



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Submission to the Independent Human Rights
Act Review Team's Call for Evidence**

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Recommendations

- 2.7 The NIHRC recommends that the IHRAR Team consider the Good Friday Agreement and the UK Government's commitment to non-diminution when considering its deliberations.**
- 2.8 The NIHRC recommends that the IHRAR Team engage with the Ad Hoc Committee on a Bill of Rights for NI when conducting its review to ensure that the NI context is carefully considered as part of the review.**
- 3.12 The NIHRC advises that no amendment is necessary to the duty to "take into account" ECtHR jurisprudence under section 2 of the Human Rights Act 1998.**
- 3.19 The NIHRC advises that the approach taken by domestic courts in considering issues falling within the margin of appreciation is functioning appropriately and should remain unchanged.**
- 3.25 The NIHRC advises that the current approach to judicial dialogue between domestic courts and the ECtHR permits domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard for the circumstances of the UK.**
- 4.14 The NIHRC recommends that no amendments are required for Sections 3 and 4 of the HRA, nor should either section be repealed.**
- 4.19 The NIHRC advises that the no changes are necessary with respect to section 14 of the HRA governing derogation orders.**
- 4.21 The NIHRC advises that the current framework is sufficient for dealing with subordinate legislation and no changes are necessary.**
- 4.27 The NIHRC advises that the HRA should apply to public authorities in overseas territories.**

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to Section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). In accordance with this function, the NIHRC provides this submission to the call for evidence by the Independent Human Rights Act Review Team (IHRAR).
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights¹, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN).
- 1.3 In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding but provide further guidance in respect of specific areas.
- 1.4 The NIHRC welcomes the opportunity to respond to the IHRAR's call for evidence. This submission will set out the Northern Ireland context before addressing theme one and theme two as identified in the call for evidence.

2.0 The NI context

- 2.1 The Commission notes that the present call for evidence is seeking comment on the technical and operational aspects of the Human Rights Act (HRA) 1998, but it is cognisant that any changes to the mechanisms of the HRA may have an impact on the protection and enforcement of rights.
- 2.2 The Belfast (Good Friday) Agreement (GFA) 1998 created a duty on the UK Government to incorporate the ECHR into Northern Ireland law "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".² This incorporation was achieved through the HRA. Comparable protection for human rights was committed to by the Government of Ireland and given effect through the ECHR Act 2003.³

¹ Ratified by the United Kingdom in 1951

² The Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

³ Ibid, para 9.

- 2.3 The continuing centrality of human rights protection through the GFA in NI can be evidenced through the UK Government's non-diminution commitment under article 2(1) of the Northern Ireland Protocol of the EU/UK. The UK government has committed to 'no diminution of rights under the Rights, Safeguards and Equality of Opportunities section of the Belfast (Good Friday Agreement). In an explainer document issued by the in August 2020 the UK Government outlined that:

The Protocol commitment means that the UK Government must ensure that the rights, safeguards and equality of opportunity provisions set out in the relevant chapter of the Agreement are not diminished as a result of the UK leaving the EU. We do not envisage any circumstances whatsoever in which any UK Government or Parliament would contemplate any regression in the rights set out in that chapter, but the commitment nonetheless provides a legal binding safeguard. It means that, in the extremely unlikely event that such a diminution occurs, the UK Government will be legally obliged to ensure that holders of the relevant rights are able to bring challenges before the domestic courts and should their challenges be upheld, that appropriate remedies are available.⁴

Taking into account the UK Government commitment to uphold the GFA we would caution against any proposals which diminish access to remedies against ECHR violations through reform of the machinery of the Human Rights Act.

- 2.4 The Northern Ireland Act 1998 (NIA) incorporates the commitments of the GFA into domestic law and legislates for devolution in NI. The ECHR is embedded into the NIA, in keeping with commitments made under the GFA.⁵ For example, sections 6 and 24 of the NIA require compatibility with Convention rights.⁶ While the IHRAR is not offering recommendations on the content of the Convention rights contained in the HRA, potential recommendations which would change the operational mechanisms of the Act may consequently impact on the NIA.
- 2.5 Both the GFA and the St Andrews Agreement 2006 provide for a Bill of Rights for Northern Ireland, yet NI remains without one. A Bill of Rights for NI would afford an additional layer of human rights protection, to supplement that of the HRA. The New Decade New Approach agreement committed to establishing a NI Assembly Ad Hoc Committee on a Bill of Rights, assisted by an expert panel.⁷ The Ad Hoc Committee has been established and is consulting on the issue. In its concluding observations

⁴ NO Office, 'Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland', (NIO, 2020), at 2.

⁵ The Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity, at para 2.

⁶ Northern Ireland Act 1998, at section 6(2)(c).

⁷ NI Office, 'New Decade New Approach', (NIO, 2020), at para 37.

on the UK, the CESCR noted that the UK Government should take measures to expedite the adoption of a Bill of Rights for NI.⁸

- 2.6 Given the potential for the IHRAR to lead to changes in the operation of the HRA, it is vital to ensure protection of human rights in NI is not diminished through changes to the machinery of the HRA.
- 2.7 **The NIHRC recommends that the IHRAR Team consider the Good Friday Agreement and the UK Government's commitment to non-diminution when considering its deliberations.**
- 2.8 **The NIHRC recommends that the IHRAR Team engage with the Ad Hoc Committee on a Bill of Rights for NI when conducting its review to ensure that the NI context is carefully considered as part of the review.**

3.0 The Relationship between Domestic Courts and the European Court of Human Rights

- 3.1 While the terms of reference for the IHRAR are not focusing on the content of the Convention Rights enshrined within the HRA, the Review has been charged with considering options for amending operational aspects of the HRA including examining the relationship between domestic courts and the European Court of Human Rights (ECtHR).⁹
- 3.2 Section 2(1) of the HRA states:
 - (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
 - (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
 - (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
 - (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
 - (d) decision of the Committee of Ministers taken under Article 46 of the Convention,

⁸ E/C.12/GBR/CO/6, Committee on Economic Social and Cultural Rights, 'Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland', (CESCR, 2016), at para 10; see also CCPR/C/GBR/CO/7, Human Rights Committee, 'Concluding observations on the seventh periodic review of the United Kingdom of Great Britain and Northern Ireland', (CCPR, 2015).

⁹ Independent Human Rights Act Review, 'Terms of Reference', (IHRAR, 2020).

Whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

- 3.3 Applications against the UK Government are rarely upheld by the ECtHR. In 2019, the ECtHR dealt with 359 applications relating to the UK; 347 were struck down or declared inadmissible, five judgments were delivered, which found at least one violation of the ECHR.¹⁰ This data, of course, does not account for the cases that are resolved through the domestic process under the HRA.
- 3.4 In her evidence to the Joint Committee on Human Rights, Lady Hale notes the HRA has had a positive impact on the UK's relationship with the ECtHR because they are now doing the same thing. This can be seen through the jurisprudence, as the UK has lost far fewer cases at the ECtHR since the introduction of the HRA.¹¹
- 3.5 The HRA has allowed individuals, and organisations, to bring cases regarding human rights violations through the domestic courts, where previously any recourse to remedy would have had to be accessed through the ECtHR. This is particularly valuable for NI given its post-conflict status as the HRA has facilitated individuals in holding the State to account over issues connected to dealing with NI's past. Despite the development of the Article 2 jurisprudence at Strasbourg, the role of the domestic courts in applying the Convention through the HRA remains central to the protection of rights in NI. In the cases of *Finucane* and *Hugh Jordan*, in which the court considered the adequacy of legacy investigations under Article 2, the UKSC held that investigative obligations under Article 2 ECHR had not been complied with, reversing decisions by the Court of Appeal of NI.¹² Changes to section 2 of the HRA could lead to increased numbers of individuals taking cases to Strasbourg, which would be a retrograde step particularly in terms of the propensity for legacy issues to be litigated on human rights grounds.

How has the duty to “take into account” ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

- 3.6 Section 2 of the HRA requires courts to “take into account” relevant ECtHR jurisprudence when making decisions on Convention rights; it does not compel courts to follow unequivocally.¹³ This has been reflected in several decisions by domestic courts, but notably in *Manchester City Council v*

¹⁰ Council of Europe, 'Country Profiles: the United Kingdom', (CoE, 2020), accessed at [CP United Kingdom ENG \(coe.int\)](https://coe.int/cp/United_Kingdom_ENG)

¹¹ Lady Brenda Hale, ‘The Government’s Independent Human Rights Act Review: Witness The Rt Hon the Baroness Hale of Richmond DBE’ (JCHR, 2021), accessed at [Parliamentlive.tv - Human Rights Committee](#)

¹² In the matter of an application by Geraldine Finucane for Judicial Review [2019] UKSC 9

¹³ Lady Brenda Hale, ‘The Government’s Independent Human Rights Act Review: Witness The Rt Hon the Baroness Hale of Richmond DBE’ (JCHR, 2021), accessed at [Parliamentlive.tv - Human Rights Committee](#)

Pinnock, where Lord Neuberger noted, “this Court (UKSC) is not bound to follow every decision of the ECtHR”.¹⁴

- 3.7 Lord Phillips has reiterated this point to the Joint Committee on Human Rights, stating that, had there been no reference to the requirement to take account of Strasbourg jurisprudence in the HRA, domestic courts would have done so automatically “because it would be the proper course when trying to resolve issues relating to the meaning of the Convention”.¹⁵
- 3.8 In *Regina v Special Adjudicator (Respondent) ex parte Ullah (Appellant)*, Lord Bingham notes that the Court’s duty under Section 2 of the HRA is to “take account” of (not follow) Strasbourg jurisprudence unless there is a good reason not to.¹⁶ Lord Bingham identifies the ‘Ullah principle’, whereby a national court should not dilute the effect of Strasbourg case law without good reason, noting the duty of national courts is to “keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less”.¹⁷
- 3.9 Recent jurisprudence from domestic courts has seen a shift away from the Ullah principle. In *Nicklinson v Ministry of Justice*, a case relating to assisted suicide, the UKSC considered whether section 2 of the Suicide Act 1961 was incompatible with article 8 of the ECHR. The appellant contended that four Strasbourg decisions on assisted suicide had decided that a “blanket ban” was incompatible with article 8, making section 2 incompatible with article 8 even with a wide margin of appreciation.¹⁸ Lord Neuberger notes the Ullah principle did not apply given that Strasbourg allows a wide margin of appreciation on issues dealing with assisted suicide.¹⁹
- 3.10 In *Poshteh v Royal Borough of Kensington and Chelsea*, a case concerning housing rights, the UKSC considered whether there had been a breach to article 6 of the ECHR. Poshteh was considered in light of *Ali v UK*, where the Grand Chamber held that article 6(1) did apply to that case.²⁰ Lord Carnwath acknowledged the duty to “take account of” Strasbourg jurisprudence under section 2 of the HRA but noted that the Chamber had consciously gone beyond the scope of previous cases in *Ali v UK*.²¹ As such, Lord Carnwath stated that on this occasion the UKSC should not consider the Chamber’s decision as a sufficient reason to depart from its own unanimous conclusion.²²

¹⁴ *Pinnock v Manchester City Council* [2011] UKSC 6 & [2010] UKSC 45, at para 48.

¹⁵ Lord Phillips, Oral Submission to the Joint Committee on Human Rights, HC 873-ii, 15 November 2011.

¹⁶ *Regina v Special Adjudicator (Respondent) ex parte Ullah (FC)(Appellant)* [2004] UKHL 26, at para 20.

¹⁷ *Ibid.*

¹⁸ *R (on the application of Nicklinson and another)(AP)(Appellants) v Ministry of Justice (Respondent)* [2014] UKSC 38, at 62.

¹⁹ *Ibid.*, at 69.

²⁰ *Poshteh (Appellant) v Royal Borough of Kensington and Chelsea (Respondent)* [2017] UKSC 36, at para 18.

²¹ *Ibid.*, at para 36.

²² *Ibid.*, at para 37.

- 3.11 The development of the jurisprudence in this area shows the domestic familiarity with the Convention and Strasbourg Court and the utility of its jurisprudence in making domestic assessments of compliance. The courts have shown a willingness to give due regard to Strasbourg jurisprudence but have not been bound to follow their decisions.
- 3.12 **The NIHRC advises that no amendment is necessary to the duty to “take into account” ECtHR jurisprudence under section 2 of the Human Rights Act 1998.**

When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?

- 3.13 The ECtHR affords States Parties a degree of discretion, (a margin of appreciation), when determining decisions on State compliance with the convention. In providing this discretion the ECtHR leaves “States party to the Convention a certain margin of appreciation in deciding whether and to what extent an interference is necessary”.²³ The scope of the margin of appreciation will vary “according to the circumstances, the subject-matter and the background”.²⁴ As a general rule, a wide scope has been given to the issues of national security, tax, moral questions and social and economic policy. On the other hand, a narrow margin of appreciation is afforded in cases concerning criminalising gay relationships between consenting adults and freedom of speech governing political debate or matters of public interest.
- 3.14 There are a number of examples where the ECtHR have given deference to individual states. In *Evans v UK*, the ECtHR noted that several factors must be considered when determining the breadth of the margin of appreciation, stating:

Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted ... Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider ... There will also usually be a wide margin if the State

²³ *Eweida and Others v United Kingdom*, ECtHR, (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) (15 January 2013), para 84.

²⁴ *Eweida and Others v United Kingdom*, ECtHR, (Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10) (15 January 2013), para 88.

is required to strike a balance between competing private and public interests or Convention rights.²⁵

- 3.15 In matters for example, relating to social security, the ECtHR will usually afford states a wide margin, noting:

Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation."²⁶

- 3.16 Domestic courts have identified that the margin of appreciation is a concept of international law governing the relationship between an international court and contracting states.²⁷ The margin of discretion is a concept that, though substantively similar to the margin of appreciation, describes the latitude accorded to legislatures in the application of convention rights.²⁸

- 3.17 Lord Neuberger explains in *Nicklinson v Ministry of Justice* that when Strasbourg decides that an issue resides within a state's margin of appreciation, "it is open to a domestic court to declare that a statutory provision, which is within that margin, nonetheless infringes Convention rights in the United Kingdom".²⁹

- 3.18 Courts are aware that judges are not there to make policy decisions, acknowledging that this is the duty of Parliament. In *R v the Registrar General for England and Wales*, the Court of Appeal identified important foundations on which the margin of discretion accorded to Parliament rested.³⁰ The first is that the Government has greater opportunity to access wider information than courts, has greater access to expert bodies and to public opinion, granting Parliament the ability to access the widest

²⁵ *Evans v United Kingdom* 43 EHRR 21, at para 77.

²⁶ *Stummer v Austria*, ECtHR, Application no. 37452/02 (7 July 2011), para 89.

²⁷ *R (On the Application of) McConnell & Anor v The Registrar General for England and Wales* [2020] EWCA Civ 559, at para 80; see also Lady Hale's Judgement in *P and others (AP)(Northern Ireland)* [2008] UKHL 38, at para 118.

²⁸ *Ibid*, at para 81.

²⁹ *R (on the application of Nicklinson and another)(AP)(Appellants) v Ministry of Justice (Respondent)* [2014] UKSC 38, at 59.

³⁰ *R (On the Application of) McConnell & Anor v The Registrar General for England and Wales* [2020] EWCA Civ 559, at para 81.

possible information to inform policy decisions.³¹ Secondly, the Court surmised that democratic legitimacy provides a basis for “concluding that the courts should be slow to occupy the margin of judgement more appropriately within the preserve of Parliament.”³²

3.19 The NIHRC advises that the approach taken by domestic courts in considering issues falling within the margin of appreciation is functioning appropriately and should remain unchanged.

Does the current approach to ‘judicial dialogue’ between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

3.20 The interaction between domestic courts and the ECtHR regarding judgements is referred to as judicial dialogue. In *Manchester City Council v Pinnock*, Lord Neuberger states that the UKSC is not bound to follow every decision from Strasbourg, as to do so would “destroy the ability of the Court to engage in the constructive dialogue with the ECtHR which is of value to the development of Convention law”.³³

3.21 In *Horncastle and others*, a case concerning the application of testimony by anonymous witnesses in trials, the UK Supreme Court held that there had been no violation under article 6 of the ECHR because there were appropriate safeguards within domestic provisions that protected a defendant’s right to fair trial.³⁴ In a similar case, *Al-Khawaja and Tahery v UK*, the ECHR had held that the use of hearsay evidence had violated article 6.³⁵ This case was referred to the Grand Chamber of the ECtHR, which had deferred the case pending a judgement in *Horncastle*.³⁶

3.22 It was suggested in *Horncastle and others* that the UKSC should take into account the jurisprudence of the ECHR in determining a violation to article 6. In considering the duty to take into account Strasbourg jurisprudence, Lord Phillips stated:

There will be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or

³¹ Ibid.

³² Ibid, at para 82.

³³ *Pinnock v Manchester City Council* [2011] UKSC 6 & [2010] UKSC 45, at para 48.

³⁴ *Horncastle & Others* [2009] UKSC 14, at para 38.

³⁵ *Al-Khawaja and Tahery* [2009]

³⁶ *Horncastle & Others* [2009] UKSC 14, at para 9.

accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course.³⁷

- 3.23 After the UKSC's decision in *Horncastle and others*, the Grand Chamber found that there had been no violation of article 6 in *Al-Khawaja v UK*.³⁸ Judge Bratza identified this as "a good example of judicial dialogue" between national courts and the ECtHR in determining the application of the Convention.³⁹
- 3.24 An example of a UK decision informing a judgement of the ECtHR is that of *R v Secretary for Culture, Media and Sport*, where the (then) House of Lords (HoL) decided that limiting freedom of expression in relation to election spending was not incompatible with article 10 of the ECHR.⁴⁰ Lady Hale noted that UK laws on election spending were "a balanced and proportionate response to the problem".⁴¹ When the case was brought to the ECtHR, the Court agreed with the HoL in spite of similar jurisprudence where they had found violations to article 10.⁴² Lady Hale has suggested that this is evidence that, through judicial dialogue, the UK has been able to influence decisions in Strasbourg.⁴³
- 3.25 **The NIHRC advises that the current approach to judicial dialogue between domestic courts and the ECtHR permits domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard for the circumstances of the UK.**

4.0 The Impact of the HRA on the Relationship between the Judiciary, the Executive and the Legislature

Should any changes be made to the framework established by sections 3 and 4 of the HRA?

³⁷ Ibid, at para 11.

³⁸ *Al-Khawaja and Tahery v UK* [2011] ECHR 2127, at para 175.

³⁹ Ibid, at the concurring opinion of Judge Bratza at para 2.

⁴⁰ *R (Animal Defenders International) v Secretary of State for Culture Media and Sport* [2008] UKHL 15

⁴¹ Ibid, at para 51.

⁴² *Animal Defenders International v United Kingdom* [2013] ECHR 362

⁴³ Lady Brenda Hale, 'The Government's Independent Human Rights Act Review: Witness The Rt Hon the Baroness Hale of Richmond DBE' (JCHR, 2021), accessed at [Parliamentlive.tv - Human Rights Committee](https://parliamentlive.tv/ProgramPage/ParliamentLiveTV-HumanRightsCommittee)

- 4.1 Section 3 of the HRA identifies that both primary and secondary legislation should be read and applied in a manner applicable with Convention rights “so far as is possible to do so”.⁴⁴ Section 3 also identifies that a finding of incompatibility under Convention rights:
- (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
 - (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.⁴⁵
- 4.2 The HRA reserves the function to amend primary legislation to Parliament and in doing so, seeks to preserve the doctrine of parliamentary sovereignty. The courts have repeatedly reinforced this principle of judicial deference to the legislature. For example, the House of Lords (HoL) has stated of the HRA, “the Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament”.⁴⁶
- 4.3 The practice of judicial deference has been upheld through the jurisprudence. In *R (on the application of) MA and others v The Secretary of State for Work and Pensions*, a challenge to the ‘bedroom tax’ Lord Dyson noted that the court should exercise “considerable caution before intervening with a scheme approved by Parliament” in reference to housing benefit regulations.⁴⁷ The UKSC emphasised, on appeal, that this was the correct course of action in *R (on the application of Carmichael and Rourke) v Secretary of State for Work and Pensions*.⁴⁸
- 4.4 The HoL reaffirmed the importance of judicial deference when deciding on a case involving a definition of gender identity. In *Bellinger v Bellinger*, Lord Nicholls noted that, given its sensitive nature, the issue would require extensive enquiry and public consultation. Lord Nicholls affirmed in respect of social policy and administrative feasibility, “the issues are altogether ill-

⁴⁴ Human Rights Act (1998), at sec 3(1).

⁴⁵ Ibid, at sec 3(2)(b)(c)

⁴⁶ *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291, at para 39.

⁴⁷ *R (on the application of) v The Secretary of State for Work and Pensions* [2014] EWCA Civ 13, at para 60.

⁴⁸ *R (on the application of Carmichael and Rourke) (formerly known as MA and others) (Appellants) v Secretary of State for Work and Pensions (Respondent)* [2016] UKSC 58, at para 30.

suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament”.⁴⁹

- 4.5 In oral evidence to the JCHR, Lord Judge identifies that the HRA is legislation produced by Parliament with the intention of preserving parliamentary sovereignty. Lord Judge states, “ultimately, it is for Parliament to decide, and by Parliament I do not mean the Government or the Executive; I mean Parliament”.⁵⁰
- 4.6 A criticism that has been levelled at the HRA is that it allows courts to make decisions that infringe upon the responsibilities of a democratically elected Parliament. However, as the previously cited caselaw suggests, the courts are both able to fulfil their duty to interpret compliance with Convention rights, while upholding the principle of parliamentary sovereignty.
- 4.7 The HRA was particularly important to NI when it was without a sitting Assembly between January 2017 and January 2020. In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review, a case concerning abortion access, was brought to the UKSC during this period without a functioning Assembly, Lord Mance noted that there was no indication when or if Stormont would resume operations.⁵¹ As such, Lord Mance commented that the present law was incompatible with Convention rights, stating that it was in need of “radical reconsideration”.⁵²
- 4.8 Section 4 of the HRA identifies that the court, where it is satisfied that a provision is incompatible with Convention rights, can make a declaration of incompatibility (DOI).⁵³
- 4.9 A DOI does not affect the validity or ongoing operation of the provision and it “is not binding on the parties to the proceedings in which it is made”.⁵⁴

⁴⁹ *Bellinger (FC) (Appellant) v. Bellinger* [2003] UKHL 21, at para 37.

⁵⁰ Lord Judge, Oral Submission to the Joint Committee on Human Rights, HC 873-ii, 15 November 2011.

⁵¹ In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) [2018] UKSC 27, at para 135.

⁵² *Ibid.*

⁵³ Human Rights Act (1998), at section 4(2).

⁵⁴ *Ibid.*, at sec 4(6).

- 4.10 DOIs are a rare occurrence with an average of little over two a year since commencement of the Human Rights Act. There have been 43 DOIs between October 2000 and July 2020.⁵⁵ Of these 33 DOIs, nine have been overturned on appeal and one is awaiting an appeal decision, leaving 33 DOIs after appeals were exhausted.⁵⁶ Of these 33 DOIs five related to provisions that had already been amended by primary legislation, eight have been resolved by remedial order, in two cases the Government has proposed to address by remedial order, 15 have been addressed by primary or secondary legislation.⁵⁷
- 4.11 Courts in NI have shown restraint in making DOIs in instances where they have found legislation to be incompatible with Convention rights.
- 4.12 In the matter of an application by Siobhan McLaughlin for Judicial Review, the UKSC made a DOI under section 4 of the HRA in response to the lack of provision for a social security benefit for widowed parents that was unavailable to unmarried couples.⁵⁸ The UKSC notes that the declaration does not change the law, it is for the “relevant legislature to decide whether or how it should be changed”.⁵⁹ This judgment is from 2018, and the DOI has not been addressed, demonstrating that the process to remedy an incompatibility is often slow to action and does not offer immediate remedy.
- 4.13 The availability of sections 3 and 4 of the HRA, permits the Courts with options which both preserve the interpretative functions of the judiciary and parliamentary sovereignty. Any amendment of these sections which would weaken the powers of the Court would inevitably have an impact upon rights protection. It is important that the Courts retain the options to read compatibly, given the often slow process of resolving a DOI.
- 4.14 **The NIHRC recommends that no amendments are required for Sections 3 and 4 of the HRA, nor should either section be repealed.**

⁵⁵ Ministry of Justice, ‘Responding to Human Rights Judgements: Report to the Joint Committee on Human Rights on the Government’s response to human rights judgements 2019-2020’, (MoJ, 2020), at Annex A.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ In the matter of an application by Siobhan McLaughlin for Judicial Review [2018] UKSC 48, at para 42.

⁵⁹ Ibid, at para 44.

What remedies should be available to domestic courts when considering challenging derogation orders made under section 14(1)?

- 4.15 The power to derogate from certain international human rights provisions in times of emergency is already established in human rights mechanisms. Article 15 of the ECHR identifies that in war or in other times of emergency States can derogate from certain Convention rights, however there can be no derogation from articles 2, 3, 4 and 7.⁶⁰
- 4.16 Article 4 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to derogate from certain rights in times of public emergency except from articles 6, 7, 8, 11, 15, 16 and 18 from which there can be no derogation.⁶¹ General Comment no 29 of the ICCPR identifies that two fundamental conditions must be met to warrant derogation from the Covenant; “the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency⁶².”
- 4.17 Domestic courts have considered challenges to derogation orders. In *A v Secretary of State for the Home Department*, the HoL held that the threat of terrorism was not a sufficient threat to warrant a derogation from article 5 of the ECHR.⁶³ In response to the Secretary of State’s distinction between democratic institutions and the courts, Lord Bingham stated:
- The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.⁶⁴

⁶¹ Ratified by the UK in 1976; see also the Siracusa Principles, which state that limitations on human rights under the ICCPR must meet the standards of legality, evidence-based necessity, proportionality and gradualism.

⁶² CCPR/C.21.Rev.1/Add.11, Human Rights Committee, ‘General Comment No. 29: States of Emergency’ (HRC, 2001), at para 2.

⁶³ *A v Secretary of State for the Home Department* [2004] UKHL 56.

⁶⁴ *Ibid*, at para 42.

4.18 The Government is not obliged to consult Parliament before it decides to derogate from a Convention right, but once made it must be laid before Parliament where it will cease to have effect after 40 days unless approved by a resolution from both House of Commons and House of Lords.⁶⁵ The JCHR has noted that Parliament's ability to scrutinise derogations is "therefore fairly limited".⁶⁶ Arguably, allowing more effective remedies to domestic courts when challenging derogation orders adds an additional check and balance on the Government where parliament lacks the necessary opportunity and scope to scrutinise these orders.

4.19 **The NIHRC advises that the no changes are necessary with respect to section 14 of the HRA governing derogation orders.**

Under the current framework, how have courts and tribunals dealt with subordinate legislation that are incompatible with Convention rights?

4.20 Primary legislation from devolved administrations is defined as subordinate legislation by section 21 of the HRA.⁶⁷ In practice, we are unaware of any issues arising from how the courts in NI have dealt with incompatible secondary legislation. In the matter of an application by the Northern Ireland Human Rights Commission, a case concerning the right of same-sex couples to adopt, the court held that articles 14 and 15 of the Adoption (Northern Ireland) Order 1987 were incompatible with articles 8 and 14 of the ECHR.⁶⁸ The Court noted that both articles were provisions of secondary legislation.⁶⁹ Subsequently, the Court ruled that articles 14 and 15 of the Adoption order would be read down.

4.21 **The NIHRC advises that the current framework is sufficient for dealing with subordinate legislation and no changes are necessary.**

In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

4.22 The Overseas Operations (Service Personnel and Veterans) Bill 2019-21 is currently going through Parliament. The Bill aims to create protections for

⁶⁵Human Rights Act 1998, at section 16.

⁶⁶ Joint Committee on Human Rights, 'Thirteenth Report', (JCHR, 2008), at para 96.

⁶⁷ Human Rights Act (1998), at section 21.

⁶⁸ In the matter of an application by the Northern Ireland Human Rights Commission [2012] NIQB 77, at para 75.

⁶⁹ Ibid, at para 61.

members of the armed forces pertaining to breaches of the ECHR, which resulted from overseas military operations. The Bill would create a six-year statutory limitation on taking cases against UK service personnel involved in overseas operations. The Bill currently excludes alleged crimes involving military personnel in NI.⁷⁰

4.23 The UN Special Rapporteur on Torture identified his concerns regarding the Overseas Operations Bill, noting:

The envisaged legislation will encourage or impose near systematic impunity for torture and other cruel, inhuman or degrading treatment or punishment perpetrated by UK personnel, in clear contradiction to treaty obligations to prevent and prosecute any such abuse, most notably under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.⁷¹

- 4.24 The NIHRC has raised its concerns regarding the Overseas Operations Bill and a potential statute of limitations to the Committee against Torture.⁷² The UN Committee against Torture (CAT) recommended the UK Government “refrain from enacting amnesties or statutes of limitations for torture or ill-treatment”, which are inconsistent with UN Convention against Torture.⁷³
- 4.25 The NIHRC has advised that the introduction of statutes of limitations present barriers to effective prosecution for human rights violations and abuses, such as violations to articles 2 and 3 of the ECHR.
- 4.26 The extraterritorial application of UK legislation is not unusual, particularly pertaining to human rights. The Domestic Abuse Bill, currently being considered by the HOL, will apply extra-territorially in relation to domestic abuse offences committed by UK citizens abroad to ensure compliance with their obligations under the Istanbul Convention. The UK already has extra-territorial jurisdiction covering offences concerning forced marriage and sexual offences where the victim is under 18.⁷⁴ Removing or rescinding the extra-territorial application of the HRA with respect to military personnel overseas would lower the standard of accountability for human rights breaches for the state below the standard for private citizens.

⁷⁰ Ministry of Defence, ‘Guidance: Overseas Operations (service personnel and veterans) Bill’, (MoD. 2020), accessed at [Overseas Operations \(service personnel and Veterans\) Bill - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444444/Overseas-Operations-Bill-Guidance.pdf)

⁷¹ OL/GBR/6/2020, Mandate of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 15 June 2020, at 2.

⁷² NI Human Rights Commission, ‘Update in respect of UN CAT Committee follow-up procedure to UK’s 2019 Concluding Observations’, (NIHRC, 2020), at para 2.30; see also NI Human Rights Commission, ‘Submission to NIO’s Consultation on Addressing the Legacy of Northern Ireland’s Past’ (NIHRC, 2020).

⁷³ NI Human Rights Commission, ‘Submission to NIO’s Consultation on Addressing the Legacy of NI’s Past’ (NIHRC, 2018), at para 41(f).

⁷⁴ Home Office, ‘Extraterritorial Jurisdiction Factsheet’, (Home Office, 2020), accessed [Extraterritorial jurisdiction factsheet - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444444/Extraterritorial-Jurisdiction-Factsheet.pdf)

4.27 The NIHRC advises that the HRA should apply to public authorities in overseas territories.

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