Written Evidence by the Human Rights Consortium (BOR0058)

The Human Rights Consortium is a broad alliance of civil society organisations from across all communities, sectors and areas of Northern Ireland who work together to develop a human rights based society.

The Consortium is made up of 160 member groups who are organisations in their own right. Each member is non-party political, non-governmental and supportive of the Consortium principles. Our membership organisations are drawn from a range of sectors and geographic areas and include community groups, trade unions, NGO's and charities.

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

Questions 1 & 2

Clause 3 of the proposed Bill would have wide-ranging implications for how rights are interpreted and enjoyed by individuals and communities across the UK, while undermining the legitimacy of UK courts' rulings on Convention rights internationally and potentially putting them at odds with the ECtHR interpretation of specific rights. The departure from the understanding of the European Convention of Human Rights (ECHR) as a 'living instrument'[1], combined with the further leeway for divergence with case law of the European Court, appears designed to encourage domestic courts to interpret rights in a restrictive and limited manner.

While domestic courts will continue to be able to draw on case law of the ECtHR, the specific duty placed on courts to have regard to this jurisprudence will be abandoned in the new Bill. This shift in approach could impact particularly on the rights of marginalized communities, particularly those where the social and legal understanding of how human rights apply to them has significantly developed in recent decades, such as the understanding of Article 8 as including the right of transgender individuals to access legal gender recognition[2].

The importance of keeping pace with developments in how rights are understood in the European Court of Human Rights (ECtHR) cannot be understated. Section 2 of the Human Rights Act (HRA) played a key role in "bringing rights home", and was also intended by the Government of the day to "help to influence the development of case law on the Convention by the European Court of Human Rights"[3], allowing UK domestic courts to play a role in developing the understanding of rights on an international level.

The proposed move away from UK domestic Courts being bound to consider the jurisprudence of the ECtHR could also result in a significant increase in cases going to Strasbourg. If rights are not held to the same standard in domestic courts as they are in ECtHR, it is likely that more individuals who have experienced violations will attempt to rely on the European Court to address this.

Interim measures and the UK's international obligations

Question 3

[1] The ECHR as a Living Instrument: Its Meaning and its Legitimacy
[2] Grand Chamber judgment Goodwin v. United Kingdom 11.07.02
[3] Rights Brought Home: The Human Rights Bill (White Paper)

The use of interim measures by the ECtHR is relatively constrained, mostly being utilised where there is a threat to life (Article 2) or a risk of torture and inhuman or degrading treatment (Article 3), and only where there is an "imminent risk of irreparable damage" if action were not taken[4]. In this context, the decision by the Government to exempt courts from implementing them would be a significant breach of their international obligations and would seriously undermine the UK's standing on the international stage.

In 2021, only 5 requests for interim measures against the UK were granted, with 9 refused and 37 found to be outside the scope of rules governing the use of interim measures.[5] The ease with which the UK Government will abandon their international obligations, given the limited application of interim measures against the UK in a contemporary context, will having a chilling effect on the enjoyment of rights in the UK. We would consider that ignoring interim measures imposed by the European Court puts the UK on a collision course with the Court and the Article 13 remedy rights contained within the Convention itself.

Parliamentary scrutiny of human rights

Questions 4 & 5

The Governments concern with how Parliament should "scrutinise" human rights issues is, while seemingly well-intentioned, clearly misdirected. The role of Parliament is to scrutinise the work of Government, hold them to account and ensure they are upholding their international obligations, including those based on international human rights standards. Given the Government's refusal to submit this Bill for pre-legislative scrutiny, it seems to be more concerned with undermining this scrutiny rather than enhancing it.

There are clear mechanisms by which scrutiny of human rights issues are currently entwined in the work of Parliament, including through the Joint Committee and the HRA Section 19 requirement placed on ministers. While these could be strengthened and given further weight, this is clearly not the purpose of the Bill: its purpose appears to be to remove scrutiny of Government actions, undermine the enjoyment of rights, and enable further human rights violations to take place.

The removal of the Section 19 requirement for Ministers to make a statement speaking to the human rights compliance of any of their proposed Bills will have a direct impact on the level of scrutiny Bills receive on their human rights implications, while also sending a signal that compliance with rights and international standards is not a priority for this Government, nor is it something that will be taken seriously or addressed if raised.

Interpreting and applying the law compatibly with human rights

Questions 6 & 7

Section 3 of the HRA was another key component in "bringing rights home" and ensuring that any legislation that was passed domestically would be interpreted and implemented, so far as possible, in compliance with Convention rights. It provided domestic courts with a vital remedy to ensure that legislation, as applied, did not result in rights violations, and has

[4] ECtHR: Rules of Court (Rule 39)
[5] https://www.echr.coe.int/Documents/Stats_art_39_01_ENG.pdf

enabled the courts to curb the excesses of Government policies which are leading to a diminution of rights.

In practice, this meant that there were comparatively few cases where legislation has been declared incompatible with the ECHR as courts have been able to ensure that the majority of UK laws were interpreted and implemented in a way that upheld rights. The removal of this duty will likely result in more declarations of incompatibility, which the Government or Parliament may choose to remedy by amending legislation; however, they are not legally required to do so. Given the current direction of travel for the Government, wherein they have attempted to undermine and target human rights lawyers[6] while scapegoating the ECHR for preventing them from committing rights violations[7], it seems unlikely that declarations of incompatibility will be an effective remedy given the Government's expected reluctance in expediently addressing any incompatibilities identified within their legislation.

The inclusion of Clause 40 within the Bill is extremely worrying. The suggestion that the Secretary of State may choose to 'preserve or restore' the effect of a previous judgement made under Section 3 suggests that any judgement not preserved would be abandoned and no longer form the basis of implementation of the relevant legislation. This has the potential to cause widespread uncertainty and a significant amount of litigation, throwing into disrepute the interpretation of countless pieces of legislation which have been subject to Section 3 case law.

The removal of Section 3 and inclusion of Clause 40 call into serious question the ongoing compatibility of current laws on the statute books with the ECHR. Any legislation which has been subject to judicial review, or where the interpretation or implementation of legislative provisions has been impacted by Section 3, could potentially be in breach of Convention rights from the minute this Bill receives royal assent. It cannot be overstated the degree to which this could cause widespread political, legal, and social instability and disruption.

Question 8

Positive obligations have been an essential tool for domestic courts and the ECtHR to ensure that states parties proactively uphold human rights standards. In Northern Ireland, these positive obligations have played a key role in the peace process and in dealing with legacy issues. Case law developed around the Article 2 right to life placed a positive obligation on the state to carry out effective and independent investigations into deaths during the troubles. This has been used to ensure adequate investigations in a range of cases such as the murder of Pat Finucane[8] and the Omagh bombing[9].

The development of case law surrounding positive obligations has been another essential remedy for addressing rights violations and aiming to ensure those violations do not continue to occur. Positive obligations relating to ECHR Article 3, freedom from torture and inhumane treatment, have been used to identify areas where legislation has provided insufficient levels

[6] Conservative conference: Boris Johnson's attack on 'lefty human rights lawyers' branded shocking by Bar Council

[7] UK must curb influence of European human rights rules, says Braverman

[8] In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)

[9] Omagh Bombing Judgement – Judicial Communications Office

of protection from harm, e.g. legislation governing ‘reasonable chastisement’ failing to prevent instances of child neglect and abuse[10].

The singling out of, in particular, those who have committed criminal offences as being somehow less deserving of having their rights upheld is extremely concerning, and continues the theme of this Rights Removal Bill in not only undermining the rights themselves but also targeting the universality of how those rights are applied and enjoyed. From the specific carve-outs for deportation law, government exemptions from free speech protections, to having courts give “great weight to the need to avoid” ensuring police uphold the rights of individuals in custody, the Government has a clearly defined idea of who should be allowed to enjoy their rights and the limited manner in which those rights should be understood.

Question 9

The functioning and independence of Parliament, as well as their ability to make decisions to shape the legislative direction of the UK, is essential to help ensure that individuals can engage with democracy and influence that direction of travel through elections. The judiciary plays a very key role in this relationship, though, by providing a check on Parliament and Government to ensure that the base-line of rights and freedoms are upheld, regardless of the ideology or policies of the Government of the day.

There have been a range of instances in the past number of years demonstrating how the Government and Parliament have not struck the appropriate balance between policy aims and Convention rights. The Rwanda scheme pursued by the Home Office under the new Nationality and Borders Act is a key recent example, with the ECtHR issuing an interim measure to prevent the deportation of an individual to Rwanda. In liberal democracies across the world, far-right authoritarian regimes are taking advantage of the loosening of human rights protections and regulations, and clamping down on the activities of civil society and engaged actors working to promote human rights[11]. The reframing of responsibilities and powers within Clause 7 towards Parliament and away from international human rights standards and an independent judiciary is extremely worrying for this reason: it provides the environment and judicial leeway for this or any future government to seize more control, pass more laws undermining human rights, and provides the ideological cover to continue ignoring essential international obligations.

Question 10

The HRA has provided the mechanisms and impetus for public authorities to implement meaningful, rights-based changes to their operations. In particular, the Section 6 requirement for public authorities to act in compliance with Convention rights has been transformational in many areas, particularly with regards to policing in Northern Ireland. The Section 6 duties of the HRA have been an essential component of a revised policing framework in Northern Ireland that places human rights compliance at its core. One of the key functions of the Northern Ireland Policing Board, as set out in s3(3)(b)(ii) of the Policing (Northern Ireland) Act 1998, is to monitor compliance with the 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. While the appointment of Human Rights Advisors

[10] Case of A v The United Kingdom - ECtHR
[11] WEF: 5 things to know about the decline of human rights

to the Policing Board, has in turn helped develop a monitoring framework to measure the work of the police against human rights standards[12].

Under the proposed changes to our human rights framework, those interacting with state agencies cannot be assured that their rights are upheld. In cases where they aren't, they also cannot be assured that there will be an adequate remedy for this rights violation due to various other clauses in the Bill. This will have wide-ranging ramifications, particularly for already marginalized or vulnerable groups in the UK including disabled people, women, young people, LGBTQ+ people, migrants and people of colour, and could result in further disillusionment within those communities of state agencies.

Enforcement of Human Rights: Litigation and remedies

Questions 11 & 12

We believe that the human rights framework envisaged by the Bill is a step down from the current standards of protection established by the Human Rights Act. The Bill is designed to restrict rights, discourage human rights claims and protect the Government from adequate scrutiny. Almost every aspect of the Bill, such as the removal of essential remedies including positive obligations and interpretive obligations, is designed to undermine the ability of domestic courts to hold Government accountable or to restrict the ability of individuals within the UK to enjoy and enforce their rights. Even instances where the Bill purports to be expanding or promoting specific rights, such as the Clause 4 promotion of the right to "freedom of speech", contains provisions undermining the right or enabling further state-sanctioned attacks on those rights.

As will be explored in the 'Human Rights Act and the Devolved Nations' section, the HRA has been essential to delivering on key commitments within the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast/Good Friday Agreement. The commitment pertinent to this question refers to the Article 13 right to 'remedies for breach of the Convention'. We contend that the Clause 5 restrictions on the use of positive obligations, as well as the removal of the Section 3 interpretive duty, undermines the Article 13 right to seek an effective remedy. While damages may still be awarded for rights violations, the Bill removes essential remedies courts could deploy to ensure that rights violations are meaningfully addressed wherever they occur.

Not only is the additional 'permission stage' introduced through Clause 15 designed to reduce the accessibility of the courts, it also ignores the already existing permission stage within the HRA. Applicants are already required to prove that they have or will be a victim of a human rights violation. This increased requirement to prove 'significant disadvantage' – or, in the absence of this, 'wholly exceptional public interest' - will discourage victims of rights violations from attempting to seek remedies. Combined with the aforementioned removal of remedies, this Bill will have the effect of discouraging domestic human rights claims and creating an environment where it is increasingly difficult to enjoy and uphold your rights across the UK.

Question 13

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[12] Human Rights: PSNI Policies & Procedures

A foundational principle of the human rights legal framework, as asserted in the Universal Declaration of Human Rights, is the universality of rights[13]. Universal application of rights and availability of remedies/damages for rights violations is essential to preserve the integrity of the judicial system and ensure that those rights are respected and upheld in law. The conduct of victims should not be relevant to the damages or remedies awarded for violations of rights: the substance of the rights violation which occurred should be the primary concern of the courts. Further impetus for courts to differentiate the awarding of damages or remedies based on the conduct of victims in unwelcome and unnecessary.

Specific rights issues

Questions 14 & 15

As referenced above, the universality of rights is absolutely integral to the understanding of how rights should be enforced and interpreted. The specific targeting of the rights of prisoners through Clause 6, as well as the rights of migrants and refugees through Clauses 8 and 20, sets an extremely dangerous precedent that the selective application of rights is accepted and even encouraged by the UK Government.

While the Human Rights Act Reform consultation did not consult on these specific proposals, the Prison Reform Trust rejected the proposed reforms in their entirety in their consultation response[14], stating that "the HRA has played a significant role in giving individuals, including those held in prison, the power to enforce their rights in practice". We believe the proposals to rebalance the focus of the courts from human rights to individual conduct and "reducing risk to the public" regarding the rights of prisoners is unnecessary and extremely concerning.

The provisions in Clause 8 would enable the Government to even further restrict the cases in which individuals facing the prospect of deportation would be able to rely on their Article 8 right to private and family life. This would allow, for instance, the Government to restrict rules to such an extent that the length that an individual has resided in the UK – including for those whose entire life from early childhood has been spent in the UK – could be made irrelevant in decisions concerning their deportation[15]. It is evident that Clauses 8 and 20 are a clear departure from the ECHR understanding of how rights should be applied, and will strip rights from many individuals seeking safe refuge in the UK.

Questions 16 & 17

We are not in favour of the HRA being amended in a way which would allow the UK Government to derogate from the ECHR in operations overseas by the UK military. The protections provided to UK military personnel operating overseas by the HRA have been important protections that we wish to see retained.[16]

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[13] Universality, cultural diversity and cultural rights - OHCHR
[14] Prison Reform Trust evidence to the Ministry of Justice consultation Human Rights Act Reform – February 2022
[15] Deportation and Clause 8 of the Bill of Rights
[16] See Smith v MoD, [2013] UKSC 41; [2014] AC 52

Article 6 of the Human Rights Act already protects the right to a fair trial and this can already be utilised where appropriate to provide for jury trials. There has been no substantive case made for a change in this regard.

Questions 18 & 19

The Bill's freedom of speech provisions were characterised by the Bill's sponsor Dominic Raab as an effort to prevent this right being "whittled away" by "wokery and political correctness". It is likely that, in the context of an increased number of debates around free speech relating to issues like the expression of so-called 'gender critical' beliefs in workplaces[17] and universities[18], this clause could attempt to be leveraged to clamp down on the ability of minoritized and marginalised communities to challenge harassment and abuse.

The Article 10 right to free expression attempts to strike a workable balance between the right to express personal beliefs and opinions with the right of individuals to exist safe from harm and the requirement to adequately address harassment, hate speech, and other forms of expression which can cause harm. It is likely that the Government chose to only focus on 'freedom of speech' as it has become specifically coded in contemporary socio-political discussions as the right to express 'offensive' or 'inflammatory' speech[19], particularly within right wing, anti-LGBTQ and white nationalist groups. [20]

It is likely that these changes are an attempt to enshrine a conservative and regressive approach to 'freedom of speech' within the domestic jurisprudence, all the while clamping down on the ability of individuals to organize protests and exercise their freedom of speech against government overreach and the removal of rights.

The Human Rights Act and the Devolved Nations

Questions 20 & 21

We would refer to the submissions made by the Human Rights Consortium Scotland for the specific issues relating to the impact of the Bill in Scotland.

The Rights Safeguards and Equality of Opportunity section of the Belfast/Good Friday Agreement made a specific commitment to incorporating the ECHR domestically. In paragraph 2 of that section it states, 'The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.'

The Human Rights Act and the Northern Ireland Act gave effect to these commitments, with the intention that a for-purpose Bill of Rights for Northern Ireland would be delivered by the Government to supplement those rights. 24 years on, Northern Ireland is still without a Bill of Rights, and the vital protections achieved through the Human Rights Act are under threat.

The commitment to incorporation of the ECHR domestically and the power for the domestic courts to strike down Assembly legislation as a breach of the ECHR will remain in place

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[17] Maya Forstater: Woman wins tribunal appeal over transgender tweets
[18] The university 'free speech crisis' has been a rightwing myth for 50 years
[19] The free speech panic: how the right concocted a crisis
[20] Right-wing fundamentalists are using the slogans of free speech to purge dissent

under the new Bill of Rights Bill. However, for the two remaining elements of the B/GFA commitment there is a clear breach of the commitment to these elements within the proposed legislation.

The restrictions on the use of positive obligations and the removal of the interpretative obligation outlined above would be a clear breach of the commitment in the B/GFA to provide remedies for breaches of the Convention. Without access to these remedies to ensure the cause of rights violations is meaningfully addressed, courts will be forced to rely on e.g. declarations of incompatibility, which the Government may choose to ignore. While NI courts will continue to have the power to strike down Assembly legislation which is deemed incompatible with Convention rights, no such remedy will be available for UK-wide legislation with regards to their impact in Northern Ireland.

Likewise, the application of other restrictions and changes to how rights are applied and interpreted under this Bill may result in outcomes that are themselves breaches of that same commitment. For instance, the potential diminished standard of judgments or rights protections that individuals would experience if domestic courts do not properly take account of previous ECtHR decisions could be considered in breach of the commitment made by the UK Government to provide full access to Convention rights. Further the introduction of a more restrictive 'permission stage' would very likely be a breach of the B/GFA commitment to providing direct access to the domestic courts for breaches of the Convention. In effect these proposals represent both immediate and potential violations of the Belfast/Good Friday Agreement and a significant diminishment of the rights which individuals have enjoyed access to in the period since that important peace treaty.

There are also potential issues with regarding interactions between this Bill and the NI Protocol. In Article 2 of the Protocol, the UK Government committed to "no diminution of rights in Northern Ireland as a result of Brexit". While the passage of this Bill is not necessarily as a result of Brexit, if it were passed in the pre-Brexit period individuals would have been able to rely on underpinning EU laws to protect and uphold their rights. With this underpinning EU law no longer accessible, any diminishment or weakening of the protections within the HRA – such as Clause 8 placing stringent conditions on human rights cases relating to deportation law – could constitute a violation of Article 2, as it would not have been possible were it not for Brexit.

Given the constitutional significance of the Human Rights Act within Northern Ireland, its provisions underpinning key Belfast/Good Friday Agreement commitments, and the centrality of rights to the peace process here in its entirety, it is essential that consent is sought from the Northern Ireland Assembly for this seismic shift in our rights framework.

26/08/2022