Written evidence from Humanists UK (HRA0023)

ABOUT HUMANISTS UK

At Humanists UK, we want a tolerant world where rational thinking and kindness prevail. We work to support lasting change for a better society, championing ideas for the one life we have. Our work helps people be happier and more fulfilled, and by bringing non-religious people together we help them develop their own views and an understanding of the world around them. Founded in 1896, we are trusted to promote humanism by over 100,000 members and supporters and over 100 members of the All Party Parliamentary Humanist Group. Through our ceremonies, pastoral support, education services, and campaigning work, we advance free thinking and freedom of choice so everyone can live in a fair and equal society.

We have extensive experience supporting individuals in bringing successful legal claims under the Human Rights Act 1998. We have recently organised a coalition of more than 150 charities, trades unions, human rights organisations, and religion or belief groups in opposition to any weakening of the Act and judicial review. Signatories include the Samaritans, the RNIB, Shelter, Save the Children, the Wildlife Trusts, the Joint Council on the Welfare of Immigrants, the End Violence Against Women Coalition, and many more besides.[1]

SUMMARY OF OUR RESPONSE

We welcome the opportunity to help shape the Joint Committee on Human Rights' response to the Government's independent inquiry into the Human Rights Act 1998 (HRA). The HRA is the signature piece of rights protection in the UK. It has not only enabled ordinary citizens to enjoy and defend liberties that were once inaccessible, but also ushered in a general culture of respect and support for rights among public authorities. Viewed in the wider context of the Government's recent proliferation of Henry VIII powers, review of administrative law, and sustained rhetoric against the HRA, we are concerned that any amendment of the HRA risks undermining these achievements, and urge the Joint Committee to wholeheartedly oppose any erosion or watering down of its status.

RESPONSE TO CALL FOR EVIDENCE QUESTIONS

1. Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their human rights?

Prior to the HRA, fundamental rights were protected in the UK through a patchwork of common law presumptions[2] and stricter judicial review standards.[3] Although the UK also subscribed to the European Convention on Human Rights (ECHR), British citizens were unable to domestically rely on the ECHR for

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[1] For a full list of signatories, see 'Protect Human Rights and Judicial Review': https://humanrightsact.org.uk/

[2] A principal mechanism by which the legal system protected rights lay in assumptions about how legislation should be interpreted. This meant the courts were able to: (i) interpret legislation in light of constitutional fundamentals to ensure a human rights-friendly interpretation (See *Waddington v Miah [1974] 2 ALL ER 377*), and (ii) assume Parliament did not intend to interfere with fundamental rights in the event of ambiguous language (See *Ex p Simms [1999] UKHL 33*).

[3] In cases where courts felt that fundamental rights were at issue, they developed a heightened standard of *Wednesbury* unreasonableness known as 'anxious scrutiny' (See *Bugdaycay v Home Secretary [1987] AC 514*). However, this standard remained unconcerned with the 'merits' of a public authority's decision.

protections. Moreover, by the turn of the new millennium, the inherent drawbacks of this framework had become evident:

I. the rights recognised under the common law were markedly more limited than the ECHR;[4]
II. individuals could not rely upon our courts to challenge primary legislation, even if it clearly violated their rights;[5]
III. the power of heightened judicial review standards remained unclear, but they were obviously weaker than proportionality;[6] and
IV. British citizens were increasingly applying to the European Court of Human Rights to vindicate their rights; this process normally took a number of years to complete and was often prohibitively expensive.

Against this backdrop, no-one could reasonably argue that the impact of the HRA has been anything other than an outstanding success, resulting in improved access to justice, and empowering marginalised communities to defend their rights.

An example from our own work is a case concerning religious education where we supported three humanist families in challenging the Department for Education's (DfE's) assertion that just teaching its GCSE religious studies curriculum, which excludes non-religious worldviews, would meet the statutory requirements for the entirety of religious education (RE) teaching at key stage 4. The judge in the case ruled that it wouldn't, because excluding any teaching about non-religious worldviews from the entirety of key stage 4 RE would be insufficiently pluralistic to meet the requirements of the Convention.[7]

The families were only able to bring their challenge because it was grounded in human rights law: namely Article 9 of the HRA (Freedom of thought, conscience, religion, and belief) and Article 2 of the First Protocol (Right to education). Without the Act they would have been unable to establish that the Government's Convention duty to respect a parent's religion or belief in carrying out its educational functions would be breached by permitting religious education to ignore or disrespect the beliefs of non-religious parents. It remains deplorable that the DfE reacted to losing the case merely by withdrawing their assertion, while denying that any reform of RE was required.[8]
Nonetheless, we strongly believe the HRA has provided a cost effective method for individuals, from all backgrounds, to enforce their rights and hold public authorities to account.

2. How has the operation of the Human Rights Act made a difference in practice for public authorities? Has this change been for the better or the worse?

Outside the substantive and litigation benefits noted above, another virtue of the HRA that is sometimes overlooked is the normative impact it has had upon society. Thus, when the Welsh Government announced in 2019 its intention to amend the law on RE to explicitly include non-religious worldviews, putting them on an equal footing with major religions, its White Paper explicitly stated that its reason for changing the law was 'to take account of the effect of the Human Rights Act 1998'.[9] In other words, the

[4] See *Malone v Metropolitan Police Commissioner [1979] CH 344*
[5] See *Inland Revenue Commissioners and Another v Rossminster Ltd and others [1980] AC 952*
[6] See *ex p Brind [1991] 1 AC 696*
[7] See *Fox and others v Secretary of State for Education [2015] EWHC 3404 (Admin)*
[8] Humanists UK, 'High Court ruling on Religious Education: BHA responds to 'misleading' and unfair criticism by Government' (2016). Available at:https://humanism.org.uk/2016/05/31/high-court-ruling-on-religious-education-bha-responds-to-misleading-and-unfair-criticism-by-government/

HRA successfully cultivated a culture where rights were protected by providing a lens through which the Government assessed its decision, without the need for litigation.

Despite its measurably positive impact upon the attitudes of public authorities, there is still room for improvement. In particular, we are concerned at the narrow interpretation of s.6(3)(b) which excludes many third parties delivering services under contracts with public (typically local) authorities. As things stand, many religious bodies involved in such contracts are held not to be covered and are thus able to take advantage of their exemptions under the Equality Act 2010. Users of services are therefore at risk of discrimination in a way that they would not be if s6(3)(b) was more widely interpreted or if the exemption under the Equality Act did not apply when religious bodies were acting on behalf of a public authority.[10] In our view, there is no rational basis for the protection of fundamental rights depending upon a lottery as to whether services are contracted out or not. Indeed, this is especially concerning given that local authorities often employ religious – sometimes highly evangelical – organisations as service providers.[11] Therefore, we recommend the current definition of hybrid public authorities - by which we mean private actors who perform a public function - should be expanded along the same lines currently used in the context of judicial review,[12] so that where services provided by a third party would previously have been performed by a public authority the HRA still has effect.

3. What has been the impact of the Human Rights Act on the relationship between Courts, the Government, and Parliament?

In general, we believe the HRA has not substantially changed the relationship between the Courts, the Government, and Parliament.

Respecting the existing relationship

Firstly, Section 3 of the HRA has arguably not had a major impact because it is merely a logical extension of the existing common law presumption that Parliament does not intend to legislate in a manner incompatible with human rights: it is therefore not a major change to empower the courts to provide a remedy. Even less does Section 4 (declarations of incompatibility) challenge the relationship between the judiciary and the legislature, since it merely marks up an inconsistency with the Convention while leaving it to Parliament to decide how – indeed, whether – to act, as in the well-known prisoners' voting rights case. Even in cases where the courts are tempted to declare legislation as incompatible, they still show considerable reluctance to trespass on Parliamentary ground.[13]

Proposed reforms

Given the foregoing, we are opposed to any amendment to Sections 3 and 4. In particular, if limiting the use of Section 3 or making Section 4 no longer a remedy of 'last resort' means that the courts should flag

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[9] Humanists UK, 'Welsh Government to change law on school RE to include humanism' (2019). Available at: https://humanism.org.uk/2019/01/28/welsh-government-to-change-law-on-school-re-to-include-humanism/

[10] See Section 6(3)(b) of the Human Rights Act 1998; *YL v Birmingham City Council [2007] UKHL 27*

[11] Such organisations thus remain free to discriminate on the basis of religion or belief and sometimes other protected characteristics, like sex or sexual orientation against service users and employees – even when the services they are providing are being delivered under contract from the state.

[12] *R (Datafin plc) v Panel on Take-overs and Mergers [1987] Q.B. 815*

[13] As in the succession of cases Humanists UK has supported in relation to assisted dying. In particular, during *R (Nicklinson) v Ministry of Justice UKSC 38*, even though a 5-4 majority of the Supreme Court considered the Suicide Act 1961 might breach Article 8 of the Human Rights Act 1998, a 3-2 majority within the first majority chose to defer to Parliament's prerogative; indicating that the courts consider Parliament is in a better position to introduce a major social reform.

issues for parliamentary debate rather than making definitive legal determinations, that would ultimately undermine the nature of the Act as an effective legal remedy for infringements of human rights. Rather than 'restore' competence to Parliament (or the Government), it would leave unresolved alleged abuses of human rights and burden Parliament with possibly inchoate questions when its time is already limited. People would once again be driven to direct recourse to the European Court of Human Rights to protect their interests. Moreover, if the purpose of reform is to limit any perceived politicisation of the judiciary, then it stands to reason that instructing the courts to highlight more issues for Parliament's attention will not resolve but exacerbate the alleged problem, drawing the Courts further into contentious areas and political debates. We urge the Joint Committee to warn strongly against altering Sections 3 and 4 and instead to support the HRA for striking a sensible and elegant balance between providing effective legal remedies and respecting Parliament's sovereignty.

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