CAJ
Committee on the Administration of Justice

Promoting Justice / Protecting Rights

CAJ Response to the Independent Human Rights Act Review (IHRAR)

March 2021

Introduction

This response to the call for evidence by the IHRAR is filed on behalf of the Committee on the Administration of Justice (CAJ). CAJ is an independent human rights non-governmental organisation with cross community membership in Northern Ireland and beyond. It was established in 1981, campaigns on a broad range of human rights issues and is a member of the International Federation of Human Rights (FIDH). CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its international human rights obligations.

In addressing the particular circumstances of Northern Ireland it should be noted that the incorporation of the European Convention on Human Rights (ECHR) into Northern Ireland law was an explicit commitment of the Belfast/Good Friday Agreement (GFA), given effect though the Human Rights Act 1998 (HRA) and Northern Ireland Act 1998:

> 'The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.'[1]

The GFA also provided that these protections should be complimented and enhanced through a Bill of Rights for Northern Ireland. It is our view that any changes or weakening of these protections would be in breach of the GFA and potentially destabilise elements of our peace settlement.

At the outset, we query the need for this Review and echo the comments of Baroness Hale in her evidence to the Joint Committee on Human Rights in its examination of this Review:

> 'I do not think that the Human Rights Act causes a problem for Parliament, because it is very carefully crafted, as I think you heard from Lord Neuberger and Dominic Grieve last week, to ensure that Parliament remains supreme and can take whatever action it deems fit, including doing nothing at all, even if the courts have said that a particular piece of legislation is incompatible with the convention rights. I do not think there is a problem or any need to fix it. I cannot

[1]Paragraph 2 of the Rights, Safeguards and Equality of Opportunity section of this Agreement set out this commitment https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf

> myself think of a fix that would make things better as opposed to potentially making things worse.'[2]

In the 'Context' section of the Terms of Reference (ToR) it is asserted, without providing any evidence, that 'there is a perception that, under the Human Rights Act (HRA), courts have increasingly been presented with questions of 'policy' as well as law'. In our view, there is another 'perception', which is equally to the point and expresses the correct balance between the branches of government. This was well articulated by the late Lord Kerr in comments made just before his untimely death. He said that while Ministers might be:

> '…irritated by legal challenges which may appear to them to be frivolous or misconceived, if we are operating a healthy democracy, what the judiciary provides is a vouching or checking mechanism for the validity [of] laws that parliament has enacted or the appropriate international treaties to which we have subscribed … The last thing we want is for government to have access to unbridled power.'[3]

We respectfully agree with Lord Kerr's comments and would argue that any restriction on the workings of the HRA would weaken judicial oversight of the executive and undermine the practical application of the rule of law.

Context

It is important to see this Review in the context of a long list of attempts by Conservative Government to weaken or entirely scrap the HRA. To take one example, 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws' was published in October 2014.[4] This document prefigured the tabling of a Bill to radically change the impact of what it now called 'Labour's Human Rights Act'. It said that the key objectives of its new Bill were:

- Repeal Labour's Human Rights Act;
- Put the text of the original Human Rights Convention into primary legislation;
- Clarify the Convention rights, to reflect a proper balance between rights and responsibilities;
- Break the formal link between British courts and the European Court of Human Rights (ECtHR);
- End the ability of the ECtHR to force the UK to change the law;
- Prevent our laws from being effectively re-written through 'interpretation';
- Limit the use of human rights laws to the most serious cases;
- Limit the reach of human rights cases to the UK;
- Amend the Ministerial Code to remove any ambiguity in the current rules.[5]

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[2] Oral evidence: The Government's Independent Human Rights Act Review, HC 1161 on 3.2.21 https://committees.parliament.uk/oralevidence/1661/pdf/

[3] https://www.theguardian.com/law/2020/oct/19/uk-needs-judges-to-limit-government-power-says-lord-kerr

[4] https://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document

[5] Ibid. p 6

The above did not make it into Bill form and the previous 2011 Commission into a UK Bill of Rights made an inconclusive final report. Nonetheless, the 2014 document stands as a record of long standing hostility to the HRA and to the Convention itself.

The 2015 Conservative Party Manifesto repeated this:

> 'The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.'[6]

While the 2019 Conservative Party Manifesto committed to updating 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. We will ensure that judicial review is available to protect the rights of the individuals against and it is not abused to conduct politics by another means or to create needless delays.'

CAJ responded to the Independent Review of Administrative Law, raising our concerns about any proposals that may further weaken the rule of law.[7] That Review, like this current Review had a short consultation period limiting the opportunity for a wide range of responses addressing the rule of law matters under consideration. We note this Review's proposed engagement process, to include evidence sessions with interested parties, to follow the call for evidence and hope that this provides for extensive engagement with a wide range of stakeholders.

It is difficult to believe that the widespread antipathy in the Government party to human rights in general and the HRA in particular has dissipated; members of the Review team should take that into account in their deliberations.

It is also important to note that there is an apparent willingness to weaken the rule of law amongst members of the current government. This Review is being taken forward against the backdrop of attacks on lawyers from the most senior levels of Government, namely the Prime Minister and Home Secretary. This has been articulated in terms that both explicitly encompass political discrimination ('leftist' lawyers) but also create a climate of hostility towards the legal profession that has had lethal consequences in Northern Ireland in the past. This, together with attacks on the 'vexatious' prosecutions of historic offences in Northern Ireland, fundamentally undermines the constitutional principles of the rule of law and the separation of powers: key cornerstones of a democratic society.[8]

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[6] See page 60: http://ucrel.lancs.ac.uk/wmatrix/ukmanifestos2015/localpdf/Conservatives.pdf

[7] https://caj.org.uk/wp-content/uploads/2020/10/CAJ-Response-to-Independent-Review-of-Administrative-Law-IRAL-Call-for-Evidence.pdf

[8] https://www.theguardian.com/law/2020/oct/06/legal-profession-hits-back-at-boris-johnson-over-leftylawyers-speech https://www.theguardian.com/uk-news/2020/oct/23/man-faces-terror-charge-over-alleged-attack-atimmigration-law-firm https://www.theguardian.com/politics/2020/oct/25/lawyers-ask-johnson-and-

As well as the political backdrop to this Review, it is important to acknowledge the role of elements of the tabloid press in misrepresenting human rights cases and issues and their hostility to the HRA and the role of the ECtHR. As well as regular conflation of the ECHR and EU, there is failure to report on the benefits of the HRA in their opposition to it. There is also sensationalist reporting that the HRA is a 'criminals' charter' and a disproportionate focus on extradition and deportation cases. The UN High Commissioner for Human Rights has condemned 'decades of abuse' of targeting migrants and noted that it was comparable to the language used by Rwandan media outlets in the lead up to the 1994 genocide and the Nazi media.[9] The European Commission against Racism and Intolerance has called upon all political parties to take a firm stand against intolerant discourse and also noted that hate speech 'in some traditional media continues to be a serious problem, notably as concerns tabloid newspapers'.[10]

The Review also takes place against the background of other measures undermining the rule of law by the present government. In March 2020, the Secretary of State for Northern Ireland announced[11] that the government would unilaterally renege on its commitment to legislate for the UK-Ireland Stormont House Agreement and to set up institutions to deal with the legacy of the Northern Ireland conflict, including an Historical Investigations Unit to ensure discharge of procedural duties under ECHR Article 2 (right to life).[12]This statement was expressly linked to the Overseas Operations (Service Personnel and Veterans) Bill, which seeks to prevent prosecutions for past war crimes, including torture and killings, by the UK military. The bill would also diminish the incorporation of the ECHR in Northern Ireland law in conflict with the GFA, itself including a legally binding international treaty.[13]

The Government has also legislated for the Covert Human Intelligence Sources (Criminal Conduct) Act 2021, which allows the intelligence and security services, as well as a range of other public authorities, to issue criminal conduct authorisations for agents. The Act places no express limits on the crimes that can be authorised, including murder and torture, and reverses the reforms of the NI peace process by bypassing the independent role of the prosecution service in relation to criminal offences committed

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patel-to-apologise-forendangering-colleagues:'The signatories include three former justices of the UK supreme court, five retired appeal court judges, three former high court judges, the lawyer heads of four Oxford University colleges, more than 80 QCs, 69 law professors from leading English universities, the directors of Liberty and Justice, as well as hundreds of law firm partners, barristers and solicitors.'

[9] https://news.un.org/en/story/2015/04/496892-un-rights-chief-urges-uk-curb-tabloid-hate-speech-end-decades-abuse-targeting

[10] See paragraphs 39 & 40: https://rm.coe.int/fifth-report-on-the-united-kingdom/16808b5758

[11] Written Ministerial Statement, 18.3.21 https://questions-statements.parliament.uk/written-statements/detail/2020-03-18/HCWS168

[12] See Northern Ireland Affairs Committee ' Addressing the Legacy of Northern Ireland's Past: the Government's New Proposals (Interim Report), 21.10.21 https://committees.parliament.uk/publications/3186/documents/29458/default/

[13] The Rights, Safeguards and Equality of Opportunity section of the GFA provides an unqualified commitment that *'2. The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.' There is no qualification to events in Northern Ireland nor an arbitrary cut of date as to when this commitment will apply.*

by informants, instead rendering such crimes 'lawful for all purposes'. Although the House of Lords had put in place express limits on this criminal conduct to exclude breaches of the Convention, these amendments were removed in a House of Commons vote.[14] It is particularly concerning that the Home Office ECHR Memorandum to the Bill stated that the ECHR does not apply where conduct is intended to disrupt and prevent that conduct, or more serious conduct:

> '16. Third, it is to be expected that there would not be State responsibility under the Convention for conduct where the intention is to disrupt and prevent that conduct, or more serious conduct, rather than acquiesce in or otherwise give official approval for such conduct, and/or where the conduct would take place in any event.'[15]

In response to questioning from Minister David Davis, on the conflicting government commentary on the applicability of the HRA, the Solicitor General stated that:

> 'First, in response to my right hon. Friend the Member for Haltemprice and Howden (Mr Davis), I am happy to confirm that an authorisation of conduct that would breach the Human Rights Act would always be unlawful. All authorisations issued under the Bill must comply with the Human Rights Act or they will be unlawful. I can therefore confirm and place on record that the Human Rights Act binds all the authorised activity of undercover agents, alongside the state itself.'[16]

These apparently contradictory representations of the Government's view leave tremendous legal uncertainty. If, for example, it is the Government's view that the subjective 'intention' of the agent or handler to disrupt or prevent criminal conduct takes their own criminality out of the purview of the HRA, the assurances given in Parliament are worth little.

This legislation is in response to the 'Third Direction' litigation taken by CAJ and three other NGOs, which challenged the ECHR compatibility of M15 Guidelines to authorise criminal offences by informants.[17] This challenge addressed the lack of accountability and oversight of the actions of undercover agents, even where they breach the HRA and MI5 authorisation of the use of agents extra-territorially on the grounds that their own case handling system and adjudicators are sufficiently equipped to deal with any human rights violations. During this hearing, Government lawyers stated that the policy, derived from royal prerogative pre-1989 and from the Security Services Act 1989 thereafter, allowed MI5 to authorise an informant to commit murder and have argued

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[14] https://services.parliament.uk/Bills/2019-21/coverthumanintelligencesourcescriminalconduct.html
[15] See paragraph 16, Covert Human Intelligence Sources (Criminal Conduct) Bill, ECHR Memorandum by the Home Office; https://publications.parliament.uk/pa/bills/cbill/58-01/0188/CHIS%20(CC)%20Bill%20-%20ECHR%20Memo%20FINAL.pdf
[16] See in particular columns 1017 and 1023: https://hansard.parliament.uk/commons/2021-02-24/debates/0D04B70B-0557-4E9F-BF11-CA8AB040B4B9/CovertHumanIntelligenceSources(CriminalConduct)Bill
[17] Along with the Pat Finucane Centre, Reprieve and Privacy International, for background see: https://privacyinternational.org/legal-action/third-direction-challenge judgment further to the appeal hearing has been reserved.

that the HRA does not apply to agents during such acts.[18] The Government claim that the HRA will provide a sufficient safeguard does not stand up given that it has stated that the HRA does not apply to much of the conduct of covert agents, even where involved in murder or torture.

The Internal Market Bill, now Act, also, in its original form, explicitly broke international law - as was openly conceded by the NI Secretary of State - by disregarding the treaty with the EU, signed only nine months before, governing the status of Northern Ireland post-Brexit. Government amendments to the bill, which were adopted as it completed passage in the House of Commons, expressly diminished the incorporation of the ECHR into domestic law in NI specific provisions in the bill, and hence breached the GFA. In a Joint Briefing advising on the bill, the Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland advised that this undermined the GFA commitment to incorporate the ECHR, and disapplied the scope of the ECHR in relation to the Bill and thus constitute 'regressive measures'.[19]

Successive UK Governments have also shown a lack of respect for the ECtHR in refusing to implement its judgments, both in individual cases and general measures, relating to the legacy of the conflict in Northern Ireland since 2001. CAJ has carriage of a number of relevant cases and has a general brief to combat impunity in dealing with our conflicted past. Part of this involves reporting at least every six months for the past twenty years to the Council of Europe's Committee of Ministers, as it supervises implementation of a number of the *McKerr Group of Cases* concerning the actions of the security forces in cases where the UK was found to have violated Article 2 ECHR. We continue to document the delay and obfuscation on the part of the UK Government in these cases and general measures.[20] A number of these cases have been the subject of further domestic litigation and findings of Article 2 ECHR violations by the UKSC, which reflects the central importance of the HRA in addressing the legacy of the Northern Ireland conflict in the absence of an overarching transitional justice mechanism.[21] This is another example of a contempt for the rule of law, which is reprehensible for the government of any democratic country.

In our view, the Review team members should take an inquisitorial approach over the claims of Ministers when they give evidence. The present intervention is part of a longer tendency to weaken and limit judicial oversight of government policy and

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[18] The Guardian 27 January 2021: 'Government lawyer tells court MI5 officers could authorise murder'
[19] Available as a link in the accompanying Joint Statement: https://www.equalityni.org/Footer-Links/News/Delivering-Equality/UK-Internal-Market-Bill-Must-Address-Human-Rights
[20] See CAJ's most recent Rule 9 submission to the Committee of Ministers on the McKerr Group of Cases: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2021)181E%22]} UK Action Plan: https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2021)101E%22]} and the Committee of Ministers' December 2020 Interim Resolution: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a097b6
[21] For eg: *In the matter of an application by Hugh Jordan for Judicial Review* [2019] UKSC 9; *In the matter of an application by Geraldine Finucane for Judicial Review* [2019] UKSC 7; Other Article 2/3 challenges pending before the UKSC: *In the matter of an application by Mary McKenna for Judicial Review (Northern Ireland) No 2* UKSC 2020/0026: [2019] NICA 46; *In the matter of an application by Francis McGuigan for Judicial Review (Northern Ireland)* UKSC 2020/0020: [2019] NICA 46; *In the matter of an application by Margaret McQuillan (AP) For Judicial Review (Northern Ireland)* No 1 UKSC 2020/0028: [2019] NICA 13

actions. The rule of law applies to all in society including, especially, the government. This Review must not compromise that principle.

We note that these developments contrast starkly with the commitment of the UK in its Chairmanship of the Committee of Ministers of the Council of Europe, resulting in the 2012 'Brighton Declaration' in which the UK and other member states reaffirmed:

> '…their deep and abiding commitment to the Convention, and to the fulfilment of their obligation under the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention'.[22]

Particular importance of the HRA to Northern Ireland

The incorporation of the ECHR was a basic ingredient of the human rights protections in the Belfast/Good Friday Agreement (GFA). It was regarded as so important that the Agreement also committed the Irish Government to incorporate the ECHR under the 'equivalence' provisions and established the European Convention of Human Rights Act 2003. In our view, any amendment to the HRA insofar as it has effect in Northern Ireland would constitute a flagrant breach of the Agreement and potentially destabilise the peace settlement. It is our view that it is not necessary or appropriate to change the operation of the HRA in Northern Ireland.

The Agreement, in addition to being overwhelmingly approved by referendum, in Ireland, North and South, was also incorporated as a treaty between the UK and Ireland and lodged with the UN (UK Treaty Series no. 50 Cm 4705). Article 2 of the treaty binds the UK to implement provisions of the annexed Multi-Party Agreement, which correspond to its competency. Paragraph 2 of the Rights, Safeguards and Equality of Opportunity section of this Agreement set out this commitment.[23]

This commitment was given legislative effect through the HRA 1998 and the Northern Ireland Act 1998.

The Agreement also commits to safeguards to ensure the Northern Ireland Assembly, or public authorities, cannot infringe the ECHR. Any interference with this safeguard takes away a significant pillar of the human rights architecture, both of the Agreement and Northern Ireland society. It threatens the whole basis of trust in the new institutions that has been painstakingly built up since 1998.

It is also of particular importance to note that any amendment of the HRA necessitates a process of review between the UK and Irish Governments in consultation with the NI Assembly parties. Paragraph 7 of the section 'Validation, Implementation and Review' of the Agreement makes this clear:

> '**Review procedures following implementation** .... 7. If difficulties arise which require remedial action across the range of institutions, or otherwise require amendment of the British-Irish Agreement or relevant legislation, the process of

[22] https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf

[23] Ibid footnote 1

review will fall to the two Governments in consultation with the parties in the Assembly. Each Government will be responsible for action in its own jurisdiction.'[24]

In relation to other key provisions of the peace settlement, the HRA 1998 is, for example, also vital to the framework for the human rights compliance of policing in Northern Ireland. One of the key functions of the Northern Ireland Policing Board, as set out in s3(3)(b)(ii) of the Policing (Northern Ireland) Act 1998, is to monitor compliance with the Human Rights Act 1998. The PSNI Code of Ethics, provided for under s52 of the same Act, is also designed around the framework of the ECHR as provided for by the HRA 1998. Again, the full impact of this legislation involves both the letter of the Convention and its jurisprudence, as we argue below. The Justice (Northern Ireland) Acts 2002 and 2004 were also introduced following peace settlement commitments. Of particular note is the power conferred upon the Attorney General for Northern Ireland under s8 of the 2004 Act to issue and revise human rights guidance for criminal justice organisations which they must give regard to.[25]

A 2017 report of a conference on the Human Rights Act organised by the Human Rights Consortium and UNISON is a useful resource for this Review when considering the particular circumstances of this jurisdiction. This report, entitled 'The Impact of the Human Rights Act in Northern Ireland: Conference Report', is available online. As keynote speaker at this Conference, the Chief Constable of the PSNI made it clear that the threatened removal of the HRA would be 'hugely detrimental to both confidence in policing and the confidence of the police to make difficult decisions' and that 'Human Rights have been incorporated into our policy and it has become the norm for human rights to guide the decisions we make and the operations activity we undertake'.[26]

Also of particular importance is Article 2 of the NI Protocol to the Withdrawal Agreement, which provides for 'no diminution' of certain GFA rights, including the incorporation of the ECHR as a result of Brexit. Whilst the current Review of the HRA is also part of a broader trend, its linkage to Brexit is clear, not least in its timing. It also stems from a similar cultural and political attitude towards external influence on domestic law. Nonetheless, any diminution of the relevant GFA rights, including the incorporation of ECHR rights that follow and relate to Brexit will be unlawful under the domestic incorporation of Article 2(1) of the Protocol. Should government manage to successfully convince a court that a diminution of ECHR incorporation in NI law as an outworking of this review of the HRA is nothing to do with Brexit (despite taking place just after Brexit, and after significant conflation of the EHCR and EU during the whole Brexit process and, at times, a 'twin' campaign against EU and ECHR membership) we would nevertheless face an absurd political scenario in which GFA rights that the UK has steadfastly legally guaranteed not to diminish as a result of Brexit, given their importance, are diminished anyway for another reason.

[24] Ibid. See page 31 & 32 - Validation, Implementation and Review section
[25] https://www.attorneygeneralni.gov.uk/human-rights-guidance
[26] http://www.humanrightsconsortium.org/wp-content/uploads/2017/04/The-Impact-of-the-HRA-in-Northern-Ireland-Conference-Report-1.pdf

Breaking or weakening the link with ECtHR jurisprudence, or in other ways restricting the application of the HRA, could well trigger the attention of the 'dedicated mechanisms' set up under the Protocol to protect rights.[27]

It is important to note that the Agreement provides for ECHR incorporation to be complimented and supplemented by a Bill of Rights for Northern Ireland.[28] The current direction of debate is towards enhancing rights protections rather than weakening them. In the 'New Decade, New Approach' document, which was the basis of the re-establishment of the democratic institutions at Stormont, a Bill of Rights Ad Hoc Committee of Members of the Legislative Assembly was established.[29] Its brief is to examine the case for a Bill of Rights that builds on and surpasses the protection in the ECHR. Again, any significant amendment of the HRA, especially in regard to weakening the link with ECtHR jurisprudence, would go against this direction of debate.

Theme 1

This first theme of the Review's Terms of References addresses the relationship between domestic courts and the ECtHR and invites general views on how this is working and any recommendations for changes.

It is our view that incorporation of the ECHR as committed to by the British Government in the GFA cannot just mean repeating the text of the ECHR (or most of it) in a UK statute. It also involves 'bringing in' the institutions of the Convention and the jurisprudence developed by the Court and other Convention bodies. This view of incorporation is currently completely recognised by the HRA. Section 1 of the HRA lists Convention rights as those in (most of) the ECHR. Section 2 'Interpretation of Convention Rights' says, in effect, that the convention rights must be interpreted 'taking account' of ECtHR jurisprudence and the positions of other Council of Europe institutions:

> '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, whenever made or given, so far as, in the opinion of the court or

[27] See, for e.g. CAJ evidence to the Northern Ireland Affairs Committee on its inquiry into 'Citizenship and Passport Processes in Northern Ireland', February, 2021 : https://committees.parliament.uk/writtenevidence/22343/html/ and CAJ briefing note EU-UK future relationship cliff edge: Outstanding issues around access to EU and human rights in the Northern Ireland context, August 2020: https://caj.org.uk/wp-content/uploads/2020/08/Rights-and-the-EU-future-relationship-Aug-20.pdf

[28] Ibid. See pages 21-21, Rights, Safeguards and Equality of Opportunity, Human Rights

[29] http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/

tribunal, it is relevant to the proceedings in which that question has arisen.' (Sec 2(1))'.

It is this Section that requires UK courts to 'take account' of European Court decisions (not follow them as binding precedent as some caricatures allege) and it is that link that the previous Government was committed to breaking, and which is called into question in this theme. In our view, to break with the jurisprudence of the ECHR and provide for UK courts to be able to take account of, and contribute to, that jurisprudence would without doubt breach the GFA and its supporting Treaty.

Detailed questions

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?

It is our view that the section 2 duty to 'take account' of ECtHR jurisprudence, in so far as it is relevant, has been applied appropriately in Northern Ireland and we do not believe that it is necessary or would be practical to amend this section in a manner which would diminish this duty. The HRA has empowered this. As the Late Lord Kerr outlined:

> '… section 2 of the Human Rights Act is cast deliberately in terms which do not require strict adherence to Strasbourg jurisprudence. There are, of course, sound practical and policy reasons why our national courts should follow decisions of the ECtHR. The most important of these was touched on by Lord Hoffmann in Re G:
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> > The best reason is the old rule of construction that when legislation is based upon an international treaty, the courts will try to construe the legislation in a way which does not put the United Kingdom in breach of its international obligations. If Strasbourg has decided that the international Convention confers a right, it would be unusual for a United Kingdom court to come to the conclusion that domestic Convention rights did not. Unless the Strasbourg court could be persuaded that it had been wrong (which has occasionally happened) the effect would be to result in a finding that the United Kingdom would be in breach of the Convention. Thus section 2(1) of the 1998 Act allows for the possibility of a dialogue between Strasbourg and the courts of the United Kingdom over the meaning of an article of the Convention but makes this likely to be a rare occurrence.'[30]

While there has been much judicial and academic commentary on the application of, and developments since, the Ullah 'mirror principle', the 2019 Supreme Court decision in *R (on the application of Nealon & Hallam) v Secretary of State for Justice*[31] provides a further development in the interpretation of the section 2 obligation. This challenge considered whether the statutory compensation scheme for miscarriages of justice was compatible with Article 6 ECHR. In departing from the ECtHR Grand Chamber decision

[30] *The UK and European Human Rights, A Strained Relationship?* Chapter 3,pg 56: *The Relationship Between the Strasbourg Court and the National Courts – As Seen from the UK Supreme Court,* Hart Publishing, 2015.
[31] [2019] UKSC 2

of *Allen v United Kingdom,*[32] the Supreme Court chose to follow domestic authorities on a number of grounds including that Allen was not binding, was a weak authority, and UK law had been misapplied by the ECtHR.

It is difficult to see in what way section 2 HRA could be usefully amended in the way sought by those setting up the review. The nature of the duty means that the courts already have flexibility not to follow a particular line of Strasbourg case law if there is good reason not to. Being prescriptive about how the courts should approach the Strasbourg case law might be counter-productive if circumstances arose that had not been anticipated.

Furthermore restricting the ability of the courts to take into account the Strasbourg case law might mean claimants lose cases in UK courts and then have to make an application to Strasbourg. There is a risk of both increasing the number of applications made to Strasbourg and increasing the likelihood that ECtHR will find the UK to have violated the Convention.

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?

It is our view that the domestic courts and tribunals have approached issues falling within the margin of appreciation appropriately and there is no need for any change.

In the Northern Ireland Court of Appeal case of *Close & Ors, Re Judicial Review,* the appellants claimed that the prohibition on same sex marriage in Article 6(6)(e) of the Marriage (Northern Ireland) Order 2003 unlawfully discriminated against them in violation of Article 14 ECHR in the ambit of Articles 8 and 12 ECHR.[33] The Court of Appeal set out as the correct approach to comply with section 2(1) that outlined by Lord Mance in *D and V v Commissioner of Police of the Metropolis (Liberty and others intervening)*:

> '152. Finally, I do not accept that Lord Bingham's well-known cautionary remarks in R (Ullah) v Special Investigator [2004] 2 AC 323 were confined to the international level (whatever relevance that would mean they had domestically). They were, and have correctly been understood in later authority, such as R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening) [2008] AC 153, as guidance relating to the general approach which domestic courts should take. The general aim of the Human Rights Act 1998 was to align domestic law with Strasbourg law. Domestic courts should not normally refuse to follow Strasbourg authority, although circumstances can arise where this is appropriate and a healthy dialogue may then ensue: see eg R v Horncastle [2010] 2 AC 373; Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2011] 2 AC 104, para 48 and R (Chester) v Secretary of State for Justice [2014] AC 271, paras 27–28. Conversely, domestic courts should not, at least by way of interpretation of the Convention rights as they apply domestically, forge ahead, without good reason.'[34]

[32] (App. no. 25424/09)
[33] 2018] UKSC 11 at [152]-[153]:
[34] Ibid. paragraph 40

It went on to cite Lord Mance in Re NIHRC's Application as the correct approach to follow:

> '115. Looked at from the perspective of the European Court of Human Rights, there is no doubt that this is a situation where that court would afford the UK, represented in this context by the Northern Ireland Assembly, a large margin of appreciation.
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> …
>
> As Lord Hoffmann put it in Re G [2009] 1 A.C. 173, at [37]: "In such a case, it is for the court in the United Kingdom to interpret arts 8 and 14 and to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom. The margin of appreciation is there for division between the three branches of government according to our principles of the separation of powers. There is no principle by which it is automatically appropriated by the legislative branch.'[35]

It concluded that the discrimination against same sex couples was not justified but did not proceed to make a declaration under section 4, as this would serve no purpose due to legislative developments.

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?

We consider that the current approach to 'judicial dialogue', both formally and informally, between the domestic courts and ECtHR is effective with good communication and compromise demonstrated on both parts and this does not need strengthened. The relationship between domestic and Strasbourg judges is one founded on dialogue and respect as illustrated by the following example.

In considering the dialogue between the ECtHR and domestically, the decision in *Animal Defenders International v UK* is of particular interest. [36] After deliberating for 13 months, by a slim majority, the Grand Chamber held that the UK ban on paid political advertisements in broadcast media did not violate Article 10 ECHR. Its departure from the case of *Vgt v Switzerland* with near identical facts was of particular surprise to many. It found that:

> '…the applicant NGO's right to impart information and ideas of general interest which the public is entitled to receive with, on the other, the authorities' desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media.'

In reaching this decision, it is clear that the ECtHR gave weight to the domestic legislative and judicial examination of this issue:

> '114. … The Government, through the DCMS [the Department], played an important part in that debate explaining frequently and in detail their reasons

[35] Ibid. paragraph 45
[36] (Application no. 48876/08) Animal Defenders UK v. The United Kingdom (coe.int)

for retaining the prohibition and for considering it to be proportionate and going so far as to disclose their legal advice on the subject (paragraphs 50-53 above). The 2003 Act containing the prohibition was then enacted with cross-party support and without any dissenting vote. The prohibition was therefore the culmination of an exceptional examination by parliamentary bodies of the cultural, political and legal aspects of the prohibition as part of the broader regulatory system governing broadcasted public interest expression in the United Kingdom and all bodies found the prohibition to have been a necessary interference with Article 10 rights.

115. It was this particular competence of Parliament and the extensive pre-legislative consultation on the Convention compatibility of the prohibition, which explained the degree of deference shown by the domestic courts to Parliament's decision to adopt the prohibition (in particular, paragraphs 15 and 24 above). *The proportionality of the prohibition was, nonetheless, debated in some detail before the High Court and the House of Lords. Both courts analysed the relevant Convention case-law and principles, addressed the relevance of the above-cited VgT judgment and carefully applied that jurisprudence to the prohibition.* Each judge at both levels endorsed the objective of the prohibition as well as the rationale of the legislative choices which defined its particular scope and each concluded that it was a necessary and proportionate interference with the applicant's rights under Article 10 of the Convention.

116. The Court, for its part, attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process.' (emphasis added)

An analysis of this case has found that it:

> '…does represent precisely the merits of UK judges scrutinizing the state's arguments in UK courts, in Convention-rights terms and with due consideration of Strasbourg jurisprudence, before the issue travels to Strasbourg for consideration there. The Strasbourg Court not only essentially adopted the reasoning of the UK courts, but in doing so it explicitly rowed back from its own jurisprudence (i.e. the *VgT* case). This is an entirely appropriate form of institutional dialogue, and shows maturity of judgment, the flip side of the much-maligned UK courts' own willingness to apply rules laid down in Strasbourg. The upshot of this is plain: a British Bill of Rights that acted as a substitute for the Human Rights Act 1998 would have destroyed that dialogue, and made the wrong outcome in *Animal Defenders International* more likely.'[37]

It is worth noting that despite very regular dialogue with the Council of Europe, the UK has failed to comply with a number of ECtHR cases on Article 2 ECHR arising from Northern Ireland, as outlined above. This includes the UK obligation to hold an Article 2 ECHR compliant public inquiry into the murder of solicitor Pat Finucane. Despite these

[37] https://ukconstitutionallaw.org/2013/04/25/jeff-king-deference-dialogue-and-animal-defenders-international/

cases remaining under the enhanced supervision of the Council of Europe's Committee of Ministers - and repeated expressions of concern by the Committee due to the delays and lack of information provided on both the individual and general measures - twenty years after these judgments the UK still has not properly discharged its obligations under Article 46 ECHR. In its December 2020 Interim Resolution, the Committee expressed its 'profound regret' that the inquests and investigations as put forward as remedies to the original ECtHR judgments have still not been completed, and their 'profound concern' that the UK failed to provide details to its request for information and will examine these cases again in its March meeting.[38]

The British media also critiques the ECtHR, though not always constructively. This has resulted in at least one instance of the ECtHR Registrar issuing a statement as the court was 'concerned about the frequent misrepresentation of its activities in the British media'.[39]

Theme 2

The second theme of the request for evidence considers the impact of the HRA on the relationship between the judiciary, the executive and the legislature. At the start, it asks for 'general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy'. It goes on to say: 'We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change.'

In general, we do not believe there are any serious problems in the way the HRA affects the relationship between the judiciary, the executive and the legislature. As a matter of law and the constitution, there is no true separation of powers in the UK. The Crown in Parliament is sovereign, the Government of the day advises the Crown, but is subject to the support of the legislature and the courts can only pronounce on the law in particular cases on the basis of statute and common law (both completely amendable by the legislature). A Government with a sufficiently stable majority in Parliament can legislate with the extent and reach it chooses on any subject it wishes. Whilst it is outside the scope of the review, given its focus on the HRA, this itself can be problematic insofar as legislation that breaches international law (even provisions on norms such as torture) can be made by Parliament

It is therefore inherently problematic when a UK Government complains that the judiciary is encroaching into 'policy' areas, meaning the practical application of its wishes. If it seriously believed there was a problem, it could ask Parliament to legislate to remove it. The problem it comes up with is that unfettered executive power offends against the principle of the rule of law which, to date, has public support and is politically difficult to discard. In essence, in simple terms, it appears that Government at times is arguing (in relation to both the HRA and beyond), that it should have a power to act unlawfully, and that when it acts unlawfully judges are 'interfering' by stopping it; yet that is precisely the role of judges in a rule of law society.

[38] Ibid. 19

[39] https://www.theguardian.com/law/2013/oct/14/european-court-human-rights-attacks-uk-newspapers

In general, the role of the courts in interpreting the HRA represents the application of the rule of law. The legislature has decided that a body of law (written Convention and subsequent jurisprudence, though the latter is only advisory), ratified by the sovereign action of the UK as a state (the executive), will have effect domestically and the role of the courts is to interpret that law. In certain cases, that will be inconvenient but that is no justification for a power grab by the executive.

Let us briefly consider the development of the procedural obligation to carry out proper and effective investigations into potential breaches of Articles 2 of the ECHR. This was developed in the *McKerr group of cases*[40] from Northern Ireland in which judgment was given by the ECtHR from 2001 onwards. The procedural obligation was first 'implied' by the Court on the basis that, without a proper and independent investigative procedure, the substantive obligation to protect the right to life was meaningless, especially if the state might be implicated in a death. The domestic courts have, quite properly, repeatedly decided that this obligation for a fair and proper investigation extends to 'legacy' cases in Northern Ireland. They have been prescriptive in what kind of an investigation (independent and effective) is required but not the method of ensuring that. In other words, the courts have pronounced on what human rights law requires, but not on the policy area– of how it should be carried out.

Unfortunately, this has given room for the UK government to prevaricate and delay in implementing the judgements of the European Court and the domestic courts, for the best part of two decades. No-one doubts the complexity of dealing with the legacy of the conflict in this region, but 'judicial activism' is not one of the problems.

Detailed Questions

Under Theme 2, the Call for Evidence asks:

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

(i) 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)?

Sections 3 and 4 represent a balance between the two main principles of the constitution: respect for the rule of law (including human rights) and parliamentary sovereignty. The drafters of the Human Rights Act avoided the position that obtains in the US, Germany, South Africa or Ireland whereby the courts can disapply or strike down primary legislation if inconsistent with constitutional rights. These models give greater weight to the imperative to protect the rules of law and human rights. The Human Rights Act drafters also rejected the Canadian compromise whereby courts can strike down legislation, but the legislatures have the possibility to pass legislation explicitly stating it applies 'notwithstanding' the rights in the Canadian Charter of Rights

[40] Ibid. 19 and *McKerr v. the United Kingdom* (dec.), no. 28883/95, 4 April 2000

and Freedoms. The Human Rights Act approach is already more deferential to the legislature than any of these models.

In applying the Human Rights Act, the courts are giving effect to the intention of Parliament that legislation should be interpreted compatibly with Convention rights in so far as it is possible to do so.

We are not aware of any Northern Ireland decisions where legislation has been interpreted inconsistently with the intention of Parliament and do not consider it necessary to amend or repeal section 3.

The leading case in this area is the 2004 House of Lords decision in *Ghaidan v Godin-Mendoza.*[41] This case involved the interpretation of paragraph 2 of Schedule 1 of the Rent Act 1977, which allows a 'surviving spouse' to succeed to a statutory tenancy. The respondent in this case was the same sex partner of the deceased original tenant and the landlord was seeking possession of the flat in question. In a previous case,[42] before the coming into forces of the HRA, the Lords had ruled that a person living with the tenant in a stable and monogamous same-sex relationship was to be regarded as a member of the tenant's family within the meaning of paragraph 2(3) of schedule 1 to the Rent Act 1977, and therefore entitled to an assured tenancy of the property. But the Lords had rejected the argument that such a person was to be regarded as a 'surviving spouse' who was entitled to succeed to the more advantageous statutory tenancy. Although paragraph 2(2) extended the term 'spouse' to a person who was 'living with the original tenant as his wife or her husband,' the Lords had held that these words implied persons of the opposite sex.

The Lords first decided unanimously that the interpretation of paragraph 2 in *Fitzpatrick* amounted to unjustified discrimination (under Article 14 ECHR) between heterosexual couples and same-sex couples in the enjoyment of the right to respect for the home (Article 8 ECHR). This was an important finding in its own right but the Lords then had to decide whether it was possible, using section 3 of the HRA, to read and give effect to paragraph 2(2), the 'spouse' provision, in a way, which would remove the discrimination and, therefore, ensure compatibility with article 14 of the convention.

The Lords all accepted that Parliament in Section 3 HRA had intended to impose a broad duty to do everything possible to achieve compatibility through interpretation, with declarations of incompatibility being a remedy of last resort, to be made only rarely. Section 3 is not limited to cases where a statutory provision is ambiguous – it comes into play in any case where interpretation using normal principles would lead to breach of convention rights.

Lord Nicholls explained that:

> 'once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman [sic] in the statutory provision under

[41] [2004] UKHL 30
[42] *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27

consideration. That would make the application of section 3 something of a semantic lottery.'

The Lords accepted, however, that there were two fundamental limits to this principle of a broad interpretation of the impact of section 3. First, compatible interpretation is not possible where it is inconsistent with a fundamental feature or aim of the scheme of the legislation in question; this was the case in the first Belmarsh case. Second, compatible interpretation would be impossible where the legislation in issue had wide ramifications, raising policy issues ill-suited for determination by the courts or court procedures as set out in *Bellinger v. Bellinger*.

Of course, there will always be room for debate around the application of the second limit to the broad interpretation of section 3 – though we have no evidence of occasions where the courts have unduly trespassed on policy issues. However, the approach of the Lords in this case combines the two principles of the supremacy of human rights and the sovereignty of Parliament. In fact, this case gives practical effect to the clear intention of Parliament in promoting the supremacy of human rights by passing section 3 of the HRA, which asserts that, where possible, legislation should be interpreted compatibly with Convention rights as designated in the HRA.

In this sense, section 3 reflects the common law principle of legality: it is presumed that Parliament legislates compatibly with basic rights and constitutional principles, though Parliament remains free to legislate incompatibly provided it does so using clear language: *R (Evans) v Attorney General*[43], *R v Secretary of State for the Home Dept., ex parte Simms*.[44]

In our view, this remains the proper approach.

The call for evidence continues:

(ii) 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?

To significantly amend or repeal section 3 would be to remove one of the fundamental aims of the HRA, which is to provide that the whole corpus of law should be interpreted, as far as possible, in a way compatible with basic human rights. In our view, there is no evidence of a problem that requires to be fixed. In those circumstances, any change, which diminishes the impact of section 3, would be a deliberate regression from human rights protection.

(iii) 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?'

[43] [2015] UKSC 21
[44] [2002] 2 Appeal Cases 115

This question seems to imply that section 3 is repealed or significantly weakened, thus putting decisions on incompatibility 'higher on the agenda,' as it were, of a court interpreting a statute in the light of the HRA. If that were the case, there would be no or delayed relief for the claimant, delay in the parliamentary process for amending the offending legislation, as the number of incompatibility decisions would inevitably increase, and an increased level of legal uncertainty in possibly crucial areas.

We are aware of three Northern Ireland cases in which section 4 declarations of incompatibility have been issued. The first being the 2002 case of Re *McR's Application,*[45] in which a declaration was made that Section 62 of the Offences Against the Person Act 1861 (attempted buggery), which continued to apply in Northern Ireland, was incompatible with Article 8 to the extent that it interfered with consensual sexual behaviour between individuals. It was repealed in NI by the Sexual Offences Act 2003, sections 139, 140, Schedule 6 paragraph 4 and Schedule 7.

The second NI declaration of incompatibility arose in *In the matter of an application by the Northern Ireland Human Rights Commission.*[46] This abortion challenge sought a declaration that sections 58 and 59 of the Offences against the Person Act 1861 and section 25(1) of the Criminal Justice Act (Northern Ireland) 1945 were incompatible with Articles 3, 8 and 14. The High Court's finding of incompatibility was overturned by the Court of Appeal but was appealed to the Supreme Court which found that the Commission did not have standing to bring the case but stated that the then NI abortion laws were incompatible with Article 8 ECHR on three grounds.

The third case of note is *In the matter of an application by Siobhan McLaughlin.*[47] This challenge followed the refusal to pay Widowed Parents Allowance to a bereaved cohabitee, who had lived with her partner for 20 years and left as sole carer for four children. The application was successful before the High Court, overturned by the Court of Appeal and reinstated by the Supreme Court, which declared that the requirement in Section 39A of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 for a marriage/civil partnership as a qualifying condition of WPA was incompatible with Article 14, read with Article 8.

These three cases also demonstrate how the Human Rights Act protects the rights of everyone: the right of people to engage in consensual private sexual conduct; the right of women to access terminations without being subject to inhuman and degrading treatment; the right of a bereaved person to access parents' allowance.

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

The first issue here is whether, and how, there can be challenges to designated derogation orders. In the first Belmarsh case,[48] the Lords came to rule on the derogation because the Anti-Terrorism, Crime and Security Act 2001 expressly allowed such orders to be challenged before the Special Immigration Appeals Commission and on appeal therefrom. The new Overseas Operations (Service Personnel and Veterans) Bill, for

[45] [2002] NIQB 58, [2003] NI1
[46] [2015] NIQB 96 & 102
[47] Supreme Court decision: [2018] UKSC 48, NI CoA decision: [2016] NICA 53, High Court decision: [2016] NIQB 11
[48] *A v Secretary of State for the Home Department [*2004] UKHL 56, [2005] 2 AC 68

example, requires the government to 'keep under consideration' whether to derogate from the ECHR in cases of overseas operations but provides no explicit means of challenge if an order is made. Although the new section 14A which is to be inserted in the HRA seems to be merely declaratory and functionally redundant. We believe it should be the role of the courts domestically to decide whether the conditions for derogation in Article 15(1) of the ECHR are fulfilled in any given case.

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?

We are not aware of any problems arising in this area. In principle, we think it is an important safeguard, contained in the GFA, that courts have the power to strike down legislation of the Northern Ireland Assembly if it is incompatible with the ECHR. It would also be important, as the Agreement states, for the same power to exist in relation to any Bill of Rights for Northern Ireland. The Agreement was, in many ways, a promise to create a rights-based society and the enforceable requirement that all legislation in the new Assembly be compatible with human rights was an important part of that.

In more general terms, given that subsidiary legislation frequently suffers from a lack of detailed parliamentary oversight, the ability of the courts to quash legislation, which is incompatible with human rights, is an important protection.

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?

In our view, ECHR binds the UK state in general and is not restricted to actions on the territory of the UK or other jurisdictions, which it legally controls. The law on this matter as set out by the European Court of Human Rights in *Al-Skeini v UK* and *Al-Jedda v UK* should continue.[49]

From this perspective among others, we are opposed to the provisions in the Overseas Operations (Service Personnel and Veterans) Bill avoiding the application of ECHR to military operations. We note that the Parliamentary Joint Committee on Human Rights has found these provisions to be in breach of the 'UK's international legal obligations under international humanitarian law, human rights law and international criminal law'.[50]

In particular, it is our view that clause 11, which limits the scope of available remedies, is in breach of Article 13 of the Convention and of the GFA insofar as it limits direct access to the NI courts in relation to overseas operations. As noted earlier this Bill was brought in alongside a Written Ministerial Statement stating that troops who served in NI during the troubles should have the same protection as troops operating abroad. [51]

[49] (2011) 53 EHRR 15 and (2011) 53 EHRR 23 respectively

[50] https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/120321/operations-service-personnel-and-veterans-bill-is-unjustifiable-ineffective-and-will-prevent-justice-from-being-done-say-joint-committee-on-human-rights/

[51] See Model Bill Team Submission to the JCHR: https://caj.org.uk/wp-content/uploads/2020/11/Model-Bill-Team-Submission-to-the-Joint-HRC-on-Overseas-SPV-Bill.pdf

As also outlined above, we are also concerned at the extraterritorial effect of the Covert Human Intelligence Sources (Criminal Conduct) Act 2021, which allows authorisation of agents of a number of public authorities to commit crimes, with no express limits, even over murder. This includes the power to authorise such CHIS conduct abroad. All of this is of particular concern given the conflicting information from government on whether acts of these agents engage Convention obligations. While the Home Office ECHR Memorandum stated that there would not be responsibility under the Convention for certain conduct, in respect of this legislation, in its final consideration on 24 February 2021, the Solicitor General said that all authorisations must comply with the HRA and it binds all the authorised activity of undercover agents, including the state itself.[52]

This could be an important safeguard, albeit only confirmed by a declaration in Parliament, rather than by express provision in the Bill. It also leaves legal uncertainty about the scope of the HRA in such cases. However, any amendment to the HRA that reduced its territorial reach or relevance to the action of authorised state agents would breach this commitment.

(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?

We are, generally speaking, cautious when it comes to the use of secondary legislation in important matters. It is usually desirable that full parliamentary scrutiny is afforded to laws passed in the area of human rights. However, given that there is a safeguard, in that the draft Order must be approved by both houses of Parliament, we do not think that there is any pressing reason for change.

Conclusion

As we have outlined above we question the need for this Review of the Human Rights Act. Given that the incorporation of the ECHR through the HRA was a central tenet of our peace settlement, we consider any amendment or weakening of these protections to be in breach of the GFA, which could lead to a potential undermining of one of the most successful underpinning elements of our hard-won peace process.

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[52] Ibid. 14 & 15