

Procedural Aspects of the Human Rights Act

WEBINAR TRANSCRIPT

Overview

This webinar covers procedural aspects of the Human Rights Act 1998, specifically for Government lawyers. This includes the process for handling human rights issues when preparing Bills and for responding to declarations of incompatibility.

The training aims to educate viewers so that they:

- Are clear about the tests for the two types of section 19 HRA 1998 statements
- Understand what is needed for Government human rights assessments for primary legislation, and what is required for Parliament
- Understand the effects of declarations of incompatibility, and what steps to take if one is made
- Can take steps to remedy incompatible legislation, with the aid of the mechanism established by the Act

Introduction

Rosemary Davies: Hello and welcome to our webinar about procedural aspects of the Human Rights Act. I'm Rosemary Davies, Legal Director at the Ministry of Justice. With me are two colleagues from the Information and Human Rights Law team.

Sarah Howard-Jones: I'm Sarah Howard-Jones.

Eleonor Duhs: I'm Eleonor Duhs.

Rosemary Davies: Eleonor, could you tell us which topics we're planning to cover?

Eleonor Duhs: Yes. Firstly, we're going to look at statements under section 19 of the Human Rights Act 1998. Then we're going to look at the human rights information that's required for primary legislation. Then, thirdly, we're going to look at declarations of incompatibility and, fourthly, at Remedial Orders.

Rosemary Davies: And, Sarah, why did we choose those topics for Government lawyers?

Sarah Howard-Jones: Well, these topics, hopefully, will provide useful guidance for Government lawyers who are dealing with primary legislation – to give them some guidance on how to deal with section 19 statements and to deal with the human rights issues which arise during dealing with Bills. And, generally, for both litigation and advisory lawyers we consider it would be helpful to explain the effects of declarations of incompatibility and what to do if one's made; and to know more about what the Human Rights Act offers as a mechanism for remedying incompatible legislation.

Rosemary Davies: So our learning objectives?

Sarah Howard-Jones: Our learning objectives are, first, to be clear about the tests for the types of section 19 statement. Second, to understand what's needed for internal human rights assessment for Bills and what's needed for Parliament. Third, to understand the effects of declarations of incompatibility. And fourth, how to take steps to remedy incompatible legislation with the aid of the mechanism established by the Human Rights Act.

Section 19 statements

Rosemary Davies: So, section 19 statements. We asked our colleague Emma Burgess what she thought lawyers needed to know about them.

Emma Burgess: First of all, I think a lawyer needs to be thinking very carefully about the level of assurance that a minister needs before he or she can give a section 19 statement to Parliament. And secondly, they need to be thinking about the level of justification and the reasons that minister is going to give to Parliament in presenting that section 19 statement.

Rosemary Davies: Looking then at the requirements of section 19 of the Human Rights Act, a minister who introduces a Bill into each House of Parliament has to sign a statement, either under section 19(1)(A) or

19(1)(B) about compatibility of the Bill with the Convention rights. He signs it on a piece of paper, it appears on the front of the Bill when it's published. Sarah, section 19(1)(A) – what are the considerations?

Sarah Howard-Jones: Well, for section 19(1)(A), it must be possible for the minister to make the statement with a degree of certainty that it's more likely than not that all of the provisions of the Bill would withstand challenge if a challenge were brought before the courts. This applies not only to domestic courts but, of course, the Strasbourg Court as well.

The test for the section 19(1)(A) statement, and for making one, was explained very soon after the Human Rights Act received royal assent. This was in a written answer to a parliamentary question by the then Home Secretary, Jack Straw. He said:

"A minister must be clear that, at a minimum, the balance of argument supports the view that the provisions are compatible. A minister must consider whether or not it is more likely than not that the provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and before the Strasbourg Court. A minister should not be advised to make a statement of compatibility where legal advice is that, on balance, the provisions of the Bill would not survive such a challenge."

So the role for GLS lawyers is to advise a minister as to whether or not it's possible to make that statement. And in more difficult cases it may be necessary for departmental lawyers to consult the Law Officers.

Rosemary Davies: And, Eleonor, would we expect the minister to have to account to Parliament for his statement.

Eleonor Duhs: Well, the minister in charge of the Bill should be ready to explain in debate his or her thinking on the compatibility of the provisions with the Convention. So the minister should be ready to give a general outline of the arguments which led him or her to the conclusion that the provisions were compatible with Convention rights.

Rosemary Davies: And what about the case where he can't make that statement, or she can't? Sarah, section 19(1)(B).

Sarah Howard-Jones: Yes. Well, section 19(1)(B), that statement doesn't require the minister to take the view, or indeed state in that statement, that the provisions within a Bill are incompatible. Nonetheless, the statement is that he's unable to make a positive statement of compatibility but wishes the House to proceed with the Bill nonetheless. It doesn't prevent the minister from later arguing in court that the provisions are, indeed, compatible and that's in line with the nature of the statement itself.

Again, departmental legal advisers will take the lead in providing the formal advice to the minister as to the section 19(1)(B) statement. If it appears likely that that's going to be necessary, it's for those lawyers to contact the Law Officers to ensure that the matter is discussed and that the Law Officers can add their input to this advice.

Rosemary Davies: By the Law Officers there, you mean the Attorney General and the Advocate General for Scotland?

Sarah Howard-Jones: That's right, yes.

Rosemary Davies: Eleonor, how many examples have there been of 19(1)(B) statements?

Eleonor Duhs: There've been two. The first was in relation to what became section 321 of the Communications Act 2003. Now, that clause maintained the UK ban on political advertising and the minister wasn't able to sign the statement under section 19(1)(A) because, at the time, there'd been a judgment in a Swiss case which said that those sorts of political bans violated Article 10 of the ECHR. The Government indicated that it had reasonable prospects of successfully defending any subsequent challenge to the ban in the Communications Act on the basis that the Swiss hadn't made their justifications very well in the particular case. And the Government anticipated that, in the long run, our ban would be found to be lawful. And that was, in fact, proved correct because there was a challenge in the case of *Animal Defenders International v United Kingdom*, in which the Government was successful.

Rosemary Davies: Eight years later. And the other example?

Eleonor Duhs: The second example was when the Deputy Prime Minister signed a statement under section 19(1)(B) in relation to the House of Lords Reform Bill. The minister wasn't able to sign a statement of compatibility because the franchise of the elected House of Lords was based on the Commons franchise and the court had ruled that the Commons franchise was incompatible with Convention rights in relation to the issue of prisoner voting.

Rosemary Davies: And that's an interesting example because the House of Lords Reform Bill itself was not incompatible, but because it referred to the Commons franchise a section 19(1)(B) statement was needed.

Human rights and the legislative process

Rosemary Davies: So moving on to topic two, the analysis that departmental lawyers need to do of the ECHR issues, we asked Emma again what it would be interesting to know.

Emma Burgess: I think it's useful to appreciate that an ECHR memorandum to the PBL Committee is quite a different document to the Parliament-facing documents, like explanatory notes. And it would be very useful to hear, I think, more about the distinction between the two.

Rosemary Davies: Eleonor, can you tell us about the role of the ECHR memorandum?

Eleonor Duhs: Yes. The memorandum is prepared by the Parliamentary Business and Legislation Committee, which is known as PBL.

Rosemary Davies: That's a committee of Cabinet?

Eleonor Duhs: It is, yes. It sets out the Bill's compatibility with the Convention. The memorandum cannot be disclosed outside Government. Memorandums should contain frank assessments of human rights arguments, including analysis of any weaknesses in the department's position. It should only deal with the main issues and it should be succinct. A basic knowledge of the ECHR can be assumed and it should be supported by any significant cases which might affect the analysis. When advice has been sought from counsel or from Law Officers that should be referred to in the memorandum and, in some cases, it might be

useful to annex the advice to the memorandum. It is important to differentiate between the memorandum produced for PBL and the public version of the memorandum on the Bill, which might appear in the explanatory notes or be provided to the Joint Committee on Human Rights, known as the JCHR. And we'll talk about the JCHR in a moment.

Rosemary Davies: And, Sarah, who needs to be involved in the ECHR memo process?

Sarah Howard-Jones: Well, once the departmental lawyers have put together with policy colleagues the draft of the ECHR memorandum, it needs to be sent to the Law Officers. And the lawyers at that department will work together with the departmental lawyers, offering comments as how best the departmental lawyers can present the Bill and its provisions. It's important that that communication with the Law Officers is at least two weeks before the matter is due to be considered by PBL. If the matter's controversial, it's of course the case that the lawyers should be approaching the Law Officers earlier than that, so that there's plenty of time to resolve difficult issues.

Rosemary Davies: And the explanatory notes, Eleonor?

Eleonor Duhs: Yes. All Government Bills introduced in either House must be accompanied by explanatory notes which will then be updated during the course of the Bill's passage through Parliament. The explanatory notes should contain information on human rights compatibility or a link to publicly accessible analysis. For example, one provided by the department to the JCHR. The Government has undertaken to provide information about the grounds on which any interference in the Convention rights is justified. Though it wouldn't be appropriate for them to contain the same sort of full and frank disclosure of potential weaknesses as is the case for the memorandum for PBL.

Rosemary Davies: So one version for Cabinet colleagues, one version for public consumption, but both of them dealing with the issues. You mentioned the Joint Committee on Human Rights. What are their expectations, Eleonor?

Eleonor Duhs: They report on the human rights issues raised by the Bill and they'll closely examine the arguments that the department puts forward to justify an interference with Convention rights. They recommend that departments publish a detailed human rights memorandum on the introduction of the Bill. This practice is to the benefit of departments because it enables the legislative scrutiny to be more focused and, in some cases, it will lead to the Bill being cleared from scrutiny by the Committee at an earlier stage in the Bill's passage. This isn't yet a Government requirement but it is increasingly regarded as being good practice.

Rosemary Davies: So you don't have to provide a voluntary memorandum to the JCHR but it may be advisable, may smooth the progress of the Bill. What if new issues are added to the Bill during its progress by amendment, with human rights implications?

Sarah Howard-Jones: Yes. If the department chooses to make, or accepts, amendments in the course of the Bill's process which have substantial human rights elements then a fresh analysis needs to be undertaken of the impact of those provisions, and that analysis communicated to both the JCHR and, before that, to PBL. So it's important for departmental lawyers at that time to consider that impact and to ensure that either, if there's been a JCHR memorandum that an update is provided to that, or a separate

memorandum on this point, or if there's another way of communicating in writing with the JCHR to inform them of the fresh analysis.

Declarations of incompatibility

Rosemary Davies: So assuming the Bill is passed through Parliament, comes into force but then is challenged in the courts and a declaration of incompatibility is made. We asked one of our colleagues, George Keating, what lawyers would want to know about declarations of incompatibility.

George Keating: They're not a common occurrence but they need to be taken very seriously. So I think it would be really helpful to understand what sort of practical steps I'm expected to take, as a departmental lawyer if the declaration's made in my area of work. I think also it would be really helpful to understand more about remedial steps and the best way to go about the process of remedying the incompatible legislation.

Rosemary Davies: So, Sarah, can you talk us through declarations of incompatibility?

Sarah Howard-Jones: Well, section 3 of the Human Rights Act requires that, as far as it's possible to do so, primary legislation and subordinate legislation must be read and given effect to in a way that is compatible with Convention rights. And it's only if it's not possible to do that that the court will consider making a declaration of incompatibility. Section 4 of the Human Rights Act provides that mechanism. And so where it's impossible for the court to interpret primary legislation compatibly with the Convention, it will consider making that declaration of incompatibility.

The courts which are able to do this are the higher courts. So, in the case of England and Wales, the High Court, the Court of Appeal, the Supreme Court. The concept of declaration of incompatibility is central to the constitutional balance which is respected by the Act, leaving Parliament sovereign in relation to primary legislation.

Rosemary Davies: So what are the effects of the declaration of incompatibility?

Eleonor Duhs: A declaration of incompatibility doesn't affect the validity or the operation or the enforcement of primary legislation. The courts still have to give effect to an Act of Parliament even if they found it to be incompatible with Convention rights. There is an exception to the duty on public authorities under section 6 of the Act to act in a way which is compatible with the Convention where primary legislation requires incompatible action.

The Government department will be notified where a court is considering making a declaration of incompatibility. The relevant minister is entitled to be joined as a party to the proceedings. And on a practical level you should notify the MOJ Human Rights Law Team of any case which raises wider, cross-Government issues or which is likely to be controversial or to attract public attention. And where a declaration of incompatibility is actually made, the MOJ can advise you on the other steps which are necessary in terms of notifying the JCHR and considering whether other departments need to be involved in your decision as to whether to appeal. To date, there've been 28 declarations of incompatibility and eight have been overturned on appeal.

Rosemary Davies: And, Sarah, is a failure to legislate challengeable in the courts?

Sarah Howard-Jones: Failure to legislate is not, of itself, challengeable in court. The Human Rights Act does not require a minister to respond to a declaration of incompatibility. That, again, is a reflection of the respect the Act has for Parliamentary sovereignty. But it's perhaps of interest that the Strasbourg Court has concluded that declarations of incompatibility don't, in their view, constitute a sufficient remedy in relation to Article 35 of the Convention because of this discretion which lies with the minister as to what steps to take in relation to the declaration. The UK Government strongly disagrees with that position and continues to do so.

Rosemary Davies: But understandable perhaps that the Strasbourg Court should take that view and if a minister doesn't act to cure an incompatibility, the battle may continue in Strasbourg.

Sarah Howard-Jones: Well indeed. In most cases we've heard about the declarations of incompatibility that have been made and, in the overwhelming majority of cases, the steps that have been taken have been to remedy those incompatibilities. But if there is a case when that's not taken, it may lead to the Strasbourg Court taking a stronger view.

Remedial Orders

Rosemary Davies: So, moving to our final topic for today: Remedial Orders. Eleonor, could you tell us about the special procedure for remedying incompatibility that the Act sets out?

Eleonor Duhs: Yes. If a court makes a declaration of incompatibility or the European Court of Human Rights at Strasbourg rules that a legislative provision is incompatible with human rights legislation, then the minister can use section 10 of the Act as an alternative to making new primary legislation to make amendments which the minister considers necessary to remove the incompatibility. And these amendments are made using what's called Remedial Orders under section 10. So, section 10 can be used to amend primary legislation and to amend or revoke subordinate legislation which has been quashed or declared invalid by reason of incompatibility with convention rights.

Rosemary Davies: And what's the procedure, Sarah?

Sarah Howard-Jones: Well, the procedure's covered in Schedule 2 of the Human Rights Act. And it's noteworthy that paragraph 1 of that Schedule provides that Remedial Orders may have retrospective effect. And also it's noteworthy that an Order can amend not only the legislation in which the incompatibility appears but other primary legislation as a consequential amendment of the changes being made.

Schedule 2 goes on to deal with the procedure of how a Remedial Order can be made. Perhaps the best description for that is a kind of super-affirmative procedure. A draft of the proposed Order is laid before both Houses for a 60-day consultation period. During that time representations can be made by members of the Houses in relation to the draft Order. At the conclusion of that period, the Government needs to consider those representations and produce a revised Order and explain alongside that Order which of the representations it's taken on and how it's dealt with the revised Order. And then the Order lays for a further 60 days, during the course of which it needs approval from each of the Houses before it can be made and come into force.

Rosemary Davies: That doesn't sound very speedy. Is there an urgent procedure?

Sarah Howard-Jones: Yes, well, fortunately, the Human Rights Act does provide for an urgent procedure for Remedial Orders. And in those cases the Order is made before it's laid in Parliament and it's laid for a period of 120 days and it's approved within those 120 days of making. So that allows Parliament sufficient scrutiny of the Order.

Rosemary Davies: And are there examples of the type of issues that have been tackled by Remedial Orders?

Sarah Howard-Jones: Yes. Well, there have been, so far, eight Remedial Orders that have been made since the Act came into force. Three of which have been under the urgent procedure; two examples of which. One is in relation to the Mental Health Act 1983 Remedial Order of 2001, which amended the Mental Health Act to allow for the Mental Health Review Tribunal to oblige it to release a patient if he was not suffering from a mental disorder which required detention.

Rosemary Davies: Quite significant subject matter.

Sarah Howard-Jones: Yes. And also significant, in the case of the Naval Discipline Act 1957 Remedial Order of 2004, which changed the rules on courts-martial to ensure they met the Article 6 requirements of independence and impartiality.

Rosemary Davies: So, in theory and in practice, quite substantial amendments to the law can be made by a form of subordinate legislation.

Summary

Rosemary Davies: So that brings us to the end of today's webinar. We'll take another look at those learning objectives. Eleonor, how did we do?

Eleonor Duhs: Well, we hope you now have a clear understanding of section 19 statements and the tests which apply; that you understand what's needed for your internal analysis of human rights considerations for a Bill, but also what's required for Parliament; that you understand the effect of declarations of incompatibility; and also that you know now how to take steps to remedy incompatible legislation with the aid of the mechanism in the Human Rights Act.

If you need further sources of information, then you can go to the LION pages. But if you can't find your answer or there's a particularly difficult issue that you're dealing with, then please contact the Ministry of Justice.