

THE **LAW SOCIETY**
OF NORTHERN IRELAND



Ministry of Justice

Consultation

**HUMAN RIGHTS ACT REFORM: A MODERN BILL OF
RIGHTS**

**Response of the Law Society of
Northern Ireland**

March 2022

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ABOUT THE LAW SOCIETY

The Law Society of Northern Ireland (the Society) is the professional body for solicitors, regulating and representing all solicitors in Northern Ireland.

The Society represents over 2,800 solicitors working in approximately 470 firms throughout Northern Ireland in the public sector, in business and in the community and voluntary sector. Members of the Society thus represent members of the public, small, medium and large enterprises, government bodies and charities, making the Society uniquely placed to offer constructive comment on policy and law reform proposals across a broad range of topics.

March 2022

INTRODUCTION

The Law Society of Northern Ireland (the Society) is concerned about the proposals contained within the consultation document to amend the Human Rights Act 1998 (the HRA), particularly in the context of other ongoing proposals of the UK Government impacting on human rights, the rule of law and access to justice. The proposals, taken together, will fundamentally change the protection of human rights. It is our view that the vast majority of the proposed reforms are neither necessary nor desirable.

The HRA was designed to “bring rights home”, and thus provides a mechanism whereby effective remedies, in respect of human rights violations, are available at a national level. The HRA functions, as it should, to uphold a minimum standard of rights protections, whilst affording national courts a high degree of flexibility in deciding how to apply these standards in practice.

Legal practitioners view the HRA as working extremely effectively in NI. The HRA has significant importance in NI and is a central and critical part of the Belfast/Good Friday Agreement 1998 (GFA) and the Northern Ireland Act 1998 (the NI Act). Any proposed amendments to the HRA require the most careful consideration in view of the particular circumstances of NI. Issues of devolution have not been sufficiently considered throughout the consultation document, which contains only one question about the application of the proposals to NI.

An Independent Review of the HRA was conducted by Sir Peter Gross and an expert panel in 2021. The Society wishes to reiterate all our points made in that submission to this review¹. It is disappointing that the findings of this review appear to have been set aside, particularly given the detail and scale of the work undertaken. The Independent Review found that the HRA generally works well, which contradicts the need for the various proposals set out within this consultation. In fact, many of the proposals within this consultation go much wider and are at odds with the findings and advice of the Independent Review. The Society appreciates that no Government is beholden to the findings of an independent review, but to ostensibly set aside the findings and not engage with such an extensive and professional exercise does not seem appropriate.

¹ https://www.lawsoc-ni.org/DatabaseDocs/nav_3704459_response_-_ihrar_call_for_evidence_120321.pdf

A substantial number of the proposals do not have a clear evidence basis to justify the need for reform or are based on unbalanced evidence. Various practitioners have expressed concern that the lack of clarity demonstrates that the proposals have not been adequately thought through, yet the practical out-workings of them would be significant. In practice, the HRA has played a positive role in developing rights and accountability in for example, areas such as social care and mental health. The positive benefits of the HRA are not fully reflected in the consultation document's analysis of the impact of the HRA.

In addition to the above concerns, the Society is particularly concerned about the ability of the proposals to restrict access to justice. The proposal contained within question 8 around the introduction of a permission stage is of significant concern. This proposal is unclear, and would have wide ramifications, including unclear procedural processes. It would ultimately result in fewer people being able to seek or access redress. Moreover, it is worrying that various proposals would have the effect of weakening or reducing rights. Some of the proposals would result in the creation of a two-tier system of claimants, which goes against the core principle of the universality of human rights.

I. RESPECTING OUR COMMON LAW TRADITIONS AND STRENGTHENING THE ROLE OF THE SUPREME COURT

Interpretation of Convention rights: section 2 of the Human Rights Act

Question 1: We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2, as a means of achieving this.

As outlined in our response to the Independent Review of the HRA, the Society does not see a need for any amendment to section 2 of the HRA as it has been applied sensibly and appropriately to date. The section 2 duty to take account of the European Court of Human Rights' (ECtHR) jurisprudence has been working well in NI and it is entirely appropriate that there is an international dimension to the protection of international human rights standards. One of the most effective ways of doing so is by having due regard to the jurisprudence of the ECtHR, therefore the Society would have concern about the proposal to reduce reliance on Strasbourg case law.

Consequently, the Society does not support the adoption of the draft clauses contained after paragraph 4 of Appendix 2.

The position of the Supreme Court

Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights.

How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

The supremacy of the UK Supreme Court is a well-recognised principle, and there is little evidence within the consultation document or elsewhere to suggest that the position or the role of the UK Supreme Court is unclear. The Strasbourg court is concerned only with 'the supervision of the implementation by Contracting States of their obligations under the Convention'.² The ECtHR has repeatedly stated that it does not wish to act as a 'court of

² Seal v United Kingdom, App No 50330/07, 7 December 2010 at [53]

fourth instance by calling into question the outcome of domestic proceedings' as the 'domestic courts are best placed to interpret and apply rules of substantive and procedural law'.³

Trial by Jury

Question 3: Should the qualified right to jury trial be recognised in the Bill of Rights? Please provide reasons.

The qualified right to jury trial is a long-standing feature of the legal system in the UK and has played an important role in ensuring the fairness of certain trials. The right to a fair trial is already protected through Article 6 of the HRA and therefore this would change very little in practice.

Trial by jury is prescribed by law in each of the jurisdictions of the UK, which differs across each jurisdiction. In NI, the Justice and Security (Northern Ireland) Act 2007 allows for trial without a jury in certain limited circumstances. The need for these provisions is statutorily renewed and reviewed every two years by Parliament. The terrorism threat in NI remains severe, which deems non-jury trials necessary in a small number of cases to eliminate the impairment of the administration of justice. The Society's view is that these current provisions should remain in NI until the proposed Independent Review to be carried out by Mr. David Seymour is concluded.⁴

Freedom of Expression

Question 4: How could the current position under section 12 of the Human Rights Act be amended to limit interference with the press and other publishers through injunctions or other relief?

Section 12(4) of the HRA directs the courts to have 'particular regard to the importance of the Convention right to freedom of expression'.

It is important to note that NI does not have the equivalent of the Defamation Act 2013 which exists in England and Wales. Defamation law in NI has developed through common

³ Bullen and Soneji v United Kingdom, App No 3383/06, 8 January 2009 at [75]

⁴ See https://www.lawsoc-ni.org/DatabaseDocs/nav_7025597_response_-_nio_-_extending_non-jury_trial_provisions_under_the_justice_and_secu.pdf

law with some aspects codified in statute. There is currently a Private Members Bill on Defamation passing through the NI Assembly, therefore any proposals should be considered in this context and take account of any changes implemented by the Bill.

Question 5: The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations above. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?

Article 10 of the European Convention on Human Rights (ECHR) is already a qualified right and does not need to be confined anymore than it already is. There are various circumstances in which the right can be interfered with, including the need to protect national security and keep citizens safe.

Question 6: What further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources?

Protection for journalists' sources is reasonably well protected in the UK. In the case of *Goodwin v United Kingdom* App no 17488/90 (ECtHR 1996), it was held that 'freedom of expression constitutes one of the essential foundations of a democratic society' and that the protection of sources 'is one of the basic conditions for press freedom'. The reasoning in *Goodwin* has been followed in several subsequent cases, which demonstrates that there is already an element of protection for journalistic sources within the law.

In *re Fine Point Films*⁵, a NI case relating to the interference with journalist sources, the court acknowledged the importance of journalists in a democratic society, and relied on the decision of *Goodwin*, highlighting the right to freedom of expression of journalists under Article 10 ECHR and the associated protection for journalistic sources.

Question 7: Are there any other steps that the Bill of Rights could take to strengthen the protection for freedom of expression?

⁵<https://www.judiciaryni.uk/sites/judiciary/files/decisions/Fine%20Point%20Films%20and%20Birney,%20McCaffrey%20and%20PSNI%20and%20Durham%20Constabulary%20Applications.pdf>

The Society is not aware of any additional steps that could be taken as this right is already protected under Article 10.

II. RESTORING A SHARPER FOCUS ON PROTECTING FUNDAMENTAL RIGHTS

A permission stage for human rights claims

Question 8: Do you consider that a condition that individuals must have suffered a 'significant disadvantage' to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way of making sure that courts focus on genuine human rights matters? Please provide reasons.

There is a lack of specific information surrounding the proposals on the introduction of a permission stage, and the reasons why the Government believe this is necessary. This is also another aspect of the consultation where the question presupposes the outcome. There is also a lack of evidence to suggest that the courts are not currently focused on genuine human rights matters. It is also important to highlight that breaches of human rights warrant judicial oversight and remedy.

There are currently admissibility stages for courts to consider in order for cases to progress. Section 7 of the HRA already includes the 'victim test' for standing for any person bringing a human rights case, which requires them to demonstrate that they have been directly affected by an actual or threatened breach of their human rights.

It is necessary that individuals have access to the courts when their rights have been breached. It appears that the likely impact of the introduction of a permission stage would be to make it more difficult, particularly for vulnerable or disadvantaged individuals, to access the courts in relation to ECHR rights and to enforce their rights. It is unclear how the 'significant disadvantage' test would work in practice. There is a lack of information on what would amount to a 'significant disadvantage' or how this test would work in practice. However, this threshold appears to be higher than the victimhood test provided for by Article 34 of the ECHR and may be commensurately more difficult to prove. Thus, this proposal could undermine access to the ECHR by adding a further burden on individuals to prove they have experienced a 'significant disadvantage'. This may have a disproportionate impact on certain groups in society, particularly for vulnerable individuals by creating additional barriers and disincentives to bringing claims.

Moreover, the Society notes that the admissibility threshold that an applicant must cross in order to take a case before the Strasbourg court is necessarily constrained by practical considerations – including the enormous size of the demographic entitled to apply to Strasbourg – which should not necessarily guide the relevant threshold domestically, given that the Strasbourg court is also bound by the doctrine of subsidiarity.

Contrary to the stated objectives of increasing clarity and certainty, introducing the significantly unclear concept of a ‘significant disadvantage’ would create further uncertainty for both individuals and the courts to work out the meaning of this term. Moreover, it is unclear how this proposal would coexist with the leave requirements surrounding applications for judicial review, and it is likely to lead to several procedural complications in practice. Clear, distinct processes are necessary for both citizens and legal professionals, and further clarity is required on how this proposal would operate both in the context of judicial review proceedings and elsewhere.

In addition, Article 13 of the ECHR provides for the right to an effective remedy. Adding a further permission stage is likely to result in more cases going to the ECtHR as people may turn to the ECtHR to access justice.

Furthermore, the Good Friday Agreement (GFA) sets out that “the British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with **direct access** to the courts...”. Therefore, the introduction of a permission stage could potentially interfere with the GFA by limiting direct access to the courts. Consequently, this proposal requires very careful consideration in the context of NI and the GFA.

Due to the reasons highlighted above, the Society is strongly against this proposal.

Question 9: Should the permission stage include an ‘overriding public importance’ second limb for exceptional cases that fail to meet the ‘significant disadvantage’ threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.

As outlined above, the Society is not in favour of an additional permission stage for human rights claims. This suggestion would draw the courts into a question of fairness to decide

issues of admissibility. It is difficult to decide on the merits of case in the absence of all arguments being made properly.

Judicial Remedies: Section 8 of the Human Rights Act

Question 10: How else could the government best ensure that the courts can focus on genuine human rights abuses?

The Society believes that there is not enough evidence available to suggest that the courts are not currently focused on genuine human rights abuses and the Government's desire to 'reduce the numbers of human rights-based claims being made overall'⁶ is concerning.

There are a number of protections already in place, including the victim test under section 7. Section 8(3) currently strikes the right balance, and therefore should not be amended.

Positive obligations

Question 11: How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons.

There is a lack of evidence surrounding the proposed need to restrict positive obligations. Positive obligations have been part of the UK common law for a long time and are a vital part of the way human rights operate to protect individuals' rights. Any changes to this framework would put rights at risk and would reduce the ability to hold public authorities to account, with wide ramifications across various areas including protecting victims of domestic violence or human trafficking and slavery.

Positive obligations are particularly important in NI in the context of legacy cases. Positive duties that have emerged from ECtHR interpretations of Article 2 and 3 have been essential in seeking progress on legacy investigations. Many legacy cases remain unresolved in NI and elsewhere, and the sensitivities around legacy cases have been heightened in recent months following the MoJ's recent proposals to deal with these types of cases. Any reduction in the scope of positive obligations will undermine the ability to access Convention rights and will have particular consequences in NI.

⁶ Page 66 of the consultation document

III. PREVENTING THE INCREMENTAL EXPANSION OF RIGHTS WITHOUT PROPER DEMOCRATIC OVERSIGHT

Respecting the will of Parliament: section 3 of the Human Rights Act

Question 12: We would welcome your views on the options for section 3.

Option 1: Repeal section 3 and do not replace it.

Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.

We would welcome comments on the above options, and the illustrative clauses in Appendix 2.

The Independent Review of the Human Rights Act recommended that there should be no significant change to Section 3 and stated that there is no evidence that the courts are not using Section 3 properly.

Section 3 of the HRA requires that both primary and subordinate legislation must be read in a way which is compatible with Convention rights, as far as it is possible to do so. Following the enactment of the HRA, this was seen as a positive step towards rights protections, rather than an interference with parliamentary sovereignty

Section 3 does not give the courts power to make new laws – legislation must be interpreted in accordance with the HRA. This was confirmed by the House of Lords in *Sheldrake v DPP* [2004] UKHL 43 commenting on *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. Lord Bingham outlined four rules for the application of section 3 HRA;

‘First, the interpretative obligation under Section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a Convention-compliant interpretation under Section 3 is the primary remedial measure and a declaration of incompatibility under Section 4 an exceptional course.

Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a Convention compliant interpretation is not possible.'

The fourth rule ensures the preservation of parliamentary sovereignty by limiting the ability of the courts to interpret legislation so that Parliament's express intention in enacting a piece of legislation cannot be undermined. This is supported by a strong body of caselaw which demonstrates the courts' willingness and ability to apply limits to the interpretive obligation.

As outlined in our response to the Independent Review, legal academic Christopher Crawford provided a useful analysis of cases from the UK superior courts where section 3 has been applied⁷. Of the 59 cases listed by Crawford, there were 34 in which the relevant provision was not amended after being 'read down' under Section 3. In a further 6 cases, an amendment was made that had no correlation to or impact upon the section 3 interpretation. This means that in 40 of the 59 cases, the section 3 interpretation was accepted by Parliament, effectively proving that there was no interference with Parliament's intention. In another seven of the cases, the court considered the repealed or soon-to-be repealed legislation and found that the repealed Bill or Act was consistent with the interpretation ultimately reached by the court. This means that Parliament had already decided to amend the legislation in the direction of improved rights protections, independently of the courts. Thus, in 47 of the 59 cases, there was no conflict between parliamentary intention and the courts' interpretation under Section 3. In fact, Crawford's findings showed only one case in which Parliament implicitly rejected the court's interpretation. Subsequently, there is little or no evidence that Section 3 has led to any significant or widespread interference with Parliamentary intention.

In light of the above, the illustrative clauses contained in Appendix 2 are ill-considered and are not necessary.

Question 13: How could Parliament's role in engaging with, and scrutinising, section 3 judgments be enhanced?

⁷ Christopher Crawford, 'Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998' (2014) 25 *King's Law Journal* 34 - 59

In relation to section 3, the Independent Human Rights Act Review report states ‘there is no substantive case for its repeal or amendment’. We do not believe that there is sufficient evidence that Section 3 takes power away from or reduces the role of Parliament.

Question 14: Should a new database be created to record all judgments that rely on section 3 in interpreting legislation?

The creation of a database to record all judgments that rely on section 3 in interpreting legislation would be welcome as this would allow judgments to be easily accessible. It would also increase transparency and may increase understanding around the application of section 3 in practice.

When legislation is incompatible with the Convention rights: sections 4 and 10 of the Human Rights Act

Declarations of incompatibility

Question 15: Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

Section 4 declarations are only used in a very small number of cases, demonstrative of very few instances of significant conflict between Parliamentary intention and the HRA. Furthermore, new legislation is passed in the full knowledge that it will be interpreted in accordance with Section 3. The fact that the courts have made use of Section 4, where necessary, is evidence of the recognition of the need to maintain a balance between Sections 3 and 4.

As the proposal extends to all secondary legislation, the Society is concerned that this proposal could result in a breach of the GFA. Section 21(1) of the HRA defines an Act of the NI Assembly as subordinate legislation, meaning they can be quashed if they are found to be incompatible with any of Convention rights protected by the HRA. This is reinforced by section 6 of the NI Act 1998, which sets out that a provision of an Act of the Assembly is “not law” if it is not compatible with any of the Convention rights.

The proposal could result in a breach of the UK Government’s international law obligations under the Belfast (Good Friday) Agreement. The Agreement states:

“The Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas, subject to...the ECHR and any Bill of Rights for Northern Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void”. (Democratic Institutions in Northern Ireland – para. 26)

Furthermore, the Agreement imposes the following obligation:

“The British Government will complete incorporation into Northern Ireland Law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency”. (Rights, Safeguards and Equality of Opportunity – para. 2)

Therefore, caution should be taken in respect to this proposal. Courts must remain empowered to overrule Assembly legislation where it conflicts with Convention rights.

Question 16: Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with the Convention rights? Please provide reasons.

This element of the Judicial Review and Courts Bill which is currently progressing through Parliament will have no immediate effect in Northern Ireland.

Should Clause 1 of the Judicial Review and Courts Bill be enacted, we would not favour it being extended to human rights proceedings across the UK. The forms of relief available by way of an application for judicial review in NI do not include provision for suspended or prospective-only quashing orders.

Remedial orders

Question 17: Should the Bill of Rights contain a remedial order power? In particular, should it be:

a. similar to that contained in section 10 of the Human Rights Act;

b. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;

c. limited only to remedial orders made under the 'urgent' procedure; or

d. abolished altogether?

Please provide reasons.

As set out in our response to the Independent Human Rights Act Review, it is our view that the current arrangements set out in Section 10 of the HRA are satisfactory and any alteration to the current process is undesirable.

Statement of Compatibility – Section 19 of the Human Rights Act

Question 18: We would welcome your views on how you consider section 19 is operating in practice, and whether there is a case for change.

It is our view that section 19 is operating effectively in practice and there is no need for change. Section 19 operates in practice as a 'human rights assessment' and is an important transparency tool as it ensures that human rights are considered when new laws are being made.

Application to Wales, Scotland and Northern Ireland

Question 19: How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?

It would be extremely difficult for a Bill of Rights to reflect the different interests, histories and legal traditions of all parts of the UK. Any process to develop a Bill of Rights for the whole of the UK would require careful consideration and extensive engagement with devolved nations to ensure that all aspects of devolved issues are considered and reflected. This consultation would not be a sufficient basis of engagement to justify change.

The HRA provides a legal framework for protecting human rights across the UK, in a way that respects the individual circumstances of each of the devolved nations and reflects the different legal systems which operate in the UK. It provides a minimum standard of human rights protection in a way which permits bespoke developments at the devolved levels which seek to further protect human rights. Therefore, it should not be replaced.

The particular circumstances of Northern Ireland require careful consideration in the context of the proposals. The HRA underpins the GFA and the NI Act. The HRA is central to Northern Ireland's constitutional settlement, in two key dimensions:

- Firstly, there is an international dimension, comprising the GFA in which the UK Government commits to the complete incorporation of the ECHR in Northern Ireland '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'. Moreover, Article 2 of the Ireland/Northern Ireland Protocol provides for 'no diminution of rights, safeguards and equality of opportunity' in NI.
- Secondly, there is a domestic law dimension in the form of the NI Act 1998.

It is our view that significant reform to the HRA presents substantial potential risks to stability and peace in NI, especially at a time when political instability remains high. Changes to the operation of the HRA in NI are undesirable and may have far-reaching consequences. Additionally, any significant modification to the HRA that leads to a diminution of rights will likely attract international attention and concern.

Furthermore, the New Decade New Approach agreement (2020), a deal to restore power sharing in NI in 2020, provided for the creation of an Ad Hoc Committee on a Bill of Rights in Northern Ireland. Its work is premised on the commitment within the GFA to a Bill of Rights which it was envisaged would build upon the HRA. The report of this Committee was published in recent weeks and is likely to be picked up in the next mandate, therefore this process should not be interfered with. Moreover, it is important to note that the debate in NI is currently focused on the potential extension of human rights, rather than diminution.

It is undesirable that devolved issues have only been largely contained within one question in this consultation, with very little consideration being given to the potential impacts. The devolution settlement in NI should be respected. Any fundamental changes to the current position should only be brought forward following legislative consent being received by the NI Assembly (as per the Sewel Convention).

Public authorities: section 6 of the Human Rights Act

Question 20: Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered?

Please provide reasons

The Society supports the overarching purpose of the HRA to embed respect for human rights in all acts of public authorities, and this is central to the principle of universal human rights which underpins our legal framework. Section 6 ensures that human rights are accessible and usable for individuals.

Additional clarity on whether a body is a public authority, or a function is of a public nature may be useful. Providers should be obliged to uphold Convention rights across various sectors, including health and social care accommodation and education settings, even if those services are contracted out. This has already been recognised for example through social and residential care. It is important that contractors meet the basic standards required by the Convention.

Question 21: The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer? Please explain your reasons.

Option 1: provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or

Option 2: retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.

The Society does not favour either option, bearing in mind that public authorities already have significant protection when giving effect to primary legislation already.

Extraterritorial jurisdiction

Question 22: Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.

As outlined above, the Society supports the overarching purpose of the HRA to embed respect for human rights in all State operations and acts of public authorities. As a signatory to the Convention, the UK must ensure that there are no limits to the application of human rights from the Act or the Convention overseas.

It does not appear that there is an issue with how the HRA currently applies to those exercising UK governmental power abroad and there does not appear to be a problem with the court's jurisprudence relating to this matter.

Qualified and limited rights

Question 23: To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act?

We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.

Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.

Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

We do not believe that there are any issues with the current proportionality test, and there is a lack of evidence behind the proposed need for reform. It is a vital part of how human rights are protected and ensures that rights are balanced. It enables careful consideration to be given to the facts of each individual situation, and therefore the courts ability to consider issues and make decisions should not be restricted.

In the *Animal Defenders* case⁸, the following judgment from Lord Bingham demonstrates that the courts are fully cognisant of the great weight that should be given to legislation enacted by Parliament:

The weight to be accorded to the judgment of Parliament depends on the circumstances and the subject matter. In the present context it should in my opinion be given great weight, for three main reasons. First, it is reasonable to expect that our democratically-elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy. It cannot be supposed that others, including judges, will be more so. Secondly, Parliament has resolved, uniquely since the 1998 Act came into force in October 2000, that the prohibition of political advertising on television and radio may possibly, although improbably, infringe article 10 but has nonetheless resolved to proceed under section 19(1)(b) of the Act. It has done so, while properly recognising the interpretative supremacy of the European Court, because of the importance which it attaches to maintenance of this prohibition. The judgment of Parliament on such an issue should not be lightly overridden. Thirdly, legislation cannot be framed so as to address particular cases. It must lay down general rules ... A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial.

Consequently, no change is required to the current proportionality test.

Deportations in the public interest

Question 24: How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.

Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment.

⁸ *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 2 WLR 781

Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights.

Option 3: Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.

This proposal aims to limit the scope of Articles 5, 6 and 8. It also undermines the role of judges in determining questions of law relation to human rights. Limiting the scope of any human rights for a 'certain category of individuals' goes against one of the core principles of human rights i.e. that they are universal for all. This proposal is highly likely to have a particular impact on minority communities and would likely undermine their ability to access rights. It creates a situation where the law is not applied equally to everyone, in contravention of the principal of the universality of human rights. The Convention applies to all people residing in a territory, whether they are nationals of that state, immigrants (whether deemed illegal or not), or stateless. Criminal sentencing and deportation orders are already used disproportionately against black and Asian people. This proposal is likely to further increase racial discrimination.

Moreover, there does not appear to be sufficient evidence that deportations that are in the public interest are being frustrated, therefore the need for change is not justified. Human rights do not 'frustrate' state actions, they are an essential safeguard. In addition, deportations are not in the public interest if they conflict with human rights.

Illegal and irregular migration

Question 25: While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?

The Society rejects the framing of the human rights of migrants, refugees and asylum seekers, as "impediments" that can or should be circumvented. This proposal, taken together with other reforms such as those included in the Nationality and Borders Bill, highlights a worrying trend seeking to marginalise migrants and asylum seekers. As outlined above, human rights are universal and therefore should be protected for all,

including migrants, refugees, and asylum seekers. This proposal would engage the right to life (Article 2) particularly in relation to migration across the English channel.

Remedies and the wider public interest

Question 26: We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:

a. the impact on the provision of public services;

b. the extent to which the statutory obligation had been discharged;

c. the extent of the breach; and

d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.

Which of the above considerations do you think should be included? Please provide reasons.

Any such changes to the functioning of Section 8 of the HRA would place barriers in the way of achieving remedies for violation of rights and holding public authorities to account. We do not believe there is sufficient evidence to suggest that a change to the current approach is required. The independent courts are best placed to make decisions based on the individual facts of each case, and they already take account of a number of factors when deciding to award remedies in a case. Any limitation on redress or damages will limit access to justice and the principle of providing adequate and appropriate redress for the impact of breaches of human rights.

IV. EMPHASISING THE ROLE OF RESPONSIBILITIES WITHIN THE HUMAN RIGHTS FRAMEWORK

Question 27: We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons.

Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or

Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

As outlined above in responses to previous questions, human rights are universal. It is widely recognised that responsibilities play an important role within the human rights framework as, within most qualified rights, there are references to responsibilities. This proposal would impact on the universality of human rights and would create a system where some individuals would not be able to access a remedy where their rights have been breached. Moreover, there is already sufficient scope for courts to take conduct into account when considering remedies.

V. FACILITATING CONSIDERATION OF AND DIALOGUE WITH STRASBOURG, WHILE GUARANTEEING PARLIAMENT ITS PROPER ROLE

Question 28: We would welcome comments on the options, above, for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2.

There is already an adequate process in place for the UK Parliament to respond to Strasbourg judgments, therefore the proposals are unnecessary.

Question 29: We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights.

In particular:

a. What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate;

b. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate; and

c. How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.

A more extensive impact assessment would be required than the above to ensure that impacts are considered carefully.

The Human Rights Act safeguards the rights of all within the UK. Many of the proposals contained within the consultation document will limit rights and make it harder for some individuals to obtain redress. This goes against the core principle that human rights are universal and would therefore have negative impacts for many groups in society.

Within the consultation document, the Government proposes a number of fundamental changes to the way rights work in practice. This would result in access to justice being undermined, and additional barriers being placed in the way of individuals enforcing their rights. The introduction of a permission stage (questions 8-9) will introduce procedural hurdles, and would restrict access to justice, perhaps most particularly for vulnerable people.

The HRA is incorporated into devolution laws, yet there is little detailed consideration within the consultation document of how the proposals would work or interact with law and

procedures at the devolved level. Little consideration has been given to the impacts of the proposals on NI. As outlined above, the particular circumstances of NI require careful consideration within a HRA context.

CONCLUSION

In conclusion, the HRA is working effectively in practice, therefore there is no case for reform. The proposals, many of which lack a clear evidence basis, have the potential to do significant damage to human rights as they currently exist and limit the ability of individuals to enforce their human rights and seek redress. The proposals will have a detrimental impact on access to justice, particularly for vulnerable and disadvantaged groups.

The HRA has significant constitutional importance in NI, yet the proposals have not adequately considered NI nor the GFA. Significant consideration and caution should be given to the unique circumstances of NI. Any diminution of rights in NI or fundamental changes to the way rights work would be unacceptable and would present potential risks to stability and peace in NI. Changes to the way rights work in NI are neither required nor desirable.