



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## **Advice on the Bill of Rights Bill**

**September 2022**

## Table of Contents

<b>1.0 Introduction.....</b>	<b>3</b>
<b>2.0 Repeal of Human Rights Act 1998.....</b>	<b>3</b>
<b>3.0 Relationship between UK Courts and ECtHR.....</b>	<b>8</b>
<b>4.0 Interim Measures.....</b>	<b>12</b>
<b>5.0 Parliamentary Scrutiny of Human Rights .....</b>	<b>13</b>
<b>6.0 Interpreting and Applying the Law .....</b>	<b>14</b>
Positive obligations .....	14
Proportionality.....	16
Meaningful consultation .....	18
<b>7.0 Enforcement of Human Rights .....</b>	<b>19</b>
<b>8.0 Specific Issues.....</b>	<b>20</b>
Universality.....	20
Hierarchy of rights .....	21
Extra-territoriality .....	23
Trial by jury .....	24
<b>9.0 Devolution .....</b>	<b>25</b>
<b>10.0 NIHRC's Powers.....</b>	<b>27</b>
<b>Annex 1: Summary of Recommendations .....</b>	<b>28</b>
<b>Annex 2: Human Rights Standards .....</b>	<b>32</b>

## 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 United Kingdom (UK) - European Union (EU) Withdrawal Agreement (Protocol Article 2), 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 UK's withdrawal from the EU. In accordance with these functions, the NIHRC provides the following advice on the Bill of Rights Bill.
- 1.2 A Bill of Rights should strengthen human rights protections and build on the success of the Human Rights Act. The present Bill does the opposite. It contradicts fundamental human rights principles and creates barriers to effective remedy. Specific to NI, the UK Government committed, through the Belfast (Good Friday) Agreement, to the full incorporation of ECHR rights, including direct access to courts. The current Bill weakens this commitment and undermines NI's devolution settlement and peace agreement. The Bill also risks creating confusion around the interpretation of Protocol Article 2.
- 1.3 The NIHRC concludes that the fundamentals of the draft Bill require immediate and thorough reassessment, which should take place through meaningful engagement. The result should be grounded in human rights compliance, with a view to strengthening human rights protection. The NIHRC is of the view that the present Bill is the antithesis of what is required.**

## 2.0 Repeal of Human Rights Act 1998

- 2.1 The UN Human Rights Committee recommended that the UK Government:

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 UN ICCPR, in the domestic legal order, and provide effective protection of those rights across all jurisdictions.<sup>1</sup>

- 2.2 The UN Committee on Economic, Social and Cultural Rights (UN ICESCR Committee) recommended that the UK Government “take all necessary measures to ensure that any new legislation” as part of the UK Government’s plan to repeal the Human Rights Act 1998 and introduce a new Bill of Rights “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”.<sup>2</sup>
- 2.3 Similarly, the UN Committee on the Elimination of All Forms of Racial Discrimination (UN CERD Committee) recommended that the UK Government “ensure that any changes to the current human rights framework strengthens the protection of human rights, and in particular the rights of individuals protected under Article 1 of the UN CERD”.<sup>3</sup>
- 2.4 The UN Committee against Torture (UN CAT Committee) has reiterated that the UK Government “should ensure that any legislative changes do not diminish the State Party’s current level of legal protections regarding the prohibition of torture and other ill-treatment”.<sup>4</sup>
- 2.5 Additionally, the UN Working Group on the Universal Periodic Review made several recommendations for the UK Government to ensure that there is no regression of human rights in any potential reform of the Human Rights Act 1998. Furthermore, that any proposed British Bill of Rights would strengthen, not reduce, rights and have no impact

---

<sup>1</sup> 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).

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.

on the scope of protection or the access to remedies under the ECHR.<sup>5</sup> The UK is currently under review and we have highlighted the proposed Bill as a concern within our written submission and engagement with the UN Working Group on the Universal Periodic Review.<sup>6</sup>

2.6 Furthermore, in response to the Bill, several UN Special Rapporteurs have raised concerns that:

the proposed Bill is going back on the commitments undertaken by the UK when it ratified the ECHR, but also, on those commitments that relate to universal human rights instruments. In particular, we are concerned that if adopted as is, the Bill may be in violation of the rights to a fair trial, effective remedies, and equality before the courts, and it may be placing individuals in certain situations at risk of less human rights protection; and may also constitute a contravention of the Vienna Convention on the Law of Treaties.<sup>7</sup>

2.7 The UN Special Rapporteurs also stated concerns that the proposed Bill:

would significantly modify the enforcement of the ECHR in the UK, including the rights of individuals in the UK to effective remedy for any violations thereof. We are worried that the draft Bill would therefore have a far-reaching systematic impact on the enjoyment of all ECHR rights in the UK, including but not limited to, the right to a fair trial (Article 6 ECHR) and the freedom of peaceful assembly and association (Article 11 ECHR).<sup>8</sup>

---

<sup>5</sup> 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.

<sup>6</sup> NI Human Rights Commission, 'Submission to the UN Human Rights Council's Universal Periodic Review of the UK' (NIHRC, 2022).

<sup>7</sup> Letter from UN Special Rapporteur on the Independence of Judges and Lawyers, Diego García-Sayán; the UN Working Group on Arbitrary Detention, Mumba Malila; UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Morris Tidball-Binz; UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Clement Nyaletsossi Voule; UN Special Rapporteur on the Human Rights of Migrants, Felipe González Morales; UN Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences, Tomoya Obokata, and UN Special Rapporteur on Trafficking in Persons, Especially Women and Children, Siobhán Mullally to the UK Government, 17 August 2022.

<sup>8</sup> Ibid.

2.8 Specific to NI, the UN Working Group on the Universal Periodic Review recommended that the UK Government:

provide reassurance that any proposed British Bill of Rights would complement rather than replace the incorporation of the ECHR in NI law and acknowledging this is a primary matter for the NI Executive and Assembly — that a Bill of Rights for NI to reflect the particular circumstances of NI should be pursued to provide continuity, clarity and consensus on the legal framework for human rights there.<sup>9</sup>

2.9 Recommendations to “expediate the process of adopting a Bill of Rights for NI” are shared by the UN Human Rights Committee,<sup>10</sup> UN ICESCR Committee,<sup>11</sup> UN CRC Committee,<sup>12</sup> and UN CERD Committee.<sup>13</sup>

2.10 The Joint Committee on Human Rights found that “the Human Rights Act has had a positive impact on the enforcement and accessibility of rights in the UK, both in and out of court”.<sup>14</sup> In summary, the Joint Committee on Human Rights stated that:

we are concerned that the proposals and their consequences run counter to three central principles of human rights law. Human rights are universal; they apply to everyone. Human rights are fundamental and require special protection within the domestic and international legal order. Human rights must be able to adapt to stand the test of time, as the common law does. We do not think a case has been made for replacing the Human Rights Act with the British Bill of Rights in the form proposed by the [UK] Government.<sup>15</sup>

---

<sup>9</sup> 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.

<sup>10</sup> 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(b).

<sup>11</sup> 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.

<sup>12</sup> CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 7(b).

<sup>13</sup> 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.

<sup>14</sup> House of Commons and House of Lords Joint Committee on Human Rights, ‘Human Rights Act Reform’ (HC, 2021), at 4.

<sup>15</sup> Ibid.

2.11 Furthermore, Lady Hale, former President of the UK Supreme Court, has stated that:

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.<sup>16</sup>

2.12 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”.

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

2.14 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.<sup>17</sup> Protocol Article 2 requires the UK Government 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.

2.15 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.<sup>18</sup> 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

---

<sup>16</sup> NI Human Rights Commission, ‘Press Release: Annual Human Rights Lecture 2022: Lady Hale’s Keynote Address in Full’, 25 July 2022.

<sup>17</sup> 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.

<sup>18</sup> Article 4, UK-EU Withdrawal Agreement.

challenges before domestic courts and ... that appropriate remedies are available"<sup>19</sup> and this has been confirmed by the NI High Court.<sup>20</sup>

**2.16 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.**

**2.17 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.<sup>21</sup> Yet, State discretion is already embedded within domestic legislation. The principles of subsidiarity,<sup>22</sup> margin of appreciation<sup>23</sup> and the restriction on courts' declarations of incompatibility of primary legislation<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> The ECHR is a living

---

<sup>19</sup> NI Office, 'UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in NI: What does it Mean and How will it be Implemented?' (NIO, 2020), at para 6.

<sup>20</sup> *Re SPUC Pro-Life Limited* [2022] NIQB 9, at para 77.

<sup>21</sup> Clause 1(2), Bill of Rights Bill.

<sup>22</sup> Protocol No 15 Amending the ECHR, 24 June 2013.

<sup>23</sup> Protocol No 15 Amending the ECHR, 24 June 2013.

<sup>24</sup> Section 4, Human Rights Act 1998.

<sup>25</sup> Article 46(1), European Convention on Human Rights 1950.

<sup>26</sup> Clause 3(2), Bill of Rights Bill.



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.

- 3.3 The Human Rights Act 1998 requires that domestic courts “must take into account” ECtHR jurisprudence.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>
- 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,<sup>30</sup> 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],<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> The present Bill however preserves that duty but with an important difference - the focus is on

---

<sup>27</sup> Section 2, Human Rights Act 1998.

<sup>28</sup> Clause 3(1), Bill of Rights Bill.

<sup>29</sup> Clause 3(3), Bill of Rights Bill.

<sup>30</sup> *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26.

<sup>31</sup> *Rabone and Another v Pennine Care NHS Trust* [2012] UKSC 2.

<sup>32</sup> Section 6, Human Rights Act 1998; Clause 12, Bill of Rights Bill.

<sup>33</sup> Section 3, Human Rights Act 1998.

how the courts (not public authorities) interpret ECHR rights.<sup>34</sup> This creates unnecessary confusion and a weakening of protection in practice that does not exist under the 1998 Act.

**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.<sup>35</sup> 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”.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

3.8 The EU Charter of Fundamental Rights continues to apply in the application and interpretation of any EU law and concepts referred to

---

<sup>34</sup> Clause 3, Bill of Rights Bill.

<sup>35</sup> Belfast (Good Friday) Agreement, 10 April 1998, Part 6 on Rights, Safeguards and Equality of Opportunity.

<sup>36</sup> 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.

<sup>37</sup> 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).

<sup>38</sup> NI Human Rights Commission, ‘Response to the consultation on Human Rights Act Reform: a Modern Bill of Rights’ (NIHRC, 2022).

<sup>39</sup> NI Office, ‘UK Government Commitment to “No Diminution of Rights, Safeguards and Equality of Opportunity” in NI: 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.

in the Withdrawal Agreement, including any EU obligations which underpin the rights, safeguards and equality of opportunity protections within scope of Protocol Article 2.<sup>40</sup> 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).<sup>41</sup>

- 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.<sup>42</sup> 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.**

---

<sup>40</sup> 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.

<sup>41</sup> *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.

<sup>42</sup> *Ibid.*

## 4.0 Interim Measures

- 4.1 The ECtHR can indicate interim measures to any High Contracting Party to the ECHR.<sup>43</sup> These are urgent measures which, in accordance with the established practice of the ECtHR, apply only where there is an “imminent risk of irreparable damage”.<sup>44</sup> They are only to be applied in limited situations, typically those where there are fears of a threat to life or ill-treatment.<sup>45</sup> Historically, the majority of interim measures were used in deportation and extradition cases.<sup>46</sup> See also the UK’s recent attempted deportation of asylum seekers to Rwanda.<sup>47</sup>
- 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.<sup>48</sup> 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 ECtHR<sup>49</sup> and to significantly restrict positive obligations,<sup>50</sup> 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.**

---

<sup>43</sup> European Court of Human Rights, ‘Rules of Court’ (CoE, 2022), at Rule 39.

<sup>44</sup> *Mamatkulov and Askarov v Turkey* (2005) ECHR 64, at para 104.

<sup>45</sup> European Court of Human Rights, ‘Practice Direction: Requests of Interim Measures (Rule 39 of the Rules of Court’ (CoE, 2002), at 1.

<sup>46</sup> *Ibid.*

<sup>47</sup> 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.

<sup>48</sup> Clause 24, Bill of Rights Bill.

<sup>49</sup> Clause 1, Bill of Rights Bill.

<sup>50</sup> Clause 5, Bill of Rights Bill.

## 5.0 Parliamentary Scrutiny of Human Rights

5.1 Parliamentary sovereignty enables the UK Parliament to create or repeal any law.<sup>51</sup> No Parliament can pass laws that future Parliaments cannot change, and the courts cannot overrule a Parliament's legislation.<sup>52</sup> However, the UK's separation of powers doctrine is relevant whereby "major institutions of State should be functionally independent".<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

**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**

---

<sup>51</sup> UK Parliament, 'Parliamentary Sovereignty'. Available at: <https://www.parliament.uk/site-information/glossary/parliamentary-sovereignty>

<sup>52</sup> Ibid.

<sup>53</sup> Richard Benwell and Oonagh Gray, 'The Separation of Powers' (HoC, 2022).

<sup>54</sup> Clause 1(2), Bill of Rights Bill.

<sup>55</sup> Section 19, Human Rights Act 1998.

**mechanism that places human rights at the forefront of lawmakers' minds.**

## **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.<sup>56</sup> Such steps should have the “real prospect of altering the outcome or mitigating the harm”.<sup>57</sup> 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.<sup>58</sup> The right to an effective remedy can take many forms, including thorough investigation,<sup>59</sup> 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”.<sup>60</sup> It also proposes that:

in deciding whether to apply a pre-commencement interpretation of a... [ECHR] right that would require a public authority to comply with a positive obligation, the court must give great weight to the need to avoid applying an interpretation that would –

a) have an impact on the ability of the public authority or of any other public authority to perform its functions;

b) conflict with or otherwise undermine the public interest in allowing public authorities to use their own expertise when deciding how to allocate the financial and other resources available to them, including in particular, the

---

<sup>56</sup> 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.

<sup>57</sup> *Opuz v Turkey* (2009) ECHR 870.

<sup>58</sup> *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.

<sup>59</sup> Article 13 European Convention on Human Rights 1950; Article 3(2)(a), UN International Covenant on Civil and Political Rights 1966; *Kaya v Turkey* (1998) ECHR 10, at paras 106-107.

<sup>60</sup> Clause 5(1), Bill of Rights Bill.

professional judgment of those involved in operational matters;

- c) require the police to protect individuals who are involved in criminal activity or otherwise undermine the police's ability to determine their operational priorities;
- d) require an inquiry or other investigation to be conducted to a standard that is higher than is reasonable in all the circumstances;
- e) affect the operation of primary legislation (including primary legislation relating to supply and appropriation).<sup>61</sup>

6.3 These factors 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.<sup>62</sup> 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.

6.4 To give a specific example, when read alongside the proposed mandate restrictions within the NI Troubles (Legacy and Reconciliation) Bill,<sup>63</sup> this raises specific concerns for NI and how positive investigative obligations related to the NI conflict can or will be fulfilled.

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

---

<sup>61</sup> Clause 5(2), Bill of Rights Bill.

<sup>62</sup> Clause 5(2), Bill of Rights Bill.

<sup>63</sup> See NI Human Rights Commission, 'Advice on NI Troubles (Legacy and Reconciliation) Bill' (NIHRC, 2022).

- 6.6 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.<sup>64</sup> 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.<sup>65</sup> 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.
- 6.7 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.**

## **Proportionality**

- 6.8 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.<sup>66</sup> Applying a margin of appreciation must be guided by recognised principles, such as the principle of proportionality.

---

<sup>64</sup> NI Human Rights Commission, 'Submission to Department of Justice Consultation on Measures to Strengthen the Response to Modern Slavery and Human Trafficking' (NIHRC, 2022).

<sup>65</sup> *Rayonna prokuratura Lom*, Case C-467/18, 19 September 2019, at para 42-45.

<sup>66</sup> *Sunday Times v UK* (1979) ECHR 1.



6.9 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.<sup>67</sup> It also requires consideration of what is necessary within the specific context.<sup>68</sup>

6.10 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.<sup>69</sup> 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.<sup>70</sup> 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.

**6.11 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.**

6.12 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.<sup>71</sup> 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.<sup>72</sup> 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

---

<sup>67</sup> *Rasmussen v Denmark* (1984) ECHR 17.

<sup>68</sup> *Sunday Times v UK* (1979) ECHR 1; *Rasmussen v Denmark* (1984) ECHR 17.

<sup>69</sup> Clauses 1(2)(c), 4(1), 5(2), 6(2), 7(2)(b), 18(6), 21(2), Bill of Rights Bill.

<sup>70</sup> *Sunday Times v UK* (1979) ECHR 1; *Handyside v UK* (1976) ECHR 5.

<sup>71</sup> Clause 40, Bill of Rights Bill.

<sup>72</sup> Section 6, Human Rights Act 1998; Clause 12, Bill of Rights Bill.

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.

**6.13 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**

6.14 The UN ICESCR Committee recommended that the UK Government “undertake a broad public consultation on its plan to repeal the Human Rights Act 1998 as well on the proposal for a new bill of rights”.<sup>73</sup> Similarly, the UN Committee on the Elimination of All Forms of Racial Discrimination (UN CERD Committee) recommended that the UK Government “undertake meaningful and broad public consultation on its proposals to revise its human rights legislation”.<sup>74</sup> The UN Working Group on the Universal Periodic Report also recommended that the UK Government “carry out extensive consultations with civil society related to the repeal of the Human Rights Act 1998”.<sup>75</sup>

6.15 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”.<sup>76</sup> The UK Government has not conducted any further meaningful engagement on this issue. The independent review team’s views have been ignored within the present Bill without justification.

---

<sup>73</sup> 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.

<sup>74</sup> 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.

<sup>75</sup> 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.

<sup>76</sup> UK Government, ‘The Independent Human Rights Act Review’ (UK Gov, 2021), at 30.

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

## **7.0 Enforcement of Human Rights**

- 7.1 Everyone whose ECHR rights are violated must “have an effective remedy before a national authority”.<sup>77</sup> 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.<sup>78</sup> 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”.<sup>79</sup> 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.”<sup>80</sup> Alternatively, the case can proceed where it is “of wholly exceptional public interest” to do so.<sup>81</sup> NI judicial reviews are excluded from this requirement.<sup>82</sup> 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”.<sup>83</sup> It prevents

---

<sup>77</sup> Article 13, European Convention on Human Rights 1950.

<sup>78</sup> *El-Masri v The Former Yugoslav Republic of Macedonia* (2012), Application No 39630/09, Judgment of 13 December 2012, at para 255.

<sup>79</sup> Belfast (Good Friday) Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

<sup>80</sup> Clause 15(1), Bill of Rights Bill.

<sup>81</sup> Clause 15(3), Bill of Rights Bill.

<sup>82</sup> Clause 15(2)(a), Bill of Rights Bill.

<sup>83</sup> Clause 18(1), Bill of Rights Bill.

damages being awarded simply where a violation is found, otherwise referred to as 'vindicatory damages', which can be useful in encouraging public authorities to comply with human rights. The present Bill proposes that a victim's conduct (whether relevant to the claim or not) is considered when deciding whether to award damages,<sup>84</sup> 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.<sup>85</sup> The extent to which interference can occur is determined by the type of right involved,<sup>86</sup> 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

---

<sup>84</sup> Clause 18(5)(a), Bill of Rights Bill.

<sup>85</sup> Article 15(2), European Convention on Human Rights 1950; Article 4(2), UN International Covenant on Civil and Political Rights 1966.

<sup>86</sup> 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.

proportionality. The interference should be applied only as long as is necessary in pursuit of a legitimate aim, such as public safety.<sup>87</sup>

8.2 The UK Government continues to frame its human rights reform proposals, including within the present Bill, in divisive language that frames certain groups of rights holders as less entitled to rights protection. For example, within the present Bill those involved in criminal activity<sup>88</sup> and immigrants convicted of an offence<sup>89</sup> 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,<sup>90</sup> indivisible and interdependent.<sup>91</sup> 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.<sup>92</sup>

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].

---

<sup>87</sup> *Handyside v UK* (1976) ECHR 5.

<sup>88</sup> Clauses 5(2)(c) and 6, Bill of Rights Bill.

<sup>89</sup> Clauses 8 and 20, Bill of Rights Bill.

<sup>90</sup> 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>

<sup>91</sup> 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>

<sup>92</sup> Articles 3 and 11, European Convention on Human Rights 1950.

- 8.6 The present Bill proposes that freedom of speech<sup>93</sup> and freedom of thought, conscience and religion<sup>94</sup> are given particular importance. Clause 4(1) of the present Bill proposes that “when determining a question which has arisen in connection with the right to freedom of speech, a court must give great weight to the importance of protecting the right”. Clause 23 of the present Bill proposes that “the court must have particular regard to the importance” of the right to freedom of thought, conscience and religion when it is “considering whether to grant any relief which, if granted, might affect the exercise by a religious organisation of the... [ECHR] right set out in Article 9 of the... [ECHR]”.
- 8.7 As qualified rights, the UK already has a broad margin of appreciation 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.
- 8.8 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.
- 8.9 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.**

---

<sup>93</sup> Clause 4, Bill of Rights Bill.

<sup>94</sup> Clause 23(2), Bill of Rights Bill.

## Extra-territoriality

8.10 Ratifying States, such as the UK, “shall secure to everyone within their jurisdiction the rights and freedoms defined” within the ECHR.<sup>95</sup> 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.<sup>96</sup>

8.11 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.<sup>97</sup> This can be through military occupation,<sup>98</sup> military action,<sup>99</sup> control of policies and actions,<sup>100</sup> and/or exercising control and authority over an individual within another State’s territory.<sup>101</sup> It can extend where an administration survives due to the military, political, financial or other support from another State.<sup>102</sup> It can also extend to preventing the extradition of foreign nationals and having a duty of care towards soldiers operating in a third State.<sup>103</sup> Extra-territorial application of the ECHR extends to positive obligations,<sup>104</sup> such as conducting an effective investigation.

8.12 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.<sup>105</sup> The present Bill defines an overseas military operation as:

any operations outside the British Islands, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course

---

<sup>95</sup> Article 1, European Convention on Human Rights 1950.

<sup>96</sup> Article 13, European Convention on Human Rights 1950.

<sup>97</sup> *Bankovic v Belgium* (2001) ECHR 890; *Issa v Turkey* (2004) ECHR 629.

<sup>98</sup> *Bankovic v Belgium* (2001) ECHR 890.

<sup>99</sup> *Al-Skeini v UK* (2011) ECHR 1093.

<sup>100</sup> *Issa v Turkey* (2004) ECHR 629.

<sup>101</sup> *Öcalan v Turkey* (2003) ECHR 125.

<sup>102</sup> *Chiragov and Others v Armenia* (2015) ECHR 647.

<sup>103</sup> *Al-Saadoon and Mufdhi v UK* (2010) ECHR 282.

<sup>104</sup> *Pisari v Republic of Moldova and Russia* (2015) ECHR 403; *Mozer v Republic of Moldova and Russia* (2016) ECHR 213.

<sup>105</sup> Clause 14, Bill of Rights Bill.

of which members of Her Majesty's forces come under attack or face the threat of attack or violent resistance.<sup>106</sup>

**8.13 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**

8.14 The right to a fair trial under the ECHR neither inhibits nor requires trial by jury.<sup>107</sup> It makes it clear that a legal case must be tried by a legitimate body "established by law"<sup>108</sup> and that a trial is heard by an "independent and impartial tribunal",<sup>109</sup> which extends to jurors.<sup>110</sup>

8.15 The present Bill proposes to expressly protect the right to trial by jury, bar several stated exceptions.<sup>111</sup> These are:

- a) where the person pleads guilty;
- b) where the person chooses to be tried without a jury;
- c) where the offence is prescribed by law as insufficiently serious to be required to be tried before a jury;
- d) where it is otherwise prescribed by law that the person should be tried without a jury.<sup>112</sup>

8.16 In NI, non-jury trials have been temporarily permitted on a continuous rolling basis since 2007.<sup>113</sup> 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 discontinued, leading to a danger that non-jury trials are becoming

---

<sup>106</sup> Clause 14(6)(a), Bill of Rights Bill.

<sup>107</sup> Article 6, European Convention on Human Rights 1950; Article 14, UN International Covenant on Civil and Political Rights 1966.

<sup>108</sup> Article 6(1), European Convention on Human Rights 1950; *Jorgic v Germany* (2007) ECHR 583, at para 64.

<sup>109</sup> Article 6(1), European Convention on Human Rights 1950.

<sup>110</sup> *Holm v Sweden* (1993) ECHR 58, at para 30.

<sup>111</sup> Clause 9, Bill of Rights Bill.

<sup>112</sup> Clause 9(2), Bill of Rights Bill.

<sup>113</sup> 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.



'normalised' as a semi-permanent feature of NI's criminal justice system.<sup>114</sup>

**8.17 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.**

**8.18 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".<sup>115</sup> 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.<sup>116</sup>

---

<sup>114</sup> Correspondence from the NI Human Rights Commission to the Secretary of State for NI, 11 February 2021.

<sup>115</sup> Belfast (Good Friday) Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

<sup>116</sup> Belfast (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,<sup>117</sup> reflecting commitments made under the Belfast (Good Friday) Agreement.<sup>118</sup>
- 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”.<sup>119</sup> 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.**

---

<sup>117</sup> For example, sections 6 and 24 of the NI Act require compatibility with ECHR rights.

<sup>118</sup> Belfast (Good Friday) Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

<sup>119</sup> Belfast (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.<sup>120</sup> To facilitate this, the present Bill proposes to repeal the Human Rights Act and amend the NI Act. The NIHRC's right to bring own motion cases without a victim is currently jointly linked to these two pieces of legislation.<sup>121</sup> The present Bill does not propose amending the NI Act in such a way as to remedy the effects of repealing the Human Rights Act on the NIHRC's right to take own motion cases. This further limits 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.**

---

<sup>120</sup> Clauses 7-10, Schedule 5, Bill of Rights Bill.

<sup>121</sup> Section 71(2B), NI Act 1998.

## **Annex 1: Summary of Recommendations**

- 1.3** The NIHRC concludes that the fundamentals of the draft Bill require immediate and thorough reassessment, which should take place through meaningful engagement. The result should be grounded in human rights compliance, with a view to strengthening human rights protection. The NIHRC is of the view that the present Bill is the antithesis of what is required.
- 2.13** The NIHRC is gravely concerned that the present Bill will significantly weaken the protection afforded.
- 2.16** 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.
- 2.17** 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.
- 3.6** 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.
- 3.10** 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.**

- 4.3 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.**
- 5.3 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).**
- 5.5 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.**
- 6.5 The NIHRC advises that the present Bill’s proposals to ignore the UK’s positive obligations will weaken the protection of individuals and increase the likelihood of violations.**
- 6.7 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.**
- 6.11 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.**

- 6.13** 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.
- 6.16** The NIHRC advises that majority support for retaining the Human Rights Act has been ignored within the present Bill, without justification.
- 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.
- 8.3** 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.
- 8.9** 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.
- 8.13** 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.
- 8.17** 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.
- 8.18** The NIHRC advises that the Bill should provide clarity as to when trial by jury is required.

**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.**

**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.**

## Annex 2: Human Rights Standards

1.1 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems.<sup>122</sup> The relevant regional and international treaties in this context include:

- CoE European Convention on Human Rights 1950 (ECHR);<sup>123</sup>
- UN International Covenant on Civil and Political Rights 1966 (UN ICCPR);<sup>124</sup>
- UN International Covenant on Economic, Social and Cultural Rights 1966 (UN ICESCR);<sup>125</sup>
- UN International Convention on the Elimination of All Forms of Racial Discrimination 1965 (UN CERD);<sup>126</sup>
- UN Convention on the Elimination of All Forms of Discrimination against Women 1981 (UN CEDAW);<sup>127</sup>
- UN Convention against Torture 1984 (UN CAT);<sup>128</sup>
- UN Convention on the Rights of the Child 1989 (UN CRC);<sup>129</sup> and
- UN Convention on the Rights of Persons with Disabilities 2006 (UN CRPD).<sup>130</sup>

1.2 In addition, there exists a body of 'soft law' developed by human rights bodies of the CoE and UN. These declarations and principles are non-binding, but provide further guidance in respect of specific areas. The relevant standards in this context include, inter alia:

---

<sup>122</sup> The NI Executive is subject to the obligations contained within the specified regional and international treaties by virtue of the United Kingdom (UK) Government's ratification. In addition, section 26(1) of the NI Act 1998 provides that "if the Secretary of State considers that any action proposed to be taken by a Minister or NI department would be incompatible with any international obligations... [s]he may order direct that the proposed action shall be taken". The NIHRC further recalls that section 24(1)(a) of the NI Act 1998 states that "a Minister or NI department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act... is incompatible with any of the [ECHR] rights".

<sup>123</sup> Ratified by the UK in 1951.

<sup>124</sup> Ratified by the UK in 1976.

<sup>125</sup> Ratified by the UK in 1976.

<sup>126</sup> Ratified by the UK in 1969.

<sup>127</sup> Ratified by the UK in 1986.

<sup>128</sup> Ratified by the UK in 1988.

<sup>129</sup> Ratified by the UK in 1991.

<sup>130</sup> Ratified by the UK in 2009.



- UN Human Rights Committee’s 2015 Concluding Observations on the UK;<sup>131</sup>
- UN Committee on the Rights of the Child (UN CRC Committee)’s Concluding Observations on the UK;<sup>132</sup>
- UN Committee on Economic, Social and Cultural Rights (UN ICESCR Committee)’s 2016 Concluding Observations on the UK;<sup>133</sup>
- UN Committee on the Elimination of Racial Discrimination (UN CERD Committee)’s 2016 Concluding Observations on the UK;<sup>134</sup>
- UN Working Group on the Universal Periodic Review’s 2017 Report on the UK;<sup>135</sup> and
- UN Committee against Torture (UN CAT Committee)’s 2019 Concluding Observations on the UK.<sup>136</sup>

1.3 The Commission further advises on the UK Government’s commitment in Protocol Article 2(1) 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.

---

<sup>131</sup> 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.

<sup>132</sup> CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016.

<sup>133</sup> 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.

<sup>134</sup> 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.

<sup>135</sup> 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.

<sup>136</sup> 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.

## Contact us

Please send any queries to  
[Rhyannon.Blythe@nihrc.org](mailto:Rhyannon.Blythe@nihrc.org)

[www.nihrc.org](http://www.nihrc.org) | [info@nihrc.org](mailto:info@nihrc.org) | +44 (0)28 9024 3987  
4<sup>th</sup> Floor, Alfred House, 19-21 Alfred Street, Belfast, BT2 8ED

