Submission to the Independent Review of the Human Rights Act

Introduction

LawWorks (the Solicitors Pro Bono Group) welcomes the opportunity to make a submission to the Independent Review of the Human Rights Act (IRHRA).

In making this submission, we do not claim to have the same level of expertise or evidence that specific human rights organisations and others can offer as litigating human rights claims on a pro bono basis is relatively rare. Litigating claims under the Human Rights Act (HRA) with lawyers acting pro bono does sometimes happen, but as a form of judicial review with cost implications it requires very careful planning between claimants and their lawyers. However, as an access to justice charity we are also interested in human rights issues more broadly and support the Human Rights Act (HRA). Indeed a shared commitment to human rights principles, the rule of law and access to justice lies behind why so many lawyers choose to undertake pro bono work which is always an adjunct to, and not a substitute for, a proper system of publicly funded legal services.

Article 6 (Schedule 1 of the HRA) is especially important to LawWorks as it re-enforces the requirements of real and effective access to court and legal remedies, which may require access to legal assistance. The Act's real impact though is felt beyond the courtroom, whether in the care system, immigration, education, social housing and welfare benefits, the HRA provides a powerful practical tool for advocacy, and for planning, delivering and securing rights-respecting services and outcomes. Our response considers this wider context of the HRA, as well as the specific issues raised by this review.

About LawWorks

LawWorks (the Solicitors Pro Bono Group) promotes, supports and facilitates pro bono legal services that extend access to the law for individuals and communities in need and the organisations that support them. We champion pro bono because of the positive contribution and difference it makes for individuals, communities and society. We work (in England and Wales) with the solicitors' profession and with our members, the Law Society, law schools and law students, law centres, advice agencies and others to develop and support pro bono legal services, and to promote access to justice for all.

Our key programmes include:

- **Clinics** - we support a network of around 290 independent pro bono legal advice clinics across England and Wales, providing training, resources and guidance, and professional indemnity insurance. 70,261 people were helped by clinics in 2019, 37,551 clients (53%) received legal advice, and 32,710 were given information or referred to other services;[i]
- **Not-for Profits-programme** - we broker pro bono advice for smaller charities and social enterprises on a broad range of legal matters;
- **Bespoke casework and representation** ('secondary specialisation') - our in-house solicitors triage and supervise cases, including social security tribunal appeals, unpaid wages cases and support for the parents and carers of children with life-limiting conditions (in partnership with the charity Together for Short Lives);
- **Online platforms** – we have been developing websites and digital projects (such as 'Legal Free Answers') to facilitate pro bono legal volunteering and access to free legal advice.

We work collaboratively, for example with our partners in the Litigants in Person Support Strategy (LIPSS). In addition, LawWorks promotes, supports and facilitates pro bono by providing training, knowledge sharing events, pro bono awards, and engaging in policy -

working with the regulators, professional bodies and stakeholders to encourage a supportive environment for pro bono within a strong access to justice infrastructure.

General comments and terms of reference

Our starting point is that 20 years of the HRA's operation has had a positive impact, but effective human rights legislation and practice is still needed. Many of our legal advice case studies provided by clinics and LawWorks projects demonstrate the ongoing importance of implementing effective human rights policies and protections in the UK.[ii] For example:

- An East Anglia law clinic helped Rachel, a British woman who fled Greece to escape an abusive relationship but was arrested for removing the children from Greece without their father's consent; with legal assistance provided at the final hearing, the judge concluded that the children should not be returned to Greece, having been persuaded by the strength of Rachel's evidence.

- Advice and support from our project with Together for Short Lives helped Fiona secure a carer's needs assessment in respect of caring responsibilities for her niece Caitrin, who was born with severe brain damage – she had become Caitrin's carer after obtaining a Special Guardianship Order.

These, and other stories on our website, demonstrate that human rights principles and tools are important – even where legal advice or action does not directly draw on the HRA. In our casework for the parents and carers of children with life-limiting conditions, we sometimes find it useful to refer to the HRA in correspondence with local authorities and health bodies to explain how HRA Articles may potentially be engaged. We therefore hope that this review will look to strengthen rather than weaken the HRA as a benchmark.

On the terms of reference, whilst it is reassuring that they do not include reviewing the substantive rights incorporated from the European Convention on Human Rights (ECHR), any potential regression from existing standards and compliance would be a significant cause for concern. It is not entirely clear from the terms of reference what problem or problems the review is seeking to fix. The cardinal question should be whether the HRA has effectively protected individual rights in the UK – in our view it has. The HRA has achieved its primary aim of making Convention rights enforceable in the UK legal system, and supporting a culture of respect for human rights.

Although not directly referenced, this review needs to be considered together with the separate independent review of administrative law (IRAL) currently being conducted by the Government in relation to judicial review proceedings, and potential further proposals to reform the UK Supreme Court. As well as the direct crossover between the HRA and judicial review, there are similar rule of law issues at stake. The concern here is that the combined effect of different aspects of legal and constitutional reform may result in a weakening of the rule of law and the pathways currently in place for challenging decisions of the executive and public bodies.

Section 1: The relationship between domestic courts and the European Court of Human Rights (ECtHR).

We consider that the current legislation is well-crafted and maintains the primary role of the courts, ensuring that convention rights and jurisprudence are applicable in UK courts rather than having to seek recourse to the European Court of Human Rights (ECtHR) in Strasbourg. Capacity to adjudicate within UK courts has an obvious access to justice benefit in comparison to the cost and procedure of recourse to the ECtHR, so it is essential that matters engaging convention rights remain capable of adjudication in the UK courts, with an emphasis on improving rather than diminishing access.

The interpretation of section 2 duty of the HRA to "take into account" ECtHR jurisprudence should be a matter for judges, and we would not want to see judicial discretion fettered in how cases are approached, as this could risk undermining the judiciary's independence in applying convention rights. Judges are not required to mirror the Strasbourg jurisprudence, but it is entirely consistent with public law adjudication in the UK for our courts to be able to take ECtHR judgements into account. This approach also allows judges to give due respect to the wide margin of appreciation that the ECHR accords Governments in relation to matters of social and economic policy.

Section 2: The impact of the HRA on the relationship between the judiciary, executive and parliament, and whether domestic courts are being unduly drawn into areas of policy.

Commenting in depth on the constitutional aspects of human rights legislation would take us beyond our charitable objectives, but there are important principles about the rule of law and access to justice that we would like to re-enforce. The Panel's questions are framed in terms of the courts' engagement in policy matters, but courts don't decide on policy, they decide on questions of law, although decisions on law can impact on policy. Also, what the panel means by "drawn into areas of policy" is not clear, and "policy" is not defined in this context. As in our answer to the previous section, our starting point is that the judiciary's discretion and independence over determining questions of law should be considered paramount, and we hope that the panel will support this principle.

The existing mechanisms of the Act provide for the proactive implementation of, and compliance with, convention rights both in drafting legislation, legislative implementation and in public bodies' decision-making. The benefit of this approach is that it reduces reliance on court remedies to enforce rights and establish good practice. In this respect, we broadly support the section 3 and 4 provisions of the HRA on interpretation and compatibility, as well as the section 6 duty on public authorities to uphold human rights, and consequently people's experiences of their rights in everyday life. Further re-enforcement of this approach of proactive "human-rights proofing" of legislation and its implementation can be found in sections 19 and 10 of the Act which respectively require statements of compatibility with convention rights for all primary legislation, and provide a fast-track remedial order procedure for Government to amend non-compliant legislation. In other words, the provisions of the HRA are carefully balanced to achieve two important outcomes; firstly, that policy is designed in a way that is legally compliant with convention rights, and that, secondly, where there are breaches of convention rights there are effective remedies and recourse to the UK courts for those affected.

We are not aware of any significant problems with the above provisions – they are intended to be complementary, enhance parliamentary scrutiny and minimise legal challenges and judicial interventions on issues of compatibility between domestic legislation and convention rights. There have been less than 50 declarations of incompatibility, and only a handful of remedial orders since the Act came into effect (to put in context, there are up to 4,000 legislative instruments passed annually). If anything, there may be a case for strengthening provisions which seek to prevent issues of compatibility occurring; for example last December it was concerning that changes to new immigration legislation were enforced to make rough sleeping grounds for deportation for non-UK nationals.[iii] The policy to deport rough sleepers had already been successfully challenged in the High Court in 2017, but the Home Office nevertheless re-introduced it and it may now face a further challenge on HRA grounds.

Suggestions that courts are "interfering" in policy are often exaggerated, distorted and presented without balancing information about the state's wide margin of appreciation, and the important distinction lost that the courts are not so much 'interfering' in policy but rather determining aspects of law relevant to policy. There is also a vital function and role for public legal education (PLE) in better explaining how the Act works. LawWorks provides the

secretariat to the APPG on Pro Bono and Public Legal Education and are therefore interested in issues of public legal information and perception.

Finally, we would also invite the panel to consider how the HRA as a codified statement of human rights, and as an advocacy tool, can support a range of other policy and practice agendas. The HRA sets a benchmark, and this has been demonstrated to have had positive impact for several sectors, in terms of best practice and in how future legislation is framed. Again, we would reference the care sector where our experience from working on children's care issues has been that lawyers are able to use the HRA instrumentally in correspondence with health and social care bodies to achieve better outcomes, and without recourse to litigation. As regards 'future proofing' of legislation and designing in convention rights, the HRA is, for example, is specifically referenced within the Care Act 2014. Another example is mental health legislation which has been one area where there have been some significant human rights legal challenges (as well as practice-based changes) to make laws more rights-respecting. The new Mental Health Act White Paper is founded upon the very principles at the heart of the HRA, so in this respect the HRA is contributing to the positive reform of mental health law.

March 2021

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[i] Lawworks Clinics Network report 2019 https://www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-clinics-network-report-2019

[ii] https://www.lawworks.org.uk/about-us/case-studies

[iii] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/928751/CCS001_CCS1020373376-001_Statement_of_changes_in_Immigration_Rules_-_HC_813__PRINT_.pdf