Commission on a Bill of Rights: second consultation
Response from Thompsons Solicitors

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About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Introduction

We are very grateful for the opportunity to respond to this consultation. We want in particular to focus on two aspects. The first is a sequence of reasoning on fundamental issues which runs through the report of the Joint Committee on Human Rights of July 2008, which we believe to be essential. The second is our particular experience in relation to collective labour law rights, especially in the current economic climate, and how their protection under Article 11 of the European Convention in particular, is not being given due prominence legislatively, and in political and public discourse.

Fundamental issues

Before responding to the questions posed by the Commission in this second consultation, we think that it is first essential to address a series of fundamental issues. The outcome of that exercise goes a long way towards defining the parameters of what a Bill of Rights could achieve, both legally and pragmatically. Those issues are:

(i) Each of the 47 Member States of the Council of Europe is a signatory to the European Convention on Human Rights, which has been in operation for more than 50 years. The European Convention is binding on the United Kingdom as a matter of international law (see Article 1) and, subject to denunciation by the United Kingdom, it will continue to be so, regardless of what may be contained in a UK Bill of Rights;

(ii) The United Kingdom could denounce the European Convention on giving six months' notice (see Article 58). But we can not believe that is realistic politically, particularly when compliance with human rights standards is one of the accession criteria for the EU, which is itself now committed to accession to the European Convention;

(iii) Assuming that the United Kingdom does not denounce the European Convention, then it will continue to be bound by the judgments of the European Court of Human Rights (see Article 46), and there is no escaping from that conclusion;

(iv) Having a UK Bill of Rights would not lead to the United Kingdom being given a wider margin of appreciation by the European Court of Human Rights[1];

(v) The Human Rights Act provides a carefully calibrated mechanism for integrating European Convention rights into UK law which respects both parliamentary sovereignty and the UK's democratic traditions. Other models of human rights protection would make much greater inroads into parliamentary sovereignty, such as a judicial power to strike down primary legislation, and entrenchment beyond the obligation to interpret existing and future legislation consistently with European Convention Rights; and

(vi) The cornerstones of this mechanism - the obligation on public authorities to act compatibly with Convention rights, the obligation to interpret legislation compatibly with Convention rights so far as it is possible to do so and the power of courts to grant declarations of incompatibility - have become minimum standards which should be adhered to in any legal system which is to give effect to European Convention Rights.

None of these conclusions is new. They are all contained in the Joint Committee on Human Rights' report "A Bill of Rights for the UK?" of July 2008.

From its consideration of the above issues, the Joint Committee drew the conclusions that:

(i) *"….any UK Bill of Rights has to be "ECHR plus". It cannot detract in any way from the rights guaranteed by the ECHR";* and

(ii) *"…..it is imperative that the HRA not be diluted in any way in the process of adopting a Bill of Rights. Not only must there be no attempt to redefine the rights themselves……but there must be no question of weakening the existing machinery in the HRA for the protection of Convention rights."*

We agree, and we think that this reasoning and these conclusions should underpin what the Commission reports to government. Our view is reinforced by the Commission's own terms of reference which limit the inquiry into a UK Bill of Rights which *"……builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extends our liberties."*

We turn now to address the questions posed in the consultation. All of our answers are predicated on the conclusions reached above.

Q1 What do you think would be the advantages or disadvantages of a UK Bill of Rights? Do you think that there are alternatives to either our existing arrangements or to a UK Bill of Rights that would achieve the same benefits? If you think that there are disadvantages to a UK Bill of Rights, do you think that the benefits outweigh them? Whether or not you favour a UK Bill of Rights, do you think that the Human Rights Act ought to be retained or repealed?

A UK Bill of Rights could extend the range of human rights protected in the United Kingdom in the light of national and international developments since the European Convention was ratified. We favour the protection in a Bill of Rights of socio-economic rights which are not already protected by the European Convention and the Human Rights Act. Our view is that the retention of the mechanisms contained in the Human Rights Act, as a minimum standard, is essential.

[1] As confirmed by the Joint Committee on Human Rights, at paragraph 42 of its report "A Bill of Rights for the UK?", July 2008

Q2 In considering the arguments for and against a UK Bill of Rights, to what extent do you believe that the European Convention on Human Rights should or should not remain incorporated into our domestic law?

We are very firmly of the view that the European Convention should remain incorporated into our domestic law. To provide otherwise would signal a return to the pre-Human Rights Act regime under which an individual had no domestic means in the United Kingdom of holding the State and public authorities to the standards in the European Convention, to which the United Kingdom is bound at international level. That would send a very damaging message that the United Kingdom was not serious in its commitment to human rights. We also endorse the reasons given by the University of Cambridge's Centre for Public Law in its memorandum of 29 August 2007 to the Joint Human Rights Committee (the Convention would remain binding anyway when implementing EU law, the United Kingdom is party to other human rights instruments which would remain binding and there would be at least some residual human rights derived from common law).

Q3 If there was to be a UK Bill of Rights, should it replace or sit alongside the Human Rights Act 1998?

The legislative mechanisms contained in the Human Rights Act, as a minimum, should be retained, whether in the form of the Human Rights Act, or in a UK Bill of Rights.

Q4 Should the rights and freedoms in any UK Bill of Rights be expressed in the same or different language from that currently used in the Human Rights Act and the European Convention on Human Rights? If different, in what ways should the rights and freedoms be differently expressed?

Q5 What advantages or disadvantages do you think there would be, if any, if the rights and freedoms in any UK Bill of Rights were expressed in different language from that used in the European Convention on Human Rights and the Human Rights Act 1998?

The same language as is currently used in the Human Rights Act and the European Convention should be used.

It is said that (i) greater clarity and (ii) a better reflection of circumstances in the United Kingdom can be achieved by using different language. This fails to take into account the fact that standards in the European Convention are intended to operate on a universal international basis. Using different language would also introduce the very real prospect of inconsistency between the content of the UK Bill of Rights and the interpretation of the European Convention by the Strasbourg court. That said, especially in the context of labour rights, and consistent with other European countries, it would be helpful for the content of the Convention rights to be further explained by reference to the other international instruments to which the United Kingdom is a party.

Q6 Do you think any UK Bill of Rights should include additional rights and, if so, which? Do you have views on the possible wording of such additional rights as you believe should be included in any UK Bill of Rights?

Q7 What in your view would be the advantages, disadvantages or challenges of the inclusion of such additional rights?

We will be returning specifically to the area of collective labour law rights. We agree with the recommendations of the Joint Committee on Human Rights. Rights derived from the UN Convention on the Rights of the Child should be included in any Bill of Rights. There should be a simply formulated, free-standing and over-arching right to equality in any Bill of Rights. The Equality Act would continue to define the right in more detail in specific contexts. We agree that a Bill of Rights should also include a right to trial by jury in serious cases, a right to administrative justice and economic and social rights (health, education, housing, a healthy environment and an adequate standard of living). For economic and social rights, we favour a mechanism based on the South African model of a duty of progressive realisation by legislative and

other measures, a duty to report to parliament, and justiciability of the measures adopted. We refer to the widespread appreciation of the National Health Service sequence in the Olympic Games opening ceremony. We think this was an important affirmation of what has become a human right being embedded in the United Kingdom's culture. We would favour similar public affirmations in the future.

Q8 Should any UK Bill of Rights seek to give guidance to our courts on the balance to be struck between qualified and competing Convention rights? If so, in what way?

No. The balancing exercise between qualified and competing Convention rights is a matter of Convention law. Attempting to define how that balancing should be undertaken by a domestic court runs an increased risk of inconsistency with the approach which may be adopted by the Court in Strasbourg. The argument is essentially the same as for expressing rights in the same language as is used in the European Convention.

Q9 Presuming any UK Bill of Rights contained a duty on public authorities similar to that in section 6 of the Human Rights Act 1998, is there a need to amend the definition of "public authority"? If so, how?

We do not at present have a concluded view.

Q10 Should there be a role for responsibilities in any UK Bill of Rights? If so, in which of the ways set out above might it be included?

No. Human rights should not be conditional on the performance of responsibilities. We agree with the reasoning of the Joint Committee on Human Rights.

Q11 Should the duty to take relevant Strasbourg case law "into account" be maintained or modified? If modified, how and with what aim?"

It is essential that there is consistency between the interpretation of the Convention rights in the United Kingdom and in the Court in Strasbourg. The duty to take Strasbourg case law "into account" should not be weakened. The context is that the United Kingdom, as contracting party, is legally bound by the decisions of the Court in Strasbourg.

In our area of expertise, there is recent authority from the Strasbourg Court confirming that the Court will take account of international instruments (whether ratified or not) and the laws and practices in Member States[2]. We think it would be helpful for this to be reflected in any Bill of Rights.

Q12 Should any UK Bill of Rights seek to change the balance currently set out under the Human Rights Act between the courts and Parliament?

We have sympathy with the view that the courts should be able to strike down primary legislation where incompatibility with the Convention is shown. We certainly think that there should be no weakening of the interventions available to the courts.

[2] Demir and Baykara v Turkey [2009] IRLR 766

Q13 To what extent should current constitutional and political circumstances in Northern Ireland, Scotland, Wales and/or the UK as a whole be factor in deciding whether (i) to maintain existing arrangements on the protection of human rights in the UK, or (ii) to introduce a UK Bill of Rights in some form?

Q14 What are your views on the possible models outlined above for a UK Bill of Rights?

Q15 Do you have any other views on whether, and if so, how any UK Bill of Rights should be formulated to take account of the position in Northern Ireland, Scotland or Wales?

There should be detailed dialogue between central government and devolved administrations. We do not think that the complications of devolution should be overstated. We would tend towards the model outlined at paragraph 80 of the consultation document provided that the current justiciability of Convention rights was not compromised in any devolved administration.

Other issues

Obligations concerning Article 11 of the Convention: collective bargaining and collective action

We wanted to take up the invitation to refer to other issues which we believe to be relevant to the Commission's terms of reference.

We note that the Commission is tasked with examining the operation and implementation of Convention obligations, and considering ways to promote a better understanding of the true scope of these obligations and liberties.

We think that there is a serious failure to acknowledge the foundation of rights to conduct collective bargaining and to take collective action in Article 11 of the European Convention and other international instruments, the majority of which the United Kingdom has ratified.. We think that this leads to a failure to recognise, and have due regard to, international collective labour rights obligations in UK legislation. We also think that the foundation of these rights in international human rights obligations is not given due prominence in political and public discourse. We respectfully suggest that these failings, and how to promote a better understanding of the true scope of collective labour law rights, is within the Commission's remit.

In its seminal judgment in the Demir and Baykara case[3], the Grand Chamber of the European Court of Human Rights unanimously held that the right to bargain collectively has become *"…one of the essential elements of the right to form and join trade unions for the protection of [one's] interests set forth in Article 11 of the Convention…"*. It reached this conclusion expressly by taking into account elements of international law other than the European Convention. International labour standards explicitly taken into account were International Labour Organisation Conventions 87 (Freedom of Association and the Protection of the Right to Organise), 98 (Right to Organise and Collective Bargaining) and 151 (Protection of the Right to Organise and Procedures for Determining Terms and Conditions of Employment in the Public Sector), Article 6 of the Council of Europe's Social Charter of 1961, Articles 12(1) and 28 of the EU Charter of Fundamental Rights of 2000, Article 8 of the International Covenant on Economic, Social and Cultural Rights 1966 and the "practice of Member States". Furthermore, the Court went on to hold that the parameters of specific restrictions on the Article 11 right must themselves also be shown to be compatible with international labour law standards.

It is thus absolutely clear, in defining both the parameters of the core right and the circumstances of permissible interference, that Article 11 of the European Convention will be interpreted by the European Court by reference to other international instruments covering the area, as cited above-whether ratified by the Member State in question or not.

[3] See 1 above.

Shortly after Demir and Baykara, in the Enerji Yapi-Yol Sen v Turkey case, a similar approach was adopted by the European Court in relation to industrial action, where the Court observed that *"…the right to strike is recognised as the indissociable corollary of the right to bargain collectively…"*[4].

It is true that the matter of compliance of the United Kingdom's law in relation to collective action has been considered by the Court of Appeal since the Grand Chamber's decision in Demir and Baykara in the Metrobus case[5]. It is also true that the Court of Appeal declined to hold that the effect of the Enerji Yapi-Yol case alone was to articulate a right to strike within Article 11. But that articulation of the right to strike within Article 11 has been confirmed subsequently in a stream of cases in Strasbourg[6]. The Court of Appeal's judgment in the Metrobus case is in any event seriously questioned[7].

The supervisory bodies of the international instruments referred to above have on numerous occasions considered the United Kingdom's legislation in relation to collective bargaining and collective action. Since its critical report of 1989, the ILO's Committee of Experts has consistently criticised matters such as classifying industrial action as a breach of the contract of employment, the lack of adequate protection for workers dismissed while taking part in industrial action, the outright ban on secondary action and the circumstances of a trade dispute.

Likewise, most recently in 2010, the European Committee of Social Rights concluded that collective labour laws in the United Kingdom infringed Article 6 of the European Social Charter (the right to bargain collectively). For example, workers do not have the right to bring legal proceedings against employers who made offers to co-workers in order to induce them to surrender their union rights and, in those types of cases, trade unions could not complain of a violation of the right to collective bargaining. The UK's laws in relation to industrial action did not conform with Article 6(4) of the European Charter because the scope for workers to defend their interests through lawful collective action was excessively circumscribed, the requirement to give notice of an industrial action ballot (in addition to a strike notice) was excessive and the protection of workers against dismissal was insufficient. The government should also ratify the 1995 Protocol to the Charter permitting collective complaints.

With the exception of the EU Charter of Fundamental Rights, the United Kingdom is a signatory to, and has ratified, each of the international labour instruments referred to. (In fact, as the Grand Chamber said in the Demir case, it is still necessary to consider instruments that have not been ratified by the Member State in question).

The government's bitterly contested austerity measures fall especially hard on workers in the public sector. The measures include cuts to pensions and civil service redundancy schemes, pay freezes and the prospect of regional collective bargaining. The contest itself inevitably involves strike action.

These are all issues which directly engage Article 11 and the other international labour law instruments referred to above. Perhaps most directly relevant are the rights contained in ILO Convention No.151 - the Protection of the Right to Organise and Procedures for Determining Terms and Conditions of Employment in the Public Sector.

There will also be circumstances in which Article 1 of Protocol 1 to the European Convention is engaged. That was the case when the government reduced the redundancy terms of civil servants in December 2010.

Yet the relevant Convention and other rights derived from international instruments find no place in public and political discourse concerning responses to the financial crisis. As an example, the unions involved in the challenge to the reduction in civil service redundancy terms consistently argued that Article 1 of Protocol 1 to the Convention was engaged, a position which was flatly denied by the government, but subsequently confirmed both by the Joint Committee on Human Rights and by the Administrative Court[8].

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[4] Application No.68959/01

[5] Metrobus Ltd v Unite the Union [2009] IRLR 859

[6] See for example Danilenkov v Russia Application No.67336/01,Urcan v Turkey pplication No. 23018/04,Saime Ozcan v Turkey Application No.22943/04, Karacaya v Turkey Application No. 6615/03 and Kayha and Seyhan v Turkey Application No. 30946/04.

[7] See for example *The Dramatic Implications of Demir and Baykara*, Hendy and Ewing, [2010 ILJ 39(1), 2-51

[8] See PCS and POA v Minister for the Civil Service [2011] EWHC 2011

We respectfully invite the Commission to affirm that matters such as these should be given due prominence in public and political discourse. This is particularly so in the context of the current financial crisis. We also invite the Commission to consider measures to achieve this objective. Governments should also be held to account for their non-compliance with international labour law, and other, instruments which have been ratified by the United Kingdom. In this regard, stark examples include the United Kingdom's compliance with ILO Conventions 87 and 98 and the European Social Charter.

One means of achieving this might be through earlier and greater involvement of the Joint Parliamentary Committee on Human Rights. Its role in ensuring compliance with the international instruments we have referred to might be increased.

Another mechanism might be a requirement for reasoned statements of compatibility with Convention rights on the face of new legislation.

In this regard, it is to be noted the forthcoming reduction in the resources of the Equalities and Human Rights Commission will hardly assist.

Further information:
Thompsons Solicitors
Congress House
Great Russell Street
London
WC1B 3LW
richardarthur@thompsons.law.co.uk