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Our ref: IHRAR call for evidence
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Independent Human Rights Act Review Panel
By email only: IHRAR@justice.gov.uk

Dear Panel Members

Response to the IHRAR's call for evidence

1. Please accept this letter as the Centre for Women's Justice response to your call for evidence, published on 13 January 2021.

About us and background to our response

2. Centre for Women's Justice (CWJ) is a lawyer-led charity focused on challenging failings and discrimination against women in the criminal justice system. We conduct strategic litigation and provide training to frontline women's services across England and Wales on legal remedies available to victims of male violence. We also work closely with women's sector groups, providing advice and assistance to frontline services.

3. Our lawyers have extensive experience of using the Human Rights Act 1998 (HRA) in all of our work. Our client group, and the service users of the frontline services we advise, have been immeasurably assisted by the HRA 1998. Indeed prior to its introduction, this group - comprising victims of domestic and/or sexual violence, victims of trafficking and victims of childhood sexual abuse – had almost no remedies available to them that could be enforced in the domestic courts. Moreover, it has only been with the assistance of the European Court of Human Rights (ECtHR), that the rights of this group have been fully understood by the domestic courts and are now enforceable by individuals seeking justice for failings by various UK State bodies. We therefore urge extreme caution in any proposed amendments to the scope or functioning of the HRA as presently assists. For our client group, it has been vital.

4. We have considered the call for evidence documents carefully. In summary, the panel seeks evidence about the interplay between the ECtHR and domestic courts, including how ECtHR jurisprudence is considered by the domestic courts, and focuses to a significant degree on whether the HRA is enabling individuals to challenge policies and interfere with "public administration". CWJ considers the questions as drafted are wide, leading, and unlikely to prompt useful contribution from groups such as ours which focus on a narrow and specific

issue. Moreover, the questions do not properly reflect why individuals use the HRA, as the premise appears to be that they do so to interfere with public administration rather than to seek to protect and enforce their own rights which may tangentially have an impact on public administration. In our view, this approach is so flawed that we are not able to respond to the questions as drafted.

5. This is further complicated by the fact that the panel appears to seek evidence on the functioning of the HRA, while failing to invite evidence on the assistance provided to individuals by the HRA. In our view it is not possible to consider how the HRA functions in a vacuum. It is reassuring that the review proceeds on the footing that the UK will remain a signatory to the ECHR and that the substantive rights set out therein are not at risk. The HRA is of course primary legislation drafted and passed by Parliament which incorporates the ECHR, almost wholesale, into UK law and allows individuals to bring to challenges against public bodies in the domestic courts, instead of having to enforce those rights in the ECtHR. It is in essence an "enabling" Act, allowing for the process of balancing and enforcing ECHR rights to be quicker and cheaper for all parties and rooted in domestic considerations. It was carefully drafted to provide UK courts the ability to consider domestic legislation alongside convention rights and to make decisions within the extensive margin of appreciation afforded to all signatory States. It expressly states that ECtHR decisions must be taken into account, rather than followed. It plainly upholds parliamentary sovereignty. It is therefore of some concern that this review seeks evidence on how the HRA functions, devoid of any consideration as to its impact on those whose rights have been infringed.

6. As such, we have prepared our response not to specifically answer the questions as drafted, but to provide the panel with some cases which illustrate the vital significance of the HRA to our client group, to provide context for any recommendations the panel may make. The questions asked and any proposals made, must not take place in a vacuum, ignoring the real benefits for individuals arising from the HRA. We hope no changes will be made to the HRA (unless to extend the protections it provides) but if and when any concrete changes are proposed, these must be consulted on and we will provide a more detailed response at that time.

Our response

7. The right to live free from fear, injury and exploitation is reflected within the European Convention on Human Rights (ECHR). The main articles that are engaged in relation to the issues affecting our client group are:

   Article 2 - the right to life
   Article 3 - prohibition of torture
   Article 4 - prohibition of slavery and forced labour
   Article 8 - the right to respect for private and family life

Article 14 - prohibition on discrimination regarding Convention rights

8. As you are aware, in the ECHR most articles are drafted as 'negative obligations' which require the State to refrain from conduct which inflicts harm on individuals. For example, "Article 3 - Prohibition of torture - No one shall be subjected to torture or to inhuman or degrading treatment or punishment." However, it has been the interpretation of these negative obligations as imposing positive obligations on the State, largely by the ECtHR, that has been of most assistance to our client group. For example, Article 3 has been interpreted to mean that States have an obligation to have effective criminal systems in place to investigate serious offences such rape committed by a private individual. These judgments have been taken into account by our domestic courts. We have seen no evidence that ECtHR judgments are simply followed, rather, we have noted that they assist domestic courts in understanding the ECHR and considering how these aspects should be applied here, with full regard to domestic legislation and parliamentary sovereignty.

9. Much of our work assisting survivors of domestic and sexual violence relies on these findings of 'positive obligations' and have since been interpreted by domestic courts to include not only a systemic duty (namely to have a system of laws), but also an operational/investigative duty (namely to take steps such that the system is effective). It is important to note that there are no such duties under the common law and until the HRA, our client group had no domestic remedy available to them to rectify or seek justice over investigative failings.

10. We list below some of the cases that are of greatest significance to our client group. The principles arising have since been relied on repeatedly in private and public law claims including those which settle before trial, sometimes even before proceedings have been issued, by women seeking justice and accountability. Sometimes this has resulted in fresh or re-opened criminal investigations of people accused of extremely serious crimes including rape, child sexual abuse and trafficking which can not only lead to justice for the victims, but also to greater public safety. The cases are set out chronologically and this list is not meant to be exhaustive.

11. *Osman v UK* [1998] ECHR 101 is a case which was heard in the ECtHR because the HRA was not in force at the time of the application, so the matter could not be considered domestically. However, it is included here because it is a case from which a number of important duties have arisen and the HRA has meant that the findings and boundaries of *Osman* have since been considered and refined in domestic courts as public bodies' duties.

12. The case confirmed that there is a positive obligation upon the State to seek to prevent loss of life where the authorities *'knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and failed to take measures within the scope of their powers which, judged reasonably,*

might have been expected to avoid that risk.' The case concerned the shooting of a schoolboy's father by his teacher.

13. This 'operational duty' is highly relevant to the protection of women at risk from violent men. It has been used by families of victims who were killed after State failings, including to ensure that a detailed inquest take place examining the State's failings (a positive obligation imposed by Article 2 is also a duty of enhanced investigation) and for coroners to consider whether lessons can be learned by way of preparing a 'Prevention of Future Deaths' report.

14. It can also be used to try to prevent such tragedies. For example, if the police are failing to act on a serious and credible threat to a woman's life, she can seek to rely on this positive obligation to challenge the inaction of the police or any other public authority who may be in a position to take steps to protect her.

15. *OOO and Others -v- Commissioner of Police of the Metropolis [2011] EWHC 1246 (QB)* was a civil claim in which it was found that the police have a legal duty to conduct an effective investigation into trafficking under Article 4. The case concerned the failure of the police to investigate, for 2.5 years, the allegations made by two young girls that they had been trafficked and were being held in domestic servitude. This argument could not have been brought without ECHR rights, and could not have been brought in the domestic courts without the HRA.

16. The case has been used by women and girls who have been trafficked for various forms of exploitation to try to ensure that the police take steps to protect them and investigate their traffickers. We have been involved in assisting victims raise it in representations when they believe the police are failing to investigate when allegations are made, to try to ensure that traffickers are brought to justice.

17. *Waxman (R) (on the application of) v Crown Prosecution Service* [2012] EWHC 113 was a judicial review claim challenging the decision of the Crown Prosecution Service ('CPS') not to prosecute her stalker for harassment. The Court held that in certain circumstances Article 8 can impose a positive obligation to provide an effective criminal remedy, and vulnerable individuals are particularly entitled to effective protection. The State therefore owed Ms Waxman a duty under Article 8 to take proper measures to protect her and was in breach of its duty in failing to pursue the prosecution. She was also awarded compensation.

18. This case has been of particular assistance to victims of stalking, as it can be relied upon to try to ensure that police take steps to protect victims of stalking and that prosecutions are taken forward where possible.

19. *EK (Article 4 ECHR: Trafficking Convention)* [2013] UKUT 00313 (IAC) involved a woman called EK who was trafficked to the UK from Tanzania in 2006 for domestic servitude. Contrary to

UKBA guidance she was not given information on her rights upon entry to the UK. After an initial escape, she was internally re-trafficked. In 2010 she was referred through the National Referral Mechanism as a victim of trafficking and assisted to raise an asylum claim. In the Upper Tribunal, EK argued that the failure to give her information at entry had amounted to a breach of Article 4 and that this had contributed directly to her vulnerability to trafficking, and to the damage caused to her health.

20. The judgment established that in cases where the UK has breached its obligations under Article 4, a duty of reparation is owed and that this impacts directly on any decision to remove an individual from the UK. It is hoped that, following the judgment, such initial failures are less likely to occur. The case can be used by victims and survivors of trafficking to enforce their rights, including assisting them to seek asylum to protect them from further trafficking and harm.

21. *DSD and NBV v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB) was a case brought by two claimants, one of the first and one of the last victims of John Worboys, the so-called "black cab rapist", who is believed to have attacked over 100 women. They sought a declaration and damages on the basis that the police had failed at both a systemic and an operational level to investigate their claims of sexual assault, arguing that Articles 3 and 8 imposed a positive duty on the State to conduct an effective investigation.

22. On appeal, the Commissioner attempted to argue that, (1) the investigative duty was limited to alleged mistreatment by state actors or where there was state complicity in the actions of non-state actors, and (2) a violation of the investigative duty could only be founded if there were systemic failings at the policy and structural level. These arguments were both rejected. The police also sought to argue that the case was an attempt to circumvent previous decisions by the Courts which held that the police were immune from prosecution in negligence for failed investigations. However, the Courts rejected this argument also recognising that rights under the ECHR (enforceable under the HRA) are separate arguments to those raised in negligence.

23. All courts, up to and including the Supreme Court (in 2018) held that Article 3 imposed a positive duty on police forces to investigate allegations of inhuman or degrading treatment by third parties and that egregious and significant errors in an investigation can give rise to a claim.

24. DSD & NBV's case was a significant victory for victims of VAWG (violence against women and girls), particularly rape and sexual assault, in seeking to hold the police – and other public bodies – to account for serious investigatory failures. Until this claim it had not been definitively confirmed in the UK courts that the investigative duty could arise in respect of inhuman/degrading conduct perpetrated by a private citizen and this would not have been possible without the HRA.

25. This is a case that led to police forces better resourcing sexual crime units and one on which victims often rely to try to ensure proper investigation where there are severe delays or failings in investigations.

26. *Michael v Chief Constable of South Wales* [2015] UKSC 2 is a case in which Ms Michael's parents and two young children brought claims for damages both in negligence and under the HRA for breach of a public authority's duty under Article 2 to protect Ms Michael's right to life when she was murdered by her ex-partner, having already called the police to ask for protection, stating that her ex-partner had threatened to return to her home to kill her. The Chief Constable applied for both claims to be struck out. The application was refused at first instance. The Court of Appeal then reversed the decision in relation to the negligence claim, holding that there should be summary judgment in favour of the police. However, they upheld the decision to allow the Article 2 claim to proceed to trial. The majority of the Supreme Court concluded that while the police owe no duty of care in negligence to members of the public who suffer harm at the hands of criminals, the police may still be liable for a breach of Article 2 and such claims can be brought in the domestic courts under the HRA. The police may be held liable to victims (or their families) for clear failures to prevent a potentially fatal incident of domestic violence of which they have received specific warning.

27. This case can and has been relied on by our client group where the State has failed to act on threats to kill. It is hoped that the police's better understanding of what the duty entails, as clarified by the Supreme Court, will mean that such urgent calls will be acted on quickly, and lives may be saved. This case also illustrates how without the HRA there would not be any legal route to accountability for such victims in the domestic courts.

28. *R (QSA and others) v Secretary of State for the Home Dept and Secretary of State for Justice* [2018] EWHC 407 (Admin) was a claim for judicial review brought by three women, each of whom have multiple convictions for 'soliciting' under s1, Street Offences Act 1959 (SOA 1959) as a result of being groomed into prostitution at a young age. The convictions are all over twenty years ago and each of the Claimants has exited prostitution. However, under what was known as the 'multiple conviction rule', these offences had to be disclosed when applying for certain types of employment and even when accessing educational courses. This was because of a rule that more than one offence, no matter how minor or how long ago, meant that all offences would be disclosed. The Claimants argued that the rule violated their Article 8 rights. They were successful and in November 2020, following this case and another argued on similar terms, the rule was changed.

29. The outcome of this case is of great assistance to victims of grooming who have been forced into prostitution or other criminal activity, as it means that they no longer have to disclose their convictions, and as such, do not have to divulge to employers the abuse they suffered, often as children.

30. *R v Bater-James and another* [2020] EWCA Crim 790 - The Court of Appeal heard two cases concerning the disclosure of the digital contents of the mobile phones of two survivors of serious sexual offences. The Court of Appeal held that there is no obligation on investigators to seek to review a witness's digital material without good cause. The request to inspect digital material, in every case, must have a proper basis, usually that there are reasonable grounds to believe that it may reveal material relevant to the investigation or the likely issues at trial ('a reasonable line of inquiry'). The court also re-affirmed that 'Victims do not waive… their right to privacy under Article 8 of the ECHR, by making a complaint against the accused. The court, as a public authority, must ensure that any interference with the right to privacy under Article 8 is in accordance with the law, and is necessary in pursuit of a legitimate public interest'. The judgment resulted in the NPCC withdrawing the blanket consent forms for digital data extraction they had been using on rape complainants and in new guidance being issued aiming to reduce unnecessary interference with complainants' privacy rights.

31. The above case is another example of where the HRA has enabled the rights of victims to be protected. Had the HRA not operated as it does, the women would most likely have been left without a means of protecting their rights. This issue of rape complainants being "digitally strip-searched", as it has become known, is a real obstacle to women and girls reporting sexual violence and continuing to support prosecutions such that this case is of great significance to our client group.

Conclusion

32. We hope that the cases outlined provide a brief but helpful illustration of the vital nature of the HRA for our client group such that the panel will not recommend any interference with its operation which may put such protections at risk. As outlined above, if and when any concrete changes are proposed, these must be consulted on and we will provide a more detailed response at that time.

Yours faithfully

Centre For Women's Justice