Jersey Human Rights Working Group
Main provisions of Human Rights Jersey Law
A brief explanatory document

Introduction

1. The purpose of the Human Rights (Jersey) Law 2000 is to give further effect in domestic law to certain rights and freedoms guaranteed under the European Convention on Human Rights. It does so in two main ways -

- by requiring all legislation to be interpreted as far as possible in a way which is compatible with the Convention rights; and

- by requiring public authorities not to act in a way which is incompatible with the Convention rights.

The Convention Rights

2. These are set out in Schedule 1 to the Law.

1. Article 4(1) of the Law provides that -

"So far as it is possible to do so, principal legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

This goes beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will, once the Law comes into force, be under a clear duty to interpret legislation so as to uphold the Convention rights unless the legislation is so clearly incompatible with the Convention that it is impossible to do so.

2. That applies regardless of how any court may have interpreted legislation before the Law comes into force. The provision applies to both principal and subordinate legislation (terms which are defined in Article 2 of the Law), and to both past and future legislation. It applies to all courts and tribunals. An interpretation of a statutory provision so as to be compatible with the Convention rights will be of general application.

Principal legislation

3. The Law will not permit the courts to set aside principal legislation. If such legislation cannot be interpreted compatibly with the Convention rights it must nevertheless be applied.

4. But in such cases Article 5 provides that the higher courts - the Royal Court, Court of Appeal and Judicial Committee of the Privy Council - may make a declaration that a provision of principal legislation is incompatible with a Convention right. A declaration of incompatibility will not affect the continuing validity of the legislation, but will draw the incompatibility to notice and should provoke its amendment.

5. Article 6 entitles the Attorney General (or a person nominated by him) to be joined as a party to proceedings where a court is considering making a declaration of incompatibility. This will enable the Attorney General to provide the court with information and argument which may be relevant to its consideration of the issue.

6. People involved in the case which gave rise to the declaration of incompatibility will not automatically benefit from that declaration. The court will not suspend its decision in that case (or any other case involving that legislation) pending a response by the States to the declaration, but will determine the case in accordance with the law as it stands. However, in appropriate cases the States might be able to give a discretionary remedy to those individuals. Also, amendments of legislation can be given retrospective effect, which may leave the way open for individuals affected by the incompatible legislation to pursue their own remedy.

7. Anyone who remains dissatisfied with the decision of the domestic court or the response from the States will retain the right to petition the Human Rights Court in Strasbourg claiming a violation of the Convention. Nothing in the Law will remove a person's right to seek redress in Strasbourg once all domestic remedies have been exhausted. It is not possible for the States to appeal to Strasbourg from the domestic courts.

<u>Subordinate legislation</u>

8. While courts will have no powers under the Law to set aside provisio ns of principal legislation, they are already able to quash or set aside subordinate legislation on legality grounds. Under the Law courts will, with one exception, similarly be able to disapply subordinate legislation if they cannot interpret it compatibly with the Convention rights. The one circumstance where a court could not set aside incompatible subordinate legislation is where it is "inevitably incompatible". This is where the terms of the parent statute are such that any subordinate legislation made under it must necessarily take a form which is incompatible with the Convention rights. In such a case, the higher courts could make a declaration of incompatibility which might provoke amendment of the principal and subordinate legislation.

9. Where a provision of subordinate legislation is set aside, the States would, in the normal way, wish to consider making new provision which is compatible with the Convention rights.

The conduct of public authorities

10. The second main way in which the Law would operate is through the requirement on public authorities to comply with the Convention rights. The scheme in outline is that Article 7 of the Law makes it unlawful for public authorities to act in a way which is incompatible with a Convention right; Article 8 enables people to rely on the Convention rights in court or tribunal proceedings involving a public authority; and Article 9 enables a court or tribunal to provide a remedy where a public authority is found to have acted unlawfully.

Meaning of "public authority"

11. It is crucial, in considering the way the Law would work, to understand the position of the States. For the purposes of the Law, the States is treated as two entities; the States Assembly and the States administration. With two exceptions, the States Assembly is outside the scope of the Law. This preserves the constitutional doctrine of the sovereignty of the States as a legislature. The States administration, however, (i.e. Committees and their Departments) are public authorities under the Law, just as Ministers and Departments of the United Kingdom Government are under the Human Rights Act 1998. So too, will be several other departments which are part of the States machinery but not directly responsible to the States or a States Committee, such as the Viscount, the Judicial Greffier and the Law Officers.

12. The Law does not contain a definition of a "public authority". Instead it approaches the issue by reference to the concept of a public function. After stating that it is unlawful for a public authority to act incompatibly with a Convention right, Article 7 provides that a public authority includes a court or tribunal, and "any person certain of whose functions are functions of a public nature". The effect of Article 7 is to identify three categories of organisation.

13. The first contains organisations which might be termed "obvious" public authorities, all of whose functions are public. Examples of bodies likely to fall within this category are as well as the States administration, the Parish administrations, the States and Honorary police forces and the Financial Services Commission. All the acts of such bodies must comply with the Convention rights. The second contains organisations with a mix of public and private functions. A possible example is the utility companies and, in the future, "corporatised" States Departments, which exercise the public function of supply of a service but act privately in other functions. The liability of these bodies, unlike those of "obvious" public authorities is limited to their public acts. Their private acts are excluded from the scope of Article 7. The third contains bodies (such as most private businesses) which have no public functions and which fall outside the scope of Article 7.

14. It will be for the courts to determine, in the cases that come before them, whether or not an organisation is a public authority. In some cases it will be obvious and there will be no need to inquire further. In others, the courts will need to consider whether an organisation has any public functions. The concept of what is a public function is familiar to the courts, notably in the context of judicial review, and it is expected that they will take as a starting point the kind of tests applicable in determining susceptibility to review in that context. Looking at the nature of the body and the activity in question, they might consider, for example, whether but for the existence of a non-statutory body the States would intervene to regulate the activity in question; whether the States provided any under-pinning for the activities of the body; and whether the body exercised extensive or monopolistic powers.

15. An important qualification is that public authorities do not act unlawfully if they are acting so as to give effect to incompatible principal legislation. If this were not so, Laws and Acts of Parliament applying the Island which were incompatible with the Convention rights could effectively be nullified, since public authorities could not put them into operation. As mentioned earlier, the States Assembly is not a public authority under the Law, nor is any person exercising functions in connection with proceedings in the States Assembly, but Article 8(4) requires the States Assembly to act compatibly with the Convention rights when making subordinate legislation or deciding to acquire land by compulsory purchase.

Proceedings

16. If a person believes that a public authority (or where allowed by Article 8), the States Assembly has violated his Convention rights, Article 8 offers him two avenues of redress. He may rely on the Convention rights in the course of any other proceedings which involve the public authority and to which he is a party (Article 8(1)(b)). So, for example, in defending criminal proceedings, or in contesting any civil action involving the public authority, or in an appeal against the decision of a court or tribunal, or in seeking judicial review, it will be possible to add arguments based on the Convention rights to the other arguments being adduced. Alternatively, he may bring proceedings against the public authority on the sole ground that it has acted unlawfully, that is, in a way which is incompatible with the Convention rights (Article 7(1)(a)). Rules of court will be made to determine the appropriate court or tribunal for the bringing of cases in this category.

17. The Law does not specify which of these two routes is to be taken in preference to the other in any particular case, but the expectation is that a person will initiate court proceedings against a public authority on Convention grounds alone under Article 8(1)(a) only where no existing means of legal challenge is open to him.

18. The time limit for bringing proceedings under Article 8(1)(a) is one year from the date of the act complained of, or such longer period as the court considers equitable in all the circumstances.

19. With one exception, Article 8 does not apply to proceedings for acts committed before that Article comes into force. The exception is that a person may rely on the Convention rights in the course of proceedings brought by or at the instigation of a public authority after the Law comes into force, whenever the act in question took place.

20. The Law is designed to enable persons to rely on their Convention rights before domestic courts in the same circumstances that they can rely upon them before the Strasbourg institutions. Article 8 accordingly mirrors the approach taken in Strasbourg. Reliance on the Convention rights is restricted to the victims (or potential victims) of unlawful acts.

21. Although Strasbourg case-law provides, in several respects, a fairly wide definition of a "victim", the "victims test" is nevertheless a narrower one than the sufficient interest test currently applicable in judicial review. Interest groups will not therefore be able to bring cases on Convention grounds unless they themselves are the victim of an unlawful act. But it will still be possible for such groups to assist and advise persons who bring an action themselves, and to make submissions to the court, for example through the filing of an *amicus* briefs.

Remedies

22. Article 9 provides that if a court or tribunal finds that a public authority (or the States Assembly) has acted unlawfully, it will be able to award whatever remedy within its normal powers as seems to it just and appropriate. Depending on the circumstances, this might include ordering a person's release from detention or ordering the payment of compensation. In deciding whether to award compensation and the amount of any award, courts and tribunals will be required to take into account the principles applied by the European Court of Human Rights. The Court does not automatically award compensation and, when it does, the award tends to be modest.

Courts and tribunals as public authorities

23. The inclusion of courts and tribunals within the meaning of public authority has certain consequences. First, they will be required to develop the customary law in a way which is compatible with the Convention rights. They will not be required to follow precedent where that is incompatible with the Convention rights.

24. Second, they will be required to apply the Convention rights, where relevant, in all proceedings, even if neither party is a public authority. The Law will

accordingly have at least an indirect impact on private law proceedings. In such cases courts and tribunals will not be able to award a remedy under the Law for a breach of the Convention rights (because there will be no public authority which the court or tribunal finds has acted unlawfully). But they might develop remedies for such cases over time.

Other provisions

25. Article 3 requires Island courts and tribunals to take account of any relevant judgments, decisions, declarations or opinions of the institutions established by the Convention when determining a question which has arisen in connection with a Convention right.

26. Article 16 requires Committees to publish a statement, before lodging new principal legislation, on the compatibility with the convention rights of the Law it is piloting through the States. The Committee must either make a statement that in its view the provisions of the Law are compatible with the Convention rights (a "statement of compatibility"), or make a statement that although it cannot make a statement of compatibility, the Committee nevertheless wishes the States to proceed with the draft.

27. A statement of compatibility will not serve the purpose of determining in law whether or not legislation is compatible with the Convention rights. That will be a matter for the courts. But it will place the onus on Committees to make sure legislation is compatible as far as they are able to do so, or else to have a very good reason which the Committee can give to the States to justify proceedings with it despite its possible incompatibility.

28. Further reading /information sources on human rights -

- *European Convention on Human Rights, as amended by Protocol 11*, Directorate of Human Rights, Council of Europe 1998
- *Rights Brought Home: The Human Rights Bill*, Home Office, Cm 3782
- *Human Rights in Scotland,* Scottish Office 1999
- *Theory and Practice of the European Convention on Human Rights*, Van Dijk and Van Hoof, Kluwer, 1998
- *European Civil Liberties and the European Convention on Human Rights*, Gearty (Ed), International Studies on Human Rights, Martinus Nijhoff, 1997
- *The Future of Human Rights in the United Kingdom*, Singh, Hart, 1997
- *The European Convention on Human Rights*, Jacobs and White, Clarendon, 1996
- *Law of the European Convention on Human Rights*, Harris, O'Boyle and Warbrick, Butterworths 1995
- *European Human Rights Law*, Janis, Kay and Bradley, Clarendon 1995
- *Blackstone's Guide to the Human Rights Law 1998*, Wadham and Mountfield, Blackstone 1999
- *The Human Rights Law 1998,* Coppel, John Wiley & Sons 1999
- *Human Rights: Coming Home to Jersey?* , Whitehead, The Jersey Law Review, Vol. 4 Issue 1, pp 12- 32, February 2000

Websites

- The Home Office: http:/www.homeoffice.gov.uk
- Council of Europe, Human Rights Directorate: http://www.coe.int/t/dgi/default_en.asp