WPG NI Response to 'Human Rights Act Reform: A Modern Bill of Rights' Consultation

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1. Introduction:

The Women's Policy Group (WPG) is a platform for women working in policy and advocacy roles in different organisations to share their work and speak with a collective voice on key issues. It is made up of women from trade unions, grassroots women's organisations, women's networks, feminist campaigning organisations, LGBT+ organisations, migrant groups, support service providers, NGOs, human rights and equality organisations and individuals. Over the years this important network has ensured there is good communication between politicians, policy makers and women's organisations on the ground.

The WPG uses our group expertise to lobby to influence the development and implementation of policies affecting women. The WPG is endorsed as a coalition of expert voices that advocates for women in Northern Ireland on a policy level. This group has collective expertise on protected characteristics and focus on identifying the intersectional needs of all women; in line with international human rights mechanisms.

The organisations represented in this response work directly with a range of groups who will be impacted by the proposed reforms in the Human Rights Act consultation including; women, girls, trans men, non-binary people, disabled people, bisexual and lesbian women, victims of domestic abuse, victims of rape and sexual assault, rural women, those with dependants, migrant women and more.

If you have any questions or queries about this evidence submission, or would like the WPG to discuss this evidence further, please contact Rachel Powell, Women's Sector Lobbyist, at: rachel.powell@wrda.net.

2. Endorsements

The WPG would like to endorse the responses submitted to this call for evidence by the Northern Ireland Human Rights Consortium, the Committee on the Administration of Justice, Women's Aid and the British Institute for Human Rights.

3. WPG Evidence

The WPG NI COVID-19 Feminist Recovery Plan, originally launched in 2020[1] and relaunched in 2021[2], highlights the disproportionate impact of the pandemic on women and makes several recommendations for addressing this impact. The Plan covers a wide range of topics, including violence against women, health inequalities and women's poverty, within six main Pillars: Economic Justice, Health, Social Justice, Culture, Brexit, Human Rights and a Bill of Rights, and International Best Practice.

The Feminist Recovery Plan provides a comprehensive roadmap on how to not only address the disproportionate impact of COVID-19 on women, but also address the structural inequalities that existed before the pandemic that led to such a disproportionate impact on women. A summary of recommendations from the Relaunched WPG Feminist Recovery Plan can be accessed here. The WPG would like to reiterate some of our evidence and recommendations from the WPG Feminist Recovery Plan relating to this consultation on the UK Human Rights Act.

3.1 Content from the WPG Feminist Recovery Plan

3.1.1 Bill of Rights

Provision for a Bill of Rights for Northern Ireland, which was to build upon the rights contained within the European Convention of Human Rights (ECHR) by including supplementary rights influenced by International Standards and our local circumstances, was provided for in the Belfast/Good Friday Agreement[3] and voted for by an overwhelming majority of people in Northern Ireland through referendum. This commitment to establishing a framework of human rights, that was to run throughout the Agreement and the government institutions it established, was to be an important confidence building measure in a society that had just experienced decades of conflict.

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[1] Women's Policy Group (2020) 'WPG NI COVID-19 Feminist Recovery Plan' Available here: https://wrda.net/wp-content/uploads/2020/07/WPG-NI-Feminist-Recovery-Plan-2020-.pdf

[2] Women's Policy Group (2020) 'WPG NI COVID-19 Feminist Recovery Plan: Relaunch – One Year On' Available here: https://wrda.net/wp-content/uploads/2021/07/WPG-COVID-19-Feminist-Recovery-Plan-Relaunch-One-Year-On.pdf

[3] See Strand Three, 'Rights, Safeguards and Equality of Opportunity', The Belfast Agreement 1998. Available at: https://bit.ly/3qjhJEv

The Northern Ireland Human Rights Commission (NIHRC), created and tasked by this Agreement with providing advice on the content of a Bill of Rights for Northern Ireland, fulfilled that duty in 2008. The NIHRC advice called for the inclusion of additional economic, social and cultural rights such as:

- The right to health (including access to gender-sensitive and appropriate healthcare services and information)he right to an adequate standard of living
- The right to work (including fair wages and equal remuneration for work of equal value without distinction of any kind)
- Environmental rights
- Social security rights
- Children's rights (including play and leisure)

It also added to and strengthened many of the civil and political rights contained within the ECHR, for example by suggesting:

- A freestanding right to equality
- The prohibition of discrimination
- The facilitation of the full and equal participation of women in political and public life
- The right of everyone to be free from violence, exploitation and harassment (including domestic violence or harassment, sexual violence of harassment and gender-related violence and harassment).[4]

The NIHRC advice was based on extensive participatory consultation with thousands of people across NI over the course of 8 years, and therefore represents a clear articulation of public opinion in this regard. A Bill of Rights for Northern Ireland based on a model advised by the NIHRC would have provided a practical mechanism for the realisation of many of the rights contained within international treaties, of which the UK is a signatory; including, but not restricted to, the various United Nations Conventions that both the UK and Ireland have ratified. These obligations will be expanded upon in section 3.1.3 of this response.

In December 2009, the UK government produced a consultation document, which rejected the majority of the advice provided by the Northern Ireland

[4] The NIHRC Advice can be accessed here: https://bit.ly/3gRRKAZ

Human Rights Commission. In their reasoning for failing to include the extensive advice of the NIHRC, the government stated that they did not see these additional rights as falling within the test of being particular to Northern Ireland or of not being the most appropriate method to realise the particular rights. Within the consultation document this view was expressed as follows: "It is the Government's view that the introduction of such rights in Northern Ireland would either be unworkable in practice, or could give rise to unjustified inequalities across the UK."[5]

Since the 1998 peace agreement there has been a consistent need for a Bill of Rights for NI, given its potential to build confidence within communities that abuses of the past will not be repeated, and that those abuses which did occur will be rectified. However, given the current time of uncertainty created by the UK exit from the EU, the suggested proposals in this consultation to 'reform' the Human Rights Act, the impact of years of austerity and those of coronavirus, (each of which impact differently on women than on the rest of society), a Bill of Rights for Northern Ireland is even more valuable as it could provide assurance and stability that whatever the future of Northern Ireland, the rights of all will be protected, respected and fulfilled.

The clear message from women in Northern Ireland is that now, more than ever, we need our Bill of Rights to be delivered. The continued threats to the Human Rights Act, the risks that Brexit presents to rights and the impact on rights due to the pandemic, mean that a strong and inclusive Bill of Rights must be urgently delivered.

3.1.2 The Human Rights Act

The Human Rights Act 1998 (HRA) gave further effect to rights from the European Convention of Human Rights (ECHR) in domestic legislation across the UK and allowed access to UK courts for violations of Convention rights. The development of this legislation was also a key provision of the Belfast/Good Friday Agreement and took on special significance in Northern Ireland where it acted as one of the key safeguards to prevent against inequalities or abuse of human rights in the exercise of power by the new Stormont Government.

[5] Northern Ireland Office Consultation Paper, 'A Bill of Rights for Northern Ireland: Next Steps', November 2009, pp 3.15

When the UK Government initially proposed undertaking a review of the Human Rights Act,[6] members of the Women's Policy Group responded to a consultation by the review panel to make it clear that nothing should be done to undermine the Human Rights Act or how the rights contained within it are enjoyed.[7] In particular, the way in which the HRA has protected women was highlighted, including by protecting unmarried spouses in relation to receipt of benefits on the death of a partner and also access to abortion.[8]

Even before the current consultation on the Human Rights Act was launched, the Women's Policy Group were concerned about the future of the HRA, particularly given statements in recent years by members of the Conservative Party:

- "If we want to reform human rights laws in this country, it isn't the EU we should leave but the ECHR and the jurisdiction of its Court." Theresa May (then Home Secretary) April 2016,
- "The Government is committed to scrapping the Human Rights Act and introducing a British Bill of Rights." Elizabeth Truss, (then) Lord Chancellor and Secretary of State for Justice, September 2016,
- "We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes." Conservative Party Manifesto 2017,
- "There is a discussion to be had around how essential the Human Rights Act is to protecting rights. But with Brexit, now is not the right time to have that discussion." David Gauke, Lord Chancellor and Secretary of State for Justice, May 2018,
- "We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government." Conservative Party Manifesto 2019.

Public support in Northern Ireland for the Human Rights Act (HRA) remains high. Polling by the Human Rights Consortium in 2017 revealed that over 85% of the population in Northern Ireland feel that the HRA is either good or very

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[6] See: https://bit.ly/3qkI6ty

[7] See for example the response from the CAJ here and the response from the Human Rights Consortium here

[8] HRC submission

good for Northern Ireland and as such any efforts to downgrade the HRA would be clearly counter to the wishes of the wider community here.[9]

While nothing must be done to undermine the HRA, this is not to say that it cannot be improved and expanded. The HRA does not represent the full protection of the ECHR. For example, there is no free-standing right to prohibition of discrimination (this is included in Article 1 of Protocol No. 12 of the ECHR, which the UK has not ratified). In order to protect enjoyment of the full range of ECHR rights, they should be fully incorporated into a Bill of Rights for Northern Ireland.

3.1.3 International Standards – Progress in Scotland and Wales

The United Kingdom is a signatory to seven of the nine UN Human Rights Treaties,[10] which means that it has agreed to be bound by them. Because of the dualist system of the UK, these rights are not automatically enforceable once the UK becomes a signatory. However, the two other devolved nations of the United Kingdom, Scotland and Wales, have both made strides to incorporate international standards into domestic decision making and laws. They have used powers within their own devolved competencies in order to give further effect to the rights in these treaties which represent international obligations to which the UK has agreed to be bound.

The Rights of Children and Young Persons (Wales) Measure 2011 requires that Welsh Ministers, in exercising any of their functions, have due regard to Part 1 of the Convention on the Rights of the Child and also select articles from the first and second optional protocols.[11] Similarly, Part 1 of the Children and Young People (Scotland) Act 2014 imposes duties on Scottish Ministers and other

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[9] Attitudes to Human Rights in Northern Ireland: Polling Data https://bit.ly/3gS2nU4

[10] International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD)
International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)
International Covenant on Civil and Political Rights 1966 (ICCPR)
Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT)
Convention on the Rights of the Child 1989 (CRC)
Convention on the Rights of Persons with Disabilities 2006 (CRPD)

[11] For more information, see this briefing to the Ad Hoc Committee on a Bill of Rights by Professor Simon Hoffman, https://bit.ly/2TZRTZP

public bodies to comply with UNCRC.[12] At the very minimum, the Northern Ireland Assembly could follow similar steps in order to give further effect to treaties such as CEDAW, ICESCR, CRC, ICERD, ICCPR, CRPD and CAT. This would be possible within its own devolved competencies.

The UNCRC (Incorporation) (Scotland) Bill[13] was passed unanimously on 16 March 2021. This Bill seeks to bring the United Nations Convention on the Rights of the Child 'fully and directly' into Scots law. In addition, in March 2021, the Scottish Equalities Secretary announced plans for a new Human Rights Bill to incorporate four additional United Nations Human Rights treaties into Scots Law. The new Bill, which will be introduced in the next parliamentary session will include specific rights, subject to devolved competence, from:

- The International Covenant on Economic, Social and Cultural Rights,
- The Convention on the Elimination of All Forms of Discrimination against Women,
- The Convention on the Elimination of All Forms of Racial Discrimination,
- The Convention on the Rights of Persons with Disabilities.

Clearly protection for rights in the other devolved areas, particularly in Scotland, has outpaced Northern Ireland. This does not have to be the case, especially because unlike Scotland and Wales, provision was made for a Bill of Rights for Northern Ireland in the Belfast/Good Friday Agreement, and this Bill of Rights was to be enacted through Westminster legislation. There is no similar limit to the powers of Westminster to legislate as there is for the devolved institutions, therefore complete incorporation of these UN treaties would be possible through a Northern Ireland Bill of Rights.

3.1.4 Recommendations:

- The UK government should bring forward a strong and inclusive Bill of Rights for Northern Ireland, which incorporates, but is not limited to, the 2008 advice from the NIHRC,

[12] For more information, see this briefing to the Ad Hoc Committee on a Bill of Rights by Professor Tobias Lock https://bit.ly/2TRf5JT
[13] Scottish Parliament - UN Convention on the Rights of the Child: https://bit.ly/3vNVSGd

- There should be a complete incorporation of the ECHR into domestic legislation in Northern Ireland – in particular ensuring a freestanding right to prohibition of discrimination,
- Any attempts to undermine the Human Rights Act 1998 will be directly opposed to the will of the people of Northern Ireland and would breach the Belfast/Good Friday Agreement.
- Until a Bill of Rights, as provided for in the Belfast/Good Friday Agreement, is provided for in Westminster legislation, NI should follow Scotland's lead of investigating options for incorporating international instruments into domestic legislation, including CEDAW, ICESCR, CRC, ICERD, ICCPR, CRPD and CAT.
- The Human Rights Act must in no way be undermined.

4. General Comments

The WPG are aware that this consultation on the Human Rights Act (HRA) occurs in the wider context of increasing attempts by the UK Government, in recent years, to weaken the systems of checks and balances on executive power and undermine key accountability mechanisms. It also takes place during a time of rapid change, in regards to the relationship between individual and state, with the balance of power being increasingly tipped towards the state.

The WPG considers this consultation to be a failed opportunity to extend and improve the HRA and disagrees with any attempts to erode or reduce the human rights of UK citizens by removing important rights and duties contained in the HRA. The WPG stands in solidarity with civil society across the four nations of the UK who are calling for the Human Rights Act to be upheld in its current form and not be diminished in any way.

The WPG are particularly concerned that the proposals set out in the Human Rights Act consultation would reduce and complicate duties currently placed on public bodies and services to uphold the rights of citizens contained in the Human Rights Act. The value of human rights for UK citizens lies not only in the rights entitlements they have but also the duties attached to these rights in human rights law. These duties allow citizens to claim their rights and actively challenge those who seek to violate them. The proposals set out in this

consultation radically erode the duties currently attached to rights in the Human Rights Act. This includes duties on public bodies, the Government, medical professionals, educational staff and the police to uphold and protect the human rights of citizens.

It is clear that those who will be most negatively impacted by the Government's proposals to reform the Human Rights Act are those who already face significant inequalities and disadvantages in society. For example, these reforms would mean that people from migrant backgrounds living in the UK are at increased risk of being deported to countries where serious human rights violations are widespread.

As the main piece of domestic human rights legislation, eroding the Human Rights Act will create a hierarchy of those who have access to human rights in the UK. By attacking the rights of some groups, all groups are negatively impacted. Human Rights go to the very core of what humans require in order to live safe and fulfilled lives and should be enjoyed by all people by virtue of being human, regardless of nationality, race, gender, religion or sexuality.

The WPG are aware that the Government has already commissioned a large-scale Independent Review of the HRA, which concluded quite clearly that the HRA is working well. Therefore, there seems to be no rationale for the sweeping changes being proposed by the government in this consultation. The Chair of the Review is on record at the Justice Committee saying that this approach by the Government is in no way a response to their Review.

It is important to remind the UK Government of the particular importance of human rights in the context of Northern Ireland, where the legacy of the Troubles continues to impact the lives of citizens and a peace process is still taking place. The incorporation of the Human Rights Act into domestic law has been particularly important in Northern Ireland for several reasons. The Good Friday Agreement, which provides the basis for the ongoing peace process in Northern Ireland, is underpinned by human rights commitments. Any attempt to undermine these commitments threatens to undermine the Agreement itself. The UK Government made commitments in the Northern Ireland Protocol as part of the EU Withdrawal Agreement to a 'no diminution of rights' and Northern Ireland civil society expect this commitment to be upheld.

The WPG would like to highlight and endorse the following comments on the Human Rights Act Consultation made by the British Institute for Human Rights:

- Our Human Rights Act safeguards the rights of every single person in the UK. These rights are about making sure everyone, no matter who they are, is treated with equal dignity and respect.
- The Government says that it wants to bring human rights closer to home. This is what the Human Rights Act already does every single day. Since 2004, there has been a significant drop in the cases brought against the UK Government to the European Court of Human Rights. This is because the Human Rights Act means that human rights have become embedded into our domestic law here in the UK.
- The Government's proposals will restrict the rights of some people in our society, essentially providing the government of the day with the power to decide who deserves rights and who does not. These changes include reducing the scope of some non-absolute rights for "certain categories of individuals" and allowing the courts to consider an individual's past behaviour when making decisions about their human rights case and if they should be awarded damages.
- Many of the proposed restrictions of rights are open-ended or vague, starting with certain groups, and no indication of where this would stop. The point of creating human-rights law after World War 2 was to prevent this; we saw too clearly how restricting rights for some people can mean that all our rights are compromised. In particular, we are very concerned about the Government's proposals to make changes to the scope of right to liberty, the right to a fair trial and the right to respect for private and family life. Limiting the rights of some people can very quickly lead to limiting the rights of us all.
- Our Human Rights Act focuses on our common humanity, recognising that rather than being dependent on the moral compass of who happens to hold power, in a decent democracy everyone deserves minimum standards. The Bill of Rights proposed in the Consultation focuses on dividing us rather than bringing us together.
- The Government appears to suggest that our human rights will remain the same, as their new law will contain the same list of rights. This is disingenuous because, crucially, the Government is proposing fundamental changes to the way our rights work and protect us. This

means that, on paper, the rights look the same, but in practice we will all be worse off, and the Government less accountable. These changes include limiting the positive obligation on public authorities to protect our human rights. This means families like the loved ones of those killed at Hillsborough will find it much harder to hold public authorities to account and to ask for investigations when something has gone wrong.

- The Human Rights Act is incorporated into devolution laws. The Government has not evidenced any detailed consideration as to how its proposals would work in Scotland, Wales, and Northern Ireland. Devolved governments in Wales and Scotland have each issued strongly-worded statements outlining the concerns about the UK Government's proposals. There are clear concerns that with these proposals the UK Government is seeking to redefine and reduce their responsibilities to us all.
- Our Human Rights Act means that if the Government or public bodies overstep the mark, each one of us can hold them to account in our everyday discussions with those making decisions affecting our lives. Or if needed, people can seek justice in the courts. Whilst judges cannot change the law, the courts decide if people's human rights have been breached and say this should stop. It is for Parliament to change the law, as it so often chooses to do, when our rights are being risked. Our Human Rights Act respects the democratic system we have in the UK.
- Any law Parliament passes, including those that risk people's human rights, can only be changed by Parliament. Sadly, much of the UK Government's approach to the law which holds them to account, is to cherry-pick certain examples and points, without the full context and facts, strengthening the "damaging perceptions"(p181) which the IHRAR said need to be tackled. For example, the Justice Secretary Dominic Raab often relies on a single immigration case to justify changes to our right to family life. What is always missing is that this case is a decade old and the legal technicality has been resolved without changing the Human Rights Act. The Human Rights Act is in fact the law which enables survivors of domestic abuse to hold authorities to account when they fail to protect them.
- Being able to hold our Government and public institutions to account is vital in any democracy, and it is our Human Rights Act that enables ordinary people to do this. Ultimately, the institution which benefits from

these proposals is the UK Government, putting more power into their hands.

- Accountability in the courts is an important part of living in a just society, but that is only one part of how our Human Rights Act works. The Government's proposals, with the focus on legal complexity, fail to recognise that human rights are about people and power, ensuring those with power are accountable to people, not only the courts but in everyday life.
- Importantly, our Human Rights Act is also vital to all the people working in public services: it is this law that helps them transform values into reality, helping them to do better with and for people. Every day, staff are working to safeguard people across the UK, to support their wellbeing, their health, to access safe housing and to get an education. Tampering with our Human Rights Act will only make their jobs harder, taking away the compass to navigate the maze of laws they use daily.

5. Responses to Consultation Questionnaire

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 of the consultation document, as a means of achieving this.

There should be no changes to how Section 2 of the Human Rights Act currently operates. The Government proposals would substantively and negatively change the existing access and enjoyment of Convention rights.

Section 2 of the Human Rights Act says that the UK domestic courts must 'take into account' rulings from the European Court of Human Rights when judging human rights questions. The point of the Human Rights Act is to 'bring home' the rights people are entitled to under the European Convention on Human Rights: to enable people to claim these rights in the UK courts, rather than applying to the European Court. However, the Strasbourg court remains the ultimate guardian of the European Convention, and of the rights of everyone in all member states. Its judgments provide guidance on the proper meaning and application of the rights in question for all member states. This provides a

vital safety net for people who have been unable to get their rights properly protected at home – often because they are from an unpopular or marginalised group that governments either do not care about or treat with hostility.

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 Supreme Court is already the highest court in the UK and ultimate judicial arbiter of laws in the UK. The HRA does not create uncertainty on this point and indeed the Supreme Court has the ability to take a different view on the interpretation of Convention rights than the ECtHR. There is no lack of clarity on this point and therefore no change is required.

The judiciary already defer heavily to the view of the government in certain policy areas. They do not make rulings on matters they consider as beyond the competence of the courts. But the government should not be above the law: it cannot ignore its obligations to respect human rights in areas which it has decided to remove from normal judicial oversight.

3. Should the qualified right to jury trial be recognised in the Bill of Rights?

Article 6 of the Human Rights Act already protects the right to a fair trial and this can be utilised where appropriate to provide for jury trials. There is no substantive case made for the need for this change and therefore no change is required.

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?

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 in the consultation document. 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?

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

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

No change to Section 12 should be introduced. Article 10 Freedom of Expression is a qualified right which can be restricted by the courts in certain circumstances if the restriction is prescribed by law, is necessary and proportionate to achieving legitimate aims including protecting national security etc and it is a right which can and is balanced against other privacy rights (Art 8). The courts currently attempt to balance these rights and there is no evidence presented to suggest that this approach is failing.

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?

No. Victims of human rights abuses should not be required to prove 'significant disadvantage' before they can seek justice. This would make access to justice for human rights violations harder to obtain than for any other kind of abuse or unlawfulness. It would undermine the concept of fundamental rights protection. Genuine and proven cases of human rights abuses would be left unremedied, and the culture of rights protection damaged. There is no justification for reducing the accountability of the state for its actions in this way. There is simply no evidence to suggest, as the government does in these proposals, that large numbers of 'spurious' claims are being brought which 'devalue' the concept of rights. Judicial review cases (a common type of human rights case) already have to pass a permission test, whether they are human rights challenges or not.

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?

The proposal would create further barriers for individuals to access the courts and the protection of Convention rights. No such permission stage should be introduced.

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

There are already very clear admissibility criteria that claimants have to meet in order to take a case under the HRA. There is no evidence to suggest that these are not working, and the Government proposals seem like a clear exercise in limiting access to the HRA protections. No changes are required to the HRA in this regard.

It is wholly inappropriate to try to exclude human rights claims entirely or stop people from challenging public authorities on human rights grounds. Protecting public authorities from human rights claims in this way and blocking otherwise valid claims against them would seriously damage rights protections in the UK.

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.

Positive obligations are an essential and inherent part of effective human rights protection. Positive obligations are an element of every human rights protection framework around the world. Failure to meet them must be open to challenge, as with any other human rights violation. It is a standard in human rights law that positive obligations must not be interpreted in a way which puts 'an impossible or disproportionate burden' on public authorities.

How to comply with a positive obligation is a decision for the authority to make, given the specific circumstances. Excluding positive obligations in the UK would undermine the entire architecture of rights protection that has been built up in international law. Positive obligations make clear that respecting and protecting rights means more than the state refraining from certain actions: they must also take active steps when the circumstances demand it.

Positive obligations have proven essential across the UK in ensuring that public authorities do not just have a negative duty not to interfere with an individual's rights, but also in a number of circumstances actually have a duty to be proactive in the protection of their rights. This has been particularly important in Northern Ireland, and we believe that no change is required to the HRA in this regard.

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 of the consultation document.

Section 3 should not be changed. The courts should continue to interpret legislation, as far as is possible, in a way that accords with the rights protected by the European Convention. Deleting Section 3 entirely would seriously damage rights protection in the UK, greatly reducing the powers of the courts to remedy rights-abusive laws. It would also drastically reduce judicial oversight and checks and balances between the different branches of government. Amending Section 3 to restrict the power of the courts to protect rights would protect outdated laws and government policy, not parliament. Parliament is already free to legislate to effectively overrule the courts if it disagrees with an interpretation that has been applied in a particular case.

The consultation sets out two options for repealing or amending the Section 3 duties. As this section has increased compliance of existing legislation with Convention rights and the Government has not provided a sufficient evidence base for the need to reform this provision, we recommend no change to this section of the HRA.

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

The suggestion to enhance the role of the JCHR has nothing to do with the HRA and can be achieved via amendments to standing orders in Westminster. We therefore believe that no change is required to the HRA in this regard.

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

A database of domestic judgments in the UK that have relied on the HRA/Convention rights would generally be helpful in understanding the use and interpretation of the Convention rights, including Section 3. But no changes to the HRA are required to achieve this. The Government could introduce this measure independently.

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?

When the courts find that secondary legislation contravenes protected rights, they should retain the power to disregard it or to strike it down. The power of higher courts to strike down secondary legislation that is incompatible with Convention rights is an important protection and means of giving effect to the ECHR protections. To remove or alter these powers would represent a diminishment in how these rights are currently protected and therefore no change should be made.

The European Convention on Human Rights is embedded in the devolved settlements in Wales, Scotland and Northern Ireland so that legislation passed by these parliaments and assembly must comply with Convention rights. Unlike Westminster, where parliamentary sovereignty is given ultimate weight, legislation from the Senedd, Stormont and Holyrood can be struck down by a court. Replacing strike-down or amendment powers with only declarations of incompatibility for Westminster secondary legislation will create an anomaly in the UK, where only legislation passed by the devolved parliament/assemblies can be struck down by the courts.

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 subordinate legislation is found to be incompatible with the Convention rights?

The impact of this proposal is that it would restrict or undermine an existing 'quashing order' power under the HRA and in this regard reduce or limit the remedies available for violation of Convention rights. We therefore disagree with these suggested changes and recommend no change to the HRA in this regard.

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?

The Section 10 powers are currently working effectively and there are no changes required to how it operates.

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

These statements of compatibility are an important transparency tool in ensuring that Government proposals are compatible with Convention rights. Whilst it would be useful to see a further analysis of government legal advice, which sets out in more detail the explanations for why legislation was or was not compatible with Convention rights, we are fearful that any suggestion to change the current operation of the HRA might be misused by the Government to undermine these protections. We therefore recommend no change to the current operation of this section of the HRA.

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?

In Northern Ireland, European Convention rights run through the Good Friday (Belfast) Agreement, set the framework for post-conflict policing, and restrain the Northern Ireland Assembly and public authorities. The proposals risk undermining the peace agreement and the political and policing structures that flow from it.

Much of the narrative and framing of the proposals is entirely based on the English legal system, with scant regard for the separate legal jurisdictions in Scotland and Northern Ireland. For example, references to 'our common law traditions' are at odds with the hybrid legal system in Scotland which draws on both common law and Roman law traditions. The Government is proposing to weaken the power of the courts to interpret legislation compatibly with Convention rights and to remove the power to strike down rights-abusive secondary legislation. The proposals are in conflict with the direction of human rights law in Scotland, Wales and Northern Ireland, where the devolved governments and legislatures are considering ways to enhance the rights protections offered by the Human Rights Act.

There has clearly been little, or no consideration given to the impact of these changes to devolved regions. A core element of each of the devolution systems of government was a provision for the new institutions to be bound to act compatibility with the HRA/Convention rights. The proposals in the consultation, if enacted in the devolved regions, will detrimentally alter the way in which these protections are experienced in those regions. The cumulative

impact of the proposals will be to limit access to the Convention rights as currently experienced. Unless the UK Government fully respects the devolved system of governance, by seeking a legislative consent motion in each jurisdiction, it will have failed to respect the views and concerns of each of these regions. Even if this takes place, these changes may introduce a two-tier system of human rights in the UK, if the proposals do not apply to devolved responsibilities but are applied to reserved powers.

Additionally, from a NI perspective, access to the Convention rights was a cornerstone of our peace process and the commitments in the Belfast/Good Friday Agreement. The proposed changes to the HRA would represent a fundamental regressive change to how Convention rights are experienced in NI and would therefore be a direct violation of the Belfast/Good Friday Agreement. Finally, the consultation says in Pt 40 that the proposals 'will have no adverse impact on any future developments towards a Northern Ireland Bill of Rights.' We do not believe this to be accurate, as the basis for a Northern Ireland Bill of Rights was to be 'Convention rights plus.' The consultation fundamentally undermines how the Convention rights would apply in NI and therefore the basis of the NI Bill of Rights is undermined if these changes proceed.

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 definition of public authorities should stay the same. The Government's own consultation document says that the definition of a public authority is appropriate. It does not provide a coherent argument for why it should be changed. Therefore, the current language which binds different organisations or bodies who are performing a public function to act compatibly with Convention rights is appropriate. We recommend no change to the HRA in this regard.

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?

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.

There is no evidence to suggest that there is a problem with this aspect of the HRA and we therefore recommend that no change is made to the HRA in this regard.

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.

We do not believe that there are any issues with how the HRA currently applies to those exercising UK governmental power abroad. We therefore recommend no change is made to the HRA in this regard.

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?

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 of the consultation document.

There is no evidence provided as to why this change to such an important element of the HRA might be needed. We therefore recommend no change to the HRA in this regard.

These proposals would seriously undermine human rights protection for marginalised groups, and others who lack sufficient influence with the majority party in parliament at any given time. It is a core function of human rights to protect people who lack power and influence from the oppressive tendencies of governments seeking popularity by demonising or otherwise targeting minorities.

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;

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; and/or

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.

Our fear is that any changes would disproportionality the right to a private and family life (Article 8) to prevent impact on minority communities and undermine their access to important rights. We believe this is also further evidence of the Government highlighting problems where none exist. We therefore recommend no change to the HRA in this regard.

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?

Human rights protections can and should apply to all people within the UK. This includes migrants, refugees and asylum seekers. Any attempts to reduce or limit the availability of these rights should be resisted. We therefore recommend no change to the HRA in this regard.

The question implies that people who move to the UK could be excluded from the full protection of human rights laws, by heavily curtailing independent judges' powers to adjudicate on them. This would create a situation where the law does not apply to everyone on an equal basis. Rights are universal – which means everyone has them all the time. They cannot and should not be removed from particular people or in particular situations. No group of people should have their rights determined solely by ministers and government officials. Excluding people from human rights protections on the grounds of their immigration status is inherently discriminatory.

26. We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. Which of the below considerations do you think should be included?

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

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

There is no evidence provided as to why this change to the HRA might be needed. We therefore recommend no change to the HRA in this regard.

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?

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.

We believe that access to the enjoyment and protection of human rights should be universal. No case has been made for the introduction of the concept of responsibilities in the adjudication of the HRA. We therefore recommend no change to the HRA in this regard.

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

We believe that this would create further barriers to changing or amending laws that are contrary to the ECHR. It is indicative of the UK's current lack of interest in being guided by and consistent with judgments of the ECtHR. We believe that this could lead to divergence with ECtHR judgments and mean that appropriate remedies for violations of Convention rights were jeopardised.

Human rights are universal: their role is often to protect a minority against a majority view, which can sometimes include protecting unsavoury or unpopular individuals. These are often the cases that the government resists

all the way to the Strasbourg court, because they involve the people it cares least for, or challenge key policies.

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:

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)

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)

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

The NI Women's Policy Group (WPG) are primarily concerned with the impact of policies and legislation on women in Northern Ireland. The WPG collective membership is made up of organisations with specialised expertise and experience working on issues relating to gender inequality and women's rights. Therefore, the concerns we raised in this section primarily relate to equality impacts of the proposed reforms on women.

When the UK Government initially proposed undertaking a review of the Human Rights Act,[14] members of the Women's Policy Group responded to a consultation by the review panel to make it clear that nothing should be done to undermine the Human Rights Act or how the rights contained within it are enjoyed.[15] In particular, the way in which the HRA has protected women was highlighted, including by protecting unmarried spouses in relation to receipt of benefits on the death of a partner and also access to abortion.[16]

[14] See: https://bit.ly/3qkI6ty
[15] See for example the response from the CAJ here and the response from the Human Rights Consortium here
[16] HRC submission

In the context of Brexit, the WPG are concerned that many areas of women's human rights have yet to be achieved, and Brexit has added a new threat to existing, hard-fought rights women currently have.[17] As the main piece of UK-wide human rights legislation, women in Northern Ireland rely heavily on the Human Rights Act to access their rights and will be adversely impacted by any attempts to erode this important legislation.

From a wider perspective, the cumulative impacts of the proposed reforms will be that the way in which we currently access European Convention rights will be fundamentally transformed. Whilst we may have access to the same Convention rights, the level and meaningfulness of that access will differ significantly from its current form. Everything from how the ECtHR jurisprudence is interpreted, the power to strike down violating legislation, the duties on public authorities and the broader interpretation by courts will become confused and diluted.

In short, the practical enforcement of our Convention rights will be significantly undermined. This will have untold impacts across a range of policy areas in Northern Ireland, including on women's rights.

Recommendations:

- Any work to build upon protections of the Northern Ireland Protocol must seek to extend the list of protected Union legislation in Annex 1 to ensure important strides for women's equality are not lost, and that equality and human rights protections in Northern Ireland continue apace with the EU,
- Any re-examination/revision of the Northern Ireland Protocol, or negotiations of the future relationship must ensure that women are adequately represented at the negotiating table and that women's voices are articulated throughout,
- Any funds replacing the European Social Fund, and other sources of EU funding, must include provision for wrap around services to ensure that women and carers can take part,
- Continued access to EU networks for civil society groups must be accommodated and encouraged by the government,

[17] Human Rights Consortium (2018), 'Brexit and Northern Ireland: Rights at Risk Report', (available online):https://bit.ly/3xFPnXk, p.32.

- The governments in Northern Ireland and the UK must produce properly disaggregated data, including breakdowns of equality impacts on all Section 75 groups,
- Nothing must be done to endanger cross-border co-operation. In particular the Human Rights Act must in no way be undermined,
- Introduce a strong and inclusive Bill of Rights for Northern Ireland, which includes a comprehensive, freestanding right to equality and non-discrimination (following examples in South Africa, Canada and the EU Charter) and which draws upon international human rights and equality obligations, must be enacted without delay,
- A Single Equality Act, which draws together and enhances existing equality laws, in order to compliment and supplement a Bill of Rights must also be enacted,
- Incorporate rights contained within the EU Charter into domestic legislation.

6. Concluding Remarks

To conclude, the WPG would like to echo remarks made by the British Institute for Human Rights:

> "Our Human Rights Act is working well, supporting people across the UK to live with equal dignity and respect, and when needed, enable us all to hold public bodies and Government to account, ensuring they fulfil their responsibilities to us all. There is no case to change our Human Rights Act."

ENDS

For any questions or queries relating to this submission, please contact:

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