BATES WELLS RESPONSE TO THE INDEPENDENT HUMAN RIGHTS ACT REVIEW (IHRAR) CALL FOR EVIDENCE

MARCH 2021

INTRODUCTION

Bates Wells is a city law firm with one of the longest standing, largest and most experienced administrative and public law teams. The team is tier 2 ranked in the Legal 500 directory and band 2 ranked in the Chambers & Partners directory. The Head of Department, Melanie Carter is in the top band of leaders in the field for both directories. Three other members of the firm are praised for their experience of administrative and public law in Legal 500 (Emma Dowden-Teale, Claire Whittle, Alistair Williams), and two others in Chambers and Partners (Rupert Earle – Band 3, John Trotter – Senior Statespeople).

To quote Legal 500: "The public and regulatory department at Bates Wells is pre-eminent in the third sector, evidenced by senior associate Claire Whittle's representation of global NGOs in sensitive public inquiries. Emma Dowden-Teale recently brought new charity clients in the education sector to the firm's roster, while practice head Melanie Carter is handling novel public law challenges to the Secretary of State's policy on public rights of way. Prestigious central government departments, public authorities and regulators also retain the team to handle judicial review litigation and policy and governance advice, ranging from Brexit-related issues to safeguarding practices and the regulation of qualifications bodies. Carter is also engaged by the National Audit Office to advise on the auditing of local authorities and NHS bodies" (Legal 500, 2020).

According to Chambers and Partners: "The team is known for "advising a diverse array of regulators on the interpretation and implementation of public law obligations. Also wellversed in resisting potential challenges including judicial reviews. Frequently instructed to advise on public sector audits and maintains considerable strengths in media and advertising regulation. Regularly sought after by charities and non-profits in relation to their regulatory concerns" (Chambers and Partners, 2020).

To summarise the response below, Bates Wells is of the view that the Human Rights Act 1998 (HRA) is fit for purpose. Bates Wells is not in favour of changing the operation and framework of the HRA in any of the ways suggested in the IHRAR terms of reference or call for evidence.

We believe that many of the public authorities we represent would agree that the HRA – which is well-understood after 20 years of operation – is fit for purpose, and that it leads to better decision-making by public bodies overall. We consider many of our public body clients would agree that judicial review (including human rights review) of government decisions is not usually about unpicking political decisions but rather about getting the law right and upholding the rule of law. The HRA acts as an important minimum benchmark for government decision-making and it is important that citizens are able to hold the government to account under our constitution and in any democracy.
Bates Wells' commercial clients also make use of the HRA, for example by bringing Article 1, Protocol 1 (protection of property) claims. We do not believe our commercial clients would be in favour of overhauling the operation and framework of the HRA either.

Bates Wells is pleased that the IHRAR is not concerned with either the substantive rights contained within the European Convention of Human Rights (ECHR) or with the question of whether the UK should remain a signatory to it. Nonetheless, changes to the operation and framework of the HRA still have the potential to put the UK's position on human rights out of step with other ECHR signatories if the UK's approach differs markedly to the approach of other signatory countries. In Bates Wells' view, any change to the operation and framework of the HRA that puts the UK out of step with other ECHR signatories would be likely to damage the UK's international reputation. It could also affect investment in the UK and the UK's trade relationships. This is particularly important after Brexit – it is vital that the UK maintains a similar position on human rights to the rest of the trading block. This will facilitate trade agreements, which may contain human rights clauses. Watering down the operation and framework of the HRA would also put the UK out of step with current international trends on human rights (for example at UN level). As the call for evidence notes, the UK's contribution to human rights law – which started as a critical post-war peace project – has been immense. It is important not to undermine that contribution now.

Should the IHRAR recommend any changes to the operation and framework of the HRA – and should the Government choose to proceed with any such recommendation - we would expect the Government to consult fully and in detail on the proposed changes. Any such consultation should occur when the proposals are at a formative stage - to allow proper engagement with any alternatives proposed to the current regime - and should allow an adequate time period for responding, given the complexity and significant constitutional implications of reform.

Finally, Bates Wells notes it is important that the operation and framework of the HRA are not considered in isolation. In this regard, we would highlight that there is significant overlap between the work of the IHRAR panel and the work of the IRAL panel. It is extremely important that the two strands of work do not become disjointed. Bates Wells recommends that the IHRAR panel also take into account responses to the IRAL call for evidence. Bates Wells understands that the IRAL panel has now delivered its report to government and been disbanded. However, the panel's report has not been published. This makes it difficult for us to comment on the latest developments in the IRAL process with respect to this review. It would be helpful - and transparent - for the government to publish the IRAL panel's report - and the government's response to it - as soon as possible. This would enable the links between any proposed changes to judicial review and any proposed changes to the HRA to be better understood and analysed.

RESPONSE TO QUESTIONNAIRE

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?

Bates Wells is not in favour of amending section 2 of the HRA. In our view, the deference paid to ECtHR jurisprudence under the duty to take into account in section 2 strikes the right balance between domestic principles and the often useful jurisprudence of the ECtHR. We note in particular the approach set out in Manchester City Council v Pinnock [2010] UKSC 45 [48]:

> 48. This Court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law (see e g R v Horncastle [2009] UKSC 14; [2010] 2 WLR 47). Of course, we should usually follow a clear and constant line of decisions by the EurCtHR: R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in Doherty v Birmingham [2009] 1 AC 367, para 126, section 2 of the HRA requires our courts to "take into account" EurCtHR decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.

The UK has benefitted hugely from the jurisprudence of the ECtHR, yet domestic courts are able to raise concerns where they believe a Strasbourg line of reasoning is incorrect or does not match fundamental domestic principles. As discussed at a recent Public Law Project (PLP) event, there are plenty of recent cases in which domestic courts have departed from the jurisprudence of the ECtHR. We are sure these will be documented in PLP's response to this call for evidence. Such cases clearly show that section 2 HRA already strikes the right balance between domestic principles and the ECHR, and that domestic courts and tribunals are not overly deferential towards the ECtHR.

The existing approach to judicial dialogue between domestic courts and the ECtHR already amply permits domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK. We see no case for change to section 2 HRA and no need to alter the current approach to judicial dialogue between UK courts and tribunals and the ECtHR.

The only possible improvement in this area would be to increase judicial training in the lower courts and tribunals about the judicial dialogue approach and the application of s2 HRA in practice.

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 "overjudicialising" 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)?
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> 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?
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> 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?

Bates Wells does not consider that the current approach under the HRA "over-judicialises" public administration or draws domestic courts unduly into questions of policy.

The courts are usually hugely deferential to the government when it comes to matters of policy. For example, in the recent Planned Motherhood [2021] EWHC 309 (Admin) case, the High Court described the Treasury's SEISS Covid scheme – which had been challenged under Article 14 ECHR – in the following terms (emphasis added):

> 82. …The Defendant wished to preserve the Scheme's simplicity. For every tweak to the simple formula, a new cohort of hard cases would have been created which fell on the wrong side of the tweaked line. The bright line solution was preferred. This, again, was a political decision for Government to make. The making of some changes (tweaks) for some groups (eg reservists and 18/19 parents) does not require wider inroads. This is a political decision, for the architects of the Scheme. It is not a matter for lawyers.

There is overlap between this theme in the IHRAR and questions around the scope of judicial review in the IRAL. As stated in response to the IRAL, the fact that the executive and the judiciary clash occasionally on whether an alleged issue of policy is justiciable does not suggest that the system is broken, but rather that our constitutional system of checks and balances is working as intended. We consider the justiciability of public powers – including on human rights grounds – to be a crucial check and balance on the government, and it would be an access to justice issue if the justiciability of this area of law were to be reduced. Access to justice is regarded as a fundamental (domestic) constitutional right in this country (see Unison [2017] UKSC 51).

As stated above, review of government decisions by the courts – including human rights review - is usually about getting the law right and supporting the rule of law. It is important that citizens are able to hold the government to account under our constitution and in any democracy. When the courts make important clarifications to the law, including on rights grounds, that is to be welcomed.

We do not believe the HRA has significantly increased the number of judicial review claims in the UK courts. This experience is backed up by quantitative research.[1] In our experience, human rights arguments often run alongside domestic public law arguments in relevant claims. This is what happened in the recent case of R (Salvato) v Secretary of State for Work and Pensions [2021] EWHC 102 (Admin), for example, in which the High Court found a government policy amounted to indirect discrimination contrary to Article 14 ECHR; however it also found that the policy was irrational as a matter of domestic public law.

In our experience, the hurdles for claimants to surmount in HRA cases are very high. Where such cases do succeed, they are an important check and balance on the actions of the executive and the legislature under our constitutional system. The balance between the judiciary, legislature and executive appears to be correct in the current operation and framework of the HRA.

Bates Wells considers that sections 3 (interpretation of legislation) and 4 (declaration of incompatibility) of the HRA work well in their existing form, and it does not see a case for change. The Courts have tended to be cautious when applying section 3 HRA, particularly if there are policy or social / economic considerations at play. Bates Wells cannot see how declarations of incompatibility under section 4 of the HRA could sensibly be considered before or at the same time as section 3 HRA. A declaration of incompatibly will not arise if legislation can be interpreted consistently with the HRA. Therefore, the consideration of whether legislation can be read and given effect in a way which is compatible with Convention rights under section 3 HRA must precede the consideration of whether a declaration of incompatibility is required under section 4 HRA.

Subordinate legislation cannot be quashed on human rights grounds if the provision incompatible with human rights has been mandated by primary legislation. In such cases, only a declaration of incompatibility is possible. In fact, subordinate legislation is rarely successfully challenged on human rights grounds, and quashing subordinate legislation is even rarer. Bates Wells notes the quantitative research recently published by Tomlinson, Graham and Sinclair,[2] which shows the limited effect the HRA has had on subordinate legislation. In their sample,[3] only 14 statutory instruments (SIs) were

[1] Varda Bondy and Lee Bridges, 'The Impact of the Human Rights Act 1998 on Judicial Review' (2003) <https://publiclawproject.org.uk/resources/the-impact-of-the-human-rights-act-1998-on-judicialreview/> accessed 18 February 2021.

[2] Joe Tomlinson, Lewis Graham, and Alexandra Sinclair, 'Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?' (2021) <https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-doesjudicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-withexecutive-law-making/>

[3] Which "combed legal databases for all final decisions handed down by the High Court and Court of Appeal of England and Wales, as well as the UK Supreme Court, between 2014 and 2020 in which the lawfulness of delegated legislation was challenged".

successfully challenged on human rights grounds in the past 7 years, compared to the thousands of SIs published each year (peaking at 4,150 in 2001). Of those 14 successful challenges, just 4 SIs were quashed. Often, challenges in court are the only rigorous scrutiny an SI ever receives, particularly where the negative resolution procedure has been used to introduce it. Therefore, it does not appear that the HRA has been overused to challenge or quash subordinate legislation, and Bates Wells does not see a case for changing the law as it currently operates in this area.

In Bates Wells' view, the extra-territorial application of the HRA has its advantages. It may uncover systemic failures by British troops overseas, leading to improvements in the UK's actions and reputation abroad, and conversely, it may clear the names of British troops where allegations are not upheld by the courts. Bates Wells does not see a case for change in this area.

In Bates Wells' view, one improvement to the remedial order process under s10 of the HRA would be to speed it up, to enhance clarity for claimants where an incompatibility with the ECHR has been found.

To conclude, Bates Wells is of the view that the HRA is fit for purpose. Bates Wells is not in favour of changing the operation and framework of the HRA in any of the ways suggested in the IHRAR terms of reference or call for evidence.

For any clarification about this response or further questions to Bates Wells please contact Melanie Carter at [redacted]