA 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.

It is important to emphasise that Part 3 of the VPB proposes significant changes to parole and extensive new delegated powers for the Secretary of State, to which the disapplication of section 3 would also apply. Disapplying section 3 of the HRA to secondary legislation made by the Minister under new powers would remove an important way for courts to address narrow rights violations.

The BORB's proposal to repeal section 3 in its entirety was widely criticised by eminent legal figures,[6] cross-party parliamentarians and parliamentary committees,[7] and countless civil society organisations. Of the total respondents to the Government's own consultation on human rights reform, 79% said that they did not want any change to section 3 HRA.[8]

UNDERMINES THE UNIVERSALITY OF HUMAN RIGHTS

Human rights are universal – they apply to everyone on the basis of being human. This is a cornerstone of the ECHR, which prohibits discrimination in connection with one's human rights under Article 14.

As the Prison Reform Trust argues, "it is precisely in custodial institutions like prisons that human rights protections are most vital.[9] This is because prison is a paradigmatic example where one's daily routine, freedom of movement, expression, and ability to communicate, among many others, are wholly controlled by the State – which is why safeguards for one's rights, including the right to liberty (article 5), the right to a fair trial (article 6), and the right to private and family life (article 8) are so important.

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[4] Report of the Independent Human Rights Act Review, December 2021, [5.79].
[5] IHRAR Report [5.126].
[6] See for example Lord Dyson, *Human Rights Act Reform: A Dangerous or Welcome Change?,* 18 November 2022: https://www.scribd.com/document/608099369/Human-Rights-Act-reform-a-dangerous-or-welcome-change#
[7] Joint Committee on Human Rights, *Legislative Scrutiny: Bill of Rights Bill,* 17 January 2023: https://committees.parliament.uk/publications/33649/documents/183913/default/
[8] Ibid.
[9] Prison Reform Trust Briefing on the Victims and Prisoners Bill, House of Commons, Second Reading, 15 May 2023: https://prisonreformtrust.org.uk/wp-content/uploads/2023/05/Victims-and-prisoners-bill-HoC-2nd-reading-PRT-briefing.pdf

Section 3 HRA has been used sparingly in the prison context to remedy specific rights violations:

Article 5 (right to liberty) ECHR: Effective participation in the parole process

R (EG) v Parole Board [2020]: EG applied for judicial review of the alleged failure by the Parole Board and Secretary of State to secure his effective participation in his parole review process. One of the issues was whether the 2019 Parole Board Rules permitted the Board to appoint a litigation friend. Using section 3 HRA, the court found that the 2019 Rules do permit the appointment of a litigation friend: "Having a litigation friend is so fundamental to ensuring a fair hearing for a person who lacks mental capacity that it would require words which clearly exclude such an appointment before a court could find that it was not provided for."[10]

Article 8 (right to private and family life): Right to live outside of the UK while on licence

Re McManus's Application for Judicial Review [2019] NI 211: The case concerned whether a prisoner on license could be permitted to live outside the UK. The Probation Board and the Department of Justice argued that the relevant rules (the Criminal Justice (Sentencing) (Licence Conditions) (NI) Rules 2009) did not permit them to do so. There was an equivalent provision at the time in England and Wales which permitted residence outside the UK. The Court concluded that the Rules should be interpreted so as to permit discretion in relation to the approval of residence outside the UK.

On the whole, reflecting the findings of IHRAR on the courts' general approach to section 3 HRA, the courts have been restrained in their use of this interpretive provision in the prison context.

R (Anderson) v Secretary of State for the Home Department [2002] 1 AC 837: The case concerned the fixing of tariffs (the minimum term a person must spend in prison before becoming eligible to apply for parole) under the Crime (Sentences) Act 1997. This case engaged the right to a fair trial (article 6 ECHR). The Court held that the fixing of a tariff was a sentencing exercise, and so needed to be conducted by an independent and impartial tribunal rather than by the Secretary of State. Nonetheless, in this case, the Court declined to use section 3 HRA and instead made a declaration of incompatibility under section 4 HRA. Parliament eventually repealed this law and introduced transitional and new sentencing provisions in the Criminal Justice Act 2003.

Disapplying section 3 of the HRA and removing the requirement on courts to consider human rights in making decisions over people in prison, would create an unacceptable, two-tiered system of human rights protection, whereby some people can – and others cannot – benefit from the full protections of the HRA.

CONCLUSION

Human rights are victims' and survivors' rights. Undermining the Human Rights Act by bolting on an unevidenced, unworkable, and unwanted proposal to the Victims and Prisoners Bill is an insult to the tireless work of victims and survivors who have fought for years to secure better support and protections. Liberty urges Parliamentarians to rethink Part 3 of the Victims and Prisoners Bill and oppose the motion that clauses 42-44 of the Bill stand part.

For more information, please contact junp@libertyhumanrights.org.uk.

[10] Paragraph 99, R v EG [2020] EWHC 1457 (Admin)