Independent Human Rights Act Review
Submission of evidence from National AIDS Trust (NAT)

1. National AIDS Trust is the UK's HIV rights charity. We work to stop HIV from standing in the way of health, dignity and equality, and to end new HIV transmissions. Our expertise, research and advocacy secure lasting change to the lives of people living with and at risk of HIV.

2. The Human Rights Act (HRA) should not be amended, repealed, or diluted. We agree with Baroness Hale of Richmond, who when asked whether the HRA needs to be 'fixed' whilst giving oral evidence to The Government's Independent Human Rights Act Review on Wednesday 3 February 2021, said "as far as I am concerned, and I think as far as a great many people are concerned, there is no problem."

3. Instead of focusing on amending or repealing this law, the Government should focus on ensuring the rights we currently have are respected, protected, and fulfilled. This means ensuring human rights are integrated into national and local policy and practice and that people are supported to know and assert their rights. NAT champions the rights of people living with HIV. The HRA is a vital tool and forms the legal foundation that enables this. The HRA helps us to raise concerns with public bodies when we feel the rights of people living with and affected by HIV are not being upheld.

4. Realisation of individual human rights is ultimately critical to wider public good. Removing the rights of some individuals has damaging consequences for the rights and wellbeing of wider society. The HRA ultimately is in place to prevent actions that have a damaging impact beyond the individual, even if initially it is the individual's rights that are called into question under the law.

5. The reality is that we see discrimination, or the risk of unequal treatment, in many aspects of life, and failing to respect rights hampers an effective response to HIV. Effective human rights which are accessible and enforceable are an essential part of reducing HIV-related stigma and discrimination and achieving zero HIV transmissions by 2030.

6. One example involves migrant data sharing between NHS Digital and the Home Office. We have an interest in migrant access to healthcare; a significant proportion of people living with HIV in the UK were born abroad. It is vital that these people are reached by HIV prevention messages and have access to life-saving HIV treatment and care to ensure their own wellbeing and to prevent further transmission of HIV in the community. Since 2014, we have challenged an agreement which enables NHS Digital to share confidential patient data with the Home Office. The right to privacy (Article 8), and its related principle of patient confidentiality, is central to our advocacy to abolish the practice of information sharing between the NHS and immigration authorities. In January 2019, our work culminated in an inquiry by the House of Commons Health Select Committee. The Health Committee were clear and forthright in their view that the practice of immigration tracing via patient records is unacceptable, calling on NHS Digital to suspend the agreement immediately, which they did in April 2019.

7. This is a clear example of where individual rights can not be disentangled from broader public interest. The breach of individual rights of migrants harms public health by presenting barriers to access to health prevention and treatment services that increase risk of ill health later on and onward transmission of conditions such as HIV. These practices have also contributed to entrenched mistrust in the NHS and other public institutions amongst migrants and their wider communities, with many who do have rights to access choosing not to do so.

8. Another example concerns the fact that a greater number of people living with HIV will require residential care or support in their own homes. Due to effective treatment, people living with HIV can now expect a normal life expectancy. Historically many people living with HIV did not live into old age so this is not an area where many older people's services have experience. People living with HIV have expressed anxiety about whether they might face discrimination from providers who misunderstand the condition and there are unfortunately examples of poor practice in social care.

9. In response to these concerns, we produced a Guide for Care Providers to ensure care services for older people are 'HIV ready'. This guide includes key points for managers and care workers on how to protect and promote the rights of people living with HIV in their care. The HRA helps us to advocate with and for people to ensure they are treated well in the context of their care. Article 2 (right to life) ensures that HIV treatment is taken as prescribed and Article 3 ensures that people living with HIV are not subject to inhuman and degrading treatment, for example, by not being provided with proper care because of misplaced fears around transmission or HIVrelated stigma. The realisation of these rights has wider benefits, improving understanding of HIV and affected communities amongst care providers, supporting prevention and a reduction in stigma and improving health outcomes.

i. The relationship between domestic courts and the European Court of Human Rights (ECtHR) Under the HRA, domestic courts and tribunals are not bound by the jurisprudence of the ECtHR, but are required by section 2 to "take into account" that jurisprudence (in so far as it is relevant) when determining a question that has arisen in connection with a Convention right. The Review should consider the following questions in relation to this theme:

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

10. Since 2009, there has been a marked departure from the so-called 'mirror principle' as laid down by Lord Bingham in the Ullah v Special Adjudicator [2004] UKHL 26, [2004] 2 AC 323, in which he said: "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less." Section 2 does not need to be amended and the duty to "take into account" ECtHR jurisprudence has been applied well. Section 2, as it is currently applied, allows for dialogue between the ECtHR and the UK courts. There is a well-founded understanding and acceptance that it would be impractical to follow every decision from Strasbourg because it would not allow for dialogue between the two courts; this sentiment was summarised by Lord Neuberger when he said "Where … there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we

consider that it would be wrong for this (Supreme) court not to follow that line." (Manchester City Council v Pinnock [2011] UKSC 6; [2011] 2 W.L.R. 220, para.4) Successful dialogue between Strasbourg and the UK's legislature and courts is evidenced by Animal Defenders International v. The United Kingdom [2013] in which the former decided to revisit its earlier approach, taking on board the considered views of the latter. This process of dialogue ultimately supports the development of better laws that support wider public good.

11. It is hard to see how we can water down this duty to follow Strasbourg jurisprudence. When the judges want to, they can be quite comfortable departing from Strasbourg, and that is currently permissible under section 2 as it stands.

12. The case of AM Zimbabwe v Secretary of State for the Home Department (SSHD) was heard in the Court of Appeal in 2019. The Supreme Court was asked to consider whether returning AM, an individual living with HIV who had been in the UK since 2000, to Zimbabwe would violate his right under Article 3 of the European Convention on Human Rights not to be subjected to inhuman treatment by reason of his HIV positive status, in light of the decision of the ECtHR in Paposhvili v Belgium [2017] Imm AR 867.

13. AM has been receiving antiretroviral therapy (ART) since 2012 when his CD4 count had started to fall. He experienced severe side effects and so was prescribed a different drug, namely Eviplera which did not give rise to significant side-effects and which enabled his CD4 blood count to increase and his HIV viral load to become undetectable. AM's case hinged on the fact that it was doubtful whether he could access specific ART regimens that would be successful in managing his HIV in Zimbabwe, without which his CD4 blood count would fall again. In that event he would be prey to opportunistic infections which, if untreated, would lead to his death.

14. In April 2020, five justices unanimously ruled the case must be reconsidered in full, departing from previous UK case law N v United Kingdom [2008] ECHR 453 by reference to Paposhvili and to remit his application for rehearing by reference to Article 3.

15. We believe that the above example of AM Zimbabwe v SSHD demonstrates the effectiveness of section 2 in protecting the rights of people living with HIV who are at risk of removal to a country where medication is either not available or accessible, risking their health, and ultimately, their life. It shows how the UK Supreme Court appropriately took into account the ruling in Paposhvili when determining a question that has arisen in connection with a Convention right.

b) 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?

16. The margin of appreciation means that the ECtHR recognises that countries across the Council of Europe have cultural and political differences. We do not believe that any change is required and the margin of appreciation as it is currently applied ensures that the legal duties of the member countries under the ECHR are complied with, whilst still respecting the UK's sovereignty.

c) 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?

17. As set on in our response to question i.a) we believe that the current approach to judicial dialogue between domestic courts and the ECtHR satisfactorily permits domestic courts to raise concerns as to the application of ECtHR jurisprudence. Furthermore, as stated by Sir John Laws, Court of Appeal judge, the HRA allows UK judges to give carefully analysed judgments on human rights issues which have been given due consideration by the Strasbourg Court itself. In this way, an opportunity is provided for the UK to influence the ECtHR judges and the development of Strasbourg case law.

18. We believe there is sufficient space for courts to approach things in their own way and engage in dialogue. The judgements by the ECtHR in the case Al-Khawaja and Tahery v UK, Nos. 26766/05 and 22228/06 [GC], 15.12.2011 are an example of this. The ECtHR Chamber in 2009 disagreed with the House of Lords and found a violation of Article 6(1) in conjunction with Article 6(3)(d) in both cases. Following a request by the UK Government, it was referred to the Grand Chamber of the ECtHR, which published its judgment on 15 December 2011 overturning the Chamber decision having carefully examined the objections of the UK to the ECtHR case law.

ii. The impact of the HRA on the relationship between the judiciary, the executive and the legislature. The judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review should consider the way the HRA balances those roles, including whether the current approach risks "overjudicialising" public administration and draws domestic courts unduly into questions of policy. The Review should consider the following questions in relation to this theme:

a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

- **Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?**
- **If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?**
- **Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?**

19. Section 3 is central to how the HRA works everyday as it makes clear to decision makers, whether they be social workers, police or local authority staff, that when they apply legislation in their work, they must make sure they are protecting and respecting people's human rights.

20. We are not aware of instances where, because of domestic courts and tribunals seeking to read and give effect to legislation compatibility with the Convention rights, legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it. We therefore do not think that section 3 should be amended or repealed.

21. Section 3 is essential to us as organisation seeking to protect the rights people living with HIV, which is classed as a disability pursuant to paragraph 6(1), Schedule 1, Equality Act 2010. In 2017, we challenged a proposed law aimed at introducing coercive HIV testing following assaults on emergency workers. The Assaults Against Emergency Workers Bill was proposed in England in July 2017 by a Member of Parliament with Government support. The legislation included clauses allowing police to test persons suspected of spitting on or biting emergency workers for blood-borne viruses (BBVs) and made refusal to test an offence, effectively introducing coerced BBV testing. Voluntary testing is a cornerstone of an ethical, evidence based and effective response to infectious disease. The enforcement of an offence of refusal to provide a sample for testing amounts to coercion, undermining this long-standing approach and undoubtedly violating the right to private life, as protected by Article 8 of the HRA.

22. We did not oppose the bill, and fully support efforts to protect emergency workers from assault. However, we do believe the Bill required important amendments before passing into law, specifically to sections 4, 5 and 6. Working in partnership with the Terrence Higgins Trust, the British HIV Association (BHIVA), and British Association for Sexual Health and HIV (BASHH), we argued that the proposed law was a violation of rights; would increase stigma and misinformation, further validating misconceptions of risk from spitting and biting; and would not benefit but harm victims of assault. Government officials in public health and law enforcement were convinced to remove support for the clauses which were removed from the Bill in April 2018.

23. In this case it was clear that the proposed policy was inconsistent with the HRA and was therefore unlawful, but this was not the only reason why this policy was harmful. By upholding the HRA principles, it was ensured that harmful policy was not implemented and that instead the Government considered more effective ways to address the problem that the proposed policy aimed to solve. It was ultimately accepted that testing of accused perpetrators of assault would not provide useful information to protect emergency workers from infection. It would not identify recent acquisitions of BBVs and it served only to enhance misinformation and unnecessary anxiety about risk of BBV infections following assaults such as spitting and biting, that are in the vast majority of cases non-existent. It increased stereotyping and misconceptions relating to HIV and other BBVs and increased mistrust in the police amongst people living with HIV. It has been more effective to address misunderstanding amongst emergency workers so that they are not harmed by unnecessary concerns relating to HIV following assaults. This shows how interrogation through the lens of the HRA leads to better public policy and policy outcomes.

24. With regards to section 4, the provisions under section 3, whereby primary legislation and subordinate legislation must be read and applied in a way which is compatible with the Convention rights as far as it is possible to do so, gives ample opportunity for Parliament to identify potential incompatibility. There is no need for declarations of

incompatibility under section 4 to be considered as part of the initial process of interpretation.

25. There are two reasons for this: Declarations of incompatibility are rare (since the Human Rights Act 1998 (HRA) came into force on 2 October 2000 until the end of July 2019, 42 declarations of incompatibility have been made), and not all take place when the primary or subordinate legislation is subject to the initial process of interpretation. An example of this is the declaration of incompatibility made in June 2018 by the UK Supreme Court finding that the Civil Partnerships Act 2004 is incompatible with the ECHR. Of course, a declaration of incompatibility does not require Parliament or the Government to take any action to change the law and so Parliament still has the main role in determining how the incompatibility should be addressed. Declarations of incompatibility respect the constitutional roles of parliament, the executive and the courts and the process does not need to change.

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

26. We do not have any experience specifically on this issue. As with other aspects of the HRA, we have not seen any evidence to suggest that there is a problem with how section 14(1) operates.

c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

27. Since secondary legislation does not have the same status as primary legislation, it is reasonable that it does not have the same amount of scrutiny in Parliament. Courts have applied the HRA in an effective and balanced way. In the last seven years there have been 14 successful cases that have challenged secondary legislation on the grounds of the HRA, and only four of those cases resulted in the legislation being struck down.

d) 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?

e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

28. The remedial order process should not be modified as Parliament already plays a paramount role in amending legislation which has been found incompatible with the ECHR. After draft remedial orders are considered by the Joint Committee on Human Rights, they then need to be approved by both the House of Commons and the House of Lords to become law. Although urgent orders may be made without advance scrutiny, they will stop being law if they are not approved by both Houses within 120 days of being laid before Parliament. The remedial order process allows for sufficient parliamentary scrutiny whilst also acknowledging the need to amend legislation to remedy the incompatibilities quickly.

29. The HRA has ramifications beyond the court rooms and the scope of this review is too narrow to consider the widespread impact and benefits that the HRA has on people and public bodies. The HRA does not need to be amended or repealed.

Instead, the Government should focus on ensuring the rights we currently have are respected, protected, and fulfilled and harmful narratives about the HRA must be stopped so that everyone knows their rights and how to assert them, and those with legal duties to uphold rights are encouraged and supported to do so. Steps taken to ensure people have full access to their human rights are also steps taken to lessen the impact of HIV and end new HIV transmissions.

National AIDS Trust
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