Rights & Security International's Response to 'Human Rights Act Reform: A Modern Bill of Rights'

Overview

Rights & Security International (RSI) is a London-based NGO and registered charity (number 1048335). RSI has been working for the past 30 years advocating that measures taken in the name of national security should comply with international human rights laws.

The Human Rights Act 1998 (HRA) came into force on 2nd October 2000, providing the legal framework and tools for enhancing accessibility, protection, and fulfilment of the rights enshrined in the European Convention on Human Rights (ECHR).[1] Since then, the HRA has been used as an instrument to safeguard human rights in the UK and has offered increased protection to society's most marginalised groups, including women, members of the LGBTQ+ community, and asylum-seekers.[2]

The proposals outlined in the consultation document, and our responses to the questions, should be seen in light of this broader context. When looking at the current legislative landscape – including other pending legislation – the proposals can only be seen as diminishing, as opposed to augmenting, the nature and degree of human rights protection seen throughout the UK. This will detriment everyone in the UK, but will have particularly stark consequences for already vulnerable or marginalised groups. [3]

Given recent and pending legislative changes, the situation in the UK appears to be becoming one with restricted human rights protection and limited accountability for decision-makers, especially when those decisions are not fully made in compliance with or with regard to international laws. For instance, provisions in the Judicial Review and Courts Bill will seek to exclude public authorities from being ordered to grant remedies to individuals impacted by their decisions, even when a court concludes that the authority has acted unlawfully.[4] Another example is the Nationality and Borders Bill, specifically, Clause 9 of the Bill. In its present iteration, the Clause seeks to authorise the deprivation of an individual's citizenship/nationality without serving appropriate notice to the citizen.[5]

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[1] Human Rights Act 1998; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, entered into force 3 September 1953, 213 UNTS 221 ('European Convention on Human Rights').

[2] For brief explanations, see Amnesty International UK, 'Eight reasons why the Human Rights Act makes the UK a better place' (*Amnesty International*, 18 May 2020); JUSTICE, 'Asylum and human rights' (*JUSTICE*).

[3] And also for individuals impacted by the UK's actions overseas: see RSI's response to question 22 below.

[4] Judicial Review and Courts Bill, clause 1. For further information, see Public Law Project, 'Judicial Review and Courts Bill: PLP Briefing for House of Commons Second Reading' (October 2021).

[5] Nationality and Borders Bill, clause 9. Several UN Special Rapporteurs have raised concerns about this provision: see Mandates of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children and the Working Group on discrimination against women or girls, OL GBR 3/2022, 11 February 2022; Simon Hooper, 'UK citizenship-stripping powers 'discriminate against Muslims' say UN experts' (*Middle East Eye*, 18 February 2022); Rights & Security International, 'RSI writes to UN human rights experts to raise concerns about the UK's citizenship-stripping powers' (*Rights & Security International*, 11 February 2022); Haroon Siddique, 'New bill quietly gives powers to remove British citizenship without notice' (*The Guardian*, 17 November 2021).

Elsewhere, the Bill also seeks to exempt the UK Border Force from legal liability when it breaches domestic or international law.[6]

As indicated throughout this submission, RSI believes that these proposals would undermine claimants' human rights because they would be creating extra barriers to accessing justice, particularly for those that are the most vulnerable members of society.

RSI's submission demonstrates four overarching points of concern with the current proposals:

- The proposals seek to remedy problems that are at best overstated, and at worst lacking supporting evidence;
- The nature and degree of human rights protection will be severely diminished if these proposals are implemented, with exacerbated consequences for already vulnerable or marginalised communities;
- The accountability gap that the proposals create would have negative systemic impacts on decision-making;[7] and
- As a result of these issues, implementing these proposals will likely have implications for UK's international reputation and relations with its current or potential allies.

[6] Nationality and Borders Bill, Schedule 6, paras. 9-10; Rajeev Syal, 'UK Border Force could be given immunity over refugee deaths' (*The Guardian*, 13 October 2021).

[7] The UK has recently been added to CIVICUS's Civil Society Monitor 'Watchlist' for states with threats to civic space and human rights, 'due to a rapid decline in civic freedoms', as a result of these and other legislative developments: see CIVICUS, 'Threats on civic freedoms continue as government attempts to evade accountability' (*CIVICUS*, 4 February 2022).

Question 19: How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?

This section of RSI's response will focus on the impact of altering the degree and nature of human rights protection in Northern Ireland. It is based on RSI's experiences and expertise in the region.

The HRA entered into force on 2nd October 2000, altering the human rights and constitutional landscape across the UK. For instance, judges, lawyers and academics state that the HRA is a constitutional statute, due to its role in augmenting human rights protection generally, but also due to the limits it places on the powers of public authorities.[8] But in Northern Ireland, the Act holds additional importance. It is a cornerstone of, and fundamental to, the Belfast/Good Friday Agreement (B/GFA). As a result, it is also central to the consequential devolution arrangements under the Northern Ireland Act 1998.[9] The constitutional outlook for Northern Ireland has therefore been described as 'intricately woven […], dependent on devolution agreements, peace agreements, and international relationships.'[10]

As indicated throughout this submission, RSI believes that these proposals seek to remedy a problem that does not exist, and that, as a result, no reform is necessary. RSI also believes that the proposals would amount to a retrogression in human rights protection that could be seen as incompatible with the ways that modern democracies should operate. Although RSI agrees that, if new human rights legislation is introduced, it should not undermine the B/GFA,[11] we have significant doubts about whether this will be possible. The effect of the proposed amendments will have the contrary effect, undermining an international peace agreement at a time when the peace settlement is already fragile.[12]

Under the B/GFA, the UK is under an international obligation to 'complete incorporation into Northern Ireland law of the 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.'[13] The UK government has repeatedly reiterated support for the B/GFA in the various institution-building agreements for Northern Ireland, which it has agreed with the Irish government.[14]

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[8] See Colm O'Cinneide, 'Human rights and the UK constitution' (*British Academy Policy Centre*, September 2012).

[9] Under which the Northern Ireland Assembly at Stormont cannot pass legislation which is incompatible with the ECHR: see Northern Ireland Act 1998, section 6(2)(c)-(d). In *Robinson v. Secretary of State for Northern Ireland* [2002] UKHL 32, Lord Bingham Stated that the Act '… does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution' (at para. 11). In *Re Application for Judicial Review by the Northern Ireland Human Rights Commission* [2015] NIQB 96, Horner J stated that 'In Northern Ireland the Good Friday Agreement… was built on foundations, one of which was a guarantee of "rights, safeguards and equality of opportunity"' (at para. 51). Additionally, the Northern Ireland Human Rights Commission has stated '...the Human Rights Act is well crafted and both reflects and is embedded in our constitutional arrangements' (Northern Ireland Human Rights Commission, 'The 2014 Annual Statement: Human Rights in Northern Ireland' (2014), p. 57).

[10] CRG Murray, Aoife O'Donoghue and Ben TC Warwick, 'The Implications of the Good Friday Agreement for UK Human Rights Reform', (2018) 11-12 Irish Yearbook of International Law.

[11] Para. 37 of the consultation document.

[12] Jonathan Freedland, 'Peace in Ireland is precious. Brexit has made us forget that' (*The Guardian*, 4 October 2019): Duncan Morrow, 'Playing with fire: Brexit and the decay of the Good Friday Agreement' (*LSE Blogs*, 1 August 2018).

[13] Belfast/Good Friday Agreement, 'Rights, safeguards and equality of opportunity', para. 2.

[14] For instance, see Agreement between the Government of Ireland and the Government of Great Britain and Northern Ireland on Police Co-operation, Belfast, 29 April 2002, Preamble; Joint Declaration by the British and Irish Governments, April 2003, in entirety, but particularly paras. 5-8; Agreement at St Andrews, October 2006, paras. 3, 12.

On the face of the government's proposals for HRA reform, the cumulative effect of these provisions are to restrict access to courts and access to an effective remedy for people whose ECHR rights have been violated.[15] For example, the introduction of a 'permission stage' and the requirement that a claimant suffer 'significant disadvantage' will unreasonably prevent many individuals who have suffered a human rights violation from accessing a court.[16] This term is vague and open to divergent interpretation, meaning that the determination of whether there has been a 'significant disadvantage' will itself cost the claimant time and money.

Further, the proposals to limit remedies based on the fulfilment of 'responsibilities' and in the context of the public authority's actions means that individuals may go without a remedy even when their ECHR rights have been violated.[17] Limiting direct court access and access to a remedy runs counter to the plain wording of the B/GFA.[18]

The government should also look beyond the explicit wording of the peace settlement, and additionally consider the permeating effect the HRA has had on the B/GFA. In viewing the reform proposals in this light, the government should understand that it is not possible to implement these suggestions in a manner compliant with the B/GFA, without possible negative implications for the peace process.[19]

As a clear illustration of the importance of the ECHR to the people of Northern Ireland during the peace process, Horner J stated in *Re Application for Judicial Review by the Northern Ireland Human Rights Commission* that:

> *'…there can be no dispute that one of the assurances given to the people of Northern Ireland was that their human rights as enshrined in the Convention would be protected under this new constitutional settlement.*[20]

Rather than being an 'add on' to the peace agreement, ECHR incorporation and human rights protection are instead central to the agreement.[21] This is why Monica McWilliams, former leader of the Northern Ireland Women's Coalition and a major figure in the B/GFA's negotiation, has described the HRA as the 'building block' of the B/GFA.[22] This opinion is shared not only within Northern Ireland's political landscape, but also in Great Britain[23] and Ireland; the human rights provided for in the ECHR were deemed so important to the ongoing

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[15] Patrick Corrigan, 'Human Rights Act 'overhaul' could undermine Good Friday Agreement' (*Amnesty International: Belfast and Beyond*, 15 December 2021).
[16] At paras. 219-223 of the consultation document.
[17] At paras. 302-308 and 299-301 of the consultation document respectively.
[18] As has also occurred through the Overseas Operations (Service Personnel and Veterans) Act 2021, which limits civil and criminal claims arising out of the UK's overseas military operations: see Rights & Security International, 'RSI briefs the House of Lords Committee on the impact of the Overseas Operations Bill on the Good Friday Agreement' (*Rights & Security International*, 9 March 2021); House of Lords, 'Overseas Operations (Service Personnel and Veterans) Bill', vol 811, 13 April 2021, col 1181 (Baroness Ritchie of Downpatrick).
[19] See also Committee on the Administration of Justice, 'CAJ Response to the Independent Human Rights Act Review (IHRAR)' (March 2021), pp. 1, 7-9, 20.
[20] *Re Application for Judicial Review by the Northern Ireland Human Rights Commission* [2015] NIQB 96, para. 54.
[21] Aoife O'Donoghue and Ben Warwick, 'Human Rights Reform and Northern Ireland', Law School Research Briefing no. 24 (*Durham Law School*, 2015).
[22] Amnesty International UK, 'The Human Rights Act and peace in Northern Ireland' (*YouTube*, 15 November 2016), at 0:50.
[23] For instance, see the entire debate at House of Commons, 'Good Friday Agreement', vol. 332, 26 May 1999. See also House of Lords, 'Northern Ireland Bill', vol. 593, 5 October 1998, cols. 220-223 (Lord Cope of Berkeley).

operation of the B/GFA, that the Irish government agreed to incorporate the ECHR to ensure equivalency of rights protection.[24]

These agreements have been instrumental in transitioning Northern Ireland out of the conflict, in part due to their ability to gain public trust in public institutions. This has primarily occurred due to respect for the HRA and the ECHR. Coupled with proposed reforms to halt access to criminal and civil justice arising out of the conflict,[25] plans to reform the HRA by altering such a fundamental freedom as access to justice will likely undermine public trust in such vital institutions.

Nowhere has this been more crucial than in implementing post-Patten policing reforms.[26] Corrigan explains that 'binding human rights obligations have been crucial in building and bolstering public confidence' in the Police Service of Northern Ireland (PSNI) and the political structures in the region.[27] Indeed the PSNI's code of ethics is prefaced on compliance with obligations under the HRA.[28] Additionally, the Policing Board was created with the purpose of monitoring the PSNI's compliance with the HRA.[29] Instilling confidence in the institution was thereby premised on its compliance with such international standards.

As well as the implications of the government's proposals for the B/GFA and the ongoing peace process in Northern Ireland, RSI also has other practical concerns. RSI's experience in the region, working with grassroots organisations, shows that many people struggle to understand the substance of their human rights, as well as how they may seek to enforce their rights if they have been violated. Although RSI agrees with other recommendations that human rights education needs to be significantly improved throughout the UK, Northern Ireland is unique in its complexity and therefore these nuances ought to be considered when considering HRA reforms.

RSI disagrees with the government's suggestion that changes to the level of human rights protection can be done in a manner compliant with the B/GFA. Even if this were possible, the added complexity would render rights practically unenforceable for the majority of those most vulnerable to the effects of non-compliance with human rights laws.

In this submission, RSI does not seek to recite the debate about a Northern Ireland Bill of Rights. RSI does, however, wish to note that such debates lead to the general consensus in Northern Ireland that greater human

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[24] This was completed by the adoption of the European Convention on Human Rights Act 2003. See Committee on the Administration of Justice, 'CAJ Response to the Independent Human Rights Act Review (IHRAR)' (March 2021), p. 7.

[25] Northern Ireland Office, 'Addressing the Legacy of Northern Ireland's Past', CP 498 (July 2021); Rights & Security International, 'Northern Ireland Legacy: How to Uphold International Human Rights Law' (*Rights & Security International*, 18 August 2021).

[26] Independent Commission on Policing for Northern Ireland, 'A New Beginning: Policing in Northern Ireland' (September 1999), pp. 13-21. See further Maggie Beirne and Martin O'Brien, 'The Perception of Policing Change from the Perspective of Human Rights Non-Governmental Organisations (NGOs)', in John Doyle (ed.), *Policing the Narrow Ground: Lessons from the Transformation of Policing in Northern Ireland* (Dublin: Royal Irish Academy, 2010), pp. 155-157.

[27] Patrick Corrigan, 'Human Rights Act 'overhaul' could undermine Good Friday Agreement' (*Amnesty International: Belfast and Beyond*, 15 December 2021).

[28] For instance, the foreword to the code states: '[t]he Policing Board is required to issue a Code of Ethics setting out standards of conduct and practice for police officers so they are aware of the rights and obligations arising under the Human Rights Act 1998.' (Northern Ireland Policing Board and Police Service of Northern Ireland, 'Police Service of Northern Ireland Code of Ethics' (2nd edn, 2008), p.2). The code references ECHR and HRA compliance throughout: see preamble para. F, pp. 8, 16, 21-22.

[29] Police (Northern Ireland) Act 2000, s3(3)(b).

rights protection would be essential under any such legislation, not less.[30] By contrast, the government, rather than seeking to augment or complement existing human rights, seeks to remove several layers of protection.[31] This will likely contribute to a widening of the division among the public in Northern Ireland.

One final point to note is the international consequences of altering human rights protection in Northern Ireland. For various reasons, the peace process in the region is subject to international scrutiny, including from some of the UK's major allies. Implementing legislation which in effect undermines the B/GFA, or otherwise limits the degree of human rights protection in Northern Ireland, is likely to have international ramifications for the UK.[32]

RSI therefore submits that the proposals outlined in the government's consultations could have serious consequences for the B/GFA and in the level of trust for public institutions generally.

[30] Colin Harvey, 'Polling shows public wants better rights protections following Covid-19 pandemic' (*Queen's Policy Engagement*, 23 June 2021).

[31] For instance by limiting the ability to protect human rights based on a failure to comply with an individual's 'responsibilities', as noted above.

[32] BBC News, 'Brexit: Biden in new warning to UK over Northern Ireland' (*BBC News*, 22 September 2021); Irish Echo, 'Ad Hoc group forms to protect GFA' (*Irish Echo*, 19 February 2019); John Manley, 'Former Obama aide Michael Posner warns that Troubles' amnesty could damage British-US relations' (*The Irish News*, 13 August 2021); Irish Echo, 'Ad Hoc Committee Weighs In On Protocol' (*Irish Echo*, 12 November 2021).

Question 22: Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.

This submission mirrors RSI's previous submissions to the Independent Human Rights Act Review (IHRAR)[33] and the Joint Committee on Human Rights' Call for Evidence on IHRAR.[34]

RSI believes that there is no case for divergence from Strasbourg on the extent of the extraterritorial applicability of the ECHR under the HRA. By contrast, the extraterritorial application of the HRA, in its current form, has two benefits which tend against change. Firstly, it has proved an essential tool in remedying systemic flaws in decision-making. Secondly, it empowers victims of human rights violations to seek redress, regardless of where such violations have occurred, and regardless of who committed or permitted those violations to occur.

The extraterritorial application of the HRA does not place an undue burden on public authorities or the military

Although the ECHR (and thus HRA) applies extraterritorially in certain defined circumstances, the European Court of Human Rights (ECtHR) has found that a mere finding of extraterritorial application does not automatically require the State in question to fulfil every one of the Convention rights *vis-a-vis* the affected individual. Instead, under the Court's prevailing case-law, the application of the Convention can be 'divided and tailored'.[35] This means that under the current approach, only the degree of protection mandated by the situation is required and the State is therefore not always required to afford protection equivalent to the entirety of the HRA. This is a fact-sensitive assessment and requires an analysis of the individual's circumstances as well as the means and powers of control, therefore limiting the degree of human rights protection required of the UK under the Court's interpretation of the ECHR.

More broadly, the extraterritorial application of the HRA does not in any case create an unjust burden on public authorities. Rather than providing an additional hurdle or factor to consider in decision-making which may hinder efficiency, the HRA merely requires that the decision-maker consider the human rights implications of their decisions by ensuring that their actions comply with the requirements of the HRA. This is not an onerous obligation. Moreover, the requirement applies in a similar manner to conduct within the UK's territory, so the obligation is consistent and predictable.

In response to the question on the interaction between human rights law and international humanitarian law (IHL), it is important to note that in the vast majority of situations, the UK's obligations under the ECHR (and thus HRA) and under IHL will be entirely compatible. This is because both sets of laws mostly provide the same limitations on military conduct. For example, the prohibition of torture is a *jus cogens* norm,[36] meaning that it is always binding — without exception.[37]

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[33] Rights and Security International, 'Rights and Security International's Submission to the Independent Human Rights Act Review' (3 March 2021).
[34] Rights and Security International, 'Rights and Security International's Submission to the Joint Committee on Human Rights' Call for Evidence on the Independent Review of the Human Rights Act' (22 March 2021).
[35] App. No. 55721/07, *Al-Skeini and Others v. the United Kingdom*, Judgment, 7 July 2011, para. 137; App. No. 27765/09, *Hirsi Jamaa and Others v. Italy*, Judgment, 23 February 2012, para. 74.
[36] *Prosecutor v. Anto Furundžija*, Trial Chamber, Judgement, IT-95-17/1-T, 10 December 1998, paras. 144, 153-157.
[37] Article 2(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984, entered into force 26 June 1987, 1465 UNTS 85) states that: '[n]o exceptional circumstances

Where there is apparent incompatibility between the ECHR and IHL, the ECtHR has acted flexibly to ensure that all treaty provisions (and customary international law) can be upheld. In its case law, the ECtHR's and the UK Supreme Court's approaches have amply accommodated the rules of IHL as a form of *lex specialis*.[38] Thus, calls for the extraterritorial application of the HRA to be limited on the basis that it undermines the ability of the UK's armed forces to conduct effective military operations, in our considered legal opinion, are misconceived.

Critics of the extraterritorial application of the HRA in armed conflict situations have also alleged that the extraterritorial application of the HRA has led to a proliferation of claims by enemy combatants for non-compliance with the laws of war. This, in RSI's view, is a misrepresentation and/or misinterpretation of the laws. For instance, in the context of armed activities outside the UK's borders, the HRA is typically used by injured civilians and UK military personnel seeking to access justice for rights violations that have occurred as a result of potentially systemic flaws in decision-making.[39] Thus, access to UK courts is essential to realise and vindicate the rights of both service personnel and civilian victims of human rights abuses.[40] As a result, the extraterritorial application of the HRA serves an important role in facilitating justice for acts that have taken place abroad and may have gone unremedied.

The extraterritorial application of the HRA improves decision-making

The extraterritorial application of the HRA also plays a crucial role in remedying systemic flaws in decision-making and – particularly significant in the case of military action – avoiding a 'culture of impunity'. In enabling military policy and practice to be scrutinised by an independent body of judges, often in public, the HRA helps ensure that flaws in decision-making processes are transparently identified and remedied before leading to further rights-violating situations.

The prime example of the necessity of this independent oversight is the Baha Mousa Inquiry. The inquiry found that the use of hooding, beating, casual assaults, stress positions and conditioning techniques were extensive,[41] despite concerns raised at the time by senior British officers and observers from the International Committee of the Red Cross (ICRC), particularly in relation to the hooding practice.[42] Moreover, the inquiry concluded amongst others, that there were systemic issues relating to a lack of discipline, the inadequacy of detention procedures and a failure to adequately assess and respond to detainees' welfare needs,[43] alongside a lack of clear guidance for

whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.'

[38] App. No. 29750/09, *Hassan v. UK*, Judgment, 16 September 2014; *Serdar Mohammed v. Ministry of Defence* [2017] UKSC 1.

[39] For example, the *Smith & Ors v. Ministry of Defence* [2013] UKSC 41, referred to consistently as an aspect of the 'lawfare' or 'fog of law' critique, in fact concerned the ability of British troops to claim against the Ministry of Defence in relation to pre-battlefield decision-making flaws, rather than 'enemy combatants'.

[40] Martha Spurrier, 'The Human Rights Act protects our soldiers – as well as those they protect' (*The Guardian*, 21 September 2016).

[41] For example, in relation to 1st Battalion The Queen's Lancashire Regiment; see The Rt Hon Sir William Gage, *The Report of the Baha Mousa Inquiry*, HC 1452 (2011) ('Baha Mousa Inquiry'), pp. 1314-1318.

[42] Baha Mousa Inquiry, pp. 1340-1342.

[43] Baha Mousa Inquiry, pp. 1315-1318.

soldiers on the ground.[44] The need for systemic change was subsequently recognised by senior military figures,[45] and ultimately implemented, with long-lasting positive effects on military practice.[46]

It is unlikely that this inquiry would have taken place without the extraterritorial application of the HRA.[47] It was only after Baha Mousa's family successfully appealed to the House of Lords,[48] relying on the ECHR obligation to carry out an adequate and effective investigation into deaths of those within the UK's jurisdiction, that the inquiry was launched into the circumstances of his death.[49] Without the extraterritorial application of the HRA, there would have been no Baha Mousa Inquiry and, as a result, likely no changes in decision-making, policy or training.

The extraterritorial application of the HRA allows redress for human rights violations, regardless of where they occurred

The extraterritorial application of the HRA in the limited circumstances detailed above is logical and desirable given that, in instances where a public authority has control over a territory or individual, it will be in a position to influence the respect for human rights. The extraterritorial application of the HRA avoids the absurd outcome of officials being granted licence to act in a manner that violates Convention rights overseas, when they would have been prohibited from acting in the same way within UK territory.[50] This ensures that victims of human rights abuses committed overseas are not left unable to obtain justice simply by virtue of their location and regardless of the merit to their allegations.

For all the above reasons, RSI does not believe that there is a clear and demonstrated need for the UK government to diverge from Strasbourg jurisprudence.

[44] For example, in relation to the hooding policy, see Baha Mousa Inquiry, p. 1342.
[45] For example, see BBC News, 'Army pledges change after Baha Mousa inquiry' *(BBC News*, 8 September 2011).
[46] Elizabeth Stubbins Bates, 'The British Army's Training in International Humanitarian Law' (2020) 25(2) Journal of Conflict and Security Law 291.
[47] Huw Bennett, 'The Baha Mousa Tragedy: British Army Detention and Interrogation from Iraq to Afghanistan' (2014) 16(2) British Journal of Politics & International Relations 211.
[48] *Al-Skeini & Ors v Secretary of State for Defense* [2007] UKHL 26.
[49] Under Article 2 of the ECHR.
[50] In relation to the ECHR, see App. No. 31821/96, *Issa and Others v. Turkey*, Judgment, 16 November 2004, para. 71. This viewpoint is consistent among the various international human rights bodies; see also the discussion in *López Burgos v Uruguay*, Comm. No. 52/1979 (29 July 1981), CCPR/C/13/D/52/1979.

Question 27: We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons.

Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or

Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

This section of RSI's response will highlight the potential negative effects of using a claimant's past conduct to measure remedies awarded in human rights claims. Calculating and negotiating human rights through a lens of perceived conduct could have harmful effects on the individual's livelihood. Furthermore, the practice would inevitably lower the minimum standard of human rights protections initially set out in the ECHR, because it will impose requirements on claimants to have achieved a preferred standard of conduct before bringing forth any claims.[51]

As indicated throughout this submission, RSI believes that these proposals would undermine claimants' human rights because they would create extra and needless barriers to accessing justice, particularly for those that are most vulnerable and marginalised in society. By assuming claimants' responsibilities, or emphasising their previous conduct, the proposals would seek to draw a distinction between claimants that are more deserving of rights against those considered not so deserving, consequently creating a hierarchy of rights.[52]

RSI believes that all claimants are entitled to the human rights contained in international agreements and in UK law, and that those rights should not be subjected to tests of eligibility that are based on a standard of preferred conduct.[53] Using eligibility tests to assess claimants' rights could render blanket discrimination policies that would enable authorities to directly discriminate against groups that do not adhere to the preferred standards of conduct.

RSI also believes that, if implemented, these proposals would contradict several of the rights enshrined in the ECHR and elsewhere in international law.

Under Article 13 of the ECHR, an individual has the right to an effective remedy when one of their Convention rights has been violated.[54] Although national authorities are given some discretion in the remedies that can be offered for a breach of any of the provisions of the ECHR,[55] the remedy itself must be 'sufficient and accessible'.[56] RSI doubts that the mere finding of a violation of an ECHR right – which would be the result should a defendant's

[51] For instance, see Sara Margery Fry, 'Protecting the human rights of prisoners' (2018) 4 UNESCO Courier, and the citations below.
[52] Rewire News Group, 'Deserving vs. Undeserving? Everyone "Deserves" Human Rights' (*Rewire News Group*, 10 April 2012).
[53] Francesca Klug, 'Who deserves human rights?' (*The Guardian*, 25 March 2010); James Welch, 'Why do human rights apply to convicted criminals?' (*The Guardian*, 14 September 2009).
[54] See further, Council of Europe, 'Guide on Article 13 of the European Convention on Human Rights: Right to an effective remedy' (31 December 2021).
[55] App. No. 22729/93, *Kaya v. Turkey*, Judgment, 19 February 1998, para. 106.
[56] App. No. 58698/00, *Paulino Tomás v. Portugal*, Decision, 27 March 2003; App. No. 44093/98, *Çelik and İmret v. Turkey*, Judgment, 26 October 2004, para. 59.

remedy be excluded or significantly reduced as a result of their conduct – will satisfy this threshold in the majority of cases, as has been consistently held by the Strasbourg court.[57]

In granting redress within the domestic courts, the national authorities are ensuring that individuals that have been subject to human rights violations can obtain remedies in their domestic courts, without having to seek the intervention of an international court.[58] The proposals outlined in the consultation document plainly seek to exclude this right from certain categories of persons, and risk claimants seeking to escalate the enforcement of their rights in Strasbourg instead.

As well as the distinct right to a remedy, the proposals outlined in the consultation may violate other rights under the ECHR, as the Convention requires that each of the substantive rights are implemented in a way that is 'practical and effective', as opposed to 'theoretical and illusory'.[59] It is within this context that the ECHR places particular importance on the right to an effective remedy; without which human rights protection will be seen as ineffective and nugatory in most cases.[60] In the context of absolute rights, such as the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the situation is even clearer. The ability to exercise these rights, including the right to a remedy, exist regardless of the defendant's conduct or any exceptional circumstances.[61] Limiting the availability of remedies for breaches of the ECHR based on personal conduct would therefore likely fail to satisfy many of the UK's obligations under the ECHR.

This briefing also notes a fundamental issue with the example the consultation document relies upon, that of current prisoners or people otherwise convicted of a criminal offence.[62] In such a context, the effect of the proposals could amount to punishing an individual twice for the same conduct: in the first instance, by receiving a criminal conviction and associated punishment, and then secondly, by forfeiting their right to redress after suffering from a violation of their fundamental human rights. RSI's submission is that this situation could run afoul of the principle of double jeopardy.

Under the ECHR, the prohibition on an individual being tried twice for the same offence generally only applies to two sets of criminal proceedings.[63] However, it nonetheless could be implicated by the government's proposals in circumstances which the claimant in the human rights proceedings suffers severe losses as a result of their differential treatment in other types of proceeding, in this instance by forfeiting their right to a remedy for human rights violations.[64] The ECHR is more likely to render such an approach unlawful in instances in which the

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[57] App. No. 44647/98, *Peck v. the United Kingdom*, Judgment, 28 January 2003, para. 102; App. No. 75529/01, *Sürmeli v. Germany*, Judgment, 8 June 2006, para. 113; App. No. 37411/02, *Abramiuc v. Romania*, Judgment, 24 February 2009, para. 128.

[58] App. No. 30210/96, *Kudła v. Poland*, Judgment, 26 October 2000, paras. 152-155.

[59] Further, see Sébastien Van Drooghenbroeck and Cecilia Rizcallah, 'The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?' (2019) 20 German Law Journal 904.

[60] For instance, see App. No. 36813/97, *Scordino v. Italy (No. 1)*, Judgment, 29 March 2006, para. 192.

[61] See Rights & Security International, 'Abandoned to Torture: Dehumanising rights violations against children and women in northeast Syria' (2021), para. 34, and the citations therein.

[62] At paras. 126-130 of the consultation document.

[63] Article 4 of Protocol 7 to the European Convention on Human Rights explains that nobody should be tried or punished twice for the same offence. See further, Council of Europe, 'Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights: Right not to be tried or punished twice' (31 December 2021); App. Nos. 21430/11 and 29758/11, *A and B v. Norway*, Judgment, 15 November 2016, paras. 105-107; App. Nos. 52273/16 and 4 others, *Ghoumid and others v. France*, Judgment, 25 June 2020, para. 68.

[64] Contrast App. No. 18640/10, *Grande Stevens v. Italy*, Judgment, 4 March 2014, paras. 94-101, 204-211, 222 and App. No. 37697, *Prina v. Romania*, Decision, 8 September 2020, with App. No. 54012/10, *Mihalache v. Romania*, Judgment, 8 July 2019, paras. 56-62.

measures are directed at a particular group and are viewed as punishment or intended to deter reoffending.[65] The proposals in the consultation document are aimed explicitly at excluding remedies on the basis of criminal conviction, so the approach outlined in the consultation paper could also be deemed unlawful on this ground.

Additionally, if the individual concerned is deemed a 'rehabilitated' ex-offender, then limiting the availability of a remedy on the basis of prior criminal conduct may in individual cases fall foul of the Rehabilitation of Offenders Act 1974. This Act requires that rehabilitated ex-offenders should be treated 'for all purposes in law' as if they have not been punished for the commission of a prior criminal offence.[66] RSI believes that using these judgments and convictions against the claimant can equate to, and in many cases will amount to an unlawful secondary form of punishment.

RSI therefore submits that the proposals outlined in the government's consultations should not be adopted, rather, human rights protections should exist simpliciter, without being hinged on any pre-requisites.

[65] App. No. 13079/03, *Ruotsalainen v. Finland*, Judgment, 16 June 2009, paras. 41-47.
[66] Rehabilitation of Offenders Act 1974, s4; s1 outlines the circumstances in which an individual is deemed to be 'rehabilitated'.

Question 29: We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular:

a. What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate;

b. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate; and

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

Throughout this submission, RSI has noted three major costs that would result from implementing the proposals outlined in the consultation document:

- That the nature and degree of human rights protection will be severely diminished if these proposals are implemented, with exacerbated consequences for already vulnerable or marginalised communities;
- That the accountability gap that the proposals create would have negative systemic impacts on decision-making;[67] and
- As a result of these issues, implementing these proposals will likely have implications for UK's international reputation and relations with its current or potential allies.

RSI has sought to supply evidence throughout this submission of the negative impacts that the consultation's proposals would create, including in relation to the impact on specified groups of people. However, RSI requests that the government provide clear and cogent evidence to support the claims made in the consultation document regarding the necessity of wholesale changes to the HRA. This is particularly pertinent in light of the conclusions reached by the Independent Human Rights Act Review, and the Joint Committee on Human Rights' shadow report – which concluded only last year – which found that there were no grounds for making extensive changes to the UK's system of human rights protection.[68]

In response to the question asking about equalities impacts, RSI believes that other specialised groups are best placed to provide first-hand evidence on the impacts that specific groups will face. However, there are three general points that this submission wishes to raise in the context of equality impacts, that have been alluded to severally elsewhere in this submission.

Firstly, it is important to note that, although providing human rights protection for all people, the HRA is often used to safeguard the rights of already vulnerable and marginalised groups, including women, members of the

[67] The UK has recently been added to CIVICUS's Civil Society Monitor 'Watchlist' for states with threats to civic space and human rights, 'due to a rapid decline in civic freedoms', as a result of these and other legislative developments: see CIVICUS, 'Threats on civic freedoms continue as government attempts to evade accountability' (*CIVICUS*, 4 February 2022).

[68] The Panel Chair of the Independent Review of the Human Rights Act recently gave evidence to the Justice Committee on this point. This evidence is available at Justice Committee, 'Formal meeting (oral evidence session): Human Rights Act Reform' (*UK Parliament*, 1 February 2022). See a summary at Mondipa Fouzder, 'Human Rights Act consultation 'not a response to my report' – Gross' (*The Law Society Gazette*, 1 February 2022). See further, Independent Human Rights Act Review, 'The Independent Human Rights Act Review 2021' (December 2021), pp. vi-vii; House of Commons and House of Lords Joint Committee on Human Rights, 'The Government's Independent Review of the Human Rights Act', Third Report of Session 2021-22, HC 89, HL Paper 31, 8 July 2021, pp. 5-6.

LGBTQ+ community, and asylum-seekers.[69] The consequences of limiting the protection afforded by the HRA, in ways that this submission has sought to highlight, will likely have exacerbated consequences for such groups.[70]

For instance, and as noted in response to question 27 above, RSI believes that the limiting or withdrawal of remedies on the basis of 'responsibilities,' or otherwise on personal conduct, could have severe equality implications, depending on how widely this is interpreted in practice.[71] This could lead to a gradual deterioration of rights protection. Firstly, for individuals and groups labelled as 'undesirable', and secondly, for people who may share different values from those held by people and public officials in positions of power.

Finally, RSI believes that this consultation itself is not immune from equalities impacts. As a result of the delayed publication of 'easy read' versions of the consultation document, those using that document have been left with only twelve days to consider, draft and submit their consultation response. As RSI and over 140 other leading civil society groups have noted, this time period is woefully insufficient.[72]

For these reasons, and those outlined throughout this submission, RSI believes that the costs of reforming the HRA in line with the consultation document's proposals clearly outweigh the purported benefits.

[69] See Amnesty International UK, 'Eight reasons why the Human Rights Act makes the UK a better place' (*Amnesty International*, 18 May 2020); Human Rights Watch, 'Why The UK Needs Human Rights' (*Human Rights Watch*, 13 September 2017; Liberty, 'The Human Rights Act' (*Liberty*).

[70] JUSTICE, 'Asylum and human rights' (*JUSTICE*); Disability Rights UK, 'The Human Rights Act 1998 (HRA) Disability Rights UK Factsheet F1' (*Disability Rights UK*, 8 February 2018); Sharon Natt, '23 reasons why we need the Human Rights Act' (*Amnesty International*, 9 November 2021); Frances Webber, 'From Human Rights to the Bill of Rights: protection for whom?' (*Institute of Race Relations*, 20 January 2022).

[71] For further information, see Frances Webber, 'From Human Rights to the Bill of Rights: protection for whom?' (*Institute of Race Relations*, 20 January 2022); Francesca Klug, 'Who deserves human rights?' (*The Guardian*, 25 March 2010); James Welch, 'Why do human rights apply to convicted criminals?' (*The Guardian*, 14 September 2009); Rewire News Group, 'Deserving vs. Undeserving? Everyone "Deserves" Human Rights' (*Rewire News Group*, 10 April 2012).

[72] Liberty, 'Disabled people excluded from human rights review, MPs and campaigners warn' (*Liberty*, 1 March 2022).