European and External Relations Committee

Human Rights Inquiry

Legal Services Agency Ltd on behalf of Campaign for Housing and Social Welfare Law

I am writing to you on behalf of the Campaign for Housing and Social Welfare Law ("the Campaign").

The Campaign is an informal grouping of around 40 individuals who generally work in the provision of advice, assistance and representation to people in disadvantage. They generally deal with housing and social welfare law issues and, accordingly, apply, or have reference, to Human Rights issues regularly.

The Campaign has had grave concerns regarding the proposed repeal of the Human Rights Act.

To summarise: the Campaign has 100% support for the current UK and European Human Rights architecture and has no doubt that is among the most important developments to assist those in disadvantage since the Second World War. We are proud that the European Convention, in general, develops and codifies UK wide common law principles and that, indeed, it has an intimate relation with Scots Law traditions.

Of course, whilst prior to the Human Rights Act the principles of the European Convention were sometimes followed both in practice and in theory, the Human Rights Act brought the principles into day-to-day consideration of all relevant decision makers and representatives. It has been successful in developing the rule of law in Scotland and we hope that that success will be built upon in the future. We do not think a Bill of Rights is necessary: the rationale for its creation appears to follow a misguided set of reasoning and has resulted in a diversion of debate from the core issues affecting the UK in general and Human Rights in particular.

Addressing the issues highlighted:

- General view of the UK Government's proposal? Do you think changes need to be made to the current Human Rights Regime in the UK?

We do not support the UK Government's proposal in any respect. We do not think any changes need to be made to the current Human Rights regime in the UK. The current Human Rights regime is sophisticated, has achieved many successes and has much potential for the future. We regard the alleged shortfallings identified by the UK Government as exaggerated and unfounded. We deplore the proposed change.

- 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?

Any British Bill of Rights would have to contain, at the minimum, Articles 1 to 15 of the European Convention of Human Rights and the Protocols, particularly Protocol 1 (Protection of Property, Right to education, Right to free elections), Protocol 4 (the abolition of imprisonment for debt, freedom of movement, prohibition of expulsion of nationals), Protocol 6 (abolition of the death penalty, save in times of war), Protocol 7 (expulsion of aliens, appeal in criminal matters, compensation for wrongful conviction and right not to be punished twice), and Protocol 13 (total abolition of the death penalty).

We are aware that it has been suggested that a British Bill of Rights could codify and clarify ways in which the European Convention has developed.

We do not support this: the attempts to so codify such a broad set of principles would either require very detailed consideration and consultation over a significant period of time or risk restricting or removing either existing rights or potential developments for the future. We support the way that the European Convention has developed as a "living instrument" through the case-law of the European Court of Human Rights ("Strasbourg Court"), and the way in which the UK judiciary are able to use the Human Rights Act to reflect this in the UK context. It has developed effectively over the years.

Contrary to the "tabloid" myth-making, the ways that the "living instrument" has developed have been in direct accordance with the fundamental principles to which we adhere. In any event, even where the UK judiciary has taken issue with the approach of the Strasbourg Court to a particular matter, the Human Rights Act does not compel the UK judiciary to follow any judgment of the Strasbourg Court. Indeed, this particular aspect of the Human Rights Act gives the opportunity for a "judicial dialogue" between the two courts. This has been used to great effect in the past.

As the committee is of course aware, the Human Rights Act applies to public authorities and the courts: by no means, of course, just the Scottish Government or Parliament. Its scope therefore goes beyond the Scotland Act 1998, which applies only to the Scottish Government and Parliament. A British Bill of Rights, unless it in some way reflected the existing architecture, would, in effect, cut away the arrangements that have and continue to work well in Scotland. They would need to recreated. Given that the current arrangements work well across the UK this would, in effect, be an enormous amount of unnecessary effort.

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

These arguments are misinformed. One suspects that many of those concerned are deliberately misinforming the public. Under the Human Rights Act, section 4 Declarations of Incompatibility are not binding on the UK Government; legislation cannot be "struck out" by the UK courts. Furthermore, the domestic courts are not bound by the decisions of the European Court of Human Rights; section 2 of the Human Rights Act merely requires UK courts to "take into account" Strasbourg case-law (amongst other things). There are, in fact, very few points of disagreement in any area. Section 3 of the Human Rights Act requires UK courts to interpret, so far as is possible to do so, legislation in light of the requirements of the ECHR. Where

the wording of UK legislation makes it impossible for the UK courts to do so, or if the intentions of the UK Parliament in drafting the legislation are clearly contrary to any principle emanating from Strasbourg case-law, then the UK courts cannot defy Parliament. Parliament is sovereign.

The only area that binds the UK Government are judgments of the European Court of Human Rights against the UK. Article 46 ECHR makes the binding nature of Strasbourg court judgments clear. This is an important international treaty obligation. It is, of course, crucial that the UK is bound by judgments of the European Court of Human Rights where it is a party: not because we have often lost cases (absolutely on the contrary) but because it is important to provide an enforcement mechanism respected by all that can be applied to other members of the Council of Europe where the respect for Human Rights is much weaker. If we value the application of Human Rights across Europe and across the world, our example in agreeing to adhere to the court's decisions is crucial in providing a means of international enforcement. We view the binding nature of the Strasbourg court's judgments as a matter of the Rule of Law. We respect the rule of law: we believe most people do. Compliance with the European Convention and compliance with judgments of the Strasbourg court, where we are a party, are integral to the Rule of Law.

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

The European Convention of Human Rights is a "living instrument". It is a text drafted originally in the 1940's and adopted in the 1950's. It crystallised the then view as to fundamental common law principles developed in the UK since the Magna Carta, if not before. It comes out of a tradition of the development of Human Rights and provides a proper structure in which to safeguard them. As with almost all international law instruments, and indeed constitutional instruments, it can only endure if it is considered as a "living instrument". As a result, it is responsible for Europe's current stance on key issues such as access to abortion, LGBTI rights, and corporal punishment. These rights were not even contemplated in 1940's and 1950's Europe. It is worth pointing out that the latter two examples provided above involve landmark cases brought by British applicants.

The European Convention has been criticised that it has developed in ways that were "not originally" contemplated. Many of those enunciating this view have no factual basis for their assertion. In any event, what was originally contemplated is not relevant: the key thing is that, as a living instrument, it has and can reflect our developing Human Rights awareness and social attitudes across Europe. We vigorously support this.

Further to the above, it is worth remembering that the application of the development of Human Rights law in the UK is ultimately under the supervision of the UK Supreme Court and not the Strasbourg Court. The Supreme Court has never been in any doubt that it is indeed Supreme: UK Human Rights Law has still developed in accordance with our traditions and its decisions.

- What do you think the practical impact of the proposals would be in individual cases, for example, as regards immigration policy, criminal law, or decisions made by public authorities?

The Scotland Act is plain: the ECHR is "hard wired" into the way that Scottish Government and Parliament work. However, the Scotland Act's drawing in of human rights principles does not apply beyond acts of Scottish Ministers and acts of Scottish Parliament; it is the Human Rights Act that applies to our public bodies including hospitals, schools, councils and the Police. Unless the British Bill of Rights was, in effect, a re-enactment of the current Human Rights architecture, a practical impact of the proposals would be, for example, to remove immigration policy, criminal law or decisions made by public authorities from the scope of Human Rights law. This would be deplorable. An important component of human rights is precisely the way it applies so broadly.

If the British Bill of Rights did in fact replicate the current application of Human Rights Law in the UK, then one would have to ask why do we require change at all?

- What impact do you think any changes will have on Scotland more generally? Will 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?

This is a very complicated point which has attracted much discussion since the UK Government proposals were put forward. Our position is best summarised thus: the repeal or any amendment of the Human Rights Act would not engage the Sewel Convention by virtue of the fact it is protected by Schedule 4 of the Scotland Act 1998. However, were it to be replaced by a British Bill of Rights this would presumably impact on Human Rights in Scotland. Human Rights is not a "reserved" matter as outlined in section 7 of Schedule 5 of the Scotland Act 1998. Therefore, as things stand, it is certainly arguable that replacing the Human Rights Act with another instrument which would apply in Scotland would require consent of the Scottish Parliament *per* Sewel Convention.

What is more straight forward is that any change in the UK's relationship with the Council of Europe would likely require Sewel consent. For example, we understand that the UK Government's proposals would be to prevent Strasbourg court judgments from being binding on the UK Government. This would fly in the face of Article 46 ECHR and the very purpose of the Council of Europe. In our view, it not foreseeable that the Council of Europe would accept the UK reserving against this Article. To that end, the UK Government has not ruled out withdrawing from the jurisdiction of the Strasbourg court or from the Council of Europe itself. If this were to come to pass, there would be consequences not only for Human Rights protection in Scotland but for the continuing applicability of the Scotland Act. As noted above, the ECHR is "hard-wired" into the Scotland Act. This would, in our view, invoke the Sewel Convention.

- Do you think it would be possible to have different Human Rights regimes in the United Kingdom?

It is certainly possible in theory to have different Human Rights regimes in the UK. Were the Human Rights Act to be repealed and not replaced in Scotland, it may be possible for the Scottish Parliament to re-create the Human Rights Act in Scotland. This is not desirable in any way. Individuals would have different levels of protection depending on their geographical location in the UK. This will inevitably lead to constitutional confusion in respect of devolved and reserved matters, and great injustice seems an inescapable result.

- 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, within the Council of Europe?

The possible consequences of the UK Government's proposals, particularly in respect of Article 46 ECHR, have been set out above. There is no doubt that owing to austerity, the refugee crisis, developing security concerns and other issues, Europe is moving in to a period of crisis in general and, in particular, with regards to Human Rights principles. Any weakening of our commitment to Human Rights principles weakens the European arrangements which now desperately require protection.

The Government's proposals risk being a precedent for other countries where day-to-day human rights protection is, in practice, much weaker. This would be a dangerous and, indeed, deplorable precedent that would indeed be contrary to our traditions.

To be frank ,the mendacious assertion that the European Convention reduces the sovereignty of Parliament risks supporting those arguments in less stable jurisdictions.

Summary

The Campaign Group Member are committed to the notion, set out in the preamble to the European Convention that fundamental freedoms are the foundations of justice and peace.

The European Convention and the Human Rights Act, which brings the European Convention directly into UK law, have provided a sound basis for the development of a human rights culture in the UK. That human rights culture has spread, as a consequence of the Human Rights Act, to not only central and local government but also all public authorities and, of course, the courts. The development of the application of those principles has been ultimately directed by the UK Supreme Court, of course, informed by developments elsewhere but by no means controlled by them.

Our observance of human rights and participation in the European process is admired and respected elsewhere.

The Campaign Group believes that the development of human rights in Scotland, the UK, Europe and beyond is best served by a reassertion of our commitments to the Human Rights Act, an increase of awareness of the fruits of this approach and a principled application of the legal concepts.

If the committee wishes further evidence, we would be delighted to provide it.

Meantime, can I thank you on behalf of the Campaign Group Members for this opportunity to give our comments.

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