Written Evidence by Professor Rory O'Connell (BOR0041)

Introduction: There is no convincing case for major Human Rights Act reform.

Clause 3 (Q1): Clause 3 of the Bill of Rights Bill, the interpretation clause, risks creating legal uncertainty as there are at least three possible interpretations as to how UK courts should use Strasbourg jurisprudence. To the extent that the proposals suggest UK courts should prioritise the text (and possibly the preparatory works) of the Convention and not the Strasbourg jurisprudence this will create difficulties in interpreting the Convention. The Government position seems to rest on a misconceived critique of the legitimacy of the European Court of Human Rights' approach to interpretation.

Parliamentary scrutiny (Q4): The Bill does not appear to enhance parliamentary scrutiny in any meaningful way.

Section 3 HRA (Q6): Section 3 of the Human Rights Act, together with section 4 represents a successful balance between the aims of protecting human rights and preserving parliamentary sovereignty. There is no convincing case for repealing section 3. The most controversial use of section 3 was in 2001. Since then the courts have clarified how sections 3 and 4 are to be interpreted and applied. To the extent that there is an issue that section 3 results in courts reading in words into statutes, there are possible reforms to address concerns about accessibility that do not upset the balance between sections 3 and 4.

Positive obligations (Q8). Clause 5 on positive obligations is a most objectionable provision. The proposals will undermine protections for victims of sexual and domestic violence, children, victims of trafficking and domestic servitude, victims of crime and others. The proposals will create legal uncertainty. They will lead to more cases going to Strasbourg and more findings that the UK has violated the Convention.

Parliament's role in balancing (Q9): It is not clear if clause 7 simply reiterates the current practice of the courts. To the extent it simply reiterates the current practice it is unnecessary.

Jury trial (Q17). The wording of clause 9 is unusual. It does not seem to create any right to jury trial. If it does create such a right, then there are extensive exceptions including an all-purpose one where 'prescribed by law'. Experience from other common law countries with experience of a right to jury trial indicates some of the issues which a right to jury trial might raise. The Government proposals do not discuss any of those issues.

Devolved nations (Q20). The Government proposals do not seriously engage with developments in the devolved nations. In particular, the Bill risks undermining the role of the Convention in Northern Ireland where Convention incorporation is part of the Belfast Good Friday Agreement.

Joint Committee on Human Rights response

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Introduction

[1] I am grateful to Dr Anne Smith (Ulster University) and Gemma McKeown (Committee on the Administration of Justice) for comments on a draft of this submission.

This is a response to the JCHR call for evidence. It addresses a small number of the questions that the JCHR poses.

Before addressing those specific questions, I should state that, as the JCHR itself has written, the Government has made no convincing case for major Human Rights Act reform.[2] The Government had commissioned an independent review of the Human Rights Act. That independent review did not find a compelling case for major reform within the terms of its remit.[3] The Government consulted the public on Human Rights Act reform and the results of that consultation show no serious support for major Human Rights Act reform.[4] The Bill of Rights Bill will not advance the protection of human rights.

The rest of this response covers the specific questions on clause 3 (Q1), parliamentary scrutiny (Q4), section 3 HRA (Q6), positive obligations (Q8), Parliament's role in balancing (Q9), jury trial (Q17), and the devolved nations (Q20).

Relationship between the UK Courts and the European Court of Human Rights

1. **Clause 3 of the Bill states how courts must interpret Convention rights, including by requiring them to have "particular regard to the text of the Convention right." What would be the implications of clause 3?**

Clause 3 risks creating legal uncertainty. It provides that courts must have 'particular regard to the text of the Convention right' and may have regard to the preparatory works and to developments under the common law. It would replace section 2 of the Human Rights Act which provides that the courts must take into account the Strasbourg jurisprudence, though they are not bound by it. Clause 3 of the Bill is opaque on the Strasbourg jurisprudence question – it does not expressly preclude any reference to the Strasbourg jurisprudence but the change in the approach between section 2 HRA and clause 3 means there are issues the courts will have to resolve.

The courts already pay regard to the text of the Convention, and the preparatory works as well as the Strasbourg jurisprudence. In practice the courts pay close attention to the Strasbourg jurisprudence and Strasbourg's approach to interpretation and application. This does not eliminate the possibility of disagreement, whether among UK judges or between UK judges and Strasbourg, nor does it eliminate the possibility of the Convention's interpretation developing to address new circumstances often unforeseen at the time of drafting. The current practice does enable a common understanding of how to approach the question of interpretation and any disagreements of approach are frequently helpful in stimulating a 'dialogue' between the UK courts and Strasbourg.

Clause 3 might upset this practice as it portends at least three different possibilities:

1. The courts should continue to interpret the Convention in light of all these different sources, including the Strasbourg jurisprudence as it is implicit that the norms in the Convention include how they have been applied and interpreted by the authorised international institutions. Any use of Strasbourg jurisprudence would be limited by the 'ECHR as a ceiling' provisions in 3(3).

[2] Joint Committee on Human Rights, Human Rights Act Reform.
[3] The Independent Human Rights Act Review.
[4] Human Rights Act Reform: A Modern Bill of Rights, Consultation Response.

2. The courts should continue to interpret the Convention in light of all these different sources, but give priority to the wording of the Convention. Any use of Strasbourg jurisprudence would be limited by the 'ECHR as a ceiling' provisions in 3(3).

3. The courts should give a priority to the wording of the Convention and may have regard to the sources mentioned in clause 3, but cannot have regard to other sources (e.g. Strasbourg jurisprudence). Though the implications of clause 3(3) is that some reference to Strasbourg jurisprudence would be permitted if only to ensure the ECHR functions as a ceiling.

Other interpretations of clause 3 may be possible.

If passed in its current form clause 3 will create legal uncertainty until the UK Supreme Court indicates how it is to be interpreted and applied.

While the first interpretation suggested above would probably mean the courts could continue their current approach to interpreting the Convention rights (subject to the ceiling clause which is problematic in itself), there are several problems inherent in either of the other approaches. The Convention is deliberately written in general language. Whilst the text is important and has to be considered, it is difficult to see how there can be primarily textual interpretations of terms like 'torture' 'inhuman or degrading treatment or punishment', 'forced or compulsory labour', 'fair trial' 'respect for his private and family life', 'discrimination' or 'possessions'.

It is not clear from a purely textual reading that 'forced or compulsory labour' for instance would include human trafficking or domestic servitude, but the Strasbourg Court has so interpreted the Convention.[5] Other terms are even more abstract - take right to respect for private and family life. It is difficult to see how a focus on the text helps us answer questions like whether the law should automatically recognise the link between a mother and her child,[6] or whether same-sex couples are entitled to recognition in a civil partnership.[7]

If the text does not provide a guide as to how to answer these questions, then we have to turn to the purpose of the Convention and the extensive Strasbourg jurisprudence. The courts in the UK and Strasbourg have interpreted these terms and developed an extensive jurisprudence which fleshes out what these terms mean.

The drafters of the Convention were aware of the possibility that the text would have to be interpreted. Scholarship on the origins of the Convention clarifies that the Convention is a result of compromises between different positions most notably between those who saw it as a bulwark against fascism and communism on the one hand, and others who saw it as providing for human rights protection in a more expansive sense, understanding (or perhaps fearing) that the Court they were creating would have a role in developing the interpretation of the Convention.[8] One of the leading drafters of the Convention, Teitgen for example envisaged that the Court would develop a European common law of human rights.[9]

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[5] *CN and V v France,* app no 67724/09, ECtHR.

[6] *Marckx v Belgium* App no 6833/74, (1979) 2 EHRR 330.

[7] *Oliari v Italy* Apps no 18766/11 and 36030/11, (2015) 65 EHRR 26.

[8] Ed Bates, *The Evolution of the European Convention on Human Rights: from its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010) 104-106 on the compromise between a 'collective pact against totalitarianism or European bill of rights'.

[9] Bates, *The Evolution of the European Convention on Human Rights* 74.

The role of the European Court of Human Rights in developing the Convention to protect human rights rests on specific approaches to interpretation: the Convention must be given an effective interpretation; the Convention's interpretation can evolve (the 'living instrument' idea) and the interpretation of Convention terms is autonomous (the meaning of terms in the Convention is not necessarily the same as in domestic legal systems).[10] The Government consultation takes issue with some of these doctrines, specifically the living instrument approach, stating that the effect is that the

> meaning and scope of many particular aspects of some Convention rights have changed substantially over the years without meaningful democratic oversight, in some cases going well beyond what the drafters and original signatories had intended or could have reasonably anticipated.[11]

The implication in this passage is that the Convention should be limited to what the drafters and original signatories could have anticipated. There are serious challenges with such an approach. It suggests the Convention should prevent fascist-like behaviour and little else which would be an extremely limited treaty. It would require us to imagine how the drafters would deal with changes in technology (implications of DNA, surveillance, gender reassignment surgery) or for that matter changes in social norms (early Strasbourg decisions found nothing objectionable about laws penalising same-sex intercourse). It ignores the fact that some of the drafters did indeed envisage a greater role for the Convention and the Court than merely a safeguard against extreme tyranny.

The implication in the passage also ignores the fact that the states of the Council of Europe have expressed their commitment to the Convention by amending it. This has been done repeatedly: creating a permanent Court in 1998 (Protocol 11) and reforming the institutions in 2004 (Protocol 14), 2016 (Protocol 16) and 2021 (Protocol 15). Several of these Protocols have unanimous approval (Protocols 11, 14, 15). The states approved these Protocols long after the Court's approach to interpretation (and the doctrine of positive obligations) had been developed.[12] If consent from the states is required then the approval of these Protocols provides it, subject to the changes introduced. The UK has also endorsed the Convention (and undertaken obligations in respect of it) in the Belfast Good Friday Agreement 1998,[13] again in the Ireland / Northern Ireland Protocol[14] and in the EU-UK Trade and Cooperation Agreement.[15]

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[10] Among many other references, Rory O'Connell, *Law, Democracy and the European Court of Human Rights* (Cambridge University Press 2020) chapter 3; Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press 2019) chapters 2-4.

[11] Human Rights Act Reform: A Modern Bill of Rights – consultation para 47.

[12] The European Court of Human Rights set out the basic principles in the 1970s though the jurisprudence continues to evolve. See Bates, *The Evolution of the European Convention on Human Rights*.

[13] The Belfast Good Friday Agreement 1998 makes several references to the ECHR.

[14] Ireland / Northern Ireland Protocol. The Protocol does not explicitly reference the ECHR but does refer to the Belfast Good Friday Agreement being protected in all its parts (preamble) and to the rights of individuals, (article 2) referencing the 'Rights, Safeguards and Equality of Opportunity' section of the Agreement.

[15] EU-UK Trade and Cooperation Agreement, article 524:

> Protection of human rights and fundamental freedoms
> 1. The cooperation provided for in this Part is based on the Parties' and Member States' long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and *in the European Convention on Human Rights*, *and on the importance of giving effect to the rights and freedoms in that Convention domestically.*
> 2. *Nothing in this Part modifies the obligation to respect fundamental rights and legal principles as reflected, in particular, in the European Convention on Human Rights* and, in the case of the

There is a risk that a focus on the text of the Convention (and the preparatory works) would mean the Bill would support an approach to interpretation different from that supported in international law. The Vienna Convention on the Law of Treaties (VCLT) 1969 specifies the general rule on interpretation 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*' (emphasis added).[16] The VCLT gives due attention to the text of treaties and their preparatory works but there is also a requirement of purposive interpretation.

Finally, any interpretation of clause 3 Bill of Rights Bill which results in the UK courts adopting different interpretations of Convention rights to that adopted in Strasbourg is likely to that litigants will be denied an effective remedy in the UK courts; this will result in more litigants going to Strasbourg, and more findings in Strasbourg that the UK has violated Convention rights.

Parliamentary scrutiny of human rights

4. The Government's consultation suggested that the role of Parliament in scrutinising human rights should be strengthened. Would the Bill of Rights achieve this? How could this be achieved?

There is little in the Bill of Rights Bill that supports this laudable aim. Clause 25 requires the Secretary of State to notify Parliament of an adverse ruling against the UK in Strasbourg. This minor reform is unobjectionable and helpful in formally alerting Parliament to the issue, but in practice it seems unlikely to make any real difference to Parliament's role.

The Explanatory Notes section discussing the repeal of section 3 HRA is titled 'Increase democratic oversight of human rights issues'.[17] It is not clear how repealing section 3, without more, necessarily increases Parliament's role in oversight or scrutiny of human rights. The effect of the change is to ensure that people whose rights have been denied because of a statutory provision will not get an effective remedy in court and will have to await a change in the law introduced by Parliament.

The UK Parliament already has an excellent model for parliamentary scrutiny of human rights issues in the work of the Joint Committee on Human Rights.[18] The Independent Panel Report on the Human Rights Act makes some suggestions for how the role of Parliament and the JCHR in human rights scrutiny work could be improved.[19] While the Government consultation on HRA reform alludes to this, the actual proposals do not seem to have any significant suggestions. It is difficult to see how the Government is serious about supporting parliamentary scrutiny on human rights issues.

Union and its Member States, in the Charter of Fundamental Rights of the European Union. (emphasis added).

[16] Article 31(1).

[17] Explanatory Notes paras 7-10.

[18] Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of constitutional Watchdog' in Murray Hunt (ed.) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015).

[19] The Independent Human Rights Act Review 254-256.

Interpreting and applying the law compatibly with human rights

6. The Bill removes the requirement in section 3 HRA for UK legislation to be interpreted compatibly with Convention rights "so far as possible". What impact would this have on the protection of human rights in the UK?

Section 3 of the Human Rights Act, together with section 4, represents a successful balance between the aims of protecting human rights and preserving parliamentary sovereignty.

The Independent Review on the Human Rights Act has convincingly answered queries about the section 3 and section 4 issues. The Independent Review finds, on the basis of a detailed analysis of section 3 case law, that there is no 'substantive case for its [section 3 HRA] repeal or amendment other than by way of clarification or for altering either the balance between sections 3 and 4 … or the *locus standi* requirements'.[20] The most controversial section 3 was the 2001 case of *R v A* involving the interpretation of a provision protecting the victims of rape from having to give evidence about their sexual history.[21] The case was a controversial application of section 3 HRA but importantly within a few years cases like *Ghaidan v Godin Mendoza*,[22] *Bellinger v Bellinger*[23] and others clarified how sections 3 and 4 would function.

The logic of the proposed change is that statements of incompatibility would become more common. This means that rectifying any violations of rights will require parliamentary time for considering primary acts or the time needed for the adoption of secondary legislation.

The Government's consultation on the Human Rights Act recognises that the *R v A* case in 2001 is the highpoint of expansive interpretation.[24] The discussion on section 3 mentions four later cases (including *Ghaidan v Godin Mendoza* in 2004).[25] One of these cases is *O'Donnell v Department for Communities*[26] where the Court of Appeal in Northern Ireland read in 'a new exception to the conditions for receiving a particular benefit under an Act of the Northern Ireland Assembly'.[27] To provide a bit more detail on this case: the appellant was seeking a Bereavement Support Payment following the death of his spouse. The Department refused because the deceased had not made any national insurance contributions. The deceased had been unable to work during her life because of severe disability. The Court of Appeal concluded this was discriminatory and the Department had not justified the policy. The Court of Appeal could not make a Declaration of Incompatibility as the legislation was an Act of the Assembly. In this situation, reading in an exception provided an effective remedy for this and similar cases. Under the Bill of Rights Bill scheme the courts would have difficulty in providing an effective remedy and the appellant would have to await until the Assembly could amend the legislation.

I give a bit more detail than the Government consultation does because it highlights the competing interests involved. The consultation emphasises the need to respect the wording of legislation, but there is also another aim of providing effective human rights protection (in this case preventing discrimination based on disability). The consultation therefore gives a partial picture of the interests at stake.

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[20] The Independent Human Rights Act Review 181.
[21] *R v A.* [2001] UKHL 25, [2001] 3 All England Reports 1.
[22] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.
[23] *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467.
[24] Human Rights Act Reform: A Modern Bill of Rights – consultation para 118.
[25] A later part of the consultation mentions two more examples including one where the courts ultimately did not use section 3: Human Rights Act Reform: A Modern Bill of Rights – consultation paras 163-166.
[26] *O'Donnell v Department for Communities* [2020] NICA 36 (10 August 2020).
[27] Human Rights Act Reform: A Modern Bill of Rights – consultation para 120.

There is certainly a legitimate interest in ensuring that legislation is accessible in the sense of comprehensible to those who read it (though it would be naïve to suggest that all legislation can be reliably understood simply by looking at its written terms without considering case law). There are other ways to address this concern other than the one proposed in the Bill. For instance, it would be possible to have an official database of cases where section 3 interpretations had been issued.[28] Or a minister could be required to notify the legislature of a section 3 interpretation. Or there could be a specific power for a minister to amend legislation to include the terms of a section 3 declaration in legislation (subject to legislative scrutiny).[29] Any of these approaches would address the concern about legislation including exceptions read-in to the legislation without upsetting the balance in sections 3 and 4 Human Rights Act; they would also enhance Parliament's role in relation to human rights scrutiny.

The Bill of Rights Bill proposals will repeal section 3 HRA and not replace it. This is an unusual approach. The Human Rights Act is one example of statutory (as opposed to constitutional) protection being given to human rights. There are examples of this type of statutory scheme in other common law countries such as Australia, New Zealand, Ireland, Canada and the Australian state of Victoria.[30] Generally these statutes have a clause, equivalent to section 3 HRA, explaining how the courts should interpret other statutes in the light of the human rights being protected.[31]

The Government proposals will repeal section 3 without providing replacement guidance. According to the explanatory notes this will mean that the courts will use 'orthodox principles of construction' and if this means a declaration of incompatibility is issued, Parliament can resolve the problem.[32] The Bill of Rights Human Rights Memorandum also refers to the suggestions that the courts will revert to using 'orthodox principles of construction'.[33] The consultation paper gives somewhat more detail on what the Government believes will happen in the event of section 3 HRA being repealed: there would be a reversion to the pre-HRA approach. If legislation is ambiguous then the courts could apply the 'common law presumption that Parliament does not intend to act in breach of international law, including treaty obligations'.[34]

None of the Government documents on the Bill of Rights Bill seem to consider the common law doctrine of legality (sometimes referred to as constitutional rights[35]) that the courts had been applying in the 1990s and at the start of the 21st century.[36]

8. Clause 5 of the Bill would prevent UK courts from applying any new positive obligations adopted by the ECtHR following enactment. It also requires the courts, in

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[28] This indeed was recommended by the Independent Human Rights Act Review Panel: The Independent Human Rights Act Review 251.
[29] The Independent Human Rights Act Review 201.
[30] These are discussed in Kris Gledhill, *Human Rights Acts: The Mechanisms Compared* (Bloomsbury Publishing 2015).
[31] Section 2 of the European Convention on Human Rights Act 2003 (Ireland); section 6 of the New Zealand Bill of Rights Act 1990; section 32 of Victoria's Charter of Human Rights and Responsibilities Act 2006; section 30 of Australia's Human Rights Act 2004; section 2 of the Canadian Bill of Rights 1960. The Canadian Charter of Rights and Freedoms 1982 does not have such a clause but the Charter is more akin to a constitutional provision with courts empowered to strike down legislation.
[32] Explanatory Notes paras 7-10.
[33] Bill of Rights: European Convention on Human Rights Memorandum para 19.
[34] Consultation Human Rights Act Reform: Modern Bill of Rights para 239.
[35] *R v Lord Chancellor (ex parte Witham)* [1997] EWHC Admin 237, [1998] QB 575.
[36] See for instance, *R v Secretary of State for the Home Dept., ex parte Simms* [2002] 2 Appeal Cases 115.

deciding whether to apply an existing positive obligation, to give "great weight to the need to avoid" various things such as requiring the police to protect the rights of criminals and undermining the ability of public authorities to make decisions regarding the allocation of their resources. Is this compatible with the UK's obligations under the Convention? What are the implications for the protection of rights in the UK?

This is a most objectionable proposal.[37]

The doctrine of positive obligations has been a flexible tool in enabling the human rights to be relevant in contemporary and evolving conditions. Positive obligations have been helpful in many different cases. Positive obligations require the state to maintain adequate legal framework for the protection of human rights and also require specific operational duties in different circumstances.

Positive obligations have been especially relevant in protecting members of groups whose rights are particularly likely to be violated. Victims of sexual violence,[38] domestic violence,[39] domestic servitude[40] and human trafficking[41] for instance have been able to vindicate their rights where states have failed to protect them. Children who have been beaten[42] or subject to serious child neglect[43] have also been able to go to the Strasbourg court to vindicate their rights when public authorities have not protected them. Given that victims of crime are among the frequent beneficiaries of this doctrine it is difficult to understand the Government rationale for limiting positive obligations.

The proposals will create legal uncertainty. The Convention does not have a formal written definition of positive obligations (or negative obligations for that matter) and the UK courts will have to figure out how the statutory scheme in the Bill of Rights Bill with interact with the Convention. The proposals seem based on the assumption that positive obligations are an extra textual gloss on essentially negative rights in the text of the Convention, but this is not an accurate understanding of the Convention texts. Some of the Convention rights include explicit positive obligations (the right to free elections for instance or the first sentence of the right to life article) - will clause 5 prevent any new interpretation of these rights?

This proposal will inevitably result in the UK being in breach of its obligations under the Convention as it will require courts to ignore 'new' positive obligations and hamper the implementation of currently recognised positive obligations. It will increase the number of applications by individuals going to Strasbourg and increase the number of cases where the UK is found to have violated the Convention.

9. Clause 7 of the Bill requires the courts to accept that Parliament, in legislating, considered that the appropriate balance had been struck between different policy aims and rights and to give the "greatest possible weight" to the principle that it is Parliament's role to strike such balances. In your view, does this achieve an appropriate balance between the roles of Parliament and the courts?

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[37] See Rory O'Connell, *Briefing note – Positive Obligations and the Bill of Rights Bill* (Committee on the Administration of Justice, 2022).
[38] *X and Y v Netherlands* App no 8978/80, (1985) 8 EHRR235.
[39] *Opuz v Turkey* App no 33401/02, (2010) 50 EHRR 28.
[40] *CN v United Kingdom* 32431/08 and 45886/07 App no 10865/09, [2013] 56 EHRR 24.
[41] *VCL and AN v United Kingdom* App nos 77587/12 and 74603/12, [2021] 73 EHRR 9.
[42] *A v United Kingdom* App no 25599/94, (1998) 27 EHRR611.
[43] *Z. v United Kingdom* App no 29392/95, (2002) 34 EHRR97.

The courts already give the greatest possible weight to the role of Parliament in striking such a balance. The Human Rights Memo accompanying the Bill makes explicit if brief reference to the approach of the Supreme Court's judgment in the two-child rule case.[44] If clause 7 merely recognises the existing practice, then it seems unnecessary at best.

The approach of the Supreme Court in the two-child rule case is somewhat more nuanced than the brief reference in the Human Rights Memo suggests. The Supreme Court recognises that the 'courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security' but this is not a rigid rule; the Supreme Court also says that it is 'important to avoid a mechanical approach' and that a 'more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors that may be relevant'. These factors might include differential treatment on sex or race for instance.[45] The Supreme Court also references cases like *Ghaidan* (2004) in this passage, highlighting that the approach is well established.

It is difficult to see why clause 7 makes this provision for the UK Parliament and not for the other democratic legislatures in the UK.

17. The Bill introduces a limited right to trial by jury. What would be the legal significance of the right?

It is difficult to see that there would be any meaningful change brought about by clause 9. Jury trial is compatible with Article 6 ECHR, though not required. One reading of clause 9 is that it does not provide for any right at all – it simply recognises that jury trial is one of the ways in which article 6 ECHR fair trial rights are secured.

The wording is strikingly different from jury trial rights in common law texts elsewhere e.g. the Canadian Charter of Rights and Freedoms says that 'Any person charged with an offence has the right …. to the benefit of trial by jury….'[46]. The New Zealand Bill of Rights provides that 'Everyone who is charged with an offence … shall have the right … to the benefit of a trial by jury ….'[47]

The Government consultation paper on Human Rights Act reform refers to the 'right' to a jury trial in several places.[48] However, this language is not used in the Bill nor in the Explanatory Notes when discussing the jury trial proposals.[49] This suggests, consistent with the wording of clause 9, that there is no intention to provide a right to trial by jury.

Assuming that there is some way to interpret a right to jury trial in clause 9 then there are many exceptions to it. Clause 9 includes important exceptions to jury trial including an all-purpose exception where it is 'prescribed by law' that a person should be tried without a jury.

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[44] *R (on the application of SC CB and 8 children) (Appellants) v Secretary of State for Work and Pensions and others (Respondents)* [2021] UKSC 26, (9 July 2021)

[45] Paragraph 159 of the SC case.
[46] Section 11 of the Canadian Charter of Rights and Freedoms 1982.
[47] Section 24 of the New Zealand Bill of Rights Act 1990.
[48] Consultation Human Rights Act Reform: Modern Bill of Rights Foreword, paras 9, 203.
[49] The Explanatory Notes paras 28-31 do not refer to a right to a jury trial. They only reference to a right is the article 6 ECHR right to a fair trial.

This is a very broad exception and notably applies not only to acts of the legislature but presumably also restrictions in statutory instruments and the common law.

Given the extent of the exceptions it is unlikely that this right would have any effect. If we look at the Irish Constitution as an example, we find that Article 38.5 has a right to jury trial with exceptions for minor offences, 'special courts' (in practice three-judge juryless courts considering terrorism and organised crime cases) and military tribunals.[50] There is no all-purpose exception of the type proposed in clause 9.

The right to a jury trial has given rise to extensive constitutional litigation in Ireland, and in some instances the courts have found statutory provisions to be inconsistent with the constitutional right. For instance, the courts held that a 1908 statute which provided for three-years detention in a Borstal institution for young offenders was not consistent with the right to jury trial.[51] The Irish courts also held that a statutory provision punishing someone for failing to answer a question posed by a Parliamentary Committee was not a minor offence.[52] So the Irish provision on the right to a jury trial is meaningful. The key point here is that many of the cases discussed by the Irish textbooks concern limitations *imposed by statute,*[53] or otherwise prescribed by law.[54] All these limitations on the right to a jury trial would presumably be protected by the all-purpose 'prescribed by law' exception in clause 9 in the Bill of Rights Bill For that reason, clause 9 risks being largely meaningless.

If the clause does create a right to jury trial, subject to extensive exceptions, there is a possibility that the clause might not be totally meaningless. This would be the case if it were interpreted to cover not merely whether there is a jury trial but also what is meant by a jury trial. The Irish example indicates that the right to a jury trial can raise questions other than the simple denial of a jury trial. For instance, can the legislature create a jury with a different number of jurors from the traditional number? Or provide for different majority-voting rules on a jury?[55] Or is the jury to be understood as it was understood when the Constitution was adopted?[56] Does it require that the jury deliberations be confidential?[57] Must a jury be representative of the community in some way, and if so how, and at what level (local? national?).[58] The Irish cases also suggest there might be a meaningful role where a prosecuting authority has a discretion to exercise as to whether to send someone for trial with or without a jury,[59] or where a judge has overstepped their role and directed a jury to convict.[60]

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[50] Constitution of Ireland, Article 38.

[51] *State (Sheerin) v Kennedy* [1966] Irish Reports 379, discussed in Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *JM Kelly: The Irish Constitution* (5th Bloomsbury 2019) 1389.

[52] *In re Haughey* [1971] Irish Reports 217, discussed in Hogan *JM Kelly: The Irish Constitution* 1389.

[53] Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (Clarus 2019) 318-322; Hogan *JM Kelly: The Irish Constitution* 1382ff.

[54] For instance, by a statutory instrument: *Mallon v Minister for Agriculture, Food and Fisheries* [1996] Irish Reports 517, discussed in Hogan *JM Kelly: The Irish Constitution* 1393. The Irish courts regard criminal contempt of court as a special partial exemption form the right to a jury trial: Hogan *JM Kelly: The Irish Constitution* 1444.

[55] Hogan *JM Kelly: The Irish Constitution* 1432.

[56] Hogan *JM Kelly: The Irish Constitution* 1386, 1429ff.

[57] Hogan *JM Kelly: The Irish Constitution* 1435.

[58] This was the issue in the case concerning the exemption from jury service for women in *De Búrca and Anderson v Attorney General* Jury case, [1976] Irish Reports 38.

[59] *Murphy v Ireland* [2014] 1 Irish Reports 198, discussed in Hogan *JM Kelly: The Irish Constitution* 1419.
The Irish cases also highlight that the right to a jury trial has not been such a consistent principle of the UK legal tradition as the Bill of Rights documents suggests. Justice Henchy refers to the 'bitter Irish race-memory of politically appointed and Executive-oriented judges, of the suspension of jury trial in times of popular revolt, of the substitution therefor of summary trial or detention without trial, of cat-and-mouse releases of such detention, of packed juries and sometimes corrupt judges and prosecutors….' *People (Director of Public Prosecutions) v O'Shea* [1982] Irish Reports 384, 432 quoted in in Hogan *JM Kelly: The Irish Constitution* 1419.

One would expect a serious proposal on protecting the right to a jury trial to consider some of these issues, preferably drawing on relevant comparative examples from common law countries that have included it in a bill of rights.[61] The failure of the UK Government proposals[62] to discuss any of these issues is a remarkable dereliction of sound policymaking.

The Human Rights Act and the Devolved Nations

20. How would repealing the Human Rights Act and replacing it with the Bill of Rights as proposed impact human rights protections in Northern Ireland, Scotland and Wales?

The Bill of Rights Bill consultation provides minimal discussion of the implications of the reform for the devolved nations. Apart from a discussion of the provisions in the Belfast Good Friday Agreement, there is little in the consultation on different initiatives in the devolved nations to better protect human rights.[63] The Scottish and Welsh Governments have described the proposals as 'unwelcome and unnecessary'.[64]

In relation to Northern Ireland, there are specific issues because of the Belfast Good Friday Agreement.[65] The Agreement lists the ECHR as one of the safeguards in the Strand One institutions:

> (b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission;
> (c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland;

To implement this the UK Government agrees to legislate for

> incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.

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[60] *People (Director of Public Prosecutions) v Davis* [1993] 2 Irish Reports 1, discussed in Hogan *JM Kelly: The Irish Constitution* 1431.

[61] I have focused on Ireland but the right to a jury trial also features in section 11 of the Canadian Charter of Rights and Freedoms 1982, and section 24 of the New Zealand Bill of Rights Act 1990. The consultation Human Rights Act Reform: Modern Bill of Rights only fleetingly refers to this sort of comparative experience eg paras 77-81, 85, 90 with references to Australia, Canada, New Zealand; apart from references to the Belfast Good Friday Agreement there is no discussion of Ireland's experience.

[62] The Consultation Human Rights Act Reform: Modern Bill of Rights does not canvass these issues in its two-paragraph discussion (paras 202-203). The Explanatory Notes also ignore these possible implications (paras 28-31).

[63] For a discussion of economic and social rights in the UK and the devolved regions see Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge 2020).

[64] Devolved nations criticise unwelcome and unnecessary UK Government plans to drop Human Rights Act.

[65] For a detailed examination of the issues see Colin Murray, Aoife O'Donoghue and Ben Warwick, *Policy Paper: The Place of Northern Ireland within UK Human Rights Reform* (2015) and more recently C Murray, Aoife O'Donoghue and Ben TC Warwick, 'The Implications of the Good Friday Agreement for UK Human-Rights Reform' (2017) Irish Yearbook of International Law (2017).

The ECHR has been important in the peace process in Northern Ireland. The ECtHR case law on Article 2 (right to life) provides a set of external criteria to assess investigations into killings during the conflict in Northern Ireland. The UK courts have followed this line of case law and applied it in many cases related to the conflict, including the murder of Pat Finucane[66] and the Omagh bombing.[67]

The ECHR has also been important in providing the basis for public authorities to adopt a human rights approach and in particular the Police Service of Northern Ireland (PSNI) has benefitted from this. 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 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. The Justice (Northern Ireland) Acts 2002 and 2004 were also introduced following peace settlement commitments. Also of note is the power conferred upon the Attorney General for Northern Ireland under s8 of the 2004 Act to issue and revise human rights guidance for criminal justice organisations which they must give regard to.[68]

In 2017 the Chief Constable of the PSNI made it clear that the threatened removal of the HRA would be 'hugely detrimental to both confidence in policing and the confidence of the police to make difficult decisions' and that 'Human Rights have been incorporated into our policy and it has become the norm for human rights to guide the decisions we make and the operations activity we undertake'.[69]

The proposals in the Bill of Rights Bill will likely undermine the role of the ECHR in Northern Ireland. The interpretive clause in the Bill might mean that domestic courts will be reluctant to refer to the actual case law of the ECtHR. The clause on positive obligations will prevent the recognition of any new positive obligations and hamper the implementation of existing positive obligations. This may include positive obligations in relation to investigations of killings, as well as positive obligations to protect people from violations of their rights.

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[66] *Finucane's application for Judicial Review* [2019] UKSC 7.
[67] *In re Michael Gallagher* [2021] NIQB 85 (8 October 2021).
[68] https://www.attorneygeneralni.gov.uk/human-rights-guidance
[69] http://www.humanrightsconsortium.org/wp-content/uploads/2017/04/The-Impact-of-the-HRA-in-Northern-Ireland-Conference-Report-1.pdf