



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Response to the consultation on
Human Rights Act Reform:
a Modern Bill of Rights**

March 2022

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Summary of Recommendations

The NI Human Rights Commission (NIHRC) rejects in its totality the proposal to reform the Human Rights Act (HRA).

The NIHRC:

- 2.11 recommends that the Human Rights Act is retained.**
- 2.12 recommends the UK Government responds in full to the IHRAR report, which found overwhelming support for retaining the HRA, and develops a programme of education to support public understanding of, and engagement with, the HRA.**
- 2.17 recommends that public authorities should be required to act in ways which promote and protect human rights for all.**
- 2.18 rejects the negative framing presented in the proposals, particularly the divisive language and framing of certain groups of rights holders as less entitled to rights protection. The NIHRC recommends that this is revised to ensure the universality of human rights is reflected, and to prevent the demonisation of particular groups based on their ethnicity or circumstances.**
- 2.22 recommends that protection of rights in Northern Ireland is strengthened, not lessened.**
- 3.5 recommends that the UK Government fully considers the complexities and realities of devolution in the context of these proposals, including the history of rights in Northern Ireland, and details how any proposed changes will strengthen protections outlined in the Belfast (Good Friday) Agreement.**
- 3.6 recommends that the UK Government recognises its international obligations under the Belfast (Good Friday) Agreement 1998, particularly, in this context, with reference to incorporation of the ECHR and direct access to courts.**

- 3.13 recommends that the UK Government sets out in detail what consideration has been given to the proposals' compliance with Protocol Article 2, including consideration of the effect of the proposals on the rights, safeguards and equality of opportunity protections under the relevant chapter of the Belfast (Good Friday) Agreement (and underpinned by EU law) that fall within the scope of Article 2.**
- 3.16 advises that the protection of safeguards under Protocol Article 2 encompasses how those rights are claimed and enforced and available remedies. The NIHRC therefore recommends that in any assessment for compliance with Protocol Article 2, the UK Government should consider access to remedies and how ECHR rights are claimed and enforced.**
- 3.17 recommends that no further action is taken in relation to the UK Government's proposals until a detailed assessment of compliance with Protocol Article 2 is undertaken and published.**
- 3.18 recommends that the UK Government provides greater clarification on all its proposals, to enable a full assessment the degree to which the proposals are compliant with Article 2.**
- 3.26 recommends that the UK Government takes cognisance of the interplay of the ECHR, the EU Charter of Fundamental Rights and Protocol Article 2 and ensures there is no weakening of the substantive rights, or how those rights are claimed and enforced, including access to remedies.**
- 3.31 recommends that the UK Government considers and engages with the ongoing process to develop a Bill of Rights for NI to avoid contradicting and frustrating this process, committed to under the Belfast (Good Friday) Agreement.**
- 3.34 recommends that the UK Government ensures the continued access to domestic courts for human rights violations, particularly in the context of Northern Ireland's post-conflict legacy.**

3.37 recommends that the current proposals for reform of the HRA are withdrawn, in light of the likely damaging impact on the Northern Ireland peace process.

1 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). Further, the NIHRC, pursuant to section 78A(1) of the Northern Ireland Act, must monitor the implementation of Article 2(1) of the Protocol on Ireland/Northern Ireland in the EU Withdrawal Agreement (rights of individuals) (Protocol Article 2).
- 1.2 In accordance with these functions, the following advice is submitted in response to the Ministry of Justice consultation on Human Rights Act Reform: a Modern Bill of Rights.
- 1.3 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights¹ (ECHR), as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding but provide further guidance in respect of specific areas.
- 1.4 The NIHRC further advises on the UK Government commitment in Protocol Article 2 to ensure there is no diminution of rights, safeguards and equality of opportunity in the relevant section of the Belfast (Good Friday) Agreement as a result of the UK's withdrawal from the EU. This is given effect in UK law by section 7A of the EU (Withdrawal) Act 2018. In addition, Section 6 of the Northern Ireland Act 1998 provides that the NI Assembly is prohibited from making any law which is incompatible with Protocol Article 2. Section 24 of the 1998 Act also provides that all acts of the NI Ministers and Departments should be compatible with Protocol Article 2.

¹ Ratified by the United Kingdom in 1951.

- 1.5 Whilst the NIHRC welcomes the opportunity to respond to the Ministry of Justice consultation on a proposed reform of the Human Rights Act and a proposed Bill of Rights, it is disappointed in the content of the proposals and their apparent lack of evidence base. The NIHRC robustly rejects the proposal for reform and its purported premise.
- 1.6 The NIHRC responded to the call for evidence by the Independent Human Rights Act Review (IHRAR) Team in 2021.² In that response, the NIHRC outlined its concerns and made a series of recommendations for consideration in any discussion about potential reform of the Human Rights Act. The NIHRC urges the Government to reconsider the findings of the IHRAR, which reported “an overwhelming body of support for retaining the HRA” following engagement and consultation.³
- 1.7 The NIHRC is alarmed by the lack of consideration afforded to the complexities of devolution, and particularly the sensitivities and history of NI, within the consultation paper. The proposals outlined in the consultation document do not adequately consider the Belfast (Good Friday) Agreement, and the integral role of the both the HRA and ECHR in the complex fabric of the NI Peace Process. Section 3 of this response highlights the importance of this.
- 1.8 The centrality of human rights and equality protections to the peace process in NI were reflected in the negotiations leading to the UK’s withdrawal from the EU, where both parties recognised that the Belfast (Good Friday) Agreement required consideration and protection.⁴ This commitment to safeguarding human rights and equality protections is reflected in Protocol Article 2. The NIHRC is concerned that there has been minimal consideration of Protocol Article 2, particularly as destabilising the human rights framework in the UK and in NI could impact on the UK Government commitment on human rights and equality in NI after UK withdrawal from the EU. Section 3 of this response sets this out in more detail.

² NIHRC, ‘Submission to the Independent Human Rights Act Review Team’s Call for Evidence’, March 2021. Available [here](#).

³ The Independent Human Rights Act Review, 2021, p.30.

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.

1.9 The NIHRC rejects the proposal for reform. In this response, the NIHRC does not intend to respond to the detail of the proposals, as we strongly believe they are based on a flawed premise, but rather will seek to provide general comments on the proposal in its entirety, as well as highlighting specific concerns as they relate to NI, including under Protocol Article 2. Should the UK Government choose to proceed with reform, the NIHRC will provide further detailed advice on substantive proposals, if and when they are produced.

2 General Comments

2.1 The NIHRC rejects the proposal to reform the Human Rights Act 1998 (HRA) and the premise for this proposal in its totality.

2.2 There has been long running international interest in a potential reform of the HRA, and concern repeatedly raised by international Treaty Bodies. In 2017, the Report of the UN Working Group on the Universal Periodic Review made a number of recommendations for the UK Government to ensure that there was no regression of human rights in any potential reform of the HRA, and that any proposed British Bill of Rights would strengthen rather than reduce rights, with no impact on the scope of protection or the access to the remedies under the ECHR.⁵ It also recommended that the UK Government “carry out extensive consultations with civil society related to the repeal of the 1998 Human Rights Act” and “in view of the process of leaving the EU, ensure that any new legislation aims at strengthening human rights in the entire jurisdiction of the country”.⁶ Specific to NI, the UN Working Group recommended that the UK Government:

Provide reassurance that any proposed British Bill of Rights would complement rather than replace the incorporation of the European Convention on Human Rights in Northern Ireland law and acknowledging this is a primary matter for the Northern Ireland Executive and Assembly — that a Bill of Rights for Northern Ireland to reflect the particular circumstances of Northern Ireland

⁵ 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.

⁶ 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.

should be pursued to provide continuity, clarity and consensus on the legal framework for human rights there.⁷

2.3 In its 2015 Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, the Human Rights Committee noted it was “concerned about a reported plan to repeal the Human Rights Act 1998 and to replace it with a new Bill of Rights for the United Kingdom of Great Britain and Northern Ireland, and that such a development will weaken the degree of protection afforded to the rights enshrined in the Covenant, within the domestic legal order”.⁸ The Committee recommended that the State Party should:

Ensure that any legislation passed in lieu of the Human Rights Act 1998 — were such legislation to be passed — is aimed at strengthening the status of international human rights, including the provisions of the Covenant, in the domestic legal order, and provide effective protection of those rights across all jurisdictions.⁹

2.4 More recently, the Human Rights Committee again raised the issue of potential reform of the HRA in its List of Issues Prior to Reporting in May 2020, wherein it asked the UK Government to “provide information on any initiative to reform or repeal the Human Rights Act 1998”.¹⁰ The NIHRC notes that in its response, the UK Government detailed plans for the IHRAR, and assured the Committee that “the panel will report back in Summer 2021 and their report will be published, as will the government’s response”.¹¹ Whilst the report was eventually published in December 2021, the government’s response has not yet been published despite the progress of this consultation, as highlighted by Sir Peter Gross in his

⁷ 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.

⁸ CCPR/C/GBR/CO/7, ‘UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland’, 17 August 2015.

⁹ CCPR/C/GBR/CO/7, ‘UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland’, 17 August 2015.

¹⁰ CCPR/C/GBR/QPR/8, ‘UN Human Rights Committee List of issues prior to submission of the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland’, 5 May 2020 at para 3.

¹¹ The United Kingdom’s Response to the United Nations Human Rights Committee’s List of Issues on the Covenant on Civil and Political Rights (ICCPR) dated May 2020, June 2021, at p5.

evidence to the Justice Committee in February 2022.¹²

- 2.5 The Committee on Economic, Social and Cultural Rights raised its worries about potential reform of the HRA in its Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland. It noted “concern raised by national stakeholders with regard to the announced plan to replace the Human Rights Act 1998 with a new British bill of rights that the new legislation may lower the status of international and regional human rights standards”.¹³ The Committee therefore recommended that:

the State party undertake a broad public consultation on its plan to repeal the Human Rights Act 1998 as well as on the proposal for a new bill of rights. It also recommends that the State party take all necessary measures to ensure that any new legislation in this regard is aimed at enhancing the status of human rights, including economic, social and cultural rights, in the domestic legal order and that it provide effective protection of those rights across all jurisdictions of the State party.¹⁴

- 2.6 Similarly, in 2016 the Committee on the Elimination of Racial Discrimination noted it was “concerned that the proposal to replace the Human Rights Act of 1998 with a new British bill of rights may lead to decreased levels of human rights protection in the State party, which would negatively affect the situation of individuals protected under article 1 of the Convention”.¹⁵ It recommended that:

the State party undertake meaningful and broad public consultation on its proposal to revise its human rights legislation and that it ensure that any changes to the current human rights framework strengthen the protection of human

¹² UK Parliament Hansard, ‘Justice Committee: Oral Evidence: Human Rights Act Reform – Sir Peter Gross – HC 1087’, 1 February 2022.

¹³ E/C.12/GBR/CO/6, ‘UN Committee on Economic, Social and Cultural Rights Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’, 14 July 2016, at para 9.

¹⁴ E/C.12/GBR/CO/6, ‘UN Committee on Economic, Social and Cultural Rights Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’, 14 July 2016, at para 10.

¹⁵ CERD/C/GBR/CO/21-23, ‘UN Committee on the Elimination of Racial Discrimination Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland’, 3 October 2016, at para 9.

rights, in particular the rights of individuals protected under article 1 of the Convention.¹⁶

- 2.7 It is the view of the NIHRC that despite numerous international recommendations, the proposals outlined in the consultation document fail to either maintain or strengthen current protections, fail to recognise the impact on NI, and reduce access to remedies.
- 2.8 The NIHRC is also disappointed at the lack of meaningful engagement attached to this consultation exercise, again contrary to international recommendations. The publication of the command paper in December, at the same time as the IHRAR report and while a number of other potentially concerning Bills which impact on rights and civil liberties progress through Parliament, demonstrates a lack of willingness to engage with the IHRAR findings, with National Human Rights Institutions and with civil society more broadly. Further, carrying out this particular exercise in the midst of a pandemic also suggests a lack of regard for ensuring meaningful consultation on such an important issue. In addition, the NIHRC notes that an 'easy read' version of the consultation document was not published until late February, and that this document was not entirely accessible, thereby creating further barriers for engagement from certain groups of right holders.
- 2.9 The NIHRC believes a lack of good faith has been demonstrated in the Government's failure to effectively engage with and respond to the report of the IHRAR. The proposals set out in the consultation paper do not reflect the findings of the IHRAR, and appear to lack evidence. The IHRAR found little evidence to support the case for repeal:

On the contrary, there was an overwhelming body of support for retaining the HRA. Furthermore, detailed arguments in favour of repeal and replacement of the HRA with a British Bill of Rights were not provided, nor could we have properly considered the issue given IHRAR's ToR. We do, however,

¹⁶ CERD/C/GBR/CO/21-23, 'UN Committee on the Elimination of Racial Discrimination Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland', 3 October 2016, at para 10.

note, that it is an issue that has, in any event, been considered before inconclusively.¹⁷

2.10 The NIHRC believes that the 'problems' identified by the UK Government are not problems created by the HRA. Indeed, the IHRAR report highlighted misconceptions and negative narrative about the HRA as contributing to public ownership issues, and recommended a programme of civic and constitutional education to support public understanding and ownership of the HRA.¹⁸

2.11 The NIHRC recommends that the Human Rights Act is retained.

2.12 The NIHRC recommends the UK Government responds in full to the IHRAR report, which found overwhelming support for retaining the HRA, and develops a programme of education to support public understanding of, and engagement with, the HRA.

2.13 Much of the narrative outlining the purported case for reform in the consultation document, particularly in chapter three, seeks to frame the HRA negatively and fails to reflect the benefits of the Act. Moreover, the NIHRC notes that throughout the document, emphasis is placed on reducing the obligations of government and public authorities to protect and promote rights and standards, rather than ensuring protections for individuals. Whilst we appreciate that cost efficiency must always be a key consideration for government and public authorities, the reliance on a cost-saving argument as the basis for change arguably reflects a failure to recognise the importance of providing a good, person-centred, outcomes-focused service.

2.14 For example, the case study provided on page 40 of the consultation document entitled 'Prisons' provision of drug treatments' outlines the number of successful claims by prisoners who claimed that their human rights were breached by the failure to provide them with methadone, Valium or other particular forms of treatment for their drug addictions; the case study shows that the Prison Service settling claims cost around £7 million between 2005 and 2011. The NIHRC would highlight that these were successful

¹⁷ The Independent Human Rights Act Review, 2021, p.30.

¹⁸ The Independent Human Rights Act Review, 2021, pp.18-20.

claims precisely because the Prison Service had violated prisoners' human rights, and the costs incurred through settlement under Articles 3, 8 and 14 ECHR could be avoided by providing compliant care in the first instance. As well as this being a basic human rights requirement, it is reasonable to expect that a prison environment, responsible for prisoners' care and rehabilitation, would provide access to healthcare, including treatment for addiction, to achieve its purpose of improving outcomes and promoting desistance, and yet the case study seeks to frame the claims as gratuitous cost to the taxpayer.¹⁹ Elements of the proposals suggest a willingness instead to provide public authorities with more freedom to act in ways which are, potentially, incompatible with the international human rights framework to which the UK has agreed to be bound by.

- 2.15 The NIHRC is extremely concerned by, and strongly rejects the use of, the divisive language used throughout the consultation document and the negative framing of certain groups of individuals. This is particularly the case in relation to race and ethnicity, immigrants, and prisoners. The implied hierarchy of rights-holders undermines the basic premise of the universality of human rights.
- 2.16 Further, there is a risk that the proposals, if implemented, could deny access to justice for human rights violations in the domestic courts and result in more cases going to the European Court of Human Rights (ECtHR) in Strasbourg. This could create additional barriers, particularly for those who are already disadvantaged who may be prevented from accessing justice due to the financial costs and the length of time taken by court proceedings.
- 2.17 **The NIHRC recommends that public authorities should be required to act in ways which promote and protect human rights for all.**
- 2.18 **The NIHRC rejects the negative framing presented in the proposals, particularly the divisive language and framing of certain groups of rights holders as less entitled to rights protection. The NIHRC recommends that this is revised to ensure the universality of human rights is reflected, and to**

¹⁹ Consultation document, p.40

prevent the demonisation of particular groups based on their ethnicity or circumstances.

- 2.19 With specific reference to NI, the consultation document and proposals fail to recognise the complexities of devolution and of the history of conflict. The consultation document refers to “the UK’s tradition of upholding human rights”²⁰, and the first chapter seeks to outline the legacy of rights in the UK. This fails to reflect how, in the case of NI, there is a complex history of human rights protections, in which international mechanisms have previously found violations.²¹ However, it is the view of the NIHRC that the HRA has long helped to protect the rights of all people in NI, and it has done so in a way that is reasonable and balanced. We are also aware from engagement with our colleagues in Scotland that there are different yet equally worrying potentially adverse impacts for devolution in Scotland that have not been adequately considered in the consultation paper.
- 2.20 We know that people in NI want greater and more effective protection, not less. In 2021, the NI Assembly Ad Hoc Committee on a Bill of Rights published research which found that only 30 per cent agreed with the statement that everyone in NI today enjoys the same basic human rights.²² The research found that the existence of inequality (including inequality of access) and discrimination was the main reason for not agreeing with the statement; respondents identified disability, age, religion, cultural background and ethnic group as the top five areas which need further human rights protection.²³
- 2.21 Research carried out in 2017 by the Human Rights Consortium on attitudes to human rights in NI found an “overwhelmingly positive” response, with 84 of respondents indicating that they felt protecting human rights in NI was a positive thing.²⁴ Similarly, when asked whether the HRA was good or bad for NI, the respondents were highly supportive, with 84 per cent providing a positive response.²⁵ The research found that “human rights unite Northern Ireland rather

²⁰ Consultation document, p.3.

²¹ See, for example, the *McKerr* group of cases.

²² Robert Barry and Louise Close, ‘Research and Information Service Briefing Note: NI Bill of Rights Survey’, NI Assembly, March 2021.

²³ Robert Barry and Louise Close, ‘Research and Information Service Briefing Note: NI Bill of Rights Survey’, NI Assembly, March 2021.

²⁴ Human Rights Consortium, ‘Attitudes to Human Rights in Northern Ireland’, HRC, July 2017, p7.

²⁵ Human Rights Consortium, ‘Attitudes to Human Rights in Northern Ireland’, HRC, July 2017, p11.

than divide it”: across demographics and communities, there was a clear message of support for human rights, for laws that uphold international human rights standards, and for the universality and equal application of human rights.²⁶ More recently, polling data from the Human Rights Consortium on a Bill of Rights for Northern Ireland found that the public wants stronger human rights protections following the experience of the Covid-19 pandemic.²⁷

2.22 **The NIHRC recommends that protection of rights in Northern Ireland is strengthened, not lessened.**

2.23 For these reasons this response will not engage with the specific proposals, which we believe to be without merit, and instead will focus on the specific Northern Ireland context which the Government has so far failed to consider. Should the UK Government choose to proceed with reform, the NIHRC will provide further detailed advice on substantive proposals, if and when they are produced.

3 The Northern Ireland Context

3.1 The consultation document fails to reflect the complexities of devolution in NI, the Belfast (Good Friday) Agreement 1998, and the integral role of the ECHR and HRA in these. The differing legal and political, as well as historical, contexts of devolution across the UK do not appear to be considered adequately, and the consultation questionnaire attempts to cover this with one question (question 19). Given the potential for the proposed reform to severely impact rights within NI, this lack of regard is hugely concerning.

3.2 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 Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency”.²⁸ This incorporation was achieved through the HRA. Comparable protection for human rights was committed to by the Government of Ireland and given effect through the ECHR Act 2003. The Belfast (Good Friday) Agreement notes compliance with the ECHR is a ‘safeguard’ for the peace process in NI:

²⁶ Human Rights Consortium, ‘Attitudes to Human Rights in Northern Ireland’, HRC, July 2017, p5-6.

²⁷ Human Rights Consortium, ‘A Bill of Rights for Northern Ireland: Polling Data’, HRC, June 2021.

²⁸ The Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

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 European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland 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 Northern Ireland; ...²⁹

- 3.3 The HRA therefore has an enhanced constitutional function and heightened role unique to NI.
- 3.4 The Northern Ireland Act 1998 (NIA) incorporates the commitments of the Belfast (Good Friday) Agreement into domestic law and legislates for devolution in NI. The ECHR is embedded into the NIA, in keeping with commitments made under the Belfast (Good Friday) Agreement.³⁰ For example, sections 6 and 24 of the NIA require compatibility with Convention rights.³¹ The NIHRC is deeply concerned that changes to the HRA will impact on the NIA, and the rights framework on which peace and devolution in NI is built. As an international treaty, any moves to undermine the Belfast (Good Friday) Agreement and the Acts that underpin it is likely to attract international criticism.
- 3.5 **The NIHRC recommends that the UK Government fully considers the complexities and realities of devolution in the context of these proposals, including the history of rights in Northern Ireland, and details how any proposed changes will strengthen protections outlined in the Belfast (Good Friday) Agreement.**
- 3.6 **The NIHRC recommends that the UK Government recognises its international obligations under the Belfast (Good Friday)**

²⁹ The Good Friday Agreement 1998, Strand One: Democratic Institutions in Northern Ireland, at para 5.

³⁰ The Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

³¹ Northern Ireland Act 1998, at section 6(2)(c).

Agreement 1998, particularly, in this context, with reference to incorporation of the ECHR and direct access to courts.

Protocol Article 2

- 3.7 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 consideration and protection.³²
- 3.8 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.
- 3.9 The rights, safeguards and equality of opportunity part of the Belfast (Good Friday) Agreement includes a general commitment to the "civil rights and religious liberties of everyone in the community" and the rights set out in this chapter are "affirmed in particular" and therefore make up a non-exhaustive list.³³ In addition to the listed rights, safeguards and equality of opportunity protections, this chapter also commits the UK Government to the incorporation of the ECHR. It also anticipates further work on a Bill of Rights for NI to identify rights supplementary to the ECHR and draw on international instruments and experience.
- 3.10 The general commitment of the Belfast (Good Friday) Agreement signatories to the range of rights referenced within the chapter must therefore be understood as embracing, as a minimum, those rights set out in the ECHR.³⁴ In its Explainer the UK Government has confirmed that the "key rights and equality provisions in the [Belfast (Good Friday)] Agreement are supported by the ECHR

³² 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.

³³ Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity.

³⁴ 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).

which has been incorporated into NI law pursuant to the commitment in the Agreement to do so”.³⁵

- 3.11 The NIHRC takes the view that 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.
- 3.12 The NIHRC notes with concern there is minimal reference to Protocol Article 2 in the UK Government’s proposals. The consultation states that the proposals will “ensure that human rights continue to be fully protected in NI ... through an improved framework that provides greater legal certainty and respects our constitutional principles” and that “these proposals will be fully in line with our commitments under the Withdrawal Agreement, the Northern Ireland Protocol and the TCA”.³⁶ However it is not clear that an analysis of the impact of the proposals on Protocol Article 2 has been undertaken, nor is it clear how the UK Government seeks to ensure compliance with Protocol Article 2.
- 3.13 **The NIHRC recommends that the UK Government sets out in detail what consideration has been given to the proposals’ compliance with Protocol Article 2, including consideration of the effect of the proposals on the rights, safeguards and equality of opportunity protections under the relevant chapter of the Belfast (Good Friday) Agreement (and underpinned by EU law) that fall within the scope of Article 2.**
- 3.14 Article 4 of the Withdrawal Agreement provides that individuals can rely directly on the provisions of the Withdrawal Agreement in UK Courts, including Protocol Article 2. Article 4 further provides that judicial and administrative authorities must be empowered to “disapply inconsistent or incompatible domestic provisions”.³⁷ This has been incorporated into UK law in Section 7A of the EU (Withdrawal) Act 2018, which gives effect to all the rights, obligations and remedies arising under the UK-EU Withdrawal

³⁵ 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.

³⁶ Ministry of Justice, ‘Human Rights Act Reform: A Modern Bill Of Rights - A consultation to reform the Human Rights Act 1998’, (MOJ, 2021) at paras 68-70.

³⁷ UK Government, ‘UK Government commitment to no-diminution of rights, safeguards and equality of opportunity in Northern Ireland’, (NIO, 2020), at para 29.

Agreement in UK law without the need for further enactment. The UK Government has recognised that Protocol Article 2 has direct effect and that individuals can invoke their rights under Protocol Article 2 in UK Courts.³⁸ The NI High Court has also recognised that “Article 2 has direct effect and legal persons ... are able to rely on it in domestic courts”.³⁹

- 3.15 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. Requiring courts to diverge from ECtHR jurisprudence risks diminishing the rights, safeguards and equality of opportunity protections which fall within scope of Protocol Article 2. The NIHRC is concerned that any changes to how UK courts interpret the ECHR or how it is claimed or enforced in NI law and available remedies, could constitute a diminution of human rights and equality protections in Protocol Article 2.
- 3.16 **The NIHRC advises that the protection of safeguards under Protocol Article 2 encompasses how those rights are claimed and enforced and available remedies. The NIHRC therefore recommends that in any assessment for compliance with Protocol Article 2, the UK Government should consider access to remedies and how ECHR rights are claimed and enforced.**
- 3.17 **The NIHRC recommends that no further action is taken in relation to the UK Government’s proposals until a detailed assessment of compliance with Protocol Article 2 is undertaken and published.**
- 3.18 **The NIHRC further recommends that the UK Government provides greater clarification on all its proposals, to enable a full assessment the degree to which the proposals are compliant with Article 2.**

EU Charter on Fundamental Rights

- 3.19 Pursuant to Article 4(1), the Withdrawal Agreement produces the ‘the same legal effects’ on the UK as EU law on EU Member States,

³⁸ 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

³⁹ *Re SPUC Pro-Life Limited* [2022] NIQB, at para 77.

including compliance with the EU Charter on Fundamental Rights and the general principles of EU law.⁴⁰

- 3.20 Where required by Protocol Article 2, the EU Charter of Fundamental Rights continues to have relevance in NI. This is an exception from the general provision of the EU (Withdrawal) Act 2018 which provides that the EU Charter is not carried over by the general rules on the retention of EU law and is not part of UK law on or after 1 January 2021.⁴¹
- 3.21 When EU Member States are implementing EU law, they are required to “respect the rights, observe the principles and promote the application” of the EU Charter.⁴² The EU Charter can be considered to have direct effect where it meets the test of being sufficiently precise and unconditional.⁴³ It places an obligation on the national courts to “guarantee the full effectiveness of those articles by disapplying, if need be, any contrary provision of national law”.⁴⁴ The EU Charter 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 protections within scope of Protocol Article 2.⁴⁵
- 3.22 The link between rights in the EU Charter and the ECHR is well established.⁴⁶ Article 52 on the scope and interpretation of the EU Charter confirms that in so far as the Charter contains rights which correspond to rights in the ECHR, “the meaning and scope of those rights shall be the same as those laid down by the said Convention”.

⁴⁰ For further discussion on the EU Charter and Protocol Article 2 see Bernard McCloskey, ‘Charter of Fundamental Rights’ in McCrudden (ed), ‘The Law and Practice of the Ireland-Northern Ireland Protocol’ (OUP, 2021), at 164-166.

⁴¹ Section 5, EU (Withdrawal) Act 2018. See Comments from Colton J in *Re SPUC Pro-Life Ltd* [2022] NIQB.

⁴² Article 51(1) of the EU Charter of Fundamental Rights; *Åklagaren v Hans Åkerberg Fransson*, Case C-617/10, 26 February 2013; *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, Case C-414/16, 17 April 2018, para 76.

⁴³ *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, Case C-414/16, 17 April 2018, para 78.

⁴⁴ *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, Case C-414/16, 17 April 2018, para 79.

⁴⁵ 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) if the EU Charter of Fundamental Rights.” Kellerbauer, Dumitriu-Segnana, Thomas Liefländer, ‘The UK-EU Withdrawal Agreement – A Commentary’ (OUP, 2021), at 39.

⁴⁶ *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.

It further provides that this clause does not prevent EU law from providing “more extensive protection”. The Explanations to the Charter do not have legal status but are “a valuable tool of interpretation intended to clarify the provisions of the Charter”.⁴⁷ These Explanations provide further guidance on the reference to the ECHR, noting that Article 52(3) is intended to “ensure consistency between the Charter and ECHR” and that “the level of protection in the Charter may never be lower than that guaranteed by the ECHR”. It further states that “reference to the ECHR covers both the Convention and the Protocols to it” and that “the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the ECtHR and by the CJEU”.⁴⁸

3.23 In its analysis of the rights in the EU Charter in 2017, the UK Government recognised the link between the EU Charter and the ECHR noting that “eighteen of the articles correspond, entirely or largely, to articles of the ECHR and are, as a result, protected both internationally and, through the Human Rights Act 1998 and the devolution statutes, domestically”.⁴⁹

3.24 In *R (AB) v Secretary of State for the Home Department* Mostyn J found that

the Human Rights Act 1998 incorporated into our domestic law large parts, but by no means all, of the ECHR. Some parts were deliberately missed out by Parliament. The Charter of Fundamental Rights of the EU contains, I believe, all of those missing parts and a great deal more.⁵⁰

3.25 Decoupling the link between how UK courts interpret ECHR rights and the case law of the ECtHR creates a situation where the interpretation of those EU Charter rights which are within the scope of Protocol Article 2 would maintain a link to the ECtHR case law, whereas other aspects of ECHR outside the scope of Protocol Article 2 would be subject to a different, potentially lower standard.

⁴⁷ Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).

⁴⁸ Explanations Relating to the Charter of Fundamental Rights – Article 52 (2007/C 303/02)

⁴⁹ Department for Exiting the EU, ‘Charter of Fundamental Rights of the EU Right by Right Analysis’, (DExEU, 2017), at 4.

⁵⁰ *R (AB) v Secretary of State for the Home Department* [2013] EWHC (Admin) 3453, at para 14.

3.26 The NIHRC recommends that the UK Government takes cognisance of the interplay of the ECHR, the EU Charter of Fundamental Rights and Protocol Article 2 and ensures there is no weakening of the substantive rights, or how those rights are claimed and enforced, including access to remedies.

Bill of Rights

3.27 In its Concluding Observations on the UK, the UN Committee for Economic, Social and Cultural Rights noted that the UK Government should take measures to expedite the adoption of a Bill of Rights for NI.⁵¹ The Committee for the Elimination of Racial Discrimination made a similar recommendation in its Concluding Observations in 2016.⁵² Both the Belfast (Good Friday) Agreement and the St Andrews Agreement 2006 provide for a Bill of Rights for NI, yet NI remains without one. A Bill of Rights for NI would afford an additional layer of human rights protection, to supplement that of the HRA. The 'New Decade, New Approach' agreement committed to establishing a NI Assembly Ad Hoc Committee on a Bill of Rights, to consider the creation of a Bill of Rights "that is faithful to the stated intention of the 1998 Agreement in that it contains rights supplementary to those contained in the European Convention on Human Rights".⁵³ The Ad Hoc Committee recently published its report, however the Committee was "unable to make a decision on the justiciability and enforcement of rights due to the absence of a panel of experts and the content of the DUP party position paper".⁵⁴

3.28 The NIHRC takes the view that EU withdrawal strengthens the case for a Bill of Rights and may make it more important and beneficial. As noted above, the UK Government recognised that withdrawal from the EU poses direct challenges in relation to human rights and equality and the commitment in Protocol Article 2 aims in part to address this.

⁵¹ E/C.12/GBR/CO/6, Committee on Economic Social and Cultural Rights, 'Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland', (CESCR, 2016), at para 10.

⁵² CERD/C/GBR/CO/21-23, 'UN Committee on the Elimination of Racial Discrimination Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland', 3 October 2016, at para 10.

⁵³ NI Office, 'New Decade, New Approach', (NIO, 2020), at para 5.26.

⁵⁴ Ad Hoc Committee on a Bill of Rights, 'Report of the Ad Hoc Committee on a Bill of Rights' (NI Assembly, 2022), at p.16.

- 3.29 Protocol Article 2 is no substitute for a Bill of Rights. It is limited in scope to the provisions of the relevant chapter of the Belfast (Good Friday) Agreement and to precluding a diminution of rights, safeguards or equality of opportunity occurring 'as a result of Brexit'. The 'keeping pace' requirement only applies to the six Annex 1 Equality Directives and not to other relevant underpinning EU obligations where only non-diminution is guaranteed. A wide range of NI legislation relevant to rights may therefore be susceptible to diminution that would be incapable of challenge via Protocol Article 2 but could be protected by a non-retrogression clause in a Bill of Rights.
- 3.30 It is important to note that the NI Bill of Rights has always been envisioned as supplementary to the ECHR, as incorporated by the HRA, rather than a standalone alternative to either. The intention is to build upon the protections already provided. Reform of the HRA would, therefore, undermine this process. The NIHRC advises that the HRA is the fulfilment of the Belfast (Good Friday) Agreement commitment to incorporate the ECHR into NI law. This should be ring-fenced and supplementary rights, taken together with the HRA, enacted to create a Bill of Rights for NI.
- 3.31 **The NIHRC recommends that the UK Government considers and engages with the ongoing process to develop a Bill of Rights for NI to avoid contradicting and frustrating this process, committed to under the Belfast (Good Friday) Agreement.**
- 3.32 The HRA has allowed individuals, and organisations, to bring cases regarding human rights violations through the domestic courts, where previously any recourse to remedy would have had to be accessed through the ECtHR. This is particularly valuable for NI given its post-conflict status as the HRA has facilitated individuals in holding the State to account over issues connected to dealing with NI's past. Despite the development of the Article 2 jurisprudence at Strasbourg, the role of the domestic courts in applying the Convention through the HRA remains central to the protection of rights in NI. In the cases of *Patrick Finucane* and *Hugh Jordan*, in which the court considered the adequacy of legacy investigations under Article 2, the UK Supreme Court (UKSC) held that investigative obligations under Article 2 ECHR had not been

complied with, reversing decisions by the Court of Appeal of NI.⁵⁵ The proposed reform of the HRA could lead to increased numbers of individuals taking cases to Strasbourg, which would be a retrograde step particularly in terms of the propensity for legacy issues to be litigated on human rights grounds.

3.33 The HRA was particularly important to NI when it was without a sitting Assembly between January 2017 and January 2020. In *Re Northern Ireland Human Rights Commission*, a case concerning abortion access which came before the UKSC during a period in which the NI Assembly was not functioning, Lord Mance noted that there was no indication when or if Stormont would resume operations.⁵⁶ As such, Lord Mance commented that the present law was incompatible with Convention rights, stating that it was in need of “radical reconsideration”.⁵⁷ This is particularly relevant given the NI Executive is again facing a potential period of instability.

3.34 **The NIHRC recommends that the UK Government ensures the continued access to domestic courts for human rights violations, particularly in the context of Northern Ireland’s post-conflict legacy.**

3.35 The NIHRC notes that the IHRAR concluded that:

It must also be acknowledged that both proposals [i.e., the British Bill of Rights and repeal of the HRA], in the Panel’s view, could have a significant impact on devolution and the Northern Ireland Peace Agreement (the Good Friday or Belfast Agreement), clearly so in the case of straightforward repeal. It might be said that, depending on how a British Bill of Rights was framed, it might pose less of a risk of such an impact in the devolution context *if* it substantially replicated the HRA.⁵⁸

3.36 Given the scope of the proposals presented in the consultation paper, which go beyond the terms of reference for the IHRAR, the NIHRC considers that the proposed British Bill of Rights would not

⁵⁵ In the matter of an application by Geraldine Finucane for Judicial Review [2019] UKSC 7; In the matter of an application by Hugh Jordan for Judicial Review [2019] UKSC 9.

⁵⁶ 51 In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) [2018] UKSC 27, at para 135.

⁵⁷ Ibid.

⁵⁸ The Independent Human Rights Act Review, 2021, p.32.

sufficiently replicate the HRA so as to amount to continuing protection for NI. On the contrary, the NIHRC fears that the proposals amount to less rights, for fewer people, in more limited circumstances.

3.37 The NIHRC recommends that the current proposals for reform of the HRA are withdrawn, in light of the likely damaging impact on the Northern Ireland peace process.

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