Independent Human Rights Act Review
Response to Call for Evidence March 2021
CoramBAAF

CoramBAAF is an independent membership organisation for professionals, foster carers and adopters, and anyone else working with or looking after children in or from care, or adults who have been affected by adoption. It is a successor organisation to the British Association for Adoption and Fostering (BAAF).

We have adoption agency and fostering service members across the UK from local authorities and the voluntary and independent sector. Other organisations that also work in the field, for example, legal practices and children's organisations, benefit from associate membership. We also have almost 900 individual members, including independent social workers, trainers, adopters, foster carers, therapists, lawyers, looked after children (LAC) nurses, researchers and more. We work on behalf of our members and with the Government and other stakeholders to ensure the very best outcomes for children in care.

We make this response from the perspective of the impact of the Human Rights Act (HRA), its implementation and the proposed review, on children and families affected by care proceedings and adoption.

i. The relationship between domestic courts and the European Court of Human Rights (ECtHR)
The Review should consider the following questions in relation to this theme:
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 courts have frequently considered European case law in interpreting concepts under the HRA, particularly in considering the meaning of "family life", which can arise in so many different, fact-specific ways.

In a recent typical example: *The London Borough of Hounslow v El & Ors (Rev 1)* [2020] EWHC 3140 (Fam), the court quoted from several ECtHR cases in deciding whether or not the legal (but not biological) father of relinquished twins should be informed of their birth. The court is able to look at the jurisprudence for guidance, while considering the case within the context of the English presumption of legitimacy and parental responsibility under the Children Act 1989.

This appears to work well and we see no need for any amendment of section 2.

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?

Within the sphere of family law, and particularly in the field of adoption, there is a wide margin of appreciation, for instance, there are many European countries that will not allow adoption by same-sex couples, and these policies have not been successfully challenged before the ECtHR.

The four UK legal frameworks for adoption have no direct equivalent across the members of the European Council. The ECtHR has found the UK systems to be compliant with the

Convention on Human Rights, although there have been concerns about adoption without parental consent and the need for proportionality, for example, in *YC v United Kingdom* [2012] 55 EHRR 967, which was referred to in the leading case of *Re B (A Child)* [2013] UKSC 33 (adoption can only be permitted when "nothing else will do").

This combination of respect for judgments of the ECtHR and the unique British context of care proceedings and adoption is an example of domestic courts being able to make decisions based on best practice and experience from across Europe.

We see no need for change in this area.

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?

We have no direct knowledge or experience of judicial dialogue and cannot comment on this area.

ii. The impact of the HRA on the relationship between the judiciary, the executive and the legislature
The Review should consider the following questions in relation to this theme:
a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:
• 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)?

We are not aware of any instances in our area where legislation has been interpreted in a way that thwarts or undermines the intention of Parliament, but we are aware of unintended consequences of legislation when interpreted in accordance with the HRA. For example, special guardianship orders were introduced in the Adoption and Children Act 2002 with the intention of providing a permanent legal status for children for whom adoption was not an option. The application of Article 8 in decisions such as *Re B* (above) has led to a reduction in the number of children placed for adoption, as the courts have made special guardianship orders to secure very young children in kinship placements. This consequence does not appear to have been within the contemplation of Parliament at the time of passing the Act. However, unintended consequences of legislation have always been possible, and are not directly related to interpretation under section 3 of the HRA.

It is impossible to legislate for all eventualities, particularly when dealing with family situations, and where Parliament has not provided for flexibilities, the courts have sometimes had to "read down" to meet both the intentions of Parliament and the requirements of the HRA. A recent example is *In the matter of Re A (A Child: Adoption Time Limits s.44(3))* [2020] EWHC 3296 (Fam), in which a prospective adopter filed her application to adopt but made errors on the form, leading to it being rejected. She submitted a corrected application form but by then was outside the notice "window" laid down in section 4(3) of the Adoption and Children Act 2002. The court held that in the circumstances, the child's Article 8 rights to a family life required that an adoption order be made, notwithstanding a technical non-compliance with the statutory requirement. The court found that the reasons for the time

limit were to allow the court to have reasonably current information on which to base their decision making, and that Parliament cannot have intended failure to comply strictly with the time limit to lead, as it would in this case, to a complete bar on the application.

When considering the use of section 3, the courts do always have regard to the intentions of Parliament. As it must be assumed that current legislation is not passed with the intention of depriving any person of their Convention Rights, section 3 is a positive way of applying the intentions of Parliament to a particular situation that they may not have been able to foresee.

We do not see any reason to repeal or to amend section 3.

• 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?
We do not support the amendment or repeal of section 3.

• 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?

Section 19 of the HRA requires the minister in charge of a Bill to make a statement of compatibility before its Second Reading. It would be preferable for this declaration to be based on an exhaustive investigation of all the potential situations in which the proposed legislation might affect the Convention Rights of every individual, and for Parliament to debate and clearly express its intentions wherever an incompatibility might arise. This is not a practical possibility, due to both the time needed to investigate every possible implication of the proposed legislation, and, particularly when legislating for complex family situations, the propensity of real life to throw up unimagined situations – for example, whether a transgender man becoming pregnant after obtaining his gender recognition certificate should be registered as "mother" on his son's birth certificate (*McConnell & Anor, R (On the Application Of) v The Registrar General for England and Wales* [2020] EWCA Civ 559 – the court declined to issue a certificate of incompatibility).

Where there is an unintended or unforeseen incompatibility, Parliament is unlikely to have the capacity or inclination to consider and correct the incompatibility, especially where it affects an individual or very small number of people. The court's ability to make a declaration under section 4 provides an independent way of identifying issues within their specialist areas which would be impossible to replicate within Parliament or before implementation of legislation.

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

We are not aware of, nor can we envisage, a situation in which a designated derogation order would be made in relation to which a challenge could be mounted in the Family Court or Family Division. This question falls outside our area of experience and knowledge.

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?

As far as we are aware, there is no distinction between the approach of the Family Courts to primary or secondary legislation, and therefore the observations above apply equally to delegated legislation – we do not consider that any change or amendments are required.

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?

This question is not relevant to our field of knowledge and experience.

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?

The existing process appears to allow opportunity for challenge to any proposed remedial order by Parliament, subject to the usual restraints of capacity and political prioritisation. I do not have sufficient experience or expertise in Parliamentary processes to suggest any modifications.

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