

Independent Human Rights Act Review (IHRAR)

Call for Evidence

A call for evidence produced by the Independent Human Rights Act Review Panel

About this call for evidence

To:	All interested parties
Duration:	From 13/01/21 to 03/03/21
Enquiries:	Independent Human Rights Act Review Secretariat Email: IHRAR@justice.gov.uk
How to respond:	<p>Please send your response by 3rd March 2021 to IHRAR@justice.gov.uk</p> <p><i>Given the current COVID-19 situation, access to office buildings is limited. If you would like a paper copy, or would prefer to mail a hard copy of your submission, please get in contact with the IHRAR Secretariat using the email address above.</i></p>

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Introduction

Chair of the Independent Human Rights Act Review, Sir Peter Gross:

“The UK’s contribution to human rights law is immense. It is founded in the common law tradition, was instrumental in the drafting and promotion of the European Convention on Human Rights (the Convention) and is now enshrined in the Human Rights Act 1998 (HRA). The HRA has now been in force for 20 years and it is timely to review its operation and framework. The Independent Human Rights Act Review (IHRAR) has been established to carry out that review. It is explicitly independent and contains a robust panel of eminent lawyers and academics, each one of whom will provide a range of views on the HRA’s operation. The Review’s Terms of Reference (ToR) focus on the operation of the HRA. They are not concerned with either the substantive rights contained within the Convention or with the question whether the UK should remain a signatory to it; the Review proceeds on the basis that the UK will remain a signatory to the Convention. The ToR have been drafted in neutral terms. The Review has no pre-conceived answers and intends to examine all the questions within the scope of the Review comprehensively. In doing so, the panel wants to consult widely and encourages the widest possible range of views from the public and interested parties in its consultations, across all four nations of the UK.”

Questionnaire

The Review is **not** considering the UK's membership of the Convention; the Review proceeds on the footing that the UK will remain a signatory to the Convention. It is also **not** considering the substantive rights set out in the Convention. When providing your answers to the questions raised under the two themes that the Review is considering please bear this in mind.

Theme One

The first theme deals with the **relationship between domestic courts and the European Court of Human Rights (ECtHR)**.

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

We would welcome any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change.

Specifically, we would welcome views on the detailed questions in our ToR. Those questions are:

- 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?

Theme Two

The second theme considers the **impact of the HRA on the relationship between the judiciary, the executive and the legislature**.

The ToR note that the judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review will 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.

We would welcome any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change.

Specifically, we would welcome views on the detailed questions in our ToR:

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

- i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?
 - ii. If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?
 - iii. Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?
- 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?
 - 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?

Next steps

The call for evidence will run for 7 weeks and will be followed by engagement with interested parties once written submissions have been considered. We also intend to hold evidence sessions to ensure the widest possible engagement with the public. More details on when and how these sessions will be organised will be shared in due course.

The Review is intended to conclude in Summer 2021 and both the panel's report and the Government response will be published.

Contact details/How to respond

Please send your response to IHRAR@justice.gov.uk.

We would welcome succinct responses. Please try to keep your response to a maximum of 25 pages or 12,500 words. Consultees should only submit a single response.

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Review's Secretariat IHRAR@justice.gov.uk.

Extra copies

Alternative format versions of this publication can be requested from IHRAR@justice.gov.uk.

Responses

The responses to this call for evidence will be considered by the Panel in coming to its conclusions in the IHRAR report.

Publication of report

The report by IHRAR will be published online at www.gov.uk.

Representative groups

Where relevant, representative groups are asked to give a summary of the people and organisations they represent when they respond.

Treatment of Responses

In the interests of openness and transparency, responses to the call for evidence will be published on the IHRAR website as soon as is practicable, with the respondent identified. If a respondent considers that exceptional circumstances provide reasons that their response should not be published, or that they should not be identified, they may request this. The Panel will have discretion to accede to such individual requests if they agree that exceptional circumstances justify non-publication or non-identification. The Secretariat will contact any respondent making such a request directly. It should be noted that even if the Panel exercises its discretion not to publish a particular response, that response may still be disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the UK General Data Protection Regulation, and the Environmental Information Regulations 2004). All personal data will be processed in accordance with the UK General Data Protection Regulation.

Glossary of terms

Judicial Dialogue

Judicial dialogue concerns the relationship between domestic courts and the ECtHR.

Margin of Appreciation

The margin of appreciation refers to the degree of flexibility accorded by the ECtHR to national authorities in fulfilling their obligations under the Convention.

Declaration of Incompatibility

A declaration of incompatibility is a declaration issued by a domestic court under section 4 of the HRA that a statutory provision is incompatible with a Convention right.

Remedial Order

A remedial order is an order made by a Government Minister or Her Majesty in Council amending legislation which has been declared incompatible with a Convention right (under section 4 of the HRA) or which appears to the Minister or Her Majesty in Council to be incompatible with a Convention right, having regard to a finding of the ECtHR in proceedings against the UK.

Designated Derogation Order

Under Article 15 of the Convention, states are permitted in times of emergency to take measures deviating from their obligations to secure certain Convention rights and freedoms. This is known as derogation. A designated derogation order is an order made under section 14 of the HRA that gives effect in domestic law to a derogation by the UK under Article 15.

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.