The British Institute of Human Rights
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The Human Rights Act: A powerful tool for ensuring rights are made real in the UK

BIHR's response to the Independent Human Rights Act Review calling for less review and more human rights leadership

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1. EXECUTIVE SUMMARY

> "The Human Rights Act helps us all live our lives as equal citizens. It is the foundation of a forward-looking and fair society that believes that all lives matter and that everyone has a part to play."
>
> Quote from respondent to our survey, "The Human Rights Act and Me."

At BIHR, we see the value of the Human Rights Act every day in our work with people interacting with services, community and advocacy groups and staff working in public services. The Human Rights Act is, in its current form, an incredibly powerful tool which has the power to create a culture of respect for human rights in the UK. Since the passing of the Human Rights Act, for over 20 years, we at BIHR have been supporting the operation of the Act with rights holders and duty bearers. Our experience shows there is still a long way to go until a culture of respect for human rights becomes a reality for all of us, here in the UK. Our submission makes it clear, however, that the route to making human rights real for everyone is not through more legislative review of our Human Rights Act but through human rights leadership, at all levels, ensuring that the Human Rights Act is understood and implemented every day, in every interaction a person has with public services.

1.1: About BIHR

The British Institute of Human Rights (BIHR) is a charity working in communities across the UK to enable positive change through the practical use of human rights law beyond the courts, sharing this evidence of change and people's lived experiences to inform legal and policy debates. We work to support people with the information they need to benefit from their rights; with community groups to advocate for social justice using human rights standards; and with staff across local and national public bodies and services to support them to make rights-respecting decisions. This enables us to call for the development of national law and policy which truly understands people's experiences of their human rights. Established in 1970, with a focus on supporting a culture of respect for human rights since the passing of the Human Rights Act in 1998, we work with over 2,000 people each year. Our submission, analysis and recommendations are directly informed by our organisation's unique expertise of human rights practice, and people's real-life experiences of the issues.

We welcome that the Review sets out that there is no intention to withdraw the UK from the European Convention on Human Rights nor to amend the rights brought down into domestic law through our Human Rights Act. However, we are concerned that a Review into 20 years of the operation of the Act focuses entirely on the Act in courtrooms and parliament. The narrow focus of the Review means that not only is it inaccessible to the majority of people who have lived experience of the operation of the Act, but it misses out any reflection of the Act's key aim, to create a culture of respect for human rights in the UK.

Since the Review's announcement[1] on 13th January 2021, we have engaged in extensive evidence gathering alongside partner organisations including the British Association of Social Workers (BASW), Learning Disability England, The Human Rights Consortium Scotland, All Wales People First, Equally Ours and many more. The evidence included throughout our submission comes from over 400 people all of whom have lived experience of our Human Rights Act in its current form. These are the individuals whose views should be central to any review of the operation of the Human Rights Act.

1. People: People accessing (or trying to) access public services, their family members and people who care about them.
2. Advocacy and Community Groups: Formal advocates (e.g., IMCA, IMHA etc.), self-advocates, and other community, campaigning, and advocacy groups.
3. Staff: People with legal duties to respect and protect rights. This includes those working in public services and in private, charitable, or voluntary bodies delivering public services.

1.2: Our Key Findings

- 100% of people who responded to our Review research said that the Human Rights Act was important to them.
- 76% have either used the Human Rights Act in their life or work to help change things for the better or know someone who has.
- 88% are worried that this Review may lead to less protection of rights.
- 63% of staff in public bodies and services have used the Human Rights Act to help change decisions or policies so they can better support people.

1.3: Our Recommendations to the Independent Human Rights Act Review

- Any Review of the Human Rights Act must be open and accessible to the people the Human Rights Act impacts every day.
  The protections in the Human Rights Act belong to people, so any Review of those protections must be open and accessible to those whose lives any proposed changes would impact. Accountability through the court system is a vital part of ensuring a just society, but that is only one part of how our Human Rights Act works; our law has a much wider impact than its use in courtrooms. Discussions about the operation of our Human Rights Act and how it can be improved must focus on people's experiences of interacting with public power and crucially, people's experiences of working within public services to respect, protect and fulfil human rights. Sharing these voices with the Review is the primary reason for our submission.

[1] Independent Human Rights Act Review (IHRAR) Call for Evidence (2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962423/Call-for-Evidence.pdf

- **Any national debates or reviews of the Human Rights Act must include evidence of section 6 of the Act. Reviews and inquiries which put the focus on the operation of the Act solely in the context of a courtroom do little to support a culture of respect for human rights**.
  Often, in national debates, and in the terms of this Review, there is little acknowledgment of the importance of section 6 of the Human Rights Act in securing people's rights through everyday advocacy, challenging and changing the decisions public officials make each day. Section 6 means that people can draw on the law when having conversations with public bodies about the fulfilment of their rights. These conversations between people, their loved ones, advocates and public bodies lead to rights-respecting change yet appears to have no space in this Review, despite representing a key part of the Act's operation over the last 20 years.

- **The Human Rights Act exists to put limits on government power. Frustration with this is not a reason for a Review. There must be no move to remove or reduce accountability.**
  Our UK Human Rights Act, and indeed all human rights laws are about putting limits on excessive state power. These limits are needed as much now as they were 70 years ago when the global community drafted the Universal Declaration of Human Rights (1948), and regionally the European Convention on Human Rights (1950). We should all be troubled when government frustration with these limits on power – necessary in any modern democracy - shifts to the reason for review, dilution, or repeal. There must be no move to remove the primary purpose of our domestic Human Rights Act which exists to ensure accountability at a range of levels, based on internationally agreed standards.

- **Any move to change the HRA or any Review into its operation must give full consideration to the HRA's distinct role in each devolved nation.**
  In Scotland, Northern Ireland, and Wales, the HRA is a crucial building block for increased rights protections; removing that block or changing its contents could be hugely detrimental. Crucially, in Northern Ireland our Human Rights protections through the European Convention on Human Rights and HRA are part of an international peace process. There must always be acknowledgement that the conversation around human rights protections looks very different depending on where you live in the UK. There should be learning from devolved nations, who devote human rights conversations not to reviewing how the mechanisms of the Act work in courtrooms and exploring reforms to restrain the current Act, but to how we can build and expand on our existing protections.

- **There is a clear need for government leadership, successive UK governments[2] failure to stand by our the Human Right's Act's passing**,
  There is a real need for the UK government (whichever party that happens to be) to show national leadership and investment of resources, education, practical implementation and monitoring to secure a culture of respect for human rights. Reviewing the law is not the solution to this, the solution is human rights leadership which prioritises the voices of people interacting with and delivering public services and supports the implementation of the law in order to make rights real.

[2] This can be starkly compared to actions of some of the devolved governments focused on securing the HRA and bringing additional international human rights protections into the UK, which builds on our current law rather than questioning or undermining it.

- **We need to focus on the actual barriers to the realisation of people's rights in the UK and address these, rather than legal review.**
  Our UK Human Rights Act, in its current form is an incredibly powerful tool which, when understood and used by people and public services, we see can see glimpses of a culture of respect for human rights in the UK making a positive difference. Our evidence shows that the barriers to a culture of respect for human rights are not about the law itself, but are barriers about: awareness, confidence to implement rights-respecting practice in public bodies and services, funding and resources, a lack of integration into training, qualification and monitoring, etc. As a country, we need to focus our time and energy into strengthening the ability of public bodies to use the law in everyday policy and practice, and improve people's consciousness of being rights-holders both of which will help secure equal dignity and respect in everyday life.

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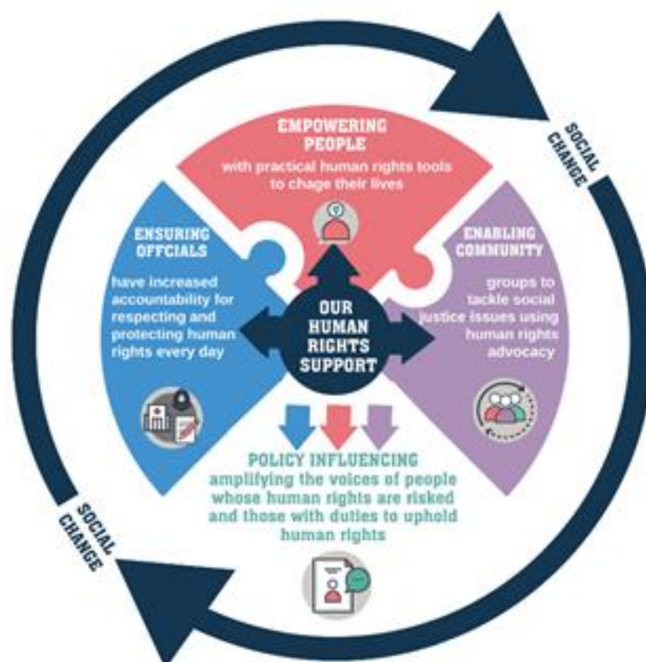
2. ABOUT BIHR AND OUR POLICY SUBMISSION METHODOLOGY

2.1: About BIHR



The British Institute of Human Rights (BIHR) is a charity working in communities across the UK to enable positive change through the practical use of human rights law beyond the courts. We share this evidence of change and people's lived experiences to inform legal and policy debates.

BIHR was established in 1970 with the specific focus on bringing the fundamental protections in the European Convention of Human Rights1950 into UK law, so people could benefit from their rights at home, and not solely by taking cases to the European Court of Human Rights (with the recognition of the importance of a final judicial arbiter in many cases).

By creating a set of domestic legal duties to make 16 rights from the European Convention enforceable in the UK, the Human Rights Act creates a vital safety for us all, especially when we're in vulnerable positions or interacting with public power.

We work with three main stakeholder groups:

- People interacting with public bodies and services, supporting them with the information they need to benefit from their human rights in daily life (e.g., being able to raise right to family life and non-discrimination issues in discussions with housing officers);

- Community and voluntary sector groups to support them to advocate for social justice using human rights standards (e.g., using the Human Rights Act section 6 duty and the right to not be treated in an inhuman way to call for better responses to domestic abuse);

- Staff across local and national public bodies and services to support them to make rights-respecting decisions (e.g., skilling up staff to understand what upholding the right to liberty means when supporting the care needs of people with mental capacity issues to ensure dignity, respect and equality is at the heart of decision-making and policy).

Our direct work enables us to call for the development of national law and policy which truly understands people's experiences of their human rights. We work with over 2,000 people

across our stakeholder groups each year, across the UK, including devolved countries. Our submission, analysis and recommendations are directly informed by our organisation's unique expertise of human rights practice and people's real-life experiences of the issues, together with a programme of public engagement to collect data and experiences specifically for this Review.

2.2: Our engagement with the Review of the HRA

Since the announcement of the Review in January 2021 we have been inundated with support requests from partner organisations. Our varied partner organisations (some delivering public services, others supporting people who access public services) were concerned about:

1. the existence of the Review for the protections of our rights in the UK; and
2. being unable to respond to the legal questions asked.

We responded to requests for support by developing materials and upskilling sessions, as well as gathering evidence directly for those unable to respond themselves. We held a number of briefings with charity groups and service providers, all concerned about the future of the Human Rights Act and unsure about how to participate in the Review, as well as speaking at numerous online events such as one hosted by Young Legal Aid Lawyers.

2.2.1: Our Upskilling and Research Sessions

Over the past 7 weeks we have held 5 upskilling and research workshops, in partnership. Our sessions, attended by 300 people, included:

1. A session on 2 February 2021, for people, family members/loved ones, carers, self-advocates and community groups. Co-badged with Article 12, POhWER, All Wales People First, and Learning Disability England..
2. A session on 9 February 2021 for advocacy and campaigning groups, third and voluntary sector organisations. Co-badged with Article 12, HEAR, Inclusion Gloucestershire, POhWER, All Wales People First, and Learning Disability England.
3. A session for people working in public service delivery or working for an organisation who delivers a public service such as health, care or education. Co-badged with Learning Disability England and the British Association of Social Workers (BASW).
4. A session on 17 February 2021 for the general public and for policy groups with Equally Ours.
5. A session on 16 February 2021 for the general public specifically in Scotland with Human Rights Consortium Scotland.

These sessions, plus additional briefings and speaking events, reached well over 400 people, each focusing on people with lived experience, advocacy and community groups, staff working in public bodies/services, along with a specific session on Scotland, noting the importance of devolution in any review of UK human rights law. Through these sessions we conducted research, gathering participants views on key issues around the operation of the Human Rights Act, and the future of the law. We asked the same research questions in

an open online survey (provided in Easy Read to enable disabled people to also be heard), which received 48 responses.

In this submission, we have combined, analysed and presented the data from across our workshops and survey along with our own experience of supporting the practical use of the Human Rights Acts over the last 20 years.

3. OUR ANALYSIS OF THE HUMAN RIGHTS ACT IN GENERAL

The Human Rights Act (HRA) exists to ensure that everyone's rights here in the UK are respected, protected and fulfilled. It is a carefully considered piece of legislation which respects universal human rights principles and the constitutional conditions of the UK (including parliamentary sovereignty). The HRA provides a necessary and practical legal framework for upholding people's fundamental rights domestically and importantly, for holding the state to account.

Our UK HRA, and indeed all human rights laws, are about putting limits on state power, recognising that in modern democracies, governments must have some checks and balances. Some level of government frustration with human rights laws is therefore to be expected. When this shifts to the reason for review, dilution or repeal of those human rights laws, removing them from their primary purpose of accountability based on internationally agreed standards, that is a worry in any country. It is a real worry that this has been the direction of travel in the UK for over decade. In our work, this concern has been all too evident since the announcement of the Independent HRA Review on 13th January 2021.

3.1: Our Human Rights Act and International Principles

All human rights laws, by their very nature, will at some points be inconvenient to governments because they exist to put limits on excessive state power and uphold the rights of the individual. This concept and the values which underpin our HRA are not new or unique to the UK; they have been around for over 800 years in our own legal systems.

The HRA's principal aim was to "bring rights home" by taking 16 of the fundamental human rights in the European Convention on Human Rights (ECHR, 1950) and putting them into UK law, creating a set of domestic legal duties to make the rights enforceable. The rights in the ECHR draw on the Universal Declaration of Human Rights (UDHR, 1948), developed by the world community at the United Nations, following World War 2.

More than standards which are popular or acceptable for a government of the day, human rights have been debated, deliberated and are internationally agreed principles. In 1998 our UK parliament, with cross-party support, enshrined these human rights into our domestic legal system. In bringing these rights into our law, the UK acted on what Eleanor Roosevelt, the Chairperson of the United Nations Human Rights Commission, set out in 1958, on the 10th anniversary of the UDHR:

> "Where do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world."

When Eleanor Roosevelt said these words, it was in the wake of the devastation of World War 2 and what happens when governments go unchecked, deciding who has rights and who does not. The need for people to have a safety net, a set of fundamental rights which the state must respect, protect and fulfil has not changed.

In 2020, we experienced and continue to experience one of the world's greatest human rights crisis, described by Secretary-General of the UN, Antonio Guterres back in April 2020 as an "…economic crisis. A social crisis. And a human crisis that is fast becoming a human rights crisis." More recently in February 2021, he noted "One year on, another stark fact is tragically evident: our world is facing a pandemic of human rights abuses."

This crisis is not one of law, it is one of people's lived reality of the law, in other words, its implementation. The existence of legal frameworks, our HRA included, is what enables each of us to challenge human rights abuses. To challenge abuses and ensure our equal dignity is respected, human rights must be recognised by law, enforceable in the courts *and* integrated into the culture of how public power is exercised in every day ways from the policies right through to decisions about each person.

3.2: Our Human Rights Act mechanisms and the UK's constitutional arrangements

In the UK, there are a range of constitutional principles which set out how power is exercised across a range of institutions, with checks and balances to support a separation of powers. Unlike many other countries, we do not have a codified written constitution. Crucially, the HRA contains mechanisms that respect the separation of powers between the government (executive), parliament (legislature) and the courts (judiciary). The mechanisms within the HRA work as intended to ensure that Convention rights are enforceable here at home whilst maintaining the constitutional principles of the UK. These mechanisms are explained below.

3.2.1: UK courts and the European Court of Human Rights

Section 2 of the HRA means that when a UK court is deciding a human rights question, it must "take into account" any "judgment, decision, declaration or advisory opinion of the European Court of Human Rights"[3]. This duty is about consistency and certainty, ensuring that decisions about rights in the UK courts are not completely different form the judgments of ECtHR. Legal certainty is a long-established principle of domestic law. Section 2 of the HRA provides a helpful tool for judges in the UK to reach conclusions on oftentimes difficult legal questions around the rights contained in the HRA. You can read our views on section 2 in more detail here.

3.2.2: The duty to apply other laws to be rights respecting in practice

Section 3 of the HRA means that primary legislation (Acts of Parliament) and subordinate legislation (e.g., Regulations) must be read and applied in a way which is compatible with

[3] Section 2, Human Rights Act 1998. Available at: https://www.legislation.gov.uk/ukpga/1998/42/section/2

the Convention rights as far as it is possible to do so. You can read our views on how section 3 works in the courtroom here.

Beyond the courts, which is the primary focus of this submission, this means when public bodies and services are applying other laws they should do so in a way that is compatible with our human rights, e.g., the Mental Health Act, the Children's Act, the Social Work Scotland Act or the Coronavirus Act etc. Every day at BIHR, we support public officials to apply legislation and policy compatibly with the HRA, leading to better outcomes for the individuals they support (see below, sections 3.2.5). We know from our work, including change programmes over the last 20 years, that there are many public officials using the HRA every day and ensuring all subordinate legislation is applied compatibly. When assessing whether changes to Section 3 are necessary, it is fundamental that we consider how this section of the HRA is being used beyond the courts.

3.2.3: No strike down power for courts

Section 4 of the HRA means that if a higher UK court considers that a law, or more specifically, part of a law, is incompatible with human rights, it can make a declaration of incompatibility (DOI). Parliamentary sovereignty means that the law will not automatically change following a DOI. Rather, the law remains in force until parliament approves change (if it decides to do so). It is up to the government and parliament to resolve the problem with the law, thus maintaining the separation of powers in the operation of our HRA. The situation is different for devolved and subordinate or secondary laws; but this is because those forms of legislation do not have primacy, as only Acts of parliament are sovereign. Respect for the UK's constitutional principle of parliamentary sovereignty is woven throughout the HRA, in a highly innovative and nuanced piece of legal drafting. You can read our views on how section 4 works here.

3.2.4: Our Human Rights Act and Devolution Arrangements

The rights within the HRA, brought into UK law from ECHR are interwoven into the devolution arrangements in Northern Ireland, Scotland and Wales. The Scotland Act 1998, the Wales Act 1998 and the Northern Ireland Act 1998 (which is part of an international peace process) established devolved legislatures and administrations. Each devolved nation has a range of issues for which it is responsible, many of which impact on human rights. Importantly, all the devolution arrangements prevent the parliaments/assemblies from passing laws which may be incompatible with Convention rights, as set out in the HRA. If a court in the devolved nations finds such a law to be incompatible it can be disapplied, because such a law would be outside the powers delegated to those bodies ("ultra vires") (this is not the same for the UK parliament which is sovereign, as explained above). The mechanisms in the HRA and its position in devolution arrangements are part of what makes the HRA such an innovative, distinct piece of legislation. Any move to change the HRA or any Review into its operation must give full consideration to the HRA's distinct role in each devolved nation. In devolved nations, the HRA is a crucial building block for increased rights protections; removing that block or changing its contents could be hugely detrimental.

3.2.4 (1): The Human Rights Act in Scotland

The Human Rights Consortium Scotland, a civil society network of 110 member organisations who work together to protect human rights have raised grave concerns about the impact of the Review on the human rights trajectory there. The Consortium, in their response to this Review,[4] share that, "Scotland is on the precipice of major human rights law reform... **any amendments to the HRA and how it operates could have highly regrettable, detrimental impacts on these very positive and welcome human rights advances in Scotland."**

Professor Nicole Busby, in a briefing paper for the Civil Society Brexit Project,[5] flags:

> "Whilst the scope of the Review appears to preclude repeal of the HRA, it is not known how extensive its recommendations for reform will be. If adopted by the UK Parliament, the current devolution arrangements could prove to be problematic for any such reform, in the most extreme case requiring amendments to be made to the relevant statutes including the Scotland Act. Perhaps more likely, even in the case of relatively minor amendment, is the potential for any proposed reform to disturb the progressive and ongoing development of a human rights-based approach and corresponding culture within Scotland's political institutions with resulting impacts felt by its wider society."

At BIHR's event on Human Rights Day 2020, "70 years of the European Convention on Human Rights, 22 years of the UK's Human Rights Act: Human rights in the UK, Covid-19 response and recovery" Professor Alan Miller, the Independent Co-chair of the Scottish Government's National Taskforce for Human Rights, spoke about the Taskforce's work. He described the situation in Scotland as the opposite of regression, a dynamic movement, together with civil society towards the realisation of rights. Professor Miller stated that, by March 2021, a Bill will be presented to the Scottish Parliament which aims to establish a new human rights framework for Scotland. The Bill includes restating and reinforcing the Human Rights Act and the Equality Act, and to go further by including incorporation of many UN Treaties. Professor Miller highlighted that consent from the Scottish Government and Parliament to agree reforms from Westminster that undermine the HRA would not be forthcoming. The Human Rights Consortium Scotland make the impact of the HRA and their concerns about changes at UK level clear:

> **"The HRA has had significant impact on the courts, law, policy, practice and culture within devolved Scotland, as well as giving vital legal protection for individuals. The HRA is the underpinning, starting point for the major human rights law reforms in Scotland -any change to this foundational human rights law will detrimentally impact the strengthening of human rights law at devolved level."**

3.2.4 (2): The Human Rights Act in Wales

A similar approach to human rights, one of progression rather than regression, can be seen in Wales. One example of this is through the Welsh Government's approach to children's rights and the commitment to the principles of the United Nations Convention on the Rights

[4] Human Rights Consortium Scotland response to the IHRAR
[5] Busby, N. Human Rights and Devolution: The Independent Review of the Human Rights Act: Implications for Scotland, for the Civil Society Brexit Project 2020, available here.

of the Child (UNCRC). Wales. Through the Rights of Children and Young Persons (Wales) Measure 2011 a duty is placed on Ministers to have due regard to the UNCRC when developing or reviewing legislation and policy. This means that Ministers must give the appropriate weight to the requirements of the UNCRC, balancing them against all the other factors that are relevant to the decision in question. The measure also makes Ministers responsible for ensuring that people in Wales know about, understand and respect the rights of children and young people as outlined in Article 42 of the UNCRC. To ensure compliance the Welsh Government also developed the Children's Rights Impact Assessment (CRIA).[6]

At our Human Rights Day Event, we heard from Joe Powell, Chief Executive of All Wales People First, the national umbrella body for self-advocates with learning disabilities in Wales. Joe spoke of the importance of the Human Rights Act in self-advocacy in Wales, stating that, "**Without human rights we are never going to be seen as people first.**" You can listen to an excerpt of Joe's speech here.

3.2.4 (3): The Human Rights Act in Northern Ireland

In Northern Ireland, the Human Rights Act is part of the 1998 Belfast/Good Friday Agreement, part of the international peace process. Any change to the HRA could have a significant impact on Northern Ireland's peace process.

In December 2020, at our Human Rights Act event, we heard from Brian Gormally, Director of the Committee on the Administrative Justice (CAJ) in Northern Ireland. CAJ is an NGO which seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. Brian spoke about the human rights landscape as seen from Northern Ireland, explaining the HRA's deep significance in Northern Irish society.

> "It is the main legal means through which dealing with the legacy of the conflict could be addressed. It underpins and legitimates the practice of contemporary policing."[7]

Crucially, following the New Decade, New Approach Agreement in Northern Ireland in early 2020, the Ad Hoc Committee on a Bill of Rights for Northern Ireland was set up. The Committee is tasked with considering the creation of a Bill of Rights for Northern Ireland. The Agreement set out that a new Bill of Rights should be in line with the intentions written in the Belfast/Good Friday Agreement, meaning that a new Bill of Rights for Northern Ireland's intention would be to build on the rights set out in the ECHR and HRA.[8] The Human Rights Consortium in Northern Ireland has a clear position on the HRA:

> "For the past 15 years the Human Rights Act has been successful in protecting the rights of people with disabilities, older people in care homes, people's rights to a fair trial, protection of family and private lives."[9]

Northern Ireland is moving towards the creation of their own Bill of Rights, using the HRA as the building block for this. Should the UK Government make changes to the HRA without

[6] Children's rights in Wales | GOV.WALES
[7] #MakingChange Through Human Rights... Brian Gormally - YouTube
[8] Have your say: Human Rights in Northern Ireland (niassembly.gov.uk)
[9] Human Rights Act - Human Rights Consortium

consideration of the Act's significance in devolved nations, this risks at best undermining the progressive work of devolved nations towards greater protections of rights for everyone in society and at worst destabilising a peace process. This Review must consider all responses raising concerns about the Human Rights Act and devolution.

3.2.5: The duty to uphold human rights in everyday practice for public bodies and services

The passing of the Human Rights Act in 1998 brought these rights home, with two key aims:

1. To enable people to bring human rights cases in the UK courts; and
2. to help create a culture of respect for human rights.[10]

It is the second, often forgotten aim, of the Human Rights Act which BIHR is focused on supporting a culture of respect for human rights in the UK. This is at the heart of the legal duty in section 6 of the HRA. This section, which does not appear in the Review's consultation questions, makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. The only exception to this legal duty is if a piece of primary legislation means that the state could not have acted differently.[11] (Combined with the interpretive duty in section 3 (see above) this should operate to make this less likely).

A public authority for the purposes of the HRA is "any person certain of whose functions are functions of a public nature."[12] It therefore includes traditional public bodies and the range of private, charitable, and other organisations who deliver public services, reflecting the reality of how public power is held across the UK.

Human Rights Act Review Research:

78% of respondents said that the Human Rights Act is important for them and/or the people they care about as it helps to raise concerns with public bodies or services when they feel their rights are not being upheld.

A culture of respect is fundamental for every person, in their everyday life. The legal duties imposed by our Human Rights Act require that when people are interacting with public bodies and services, as so many of us do in our everyday experiences (e.g., housing healthcare, social care, education, etc.) the officials involved should respect, protect and secure the full enjoyment of human rights. Essentially, human rights should be the reference point for every person's dealings with those who hold public power:

> "A human rights culture is one that fosters basic respect for human rights and created a climate in which such respect becomes an integral part of our way of life and a reference point for our dealing with public authorities… in which all our

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[10] The Secretary of State for the Home Department, Rights Brought Home: The Human Rights Bill, October 1997, at Chapter 2 and 3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf
[11] Section 6(2), Human Rights Act 1998 [United Kingdom of Great Britain and Northern Ireland], 9 November 1998, available at: https://www.legislation.gov.uk/ukpga/1998/42/section/6
[12] Ibid

institutional policies and practices are influenced by these ideas… The building of a human rights culture... [depends] not just on courts awarding remedies for violations of individual rights, but on decision-makers internalising the requirements of human rights law, integrating to standards into their policy and decision-making processes, and ensuring that the delivery of public services in all fields in fully informed by human rights considerations."[13]

This is what BIHR supports people and organisations to do, using the HRA section 6 duty as the lever for change. However, in national debates, and the terms of this Review, there is little acknowledgment of the importance of section 6 in securing people's rights through everyday advocacy, challenging and changing the decisions public officials make each day. Section 6 means that people can draw on the law when having conversations with public bodies about the fulfilment of their rights. These conversations between people, their loved ones and advocates and public bodies which lead to rights-respecting change, appear to have no space in this Review, yet this represents a key part of the HRA's operation over the last 20 years.

Human Rights Act Review Research:

"63% of staff in public bodies have used the Human Rights Act to help change decisions or policies so they can better support people".

Below we have included a range of examples demonstrating the difference section 6 of the HRA makes for people, advocates and public officials every day, including during the pandemic. We have over 50 qualitative case studies of section 6 enabling people and public officials to make real change which ensures people are treated with dignity and respect, when they otherwise would have received poor treatment.[14]

Edna and Emily challenge arbitrary care home visiting restrictions with the HRA

Edna is 83 and lives in residential care, her daughter Emily visits most days after work. Following a Covid-19 outbreak the home put a no visiting policy in place. It has now been 34 days, and Edna is isolated and lonely, missing Emily hugely. Emily had accessed some support on the HRA and speaks to the care home manager about her mum's right to private, family life, home and correspondence, with the home is legally obliged to respect (Article 8, HRA). Emily discusses how this right includes mental and physical wellbeing, family and other relationships, and whilst it can be restricted to protect her mum and/or others from harm, this needs to be proportionate. With no consideration of Edna's ability to keep in touch with Emily, the manager recognises that a blanket ban on visiting is not the least restrictive option. Knowing that they have legal duties under section 6 of the HRA, a meeting is called to agree what alternatives can be put in place whilst they deal

[13] JCHR Sixth Report of Session 2002-03, The Case for a Human Rights Commission, HL Paper 67-I/HC 489-I, at para. 2

[14] Please contact Carlyn Miller, Policy and Programmes (cmiller@bihr.org.uk), if you would like further examples of how the HRA is being used every day beyond the courtrooms to achieve positive change for and with people.

with the current outbreak. After the meeting, staff put in place several measurs which are less restrictive to support people's mental and physical wellbeing whilst still protecting the right to life, which is a real and immediate risk during a Covid-19 outbreak. The measures vary as staff know the same measure will not work for everyone but include video calls, PPE provision for visitors of those for whom video calls not possible, a gazebo in the garden and a floor-to-ceiling screen. Some restrictions are still needed but applying the HRA in practice has ensured this is based on each individual and is more proportionate. Emily now visits her mum every Sunday, wearing full PPE, until the outbreak is contained. The HRA helped keep a family together at a time when then need each other the most.

Muriel and Robert relied on the HRA to ensure end of life visits

On 21 July, Robert had a serious fall at home and his wife Muriel called an ambulance. The ambulance arrived and Muriel was told she could not accompany Robert, "due to Covid rules". Robert, who is 79 and has dementia, was in intensive care for 12 weeks. Muriel was not allowed to visit; nurses gave her daily telephone updates. On 25 October, Robert was discharged to residential care. The care home he was moved to was locked down the following morning due to a positive Covid-19 test. It has now been 4 months since Muriel watched Robert leave in an ambulance. The couple have had no contact as Robert is too distressed to talk on the phone, he is deteriorating mentally and physically. The thought that she might not get to say goodbye keeps Muriel awake at night. Muriel reaches out to an advocacy organisation who advises her that based on the severe impact this is having on Muriel and Robert's mental and physical wellbeing, the couple's right not to be treated in an inhuman and degrading way (Article 3, HRA) might be at risk. Restricting or risking this right is not lawful because it is an absolute human right. Muriel uses a template letter to raise the care home's legal duty under the HRA. The care home has since arranged for Muriel to be provided with full PPE so that she can visit Robert regularly and will ensure that Muriel is vaccinated together with staff so that she can spend time with Robert as he nears the end of his life.

Joe Powell, CEO of All Wales People First, the membership organisation for people with learning disabilities self-led groups. In this video Joe discusses how they have used the HRA section 6 duty and the language of lawful, legitimate and proportionate under Artcle 8 to challenge a service's decision to make a woman with learning disabilities self-isolate for 14 days every time she went out. When the HRA was used this unlawful practice stopped immediately.

Sarah works in an NHS Trust. In this video she shares how the HRA provides an important practical framework for frontline staff to make daily decisions about health care treatment.

Martin headed operations at a voluntary sector housing association that supports people with mental health issues. In this blog he explains how their integration of the HRA into daily operations helped challenge their own policies and practice, with a reduction of violent incidents by 50% and reduce evictions. Using the HRA also helped the organisation to challenge a proposal for staff to wear high visibility jackets when supervising residents in the neighbourhood, in order to mark them out.

Sarah, the then Director of NSUN (the National Survivor User Network). In this blog she talks about how they have used the HRA to secure changes to mental health policy and to support people who are detained.

Ian is a carer for his disabled son and his wife. In this video Ian shares how he relies on the HRA to support his loved ones and other carers, because too often services and commissioners are making decisions that risk people's dignity and equality.

Amy (not her real name) received mental health treatment as a child, in hospital. She later became an NHS staff member working on a project with staff and people receiving services to better ensure the rights in the HRA are upheld in everyday decision-making. In this blog Amy shares her experience on the importance of the HRA for supporting patients to know they have rights, and for staff to respect and protect people's rights every day.

Em and Anna share how the HRA is helping survivors of domestic abuse

Em (not their real name): “Given my past experiences I have really struggled with standing up for myself and my rights, I haven’t had any confidence. But now I know that it is the law for me to have my rights upheld, I feel like I can use human rights when I want to challenge a decision or try to get a better solution.”

Anna, support worker: "Often the clients we work with have a limited understanding of their own human rights and how this intersects with their experiences of domestic abuse and the legal obligations and responsibilities of professional agencies that are supporting them. For clients to work with BIHR to develop the Human Rights Tool and participate, has provided a platform for victims/survivors to both learn about their rights, and also ensure that the information is accessible to others experiencing domestic abuse. The individuals that participated have felt incredibly empowered since gaining a much deeper understanding of their human rights, and how they are able to use these to advocate for themselves when engaging with professionals. Often, human rights are not considered when fundamental decisions regarding the client’s situation, are being made by other professional bodies such as social care and the police. It is therefore imperative that the HRA is considered by all professionals engaging with individuals experiencing domestic abuse … [the project has] been invaluable in allowing both the victims/survivors and case working teams to develop more confidence in using HRA advocacy to achieve positive outcomes."

Human Rights Act Review Research:

“I am using the Human Rights Act right now to defend my daughter in a locked institution about to be sent out of area away from home and family.”

Human Rights Act Review Research:

“As a representative of the state (social worker) I can say that the Human Rights Act has almost always been a positive thing, even if it has sometimes meant more work or more effort. The result - ensuring that the rights of patients and service users are respected - is always worth it.”

“I am a social worker and find that the rights in the Human Rights Act - liberty, privacy, freedom from inhuman treatment - are vital and should be central when decisions are made affecting vulnerable people. Ensuring that decision-makers MUST take these rights into account ensures better, fairer decision-making.”

“As a social worker, the rights in the HRA are - and should be - central to our decision-making. … Without the requirements of the HRA I can guarantee that unfair and unjust policies would be in place, affecting some of the most vulnerable in society.”

The examples above show the difference made when decision-makers internalise the requirements of human rights law and integrate those into their policies and decision-making processes. The Human Rights Act is an incredibly powerful tool when it is understood and used. The challenge is that is often misunderstood and underused, reviews and inquiries which put the focus on the operation of the Act solely in the context of a courtroom do little to support the move to a culture of respect for human rights.

- For every person and their family whose detention under the Mental Health Act has been rights-respecting, least restrictive and of therapeutic benefit because that Approved Mental Health Professional or Independent Mental Health Advocate was Human Rights Act trained.

- For every individual whose social care assessment or review happened despite easements because that social worker knew it could breach their human rights if easements aren't applied compatibly.

- For every care home resident who has been supported to see their loved ones during the pandemic because that care home manager did a human rights impact assessment.

- And crucially, for every person for whom these things have not happened but who have found the tool they needed to challenge power in the Human Rights Act.

This is the kind of impact of the operation of the HRA in practice, every day in the lives of people and public officials, which risks being missed by this Review and any subsequent recommendations to the UK government. Yet any such recommendations could lead to change that would profoundly impact people's everyday experiences of having their human upheld in the UK.

3.2.5: The real issue that needs addressing: human rights leadership

In our evidence gathering, we asked people and public officials, prior to BIHR's support, what they feel are the barriers to achieving a culture of respect for human rights. The word cloud below, from one of our many sessions, answered by 69 people raises the familiar issues of awareness, education, funding and empowerment (note the larger words mean they were repeat answers). **Not a single person in 69 in this study, and across the board in our work, answered that what they felt was needed was a review of the Human Rights Act.**

Research question: what are the barriers to achieving

a culture of respect for human rights in the UK?

At BIHR, we echo the voices of the people we work with; and a very clear message is that Review of the Human Rights Act is unnecessary (see below, section 4). The HRA is based on universally agreed principles and international and regional laws which exist to limit state interference and uphold the fundamental rights of individuals. Sadly, history and people's everyday experiences remind us of the need for human rights laws. The past year reinforces this all too starkly.

That is not to say the UK's protection of human rights is perfect; plainly it is not, and we see people's rights risked and breached far too regularly. The problem that needs addressing is not the HRA. The legal framework is not failing. As this submission demonstrates, there is ample evidence of the law supporting people to be treated with equal dignity and respect. The HRA can be part of the solutions needed, not the problem. When we strengthen the ability of public bodies to use the HRA and of people and communities to advocate for their rights we see the difference a culture of respect for human rights makes.

The failure has been one of leadership, from successive UK governments[15] since the HRA's passing, to show the necessary national leadership and investment of resources, education, practical implementation and monitoring to secure a culture of respect for human rights.

Spotlight: Ensuring human rights protection for people during the pandemic

After the Coronavirus Act (CVA) was passed in March 2020, we were inundated with human rights capacity building requests from public bodies and those delivering public functions. The ask from public bodies, most notably Adult Social Care Teams (initially), across the UK was to support teams of staff to apply the CVA compatibly with the ECHR and through this, the HRA. We believe the reason for this increase in demand for our support was a direct result of Schedule 12 of the CVA which, when setting out the powers of local authorities in England, stated:

"A local authority must meet an adult's needs for care and support if— (b) the authority considers that it is necessary to meet those needs for the purpose of avoiding a breach of the adult's Convention rights."[16]

The guidance which followed on social care easements produced by the Department of Health and Social Care also made clear:

"Local authorities will remain under a duty to meet needs where failure to do so would breach an individual's human rights under the European Convention on Human Rights (ECHR). These include, for example, the right to life under Article 2 of the ECHR, the right to

[15] This can be starkly compared to actions of some of the devolved governments focused on securing the HRA and bringing additional international human rights protections into the UK, which builds on our current law rather than questioning or undermining it.

[16] https://www.legislation.gov.uk/ukpga/2020/7/section/17/enacted

freedom from inhuman and degrading treatment under Article 3 and the right to private and family life under Article 8."[17]

As did the Scottish Government statutory guidance for local authorities on sections 16 and 17 of the Coronavirus Act 2020:

"When using these provisions, all decisions made on an individual's social care needs should be considered alongside their individual wellbeing and fundamental human rights."[18]

As a human rights organisation, we know that Section 3 of the HRA, together with section 6 of the HRA (see section 6 below), means that public officials across the UK should apply both primary and subordinate legislation compatibly with human rights, unless there is an explicit provision which prevents this, creating a statutory defence. However, the CVA and the succeeding guidance which made this duty explicit led to the increase in awareness of this part of the Human Rights Act for public bodies.

Since March 2020 over 40 public bodies across the UK reached out to us for practical human rights support. We have provided support to over 2,000 public officials to understand how to apply coronavirus legislation compatibly with the HRA. This includes:

Somerset County Council, Leicestershire County Council, South Gloucestershire Council, the Nursing & Midwifery Council, Lincolnshire Council, Rutland County Council, Lancashire Council, Gloucestershire Council, Blaenau Gwent County Borough Council, West Berkshire Council, Telford & Wrekin Council, Worcestershire County Council, NHS Torbay & South Devin, Suffolk Safeguarding Partnership, Derbyshire City Council, NHS Dumfries & Galloway, Midlothian Health and Social Care Partnership, Norfolk and Suffolk Foundation Trust, TEWV NHS Foundation Trust, Trafford CCG.

Staff and leaders who attended our human rights capacity building sessions on the HRA and the pandemic have shared:

"I will integrate this into decision making in Dementia Care."

"I will make sure that if the Care Act Easements are switched on where I work, I will ensure not to apply them if they breach human rights."

"Knowing that I can disapply a provision of the mental health law if it breaches the rights of an individual has changed so much about how I will practice."

"How COVID is having an impact and what to consider – lawful, legitimate, proportionate when making decisions."

"This approach to decision making demystified a lot, it has given us the answers we need at a difficult time."

[17] https://www.gov.uk/government/publications/coronavirus-covid-19-changes-to-the-care-act-2014/care-act-easements-guidance-for-local-authorities
[18] https://www.gov.scot/publications/coronavirus-covid-19-changes-social-care-assessments-statutory-guidance-local-authorities-sections-16-17-coronavirus-act-2020-updated-6-nov/

4. OUR EVIDENCE ON 20 YEARS OF THE OPERATION OF THE HRA

The views and evidence included below, which have informed our submission, come directly from:

1. People: People accessing (or trying to) access public services, their family members and people who care about them.
2. Advocacy, Community and Voluntary Groups: Formal advocates (e.g. IMCA, IMHA 2etc.), self-advocates, and other community, campaigning, and advocacy groups.
3. Staff: People with legal duties to respect and protect rights. This includes those working in public services and in private, charitable, or voluntary bodies delivering public services.

This evidence that we have gathered in response to this Review is bolstered by our organisational expertise and experience developed over the past 20 years of supporting people, advocacy and community groups and stuff in public service to use the HRA every day.

4.1: What people really think about the Human Rights Act

As noted, we have interacted with over 400 people over the last 7 weeks, discussing the Human Rights Act and the Independent Review into the HRA.

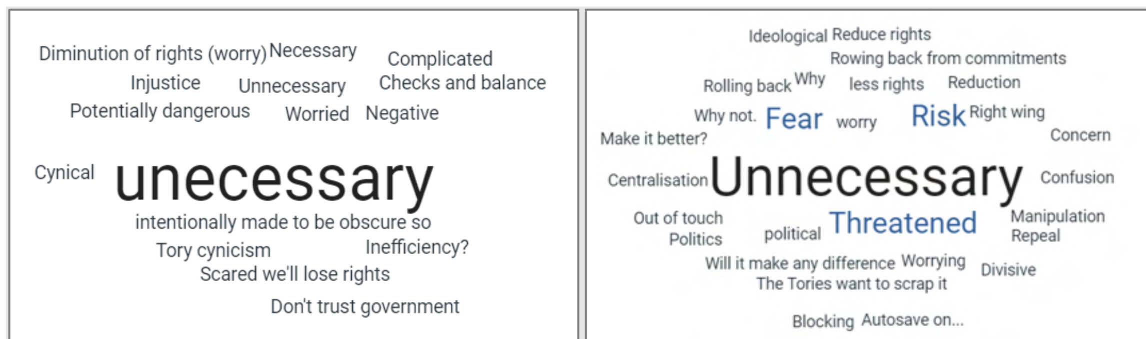
Human Rights Act Review Research:

100% of our research respondents said that the Human Rights Act was important to them.

Human Rights Act Review Research:

88% of our research participants think the Human Rights Act is important because our country should have a law which says that governments and public bodies or services should protect our rights, and courts should be able to look at cases about rights.

When we asked what attendees though about the Independent Review into the Human Rights Act, the most common answer was **"unnecessary"**, for example:



Scotland Session *Equally Ours Session*

Human Rights Act Review Research:

88% of research respondents are worried that this review may lead to less protection of rights.

This reflects our experience over the last 20 years, where we have overwhelming seen the HRA recognised as an incredibly important piece of legislation, and uitilised as such. Over the past 20 years we have gathered numerous examples of people, community and advocacy groups and public services staff using the HRA to create real change (noted above, section 3.2.5)

4.2: People interacting with public services and those who care about them

Human Rights Act Review Research:

78% of the people said that the Human Rights Act is important for them and/or the people they care about as it helps them to raise their concerns with public bodies/services when the feel their rights are not being upheld.

The people that we have worked with and supported have shared with us countless examples of how they have used human rights to create positive change in their lives. For example, Becca, a woman who was involved in our recent project to develop an online human rights tool for women survivors of domestic abuse:

Becca's Story

Becca had recent left an abusive relationship and was rebuilding her life. Becca's children had been removed from her care by social services, which she was incredibly upset about. She had been trying for a number of months for the decision to be looked at again, but no progress had been made. Becca attended a mapping session during a BIHR project to create a new human rights tool where we discussed human rights and how they can apply

to the everyday lives of women who are rebuilding their lives after domestic abuse, including the right to private and family life, home and correspondence.

Becca's support worker told us: inspired by your session Becca and I spoke to her solicitor about the situation, using the language of human rights, language she had not known of or felt confident in using before. The solicitor helped Becca challenge the decision using human rights. As a result, the court overruled the decision to have her children removed and said Becca can work with social workers to gain skills and support to have full custody of her children again.

(Source: BIHR's work)

4.3: Advocacy and community groups, campaigning and voluntary organisations

Human Rights Act Review Research:

74% of the respondents said the Human Rights Act is important to them as advocates or in their work to support other people as it helps them to support people so that their rights are respected.

We have seen how human rights give advocates a practical framework for managing difficult situations. Human rights are central to the work of advocates as advocacy helps people to express their views or concerns, to explore choices, to access information and services, and to protect and promote rights. Human rights also underpin how other laws and restrictions should be applied.

Jenny's Story

Jenny wanted to leave a mental health hospital to visit the coffee shop, but staff said she couldn't as it wouldn't be in her best interests. Jenny was not formally detained and could leave at any time. Refusing to let Jenny leave meant informally detaining her without any safeguards. Advocates raised Jenny's right to liberty with staff and arranged for Jenny to leave to get coffee. This reassured staff about her safety. Respecting Jenny's right to liberty helped her gain control over her life.

(BIHR's work, here)

Human Rights Act Review Research:

54% of the respondents said the Human Rights Act is important to them as a campaigner as it helps them to ask for local, regional, or national changes to make decisions, policies and laws more respectful of rights.

We have been involved in and supported a number of campaigns that have used the Human Rights Act over the past 20 years. Some successful examples of campaigns using the Human Rights Act include:

- Equal marriage (and before that, partnerships)[19]
- Addressing violence against women and the failures of the criminal justice system[20]
- Fighting for justice for the Hillsborough families[21]
- The rights of children being considered in deportation issues
- Addressing the hostile environment[22]
- Accountability for Grenfell[23]
- Tackling abuse and neglect in health and care[24]
- Privacy and the rise of data collection, tracking and artificial intelligence[25]

The Human Rights Act, and human rights more generally, have been a useful campaigning tool for self-advocates and campaigners. For example, following the exposure of the horrific abuse of patients in an assessment and treatment unit (ATU) at Winterbourne View Hospital, self-advocates, friends, families and supporters came together under the "Stripped of Human Rights" campaign to call for their rights to be respected and to be treated with dignity.[26]

4.4: Staff with legal duties to respect and protect rights in public bodies and services

Human Rights Act Review Research:

44% of the respondents said the Human Rights Act is important to them as a staff member in a public body or service, as it helps them to uphold the rights of people accessing the support they provide.

Over the past 20 year we have worked closely with public authorities and the staff working for them, supporting them to increase the accountability of public bodies to respect and protect human rights in everything they do, every day. This work includes supporting human rights-based decision-making with frontline staff and local policy decisions, to using a human rights approach to commissioning and changing laws and national policies to ensure they are human rights compliant.

[19] https://www.stonewall.org.uk/our-work/campaigns/1998-human-rights-act-opens-door-lgbt-rights
[20] https://www.bihr.org.uk/Blog/victims-human-rights-must-be-protected
[21] https://www.bihr.org.uk/blog/hillsborough-inquest
[22] https://www.bbc.com/news/uk-47415383
[23] https://www.bihr.org.uk/blog/grenfell-tower-hra
[24] Layout 1 (equalityhumanrights.com)
[25] https://www.theguardian.com/uk-news/2018/sep/13/gchq-data-collection-violated-human-rights-strasbourg-court-rules
[26] https://www.bihr.org.uk/Blog/the-strippedofhumanrights-protests

Children and Adolescent Mental Health inpatient service

Young people were admitted to the Tier 4 service from all over the country, potentially separating them from their family and friends for many weeks. An ongoing problem for staff, common to many mental health in-patient services, has been managing access to mobile phones and the internet. There are additional concerns with young people around internet grooming, exploitation and inappropriate usage. This made staff fearful of being blamed for allowing such access and potentially placing a young person in a vulnerable position whilst in their care. This resulted in young people not having access to phones and the internet.

Following their involvement in BIHR's project (2011-2014) the centre applied a human rights approach and individualised care planning and have made the following changes:

Mobile phones: previously the service policy banned young people's use of mobile phones due to safety concerns (both harm to the young person or them using the phones for harm). The policy was reviewed and now all young people have access to their mobile phones, with safety concerns being managed on an individual basis, giving more responsibility to the young person. This has improved young people's ability to maintain contact with their family and friends and provided staff with a framework for managing access issue.

Internet access: this had also been restricted due to safety concerns. The service drafted a new policy, allowing young people access to the internet, with safety concerns being addressed by staff on an individual basis. The aim is to further improve young people's contact with their family and friends and give staff a clear framework to respect rights and uphold their duties to protect against harm.

(Source: BIHR's work)

The often-used rhetoric that staff working in public services see the Human Rights Act as a hindrance to decision-making, has in our experience not been the case. Indeed, when decision makers are supported to understand and apply the HRA they see it as an incredibly helpful and practical tool for policy and practice.

Human Rights Act Review Research:

64% of those attending our staff-focused research workshop said the HRA has helped them to change decisions or policies so they can better support people.

36% said the HRA has helped them to change decisions or policies to better support staff and the organisation.

4.5: How is the Human Rights Act Being Used?

Human Rights Act Review Research:

76% of research respondents have either used the HRA in their life or work to help change things for the better or know someone who has.

When asked to share how they have used the Human Rights Act to help change things for the better:

- 50% said the Human Rights Act has helped them challenge poor decisions by public bodies/services that affect them (or the people they support).
- 28% said the Human Rights Act has helped them challenge lack of basic public services that they or the people they support should be able to access.
- 26% said the Human Rights Act has helped them to change decisions or policies so they can better support people.
- 19 % said the Human Rights Act has helped them to change decisions or policies to better support staff and organisation.
- 16% said the Human Rights Act has helped them or the people they support to bring a legal case in the courts to challenge the decisions of a public bodies/services.

Specific responses included:

I successfully advocated for a patient to have their family with them when they died, using the HRA."

"Have been part of successful campaigns around poverty and dignity as well as poverty and the media."

"It underlies what I as a practitioner, and the service we run do."

"We make sure the HRA feeds into our own decisions, and I use the HRA in order to advocate for the rights of others too. I am a social worker and find that the rights in the HRA - liberty, privacy, freedom from inhuman treatment - are vital and should be central when decisions are made affecting vulnerable people. Ensuring that decision-makers MUST take these rights into account ensures better, fairer decision-making."

"As a social worker, the rights in the HRA are - and should be - central to our decision-making. Unjust or unfair policies have been modified in light of reflecting on whether they properly respect the rights of patients and service users. This has affected the general level ("which policies should we have in place") and the individual level ("how should a policy apply to this person"). Without the requirements of the HRA I can guarantee that unfair and unjust policies would be in place, affecting some of the most vulnerable in society."

5. Our Recommendations to the Independent Human Rights Act Review

The HRA is an incredibly powerful tool which has the power to create a culture of respect for human rights in the UK. However, we still have some way to go before rights are made real for all of us, every day.

Crucially, the issue which prevents the UK reaching a culture of respect for human rights, is not the law itself, but rather the leadership to implement it; changing the law is not the solution. During our research we asked people, community and voluntary groups, and public officials about the barriers to securing a culture of respect for human rights. Not a single person said there was a need to review the law (see above, section 3.2.5)

What is needed is to focus on the implementation of this law. All staff working for public authorities and those working in public services and in private, charitable or voluntary bodies delivering public services have a legal duty to protect, respect and fulfil human rights. However, human rights training or capacity building is not given as standard. Over the last year we have trained over 2,000 staff working in public authorities many of whom have never received human rights training before. For example, in a recent survey conducted with local authority staff working with children and young people prior to a BIHR human rights session, only 15% of respondents had attended human rights training before.

During our sessions we have been told countless times by people with a wealth of experience, such as Commissioners of 30 years or nurses of 20 years, that they have never been told about their duty to uphold human rights. This duty has now been law for over 20 years. Likewise, when we do sessions with people who are accessing (or trying to access) services they are able to say "that's against my human rights" but have not had the support to fully understand their rights and to use the rights within the HRA in conversations with services.

None of this is the failure of the law itself. The Care Act, for example is vastly more complex and longer than the HRA and practitioners are still able to cite sections of the Care Act and integrate these into their work. This is because time and resources have been put into supporting practitioners to use Care Act in their work. Our work over the past 20 years shows that the HRA can be translated into a practical and easily understood tool. However, it continues to be discussed only in reference to courtrooms. This Review exacerbates this problematic narrative, not least because when the Review is discussed, it claims to be looking at how the HRA is working for all of us.

> "It is absolutely within the traditions I have just mentioned for the Government to look at them again to make sure that they are working in a way that benefits the majority of us." Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice [27]

There is a clear failure of leadership to put people's human rights at the heart of all interactions with government and public power, both nationally and locally. Staff working in

[27] Rt Hon Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice. Joint Committee on Human Rights, Oral evidence: 18 November 2020 Ministerial scrutiny: human rights, HC 978;

public authorities need to be trained in using the HRA and supported by leadership to do this. The legal framework of the HRA should be used on an daily basis by "decision-makers internalising the requirements of human rights law, integrating to standards into their policy and decision-making processes, and ensuring that the delivery of public services in all fields in fully informed by human."[28]

We need to stop calling for Reviews of the law and start focusing on the actual barriers to the realisation of people's rights in the UK. These barriers are not legal barriers but practice barriers, funding barriers, support barriers, resource barriers... We need to focus our time and energy into strengthening the ability of public bodies to use the law, not reviewing the law.

[28] Joint Committee on Human Rights Thirty-Second Report, paragraph 141

6. CONTEXTUALISING THE LEGAL QUESTIONS POSED BY THE REVIEW

Both the Lord Chancellor and Chair of the Panel have stated that 20 years since its passing, it is timely to review the operation of the Human Rights Act.[29] However, as we've also noted throughout this submission, the questions that have been asked by the Panel have a legalistic focus. It is regrettable that there is little consideration of section 6 of the Human Rights Act, which places the duty on public authorities to uphold human rights, and when this does not happen is the legal basis for court action. Consideration of 20 years operation of the Human Rights Act should include how section 6 is being applied, and impact of this for rights protection in the UK beyond the courts, as noted throughout our submission.

6.1: Over-focus on litigation and previous "reviews"

The ability to bring legal cases and seek a remedy for breaches of human rights is a vital part of ensuring accountability within any democracy; and such legal action was simply not possibly before the Human Rights Act. Much of the UK political and media discussions of the Human Rights Act has tended to focus on the ability to litigate rights in the courts. This focus has been at the heart of the numerous reviews (and political and media rebukes) of the Act since its passing, from a range of governments and political parties. It is often legal cases that are cited by those who have advocated the Human Rights Act's "scrapping", amendment or rebranding. Some political discomfort with any human rights law should be expected, as these standards serve as a check on government and public power, and will inevitably restrict some actions or decisions in order to protect people's rights. However, the way we have seen particular legal cases used, often by those whose actions are occasionally curtailed by the by the law, as a the basis for completely undoing or redesigning the system of rights protection in the UK is very worrying. This worry has been shard with BIHR by almost every person we have engaged with about the Review since January 2021 (as well as more widely in our general work each year).

We note that this Review is not the first government appointed review of the Human Rights Act. For example, in 2011 the coalition government established a Commission on a UK Bill of Rights, which ran two consultation exercises and reported in January 2013. That Commission did not deliver a consensus report; on whether there should be a new bill of rights, the Commission was split between a majority view and a minority view, with further differences of opinion within the majority view. The main report was supplemented by eight individual papers from members, setting out their different views. The submissions to that Commission were published (we continue to welcome this Review's commitment to also publish the submissions it receives), and analysis shows that:

- 88% supported retaining the HRA (rising to 96% when including submissions made via postcards).

[29] Joint Committee on Human Rights, Oral evidence: 18 November 2020 Ministerial scrutiny: human rights, HC 978; and Government Press Release, 'Government launches independent review of the Human Rights Act' (December 2020). Available here: https://www.gov.uk/government/news/government-launches-independent-review-of-the-human-rights-act

- 98% supported the continue retention of incorporation of the ECHR (we note, and welcome, the Government's clarity in this Review process that it remains committed to staying within the ECHR)
- 45% opposed a new UK bill of rights (28% advocated for a new bill of rights or expressed conditional support for one)
- Of those opposed to a new UK bill of rights, the most commonly expressed view – 350 in total – was that the HRA is already a legally enforceable bill of rights that is working well
- Of those who expressly advocated/expressed conditional support for a new UK bill of rights the most commonly held view – 140 in total – was that a new UK BOR could adopt additional rights supplementary to those in the HRA (not replacing).[30]

There have additionally been a number of parliamentary and devolved assembly inquiries exploring the operation of the HRA over the last 20 years, which have noted the importance of the law, and its impact, often questioning what the "problem" is with the HRA, aside from fulfilling its role in holding state and government power to account. For example:

- EU Select Committee (UK) concluded: 'witnesses to this inquiry raise serious questions over the feasibility and value of a British Bill of Rights of the sort described by the [UK Minister] … they make a forceful case for the Government to think again before continuing with this policy.'[31]
- Scottish Parliament Committee inquiry: 'there is strong opposition from Scottish stakeholders to any repeal of the Human Rights Act 1998'.[32]

We believe there is ample evidence about the importance of the HRA in the UK, including in the devolved nations, which we implore the Review Panel to recognise. As is clear throughout our submission, we believe this consultation seems to seek answers to questions which assume something needs fixing without articulating what is broken or problematic. This is why we have sought to address how the HRA is working in the UK, drawing on its stated aims to supporting a culture of respect for human rights, and not simply its legal operation within the courts or within our constitutional arrangements.

Notwithstanding this, we will provide our answers to the questions posed, drawing on our legal expertise and practical expertise on the application of the HRA, with the understanding that we believe these questions in isolation are far too narrow for any serious review of 20 years operation of the HRA.

6.2 Answers to Theme 1

(a) How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

The duty in section 2 of the HRA

[30] British Institute of Human Rights, Summary of Final Report from the Commission on a UK Bill of Rights. (January 2013) https://www.bihr.org.uk/Handlers/Download.ashx?IDMF=d856197b-36f9-4979-b516-06d3f78635c9
[31] House of Lords EU Justice Committee Report: UK Bill of Rights, 12th Report of Session 2015–16 (May 2016), www.publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/139.pdf
[32] Scottish Parliament. European and External Relations Committee, 3 March 2016, http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10416&i=95872

When a UK court is deciding a human rights question it must "take into account" any "judgment, decision, declaration or advisory opinion of the European Court of Human Rights" (section 2 of the HRA). The "jurisprudence of the ECtHR" means all the previous judgments, decisions, declarations and advisory opinions of the ECtHR. The duty in section 2 is not a strictly binding duty on UK courts; courts do not have to interpret the rights in the rights in the Convention the exact same way that the ECtHR has done before. Instead, they should "take into account" the judgments of the ECtHR. In *Ullah*, Lord Bingham explained this situation:

> "... While [ECtHR]case law is not strictly binding, it has been held that courts **should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court** ... This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law... The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less." (our emphasis)

It is interesting to note that when section 2 of what became the Human Rights Act was debated in parliament, Lord Kingsland (Conservative) proposed an amendment to make UK courts "bound by" ECtHR cases. The then Lord Chancellor (Labour government) stated this would be "strange" and then intention of the "take into account" provision was to allow UK courts "flexibility and discretion".[33]

Application in practice

The duty to take into account has been applied in the courts to assist judges in reaching their decisions. It is clear that UK courts use this duty to keep a pace with ECtHR jurisprudence, to ensure the UK's human rights protection do not fall behind, and as a tool to support the development of UK jurisprudence where there is no established ECtHR case law on the specific legal or factual issue in hand. Examples of cases where judges have taken account of the ECtHR jurisprudence to assist them in reaching their conclusions include:

- Ullah: The House of Lords (prior to the Supreme Court) took account of ECtHR jurisprudence extensively. Lord Bingham, in his decision, referred to ECtHR cases to explore "the crucial issue dividing the parties": "whether, in a foreign case, reliance may be placed on any article of the Convention other than article 3, and in particular whether reliance may be placed on article 9". [para 15]

- Cheshire West: Lady Hale (as she was then) took account of Strasbourg jurisprudence in defining 'what is a deprivation of liberty'; assisted in exploring this issue, particularly: (1) whether the concept of physical liberty protected by article 5 is the same for everyone, regardless of whether or not they are mentally or physically disabled; and (2) determining the essential character of a deprivation of liberty. This provided basis for

[33] Klug, F. and Wildbore, H. (2010) 'Follow or Lead? The Human Rights Act and the European Court of Human Rights', European Human Rights Law Review, 6: 621-30.

the Supreme Court to develop the UK's jurisprudence on the specific factual situation which had not been before the Strasbourg Court:

> “The Strasbourg case law, therefore, is clear in some respects but not in others. The court has not so far dealt with a case combining the following features of the cases before us: (a) a person who lacks both legal and factual capacity to decide upon his or her own placement but who has not evinced dissatisfaction with or objection to it; (b) a placement, not in a hospital or social care home, but in a small group or domestic setting which is as close as possible to “normal” home life; and (c) the initial authorisation of that placement by a court as being in the best interests of the person concerned. The issue, of course, is whether that authorisation can continue indefinitely or whether there must be some periodic independent check upon whether the placements made are in the best interests of the people concerned.” [para 32]

- McConnell: The Court of Appeal recently noted “The third fundamental feature of the case is that there is no decision of the Strasbourg Court which suggests the interpretation advanced by the Appellants. The approach which the courts take under the Human Rights Act is in general to keep pace with the jurisprudence of the Strasbourg Court but not to go beyond it." [para 72]

No need for amendment

This duty is about consistency and certainty, ensuring that decisions about rights in the UK courts are not completely different from the judgments of ECtHR. Legal certainty is a long-established principle of English law. If a UK court decides a question relating to a human right in a way that is very different to previous decisions and judgments of the ECtHR, it is likely that the decision will be referred to the ECtHR and may result in the decision being overturned.

We welcome the current Government's commitment to staying within the European Convention on Human Rights (ECHR).[34] As a (founding) member of the ECHR our international legal obligations include a commitment to abiding by the judgements of the ECtHR in which the UK is involved (Article 46). The ECHR system recognises that each countries domestic authorities and the ECtHR has shared responsibility for the protection of human rights. The principle of subsidiarity means that it is our own institutions in the UK that have the primary responsibility for protecting human rights. Significant activity in the Council of Europe has stressed the importance of domestic human rights protection, and the need to take account of ECtHR judgements as part of this process, including the Brighton Declaration, established during the UK's presidency of the Council of Europe. The Declaration specifically affirms this approach:

> "Enabling and encouraging national courts and tribunals to take into account the relevant principles of the Convention, having regard to the case law of the Court, in conducting proceedings and formulating judgments; and in particular enabling litigants, within the appropriate parameters of national judicial procedure but without

[34] See Question 223, Page 32, Committee on the Future Relationship with the European Union Oral evidence: Progress of the negotiations on the UK’s Future Relationship with the EU, HC 203 Monday 27 April 2020, https://committees.parliament.uk/oralevidence/313/pdf/

> unnecessary impediments, to draw to the attention of national courts and tribunals any relevant provisions of the Convention and jurisprudence of the Court".[35]

Taking into account the wider judgments of the ECtHR enables the UK to ensure we are keeping pace with developments. It also helps ensure legal consistency and certainty, both key elements of the rule of law, an enduring principle of our domestic law and the European system of human rights protection which the UK helped established, and which the government has committed to remaining within.

(b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?

The margin of appreciation

The margin of appreciation is an important legal principle which means that the ECtHR recognises different social, cultural and political values and systems within the 47 countries that are members of the ECHR (and Council of Europe). This enables a level of consistency in protecting human rights across the 47 countries, whilst still respecting the competency domestic authorities to determine key areas, particularly where is not a common or shared approach or there is a delicate balance of competing rights to be made.

Application in practice

The UK has been involved in several cases at the ECtHR where the Court has applied the margin of appreciation and deferred to the judgement of the domestic authorities. For example, there have been a number of UK cases involving an individual person's right respect for private life (Article 8) and media reporting under the right to freedom of expression (Article 10). As with many human rights cases these involved delicate balances between a range a rights for different people. When this issue went before the ECtHR in *MGN Limited v UK*, the Court applied the margin of appreciation and agreed with the balance struck by the UK courts, noting that it would need strong reasons to substitute its view for that of the final decision of the domestic court.

No need for amendment

The margin of appreciation helps ensure that the protection of human rights under the ECHR system is both principled and practical. This is in line with the principle of subsidiarity and shared responsibility for human rights protection, with an emphasis on the role of domestic authorities. The principle of consistency is maintained, but so too is the need for domestic courts to be able to make judgments where they are best placed to do so.

(c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

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[35] Para 9(c)(iv), page 2, High Level Conference on the Future of the European Court of Human Rights Brighton Declaration, https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf

Judicial dialogue

Judicial dialogue takes place where judges in different courts interact and address issues when adjudicating on certain, often similar, situations. This is an ongoing process, primarily done via judgments and judicial reasoning, as well as more informal contact and regular meetings between ECtHR judges and domestic judges, including the UK. Judicial dialogue may take place, for example, when the UK courts are explaining why they are not following the ECtHR previous judgments exactly, or where the ECtHR sets out its reasons for departing from or upholding the UK court decisions.

Application in practice

There are several examples of judicial dialogue occurring across a range of issues between the UK courts and the Ect.HR. For example, in the UK case of R v Horncastle the Supreme Court had to consider the admission of hearsay evidence when a witness could not attend court in person. The Supreme Court declined to follow the ECtHR Chamber decision in Al-Khawaja, which took a limited view of when hearsay evidence could be relied on. The UK's Supreme Court found that the common law and statutory safeguards prevented the trial being unfair and the ECtHR's approach would lead to difficulties for English criminal procedure. Al-Khawaja was later heard in the Grand Chamber of the ECtHR, and the Court reversed the earlier finding, not least in light of the view taken by the Supreme Court in Horncastle and held that in principle English law contains sufficient safeguards to comply with the right to a fair trial (Article 6).

We have also seen how, when there may be conflicts with domestic case law and ECtHR decisions on a similar issue, the UK's approach of courts following the UK decisions rather than the ECtHR is correct. For example, in the UK case of Leeds v Price the Court of Appeal was faced with decision of the UK's superior court (at the time the House of Lords in Qazi) which permitted council eviction actions, in contrast to a later decision by the ECtHR involving the UK (Connors v UK) which meant that Qazi might have to be reconsidered. The Court of Appeal decided it must follow the UK superior court decision and that the ECtHR decision did not over-rule the UK one. They also referred to case to the UK superior court to reconsider it in the light of Connors. The UK superior court confirmed that this was the correct approach; the leading case in English law is binding, and lower courts must follow that to ensure legal certainty. It also recognised that ECtHR decisions are often very fact-specific and the margin of appreciation may relevant. The Leeds case itself went to the ECtHR Kay v UK and was then reconsidered in the UK Supreme Court in the case of Pinnock. The Supreme Court confirmed that it is not bound to follow a decision of the ECtHR where there is a clear and consistent line of authority, that should be followed.

Additionally, we note the evidence of the current President of the ECtHR and the UK judge to the Joint Committee on Human Rights which states:

> "Another example of formal judicial dialogue – though much more immediate and within the same proceedings - between the UK courts and Strasbourg is the Charlie Gard case, where the UK Supreme Court in its final judgment/order included two paragraphs which were specifically directed to the Court before whom an application (including for interim measures) was at that time pending … In addition, there is also extensive informal dialogue which takes place through various means. Firstly, there are regular bilateral meetings between small groups of UK judges (from the three domestic UK jurisdictions and the Supreme Court) and judges from the

> Court. These are held every 18 months or so alternately in Strasbourg or in the UK. Secondly, the UK Judge on the Court, Tim Eicke, frequently visits the UK and engages in informal dialogue with the judiciary in England and Wales as well as in Scotland and Northern Ireland. Another forum for informal dialogue is the Superior Courts Network ("SCN"). This network was established by the Court in 2015 and currently groups 93 superior courts from 40 out of the 47 Council of Europe Member States. In 2019 four jurisdictions joined from the United Kingdom: the UK Supreme Court, the Court of Sessions and Judiciary of Scotland, the Court of Appeal of England and Wales and the Court of Appeal of Northern Ireland. The SCN gives member courts privileged access to case-law information, including updates on important cases which is sent on the day of adoption of the judgment, as well as access to ad hoc case-law information through their own dedicated "focal point". In return, the superior courts provide the Strasbourg Court with information on the relevant domestic law for the purposes of any comparative law analysis required in any particular case notably by the Grand Chamber (in 2020, 4 such contributions were provided, with a maximum of 10 per year)."

No need for change

The opposite of judicial dialogue would be where there is no space for either discussion or exchange between the UK courts and the ECtHR, or for the UK courts to approach the issue in their own way. This is clearly not the case, and in fact we've seen changes to both UK and ECtHR judgements on the basis of dialogue, as well as sustained efforts to ensure dialogue is effective. We agree with the current President of the ECtHR and the UK Judge: "our view is that both the formal and the informal judicial dialogue is going extremely well and it is rather difficult to identify any particular area for improvement."[36]

6.3 Answers to Theme 2

As the Review's Terms of Reference note, the judiciary, government and parliament each have important roles in protecting human rights in the UK. It is unfortunate that the questions in this theme have set a direction of travel to focus on "over-judicialising" public administration and draws domestic courts unduly into questions of policy.

The HRA enables human rights accountability within the UK's constitutional arrangement. It specifically preserves the parliamentary sovereignty; the courts cannot strike down an Act of Parliament, and nor does it bestow law-making power on the courts. The constitutional relationship between parliament and the courts is maintained. Only parliament can make law, and the courts role is to interpret and apply that law.

a) Should any change be made to the framework established by sections 3 and 4 of the HRA?

We do not believe the framework in sections 3 and 4 need to be changed. Taken together these sections are examples of finely balance, nuanced drafting which enables the protection of human rights in practice and within the courts, whilst respecting the UK's constitutional principle of parliamentary sovereignty.

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[36] Written evidence from Judge Robert Spano, President of the European Court of Human Rights and Judge Tim Eicke (HRA0011) (February 2021) https://committees.parliament.uk/writtenevidence/22906/pdf/

As Lord Nicolls noted in *Ghaidan*:

> "Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights 'so far as it is possible to do so'. This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention."[37]

He went on to note "that under the 1998 Act the use of the interpretative power under section 3 is the principal remedial measure, and that the making of a declaration of incompatibility is a measure of last resort" (para 39). By passing the HRA, parliament has acknowledged that there must be a mechanism to allow rights-respecting interpretations of the other laws, but this comes with the important qualification in section 3 is the requirement that laws be interpreted compatibly with human rights only "so far as it is possible to do so". An interpretation cannot be at odds with the law itself, so the courts cannot fundamentally change a provision to make it rights-respecting if that would conflict with the wider law that the provision sits within.

Mr Godin-Mendoza's Case

In 2004 the House of Lords (now Supreme Court) used section 3 HRA to interpret an Act compatibly with the right to non-discrimination. Mr Godin-Mendoza lived with his same-sex partner for almost 30 years. His partner had a protected tenancy of the flat they lived in. After his partner died the landlord sought to evict Mr Godin-Mendoza. Under the Rent Act 1977 a person living with a protected tenant "as his or her wife or husband" was to be treated as if they were a surviving spouse, even if unmarried, and entitled to be treated in the same way as the protected tenant. The landlord argued that as a same sex partner Mr Godin-Mendoza was not entitled to the same level of protection. Using section 3 of the HRA, the court interpreted the provisions of the Rent Act as treating homosexual and heterosexual couples equally, allowing Mr Godin-Mendoza to remain securely in his home.

It is important to remember the practical impact of section 3 beyond the courts as well. This duty is central to how the HRA works everyday as it makes clear to decision makers, whether they be social workers, police or local authority staff, that when they apply legislation in their work, they must make sure they are protecting and respecting people's human rights.

Ultimately, section 3 does not grant courts law-making powers to our courts. It is instead a sensible mechanism to ensure that, where possible, the courts can ensure rights are respected through the application of other legislation.

Additionally, the doctrine of implied repeal - that if a later Act is inconsistent with a previous Act, the newer one prevails, and the implication is that the older has been repealed where there are inconsistences - does not apply. Rather, if an Act cannot read compatibly with human rights, the only power available to the courts (and only the higher courts) is to make a declaration of incompatibility (DOI). As noted, this is not a stroke down power. Section

[37] Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557 at para 26

4(6) specifically states that a DOI does not affect the validity of the law. The law which cannot be applied in a rights-respecting way remains in force unless and until parliament decides to amend the law.

As the UK Government itself notes, since the HRA came into force on 2 October 2000 until the end of July 2019 only 42 DOIs have been made by the courts. To put this in perspective, this is an average of less than 3 DOIs a year.[38]

Case Study[39]

The Care Standards Act 2000 allowed the listing of care workers as being unsuited to work with vulnerable adults after a complaint had been made about them, without giving them an opportunity to answer the allegations. Care workers placed on the provisional blacklist, known as the Protection of Vulnerable Adults list, were immediately suspended from the workplace without pay, and faced a wait of up to a year or more before the case against them could be heard. A large number of care workers and nurses were suspended based on allegations that turned out to be groundless and suffered significant stress and loss of earnings. June Wright, a nurse, and three others challenged the procedure on the grounds that it was incompatible with the right to a fair trial under Article 6(1) of the ECHR. In January 2009, five law lords unanimously ruled that the practice was unfair and incompatible with Article 6. Since the House of Lords ruling the procedure under the Care Standards Act has been replaced with a new Vetting and Barring Scheme which gives individuals in all but the most serious cases the right to make representations before being listed as unsuitable to work with children or vulnerable adults.

In particular:
(i) Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

This question appears to assume there is a problem with section 3 and seeking evidence, rather than seeking evidence about the operation of section 3 and then analysing whether there is an issue which needs addressing. We believe that section 3 is central to how the HRA works everyday within and beyond the courts. As noted above, section 3 only works to enable rights-respecting interpretation, in line with the HRA, which was passed by parliament, and notwithstanding this the courts cannot make an interpretation which is at odds with the legislations itself.

(ii) If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

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[38] There is no official database of DOIs, the Ministry of Justice has provided a summary of all declarations in chronological order and the Government's response in this report: Responding to human rights judgments Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2018–2019 (Oct 2019)
[39] R (On the application of Wright and others) v Secretary of State for Health and another (2009) UKHL 3

No, section 3 should not be amended or repealed, and there should be no retroactive application of any amended section 3 in the future. We need legal certainty, itself a key principle of domestic law, in order to be able to make and enforce law and for people in the UK to be able to abide by it.

(iii) Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

This question appears to be suggesting that the section 3 duty on courts to make rights-respecting interpretations of legal provisions (where possible) should be replaced with a move straight to making DOIs. In the context of questioning the powers of courts that seems a rather odd position.

Considering section 4 already forms part of the section 3 considerations undertaken by courts, as the two sections are interrelated. Importantly, the proposition behind the question appears not to recognise the compatibility exercises that occur within parliament and the role of parliament more broadly in the HRA framework. Section 19 requires the government to state whether the Bills it proposes respect our rights in the HRA, and through debates, amendments, votes and committees (particularly the JCHR), there are a range of parliamentary opportunities to consider any rights compatibility issues with new legislation. When a DOI is issued by the courts, it is parliament that determines whether to amend the law or not, and should the courts make a section 3 interpretation that parliament disagrees with that, this can be overridden through a new Act of parliament. We believe the HRA, and the courts have the right balance; section 3 is vital to support practical applications of law that are rights respecting both inside and beyond courts, and section 4 DOIs are a last resort.

Additionally, we note that this question does not recognise the different ways that the HRA works in devolved contexts. We urge the Review to take into considerations responses provided which set out these legal questions from a devolved context.

(b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

Derogation from rights have very serious implications on the realisation of the rights of people within a country. As such, derogations would be a very last resort and, as provided for in Art 15 ECHR, only "In time of war or other public emergency threatening the life of the nation". Such an extreme measure ought to be subject to challenge in the judicial system.

(c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

Subordinate legislation (regulations, rules, statutory instruments or orders) is made under the authority of an Act of parliament. We note that statutes often give ministers the power to make rules or regulations, usually with the approval of parliament. Indeed, much of the current Covid-19 related legislation has been made by the Government rather than parliament via Regulations, with limited (at best) involvement of parliament.

The section 3 duty to interpret laws compatibly with human rights applies to subordinate legislation in the same way that it applies to Acts of parliament. However, if a compatible interpretation cannot be made, the subordinate legislation can be disapplied. This is because subordinate legislation is not made by parliament, which is sovereign, but is made by the delegated authority, e.g., Government or devolved assembly, which is not sovereign.

> "The Human Rights Act is an act of the United Kingdom parliament and takes precedence over subordinate legislation such as the regulation in question … This means that incompatible subordinate legislation must simply be ignored … There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear." [40]

This must be the correct approach, unless there is some suggestion that institutions other than parliament should be sovereign within the UK's constitutional framework.

(d) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

The Human Rights Act can apply to acts of a UK public authority performed outside its territory only where the victim was within the jurisdiction of the UK for the purposes of Article 1 of the ECHR. One way that courts have said that the HRA might apply outside the UK is when the state, through its representatives (such as a soldier working for the UK army), exercises 'effective control' over an area or a person. This does not apply to active combat. We believe this is appropriate.

(e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

A remedial order is an order made by a minister under the Human Rights Act 1998 to amend legislation which has been found incompatible with the ECHR. As it is an Order, this is a form of secondary legislation. Draft remedial orders are considered by the Joint Committee on Human Rights and then need to be approved by both the House of Commons and the House of Lords to become law; thus, operating within the principle of sovereignty. Additionally, enhancing the role of parliament would require parliamentary time and resources. Given that governments control both, there would certainly be questions about partisan influence, as opposed to the current approach with the JCHR which is cross-party and cross-House and utilises expert legal advice.

Urgent orders may be made without advance scrutiny, but they will stop being law if they are not approved by both Houses within 120 days of being laid before Parliament. According to the Home Office: "The decision to use a Remedial Order strikes an appropriate balance between the need to remedy the incompatibilities quickly without further delay and the need to allow parliamentary scrutiny of the measures proposed."

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[40] Lady Hale RR v Secretary of State for Work and Pensions (2019) UKSC 51 para 27