Independent Human Rights Act Review - Call for Evidence response
Fawcett Society
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Background

The Fawcett Society is the UK's leading charity campaigning for gender equality and women's rights at work, at home and in public life. Our vision is of a society in which women and girls in all their diversity are equal and truly free to fulfil their potential. We trace our roots back to 1866, when Millicent Fawcett began her lifetime's work leading the peaceful campaign for women's votes. Today we remain the most authoritative, independent advocate for women's rights in the UK.

What we are calling for

To retain section 2 in order to ensure that our law keeps up with changes in human rights effectively and appropriately.
To refrain from making any changes to the framework established by sections 3 and 4 of the HRA and to preserve the current remedial order process, to ensure the balance of power between the courts, the government and Parliament and to preserve the rule of law.

The Consultation Questions

Theme One - the relationship between domestic courts and the European Court of Human Rights (ECtHR).

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?

Our courts, and the UK Supreme Court in particular, have not been subservient to ECtHR jurisprudence. This has been amply demonstrated by case law. UK courts have been able to depart from the ECtHR when the reasoning is poor or they feel that ECtHR is wrong.

When such cases have been taken to the ECtHR, the Court has been willing to listen to the reasons given and even change its decision as a result. Judicial dialogue demonstrates a good balance between enabling the ECtHR to understand our legal and social context and ensuring a level of accountability for the UK courts.

Several examples of where declarations of incompatibility resulted from the UK courts taking into account developments in Strasbourg jurisprudence, in line with section 2, have been helpful on important gender-related issues, including:

- R (Steinfeld & Anor) v Secretary of State for International Development [2018] - opened up civil partnerships to opposite sex couples (with the relevant legislation subsequently amended by an executive order)
- Siobhan McLaughlin for Judicial Review (Northern Ireland) [2018] - exclusion of unmarried partners from widows' allowance, subsequently remedied by an amendment of the relevant regulations
- Bellinger v Bellinger [2003] - legislation preventing transsexual persons from marrying, which was subsequently remedied by the GRA 2004
- Re Ewart judgment from Northern Ireland, finding its abortion law to be incompatible with the European Convention on Human Rights.

Human rights and work to ensure gender equality apply to so many different parts of our lives that new questions are always being decided by the ECtHR. European societies are changing all the time, so things that the law might not have seen as a breach of human rights in the past might be now. This means that we need to have a way for our law to keep up with these changes. Section 2 has done this for over a decade and the very small number of cases that have needed to be taken to the ECtHR shows that it has been working well.

If there are changes to section 2 of the HRA, a lot of jurisprudence from the past 20 years would also come into question, as these rulings have been decided under the obligation to "take into account" ECtHR decisions. There is also a risk this would open up a gap between what the ECtHR requires and what is applied at UK level and we might not know what the courts will decide our rights mean in practice. This would mean more cases have to go to court, and it would also make it more difficult to have constructive discussions about how to fix or prevent breaches of our rights. Any increase in the latitude given to public authorities would increase the risk of denying a remedy to people whose rights have been breached, often women in distress or need, who are most at risk of deprivation in our society.

Theme Two - the impact of the HRA on the relationship between the judiciary, the executive and the legislature.

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: INDEPENDENT HUMAN RIGHTS ACT REVIEW 6 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?

The legislative/parliamentary balance works well in our experience. The HRA supports us by providing a common basis for rights across all four administrations in the UK.

We do not agree that section 3 should be amended or repealed. As currently drafted, it provides a sensible balance between implementing a law as passed by Parliament and making sure that rights are respected in practice when that law is applied to the lives of real women. (Where the problem cannot be fixed by interpretation, our courts cannot change or refuse to apply the law – only Parliament can do that).

Section 4 balances the role of the court to interpret the law and Parliament to change it. This system respects the constitutional roles of parliament, the executive and the courts.

From a gender equality perspective, there are several examples of situations where the obligation on courts to interpret legislation 'as far as possible' in conformity with Convention rights has made a big difference - as a court interpretation can give a concrete outcome for those in personal distress (while waiting for possible Parliamentary could be long and may not happen). The uncertainty that would be generated from any move away from the existing approach would further stress individuals/groups needing support to live a fair and equitable life in practice, often while dealing with significant personal grief or worry.

Examples of this action include:

- Ghaidan v Godin-Mendoza [2004] - life tenancy inherited by same-sex partner
- exclusion of unmarried parents from being considered for adoption in Northern Ireland held to be in breach, with relevant legislation re-interpreted.
- Hurley v Secretary of State for Work and Pensions [2015] - failure to exempt carers from effect of the 'bedroom tax' held to breach Article 14 ECHR (non-discrimination). This remains the most significant 'pro-carers' case handed down in English law.

Enhancing the role of Parliament in the way suggested would lead to significant delay in people being able to have their rights respected in practice. The current system has been crafted to find the right balance between the inevitable delay of a legal process, enabling Parliament to play its role, and ensuring rights, often of women in precarious situations, are respected without major and unreasonable delay.

If there are changes needed to this framework it would be so that things could move faster for those experiencing human rights violations. Proposals to introduce political involvement at an early stage of a human rights case would risk slowing the process down as well as risk drawing our courts inappropriately into those political deliberations.

Various of the changes that the questions seem to envisage would also mean allocating significantly more parliamentary time and resources.