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Mind's written submission to the Independent Human Rights Act Review's Call for Evidence

About Mind

We're Mind, the mental health charity for England and Wales. We believe no one should have to face a mental health problem alone. We provide advice and support to empower anyone experiencing a mental health problem. We campaign to improve services, raise awareness and promote understanding.

Mind gratefully acknowledges the assistance of Sophy Miles, barrister at Doughty Street Chambers, in preparing this submission.

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Overview

The Human Rights Act (HRA) enshrines the European Convention on Human Rights (ECHR) in UK law. The ECHR is a living instrument and judgments from the European Court of Human Rights (ECtHR) continually build upon previous jurisprudence and evolve over time. This in turn affects how domestic courts interpret the human rights of people in the UK.

The HRA is a carefully constructed scheme specifically designed to uphold rights whilst maintaining the authority of Parliament. In the twenty three years since becoming law, it has played a vital role in securing rights for people with mental health problems.

We know that many people with mental health problems experience infringements of their human rights. This can take the form of abuse and degrading treatment; unwarranted

deprivation of liberty and autonomy; lack of protection for family and private life; as well as routine discrimination.

The HRA provides significant protection for people with mental health problems by helping to change practice and procedure, culture and attitudes, and offering redress when breaches have taken place. As ECtHR case law has developed, so too have the safeguards and rights of people with mental health problems in the UK.

In considering the future of human rights protections, we would oppose any reforms that threatened an individual's ability to seek redress for breach of their human rights, prevented British judges from relying on the development of ECtHR case law to inform their own interpretations or limited domestic implementation of international standards.

We should add that whilst we are pleased to have the chance to respond to this consultation, we are disappointed that little effort has been made to make the consultation genuinely inclusive. The questions are highly technical in nature. Together with the tight timetable for responses, we are concerned that this may deter the very individuals who most need human rights protection from providing their views.

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.

Before turning to the specific questions in theme one, we draw the Review's attention to the HRA's role in bringing home legal redress for people with mental health problems when their human rights are breached. Before its enactment, people would need to take their cases to Strasbourg to enforce their human rights. We would strongly oppose a return to that system. Funding and logistical difficulties would pose almost insuperable obstacles to the individuals we represent.

Mind also wishes to highlight the different approaches taken by the four home nations to the development of human rights protection in law. For example, Wales has taken a much more enthusiastic approach to the implementation of international rights standards since

devolution[1]. We are concerned that reforms to the HRA which undermine an individual's ability to realise their human rights, could result in a significant divergence in human rights protections between the four nations.

Specifically, we would welcome views on the detailed questions in our ToR. Those questions are:

How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

By making the rights from the European Convention of Human Rights enforceable in the UK, the HRA brought home important protections for people with mental health problems. The following rights are key in a mental health context:

- Right to life (Article 2)
- Right to not be subject to inhuman or degrading treatment (Article 3)
- Right to liberty (Article 5)
- Right to a fair hearing (Article 6)
- Right to respect for private and family life (Article 8)
- Right to not be discriminated against (Article 14)

The duty to take ECtHR jurisprudence into account ensures that human rights are not static, but remain in step with the modern world.

For example:

- Cases such as Savage v South Essex Partnership NHS Foundation Trust[2] and Rabone v Pennine Care NHS Trust[2] have led to a significant improvement in the rights in the Coronial system for the bereaved families of mental health patients who have taken their own lives, because of ECtHR jurisprudence on the operational duty under Article 2.

- Cases such as TP&AR v SSWP[3] protected the rights of vulnerable benefits claimants in the implementation of Universal Credit because of ECtHR jurisprudence on Article 14.

- The case of Cheshire West[4] gave thousands of disabled people in supported living, deprived of their liberty without authorisation the right to an independent periodic

[1] For example, the Rights of Children and Young Persons (Wales) Measure 2010 which partially incorporates the UN Convention on the Rights of the Child or the Welsh Government's Framework for Action on Independent Living which sets out its vision for taking forward implementation of the CRPD in Wales [2] [2008] UKHL 74

[2] [2012] 2 AC 72

[3] [2018] EWHC 1474 (Admin)

[4] [2014] UKSC 19, [2014] MHLO 16

check on whether their living arrangements were necessary and in their best interests because of ECtHR jurisprudence on Article 5

Another important example of how human rights protections have developed in the UK in step with the modern world concerns the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). In force from 2008, and signed and ratified by the UK, the CRPD is seen is a "paradigm shift"- a move from the medical to the social model with autonomy for those with disabilities at its heart. Mind generally sees this as the gold standard for human rights protection for disabled people. The CRPD has appeared in the reasoning of crucial ECtHR rulings on the rights of people with mental health problems such as *Stanev v Bulgaria*[5] , *RP v UK*[6] , and *MH v UK*[8].

As the UK courts take into account the developments in Strasbourg, so we have seen the CRPD becoming a source of persuasive authority and has been referred to in the Supreme Court (Article 14 CRPD – the right to liberty and security of person) on the definition of deprivation of liberty[9] and in the Court of Appeal (Article 19 – the right to living independently and being included in the community) on the meaning of independent living and non-discrimination[7]. Article 13 CRPD (the right to access to justice) was held to reinforce Article 6 of the ECHR in an important case about the rights of detained patients to choose to have public hearings in the Mental Health Tribunal.[8]

Whilst the domestic courts are not beholden to Strasbourg, the requirement to "take into account" ECtHR developments are part of the process whereby the transformative rights in the CRPD begin to enhance the interpretation of ECHR rights by the domestic courts. Mind therefore sees no need to amend section 2 and considers that any amendment is likely to be detrimental to rights of people with mental health problems.

a) 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?

Mind does not consider any change is required in this area.

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[5] (App no 36760/06) [2012] ECHR 46. A case about the Article 5 rights of a man with schizophrenia

[6] (App no 38245/08) [2012] ECHR 1796. A case about the Article 6 rights of an incapacitated woman [8] (App no 11577/06) [2013] ECHR. A case about the Article 5 rights of a young woman with a learning disability who was detained under the Mental Health Act, who lacked capacity to apply to the Tribunal.

[9] ((*P v Cheshire West and Chester Council and another; P and Q v Surrey County Council* [2014] UKSC 19) ("Cheshire West")

[7] (*Burnip v Birmingham City Council & Anor (Rev 1)* [2012] EWCA Civ 629

[8] (*AH v West London MHT (J)* [2011] UKUT 74 (AAC

b) 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?

Mind considers that the current approach to judicial dialogue is working well and does not consider any change is required in this area

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 "over-judicialising" 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.

Mind's view is that the HRA is a carefully constructed scheme specifically designed to uphold rights whilst maintaining the authority of Parliament. It is a finely balanced piece of legislation and we would have significant concerns that attempting to amend or improve any individual element would have unintended negative consequences.

Before turning to the specific questions, we draw the Review's attention to the valuable role of the HRA in avoiding matters being taken to court altogether. Mind's experience is that the presence of the HRA on the statute book has been instrumental in empowering patients and their advocates to secure respect for their rights. The following are examples[9] from our experience:

- A woman was discharged from a Mental Health Unit before she felt ready and while she was experiencing suicidal thoughts. Her advocate relied on the woman's rights under Article 2 to press her support team to protect her right to life, and they increased the frequency of their visits as a result;
- An advocate on a mental health ward helped a man make a complaint relying on Article 3, after the patient was restrained in a way he felt was intended to cause pain. The hospital introduced new staff training on the use of restraint.

[9] Featured in Mind's Four Page Focus-Human Rights and Mental Health in the Mind Membership Magazine Issue 15 Spring 2014. Copy available on request.

- An informal patient was being prevented from leaving the ward. His advocate argued that his rights under Article 5 were being violated and successfully complained on his behalf.

The HRA has been of central importance in protecting the human rights of inpatients during the Covid-19 pandemic. We are aware of examples where detained patients and their advocates have relied on the HRA to safeguard their rights swiftly and usually by correspondence alone. Examples included challenges to blanket policies on section 17 leave and unlawful restrictions on communications with lawyers acting in Mental Health Tribunals. Importantly, patients and advocates were able to rely on the guidance of organisations such as the statutory regulator for England, the Care Quality Commission[10], which expressly refer to concepts from the HRA, necessity and proportionality[11].

Mental health professionals were also encouraged to maintain a human rights focus when providing care during the pandemic. For example, guidance issued by the Royal College of Psychiatrists[12] advised its members that:

> *"Principles to be borne in mind in resolving particular ethical dilemmas include fairness and distributive justice, equity, respect for autonomy, necessity, proportionality and reciprocity, and beneficence and non-maleficence, whilst continuing to promote empowerment, autonomy and recovery. All approaches need to remain consistent with human rights – the Universal Declaration of Human Rights and the Convention on Rights of Persons with Disabilities."*

The value and impact of the HRA is much broader than the questions in this call for evidence suggest. If the HRA did not function as well as it currently does, we do not believe that a human rights approach would be possible in the ways highlighted above.

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?

[10] Protecting people's human rights while detained under the MHA is an express purpose of the CQC – their website says, 'Our job is to check that patients' basic human rights are maintained while they are being cared for or treated under the Mental Health Act.' - https://www.cqc.org.uk/guidance-providers/mental-healthservices/mental-health-act

[11] See for example the CQC's Brief Guide: the use of 'blanket restrictions' on mental health wards- https://www.cqc.org.uk/sites/default/files/20191125_900767_briefguideblanket_restrictions_mental_health_wards_v3.pdf, cited in NHS England's *Legal guidance for mental health, learning disability and autism, and specialised commissioning services supporting people of all ages during the coronavirus pandemic"* dated 30 March 2020.[14]

[12] https://www.rcpsych.ac.uk/about-us/responding-to-covid-19/responding-to-covid-19-guidance-forclinicians/covid-19-ethical-considerations

Mind's view is that the carefully constructed scheme of the HRA was specifically designed to uphold rights whilst maintaining the authority of Parliament.. We would have significant concerns that attempting to shift the balance could have unintended consequences for ensuring swift access to justice for people with mental health problems. For example, if the use of section 3 was limited in the future, this would undermine the court's ability to provide an immediate remedy to individuals in their cases.

For people with mental health problems, the current framework has meant laws and policies which have better respected human rights - and a route to challenge when this isn't the case. The Mental Health Act 1983 (MHA '83) has been challenged and updated a number of times in this way, through both Declarations of Incompatibility under section 4 and judicial interpretation under section 3.

For example, the right to liberty (Article 5) was used to challenge a section/provision of the MHA '83, which placed the burden of proof on patients to prove that the criteria justifying detention in hospital for treatment no longer existed in order for the Mental Health Review Tribunal to order discharge. This was found to be incompatible with human rights, and the court issued a Declaration of Incompatibility. [13] Following the case, the situation was remedied with the swift introduction of the Mental Health Act 1983 (Remedial) Order 2001.

In the case of SSG, who wanted her same-sex partner to be her 'nearest relative' under the MHA '83, judicial interpretation clarified that same-sex partners should qualify as a "relative" under the law.[14]-

In this sense, the framework has allowed the MHA to be updated in response to changing times. The latest stage in this process is the Government's White Paper, Reforming the Mental Health Act (January 2021)[15]. This in turn is largely based on the recommendations of the Independent Review of the Mental Health Act, chaired by Sir Simon Wessley, "Modernising the Mental Health Act- Increasing Choice, reducing compulsion"[16]. In his introduction, Sir Simon wrote:

> *"I was tasked to see If the Act is up to date in how it deals with human rights (it isn't)"*

He later referred to:

[13] R (H) v MHRT North and East London Region (2001) EWCA Civ 415

[14] Please note that this case took place before the introduction of equal marriage
R (SSG) v Liverpool City Council [2002] EWHC 4000

[15] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/951398/mental-health-act-white-paper-web-accessible.pdf

[16] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778897/Modernising_the_Mental_Health_Act_-_increasing_choice__reducing_compulsion.pdf

> *"the need to take what Danius Puras calls the "deliberate, targeted and concrete" [12] actions to eliminate human rights violations within mental health settings*.

The proposed new principles in the White Paper- "Choice and Autonomy, Least Restriction, Therapeutic Benefit and The person as an Individual" are imbued with concepts from human rights law, as are many of the White Paper's proposals.[17] In this way, the HRA has acted as a strong driver for legislative reforms that uphold the rights of people who use mental health services and come closer to meeting their needs and expectations.

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)?

Mind is not aware of the domestic courts and tribunals interpreting legislation in a manner inconsistent with the intention of the UK Parliament in enacting it. However, judicial interpretation can ensure that outdated legislation keeps pace with the values of the contemporary UK Parliament, whilst still being limited by the overall purpose of the legislation.

To put this into context, the MHA 1983 came into force when attitudes to same sex relationships were vastly different. Only a few years after the MHA's enactment, Section 28 of the Local Government Act 1988 prohibited local authorities from promoting homosexuality. However, by the time SSG brought their case in 2002 (referred to above), societal values had shifted dramatically and two years later the Civil Partnerships Act 2004 was enacted with cross party support. Judicial interpretation under section 3 ensured that the overall purposes of the legislation (to provide a safeguard against arbitrary detention) was extended to people in same sex relationships.

Reform of legislation like the MHA is often a "once in a generation"[18] opportunity. Section 3 provides an immediate remedy to individuals and ensures that legislation can be interpreted in a way that aligns with modern values where full scale reform is not an option.

(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?

[17] For example, the proposals to strengthen the criterial for detention and extend the powers of the Tribunal to consider challenges to treatment decisions.

[18] https://twitter.com/dhscgovuk/status/1349289756572704769

For the reasons above, we see no need to amend or repeal section 3. This would undermine important rights for people with mental health problems. Retrospective legislation is damaging to certainty and fairness.

(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?

It is not entirely clear from the question exactly what is envisaged. If it is suggested that the courts should simply refer the matter to Parliament at the outset, without the need to rule on this, Mind would be concerned that this would lead to significant delay due to limited Parliamentary time; would be an inefficient use of the courts and would undermine the carefully crafted scheme whereby sections 3 and 4 work together.

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

Again, it is not clear what is envisaged or what it is considered ought to change. Challenges should be considered on public law grounds including whether there has been a violation of ECHR rights.

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?

Mind does not consider any change is required in this area

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?

Mind has no observations to make on this question

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?

Mind is unclear what the purpose of any modification would be and is concerned that the cumulative effect could be of increasing delays following a declaration of incompatibility.

The remedial order process is discretionary and provides a "fast track" procedure to amend legislation found to be incompatible. The process has in-built parliamentary scrutiny through

the Joint Committee on Human Rights (JCHR) which must report to both Houses on any remedial order Both Houses must then approve the order for it to become law.

If it is suggested that the "fast track" procedure should be abolished, Mind would oppose this. Declarations of incompatibility often concern very technical pieces of legislation and limited parliamentary time could frustrate the purpose of the remedial order process altogether.

In the case of R (H) v MHRT North and East London Region (referred to above), the issue was technical but of fundamental importance to patients accessing the Mental Health Tribunal. The declaration of incompatibility made under section 4 was swiftly followed by a remedial order which altered the burden of proof for many thousands of detained patients accessing the Mental Health Tribunal.[19] Had the remedial order process not been available, these people would potentially have had to wait much longer for a resolution, if it had come at all.

Mind have had sight of the Law Society's response to this Call for Evidence. We note their position about the potential problems with using the remedial order process to amend the HRA itself. Mind shares these concerns and believes this is an area the panel should consider.

[19] In 2002 – 2003, there were 22,595 patients detained under section 2 and 3 of MHA 1983 in England who would have potentially been eligible to apply to the Mental Health Tribunal. National Statistics (2005) 'Inpatients formally detained in hospitals under the Mental Health Act 1983 and other legislation, England: 1994-95 to 2004-05' https://files.digital.nhs.uk/publicationimport/pub00xxx/pub00801/inp-for-det-men-heaact-1983-eng-94-05-rep.pdf