



# **EQUALITY COMMISSION FOR NORTHERN IRELAND**

**Response to consultation:**

**Human Rights Act Reform: a Modern Bill of Rights, Ministry of Justice**

**March 2022**

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# 1 **Executive Summary**

- 1.1 The Equality Commission for Northern Ireland ('the Commission') sets out below its recommendations in response to the Ministry of Justice [consultation on 'Human Rights Act Reform: a Modern Bill of Rights'](#).
- 1.2 Overall, the Commission is not persuaded that the Government has demonstrated a need for reform of the 1998 Human Rights Act.
- 1.3 The Commission is of the view that, in general terms, current government proposals are vague and their specific outworkings in practice are unclear.
- 1.4 We consider that Government needs to expressly consider and communicate any negative impacts of its proposals, including with specific regards to:
- The Belfast-Good Friday Agreement
  - Equality of opportunity and good relations in Northern Ireland
  - Non-diminution commitments under Article 2(1) of the Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.
- 1.5 Such considerations should be evidence-based and stakeholder informed, with any benefits and impacts clearly distilled and presented.
- 1.6 Currently, based on the information and proposals presented, the Commission is not supportive of the Government's proposed reform of the 1998 Human Rights Act.

## ***Overarching Recommendations***

- 1.7 With regards to human rights protections generally, the Commission considers that:
- The Human Rights Act 1998 (HRA) should not be reformed without a convincing case that such reform is necessary to further improve access to rights.

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

### Considerations under Article 2(1) of the Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement.

1.8 Given the general nature of some of the proposals, the Commission is concerned that there is the potential that some of the Government's proposals will weaken current European Convention on Human Rights (ECHR)/ Human Rights Act (HRA) protections and engage some of the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Good Friday Agreement.

1.9 Accordingly, we recommend:

- Government should set out in detail what consideration has been given to the proposals' compliance with Article 2 (1) of the Protocol.
- An assessment of compliance should be carried out and published before any further action is taken in relation to the proposals
- Government should provide clarification as regards certain proposals, to enable the Commission, and the Government, to fully assess the degree to which the proposals are compliant with Article 2.

## ***Recommendations in response to specific Government proposals***

1.10

The following recommendations take account of the specific consultation proposals that are most relevant to our role and remit.

- Ensure the continued role of the ECHR and ECtHR in judicial interpretations
- Ensure freedom of expression is balanced with competing rights, in compliance with international human rights obligations
- Avoid introducing additional barriers to bringing cases under the HRA
- Equality groups should continue to benefit from the development of positive obligations
- Avoid any breaches or undermining of the Belfast-Good Friday Agreement when considering the HRA
- Ensure legislation which is not compliant with the ECHR can be dealt with effectively
- The scope of human rights should not be disproportionately limited or discriminate on equality grounds
- Past conduct should not be considered when deciding remedies in HRA cases

## **2 Introduction**

- 2.1 The Equality Commission welcomes the opportunity to respond to the Ministry of Justice's consultation on the proposed reform of the Human Rights Act 1998 (HRA).
- 2.2 Further information on the role and remit of the Commission is set out in Annex A.
- 2.3 Set out in the sections below are the Commission's recommendations in response to the overall proposals in general, and to the specific questions raised in the consultation paper. The Commission has responded only to those questions and issues within its role and remit.

## **3 Overarching recommendations**

- 3.1 The Commission considers that the proposals, 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.
- 3.2 The following recommendations relate to the Government's proposed reforms in their entirety.

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

- 3.3 The Commission is not persuaded that the Government has demonstrated a need for reform of the 1998 Human Rights Act.
- 3.4 The Commission considers that, in general terms, current government proposals are vague and their specific outworkings in practice are unclear.
- 3.5 Accordingly, based on the information and proposals presented, the Commission is currently not supportive of the Government's proposed reform of the 1998 Human Rights Act.

- 3.6 Government should be specific about any proposed changes and their intended and anticipated impact(s), conveying their case for any changes via an explicit presentation of relevant evidence and stakeholder input.

### Supporting rationale

- 3.7 The HRA 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,<sup>1</sup> race and ethnicity,<sup>2</sup> sexual orientation,<sup>3</sup> disability,<sup>4</sup> gender,<sup>5</sup> religion and belief,<sup>6</sup> and dependents<sup>7</sup>. In Northern Ireland, 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 HRA<sup>8</sup>.
- 3.8 The Joint Committee on Human Rights (JCHR) found that the 'HRA has had an enormously positive impact on the enforcement of human rights in the UK'<sup>9</sup>.
- 3.9 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 wide-ranging reforms to the HRA, nor its repeal and replacement with a Bill of Rights.

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<sup>1</sup> Schwitzgebel v Switzerland, application no 25762/07, 10 June 2010.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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;

<sup>6</sup> 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.

<sup>7</sup> DA [2019] UKSC 21.

<sup>8</sup> 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.

<sup>9</sup> Joint Committee on Human Rights (2021) [The Government's Independent Review of the Human Rights Act](#), Third Report of Session 2021–22, HC 89 HL Paper 31, para 25.

- 3.10 Further, despite commissioning the Independent Human Rights Act Review (IHRAR), we note that the Government consultation proposals depart significantly from the recommendations made within it<sup>10</sup>, and include reform to areas not considered by the IHRAR<sup>11</sup>.
- 3.11 We also note the concerns raised by numerous legal academics and professionals that such significant reform is unnecessary<sup>12</sup>.
- 3.12 For instance, in its response to the IHRAR, Queen's University Belfast Human Rights Centre has advised<sup>13</sup> that they 'see no need to diminish in any way the protections that the HRA offers to the people of Northern Ireland'. Likewise, the NIHRC has set out its view<sup>14</sup> that no change to the HRA is necessary.

### ***Human rights law should reflect the particular circumstances in Northern Ireland<sup>15</sup>***

- 3.13 We highlight the importance of the 1998 Belfast-Good Friday Agreement and note our concerns that any changes to the human rights framework has the potential to have far reaching impacts on the underpinnings of the improved society in Northern Ireland in which we now live.
- 3.14 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.

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<sup>10</sup> MOJ (2021) [The Independent Human Rights Act Review](#) CP 586, vi

<sup>11</sup> For example, the TOR of the IHRAR does not include consideration of freedom of expression. MOJ (2021) [The Independent Human Rights Act Review](#) CP 586, Annex III.

<sup>12</sup> For instance: The Bar of Northern Ireland (2021) [Independent Human Rights Act Review: Call for Evidence](#), para 55; The Law Society of Northern Ireland (2021) [Call for Evidence Independent Human Rights Act Review: Response of the Law Society of Northern Ireland](#), p. 4.

<sup>13</sup> QUB Human Rights Centre (2021) [Evidence to the Independent Human Rights Act Review](#), para 42.

<sup>14</sup> NIHRC (2021) [NI Human Rights Chief Commissioner Responds to Proposed Replacement of the Human Rights Act](#).

<sup>15</sup> ECNI (2021) [Submission to Ad Hoc Committee on a Bill of Rights for Northern Ireland](#), para 1.2



### Supporting rationale

- 3.15 The Commission's long-standing position is in support<sup>16</sup> of the adoption of a strong and inclusive NI Bill of Rights, reflecting the particular circumstances of Northern Ireland.
- 3.16 We have noted<sup>17</sup>, for example, that research commissioned by the Equality and Human Rights Commission (EHRC)<sup>18</sup>, 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'.

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

- 3.17 Human Rights protections must be compliant with international law and commitments.
- 3.18 Government must adhere to the principle of 'non-regression' and ensure that current levels of protection under the HRA and other ratified human rights instruments are not eroded<sup>19</sup>.
- 3.19 Any regression of human rights could negatively impact across the equality grounds.

### Supporting rationale

- 3.20 The Commission welcomes the Government's commitment to the ECHR<sup>20</sup>.
- 3.21 However, the Government's broader international human rights commitments are also of importance. Human Rights

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<sup>16</sup> ECNI (2021) [Submission to Ad Hoc Committee on a Bill of Rights for Northern Ireland](#), para 1.2

<sup>17</sup> ECNI (2011) [Response to the Commission on a Bill of Rights' Consultation: 'Do we need a UK Bill of rights?'](#) para 40.

<sup>18</sup> EHRC (2011) [Developing a Bill of Rights for the UK](#), section 5.2.

<sup>19</sup> ECNI (2021) [Submission to Ad Hoc Committee on a Bill of Rights for Northern Ireland](#), para 2.7

<sup>20</sup> MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588, p.3.

protections should be in line with the UK Government's international human rights law commitments beyond the ECHR, such as UNCPRD, 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***

- 3.22 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 international human rights Conventions and the UN Sustainable Development Goals ('SDGs')<sup>21</sup>.
- 3.23 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**

- 3.24 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 HRA and the measures they are required to take in order to comply.
- 3.25 This view has been echoed by the IHRAR<sup>22</sup> 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'.

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<sup>21</sup> ECNI (2021) [Submission to Ad Hoc Committee on a Bill of Rights for Northern Ireland](#), paras 8.1-8.4.

<sup>22</sup> MOJ (2021) [The Independent Human Rights Act Review](#) CP586, paras 52-57.

- 3.26 The SDGs include goals and targets on tackling poverty and reducing inequalities, and a specific goal on achieving gender equality (Goal 5).

***Rolling impact assessment and stakeholder engagement should inform steps to improve realisation of human rights under the HRA***

- 3.27 Government should take steps, on a rolling basis, to identify how individuals from across the full range of equality categories and 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.
- 3.28 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.
- 3.29 Action should be taken to encourage and secure the participation of under-represented groups (such as disabled people) in accessing rights.

**Supporting rationale**

- 3.30 Due to lack of data<sup>23</sup> 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.
- 3.31 However, it is clear that the ECHR and the HRA have been important routes for equality groups to access rights.
- 3.32 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.
- 3.33 Such an assessment should consider key barriers and enablers to advancing the realisation of rights and responsibilities.

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<sup>23</sup> MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588, Appendix 3, para 12.

- 3.34 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”*.

## **4 Article 2 considerations**

- 4.1 These recommendations relate to the Commission’s views on whether or not the proposals would, if implemented, result in a breach of the Government’s commitment under Article 2(1) of the Protocol.
- 4.2 Overall, given the general nature of some of the proposals, the Commission is concerned that there is the potential that some of the Government’s proposals will weaken current ECHR / Human Rights Act protections and engage some of the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Good Friday Agreement.

### ***Recommendations***

- Government should set out in detail what consideration has been given to the proposals’ compliance with Article 2 (1) of the Protocol.
- An assessment of compliance should be carried and published before any further action is taken in relation to the proposals:
  - we recommend that this includes a consideration of the effect of the proposals, if implemented, on the rights, safeguards and equality of opportunity provisions and protections under the relevant chapter of the GFA (and underpinned by EU law) that fall within the scope of Article 2;
  - any assessment of the proposals’ 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.

- Government should provide clarification as regards certain proposals, to enable the Commission, and the Government, to fully assess the degree to which the proposals are compliant with Article 2.

### Supporting Argument

- 4.3 We draw to the Government's attention that it made clear in its Explainer document (2020)<sup>24</sup> on Article 2 that it considered that 'the key rights and equality provisions in the Belfast / Good Friday Agreement (GFA) are supported by the ECHR'. It also made clear its commitment to the ECHR and 'to protecting and championing human rights'.
- 4.4 Further, the Government's commitment to the incorporation of the ECHR into NI law was set out in the chapter of the GFA entitled "Rights, Safeguards and Equality of Opportunity"<sup>25</sup>.
- 4.5 This commitment to protect and champion human rights is an important commitment, particularly in light of the Government's recognition that equality rights in the GFA are supported by the ECHR. We therefore expect the Government to uphold this commitment to protect and champion human rights and to ensure that its proposals do not in any way run contrary to, or breach, that commitment.
- 4.6 The Commission notes that the Government in its HRA Reform consultation document claims its proposals will be 'fully in line with its commitments under the Withdrawal Agreement, the Protocol and the EU-UK Trade and Cooperation Agreement (TCA)'.<sup>26</sup>
- 4.7 However, we note that there is no detail as to what consideration the Government has given to compliance with its commitment under Article 2 (1) of the Protocol. For example, the Government proposals do not refer in specific terms to any potential impact of its proposals 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

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<sup>24</sup> NIO [Explainer](#) (2020) on UK Government commitment to "no diminution of rights, safeguards, and equality of opportunity" in NI: What does it mean and how will it be implemented.

<sup>25</sup> In particular, the Government committed to complete incorporation into Northern Ireland law of the 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'.

<sup>26</sup> NIO [Explainer](#) (2020) on UK Government commitment to "no diminution of rights, safeguards, and equality of opportunity" in NI: What does it mean and how will it be implemented, para 70

impact of the Government's proposals on these rights, the Commission is concerned that the implications of Article 2 may not have been adequately addressed by the UK Government.

- 4.8 Further, this assessment by the Government should include the remedial dimensions of those rights, as a substantive right can be much less well protected if the remedial rules were no longer to apply. In the Commission's view a GFA-protected right, for example, the right relating to 'non-discrimination'<sup>27</sup>, 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 much less protected and 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.
- 4.9 As noted, at this initial stage, we are therefore concerned that there is the potential that some of the Government's proposals will weaken current ECHR/HRA protections and engage some of the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the GFA.
- 4.10 However, as some of the proposed specific amendments to the HRA are unclear from the consultation document<sup>28</sup>, and therefore the exact nature and impact of these amendments is not clear, the exact degree to which the proposals may reduce the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the GFA proposals cannot yet be fully assessed at this stage.

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<sup>27</sup> The right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity.

<sup>28</sup> For example, it is unclear whether the proposed change to section 6 of the HRA and the subsequent proposed limitation on remedies would also apply in the context of a finding that the Northern Ireland Executive was acting pursuant to an Act of the Assembly.

## **5 Common law and role of UK Supreme Court (Questions 1-2, 5, 7)**

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

- 5.1 Based on the limited evidence provided, the Commission is not persuaded of the case to reform section 2 of the HRA, and is concerned that if such changes were made, the ability of domestic courts to use the ECHR in Northern Ireland would be constrained.
- 5.2 Accordingly, we recommend that no change should be made to the courts' requirement to follow ECtHR judgments.

### **Supporting rationale**

- 5.3 The Commission is concerned by the proposals<sup>29</sup> to replace section 2 HRA so as 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, which may lead to equality groups being unable to access rights at the domestic level.
- 5.4 Further, the reform of section 2 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 HRA requires that the 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.
- 5.5 However, if UK courts no longer have to follow the ECtHR's interpretative methods, the continued use of these conventions

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<sup>29</sup> MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588, paras 190-197.

for interpretative purposes is also in doubt, thus weakening the domestic effect of international human rights law.

- 5.6 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 2<sup>30</sup>, and the Bar of Northern Ireland expressed alarm<sup>31</sup> at the prospect of changes to section 2.

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

- 5.7 We note with concern the proposal to limit the scope for interference with Article 10 (freedom of expression) to limited and exceptional circumstances<sup>32</sup>, despite this matter not being considered by the IHRAR<sup>33</sup>.
- 5.8 Freedom of expression should be proportionately balanced with other rights, including the prohibition of discrimination.
- 5.9 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**

- 5.10 The Commission recognises the importance of this fundamental right. However, we have previously<sup>34</sup> raised the need to balance freedom of expression with other rights. For instance, there may be a significant impact on groups seeking

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<sup>30</sup> NIHRC (2021) [Submission to the Independent Human Rights Act Review Team's Call for Evidence](#), paras 3.6-3.12.

<sup>31</sup> The Bar of Northern Ireland (2021) [Independent Human Rights Act Review: Call for Evidence](#), para 25-29.

<sup>32</sup> MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588, para 215.

<sup>33</sup> MOJ (2021) [The Independent Human Rights Act Review](#) CP586, Annex III.

<sup>34</sup> ECNI (2020) [Hate Crime in Northern Ireland Policy Recommendations and Supporting Rationales](#), paras 4.176-4.184.



to protect their privacy, and thus the proposal may adversely affect disabled persons and those who identify as LGBT.

- 5.11 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 school<sup>35</sup>; and the public display of a poster involving hostility against a religious group<sup>36</sup>.
- 5.12 It should also be noted, for example, 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 speech; position and status of the speaker; the economic, social and political climate, and the reach of the speech<sup>17</sup>.
- 5.13 In addition, guidance set out in the UN Rabat Plan of Action<sup>18</sup>, 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).
- 5.14 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 already<sup>19</sup>.

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<sup>35</sup> 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](#).

<sup>36</sup> Norwood v the United Kingdom (Application no 23131/03) ,as cited in European Court of Human Rights, (2020) [Factsheet on Hate Speech](#).

## 6 Fundamental rights (Questions 8-9, 11)

### ***Avoid introducing additional barriers to bringing cases under HRA***

- 6.1 The Government should not introduce an additional permission stage when individuals wish to bring a human rights claim.
- 6.2 We note that such a permission stage was not considered or recommended by the IHRAR<sup>37</sup>.
- 6.3 It is unclear how much of a change this would be to the current 'standing' requirements. How far, if at all, this would go beyond the current '*victim*' requirement is unclear, as is the proposed '*public importance*' override of the '*significant disadvantage*' requirement, which would be made available but only in '*exceptional circumstances*'<sup>38</sup>.
- 6.4 Unless further clarification is to be provided on the meaning of these terms, the effect of these proposals would be to give additional power to the courts to tighten up access to the courts, if they choose to do so. No such change should be brought without a sufficient evidence based and robust case for change.

### **Supporting rationale**

- 6.5 The Government has questioned<sup>39</sup> whether individuals should have to show 'significant disadvantage' to be able to bring a claim under the proposed Bill of Rights.
- 6.6 It would be a danger to overemphasise the extent to which frivolous or spurious human rights claims are brought, and further objective detail on the benefits of such an addition would be helpful.

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<sup>37</sup> MOJ (2021) [The Independent Human Rights Act Review](#) CP586, Annex III.

<sup>38</sup> MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588. paragraph 223.

<sup>39</sup> MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588, paras 219-223.

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

- 6.7 We note with concern the Government's intent<sup>40</sup> to 'address the imposition and expansion of positive obligations'.
- 6.8 We are concerned that such proposals could limit the ability of courts to develop positive obligations which benefit equality groups.
- 6.9 Any constraint on the courts' ability to develop positive obligations, in line with the ECHR, should be avoided.

### **Supporting rationale**

- 6.10 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-assignment<sup>41</sup>. In the context of horizontal positive obligations between private parties, the Court has held that Article 8 requires the criminalisation of rape<sup>42</sup>.
- 6.11 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 Democratic Oversight (Questions 12-13, 15, 17, 19, 24)**

### ***Ensure the continued role of the ECHR in judicial interpretations***

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<sup>40</sup> MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588, 229-231.

<sup>41</sup> *Goodwin v United Kingdom*, application no 28957/95, 11 July 2002 (GC).

<sup>42</sup> *X and Y v the Netherlands*, application no 8978/80, 26 March 1985.

- 7.1 Based on the limited evidence provided, the Commission is not persuaded of the case to reform section 3 of the HRA, and are concerned that if such changes were made, the ability of domestic courts to use the ECHR in Northern Ireland would be constrained.
- 7.2 Accordingly, no change should be made to the courts' obligation to interpret legislation to comply with the ECHR as far as possible.

### Supporting rationale

- 7.3 We note with concern the Government's proposals<sup>43</sup> to repeal or replace section 3 HRA, in order to limit the current obligation to interpret legislation '*as far as possible*' to conform with the ECHR.
- 7.4 The Commission has previously noted<sup>44</sup> that HRA's impact has been enhanced by the fact that, unlike the equality legislation, it applies to Acts of Parliament. The proposal to repeal or replace Section 3 may lead to the domestic courts interpreting existing legislation so as to comply with Article 14 requirements more often than currently.
- 7.5 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 tenancies<sup>45</sup>.
- 7.6 We note that the Joint Committee on Human Rights (JCHR), in its inquiry into the Government's Independent Review of the Human Rights Act<sup>46</sup> found that

*'Section 3 HRA allows the judiciary to ensure that legislation is read compatibly with the Convention where possible. This supports the overarching intention of Parliament that legislation should not violate Convention rights. We have not been provided with any evidence to suggest that the courts are*

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<sup>43</sup> MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588, paras 233-242.

<sup>44</sup> ECNI (2011) [Response to the Commission on a Bill of Rights' Consultation: 'Do we need a UK Bill of rights?'](#), para 18.

<sup>45</sup> Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557 (HL(E)).

<sup>46</sup> Joint Committee on Human Rights (2021) [The Government's Independent Review of the Human Rights Act](#), Third Report of Session 2021–22, HC 89 HL Paper 31, para 105

*wrongly applying this power or that its use undermines or usurps the role of Parliament...There is no case for amending or repealing this provision’.*

- 7.7 We further note that the NIHRC<sup>47</sup> and the Bar of Northern Ireland<sup>48</sup> have both recommended that no amendments are required for section 3 of the HRA, and it should not be repealed.

### ***Avoid any breaches or undermining of the Belfast-Good Friday Agreement when considering the HRA***

- 7.8 We note that the IHRAR<sup>49</sup> rejected the option to amend the HRA to prevent subordinate legislation from being quashed, partly due to concerns around potential problems for devolution.
- 7.9 The HRA should not be reformed in such a way as to breach or undermine the Belfast-Good Friday Agreement (GFA), particularly in respect of the ability of courts to ensure NI Assembly Acts are compliant with the ECHR.

### **Supporting rationale**

- 7.10 Currently, under the Northern Ireland Act (NIA), the courts may declare that Acts of the Assembly are *ultra vires* if they breach the ECHR.
- 7.11 We are concerned to note the Government is considering<sup>50</sup> amending section 4 HRA to provide that ‘declarations of incompatibility are also the only remedy available to courts in relation to certain secondary legislation’. It would seemingly create an anomaly if equivalent restrictions on the scope of

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<sup>47</sup> NIHRC (2021) [Submission to the Independent Human Rights Act Review Team’s Call for Evidence](#), paras 4.1-4.14.

<sup>48</sup> The Bar of Northern Ireland (2021) [Independent Human Rights Act Review: Call for Evidence](#), paras 37-38.

<sup>49</sup> MOJ (2021) [The Independent Human Rights Act Review](#) CP 586, paras 55-64.

<sup>50</sup> MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588, paras 246-251.

judicial powers were not placed on courts applying the NIA, since all Assembly Acts constitute secondary legislation.

7.12 However, the Commission is concerned at how this would interact with the UK's obligations under the GFA. We note that the Agreement<sup>51</sup> provides that the 'remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency'. If the ability of courts to overrule Assembly legislation which is not compatible with the Convention is removed, it is unclear how the UK Government's obligations under the GFA will be ensured.

7.13 More generally, given the reduced scrutiny of secondary legislation, the removal of the ability of courts to strike down any such legislation should be approached with caution. We note the JCHR<sup>52</sup> found

*'the court's power to quash secondary legislation that cannot be read compatibly with Convention rights respects Parliamentary sovereignty rather than challenging it. It is also an appropriate check on the power of the Executive, in accordance with the separation of powers and the rule of law'.*

7.14 We note that the NIHRC<sup>53</sup>, the Law Society of Northern Ireland<sup>54</sup> and the Bar of Northern Ireland<sup>55</sup> have advised that the current framework is sufficient for dealing with subordinate legislation and no changes are necessary. Likewise, the Committee on the Administration of Justice (CAJ) argues<sup>56</sup> that the ability of courts to strike down Northern Ireland Assembly legislation is 'an important safeguard'.

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

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<sup>51</sup> [Belfast Agreement](#) (1998) p. 16.

<sup>52</sup> Joint Committee on Human Rights (2021) [The Government's Independent Review of the Human Rights Act](#), Third Report of Session 2021–22, HC 89 HL Paper 31, para 112.

<sup>53</sup> NIHRC (2021) [Submission to the Independent Human Rights Act Review Team's Call for Evidence](#), paras 4.20-4.21.

<sup>54</sup> The Law Society of Northern Ireland (2021) [Call for Evidence Independent Human Rights Act Review: Response of the Law Society of Northern Ireland](#), pp. 9-10.

<sup>55</sup> The Bar of Northern Ireland (2021) [Independent Human Rights Act Review: Call for Evidence](#), paras 49-52.

<sup>56</sup> CAJ (2021) [CAJ Response to the Independent Human Rights Act Review](#) (IHRAR), p. 19.

- 7.15 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.
- 7.16 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.

### *Supporting rationale*

- 7.17 It is unclear how a proposed<sup>57</sup> limitation on remedial order powers may work in practice. However, it could result in more standoffs between Parliament and the Council of Europe, if Parliament refuses to introduce primary legislation to remedy an Article 14 violation of the ECHR.
- 7.18 The Bar of Northern Ireland<sup>58</sup> considers the current remedial order process ‘strikes an appropriate balance’, and the Law Society of Northern Ireland<sup>59</sup> states ‘any alteration to the current process is undesirable’.
- 7.19 We further note that the JCHR<sup>60</sup> has pointed to its enhanced scrutiny of remedial orders and advise there is ‘little need or appetite for a more stringent parliamentary process’.

### ***The scope of human rights should not be disproportionately limited***

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

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<sup>57</sup> MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588, paras 253-258.

<sup>58</sup> The Bar of Northern Ireland (2021) [Independent Human Rights Act Review: Call for Evidence](#), para 54.

<sup>59</sup> 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.

<sup>60</sup> Joint Committee on Human Rights (2021) [The Government's Independent Review of the Human Rights Act](#), Third Report of Session 2021–22, HC 89 HL Paper 31, paras 235-236.



- 7.21 We note that the proposal on deportations was not considered by the IHRAR<sup>61</sup>.

### Supporting rationale

- 7.22 We note with concern, for example, the Government proposal<sup>62</sup> to limit the use of Articles 5, 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. This may limit the ability to challenge discriminatory deportations.
- 7.23 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.

## **8 The role of responsibilities within the human rights framework (Question 27)**

### ***Past conduct should not be considered when deciding remedies in HRA cases***

- 8.1 We note with concern the suggestion<sup>63</sup> that the proposed Bill of Rights should include mention of the 'responsibilities' and conduct of claimants, with the remedies system taking into account past conduct when deciding on damages.

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<sup>61</sup> MOJ (2021) [The Independent Human Rights Act Review](#) CP 586, Annex III.

<sup>62</sup> MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588, paras 292-296.

<sup>63</sup> MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588, paras 302-308.



- 8.2 As at present, the Commission recommends that the previous conduct of individuals claiming rights should not be considered when deciding damages.

### Supporting rationale

- 8.3 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. 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 population<sup>64</sup>, and men may be disproportionately impacted by any measure that takes into account previous convictions.
- 8.4 A consideration of past conduct would also seem to undermine the notion of the universality of human rights.

## **9 Dialogue with Strasbourg (Question 28)**

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

- 9.1 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.
- 9.2 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.

### Supporting rationale

- 9.3 We note Government proposals<sup>65</sup> to provide ‘a formal way for Parliament to play a stronger role in responding to Strasbourg’

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<sup>64</sup> 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.

<sup>65</sup> MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588, paras 309-317.

when there is an adverse ruling against the UK. Along with proposals to limit remedial orders<sup>66</sup>, this could result in more standoffs between Parliament and the Council of Europe.

- 9.4 The proposals could therefore lead to delays for individuals in equality groups seeking clarification on their rights.

## **10 Concluding Summary**

- 10.1 As noted, based on the information and proposals presented, the Commission is not persuaded that the Government has demonstrated a need for reform of the 1998 Human Rights Act.
- 10.2 In the context of Article 2(1) of the Ireland/Northern Ireland Protocol to the UK-EU Withdrawal Agreement, we are also concerned that there is the potential that some of the Government's proposals will weaken current ECHR / Human Rights Act protections and engage some of the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Belfast/Good Friday Agreement.
- 10.3 Accordingly, we have set out a number of overarching and specific recommendations for consideration and action.

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<sup>66</sup> MOJ (2021) [Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998](#), CP 588, paras 253-258.

## **11      Annex A: Role and Remit of the Equality Commission for Northern Ireland**

- 11.1      The Equality Commission for Northern Ireland ('the Equality Commission') is an independent public body established under the Northern Ireland Act 1998. 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.
- 11.2      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
- 11.3      Further, the EU (Withdrawal Agreement) Act 2020 empowers the Commission, along with the Northern Ireland Human Rights Commission, to monitor, advise, report on, promote, and enforce the implementation of Article 2(1) of the Ireland/Northern Ireland Protocol ('the Protocol') to the UK-EU Withdrawal Agreement.