

# Independent Human Rights Act Review

Written evidence from The Legal Education Foundation

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## **About this review**

The Government has established an independent review to examine the framework of the HRA ('the review'), how it operates in practice and whether any change is required. It has a narrow scope, focusing on:

- the relationship between domestic courts and the European Court of Human Rights and
- the impact of the HRA on the relationship between the judiciary, the executive and the legislature.

The review is specifically concerned whether the HRA strikes the correct balance between the roles of the courts, the Government and Parliament and whether the current approach risks domestic courts being unduly drawn into questions of policy.

This is the fifth examination of the effectiveness of the HRA in the last ten years: The Joint Committee on Human Rights (JCHR) previously examined whether the HRA was effective in 2018; in 2014, the Conservative Party published its proposals on the future of human rights within the UK; and in 2011, the newly elected Conservative Government held a Commission on a Bill of Rights, which examined whether there was a need to replace the HRA with a bill of rights.

## **Introduction**

The Legal Education Foundation (the LEF) is an independent grant-making foundation whose vision is of a society that fosters the principles of justice and fairness, where people understand and use law to bring about positive change and to prevent harm and where public systems and structures uphold the rule of law. We focus on the essential role of legal education in helping people and organisations to understand and use the law as a tool for change. We believe the law should be readily available at the times and in the places where people need it.

In the past six years, we have distributed more than £30 million to over 200 organisations in the legal field. This includes funding to organisations who provide technical legal expertise on key aspects of human rights to policy makers and parliamentarians as well as legal education to the public.

## Key points and recommendations

- There are compelling reasons why the current approach to human rights accountability should be retained, namely that the HRA has greatly benefited a vast number of people from across society, improving their health and wellbeing, ensuring their dignity, autonomy, privacy, family life and overall improving their quality of life.
- There is no evidence to suggest that there is an imbalance between the roles of the courts, the Government and Parliament, nor do we see any evidence that domestic courts are being drawn ‘unduly’ into questions of policy. Altering one aspect of the HRA risks undermining its overall effectiveness.
- However, there is evidence that due to poor implementation of the HRA by public authorities and decision makers, many people continue to face human rights abuses in their daily lives. The Coronavirus pandemic also poses distinct threats to the enjoyment of human rights for many people.
- Amendments to the HRA could have significant implications for the devolution settlements of the devolved nations and any review of the HRA needs to carry out specific and detailed analysis of the implications of any changes in the light of the impact on devolution settlements.
- Systemic barriers to accessing justice such as cuts to legal aid, the closure of advice services, a lack of understanding of and negative societal depictions of human rights, and finally barriers posed by the pandemic mean that people face significant barriers to holding public authorities accountable for human rights abuses.
- There is a strong case for Government to provide more support and training to public authorities to fulfil their duties under the HRA: to take a more active and central role in providing public legal education about human rights; and to reframe the discussion and debate about human rights to help address misunderstandings and misperceptions.
- The HRA has a crucial role to play in the recovery from the Coronavirus crisis, ensuring that recovery is inclusive and that people have the access to the services and redress that they need, particularly for those individuals that have been impacted hardest by the pandemic.
- Finally, it is essential that the Independent Human Rights Act Review engage directly with members of the public, particularly with those people who have experienced human rights abuses, about how HRA accountability can be improved.

## Scope of the review

The 2019 [Conservative Manifesto](#) committed to updating the HRA and administrative law to ensure the proper balance between the rights of individuals, national security and effective government. However, it is notable that this current review does not mention the rights of individuals. Instead, its focus is very much on the needs of government. The review asks whether the HRA strikes the ‘correct balance between the roles of the courts, the Government and Parliament’ implying that there is in fact a problem by examining whether the current approach ‘risks domestic courts being *unduly* drawn into questions of policy’.

In addition to whether the HRA strikes the right balance between the judiciary and the executive, and whether there is a risk that the judiciary will be drawn into questions of policy, there should be an extra question asking whether there is any evidence that such an imbalance has emerged. In The answer to this question lies beyond the scope and the expertise of the LEF however we would point to the [written evidence](#) from Judge Robert Spano, President of the European Court of Human Rights and Judge Tim Eicke (HRA0011) to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2018–2019.<sup>1</sup> They argue that the fact that the number of applications brought to Strasbourg against the UK is exceptionally low and further that the number of cases resulting in a judgment finding a violation is also very low and that this is strong evidence that the UK courts are successfully applying the European Convention on Human rights at the domestic level.<sup>2</sup>

For evidence of judicial reach, we refer to the examination by J Tomlinson, Graham, L. and Sinclair, A (2021) who argue that ‘there is scant evidence of judicial overreach’ and that ‘decision-making in this context is characterised more by judicial deference’.<sup>3</sup> Furthermore, with the proliferation of delegated legislation, the HRA is an essential tool to enabling people to hold the government accountable.

Given that the remit of the LEF is to focus on whether people understand the law and can use it to bring about positive change, we believe that there is an imbalance within this review and that it should also be examining whether the current application of the HRA within the UK adequately balances the rights of individuals against executive power, particularly regarding whether people are able to effectively realise and enforce their rights under the HRA. Again, the question of evidence is pertinent to access to justice and the HRA because

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<sup>1</sup> Written evidence from Judge Robert Spano, President of the European Court of Human Rights and Judge Tim Eicke (HRA0011) to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2018–2019, <https://committees.parliament.uk/writtenevidence/22906/pdf/>

<sup>2</sup> See above.

<sup>3</sup> Joe Tomlinson, Lewis Graham, and Alexandra Sinclair, ‘[Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?](#)’, *UK Constitutional Law Association*, February 22, 2021.

as highlighted in our report on civil justice reform<sup>4</sup>, in order to test, review and, where necessary, improve systems so that access to justice is safeguarded and people's rights are upheld, there must be a strategy for data collection and analysis. So in this instance, more information on who, how and when individuals are using the HRA, needs to be collected and used to inform deliberations and recommendations.

### **Does the current human rights framework meet the needs of individuals?**

The short answer to this question is yes in that since the HRA came into force in October 2000, it has greatly benefited a vast number of people from across society in a variety of very important ways. One of our grant funded organisations, the British Institute of Human Rights, has [case studies](#) of how the HRA has benefited people including examples where people have used the HRA to gain more prompt access to medical diagnostic tools, access to housing when fleeing domestic abuse, better access to social care, and being able to live as a married couple in a care home.<sup>5</sup> These case studies illustrate the way in which the HRA is significantly improving the wellbeing and the quality of their lives. Key to this accountability is the fact that the HRA has been incorporated into domestic law and is therefore legally enforceable in the UK. Individuals can bring a case under the HRA in the UK courts rather than taking it to the European Court of Human Rights in Strasbourg which would be much more costly and time-consuming.

### **Is there a case for change?**

Drawn from the contact we have with our grant funded organisations in the human rights civil society sector, we know that although the HRA has greatly benefited people in the UK, many individuals continue to face human rights abuses in their daily lives.

Furthermore, it is well documented that Covid-19 has affected human rights both here in the UK and worldwide. In a joint report, [The Government's response to COVID-19: human rights implications](#) the House of Commons, House of Lords and the Joint Committee on Human Rights (JCHR), document the way in which the Coronavirus pandemic and the UK Government's response to the pandemic has impacted on the human rights of people residing in the UK.<sup>6</sup> Many of these breaches will have been necessary in the short term with regard to the primacy of the right to life as protected in law under Article 2 of the European Convention on Human Rights (the 'Convention'). However, it is also true that many of the other breaches arose because of various public authority failures including for example, the

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<sup>4</sup> Byrom, N. (2019) '[Executive summary: Digital Justice: HMCTS data strategy and delivering access to justice](#)', paragraph II.

<sup>5</sup> [Human Rights Change Lives | British Institute of Human Rights \(bihr.org.uk\)](#)

<sup>6</sup> House of Commons, House of Lords, & Joint Committee on Human Rights, [The Government's response to COVID-19: human rights implications](#), September 2020.

allocation of personal protective equipment, the blanket use of Do Not Attempt Cardiopulmonary Resuscitation notices in care homes, hospital triage protocols using non-medical criteria such as age and disability, the deaths in care homes due to early releases from hospitals, and the digital exclusion of many vulnerable and disadvantaged people from the justice system.<sup>7</sup>

That people continue to experience human rights abuses in their daily lives, and even more so because of the pandemic is not indicative that that the HRA is unfit for purpose. What is evident is that there are many barriers to people understanding and realising their human rights and that there needs to be much better and more effective implementation of human rights by public authorities and decision makers. This is particularly important at a time when there is likely to be a post-pandemic surge in demand for services at the same time as extreme financial pressure on local authorities. The HRA will have a role to play in ensuring that in the context public bodies providing access to services, such as social care, do so in a way that meets human rights obligations.

#### Implementation of human rights by public authorities and decision makers

Section 6 of the HRA requires public authorities to act in conformity with Convention rights. However, evidence to the JCHR in 2018 indicated that inconsistent training of public officials on their duty to comply with the HRA has resulted in patchy awareness and low levels of understanding of human rights by various public authorities.<sup>8</sup> The example of the failure by Home Office officials to understand their duties under the HRA during the Windrush scandal is highlighted.

When human rights approaches are embedded in the delivery of public services, this results in the human rights of individuals being upheld, having a positive effect on their lives. There are some excellent examples of civil society projects run by organisations such as the British Institute of Human Rights<sup>9</sup>, that work with public authorities and decision makers to integrate human rights processes and policies into services and decision-making processes.<sup>10</sup> However, there needs to be much more support and better implementation of the duties arising under the HRA in public service delivery and decision making by Government.

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<sup>7</sup> House of Commons, House of Lords, & Joint Committee on Human Rights, [The Government's response to COVID-19: human rights implications](#), September 2020.

<sup>8</sup> Joint Committee on Human Rights, [Enforcing Human Rights](#), www.gov.uk, 2018.

<sup>9</sup> <https://www.bihhr.org.uk/ourwork-publicbodies>

<sup>10</sup> Over the last 8 years TLEF has also provided grants in this respect to other organisations including: Maternity Action (pregnant women), Electronic Immigration Network *and others* (people navigating immigration and asylum processes), Access (disabled people), Women's Resources Network (women), Life Stories Network (carers of people with dementia), LGBT Consortium (LGBT people), BIHR, Life Stories Network (NHS patients).

## Implementation of human rights in the devolved nations

The HRA applies to the United Kingdom but in terms of how the Act has been embedded and implemented by public authorities varies across the devolved nations. For example, Scotland has started to reform its human rights laws, strengthening protections and rights for individuals, for example a [National Taskforce on Human Rights Leadership](#) is developing recommendations for a broader new human rights statutory framework for Scotland.

In Wales, the Welsh Government has commissioned Swansea University to undertake research on mechanisms to strengthen and advance equality and human rights in Wales and to make recommendations for legislative, policy and guidance changes and any other reforms that help meet this objective.<sup>11</sup>

There are very particular issues regarding human rights in Northern Ireland, in particular the need to legislate a distinct Bill of Rights to conform with the provisions of the Belfast/ Good Friday Agreement and reflect the circumstances of Northern Ireland.

It is therefore important to recognise that amendments to the HRA will potentially lead to divergence between the four nations, particularly regarding the implementation of different human rights frameworks. Therefore, any review of the HRA needs to carry out specific and detailed analysis of the implications of any changes in the light of the impact on devolution settlements.

## Access to justice and public legal education

An essential part of the enforcement of human rights is access to justice. Drawn from the extensive contact we have with our grant funded organisations, our research expertise, and our general knowledge of the sector, we know that there is an access to justice crisis. The impact of cuts to civil legal aid on practitioners and their clients has been profound: there are fewer legal aid providers providing advice and representation, there has been a reduction in funding for advice services and subsequent creation of legal aid deserts, particularly in community care, welfare benefits and housing which has resulted in people unable to access legal aid advice in these areas. This has resulted in many people who are simply not able to pay for legal advice, particularly those who are already marginalised and vulnerable to harm and who are in even more precarious situations because of Covid-19.<sup>12</sup>

These systemic barriers further compound some of the existing challenges people face, particularly those who are disadvantaged or vulnerable, and who often experience multiple

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<sup>11</sup> <https://gov.wales/research-strengthening-and-advancing-equality-and-human-rights-wales-focus-groups-html>

<sup>12</sup> The HRA will play a crucial role in the recovery from the Coronavirus crisis, ensuring that people have the access to the services and redress that they need, particularly for those individuals that have been impacted the hardest by pandemic.

barriers to accessing justice which prevents them from challenging human rights abuses and holding public authorities accountable to the HRA. Disability, low income, homelessness, fear of the legal system, lack of English proficiency or fluctuating mental capacity are just some of the barriers people face to holding public authorities accountable for human rights.

### Public legal education and reframing the human rights debate

As part of our [Fairer Systems](#) programme, our funding has underlined the importance and role of supporting expert organisations and specialists that have been able to use rights contained in the HRA to bring about positive change for disadvantaged and vulnerable groups in society. From the work our grant funded organisations do, it is evident that a lack of knowledge or understanding of what people's rights are under the HRA or indeed, the rule of law is a significant barrier to holding public authorities accountable.

At the LEF we award grants to organisations that aim to increase people's awareness of their rights and the rule of law. However, this focus on public legal education in civil society is not matched across government as following LASPO, funding from the Ministry of Justice for public legal education was cut.<sup>13</sup> The Government needs to take a more active and central role in providing public legal education about human rights so that the goal of creating better awareness of rights and the rule of law throughout society is achieved.

Negative depictions of human rights in the media as well as hostile public attitudes towards human rights contribute to a lower level of understanding and support for human rights in the UK which in turn impacts on people's ability to hold public authorities accountable to the HRA. There has been some fantastic work from organisations such as Equally Ours who have used values based strategic communications to reframe the debate around human rights with their campaign, '[Human rights. Our voices](#)'<sup>14</sup> as well as [Act for the Act](#), a 2015 campaign set up to tell the stories of people who have used the HRA during very difficult and challenging periods of their lives.<sup>15</sup> However, there needs to be support from Government to reframe the discussion and debate about human rights to help address misunderstandings and misperceptions about how human rights operate in practice.

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<sup>13</sup> Joint Committee on Human Rights, [Enforcing Human Rights](#), www.gov.uk, 2018.

<sup>14</sup> [www.equallyours.org.uk/human-rights-our-rights-reframing-human-rights/](http://www.equallyours.org.uk/human-rights-our-rights-reframing-human-rights/)

<sup>15</sup> [www.actfortheact.uk](http://www.actfortheact.uk)