Written evidence from the Law Society (HRA0063)

Introduction

1. The Law Society of England and Wales welcomes the opportunity to respond to this inquiry. Our response to this and the Independent Human Rights Act Review (IHRAR) has been informed by in-depth consultation with our members. Our full response to the IHRAR call for evidence is available on our website.[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?

2. The Human Rights Act (HRA) is a legal instrument of great constitutional importance. It is the central statute confirming the rights and freedoms owed to all people in the UK and provides robust protection for these.

3. The legislative purpose and intention behind enacting the HRA was to provide an effective domestic remedy for breaches of the rights contained in the European Convention on Human Rights (ECHR) and to avoid cases proceeding to the European Court of Human Rights (ECtHR) when they could be resolved more swiftly in the domestic courts.[2] Individuals are now able to access justice in human rights claims more easily, quickly and without the significant costs attached to petitioning the ECtHR.

4. Since 2010 the number of cases brought against the UK in the ECtHR has been steadily declining with the UK having the fewest applications by population size of all the ECHR member states.[3] Findings of violations against the UK have also dropped significantly – in 2019 there were only five judgments finding violation while in 2018 there was just one.[4] The HRA therefore both ensures that human rights disputes arising in the UK are predominantly resolved in UK courts, and helps minimise the number of challenges the UK faces in the ECtHR.

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

5. We believe that the operation of the HRA has had a positive effect on public authorities by improving decision-making and encouraging good governance and a culture of accountability. Arguably the most significant impact of the Human Rights Act is that it has required public authorities to integrate human rights considerations into decision-making, thereby improving the quality of resulting policies. Both the threat and process of legal review contribute to this.

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[1] Available at: https://www.lawsociety.org.uk/campaigns/consultation-responses/independent-human-rights-act-review-call-for-evidence--law-society-response

[2] Secretary of State for the Home Department, *Rights Brought Home: The Human Rights Bill* (Command Paper 3782, October 1997), para. 1.14-1.16. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf

[3] Ministry of Justice, *'Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020'* (2020), p.9-10. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944857/responding-to-human-rights-judgments-2020_pdf.pdf

[4] *Ibid.,* p.10

6. Research on judicial review, including under the HRA, has provided statistical evidence that legal challenges to local authorities are linked to improvements in their performance measured against official quality indicators.[5] This is because clarity can be provided to officials on indeterminate legal questions and on how to decide issues where a conflict arises between individual and collective rights.

7. Case law under the HRA has therefore helped to clarify what is required of public authorities with regards to rights protection. As the courts have developed the doctrine of proportionality under the HRA, the more forensic judicial scrutiny of public bodies' decisions has also arguably improved the quality and sustainability of policymaking, as it requires policies to be evidence-based.

8. This has been echoed in views received by the Law Society from solicitors who work in either central or local government, emphasising that accountability to the courts is central to the functioning of public authorities and that, far from impeding decision-making, it drives good governance. However, some (particularly from local authorities) expressed the difficulty of navigating regulations and court judgments and indicated that further guidance issued by government is often beneficial.

9. The ability to challenge decisions of public authorities, including on human rights grounds, also enhances trust in state institutions and public decision-making.[6] This is true not only for individuals, but also for private businesses that have interests in the UK, where a strong adherence to the rule of law and the ability to defend business interests is attractive to international investment.[7]

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

10. The framework of the HRA maintains an appropriate relationship between the courts, government and Parliament and, importantly, upholds parliamentary sovereignty. Sections 3 and 4 of the HRA are key, interdependent mechanisms being considered by the IHRAR which determine the approach domestic courts should take to legislation that raises compatibility issues.

11. While section 3 does give courts a broad duty to interpret legislation compatibly with the ECHR, in light of the section 19 requirement for government to issue a statement of compatibility when introducing legislation, it is reasonable to presume that Parliament intended to legislate compatibly with rights and that, had they intended to breach rights, they would have used very clear language to that effect. Evidence shows that there are few notable examples of courts using broad section 3 interpretations and that they are conscious of the limits to their competencies in utilising this provision.[8] Furthermore, Parliament retains the right to amend a court's interpretation through legislation.

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[5] Lucinda Platt, Maurice Sunkin and Kerman Calvo, 'The Positive Effect of Judicial Review on the Quality of Local Government' (2010) 15(4) Judicial Review 337-342; Lucinda Platt, Maurice Sunkin and Kerman Calvo. 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England & Wales' *Journal of Administration Research and Theory* (2010) 20:i 243-i260.
[6] Brian Brewer, 'Citizen or consumer? Complaints handling in the public sector' (2007) 73(4) International Review of Administrative Sciences 549-556, 552.
[7] See, for example: Linklaters, '*Enhancing the rule of law to ensure the UK remains competitive post-Brexit'* (2017), available at: https://www.linklaters.com/en/insights/thought-leadership/rule-of-law/the-rule-of-law; Bingham Centre for the Rule of Law and Hogan Lovells, '*Risk and Return: Foreign Direct Investment and the Rule of Law'* (2014), available at: https://binghamcentre.biicl.org/publications/risk-and-return-foreign-direct-investment-and-the-rule-of-law?cookiesset=1&ts=1614184307

12. Declarations of incompatibility under section 4 HRA further robustly protect parliamentary sovereignty. A declaration of incompatibility does not affect the validity of the infringing legislation and there is no legal obligation on the executive to take remedial action, nor for Parliament to accept any measures it may propose.

13. Therefore, while declarations of incompatibility are an important solution to maintaining parliamentary sovereignty, they provide a much weaker form of rights protection than section 3. Shifting the balance between sections 3 and 4 to engender a substantial rise in the use of declarations of incompatibility would increase the number of confirmed human rights breaches potentially going unaddressed. There may also be practical implications through placing a greater burden on the parliamentary timetable, leading to increasing delays which could undermine the effectiveness of our national system of human rights protections.

Has the correct balance been struck in the Human Rights Act in the relationship between the domestic Courts and the European Court of Human Rights? Are there any advantages or disadvantages in altering that relationship?

14. The section 2 duty to 'take into account' ECtHR jurisprudence establishes the relationship between domestic courts and the ECtHR. Its wording acknowledges that this relationship is not strictly hierarchical and, in practice, domestic courts have developed a sophisticated approach whereby they only treat themselves as having a duty to follow ECtHR jurisprudence if there is a strong and consistent line of authority.[9] Even where this exists, domestic courts have been willing to depart from ECtHR jurisprudence where they are satisfied that Strasbourg has not properly considered the UK's national context.[10]

15. This approach allows for both flexibility and overall legal certainty, enabling domestic courts to keep pace with ECtHR jurisprudence and therefore helping avoid litigants needing to petition the ECtHR, without inhibiting the ability of domestic courts to assert the national position when necessary. Indeed, there have been notable instances of judicial dialogue where reasoning provided by domestic courts which explains national law and processes has encouraged the ECtHR to modify its own interpretation.[11]

16. The link to ECtHR jurisprudence created in section 2 is important for maintaining consistency across the states party to the ECHR. This is not only vital for advancing collective human rights standards – thus realising the ambition of the ECHR – but is important for providing those that may operate across borders, such as businesses, with legal certainty.

17. We therefore do not believe there is a need to amend the relationship with the ECtHR created in the HRA. However, a possible way to enhance the relationship is allowing advisory opinions of the ECtHR to be requested through signing Protocol 16

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[8] See examples: Bellinger v Bellinger [2003] UKHL 21; R (Nicklinson) v Ministry of Justice [2014] UKSC 38

[9] R v Special Adjudicator ex parte Ullah [2004] UKHL 26, para.20

[10] See, for example: R v Horncastle and Others [2009] UKSC 14; R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15; R (Hallam) v Secretary of State for Justice

[11] R v Horncastle [2009] UKSC 14 and Al-Khawaja and Tahery v United Kingdom, Apps. 26766/05 and 22228/06 [2011] ECHR 2127; R v McLoughlin and R v Newell [2014] EWCA Crim 188 and Hutchinson v. the United Kingdom, App. 57592/08, ECHR 2016

to the ECHR. The benefits of this should be first weighed against any potential for creating delays in the judicial process and any resulting impact on access to justice.

Are there any advantages or disadvantages in seeking to alter the extent to which the Human Rights Act applies to the actions of the UK (or its agents) overseas?

18. The Law Society does not believe that there is a convincing case for changing the current position with regards to the application of the HRA to actions of the UK overseas. The exceptions to the general principle of territorial application are rightly restricted and their limits have been clarified.[12] The position that has been established upholds human rights protections without stretching the reach of the HRA beyond its limits.

19. The HRA not only provides protections for those resident in a foreign territory and subject to actions of the UK, but also for UK state agents who are deployed or stationed there, often armed services personnel.[13] Limiting extraterritorial application of the HRA therefore risks removing protections from our own citizens, should their rights be infringed.[14] Even if provision were made that attempted to maintain protections only for state agents (excluding foreign residents) this would likely be discriminatory.

20. Amendment of the HRA to limit extraterritorial application would have further perverse consequences for the advancement of human rights and for the rule of law overall. It would create a situation whereby public authorities are bound by human rights obligations at home, but free to violate them elsewhere. It risks creating domestic impunity for potentially serious human rights violations committed by UK state actors in foreign territories, and therefore increases the likelihood of the UK being found to have breached human rights obligations before international courts. Ultimately this would damage the international reputation of the UK and would undermine our ability to hold other states to account for human rights abuses.

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[12] Al-Skeini v. United Kingdom, App. 55721/07 ECHR 2011
[13] See, for example, Smith and Others v Ministry of Defence [2013] UKSC 41
[14] The Law Society – and numerous others – have raised similar concerns during the passage of Overseas Operations (Service Personnel and Veterans) Bill which would limit the ability of potential claimants – including soldiers – to rely upon the HRA for acts arising during an overseas operation. For further information see: https://www.lawsociety.org.uk/en/topics/human-rights/overseas-operations-service-personnel-and-veterans-bill