Scottish Parliament European and External Relations Committee

Human Rights Inquiry

Written Evidence

November 2015

For further information contact

Angela Patrick, Director of Human Rights Policy

email: apatrick@justice.org.uk direct line: 020 7762 6415

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100
fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Summary

JUSTICE is committed to ensuring that human rights are protected and respected by each of the institutions of Government in the UK; individuals have a right to an effective remedy in our domestic courts for violation of those rights; and, in practice, enjoy each of the crucial guarantees for human rights protection enshrined in the European Convention on Human Rights and the UN human rights treaties to which the UK is a party.

In our view, the Human Rights Act 1998 currently performs the core functions of a bill of rights for the UK. We are not persuaded that there is any evidence-based argument for change to the substantive and procedural guarantees in the Act. While the Government remains committed to consult on a Bill of Rights for the UK, we have seen little detail about the substantive changes which are proposed.

The information that has been published, whether in pre-election material or through informal 'leaks' to the press has consistently suggested that any new Bill will limit the scope of rights to be protected and introduce new restrictions on how individuals might be able to enforce those rights in UK courts. The message from central Government has been generally that a Bill of Rights will mean 'fewer rights for fewer people'. If this approach is reflected in the Government's final proposals, it would undermine the systems for protection of individual rights at home and the ability of the UK to promote international legal standards on a global stage.

We particularly regret that the conversation thus far has been neglectful of the devolution settlement across the United Kingdom. We appreciate this early opportunity to engage with the Scottish Parliament on this important constitutional question.

Introduction

1. Founded in 1957, JUSTICE is a UK-based, all-party, human rights and law reform organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is also the British section of the International Commission of Jurists. JUSTICE Scotland – a branch of JUSTICE created in 2012 – works in Scotland under the direction of leading Scots jurists to pursue our vision and mission in Scotland.

2. JUSTICE Scotland is committed to ensuring that human rights are protected and respected by each of the institutions of Government in the UK. Individuals should have a right to an effective remedy in our domestic courts for violation of those rights and, in practice, should enjoy each of the substantive human rights enshrined the European Convention on Human Rights (ECHR) and the UN human rights treaties to which the UK is a party. The Human Rights Act 1998 (HRA) performs the core functions of a bill of rights for the UK. In short, JUSTICE Scotland is concerned about any change to the substantive and procedural guarantees in the Act.

3. The protection of individual rights and respect for international obligations are cornerstones of modern democracy, designed to protect us all from the excesses of unrestrained executive power. The protections of the ECHR mirrored in the HRA are woven into our constitutional arrangements, in the devolution settlements for Scotland, Northern Ireland and Wales. Any departure from those standards in substance would leave the UK out of step with our international obligations, not only in the Convention, but of those mirrored in other international human rights law standards.

4. JUSTICE has published extensively on the issue of a Bill of Rights for the UK, including two responses to the Commission on a Bill of Rights (enclosed as Annex 1), *A British Bill of Rights: Informing the Debate* (2007) (Annex 2) and *Devolution and Human Rights* (2010) (Annex 3). We are aware that many organisations have submitted very detailed arguments and evidence on various aspects of this debate, including in relation to the operation of the HRA. We have addressed many of these issues in our earlier writing on this subject. This submission is designed to provide summary answers to the questions posed by the Committee and cross-refers to our earlier work.

5. Our work so far has highlighted the complexity of agreeing any rights settlement which departs from the current nuanced integration of the HRA and devolution settlements, in particular the Scotland Act 1998 (as amended). We regret that the Government's proposals have thus far failed to explain how any changes will apply to Northern Ireland, Scotland and Wales. We appreciate the opportunity to engage with the Committee's inquiry.

What is your general view on the UK Government's proposal to introduce a British Bill of Rights to replace the Human Rights Act 1998?

6. JUSTICE Scotland considers it important to state that the operation of the HRA and the devolution legislation that incorporates the ECHR into Scottish law currently operates well. JUSTICE Scotland strongly opposes any dilution or abrogation of the fundamental rights contained in the ECHR.

7. We have not yet seen the detail of any Government proposals for reform and this limits our ability to respond in detail to some of the questions posed by this inquiry.

8. However, unfortunately, it appears that any new Bill of Rights will involve a dilution of some of the Convention Rights protected by the HRA. That is not acceptable. Subject to the unthinkable idea of withdrawal from the Council of Europe and ECHR (and the implications of such a step for our membership of the European Union), any dilution of the direct enforceability of Convention Rights in our own courts will simply see Scotland and the UK return to the a situation where people would have no option but to pursue violations of Convention rights at the European Court of Human Rights. It would undermine the original purpose of the HRA, namely to "bring rights home" and to make it possible for individuals to enforce their rights set out in the ECHR before domestic courts.

9. A very brief examination of just a few of the suggested changes being considered illustrate our concerns:

    a. *"Trivial" and "serious" rights*: One proposal in the pre-election strategy paper produced by the Conservative Party in October 2014, and reflected in recent leaks, is the qualification of any enforcement mechanism to violations of ECHR rights considered "serious" and not "trivial". The ECHR and the HRA already recognise competing individual and community rights, recognising

that proportionate limits to some rights are plainly justifiable to protect the public interest or the rights of others. Critics of the ECHR and the HRA are critical of this threshold and this proposal appears designed to allow greater scope for authorities in the UK to act without consideration of individuals' rights. It is altogether unclear what this might mean in practice, but it implies that an individual might have a valid claim that their rights have been violated but have a remedy refused. This echoes the suggestion of an earlier conservative Private Members' Bill introduced by a Conservative Party backbencher at Westminster, which would have permitted violations of Convention rights which were deemed "reasonable". Reasonableness, seriousness and triviality are all highly subjective concepts new to these proposals. It begs the question how the Westminster Parliament might draw a line between trivial and serious violations consistent with our obligations in the ECHR and specifically, the right to an effective remedy guaranteed by Article 13 ECHR.

b. *Qualifications and qualifiers to the protection of ECHR rights:* There are a number of areas where the Government may consult on qualification to the application of the ECHR rights by the European Court of Human Rights. Two of the most significant are the application of Article 3 ECHR through the protection of individuals against return to a country where they face a "real risk of torture" and the intention to exclude the work of the military overseas from the protection of the HRA.

In respect of the "real risk" test, the UK argued this point before the European Court of Human Rights in *Saadi,* It is clear that there is no form of internationally acceptable test that will allow the lawful return of an individual to a real risk of torture. If there is evidence that an individual faces a real risk of torture on return, should the UK seriously be seeking shortcuts? Changes to this approach will leave the UK out of step not only with the ECHR as applied by the European Court of Human Rights, but could undermine our commitments under the International Covenant on Civil and Political Rights and the UN Convention against Torture.

In respect of extraterritorial application, removing the protection of the HRA won't change the scope of our obligations under the Convention itself. While the UK has an obligation to provide a remedy for violations of the Convention

– in the limited circumstances where it applies overseas – these are obligations which the UK will continue to owe irrespective of any limits offered in a domestic bill of rights. Expressly legislating to prevent the application of domestic law to troops operating in theatre would leave soldiers – in the limited circumstances they may have a claim – to go to Strasbourg for a remedy. Removing the remedy at home will not change the scope of the Convention.

Any substantive change to the scope of Convention rights could mean that a person could have a perfectly valid right under the Convention but no enforceable right in domestic law. Applicants to the European Court of Human Rights must exhaust all *effective* domestic remedies before taking the road to Strasbourg (Article 34). If a remedy is clearly excluded in domestic law, it cannot be considered effective. An unintended consequence of these changes might be that more frequently individuals could leap-frog the domestic courts entirely. Ironically, the impact of any such limitation could be to limit the engagement of domestic courts in the development of international law in precisely those cases which critics of the HRA and the ECHR find politically most difficult.

10. Many individuals and organisations – including JUSTICE - have proactively worked to consider how many individual rights might be *better* protected within the UK, including in respect of social and economic rights. However, it is very clear from the messages from Government that the current discussion is not about improving the UK's human rights settlement or about protecting a wider range of rights more effectively. Instead, the conversation is focused on greater control for Parliament at Westminster, freeing public authorities from the existing constraints of the HRA and, in short, about fewer rights for fewer people. This debate is not an opportunity for the discussion of a new "shopping list" for enhanced legal rights. Against this background, JUSTICE is concerned that public debate should focus closely on the case for any reform and the implications of any new limits proposed for the protection of individual rights in the UK and the UK's compliance with its international obligations.

What rights, if any, would a British Bill of Rights have to contain? How would a British Bill of Rights interact with Scotland's separate legal system? What impact do you think any changes will have on Scotland more generally?

11. Any reform which undermines the protections in the HRA and the ECHR would be a regressive step for the UK, and for Scotland's legal system. While it appears that the Government has committed to ensuring that any new Bill of Rights contains the text of the Convention, many of the changes currently being considered would, in effect, reduce the protection offered to some or all rights to a degree which would fall below the standard guaranteed in the ECHR. In short, the proposals would be based on a HRA "minus"/ECHR "minus" model (see above). JUSTICE Scotland considers that this approach would inevitably lead to the likelihood that rights are offered less protection and would undermine the UK's commitments under the ECHR to protect all of the rights enshrined in the Convention, to afford an effective remedy for any violation and to give effect to judgments of the European Court of Human Rights (Articles 1, 13, 46 ECHR).

12. The settlement in the Scotland Act and the HRA, grounded in the Convention rights guaranteed by the ECHR, has worked well for the Scots legal system, resulting in many overdue and profound reforms of both our criminal and civil law.

13. The treatment of disability, mental health, discrimination, and equality in the law has progressed greatly, and there has been a profound shift in the recognition of the rights of victims and witnesses involved in the criminal justice process, most recently enshrined in Scotland in the Victims & Witnesses (Scotland) Act 2014.

14. Following the integration of Convention rights into the constitutional settlement in Scotland, there have been major changes to the appointment and tenure of judges in Scotland, for example. In criminal law there have been major changes in the system of disclosure of evidence by the Crown (including the disclosure of prior convictions to the defence), the right to have a lawyer present when interviewed by the police, and consequent to the terms of Article 6 ECHR (right to a fair trial within a reasonable period of time), there is now far greater judicial scrutiny of the actions of the prosecution service than happened in the past. Further, in civil law the right of unmarried fathers to participate in proceedings concerning their children has been recognised, and the need for the Crown Office in Scotland to put in place the

necessary procedures to ensure the practical and effective investigation of deaths (Article 2 ECHR) has been given greater focus.

15. These progressive steps – making a practical difference in the operation of the justice system and the protection of individual rights – in Scotland have, in JUSTICE's experience, been replicated across the UK. Key decisions and judgments based on the HRA have advanced the protection of individual rights in the UK significantly. These include decisions on topics as diverse as equality in housing allocation for people with disabilities; on the amendment of the procedures for challenging detention on mental health grounds; equality in tenancy rights for same-sex couples and the declaration of incompatibility of the administrative detention of foreign nationals suspected of terrorist offences without trial. We are concerned that the discussion on a bill of rights for the UK has so far failed to recognise the value which the HRA has added to the protection of individual rights within the UK.[1]

16. Unfortunately, none of the Government's proposals thus far have explained how any new settlement would affect the legal system in Scotland nor how any new measures would replace the Convention rights protected by the Scotland Act. JUSTICE Scotland considers that finding any alternative mechanism which protects individual rights to the same degree and which respects both the devolution settlement and the UK's international obligations will be legally very difficult.

Arguments have been made that the current system does not sufficiently respect the sovereignty of the UK Parliament. What are your views on this?

17. JUSTICE Scotland considers that the current system, with declarations of incompatibility available but used sparingly, remains an elegant solution which respects both parliamentary sovereignty (at Westminster) and the effective protection of fundamental human rights.

18. In Scotland, Convention rights are written into the devolution settlement in a way that limits the power of both the Scottish Government and the Scottish Parliament. In

[1] *R (Bernard) v Enfield London Borough Council* (2003) UKHRR 4; *H v Mental Health Review Tribunal North & East London Region (Secretary of State for Health Intervening)* [2001] EWCA Civ 415; *Ghaidan v. Godin-Mendoza* (FC) [2004] UKHL 30 and *A and others v Home Secretary* [2005] 2 AC 68. This selection deliberately refers to both cases involving interpretation under Section 3 and declarations of incompatibility under Section 4. Others have, in their submissions to the Committee outlined in greater detail the evidence to support the contribution that the HRA has made to the development of rights protection in the UK, including Liberty. We do not intend to repeat this detailed exercise in this short submission.

Scotland the rights and freedoms set out in the ECHR are protected by common law, domestic legislation and underpinned by the incorporation into Scots law of the ECHR rights through the HRA and the devolution legislation.

19. However, there is nothing in the HRA which limits, in our view, the ability of the UK Parliament to act as it would wish. While Section 10 HRA provides a "fast-track" mechanism for the UK Parliament to respond to Section 4 HRA declarations of incompatibility made by the UK courts, there is nothing in the HRA which forces the hand of either the Executive or Parliament in providing a response. Equally, if the courts adopt an interpretation of the law pursuant to Section 3 HRA with which the UK Parliament disagrees, Westminster can change the law through new statute.

20. Similarly, although Section 2 HRA requires judges to *take into account* the jurisprudence of the European Court of Human Rights, there is nothing in the HRA which requires our courts to slavishly follow the decisions of that Court or any requirement on Parliament to act in a particular way.

21. This is, of course, distinct from the international law obligation on the UK as a State to respect its commitment in Article 46 ECHR to give effect to the judgments of the European Court of Human Rights in cases where the UK is found to be in violation. This international obligation will continue to apply regardless of the scope of the HRA or any domestic bill of rights. Similarly, the common law presumes that the UK intends to comply with its international obligations when interpreting domestic statutes and developing the common law. If those obligations are defined in a specific manner by an international court with jurisdiction, that definition will continue to be relevant to the development of rights protection in the UK, regardless of the scope of Section 2 HRA.

22. The limits of any argument on sovereignty are perhaps best illustrated by the outcome in one of the most contentious cases for the UK Government under the Convention since the implementation of the HRA. The decision of the European Court of Human Rights in *Hirst (No 2)* that the existing blanket ban on prisoners voting in the UK is in violation of Protocol 1, Article 3 ECHR was handed down in 2005. Despite this, and in demonstration of the continuing sovereignty of the UK Parliament, no action has been taken to remedy the situation and, it would seem, most unlikely to happen in the future. While this leaves the UK in violation of its obligation under Article 46 ECHR, there is nothing in the HRA which limits the sovereignty of Parliament in our *domestic* constitutional settlement.

In addition, it has been suggested that the European Court of Human Rights has developed mission creep, expanding the European Convention on Human Rights into areas which it should not cover. What views do you have on this argument?

23. The ECHR is a living instrument which evolves in light of societal changes, which consequently permits the ECHR to remain relevant to modern life. Developments in the law of the Convention can be seen as a necessary corollary to aspects of the fundamental rights specifically included in the Convention. To describe this process as mission creep is misleading and unhelpful.

24. The Convention was drafted over 50 years ago and there are some understandable linguistic limitations within it (for example, it contains no express protection against discrimination on the grounds of sexuality). However, like any broad statement of constitutional guarantee, the rights themselves are made real in their application to the facts of the cases considered by the Court in Strasbourg or by our domestic judges. Thus, in the interpretation of the right to life guaranteed by Article 2 ECHR, the application by the Court has led to a greater understanding of the procedural obligations on the State to protect life and the improvement of practice and policy operated by the police in their operations. In the UK, this has had a direct impact on the response of the police to threats to kill and other reported risks to life; and on the obligation to conduct an inquiry when systems fail and lives are lost. Many cases would not have been envisaged in 1950. For example, the development of a DNA database and the activity of Government to retain samples from innocent people and children may have been a question unthinkable to the framers. Yet, in *S and Marper v UK,* it is difficult to see how this issue would not engage the right to respect for privacy contained in Article 8 ECHR.[2]

25. It appears that for critics of the HRA , any amendment to the language should restrict the rights guaranteed by the Convention by, for example, excluding protection guaranteed by the case-law of the European Court of Human Rights; by redrawing the balance to render lawful actions currently considered disproportionate, or by limiting the enforcement mechanisms in the HRA . Such a retrogressive step would be unique internationally; would undermine the ability of people in the UK to secure redress for violations of rights in UK courts and would damage the ability of the UK to

[2] App. No. 30562/04 [2008] ECHR 1581 (4 December 2008)

meet its international obligations in the ECHR and the UN human rights treaties, irreparably.

Do you think it would be possible to have different human rights regimes within the United Kingdom?

26. Historically, JUSTICE's work has highlighted the complexity of agreeing any rights settlement which departs from the current nuanced integration of the HRA and existing devolution settlements, as a 'legal and political nightmare'. While differential forms of rights protection are considered the norm in most federal systems, the UK is not a federal state. Importantly, even within those systems, there is broad agreement on a national minimum standard of rights protection which applies across the states, despite variations within individual states or regions.

27. We are extremely concerned that the current legal and political climate in the UK would make agreement on a system which reflects – and respects – the devolution settlement, impossible. At a minimum, we consider that any proposals for change which depart from the substantive and procedural rights in the HRA would provoke very different public responses in Scotland, Wales and Northern Ireland; these different approaches would be politically divisive and far from simple to resolve. This reality has been most clearly acknowledged in the findings of the Bill of Rights Commission established in the last Parliament by the Coalition Government.

28. Recent suggestions recognise that it may be impossible to secure the agreement of the devolved assemblies to any decision which would establish a UK-wide Bill of Rights. While the existing devolution settlement recognises inherent differences in approach to the method and incorporation of Convention Rights – the substantive rights guaranteed across the United Kingdom remain the same – grounded in respect for the ECHR.

29. In legal terms, the failure to protect a right guaranteed by the Convention in law in England and Wales, would place the UK as a State in violation of its obligations internationally with associated implications for the reputation of the UK as a whole (including Scotland). In practical terms, this could create difficulties in connection with the enforcement of rights across borders within the UK and for violations which have an implication nationally. For example, if reserved legislation applicable across the UK were challenged; would it be sustainable that some individuals might have a

remedy in Scotland but others would need to take their case to the European Court of Human Rights in Strasbourg?

30. Any outcome which saw a lesser degree of protection than the ECHR offered in one part of the UK than in the others, and which fell below the standard protected by the European Court of Human Rights would be, in our view, legally and politically unsustainable.

Would the Scottish Parliament have to consent to any changes under the Sewel Convention? Could the UK Government act without the consent of the Scottish Parliament?

31. The constitutional and political implications of any decision of the UK Parliament for the constituent parts of the UK – and the involvement of the Scottish Parliament, the Northern Ireland Assembly and the Welsh Assembly in that decision – will, in our view, be at the heart of the forthcoming debate.

32. Despite the Westminster Parliament retaining the legal authority to legislate on all matters, whether reserved/excepted or devolved/transferred, a constitutional convention has arisen that it will not legislate on devolved/transferred matters without the consent of the devolved Parliaments and Assemblies (following the 'Sewel Convention'). Section 2 Scotland Act reflects this Convention in statute:

"the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament."

33. The repeal of the HRA and the replacement of all Convention Rights with a UK Bill of Rights which departs from the ECHR could alter the devolution settlement in the Scotland Act 1998 and could, by necessary implication, alter the scope of Scottish authorities and the Scottish Parliament to act in respect of all devolved matters.[3] Against this background, the position of the Scottish Government that legislative consent would be required for such a radical change is consistent, in our view, with the Sewel Convention. The final consideration of constitutionality and legislative consent will, of course, depend on the substance and extent of the final proposals.

[3] See, for example, Jack Beatson, Stephen Grosz, Tom Hickman and Rabinder Singh, Human Rights: Judicial Protection in the UK, Sweet & Maxwell, 2008, p735: "*[s]hould the UK Parliament ever choose to amend the HRA by introducing any qualifications on the meaning or breadth of the Convention rights that are given effect by the HRA, this will automatically and correspondingly expand or reduce the competence of [the devolved bodies]*."

34. Politically, JUSTICE Scotland considers that, in the current environment, it will be extremely difficult for the Westminster Parliament to proceed unilaterally to rearrange the constitutional arrangements for the protection of individual rights across the UK without the engagement and support of all of the parts of the UK, including the Scottish Parliament.

What impact do you think the UK Government's proposals will have on the UK and Scotland at an EU and international level, for example the Council of Europe?

35. JUSTICE Scotland considers that there is little doubt that the approach of the UK to human rights is watched and assessed throughout the world. That the UK appears to be seeking to dilute its commitment to its international treaty obligations sends out the worst possible message. That is, that the UK's respect for the rule of law persists only as long as it is convenient. This approach regrettably gives succour to nations with less respect for international law or individual rights. That the message comes from the UK – a country which has traditionally led on the promotion of international standards and respect for the rule of law – is particularly damaging. An aggressive approach has the potential to undermine not only the credibility of the ECHR but of other systems for the international protection of human rights standards.

36. Even before the Government's proposals have been published, the implications of its stance during the past five years are already being keenly felt on the international stage. For example, in resisting the jurisdiction of the International Criminal Court in Kenya, President Kenyatta used the UK's attitude to the ECHR as an example of legitimate push-back against international standards in favour of domestic sovereignty: "*The push to defend sovereignty is not unique to Kenya or Africa. Very recently, the prime minister of the United Kingdom committed to reasserting the sovereign primacy of his parliament over the decisions of the European Human Rights Court. He has even threatened to quit that court.*"[4]

37. Although the implications for our own respect for international law standards will hinge on the detail of any proposals produced, it is beyond a doubt that the tone of the debate thus far has had a global impact on respect for international human rights standards. If the UK continues to formally distance itself from the substantive rights

[4] President Kenyatta, Kenya, 6 Oct 2014. See full speech, here. https://adam1cor.files.wordpress.com/2014/10/hansard-report-monday-6th-october-2014-1.pdf

protected by the ECHR, this will undermine not only the operation of the Convention, but will have a far wider impact on both the international human rights framework, respect for the legal systems of the UK and for the rule of law.

JUSTICE Scotland

November 2015