Written evidence from Dr John McGarry and Dr Samantha Spence (HRA0056)

Executive summary

General:

- The Human Rights Act 1998 works well and we suggest that any attempt to amend it should be viewed with caution.

In answer to the question in Theme 2 of the Terms of Reference of whether any change be made to the framework established by sections 3 and 4 of the HRA:

- We do not recommend the amendment or repeal of section 3 which strikes the right balance between parliamentary sovereignty and incorporating the Convention rights into UK law.

- Moreover, Parliament may intervene to correct legislation which has been interpreted in a way with which it disagrees.

- The intention of Parliament is a contested concept and, as such, should not be used as a standard against which interpretations under section 3 are evaluated or (if section 3 were amended) governed.

- The terms of reference ask whether declarations of incompatibility should be 'considered as part of the initial process of interpretation … so as to enhance the role of Parliament in determining how any incompatibility should be addressed'. If this is suggesting involving Parliament in determining the meaning of legislation in a live case then we argue that this would be highly problematic in terms of separation of powers, the right to a fair trial under Article 6 and the sub judice rule. There would also be practical problems in deciding what Parliament's involvement would be.

- We suggest that, where a declaration of incompatibility has been made, the relevant Minister should be obliged to make a statement to the House of Commons as to whether or not the Government intends to amend the legislation in question.

Full response

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

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 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 If yes, should section 3 be amended (or repealed)?

1. We do not recommend amendment or repeal of section 3. The provision strikes the right balance between making the Convention rights an integral part of UK law, including statute, and respecting the words used in legislation.

2. Moreover, if Parliament believes that the courts have gone too far in interpreting legislation so as to conform with the Convention rights, then it may correct this. Parliament may enact legislation making it explicitly clear that it should be interpreted and applied in a particular way even if it conflicts with the Convention rights.

3. Further, the intention of Parliament is a notoriously slippery concept and it is a mistake to believe that it may be identified in a conclusive way.
    i. Even if we imagine that Parliament has one intention with regard to a particular statutory provision, any attempt to identify this by the courts (or anyone else) would not identify that original intention; rather it would be a mere reconstruction, a best guess (influenced by conscious and unconscious biases) at what the original was.
    ii. This view that any identified intention will be a reconstruction rather than the original is even more the case where the legislation in question is being applied to a factual situation not discussed, and perhaps not even envisaged, by Parliament.
    iii. Also, it is self-evident that among the about 800 peers that compose the House of Lords and 650 MPs that make up the Commons, there is not one common intention. Parliamentarians will vote for or against legislation for various reasons. So, the question would be 'whose intention do we attempt to identify'. Would it be, for instance, only those who spoke in debate and voted in favour of a Bill? Only those who voted at Third Reading in each House? Only the promoters of the Bill? There is, we suggest, no way to answer this question which would not involve prioritising the views of a subsection of Parliament over Parliament as a whole.

4. This difficulty in identifying the intention of Parliament would be very evident if section 3 were replaced with a provision which limited – by reference to such intention – the obligation to interpret legislation in conformity with the Convention rights. In cases where the obligation to so interpret arose, there would be extensive argument about what Parliament intended when it enacted the legislation with the parties drawing on various extraneous material such as Hansard, Ministerial statements, press releases, party manifestos, etc.

• 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?

5. We assume the suggestion here is that, if a court determines at an early stage that there is likely to be a declaration of incompatibility that it should pause the case and make some kind of referral to Parliament. If this assumption is incorrect, we cannot see the benefit of a declaration being 'considered as part of the initial process of interpretation … so as to enhance the role of Parliament in determining how any incompatibility should be addressed.'

6. If our assumption is correct, then such involvement of Parliament in a live case would be highly problematic for many reasons. First, it would be a clear breach of the separation of powers principle which requires that Parliament legislates and that the courts, not Parliament, determine the meaning of legislation in the context of the case before them.

7. Second, it would involve a political body – Parliament – becoming involved in the judicial process. This may itself breach the right to a fair trial under article 6 of the European Convention on Human Rights.

8. Third, such involvement by Parliament would breach the sub judice rule which prevents parliamentarians commenting on a case currently before the courts.

9. There would also be significant practical questions which would need to be addressed if this approach were taken. For example, would any referral to Parliament be to both Houses. If so, this would likely cause delays to the decision of the case in question. Or, would a referral be to, say, a joint committee. If the latter, would any determination of this committee need to be approved by Parliament by positive or negative resolution?

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?

10. We suggest that the remedial process established in section 10 and Schedule 2 be retained. It provides a speedy process to amend legislation in order to bring it into line with the Convention rights while the positive resolution procedure set out in Schedule 2 ensures the appropriate involvement of both Houses of Parliament.

11. However, we suggest one change which would enhance the role of Parliament: if there is a declaration of incompatibility, and the case will proceed no further (ie there will not be an appeal or the declaration has been issued or confirmed by the Supreme Court), the relevant Minister should be obliged to make a statement to the House of Commons as to whether or not the Government intends to amend the legislation in question.

Conclusion

12. The Human Rights Act 1998 seems to us to strike the right balance between incorporating the Convention rights and respecting parliamentary sovereignty. Moreover, the Act means that Convention cases are, more often than not, decided by UK courts. This, along with the mechanisms in sections 3 and 4, means that the UK Government is less likely to be found in breach of the Convention by the European Court of Human Rights. For this reason, we suggest that any proposed amendment to the 1998 Act should be viewed with caution.

13. Additionally, the review seems to be motivated by an executive dislike of constraints on executive power, such dislike being fed and substantiated by sometimes wildly inaccurate press reporting. For the sake of clarity, we suggest that we (as a country) should be very wary of amending the Human Rights Act 1998 in favour of a system of protecting rights against abuse of executive power with which the executive is perfectly comfortable.

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