



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Evidence to Joint Committee on Human
Rights Legislative Scrutiny of the Bill of
Rights Bill**

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1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(1) of the Northern Ireland (NI) Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in NI. The NIHRC is also mandated, under section 78A(1) to monitor the implementation of Article 2(1) of the Protocol on Ireland/NI of the European Union (EU) Withdrawal Agreement, to ensure there is no diminution of rights protected in the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast (Good Friday) Agreement 1998 as a result of the United Kingdom (UK)'s withdrawal from the EU. In accordance with these functions, the following evidence is submitted to the Joint Committee on Human Rights (Joint Committee) for its legislative scrutiny of the Bill of Rights Bill.
- 1.2 The NIHRC is due to publish comprehensive advice, which will be shared with the Joint Committee in due course. This evidence raises the headline issues in line with the Joint Committee's questions.

2.0 Repeal of Human Rights Act 1998

- 2.1 Several independent human rights experts have emphasised that any change to the UK's current domestic human rights framework should strengthen, not weaken, human rights protections.¹ Also, specific to NI, any changes should "complement rather than replace the incorporation of the ECHR in NI law".²
- 2.2 Furthermore, Lady Hale, former President of the UK Supreme Court, has stated that:

¹ CCPR/C/GBR/CO/7, 'UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI', 17 August 2015, at para 5(c); E/C.12/GBR/CO/6, 'UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 14 July 2016, at para 10; CERD/C/GBR/CO/21-23, 'UN CERD Committee Concluding Observations on the Twenty First to Twenty Third Periodic Reports of UK of Great Britain and NI', 26 August 2016, at para 10; CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 11; A/HRC/36/9, 'UN Working Group on the Universal Periodic Review Report of the Working Group on the Universal Periodic Review - UK of Great Britain and NI', 14 July 2017, at paras 134.67; 134.68; 134.69; 134.70; 134.71; 134.72; 134.73; 134.74; 134.75; 134.76; and 134.77.

² A/HRC/36/9, 'UN Working Group on the Universal Periodic Review, Report of the Working Group on the Universal Periodic Review - UK of Great Britain and NI', 14 July 2017, at para 134.67.

quite apart from reducing the protection currently available to the victims of human rights violations, and thus risking the breach of our international obligations... [a British Bill of Rights] will lead to doubts and uncertainties and a greatly increased risk of time-consuming and costly litigation both here and in Strasbourg for years to come. And the case for taking that risk has simply not been made out.³

2.3 Clause 1(1) of the current draft proposes that this legislation “reforms the law relating to human rights by repealing and replacing the Human Rights Act 1998”.

2.4 The NIHRC is gravely concerned that the present Bill will significantly weaken the protection afforded.

2.5 The UK Government and the EU recognised the centrality of human rights and equality protections to the peace process in the negotiations leading to the UK’s withdrawal from the EU and that the Belfast (Good Friday) Agreement required special consideration and protection.⁴ Protocol Article 2 requires the UK Government and the NI Executive to ensure that no diminution of rights, safeguards and equality of opportunity contained in the relevant part of the Belfast (Good Friday) Agreement occurs as a result of the UK’s withdrawal from the EU.

2.6 The UK-EU Withdrawal Agreement provides that individuals can rely directly on the provisions of the Withdrawal Agreement, including Protocol Article 2, in UK Courts.⁵ Section 7A of the EU (Withdrawal) Act 2018 gives effect to all the rights, obligations and remedies arising under the UK-EU Withdrawal Agreement in UK law without the need for further enactment. The UK Government has recognised that it is “obliged to ensure that holders of relevant rights are able to bring challenges before domestic courts and ... that appropriate remedies are available”⁶ and this has been confirmed by the NI High Court.⁷

³ NI Human Rights Commission, ‘Press Release: Annual Human Rights Lecture 2022: Lady Hale’s Keynote Address in Full’, 25 July 2022.

⁴ Joint report from the Negotiators of the EU and UK Government progress during Phase 1 of Negotiations under Article 50 TEU on the UK’s Orderly Withdrawal from the EU, 8 December 2017, para 53.

⁵ Article 4, UK-EU Withdrawal Agreement.

⁶ NI Office, ‘[UK Government Commitment](#) to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 6.

⁷ *Re SPUC Pro-Life Limited* [2022] NIQB 9, at para 77.

2.7 The NIHRC advises that the protections in Protocol Article 2, while an important safeguard against the diminution of rights following UK withdrawal from the EU, are not a substitute for the comprehensive framework of human rights protections under the Human Rights Act.

2.8 The NIHRC is further concerned that, while Protocol Article 2 provides an additional framework for the protection of rights and safeguards, the weakening of human rights protections in the present Bill will create uncertainty and confusion, making the interpretation of Protocol Article 2 more challenging and may lead to a culture shift that will further reduce the robustness of human rights protections in NI.

3.0 Relationship between UK Courts and ECtHR

3.1 The present Bill seeks to clarify and re-balance the relationship between the UK courts, the ECtHR and UK Parliament.⁸ Yet, State discretion is already embedded within domestic legislation. The principles of subsidiarity,⁹ margin of appreciation¹⁰ and the restriction on courts' declarations of incompatibility of primary legislation¹¹ preserve respect for Parliamentary sovereignty and already require a balanced relationship between the UK courts and ECtHR. It is also the UK's choice to be a High Contracting Party to the ECHR and thus must "undertake to abide by" the ECtHR's final judgment.¹²

3.2 The present Bill, however, proposes that domestic courts "must have particular regard" to the text of the ECHR and, in interpreting the text, to the preparatory work of the ECHR.¹³ The ECHR is a living document that should have the ability to react to societal developments. The preparatory work of the ECHR only reflects society as it was in the 1950s.

⁸ Clause 1(2), Bill of Rights Bill.

⁹ Protocol No 15 Amending the ECHR, 24 June 2013.

¹⁰ Protocol No 15 Amending the ECHR, 24 June 2013.

¹¹ Section 4, Human Rights Act 1998.

¹² Article 46(1), European Convention on Human Rights 1950.

¹³ Clause 3(2), Bill of Rights Bill.

- 3.3 The Human Rights Act 1998 requires that domestic courts “must take into account” ECtHR jurisprudence.¹⁴ This is not replicated within the present Bill, which proposes that “the UK Supreme Court is the ultimate judicial authority on questions arising under domestic law in connection with” the ECHR.¹⁵ It continues that a domestic court “may not adopt an interpretation” of an ECHR right that “expands the protection” of this right “unless... [there is] no reasonable doubt that the ECtHR would adopt that interpretation if the case were before it”, but a domestic court may also “adopt an interpretation of the right that diverges” from ECtHR jurisprudence.¹⁶
- 3.4 These clauses are self-contradictory. The UK Supreme Court is to be the ultimate adjudicator, but only if it is minded to limit rather than enhance human rights protection. This is unnecessary and confusing. While it sits along with the previously established Ullah principle,¹⁷ this has been reconsidered over the years to accommodate instances where established ECtHR jurisprudence does not exist or has not yet been reconsidered so as to reflect societal developments. The domestic courts have played an important role in protecting minorities against discrimination. This Bill will weaken their ability to protect those who do not have the agency or support to test a case before the ECtHR. A case like *Rabone* [2012],¹⁸ which ruled that positive obligations applied to informal, not just detained, psychiatric patients, could not be brought.
- 3.5 Public authorities must still act in a way that is compatible with the ECHR.¹⁹ The Human Rights Act makes it clear that this requires public authorities and courts to interpret legislation “so far as it is possible to do so” in an ECHR-compliant way.²⁰ The present Bill however preserves that duty but with an important difference - the focus is on how the courts (not public authorities) interpret ECHR rights.²¹ This creates unnecessary confusion and a weakening of protection in practice that does not exist under the 1998 Act.

¹⁴ Section 2, Human Rights Act 1998.

¹⁵ Clause 3(1), Bill of Rights Bill.

¹⁶ Clause 3(3), Bill of Rights Bill.

¹⁷ *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26.

¹⁸ *Rabone and Another v Pennine Care NHS Trust* [2012] UKSC 2.

¹⁹ Section 6, Human Rights Act 1998; Clause 12, Bill of Rights Bill.

²⁰ Section 3, Human Rights Act 1998.

²¹ Clause 3, Bill of Rights Bill.

3.6 The NIHRC advises that there is already a balanced relationship between the UK courts, ECtHR and UK Parliament by virtue of the Human Rights Act. The NIHRC is concerned that the present Bill creates an imbalance and will lead to uncertainty, prevent the domestic courts from reacting to societal developments and redirect cases away from the domestic courts towards the ECtHR.

3.7 The Belfast (Good Friday) Agreement makes a direct link between the Rights, Safeguards and Equality of Opportunity Chapter and the ECHR.²² The UK Government has recognised that the “key rights and equality provisions in the [Belfast (Good Friday)] Agreement are supported by the ECHR which has been incorporated into NI law pursuant to the commitment in the Agreement to do so”.²³ The signatories’ commitment in the Belfast (Good Friday) Agreement to rights in this chapter must therefore be understood as embracing, as a minimum, those rights set out in the ECHR.²⁴ Therefore, the non-diminution commitment in Protocol Article 2 encompasses the full range of rights set out in the ECHR, to the extent that they are underpinned by EU obligations in force on 31 December 2020.²⁵ As noted above, both the UK Government and the NI High court have recognised that Protocol Article 2 has direct effect and that individuals can invoke their rights under Protocol Article 2 in UK Courts.²⁶

3.8 The EU Charter of Fundamental Rights continues to apply in the application and interpretation of any EU law and concepts referred to in the Withdrawal Agreement, including any EU obligations which underpin the rights, safeguards and equality of opportunity

²² Belfast (Good Friday) Agreement, 10 April 1998, at Part 6 on Rights, Safeguards and Equality of Opportunity.

²³ NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 3.

²⁴ This relates to the scope of issues and EU law relevant to Article 2, rather than the question of whether Article 2 requires the UK to remain committed to the ECHR as considered in Social Change Initiative, ‘Human Rights and Equality in Northern Ireland under the Protocol – A Practical Guide’ (SCI, 2021); Christopher McCrudden, ‘Parliamentary Scrutiny of the Joint Committee and the Application of the Northern Ireland Protocol – Evidence to the House of Commons European Scrutiny Committee’ (ESC, 2020); and Sylvia De Mars, Aoife O’Donoghue, Colin Murray and Ben Warwick, ‘Commentary on the Protocol on Ireland/Northern Ireland in the Draft Withdrawal Agreement’ (2018).

²⁵ NI Human Rights Commission, ‘Response to the consultation on Human Rights Act Reform: A Modern Bill of Rights’ (NIHRC, 2022).

²⁶ NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in Northern Ireland: What does it Mean and How will it be Implemented?’ (NIO, 2020), at para 29; *Re SPUC Pro-Life Limited* [2022] NIQB, at para 77

protections within scope of Protocol Article 2.²⁷ Article 52 of the EU Charter establishes a link between the rights in the EU Charter and the ECHR and this link has been further developed in the jurisprudence of the Court of Justice of the EU (CJEU).²⁸

3.9 Pursuant to Protocol Article 2, there can be no diminution of those ECHR rights which were underpinned by EU law prior to 1 January 2021. Where an EU Charter right is engaged, which corresponds to a right in the ECHR, the CJEU has consistently found that it should be interpreted in line with the relevant ECHR right and connected case law of the ECtHR.²⁹ The non-diminution commitment therefore maintains its link to the ECHR as interpreted through the ECtHR regardless of any change to how those rights are implemented in the present Bill. Nevertheless, decoupling the link between how UK courts interpret ECHR rights and the case law of the ECtHR creates unhelpful confusion. For example, whereas ECHR rights, and relevant EU Charter rights, within the scope of Protocol Article 2 would maintain a direct link to the ECtHR case law, ECHR rights outside the scope of Protocol Article 2 would be subject to a different, lower standard.

3.10 **The NIHRC advises that, irrespective of the provisions of the Bill, future ECtHR jurisprudence will continue to inform the interpretation of Protocol Article 2, due to the interpretive requirement in Article 52 of the EU Charter of Fundamental Rights regarding the ECHR and the resulting CJEU jurisprudence.**

4.0 Interim measures

4.1 The ECtHR can indicate interim measures to any High Contracting Party to the ECHR.³⁰ These are urgent measures which, in accordance with the established practice of the ECtHR, apply only where there is

²⁷ Article 4(3) provides that where the Withdrawal agreement refers to EU law or concepts, it should be interpreted and applied in accordance with the methods and general principles of EU law. As noted in Kellerbauer et al, "The obligation to apply these provisions in accordance with the general principles of [EU] law means for the UK that it is bound to observe the EU fundamental rights when implementing those provisions of the Agreement. Hence in substance, Article 4(3) has the same effect as article 51(1) of the EU Charter of Fundamental Rights." Kellerbauer, Dumitriu-Segnana, Thomas Liefländer, 'The UK-EU Withdrawal Agreement – A Commentary' (OUP, 2021), at 39.

²⁸ *WebMindLicences kft v Nemzeti Adó*, Case C-419/14, 17 December 2015, para 70; *AK v Krajowa Rada Sądownictwa v Sąd Najwyższy*, Case C-585/18, C-624/18 C-625/18, 19 November 2019, para 116-118; *Rayonna prokuratura Lom*, Case C-467/18, 19 September 2019, para 42-45.

²⁹ *Ibid.*

³⁰ European Court of Human Rights, 'Rules of Court' (CoE, 2022), at Rule 39.

an “imminent risk of irreparable damage”.³¹ They are only to be applied in limited situations, typically those where there are fears of a threat to life or ill-treatment.³² Historically, the majority of interim measures were used in deportation and extradition cases.³³ See also the UK’s recent attempted deportation of asylum seekers to Rwanda.³⁴

4.2 The present Bill proposes that interim measures issued by the ECtHR are to be ignored by domestic courts, public authorities and any other person.³⁵ This will likely increase the number of violations for which individuals will be entitled to exercise their right to an effective remedy. Combined with the proposals to rebalance the relationship with the ECtHR³⁶ and to significantly restrict positive obligations,³⁷ resulting cases will be increasingly pushed away from the domestic courts towards the ECtHR.

4.3 The NIHRC advises that interim measures are an early warning sign to a State that its proposed actions are incompatible with human rights and will likely be subject to legal action, during which time significant damage is possible that will require remedying. The NIHRC warns that, given the scenarios for which the ECtHR reserves interim measures, simply ignoring one could cost lives – an irremediable outcome.

5.0 Parliamentary scrutiny of human rights

5.1 Parliamentary sovereignty enables the UK Parliament to create or repeal any law.³⁸ No Parliament can pass laws that future Parliaments cannot change, and the courts cannot overrule a Parliament’s legislation.³⁹ However, the UK’s separation of powers doctrine is

³¹ *Mamatkulov and Askarov v Turkey* (2005) ECHR 64, at para 104.

³² European Court of Human Rights, ‘Practice Direction: Requests of Interim Measures (Rule 39 of the Rules of Court)’ (CoE, 2002), at 1.

³³ *Ibid.*

³⁴ European Court of Human Rights, ‘Press Release: The European Court grants urgent interim measure in case concerning asylum-seeker’s imminent removal from the UK to Rwanda’, 14 June 2022.

³⁵ Clause 24, Bill of Rights Bill.

³⁶ Clause 1, Bill of Rights Bill.

³⁷ Clause 5, Bill of Rights Bill.

³⁸ UK Parliament, ‘Parliamentary Sovereignty’. Available at: <https://www.parliament.uk/site-information/glossary/parliamentary-sovereignty>

³⁹ *Ibid.*

relevant whereby “major institutions of State should be functionally independent”.⁴⁰ Parliament makes (and changes) the law, the Executive Government puts the law into action, and the courts make findings on evidence and issue judgments on the correct interpretation of the law. This enables the courts to assess whether it believes that Parliament struck the right balance with a law and to make a judgment suggesting a change to the law as and when the courts deem it necessary.

5.2 The present Bill “clarifies and re-balances the relationship between the courts in the UK, the ECtHR and Parliament”, including by ensuring that “courts must give the greatest possible weight” to Parliamentary decisions.⁴¹ Parliamentary sovereignty provides that it is Parliament’s prerogative whether to follow or disregard the courts’ assessments. However, the option to assess that must be practically available and utilised by the courts.

5.3 The NIHRC advises that parliamentary sovereignty and separation of powers should go hand-in-hand. This is not the case in the present Bill, particularly within proposed clause 1(2)(c).

5.4 The present Bill proposes to remove the requirement for Ministers to make a statement as to whether a Government Bill is compatible with human rights.⁴²

5.5 The NIHRC advises that removing the requirement for Ministers to make a statement on legislation’s compatibility with human rights removes an important monitoring mechanism that places human rights at the forefront of lawmakers’ minds.

⁴⁰ Richard Benwell and Oonagh Gray, ‘The Separation of Powers’ (HoC, 2022).

⁴¹ Clause 1(2), Bill of Rights Bill.

⁴² Clause 19, Bill of Rights Bill.

6.0 Interpreting and Applying the Law

Positive obligations

- 6.1 Obligations are attached to each substantive ECHR right, requiring that a State ensures appropriate steps are taken to protect against unlawful infringement of a right.⁴³ Such steps should have the “real prospect of altering the outcome or mitigating the harm”.⁴⁴ When State resources are limited, States have wide discretion as to what steps should be taken, but this should consider the specific circumstances of the case.⁴⁵ The right to an effective remedy can take many forms, including thorough investigation,⁴⁶ deeming it also relevant.
- 6.2 The present Bill proposes that, from the commencement of the legislation, a court may ignore the requirement for a public authority “to comply with a positive obligation”.⁴⁷ It also proposes that the court “must give great weight” to a variety of factors that are drafted in such a way as to imply human rights are nothing more than an annoyance that prevent public authorities from doing their job.⁴⁸ Contrary to what is suggested within the present Bill, it is not the NIHRC’s view that human rights standards act as an unreasonable constraint. Relevant obligations include things such as specialist training, steps to prevent known real and immediate risks and conducting thorough investigations to establish accountability. These are key to pre-emptively protecting individuals. Already, the margin of appreciation and principles of universality, proportionality, reasonableness, necessity and subsidiarity afforded by the ECHR together ensure that a State has broad discretion to perform its functions so long as it does so in a balanced and effective way. The present Bill will undermine that.

⁴³ See for example, *Storck v Germany* (2005) ECHR 406, at para 101; *El Masri v The Former Yugoslav Republic of Macedonia* (2012) ECHR 70, at para 239.

⁴⁴ *Opuz v Turkey* (2009) ECHR 870.

⁴⁵ *Cotlet v Romania* (2003) ECHR 263; *Gagiu v Romania* (2009), Application No 63258/00, Judgment of 24 February 2009; *Pentiacova and Others v Moldova* (2005) ECHR 947.

⁴⁶ Article 13, ECHR; Article 3(2)(a), UN ICCPR; *Kaya v Turkey* (1998) ECHR 10, at paras 106-107.

⁴⁷ Clause 5(1), Bill of Rights Bill.

⁴⁸ Clause 5(2), Bill of Rights Bill.

6.3 To give a specific example, when read alongside the proposed restrictions within the NI Troubles (Legacy and Reconciliation) Bill, this raises specific concerns for NI.

6.4 The NIHRC advises that the present Bill's proposals to ignore the UK's positive obligations will weaken the protection of victims and increase the likelihood of violations.

6.5 Protocol Article 2 requires the UK Government to ensure there is no diminution of the rights, safeguards and equality of opportunity protections in the relevant chapter of the Belfast (Good Friday) Agreement as a result of the UK's withdrawal from the EU. The NIHRC has already identified how positive obligations arising under Article 4 of the ECHR in respect of trafficking fall within scope of Protocol Article 2, to the extent that those obligations are underpinned by the EU Trafficking Directive.⁴⁹ As noted above, the EU Charter of Fundamental Rights is relevant to the interpretation and application of Protocol Article 2. Where an EU Charter right, which corresponds to a right in the ECHR, is engaged, the CJEU confirms that it should be interpreted in line with the relevant ECHR right and connected ECtHR case law, including where that jurisprudence gives rise to a positive obligation.⁵⁰ Therefore, where there is a link between Protocol Article 2 and an ECtHR interpretation of an ECHR right, the restrictions on positive obligations should not apply. However, these restrictions on positive obligations create unhelpful confusion. Moreover, there is a risk that the present Bill will create a culture shift where reduced human rights protections in NI in the future could have implications for how Protocol Article 2 is interpreted and applied.

6.6 The NIHRC advises that while the protections of rights in Protocol Article 2 are not directly impacted by the weakening of positive obligations arising under the ECHR within the domestic legal framework, the present Bill creates unhelpful confusion.

⁴⁹ NI Human Rights Commission, 'Submission to Department of Justice Consultation on Measures to Strengthen the Response to Modern Slavery and Human Trafficking' (NIHRC, 2022).

⁵⁰ *Rayonna prokuratura Lom*, Case C-467/18, 19 September 2019, para 42-45.

Proportionality

- 6.7 Domestic authorities are, in most cases, afforded a margin of appreciation or discretion in how to ensure adherence to the ECHR. The extent of the margin is determined by the type of right involved – a wide margin for qualified rights, narrower margin for limited rights and narrow margin in very exceptional circumstances for absolute rights.⁵¹ Applying a margin of appreciation must be guided by recognised principles, such as the principle of proportionality.
- 6.8 Proportionately is the guiding principle for courts seeking to achieve a fair balance between competing interests. This requires consideration of Parliamentary sovereignty, but this is not an exclusive consideration and must form part of contemplating all surrounding circumstances.⁵² It also requires consideration of what is necessary within the specific context.⁵³
- 6.9 The present Bill premises that it is for Parliament to decide the appropriate balance of rights. It proposes to achieve this by requiring that courts give the ‘greatest possible weight’ or ‘great weight’ to decisions made by Parliament.⁵⁴ These are not recognised legal concepts. By their nature, they disregard the principle of proportionality, which is to achieve a fair balance between the public interest and an individual’s rights.⁵⁵ They also risk misinterpretation of how the margin of appreciation doctrine. It also raises further questions regarding separation of powers and enabling the courts to make independent judgments on the law.
- 6.10 The NIHRC advises that the present Bill’s proposal to rely solely on Parliament for deciding the appropriate balance of rights disregards the principle of proportionality and risks misinterpreting how the margin of appreciation doctrine should apply, at the expense of ensuring a fair balance is achieved between the public interest and an individual’s rights.**

⁵¹ *Sunday Times v UK* (1979) ECHR 1.

⁵² *Rasmussen v Denmark* (1984) ECHR 17.

⁵³ *Sunday Times v UK* (1979) ECHR 1; *Rasmussen v Denmark* (1984) ECHR 17.

⁵⁴ Clauses 1(2)(c), 4(1), 5(2), 6(2), 7(2)(b), 18(6), 21(2), Bill of Rights Bill.

⁵⁵ *Sunday Times v UK* (1979) ECHR 1; *Handyside v UK* (1976) ECHR 5.

6.11 The present Bill proposes that the Secretary of State can make regulations to “preserve or restore” a judgment that was made in reliance on section 3 of the Human Rights Act.⁵⁶ Additionally, the present Bill proposes replacing the current duty on public authorities to act compatibly with human rights, unless they are required to do otherwise because of legislation.⁵⁷ The certainty currently offered by the Human Rights Act will be significantly eroded by these alternative provisions. It also relies on the political will of the UK Government to ensure that any gaps in human rights protection across domestic law and policy created by the proposed significant constitutional change are plugged, which seems unlikely from the tone of this present Bill.

6.12 The NIHRC advises that the proposals within clauses 12 and 40 of the present Bill are impractical, confusing and unnecessarily resource intensive. This will in our experience not only affect public authorities tasked with implementing the laws and policies, but the ability for individuals to have their rights vindicated and, where a violation has occurred, remedied.

Meaningful consultation

6.13 Several international experts have recommended over the years that the UK Government conducts a meaningful and broad consultation on its plans to revise its human rights legislation.⁵⁸ Engagement and consultation were undertaken by the Independent Human Rights Act Review Team, which reported “an overwhelming body of support for retaining the Human Rights Act”.⁵⁹ The UK Government has not conducted any further meaningful engagement on this issue.

6.14 The NIHRC advises that majority support for retaining the Human Rights Act has been ignored within the present Bill, without justification.

⁵⁶ Clause 40, Bill of Rights Bill.

⁵⁷ Section 6, Human Rights Act 1998; Clause 12, Bill of Rights Bill.

⁵⁸ E/C.12/GBR/CO/6, ‘UN ICESCR Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 14 July 2016, at para 10; CERD/C/GBR/CO/21-23, ‘UN CERD Committee Concluding Observations on the Twenty First to Twenty Third Periodic Reports of UK of Great Britain and NI’, 26 August 2016, at para 10; A/HRC/36/9, ‘UN Working Group on the Universal Periodic Review Report of the Working Group on the Universal Periodic Review - UK of Great Britain and NI’, 14 July 2017, at para 134.76.

⁵⁹ UK Government, ‘The Independent Human Rights Act Review’ (UK Gov, 2021), at 30.

7.0 Enforcement of Human Rights

- 7.1 Everyone whose ECHR rights are violated must “have an effective remedy before a national authority”.⁶⁰ For a remedy to be effective it must be available, sufficient, and effective in theory and practice, having regard to the individual circumstances of the case.⁶¹ The Belfast (Good Friday) Agreement also requires the UK Government to incorporate the ECHR into NI law and to do so to provide people 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”.⁶² The Human Rights Act provides this access, which is undermined by this present Bill.
- 7.2 The present Bill proposes that human rights proceedings require permission from the court to proceed. Furthermore, the victim must have or will suffer “a significant disadvantage.”⁶³ Alternatively, the case can proceed where it is “of wholly exceptional public interest” to do so.⁶⁴ NI judicial reviews are excluded from this requirement.⁶⁵ However, where this restriction does apply, the implication is that a claimant will not be refused permission if the ECtHR would likely accept the application. However, decoupling the domestic courts interpretation from the ECtHR’s interpretation removes useful guidance for the domestic courts in reaching such decisions. It will also mean claimants exhausting their domestic remedies sooner, which may increase the number of applications (and successful ones at that) to the ECtHR.
- 7.3 The present Bill proposes limiting the award of damages to situations where the claimant has “suffered loss or damage”.⁶⁶ It prevents damages being awarded simply where a violation is found, otherwise referred to as ‘vindictory damages’, which can be useful in encouraging public authorities to comply with human rights. The

⁶⁰ Article 13, ECHR.

⁶¹ *El-Masri v The Former Yugoslav Republic of Macedonia* (2012), Application No 39630/09, Judgment of 13 December 2012, at para 255.

⁶² The Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

⁶³ Clause 15(1), Bill of Rights Bill.

⁶⁴ Clause 15(3), Bill of Rights Bill.

⁶⁵ Clause 15(2)(a), Bill of Rights Bill.

⁶⁶ Clause 18(1), Bill of Rights Bill.

present Bill proposes that a victim's conduct (whether relevant to the claim or not) is considered when deciding whether to award damages,⁶⁷ a further step away from the principle of universality. It also proposes that the impact on public authorities' resources in the current and future cases should be considered and that the damages awarded should not be more than the ECtHR would award.

7.4 Providing a remedy that is effective is the minimum required with the principles of proportionality and reasonableness guiding how to achieve the appropriate balance with, for example, public interest in appropriately spending the public purse.

7.5 The NIHRC is concerned that the tone set by the present Bill appears to place its focus on avoiding (as opposed to facilitating) an effective remedy.

8.0 Specific Issues

Universality

8.1 The principle of universality is the cornerstone of human rights. It means that all humans are entitled to the rights and freedoms contained within human rights law. Except for freedom from torture, freedom from slavery and no punishment without law, rights and freedoms can be interfered with.⁶⁸ The extent to which interference can occur is determined by the type of right involved,⁶⁹ which factors in scenarios where the surrounding circumstances may determine that, in order to protect the rights of others, an individual's rights may need to be constrained. However, to ensure fairness it is important that such interferences are guided by the principles of proportionality. The interference should be applied only as long as is necessary in pursuit of a legitimate aim, such as public safety.⁷⁰

8.2 The UK Government continues to frame its human rights reform proposals, including within the present Bill, in divisive language that

⁶⁷ Clause 18(5)(a), Bill of Rights Bill.

⁶⁸ Article 15(2), ECHR; Article 4(2), UN ICCPR.

⁶⁹ Limited rights, such as right to life, can only be interfered with in very specific circumstances as set out within human rights law. Qualified rights, such as right to freedom of expression, can be interfered with in broader circumstances as set out within human rights law. See for example, Articles 2(2) and 10(2) of the ECHR.

⁷⁰ *Handyside v UK* (1976) ECHR 5.

frames certain groups of rights holders as less entitled to rights protection. For example, within the present Bill those involved in criminal activity⁷¹ and immigrants convicted of an offence⁷² are not deemed worthy of human rights protection. Thus, creating a hierarchy of victim, which is contrary to the principle of universality.

8.3 The NIHRC advises that the present Bill should be revised to ensure the universality of human rights is reflected, and to prevent the demonisation of particular groups based on their ethnicity or circumstances.

Hierarchy of rights

8.4 There is no hierarchy of rights within the current framework. All human rights are inalienable,⁷³ indivisible and interdependent.⁷⁴ Carefully crafted human rights treaties, such as the ECHR, provide guidance on when some rights have more discretion built in than others. For example, torture should not occur under any circumstances, but freedom of assembly can be curtailed when it is proportionate and necessary in pursuit of a legitimate aim (such as the protection of health or morals) to do so.⁷⁵

8.5 Furthermore, Article 17 of the ECHR provides that rights may not be:

interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the... [ECHR].

8.6 The present Bill proposes that freedom of speech⁷⁶ and freedom of thought, conscience and religion⁷⁷ are given particular importance. As qualified rights, the UK already has a broad margin of appreciation

⁷¹ Clauses 5(2)(c) and 6, Bill of Rights Bill.

⁷² Clauses 8 and 20, Bill of Rights Bill.

⁷³ Rights should not be interfered with except in specific situations and according to due process. See Office of the High Commissioner of Human Rights, 'What Are Human Rights?'. Available at: <https://www.ohchr.org/en/what-are-human-rights>

⁷⁴ That one right cannot be fully enjoyed without fulfilling other rights. See Office of the High Commissioner of Human Rights, 'What Are Human Rights?'. Available at: <https://www.ohchr.org/en/what-are-human-rights>

⁷⁵ Articles 3 and 11, European Convention on Human Rights 1950.

⁷⁶ Clause 4, Bill of Rights Bill.

⁷⁷ Clause 23(2), Bill of Rights Bill.

in how it deems freedom of expression and freedom of religion should be protected. However, it is important that any promotion or interference regarding these rights are proportionate and necessary in the pursuit of a legitimate aim, as guided by the ECHR and its jurisprudence.

8.7 Balancing the approach in the proposed Bill with other legislation should be an additional consideration. The Online Safety Bill seeks to enhance all forms of speech, potentially including harmful or hate speech. The Police, Crime, Sentencing and Courts Act 2022 seeks to curtail such speech. The proposal to enhance protection of speech, as opposed to broader expression, without any clear justification or consideration of guiding human rights principles also creates difficulties.

8.8 The NIHRC advises that the present Bill’s proposal to elevate freedom of speech and freedom of thought, conscience and religion creates a hierarchy of rights that is contrary to human rights principles.

Extra-territoriality

8.9 Ratifying States, such as the UK, “shall secure to everyone within their jurisdiction the rights and freedoms defined” within the ECHR.⁷⁸ This means that the ECHR must be adhered to within the territory of each ratifying State. There also must be an effective remedy for any violation that occurred.⁷⁹

8.10 The ECHR has extra-territorial application in certain exceptional circumstances. The jurisprudence suggests that the ECHR has extra-territorial application where there is lawful or unlawful effective control.⁸⁰ This can be through military occupation,⁸¹ military action,⁸² control of policies and actions,⁸³ and/or exercising control and authority over an individual within another State’s territory.⁸⁴ It can extend where an administration survives due to the military, political,

⁷⁸ Article 1, ECHR.

⁷⁹ Article 13, ECHR.

⁸⁰ *Bankovic v Belgium* (2001) ECHR 890; *Issa v Turkey* (2004) ECHR 629.

⁸¹ *Bankovic v Belgium* (2001) ECHR 890.

⁸² *Al-Skeini v UK* (2011) ECHR 1093.

⁸³ *Issa v Turkey* (2004) ECHR 629.

⁸⁴ *Öcalan v Turkey* (2003) ECHR 125.

financial or other support from another State.⁸⁵ It can also extend to preventing the extradition of foreign nationals and having a duty of care towards soldiers operating in a third State.⁸⁶ Extra-territorial application of the ECHR extends to positive obligations,⁸⁷ such as conducting an effective investigation.

8.11 The present Bill proposes to prevent cases regarding overseas military operations from being taken within or outside the UK, including removing the ability to rely on the positive obligation to investigate any potential extra-territorial violation resulting from a military operation, as required by Articles 2 and 3 of the ECHR.⁸⁸

8.12 The NIHRC is concerned that the present Bill's proposals to prevent human rights obligations extending to the UK Government's overseas military operations is not human rights compliant.

Trial by jury

8.13 The right to a fair trial under the ECHR neither inhibits nor requires trial by jury.⁸⁹ It makes it clear that a legal case must be tried by a legitimate body "established by law"⁹⁰ and that a trial is heard by an "independent and impartial tribunal",⁹¹ which extends to jurors.⁹²

8.14 The present Bill proposes to expressly protect the right to trial by jury, bar several stated exceptions.⁹³

8.15 In NI, non-jury trials have been temporarily permitted on a continuous rolling basis since 2007.⁹⁴ These decisions are based on the UK Government's continued assessment that the threat level NI-related terrorism in NI was severe. However, there is a lack of clarity around the conditions whereby the use of non-jury trials will be

⁸⁵ *Chiragov and Others v Armenia* (2015) ECHR 647.

⁸⁶ *Al-Saadoon and Mufdhi v UK* (2010) ECHR 282.

⁸⁷ *Pisari v Republic of Moldova and Russia* (2015) ECHR 403; *Mozer v Republic of Moldova and Russia* (2016) ECHR 213.

⁸⁸ Clause 14, Bill of Rights Bill.

⁸⁹ Article 6, ECHR; Article 14, UN ICCPR.

⁹⁰ Article 6(1), European Convention on Human Rights 1950; *Jorgic v Germany* (2007) ECHR 583, at para 64.

⁹¹ Article 6(1), European Convention on Human Rights 1950.

⁹² *Holm v Sweden* (1993) ECHR 58, at para 30.

⁹³ Clause 9, Bill of Rights Bill.

⁹⁴ In 2021, the former Secretary of State for NI, Brandon Lewis MP, once again extended the provisions until 31st July 2023. See Justice and Security (NI) Act 2007; Justice and Security (NI) Act 2007 (Extension of Duration of Non-jury Trial Provisions) Order 2021.

discontinued, leading to a danger that non-jury trials are becoming 'normalised' as a semi-permanent feature of NI's criminal justice system.⁹⁵

8.16 The NIHRC advises that the Bill should expressly state that a decision to enable a non-jury trial should be guided by the principles of proportionality and necessity.

8.17 The NIHRC advises that the Bill should provide clarity as to when trial by jury is required.

9.0 Devolution

9.1 The Belfast (Good Friday) Agreement created a duty on the UK Government to incorporate the ECHR into NI law "with direct access to the courts, and remedies for breach of the... [ECHR]... including power for the courts to overrule Assembly legislation on grounds of inconsistency".⁹⁶ This incorporation was achieved through the Human Rights Act. The Belfast (Good Friday) Agreement notes compliance with the ECHR is a 'safeguard' for the peace process in NI. It states that:

there will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including...

b) the ECHR and any Bill of Rights for NI supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission;

c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for NI.⁹⁷

⁹⁵ Correspondence from the NI Human Rights Commission to the Secretary of State for NI, 11 February 2021.

⁹⁶ The Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

⁹⁷ The Good Friday Agreement 1998, Strand One: Democratic Institutions in Northern Ireland, at para 5.

- 9.2 The Human Rights Act therefore has an enhanced constitutional function and role unique to NI. The present Bill does not respect the need to fill the gap that will be created by repealing the 1998 Act and to do so in a way that enhances (rather than weakens) human rights protections.
- 9.3 The NI Act 1998 incorporates the commitments of the Belfast (Good Friday) Agreement into domestic law and legislates for devolution in NI. The ECHR is embedded into the NI Act,⁹⁸ reflecting commitments made under the Belfast (Good Friday) Agreement.⁹⁹
- 9.4 The Belfast (Good Friday) Agreement also commits the Government of Ireland to ensure “at least a comparable level of protection of human rights as will pertain in NI”.¹⁰⁰ This is given effect through the Human Rights Act and the Government of Ireland’s ECHR Act 2003. The present Bill will water down the protection of human rights in NI, thus potentially bringing about discrepancies between the level of human rights protection with Ireland.
- 9.5 Protocol Article 2 reflects the recognition by both the UK and EU that special consideration of human rights and equality in the Belfast (Good Friday) Agreement was essential as the UK left the EU. As such the UK Government committed to ensuring there would be no diminution of the rights, safeguards and equality of opportunity in the relevant part of the Agreement as a result of the UK’s withdrawal from the EU.
- 9.6 The NIHRC advises that the present Bill does not adequately consider the Belfast (Good Friday) Agreement, and the integral role of both the Human Rights Act and ECHR in the complex fabric of the NI Peace Process and devolution. The NIHRC is particularly concerned that the present Bill appears to be incompatible with obligations under the Belfast (Good Friday) Agreement to incorporate the ECHR and provide direct access to the courts.**

⁹⁸ For example, sections 6 and 24 of the NI Act require compatibility with ECHR rights.

⁹⁹ The Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

¹⁰⁰ The Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 9.

10.0 NIHRC's Powers

10.1 The present Bill proposes strict limits on who can initiate a challenge.¹⁰¹ It omits reference to the NIHRC's right to bring own motion cases without a victim.¹⁰² This affects the NIHRC's right to bring own motion cases, further limiting the NIHRC's powers to litigate. It is understood that the UK Government intends to introduce an amendment to remedy, but the NIHRC has not yet had sight of this.

10.2 The NIHRC advises that the present Bill should ensure that the NIHRC has the powers to bring own motion cases without a victim.

¹⁰¹ Clauses 7-10, Schedule 5, Bill of Rights Bill.

¹⁰² Section 71(2B), NI Act 1998.

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