Human Rights Act Reform

Wildlife & Countryside Link response to Ministry of Justice consultation

March 2022

Introduction

1. Wildlife and Countryside Link[1] (LINK) is the largest environment and wildlife coalition in England, bringing together 65 organisations to use their joint voice for the protection of nature.

2. We note this consultation from the Ministry of Justice[2] and the proposals it advances concerning the future of the Human Rights Act 1998 ("**the HRA**").

3. We have responded to the questions by raising key points of concern regarding the proposals, drawn from LINK's Legal Strategy Group. The Legal Strategy Group works to improve the creation, implementation and enforcement of English Law to better protect the natural environment.

4. The nexus between the environment and human rights is now widely recognised. The work of the UN Special Rapporteur for Human Rights and the Environment and the Framework Principles adopted by the Office of the High Commissioner for Human Rights[3] (OHCHR) evidence this at international level. At regional level, we see environmental claims growing in number and impact – including cases such as Fadayeva v Russia[4] and, more recently, Duarte Agostinho v Portugal[5] which focuses on the failure of states to take action to tackle climate change in particular.

5. Similarly, at domestic level the degree to which environmental and human rights issues overlap is evidenced by decisions such as R (On the Application Of) Richards v The Environment Agency[6] where the health impacts of extended pollution from a landfill site and the failure of public authorities to control this were determined on human rights principles. WWF's intervention in the Heathrow Third Runway challenge highlighted the Link between climate change and children's rights[7]. The Government's Net Zero Strategy has also recently come under challenge partly on human rights grounds[8].

6. Finally, expert bodies have increasingly recognised and evidenced this link – see for example the seminal 2018 report of the Intergovernmental Science-Policy Platform on Biodiversity and

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1 Wildlife and Countryside Link

2 Human Rights Act Reform: A Modern Bill of Rights - GOV.UK (www.gov.uk)

3 OHCHR | Framework Principles on Human Rights and the Environment

4 https://hudoc.echr.coe.int/eng?i=001-69315,

5 Duarte Agostinho and Others v. Portugal and Others (communicated case) (coe.int)

6 (Richards) v Environment Agency [2021] EWHC 2501 (Admin)

7 WWF reaction to Court of Appeal judgement on Heathrow | WWF

8 ClientEarth are suing the UK government over its net zero strategy | ClientEarth
See also the similar Public Law Project challenge

Ecosystem Services (IBPES), which underlines the fact that the nature crisis is a crisis for people, because we are sustained and nourished by it[9].

7. LINK therefore has a strong interest in the British Bill of Rights consultation because it will impinge on the environmental work LINK members do and this response should be read in light of that fact.

Our concerns

8. LINK is concerned that the proposals for change to the HRA set out in the consultation document will undermine scope to hold public authorities to account for the decisions they take concerning climate change and wider environmental issues. LINK notes that the means to ensure accountability are under threat in a number of respects at this time – including changes to the law of protest through the Police Bill and changes to judicial review through the Judicial Review and Courts Bill. The British Bill of Rights will add to and worsen the picture.

9. The changes proposed to (what might be described as) the governance structures set up under the HRA are far reaching and will leave few of its key elements untouched or unharmed.

10. Further, some of the changes to those structures go so far (e.g. preventing the court from interpreting domestic law contrary to the "clearly expressed will of Parliament") as to undermine the substance of the rights guaranteed through the Convention. They are also liable to render the government in breach of its wider international law obligations, including under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[10] ("**the Aarhus Convention**") (see below).

11. Taken together, the net result of the proposed changes is arguably to turn back the clock to the position *ex ante* the 1998 Act, since the proposals (if implemented) are liable to render whole areas of decision making by public authorities all but immune to effective challenge in the UK courts and create such significant constraints on remedies as to make recourse to the Strasbourg court highly likely, which it was the purpose of the 1998 Act to remove the need for. LINK reminds MOJ that we do not have the luxury of time to tackle the climate and nature crises.

12. Our response focusses on three main areas:
    - limiting the role of the court
    - constraining interpretation of domestic law
    - redress

Limiting the role of the court

13. Perhaps the most worrying proposal in the consultation is the invitation (at para 201) to give views on "*the proposal to demarcate areas in which court should not go including national security, diplomatic relations, resource allocation or where there is no social consensus*". We find

9 https://www.ipbes.net/global-assessment

10 The UK ratified the Aarhus Convention in February 2005. The text can be found here

this proposal deeply concerning and note there is no recommendation to this effect in the Independent Human Rights Act Review led by Sir Peter Gross[11] (published on the same day as the consultation was launched).

14. LINK wishes to underline that any such proposal would almost certainly breach the right to a fair trial as covered by Article 6 of the European Convention on Human Rights ("**the Convention**") by constraining the notion of "civil rights" in a way for which there is no basis in the Convention. Further, it would render the UK in breach of Article 9 of the Aarhus Convention on the basis that environmental cases will frequently raise resource issues and there is no basis in the Convention on which to exclude such cases either. In particular, Article 9(4) of the Aarhus Convention requires contracting Parties to provide members of the public with access to legal review mechanisms that are "… *fair, equitable, timely and not prohibitively expensive*". Removing entire classes of claim from review by the courts is neither fair nor equitable to claimants.

15. There are echoes of this approach in the proposals concerning positive obligations where the consultation asks a question about how best to restrain such obligations so as to avoid "*fettering the way government can make operational decisions, determine policy in the wider interest and allocate finite taxpayer's resources*" (para 229). Leaving aside the wider debate about positive obligations and the government's proposals in this regard, LINK is very concerned about the proposal to limit the scope of the court's review of human rights law more broadly. If policy and operational / resource considerations are to be removed from the court's review, what, LINK asks, does this leave for positive obligations to fasten on? It is difficult to see how this approach could comply with the ECHR and Article 9(4) of the Aarhus Convention as articulated above.

16. Similarly, the government seeks views on how to ensure Parliament can "oversee" the operation of section 3 of the HRA (para 243). Section 3 is concerned with the interpretation of legislation which is pre-eminently the role of the court. Far from restoring Parliamentary sovereignty, empowering Parliament (in some way) to supervise the courts in this area undermines the separation of powers and risks politicising the legal interpretation of statute. The proposal affects environmental claims (of the kind outlined above) as much as any other - hence LINK drawing attention to this issue.

17. Finally LINK underlines the importance of retaining extra-territorial effect in relation to claims concerning the environment. It will be clear that environmental impacts are not confined to state borders[12]. The Committee of the Convention on the Rights of the Child has recently found that states can be held liable for climate impacts experienced by individuals in other states[13], which flows from this principle [and that of state responsibility]. LINK would be deeply concerned if proposals to limit extra-territorial effect of the ECHR impacted on such claims.

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11 The Review was set up to consider how the Human Rights Act is working in practice and whether any change is needed. The independent Panel submitted their report to the Deputy Prime Minister in October 2021. The report can be found here

12 The Paris Agreement 2015 provides one example of how climate & nature action needs to cross borders in order to be effective: https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement

13 Sacchi & others - http://climatecasechart.com/climate-change-litigation/non-us-case/sacchi-et-al-v-argentina-et-al/

Constraining the interpretation of domestic law

18. The government's proposals to constrain the scope to interpret domestic law (para 233) contrary to the clearly expressed will of Parliament also raises significant questions about the application of human rights going forward. If human rights duties will not constrain the lawfulness of the acts of public bodies in this way, the Bill of Rights potentially opens up whole areas of activity by public bodies in which human rights will no longer apply, or at least far less effectively and with much less certainty. By creating large lacunae of this kind, the Bill of Rights is likely to necessitate more litigation before the Strasbourg Court which is already under great strain, takes longer, costs more and was the purpose of the Human Rights Act to remove the need for.

19. Similar proposals (to give precedence to domestic law) are set out as regards section 6 of the HRA (para 274) and are problematic for much the same reasons.

20. Finally, government proposes that Parliament determine "authoritatively" what is necessary in a democratic society (para 303) and that it will guide interpretation of Article 8. Article 8 is of real consequence in environmental claims particularly as the climate crisis poses increasing risks and harms to individuals and their homes e.g. from flooding, extreme weather, heat waves etc.

Redress

21. The consultation document contains a number of proposals which will undermine redress and will therefore impact on environmental claims also. LINK has already expressed deep concerns about clause 1 of the Judicial Review and Courts Bill and the harmful effect of Suspended Quashing Orders (SQOs) and Prospective Quashing Orders (PQOs) on access to environmental justice and the UK's ability to bring itself back into compliance with the Aarhus Convention[14]. The proposals outlined in the Bill of Rights exacerbate these concerns.

22. First, the government wishes to explore whether declarations of incompatibility should be the only remedy available for secondary legislation as well as primary legislation (paragraph 250). This proposal fails to pay any regard to the hierarchy of legislation in the UK – namely that primary legislation takes precedence over secondary legislation. It would not constitute an effective remedy, moving the UK further away from compliance with the Aarhus Convention (Article 9) nor potentially under Article 13 of the Convention, since a declaration of incompatibility offers no guarantee that the illegality will be cured, nor offers any certainty as to when that may occur (potentially giving rise to significant injustice).

23. Second, the consultation proposes making redress contingent on the behaviour of the claimant (para 305) however long ago or unrelated to the facts of the particular case. This approach runs the risk of creating real injustice and requiring factors to be taken into account which are wholly

[14] See: https://www.wcl.org.uk/docs/assets/uploads/The_Judicial_Review_Courts_Bill_and_the_Environment_Briefing_for_Lords_2ndreading_07.02.22.pdf

unrelated to the case at issue. Leaving aside the extent to which such an approach complies with Article 13 (the right to a fair remedy) of the Convention, LINK is concerned about the environmental injustice which this proposal potentially creates.

24. Third, the consultation proposes that the court take account of the impact of the remedy on the provision of public services (para 299). Such an approach would render judicial review an all but toothless means of seeking redress. The public authority cannot be protected from the consequences of its own illegal act on the basis that the remedy awarded may prejudice the performance of other duties. It was surely required to factor in that risk when seeking legal advice on the decision or legislation in question. There is no consideration in the consultation document as to how this proposal would work where the public authority has acted dishonestly or negligently. It is surely unconscionable to excuse a public authority from the consequences of its own law breaking in this way. Moreover, to deprive civil society of their appropriate remedy offends some of the most fundamental principles of the rule of law, namely the combined effect of Articles 6 and 13 of the Convention (which serve to ensure that everyone is entitled to a fair trial and an effective remedy).

25. Furthermore, this approach would again undermine the UK's compliance with Article 9 of the Aarhus Convention (concerning access to environmental justice). Where unlawful decision-making has been found, the fair and just outcome is for the Court to quash the decision and for the decision-maker (should it so wish) to go back and remake the decision on a properly lawful basis. To allow unlawful decisions to stand offends the rule of law in general terms but there are two important ramifications in environmental claims. First, they unfairly deprive the successful claimant in an Aarhus Convention claim to timely and effective remedies. Second, there could be adverse and irreversible effects on the environment and human health by allowing improperly made decisions on matters as diverse as air and water quality, climate change and the protection of biodiversity to stand.

26. Finally LINK raises concerns about the proposal to make remedial orders available only in cases of urgency (para 256). This further delays a just remedy on the basis that it may take months or even years for a suitable legislative vehicle to become available to address the illegality. When combined with SQOs proposed under the Judicial Review and Courts Bill, it is clear that the Bill of Rights increases the risk of justice delayed (contrary to the pledge in the Magna Carta to the contrary – which is cited at the outset of the document). In a case where a SQO is granted which is only proactive in effect, the proposals will amount to a breach of Article 13 ECHR.

Other points

27. LINK wishes to raise a concern around the proposal to introduce an additional permission stage for human rights claims (para 219). Clearly judicial review already contains a permission stage. Given the test proposed overlaps to some degree with the arguable case test under Part 53 it would be redundant in JR and should not apply there. More broadly the test creates a much higher hurdle for human rights claims going forward and undermines access to justice.

28. Finally LINK struggles with the description of social and economic rights as "new" (para 185). Government will no doubt be aware that the European Social Charter under the Council of Europe dates from 1961 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) dates from 1966 - both of which the UK is a signatory to. LINK takes it that government does not see the social and economic rights set out in these instruments as new and that it will continue to abide by, and give effect to, its international obligations in this regard. Social and economic rights interface with environmental rights given the extent to which nature and climate impact on health and living standards for example.

For questions or further information please contact:

Matt Browne, Advocacy Lead, Wildlife and Countryside Link
T: 020 8078 3586
E: matt@wcl.org.uk

This response is not confidential.

This response is supported by the following Link members:

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