

EAST AYRSHIRE COUNCIL

POLICY AND RESOURCES COMMITTEE -

4TH MAY 2000

HUMAN RIGHTS ACT 1998

Report by Solicitor to the Council

1. PURPOSE OF REPORT

- 1.1 To advise Members of the implications of the Human Rights Act 1998, and to obtain approval for an in-house training programme and audit of Council services to address Human Rights Act issues in Council services and procedures.

2. BACKGROUND

- 2.1 The Human Rights Act 1998 is the embodiment of a manifesto commitment of the government, following upon a White Paper entitled "Rights Brought Home - The Human Rights Bill".
- 2.2 That Bill referred to the delay and expense in bringing cases to Court in Strasbourg. It cited the failure of the British judicial system to provide protection of basic human rights as provided by the European Convention of Human Rights (ECHR) in 50 cases where violations by the UK had been found, half of these occurring since 1990.
- 2.3 Between 1964 and July 1999, the European Convention on Human Rights was referred to in over 650 English court cases, although not incorporated in UK law. Statistics for Scottish court cases are not available.

3. CONSIDERATIONS

- 3.1 The Act comes into effect fully throughout the United Kingdom on **2nd October 2000**.
- 3.2 The Convention rights are incorporated by the Act and are set out as an Appendix to this Report.
- 3.3 Under the Scotland Act 1998, the Scottish Parliament is required to comply with the ECHR. The Scottish Parliament and the Scottish Executive have been bound by the ECHR since assuming their powers in July 1999 by virtue of Sections 29 and 57 of the Scotland Act.

4. ECHR CONCEPTS

4.1 The European Convention on Human Rights introduces concepts which are novel in UK jurisprudence:-

4.2 A Living Instrument

The Convention is known as a living instrument, since the starting point in interpreting Convention rights is purposive, ie as values within society change over time so does the scope of the Convention rights. This is one of the major conceptual difficulties that many senior judges have with the legislation, and there are fears that it may blur the lines between making the legislation (the role of politicians and government) and its interpretation (the role of the courts). The role of the courts has traditionally been the search for the true meaning of legislation. There is a view that the creation of legislation is a job which ought to be left to the democratically accountable Members of Parliament.

4.3 Proportionality

There are 3 categories of rights, Absolute, Limited and Qualified. The principle of proportionality is very important because it gives the court a power to exercise a value judgement as to whether a restrictive measure is justified in the circumstances. In the case of Limited or Qualified rights, the Convention sets out circumstances or principles whereby an interference with a person's rights is permitted. The more important the right protected, the more serious must be the justification or "pressing social need" to interfere with it. The onus of proof will be on any public body seeking to demonstrate the interference or derogation is legitimate, and the means are not excessive in the circumstances

4.4 Margin of Appreciation

This principle means that a court should not substitute its own views where a public authority has a discretion, for example in planning or licensing areas. It should be noted that this is a much stricter test than the "Wednesbury" test of reasonableness which currently applies in areas where Elected Members and members of other public bodies have discretionary powers. It is not sufficient that the decision maker has acted reasonably, carefully and in good faith. The burden of proof is shifted to the local authority or public body to justify the derogation from a Convention right.

5. THE ACT IN PRACTICE

- 5.1 As far as possible, all legislation must be interpreted in conformity with Convention rights. All UK courts and tribunals will require to take account of judgements of the European Court of Human Rights. In relation to Westminster Acts of Parliament, if these cannot be interpreted to accord with Convention rights, the Higher Courts have the power to declare these Acts of Parliament incompatible, which will allow a “fast track” mechanism for amending legislation to be taken through the Westminster Parliament. In relation to the Scottish Parliament, because of the terms of the Scotland Act mentioned in paragraph 3 above, the courts will have the power to quash the offending legislation.
- 5.2 The Act will apply to all actions and decisions of public authorities. All public bodies will require to act compatibly with Convention rights. The Convention provides protection against conduct, or even against proposed conduct, provided there is an identified “victim” of the unlawful act. The legislation is not intended to operate as a vehicle for special interest groups or pressure groups to bring actions.
- 5.3 There are a range of remedies available from the courts in relation to actions of public authorities, and the ones of particular reference to local authorities are as follows:-
- declarator
 - specific implement
 - prohibition
 - damages.

6. COUNCIL SERVICES AFFECTED

- 6.1 As indicated earlier in this Report, every action of a local authority requires to be compatible with Convention rights. All aspects of policy making, procedures, exercise of discretion and decisions directly affecting constituents will be subject to scrutiny in terms of ECHR considerations.
- 6.2 Every area of the Council’s function will be affected:-
- social work
 - education
 - housing
 - environmental health
 - planning
 - licensing and registration
 - employment of staff.

(i) Social Work

Article 2 - The Right to Life, and Article 8 - The Right to Respect for Family Life will be the principal Human Rights consideration for social work services. The way residential and other facilities are run for clients will have to respect their human rights. There are a whole range of social work issues which will be affected, but examples include Child Protection Orders and the fact that children, rather than abusers are usually removed from the home suggest there is insufficient emphasis on the rights of the child. Convention rights are also likely to be used to provide protection against inappropriate use of secure accommodation. The denial of parental access to reports concerning a child during care proceedings have already been the subject of litigation in the European Courts *McMichael v UK* (1995) Series A. As a result of this case, the Children's Hearings (Scotland) Rules 1996 came about.

(ii) Education

Education policies will require to take account of the rights of parents to respect for the religious and philosophical beliefs (Article 2). For example, an exclusion policy which disproportionately affected particular racial groups, sibling admissions policies, resource allocations to special educational needs provisions may all raise issues under Article 14 (discrimination).

(iii) Housing

Again there are a range of issues in relation to housing law such as landlord and tenant, homelessness, protection from eviction/Anti-Social Behaviour Orders, maintenance and repair, rent law and housing benefit which will all be subject to Human Rights Act considerations. It is understood that legislation removing the responsibility for appeals in housing benefit cases from local authorities and transferring these to the Independent Tribunal Service is anticipated. This is on account of the incompatibility of the present legislation in terms of Article 6(1) (the right to a fair hearing before an impartially constituted Tribunal). The Act may present particular difficulties in relation to action taken against "anti-social" neighbours or provisions for sex offenders in the community. These require to be considered in light of Article 8 (the right to respect for private and family life and home). Challenges on this ground are likely to come from those threatened with eviction or Anti-Social Behaviour Orders, and also from others in the community who consider the local authority is failing to protect the enjoyment of their rights by not pursuing anti-social neighbours or removing sex offenders. This will be a difficult conflict for the local authority to resolve.

(iv) Environmental Health

Local authorities have environmental obligations concerning air pollution, contaminated land, nuisance, litter and noise. Consideration requires to be given to the consequences of not acting against environmental damage. The European Court of Human Rights has found that nuisance created by aircraft noise and other environmental nuisances may, in severe cases, impinge on the right to respect of family life and home (Article 8).

(v) Planning matters

Planning has been a local authority function most frequently litigated before the European Courts both in respect of local plan issues as well as those relating to development control. A range of case authorities from planning control, Compulsory Purchase Orders through to the rights of gypsies and the independence of the planning appeal procedure have been tested in the Court at Strasbourg. It is probably fair to anticipate that planning issues, and in particular, the rights of objectors in the planning process will feature heavily in court cases with a European dimension.

(vi) Licensing and Registration

A licence is a possession under Article 1(1) of the First Protocol in addition to be a determination of civil rights to which Article 6 applies. Terms and conditions imposed on the grant of a licence will therefore need to be proportionate and necessary to protect the interests of a democratic society. The impartiality of Licensing Committees and Licensing Boards and whether they afford applicants and objectors a fair hearing is likely to be a fruitful source of litigation. Some decisions already taken in relation to the administration of the District Court Service within local authorities lend weight to this view.

(vii) Employment of Staff

Councils will need to ensure that their recruitment and selection and personnel policies comply with Human Rights Act considerations. Convention rights will be applicable in relation to any proposals involving tapping or monitoring of phones in the workplace drug or alcohol testing, excessively long suspensions, prohibitions on contacting the press, dismissal for conduct outside the work context and dress codes. They will also apply in construing and applying the Discipline and Grievance Procedures.

7. THE REQUIREMENT FOR A FAIR HEARING - ARTICLE 6

- 7.1 The main feature of Article 6 is the right to a fair hearing before an independently constituted tribunal. It is not necessary for every stage in a local authority's processes to comply fully with Article 6, providing there is a right of appeal to a judicial body with full jurisdiction (ie the Sheriff Court or an employment tribunal). However Article 6 provides a standard against which authorities can measure the integrity of their internal procedures and should be closely scrutinised, in particular where there is no statutory right to such a hearing or procedure.

8. CONCLUSIONS

- 8.1 Both Members and officers will have a responsibility to ensure that requirements of any rights relevant to Council services become part of the practice, procedure and culture of the local authority. All policies and decisions will have to be made by balancing individual rights and freedoms with the obligations and duties as contained in the Act.
- 8.2 The Council will need to demonstrate knowledge of the Convention rights, and that the Council's decisions have been informed by the principles of proportionality and non-discrimination. As mentioned in paragraph 4.4 it will not be sufficient for local authorities to assert that their decision has been taken reasonably, carefully and in good faith. Local authorities will have an additional obligation to justify their action in terms of Convention rights. This will not always be easy, as Human Rights Act arguments are likely to be advanced by those holding opposing views over a particular issue.

9. POLICY/FINANCIAL IMPLICATIONS

- 9.1 The policy implications for the Council are as outlined in this Report.
- 9.2 There are no financial implications arising from the implementation of the Human Rights Act 1998. There may be costs involved in the review of Council policies and procedures however these are not expected to be significant.

10. LEGAL IMPLICATIONS

- 10.1 Each public authority has a legal responsibility to ensure its own policies and practices are compatible with the Convention rights.
- 10.2 For East Ayrshire Council, this should include an audit of Council procedures and practices, in particular the Committee arrangements, policy documents and hearing procedures used by the Council to discharge its functions.

- 10.3 A review mechanism already exists in the form of the Member/Officer Working Group examining alternatives to the Committee system. It is suggested that this Working Group may be an appropriate vehicle for examining the Council's compliance with Human Rights Act issues.
- 10.4 Human Rights Act training for Members and officers should be carried out across the Council updating good practice and ensuring the broad set of values encompassed by the European Convention on Human Rights are reflected in all aspects of Council service.

11. **RECOMMENDATIONS**

11.1 It is recommended that:-

- (a) Members remit consideration of Human Rights Act implications to the Member/Officer Working Group on alternatives to the Committee system,
- (b) request the Solicitor to the Council to arrange a committee focused Human Rights Act training session for each Committee of the Council, and
- (c) otherwise note the contents of this Report.

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19th April 2000

LIST OF BACKGROUND PAPERS

Nil.

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THE ARTICLES

Rights and Freedoms

Article 2 - The Right to Life

Article 3 - The Prohibition of Torture

Article 4 - The Prohibition of Slavery and Forced Labour

Article 5 - The Right to Liberty and Security

Article 6 - The Right to a Fair Trial

Article 7 - The Punishment without Law

Article 8 - The Right to Respect for Private Family Life

Article 9 - The 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 14 - The Prohibition of Discrimination

Article 16 - Restriction on Political Activity of Aliens

Article 17 - Prohibition of Abuse of Rights

Part II of the Act

The First Protocol

1. The protection of property.
2. The right to education.
3. The right to free elections.

The Sixth Protocol

Article 1 - Abolition of the death penalty.

Article 2 - Death penalty in time of war.

AGENDA