Independent Human Rights Act Review (IHRAR):

Response from the Law Centres Network

About us

Law Centres are not-for-profit law practices specialising in social welfare law, that have ben operating in the UK for 50 years. The Law Centres Network (LCN) is the specialist support organisation serving 41 Law Centres across the country. At the specialist end of the advice spectrum, Law Centres provide services that few not-for-profits provide – legal casework, advocacy and representation – normally at a point when legal problems have escalated and become costly to resolve.

Initial remarks

Law Centres target their services at people living in poverty and disadvantage in order to level the legal playing field for them, so they would no longer fight an uphill battle to have their rights and legal entitlements upheld. Our work focuses on areas of practice such as welfare rights, housing, debt, employment, immigration and discrimination. These are areas where our clients often face public authorities – local councils, government departments and their agencies – with outsized impact on their freedoms and rights. Through this work, we see every day how human rights arise, as Eleanor Roosevelt had put it in 1958, "in small places close to home… the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination." Our purpose is to help them attain these.

Human rights are in essence about preserving human life and dignity. Therefore, instruments such as the UK Human Rights Act (HRA) have a benign, protective function: put simply, for those in vulnerable circumstances or those least able to assert their rights through their own means, it sets an essential standard for basic freedoms and rights. Such a 'safety net' function is of particular value in a common law legal system in which those rights and freedoms are not otherwise clearly specified and the constitution is unwritten. To people like Law Centre clients, whose circumstances make them more reliant on public provisions and therefore on interacting and sometimes differing with public bodies, HRA is a of particular significance.

We regard the Human Rights Act as a provision fundamental to our practice and have been using it in the service of our clients ever since its enactment over 20 years ago. To Lord Bingham's famous questions, "Which of these rights, I ask, would we wish to discard? Are any of them trivial, superfluous, unnecessary? Are any them un-British?" our responses remain none, no and no. We are therefore understandably concerned at attempts to unbundle the HRA package for review. If anything, we believe that it should be a cornerstone for further development, such as the anchoring of social and economic rights, or international conventions on the rights of children or people with disabilities, in British law.

In Law Centres' experience, HRA functions well in its own right: it is not 'broken' and therefore requires no fixing, as Lady Hale, Lord Neuberger and Sir Dominic Grieve QC have told the Joint Committee on Human Rights only recently. In fact, HRA could be made even more effective on current terms by improving access to justice provisions, such as legal aid, so more people would be able to make use of it in more circumstances, thereby increasing its deterrent effect and virtuous impact.

HRA in practice: profound impact for people in dire straits

In Law Centres' experience, HRA is a powerful tool for attaining results that should be welcomed by all parties. The following examples from our practice bear this out.

In **litigation**, the Act enables opportunities for the courts to interpret the law in order to clarify or update it as needed, firmly in line with common law principles.

- **Updating rules on end-of-life support**: Lorraine is a single mother of three and at forty years old she is dying with Motor Neurone Disease, a degenerative and terminal illness. She applied for benefits under the terminal diagnoses rule, intended to provide expedited access to social security for the remainder the claimant's life. However, she was refused because her doctor could not assert that she would die within six months; MND is a complex condition and hard to predict. Originally intended as a compassionate measure, the six-month rule was not updated in over 30 years and has become a hurdle for many like Lorraine at a particularly tender time. Law Centre NI helped Lorraine bring a Judicial Review of the decision, and the court agreed that the rules discriminate between different classes of terminally ill claimants. It judged that the rules breached Lorraine's art. 8 and art. 14 HRA rights. Accordingly, she was awarded compensation for her ordeal, and the government has committed to change the six-month rule – benefiting thousands in her position.
- **Asylum housing and support in lockdown:** PA and MA received notice to leave their s.4 asylum accommodation last October, just as Covid-19 infections were increasing again. The Home Office said this was because their asylum claims had been refused and they should agree to leave the UK. Like many in their position, they were unwilling to leave as they fear for their lives in their country of origin. They appealed to the Asylum Support Tribunal arguing that, although their fresh claims for asylum had been refused, they still qualified for support under s.4 human rights criteria, because those related not only to breaches of *their* human rights but also to those *of others*. If evicted, it was argued, the two would turn to the deprived local BAME communities that were already at greater risk from the pandemic. The Tribunal accepted that public health concerns were relevant and that the human rights safety net was not limited to the individual. It has since applied this reasoning to other appeals against the refusal of accommodation or support.

In **casework**, too, HRA serves as a compelling framework of standards for the conduct of public bodies, orienting public administration toward Parliament's intention.

- **Appropriate home and care**: 'Archie' and his wife were living with their son and daughter-in-law and grandchildren, in an overcrowded privately rented flat. Archie is

paralysed from the neck down and had to sleep in the living room, because the doors were too narrow for his wheelchair and the landlord refused adaptations. His wife and son had to carry him from room to room, increasing his risk of falls. The council's social services department assessed him and, despite concluding that if he had suitable accommodation he could be cared for at home, they did not offer him mainstream accommodation but a place in a nursing home – which would have separated him from his wife and primary carer. The Law Centre persuaded the council that its Care Act power to provide ordinary accommodation turned into a duty where it was required to avoid a breach of Archie's art. 8 HRA rights. Social services had been willing to assist but seemed to think that residential care or a home care package were their only solutions. Human rights arguments framed the case in a way that led them to a good solution for Archie, his family and their budget.

- **Rough sleeping during lockdown:** 'Richard' is a healthy man in his 50s whose relationship with his wife as broken down. He has been living with his uncle and his family during the first lockdown but was told to leave and has no other family or friends who can help. He asked the council for help, but they told him that, without children or health problems, he was not in priority need to be housed. He was facing street homelessness and was really scared. He had never slept on the streets before and doing so would have risked him losing his job, meaning he would find it even harder to find an affordable flat to rent. The council was persuaded that, in the context of the pandemic, its refusal to use its Localism Act powers to assist Richard – meaning he would be forced to sleep rough and unable to protect himself from Coronavirus – would significantly risk breaching his art. 3 and 8 HRA rights. The Law Centre also claimed that a failure to accommodate Richard also risked breaching his art. 2 HRA rights, creating a risk to public health and the lives of others.
- **Safety for the abused and the community**: 'Mirko' and 'Sima' are European nationals who fled gangmasters in another city and reported the traffickers to the police. They were refused assistance as victims of modern slavery because they managed to escape just before they were enslaved. Terrified of repercussions, they want to leave the UK as soon as possible, but need to be tested for Covid-19 before they can leave. They have been sleeping rough for two days. A homelessness charity will pay for their travel and help them with the arrangements, but when the charity asked the council for help with accommodation, the council refused because they were deemed not to be in priority need. The Law Centre persuaded the council that to be left homeless and destitute during the lockdown, whilst willing but unable to leave the UK, would constitute a breach of their human rights and cause a risk to public health and the lives of others. It has agreed to accommodate them under its Localism Act powers.

As these recent examples demonstrate, the current UK human rights regime already works well in enabling improvements to people's lives and equipping them to take action, stand up and assert their rights and liberties. When they do, the effect is profound: as one Law Centre lawyer has put it, "the opposite of poverty is not wealth, it is justice. When people experience justice they are empowered." The effect of human rights is dynamic and can be used to cement social progress for disadvantaged groups and reduce and eliminate long-running inequalities. They are essential to the diverse society that the UK is in the 21st century.

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

We welcome the Review's clarification, that it is considering neither UK membership of the convention nor the substantive rights set out in it. However, the questions of **s.2 and the duty to 'take into account'** ECtHR jurisprudence, which are in consideration, *still affect substantive rights* by affecting their ongoing interpretation and implementation.

We believe that the current mechanism strikes a good balance between applying Convention rights appropriately in the UK while staying abreast of ECtHR case law developments. We consider that amending s.2 would upset that carefully maintained balance. Looking back, this would raise doubts about the status of jurisprudence shaped by 'taking into account' since HRA's introduction. Looking ahead, amending s.2 could enable a wider divergence of UK courts from ECtHR, which would weaken the legal certainly about the interpretation of substantive rights – in effect, making the rights themselves less clear. This would also weaken HRA's effectiveness in framing consensual resolutions with public bodies and would make litigation to authoritatively interpret the Act more likely.

Those most at risk of being adversely affected by changes to s.2 are precisely individuals and groups who have the greatest need of HRA's protection, due to their particular historical or current disadvantage. The gradual progress toward effective equality for groups like LGBT+ people, or people with disabilities, or Gypsy and Roma people, relies on the legal certainty about the accumulated interpretations HRA by domestic courts and ECtHR. Denting that certainly would call into question existing precedent, preventing claimants from obtaining remedies or forcing them to travel to Strasbourg to vindicate their rights. Furthermore, it risks undoing years of valuable progress toward making the UK a more equal society.

We believe that no change is required to the current approach to states' **margin of appreciation**. Both ECtHR and our domestic courts allow public bodies significant latitude to set public policy as they see fit – indeed, at times perhaps more latitude than we think they should have. Both also show a reluctance to stray into political matters or issues of public policy, often confining themselves to ways in which human rights play out in issues of public administration and largely leaving it to public bodies to balance policymaking with individual rights.

We believe that the current approach to **'judicial dialogue'** has functioned satisfactorily so far. Therefore, we would suggest that the best way to preserve it would be to maintain this approach. As commented above, we believe that the 'taking into account' requirement already delivers a balance of overall consistency with respectful divergence of interpretation. ECtHR has respected the UK margin of appreciation and acknowledges local reasoning and, for their part, domestic courts from the Supreme Court on down continue to interpret Convention rights as they believe works best for the UK.

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

The relationship between the courts, government and Parliament is fundamental to our constitutional settlement. It would be fair to say that it is a dynamic relationship, one in which the balance between the powers' respective roles is maintained through constant negotiation based on common premises, some of which are encapsulated in HRA. The Act's role is not simply to enshrine Convention rights but, in this, to be the means through which individuals can access their rights and challenge breaches of them when public bodies get the law wrong.

This function, of enabling individuals to hold public bodies to account based on HRA, is vital for challenging Executive overreach. In performing it, the courts are carrying out their proper and accepted role. Scrutinising the way they do so is a legitimate exercise, but here the government's working hypothesis seems somewhat tendentious. The terms of reference tell us that "*There is a perception* that, under HRA, courts have increasingly been presented with questions of "policy" as well as law" (p.10, our italics) – as bold an assertion as it is vague and requiring substantiation. Later (p.11) the call for evidence wants to find out "whether the current approach risks "over-judicialising" public administration." One is left to wonder what is meant by 'over-judicialising', whether there is an acceptable level of 'judicialising', who sets it, and how.

Theme two focuses, then, on the framework established by s.3 and s.4 HRA. This framework respects Parliament's sovereignty in assuming that breaches of human rights in legislation are not intentional. S.3 empowers the courts to fix this problem by interpreting said legislation – a role that, in our experience, they approach with great care to respect Parliament's intention. Where this is not possible, s.4 allows them to make a Declaration of Incompatibility (DOI) with HRA, returning the problematic legislation to Parliament so it can perform its proper role of changing legislation.

We believe that the s.3-s.4 framework works well and does not need to be changed: not by amending s.3 and certainly not by repealing it. The questions of courts interpreting legislation in a manner inconsistent with Parliament's intention seem overstated, and we do not have examples of such instances to consider. Amending or repealing s.3 would impair the courts' interpretive function, which they have exercised for over 20 years. As with s.2 above, such changes, even if restricted to past legislation, would lead to legal uncertainty about existing precedent and HRA case law – an unwelcome and disproportionate consequence.

The review questions seem to seek a shift toward a reliance on s.4 DOIs as a means of limiting courts' interpretive role and 'enhancing' Parliament's role in addressing incompatibility. We believe that this is neither needed nor advisable. Parliament does not need this enhancement because its primacy in resolving incompatibilities is assured. On the one hand, it can already decide how to fix its own legislation after a s.4 DOI. On the other hand, it can already legislate further to supersede the courts' s.3 interpretation if it is dissatisfied with it.

Even if the unneeded step were taken to 'enhance' Parliament's role by preferring s.4 DOIs, it would lead to two undesirable consequences. Firstly, government already has significant influence over parliamentary business, so an even greater role for Parliament in resolving incompatibilities would in effect give *government* more control of whether and how to respond to court findings of breaches. Secondly, Parliament's already considerable volume of legislative business, especially involving sufficient scrutiny as befits human rights provisions, would delay much-needed remedies for rights breaches. This would also likely be the case if

Parliament's role in the remedial order process (s.10 and schedule 2 HRA) were 'enhanced', a suggestion that we believe is unnecessary because the process already seems effective enough.

In sum, a shift of this nature could end up being a case of justice delayed – justice denied. Moreover, the greater role that Parliament (or government-in-Parliament) has, the lesser role that the courts can play and the less relief that they can offer individuals. In turn, this would effectively reduce the Executive's accountability to the public, allowing government to 'mark its own homework' – surely an outcome to be avoided on rule of law grounds.

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