Justice Committee

8 March 2022

Dominic Raab MP
Deputy Prime Minister
Lord Chancellor & Secretary of State for Justice
Ministry of Justice
102 Petty France
London SW1H 9AJ

[By email]

Dear Dominic,

Response to the Government's consultation on Human Rights Act Reform

The Justice Committee welcomes the opportunity to contribute to the Government's consultation on reforming the Human Rights Act 1998 (the HRA). The HRA is a significant constitutional statute that is designed to enhance the protection of human rights within the United Kingdom. The Committee recognises that after over twenty years in force, it is important to examine how the UK's human rights framework is working and to establish whether it can be improved. As Sir Peter Gross, the Chair of the Independent Review of the Human Rights Act 1998, said to us in evidence otherwise there is "the danger of complacency".[1]

The Independent Review of the Human Rights has produced an extremely valuable report that provides a detailed assessment of how the HRA is working. The Independent Review's scope was carefully defined to focus on two themes: the relationship between domestic courts and the European Court of Human Rights (ECtHR); and the impact of the HRA on the relationship between the judiciary, the executive and the legislature. By contrast this consultation is broader and includes significant issues that were outside of the scope of the Independent Review.[2] On

[1] Justice Committee, Human Rights Act Reform, 1 February 2022, Q45
[2] See written evidence of Sir Peter Gross to the Justice Committee

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substantive Convention rights, for example, questions 23, 24 and 25 of the consultation, it is regrettable that the Independent Review was not given an opportunity to provide its view on these important questions. Lord Carnwath, the former Supreme Court Justice, told us on 8 February that he found this "frustrating".[3] We agree.

Sir Peter Gross outlined in written evidence to the Committee an analysis of how this consultation and the report of the Independent Review relate to each other.[4] This analysis highlights that there are some areas of agreement between the two documents, but it also draws attention to points where the consultation appears to disagree with the Review but without addressing the Review's reasons for not recommending or rejecting the relevant option. Given the quality of the work undertaken by the Review and the resources used, we believe it is incumbent on the Government to provide a detailed formal response to the Review's report.

Major constitutional reform should be underpinned by a well-structured consultation process. We welcome the fact that the Government is consulting on its proposals to change the HRA, however, we are concerned that the difference between the scope of the Independent Review and this consultation combined with the lack of a formal response to the Review, may make it harder to achieve the level of consensus which is desirable when making constitutional reforms.

The Committee's response focuses on four elements of the consultation: the separation of powers, the position of the Supreme Court, trial by jury and section 12 of the HRA.

[3] Justice Committee, Human Rights Act Reform, 8 February 2022, Q94
[4] See written evidence of Sir Peter Gross to the Justice Committee

The separation of powers

The consultation states that the Government wants to introduce a Bill of Rights which will provide "greater legal certainty and respect for the separation of powers between the judicial and legislative branches of government".[5] A number of the consultation questions cover the effect of the statutory framework of the HRA on the separation of powers and whether these should be changed. Overall, the Independent Review only recommended minor changes to this framework. Sir Peter Gross, in his evidence to the Committee, explained that in relation to the separation of powers, the HRA "had a more limited impact than was sometimes suggested".[6] He emphasised to us that the case law on the main provisions of the HRA had "settled down" in more recent years.[7] It is instructive that much of the controversy over the HRA relates to cases that were decided during the first decade of the Act's operation. He also drew attention to the courts' greater reliance now on judicial restraint, which he described as "the prevailing philosophy in the Supreme Court at the moment".[8] Lord Carnwath also stressed the settled approach of the courts and said that he was not convinced that the legislation was necessary to alter the effect of the HRA on the separation of powers.[9] The Deputy Prime Minister and Lord Chancellor, Dominic Raab, told the Committee that even if the approach of the court had changed in recent years, that in itself was a reason for legislating: "precisely because what ebbs may flow, there is a case for codifying it".[10] If that is the aim of this Bill of Rights, then the Government should articulate how the legislation would limit the ebb and flow that the Deputy Prime Minister referred to.

If implemented, the new Bill of Rights will require the courts, and particularly the Supreme Court, to decide how to interpret the new legislative framework. As such, it

[5] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights – consultation (2021) para 182
[6] Justice Committee, Human Rights Act Reform, 1 February 2022, Q58
[7] Justice Committee, Human Rights Act Reform, 1 February 2022, Q46
[8] Justice Committee, Human Rights Act Reform, 1 February 2022, Q58
[9] Justice Committee, Human Rights Act Reform, 8 February 2022, Q78
[10] Justice Committee, The work of the Ministry of Justice, 20 November 2021 Q20

will inevitably take a while for the case law on the new framework to "settle down" again. In that sense, there is a risk that a new framework will result in cases and judgments that lead to fresh concerns over the separation of powers. In broad terms, there are reasons to be sceptical of the claim that the HRA is responsible for a significant problem in relation to the separation of powers. Professor Richard Ekins told us that it was "undeniable" that the Human Rights Act has involved the courts in answering "political questions" that they would otherwise not have had the jurisdiction to answer.[11] Even if one does accept there is a problem, it is unclear whether a new legislative framework would necessarily provide improvements to either legal clarity or respect for the separation of powers.

In relation to Question 12 of the consultation, the Committee would suggest that of the two sections outlined, Option 2 would be preferable to Option 1. That said, our overall position would be to support the Independent Review's recommendation that section 3 should be amended to reflect the existing approach of the courts. We would support an amendment to section 3 along the lines of that set out on page 251 of the Independent Review. In his evidence to us, Sir Peter Gross emphasised the confusion over the Government's position on section 3.[12] The consultation notes that the Government agrees with the Review Panel that section 3 should not be repealed.[13] However, the consultation does indicate that the Government's preferred option would be to replace section 3 with an alternative provision set out in Appendix 2.[14] By contrast with the indicative clause set out in the Review, both Option 2A and Option 2B set out in the consultation would remove the current wording: "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". As such it appears that the Government does not support the

[11] Justice Committee, Human Rights Act Reform, 8 February 2022, Q79
[12] Justice Committee, Human Rights Act Reform, 1 February 2022, Q48
[13] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights – consultation (2021) para 237
[14] Ministry of Justice, Human Rights Act Reform: A Modern Bill of Rights – consultation (2021) para 238

Review's approach to section 3. Option 2A and Option 2B would necessarily require the courts to develop a new approach to interpreting Convention Rights, and although there may be some merits in such a change, we are not convinced that the courts' existing approach has been shown to be sufficiently problematic. Furthermore, of the two approaches outlined, the Committee believes that Option 2A's requirement that a provision needs to be capable of more than one interpretation before it would apply would add unnecessary complexity into the court's approach.

In relation to Question 15 on section 4, we would not support making declarations of incompatibility the only available remedy to courts in relation to secondary legislation that is found to be incompatible with Convention rights. We agree with the point made by the Independent Review and Sir Peter Gross in evidence to us that it would be incongruous for human rights to be the only area where the courts could not rule that secondary legislation was invalid.[15] In relation to Question 16, we agree with Lord Carnwath that it would be beneficial for suspended and prospective quashing orders to be available in all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with Convention rights.[16]

The Supreme Court

In relation to Question 2 of the consultation on the position of the Supreme Court, the Committee would question whether it is correct to assert, as the consultation notes at para 198, that the supremacy of the UK Supreme Court has been undermined by the European Court of Human Rights. As Lord Reed noted in *Elan-Cane* in December 2021, the HRA does not mean that domestic courts are bound to follow every decision of the ECtHR "but there should in principle be an alignment between interpretation at the international and domestic levels".[17] The same point

[15] Justice Committee, Human Rights Act Reform, 1 February 2022, Q54
[16] Justice Committee, Human Rights Act Reform, 8 February 2022 Q119
[17] *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56 para 87

was made by the Supreme Court in *Pinnock* in 2010 and in *Haney* in 2015. In *Haney,* the Supreme Court explained that the degree of constraint imposed by section 2 of the HRA was "context specific". [18] In that case the court declined to follow the ECtHR's approach in *James v UK* "as it was based on an over-expanded and inappropriate reading of the word "unlawful" in article 5(1)(a)".[19] As with section 3 of the HRA, the domestic courts' position on section 2 now appears to be settled and not as problematic as it arguably was in the first decade of the HRA's operation.

In relation to Question 1 of the consultation, there is a risk that either of the two provisions proposed would cause uncertainty for limited, or at least unclear, benefit. As Sir Peter Gross set out in his evidence to us, the clause proposed would risk opening up a significant gap between the rights enforceable here and what can be enforced in Strasbourg.[20] That would seem to be in tension with the overall framework created by the HRA. While it is open to the Government to introduce an entirely different framework, it is unclear whether that is the Government's aim. In relation to considering the case law of other jurisdictions, it is also unclear what would be gained by including such a direction in statute. As Lord Carnwath explained to us in his evidence, there is nothing that stops the Supreme Court referring to the judgments of the courts in other common law jurisdictions in human rights cases.[21] If the clauses are not designed to change the existing legal position, then there is a risk, as Lord Carnwath set out to us, that their purpose will be uncertain and will cause "a lot of argument about what it is trying to achieve so it is actually counterproductive".[22]

[18] *R (on the applications of Haney, Kaiyam, and Massey) v The Secretary of State for Justice* [2014] UKSC 66 Para 35
[19] *R (on the applications of Haney, Kaiyam, and Massey) v The Secretary of State for Justice* [2014] UKSC 66 Para 35
[20] Justice Committee, Human Rights Act Reform, 1 February 2022, Q37
[21] Justice Committee, Human Rights Act Reform, 8 February 2022, Q91
[22] Justice Committee, Human Rights Act Reform, 8 February 2022, Q91

More broadly, we are unclear from the consultation how the Government envisages the proposed Bill of Rights will alter the way in which the domestic courts refer to the case law of the European Court of Human Rights when interpreting Convention rights. The consultation states that the Bill of Rights will retain all the substantive rights currently protected under the Convention and the HRA. If that remains the case it is difficult to see what would be achieved by enacting a complex interpretive provision, of the sort outlined in the Annex of the consultation, in order to require domestic courts to take an approach which is already possible under the HRA. As Professor Ekins set out in his evidence to the Committee: "To anticipate what Strasbourg will do is inevitable given the structure of the Human Rights Act and our membership of the convention."[23] However, we do appreciate that if the Bill of Rights contains an entirely new set of substantive rights, then section 2 would no longer be appropriate. But if that is what the Bill of Rights is designed to achieve then this will inevitably require the domestic courts to decide what those rights should mean. As Professor Ekins suggested to us, that is likely to increase the risk of "judicial creativity".[24]

Trial by Jury

In relation to Question 3 of the consultation, we have no principled objection to the inclusion of the right to trial by jury being included in the proposed Bill of Rights. In evidence to the Joint Committee of Human Rights, Lord Wolfson of Tredegar, explained that the Government is not planning to change the law on jury trials in England and Wales, Scotland or Northern Ireland.[25] Given that, we would expect to see a clearer justification of why the Right to Jury should be included in the Bill of Rights. Broadly speaking it is unwise to include provisions in legislation that are not designed to change the law, a point which was made to us by Kirsty Brimelow QC.[26]

[23] Justice Committee, Human Rights Act Reform, 1 February 2022, Q99
[24] Justice Committee, Human Rights Act Reform, 1 February 2022, Q99
[25] Joint Committee on Human Rights, Human Rights Act reform, 2 February 2022, Q23
[26] Justice Committee, Human Rights Act Reform, 8 February 2022, Q132

Even if the inclusion of the right to jury trial would not change the operation of jury trials, the Bill of Rights could seek to provide a degree of constitutional protection to the right. For example, the inclusion of the right could seek to limit the ability of future governments to change jury trials through secondary legislation. In practice any such protection would depend on the extent to which the courts were empowered to enforce the substantive rights in the Bill of Rights. Given the debate over limiting the right to jury trial in England and Wales during the covid-19 pandemic, there is a case for including the right to jury trial in the Bill of Rights in order to highlight its constitutional significance.[27] Its inclusion would not prevent changes to the operation of the right, but it would communicate to future Parliaments that any changes represent a change to a constitutional right. Professor Cheryl Thomas emphasised to us that trial by jury is very strongly supported by the public and as a result its inclusion in the Bill of Rights could help to emphasise that the Bill is a distinctively British set of rights.[28]

Section 12 of the Human Rights Act

In relation to Questions 4 and 5 of the consultation, we are sceptical as to whether the suggested changes to section 12 would achieve the Government's aim of encouraging the courts to give greater weight to the freedom of expression. The Committee is currently undertaking an inquiry on open justice which has highlighted the importance to the right to freedom of expression and the importance of the media's ability to report on what happens in open court. The limited effect of section 12 can be explained by the fact that under the HRA and the Convention, when more than one qualified right is engaged, the courts are required to balance the relevant rights by examining the specific context of the case. The Convention does not prioritise one qualified right over another, and the courts are required to balance those rights by examining the specific context which gives rise to their

[27] See Justice Committee, Coronavirus (COVID-19): The impact on courts (2020) paras 77-79
[28] Justice Committee, Human Rights Act Reform, 8 February 2022, Q136

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engagement.[29] Section 12 does not create a hierarchy of rights even at the interlocutory stage, as the Supreme Court explained in *PJS*.[30]

Furthermore, it should be recognised that in certain situations where the right to a private life is engaged, an interim injunction may be the only effective remedy. As long as the Bill of Rights includes the right to respect for private and family life then the courts will continue to seek to provide effective remedies to protect that right through injunctions where other remedies, such as damages, wouldn't be effective. If the Government's aim is to change the courts' current approach to privacy, then arguably it might be advised to consider the case for a comprehensive legislative framework instead of seeking to make changes through the proposed Bill of Rights. We are not convinced that broadly framed provisions that direct the courts to prioritise a particular interpretive approach will be the best way to secure greater protection for freedom of expression than is currently provided by the HRA. Alternatively, if the Bill of Rights is to contain an entirely new rights framework, then that could provide an opportunity for recasting the right to freedom of expression and the right to respect for private and family life in a way that could be substantially different from the Convention.

Your sincerely,

Sir Robert Neill MP

Chair

Justice Committee

[29] See Lord Hoffman in *Campbell v MGN* [2004] UKHL 22 and Lord Steyn in *In re S* [2004] UKHL 47

[30] *PJS v News Group Newspapers Ltd* [2016] UKSC 26 at para 20

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