

Economic, Social and Cultural Rights Bill

Consultation Draft

Responses can be made by emailing escr.bill@gmail.com by 14 July 2019

**More information is available at
<https://research.ncl.ac.uk/article22/consultation/>**

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Economic, Social and Cultural Rights Bill

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**A
BILL
TO**

give further effect to economic, social and cultural rights as human rights [in the United Kingdom¹]; and for connected purposes.

WHEREAS:²

- (1) Recognition of the inherent dignity and of the equal and inalienable rights of all human beings is the foundation of freedom, justice and peace³
- (2) The people of the United Kingdom have a long history of achieving that recognition through struggle and rebellion against tyranny and oppression⁴
- (3) The responses of Parliament over centuries have been both to suppress those struggles and rebellions and to address their causes, including by the acquisition of greater powers and authority⁵ and the enactment of legislation to further social justice and protect human rights⁶
- (4) Such legislation has included Magna Carta Libertatum 1215, Carta de Foresta 1217, Bill of Rights 1689, Roman Catholic Relief Act 1791, Slave Trade Act 1807, Representation of the People Act 1832, Representation of the People (Scotland) Act 1832, Slavery Abolition Act 1833, Married Women's Property

¹ This draft assumes that an Economic, Social and Cultural Rights Act would apply to the UK, as does the Human Rights Act 1998. However, this is only an assumption for the purpose of drafting, and territorial application will depend on many factors, including devolution legislation, and the human rights policies and initiatives of the devolved administrations (such as [the recent recommendations](#) of the Scottish First Minister's Advisory Group on Human Rights Leadership).

² The inclusion of preambles to public Acts of Parliament appears to be a practice that has been discontinued, though they are still included in private Acts (such as the [University of London Act 2018](#)) and orders (such as [The Land Registry Trading Fund \(Extension and Amendment\) Order 2018](#)). A preamble has been included in this draft in order to help explain the context for the Bill for the purposes of consultation.

³ This is based on the opening preambular paragraph of the [Universal Declaration of Human Rights](#): "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

⁴ This is based on the third preambular paragraph of the Universal Declaration of Human Rights: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law", and on UK history (see footnote 6)..

⁵ The UK Parliament has outlined [the development of parliamentary authority](#).

⁶ See '[Struggles for Human Rights in Britain: A Reading List](#)', prepared by Dr Rachel Hammersley, Senior Lecturer in Intellectual History, Newcastle University.

Acts 1870 and 1882, Trade Union Act 1871, Public Health Act 1875, Trade Disputes Act 1906, Old-Age Pensions Act 1908, National Insurance Act 1911, Representation of the People Act 1918, Housing and Town Planning Act 1919, Representation of the People (Equal Franchise) Act 1928, Education Act 1944, National Health Service Act 1946, National Health Service (Scotland) Act 1947, Criminal Justice Act 1948, National Assistance Act 1948, Housing Act 1949, Legal Aid and Advice Act 1949, Murder (Abolition of Death Penalty) Act 1965, Race Relations Acts 1965, 1968 and 1976, Equal Pay Act 1970, Sex Discrimination Acts 1975 and 1986, Employment Protection (Consolidation) Act 1978, Disability Discrimination Acts 1995 and 2005, Human Rights Act 1998, Civil Partnership Act 2004, Equality Acts 2010 and 2016, and the Modern Slavery Act 2015⁷

- (5) Development of the law of the United Kingdom has also included a recognition of certain fundamental values, such as the rule of law, liberty, democracy, fairness, solidarity and civic duty⁸
- (6) The United Kingdom voted in favour of adopting the Universal Declaration of Human Rights in the United Nations General Assembly in 1948,⁹ which promotes these values, and has subsequently ratified many other international human rights instruments as set out below in section 1 of the Act
- (7) Parliament has protected some of these human rights by the rule of law, particularly in the Human Rights Act 1998
- (8) All human rights are universal, indivisible, interdependent and interrelated
- (9) Parliament now wishes to give further effect to economic, social and cultural rights as human rights

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

⁷ This paragraph lists some of the main legal instruments and Acts of the Westminster Parliament which have been enacted to further social justice and protect human rights over the centuries, and particularly over the last two centuries.

⁸ These consist of the values referred to in the preamble of the outline 'UK Bill of Rights and Freedoms' set out in [the report](#) of the House of Lords & House of Commons Joint Committee on Human Rights (JHRC) entitled 'A Bill of Rights for the UK?' (Twenty-ninth Report of Session 2007–08. 21 July 2008. Report, together with formal minutes, page 105) (2008 Outline Bill), with the addition of 'solidarity'.

⁹ UNGA 183rd plenary meeting. 10 December 1948. [A/777](#), page 933.

Introduction

1 The Purpose of the Act

- (1) The purpose of this Act is to give further effect to and render justiciable economic, social and cultural rights as human rights [in the United Kingdom]—
- (a) consistent with the United Kingdom’s international obligations;
 - (b) in a manner which, as closely as possible, renders the rights no less enforceable than the human rights included in the Human Rights Act 1998.
- (2) The United Kingdom’s international obligations include, in particular, those in the International Covenant on Economic, Social and Cultural Rights,¹⁰ in the European Social Charter¹¹ and in the treaties referred to in subsection (3).
- (3) The treaties referred to in subsection (2) are the—
- (a) International Covenant on Civil and Political Rights;
 - (b) Convention on the Elimination of All Forms of Racial Discrimination;
 - (c) Convention on the Elimination of All Forms of Discrimination Against Women;
 - (d) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
 - (e) Convention on the Rights of the Child;
 - (f) Convention on the Rights of Persons with Disabilities;¹²
 - (g) Convention Relating to the Status of Refugees;¹³ and
 - (h) European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁴
- (4) Subsection 1(b) is without prejudice to any provision of this Act which imposes duties or confers powers that are not included in the Human Rights Act 1998.

¹⁰ The International Covenant on Economic, Social and Cultural Rights ([ICESCR](#)) was adopted by the UN General Assembly on 16 December 1966. It was [signed and ratified](#) by the United Kingdom on 16 September 1968 and 20 May 1976, respectively. There are 169 State Parties.

¹¹ The [European Social Charter](#) is a Council of Europe treaty opened for signature in 1961. It was [signed and ratified](#) by the United Kingdom on 18 October 1961 and 11 July 1962, respectively. There are 27 State Parties (of which 14 are also party to the Revised Social Charter of 1996, which includes additional rights, and which the UK has signed but not ratified). More information on the Charter and the UK’s compliance with it is provided in the consultation document and Tables on the [consultation web page](#).

¹² The UK has ratified the six treaties in clause 1(3)(a)-(f), which also include economic, social and cultural rights to greater or lesser extent and which are amongst the nine [‘core international human rights instruments’](#); ICESCR is the seventh that the UK is bound by. The UK has neither signed nor ratified the remaining two: the International [Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#), and the International [Convention for the Protection of All Persons from Enforced Disappearance](#).

¹³ The UK has been bound by this Convention [since 1954](#).

¹⁴ The UK has been bound by this Convention [since 1953](#).

2 The rights, and associated obligations

(1) Everyone has the economic, social and cultural rights set out in Schedule 1, and references in this Act to “the rights” mean the rights set out in Schedule 1.

(2) Every public authority shall respect, protect and fulfil the rights.¹⁵

(3) Every public authority shall take measures to the maximum of its available resources with a view to achieving progressively the full realization of the rights.¹⁶

(4) In subsection (2)—

(a) “respect” means refraining from interfering directly or indirectly with the enjoyment of the rights;

(b) “protect” means acting to prevent third parties from interfering with enjoyment of the rights;

(c) “fulfil” means adopting reasonable administrative, budgetary, judicial, promotional and other measures, including secondary legislation, towards the full realisation of the rights.

(5) For the purposes of subsection (3), taking measures to the maximum of a public authority’s available resources with a view to achieving progressively the full realization of the rights means taking measures to the maximum of its available resources which are deliberate, concrete, targeted, expeditious and effective.¹⁷

¹⁵ This formulation, and sub-clause (4), reflect the international law obligations of a State: “By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights” (UN Human Rights, [Office of the High Commissioner](#)).

Alternative formulations include the proposal by House of Lords and House of Commons Joint Human Rights Committee (JHRC) in 2008: “The legislature, the executive, the judiciary, public authorities and any person or body in the performance of any public function must (a) act compatibly with a right or freedom in this Bill of Rights and Freedoms and (b) take active steps to respect, protect, promote and fulfil the rights and freedoms in this Bill.” ([2008 Outline Bill](#), Clause 6, page 106); and the provision in the South African Constitution: “The state must respect, protect, promote and fulfil the rights in the Bill of Rights.” ([Section 7\(2\)](#)).

¹⁶ This formulation reflects the obligation of States under ICESCR: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” ([ICESCR](#), Article 2.1). The JHRC’s formulation in 2008 was: “The Government must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights in this schedule.” ([2008 Outline Bill](#), Schedule 3, page 110).

¹⁷ This formulation reflects the statements of the Committee on Economic, Social and Cultural Rights, that the undertaking “to take steps” in ICESCR Article 2.1 is “of immediate effect... Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant”, and that the “principal obligation of result reflected in article 2 (1) is to take steps ‘with a view to achieving progressively the full realization of the rights recognized’ in the Covenant... [T]he phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in

(6) Within one month of the commencement of every session of Parliament, the Prime Minister shall publish, and lay before Parliament, a report setting out the measures which Her Majesty's Government in the United Kingdom proposes to adopt during that session towards the realisation of the rights.¹⁸

(7) In this section, “public authority” has the same meaning as in section 5(8).

(8) For section 11(3)(c) of the Equality Act 2006, substitute—

“a reference to the equality and human rights enactments is a reference to the Human Rights Act 1998, the Economic, Social and Cultural Rights Act [20xx], this Act and the Equality Act 2010.”¹⁹

respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.” ([General Comment 3](#), paragraphs 1, 2 and 9).

¹⁸ The purpose of this sub-clause is to ensure that the realisation of the rights is an obligation which the government is required to address at the beginning of each session of Parliament. An example of a similar obligation, albeit with a different trigger, is the climate change adaptation programme under the Climate Change Act 2008, [section 58](#).

¹⁹ The Equalities and Human Rights Commission has the duty under [section 11\(1\)](#) of the Equality Act 2006 to “monitor the effectiveness of the equality and human rights enactments”. Section 11(3) of the 2006 Act, as amended, defined those enactments as “the Human Rights Act 1998, this Act and the Equality Act 2010”. Sub-clause (10) would expressly include this Bill once enacted within the Commission’s monitoring duty.

3 Pre-legislative scrutiny²⁰

(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill, lay before Parliament and submit to the relevant bodies, an initial impact assessment which—

- (a) explains the purpose of the Bill;
- (b) identifies any provisions of the Bill which the Minister considers would respect, protect and fulfil any of the rights;
- (c) quantifies the maximum resources which the Minister considers to be available in relation to any provisions of the Bill which the Minister considers would fulfil any of the rights;
- (d) identifies the rights, if any, which the Minister considers may be negatively affected by any of the provisions of the Bill;

²⁰ The Human Rights Act 1998 (HRA) requires ministers in charge of Bills to state before second reading whether their provisions are compatible with the Convention rights ([section 19](#)). No reasons for the ministers' views need be given.

In 2008, the House of Lords and House of Commons Joint Human Rights Committee (JHRC) stated that “there is considerable room for improvement in the information currently provided to parliament about whether a measure is compatible with human rights”, citing stronger mechanisms in other countries and recommending enhanced democratic scrutiny ([2008 Outline Bill](#) report, paragraphs 225-226). This is in line with the recommendation of the Committee on Economic, Social and Cultural Rights (CESCR) to the UK [in 1997](#) to consider “a human rights assessment or impact statement be made an integral part of every proposed piece of legislation or policy initiative on a basis analogous to environmental impact assessments or statements” (para. 33).

Such enhancements could take one or more of several forms, such as: publishing draft Bills (e.g., [section 16](#) of the EU (Withdrawal) Act 2018 required the government to publish a draft Bill on post-Brexit environmental principles and an enforcement authority); publishing memoranda when Bills are introduced (the JHRC [has recommended](#) on several occasions that government Departments should “publish a detailed human rights memorandum on introduction of a Bill—and certainly before Second Reading—in order to ensure effective human rights scrutiny in Parliament and beyond”. Recent examples of this non-statutory model include memoranda on the [Mental Capacity \(Amendment\) Bill](#) and on the [Immigration and Social Security Co-ordination \(EU Withdrawal\) Bill](#)); obtaining the Attorney General’s legal advice on compatibility (as was reported by the JHRC to be the mechanism in New Zealand (2008 report, paragraph 226)); conducting an impact assessment; and scrutiny by a parliamentary committee (e.g., as required by [section 30](#) of Victoria, Australia’s Charter of Human Rights and Responsibilities Act 2006) and/or by a human rights institution.

Clause 3 adopts for the purposes of illustration the requirement of an initial impact assessment which would be submitted to the JHRC and possibly human rights institutions, with a requirement for ministers to consider responses before a final assessment, and extends these obligations to government amendments to Bills, statutory instruments and Orders-in-Council as suggested by the JHRC. The provisions on the content of the assessment suggested have drawn on the [‘brief note](#) for decision-makers’ on equality impact assessments published by the Equalities and Human Rights Commission.

- (e) identifies the groups and individuals whom the Minister considers may be so affected;
- (f) describes the consultations that the Minister has had with those who may be so affected;
- (g) specifies how the Bill would alleviate any negative effects;
- (h) either—
 - (i) confirms that the Minister does not consider any of the provisions of the Bill to be regressive; or
 - (ii) identifies any of the provisions of the Bill which the Minister considers may be regressive and, in which case, explains how the Minister proposes to ensure that section 5(5) is not contravened; and
- (i) includes a provisional statement to the effect that—
 - (i) in the Minister’s view at that time the provisions of the Bill are compatible with the rights (“a provisional statement of compatibility”), in which case the statement must be accompanied by the reasons for that view; or
 - (ii) the Minister is unable at that time to make a provisional statement of compatibility but the government nevertheless wishes the House to proceed with the Bill (“a provisional statement of incompatibility”), in which case the statement must be accompanied by an explanation of the nature and extent of the incompatibility, and the reasons for the government’s wish.

(2) The relevant bodies must consider the Bill and the initial assessment, and must report to Parliament on whether in their view the Bill is compatible with the rights.

(3) The Minister in charge of the Bill must, before Third Reading of the Bill, lay before Parliament a final impact assessment which—

- (a) takes into account the reports of the relevant bodies; and
- (b) covers and updates each of the matters in relation to the initial impact assessment report which are referred to in subsection (1), including a final statement of compatibility or a final statement of incompatibility.

(4) The assessments, statement, reasons and explanation must be in writing and be published in such manner as the Minister considers appropriate.

(5) The obligations in sub-section (1) and (3) also apply, *mutatis mutandis*, on tabling or making of—

- (a) government amendments to Bills;
- (b) statutory instruments; and
- (c) Orders-in-Council.

(6) In this section, “the relevant bodies” means [the Joint Human Rights Select Committee, the Commission for Equality and Human Rights, the Scottish Human Rights Commission and the Northern Ireland Human Rights Commission].

4 Declaration of incompatibility²¹

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with any of the rights.

(2) If the court is satisfied that the provision is incompatible with any of the rights, it may make a declaration of incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with any of the rights.

(4) If the court is satisfied—

(a) that the provision is incompatible with any of the rights, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

(5) In this section “court” means—

(a) the Supreme Court;

(b) the Judicial Committee of the Privy Council;

(c) the Courts-Martial Appeal Court;

[(d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session];

(e) in England [and Wales or Northern Ireland], the High Court or the Court of Appeal;

(f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the Chancellor of the High Court or a puisne judge of the High Court;

(g) the Upper Tribunal; and

(h) the Employment Appeal Tribunal²²

(6) A declaration under this section (“a declaration of incompatibility”)—

(a) does affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is binding on the parties to the proceedings in which it is made,

²¹ This Clause mirrors HRA [section 4](#), with three modifications.

²² The Upper Tribunal and the Employment Appeal Tribunal are added to the definition of a “court” as they are superior courts of record whose jurisdictions encompass and impact on economic, social and cultural rights.

unless the House of Commons resolves otherwise.²³

(7) The court may also make an order for meaningful engagement.²⁴

(8) The Crown has the right to intervene in accordance with Schedule 2.²⁵

²³ There has been much academic discussion about the non-binding nature of declarations of incompatibility under HRA section 4, compared with other countries – see especially [Stephenson, S.](#) *From Dialogue to Disagreement in Comparative Rights Constitutionalism*. The Federation Press, 2016; [Gardbaum, S.](#) *The New Commonwealth Model of Constitutionalism*. Cambridge: Cambridge University Press. 2013. [Tushnet, M.](#) *Weak Courts, Strong Rights Judicial Review and Social Welfare Rights in Comparative Constitutional Law*. Princeton University Press, 2007. [King, J.](#) *Rights and the Rule of Law in Third Way Constitutionalism*. 30 *Const.Comment.* 101, July 2015. [Kavanagh, A.](#) What’s so weak about “weak-form review”? A rejoinder to Stephen Gardbaum. *International Journal of Constitutional Law*, Volume 13, Issue 4, 1 October 2015, Pages 1049–1053. [Geiringer, C.](#) *From Dialogue to Disagreement in Comparative Rights Constitutionalism*. *International Journal of Constitutional Law*, Volume 15, Issue 4, 3 November 2017, Pages 1247–1254.

The debate centres around the separation of powers and relates to whether ‘the final say’ on human rights violations should lie with the (unelected) courts or with Parliament or at least with the elected House of Commons. This will be a critical issue for the enactment of a Bill of this nature, which requires widespread debate.

For the purposes of that debate, clause 4(6) departs from the position under the HRA and creates a rebuttable presumption that findings of incompatibility will be binding and followed unless the House of Commons resolves otherwise.

An alternative, which increased the legislature’s power over the executive but which fell short of creating a presumption, would be to require ministers to remedy the incompatibility if the House of Commons resolved to that effect.

Yet another, and weaker still alternative, but which went beyond the HRA, was proposed in the 2008 Outline Bill, Clause 10. Within three months of a declaration of incompatibility, Ministers would be required to make a written statement explaining either that they agree the provision is incompatible with any of the rights, or that they disagree. If they disagree, they must give their reasons. If they agree, they must state whether they propose to remedy the incompatibility. If they propose to do that, they would have to make another written statement explaining in detail how the incompatibility would be remedied within six months of the declaration. The court would be empowered to consider whether the incompatibility had been remedied.

²⁴ This is an additional provision which allows a court to order ‘meaningful engagement’. This means ordering the parties to resolve their differences in line with their respective constitutional and statutory duties and rights, and to report subsequently back to the court. It has been described as a more participatory form of justice to which socio-economic rights may be well suited. This was done by the South African Constitutional Court in a housing eviction case, *Occupiers of 51 Olivia Road, Berea Township*, [Case CCT 24/07](#), 19 February 2008. Van Bueren, G. *The New Social Contract - A Dignified Life for both the Poor and the Wealthy*. 2018. See also Pillay, A. (2012). Towards effective social and economic rights adjudication: the role of meaningful engagement. *International Journal of Constitutional Law* **10**(3): 732-755.

²⁵ To help the readability of this consultation draft, the right of the Crown to intervene in cases where a court is considering whether to make a declaration of incompatibility – which appears in HRA s.5 - is set out in Schedule 2.

5 Acts of public authorities²⁶

- (1) It is unlawful for a public authority to act in a way which is incompatible with any of the rights.
- (2) Subsection (1) does not apply to an act if—
 - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
 - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the right, the authority was acting so as to give effect to or enforce those provisions; or
 - (c) the authority was acting in accordance with its duties under section 2(2) and (3).²⁷
- (3) In any proceedings in which a court is considering whether the authority was acting in accordance with its duties under section 2(2) and 3, the court—
 - (a) shall not determine that the authority was not acting in accordance with those duties on the ground only that alternative means of realising the right are available;
 - (b) shall take into account the matters referred to in subsection (4);²⁸ and
 - (c) may make an interim or final order of meaningful engagement.²⁹
- (4) The matters to be taken into account are whether:
 - (a) a wide range of acts may be possible fully to meet the authority's duty;
 - (b) the acts include emergency relief for those whose needs are urgent;
 - (c) the acts are discriminatory;
 - (d) the acts have been effectively made known to the public;
 - (e) the acts are capable of facilitating the realisation of the relevant right;

²⁶ Clause 5 mirrors HRA [section 6](#), with modifications as explained in the following notes. Clause 5(2)(a) and (b), however, raises the issue and acceptability of a government department seeking to defend legal challenges by relying on primary legislation promoted by it.

²⁷Because the Bill contains express duties on public authorities which are not contained in the HRA – namely to respect, protect and fulfil the rights set out in Schedule 1, and to take measures to the maximum of available resources with a view to achieving progressively the full realization of the rights (clause 2(2) and (3)) – it is necessary to ensure that acts of public authorities which align with those duties would not be unlawful.

²⁸Carefully drafted provisions are necessary to delineate and balance the respective roles of the courts and public authorities on economic, social and cultural rights (clause 5(3) and (4)). The matters set out in these sub-clauses (3)(a), (b) and (4) are included in the 2008 Outline Bill, page 111.

²⁹ See note to Clause 4(7).

(f) any deprivation of existing rights is demonstrably justifiable in accordance with section 8 (Limitations).

(5) It is unlawful for a public authority to act in a way which is regressive, unless the court is satisfied that—

(a) the acts and their effects on the enjoyment of the right—

(i) are reasonably justified, necessary and proportionate;

(ii) are not directly or indirectly discriminatory;

(iii) are short-term and of limited duration, including, if introduced in a crisis, limited to the duration of the crisis;

(iv) do not disproportionately negatively affect disadvantaged groups and individuals or benefit already advantaged groups at the expense of others;

(b) the acts were introduced only after—

(i) the meaningful participation of affected groups and individuals;

(ii) the most careful consideration of all reasonable alternatives;

(c) it has consulted on and subsequently prepared an accountability mechanism to provide an independent review of the acts and their effects which includes meaningful, timely and inexpensive remedies for affected groups and individuals.³⁰

(6) In subsection (5), an act is regressive if it leads, or is likely to lead, directly or indirectly, to backward steps in the enjoyment of any of the rights.

(7) The burden of satisfying the court under subsection (5) shall be on the public authority.

(8) In this section “public authority” includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

³⁰ In view of the ‘principle of non-regression’ derived from the duty of progressive realisation, it is necessary to make explicit the *prima facie* unlawfulness of regressive measures - clause 5(5)-(7). These provisions draw on the criteria developed by the Committee on Economic, Social and Cultural Rights for justifying regressive measures, as in for example [General Comment 13](#) (The right to education), para. 49; [General Comment 14](#) (The right to the highest attainable standard of health), para. 32; [General Comment 15](#) (The right to water), para. 19; [General Comment 18](#) (The right to work), paras. 21 and 34; [General Comment 19](#) (The right to social security), para. 42. See also [the letter to the UK](#), dated 8 April 2016, from the Special Rapporteurs on extreme poverty and human rights, housing, the rights of persons with disabilities and the right to food concerning the Welfare Reform and Work Act 2016; the 2013 Report of the Special Rapporteur on the human right to safe drinking water and sanitation, A/HRC/24/44, [paragraphs 13-17](#); and [Nolan, A. Lusiani, NJ, Courtis, C.](#) Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights. In: Nolan, A. (ed.) *Economic and Social Rights after the Global Financial Crisis*. CUP, 2014. pp.121-145, esp. p.140).

(9) In determining whether a person’s functions are those of a public nature, the court may take into account the public interest in having the function exercised and whether the person—

- (a) receives public funds, by contract or otherwise, to carry out the function,
- (b) is exercising statutory powers or duties,
- (c) is taking the place of central government or local authorities, and
- (d) is providing a service at public expense to individual members of the public.³¹

(10) In relation to a particular act, a person is not a public authority by virtue only of subsection (8)(b) if the nature of the act is private.

(11) An “act” includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation, unless such a failure in relation to a Minister of the Crown results in the Minister not—

- (i) performing a duty imposed in primary legislation, or
- (ii) exercising a power conferred in primary legislation,

to make secondary legislation which amounts to the Minister not acting in accordance with sections 2(2) or 3;³² or

(b) make any primary legislation or remedial order.

(12) Proceedings under section 5(1)(a) in respect of a judicial act may be brought in accordance with Schedule 2 (Judicial acts).

³¹ This sub-clause is based on the judgments of Baroness Hale in *YL v. Birmingham City Council & Ors* [2007] UKHL 27 (paragraphs 61-72), and Lord Nicholls in *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v. Wallbank & Anor* [2003] UKHL 37 (paragraphs 6-12). It is intended to provide guidance on the meaning of ‘functions of a public nature’, whilst maintaining flexibility for courts to make decisions on a case-by-case basis.

³² Under section 6(6) of the HRA, acts include failures to act except for failures to (a) introduce in, or lay before Parliament, a proposal for legislation, and (b) make primary legislation or remedial orders. Clause 5(11)(b) would maintain the latter exclusion, in view of Parliamentary supremacy. The duties to respect, protect and fulfil the rights set out in Schedule 1, and to take measures to the maximum of available resources with a view to achieving progressively full realization of the rights, will often involve the making of secondary legislation. The effect of the Bill would be significantly weakened if all failures to make bring forward such secondary legislation were excluded. This provision therefore includes those failures where Parliament has required or empowered ministers to make secondary legislation if not introducing or laying it would amount to a breach of those duties. It would not affect the power of either House of Parliament to annul or approve statutory instruments containing secondary legislation (the so-called ‘negative’ or ‘affirmative’ procedures).

6 Proceedings³³

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 5(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on any of the rights in any legal proceedings,

if that person is (or would be) a victim of the unlawful act or otherwise has (or would have) a sufficient interest in the matter.

(2) In subsection (1)(a) “appropriate court or tribunal” means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) Proceedings under subsection (1)(a) must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(4) In subsection (1)(b) “legal proceedings” includes—

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(5) Nothing in this Act creates a criminal offence.

(6) In this section “rules” means—

(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court,

³³ Clause 6 mirrors HRA [section 7](#), but goes further in sub-clause (1) by allowing natural and legal persons with a sufficient interest to bring proceedings as well as individual victims. This is in line with the nature of the rights in Schedule 1 being both individual and collective. Clause 6(11) is added with a view to ensure that legal aid is available for advice, assistance and representation in relation to the rights.

[(b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,

(c) in relation to proceedings before a tribunal in Northern Ireland—

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force,

rules made by a Northern Ireland department for those purposes,]

and includes provision made by order under section 1 of the Courts and Legal Services Act 1990.

(7) In making rules, regard must be had to section 8.

(8) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 5(1), by order add to—

(a) the relief or remedies which the tribunal may grant; or

(b) the grounds on which it may grant any of them.³⁴

(9) An order made under subsection (8) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.

[(10) “The Minister” includes the Northern Ireland department concerned.]

(11) The following paragraph is inserted into Part 1 of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012—

"Economic, social and cultural rights

"47. Civil legal services provided in relation to the rights under the Economic, Social and Cultural Rights Act 20xx"³⁵

³⁴ Tribunals are limited in their power to award damages which can prevent justice being done in a case, for example in cases involving social security benefits. This is a matter that merits consideration during the consultation.

³⁵ This sub-clause is intended to ensure that legal aid will be available for advice and representation in connection with potential violations of the rights. In March 2018, the Equalities and Human Rights Commission [reiterated its concern](#) about the removal of most cases about social security, employment, housing, debt, immigration and family law from the scope of legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

7 Judicial remedies³⁶

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.³⁷

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) A public authority against which damages are awarded is to be treated—

[(a) in Scotland, for the purposes of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;]

(b) for the purposes of the Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(5) In this section—

“court” includes a tribunal;

“damages” means damages for an unlawful act of a public authority; and

“unlawful” means unlawful under section 5(1) and 5(5).

(6) For the purposes of this section, the powers of a court include the power to make an order of non-repetition.

³⁶ This mirrors HRA [section 8](#).

³⁷ As noted in relation to Clause 6(8), tribunals are limited in their power to award damages which can prevent justice being done in a case. This is a matter that merits consideration during the consultation.

8 Limitations

The rights may be subject only to such limitations as are determined by law, and only in so far as this may be compatible with the nature of the rights and solely for the purpose of promoting the general welfare in a democratic society.³⁸

³⁸ Almost all human rights are subject to limitations. The HRA does not include a substantive generic limitations provision as the Convention rights were drafted with limitations formulated on a right-by-right basis. The ICESCR contains both generic and a small number of right-specific limitations. For illustration purposes clause 8 is based on the ICESCR's generic limitation in Article 4.

Cf. European Social Charter, Restrictions, Article 31.1 [repeated verbatim in the [1996 Revised ESC](#), Article G]: "1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals."

Cf. 2008 Outline Bill, Clause 5, Limitation of Rights: "The rights and freedoms contained in this Bill may be subject only to such reasonable limits, provided for by law, as can be demonstrably justified in a society based on the values of liberty, democracy, fairness, civic duty and the rule of law, and to the extent compatible with international human rights treaties to which the UK is a party, taking into account all relevant factors, including:

- (a) the nature of the right;
- (b) the importance and legitimacy of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) the availability of less restrictive means to achieve the purpose."

The HRA, via the ECHR, also includes a provision [prohibiting abuse of rights](#) "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention". This is repeated almost verbatim in the ICESCR, Article 5.1.

Other proceedings

9 Safeguard for existing human rights³⁹

A person's reliance on a right does not restrict—

(a) any other right or freedom conferred on him or her by or under any law having effect in any part of the United Kingdom; or

(b) his or her right to make any claim or bring any proceedings which he or she could make or bring apart from sections 6 to 8.

³⁹ This clause mirrors HRA [section 11](#). It is intended to ensure that other human rights are not adversely affected by the Bill.

Supplemental

10 Orders etc. under this Act⁴⁰

- (1) Any power of a Minister of the Crown to make an order under this Act is exercisable by statutory instrument.
- (2) The power of the Lord Chancellor or the Secretary of State to make rules (other than rules of court) under [paragraph 1(3) of Schedule 2] and section 6(9) is exercisable by statutory instrument.
- (3) [Any statutory instrument made under Schedule 4 must be laid before Parliament].
- (4) No order may be made by the Lord Chancellor or] the Secretary of State under section 2(7), 6(8)[or paragraph x of Schedule 4] unless a draft of the order has been laid before, and approved by, each House of Parliament.
- (5) [The power of a Northern Ireland department to make—
 - (a) rules under [paragraph... of Schedule 2] or section 6(9), or
 - (b) an order under section 6(8),is exercisable by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979.]
- (6) [Any rules made under [paragraph... of Schedule 2] or section 6(9) shall be subject to negative resolution; and section 41(6) of the Interpretation Act (Northern Ireland) 1954 (meaning of “subject to negative resolution”) shall apply as if the power to make the rules were conferred by an Act of the Northern Ireland Assembly.]
- (7) [No order may be made by a Northern Ireland department under section 6(8) unless a draft of the order has been laid before, and approved by, the Northern Ireland Assembly.]

11 Definitions etc.

- (1) In this Act—
 - “amend” includes repeal and apply (with or without modifications);
 - “declaration of incompatibility” means a declaration under section 4;
 - “Minister of the Crown” has the same meaning as in the Ministers of the Crown Act 1975;
 - [“Northern Ireland Minister” includes the First Minister and the deputy First Minister in Northern Ireland;]
 - “primary legislation” means any—
 - (a) public general Act;

⁴⁰ This clause mirrors HRA [section 20](#).

- (b) local and personal Act;
- (c) private Act;
- (d) Measure of the Church Assembly;
- (e) Measure of the General Synod of the Church of England;
- (f) Order in Council—

- (i) made in exercise of Her Majesty’s Royal Prerogative;
- (ii) [made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998]; or
- (iii) amending an Act of a kind mentioned in paragraph (a), (b) or (c);

and includes an order or other instrument made under primary legislation (otherwise than by the Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Assembly Government, a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland department) to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation;

“remedial order” means an order [paragraph xx of Schedule 2];

“subordinate legislation” means any—

- (a) Order in Council other than one—
 - (i) made in exercise of Her Majesty’s Royal Prerogative;
 - (ii) [made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998]; or [made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998]; or
 - (iii) amending an Act of a kind mentioned in the definition of primary legislation;
- (b) [Act of the Scottish Parliament;
- (ba) Measure of the National Assembly for Wales;
- (bb) Act of the National Assembly for Wales;
- (c) Act of the Parliament of Northern Ireland;
- (d) Measure of the Assembly established under section 1 of the Northern Ireland Assembly Act 1973;
- (e) Act of the Northern Ireland Assembly];
- (f) order, rules, regulations, scheme, warrant, byelaw or other instrument made under primary legislation (except to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation);

(g) order, rules, regulations, scheme, warrant, byelaw or other instrument made under legislation mentioned in paragraph (b), (c), (d) or (e) [or made under an Order in Council applying only to Northern Ireland];

(h) [order, rules, regulations, scheme, warrant, byelaw or other instrument made by a member of the Scottish Executive, Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Assembly Government, a Northern Ireland Minister or a Northern Ireland department in exercise of prerogative or other executive functions of Her Majesty which are exercisable by such a person on behalf of Her Majesty];

[“transferred matters” has the same meaning as in the Northern Ireland Act 1998; and

“tribunal” means any tribunal in which legal proceedings may be brought.⁴¹

(2) Schedules 2, 3 [and 4] shall have effect.

12 Short title, commencement, application and extent.⁴²

(1) This Act may be cited as the Economic, Social and Cultural Rights Act 20xx.

(2) It shall come into force on such day as the Secretary of State may by order appoint; and different days may be appointed for different purposes.

(3) Paragraph (b) of subsection (1) of section 6 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.

(4) This Act binds the Crown.

(5) This Act extends to [.....].

⁴¹ Sub-clause (1) mirrors HRA [section 21\(1\)](#), excluding references to terms not used in the Bill, and with a different title.

⁴² This clause basically mirrors HRA [section 22](#) as amended, though does not stipulate the extent of the Bill at this stage.

SCHEDULES

SCHEDULE 1

Section 2(1)

THE RIGHTS⁴³

Economic rights

1. Everyone has the right to work.
2. Everyone has the right to vocational training and guidance.
3. Everyone has the right to the enjoyment of just and favourable conditions of work.
4. Everyone has the right to form trade unions and join the trade union of their choice for the promotion and protection of their economic and social interests.
5. Trade unions have the right to establish national federations or confederations and those confederation have the right to form or join international trade-union organizations.
6. Trade unions have the right to function freely.
7. All workers and employers have the right to bargain collectively, and the right to collective action in cases of conflicts of interest, including the right to strike.

Social rights

8. Everyone has the right to social security, including social insurance.
9. Everyone without adequate resources has the right to social and medical assistance.
10. Everyone has the right to benefit from social welfare services.
11. Everyone has the right to an adequate standard of living for that person and their dependants, including adequate food, water, sanitation, clothing and housing, and to the continuous improvement of living conditions.
12. Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health.
13. Everyone has the right to education.

Cultural rights

14. Everyone has the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications.
15. Everyone has the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.

Non-discrimination

16. The exercise of these rights is guaranteed without discrimination of any kind, such as to race; national, ethnic or social origin; nationality; birth; sex; pregnancy and maternity; marital and family status; sexual orientation; gender identity or reassignment; language; religion or belief; political or other opinion; age; disability; health, economic or social status; property; place of residence or other status.

⁴³The rights have been drafted for now in a short illustrative form in order to convey their essence for the purposes of consultation and debate. For more information on each of the rights see the 'The Rights: background information' in the [Reference Material](#) to the consultation.

SCHEDULE 2⁴⁴

Sections 4(8) and 11(2)

SUPPLEMENTARY PROVISIONS

Interpretation

1 Interpretation of the rights⁴⁵

(1) A court or tribunal determining a question which has arisen in connection with a right may take into account any—

(a) international law, including judgments, decisions, declarations and opinions of international bodies;

(b) judgments of foreign courts and tribunals;

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any such law, judgment, decision, declaration or opinion is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section “rules” means rules of court or, in the case of proceedings before a tribunal, rules made [as defined].

2 Interpretation of legislation and common law⁴⁶

Any court, tribunal or other person or body interpreting any legislation (whenever enacted) or applying the common law (whenever laid down) must, so far as it is possible to do so, read and give effect to the legislation or common law in a way which is compatible with the rights and which promotes the purpose of the Act.

⁴⁴ This Schedule contains five provisions which closely mirror those of the Human Rights Act 1998 but which have been located here in order to make this draft more easily readable. Contrary to standard practice, the provisions in this Schedule are referred to as clauses and sections rather than paragraphs.

⁴⁵ This provision proposes to give courts the power (not the duty) to take into account international law, and the judgments of foreign courts. It can be compared with the HRA, [section 2](#), which gives the courts the duty to take into account judgments of the European Court of Human Rights. It can also be compared with the [2008 Outline Bill](#), clause 2, page 106-7, which would give the courts the duty to pay due regard to international law, and a power to consider judgments of foreign and international courts.

⁴⁶ This clause goes beyond the equivalent in [section 3 of the HRA](#) by extending to the common law, and follows the [2008 Outline Bill](#), clause 3, page 106.

Right of Crown to intervene

3 Right of Crown to intervene⁴⁷

(1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.

(2) In any case to which subsection (1) applies—

(a) a Minister of the Crown (or a person nominated by him),

[(b) a member of the Scottish Executive,

(c) a Northern Ireland Minister,

(d) a Northern Ireland department],

is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.

(3) Notice under subsection (2) may be given at any time during the proceedings.

(4) A person who has been made a party to criminal proceedings (other than in Scotland) as the result of a notice under subsection (2) may, with leave, appeal to the Supreme Court against any declaration of incompatibility made in the proceedings.

(5) In subsection (4)—

“criminal proceedings” includes all proceedings before the Court Martial Appeal Court; and

“leave” means leave granted by the court making the declaration of incompatibility or by the Supreme Court.

Judicial acts

4 Judicial acts⁴⁸

(1) Proceedings under section 5(1)(a) in respect of a judicial act may be brought only—

⁴⁷ This clause is the same as [section 5](#) of the HRA, and allows the government to intervene in a case where a court is considering whether to make a declaration of incompatibility.

⁴⁸ This clause is derived from [section 9](#) of the HRA. It (1) stipulates how challenges to judicial acts (essentially, but not only, judgments) which may be incompatible with any of the rights must be brought, and (2) prohibits an award of damages if the judicial act was done in good faith.

- (a) by exercising a right of appeal;
- [(b) on an application (in Scotland a petition) for judicial review;] or
- (c) in such other forum as may be prescribed by rules.

(2) That does not affect any rule of law which prevents a court from being the subject of judicial review.

(3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded.

(4) An award of damages permitted by subsection (3) is to be made against the Crown; but no award may be made unless the appropriate person, if not a party to the proceedings, is joined.

(5) In this section—

“appropriate person” means the Minister responsible for the court concerned, or a person or government department nominated by him;

“court” includes a tribunal;

“judge” includes a member of a tribunal, a justice of the peace [(or, in Northern Ireland, a lay magistrate)] and a clerk or other officer entitled to exercise the jurisdiction of a court;

“judicial act” means a judicial act of a court and includes an act done on the instructions, or on behalf, of a judge; and

“rules” has the same meaning as in section 6(9).

5 Power to take remedial action⁴⁹

(1) This section applies if a provision of legislation has been declared under section 4 to be incompatible with a right and if an appeal lies—

(a) all persons who may appeal have stated in writing that they do not intend to do so; or

(b) the time for bringing an appeal has expired and no appeal has been brought within that time; or

(c) an appeal brought within that time has been determined or abandoned.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.

(3) If, in the case of subordinate legislation, a Minister of the Crown considers—

⁴⁹ This clause follows [section 10](#) HRA but the trigger for its application based on a finding of the European Court of Human Rights has been omitted. It allows the government, if legislation has been declared incompatible, to remove the incompatibility by an order, even if it is primary legislation which has been declared incompatible. Schedule 3 would provide more detail on the procedure to be followed.

(a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and

(b) that there are compelling reasons for proceeding under this section, he may by order make such amendments to the primary legislation as he considers necessary.

(4) This section also applies where the provision in question is in subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility any of the rights and the Minister proposes to proceed under [paragraph...of Schedule 3].

(5) If the legislation is an Order in Council, the power conferred by subsection (2) or (3) is exercisable by Her Majesty in Council.

(6) In this section “legislation” does not include a Measure of the Church Assembly or of the General Synod of the Church of England.

(7) Schedule 3 makes further provision about remedial orders.

SCHEDULE 3

Section 11(2)

REMEDIAL ORDERS

[This Schedule would contain provisions similar to those in [Schedule 2](#) of the Human Rights Act 1998 covering incidental matters and the procedure to be followed in Parliament where a provision of primary or subordinate legislation has been declared incompatible by a court under clause 4.]

[SCHEDULE 4

Section xx

DEROGATION AND RESERVATION

It is unclear whether a Bill would require this Schedule. The [Explanatory Notes](#) include a short note which is intended to help inform consideration of the matter.]