

Justice Select Committee Note

1. I submit this written note at the request of the Justice Select Committee following my oral evidence session on 1 February 2022. I was asked to set out my categorisation of HM Government's consultation document on reform of the Human Rights Act 1998 (the HMG Consultation).
2. The most important point to understand, in my view, is that the HMG Consultation is not a response to the Independent Human Rights Act Review's Report (the IHRAR Report). That is evident if it is contrasted with Her Majesty's Government's response to the Faulks Review concerning administrative law. The Faulks Review and the response to it could be placed next to each other and read together. It is not possible to do so with the HMG Consultation and the IHRAR Report.
3. Taking the IHRAR Report as a starting point, the HMG Consultation can conveniently be broken down into the following categories.

(1) Areas of (apparent) agreement

4. The two documents appear to agree on the following points:
 - Giving greater prominence to the common law in respect of section 2 of the HRA;
 - Not repealing section 3 of the HRA, albeit the HMG Consultation focuses on proposed amendments to section 3 that, in reality, amount to repeal;
 - Exploring greater Parliamentary involvement in respect of section 3 judgments, and a HRA judgment database;
 - The introduction of suspended quashing orders;
 - Remedial Orders not being used to amend the HRA;
 - Change being needed to the extraterritorial scope of the Convention, albeit not unilateral change;

(2) Areas of (apparent) disagreement without addressing IHRAR's reasons for not recommending or rejecting those options

5. The two documents appear to disagree on the following points recommended or contemplated by the HMG Consultation:

- The removal of the provision from section 2 requiring UK courts to take Strasbourg case law into account;
- The introduction of an express provision that UK courts may take other common law systems into account under section 2;
- Amending section 3 to limit its applicability to instances of legislative ambiguity only;
- Contemplating declarations of incompatibility as the only remedy available with regard to 'certain' secondary legislation.

(3) Areas which have not been addressed at all

6. The following areas discussed by IHRAR were not addressed at all by the HMG Consultation:

- IHRAR's comments, in its chapter 2 at [13] and following, on a Bill of Rights;
- IHRAR's approach to the margin of appreciation and judicial restraint. (In passing the recent UK Supreme Court decision in [R \(Elan-Cane\) v Secretary of State for the Home Department](#) [2021] UKSC 56; [2022] 2 WLR 133 is a graphic example of judicial restraint at work. Views might differ on its interpretation of the margin of appreciation, but it cannot fairly be read as supporting the notion that the margin belongs to Parliament as distinct from being shared between the different branches of the state in accordance with the UK's constitutional practice. And it was a judgment not a statute which spoke in these terms (see *Elan-Cane* at [85]).
- Dialogue with the European Court of Human Rights (the Strasbourg Court) and the importance of the mature equilibrium reached between the UK courts and the Strasbourg Court as a UK asset;
- The issue of the HRA's temporal jurisdiction
- Designated Derogation Orders;

- The width and depth of IHRAR's consultation and the detailed submissions made to it.

(4) Matters outside IHRAR's scope

7. The following matters are and were outside IHRAR's terms of reference:

- Deportation;
- Freedom of expression and jury trial (although note IHRAR's comment on the latter in its discussion in chapter 2 of its report at [13]-[17]).
- The operational impact of judgments such as *Osman*, *Ziegler* and *Cheshire West*;
- Proportionality.

(5) Matters where it is not entirely clear what the HMG Consultation has in mind.

8. There are one or two matters where it is not entirely clear what the HMG consultation intends:

- Supremacy of the UK Supreme Court, particularly given *Kay v Lambeth BC* [2006] 2 AC 465, discussed in the IHRAR Report, chapter 2 at [56];
- The Parliamentary democratic shield, not least given the continued principle of Parliamentary Sovereignty, noted at numerous points within the IHRAR Report.

Sir Peter Gross

7 February 2022