

Independent Human Rights Act Review: Terms of Reference

Context

The UK contribution to human rights law is immense, founded in the common law tradition, continued with the drafting of the European Convention on Human Rights (the Convention) and, more recently, the enactment of the Human Rights Act (HRA). The HRA has now been in force for 20 years. It is timely to review its operation.

The Review is important, both of itself and because of the impact the HRA has had on relations between the judiciary, the legislature and the executive. The HRA is underpinned by the UK's international obligations under the Convention, and the UK remains committed to upholding those obligations. However, over the past 20 years a significant body of HRA case law has developed. There is a perception that, under the HRA, courts have increasingly been presented with questions of "policy" as well as law. Now is the right time to consider how the HRA is working in practice and whether any change is needed.

Scope

The Review will focus on two overarching themes regarding the framework of the HRA and will be UK wide. In reflecting on those themes, the panel should consider how the framework is operating currently, how the HRA could best be amended (if amendment is called for) to address any issues identified, and the benefits and risks of such amendments.

The panel will issue their report to the Lord Chancellor, outlining identified options for consideration. The Government will publish the panel's report and the Government's response; the Lord Chancellor will work with interested Departments to do so. We expect the panel to report to the Lord Chancellor in Summer 2021.

The Review is limited to consideration of the HRA, which is a protected enactment under the devolution settlements. Issues falling outside the domestic HRA framework, including consideration of potential changes to the operation of the Convention or European Court of Human Rights, are not within the scope of this Review.

i. The relationship between domestic courts and the European Court of Human Rights (ECtHR)

Under the HRA, domestic courts and tribunals are not bound by the jurisprudence of the ECtHR, but are required by section 2 to "take into account" that jurisprudence (in so far as it is relevant) when determining a question that has arisen in connection with a Convention right.

The Review should consider the following questions in relation to this theme:

- a) How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?
- b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?
- c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

ii. **The impact of the HRA on the relationship between the judiciary, the executive and the legislature**

The judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review should consider the way the HRA balances those roles, including whether the current approach risks “over-judicialising” public administration and draws domestic courts unduly into questions of policy.

The Review should consider the following questions in relation to this theme:

- a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:
 - Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?
 - If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?
 - Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?
- b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?
- c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?
- d) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?¹
- e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

¹ It is acknowledged that if the extraterritorial scope of the HRA were to be restricted, other legislative changes beyond the HRA may be required in order to maintain compliance with the UK’s obligations under the Convention. As such changes would fall outside the scope of the Review, the panel is not asked to make specific legislative recommendations on this issue, but only to consider the implications of the current position and whether there is a case for change.