



THE NOTTINGHAMSHIRE LAW SOCIETY

REFORM OF HRA CONSULTATION NOTTINGHAMSHIRE LAW SOCIETY RESPONSES

NOTTINGHAMSHIRE LAW SOCIETY
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Summary

I Respecting our common law traditions and strengthening the role of the Supreme Court

Question 1

We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2 of the consultation document, as a means of achieving this.

Both proposals risk the domestic courts interpreting rights more restrictively which may leave the only other option being redress in Strasbourg. The cost and time of this would be beyond most individuals which would create an access to justice problem.

Further, the established approach is already that laws created in the UK are the first port of call before Strasbourg case law. The need for reform is not clear.

Question 2

The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights.

How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

It shouldn't make clear that the Supreme Court is the ultimate arbiter because it isn't. The ultimate arbiter is the European Court of Human Rights. The Human Rights Act 1998 makes it easier for the claims to be brought and have effect through national courts.

Question 3

Should the qualified right to jury trial be recognised in the Bill of Rights?

It is of course very important, but it isn't recognised in the Human Rights Act 1998 or ECHR so may not be necessary.

Question 4

How could the current position under section 12 of the Human Rights Act be amended to limit interference with the press and other publishers through injunctions or other relief?

The courts already balance any competing convention rights and are specific to the facts.

Question 5

The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations in the consultation document.

To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?

We will still be bound by the ECHR which makes it clear that there is a balance to be struck between free expression and the protection of other rights (e.g., private life). This will always be fact-sensitive, and it is not felt it would be beneficial to restrict the way in which courts can draw the balance.

Question 6

What further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources?

See response to the question above. In addition, journalist sources are protected by PACE and legislation has weakened, not strengthened it. The protections which exist are in large part down to Strasbourg jurisprudence.

Question 7

Are there any other steps that the Bill of Rights could take to strengthen the protection for freedom of expression?

See response to the question above.

II Restoring a sharper focus on protecting fundamental rights

Question 8

Do you consider that a condition that individuals must have suffered a ‘significant disadvantage’ to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way of making sure that courts focus on genuine human rights matters?

This exists in the European Court of Human Rights in order to make the European Court of Human Rights’ workload manageable and focus on the most important cases. In principle, there may not be a problem in applying it at domestic level - but only if our courts are similarly overloaded or consider they are dealing with frivolous cases. This needs to be a steer by the courts, not the government. In addition, the consultation does not develop specific proposals on this point and how it would work in practice.

Question 9

Should the permission stage include an ‘overriding public importance’ second limb for exceptional cases that fail to meet the ‘significant disadvantage’ threshold, but where there is a highly compelling reason for the case to be heard, nonetheless?

If such a permission stage is introduced, then yes.

Question 10

How else could the government best ensure that the courts can focus on genuine human rights abuses?

It is not clear what “genuine” means in this context. If a person has an arguable case that they are victim of a violation of human rights, then it is a genuine case. The implication appears to be that human rights are only for certain categories of people. However, they are arguably more important for minorities who might be less well served by the protections which the democratic professes to give to the majority.

Question 11

How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation?

Public services should observe and protect human rights. Failure to observe them should be open to challenge. It is not clear what the implications of this would be.

Any frivolous claims can be and are weeded out by the 'no significant disadvantage' criterion - or by applying similar admissibility criteria to the European Court of Human Rights itself (see in particular Article 35 ECHR).

III Preventing the incremental expansion of rights without proper democratic oversight

Question 12

We would welcome your views on the options for section 3.

Option 1: Repeal section 3 and do not replace it

Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.

We would welcome comments on the above options, and the illustrative clauses in Appendix 2 of the consultation document.

The Human Rights Act 1998 does not interfere with parliamentary sovereignty, to suggest otherwise is inaccurate. Repealing section 3 would make it more difficult for courts to read legislation compatibly with Convention rights which would weaken the overall scheme, therefore neither option is supported.

Question 13

How could Parliament's role in engaging with, and scrutinising, section 3 judgments be enhanced?

It could provide a response to any such judgments. There is very little evidence of parliamentary intervention in respect of section 3 options since the introduction of the Human Rights Act 1998.

Question 14

Should a new database be created to record all judgments that rely on section 3 in interpreting legislation?

Yes, this is a good idea.

Question 15

Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

It is not clear what the justification for this is. Secondary legislation receives little parliamentary scrutiny but can still have a large impact, such as coronavirus regulations.

Question 16

Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where subordinate legislation is found to be incompatible with the Convention rights?

Yes, although it should be a discretion for the court.

Question 17

Should the Bill of Rights contain a remedial order power? In particular should it be:

- a) similar to that contained in section 10 of the Human Rights Act;
- b) similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;
- c) limited only to remedial orders made under the 'urgent' procedure; or d) abolished altogether?

Please explain your reasons:

b). It is important that where there are incompatibilities that there is a way of rectifying this. It is right, however, that any power should not extend to the Bill of Rights itself given that this is where the power would come from.

Question 18

We would welcome your views on how you consider section 19 is operating in practice, and whether there is a case for change.

If there is a way to increase parliamentary scrutiny, then that is a good thing. Compliance with section 19 in the case of secondary legislation would be helpful.

Question 19

How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?

It is not clear what interests, histories or legal traditions need to be protected and there is no consideration of the differences that exist between the devolved nations. Where there are competing convention rights at play, the court balance these.

Question 20

Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.

There are a number of “hybrid” organisations, such as private bodies carrying out public functions, whose status can be difficult to determine. Greater clarity in this context would be welcome, although there would be a concern if the government held to its view that any new definition should not add new burdens to other organisations. For example, the court’s approach to “private” care homes in this context is felt to be problematic.

Question 21

The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer?

Option 1: Provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or

Option 2: Retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.

Which of the following replacement options for section 6(2) would you prefer?

It is not clear why any change is required. Public authorities should be required to act compatibly with human rights obligations.

Question 22

Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.

We do not feel able to offer a view on this.

Question 23

To what extent has the application of the principle of ‘proportionality’ given rise to problems, in practice, under the Human Rights Act?

We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this?

Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is ‘necessary’ in a ‘democratic society’, legislation enacted by Parliament should be given great weight, in determining what is deemed to be ‘necessary’.

Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2 of the consultation document.

It is not clear what evidence there is to suggest that the courts do not already do both of these things, therefore both are opposed. The courts, and independent judges, are well-versed in being able to balance competing rights.

Question 24

How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.

Option 1: Provide those certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment;

Option 2: Provide those certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights; and/or

Option 3: Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.

All three options are opposed. There is an implication within all of these options that human rights should not apply to those that we feel are “unworthy”/ politically unpopular. Human rights should apply to all and the courts balance competing rights.

Changing the regime is likely to make UK decisions vulnerable to challenge in Strasbourg. If the UK wishes to hold to its commitment of retaining the ECHR, it must respect those rights in all contexts. It is not clear to what extent human rights arguments presents a problem in the challenges posed by illegal migration.

Question 25

While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?

See response to question 24.

Question 26

We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. Which of the below considerations do you think should be included?

- a) the impact on the provision of public services
- b) the extent to which the statutory obligation had been discharged
- c) the extent of the breach
- d) where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.

It is important that the level of damages is separated from the underlying merits of any claim. E.g., if a person has a claim under article 3 but the individual concerned is considered to be an unsavoury character, they should be entitled to damages in the same way and at the same level as any other person would be.

VI Emphaising the role of responsibilities within the human rights framework

Question 27

We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this?

- Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or
- Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.

Option 1

Whilst the applicant's conduct in relation to the specific claim could legitimately be taken into account (this, indeed, being the present position), the applicant's wider conduct (i.e. unrelated to the underlying claim, personality traits, previous convictions etc.) cannot be said to be relevant. Rights apply to all manner of persons, reprehensible or otherwise; that is their defining feature in a civilised, rights-based society.

V Facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role

Question 28

We would welcome comments on the options for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2 of the consultation document.

It is wrong to suggest - see clause 1(b) - that Parliament's sovereignty is unfettered in this context. It is fettered by the UK's international law obligations, which have been freely entered into, and those obligations ought not to be ignored. The draft clause should reflect this by expressly acknowledging the UK's international law obligations under the Convention.

Beyond that, the mechanism for ensuring Parliamentary debate in relation to any adverse judgment seems sensible.

Relatedly, it is considered that the UK could opt into to Protocol 16 of the Convention, which allows the Supreme Court to ask the ECHR for advisory opinions.

Question 29

We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular:

Note, evidence can be uploaded at Question 30 below.

What do you consider to be the likely costs and benefits of the proposed Bill of Rights? (Please give reasons and supply evidence as appropriate)

The proposed Bill of Rights is likely to lead to more cases being taken to the ECtHR, which will likely be more expensive for the government in terms of legal costs (in circumstances

where the cases will still have to exhaust all routes of appeal in the domestic courts) and result in the UK 'airing its dirty laundry' in a more public/high-profile international arena.

What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? (Please give reasons and supply evidence as appropriate)

The Bill of Rights is likely to suggest to minority groups in particular that the UK does not value or respect their human rights. This will diminish our standing on the international stage.

To use moral worth as a precondition of any right, or to make rights contingent on the performance of responsibilities, would be moving on to a potentially politically dangerous slippery slope: see e.g. Easton, S., 2011. Prisoners' Rights: Principles and practice. Abingdon: Routledge, p. 220.

How might any negative impacts be mitigated? (Please give reasons and supply evidence as appropriate)

By making clear that rights are not contingent upon the perceived moral worth of those claiming their protection, or on the fulfilment of responsibilities.

Question 30

Upload any evidence for Question 29.

N/A

Nottinghamshire Law Society

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