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## **QUB HRC Response to the UK Government Consultation on Human Rights Act Reform**

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## **QUB Human Rights Centre**

### **Response to the Ministry of Justice's Consultation Paper on Human Rights Act Reform**

**March 2022**

#### ***Introduction***

1. This response is submitted on behalf of the Human Rights Centre (HRC) of the School of Law at Queen's University Belfast. The Centre has existed since 1989. Its members teach human rights law to undergraduate and postgraduate students, conduct research into the protection of human rights around the world and organise conferences, talks and other events at which human rights issues are discussed. This submission was compiled by a small group of HRC members<sup>1</sup> but has been endorsed by a number of its other members<sup>2</sup> and by Fellows of the Senator George J. Mitchell Institute for Global Peace, Security and Justice.<sup>3</sup>
2. Our answers to the questions posed in the consultation paper are, where appropriate, focused on our knowledge and experience of the operation of the Human Rights Act (HRA) in Northern Ireland, but they also take account of how the Act has operated elsewhere in the United Kingdom. Our submission is structured in accordance with the list of questions contained in the questionnaire attached to the consultation paper. We have answered each of the 29 questions posed. A concluding paragraph sums up our overall position.

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<sup>3</sup> Prof Cahal McLaughlin, Prof Madeleine Leonard, Dr John Topping, Prof Audrey Horning, Dr Eva Urban-Devereux and Prof Fran Brearton.

3. There are two important preliminary points that apply to our analysis as a whole. We have sought to identify whether there are any structural or institutional problems with the current HRA that would echo the scepticism (not to say, apparent hostility) manifest in the consultation paper towards the Act such as to justify the widespread changes that would flow from acceptance of the proposals explored in the consultation paper. We do not consider there are such problems in the UK as a whole, or in Northern Ireland specifically.
4. The second preliminary point is that the consultation paper contains a range of possible changes in the HRA and in the UK human rights framework, but they are at very different levels of development. Some are quite detailed and are supported with draft clauses, so that it becomes relatively clear what is proposed. Others merely set out the objective that the Government suggests should be achieved but without sufficient details that would explain precisely how the changes would work in practice. It is also the case that several of the proposals could be implemented in various ways, some of which would have more extreme consequences than others. We have assumed in what follows that all the proposed changes will be introduced and that the way in which they would be implemented would be at the more impactful end of the spectrum – what might be called the ‘worst case scenario’.

### ***Responses to the specific questions posed in the Questionnaire***

#### **I. Respecting our common law traditions and strengthening the role of the Supreme Court**

##### ***Interpretation of Convention rights: section 2 of the Human Rights Act***

**Question 1: We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2, as a means of achieving this.**

5. We consider that neither of the draft clauses in Appendix 2 is either a necessary or a desirable replacement for section 2 of the HRA, which already allows domestic

courts to draw on a wide range of law when reaching decisions on human rights issues.

6. Option 1 adds nothing to the existing state of UK law. It is already the case that courts are not required to follow or apply any judgment or decision of the European Court of Human Rights: courts lower than the Supreme Court must follow precedents set by higher UK courts,<sup>4</sup> the Supreme Court is not obliged to follow its own previous decisions and at present it 'takes account' of judgments and decisions by the Strasbourg Court. The Supreme Court is under no domestic legal obligation to slavishly follow or apply judgments or decisions of the European Court of Human Rights. It has said that it will refuse to do so in 'highly unusual circumstances'.<sup>5</sup> That provides it with the flexibility needed to take account of some peculiarly UK-related circumstances. Given the margin of appreciation doctrine, the meaning of a right under UK common or statutory law is not at present required to be the same as the meaning of a corresponding right in the ECHR, a point now expressly recognised in the Preamble to the ECHR as amended by the recital introduced by Protocol 15, in force from 1 August 2021.<sup>6</sup>
7. Option 2 adds very little to what is proposed in Option 1. Domestic courts already have particular regard to the text of a right (if there is a text). They are also currently at liberty to refer to the *travaux préparatoires* of the ECHR but are very unlikely to find much that is of any significance there, especially regarding rights in the Bill of Rights which are not contained in the ECHR, such as the right to trial by jury. Most of the rights protected by domestic UK law already go beyond what those *travaux*

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<sup>4</sup> *Kay v Lambeth London BC* [2006] UKHL 10, [2006] 2 AC 465.

<sup>5</sup> *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17 at [340] per Lord Wilson: 'Our refusal to follow a decision of the ECtHR, particularly of its Grand Chamber, is no longer regarded as, in effect, always inappropriate. But it remains, for well-rehearsed reasons, inappropriate save in highly unusual circumstances such as were considered in *R (Hallam) and R (Nealson) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279'. Those two cases were about whether England's law on compensation for a miscarriage of justice was compatible with the presumption of innocence guaranteed by Article 6(2) of the ECHR: Lords Reed and Kerr would have followed the European Court of Human Rights' judgment on this in *Allen v UK* (2013) 63 EHRR 10, but the other five Justices in the case held that the ECtHR's jurisprudence was not yet clear enough to require a declaration of incompatibility.

<sup>6</sup> The new recital in the Preamble reads 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'.

say about rights and the courts are correctly alive to the need to ensure that the law moves with the times. UK common law does not adhere to some sort of 'originalist' approach to the interpretation of statutes or to the development of the common law. The common law is antithetical to originalism. Moreover, the courts can already have regard to the development of any similar right under a judgment or decision from any common law jurisdiction.

### The position of the Supreme Court

**Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. How can the Bill of Rights best achieve this with greater certainty and authority than the current position?**

8. We believe that it is not necessary to try to make it any clearer than it is at present that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. At present the Supreme Court has the freedom to refuse to follow a judgment of the European Court of Human Rights if it does not think that it is appropriate given circumstances in the UK (e.g. that Parliament has already discussed the matter and struck a particular balance which it is open to the Supreme Court to adopt within the doctrine of margin of appreciation).
9. Furthermore, if the European Court of Human Rights issues a judgment holding that the UK has violated the ECHR, it is the responsibility of the UK Government, not of the Supreme Court, to implement that judgment in a way that is satisfactory in the eyes of the Committee of Ministers of the Council of Europe. That is what eventually occurred, for example, in relation to the issue of whether prisoners should have the right to vote.

### Trial by jury

**Question 3: Should the qualified right to jury trial be recognised in the Bill of Rights? Please provide reasons.**

10. We can see a case for including a qualified right to jury trial in any Bill of Rights for the United Kingdom. The average person in the UK probably looks upon jury trial as fundamental to the concept of criminal justice, evidenced most recently in the jury's decision to acquit four persons accused of criminal damage to the statue of Edward Colston in Bristol.<sup>7</sup>
11. Jury trials are not as common in civil law countries as they are in common law countries, but the European Court of Human Rights has found them to be compatible with Article 6 of the ECHR even though juries in the UK do not give reasons for their verdicts. Restrictions on the right to jury trial in Northern Ireland have been controversial since at least the early 1970s, and they still arise in a small number of cases each year. A model to follow in this context, perhaps, is Article 38.5 of the Constitution of Ireland, which reads: 'save in the case of the trial of offences under [...] no person shall be tried on any criminal charge without a jury'. One of the exceptions catered for by that provision allows for the establishment of the Special Criminal Court in Ireland, which, albeit controversially, operates with three judges and no jury. In situations where trial by jury for a serious offence is denied under such a provision, we recommend that additional safeguards are put in place to counter any suggestion that the juryless trial is not as protective of the right to a fair trial. These could include placing a duty on the Court to give written reasons for its judgment and giving the defendant the right to appeal the judgment without first needing to seek permission to do so.

### Freedom of expression

**Question 4: How could the current position under section 12 of the Human Rights Act be amended to limit interference with the press and other publishers through injunctions or other relief?**

12. We do not believe that paragraphs 204 to 217 of the Government's consultation paper make a convincing case for amendments to section 12 of the HRA. The case of *ML v Slovakia* [2021] ECHR 821 is cited as one where the European Court of

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<sup>7</sup> See 'Edward Colston statue: Four cleared of criminal damage' (*BBC News*, 5 January 2022) <<https://www.bbc.co.uk/news/uk-england-bristol-59727161>> accessed 3 March 2022.

Human Rights displayed a willingness to give priority to personal privacy over the right to freedom of expression. But that was a case where the convictions which the newspaper discussed were spent, where value judgments were presented as facts and where the domestic Court had not conducted a proper balancing exercise between the rights protected by Articles 8 and 10 of the ECHR. The Court accepted that the newspaper articles about sexual abuse by a Roman Catholic clergyman were in the public interest but decided that in this particular case the articles were sensationalist and made little contribution to public discussion of the matter.

13. Laws in the UK, likewise, protect people whose convictions have become spent. Indeed, the relevant legislation in England and Wales was liberalised in 2012 and 2014 and is due to be further liberalised under the Police, Crime, Sentencing and Courts Bill currently before Parliament (clause 165). In 2021 a High Court judge in Northern Ireland declared that the relevant legislation there was incompatible with the ECHR because it applied only to sentences of 30 months or less.<sup>8</sup>

14. In situations where the Government explains to Parliament why it has struck the balance between the right to free speech and other interests in a certain way, the European Court has endorsed the position as falling within the state's margin of appreciation: *Animal Defenders International v UK* (2013) 57 EHRR 21, discussing the House of Lords' decision in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312. There is no reason to assume that this will not continue to be the case. The Government's current plans for an Online Safety Bill, which will further criminalise certain forms of speech and allow for other action to be taken to deal with it, is an example of where a thorough parliamentary debate on whether the Bill strikes a proper balance within the terms of Article 10(2) of the ECHR is very likely to insulate it against a successful challenge in the European Court of Human Rights.

15. We do, however, support inclusion of the right to academic freedom in any new Bill of Rights. Recent instances of academics being hounded out of their job or

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<sup>8</sup> *In re JR123* [2021] NIQB 97 (Colton J). The legislation in question is the Rehabilitation of Offenders (NI) Order 1978, art 6(1).

subjected to threatening social media campaigns show that the law does not properly recognise the importance of academic freedom, certainly at the tertiary level. The principle of academic freedom is so important as to deserve express mention in a national Bill of Rights.

16. We also support a strengthening of the law on defamation in Northern Ireland, which does not at present benefit from the reforms introduced for England and Wales by the Defamation Act 2013. There is a Private Members Bill on this issue before the Northern Ireland Assembly at present, but there is no guarantee that it will be enacted before the Assembly rises at the end of March prior to elections in May 2022. A national Bill of Rights could usefully ensure that the right to freedom of expression is accorded a minimum degree of protection (consonant with the 2013 Act) throughout the whole of the United Kingdom.

**Question 5: The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations above. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?**

17. We do not think that the scope for interference with Article 10 needs to be confined any more than it is at present. The balancing exercise which courts have to conduct when considering interferences with the right to freedom of expression provides adequate flexibility to judges when deciding if an interference is justifiable or not. In our view, little to nothing would be added by legislating for a presumption in favour of upholding the right to freedom of expression, subject to exceptional countervailing grounds clearly spelt out by Parliament. The grounds provided in Article 10(2) coupled with the additional protection afforded by section 12 of the HRA, are, we think, appropriate and sufficient.

**Question 6: What further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources?**



18. We believe that the current law relating to the protection of journalists' sources is adequate. There is an irony in this because in the past the European Court of Human Rights has twice held that UK law did not go far enough in protecting journalists' sources: *Goodwin v UK* (1996) 22 EHRR 123 and *Financial Times Ltd v UK* (2010) 50 EHRR 46. Were it not for those judgments domestic law would not be as protective of journalists' sources as it is. We note that in a recent case in Northern Ireland the Court of Appeal quashed a warrant to obtain journalistic sources, saying that it had not been provided with any material showing that there was an overriding requirement in the public interest to justify an interference with the protection of two journalists' sources.<sup>9</sup>

**Question 7: Are there any other steps that the Bill of Rights could take to strengthen the protection for freedom of expression?**

19. In our view, no (except for our proposals concerning the right to academic freedom and the law on defamation in Northern Ireland, mentioned as part of our response to question 4).

**II. Restoring a sharper focus on protecting fundamental rights**

*A permission stage for human rights claims*

**Question 8: Do you consider that a condition that individuals must have suffered a 'significant disadvantage' to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way of making sure that courts focus on genuine human rights matters? Please provide reasons.**

20. Section 7 of the HRA 1998 makes clear that only individuals who are or would be victims of an unlawful act can bring human rights complaints. This standing criterion is expressly tied to Article 34 of the European Convention of Human

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<sup>9</sup> *In the matter of an application by Trevor Birney and Barry McCaffrey for Judicial Review* [2020] NICA 35.

Rights. When the 1998 Act was adopted, section 7 was criticised for taking a narrower approach to standing than the ‘sufficient interest’ test developed by British courts in judicial review, which allows public interest groups to bring cases.<sup>10</sup> In addition, our colleague Dr Ronagh McQuigg has argued that the victim test is unduly restrictive as it poses difficulties for human rights law being used in response to domestic violence given that many victims may be ‘too frightened or ashamed’ to report the crime.<sup>11</sup>

21. The new permission stage would further narrow the approach to standing by requiring ‘claimants to demonstrate that they have suffered a significant disadvantage before a human rights claim can be heard in court’.<sup>12</sup> This change would not prevent individuals applying to the courts, which would still be required to examine the admissibility of each case. However, it may restrict the numbers of cases that can then be considered on their merits. This would mean that some cases that would otherwise have resulted in a judgment upholding a claim of a human rights violation now being declared inadmissible. We are therefore concerned that it may adversely affect the ability of individuals whose fundamental ECHR rights have been breached to have meaningful access to courts in the United Kingdom.

22. The Consultation Paper does not detail precisely how the new permission stage would operate. But it does refer to the case management system of the European Court of Human Rights (ECtHR) as an example of a similar permission system. In the following paragraphs, we therefore review how the ECtHR system operates. We note, however, that the arguments that have been used to necessitate a ‘significant disadvantage’ threshold at Strasbourg, such as the excessive backlog

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<sup>10</sup> E.g. During legislative debates on the adoption of the HRA, Lord Lester of Horne Hill argued that the wide test applied in judicial review proceedings ‘has the advantage of enabling all relevant matters at issue to be determined together at an early stage in order to clarify whether there has been a misuse of public powers, including an abuse involving a violation of human rights. I am not aware of any instances of abuse that would justify excluding such public interest proceedings in human rights cases’. Hansard, Human Rights Bill, HL, 24 November 1997, col 823. See also Joanna Miles, ‘Standing under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Law Adjudication’ (2000) 59 *Cambridge Law Journal* 133, 143; Neil Garnham, ‘A Sufficient Victim? Standing and the Human Rights Act’ (1998) 4(1) *Judicial Review* 39, 39.

<sup>11</sup> Ronagh McQuigg, ‘The Victim Test under the Human Rights Act 1998 and its Implications for Domestic Violence Cases’ (2011) 3 *European Human Rights Law Review* 294, 297.

<sup>12</sup> Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights* (December 2021, CP 588) para 222.

of cases and the need to find political agreement on changes to the Convention across multiple states, do not apply in the same manner to domestic legal systems.<sup>13</sup> In addition, the ECHR does not require the victim test nor the raised threshold of significant disadvantage to be used at domestic level.<sup>14</sup> Indeed, international human rights systems, such as the ECHR, are generally viewed as a set of minimum standards, beyond which states should not fall, but which do not preclude states from adopting enhanced protections at the national level.<sup>15</sup>

23. Protocol 14 of the ECHR amended Article 35 to require the Court to declare inadmissible any individual application where it considers that 'the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits'. The safeguard contained in the second part of this amendment will be considered under question 9 below. For now, it is sufficient to review briefly how the Strasbourg Court has applied the 'significant disadvantage' criterion in its admissibility decisions.

24. Although Article 35 does not restrict the application of the 'significant disadvantage' criterion to specific rights, in practice the Court has rejected its application to Articles 2, 3 and 5 due to the fundamental nature of the rights concerned and their place within a democratic society.<sup>16</sup> In addition, in cases concerning freedom of thought and expression, the Court has held that the application of the criterion should take due account of the importance of these freedoms and be subject to careful scrutiny by the Court.<sup>17</sup> Beyond these limits in the Court's willingness to use the significant disadvantage criterion, the Court has found that the assessment of

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<sup>13</sup> Danny Nicol and Jane Marriott, 'The Human Rights Act, Representative Standing and the Victim Culture' (1998) EHRLR 730, 738.

<sup>14</sup> 'The Government's argument is that a "victim" test of standing applies to a claim under the Convention in Strasbourg. But the criterion applicable to an international procedure is not the appropriate test where rights are conferred in domestic law. The Convention leaves it to contracting states to decide on how to provide effective domestic remedies. The Bill should apply the existing procedural regime of domestic law.' David Pannick QC, 'Bringing Home the Human Rights', *The Times* (London, 21 April 1998).

<sup>15</sup> Miles (n 10) 143.

<sup>16</sup> See e.g. *Makuchyan and Minasyan v Azerbaijan and Hungary*, App no. 17247/13 (ECHR, 26 May 2020) at [72]-[73]; *Zelčs v Latvia*, App no. 65367/16 (ECHR, 20 February 2020) at [44].

<sup>17</sup> See e.g. *Stavropoulos and Others v Greece*, App no. 52484/18 (ECHR, 25 June 2020) at [29]-[30]; *Margulev v Russia*, App no. 15449/09 (ECHR, 18 November 2019) at [41]-[42]; *Sylka v Poland (dec.)*, App No. 19219/07 (ECHR, 3 June 2014) at [28]; *Panioglu v Romania*, App no. 33794/14 (ECHR, 8 December 2020) at [72]-[76].

minimum level of harm for admissibility is relative and depends on the circumstances of the case. For example, where a case concerns a question of principle for the applicant, it may be deemed admissible regardless of pecuniary interest.<sup>18</sup>

25. The Government consultation paper contends that the new permission stage would ‘shift responsibility to the claimant to demonstrate that a human rights claim does, in practice, raise a claim which merits the [UK] court’s attention and resources’ by requiring claimants to show that they have suffered significant disadvantage. In contrast, the European Court of Human Rights has determined that ‘the distribution of the burden of proof and the level of persuasion necessary for reaching a particular conclusion are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake’.<sup>19</sup> Thus, the Court’s approach allows the burden of proof to be balanced between the state and the claimant rather than shifted solely to the claimant.

26. The European Court of Human Rights has therefore developed a cautious approach to the ‘significant disadvantage’ criterion that in practice has limited its application to specific rights and shared the burden of proof between the claimant and the state. It has, nonetheless, resulted in more cases being declared inadmissible often based on pecuniary interpretations of significant damage.<sup>20</sup> This has raised concerns that the principle has undermined the right to an individual petition and restricted victims’ access to justice.<sup>21</sup>

27. The consequences of introducing this criterion into a new permission stage in the UK raises particular concerns for the compliance of these proposals with the Belfast (Good Friday) Agreement 1998. The 1998 Agreement requires the UK Government to incorporate the ECHR into Northern Ireland law ‘with direct access to the courts, and remedies for breach of the Convention, including the power for

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<sup>18</sup> See e.g. *Biržietis v Lithuania*, App no. 49304/09 (ECHR, 14 June 2016) at [36]–[37].

<sup>19</sup> *N.D. and N.T. v. Spain* [GC], App nos. 8675/15 and 8697/15 (ECHR, 13 February 2020) at [85].

<sup>20</sup> Dinah Shelton, ‘Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights’ (2016) 16 *Human Rights Law Review* 303, 313.

<sup>21</sup> Nikos Vogiatzis, ‘The Admissibility Criterion Under Article 35(3)(B) ECHR: A “Significant Disadvantage” to Human Rights Protection?’ (2016) 65 *International and Comparative Law Quarterly* 185.

courts to overrule Assembly legislation on grounds of inconsistency'.<sup>22</sup> If domestic courts interpret the proposed permission stage in a way which restricts access to the ECHR for otherwise meritorious cases in Northern Ireland, this could potentially breach the Belfast (Good Friday) Agreement.

28. The consultation paper calls for the introduction a new permission stage to address the perceived problems that 'frivolous and spurious cases' have come before the UK courts as a result of the HRA; that these cases have discredited human rights in the eyes of the general public; and that they undeservedly use court time and public resources.
29. The paper does not clarify what the Government deems to be 'frivolous and spurious cases'. However, it makes clear that it views some successful rights claims as falling within this category.<sup>23</sup> Chapter 3 of the consultation paper presents as problematic from a budgetary or public policy perspective a number of decontextualized examples of cases in which convicted persons, migrants and individuals who are eligible for social welfare payments have been successful in rights claims. Given that human rights law can be important for protecting the rights of the most vulnerable members of our society, we would resist any broad characterisations of cases from particular groups of claimants as frivolous or spurious, particularly where those cases have been successful on their merits.
30. In addition, we believe that the unevidenced assertion that the HRA has been tarnished by such cases in the public mind does not stand up to scrutiny. For example, polling by Setanta Res in 2021 found that only one in five people felt the HRA should be reformed, that 68 per cent of adults felt that the HRA played an important role in holding government to account, and that 59 per cent felt that existing rights protections should not be reduced.<sup>24</sup>
31. To conclude, under section 7 of the HRA, only victims of violations of the fundamental rights set out in the ECHR can take legal action. The introduction of a 'significant disadvantage' criterion into a new permission stage could deny a class

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<sup>22</sup> Belfast (Good Friday) Agreement 1998, 'Rights, Safeguards and Equality', para 2.

<sup>23</sup> See Ministry of Justice (n 12) paras 134, 135 and 157.

<sup>24</sup> Setanta Res, *Amnesty International Human Rights Poll 2021* <<https://www.amnesty.org.uk/press-releases/strong-public-support-human-rights-act-after-covid-crisis>> accessed 3 March 2022.

of victims their right to access the courts. This would inhibit the ability of individuals to hold the Government to account and could undermine the rule of law. In addition, it could potentially breach the 1998 Agreement that brought peace to Northern Ireland. Added to these risks, in the absence of detail in the consultation paper regarding how a new permission stage would operate, we are concerned that there may be considerable practical difficulties to implementing these proposals, which could add to the complexity, cost and duration of human rights litigation. We strongly recommend that this proposal is not adopted, given its negative potential consequences, and given that there is scant evidence for its necessity,

**Question 9: Should the permission stage include an ‘overriding public importance’ second limb for exceptional cases that fail to meet the ‘significant disadvantage’ threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.**

32. As set out in our response to question 8, we believe a permission stage is not necessary, could have negative consequences for victims’ access to justice, could potentially not comply with the Belfast (Good Friday) Agreement, and therefore should not be introduced. If it were nonetheless implemented, it would be essential for it to have strong safeguards that go beyond those contained in Article 35 of the ECHR.

33. The consultation paper’s proposals suggest that the permission stage ‘could include a second “overriding public importance” limb available in exceptional circumstances where claims fail to meet a ‘significant disadvantage’ threshold but for some other reason merit consideration by the courts’. The paper does not define ‘overriding public importance’, but makes clear that it is intended that this second limb would ‘give courts discretion to allow claims to proceed to a full hearing if there is a highly compelling reason on the grounds of public importance’. This framing of the safeguard limb as exceptional and discretionary suggests an expectation that the courts would not rely upon it routinely.

34. When Article 35 of the ECHR was amended to introduce the 'significant disadvantage' admissibility requirement, two safeguards accompanied the change. The first was that the 'significant disadvantage' criterion could apply 'unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits'. The Explanatory Report on Protocol 14 makes clear that this safeguard was intended to ensure that no case requiring examination on its merits was rejected, including cases which 'notwithstanding their trivial nature, raise serious questions affecting the application or the interpretation of the Convention or important questions concerning national law'.<sup>25</sup> This safeguard remains part of Article 35 and has been relied upon by the Strasbourg Court to declare admissible cases in which, although the applicant may not have been significantly disadvantaged, there is nonetheless a need to clarify States' obligations under the Convention or to prompt a State to address structural problems that could affect multiple individuals within its jurisdiction.<sup>26</sup>

35. The second safeguard introduced to accompany the change in Article 35 was that the 'significant disadvantage' criterion could apply 'provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal'. As the Explanatory Guidance makes clear, this was intended to ensure that '[i]t will never be possible for the Court to reject an application on account of its trivial nature if the case has not been duly considered by a domestic tribunal'.<sup>27</sup> It continued that it was intended to ensure that all cases relating to violations of Convention rights could receive judicial examination at the national or European level.<sup>28</sup> Protocol 15 of the Convention, which entered into force on 1 August 2021, removed this safeguard. This change was intended to ensure that the European Court of Human Rights hears fewer trivial cases.<sup>29</sup> With respect to UK domestic law, it is important to note that there is nothing in Protocol 15 to suggest that the

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<sup>25</sup> Council of Europe, *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Strasbourg, 13.V.2004.

<sup>26</sup> See e.g. *Yocheva and Ganeva v Bulgaria*, App nos. 18592/15 and 43863/15 (ECHR, 11 May 2021) at [83]; *Vavříčka and Others v the Czech Republic [GC]*, App nos. 47621/13 and 5 others (ECHR, 8 April 2021) at [163].

<sup>27</sup> Council of Europe (n 25).

<sup>28</sup> *ibid.*

<sup>29</sup> European Court of Human Rights, *Practical Guide on Admissibility Criteria* (1 February 2022) <[https://www.echr.coe.int/documents/admissibility\\_guide\\_eng.pdf](https://www.echr.coe.int/documents/admissibility_guide_eng.pdf)> accessed 3 March 2022.

expectation on national courts to hear complaints of violations of Convention rights, even those that could be deemed trivial, is diminished. This change relates purely to the jurisdiction of the Strasbourg Court.

36. The phrase ‘overriding public importance’ that is used in the consultation paper appears to be inspired by the EU Habitats Directive, which sets out that this test could be applied for reasons related to social and economic policy, human health or public safety. Drawing on the case law of the European Court of Human Rights, we would argue that it should also extend to cases that relate to important questions of law or which relate to individual rights violations with structural factors meaning that others could be at risk of suffering from similar violations. Given the importance of these issues, we believe that this test should not be discretionary.

37. The amendment of Article 35 to introduce the ‘significant disadvantage’ criterion together with its safeguards has been criticised as being legally problematic as it requires the Court to assess to some degree the merits of a case before the decision on admissibility, often in sensitive and complex areas of human rights litigation.<sup>30</sup> This is particularly so with respect to determinations of ‘overriding public importance’, including the legal significance of the case. Legal scholars have raised concerns that this could lead to ‘slippery and elusive judicial reasoning’, which could threaten procedural fairness and undermine the legitimacy of the Court.<sup>31</sup> We believe the introduction of an even more restrictive permission stage than at present could expose the UK courts to similar risks, particularly where it is used to prevent otherwise meritorious cases from being admissible.

#### Judicial Remedies: section 8 of the Human Rights Act

**Question 10: How else could the government best ensure that the courts can focus on genuine human rights abuses?**

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<sup>30</sup> Vogiatzis (n 21) 200.

<sup>31</sup> *ibid.*



38. As discussed in our response to question 8, we are sceptical of the consultation paper's claims that the UK courts are unable to focus on genuine human rights abuses. We believe that in accordance with human rights law, all individuals are entitled to have their rights protected and that the HRA provides an effective tool for ensuring that rights violations are appropriately remedied.

39. The consultation paper proposes amending section 8(3) of the HRA. This section currently establishes that:

No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

The consultation paper proposes that in order to reduce the number of human-rights based claims, section 8(3) is amended to

require applicants to pursue any other claims they may have first, either so that rights-based claims would not generally be available where other claims can be made, or in advance of any rights argument being considered, to allow the courts to decide whether the private law claims already provide adequate redress.

This proposal contains two different approaches, which could each have different consequences. The first suggests that if other claims are available, then an applicant would generally be precluded from making human rights arguments. The second is a sequenced approach where applicants would only be able to advance rights-based claims after other claims have been pursued.

40. The proposal is premised on the assumption that it is better for applicants' claims to be resolved by private law than by domestic human rights law. The consultation paper presents this as part of a move to limit the use of rights-based claims to 'serious cases' and to ensure that human rights are not used as a fall-back route to compensation. No evidence is presented to demonstrate that human rights law is indeed used problematically in this way. Furthermore, we highlight that the

existing language of section 8(3) ensures that the courts only award damages under the HRA after taking into account other remedies that have been granted, and it remains nonetheless necessary to award further damages for the human rights claim.

41. The first proposed approach, in which applicants would generally be prevented from making human rights claims if other remedies are available, could inhibit victims' access to the European Court of Human Rights. In its recent *Lee v the United Kingdom* admissibility decision, the Court referred to general principles of its case law to hold that

the specific Convention complaint presented before it must have been aired, either explicitly or in substance, before the national courts. It would be contrary to the subsidiary character of the Convention machinery if an applicant, ignoring a possible Convention argument, could rely on some other ground before the national authorities for challenging an impugned measure, but then lodge an application before the Court on the basis of the Convention argument.<sup>32</sup>

Thus, under normal circumstances, if claimants do not frame their claims before domestic courts in terms of violations of Convention rights then their claims would not subsequently be admissible in Strasbourg. However, the European Court of Human Rights may view situations where applicants have been statutorily barred from making such claims as exceptions to this general principle.

42. The alternative sequencing approach suggested in the consultation paper may require amendments to section 7(5) of the HRA. This section requires human rights claims to be brought within one year of the violation taking place or 'such longer period as the court or tribunal considers equitable having regard to all the circumstances'. Amending section 8(3) to introduce a sequenced approach may mean that it is more common for more than one year to elapse between the act that is the subject of the human rights complaint and human rights based arguments being made.

43. In addition, the introduction of this sequencing approach may mean that legal proceedings become lengthier as applicants are forced to make other claims first

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<sup>32</sup> *Lee v the United Kingdom*, App no. 18860/19 (ECHR, 7 December 2021) at [68].

even in cases where it could be clear at the outset that there are human rights implications. This could increase the cost for both public bodies and the applicants and create greater uncertainty in law and policy, while achieving very little to address the problem alleged in the consultation paper of human rights law being a 'fall back' route to compensation.

44. Based on the above, we believe that the current language of section 8(3) of the HRA strikes the right balance between ensuring victims' access to remedies and providing guidance to the courts in ensuring that they take into account damages awarded under rights claims before considering whether any additional damages are warranted under human rights law. We therefore would not support the recommendation to amend section 8(3) in either of the ways suggested in the Consultation Paper.

### Positive obligations

**Question 11: How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons.**

45. Positive obligations require states to undertake specific actions to prevent human rights violations, to protect individuals from threats to their rights from private individuals or bodies, and, as regards Articles 2 and 3, to investigate violations when they have occurred. They are aimed at the 'practical and effective protection' of rights.<sup>33</sup> Many rights that are classically understood as civil liberties, such as the right to a fair trial or the right to participate in democratic elections, create positive obligations for the state to establish the institutions and processes necessary to ensure that individuals can enjoy these rights.

46. The consultation paper is premised on the idea that positive obligations stemming from the ECHR and the HRA 1998, which effectively incorporated it into domestic

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<sup>33</sup> See e.g. *Valiulienė v Lithuania*, App no. 33234/07 (ECHR, 26 March 2013) at [75].

law, are problematic on three grounds. Firstly, the paper presents the view that the development of positive rights through domestic and Strasbourg case law has resulted in the United Kingdom being held to have legal obligations that were not explicit in the legal texts. Secondly, case law on positive rights has resulted in judges making decisions that have a bearing on social and economic policy, particularly with respect to the allocation of resources. The Government's position is that elected legislators are better placed to take such decisions. Finally, the Government contends that positive rights create legal uncertainty, absorb scarce public resources in litigation, and skew public policy priorities. The consultation paper does not make any recommendations to address the problems identified by the Government. Instead, it invites suggestions on how the imposition and expansion of positive rights can be restrained.

47. While we agree that positive rights have largely been developed by judicial human rights decision-making, we note that this does not constitute the full picture. In some instances, positive obligations stem from the wording of the clause setting out the substantive right in the ECHR. For example, Article 2, paragraph 1 provides that 'Everyone's right shall be protected by law', which allows judicial intervention to protect the right to life where the state has failed to do so. Furthermore, Article 1 of the ECHR sets out a general obligation on states to secure Convention rights to everyone within their jurisdiction. The European Court of Human Rights has read this explicit obligation alongside substantive rights when developing its positive rights jurisprudence. In addition, positive rights have long been drawn from common law principles of humanity, access to a court and legal services, and equal treatment.<sup>34</sup> For example, in 1803, a UK court stated

As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving.<sup>35</sup>

This illustrates that the legal basis for positive rights is more complex than the consultation paper suggests. Recognising this complexity is necessary to appreciate the potential consequences of efforts to restrict the 'imposition and

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<sup>34</sup> Joint Committee on Human Rights, *Tenth Report* (22 March 2007).

<sup>35</sup> *R v Eastbourne (Inhabitants)* (1803) 4 East 103, 102 ER 769 at 770.

expansion of positive obligations' through reform of the HRA. In addition, positive obligations are an inherent and necessary element of ECHR rights protection. Efforts to restrict them at the domestic level would likely lead to more adverse judgments against the United Kingdom at Strasbourg.

48. With respect to the second problem presented by the Government, it is widely acknowledged that developing positive obligations can lead judges into controversial and sensitive terrain where they may assert obligations that may contradict the policy choices of democratically-elected governments. The European Court of Human Rights has therefore been careful to refrain from being overly prescriptive in setting out positive obligations. For example, in *Powell and Rayner v the United Kingdom*, the Court held with respect to Article 8 that in consideration of positive duties

regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and ... the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.<sup>36</sup>

This illustrates how, under the doctrine of subsidiarity, the Court allows states a margin of appreciation in how they choose to comply with the Convention, including positive obligations, and to balance the needs of individuals and the community.

49. As we argue above, similar respect to the separation of powers can be found in the HRA. This Act was carefully designed to comply with the doctrine of parliamentary sovereignty and to ensure that Parliament retained a 'safety valve' to restrict the expansion of positive rights.<sup>37</sup> In addition, the Independent Human Rights Act Review rightly found that British judges have been 'careful and cautious' in their approach to the separation of powers.<sup>38</sup>

50. While we agree that the cautious approach taken by British judges and the Strasbourg Court are necessary to prevent judicial overreach, it should nonetheless be emphasised that human rights are central to democracy and the rule of law. The courts' role in upholding human rights should therefore not be

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<sup>36</sup> *Powell and Rayner v the United Kingdom*, App no. 9310/81 (ECHR, 24 January 1990) at [41].

<sup>37</sup> Independent Human Rights Act Review, *Final Report* (December 2021, CP 586) 9.

<sup>38</sup> *ibid.*

viewed as being in tension with democracy, but rather as being an essential component of it, a component that has become increasingly important as States have grown in complexity and state functions have been delegated to private entities. A proactive judicial role in society can strengthen democracy by ensuring that voices that may otherwise be marginalised can play a role in shaping law and policy.<sup>39</sup> In particular, the HRA provides an important means to enable marginalised groups to assert their rights, notwithstanding the narrow standing criteria outlined above. Furthermore, the doctrine of parliamentary sovereignty maintains that Parliament can always overturn a court decision if it so wishes.

51. The third problem presented by the Government is that the development of positive rights has led to legal uncertainty and drains on finite public resources. However, the consultation paper only refers to cherry-picked cases to evidence these claims. More systematic and contextualised evidence on the overall costs created by positive obligations and the extent to which they can be balanced by savings made through implementing more rights compliant policies is necessary to determine the accuracy of the Government's perceptions. The risk of imposing an 'impossible or disproportionate' burden on State authorities is one to which the European Court of Human Rights is already sensitive.<sup>40</sup> It has repeatedly found that measures to give effect to positive obligations must be 'reasonable' and 'adequate',<sup>41</sup> and discharged without discrimination.<sup>42</sup> Furthermore, we are conscious that in 'Bringing Rights Home', the HRA was intended to provide a cheaper and more efficient approach to rights adjudication and ensure that human rights evolved in a manner that is sensitive to UK law. If the HRA is replaced with a British Bill of Rights that seeks to undermine and reverse the positive obligations that have been developed from the ECHR and the HRA, this will lead to increased litigation in Strasbourg and an increase in the number of cases in which the UK is found to have violated the Convention. Additional litigation at Strasbourg would be a greater drain on the public purse than resolving complaints at the domestic level and would

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<sup>39</sup> Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008).

<sup>40</sup> *Osman v UK*, App no. 23452/94 (ECHR, 28 October 1998) at [116].

<sup>41</sup> *Opuz v Turkey*, App no. 33401/02 (ECHR, 9 June 2009) at [136] and [153].

<sup>42</sup> *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v. Belgium*, App no. 1474/62 and others, (ECHR, 23 July 1968).

cause further legal uncertainty given the delays that can be experienced by cases before the European Court of Human Rights.

52. To conclude, we believe that positive obligations are an important component of ensuring that States are able to effectively secure the human rights of everyone within their jurisdictions. To date, UK courts relying on the HRA and the common law have developed a careful and cautious approach to developing positive obligations, which under the doctrine of parliamentary sovereignty remain subject to the will of Parliament. We do not therefore believe that further steps are necessary to halt or reverse the expansion of positive obligations. Indeed, we believe that steps to introduce such measures are likely to be counterproductive and would exacerbate the very problems that the Government's consultation paper states it wishes to address.

### **III. Preventing the incremental expansion of rights without proper democratic oversight**

#### **Respecting the will of Parliament: section 3 of the Human Rights Act**

**Question 12: We would welcome your views on the options for section 3.**

**Option 1: Repeal section 3 and do not replace it.**

**Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.**

**We would welcome comments on the above options, and the illustrative clauses in Appendix 2.**

53. The desirability of these options is premised on the Government's view that the HRA, as it has been applied in practice, 'has moved too far towards judicial

amendment of legislation which can contradict, or be otherwise incompatible with, the express will of Parliament'.<sup>43</sup> We do not think that this view is well substantiated by evidence. We are also mindful of the fact that section 3 of the HRA is itself an expression of Parliament's will.

54. In so far as the House of Lords' decision in *R v A (No 2)* seemed to adopt an 'impossible' interpretation of the legislation dealing with cross-examination of victims by alleged perpetrators in sexual assault cases,<sup>44</sup> it seems clear that the guidelines issued by the House of Lords three years later in *Ghaidan v Godin-Mendoza* have greatly reduced the risk of such a step occurring again.<sup>45</sup> Thus, the law as it stands clearly precludes the courts from using section 3 of the HRA in a way which would involve transgressing the boundary between interpretation and legislation, while at the same time providing that rights-compliant interpretations of the law should be adopted wherever possible.

55. In Northern Ireland, the senior judiciary are clearly cognisant of the constitutional balance which underpins section 3. In *HM's Application*, for example, Treacy J acknowledged that the courts' section 3 obligation to adopt a rights-compliant interpretation of the statute book will not be appropriate where the interpretation contended for 'goes against the grain of the legislation'; where it 'is contrary to some fundamental aspect of the legislation', and/or 'where it would create some far-ranging practical effects which would be outwith the competency of the judiciary'.<sup>46</sup> Indeed, out of respect towards 'boundary lines' of this nature, the Court of Appeal in Northern Ireland recently declined to make a section 3 interpretation on the basis that 'the offending provisions' in the case before it could not 'be read in a manner opposite to the direction which the whole of the legislation was intended to go'.<sup>47</sup> Accordingly, the Court issued a declaration of incompatibility instead.

56. We consider, therefore, that the illustrative clauses appended to the Government's consultation paper are ill-considered. In effect, they would make it more difficult to

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<sup>43</sup> See Ministry of Justice (n 12) para 233.

<sup>44</sup> [2001] UKHL 25, [2001] 1 AC 45.

<sup>45</sup> [2004] UKHL 30, [2004] 2 AC 557.

<sup>46</sup> [2014] NIQB 43 at [53].

<sup>47</sup> *R v Morgan, Marks, Lynch and Heaney* [2021] NICA 67 at [124]. Also see [2022] NIQB 8.



remedy individual human rights abuses that may arise from a general statutory framework. If the Government seriously wishes to disempower the courts from resolving such context-sensitive violations as they arise on a case-by-case basis, it must be prepared to deal with a considerable increase in the number of declarations of incompatibility that are likely to be issued by the courts as a result. In other words, it must be prepared for a considerable increase in Parliamentary responsibility for facilitating effective remedies by way of primary and subordinate legislation where appropriate.

57. We also note with some concern that the draft clauses appended to the Government's consultation paper define subordinate legislation simply by reference to the Interpretation Act 1978. Section 21 of the 1978 Act is silent as to the status of an Act of the Northern Ireland Assembly. Section 21 of the HRA offers much clearer guidance as to the status of such Acts. In fact, by defining Acts of the Northern Ireland Assembly as subordinate legislation, section 21 of the HRA ensures – in tandem with section 6 of the Northern Ireland Act 1998, and in accordance with the requirements of the Belfast (Good Friday) Agreement 1998 – that such Acts can be overruled by the courts. We will return to the significance of this point in further detail below.

**Question 13: How could Parliament's role in engaging with, and scrutinising, section 3 judgments be enhanced?**

58. We support the Independent Human Rights Act Review panel's recommendation in favour of expanding the terms of reference for the Joint Committee on Human Rights.<sup>48</sup> Equally, however, we share the panel's view that such changes are only justified because they may ameliorate misplaced *perceptions* about Parliament's role in the protection of human rights. We agree that while it is important to address misplaced perceptions of this kind, in reality there is no evidence to support the claim that Parliament's role has been weakened by the judiciary's approach to section 3 of the HRA. The judiciary has been giving effect to the will of Parliament.

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<sup>48</sup> Independent Human Rights Act Review (n 37) paras 194-202.

Parliament, in turn, deserves all due credit for enacting the HRA in the constitutionally balanced manner that it did.

**Question 14: Should a new database be created to record all judgments that rely on section 3 in interpreting legislation?**

59. Yes, we also agree with the Independent Human Rights Act Review panel's recommendation in favour of recording all judgments 'where section 3 is used to interpret legislation' and where 'it has or could have made a difference to the Court's interpretation'.<sup>49</sup> Likewise, we locate the justification for such an initiative primarily in its ability to 'defuse concerns' about the judiciary's use of section 3 in practice.<sup>50</sup> Unless or until there is a real evidentiary basis for such concerns, they should not be relied upon as the basis for significant constitutional reforms.

*When legislation is incompatible with the Convention rights: sections 4 and 10 of the Human Rights Act*

*Declarations of incompatibility*

**Question 15: Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?**

60. We have considered this question with due regard to the associated commentary in the Government's consultation paper. We have noted, in particular, that the consultation paper explicitly proposes to explore 'whether there is a case for providing that declarations of incompatibility are ... *the only remedy available* to courts in relation to certain secondary legislation'.<sup>51</sup> Unless Acts of the Northern

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<sup>49</sup> *ibid*, para 192. Emphasis removed.

<sup>50</sup> *ibid*, para 193.

<sup>51</sup> See Ministry of Justice (n 12) para 250. Emphasis added.

Ireland Assembly are exempted from the scope of this proposal, our view is that, if enacted, it could result in a breach of the Belfast (Good Friday) Agreement 1998.

61. Section 21(1) of the HRA defines an Act of the Northern Ireland Assembly as subordinate (i.e. secondary) legislation, which means that Acts of the Assembly can be quashed in whole or in part if they are found to be incompatible with any of the Convention rights protected by the HRA at present. As Gillen J put it in *Re E's Application*, while section 3(2)(b) 'makes it clear that the Act does not affect the validity, continuing operation or enforcement of any incompatible primary legislation', 'the Act clearly contemplates that subordinate legislation which is incompatible with Convention rights may be quashed'.<sup>52</sup>

62. Of course, this 'quashable' characterisation of Assembly Acts is reinforced by section 6 of the Northern Ireland Act 1998, which provides that a provision of an Act of the Assembly is 'not law' if it is incompatible with any of the Convention rights scheduled to the HRA. The statutory basis of the judicial power to quash Assembly legislation which conflicts with Convention rights is derived, therefore, both from section 6 of the Northern Ireland Act 1998 and from various sections of the HRA that work in tandem with the devolution legislation. Therefore, in the present context, we proceed with our analysis on the basis that there must be parity as between these statutory provisions. It would be anomalous if a breach of statutory duty arising from section 6 of the Northern Ireland Act resulted in nullity but an identical breach arising from the HRA did not.

63. Our view is that if it becomes domestically lawful for Acts of the Northern Ireland Assembly to be remedied only by a declaration of incompatibility – by empowering the judiciary to make declarations of incompatibility in respect of subordinate legislation while Acts of the Assembly are so classified – the UK Government's international law obligations under the Belfast (Good Friday) Agreement may be breached.

The Agreement states:

The Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas, subject to ... the ECHR and any Bill of Rights for Northern

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<sup>52</sup> *Re E's Application* [2007] NIQB 58, [2008] NI 11 at [62].

Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void.<sup>53</sup>

It further imposes the following obligation:

The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.<sup>54</sup>

When read together, it seems clear to us that, as a minimum, these provisions of the Agreement require that it must be open to the Court to nullify Assembly legislation where it is found to be in breach of Convention rights.

64. We therefore urge the Government to exercise considerable caution in connection with this proposal. The courts must remain empowered to overrule Assembly legislation where it conflicts with the Convention rights scheduled to the HRA. There is a risk that, by changing the range of legislation against which a declaration of incompatibility is the only option for the Court, and therefore varying the form of relief that might be granted where a human rights violation is established in judicial proceedings, the Government could breach its obligations under the Belfast (Good Friday) Agreement.

**Question 16: Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with the Convention rights? Please provide reasons.**

65. At the time of writing, the Judicial Review and Courts Bill is at Committee Stage before the House of Lords. The relevant part of the Senior Courts Act 1981 which would be amended by clause 1 of the Bill, in so far as it seeks to provide for suspended and prospective-only quashing order reforms, does not apply in Northern Ireland. In Northern Ireland, judicial review remedies are instead governed by section 18(1) of the Judicature (NI) Act 1978 and rule 1(1) in Order

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<sup>53</sup> Belfast (Good Friday) Agreement 1998, 'Democratic Institutions in Northern Ireland', para 26.

<sup>54</sup> Belfast (Good Friday) Agreement 1998, 'Rights, Safeguards and Equality of Opportunity', para 2.

53 of the Rules of the Court of Judicature (NI) 1980. As such, the Judicial Review and Courts Bill will have no immediate effect in Northern Ireland.

66. On this basis alone, should clause 1 be enacted, we would not recommend extending its reach to HRA proceedings across the UK or any similar proceedings of the same kind. Given that the forms of relief available by way of an application for judicial review in Northern Ireland do not and will not (in the absence of further legislation) include provision for suspended or prospective-only quashing orders, the effect of such an extension would be to create a conceptually incoherent inconsistency between the relief available by way of a traditional judicial review application and by way of a HRA (or similar) challenge.

67. Moreover, in addition to conceptual incoherence, we have concerns about the appropriateness of some aspects to clause 1 when viewed in a human rights law context. We can accept that suspended quashing orders may be justified in genuinely exceptional circumstances, such as those which arose in *Ahmed v HM Treasury (No 2)*,<sup>55</sup> but we think it is important that the exercise of such a power should be left entirely to the discretion of the courts. As regards prospective-only quashing orders, however, we find it difficult to envisage any circumstances in which such a power would be appropriate. The effect of such an order would be to deprive the victim who brought a case to court of an effective remedy in respect of the human rights violation against them.

#### *Remedial orders*

**Question 17: Should the Bill of Rights contain a remedial order power? In particular, should it be:**

- a. similar to that contained in section 10 of the Human Rights Act;**
- b. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;**
- c. limited only to remedial orders made under the ‘urgent’ procedure; or**
- d. abolished altogether?**

**Please provide reasons.**

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<sup>55</sup> [2010] UKSC 5, [2010] 2 WLR 378.

68. We agree to some extent with the Government's proposals to establish a strong presumption in favour of utilising more commonly used parliamentary procedures when legislating to address legislative incompatibilities with Convention rights. In our evidence to the Independent Human Rights Act Review, we proposed two changes to the remedial process set out in section 10 of and Schedule 2 to the HRA. We stand by those recommendations and therefore repeat them here, for ease of reference.

69. First, we propose that the remedial order process should be changed to enhance the role of Parliament by creating a presumption that such amendments will be made by Bills rather than by secondary legislation. The Government should be placed under a statutory obligation to demonstrate why it is impracticable to proceed by way of a Bill, given that, when required, Parliament is able to pass an Act very quickly.<sup>56</sup> We recognise, however, that this suggestion is not without some difficulties – although in theory Parliament can act quickly, in practice the need to timetable primary legislation could be used to delay the implementation of a court judgment. Such manoeuvres should be safeguarded against.

70. Second, we do not think that the HRA itself should be amendable by way of a remedial order, despite this having recently occurred in order to allow courts to award compensation for a person's detention in breach of Article 6 of the ECHR.<sup>57</sup> Although the oversight of the Joint Committee on Human Rights, which considers remedial orders in draft, ensures some degree of accountability over the exercise of this power, we believe it is undesirable in principle, since any such amendment may go further than is strictly required by the incompatibility identified by a domestic court or the European Court of Human Rights and thereby upset the delicate balance of the HRA, intentionally or otherwise.

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<sup>56</sup> As when the European Union (Withdrawal) (No 2) Act 2019 was enacted within six days (4-9 September 2019) and the Early Parliamentary General Election Act 2019 was enacted within three days (29-31 October 2019).

<sup>57</sup> The Human Rights Act 1998 (Remedial) Order 2020.

71. As such, we favour option (b) as presented in this question, albeit subject to a statutory presumption that remedial measures will be progressed by primary rather than subordinate legislation.

Statement of Compatibility – Section 19 of the Human Rights Act

**Question 18: We would welcome your views on how you consider section 19 is operating in practice, and whether there is a case for change.**

72. We think section 19 has operated effectively in practice. While the courts have rightly refused to regard section 19 statements as binding upon them,<sup>58</sup> such a statement has nonetheless influenced judicial decision-making on at least one occasion. In *Animal Defenders*,<sup>59</sup> the Court took notice of a statement that the Secretary of State had made under section 19(1)(b) of the HRA. The Minister's statement acknowledged that the Government had doubts about the Convention compatibility of a ban on political advertising that it was seeking to enact by way of the Bill which became the Communications Act 2003. In concluding that this ban did not amount to a disproportionate interference with the freedom of expression under Article 10 of the Convention, the Court stated:

The weight to be accorded to the judgment of Parliament depends on the circumstances and the subject matter. In the present context it should in my opinion be given great weight, for three main reasons. First, it is reasonable to expect that our democratically-elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy. It cannot be supposed that others, including judges, will be more so. Secondly, Parliament has resolved, uniquely since the 1998 Act came into force in October 2000, that the prohibition of political advertising on television and radio may possibly, although improbably, infringe article 10 but has nonetheless resolved to proceed under section 19(1)(b) of the Act. It has done so, while properly recognising the interpretative supremacy of the European Court, because of the importance which it attaches to maintenance of this prohibition. The judgment of Parliament on such an issue should not be lightly overridden. Thirdly, legislation cannot be framed so as to address particular cases. It must lay down general rules ... A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that

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<sup>58</sup> *R v A* [2001] UKHL 25, [2001] 1 AC 45 at [69] (Lord Hope).

<sup>59</sup> *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 2 WLR 781.

hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial.<sup>60</sup>

73. When the same case subsequently came to be considered at Strasbourg, the European Court of Human Rights likewise attached ‘considerable weight’ to the ‘exacting and pertinent reviews’ that had been conducted both by the UK Parliament and by the relevant domestic courts.<sup>61</sup>

74. We have reproduced these quotations because they also bear upon our answer to question 23 of this consultation exercise. Question 23 invites us to express a view on whether (and, if so, how) the law could be changed to ensure that UK courts give ‘great weight’ to legislation enacted by Parliament when they are required to conduct proportionality assessments in respect of qualified and limited Convention rights. Our view is that, as these passages very clearly show, the courts already do accord ‘great’ and ‘considerable’ weight to Parliament in precisely these circumstances. It would be contrary to the context-sensitive nature of judicial proceedings to require that courts must accord great weight to a single consideration, in all circumstances.

*Application to Wales, Scotland and Northern Ireland*

**Question 19: How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?**

75. In responding to this question, we wish to distinguish clearly between a theoretically possible Bill of Rights for the United Kingdom, as opposed to the Bill of Rights that appears to be contemplated in the Government’s proposals. We consider that, carefully drafted and with appropriate respect for the unique circumstances of Northern Ireland, it would be possible to draft a Bill of Rights for the United Kingdom as a whole, without trampling on Northern Ireland’s interests and legal status, although this would be a significant challenge. The type of Bill of Rights contemplated in the Government’s proposals, however, including the ‘key

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<sup>60</sup> *ibid* at [33] (Lord Bingham).

<sup>61</sup> *Animal Defenders International v UK* (2013) 57 EHRR 21 at [116].



principles' that underlie the Government's proposals, are not consistent with the unique circumstances of Northern Ireland. We develop this point subsequently in our answer to question 29.

Public authorities: section 6 of the Human Rights Act

**Question 20: Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.**

76. We consider that the current definition of 'public authorities' is largely satisfactory but we suggest that it would be useful to add that, when determining if functions are of a 'public nature' under section 6(3)(b), courts should be directed to take into account whether the person or body in question is in receipt of money from the state in order to carry out all or part of the functions and whether the functions in question relate to the provision of education, health or social care, or accommodation. These social needs are so important in any society that the providers of them should be obliged to take into account the human rights of the recipients of their services. They are already required to act in accordance with equality legislation, but they should also be obliged to ensure that, for example, they do not ill-treat a service user or infringe his or her rights to liberty, privacy, freedom of expression and enjoyment of their property.

**Question 21: The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer? Please explain your reasons.**

**Option 1: provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or**

**Option 2: retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.**

77. Again, we do not feel that the current law is deficient, but of the two options suggested in the consultation paper we prefer the first ('provide that wherever

public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully'). The second option ('retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3') would lead to too much uncertainty, especially if section 3 were to be replaced by a provision saying that ambiguous legislation should be construed compatibly with the rights in the Bill of Rights if such interpretation can be applied in a manner that is consistent with the wording and overriding purpose of the legislation. It is hard to see how and why such an interpretative provision could be applied to the question of whether a body was providing a public function or not.

### Extraterritorial jurisdiction

**Question 22: Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.**

78. We welcome the Government's recognition that it is not possible to address the issue of the extraterritorial jurisdiction of the ECHR in domestic UK law, without breaching the UK's international law obligations under the ECHR. To the extent that others consider the extraterritorial reach of the Convention to be a problem, then it can only be addressed through addressing arguments to the European Court of Human Rights that the existing jurisprudence on the issue should be modified, and/or through the agreement of the States who are parties to the Convention to amend the Convention. We do not consider, however, that the existing jurisprudence of the Court on extraterritorial jurisdiction is in any way fundamentally problematic. Rather the opposite. We consider that the application of human rights obligations to armed conflict is a welcome development and one that Parties to the Convention should be proud of, rather than seeking to undermine.

### Qualified and limited rights

**Question 23: To what extent has the application of the principle of ‘proportionality’ given rise to problems, in practice, under the Human Rights Act?**

**We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.**

**Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is ‘necessary’ in a ‘democratic society’, legislation enacted by Parliament should be given great weight, in determining what is deemed to be ‘necessary’.**

**Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.**

**We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.**

79. In response to question 18 of this consultation, we noted our view that the courts are already fully cognisant of the great weight that should be given to legislation enacted by Parliament by reference to Lord Bingham’s judgment in the *Animal Defenders* case<sup>62</sup> and by reference to the European Court of Human Rights’ practice of according it ‘considerable weight’.<sup>63</sup> We reiterate that view in response to this question, but consider it important to add that the weighting of different considerations which arise in litigation is an inherently judicial function that should not be fettered in a way which would require the courts to act with context-blindness.

80. Moreover, we wish to underscore the significance of the UK Supreme Court’s domestically formulated approach to proportionality assessments. In *Bank Mellat*, Lord Reed explained the historical development of the law in this way:

The approach to proportionality adopted in our domestic case law under the HRA has not generally mirrored that of the Strasbourg court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions and Bills of Rights ...

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<sup>62</sup> *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 2 WLR 781 at [33] (Lord Bingham).

<sup>63</sup> *Animal Defenders International v UK* (2013) 57 EHRR 21 at [116].

The judgment of Dickson CJ in *Oakes* provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in *Oakes* can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.<sup>64</sup>

81. When read together with Lord Bingham's judgment in *Animal Defenders*, which recognises that 'great weight' should be given to legislation enacted by Parliament where it is appropriate to do so in the circumstances of a particular case, the proportionality approach described by Lord Reed in this passage removes any cause for concern in our view. To the contrary, we suggest that it represents precisely the sort of domestically fine-tuned common law approach to the development of human rights which the Government says it is keen to encourage and support throughout its consultation paper.

#### Deportations in the public interest

**Question 24: How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.**

**Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment.**

**Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights.**

**Option 3: Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.**

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<sup>64</sup> *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 at [72]-[74] (Lord Reed, dissenting, albeit not on this point).

82. We reject the premise of the question. We do not consider that deportations should be able to go ahead ‘in the public interest’ if those deportations are contrary to the ECHR, and we consider that where such deportations are attempted, there should be a domestic remedy that prevents these from occurring. Furthermore, we reject the Government’s attempt to place ‘the public interest’ in opposition to ‘human rights claims’. We do not consider that they are in opposition to each other. Indeed, we consider that ‘the public interest’ includes the protection of human rights. We therefore do not consider that any of the proposed options are acceptable.

### Illegal and irregular migration

**Question 25: While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?**

83. For the reasons stated in our answer to question 24, we also reject the premise of this question. There is a fundamental contradiction between ‘respecting our international obligations’ and removing ‘impediments from the Convention and the Human Rights Act.’ We consider that any ‘impediments’ are part of our international obligations and that the UK should not seek to undermine these protections either domestically or internationally.

### Remedies and the wider public interest

**Question 26: We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:**

- a. the impact on the provision of public services;**
- b. the extent to which the statutory obligation had been discharged;**
- c. the extent of the breach; and**
- d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.**

**Which of the above considerations do you think should be included? Please provide reasons.**

84. We consider this proposal to be both unnecessary and unbalanced. It is unnecessary based on our understanding that the courts can and do already take account of these factors, including in deciding whether to award any of the discretionary relief that is open to them in a particular case. In *Bernard*, for example, the High Court of England and Wales took account of these factors in the following terms:

As with damages for Personal Injuries the court must not ignore the consequences of awards under section 8(3) for public authorities generally and society as a whole. On a simplistic view of local authority accounting, the larger the award to the claimants under section 8 the less there will be for the London Borough of Enfield to spend on providing social service facilities for the many others in need of care within the borough. Even if the money does not come out of the social services budget, it will have to come from some other service's budget and/or from Council taxpayers.<sup>65</sup>

85. We agree with the Court in *Bernard*, which went on to acknowledge that 'it is very much in the interests of society as a whole that public authorities should be encouraged to respect individual's rights under the Convention'.<sup>66</sup> In contrast, we consider that the list of factors proposed in the Government's consultation document are unjustifiably one-sided. If Parliament does decide to offer guidance to the courts in this area, we would urge it to take a more balanced view of the various considerations that should be taken into account in the context of a human rights based claim for damages. We would commend, in particular, the judgment of Friedman J in *Mahmud's Application*:

In the absence of a clear approach to a damages claim that is on all fours with a decided case in the Strasbourg jurisprudence involving the United Kingdom or a member state with a similar standard of living, I ... respectfully summarise the approach ... as to the quantification of damages awards, which amounts to a four-stage task:

- (i) consult the common law;
- (ii) where the ill-treatment is akin to a tort, refer to its quantum bands;
- (iii) develop a domestic body of precedent as an aid to predictability and future settlements; and

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<sup>65</sup> *R (Bernard) v London Borough of Enfield* [2002] EWHC 2282 (Admin) at [58] (Sullivan J).

<sup>66</sup> *ibid* at [59].

(iv) ensure that the overall award remains in sync with the wider considerations of equitable values and standards identified by the Strasbourg Court.<sup>67</sup>

86. We would further commend and endorse the following point of view:

Money is obviously not inconsequential to the Strasbourg Court that will almost inevitably order financial payments under Article 41 when personal harm has been caused as a result of Convention incompatible conduct. At the same time, it is important to appreciate that the HRA heralded a new means of protecting individuals and bonding society, such that the approach to damages under section 8 should retain its flexibility, accessibility and sense of proportion. The value of such payments lies in their vindictory function. The state as wrong doer is required to restore its commitment to respect for the inherent dignity of the individual complainant in circumstances when that dignity – as the primary feature of all human rights law – has endured some serious and fundamental harm, and other damages under domestic law are not otherwise available to do justice to the wrong.<sup>68</sup>

#### **IV. Emphasising the role of responsibilities within the human rights framework**

**Question 27: We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons.**

**Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or**

**Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.**

87. The consultation paper states that the Government wishes to ensure that 'a proper balance is struck between individuals' rights, personal responsibility, and the wider public interest'.<sup>69</sup> This is based on the Government's perception that 'the growth of a "rights culture" ... has displaced due focus on personal responsibility and the

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<sup>67</sup> *In the Matter of an Application by Omar Mahmud for Judicial Review* [2021] NIQB 37 at [35].

<sup>68</sup> *ibid* at [37].

<sup>69</sup> Ministry of Justice (n 12) para 6.

public interest'. To evidence this claim, the paper refers to a small number of individual cases relating to both successful and unsuccessful human rights claims that have been brought by foreign offenders who have committed serious crimes and by prisoners. The paper argues that 'the elastic expansion of the parameters of human rights law has created widespread uncertainty, which has encouraged patently unmeritorious claims, requiring substantial amounts of taxpayers' money to defend them'.<sup>70</sup> However, the reliance on a small number of individual cases as underpinning evidence means that no overview of the overall cost to taxpayers is provided, nor is any evidence of widespread uncertainty provided.

88. The consultation paper further argues that unmeritorious claims brought by convicted persons (both UK citizens and foreign nationals) 'undermine public confidence in the Human Rights Act'.<sup>71</sup> No evidence is presented to support this claim and it contrasts significantly with public opinion data from recent years that shows broad support for the universality of inalienable rights. For example, in a December 2019 Survation survey of more than 2,000 people, over 88 per cent agreed with the statement: 'rights, laws and protections must apply to everyone equally' in order to be effective.<sup>72</sup> This was a 10 per cent *increase* on the outcomes from a similar survey in 2015.<sup>73</sup> The 2019 survey also found that support for universal human rights extended across the political spectrum with supporters of all leading parties holding this position.<sup>74</sup>

89. As with other elements of the consultation paper, we therefore find the evidence relied on to support the need for changes to the HRA to give greater weight to individual responsibilities is unconvincing and does not provide an adequate basis to justify the introduction of the proposed changes. As a result, we are opposed to either of the proposals outlined in question 27. In addition, there are specific problems with each of the proposals.

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<sup>70</sup> *ibid* at para 128.

<sup>71</sup> *ibid* at para 129.

<sup>72</sup> Each Other, '88% Of UK Public Thinks "Effective" Human Rights Should Protect Everyone, Poll Finds' (10 December 2019) <<https://eachother.org.uk/poll-effective-human-rights-should-protect-everyone/>> accessed 3 March 2022.

<sup>73</sup> A 2015 ComRes poll commissioned by Amnesty International has found that 78% of people within the United Kingdom believe rights have to apply to everyone equally, in order to be effective.

<sup>74</sup> Each Other (n 72).



90. Question 27 suggests that a Bill of Rights 'should include some mention of responsibilities and/or the conduct of claimants' and proposes that this be incorporated into the handling of remedies. We will focus first on the question of individual responsibilities in general terms, before returning their relationship to remedies.
91. At the level of UK domestic law, we are persuaded by the argument of Sir Rabinder Singh of the Court of Appeal of England and Wales that it is not necessary for domestic human rights legislation to set out a list of individual duties and responsibilities since regulating individual duties and punishing any breaches is the purpose of much of the rest of domestic law. Singh LJ suggests that 'if the law were to attempt to set out a person's duties and responsibilities, they would either be repetitive or superfluous, as in stating that a person has a duty to obey the criminal law or to pay taxes as are lawfully due, or (worse) would be vacuous as they would be unenforceable as a matter of legal obligation'.<sup>75</sup>
92. Within international human rights treaties, the balancing of individual rights and individual responsibilities is primarily addressed through the provisions that allow governments to restrict individuals' enjoyment of qualified rights. Such restrictions are never permitted for absolute rights such as the freedom from torture and slavery. Where they are permissible, such as for the rights contained in Articles 8, 9, 10, and 11 of the ECHR, the treaties and related case law set out clear rules regulating when and how states can restrict qualified rights. For example, restrictions must be in accordance with the law, must be necessary in a democratic society to protect the rights and freedoms of others, or otherwise necessary to protect the public interest in areas such as national security.<sup>76</sup> Thus, where individuals pose a threat to the public interest, these provisions allow states to restrict their qualified rights, including through prosecution and punishment. These provisions regulating how Governments can restrict rights are intended to safeguard against the risk that populist or authoritarian governments might use individual duties to limit rights in unpredictable and discriminatory ways.<sup>77</sup>

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<sup>75</sup> Rabinder Singh, *The Unity of Law* (Hart Publishing 2022) 130.

<sup>76</sup> See e.g. Article 8(2) of the ECHR.

<sup>77</sup> UN High Commissioner of Human Rights, *Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles - Article 29*

93. The ECHR has, however, held that it may not provide damages to terrorists, even in cases relating to violations of the right to life. For example, in the *McCann* case, after finding the UK was responsible for violating the right to life of three members of the IRA who had been intending to plant a bomb in Gibraltar, the Court stated that it 'does not consider it appropriate to make an award under this head'.<sup>78</sup> However, in *A and others v the United Kingdom*, which related to the indefinite detention of foreign nationals suspected of terrorism, the Court distinguished the case from the *McCann* judgment, highlighting that 'it has not been established that any of the applicants has engaged, or attempted to engage, in any act of terrorist violence'.<sup>79</sup> It nonetheless made an award of damages that was substantially lower than it would in other cases on the basis that the unlawful detention was the result of a public emergency and the State's inability to deport applicants to their country of origin for fear of ill-treatment.
94. In the more recent *Del Río Prada* case, the Grand Chamber disregarded the background of an applicant who had been convicted for ETA terrorist offences when deciding to award non-pecuniary damages for violations of Article 5(1). This demonstrates that even in cases where the claimant is suspected or convicted of threats to national security, the European Court is very cautious in taking the claimant's personal conduct into account when deciding whether to award damages and only does so where the claim directly results from to their involvement in illegality.
95. This direct link to illegality was made explicit in *Silver and Others v the United Kingdom (Article 50)*. In this case, claimants requested damages for the stopping by the prison authorities of a number of letters written by or addressed to the applicants. One of the grounds invoked by the European Court of Human Rights to deny damages was that one of the applicants had fabricated clandestine letters, which the Court held 'constituted a transgression of the prison regulations which, in this respect, have not been found by the Court to be incompatible with the

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<<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23999&LangID=E>> accessed 3 March 2022.

<sup>78</sup> *McCann v the United Kingdom*, App no. 18984/91 (ECHR, 27 September 1995) at [219].

<sup>79</sup> *A and Others v the United Kingdom [GC]*, App No. 3455/05 (ECHR, 19 February 2009) at [251].

Convention'.<sup>80</sup> Therefore, this applicant was denied damages for a claim that related directly to his choosing to violate national laws, where those laws had been found to be human rights compliant.<sup>81</sup>

96. We believe that the awarding of damages should not be seen as a 'reward' for the claimants, as it is presented in the consultation paper. Damages are instead an important way of ensuring that when States have violated the rights of individuals within their jurisdiction, they are encouraged to change their behaviour.<sup>82</sup> The broadly framed proposals in the consultation paper that the UK courts would have discretion to reduce or remove damages on account of the applicant's conduct confined to the circumstances of the claim or their wider conduct raise the possibility that UK public authorities would have little incentive to change behaviour that violates individual rights. In addition, if it created the impression of public authorities getting off scot-free if they violate individual rights that could undermine public confidence in the State.

97. Even more problematically, it would risk undermining the inalienability of rights and equality before the law by creating the impression that it is less important if the State violates the rights of some individuals but not others. These proposals are disproportionate and unnecessary given that the law already permits the State to restrict the qualified rights of those who violate the rights of others and section 8 of the HRA already grants the courts considerable discretion as regards remedies. Imposing additional penalties on these individuals by denying them damages if they are the victim of rights violations will almost inevitably result in additional litigation at Strasbourg, resulting in further costs and delay.

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<sup>80</sup> *Silver and Others v The United Kingdom (Article 50)*, App nos. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, (ECHR, 24 October 1983) at [16].

<sup>81</sup> Attila Fenyes et al, *Tort Law in the Jurisprudence of the European Convention on Human Rights* (De Gruyter 2011) 407.

<sup>82</sup> Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2018) 29(4) *European Journal of International Law* 1091–1125.

## **V. Facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role**

**Question 28: We would welcome comments on the options, above, for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2.**

98. We have no objection to the draft clause at paragraph 11 of Appendix 2. It is sensible to create an obligation to notify Parliament within 30 days when an adverse judgment has been issued by the European Court of Human Rights in an application brought against the United Kingdom. And it is reasonable to notify to the Committee of Ministers in the Council of Europe that in the United Kingdom democratic responsibility for legislation, and the power to legislate, lie ultimately with Parliament, although it would be somewhat surprising if the Committee was not already aware of the basic structure of the UK constitution. None of this should detract from the duty of the Government to take steps short of legislation where this is possible in response to an adverse judgment emanating from Strasbourg.

99. With reference to paragraph 312 of the consultation paper, we believe that any such provision as that proposed in paragraph 11 of Appendix 2 should also be enacted for the three devolved legislatures in the United Kingdom. It is constitutionally appropriate for those legislatures to decide how, if at all, they would wish the adverse judgment to be reflected in new devolved legislation that is within their competence. For UK-wide legislation made by the Westminster Parliament, there should first be legislative consent motions obtained from the three devolved legislatures. In this context we echo a recent report by the House of Lords' Constitution Committee:

We believe the absence of any meaningful dialogue between Parliament and the devolved legislatures on legislative consent matters is a gap in the legislative process. We recommend that to increase confidence in the Sewel convention, as well as strengthening interparliamentary scrutiny of intergovernmental relations more generally, the House of Lords should strengthen its scrutiny of bills that engage the Sewel convention. This should include the provision of a memorandum by the Government about the devolution implications of relevant bills, a greater degree of committee scrutiny of legislative consent issues – seeking input from the devolved legislatures,

where appropriate – and greater prominence for the granting, or withholding, of legislative consent by the devolved legislatures in House of Lords Business.<sup>83</sup>

### Impacts

**Question 29: We would like your views any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular:**

- a. What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate;**

We cannot identify any significant benefits of the proposed Bill of Rights for Northern Ireland. On the other hand, the strongly negative effects of the proposals on Northern Ireland are, in our view, clear. Our strong view is that the vast bulk of the proposals set out in the consultation paper present significant potential risks to stability and peace in Northern Ireland. It is widely perceived in Northern Ireland as the latest in a long line of developments calling into question the Government's commitment to human rights and its willingness to retain the ECHR at the centre of the UK's constitution. We suggest that changes in the operation of the HRA in Northern Ireland are neither necessary nor desirable. Indeed, the debate in Northern Ireland is currently focused on the potential *extension* of human rights, rather than their diminution. In what follows, we set out in more detail what we identify the adverse effects in Northern Ireland of the Government's proposals, if adopted.

100. First, the UK's continued membership of the ECHR is a significant part of the Northern Ireland constitutional settlement that resulted in the Belfast (Good Friday) Agreement, which contains an important section dedicated to the protection of human rights and equality. A crucial element of these guarantees is also the effective delivery of ECHR rights in Northern Ireland domestic law: the HRA is seen in part as the mechanism that delivered on the Agreement's promises in this

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<sup>83</sup> *Respect and Co-operation: Building a Stronger Union for the 21<sup>st</sup> Century*, 10<sup>th</sup> Report of 2021-22, HL Paper 142 (20 January 2022), Summary, p 4.

respect. The HRA therefore has a constitutional function in Northern Ireland that is unique in the UK. Tinkering with it risks upsetting a delicate constitutional balance. The consultation paper recognises this in principle, but does not appear to have appreciated just how damaging its proposals would be in practice to that settlement.

101. Anyone with any knowledge of the Northern Ireland peace process will appreciate that this is not a theoretical point. The HRA, in its present form, has been fundamentally important to at least two key elements of that process. As regards policing, the Act has been central to the progress that has been made in by the Police Service of Northern Ireland (PSNI) in securing its broader confidence of the vast majority of the people of Northern Ireland. Successive Chief Constables have stated categorically that the main purpose of the PSNI is to protect everyone's human rights. The PSNI's Code of Ethics is replete with references to international human rights standards and the NI Policing Board has a statutory duty to produce an annual report assessing how well the PSNI is complying with its human rights obligations.<sup>84</sup>

102. In addition, the HRA has been at the centre of continuing attempts to deal with the past in Northern Ireland, with two cases having reached the Supreme Court in this area in 2019 and a third in 2021.<sup>85</sup> The HRA has enabled several new investigations to take place into unsolved murders, some of which have led to successful prosecutions. It has led to a series of coroners' inquests being held into unexplained deaths, many of which have produced significant information for loved ones of the deceased and, on occasions, apologies from organisations or institutions which were in some way involved in the deaths. Several miscarriages of justice have been brought to light as a result of the application of Article 6 of the

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<sup>84</sup> For further information on the background to and importance of this unique monitoring function, see Keir Starmer and Jane Gordon, 'Monitoring the Performance of the Police Service in Northern Ireland for Compliance with the Human Rights Act 1998' (2005) 3 EHRLR 233.

<sup>85</sup> *In the matter of an application by Geraldine Finucane for Judicial Review* [2019] UKSC 7, [2019] 3 All ER 191; *In the matter of an application by Hugh Jordan for Judicial Review* [2019] UKSC 9, [2020] NI 560; *In the matter of an application by Margaret McQuillan for Judicial Review* [2021] UKSC 55, [2022] 2 WLR 49. In the 2019 cases the Supreme Court held, reversing the Court of Appeal of Northern Ireland, that Article 2 had not been fully complied with. In the 2021 case the Supreme Court endorsed its decision in *Finucane* but upheld the Secretary of State's and Chief Constable's appeals on the facts.

ECHR. Put simply, the HRA has been, and should remain, absolutely integral to the sustainability of the Northern Ireland peace process.

103. Second, given that the human rights and equality provisions of the Agreement are underpinned by an international treaty between Ireland and the UK, any significant modification of the HRA in Northern Ireland that leads to a diminution of rights will attract international attention and concern. The international reaction to provisions of the Internal Market Bill, which in 2020 sought to override the ECHR and the HRA in particular circumstances in Northern Ireland, is a salutary warning of the potential political fall-out, not least in the United States, to any weakening of the HRA.

104. Third, the Belfast (Good Friday) Agreement provides that the Irish Government will bring forward measures ensuring at least an equivalent level of human rights protection in the Republic of Ireland as pertains in Northern Ireland, leading to the Republic of Ireland introducing its equivalent to the HRA in 2003. There is a, not uncommon, divergence between the legal and political understandings of this provision. Legally, the commitment is only that of the Irish Government, not the UK Government. Politically, however, it is common for the Agreement's provisions to be regarded as containing a commitment to the equivalence of rights throughout the island of Ireland. Significant changes to the way the HRA operates will lead, therefore, to political controversy as to whether this equivalence is being maintained. The consultation paper, somewhat misleadingly, draws on the method of incorporation of the ECHR in Ireland to aspects of its proposals, but without drawing attention to the fact that the position of the ECHR in Irish domestic law is to be seen as sitting alongside a strong, judicially enforced Constitution, which contains a robust set of rights. The absence of such constitutional protections in the UK makes comparison between the HRA in Northern Ireland and the equivalent legislation in Ireland superficial and misleading, when the weakness of the Irish equivalent is cited in support of weakening the provisions of the HRA.

105. Fourth, there is a complex relationship between the HRA and the Northern Ireland Act 1998. The ECHR is independently incorporated into the devolution arrangements in Northern Ireland via the Northern Ireland Act, which was the main

vehicle for the implementation of the Belfast (Good Friday) Agreement, applying the ECHR to limit the powers of the Northern Ireland Assembly and Executive. The Northern Ireland Act refers to compatibility with Convention rights, which are defined as those referred to in the HRA. Although the consultation paper does not explicitly propose the deletion of rights protected by a revised Bill of Rights, only to the way they are protected, this distinction may prove difficult to maintain in practice. Any significant weakening of the HRA would create a gap between the way the ECHR has been delivered through the Northern Ireland Act as compared with how it would be delivered via the amended HRA. Attempting to address this gap by amending the Northern Ireland Act is likely to exacerbate the destabilising effects of the HRA reforms, because the Northern Ireland constitutional settlement will be seen as collateral damage to a review that has little to do with the realities of human rights practice in Northern Ireland.

106. Fifth, there is an even more complex relationship between the ECHR, the HRA, and Article 2 of the Ireland-Northern Ireland Protocol to the EU-UK Withdrawal Agreement, which seeks to limit the damage to the protection of human rights in Northern Ireland resulting from the UK's withdrawal from the EU by providing that there will be no diminution of certain rights in Northern Ireland as a result of the UK's exit from the EU. Where a right or safeguard protected by the Belfast (Good Friday) Agreement right was, prior to the UK's departure from the EU, underpinned by EU law and the HRA, and, following the UK's departure the EU law underpinning is no more, the right or safeguard will be diminished if the HRA's protections are then weakened or removed. Article 2 is engaged because the diminution in the right or safeguard is only possible now due to the UK's exit. Had the UK not exited, EU law would still have operated as an underpinning even if the HRA had been weakened. The Government's proposals regarding deportation, and the potential changes in remedies for Assembly legislation that breaches human rights obligations, are both likely to engage Article 2 of the Protocol. The less protection the HRA provides, the more attention will be given to using Article 2 to contest the resulting diminution of rights that may result, and with it even more pressure on the operation of the Protocol which is already under significant pressure in other respects. Successful resort to Article 2 of the Protocol (which, of course, does not apply elsewhere in the UK) may lead to opening up yet further differences between



Northern Ireland and the rest of the UK. The absence of any significant analysis of the implications of Article 2 of the Protocol for the proposals set out in the consultation paper is worrying and disappointing.

107. Sixth, the UK is not free to amend the HRA without attracting attention from the EU not only in the context of the Protocol, but also under the UK-EU Trade and Cooperation Agreement (TCA). In extreme circumstances, sanctions could be imposed against the UK for reducing human rights protections in domestic law.<sup>86</sup> The implications of the TCA for the Government's proposals do not appear to have been given any consideration. For example, several of the Government's proposals would, if fully implemented, have significant effects on the domestic application of Article 8 ECHR, in altering the application of the proportionality principle, in reducing the availability of positive obligations arising from Article 8, and in prioritising freedom of speech over rights to private life where they come into tension. One of the roles that Article 8 currently plays is in the area of data protection, and it is part of the architecture that establishes common standards for data sharing between the EU and the UK. The maintenance of data protection safeguards is one of the conditions in the TCA for the UK-EU data sharing; weakening these safeguards engages the TCA, therefore.<sup>87</sup> In a situation where the UK is increasingly dependent on trade agreements with countries and blocs outside the EU, accusations that the UK is in breach of the TCA could adversely affect the UK's ability to deliver attractive agreements elsewhere, in particular with the United States. Again, the absence of any detailed consideration of the implications of the proposed changes on the UK's commitments under the TCA is disappointing, in a context in which the consultation paper purports to identify the potential adverse impacts of its proposals.

108. Finally, it is worth bearing in mind how significantly out of step the debates leading to the publication of the consultation paper were with debates on human rights in Northern Ireland. There has been a long-standing debate in Northern

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<sup>86</sup> See Article 524 of the TCA.

<sup>87</sup> See further, Gemma Davies, 'Law Enforcement and Judicial Co-operation in Criminal Matters' in Christopher McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP 2022) 293-4.

Ireland about a bespoke Northern Ireland Bill of Rights, a debate that began with the Belfast (Good Friday) Agreement, with unionist parties (in particular, the Democratic Unionist Party) opposing such a development, and nationalist parties broadly in support. In an attempt to address the stand-off, as part of the 2020 'New Decade, New Approach' agreement to restore the power-sharing institutions of government in Northern Ireland, an Ad Hoc Committee of the Northern Ireland Assembly was established to consider further a Bill of Rights for Northern Ireland, *building on the HRA*. The recent report by the Committee, although valuable in pointing to the significant consensus among Assembly parties and across the political divide that there should be a Northern Ireland-specific Bill of Rights, in principle, was ultimately disappointing because the DUP withdrew its previous 'in principle' agreement. Whether or not discussions continue after the Assembly elections and where they might lead is uncertain. The proposals set out in the consultation paper cut across this process by seeking to reduce the protections established in the HRA, thus undermining the foundations on which negotiations on a Northern Ireland Bill of Rights have hitherto proceeded.

- a. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate; and**
- b. How might negative impacts be mitigated? Please give reasons and supply evidence as appropriate.**

109. Section 75 of the Northern Ireland Act 1998 does not appear to apply to the Ministry of Justice. Although the Ministry is listed in Schedule 2 to the Parliamentary Commissioner Act 1967, and the development of proposals for a new Bill of Rights that apply to Northern Ireland is a function of the Ministry 'relating to Northern Ireland', it has, perhaps surprisingly, and certainly disappointingly, not been designated by the Secretary of State for the purposes of section 75. The Public Sector Equality Duty in the Equality Act 2010, which does apply to the Ministry's activities in Britain, does not appear to apply to its activities in Northern Ireland. We are strongly of the view that enough is said in the Government's proposals to indicate that there may well be adverse impacts on all protected groups in Northern Ireland (that is, those that come under the coverage of section 75) because each of these groups could find their Convention rights more difficult

to access and remedy. We recommend that a full impact assessment meeting the requirements of section 75, including consultations with each of the protected groups in Northern Ireland, should be conducted before taking these proposals any further, even though section 75 may not formally require the Ministry to conduct such an impact assessment. Since an adequate assessment of impacts is necessary before any attempt can be made as to what mitigations might be introduced to reduce the adverse impacts, it is not possible to identify what mitigations are needed in the Northern Ireland context.

## ***Conclusion***

110. In summary, with the greatest respect, we consider the proposals in the consultation paper to be neither welcome nor timely. From a more general human rights perspective, we see no need to diminish in any way the protections that the HRA currently offers to the people of Northern Ireland. More broadly, given the centrality of human rights to the Northern Ireland peace settlement, a weakening of the rights currently protected by the HRA threatens that settlement. From the perspective of the need to safeguard peace and ensure stability in Northern Ireland, therefore, any move that would be widely viewed as undermining the Belfast (Good Friday) Agreement and its strong commitment to the advancement and protection of human rights would be highly regrettable.