

THE **LAW SOCIETY**
OF NORTHERN IRELAND



Call for Evidence

Independent Human Rights Act Review

Response of the Law Society of Northern Ireland

March 2021

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ABOUT THE LAW SOCIETY

The Law Society of Northern Ireland (the Society) is a professional body established by Royal Charter and invested with statutory functions primarily under the Solicitors (Northern Ireland) Order 1976 as amended. The functions of the Society are to regulate responsibly and in the public interest the solicitor's profession in Northern Ireland and to represent solicitors' interests.

The Society represents over 2,800 solicitors working in approximately 480 firms, based in 65 geographical locations throughout Northern Ireland and practitioners working in the public sector and in business. Members of the Society thus represent private clients, Government and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

Since its establishment, the Society has played a positive and proactive role in helping to shape the legal system in Northern Ireland. In a devolved context, in which responsibility for the development of justice policy and law reform takes place at a local level, this role is as important as ever.

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Introduction:

- **The context of the Review**

The Human Rights Act (HRA) is still very much in its infancy. Over the last twenty years our understanding of the HRA has been developing and, amongst human rights' practitioners the overwhelming position is that it has been working extremely effectively. Accordingly, this Review, and its timing, is of great concern.

- **The unique circumstances of Northern Ireland**

The HRA is of significant importance in Northern Ireland. The HRA underpins the Belfast/Good Friday Agreement 1998 (GFA) and the Northern Ireland Act 1998 (the NI Act). As a result, any proposed amendments to the HRA give rise to concerns in this jurisdiction and require the most careful consideration in view of the unique circumstances of Northern Ireland.

Northern Ireland is on a different statutory footing from the rest of the United Kingdom vis-a-vis the HRA, due to its centrality to Northern Ireland's constitutional settlement. There are two dimensions to this:

- an international dimension comprising section 6 of the GFA in which the UK Government commits to complete incorporation of the ECHR in Northern Ireland 'with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency'. Also, Article 2 of the NI Protocol to the Withdrawal Agreement provides for 'no diminution of rights, safeguards and equality of opportunity' in Northern Ireland; and
- a domestic law dimension in the form of the NI Act 1998.

The New Decade New Approach Agreement which ensured the restoration of a functioning government at the Northern Ireland Assembly following a forty two month hiatus paved the way for the work of the current Ad Hoc Committee on a Bill of Rights for Northern Ireland. This Committee is due to report in March 2022. Its work is premised on the commitment within the GFA to a Bill of Rights which it was envisaged would build upon the HRA.

- **The functioning of the HRA**

The HRA provides a mechanism whereby effective remedies, in respect of human rights violations, are available at a national level, rather than the financially prohibitive alternative route of the Strasbourg Court. The original objective of the HRA was to 'bring rights home' by enabling domestic courts to rule on issues involving Convention rights without resort to the European Court of Human Rights. The financial, procedural and delay barriers to taking cases to the Strasbourg Court prevent many individuals from accessing justice.

The HRA functions, as it should, to uphold a minimum standard of rights protections, whilst affording national courts a high degree of flexibility in deciding how to apply these standards in practice. Domestic courts in the United Kingdom also have the power to go beyond the Convention rights and to develop more sophisticated protections through the common law.

We echo the sentiments of Lady Hale: there is no need to ‘fix’ the HRA, as it is not broken.

Theme 1: The relationship between domestic courts and the European Court of Human Rights (ECtHR)

Question 1(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 Section 2 duty to take account of ECtHR jurisprudence has been working well in Northern Ireland. It is entirely appropriate that there is this international dimension to the protection of international human rights standards. One of the most effective ways of doing so is by having due regard to the jurisprudence of the ECtHR. This was Parliament’s express intention when the HRA was enacted.

The courts in Northern Ireland have fulfilled the obligation under Section 2, often in very sensitive and high-profile cases. The obligation has permeated both proceedings and decisions in this jurisdiction, with Northern Ireland courts regularly referring to Strasbourg jurisprudence on Convention rights in the full range of cases coming before the courts. This is indicative of the centrality of the HRA to the legal system in Northern Ireland. It is a practice which citizens of Northern Ireland have come to expect.

Additionally, under the Justice (Northern Ireland) Act 2004, the Attorney General for Northern Ireland has the power to issue quasi-binding guidance on human rights, to which criminal justice organisations must have due regard. This creates a unique protection at domestic level, by which the Attorney General can, if considered necessary, strengthen human rights in Northern Ireland beyond what is required by the Convention.

Question 1(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?

The margin of appreciation doctrine is applied in an effective manner by the Northern Ireland Courts. The system strikes the appropriate balance between the ECtHR’s supervision of State action for Convention compliance and State sovereignty.

In practice, there is sufficient flexibility for the United Kingdom to implement rights differently, as can be seen from the caselaw concerning hearsay evidence. In the cases of *Al-Khawaja and Tahery v the United Kingdom* [GC] - 26766/05 and 22228/06 and *R v*

Horncastle & Others [2009] UKSC 14, the Strasbourg court initially found that UK law on hearsay evidence was not Convention-compatible but changed its view following further consultation with the UK Government, deciding instead that the issue fell within the margin of appreciation. This is a clear example of how the margin of appreciation doctrine enables a well-functioning relationship between domestic courts and the ECtHR.

Question 1(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?

The ECtHR's openness to dialogue is central to the goal of embedding rights within domestic law and practice. The protections established by the Convention are intended to be 'subsidiary to the national systems safeguarding human rights'. This is reflected in the HRA.

The Strasbourg court is concerned only with ‘the supervision of the implementation by Contracting States of their obligations under the Convention’.¹ Indeed, the ECtHR has repeatedly stated that it does not wish to act as ‘a court of fourth instance by calling into question the outcome of domestic proceedings’ as the ‘domestic courts are best placed to interpret and apply rules of substantive and procedural law.’²

The margin of appreciation doctrine provides the means by which there can be divergence between ECHR state parties, as to the most appropriate way of implementing Convention rights. There is a clear willingness on the part of the Strasbourg court to compromise where appropriate. It is also important to highlight that UK Judges are directly involved in the development of ECtHR jurisprudence, with the opportunity to sit, on an ad hoc basis, in the Strasbourg court alongside the permanent Judges.

The Society is of the view that the current system of dialogue between domestic courts and the ECtHR has been extremely effective in embedding human rights protections. We consider there is no need to seek to alter this balance. Indeed, any interference with this complex relationship between the courts is likely to result in unforeseen negative consequences.

Theme 2: The impact of the HRA on the relationship between the judiciary, the executive and the legislature

Question 2(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**

¹ Seal v United Kingdom, App No 50330/07, 7 December 2010 at [53].

² Bullen and Soneji v United Kingdom, App No 3383/06, 8 January 2009 at [75].

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)?

- **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?**
- **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 3 of the HRA requires that both primary and subordinate legislation must be read in a way which is compatible with Convention rights, as far as it is possible to do so. Following the enactment of the HRA, this was seen as a positive step towards rights protections, rather than an interference with parliamentary sovereignty. Indeed, the HRA was seen as a way of ‘bringing rights home’, by incorporating them into domestic law, rather than a handing power over to the Strasbourg Court – see the 1997 White Paper entitled *‘Rights Brought Home: The Human Rights Bill.’*³

Section 3 does not give the courts power to make new laws - legislation must be interpreted in accordance with the HRA. This was confirmed by the House of Lords in *Sheldrake v DPP* [2004] UKHL 43 commenting on *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. Lord Bingham outlined four rules for the application of section 3 HRA;

‘First, the interpretative obligation under Section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a Convention-compliant interpretation under Section 3 is the primary remedial measure and a declaration of incompatibility under Section 4 an exceptional course.

Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a Convention compliant interpretation is not possible.’

The fourth rule ensures the preservation of parliamentary sovereignty by limiting the ability of the courts to interpret legislation so that Parliament’s express intention in enacting a piece of legislation cannot be undermined. This is supported by a strong body of caselaw⁴ which demonstrates the courts’ willingness and ability to apply limits to the interpretive obligation.

³ <https://www.gov.uk/government/publications/the-human-rights-bill>

⁴ See *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, *Bellinger v Bellinger* [2003] UKHL 21

The HRA is not the only instance where courts are tasked with interpreting legislation in a particular manner in order to make it function appropriately. Courts already have an obligation to avoid a literal interpretation of a provision where it would lead to injustice, absurdity, anomaly or contradiction. This often overlaps with the Section 3 interpretive obligation. For example, in *Mykoliw v Botterill* [2010] CSOH 84, [2010] SLT 1219, the court highlighted that the same conclusion would have been reached, regardless of which interpretive principle was applied.

Fifteen years after the commencement of the HRA, legal academic Christopher Crawford provided a useful analysis of cases from the UK superior courts where section 3 has been applied.⁵ This provides an insight into the level of friction in the relationship between Parliament and the court's interpretation under Section 3.

Of the 59 cases listed by Crawford, there were 34 in which the relevant provision was not amended after being 'read down' under Section 3. In a further 6 cases, an amendment was made that had no correlation to or impact upon the section 3 interpretation. This means that in 40 of the 59 cases, the section 3 interpretation was accepted by Parliament, effectively proving that there was no interference with Parliament's intention. In another 7 of the cases, the court considered the repealed or soon-to-be repealed legislation and found that the repealed Bill or Act was consistent with the interpretation ultimately reached by the court. This means that Parliament had already decided to amend the legislation in the direction of improved rights protections, independently of the courts. Thus, in 47 of the 59 cases, there was no conflict between parliamentary intention and the courts' interpretation under Section 3. In fact, Crawford's findings showed only 1 case in which Parliament implicitly rejected the court's interpretation.⁶

Once a provision has been interpreted under Section 3, Parliament may decide to accept the court's reading of the provision, or to clarify its legislative intention through an amendment. It can either make it explicitly compatible with the Convention or make a compatible reading impossible, thereby prompting the court to issue a declaration of incompatibility. This highlights the necessary balance between Sections 3 and 4 under the current system. Section 4 declarations are only used in a very small number of cases, demonstrative of very few instances of significant conflict between Parliamentary intention and the HRA. Furthermore, new legislation is passed in the full knowledge that it will be interpreted in accordance with Section 3. The fact that the courts have made use of Section 4, where necessary, is evidence of the recognition of the need to maintain a balance between Sections 3 and 4.

Declarations of incompatibility are rare and can only be made by Superior Courts. In Northern Ireland, only the High Court or Court of Appeal can issue a Statement of Incompatibility for Acts of the Northern Ireland Assembly. Below is a list of Northern Irish cases where courts have resorted to Section 4 declarations.

⁵ Christopher Crawford, 'Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998' (2014) 25 *King's Law Journal* 34 - 59

⁶ *M, Appellant* 2010 FamLR 152 (Sh Ct).

1. McR's Application for Judicial Review [2002] NIQB 58

The High Court declared that s.62 Offences Against the Person Act 1861, creating an offence for attempted buggery in Northern Ireland, was incompatible with ECHR Article 8. As a result, the legislation was repealed by Sexual Offences Act 2003, section 140 and Schedule 7.

2. Siobhan McLaughlin, Re Judicial Review (Northern Ireland) (Supreme Court; [2018] UKSC 48

The issue under scrutiny was whether the appellant was entitled to widowed parent's allowance (WPA). WPA is a contributory social security benefit payable to parents of dependant children who are widowed; but, at the time of the claim, a widowed parent was only eligible for WPA if at the time of the death, she was married to, or the civil partner of, the deceased.

The appellant, who had four dependant children with her deceased partner, argued that this requirement discriminated against the survivor and the children on the basis of their marital or birth status, contrary to ECHR Article 14.

The Supreme Court allowed the appeal and made a declaration that the relevant section of the Social Security legislation was incompatible with ECHR (Article 14 read with Article 8), insofar as it precludes any entitlement to WPA by a surviving unmarried partner of the deceased.

3. Northern Ireland Human Rights Commission's Application for Judicial Review [2015] NIQB 102

The law prohibiting abortion in respect of Fatal Foetal Abnormality at any time and in pregnancies due to sexual crime up to the date when the foetus becomes capable of an existence independent of the mother, was contrary to Article 8 of the Convention.

Those who are sceptical of the HRA have suggested that the interpretive scope under Section 3 should be narrowed in a manner similar to the New Zealand model, where courts interpret legislation as compatible so far as it is *reasonable* to do so, rather than so far as is *possible*. This would lower the standard of the Section 3 interpretive obligation. However, the consequence of this would be a likely increase in the use of Section 4. Given that there is little or no evidence that Section 3 has led to any significant or widespread interference with Parliamentary intention, an amendment of this nature would only serve to promote friction between Parliament and the courts.

One objective of the HRA was to bring an element of restraint into public policy matters. We are unaware of any case where the Northern Ireland courts have given an interpretation to a piece of legislation which might be considered as particularly strained in terms of trying to read it as compatible.

The consultation asks whether any amendment should be made retroactively. In our opinion, this would be a step in the wrong direction. In light of the centrality of the HRA to the Peace Agreement in Northern Ireland, and the potential destabilising effects of any alteration on the GFA, retrospective amendment should not be considered.

Question 2(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 any derogation order made by the Secretary of State for Northern Ireland in the recent past. This suggests that the Northern Ireland Government is able to manage most situations, including the Covid 19 pandemic, within the parameters of the Convention. This speaks to the effective embedding of rights as a result of the HRA. Indeed, it is clear from the language of the Convention that derogation orders are intended to be extremely rare as the vast majority of Convention rights already contain a qualification clause. In addition, the scope for derogation orders is limited as absolute rights, such as the prohibition on torture, are not amenable to derogation.

One example of derogation in Northern Ireland in the past can be found in the case of *Fox, Campbell And Hartley v The United Kingdom*: ECHR (Appl. No.12244/86; 12245/86; 12383/86. [1990] 13 EHRR 157. In this case, the UK Government wanted to change the degree of suspicion required at the time of arrest. Section 11 of The Northern Ireland (Emergency Provisions) Act 1973 stated that there need only be a *bare* suspicion, rather than a *reasonable* suspicion for arrest. The ECtHR clarified that *reasonable* suspicion was the threshold required under the Convention and therefore Section 11 was incompatible. Rather than changing the law to meet the requirements of the Convention, the UK Government chose to derogate. This example illustrates the political sensitivity surrounding derogation orders in this jurisdiction.

During the suspension of the NI Assembly, between 2017 and 2020, the HRA provided important and necessary checks on the actions of the Civil Service at a time when it was acting without Ministerial oversight, direction and control.

Question 2(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?

Section 21 of the HRA treats Acts of the Northern Ireland Assembly as subordinate legislation. This means that any Act of the Northern Ireland Assembly can be struck down by the courts if it is incompatible with the Convention. This view was confirmed by the decision in *AXA General Insurance v Lord Advocate* [2011] UKSC 46. In that case, it was decided that common law judicial review challenges are only open to acts of the devolved legislatures for devolved issues, including Convention challenges.

The Society considers that there is no need for any alteration to the current framework for striking down incompatible legislation. Furthermore, given the unique situation in this jurisdiction, any change should first require the consent of the Northern Ireland Assembly.

Question 2(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?

The Society supports the overarching purpose of the HRA to embed respect for human rights in all State operations and acts of public authorities. This is central to the principle of universal human rights which underpins our legal framework.

There are two recent examples of attempts to circumvent human rights obligations which are directly relevant to Northern Ireland. The first concerns the Overseas Operations (Service Personnel and Veterans) Bill. This Bill provides for a regression of domestic incorporation of the ECHR and will prevent domestic proceedings being brought for war crimes committed by UK military abroad. It has been stated by the Westminster Parliament's Joint Committee on Human Rights to be in breach of the 'UK's international legal obligations under international humanitarian law, human rights law and international criminal law'⁷ It has been argued that clause 11 of the Bill, which limits the scope of available remedies, is in breach of Article 13 of the Convention insofar as it limits direct access to Northern Ireland courts in relation to overseas operations. The Bill was introduced alongside a Ministerial Statement in which the Government proposed that security personnel who served in Northern Ireland during the Troubles should have the same protection as troops operating abroad.

The second example is the Covert Human Intelligence Sources Bill which is currently going through the Westminster Parliament. The Bill will allow intelligence services, police and others to authorize crime by informants to be "lawful for all purposes". While the House of Lords amended the Bill to put in place express limits on the criminal conduct which could be authorized so as to exclude breaches such as killings, torture, and sexual violence, these amendments were removed in a subsequent House of Commons vote.⁸

Question 2(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?

It is our view that the current arrangements are satisfactory and that any alteration to the current process is undesirable.

[Ends]

⁷ <https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/120321/operations-service-personnel-and-veterans-bill-is-unjustifiable-ineffective-and-will-prevent-justice-from-being-done-say-joint-committee-on-human-rights/>

⁸ <https://services.parliament.uk/Bills/2019-21/coverthumanintelligencesourcescriminalconduct.html>