



Joint Committee on Human Rights

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From Rt Hon Harriet Harman MP, Chair

Sir Peter Gross
Chair of the Independent Human Rights Act Review

4 March 2021

Dear Sir Peter

I am writing on behalf of the Joint Committee on Human Rights (JCHR) with our submission to the Government's Independent Human Rights Act Review. The JCHR launched its own inquiry to run alongside your independent review. We are writing to you at this point to comply with your deadline for submissions of 3 March, but we will be hearing further evidence and we will publish our full Report in due course. We have published all the written submissions and oral evidence we have received up to 24 February on our website. We hope this approach is helpful to you in your work.

The evidence we have heard to date along with our experience of conducting thematic inquiries, legislative scrutiny, and holding the Government to account on its response to human rights violations lead us to the view, in response to the Independent Review's consultation questions, that there is no compelling case for reform of the Human Rights Act 1998 (HRA). We have found that the legislation:

- Respects parliamentary sovereignty;
- Does not draw the UK courts into making decisions which are not for the courts but should be made by Parliament and Government;
- Provides an important mechanism which allows individuals to enforce their rights which would be impossible for most people, were it to require the great expense and years of delay of going to the European Court of Human Rights (ECtHR) in Strasbourg;
- Reduces the likelihood of the UK Government being found in breach of the Convention by the ECtHR by enabling the UK courts to rule on Convention rights, which they do in a way which is respected by and helpful to the ECtHR;
- Helps the ECtHR by providing greatly valued UK judicial input into European Convention on Human Rights (ECHR) jurisprudence; and
- Improves the work of the criminal justice system and other agencies by instilling a "human rights culture" in training and guidance.

The role of Parliament

The HRA does not act as a constraint on parliamentary sovereignty. Indeed, Dominic Grieve, former Attorney General, described its creation as “a masterpiece of respect for parliamentary sovereignty”.¹ We agree.

When the courts find that legislation, or the way that it has been applied, is incompatible with a Convention right section 3 HRA requires that they must first attempt to read that legislation in a way that makes it compatible. Where such a ‘read down’ is not possible, the courts are not permitted to create new law. Thus, the separation of powers between the courts and the legislature is respected.

Interpreting legislation in accordance with other principles is not novel to the HRA. Indeed, we heard from Dominic Grieve and Lord Neuberger, former President of the Supreme Court, that reading down and reinterpreting legislation in accordance with common law principles has been a common practice for decades.²

Often when the courts have read down legislation so as to ensure compatibility with the Convention, this has reflected societal changes that have taken place since it was enacted. We also heard of examples where the Courts had been unwilling to use the interpretative obligation where it was clear that a matter should go back to Parliament for debate and consideration there.

Eve Samson, Clerk of the Journals, told us that “*it is inevitable [that] there will be tensions and there will be cases where Parliament and the courts may disagree*”.³ Speaker’s Counsel, Saira Salimi, agreed, suggesting that “*it is possible for people in good faith to come to quite different conclusions about the compatibility and particular interpretation of legislation with the convention rights*.”⁴ But ultimately, Parliament can legislate if it disagrees with something the courts have done in pursuance of the interpretive obligation.

In respect of *secondary* legislation, if a Convention compatible reading is not possible the courts do ultimately have the power to quash statutory instruments as unlawful – but this is a pre-existing power of the High Court and the Court of Session to strike down unlawful secondary legislation, not one brought in by the HRA.

In respect of *primary* legislation, the courts are unable to set aside an Act of Parliament considered to be incompatible with Convention rights. They are limited to making a declaration of incompatibility under section 4 HRA and handing the matter back to Government and Parliament to resolve. It is then up to Government to propose a solution to an incompatibility, such as a Bill or a remedial order. It is for Parliament to scrutinise that proposal and decide on whether the solution is acceptable through its work on any Bill or remedial order and in holding Government to account for addressing any human rights violations.

The interplay of sections 3 and 4 HRA represents a carefully struck balance between respect for the legislative sovereignty of Parliament and the need to provide effective remedies for breaches of Convention rights. Lord Neuberger described it as “*a very elegant way of getting the courts to be free to do their job of deciding whether a statute is inconsistent with human*

¹ Oral evidence taken on 27 January 2021, HC 1161, [Q5](#)

² Ibid

³ Ibid, [Q11](#)

⁴ Ibid, [Q11](#)

rights, but then paying proper regard to parliamentary sovereignty by saying that it is over to Parliament to decide what to do about it.”⁵

A declaration of incompatibility is considered by the courts to be a measure of last resort. While making a declaration of incompatibility 'part of the initial process of interpretation' instead might result in greater power to resolve human rights issues being placed in the hands of the Government and Parliament, it would also result in more victims being denied an effective remedy in domestic courts – therefore weakening the timely enforcement of human rights in the UK and leading to more applications being made to the ECtHR in Strasbourg. Notably, there is no clamour from Parliament for a more active role than it already has in addressing incompatibilities in legislation. We can see no case for such a change.

The remedial process

The Government may take action to remedy an incompatibility in the law identified in a declaration of incompatibility (or following a judgment of the ECHR); usually either by a Bill or by way of the remedial order process provided under section 10 HRA. Section 10 HRA provides a specific procedure for remedying legislation that has been declared incompatible. It permits a Minister to make a remedial order amending the legislation in a way considered necessary to remove the incompatibility. Such remedial orders are subject to much greater scrutiny than many other forms of secondary legislation, including statutory instruments that may have a wide-ranging impact on human rights as we have seen during the pandemic.

Practice over the last 20 years has shown that the remedial power has been used only rarely and where a topic is not considered controversial. Of the 43 declarations of incompatibility made since 2000, only 11 have been amended by way of remedial order.⁶

The remedial power can only be used where “there are compelling reasons for proceeding under this section” rather than taking a normal legislative route. This requirement for “compelling reasons” means that remedial orders cannot be used when primary legislation in the form of a Bill is what is required. The JCHR analyses each remedial Order (and draft remedial Order) as against a set of criteria to determine if it meets the procedural requirements (including whether it is a topic that would be better suited for consideration by Parliament in a Bill) as well as considering the substantive changes being introduced.⁷ The JCHR produces

⁵ Ibid, Q9

⁶ This is the number researched by the staff of the JCHR. The MoJ state that there have been only 8 remedial orders. They add that of the other declarations of incompatibility, 15 have been addressed by primary or secondary legislation (other than remedial orders) and the rest were either overturned on appeal, resolved prior to judgment, addressed by other measures or are still under consideration. See [“Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2019–2020”](#) Dec 2020, CP 347

⁷ Under Commons Standing Order No. 152B and Lords Standing Order No. 72(c) Parliament has given the JCHR a role in scrutinising and reporting on any remedial orders which are made under section 10. The 2001-2002 JCHR addressed what might amount to “compelling reasons” in its report on the [“Making of Remedial Orders”](#). Noting expressly that this was not an exhaustive list they suggested:

- Where the amendment relates to a body of legislation which is under review with a view to major legislative reform in the next few years
- Where the legislative timetable is already fully occupied by other important, or even emergency, legislation
- Where waiting for a slot in the legislative timetable might cause significant delay and the Remedial Order procedure would be likely to cause less delay
- When the incompatibility affects the life, liberty, safety, or physical or mental integrity of the individual - in such cases, there would be ‘compelling reasons’ even if a Remedial Order would achieve only a small acceleration in the process

two Reports on a non-urgent remedial Order – once when it is laid as a proposal and one when it is laid in draft which carefully consider a number of factors including whether the procedure used is appropriate.⁸ In practice, the remedial power is not used for politically sensitive issues and is therefore not seen as controversial. Given pressures on parliamentary time there is very little appetite for requiring stricter procedures and processes for non-controversial matters. There is therefore little to no appetite for a more stringent parliamentary process in respect of remedial orders.

The relationship between the courts and the Government

Domestic courts provide a key role in maintaining the rule of law by scrutinising the lawfulness of Government actions and decision-making through judicial review. Under section 6 HRA public authorities, including Government departments, have an obligation to act compatibly with Convention rights and under section 7 HRA individuals have the right to bring court proceedings against public authorities that fail to meet that obligation. The HRA does not, therefore, materially alter the relationship between domestic courts and the Government, but it does extend the grounds on which they may find the actions of public authorities unlawful to include breaches of the Convention.

The same obligation to act compatibly with Convention rights applied to the State, and by extension to any emanations of the State, prior to the HRA coming into force - as a result of the UK being a signatory to the ECHR. The difference was that this obligation was not actionable in domestic courts; any claim for breach had to be taken to Strasbourg, making enforcement of human rights so much harder than it is now. Thus, the review of Government actions being conducted by domestic courts under the HRA is essentially the same review of Government as would be conducted by Strasbourg if the HRA were not in force. This means both that far fewer cases need to go to the Strasbourg Court, freeing up claimants and the Government from lengthy litigation before international judges, and that the Strasbourg Court benefits from the rationale of UK judges in the few cases that do reach the ECtHR. As Lord Neuberger suggested to the Committee: *“It is to the benefit of this country, and indeed all arms of the Government, that they have the UK judges deciding the issue before the Strasbourg court in the very few cases that get to the Strasbourg court.”*⁹

As discussed above, the courts have an obligation under s3 HRA to interpret legislation compatibly with Convention rights as far as it is possible to do so. Where it is not possible in respect of primary legislation, the courts can make a declaration of incompatibility under s4 HRA. The IHRAR terms of reference question whether s4 should “be considered as part of the initial process of interpretation rather than as a matter of last resort”. Such an approach is unlikely to improve the timely enforcement of applicable human rights standards for those who human rights are being violated. Moreover, it is questionable whether it is in the

⁸ These criteria are set out by the JCHR when reporting on remedial orders. See, for example, the Joint Committee on Human Rights, Fifteenth Report of Session 2017-19, [Proposal for a draft Human Rights Act 1998 \(Remedial\) Order 2019](#), HC 1547 / HL Paper 228:

“In order to consider the proposed order adequately, the Committee generally asks:

- Have the conditions for using the Remedial Order process (section 10 and Schedule 2 HRA) been met?
- Are there “compelling” reasons for the Government to remedy the incompatibility by Remedial Order?
- Is the procedure adopted...appropriate?
- Has the Government produced the required information and effectively responded to other requests for information from the Committee?
- Does the proposed order remedy the incompatibility with Convention rights and is it appropriate? For example, is any additional provision contained in the proposed order appropriate and *intra vires*—and does the proposed order omit additional provisions which it should have contained?
- Are the criteria of technical propriety applied by the JCSI satisfied?”

⁹ Oral evidence taken on 27 January 2021, HC 1161, [Q2](#)

Government's interest for the courts to resort to section 4 HRA more readily. In her evidence to the Committee Baroness Hale, former President of the Supreme Court, noted that the Government, as a party to human rights claims, has often argued that if the courts were to reject their primary argument that legislation was compatible with the Convention rights, then an incompatibility should be resolved through the interpretive obligation (section 3 HRA) rather than leaving the task to Parliament through a declaration of incompatibility. Baroness Hale added that: "*I cannot remember a case that I was involved in where we did not do whichever of [a section 3 interpretation or a declaration of incompatibility] the Government asked us to do*".¹⁰ Section 3 HRA thus provides a practical way for the State to resolve the issue there and then, remedying the breach of human rights, without the need for a remedial order or legislation.

While some claims brought under the HRA may inconvenience the Government, the majority make a valuable contribution to better governmental decision making. As Dominic Grieve put it: "*An adverse court decision, as I always used to say to my colleagues, is helpful, or should be seen as something to help better governance, not an impediment to it*".¹¹ Lord Neuberger agreed that a focus on a few high profile cases fails to recognise the positive effect of the HRA on a more day-to-day level: "*The danger is that the controversial decisions on which people can strongly disagree, or the odd decision where the courts got it wrong, get very strong and often very critical headlines, and can give a very distorted picture of the operation of the Human Rights Act, which...operates normally at a much less high-profile level in relation to people going about their business and daily lives*".¹²

Impact of the Human Rights Act on the enforcement of rights

Human rights on paper are meaningless if they cannot be enforced. The crucial importance of the enforcement of human rights for individuals affected has been a running thread throughout the work of the JCHR. The HRA has had an enormously positive impact on the enforcement of human rights in the UK, but arguably more could and should be done to improve that enforcement on the ground. We repeatedly hear of the difficulties faced by individuals whose human rights have been violated in trying to get their rights respected, even with the benefit of the HRA.

The HRA has enabled the enforcement of human rights in the UK through a number of different mechanisms.

The HRA brought the rights guaranteed under the ECHR to the foreground for UK public authorities, influencing decision and policy making to improve respect for human rights. Where public authorities fail to act compatibly it provides a remedy via the courts. The Equality and Human Rights Commission told us that this has improved practice among public authorities, and provided "*a common framework of legal principles, which can promote high-quality, user-focused services, and guide decisions about competing priorities*".¹³ This also means that many more issues can be resolved without the need to resort to litigation.

The HRA reduced the time and cost of enforcing human rights by enabling domestic courts rather than the European Court of Human Rights (ECtHR) to address questions of compatibility. As Baroness Hale told us, "*That must be a good thing, compared with having to take the United Kingdom to Strasbourg, to the European Court of Human Rights, in order to get a remedy years after the event*".¹⁴

¹⁰ Oral evidence taken on 3 February 2021, HC 1161, [Q27](#)

¹¹ Oral evidence taken on 27 January 2021, HC 1161, [Q4](#)

¹² Ibid

¹³ [HRA0025](#) [Equality and Human Rights Commission]

¹⁴ Oral evidence taken on 3 February 2021, HC 1161, [Q17](#)

The duty imposed on public authorities to act compatibly with the Convention, combined with the ability to have human rights claims heard in UK courts, means fewer cases need to go to court, and when they do, the cost and time of finding a resolution are radically reduced.

As explained above, the HRA achieves this while maintaining parliamentary sovereignty: the courts cannot strike down primary legislation. Government and Parliament are able to decide how to act after a declaration of incompatibility, although the overarching duty on the UK to comply with its international legal obligations remains.

Judicial dialogue between the domestic courts and Strasbourg

Unlike the situation before October 2000, under the HRA the domestic courts are able to address the same legal issues as are being considered in Strasbourg: the application of the ECHR in the UK legal context. Moreover, this means that the Strasbourg Court has the benefit of seeing the careful judicial consideration given by UK Courts in assessing the UK legal and political context to be applied in a given case.

The operation of the HRA has led to harmony between the two systems creating a cooperative relationship. The President of the European Court of Human Rights (ECtHR), Robert Spano, and the UK judge, Tim Eicke, told us that this relationship is mutually beneficial. Our domestic courts' consideration of the legal issues help Strasbourg to understand the UK context, reducing the likelihood of adverse findings. They told us that:

*“Domestic judgments frequently set out crucial aspects of the case including the detail of the applicable domestic law, the competing interests at play as well as any potential domestic sensitivities which may be relevant to the margin of appreciation. When the domestic decision-making is undertaken by reference to Strasbourg case-law and principles this is extremely helpful for the Court. As a matter of principle, we can probably say that having the benefit of a careful and detailed domestic engagement with the Convention principles at the national level is likely to reduce the likelihood of finding a violation against the respondent State in question”.*¹⁵

Baroness Hale provided us with the example of the *Animal Defenders International* case, which concerned political advertising, as one in which the Strasbourg court was convinced by the reasoning of the House of Lords to find that the legislation in question was compatible with the Convention, despite existing case law that suggested it might not be.¹⁶ And we heard how the Supreme Court went to considerable effort to help Strasbourg understand the relevant surrounding context in UK law in relation to hearsay, in order to avoid a finding that our rules on the admissibility of hearsay evidence were incompatible with fair trial rights.¹⁷

Since the HRA came into force, significant analysis of Strasbourg case law has been undertaken by the domestic courts, and the superior courts now show an in-depth understanding. This means that the ECtHR can be more robust in its application of the concept of subsidiarity, whereby primary responsibility for protecting Convention rights lies with the UK's domestic authorities. As such the ECtHR will be reluctant to step in where it is clear that the domestic authorities (Government, Parliament and the Courts) have clearly carefully considered the human rights issues engaged.

There are very few violations found against the UK. The number of applications brought to Strasbourg against the UK has been the lowest per head of all of the 47 Member States for the past four years. The percentage of cases that find a violation against the UK is also

¹⁵ [Letter](#) from President Spano to the Chair of the JCHR, dated 17 February 2021

¹⁶ Oral evidence taken on 3 February 2021, HC 1161, [Q19](#)

¹⁷ *Ibid*, [Q20](#)

extremely low. In 2020 only two out of 284 cases against the UK found that there had been a violation. President Spano suggested that “These figures indicate that potential human rights complaints are being successfully dealt with at the domestic level.”¹⁸

Further, the UK courts’ “sophisticated analysis” helps Strasbourg to develop jurisprudence in cases involving other countries. We heard of a recent example of a case relating to Denmark, in which the Grand Chamber changed its approach having considered the reasoning of the UK Supreme Court in a case concerning the same issue.¹⁹

Right to an effective remedy

The UK has accepted a legally binding obligation to “secure to everyone” within its jurisdiction the rights protected by the ECHR (Article 1 ECHR). Moreover, the UK has undertaken to provide anyone whose rights have been violated with “an effective remedy” for a breach of a Convention right (Article 13 ECHR).

The HRA is the principal way in which the UK both secures to everyone within its jurisdiction the Convention rights – and how it enables them to be enforced so that there is an “effective remedy” in case of a breach. The HRA is therefore the way that the UK complies with its internationally binding obligations under the ECHR, including Articles 1 and 13 ECHR.

Any change to the HRA, particularly any change that makes it more difficult for domestic courts to remedy rights violations brought before them, risks weakening the UK’s ability to comply with its obligations under Article 1 and 13 ECHR (as well as any related substantive obligations).

This includes any attempt to place limits on the application of the HRA to acts of public authorities taking place outside the territory of the UK that would be more restrictive than the exceptional extra-territorial effect established in Strasbourg case law.

The extent of extra-territorial jurisdiction of the ECHR is now settled case-law. A balance has been struck whereby the ECtHR and domestic courts have made clear when the ECHR would apply and to what extent, such that it is operationally workable for overseas peace-keeping and military actions. In cases where it is not possible to comply with specific ECHR rights in overseas military operations, the Government can, in accordance with Article 15 ECHR, make a derogation where it is strictly necessary to do so and in line with the requirements for derogating from international human rights obligations. Therefore there does not seem to be any case for limiting the ability of those, such as members of the Armed Forces, whose human rights may have been violated from having their cases determined by UK Courts.

If the extra-territorial effect of the HRA is not consistent with the extra-territorial effect of the ECHR, then victims will still be able to hold the UK to account but will have to apply to Strasbourg to do so. Consequently those cases would not have the benefit of the UK Courts having first carefully considered the application of the relevant domestic laws and practices to the given case. In such cases there could be a risk of the UK being in breach not only of the right in question, but also its obligations under Article 1 and Article 13 ECHR for not having any adequate domestic remedy.

Impact on public authorities

It is also important to note that many of the benefits of the HRA have been achieved without the need for litigation. As discussed above, section 6 HRA places an obligation on public authorities to act compatibly with Convention rights. This has helped to foster a “human

¹⁸ [Letter](#) from President Spano to the Chair of the JCHR, dated 17 February 2021

¹⁹ [S., V. and A. v. Denmark \[GC\], nos. 35553/12 and 2 others, 22 October 2018](#)

rights culture” by requiring training and guidance for staff that has improved practices in the criminal justice system, in health and social care, and other public authorities. We heard from Dominic Grieve that the education package for public authorities that came with the HRA has led to a consistent improvement in the standards that groups such as the old, the vulnerable, and children have received as a consequence. He suggested that improvements in the treatment of individuals by public authorities was the “single most important” impact of the HRA.²⁰

We will be exploring this issue in more detail in our upcoming evidence sessions.

Conclusion

We have been struck by the evidence that enforcing human rights is so crucial, and how well the HRA achieves this while also respecting the sovereignty of Parliament. We do not see that any compelling case for reform or amendment of the HRA in response to the Review’s consultation questions has been made.

Mr Grieve suggested that it was hard to see how the main structure of the Act could be improved. Lord Neuberger agreed that any change or improvements that could be made would be very much “*on the boundary*”, and described the HRA as a “*very cleverly drafted piece of legislation*”.²¹ And Baroness Hale also told us that, as far as she was concerned, there was no problem with the HRA that required fixing, and that she could not “*think of a fix that would make things better as opposed to potentially making things worse*”²²

It is notable that there have been numerous reviews of the HRA carried out by successive administrations, none of which have produced compelling evidence of a problem, or viable proposals for reform. Dominic Grieve told us of his involvement in previous attempts at reform, including a report for David Cameron in 2006 which concluded that “*the wiggle room to do anything was extremely limited and gave rise to the question of whether it was worthwhile*”. He noted that the subsequent review in 2012 (by the Commission on a Bill of Rights) “*did not come up with anything*” and that a further review commissioned by David Cameron “*led absolutely nowhere*”.²³

Given that the Government is, rightly, committed to the Convention and indeed the human rights contained in it, many of which existed in the common law long before the ECHR, the position remains that the potential for reform is limited. The HRA strikes a careful balance, respecting our constitutional arrangements and upholding the rule of law. Even relatively minor, technical changes risk upsetting this balance. Moreover, despite these previous attempts at reform, no case for reform been established.

Next steps

Our inquiry into the Human Rights Act will now continue. Our own inquiry is also exploring the following issues about the operation of the Act with witnesses:

- The effectiveness and impact of the section 6 obligation on public authorities to act compatibly with Convention rights;
- Matters relating to the extra territorial application of the HRA; and
- How any attempts to amend the Human Rights Act interplay with the UK’s devolution framework and statutes.

We look forward to engaging with you further as we continue our work, and as you conclude your own Review.

²⁰ Oral evidence taken on 27 January 2021, HC 1161, [Q1](#)

²¹ Ibid, [Q5](#)

²² Oral evidence taken on 3 February 2021, HC 1161, [Q17](#)

²³ Oral evidence taken on 27 January 2021, HC 1161, [Q8](#)

Yours sincerely

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