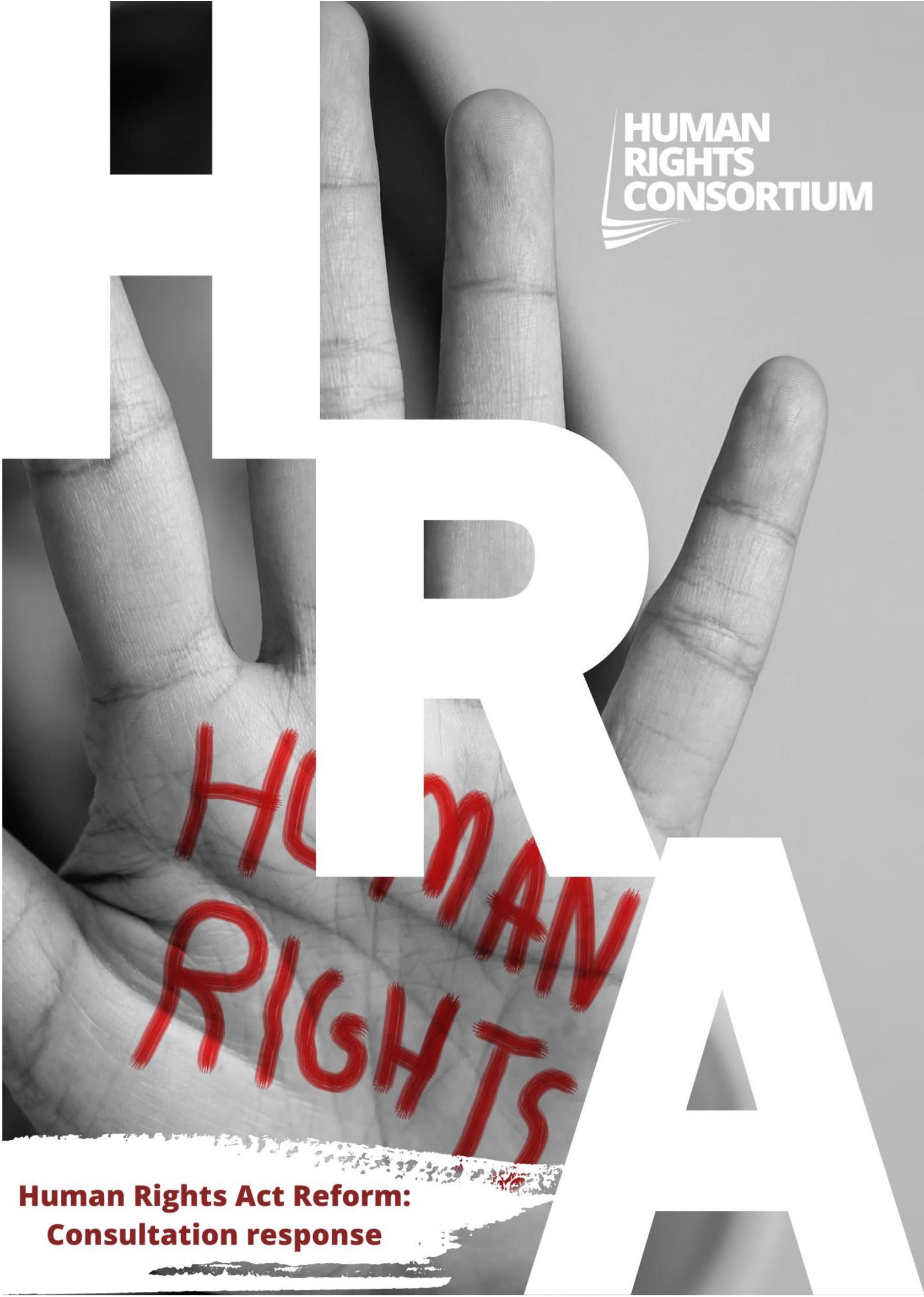




HUMAN
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CONSORTIUM



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**Human Rights Act Reform:
Consultation response**



March 2022

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About Us

The Human Rights Consortium is a human rights charity and coalition of civil society organisations from across Northern Ireland which was established in 2000. Our membership includes almost 170-member organisations from a range of community and voluntary grassroots groups, NGOs and Trade Unions, drawn from all sections of the community and all parts of Northern Ireland. We work together towards the development of a human rights based Northern Ireland.

Introduction

The Human Rights Consortium is deeply concerned about the existence, content and possible impact of this consultation exercise. Coming after a decade of attempts to undermine the Human Rights Act (HRA) and launched on the same day the report from the Independent Review of the Human Rights Act outlined little support for changing the HRA, we believe that this consultation is an attempt to weaken hard won and essential human rights protections both for Northern Ireland (NI) and the rest of the United Kingdom (UK).

If the proposals in the HRA consultation document are fully progressed as outlined they will result in a clear regression in the access and enjoyment of Convention rights as we currently know them. The Belfast/Good Friday Agreement (B/GFA) made provision for Convention (ECHR) rights being incorporated into the law of Northern Ireland. If the proposed changes are implemented locally it will fundamentally alter the way in which we currently access and experience the protection of those rights. We believe that this violates both the intention behind the B/GFA commitment and the practical protection and enjoyment of those rights commitments as we have enjoyed them over the past 22 years.

The proposals by the UK Government are presented as replacing the HRA with a Bill of Rights. Given the historic process to develop a Bill of Rights for Northern Ireland, the Consortium's role in campaigning for that Bill of Rights and our belief that a Bill of Rights should be a positive articulation of progressive rights, we refuse to characterise the UK Govt proposals as creating a Bill of Rights. The proposals outlined in the consultation document are aimed at scrapping the HRA and offering a greatly reduced set of rights. The proposals are therefore not worthy of the title Bill of Rights, and we have avoided that terminology throughout this response.

The framing of many of the concerns and questions set out in the Governments consultation document are deeply misleading, ill-informed and not based on available evidence. Many of the claims the UK Govt make about the operation of the HRA and the case for its reform in Chapter 3 are deeply flawed ideological points of opposition to the concept of progressive rights and not based on substantive evidence.

In turn the questions in the consultation document are also framed from this same flawed perspective and the Consortium has rejected most, if not all of the assumptions made in

these questions. For instance, the consultation attempts to establish a number of false notions such as framing human rights as being in opposition to the wider public interest. From our perspective the wider public interest includes and is served by respect and protection of human rights. It is also clear that from ongoing work by our members and colleagues both in Northern Ireland and across the UK that there is widespread public support for the protection of human rights and the Human Rights Act.

The consultation also clearly fails to offer appropriate response options for those that seek to retain the HRA as it currently exists. Many of the Consortium responses below have therefore been framed using the language of 'no change to the current operation of the HRA.' Additionally, some of the questions have a range of options and questions that suggest alternative wording or language to replace elements of the HRA. We have not engaged in detailed discussions on the merits of these options as they all represent retrograde measures.

Perhaps most concerning is the Government's distinct failure to take account of the range of problems and concerns that these proposals will create for those in devolved areas of the UK. Our own devolved government in Northern Ireland was based on the commitments to human rights and equality in the Belfast/Good Friday Agreement such as the Human Rights Act. To undermine or remove those commitments is to tamper with a finely balanced set of relationships that could destabilise the institutions and safeguards that underpin our peace process.

We believe that this consultation exercise is unwarranted and any change to the Human Rights Act is unnecessary. We encourage the Government to abandon its plans to reform the HRA and instead direct its attention towards promoting the understanding and utilisation of existing rights protections and fulfilling its duties to deliver additional protections such as the undelivered Bill of Rights for Northern Ireland.

Human Rights Consortium
March 2022

Consultation Questions

ECtHR jurisprudence

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

1. Under section 2 of the Human Rights Act, courts in the UK must 'take into account' any relevant Strasbourg jurisprudence. The Government suggests language that would move us away from the duty to take account of ECtHR case law to a weaker 'may take account' and broadens the list of sources for domestic courts to consider when making judgments.
2. If consideration of ECtHR jurisprudence was weakened domestically then an unacceptable level of divergence may take place between the application of the Convention rights in the UK and at the ECtHR. This in turn may lead to an increased number of UK cases going to Strasbourg, uncertainty of access to existing rights and a substantive change in how Convention rights are currently experienced.
3. We therefore believe that there should be no changes to how Section 2 of the Human Rights Act currently operates as the Government proposals would substantively and negatively change the existing access and enjoyment of Convention rights.

The position of the Supreme Court

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

4. The Supreme Court is already the highest court and ultimate judicial arbiter of laws in the UK. The HRA does not create uncertainty on this point and indeed the Supreme Court has the ability to take a different view on the interpretation of Convention rights than the ECtHR. There is no lack of clarity on this point and therefore no change is required.

Trial by Jury

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

5. Article 6 of the Human Rights Act already protects the right to a fair trial and this can be utilised where appropriate to provide for jury trials. There is no substantive case made for the need for this change and therefore no change is required.

Freedom of Expression

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

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

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

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

6. Article 10 Freedom of Expression is a qualified right which can be restricted by the courts in certain circumstances if the restriction is prescribed by law, is necessary and proportionate to achieving legitimate aims including protecting national security etc and it is a right which can and is balanced against other privacy rights (Art 8).

7. The courts currently attempt to balance these rights and there is no evidence presented to suggest that this approach is failing. We therefore believe that no change to Section 12 should be introduced.

A permission stage for human rights claims

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

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

8. The proposal would create further barriers for individuals to access the courts and the protection of Convention rights. No such permission stage should be introduced.

Judicial Remedies: section 8 of the Human Rights Act

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

9. There are already very clear admissibility criteria that claimants have to meet in order to take a case under the HRA. There is no evidence to suggest that these are not working, and the Government proposals seem like a clear exercise in limiting access to the HRA protections. No changes are required to the HRA in this regard.

Positive obligations

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

10. Positive obligations have proven essential across the UK in ensuring that public authorities do not just have a negative duty not to interfere with an individual's rights but also in a number of circumstances actually have a duty to be proactive in the protection of their rights. This has been particularly important in Northern Ireland, and we believe that no change is required to the HRA in this regard.

Section 3

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

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

Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation. We would welcome comments on the above options, and the illustrative clauses in Appendix 2.

11. The Section 3 duty to interpret laws in conformity with the rights in the HRA has been an important provision in ensuring that the protection of the Convention rights is applicable to existing laws where appropriate. This interpretative provision is only used by the courts when it is possible to interpret legislation compatibly 'so far as it is possible to do so' with the Convention rights. Where a law is not able to be interpreted in this way it can only be changed by Parliament.

12. This section of the HRA has meant that there has been a reduced necessity to re-write laws that are capable of interpretation in conformity with Convention rights. Removing these provisions would lead to more declarations of incompatibility and potential delays in reforming non-convention compliant laws if Parliament disagrees with such decisions.

13. The consultation sets out two options for repealing or amending the Section 3 duties. As this section has increased compliance of existing legislation with Convention rights and the Government has not provided a sufficient evidence base for the need to reform this provision we recommend no change to this section of the HRA.

Parliament & Section 3

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

14. The consultation asks how Parliament can have an enhanced role in reviewing legal cases where courts have used a section 3 interpretive power. It particularly asks about how

the role of the Joint Committee on Human Rights (JCHR) could be improved in scrutinising section 3 judgments.

15. The suggestion to enhance the role of the JCHR has nothing to do with the HRA and can be achieved via amendments to standing orders in Westminster. We therefore believe that no change is required to the HRA in this regard.

Database

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

16. A database of domestic judgments in the UK that have relied on the HRA/Convention rights would generally be helpful in understanding the use and interpretation of the Convention rights, including Section 3. But no changes to the HRA are required to achieve this. The Government could introduce this measure independently.

Declarations of incompatibility

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

17. Under the HRA most secondary legislation that is deemed incompatible with Convention rights can be declared invalid. The Government proposal explores the idea of introducing the use of 'declarations of incompatibility' for secondary legislation instead – in the same way that it currently applies to primary legislation. This would mean that it would be up to Parliament to amend the violating legislation rather than having it immediately struck down. This in turn is likely to lead to more delays in amending legislation that is in violation of Convention rights.

18. The power of higher courts to strike down secondary legislation that is incompatible with Convention rights is an important protection and means of giving effect to the ECHR protections. To remove or alter these powers would represent a diminishment in how these rights are currently protected and therefore no change should be made.

Quashing Orders

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

19. The impact of this proposal is that it would restrict or undermine an existing 'quashing order' power under the HRA and in this regard reduce or limit the remedies available for

violation of Convention rights. We therefore disagree with these suggested changes and recommend no change to the HRA in this regard.

Remedial orders

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

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

Please provide reasons.

20. Section 10 of the HRA provides remedial order powers that allow ministers to amend primary legislation that has had a declaration of incompatibility made against it. The consultation asks whether this procedure should be changed to give Parliament more of a role in changing incompatible legislation. This power has only been used 11 times since the HRA has come into effect but removing or altering it may allow Parliament to refuse to introduce primary legislation to remedy violations of the ECHR.

21. We believe that the Section 10 powers are currently working effectively and there are no changes required to how it operates.

Statement of Compatibility – Section 19 of the Human Rights Act

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

Application to Wales, Scotland and Northern Ireland

22. Section 19 of the Human Rights Act requires a minister introducing a Bill into Parliament to express his or her view as to the compatibility of the legislation with the Convention rights. These statements of compatibility are an important transparency tool in ensuring that Government proposals are compatible with Convention rights.

23. Whilst it might be useful to see a further analysis of government legal advice which sets out in more detail the explanations for why legislation was or was not compatible with Convention rights, we are fearful that any suggestion to change the current operation of the HRA might be misused by the Government to undermine these protections. We therefore recommend no change to the current operation of this section of the HRA.

Devolved Issues

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

24. There has clearly been little, or no consideration given to the impact of these changes to devolved regions. A core element of each of the devolution systems of government was a provision for the new institutions to be bound to act compatibility with the HRA/Convention rights. The proposals in the consultation, if enacted in the devolved regions, will detrimentally alter the way in which these protections are experienced in those regions.

25. The cumulative impact of the proposals will be to limit access to the Convention rights as currently experienced. Unless the UK Government fully respects the devolved system of governance by seeking a legislative consent motion in each jurisdiction it will have failed to ignore the views and concerns of each of these regions. Even if this takes place these changes may introduce a two-tier system of human rights in the UK if the proposals do not apply to devolved responsibilities but are applied to reserved powers.

26. Additionally, from a NI perspective access to the Convention rights was a cornerstone of our peace process and the commitments in the Belfast/Good Friday Agreement. The proposed changes/scrapping of the HRA would represent a fundamental regressive change to how Convention rights are experienced in NI and would therefore be a direct violation of the Belfast/Good Friday Agreement.

27. Finally, the consultation says in Pt 40 that the proposals ‘will have no adverse impact on any future developments towards a Northern Ireland Bill of Rights.’ We do not believe this to be accurate as the basis for an NI Bill of Rights was to be convention rights plus. The consultation fundamentally undermines how the Convention rights would apply in NI and therefore the basis of the NI Bill of Rights is undermined if these changes proceed.

Public authorities: section 6 of the Human Rights Act

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

28. The Governments own consultation document says that the definition of a public authority is appropriate. It does not provide a coherent argument for why it should be changed. Therefore, the current language which binds different organisations or bodies who are performing a public function to act compatibly with Convention rights is appropriate. We recommend no change to the HRA in respect of Section 6(1) or 6(2).

29. Given the range of services that are currently outsourced by the Government to private companies and contractors the Government may wish to consider the limitations on the definition of public authorities in Section 6(3). There may well be a case to ensure that the definition of public authority in this section includes private organisations that deliver government services, duties or contracts.

Duties on public Authorities

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

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

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

30. There is no evidence to suggest that there is a problem with this aspect of the HRA and we therefore recommend no change to the HRA in this regard.

Extraterritorial jurisdiction

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

31. We do not believe that there are any issues with how the HRA currently applies to those exercising UK governmental power abroad. We therefore recommend no change to the HRA in this regard.

Qualified and limited rights

Question 23: To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act? We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.

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

Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right. We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

32. There is no evidence provided as to why this change to such an important element of the HRA might be needed. We therefore recommend no change to the HRA in this regard.

Deportations in the public interest

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

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

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

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

33. Human Rights claims should neither be concerned or influenced by political or public opinion on the merits of how certain rights within the Human Rights Act are utilised. The concept of deportations being ‘frustrated by human rights claims’ suggests that the Government believe that such claims or those who make them are somehow underserving of the protection of human rights. This is contrary to the concept of rights being universal and should be resisted at all levels.

34. The Government wants to introduce a change to the HRA that would limit the use of rights such as the Article 8 right to private a family life in deportation cases. Our fear is that any changes would disproportionality impact on minority communities and undermine their access to important rights. We believe this is also further evidence of the Government highlighting problems where none exist as no significant evidence base has been presented to prove that this is a problem. We therefore recommend no change to the HRA in this regard.

Illegal and irregular migration

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

35. The Government is arguing that its responsibilities under the Human Rights Act (HRA) and the ECHR, as well as other international treaties such as 1951 Refugee Convention, limit

its ability to respond to certain types of migration. Effectively the Govt is complaining about having to respect the rights of people that they feel are undeserving of human rights – including those who are crossing the English Channel.

36. Human rights protections can and should apply to all people within the UK – this includes migrants, refugees and asylum seekers. Any attempts to reduce or limit the availability of these rights should be resisted. We therefore recommend no change to the HRA in this regard.

Remedies

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

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

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

37. The impact of these proposals would be to put further barriers in the way of achieving remedies for violation of rights and holding authorities to account. There is no evidence provided as to why this change to the HRA might be needed. We therefore recommend no change to the HRA in this regard.

Responsibilities

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

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

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

38. To a certain degree the consideration of past behaviour is already taken account of at the ECtHR where compensation has not been awarded following a violation. The Government proposals seek to introduce the concept of responsibilities into how the HRA operates. The Governments framing of this question is worrying however as it suggests the concept of those who are deserving and undeserving of the protection of human rights.

39. We believe that access to the enjoyment and protection of human rights should be universal. No case has been made for the introduction of the concept of responsibilities in the adjudication of the HRA. We therefore recommend no change to the HRA in this regard.

Dialogue with Strasbourg

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

40. We believe that these proposals attempt to bypass the UK responsibility as a signatory of the Convention to uphold decisions made against it at the ECtHR and could potentially lead to further stand offs over judgments that are unpopular with the majority of the UK Parliament.

41. This would create further barriers to changing or amending laws that are contrary to the ECHR. It is indicative of the UK's current lack of interest in being guided by and being consistent with judgments of the ECtHR. We believe that this could lead to unhelpful divergence with ECtHR judgments and mean that appropriate remedies for violations of Convention rights were jeopardised.

Impacts

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

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

42. The Consortium believes that the cumulative impacts of the proposed reforms will be that the way in which we currently access the Convention rights will be fundamentally transformed. Whilst we may have access to the same Convention rights in name, the level and meaningfulness of that access will differ significantly from its current form.

43. Everything from how the ECtHR jurisprudence is interpreted, the power to strike down violating legislation, the duties on public authorities and the broader interpretation by courts will become confused and diluted if these proposals proceed. In short, the practical enforcement of our convention rights will be significantly undermined. This will have untold impacts across a range of policy areas in Northern Ireland.

Belfast/Good Friday Agreement

44. A core element of the Belfast/Good Friday Agreement is a commitment to placing human rights and equality protections at the heart of the new set of relationships and institutions established by that peace agreement.

45. The Agreement outlines that the new Strand One institutions of the Northern Ireland Assembly will have *'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'*¹. It continues to outline that these safeguards will include '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'²

46. This is further expanded and reinforced in the Rights, Safeguards and Equality of Opportunity section of the Agreement which outlines the British Government's commitment to *'complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention'*³

47. This commitment was realised through the passing of the Human Rights Act which has been fundamental in the protection of human rights in this jurisdiction since. While the commitment is to incorporate the Convention rights, the HRA in its current format is the manifestation of this commitment in a peace treaty and International Agreement between two sovereign states – the UK and Republic of Ireland. Any attempt to resile from the duty to *'take into account'* the Strasbourg jurisprudence or fundamentally alter the operation of the Human Rights Act will in our opinion represent a violation of this peace treaty and the UK's international obligations. Incorporating the Convention rights into domestic legislation was not simply an undertaking to replicate the text of the convention rights in domestic law but also an undertaking to give effect to the Convention rights as they are understood to operate. This includes among other provisions the linkages to the ECtHR and appropriately taking account of its jurisprudence.

48. The incorporation of the ECHR via the Human Rights Act has become a significant pillar of the human rights architecture of the Agreement and the wider peace process. Binding the Assembly and other public bodies to act in accordance with Convention rights has been an important mechanism for insuring compliance with key human rights standards and a mechanism for individuals to seek redress for abuses of individual rights. One example of the pivotal role that the HRA has played within the peace process is its centrality to policing reform. The revised policing framework in Northern Ireland has placed HRA compliance at its core. One of the key functions of the Northern Ireland Policing Board, as set out in s3(3)(b)(ii) of the Policing (Northern Ireland) Act 1998, is to monitor compliance with the

¹ The Agreement 1998, Section 3.5

² Ibid, Section 3.5(b)

³ Ibid, Section 6.2

Human Rights Act 1998. The PSNI Code of Ethics, provided for under s52 of the same Act is also designed around the framework of the ECHR as provided for by the HRA 1998.⁴

49. In addition, the adoption of the HRA has played a strong confidence building role in a society that emerged from thirty years of conflict. A conflict which had its origins in community divisions and a range of discriminatory actions and inequalities. For the new power sharing institutions to work, members of the public who voted for the Agreement needed to be confident that neither political side within the new power sharing structures would be capable of exercising power in a discriminatory manner. Provisions like the HRA have played a key role in establishing and maintaining that confidence.

50. It is largely because of this central role in our peace process that public opinion in Northern Ireland is firmly supportive of the Human Rights Act in its current format. Around 84% of the population in Northern Ireland feel that the HRA is either good or very good for Northern Ireland and as such any efforts to amend the HRA would be clearly counter to the wishes of the local community.⁵

51. These levels of support are only possible due to the distinct nature of how the HRA operates. In particular the requirement in Section 2 of the HRA to ‘take into account’ ECtHR jurisprudence. This link with the Strasbourg judgments twinned with the continuing ability to proceed with a case to the ECtHR itself, provided a supra-national confidence building safeguard for those sections of the community in Northern Ireland who continue to be sceptical about the role of Stormont or Westminster in the protection of rights locally. To undermine or remove these important safeguards would be a direct violation of both the spirit and practical application of the Belfast/Good Friday Agreement.

52. Likewise we would be concerned that many other proposals in this consultation document would represent a direct violation of the commitments in the Belfast/Good Friday Agreement if enacted. For instance, the suggestion in question 11 that the Positive obligations that arise under the Convention rights might somehow be limited or changed presents a fundamental problem for the B/GFA. The agreement committed to creating ‘access to the convention rights’. A core strand to how Convention rights are currently understood and interpreted domestically under the HRA and internationally at the ECtHR is the placement of positive obligations on domestic governments. To alter or undermine these obligations would be to alter the way in which the Convention rights are accessed and substantively experienced. Thus in our view would represent a violation of what was committed to in the Belfast/Good Friday Agreement.

53. Another example is the suggestion in questions 8 & 9 of the introduction of a permission stage where claimants under the HRA may have to prove that they have suffered a

⁴ For further information on the PSNI adoption of the Convention rights in the new policing structures our conference report ‘The Impact of the Human Rights Act Northern Ireland’ available at <http://www.humanrightsconsortium.org/wp-content/uploads/2017/04/The-Impact-of-the-HRA-in-Northern-Ireland-Conference-Report-1.pdf> provides key insights from the then Chief Constable of the PSNI, Pg 15.

⁵ Attitudes to Human Rights in Northern Ireland: Polling Data <http://www.humanrightsconsortium.org/human-rights-unite-northern-ireland/>

‘significant disadvantage’ before their case may be allowed to proceed. The B/GFA commits to incorporate the ECHR into domestic law in Northern Ireland and provide for “direct access to the courts, and remedies for breach of the Convention, including the power for courts to overrule Assembly legislation on grounds of inconsistency”⁶. If a new permission stage creates barriers for individuals accessing the courts or Convention rights then such an addition may well be in violation of the Agreement.

Northern Ireland Bill of Rights

54. The UK Government have outlined that they believe their proposals for a Bill of Rights can sit alongside the B/GFA commitment to a Northern Ireland Bill of Rights and would *‘have no adverse impact on any future developments towards a Northern Ireland Bill of Rights.’* We do not believe that this would be the case. The commitment in the B/GFA is to rights supplementary to the ECHR taken together with the Convention rights to constitute a Bill of Rights for NI. The Northern Ireland Human Rights Commission in its 2008 advice to the Secretary of State for Northern Ireland specifically advised that the HRA should be added to the text of a Northern Ireland Bill of Rights in order to specifically ring fence and protect this baseline of standards as the floor of any new Bill of Rights. This was based on a direct requirement from the B/GFA that that new NI Bill of Rights include rights supplementary to the ECHR and taken together with the Convention rights to constitute a Bill of Rights for Northern Ireland.

55. The Convention rights/HRA was therefore envisaged to be the bedrock upon which the NI Bill of Rights was based. If we fundamentally alter the way in which Convention rights have been experienced in Northern Ireland then we are interfering and altering the premise and basis of protection on which the NI Bill of Rights was to be developed. This again in our view is what will happen under these reform proposals and will represent a violation of the Belfast/Good Friday Agreement.

56. The Government consultation proposals are also at odds with the wishes of the vast majority of civil society, the public and political parties in Northern Ireland. The direction of travel in Northern Ireland (like the other devolved regions of the UK) has been to advance or add to the protections already available through the Human Rights Act. Northern Ireland has a long-standing campaign and focus on developing a Northern Ireland Bill of Rights that protects and goes beyond Convention rights to include, for instance, social and economic rights as drawn from international standards. In contrast, the Governments consultation paper seeks to regress on the protections currently on offer in the HRA and clearly sets out its opposition to the expansion of any social and economic rights protections.

Article 2 of the Northern Ireland Protocol

57. Article 2 of the Northern Ireland Protocol to the EU-UK Withdrawal Agreement seeks to protect Northern Ireland from the diminution of certain rights as a result of the UK exiting the European Union. These include amongst others the rights within the ‘Rights, Safeguards

⁶ Belfast (Good Friday) Agreement 1998, ‘Rights, Safeguards and Equality’, para 2.

and Equality of Opportunity' chapters of the B/GFA and a list of EU Equality Directives listed in Annex 1 of the Protocol.

58. We believe that these Article 2 protections may well be engaged by the Governments proposals as there are likely to be protections in Northern Ireland that were originally protected by EU law and the HRA, but which are now only underpinned by the HRA following the UK's exit from the EU. In which case a removal or diminution of this protection may occur as result of the Governments suggested reforms of the HRA and in turn trigger the protections of Article 2 of the Protocol.

59. For this reason we are concerned that little space has been attributed in the consultation document to explore how the Governments proposed reforms will interact and overlap with the Article 2 protections in the NI Protocol. We therefore suggest that a thorough analysis is carried out to see how these important provisions interact with the HRA and the proposed reforms.

Equality

60. The suggested changes to the HRA are likely to have distinct impacts on the range of individuals, sectors and categories of equality. As the Equality Act 2010 does not extend to Northern Ireland we suggest that a through analysis and equality screening of the impacts of the proposals should be carried out under Section 75 of the Northern Ireland Act.

**Human Rights Consortium
March 2022**

