THE BAR of NORTHERN IRELAND

Human Rights Act Reform: A Modern Bill of Rights

Consultation Response

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland which comprises 650 self-employed members who operate on an independent referral basis. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy, serving the administration of justice and upholding the rule of law across this jurisdiction. Northern Ireland's independent referral Bar represents one of the cornerstones of our legal and justice system with an important history of providing expert impartial representation across a range of areas, including human rights law.

2. This consultation follows on from a review into the operation of the Human Rights Act (HRA), commissioned in December 2020. The Bar of NI submitted evidence to that review in March 2021.[1]

3. The pretext to the review of the Human Rights Act and this Consultation is the Conservative Manifesto for the general election of December 2019[2]. The Manifesto included a commitment, after Brexit, to "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" (p.48).

4. Whether or not there should be new Bill of Rights at all seems to us to be at least in part a political question, but we think that it also raises issues on which the Bar Council can appropriately express a view. The Bar Council does not consider that the Human Rights Act is outdated or that its operation gives rise to legitimate concern.

5. Whilst it is entirely legitimate to ensure, that any area of legislation remains fit for purpose and capable of addressing current conditions, there appears to be flawed perceptions at the core of the consultation about the functioning of the HRA. Chapter 3 of the Consultation document moves from citing noted judgments that have expressed areas of difficulty or even incompatibility to a narrative about a perceived "rights culture". The arguments in this area are of inferior quality and can be characterised as being largely anecdotal and general: "Since 2000, human rights claims have been brought by many people who have themselves showed a flagrant disregard for the rights of others. Other claims from prisoners also reveal

[1]See the Bar's response to the Independent Human Rights Act Review, March 2021 at IHRAR Response FINAL 03.03.21.pdf (rackcdn.com)

[2] Conservative Party Manifesto 2019 at https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf

the extent to which there is a perception that it is worth making a human rights claim, even on flimsy grounds."

6. The inclusion of these weaker, perception-based arguments seems to be a forced effort to establish a premise that the HRA requires reform. Instead, our starting position is that, on balance, the HRA works well by striking a delicate constitutional balance domestically and at the international level by enabling a common language on human rights. In adopting this position, we are aligning ourselves with the general position of The Gross Review[3] which did not supply any evidence that the HRA is not working or that it needs to be significantly reformed or abolished. Indeed, Sir Peter Gross found that, "It is our view that the Human Rights Act works well and has benefited many."

7. It is also worth noting that as an ordinary Act of Parliament, a Bill of Rights would not entrench rights. They could be taken away again by another Act of Parliament.

8. The Bar Council of NI does not intend to directly answer each of the Consultation Questions in significant detail. Instead, we refer you to our overall position below which outlines our general position in relation to the themes and topics that are within the scope of the consultation and provide added consideration of the specific circumstances of Northern Ireland.

9. In all other respects, having consulted with our colleagues in the other jurisdictions The Bar Council of NI has chosen, rather than repeat existing submissions, to indicate instead where our position aligns with and supports the answers already given by the Bar Council of England and Wales in their answers to the detailed consultation questions.

Human Rights in the Northern Ireland Constitution

10. Under the *Good Friday Agreement*, the Government undertook to "complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the court and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on the grounds of inconsistency". (Strand 3, "Rights, Safeguards, and Equality of Opportunity", paragraph 2)[4]

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[3] [33] The Independent Human Rights Act Review 2021 (publishing.service.gov.uk)

[4] The Belfast Agreement, Strand 3 on "Rights, Safeguards, and Equality of Opportunity" paragraph 2, 10 April 1998 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf

11. The new constitutional arrangements outlined in the GFA are enshrined in the *Northern Ireland Act 1998,* which is "in effect a constitution" (per Lord Bingham in *Robinson* [2002] NI 390 at paragraph 11)[5] and should therefore be accorded the status and importance of a constitution.

12. By virtue of section 6, an Act of the Northern Ireland Assembly is invalid if it is incompatible with any of the Convention rights. Section 24 provides that a Minister or Northern Ireland department has no power to make, confirm or approve of any subordinate legislation, or to do any act, so far as the legislation or act is incompatible with any of the Convention rights.

13. Section 98(1), of the NIA provides that "the Convention rights" have the same meaning as in the HRA, which is that "the Convention rights" means the rights and freedoms set out in Articles 2 to 12 and 14 of the Convention, Articles 1 to 3 of the First Protocol; and Articles 1 and 2 of the Sixth Protocol, as read with Articles 16 to 18 of the Convention (s.1(1) of the HRA). It is debateable whether section 2 of the HRA applies to courts deciding a question that arises under the NIA (which postdates the HRA and could not therefore have been in contemplation when the HRA was passed), but the requirement in section 2 of the HRA that courts "must" take Strasbourg jurisprudence into account in determining questions concerning Convention rights was certainly in mind when the NIA was passed, so that the expectation behind sections 6 and 24 of the NIA was that these important constitutional provisions (limiting the powers of both the executive and legislature exercising devolved powers in NI) would be construed in harmony with Strasbourg jurisprudence.

14. We note the undertaking given in the Consultation document that: "The protection of human rights is at the heart of the peace settlement in Northern Ireland. It is woven into the terms of the 1998 Belfast (Good Friday) Agreement. The government remains fully committed to the Belfast (Good Friday) Agreement and our proposed reforms will not undermine that Agreement."

15. We have also been heartened by the opportunity during this consultation exercise to receive certain verbal assurances from Lord Woolfson about the government's commitment to safeguarding all aspects of the Good Friday Agreement that are connected to the HRA.

[5] *Robinson v Secretary of State for Northern Ireland and Others* [2002] UKHL 32, Lord Bingham at [11]

16. Nevertheless, the Consultation does present the challenge of reconciling the above assurances that relate specifically to Northern Ireland with the potentially competing position that: "The values that will underpin the Bill of Rights are not the sole preserve of any one part of the UK. Rather, the government believes that everyone in the UK ought to benefit from improvements to our human rights framework. The government has a clear mandate to reform the UK's human rights framework, under the terms of its manifesto commitment. Our intention is to create a Bill of Rights for the whole of the UK, founded on principles common to us all." We are concerned that in the scope and direction reflected in the consultation, the Government may inadvertently be setting in train a course of action that could have the unintended consequence of undermining this foundation of the NI constitution.

17. The delicate balance of the NI constitution should not, in our submission, be upset by a sidewind in the form of legislation designed to achieve unrelated purposes in GB. That would be the effect if the divergence resulting from a more relaxed relationship with Strasbourg jurisprudence led to an effective diminution of the rights that were intended to be guaranteed by the NIA, including the powers of the courts to intervene in the event of infringement.

The Particular Importance of the Courts in NI

18. Insofar as it is not obvious, the circumstances in which the courts operate in NI are very different from those in GB.

19. A feature of the divided society is that the legislature splits along sectarian lines and the Executive consists of a mandatory coalition. Fundamental disagreement, rather than a shared platform, is the starting point on the Executive, with the result that the system is commonly dysfunctional and sometimes completely non-functional. An example of the latter is the period of 3 years between January 2017 and January 2020 when there was no Executive and no Assembly. There was a complete vacuum in representative government and the Westminster government elected not to intervene, either to re-introduce direct rule or otherwise provide any ministerial oversight. The devolved administration was run entirely by the civil service without any ministerial direction or control - a system that, in the words of Stephens LJ in *Re JR 80* [2018] NICA 585 at para. 93, was "neither democratic nor appropriately accountable"[6].

[6] *JR80's Application* [2019] NICA 58 at [93]. This case involved an application brought by a survivor of Historic Institutional Abuse who successfully challenged the failure to implement a redress scheme as recommended by the final report of the Historical Institutional Abuse Inquiry delivered in January 2017.

20. In such circumstances, the courts are the only branch of state power that operate in the field of devolved matters. While that would not justify any extension of their jurisdiction into the field of executive policy-making, it certainly militates against any *restriction* of their power to examine the compatibility of laws or executive decision-making with Convention rights, as interpreted by the body invested by the Convention with the responsibility to do so.

Access to Justice

21. The Bar Council of NI does not support the introduction of any measure which may interfere with human rights or limit access to justice. This Consultation document includes an aim to "make sure only serious cases brought" by making it harder to bring a case to court. Examples of relevant proposals are in questions 8, 9 and 10 of the consultation document.

22. The suggestion appears to be based upon a premise that the courts regularly are required to hear cases or that court time is taken up needlessly with claims where claimants bring challenges which are not based upon 'genuine' human rights breaches or if so, have not suffered any or any real prejudice thereby.

23. The Bar Council of NI is not aware of any data or evidence that courts' time and resources are burdened by meritless human rights challenges.

24. The Bar Council of NI does not support the introduction of a new and specific permission stage for human rights-based claims for challenges not brought by way of judicial review or appeals which require permission to proceed ("non-JR claims"); nor would it support the introduction of a new and specific permission stage for human rights-based JR claims ("JR Claims") beyond the existing permission stage.

25. At present, victim status is required already for a HRA claim. This means only individuals who are or would be directly affected by a breach of rights can bring a claim. This is narrower than needed to bring a judicial review and has negative implications for access to justice.

Specific Aspects of the Human Rights Act:

Section 2:

26. The Bar does not see a need for any amendment of Section 2. Section 2(1) (a) of the HRA provides that a court or tribunal determining a question which has arisen in connection with a Convention right must consider any judgment, decision, declaration or advisory opinion of the ECtHR, in so far as, in the opinion of the court, it is relevant to the proceedings. We believe that this provision has been applied appropriately to date by the courts in Northern Ireland. Our judiciary has taken ECtHR jurisprudence into consideration on numerous occasions when ruling on the application of the HRA to cases under consideration. They have always adhered to the established doctrine of following the binding domestic precedent and leaving it to the Supreme Court to decide on the ECtHR's ruling in situations involving a possible conflict with a ECtHR decision.

27. The Supreme Court's approach is clear in this respect too. This is evidenced in *Manchester City Council v Pinnock* [2011] UKSC 6 where Lord Neuberger stated at [48] that national courts may be expected to follow Strasbourg jurisprudence where there is a "*clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of [UK] law*" as long as the "*reasoning does not appear to overlook or misunderstand some argument or point of principle*". There are also examples of domestic cases where the courts have moved beyond Strasbourg jurisprudence in cases involving Article 8. For example, the House of Lords in the NI case of *Re G (A Child) (Adoption: Unmarried couples)* [2008] UKHL 38 held that a ban on unmarried couples and those in same-sex relationships adopting children under The Adoption (Northern Ireland) Order 1987, even where it would be in the best interests of the child for them to be allowed to do so, was incompatible with Article 8 and Article 14 rights.

28. Furthermore, it is also unclear as to how any revisions to section 2 HRA would substantially alter the domestic judiciary's approach to the Convention case law; the ECtHR operating within its current jurisdiction provides an invaluable range of jurisprudence which is now embedded in the UK and has only served to enrich and enliven human rights law. We are very concerned that the review may be designed to produce proposals in relation to section 2 which will aim to reduce the degree to which domestic courts take into account decisions of the ECtHR. Any attempt at removal of section 2 or to potentially permit recourse to a more extensive range of comparative law sources would instead open up the possibility

of increased unpredictability in the UK's human rights law regime which would be highly undesirable.

29. In the specific context of Northern Ireland, we are alarmed by the prospect that changes to section 2 could lead to a divergence between the jurisprudence of the UK courts and that of the ECtHR and a diminution of the powers of the courts to give effect to the Convention rights. As explained above, the prospect of such a scenario would threaten the basis of the constitutional settlement here, insofar as the divergence could dilute the protections guaranteed by the Convention.

Margin Of Appreciation

30. There is no need to change the approach taken to the "margin of appreciation" by domestic courts and tribunals. We do not see any issue in relation to how our courts have applied their discretion in this area in Northern Ireland. One example of the operation of this in the NI context relates to abortion law. *In the matter of an application by the NI Human Rights Commission for Judicial Review* [2018] UKSC 27 involved an application seeking a declaration of incompatibility that, pursuant to Section 4 of the HRA, sections 58 and 59 of the Offences Against the Person Act 1861 were incompatible with Article 3 and Article 8 ECHR. Article 8 is an area in which the UK has a certain "margin of appreciation" as to how it seeks to protect the right to a private and family life. A majority found that the law in Northern Ireland was incompatible with the right to respect for private and family life, guaranteed by Article 8 ECHR, insofar as it prohibits abortion in cases of rape, incest and fatal foetal abnormality[7].

    Parliament subsequently decriminalised abortion in NI in 2019 alongside the introduction of the Abortion (Northern Ireland) Regulations 2020.

31. The Northern Ireland case of *Re Siobhan McLaughlin* [2018] UKSC 48 may also be of interest to the panel in this area as it shows the courts taking a pragmatic approach to the use of their discretion in relation to interpretation of Article 8. The case involved a challenge to the Department for Communities for refusing to pay widowed parent's allowance to a mother solely on the grounds that she had not been married to her partner before his death under section 39A of the Social Security Contributions and Benefits (Northern Ireland) Act 1992. The Supreme Court reversed the Court of Appeal decision and held by a majority of 4 to 1 that

[7] See also *Re Ewart's Application* [2019] NIQB 88 and *Re Ewart's Application (Relief)* [2020] NIQB 33

section 39A was incompatible with Article 14 of the ECHR in conjunction with Article 8.

32. Questions around departing from ECtHR decisions have arisen on occasion in other areas in the UK context. For example, *Secretary of State for the Home Department v AF and others* [2009] UKHL 28 and *A and others v UK* (Application no. 3455/05) which involved control orders under the Prevention of Terrorism Act 2005. This saw the House of Lords compelled to follow the decision in *A v UK*, despite disagreeing with it, for several reasons; the Government had expressly asked the Grand Chamber to deal with the very issues that arose in the *AF* case and it gave an unambiguous ruling on the specific issue just days before the hearing in the House of Lords in *AF*.[8]

33. However, this case dealt with a set of very unique circumstances and the suggestion in some political circles that the ECtHR can dictate legal change in the UK on domestic matters is entirely misguided. The principle of subsidiarity, the "margin of appreciation" afforded by the ECtHR and the fact that decisions of the Strasbourg court require implementation by national authorities in order to be translated into domestic law already operate to moderate the influence of the ECtHR. The development of the requirements under section 2 HRA through judicial interpretation in the UK over the last 20 years and the ECtHR's doctrine of "margin of appreciation" cater sufficiently for any issues arising at the national level.

34. The UK courts can decline to follow the ECtHR, on the rare occasion that the Strasbourg Court has not sufficiently appreciated or accommodated particular aspects of the UK's domestic constitutional position. The decision of the UK Supreme Court in *R v Horncastle and others* [2009] UKSC 14 provides compelling authority for the suggestion that domestic courts will not simply apply relevant Strasbourg case law as a matter of course; critical engagement with the Strasbourg jurisprudence in domestic adjudication can even lead to a reconsideration and refinement of the ECtHR position.[9]

[8] Lord Kerr, *'The conversation between Strasbourg and national courts - dialogue or dictation?'* Irish Jurist 2009, 44, 1-12

[9] See also *Animal Defenders International v United Kingdom* [2013] ECHR 362

Section 3:

35. The Bar does not consider that legislation is being interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights under section 3. We are unaware of any instances where this has occurred in relation to decisions taken by courts in Northern Ireland. Section 3 is central to the operation of the HRA and it does not give the courts the power to interfere in policy making which is what this theme appears to be implying through reference to risks of "*over-judicialising public administration*"; it is already clear that the courts can only interpret legislation in a way which is consistent with the Act being interpreted. Parliament always remains sovereign in this process and the only option open to the courts is the declaration of incompatibility under Section 4. Section 4(6) specifically states that a declaration of incompatibility does not affect the validity, operation or enforcement of the law and the law remains in force until Parliament approves any change, if indeed it decides to do so.

36. Sections 3 and 4 are very closely interlinked and we believe amending or repealing Section 3 would serve no useful purpose. Furthermore, any attempt to remove or amend these sections to prevent domestic courts from examining human rights complaints would not remove the right of individual petition to the ECtHR therefore resulting in the need for time-consuming and costly complaints to Strasbourg as applications to UK courts would become merely the first port of call in a process of protracted litigation involving the UK Government as a necessary party in every case.

Declarations Of Incompatibility

37. The Bar does not believe that there is any need for reform in relation to Declarations of Incompatibility. There is nothing undemocratic in judges deciding whether Convention rights have been respected or declaring legislation to be incompatible given that the actual operation of the legislation is unaffected, and it is for the legislature to change the law; this clearly does not usurp the role of Parliament.

38. It is worth noting that in Northern Ireland a range of remedies are already open to the courts in judicial review cases involving human rights which are discretionary and can be tailored to suit the particular needs of the case. The

Judicature (Northern Ireland) Act 1978 (see also Order 53 of The Rules of the Court of Judicature (NI) 1980) makes provision for a range of flexible, practical and effective remedies which the court can direct, namely an order of mandamus, an order of certiorari, an order of prohibition, a declaration, an injunction and/or damages. The court also has the power to make the following: an award of damages (Order 53, rule 7), an order remitting the decision to the lower deciding authority for reconsideration or reversing or varying the decision (Section 21 of the Judicature (NI) Act 1978), an injunction or declaration concerning public office (Section 24 of the Judicature (NI) Act 1978) and, finally, a declaration under the Human Rights Act 1998.

39. Declarations of incompatibility are very rarely used in the Northern Ireland context; the most recent one we would refer the panel to is the decision by Treacy J in a case involving a widowed parent's entitlement to a social security benefit in the context of Articles 8 and 14. This decision was subsequently overturned by the Court of Appeal before being reinstated by the Supreme Court.[10] In addition, the court considered making a declaration in the context of judicial review proceedings on abortion law in Northern Ireland[11] in 2019 but adjourned the question of relief given the provisions of the Northern Ireland (Executive Formation etc) Act 2019 which required further consideration. No formal relief was subsequently considered necessary by the court given that the legislative change resulted in the matter being "*now firmly within the political arena*". This also clearly demonstrates the way in which the judiciary respects the boundaries between the courts and the roles of the executive and the legislature.

40. The panel should note that the Judicial Review Practice Direction in Northern Ireland[12] contains Appendix VII which specifically details the process which the parties must follow in cases involving the Human Rights Act 1998. Therefore Appendix VII highlights at paragraph 3 that a party who intends to rely on a Convention right or rights shall state that and specify "*in the case of an applicant, in the Order 53 Statement, in any other case, in a notice filed in the Central Office and served on the other parties, (a) details of the Convention right(s) which it is alleged have been (or would be) infringed and details of the alleged infringement;*

[10] *In the matter of an application by Siobhan McLaughlin for Judicial Review* [2018] UKSC 48; the Court of Appeal decision at [2016] NICA 53; the High Court decision from Treacy J at [2016] NIQB 11

[11] *Re Ewart's Application* [2019] NIQB 88 and *Re Ewart's Application (Relief)* [2020] NIQB 33

[12] Judicial Review Practice Direction 03/2018, Appendix VII at https://www.judiciaryni.uk/sites/judiciary/files/decisions/Practice%20Direction%2003-18%20-%20Judicial%20Review.pdf

(b) the relief sought; (c) whether the relief sought includes - (i) a declaration of incompatibility; or (ii) damages in respect of a judicial act to which section 9(3) of the Act applies; d) where the relief sought includes a declaration of incompatibility, details of the legislative provision(s) alleged to be incompatible and the grounds on which it is (or they are) alleged to be incompatible".

41. Furthermore, Appendix VII paragraph 4 goes on to highlight that "*An Order 121(2) Notice will be issued by the Court to the Crown and the parties if the Court is considering making a declaration of incompatibility of primary legislation. The Court will join as a party, if the requisite notice is given, a Minister, a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland Department*". At paragraph 5 "*An Order 121(3A) Notice will be issued by the Court to the Crown and the parties where the Court is considering the compatibility of subordinate legislation with a Convention right. The Court may join the Crown as a party*". These provisions make it clear that the court will take the views of the relevant Government Minister or Department into consideration and provide them with an opportunity to play an active role in any case potentially involving a declaration of incompatibility.

42. Finally, paragraph 6 states "*For the Court to identify any incompatibility issue that may arise and to comply with the notice requirement in the Rules, any party raising such an issue should specify clearly the necessary particulars in the Order 53 Statement, in the case of applicants, or in the notice, in the case of any other party*". The Judicial Review Practice Direction highlights that a properly formulated claim should always make clear the remedy being pursued and that the court will ensure that this remains under careful review as the proceedings advance. We consider that this process operates effectively in cases involving the Human Rights Act 1998 and there is no need for any change to declarations of incompatibility under Section 4.

Derogation Orders

43. Article 15 of the Convention allows the state parties to the Convention the possibility of derogating, in a limited and temporary manner, from their obligation to secure certain Convention rights and freedoms. At a domestic level Section 14 of the HRA allows the Secretary of State to make an Order stating that the UK will derogate from an Article of the ECHR, or any protocol to the ECHR, for the purpose stated in the order in certain emergency situations. Section 16 of the Act further provides that any such domestic derogation can only last a maximum of five years and then is automatically repealed unless extended again by a fresh

order and further requires repeal if the derogation from the ECHR itself has been withdrawn.

44. The panel should consider *A and others v Secretary of State for the Home Department* [2004] UKHL 56 which saw the court issue a declaration of incompatibility in relation to a detention scheme under the Anti-Terrorism, Crime and Security Act 2001 which discriminated unjustifiably against foreign nationals and it quashed the derogation order made under Section 14 HRA. However, this was only possible because the Act expressly allowed for the orders to be challenged; the relevant section of the Act was later repealed in 2005.

45. We also note that future legislation allowing for derogations may not allow for legal challenges. For example, the Overseas Operations (Service Personnel and Veterans) Bill currently progressing at Westminster which appears to require derogation from the ECHR in advance of "*significant*" overseas operations at clause 12 and inserts a new section 14A to that effect into the HRA. However, the Bill currently makes no clear provision for the derogations to be open to challenge in domestic courts or for quashing orders where necessary. It still remains unclear that derogation for overseas operations will succeed and whether, at its most basic, peacekeeping efforts would even meet the threshold as "*a public emergency threatening the life of the nation*" as per article 15 of the Convention.

46. We believe that domestic courts must have the power to quash designated derogation orders which do not meet the criteria set out in Article 15 ECHR. The Bar takes the view that if derogations are to be made in the future, then it is important that adequate opportunity is provided for legal challenge in relation to these which, if successful, could lead to the quashing of the orders.

Subordinate Legislation

47. The Bar does not believe that there is any case for change in this area. We are not aware of any issues arising in Northern Ireland around how our courts have dealt with subordinate legislation which is incompatible with Convention rights; Acts of the NI Assembly are regarded as subordinate legislation for the purposes of the HRA. Section 6 NIA also states that an Act of the NI Assembly is invalid if it is incompatible with any of the Convention rights. Section 24 provides that a Minister or Department in Northern Ireland has no power to make, confirm or approve of any subordinate legislation, or to do any act, so far as the legislation or act is incompatible with any of the Convention rights.

48. There are cases in the NI context which may be of interest to the panel in relation to this issue. For example, in *Northern Ireland Commissioner for Children and Young People's Application for Judicial Review* [2009] NICA 10 Girvan LJ stated at paragraph [17] that "*where subordinate legislation enacted under the Northern Ireland Act infringes Convention rights, the simple consequence is that the courts must disregard the subordinate legislation if to enforce it would infringe a Convention right*". The issue was also revisited recently by the Court of Appeal in *Michael O'Donnell v Department for Communities* [2020] NICA 36. We would also add that that Bar would not be supportive of any change to the HRA to prevent the courts from issuing quashing orders. This would only result in an undesirable distinction between the remedies available to the court depending on whether secondary legislation is found to be unlawful on human rights grounds or on other grounds.

49. The recent Supreme Court case of *RR (Appellant) v Secretary of State for Work and Pensions* [2019] UKSC 52 also saw Lady Hale state at [27]: "*There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear*".

50. Furthermore, the panel should be aware that the Lord Chief Justice of Northern Ireland commissioned a comprehensive review of civil justice in Northern Ireland in 2015 with a report published in 2017. It addressed a range of matters, including a dedicated chapter on judicial review.[13] The recommendations made have now largely been addressed by the Practice Direction 03/2018. However, it is worth noting that no significant issues were raised in the context of this review in relation to the operation of judicial review, including the framework for cases involving either primary legislation or subordinate legislation in the context of compatibility with the HRA and Convention rights.

[13] Review of Civil and Family Justice in Northern Ireland, *Review Group's Report on Civil Justice*, September 2017, page 289 at https://www.judiciaryni.uk/sites/judiciary-ni.gov.uk/files/media-files/Civil%20Justice%20Report%20September%202017.pdf

Conclusion

51. The Bar takes the view that any changes to the HRA could significantly undermine Northern Ireland's unique constitutional settlement. We would not support any amendments to the HRA which would diminish the level of protection afforded to citizens in this part of the UK. Indeed, any move in this direction would not be in step with the debate on human rights in NI more generally where the 'New Decade, New Approach'[14] agreement of 2020, which led to the restoration of devolved Government in NI, resulted in the establishment of an Assembly Committee with cross-community representation to explore a Bill of Rights for Northern Ireland which would seek to build on the HRA.[15]

52. Furthermore, the political narrative at times in the UK in recent years surrounding the case of *Cherry/Miller (No 2)* [2019] UKSC 41, alongside the subsequent IRAL and IHRAR, which all relate to the boundaries between the three branches of state have also served to further misconceptions around the supremacy of the court over the executive and legislature. The Bar considers that this consultation arises out of a political context whereby a series of actions have been undertaken by the Government aimed at curtailing the power of the courts and ultimately diluting human rights protections for citizens in the UK. Unfortunately, we believe that any changes to the "*operation and framework*" of the HRA will only have damaging consequences for Northern Ireland which we have discussed at length throughout our submission.

[14] *New Decade, New Approach*, January 2020 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade__a_new_approach.pdf

[15] View the Bar's evidence to the Ad Hoc Committee on a Bill of Rights, December 2020 at http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/ad-hoc-committee-on-a-bill-of-rights/written-briefings/the-bar-of-northern-ireland/