

**Written evidence from the Committee on the Administration of Justice (CAJ)
(HRA0066)**

1. This submission is filed by the Committee on the Administration of Justice (CAJ) in response to the call for evidence by the Joint Committee on Human Rights as it carries out a short inquiry to inform its response to the Independent Review of the Human Rights Act (Review). CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law. CAJ has previously filed a response to the call for evidence by the Review.¹
2. We query the need for the Review and echo the comments of Baroness Hale in her evidence to the Joint Committee on Human Rights in its examination of this Review.²

Particular importance of the Human Rights Act to Northern Ireland

3. The incorporation of the ECHR was a basic ingredient of the human rights protections in the Belfast/Good Friday Agreement (GFA).³ It was regarded as so important that the Agreement also committed the Irish Government to incorporate the ECHR under the ‘equivalence’ provisions and established the European Convention of Human Rights Act 2003. In our view, any amendment to the HRA insofar as it has effect in Northern Ireland would constitute a flagrant breach of the Agreement and potentially destabilise the peace settlement. It is our view that it is not necessary or appropriate to change the operation of the HRA in Northern Ireland.
4. The Agreement, in addition to being overwhelmingly approved by referendum, in Ireland, North and South, was also incorporated as a treaty between the UK and Ireland and lodged with the UN (UK Treaty Series no. 50 Cm 4705). Article 2 of the treaty binds the UK to implement provisions of the annexed Multi-Party Agreement, which correspond to its competency. Paragraph 2 of the Rights, Safeguards and Equality of Opportunity section of this Agreement set out the commitment to incorporate the ECHR into Northern Ireland law.⁴ This commitment was given legislative effect through the HRA 1998 and the Northern Ireland Act 1998. We should note that full incorporation, and therefore the full impact of this legislation, involves both the letter of the Convention and its jurisprudence. The link between domestic courts and the jurisprudence of the ECtHR is threatened in this review.

¹ <https://caj.org.uk/wp-content/uploads/2021/03/CAJ-Response-to-the-Independent-Human-Rights-Act-Review-Mar-21.pdf>

² When she noted ‘I do not think there is a problem or any need to fix it. I cannot myself think of a fix that would make things better as opposed to potentially making things worse’. Oral evidence: The Government’s Independent Human Rights Act Review, HC 1161 on 3.2.21
<https://committees.parliament.uk/oralevidence/1661/pdf/>

³ Paragraph 2 of the Rights, Safeguards and Equality of Opportunity section of this Agreement set out this commitment
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf

⁴ Ibid.

5. The Agreement also commits to safeguards to ensure the Northern Ireland Assembly, or public authorities, cannot infringe the ECHR. Any interference with this safeguard takes away a significant pillar of the human rights architecture, both of the Agreement and Northern Ireland society. It threatens the whole basis of trust in the new institutions that has been painstakingly built up since 1998. It is also of particular importance to note that any amendment of ‘relevant legislation,’ including the HRA, necessitates a process of review between the UK and Irish Governments in consultation with the NI Assembly parties. Paragraph 7 of the section ‘Validation, Implementation and Review’ of the Agreement makes this clear.⁵
6. In relation to other key provisions of the peace settlement, the HRA 1998 is, for example, also vital to the framework for the human rights compliance of policing in Northern Ireland. 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. Of particular 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.⁶
7. 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’.⁷
8. Also of particular importance is Article 2 of the NI Protocol to the Withdrawal Agreement, which provides for ‘no diminution’ of certain GFA rights, including the incorporation of the ECHR, as a result of Brexit. Whilst the current Review of the HRA is also part of a broader trend, its linkage to Brexit is clear, not least in its timing. It also stems from a similar cultural and political attitude towards external influence on domestic law. It is clear that any diminution of the relevant GFA rights, including the incorporation of ECHR rights, that follow and relate to Brexit, will be unlawful under the domestic incorporation of Article 2(1) of the Protocol. It is possible that government could manage to convince a court that a diminution of ECHR incorporation in NI law as an outworking of this review of the HRA was nothing to do with Brexit. This would be unlikely since it would be taking place just after Brexit, after significant conflation of the EHCR and EU during the whole Brexit process and, at times, a ‘twin’ campaign against EU and ECHR membership. In that case, we would face an absurd political scenario in which GFA rights that the UK has steadfastly legally guaranteed not to diminish as a result of Brexit, given their importance to the peace process, would be diminished anyway for another reason.

⁵ Ibid. See page 31 & 32 - Validation, Implementation and Review section

⁶ <https://www.attorneygeneralni.gov.uk/human-rights-guidance>

⁷ <http://www.humanrightsconsortium.org/wp-content/uploads/2017/04/The-Impact-of-the-HRA-in-Northern-Ireland-Conference-Report-1.pdf>

9. The conclusion is that breaking or weakening the link with ECtHR jurisprudence, or in other ways restricting the application of the HRA, could trigger the attention of the ‘dedicated mechanisms’ set up under the Protocol to protect rights.⁸
10. It is important to note that the Agreement provides for ECHR incorporation to be complemented and supplemented by a Bill of Rights for Northern Ireland⁹ and a Bill of Rights Ad Hoc Committee of Members of the Legislative Assembly was established¹⁰ to examine the case for a Bill of Rights that builds on and surpasses the protection in the ECHR. Again, any significant amendment of the HRA, especially in regard to weakening the link with ECtHR jurisprudence, would go against this direction of debate.

Applicability of the HRA to the actions of the UK (or its agent) overseas

11. In our view, ECHR binds the UK state in general and is not restricted to actions on the territory of the UK or other jurisdictions, which it legally controls. The law on this matter as set out by the European Court of Human Rights in *Al-Skeini v UK* and *Al-Jedda v UK* should continue.^{11 12}
12. We are concerned at the extraterritorial effect of the Covert Human Intelligence Sources (Criminal Conduct) Act 2021, which allows authorisation of agents of a number of public authorities to commit crimes, with no express limits, even over murder. This includes the power to authorise such CHIS conduct abroad. Contradictory advice by the Home Office ECHR Memorandum and the Solicitor General has created legal uncertainty about the scope of the HRA in such cases.¹³ Any amendment to the HRA that reduced its territorial reach or relevance to the action of authorised state agents would breach the incorporation commitment.

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⁸ See, for e.g. CAJ evidence to the Northern Ireland Affairs Committee on its inquiry into ‘Citizenship and Passport Processes in Northern Ireland’, February, 2021 : <https://committees.parliament.uk/writtenevidence/22343/html/> and CAJ briefing note EU-UK future relationship cliff edge: Outstanding issues around access to EU and human rights in the Northern Ireland context, August 2020: <https://caj.org.uk/wp-content/uploads/2020/08/Rights-and-the-EU-future-relationship-Aug-20.pdf>

⁹ Ibid. See pages 21-21, Rights, Safeguards and Equality of Opportunity, Human Rights

¹⁰ <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/>

¹¹ (2011) 53 EHRR 15 and (2011) 53 EHRR 23 respectively

¹² See Model Bill Team Submission to the JCHR: <https://caj.org.uk/wp-content/uploads/2020/11/Model-Bill-Team-Submission-to-the-JCHR-on-Overseas-SPV-Bill.pdf>

¹³ See paragraph 16, Covert Human Intelligence Sources (Criminal Conduct) Bill, ECHR Memorandum by the Home Office; [https://publications.parliament.uk/pa/bills/cbill/58-01/0188/CHIS%20\(CC\)%20Bill%20-%20ECHR%20Memo%20FINAL.pdf](https://publications.parliament.uk/pa/bills/cbill/58-01/0188/CHIS%20(CC)%20Bill%20-%20ECHR%20Memo%20FINAL.pdf)

See in particular columns 1017 and 1023:

[https://hansard.parliament.uk/commons/2021-02-24/debates/0D04B70B-0557-4E9F-BF11-CA8AB040B4B9/CovertHumanIntelligenceSources\(CriminalConduct\)Bill](https://hansard.parliament.uk/commons/2021-02-24/debates/0D04B70B-0557-4E9F-BF11-CA8AB040B4B9/CovertHumanIntelligenceSources(CriminalConduct)Bill)