

The Human Rights Act 1998: Interim Guidance

◆OM 2001/117

Target Audience:

All HSE Staff

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SUMMARY

This OM gives guidance on the Human Rights Act 1998. Whilst this guidance is primarily directed at inspectors, all HSE staff should be aware of its content, as any member of staff may face challenges about their actions. It supplements the current guidance given in the Solicitor's Office document, *The European Convention on Human Rights*.

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BACKGROUND

1 On 23 October 1997, the Lord Chancellor introduced the Human Rights Bill into Parliament. It incorporates into domestic law the rights and liberties enshrined in the European Convention of Human Rights (ECHR), a treaty to which the United Kingdom is signatory. The Human Rights Act 1998 (HRA) received Royal Assent on 9 November 1998 and came into force in England and Wales on 2 October 2000. It has been in place in Scotland since Devolution. Since this time all new legislation has been constructed in such a way as to ensure compatibility with the rights provided for by the Act.

2 This OM gives information about ECHR and its incorporation, and also guidance about potential challenges to the way HSE conducts its business.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

3 The Convention, incorporated into UK Legislation by the Human Rights Act, guarantees a range of political rights and freedoms of the individual against interference by the state.

4 Signatories may not:

- (1) Violate the right to life of their citizens, subject them to torture, inhuman or degrading treatment, or press them into enforced labour. These rights are **absolute**, and cannot be interfered with by a public body.
- (2) Deprive them of their liberty without due process and compensation, deprive them of access to justice or a fair trial or introduce laws that impose retrospective criminal liability for acts that were innocent at the time they were committed. These are **special** rights. They are derogable (can be set aside), but only in certain situations, ie times of war or public emergency. Otherwise, they are unqualified, and cannot be balanced against other public interests.
- (3) Infringe individual's rights to privacy, freedom of religion, expression, association and assembly, and the right to marry and found a family, **without proper justification**. These rights are known as **qualified** rights, but the justification for their interference is tightly controlled.

5 The rights guaranteed by the Convention must be guaranteed to each individual, irrespective of sex, race and a range of other grounds.

Use of Convention Rights in the Courts

6 Now that the Human Rights Act has been passed, the Convention is part of national law. The rights and liberties it guarantees provide litigants with a variety of positive entitlements to assert in the course of a dispute with any public body.

7 Convention grounds may be invoked in proceedings for established torts, such as negligence, breach of confidence or false imprisonment. Individuals may also rely on Convention rights as a basis for legal arguments in criminal proceedings or actions for breach of contract. Even if there is no existing cause of action to bring a case, an individual may bring an action against a public authority on the basis of a Convention ground alone, such as the right to privacy under Article 8.

8 Convention rights may also be used in judicial review proceedings. Applicants can claim a new ground of illegality: the non compliance of an official act, or piece of legislation with the Convention. Applicants will not have to satisfy the court that a disputed decision was so irrational that no rational public authority could have taken it (*Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 'Wednesbury unreasonableness'). Provided an applicant is **personally** affected by the action or decision of a public authority, it is sufficient simply to point to a breach of a Convention right which in the court's view has been infringed without lawful justification. See para 20 for further information about judicial review.

What can be challenged under the Human Rights Act?

9 Primary legislation, secondary legislation, and the common law can be made the subject of an action under the Act, in addition to **decisions and actions of public authorities**.

10 If the court is unable to interpret a statute in accordance with the Convention it has no power to set it aside. However, it can issue a declaration that the relevant statutory provision is incompatible with the rights set out in the Convention. This can lead to action by government ministers to remedy the problem. Paragraphs 21-23 give further information on declarations of incompatibility.

11 There are limitations. Secondary legislation, which includes statutory instruments and regulations, is subject to the rights set out in the Convention, and may in some circumstances be distilled by the courts (including magistrates' courts and Crown Courts) if it cannot be read in a way which is compatible with the Convention. But such legislation may be protected from challenge if the primary legislation under which it was made prevents the removal of the incompatibility and the court cannot as a result interpret the subordinate legislation in a way that is consistent with Convention rights. An example would be regulations made under an act, where the act itself is incompatible with HRA. In that case the subordinate legislation continues to be valid and enforceable until Parliament amends the primary statute.

12 It is also unlawful for all public authorities to act in a way which is incompatible with the rights in the Convention. 'An act' includes the failure to act but does not include a failure to introduce legislation or make a remedial order in pursuit to a declaration of incompatibility.

Who is liable under the Human Rights Act?

13 In principle direct challenges may only be made to the actions of 'public authorities'. The Health and Safety Executive is a public authority, within the definition of HRA. As such, all the actions of the Executive and its staff are liable to challenge under HRA.

14 But 'public authority' is widely defined. It includes central and local government, the courts, the police, immigration officers and 'any person certain of whose functions are functions of a public nature'. This means that an entity such as Railtrack, for example, will be liable under HRA when it is carrying out its role of regulating the railways and ensuring safety standards. These activities would meet the test of 'functions of a public nature'. But in its capacity as employer, it would not be liable.

15 The inclusion of courts in the definition of public authority means that individuals will be able to rely on Convention grounds in judicial review proceedings against the lower courts, such as magistrates' courts and employment tribunals. The decisions of the higher courts cannot be judicially reviewed, but they may be appealed on Convention grounds.

Strasbourg Case-law

16 A court or tribunal deciding a question in respect of a Convention right must take account of 'relevant judgments, decisions, declarations and opinions made or given by the European Commission and Court of Human Rights and the Committee of Ministers of the Council of Europe'. This means that Strasbourg jurisprudence (philosophy of law) will be influential, although not binding, on national courts. Additionally, case law from other countries which have incorporated human rights instruments may be cited, which again will be persuasive rather than binding authority.

17 However, any party which wishes to refer to Strasbourg Case-law must make copies of the full judgement available to the Court and the other parties in the proceedings. Badly constructed and referenced challenges, reliant on badly cited ECHR judgements, will be regarded in poor light by the court. Strasbourg decisions are often made on their own particular facts and must be read with care.

Procedure

18 A person who claims that a public authority has acted unlawfully may **bring** proceedings under the Human Rights Act in the appropriate court or tribunal. The limitation period for bringing such proceedings is one year.

19 Individuals may also **rely** on the Convention in any legal proceedings, provided they are a victim of that unlawful act. A victim includes a person who is at risk of being directly affected by a measure, even if they have not, as yet, been so affected. This extends to corporate entities, so long as they can demonstrate they were a victim of the unlawful actions of a public authority.

20 The requirement that an individual who seeks to rely upon the Convention must be a victim of an unlawful act, brought into domestic judicial review proceedings a more stringent test than was previously applied. Previously, pressure groups and charities were permitted to proceed with judicial review if they were deemed to have 'sufficient interest' under the Supreme Court Act 1981 s.31. Strasbourg Case-law, however, indicates that such bodies will not be able to rely on Convention grounds, unless their members are **individually** adversely affected by the alleged violation. The new test allows a respondent to oppose a public interest action by a pressure group on Convention grounds, on the basis that the applicant is not a 'victim' under the Act.

Declarations of incompatibility

21 Whilst an applicant cannot directly challenge the actions of Parliament on the basis of any of the Convention rights, they can challenge primary legislation.

22 The Human Rights Act s.4 allows the High Court and the Court of Appeal to make a declaration of incompatibility where they are satisfied that a provision of primary legislation is incompatible with the Convention rights, or that a provision of subordinate legislation is incompatible with the rights under the Convention because the primary legislation under which it was made prevents the removal of that incompatibility. A declaration of incompatibility can lead to a fast-track procedure to amend legislation. This is, however, a matter for Parliament and the Act may not necessarily be amended.

23 But even if a court has issued a declaration of incompatibility, it will not affect the validity or continuing operation or enforcement of the provision in respect of which it was given, until Parliament amends the primary legislation.

Damages and other remedies

24 The Human Rights Act imposes no general damages liability on the state for violations of the incorporated provisions of the Convention. Instead, HRA s.8 provides that

in relation to a finding of a violation a court or tribunal will be able to grant 'such relief or remedy, or make such order, within its jurisdiction as it considers just and appropriate'.

25 Damages may only be awarded by a court which has the power to do so, and then only if the court is satisfied that it is necessary to provide 'just satisfaction', having taken into account any other relief or remedy granted.

26 Compensation may be awarded both for 'pecuniary' damage, financial loss consequent on a breach of a Convention right that can be quantified, and for 'non-pecuniary loss', where, for example, an applicant has suffered distress or anxiety as a result of the violation of any of the protected rights.

The rights within the Act

27 Within HRA, a number of articles provide the following rights:

Article 2	The right to life;
Article 3	The prohibition on torture, degrading and inhuman treatment or punishment;
Article 4	The prohibition on slavery and servitude;
Article 5	The right to liberty and security of person;
Article 6	The right to a fair trial in criminal and civil proceedings;
Article 7	The prohibition on retrospective criminal offences;
Article 8	The right to privacy, family life, and correspondence;
Article 9	Freedom of thought, conscience and religion;
Article 10	Freedom of expression;
Article 11	Freedom of assembly and association;
Article 12	The right to marry;
Article 13	The right to an effective remedy; and
Article 14	The prohibition on discrimination

First Protocol

Article 1:	The right to property;
Article 2:	The right to education;
Article 3:	Election rights.

Sixth Protocol

Article 1	Abolition of death penalty;
Article 2	Exclusions from Article 1 in time of war or imminent threat of war.

28 Whilst inspectors should be aware of all the rights which are provided by HRA, a number in particular will have a bearing upon the manner in which they perform their statutory functions. The **Enforcement Guide (England and Wales)** contains legal advice that takes the EHCR into account.

ARTICLE 2

29 Article 2 provides as follows:

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

30 Article 2 is an absolute right; conflicting public interests cannot be used to weaken it.



ARTICLE 6

36 Article 6 provides as follows:

- (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- (3) Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

37 Article 6 is a special right. It might be put aside, eg in time of war or national emergency, but it might not otherwise be weakened.

38 Its construction is slightly different to the majority of the other articles; there are certain minimum rights of the individual detailed in part three of its details in relation to criminal offences (although even these rights may be qualified in some instances). However, Article 6 is similar to others in the Act, in that it merely details what the basic human right is; the public authority has the duty to determine how it should behave in order to ensure that right to a fair trial in criminal and civil proceedings is protected. The court or other impartial tribunal will be the arbiter of whether that duty has been met.

39 This allows some flexibility so that each case can be considered on its merits. This has led to court decisions which, on the face of it, appear contradictory. For example, there have been proceedings where the matters at issue have caused the court to rule that an individual should not be required to incriminate themselves (*Saunders-v-UK (1996) EHRR 313*). In other instances, the court has found that a statutory requirement put upon an individual to provide information, which is necessary for the protection of the public, was compatible with the intent of HRA, even though it led to the self-incrimination of an individual. But it is the court's interpretation on the fairness of an action in each specific case which has determined what is required to ensure that the individual's human rights have been protected. The judgement of the Privy Council in the case of Margaret Anderson Brown on 5 December 2000 made it clear that 'while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised whether expressly or implicitly, within Article 6 are not themselves absolute.

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ARTICLE 8

50 Article 8 provides as follows:

- (1) Everyone has the right to respect for his private and family life, his home and correspondence.
- (2) There shall be no interference by a public body with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

51 Article 8 is a qualified right. It is balanced against the needs of a democratic society, but every endeavour should be made to meet its provisions.



CONCLUSION

56 At this time the Human Rights Act is new. The flood of problems which commentators on HRA predicted have not, as yet, emerged but this may change. HSE is under scrutiny, and are already facing an increasing number of challenges at court. To minimise the possibility of HSE being challenged successfully under HRA, it is important that all staff ensure that they seek to apply the principles of good inspection and investigation, and comply with the requirements of such legislation as PACE and CPIA. Also they should be guided by the strategies which form HSE's developing quality systems.

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