The Law Society of England and Wales

Stakeholder Submission to the UN Human Rights Council's Universal Periodic Review – UNITED KINGDOM

41st Session (Nov. 2022)

The Law Society is a professional body representing more than 200,000 lawyers in England and Wales. Its aims include upholding the independence of the legal profession, the rule of law, and human rights around the world. The Law Society was established by Royal Charter (the "Charter of the Society") in 1845 and has consultative status with the Economic and Social Council of the United Nations since 2014. Its activities are established by statute: the Solicitors Act 1974, the Courts and Legal Services Act 1990, the Access to Justice Act 1999, and the Legal Services Act 2007.

Contact details:

Website:	http://www.lawsociety.org.uk/
Postal address:	The Law Society 113 Chancery Lane London WC2A 1PL United Kingdom
Tel:	+44 (0) 20 7242 1222
Email:	international@lawsociety.org.uk

A. Introduction

1. The Law Society welcomes the opportunity to engage with the UN on this 4th cycle of the Universal Periodic Review of the UK. We do so from the perspective of our commitment to upholding the rule of law, including human rights protections, and access to justice.

2. The UK government is currently undertaking a series of legislative reforms with constitutional significance. This includes plans to reform the Human Rights Act, changes to the system of judicial review in the Judicial Review and Courts Bill, and changes to the refugee and asylum system in the Nationality and Borders Bill. We believe that these reforms threaten the rule of law by reducing the accountability of government and access to justice. If fully enacted, these reforms would alter the landscape of human rights protections in the UK by restricting the ability to enforce protections. They would also alter the UK's relationship with its international obligations, including under UN human rights conventions.

B. Human Rights Act reforms

1. The UK government is currently consulting on proposed reforms to the Human Rights Act 1998 (HRA).[i]

2. The HRA gives domestic effect to the rights contained in the European Convention on Human Rights (ECHR). It is a cornerstone of both human rights protections in the UK and our democratic constitution. While the ECHR is not a UN treaty, it replicates many of the rights protected across UN human rights conventions.

Restricting access to justice

3. The government's proposals include the introduction of a permission stage for human rights claims. This would require individuals to first prove that they have suffered "significant disadvantage" as the result of their human rights being violated before being able to have their case heard by a court.

4. We are gravely concerned that such a high threshold would be a serious threat to accessing justice by preventing meritorious cases where a violation of human rights has occurred from being considered by the courts. It would, in effect, create a class of 'acceptable' human rights abuses that would permit routine violations. This would allow state authorities to act with impunity in 'lower-level' cases and undo the progress that has been made towards authorities embedding human rights considerations into their decision-making.

5. Proposals are also made to remove or reduce the requirement for courts (under section 3 HRA) to interpret legislation compatibly with Convention rights as contained in the HRA. This duty is a core part of the framework of the HRA and is essential to the robust protection of human rights, and the ability of individuals to swiftly access justice. It enables the courts to ensure that all legislation is read through a human rights lens, with limits imposed to ensure they do not encroach on legislative functions. This then

ensures that individuals can receive an immediate remedy and protection for their rights from the courts.

6. Without this duty, greater reliance would be put on issuing a declaration of incompatibility where, following the finding of a violation, the matter is referred back to parliament to amend the offending legislation.[ii] This is a much weaker remedy, as the individual does not receive an immediate resolution and the validity of the legislation is not affected, meaning the violation continues until parliament rectifies it. While action has always been taken by parliament following a declaration of incompatibility, it is not bound to do so. Indeed, the ECtHR has previously stated that, without an accompanying constitutional convention that the executive and legislative are required to respond, declarations of incompatibility are not an effective remedy due to their non-binding nature.[iii]

Reducing accountability

7. Further attempts to shield public authorities from scrutiny by the courts in relation to their human rights obligations are proposed. Under section 6 of the HRA, public bodies such as government departments, local authorities or police forces have an obligation to protect and secure human rights. An exception is made to this in section 6(2) where the public body is giving effect to primary legislation and the wording of that legislation is such that it requires them to act in a way that is incompatible with human rights. This means that if there is ambiguity the wording of the legislation or the public body has a degree of discretion in how it is implemented, then that body has a duty to implement it in a way that is compatible with human rights.

8. The government proposes to expand this exception so that wherever a public body is giving effect to primary legislation, it cannot be held to be liable for breaches of human rights. This therefore removes the duty for public authorities to implement laws in a way that respects human rights.

9. Removing this obligation would give more freedom to public authorities to act incompatibly with human rights. Even where it is clear that an act would contravene human rights and an alternative rights-respecting course of action is available to them, public authorities would be under no obligation to choose the course of action that would avoid breaching human rights. This is a wide dispensation which will likely result in violations occurring with greater regularity and an overall lowering of human rights standards.

10. Section 6 is one of the main success stories of the HRA. It has helped to create a culture of human rights throughout public bodies, instilling and embedding a greater respect for human rights resulting in rights considerations habitually being taken into account when public bodies make decisions or exercise their functions. We are concerned this proposal would undo the hard work public authorities have undertaken to embed rights considerations into their governance and lead to less attention being paid to human rights impacts in public decision-making.

Undermining fundamental human rights principles

11. We also have strong concerns that some of the proposed reforms undermine fundamental human rights principles. For example, it is proposed that certain rights, including but not limited to the right to private and family life, should not prevent the deportation of a foreign national offender. This would effectively strip individual rights on a blanket basis for a category of people, undermining core principles such as the universality of human rights, equality before the law and the prohibition of discrimination. No rights-respecting nation should be prepared to take forward these suggestions.

12. The consultation also expresses a desire to curtail positive obligations that arise from human rights. We are concerned that this is out of step with the understanding of human rights obligations embedded throughout international law and would lead to a significant lowering of human rights standards in the UK.

13. The proposals further seek to change the way in which the principle of proportionality is applied by courts in human rights cases. The principle of proportionality is the means by which individual rights, and interferences with them, are weighed against wider considerations such as the public and national interest. It is crucial to ensuring the rights can be applied in an appropriately balanced way and that where an interference is unavoidable, it is nevertheless done in a way that goes no further than necessary, thereby limiting the impact. We are concerned that proposals put forward would reduce the courts' ability to protect individual rights and perform their function in providing a crucial safeguard against the risk of majoritarian excesses which is present in all democratic systems.

Creating divergence with international obligations

14. Several proposals could result in the UK gradually diverging from international standards under the ECHR. In particular, it is proposed to change the relationship between the domestic legal order and case law from the ECtHR. Currently, UK courts are required under section 2 HRA to "take into account" ECtHR jurisprudence. While they are not bound by this, in practice judges have applied an approach whereby they follow "clear and constant"[iv] lines of jurisprudence unless there is good reason not to do so. This is a pragmatic approach which has allowed the UK to keep pace with the development of rights jurisprudence from the ECtHR and with the evolution of rights standards across Council of Europe member states.

15. It is proposed to significantly limit this relationship to encourage the courts to apply domestic common law standards more frequently. Not only do we feel this is unnecessary, as courts routinely do apply the common law before considering ECtHR jurisprudence, but we believe weaking the link with ECtHR case law could set the UK on a different path which may lead to divergence from its obligations under the ECHR.

16. Moreover, one of the options for reform in this regard asserts an approach to rights interpretation that is limited by original intent with reference to the travaux preparatoires of the ECHR. This therefore explicitly rejects the 'living instrument' doctrine applied by the ECtHR, increasing the likelihood of divergence. Such an approach is also out of step with the Vienna Convention on the Law of Treaties, which states that reference to

travaux preparatoires is only relevant to treaty interpretation as a supplementary means.

17. While the original intent of legislation often acts as the outer limits of what can be achieved through judicial interpretation, it has always been recognised in the UK that the courts play a fundamental role in ensuring the law is kept up to date with modern standards. We are concerned that interpreting human rights law on the basis of a historical context that existed 70 years ago is unworkable and misunderstands how human rights instruments are intended to operate.

C. Judicial Review and Courts Bill

18. Judicial review is the means through which individuals can challenge a decision or action of a public body, often on the grounds of fundamental rights. It is an important part of the UK's constitutional balance of powers between the executive, parliament, and judiciary by providing protection for individuals against state power and ensuring government and other public decision-makers are accountable.

19. At the time of writing, the Judicial Review and Courts Bill is currently undergoing its legislative passage through parliament.[v] It contains provisions to introduce new remedies which we believe would weaken the accountability of government.

20. The Bill includes provisions to introduce a new remedy of prospective quashing orders, which would remove the retrospective effect of such an order. As a result, the complained of action, decision or provision of secondary law would be upheld and retains validity up until the judgment date, despite being found to be unlawful. We believe this risks undermining the rule of law.

21. Removing the retrospective effect of a quashing order greatly reduces the consequences for government of an illegal action. This therefore reduces government accountability and would likely have a detrimental impact on good governance. The threat of review is a powerful tool in encouraging public bodies to maintain focus on human rights considerations in their actions. If public bodies are spared the risk of retrospective legal consequences this motivation will be weakened, and the quality of decision-making will likely drop.

22. We also have concerns about the impact on access to justice. Removing the retrospective effect of a quashing order denies full redress to the individual by preventing a remedy for harm already suffered. This would serve as a serious disincentive to individuals seeking to bring a claim and many will likely be deterred from pursuing a perfectly meritorious claim. We believe this would result in a chilling effect on justice, with the consequence that more unlawful actions by public bodies will go unchallenged, thus allowing human rights breaches to continue.

23. The potential for negative impacts arising from prospective quashing orders should encourage a cautious approach to their use. However, the Bill provides for a statutory presumption in favour of their use, requiring courts to award a prospective quashing order wherever to do so would provide "adequate redress".[vi] We are concerned that

this will exaggerate any negative effects by compelling the courts to issue prospective quashing orders widely.

24. The system of remedies in judicial review is predicated on judicial discretion – and for good reason. No two cases in judicial review are the same, therefore requiring remedial flexibility to ensure justice that fits the facts of the case. We believe that enforcing a statutory presumption would be a significant departure from this principle and compound the issues in relation to the rule of law and access to justice.

D. Nationality and Borders Bill

25. At the time of writing, the Nationality and Borders Bill is currently undergoing its legislative passage through parliament.[vii] It has raised significant concerns, particularly in relation to its compatibility with the UN Refugee Convention 1951 and the 1967 Protocol Relating to the Status of Refugees.

Introduction of a two-tier asylum system

26. The Bill contains provisions to allow for the differential treatment of refugees on the basis of whether they arrive directly in the UK from the country they are fleeing.[viii] Arriving directly is defined as not having stopped in another country outside the United Kingdom unless the individual could show that they could not reasonably be expected to have sought protection in that country.[ix]

27. This would create a two-tier system for cataloguing refugees based on their method of arrival, likely in contravention of the UK's obligations under the Refugee Convention. We note that the United Nations High Commissioner for Refugees observed that "resettlement and other legal pathways cannot substitute for or absolve a State of its obligations towards persons seeking asylum at its borders, in its territory, or otherwise under its jurisdiction, including those who have arrived irregularly and spontaneously."[x]

28. The ways in which it is proposed categories of refugees will be treated differently are further incompatible with the Refugee Convention, including allowing a condition of no recourse to public funds to be applied to either the refugee or a family member (in contravention of article 24 of the Refugee Convention) and allowing differential treatment in whether or not a family member is to be given leave to enter or remain (conflicting with the overarching principle of the unity of the family included at the beginning of the Convention). We believe these provisions would impermissibly penalise refugees arriving in the UK through irregular means, often as their only choice.

Interpretation of Refugee Convention

29. Other provisions seek to redefine how terms within the Refugee Convention are interpreted and the standards applied under these.

30. The Bill seeks to make changes to the standard of proof required to establish refugee status. Currently, under UK law a refugee must show there is a reasonable likelihood of being persecuted to be recognised as a refugee. The Bill will change this requirement to 'the balance of probabilities'[xi] – a higher threshold which is more difficult

to meet. This therefore risks genuine refugees not receiving the protection they are entitled to under the Refugee Convention.

31. Another provision lowers the threshold at which a refugee is considered to have committed a particularly serious crime, from one which attracts a custodial sentence of 2 years imprisonment[xii] to 12 months imprisonment.[xiii] A person who has committed a particularly serious crime is able to be returned to their home country under the exception to the principle of non-refoulement in Article 33(2) of the Convention.

32. Crimes carrying sentences of 12 months' imprisonment vary and include a range of nonviolent offences. This is therefore a very low threshold and would encapsulate offences that cannot reasonably be said to be particularly serious. We believe the risk of removing an individual's refugee protection on this basis and returning them to a country where they face persecution would be disproportionate.

E. Recommendations

1. **Refrain from progressing reforms to the Human Rights Act 1998 which would conflict with, undermine or otherwise create divergence from international standards;**

2. **Refrain from progressing reforms to the Human Rights Act 1998 and amend the Judicial Review and Courts Bill to remove measures which would undermine access to justice and the accountability of government; and**

3. **Amend the Nationality and Borders Bill to ensure compliance with the Refugee Convention 1951 and the 1967 Protocol Relating to the Status of Refugees.**

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[i] See: https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights. The Law Society's full response to the government's consultation, '*Human Rights Act Reform: A Modern Bill of Rights'* is available at: https://www.lawsociety.org.uk/campaigns/consultation-responses/human-rights-act-reform-a-modern-bill-of-rights-consultation-law-society-response.

[ii] Section 4, Human Rights Act 1998

[iii] Burden and Burden v UK, App. 13378/05, ECHR 2008, para.40 and 43

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

[v] See: https://bills.parliament.uk/bills/3035

[vi] Judicial Review and Courts Bill, HL Bill (2021-22) 120, clause 1(1)(9)(b)

[vii] See: https://bills.parliament.uk/bills/3023

[viii] Nationality and Borders Bill, HL Bill (2021-22) 82, clause 11

[ix] Nationality and Borders Bill, HL Bill (2021-22) 82, clause 36(1)

[x] United Nations High Commissioner for Refugees (UNHCR), *UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom,* para.5. Available at: https://www.unhcr.org/uk/publications/legal/60950ed64/unhcr-observations-on-the-new-plan-for-immigration-uk.html

[xi] Nationality and Borders Bill, HL Bill (2021-22) 82, clause 31(2)

[xii] Nationality, Immigration and Asylum Act 2002, s.72

[xiii] Nationality and Borders Bill, HL Bill (2021-22) 82, clause 37