03 March 2021

Equally Ours submission to Independent Human Rights Act Review

Introduction and summary

Equally Ours is the network of over 60 national organisations committed to making a reality of equality and human rights in people's lives. Our members represent some of the most disadvantaged groups throughout the UK, including those with protected characteristics under the Equality Act 2010, and they have long played a vital role in ensuring protection and representation for these groups.

Further information about our work is available at www.equallyours.org.uk

Our members can be found here.

We all want to live in an equal, just and fair society, where governments and public bodies act in our best interests. But sometimes they get it wrong and, when they do, we need effective tools to fix it. These tools are our human rights, and many are protected in law by the Human Rights Act (HRA).

The HRA has been an essential tool for many of our members and the communities they serve since its enactment in 1998, empowering them to stand up to people in power and to create a stronger, fairer, more compassionate UK. It has provided a common floor for rights across all four administrations of the UK.

It has protected people so that they can have privacy in their own home, express an opinion, have a decent place to live and protected them from abuse. The Act protects a number of the rights and freedoms that we all exercise every day.

Ordinary people have used the HRA repeatedly to challenge decisions and make their lives better.

The current Covid-19 pandemic has illustrated how essential the Act is in protecting rights, whether it be children in care, children in detention, the rights of disabled people or older people in care homes.

Looking at the effect of the HRA more broadly, from ours and our members perspective, it has provided a safety net for people, especially women, disabled people, black and minority ethnic people, LGBT people, older people and others in the most disadvantaged circumstances.

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It has set the parameters for not just how the government will act, but also local authorities, health authorities and other public authorities and agencies. In setting this 'safety net', it has meant that in many cases the HRA has had an effect without litigation being necessary as the government and public authorities realise the limits of their executive powers.

We have a real concern that if the Act is tampered with as a result of this Review, the people who will be most affected, probably with a reduction in rights or access to them, will again be those in the most disadvantaged circumstances.

Many of our members would like to see improved protection for social, economic and cultural rights, beyond the limited recognition given to such rights by the HRA. Nonetheless, there is a strong consensus that there is no case for a weakening of mechanisms in the HRA. The government must build upon the existing human rights framework, which is an important pillar of the UK constitution providing a framework for individuals beyond the limited rights available under the common law system and uncodified constitution.

The scope of the Review includes 'all four nations of the UK' as the Chair of the Review said in his introduction. It is essential that the Review considers the devolved settlements and the impact any changes would have. Since its introduction, the HRA has provided the common underpinning for rights and protections in Northern Ireland, Scotland, Wales as well as England.

Across the devolved administrations it is used as a base for additional rights. In Scotland, there will shortly be a bill presented to enhance the human rights framework there. In Northern Ireland, it is part of the Belfast/Good Friday Agreement and a central tenet of the peace process. The Belfast/Good Friday Agreement envisaged a new Bill of Rights in Northern Ireland, yet to be introduced but to be built upon the existing foundation of the Human Rights Act. In Wales, through the Rights of Children and Young Persons (Wales) Measure 2001, a duty is placed on ministers to have due regard to the UNCRC when developing or reviewing legislation or policy. The devolved administrations view human rights as dynamic and developing. This Review should ensure that this continues and there is no prospect of any regression as a result of its determinations.

Our over-riding view is that the current Review is unnecessary as the Act has worked well in 'bringing rights home' over the last 20 years.

The Independent Human Rights Act Review

Since the launch of the panel and its call for evidence we have engaged in discussions with our members, expert academics and those who have experience of applying the law in practice. We have had a consistent message from those discussions: that this review is unnecessary.

As organisations committed to social justice, our overall experience shows that the HRA reflects a carefully constructed balance between the appropriate roles of government, public authorities, the courts and those affected by rights violations.

The IHRAR call for evidence

We set out below our views on the questions asked by the IHRAR call for evidence.

Theme One

a) *How has the duty to "take into account" European Court of Human Rights (ECtHR) jurisprudence been applied in practice? Is there a need for any amendment of section 2?*

We believe that the duty to "take into account" the European Court of Human Rights (ECtHR) jurisprudence has been used in an appropriate and effective way, that finds the right balance between keeping up to date with developments in the case law and applying Convention rights with sensitivity to the UK context. This has allowed for legal certainty while keeping our rights up to date.

Legal certainty

The government has agreed that we should stay a member of the European Convention on Human Rights. The ECtHR decides what the Convention rights mean in practice. If our courts were expected to decide things in a different way to the ECtHR, it would be difficult for us to know what our rights are.

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 that change to section 2 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 wouldn't only mean more cases have to go to court, it would also make it more difficult to have constructive discussions with public authorities about how to fix or prevent breaches of our rights.

Keeping our rights up to date

Human rights apply to so many different parts of our life that new questions are always being decided by the ECtHR. European societies are also changing all the time, so things that the law might not have seen as a breach of your human rights in the past, might be now. For example, it wasn't until the 1990's that the ECtHR felt able to conclude that different ages of consent for gay and straight couples was discriminatory.[1] Prior to this, the question had been viewed as within the discretion of a member state.[2]

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.

[1] In Sutherland v UK
[2] See Dudgeon v UK and Norris v Ireland

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?*

The ECtHR decides cases coming from over 40 countries with different political systems and social norms. As a result, it has developed the concept of a 'margin of appreciation' that recognises that countries will use different ways to meet the human rights standards in the convention and might decide to balance rights in different ways.

The margin of appreciation has also allowed the ECtHR to consider issues that cross into the realm of social, economic and cultural rights in an appropriate way. The approach taken by the ECtHR has meant its jurisprudence is increasingly in line with the principle of indivisibility of all human rights. In *Airey v Ireland* the Court suggests that "the Convention sets forth what are essentially civil and political rights" but "many of them have implications of a social or economic nature".[3] Importantly, however, the ECtHR is reluctant to adjudicate on issues that are political or policy-related, which it views as in the realm of parliament and the government, and on which it gives a wide margin of appreciation.[4]

Our courts similarly allow public authorities a degree of latitude in making decisions, particularly where the court believes that the public authority is in a better position to assess the issue and balance the rights of the individual with other public policy considerations (for example issues relating to social policy or allocation of resources).

While we may sometimes feel the court gives too much latitude to public authorities in these situations, we do not believe that any change to the law is required. We would argue strongly against any increase in the latitude given to public authorities, which would increase the risk of denying a remedy to people whose rights have been breached.

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 understanding is that the current system of judicial dialogue has worked well.

The UK Supreme Court has not been subservient to ECtHR jurisprudence and 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 the ECtHR[5] is wrong. This has even happened in the lower courts. The ECtHR has, in turn, engaged with the reasoning of our courts and used it when deciding that a decision falls within the margin of appreciation given to a member state. For example, in *Animal Defenders International v United Kingdom (2013)* the ECtHR attached considerable weight to the considered judgements of both parliamentary and judicial bodies on the public interest debates impacting on the case.

ECtHR judgements are not a millstone around the neck of our judges, far from it. The framework set out in the HRA provides a carefully crafted system to enable our courts to

[3] *Airey v. Ireland,* 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305, para 26.
[4] *Chapman v United Kingdom* Application no. 27238/95, (2001) 3 E.H.R.R. 18 para. 99.
[5] See for example R (Haney, Kaiyam & Massey) v Secretary of State for Justice and another case [2014] UKSC 66, [2017] Poshteh v Kensington and Chelsea RLBC UKSC 36.

keep pace with and even influence developments before the ECtHR, while maintaining the ability to apply our human rights in a way that is right for the UK, even where that means departing from ECtHR jurisprudence. We believe that any changes to these provisions would upset the balance inherent in this framework.

Theme Two

a) *Should any change be made to the framework established by sections 3 and 4 of the HRA?*

We do not believe that the framework set out in sections 3 and 4 needs to be changed. The Act has finely balanced the roles of parliamentary sovereignty, the rule of law and the legislature.

In practice, the courts are very cautious and apply deference which reflects where their limits lie, i.e., over political or policy-related issues. Often this leads to courts concluding that there has not been a human rights violation, for example when a local authority has changed a care package to reduce costs, but care needs are still being met. Where our courts do conclude that there has been a breach of our rights, section 3 allows them to quickly and efficiently fix the breach by interpreting legislation in a way that secures our rights. This is only done where it is possible to without stretching the meaning of the legislation. This is a measured way of allowing our courts to assume that Parliament did not intend to pass a law that breached our human rights – a reasonable assumption in a democratic society.

Where the problem cannot be fixed by interpretation, our courts cannot change or refuse to apply the law – only Parliament can do that. So, section 4 provides a political process whereby our courts make a declaration of incompatibility (DOI) to inform the government of the problem and give guidance on how it can be corrected, but that relies on parliament to provide a remedy.

This system respects the constitutional roles of parliament, the executive and the courts.

There are questions over the level of scrutiny that Parliament can give when making remedial orders, and there may be a case for the government to make additional parliamentary time available to allow greater scrutiny. This would fit with the overall balance set out in the HRA and would not require any changes to the Act as it concerns the political, rather than legal, process. However, many of the issues that are dealt with by remedial orders are quite technical or straightforward legal questions. There is a risk that increasing the level of time spent on scrutiny could over politicise what are straightforward legal questions.

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)?

We do not have any examples of where this has happened, and we don't think it is as significant a problem as the question implies. The framework set out in the HRA, including section 3, already makes sure that the intention of Parliament is respected by the courts.

All that section 3 does is to tell our courts to assume that Parliament intends the laws it passes to respect our human rights unless Parliament itself says that they shouldn't. This is a

reasonable assumption, especially when the vast majority of laws put before Parliament by the government contain a declaration, under section 19 of the HRA, that the government believes its proposed legislation to be compatible with Convention rights.

Section 3 does not in any way stop Parliament from deciding that it wants our courts to apply the HRA in a different way, or not to respect our rights when applying a specific law – it just assumes that they don't and expects that Parliament, and the government, should be clear when this is what it wants to happen.

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?

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 real life.

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?

The HRA is a sensible and transparent balance between the roles of the government, of Parliament, of public authorities, of the courts and of the people affected by human rights violations.

The role of Parliament in determining how any incompatibility will be addressed is secured by the HRA in several important ways:

- The Act requires the government to declare whether it thinks that new legislation respects our rights under the HRA. The law-making process in Parliament provides many opportunities – in debates, committees and votes – to examine this declaration and propose different solutions to potential rights violations.
- When a court makes a declaration of incompatibility under section 4 of the HRA it is Parliament that decides how, and if, to fix the law.
- When a court interprets a law under section 3 of the HRA to make an incompatible law compatible with the HRA, Parliament can pass a new law to over-ride that decision.

These are tried and tested ways of ensuring that Parliament has a significant role in deciding how to address any incompatibility between the HRA and any other laws that it makes.

We are concerned that 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 carefully crafted to find the right balance between the inevitable delay of a legal process, enabling Parliament to play its role and ensuring rights of people in often precarious situations are respected without significant 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.

b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

We have not yet collected evidence specifically on this issue, but as with other aspects of the HRA we do not see any evidence that there is a problem with how section 14(1) has operated to date.

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?

We explored above how the HRA has struck the right balance when dealing with primary legislation. We believe that the HRA also strikes the right balance with secondary legislation which doesn't have the same amount of scrutiny in Parliament, so doesn't have the same status as primary legislation - which has to complete extensive parliamentary scrutiny.

This is also a good example of how the courts have applied the HRA in an effective and balanced way. In the last seven years there have only been 14 successful cases that have challenged delegated legislation on HRA grounds. Of the 14 cases in which human rights challenges to delegated legislation succeeded, the court quashed or otherwise disapplied the offending provisions in just four of them.

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?

As with the other provisions of the HRA, we believe that the way in which it applies to acts of public authorities taking place outside of the territory of the UK is a balanced and appropriate framework for securing our rights. That the state is accountable for its actions, regardless of where those actions take place, is an essential characteristic of a democratic society.

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 question posed is whether there should be enhanced parliamentary scrutiny of remedial orders. This is currently conducted by the Joint Committee on Human Rights with the support of expert legal advisers. We believe that this is an effective system that balances the need for decisions to be made through a political process, but in a way that fully understands the legal implications.

Parliament can also choose to use the normal legislative process to remedy any incompatibility – with the normal level of scrutiny that provides for. In a case brought by Just for Kids Law that went to the Supreme Court the declaration of incompatibility was addressed

by a normal statutory instrument, rather than a remedial order.[6] This shows that the government has a lot of latitude already in how they "fix" declarations of incompatibility.

The kind of changes that this question seems to envisage would mean allocating significantly more parliamentary time and resources. Both are controlled by the government of the day so could be subject to much greater political influence. There is a risk that this would not reflect an objective scrutiny process and contrasts with the current process that is cross-party, involves both Houses of Parliament and reflects the level of legal expertise needed to advise on remedies.

If we were advocating any change to remedial orders, it would be that the process should be sped up and that action is taken speedily to implement them.

Equally Ours, March 2021.

[6] See for example R (on the application of P, G and W) (Respondents) v Secretary of State for the Home Department and another (Appellants)

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Signed by:

Members:

Age UK
brap
British Institute of Human Rights
Children's Rights Alliance for England (CRAE) and and Just for Kids Law
Citizens Advice
Disability Rights UK
Discrimination Law Association
End Violence Against Women Campaign
Equality Trust
Fair Play South West
Fawcett Society
Friends, Families and Travellers
Gender Identity Research and Education Society (GIRES)
Humanists UK
Law Centres Network
Maternity Action
Mind
National AIDS Trust
National Alliance of Women's Organisations (NAWO)
Press for Change
Race on the Agenda (ROTA)
Royal National Institute of Blind People (RNIB)
Runnymede Trust
Security Women
Sign Health
Scope
Stonewall
Trades Union Congress (TUC)
Traveller Movement
UKREN (UK Race in Europe Network)
UNISON
Women's Budget Group
Women's Resource Centre

Associates:

Business Disability Forum
HEAR Equality and Human Rights Network
Just Fair