

Equality Commission for Northern Ireland

**Response to the UK Joint Committee on
Human Rights call for evidence**

Legislative Scrutiny: Bill of Rights Bill

26 August 2022

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1. Executive Summary

- 1.1 The Equality Commission welcomes the opportunity to contribute to the Inquiry by the Joint Committee on Human Rights into the Bill of Rights Bill.
- 1.2 The Equality Commission for Northern Ireland ('the Equality Commission') is an independent public body established under the Northern Ireland Act 1998.

Overarching Concerns

- 1.3 Overall, the Commission is not persuaded that the Government has demonstrated a need for reform of the 1998 Human Rights Act, including the current proposal to repeal the Human Rights Act and replace it with the 'Bill of Rights'.
- 1.4 The Human Rights Act 1998 (Human Rights Act) should not be reformed without a convincing case that such reform is necessary to further improve access to rights. The Commission considers that, in general terms, the specific outworkings of Government proposals in practice are unclear.
- 1.5 The Commission considers that the provisions in the Bill, when taken together, present a significant change in the balance between human rights and governmental power, with potentially negative impacts for legislation supporting the elimination of discrimination in Northern Ireland.
- 1.6 The Commission is concerned that the vast majority of our input and [formal response](#) to the Government [consultation](#) 'Human Rights Act Reform: a Modern Bill of Rights' has not been addressed in the subsequently published [Bill](#) or wider supporting documents published alongside the Bill.
- 1.7 We are also concerned that the Government has not set out in detail what consideration has been given to the Bill's compliance with Article 2 (1) of the Protocol, and that the Bill contains no safeguards to ensure that the Bill, as applied, does not have the potential to give rise to a breach of Article 2.
- 1.8 Overall, the Commission is concerned that the Bill, as currently drafted, could potentially adversely impact on individuals from across the grounds covered by Section 75 of the Northern Ireland Act (1998) and considers that Government should

further assess and mitigate potential impacts on these groups. Such assessment should include the engagement with, and involvement of, individuals from across those protected grounds.

1.9 Accordingly, based on the information and proposals presented, the Commission is not supportive of the Government's proposed reform of the 1998 Human Rights Act.

1.10 We summarise below the Commission's recommendations in response to the Government's overall proposals in general, and then to the specific questions raised by the Joint Committee in its call for evidence. These points are further expanded on in the main body of our submission.

General Principles

- The Human Rights Act 1998 should not be reformed without a convincing case that such reform is necessary to further improve access to rights
- Government should ensure the progressive realisation of rights and ensure that enjoyment of rights does not regress
- The UK Government and the NI Executive should take measures to promote awareness and understanding of equality and human rights and responsibilities
- Rolling impact assessment and stakeholder engagement should inform steps to improve realisation of human rights under the Human Rights Act

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

- Ensure the continued role of the ECHR and ECtHR in judicial interpretations

Parliamentary scrutiny of human rights

- Ensure legislation which is not compliant with the ECHR can be dealt with effectively

Interpreting and applying the law compatibly with human rights

- Ensure the continued role of the ECHR in judicial interpretations
- Equality groups should continue to benefit from the development of positive obligations

Enforcement of Human Rights: Litigation and remedies

- Avoid introducing additional barriers to bringing cases under Human Rights Act
- Past conduct should not be considered when deciding remedies in Human Rights Act cases.

Specific rights issues

- The scope of human rights should not be disproportionately limited
- Ensure freedom of expression is balanced with competing rights, in compliance with international human rights obligations

The Human Rights Act and the Devolved Nations

- Human rights law should reflect the particular circumstances in Northern Ireland

Article 2 considerations

- The UK Government should set out in detail what consideration has been given to the Bill's compliance with Protocol Article 2 (1).
- The UK Government should give consideration to including appropriate safeguards in the Bill, so as to ensure that the Bill, as applied, does not have the potential to give rise to a breach of Protocol Article 2.

2 Introduction

- 2.1 The Equality Commission welcomes the opportunity to contribute to the [call for evidence](#) by the Joint Committee on Human Rights into the Bill of Rights Bill.
- 2.2 The Equality Commission for Northern Ireland ('the Equality Commission') is an independent public body established under the Northern Ireland Act 1998, with responsibility for implementing equality legislation across a range of grounds. It has specific powers regarding Article 2(1) of the Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement; and has also been designated as an 'independent mechanism' under the UN Convention on the Rights of Persons with Disabilities.
- 2.3 Further information on the role and remit of the Commission is set out in **Annex 1**.

3 Overarching Concerns

- 3.1 The Commission considers that the provisions in the Bill, when taken together, present a significant change in the balance between human rights and governmental power in the United Kingdom as a whole, and in Northern Ireland specifically, and could fundamentally change the results of domestic litigation, with potentially negative impacts for legislation supporting the elimination of discrimination in Northern Ireland.
- 3.2 The Commission is concerned that the vast majority of our input and [formal response](#) to the Government [consultation](#) 'Human Rights Act Reform: a Modern Bill of Rights' has not been addressed in subsequently published [Bill of Rights Bill](#) or wider supporting documents published alongside the Bill¹.
- 3.3 Set out in the sections below are the Commission's recommendations in response to Government's overall proposals in general, and then to the specific questions raised by the Joint Committee in its call for evidence. The Commission has responded only to those questions and issues within its role and remit.

¹ Wider supporting documents published include: the Government's [response to the December consultations](#); [Explanatory Notes](#) on the Bill; an [Impact Assessment](#) which includes an equality impact assessment of the reform proposals 'in relation to the Ministry of Justice's duty under section 149 of the Equality Act 2010'; and a [Memorandum](#) on the implications of the Bill for the UK's obligations under the European Convention on Human Rights.

4 General Principles

The Human Rights Act 1998 should not be reformed without a convincing case that such reform is necessary to further improve access to rights

- 4.1 The Commission is not persuaded that the Government has demonstrated a need for reform of the 1998 Human Rights Act, including the current proposal to repeal the Human Rights Act and replace it with the Bill of Rights.
- 4.2 The Commission considers that, in general terms, the specific outworkings of Government proposals in practice are unclear.
- 4.3 Accordingly, based on the information and proposals presented, the Commission is not supportive of the Government's proposed reform of the Human Rights Act.
- 4.4 Government should be specific about the intended and anticipated impact(s) of proposed changes, conveying their case for any changes via an explicit presentation of relevant evidence and stakeholder input.

Supporting rationale

- 4.5 The Human Rights Act incorporated, in part, the European Convention on Human Rights (ECHR) into UK law. Both the European Court of Human Rights (ECtHR) and the UK Supreme Court have provided judgments that are of significance across the protected grounds/groups of Section 75 of the Northern Ireland Act (1998): age,² race and ethnicity,³ sexual orientation,⁴ disability,⁵ gender,⁶ religion and belief,⁷ and dependents⁸. In Northern Ireland,

² Schwizgebel v Switzerland, application no 25762/07, 10 June 2010.

³ Timishev v Russia, application nos 55762/00 and 55974/00, 13 December 2005; Sejdic and Finci v Bosnia-Herzegovina, application nos. 27996/06 and 34836/06, GC, 22 December 2009.

⁴ Salgueiro da Silva Mouta v Portugal, application no 33290, 21 December 1999; L and V v Austria, application nos 39392/98 and 39829/98; Schalk and Kopf v Austria, application no 30141/04, 24 June 2010.

⁵ Alajos Kiss v Hungary, application no 38832/06, 20 May 2010; Glor v Switzerland, application no 13444/04, 30 April 2009; Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47.

⁶ Abdulaziz, Cabales and Balkandali v United Kingdom, application nos 9214/80, 9473/81 and 9474/81; Konstantin Markin v Russia, application no 30078/06, 22 March 2010;

⁷ Hoffmann v Austria, application no 12875/87, 23 June 1993; Vojnity v Hungary, application no 29617/07, 12 February 2013; Eweida v United Kingdom, application nos 48420/10, 59842/10, 51671/10 and 36516/10.

⁸ DA [2019] UKSC 21.

there have been a number of important cases where individuals have successfully challenged the actions of public authorities as being contrary to their rights under the Human Rights Act⁹.

- 4.6 Given these benefits, a clear and meaningful case must be made for reform. The Commission is not convinced the Government has set out such a case for its proposal to repeal the Human Rights Act and replace it with a Bill of Rights.
- 4.7 We note the Government's view that *'reform is now required to ensure public confidence in the human rights system, to balance the rights of the individual with the diverse interests of society, to curb risk aversion for those delivering public services on the frontline, to address concerns with how the Human Rights Act operates in practice and to address democratic deficits caused by the Human Rights Act's framework'*¹⁰.
- 4.8 However, there is no indication that reform will improve access to rights, and the Government's Human Rights memorandum suggests that much of the Bill will allow courts to interpret and apply the Convention rights more restrictively than the ECtHR¹¹.
- 4.9 Further, any case for change should be based on robust evidence and stakeholder input. We note that the Government has not published the responses to its consultation on Human Rights Act Reform: A Modern Bill of Rights, instead providing a quantitative analysis¹².
- 4.10 We also note the concerns raised by numerous legal academics and professionals that such significant reform is unnecessary¹³, including the NI Human Rights Commission's rejection of the premise of the proposals for reform¹⁴.

⁹ See for example, RG (Adoption; unmarried couple) [2008] UK House of Lords 38, involving restrictions in Northern Irish law on the ability of unmarried partners to adopt children.

¹⁰ MOJ (2022) [Draft Bill of Rights: Impact Assessment](#), p. 1.

¹¹ MOJ (2022) [Bill of Rights: European Convention on Human Rights Memorandum](#), para 10.

¹² [Human Rights Act Reform: A Modern Bill of Rights \(parliament.uk\)](#)

¹³ For instance: QUB Human Rights Centre (2022) [Response to the Ministry of Justice's Consultation Paper on Human Rights Act Reform](#), paras 3, 110; CAJ (2022) [CAJ Response to the Ministry of Justice Consultation 'Human Rights Act Reform: A Modern Bill of Rights'](#)

¹⁴ NIHRC (2022) [NIHRC response to the consultation on Human Rights Act Reform: a Modern Bill of Rights](#)

Government should ensure the progressive realisation of rights and ensure that enjoyment of rights does not regress

- 4.11 Human Rights protections must be compliant with international law and commitments.
- 4.12 Government must adhere to the principle of ‘non-regression’ and ensure that current levels of protection under the Human Rights Act and other ratified human rights instruments are not eroded¹⁵.
- 4.13 Any regression of human rights could negatively impact across the equality grounds.

Supporting rationale

- 4.14 The Commission welcomes the Government’s commitment to the ECHR¹⁶.
- 4.15 However, we are concerned that the Bill of Rights Bill aims to allow courts to apply the ECHR in a more restrictive manner. It will also prevent the creation of new positive obligations and restrict rights in deportation appeals.
- 4.16 This is seemingly a regression of rights, not progressive realisation.
- 4.17 Further, the Government’s broader international human rights commitments are also of importance. Human Rights protections should be in line with the UK Government’s international human rights law commitments beyond the ECHR, such as UNCRPD, CEDAW, CERD, CRC, ICESR etc.

The UK Government and the NI Executive should take measures to promote awareness and understanding of equality and human rights and responsibilities

- 4.18 We recommend measures to raise awareness and promote understanding, including across and within departments and the wider public, of the UK Government’s obligations under a range of

¹⁵ ECNI (2021) [Submission to Ad Hoc Committee on a Bill of Rights for Northern Ireland](#), para 2.7

¹⁶ MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588, p.3.

international human rights Conventions and the UN Sustainable Development Goals ('SDGs')¹⁷.

- 4.19 Additional benefits will accrue for individuals and society as a whole if individuals and service providers are aware of and understand their respective rights and responsibilities.

Supporting rationale

- 4.20 It is vital that people in Northern Ireland, and the UK more broadly, are aware of and understand what their rights are and the difference that these rights can make to their day-to-day lives. It is also essential that public authorities have clear guidance on their responsibilities under the Human Rights Act and the measures they are required to take in order to comply.
- 4.21 This view has been echoed by the IHRAR¹⁸ which recommended 'consideration is given by Government to developing an effective programme of civic and constitutional education in schools, universities and adult education. Such a programme should, particularly, focus on questions about human rights, the balance to be struck between such rights, and individual responsibilities'.
- 4.22 The SDGs include goals and targets on tackling poverty and reducing inequalities, and a specific goal on achieving gender equality (Goal 5).
- 4.23 We are disappointed to note that the Bill of Rights Bill's impact assessment refers to costs for training judges and public authorities¹⁹, but not to promoting awareness and understanding in wider society. There appears to be no proposals to improve understanding of equality and human rights through this Bill through wider education.

Rolling impact assessment and stakeholder engagement should inform steps to improve realisation of human rights under the Human Rights Act

- 4.24 Government should take steps, on a rolling basis, to identify how individuals from across the full range of equality categories and

¹⁷ ECNI (2021) [Submission to Ad Hoc Committee on a Bill of Rights for Northern Ireland, paras 8.1-8.4.](#)

¹⁸ MOJ (2021) [The Independent Human Rights Act Review](#) CP586, paras 52-57.

¹⁹ MOJ (2022) [Draft Bill of Rights: Impact Assessment](#), pp. 38-39, paras 252-259.

service providers take account, and make use, of the human rights framework with a view to seeking out opportunities to promote equality of opportunity and mitigating any negative impacts.

- 4.25 Government should further assess and mitigate potential impacts on groups covered by Section 75 of the Northern Ireland Act 1998. Such assessment should include the engagement with, and involvement of, individuals from across those protected grounds.
- 4.26 Rolling impact assessment and stakeholder engagement should be a key element of such ongoing review, and may suggest how, and where there is scope to better to improve access to rights – in Northern Ireland and across the UK.
- 4.27 Action should be taken to encourage and secure the participation of under-represented groups, such as disabled people, in accessing rights.
- 4.28 If the Bill of Rights Bill passes into law, such rolling impact assessment should inform its development, and subsequent review or amendments.

Supporting rationale

- 4.29 Due to lack of data²⁰ and the lack of detail in some of the Government proposals, it is extremely difficult to accurately envisage how these proposals may affect different equality groups at present.
- 4.30 The Government's equality impact assessment outlines that in many areas it is 'difficult to ascertain the impacts for those with protected characteristics'.
- 4.31 However, overall the Commission is concerned that the Bill, as currently drafted, could potentially adversely impact on individuals from across the grounds covered by Section 75 of the Northern Ireland Act (1998)
- 4.32 The impact assessment states that *'Using the limited data that are currently available does, however, allow us to identify some individuals with protected characteristics that are over-represented in the populations described in this high-level assessment of equality impacts, who may be more likely to be affected by the proposed*

²⁰ MOJ (2022) [Draft Bill of Rights: Impact Assessment](#), paras 272-315.

*changes. These include men, those aged 18-49, and individuals from an ethnic minority background*²¹.

- 4.33 It is clear that the ECHR and the Human Rights Act have been important routes for equality groups to access rights.
- 4.34 On a rolling basis, the Government should, underpinned by data and informed by engagement with equality groups, seek to assess and identify opportunities to better advance equality.
- 4.35 Such an assessment should consider key barriers and enablers to advancing the realisation of rights and responsibilities.
- 4.36 The Government impact assessment for the Bill of Rights Bill advises that the *'legislation will be reviewed in line with post-legislative scrutiny procedures'*²². It is not clear that this means a rolling impact assessment.
- 4.37 In this context, it should be noted that the UNCRPD (Article 4(3)) places an obligation on the UK Government to ensure that "in the development and implementation of legislation and policies ... States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations".

²¹ MOJ (2022) [Draft Bill of Rights: Impact Assessment](#), paras 312-314.

²² MOJ (2022) [Draft Bill of Rights: Impact Assessment](#), para 322.

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

5.1 Recommendations in this section are relevant to JCHR questions:

- 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?
- 2. Clause 3 also provides that the courts may diverge from Strasbourg jurisprudence but may not expand protection conferred by a right unless there is no reasonable doubt that the ECtHR would adopt that interpretation. What are the implications of this approach to the interpretation of Convention rights?

Ensure the continued role of the ECHR and ECtHR in judicial interpretations

- 5.2 The Commission is not persuaded of the case to repeal section 2 of the Human Rights Act, and is concerned that if such changes were made, the ability of domestic courts to use the ECHR in Northern Ireland would be constrained.
- 5.3 Accordingly, we recommend that no change should be made to the courts’ requirement to have regard to ECtHR judgments.

Supporting rationale

- 5.4 The Commission is concerned by the proposals²³ to replace section 2 Human Rights Act to no longer require UK courts to have regard to ECtHR judgments and encourage greater emphasis on the text of the ECHR. This would significantly reduce the extent to which ECtHR Article 14 jurisprudence would find a secure and predictable place in Northern Ireland law, as it is unclear how courts would interpret ECtHR judgements going forward. This may lead to equality groups being unable to access rights at the domestic level.
- 5.5 Further, clause 3 of the Bill may weaken the domestic effect of international Conventions. The ECtHR has sought, on occasion, to interpret the ECHR in light of general international human rights law. Given that, currently, section 2 Human Rights Act requires that the

²³ Clause .3, Bill of Rights Bill (As Introduced).

methods of interpretation adopted by the ECtHR also apply in UK courts, UK courts must also have regard to these conventions in the interpretation of the ECHR.

5.6 However, if UK courts no longer have to follow the ECtHR's interpretative methods, the continued use of these conventions for interpretative purposes is in doubt, thus weakening the domestic effect of international human rights law.

5.7 We also note that the NIHRC, in its submission to the IHRAR, advised that no amendment is necessary to the duty to "take into account" ECtHR jurisprudence under section 2²⁴, and the Bar of Northern Ireland expressed alarm²⁵ at the prospect of changes to section 2.

6 Parliamentary scrutiny of human rights

6.1 Recommendations in this section are relevant to JCHR question:

- 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?

Ensure legislation which is not compliant with the ECHR can be dealt with effectively

6.2 If it is more difficult to introduce compliant primary legislation, or if the process of dealing with ECtHR judgments against the UK becomes considerably slower, it may negatively impact on equality groups seeking to access rights.

6.3 Human rights provisions must ensure, if courts declare legislation incompatible with the ECHR or there is a Strasbourg judgment against Parliament, that resolution can be brought, in line with the ECHR.

²⁴ NIHRC (2021) [Submission to the Independent Human Rights Act Review Team's Call for Evidence](#), paras 3.6-3.12.

²⁵ The Bar of Northern Ireland (2021) [Independent Human Rights Act Review: Call for Evidence](#), para 25-29.

Supporting rationale

- 6.4 We note Government proposals²⁶ to introduce a duty on the Government to notify Parliament of any judgments of the ECtHR against the UK, as well as instances where the UK has unilaterally declared in proceedings before the ECtHR that it has failed to comply with a Convention right.
- 6.5 This could potentially result in standoffs between Parliament and the Council of Europe, and lead to delays for individuals in equality groups seeking clarification on their rights.
- 6.6 We note the Government's view that 'remedial secondary legislation remains an appropriate measure'²⁷. The Bar of Northern Ireland²⁸ considers the current remedial order process 'strikes an appropriate balance', and the Law Society of Northern Ireland²⁹ states 'any alteration to the current process is undesirable'.
- 6.7 Human rights provisions must ensure that, if there is a Strasbourg judgment against Parliament, resolution, in line with the ECHR, can be addressed effectively and in a timely manner.

7 Interpreting and applying the law compatibly with human rights

- 7.1 Recommendations in this section are relevant to JCHR questions:
- 6. The Bill removes the requirement in section 3 Human Rights Act 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?
 - 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 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

²⁶ Clause 25, Bill of Rights Bill (As Introduced)

²⁷ MOJ (2022) [Human Rights Act Reform: A Modern Bill of Rights Consultation Response](#), para 84.

²⁸ The Bar of Northern Ireland (2021) [Independent Human Rights Act Review: Call for Evidence](#), para 54.

²⁹ The Law Society of Northern Ireland (2021) [Call for Evidence Independent Human Rights Act Review: Response of the Law Society of Northern Ireland](#), p. 10.

compatible with the UK's obligations under the Convention?
What are the implications for the protection of rights in the UK?

Ensure the continued role of the ECHR in judicial interpretations

- 7.2 The Commission is not persuaded of the case to repeal section 3 of the Human Rights Act, and are concerned that if such changes were made, the ability of domestic courts to use the ECHR in Northern Ireland would be constrained.
- 7.3 Accordingly, no change should be made to the courts' obligation to interpret legislation to comply with the ECHR as far as possible.

Supporting rationale

- 7.4 We note with concern the Government's proposals³⁰ to repeal section 3 Human Rights Act, and no longer require courts to read and give effect to legislation, so far as possible, in a way which is compatible with the Convention rights.
- 7.5 The Commission has previously noted³¹ that the Human Rights Act's impact has been enhanced by the fact that, unlike the equality legislation, it applies to Acts of Parliament. The proposal to remove the interpretative power currently found in Section 3 of the Human Rights Act may lead to the domestic courts interpreting existing legislation so as to comply with Article 14 requirements less often than currently.
- 7.6 For example, section 3 has been used to interpret references to 'his or her wife or husband' in legislation to be wider than heterosexual marriages, in relation to succession of tenancies³².
- 7.7 We further note that the NIHRC³³ and the Bar of Northern Ireland³⁴ have both recommended that no amendments are required for section 3 of the Human Rights Act, and it should not be repealed.

³⁰ Clause 1(2b), and Sch 5, para 2, Bill of Rights Bill (As Introduced).

³¹ ECNI (2011) [Response to the Commission on a Bill of Rights' Consultation: 'Do we need a UK Bill of rights?', para 18.](#)

³² Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557 (HL(E)).

³³ NIHRC (2021) [Submission to the Independent Human Rights Act Review Team's Call for Evidence](#), paras 4.1-4.14.

³⁴ The Bar of Northern Ireland (2021) [Independent Human Rights Act Review: Call for Evidence](#), paras 37-38.

Equality groups should continue to benefit from the development of positive obligations

- 7.8 We note with disappointment the Government's intent³⁵ to 'limit the imposition of positive obligations'³⁶.
- 7.9 We are concerned that such proposals could limit the ability of courts to develop positive obligations which benefit equality groups.
- 7.10 Any constraint on the courts' ability to develop positive obligations, in line with the ECHR, should be avoided.

Supporting rationale

- 7.11 The ECtHR's development of the positive obligations has given rise to important judgments of relevance to protected groups. In the context of vertical obligations that are applied to the state, for example, the Court has held that the right to respect for private life requires that a transsexual must be able to obtain legal recognition of his or her gender re-assignment³⁷. In the context of horizontal positive obligations between private parties, the Court has held that Article 8 requires the criminalisation of rape³⁸.
- 7.12 Any attempt to constrain the creation of such obligations by domestic courts may lead to a breach in the UK's international obligations under the ECHR and increased litigation in Strasbourg.
- 7.13 The Government's own impact assessment outlines that 'preventing the creation of future positive obligations may result in reduced protections for individuals where their rights may have otherwise been protected by such obligations'³⁹.

8 Enforcement of Human Rights: Litigation and remedies

- 8.1 Recommendations in this section are relevant to JCHR questions:

³⁵ Clause 5, Bill of Rights Bill (As Introduced).

³⁶ Parliament (2022) [Bill of Rights Bill: Explanatory Notes](#), Bill 117, para 11.

³⁷ *Goodwin v United Kingdom*, application no 28957/95, 11 July 2002 (GC).

³⁸ *X and Y v the Netherlands*, application no 8978/80, 26 March 1985.

³⁹ MOJ (2022) [Draft Bill of Rights: Impact Assessment](#), p.1.

- 11. Does the system of human rights protection envisaged by the Bill ensure effective enforcement of human rights in the UK, including the right to an effective remedy (Article 13 ECHR)?
- 12. Do you think the proposed changes to bringing proceedings and securing remedies for human rights breaches in clauses 15-18 of the Bill will dissuade individuals from using the courts to seek an effective remedy, as guaranteed by Article 13 ECHR?
- 13. Do you agree that the courts should be required to take into account any relevant conduct of the victim (even if unrelated to the claim) and/or the potential impact on public services when considering damages?

Avoid introducing additional barriers to bringing cases under Human Rights Act

- 8.2 The Government should not introduce an additional permission stage when individuals wish to bring a human rights claim, in relation to civil law claims with a human rights element.
- 8.3 We welcome that a permission stage will not apply to judicial reviews in Northern Ireland and recommend that no such stage should apply to civil law cases.

Supporting rationale

- 8.4 The Government has proposed⁴⁰ individuals should have to show 'significant disadvantage' to be able to bring a civil claim under the proposed Bill of Rights in Northern Ireland, and for any case in England and Wales.
- 8.5 The Government's impact assessment refers to 'trivial cases'⁴¹; it would be a danger to overemphasise the extent to which such human rights claims are brought. We note that the impact assessment⁴² recognises that the impact of this proposal is uncertain and may lead to individuals taking their case to ECtHR.

⁴⁰ Clause 15, Bill of Rights Bill (As Introduced)

⁴¹ MOJ (2022) [Draft Bill of Rights: Impact Assessment](#) paras 161-165.

⁴² MOJ (2022) [Draft Bill of Rights: Impact Assessment](#) para 177-180.

- 8.6 We further note that such a permission stage was not considered or recommended by the IHRAR⁴³, and that 90% of respondents who directly answered the relevant question in the Government's consultation disagreed that such a condition would be an effective way to ensure courts focus on genuine human rights matters⁴⁴.
- 8.7 No such change should be brought without a sufficient evidence-based and robust case for change.

Past conduct should not be considered when deciding remedies in Human Rights Act cases

- 8.8 We note with concern the suggestion⁴⁵ that the proposed Bill of Rights should require courts to take into account a person's conduct, which may be unrelated to an unlawful act, when awarding damages.
- 8.9 The Commission recommends that the previous conduct of individuals claiming rights should not be considered when deciding damages.

Supporting rationale

- 8.10 We have previously noted that this proposal may have a significant impact on equality groups, particularly if wider conduct is to be considered that is unrelated to the specific circumstances of the claim. We advised that Government should use equality disaggregated data to consider and convey any equality impacts these proposals may have. For example, the male prison population in Northern Ireland is significantly higher than the female prison population⁴⁶, and men may be disproportionately impacted by any measure that takes into account previous convictions.
- 8.11 The Government's impact assessment⁴⁷ does suggest that men, individuals aged between 18 and 49 years, and individuals from an ethnic minority background may be particularly impacted. However, this is based on 2014 data from England and Wales.

⁴³ MOJ (2021) [The Independent Human Rights Act Review](#) CP586, Annex III.

⁴⁴ MOJ (2022) [Human Rights Act Reform: A Modern Bill of Rights Consultation Response](#), para 51.

⁴⁵ Clause 18(5), Bill of Rights Bill (As Introduced)

⁴⁶ DOJ (2021) [The Northern Ireland Prison Population 2020/21](#). Table 1: In 2020/21, the average immediate custody prison population in NI included 871 males and 27 females.

⁴⁷ MOJ (2022) [Draft Bill of Rights: Impact Assessment](#), para 287.

- 8.12 A consideration of past conduct would also seem to undermine the notion of the universality of human rights.

9 Specific rights issues

9.1 Recommendations in this section are relevant to JCHR questions:

- 14. Clause 6 of the Bill would require the court, when deciding whether certain human rights of prisoners have been breached, to give the “greatest possible weight” to the importance of reducing the risk to the public from persons given custodial sentences. What effect would this clause have on the enforcement of rights by prisoners?
- 15. Clauses 8 and 20 of the Bill restrict the application of Articles 8 (right to private and family life) and 6 (right to a fair trial) in deportation cases. Do you think these provisions are compatible with the ECHR?
- 18. The Bill strengthens protection for freedom of speech, with specific exemptions for criminal proceedings, breach of confidence, questions relating to immigration and citizenship, and national security. Do you think these changes are necessary? What would be the implications of giving certain forms of speech greater protection than other rights?
- 19. Why do you think the Government has chosen to protect freedom of speech rather than freedom of expression, as guaranteed in Article 10, and what are the implications of treating the elements of Article 10 differently?

The scope of human rights should not be disproportionately limited

9.2 The scope of rights should not be disproportionately limited in relation to deportations, which may restrict the ability to challenge discriminatory deportations.

- 9.3 We note with concern the Government proposal⁴⁸ to limit the use of Articles 6 and 8 ECHR in resisting deportations, as well as a suggestion of limiting the ability of domestic courts to overturn deportation decisions approved by the Home Secretary by permitting challenges only where the decision has obviously failed to take human rights into account.

Supporting rationale

- 9.4 This proposal may limit the ability to challenge discriminatory deportations.
- 9.5 Furthermore, attempting to limit the substantive scope of particular ECHR rights will likely give rise to significant tension with the ECtHR's approach, as there may not be an effective domestic remedy sufficient to satisfy Article 13 ECHR. The ECtHR may decide that, in cases where these new limitations were operated, there would no longer be a requirement to exhaust domestic remedies. This may also lead to more litigation in Strasbourg.
- 9.6 We note that the proposal on deportations was not considered by the IHRAR⁴⁹, and also that 82% of respondents to the consultation rejected all of the Government's suggestions *to 'make sure deportations that are in the public interest are not frustrated by human rights claims'*⁵⁰.

Ensure freedom of expression is balanced with competing rights, in compliance with international human rights obligations

- 9.7 We note the Government's proposal⁵¹ for a requirement for courts to give great weight to the importance of protecting freedom of speech whenever they are balancing freedom of speech with competing rights, despite such proposals not being considered by the IHRAR⁵². It is unclear how 'great weight' will be understood by the courts.
- 9.8 Freedom of expression should be proportionately balanced with other rights, including the prohibition of discrimination.

⁴⁸ Clauses 8 and 20, Bill of Rights Bill (As Introduced).

⁴⁹ MOJ (2021) [The Independent Human Rights Act Review](#) CP 586, Annex III.

⁵⁰ MOJ (2022) [Human Rights Act Reform: A Modern Bill of Rights Consultation Response](#), para 113.

⁵¹ Clause 4, Bill of Rights Bill (As Introduced).

⁵² MOJ (2021) [The Independent Human Rights Act Review](#) CP586, Annex III.

- 9.9 In terms of ensuring the correct balance is struck between freedom of expression and other rights, Government should ensure that it complies with its international human rights obligations relating to incitement to hatred, including under the UN International Convention on Civil and Political Rights (ICCPR) and UN Convention on the Elimination of Racial Discrimination (CERD).

Supporting rationale

- 9.10 The Commission recognises the importance of this fundamental right. However, we have previously⁵³ raised the need to balance freedom of expression with other rights. For instance, there may be a significant impact on groups seeking to protect their privacy, and thus the proposal may adversely affect disabled persons and those who identify as LGBT.
- 9.11 While Article 10 of the ECHR protects expressions that offend, shock and disturb the state or any section of the population, the ECtHR has refused to uphold freedom of expression rights in cases involving the circulation of homophobic leaflets in a school⁵⁴; and the public display of a poster involving hostility against a religious group⁵⁵.
- 9.12 The impact assessment recognises ‘there is also a public interest in balancing freedom of speech with other rights and protections’⁵⁶.
- 9.13 It is unclear how this will work practically, and the impact assessment states ‘the scale of the benefit is uncertain’⁵⁷. The assessment also recognises that courts may need to spend time working through how to balance the new weight given to freedom of speech⁵⁸.
- 9.14 It should be noted, that the CERD Committee in its General Recommendation 35 on combating racist hate speech has set out contextual factors that should be taken into account when considering what incitement offences should be prohibited by law; in particular, the content and form of the speech; objectives of the

⁵³ ECNI (2020) [Hate Crime in Northern Ireland Policy Recommendations and Supporting Rationales](#), paras 4.176-4.184.

⁵⁴ *Vejdeland and Others v. Sweden* (Application no. 1813/07) Chamber Judgment 9 February 2012, as cited in European Court of Human Rights, (2020) [Factsheet on Hate Speech](#).

⁵⁵ *Norwood v the United Kingdom* (Application no 23131/03) ,as cited in European Court of Human Rights, (2020) [Factsheet on Hate Speech](#).

⁵⁶ MOJ (2022) [Draft Bill of Rights: Impact Assessment](#) p. 32, para 210.

⁵⁷ MOJ (2022) [Draft Bill of Rights: Impact Assessment](#), p. 35, para 228.

⁵⁸ MOJ (2022) [Draft Bill of Rights: Impact Assessment](#), p. 33-4, para 220.

speech; position and status of the speaker; the economic, social and political climate, and the reach of the speech¹⁷.

9.15 In addition, guidance set out in the UN Rabat Plan of Action¹⁸, which considers the distinction between freedom of expression and incitement to hatred, includes a six stage threshold test for incitement to hatred. It makes clear the need to consider the context in which the hate speech is being used; the standing or position of the speaker; the intent; the content or form; the extent of the speech (for example, its public nature); the likelihood (for example, degree of risk of harm).

9.16 Finally, guidance from the EHRC (2015) makes clear that the particular level of protection under Article 10 of the ECHR can vary considerably depending on the *type* of expression involved, and that political campaigning, journalism and commentary on matters of public interest are generally given a high degree of protection already¹⁹.

10 The Human Rights Act and the Devolved Nations

10.1 Recommendations in this section are relevant to JCHR questions:

- 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?
- 21. Should the Government seek consent from the devolved legislatures before enacting the Bill and, if so, why?

Human rights law should reflect the particular circumstances in Northern Ireland

10.2 We highlight the importance of the 1998 Belfast (Good Friday) Agreement and note our concerns that any changes to the human rights framework have the potential to have far reaching impacts on the underpinnings of the improved society in Northern Ireland in which we now live.

10.3 Any consideration of the human rights framework in the UK and Northern Ireland must take full account of the specific history and circumstances of Northern Ireland and of the 1998 Agreement and devolution settlement.

Supporting rationale

- 10.4 We note that the Government impact assessment for the Bill of Rights Bill states:

‘We are conscious of the importance of the Human Rights Act and the Convention with regards to the Belfast (Good Friday Agreement) [sic], and we continue to consider carefully the impact of any reforms to Northern Ireland’⁵⁹.

- 10.5 This seems to imply that the Government has not yet reached a conclusion as to how the new Bill of Rights would reflect the situation in Northern Ireland, including any future NI Bill of Rights.

- 10.6 The Commission’s long-standing position is in support⁶⁰ of the adoption of a strong and inclusive NI Bill of Rights, reflecting the particular circumstances of Northern Ireland. Further, we have previously recommended that the Human Rights Act should not be reformed in such a way as to breach or undermine the Belfast (Good Friday) Agreement (GFA).

- 10.7 We have noted⁶¹, for example, that research commissioned by the Equality and Human Rights Commission (EHRC)⁶², even prior to BREXIT, highlighted that ‘it appears highly likely that if the Human Rights Act 1998 were amended or repealed, and/or a Bill of Rights were enacted covering the devolved jurisdictions, there would be a need for amendments to the devolution statutes. Further, such a decision would almost certainly require the consent of the devolved legislators in Scotland and Northern Ireland’.

- 10.8 We note that the QUB Human Rights Centre, in its response to the Government consultation on a Bill of Rights⁶³, advised that:

‘given the centrality of human rights to the Northern Ireland peace settlement, a weakening of the rights currently protected by the Human Rights Act threatens that settlement. From the perspective of the need to safeguard peace and ensure stability in Northern Ireland, therefore, any move that would be widely viewed as undermining the Belfast (Good Friday) Agreement and its strong

⁵⁹MOJ (2022) [Draft Bill of Rights: Impact Assessment](#), para 44.

⁶⁰ ECNI (2021) [Submission to Ad Hoc Committee on a Bill of Rights for Northern Ireland, para 1.2](#)

⁶¹ ECNI (2011) [Response to the Commission on a Bill of Rights’ Consultation: ‘Do we need a UK Bill of rights?’](#) para 40.

⁶² EHRC (2011) [Developing a Bill of Rights for the UK](#), section 5.2.

⁶³ QUB Human Rights Centre (2022) [Response to the Ministry of Justice’s Consultation Paper on Human Rights Act Reform](#), para 110.

commitment to the advancement and protection of human rights would be highly regrettable’.

11 Article 2 considerations

- 11.1 Following the UK’s exit from the EU, the UK Government committed under Article 2 of the Ireland/Northern Ireland Protocol (‘the Protocol’) to ensuring that certain equality and human rights in Northern Ireland will continue to be upheld after BREXIT.
- 11.2 We are concerned that the Government has not set out in detail what consideration has been given to the Bill’s compliance with Article 2 (1) of the Protocol, and that the Bill contains no safeguards to ensure that the Bill, as applied, does not have the potential to give rise to a breach of Article 2.

Recommendations

- The UK Government should set out in detail what consideration has been given to the Bill’s compliance with Protocol Article 2 (1):
 - we recommend that this includes a consideration of the effect of the Bill’s provisions, if enacted, on the rights, safeguards and equality of opportunity provisions and protections under the relevant chapter of the Belfast (Good Friday) Agreement (GFA) (and underpinned by EU law) that fall within the scope of Article 2;
 - any assessment of the Bill’s compliance with Article 2 should not be limited to the impact of the proposals on the substantive rights but should also include the remedial dimensions of those rights.
- The UK Government should give consideration to including appropriate safeguards in the Bill, so as to ensure that the Bill, as applied, does not have the potential to give rise to a breach of Protocol Article 2.

Supporting rationale

- 11.3 We note that there is no detail within the proposed Bill or accompanying documents, including the Explanatory Memorandum,

as to what consideration the Government has given to compliance with its commitment under Protocol Article 2 (1)⁶⁴.

- 11.4 For example, the Government has not referred in specific terms to any potential impact of the Bill's provisions on the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the GFA. In the absence of any detailed consideration of the impact of the Bill on these rights, we are concerned that the implications of Article 2 may not have been adequately considered.
- 11.5 This assessment by the Government should include the remedial dimensions of those rights. In the Commission's view a GFA-protected right, for example, the right relating to 'non-discrimination'⁶⁵, is underpinned not only by the substantive rules of EU law, but also the remedial rules of EU law - for example, the right to secure damages for breach of a rule by the state. The substantive right would be diminished if the remedial dimensions of the right were removed. We consider that the non-diminution obligation under Article 2 applies not only to the substantive rights but also to the remedial dimensions of those rights.
- 11.6 Further, we are concerned that the Bill contains no safeguards so to ensure that the Bill, as applied, does not have the potential to give rise to a breach of Protocol Article 2. We consider that the Government should include appropriate safeguards in the Bill to ensure that a breach of Protocol Article 2 could not occur in the context of the application of the Bill. We consider that such an approach is consistent with the Government's stated general commitment to upholding Protocol Article 2⁶⁶, and to its statement on the Bill's compliance with the Protocol.

⁶⁴ The Government's Consultation Response Document, published together with the Bill, simply states that the Government reiterates that the Bill complies with the GFA, and the Protocol, but there is no supporting argument set out in terms of the Bill's compliance with Protocol Article 2.

⁶⁵ The right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity.

⁶⁶ In his [letter to Lord Jay of Ewelme, Chair of the House of Lords subcommittee on the Ireland/Northern Ireland Protocol, on Article 2 of the Protocol](#), the Right Honourable Conor Burns MP, reiterated that "the Government is firmly committed to Article 2 of the Protocol" and that "this commitment reflects the UK Government's unwavering commitment to the Belfast (Good Friday) Agreement", 24 November 2021

12 Annex 1: Role and Remit of the Equality Commission for Northern Ireland

- 12.1 The Equality Commission for Northern Ireland ('the Equality Commission') is an independent public body established under the Northern Ireland Act 1998.
- 12.2 The Equality Commission is responsible for implementing the legislation on age, fair employment and treatment, sex discrimination and equal pay, race relations, sexual orientation and disability. The Commission's remit also includes overseeing the statutory duties on public authorities to promote equality of opportunity and good relations under Section 75 of the Northern Ireland Act 1998, and the disability duties under the Disability Discrimination Act 1995.
- 12.3 The Equality Commission has been designated to act as an 'independent mechanism' jointly with the Northern Ireland Human Rights Commission, to promote awareness of, and monitor the implementation of the United Nations Convention on the Rights of Persons with Disabilities with regard to Government's obligations in relation to Northern Ireland.
- 12.4 Further, under the EU (Withdrawal Agreement) Act 2020 the Commission, along with the Northern Ireland Human Rights Commission, has been given additional powers and responsibilities, as the 'dedicated mechanism', to ensure that the UK Government's commitment under Article 2 of the Ireland/Northern Ireland Protocol ('the Protocol') to the UK-EU Withdrawal Agreement is met. This remit includes to monitor, advise, report on, promote, and enforce the implementation of Article 2(1) of the Protocol.