FACULTY OF ADVOCATES

RESPONSE

By

FACULTY OF ADVOCATES

To

THE MINISTRY OF JUSTICE

On

HUMAN RIGHTS ACT REFORM: A MODERN BILL OF RIGHTS

A CONSULTATION TO REFORM THE HUMAN RIGHTS ACT 1998

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, as a means of achieving this.

Faculty supports the IHRAR's Chapter 2 Recommended Reform Option 5 (by reference to *Osborn v Parole Board* [2013] UKSC 61, Lord Reed JSC at 54-62) and the indicative draft at paragraph [199]. Faculty does not consider that the illustrative draft clauses reflect IHRAR's Option 5 and accordingly does not consider that they will achieve their purpose.

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?

Faculty supports the IHRAR's Chapter 3 Recommended Reform Option 3 at paragraph [66] for the reasons given (that the UK Courts have developed and applied a properly principled approach, guided by judicial restraint). Faculty does not

consider that this can be achieved with greater certainty and authority than the current position.

Question 3: Should the qualified right to jury trial be recognised in the Bill of Rights? Please provide reasons.

This question raises issues both of principle and of practice.

As Lord Reed observed in *Hutchings' Application for Judicial Review,*[1] trial by jury is the traditional mode of trial for serious criminal offences in the United Kingdom. In accordance with paragraph 203 of the Consultation Paper, however, the Faculty would emphasise that criminal procedure is an area of law over which the Scottish Parliament has legislative competence. As acknowledged in footnote 129 of the paper, there is no right to a trial by jury as such in Scotland. The extent to which, if any, a statutory right to trial by jury should be created in Scotland is accordingly a matter for the Scottish Parliament.

At present in Scotland, as a matter of practice, the decision as to whether a case should be tried at summary level (by a Justice or Sheriff sitting alone) or by solemn procedure (trial by jury) is exclusively for the Crown. The legislative formulation of any category of case deemed unsuitable for trial by jury would be a matter of great difficulty. Such challenging categorisation would be inherent in the notion of a 'qualified' right. For these reasons, Faculty does not deem it appropriate for the Bill to recognise 'a qualified right to jury trial'.

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?

Faculty does not consider that any amendment to limit interference with the press or other publishers is required. Section 12(3) of the Human Rights Act already provides that such relief is not to be granted unless the applicant is likely to establish that

[1] [2019] UKSC 26, at paragraph 34

publication should not be allowed. This already sets a higher standard than the customary approach for interim measures which looks at where the balance of convenience lies. Faculty believes, however, that the current position allows for sufficient flexibility for cases where the potential adverse consequences of disclosure are particularly grave or where interdict is required to enable the Court to apply proper consideration to an application for interim relief pending a trial, proof or appeal.[2] Scots Law does not recognise 'super interdicts'.

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 above. 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?

Reference is made to Faculty's response to Question 4. Faculty believes that the law is sufficiently clear. Courts are well versed in interpreting rights, including Article 10, and balancing them with other rights. Cases are likely to be highly fact dependent. It is not clear what practical benefit would be derived from further guidance.

Question 6: What further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources?

Faculty notes that in *Fine Point Films' Application for Judicial Review*[3] the Northern Irish Queen's Bench held that there was no overriding requirement in the public interest justifying an interference with journalistic sources. Faculty believes that Scottish Courts would adopt a similar approach and that, therefore, adequate protection of journalists' sources is currently afforded.

Question 7: Are there any other steps that the Bill of Rights could take to strengthen the protection for freedom of expression?

[2] *Cream Holdings Ltd v. Banerjee* [2005] 1 AC 253, at [15]; *Dickson Minto v. Bonnier Media* 2002 SLT 776
[3] [2020] NIQB 55

Faculty is not aware of any further steps which are required.

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? Please provide reasons.

Faculty notes an apparent *a priori* assumption that the genuineness of a claim is a freestanding consideration, which can be assessed independently of the due process of assessing the facts and applying the law. Faculty does not accept such an assumption.

Faculty does not consider that a "significant disadvantage" test is necessary in the adjudication of human rights claims. The current test for standing which engages human rights claims remains fit for purpose. Under section 7 of the Human Rights Act 1998 and section 101 of the Scotland Act 1998, applicants must show that they would be a victim of the purposes of Article 34 of the ECHR. As stated by the European Court of Human Rights, a victim must be directly affected by any alleged violation. Furthermore, abstract claims are inadmissible.[4] Faculty notes that public interest litigation is Scotland is relatively uncommon and interventions by the Scottish Human Rights Commission and the Equality and Human Rights Commission are also limited.[5] Many judicial reviews contain human rights challenges which are already subject to a permission stage.[6] It should also be remembered that the Courts retain powers to dismiss unmeritorious claims.[7] Finally, cases funded by the Scottish Legal Aid Board must satisfy the tests of probable cause and reasonableness.[8]

Question 9: Should the permission stage include an 'overriding public importance' second limb for exceptional cases that fail to meet the 'significant

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[4] *Norris v. Ireland* (A/142) (1999) 13 EHRR 186 at [30]; *Klass v. Germany* (A/28) (1979-80) 13 EHRR 186 at [30]
[5] D Jack and C McCorkindale, *Standing in Scots Public Law Litigation*, available at: https://hrcscotland.org/wp-content/uploads/2020/06/final-hrcs-research-briefing-standing-in-scots-public-law-litigation-june-2020.pdf
[6] Court of Session Act 1988, section 27(1)(B)
[7] For example, Rule 17, Ordinary Cause Rules
[8] Legal Aid (Scotland) Act 1986, section 14.

disadvantage' threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.

Reference is made to Faculty's response to Question 8. In addition, Faculty notes that a 'compelling reason' test is similar to the current test for a review of a decision by the Upper Tribunal.[9] In that context, the rationale for limiting further scrutiny is based on the Courts' reluctance to interfere with decisions that lie within the expertise of specialist tribunals. Accordingly, the use of phrases such as "some other compelling reason" provide a benchmark for the common law principle of restraint where there has already been a decision. Such restraint does not appear to be applicable or necessary for new human rights claims.

Question 10: How else could the government best ensure that the courts can focus on genuine human rights abuses?

Reference is made to Faculty's response to Question 8. Faculty believes that the current approach works well.

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? Please provide reasons.

Faculty is not aware of an expansion of positive obligations and uncertainty about public bodies' legal duties in cases before Scottish Courts.

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.

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[9] *EBA v. Advocate General*, [2011] UKSC 29

Faculty's primary position is that there is no need for a Bill of Rights. Were there to be one however, such Bill should include an interpretative provision akin to and modelled upon section 3 of the HRA. Faculty is not attracted to either of the interpretative provisions mooted in Appendix 2 Options 2A and 2B of the proposed Consultation.[10] In both options compatibility is measured against the Bill itself rather than against the Convention.

Albeit we are assured that the Bill will incorporate the rights and freedoms contained in the Convention[11], the terms of proposed clauses in respect of the interpretation of freedoms clearly state that the meaning of a right or freedom in the Bill is neither determined by the meaning of a right or freedom in any international treaty nor needs to be construed as having the same meaning as a corresponding right or freedom in the ECHR or the HRA.[12] The references which are to be made ought to be clarified.

Question 13: How could Parliament's role in engaging with, and scrutinising, section 3 judgments be enhanced?

Faculty makes reference to the IHRAR's reform options in Chapter 5, especially pp. 180 *et seq*. There would be benefit in the JCHR being made aware of and considering section 3 judgments or any judgments made pursuant to an analogous provision in the Bill. To facilitate the identification of such judgments, judges and other decision makers should be encouraged to make clear where and why they are relying on section 3 of the HRA or the analogue thereto in the Bill.[13] Faculty considers that such changes should be made by primary legislation.

[10] *Human Rights Act Reform: A Modern Bill of Rights. A consultation to reform the Human Rights Act 1998,* p 98

[11] *"A consultation to review the Human Rights Act 1998",* Human Rights Act Reform Engagement Team - Roundtable Event, 3rd March 2022 via MS Teams

[12] *Human Rights Act Reform: ...* 'Option 1 Interpretation of rights and freedoms', p 96 para. (1) and (2)

[13] IHRAR Report, p. 253 para. 191

Question 14: Should a new database be created to record all judgments that rely on section 3 in interpreting legislation?

Faculty notes that many Convention related judgments are readily accessible.[14] Nonetheless, there is merit in the IHRAR Panel's recommendation to create a judgments database to complement the recommendation for another database recording where a court or tribunal has quashed subordinate legislation.[15] Such databases would assist the JCHR and Parliament more generally in obtaining an understanding of how Courts and tribunals approach Convention Rights.

Additionally, Faculty considers that care would need to be taken to identify those judgments which were not public or needed to be anonymised or redacted. Consideration should also be given to UK GDPR (retained from EU law) and to the "right to be forgotten". Subject to these considerations, the database should be accessible by the public.

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?

Faculty refers to the well-established legal framework to challenge incompatible secondary legislation. All UK jurisdictions provide specifically for the judicial review of acts or decisions by public authorities which affect individual and collective interests. These acts and decisions include subordinated laws, statutory instruments and regulations by administrative bodies and officials.

Incompatibility declarations are rare: only 44 have been made between the HRA coming into force and July 2021[16]. First, there is an interpretative duty which reduces

[14] *Ibidem,* p. 173
[15] *Ibid* p. 333
[16] Responding to human rights judgments; Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2020–2021; Ministry of Justice, December 2021 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1038601/human-rights-judgments-2021-print.pdf

the need for a court to make an actual declaration of incompatibility[17]. Secondly, even if satisfied that a provision is incompatible with the ECHR, a court is not obliged to make a declaration[18]. Thirdly, even when made, a declaration is not binding on the parties to the proceedings in which it is made[19]. Fourthly, the validity, continuing operation and enforceability of a provision remain unaffected despite its being declared incompatible[20].

Against this, it seems paradoxical to want to extend the possibility of making declarations of incompatibility to legislation *not* adopted by Parliament, when this section of the Bill aims at *"Preventing the incremental expansion of rights without proper democratic oversight"*[21]. That is so, unless what is deemed problematic is "the incremental expansion of rights", as opposed to any democratic deficit itself.

Moreover, this proposal, if implemented, would have the effect of further reducing, if only in relative terms, the standing of devolved legislation. Thus, were this proposal to be effected, instead of the current position whereby UK secondary legislation, like devolved legislation, can be struck down by the Courts, certain UK secondary legislation, like UK primary legislation, would become immune from such remedial action.

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 secondary legislation is found to be incompatible with the Convention rights? Please provide reasons.

No. Reference is made to the section immediately above. Faculty regards the extension of declarations of incompatibility to subordinate legislation as ineffectual and unnecessary. To subject declarations of incompatibility to suspensive or conditional

[17] HRA, section 3
[18] *Ibidem*, sections 4(2)&(4)
[19] *Ibid* section 4(6)(b)
[20] *Ibid* section 4(6)(a)
[21] Human Rights Act Reform: A Modern Bill of Rights; Consultation Paper, December 2021 at Questionnaire, Section III *Respecting the will of Parliament: section 3 of the Human Rights Act,* p 109

terms as per the terms of section 1 of Part 1 of the Judicial Review and Courts Bill, is to further weaken the judicial control of administrative action. Faculty agrees with the concerns highlighted by the Equality and Human Rights Commission in its Response to the Consultation (cited above) at para 71[22].

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 provide reasons.

If contrary to the Faculty's primary position, a Bill comes to be adopted, the Faculty's preference is for option "a" over other options. Subject to the views expressed in respect of questions 15 and 16 above, a remedial power similar to that contained in section 10 of the HRA constitutes a further means to ensure compliance with the Convention. In the case of remedial actions brought up in respect of primary legislation, there should remain the opportunity to allow for Parliamentary debate. In terms of subordinate legislation, the use of remedial powers — when not prevented by primary legislation - ought to remain amenable to scrutiny by means of administrative appeal or judicial review proceedings.

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.

The current practice works. Faculty is of the view that there is no need for change in this area. Statements of compatibility were initially intended to secure early debate on the human rights implications of a Bill.[23] Ministerial statements of compatibility are evidence of parliamentary intention. As such, they can be publicly scrutinised; a primary condition for democracy and the rule of law.

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[22] Response of the Equality and Human Rights Commission; p 23

[23] Rights Brought Home: the Human Rights Bill White Paper 1997 at 3.2 & 3.3

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?

Faculty considers this question to be primarily a political one. The different national interests, histories and legal traditions have evolved to a point where today they interact by virtue of individually tailored devolution agreements. Much of the future harmonious interaction among the various parts of the UK and of the delicate political balance among their respective administrations would depend on what those" key principles" are. In the opinion of Faculty, they have not been sufficiently specified.

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.

Faculty considers that the existing definition of public authorities should be maintained. Faculty agrees that section 6 has the benefit of flexibility, allowing the application of the Act to evolve as public authorities evolve. In the absence of any specific recommendations by the government, Faculty does not consider that more certainty can be provided in a way which does not undermine that flexibility.

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? Please explain your reasons. 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.

Faculty considers that option 2 is preferable to option 1 because the current exception should be retained as it is clear and effective; option 2 should mirror Faculty's response to Question 12 above.

FACULTY OF ADVOCATES

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.

Faculty's view is that there is no tension between, on the one hand, international humanitarian law standards under the Geneva Conventions and their Additional Protocols (*lex specialis)* and, on the other, international human rights standards such as those enshrined in the Convention. The humanisation of war is compatible with the protection of fundamental freedoms and guarantees. Simply, the *lex specialis* applies to combatants — whether in active service, captive, sick or wounded, during the conduct of hostilities and in respect of acts of war. Such protection extends to civilian persons not engaged in the conflict.[24] International human rights standards apply at all times. There is no reason why members of HM's armed forces should not be held accountable for human rights violations committed abroad, particularly when armed conflicts in which British troops intervene today are waged on foreign soil.

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? Please provide reasons.
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.

[24] Common Article 3 to the Geneva Conventions

Faculty is not aware that the application of proportionality has given rise to problems. The Courts have set out clear criteria on how proportionality is to be assessed.[25] All relevant factors have to be weighed in the balance between the State's interest and the individual's interest.[26] Courts have applied those principles on a case specific basis. Faculty does not believe that legislation is necessary to give guidance to the courts on how to balance qualified and limited rights in light of the existing case law. Faculty believes that neither of the options is necessary where the Courts have to balance any lawful legislation enacted against all other relevant factors.[27]

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 that 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 that 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.

Faculty notes that Human Rights claims are also in the public interest. Faculty believes that the existing legislation is adequate to ensure that the public interest is not frustrated by human rights claims.[28] The existing legislation is reflective of Option 2. The legislation is only relatively recent and the Courts have clarified how that legislation operates.[29] Faculty is of the view that the existing system, which is relatively recent, is adequate.

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[25] *Bank Mellat v HM Treasury* [2014] AC 700 at 789G-791G per Lord Reed
[26] *Agyarko v Secretary of State for the Home Department* [2017] 1 WLR 823 at paragraph 57 per Lord Reed
[27] See for example section 117B of the Nationality, Immigration and Asylum Act 2002
[28] Section 117C of the Nationality, Immigration and Asylum Act 2002; Paragraphs 397-399 of the Immigration Rules.
[29] See for example *HA (Iraq) v Secretary of State for the Home Department* [2021] 1 WLR 1327

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?

Faculty considers this to be more a policy question. In any event Faculty does not believe that the Refugee Convention or Human Rights Act contain impediments. They contain provisions which assist in protecting an individual's human rights. If an individual claims asylum, or makes a human rights claim, and is found to be at real risk, or removal is disproportionate, then the impediment is that the individual cannot be returned to their country of origin.

Question 26: We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:
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; and
d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation.
Which of the above considerations do you think should be included? Please provide reasons.

Faculty believes that there is no necessity for any factors to be set out in a Bill of Rights in considering when damages are awarded and how much. The Courts are used to considering when damages ought to be awarded for a breach of an individual's human rights and also in assessing quantum in terms of section 8 of the HRA. The Courts take into account the principles applied by the European Court of Human Rights. Faculty's view is that factors 'a', 'b' and 'd' have not featured in just satisfaction awards, although factor 'c' has.

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? Please provide reasons.
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.

Options 1 and 2 clearly include some mention of responsibilities and/or the conduct of claimants/applicants and refer to damages. Both use the remedies system in that respect. However, in the absence of draft clauses which the government believes will implement either option, Faculty does not consider that either option will prove more effective than the current exercise by the courts in awarding damages of discretion to take into account relevant matters when considering the public interest.

Question 28: We would welcome comments on the options, above, for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2.

The government states that its aim in this proposal is for Parliament to play 'a stronger role' in implementing final adverse judgments of the ECtHR, although it does not specifically state how the draft clause will achieve that beyond the current process where the government proposes legislative amendments. While in principle Faculty supports Parliamentary scrutiny of final adverse judgments of the ECtHR, it is of the view that the current process is sufficiently effective in the absence of further details of how the government believes the proposal will prove more effective.

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:
a. 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.

b. 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.
c. How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.

Faculty is not in a position to adduce evidence or data on these specific impacts.

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