



Law Society
of Scotland

Consultation Response

UK Parliament: Joint Select Committee

Proposal for a draft Human Rights Act 1998 (Remedial) Order 2019

3 October 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the UK Parliament Joint Select Committee on the proposal for a draft Human Rights Act 1998 (Remedial) Order 2019 Remedial Order).

Section 9(3) of the Human Rights Act 1998 (HRA) does not allow damages to be awarded in proceedings under the HRA in respect of a judicial act done in good faith, except to compensate a person to the extent required by article 5(5) European Convention on Human Rights (deprivation of liberty). The UK Government's proposal is to remedy the incompatibility of s. 9(3) of the HRA with Article 13 ECHR. We have the following observations:

Section 9(3) of HRA does not allow damages to be awarded in proceedings under HRA in respect of a judicial act done in good faith except in limited circumstances. The recent ECtHR judgment¹ in which the appellant spent extra time in prison because of procedural errors during his committee proceedings were such that his Article 6 ECHR rights were breached. It was held that section 9(3) was incompatible with Article 13 of ECHR

The Remedial Order seeks to amend section 9 (3) HRA accordingly. It will allow the person to seek financial redress. It will have effect only in narrow circumstances such as contempt of court proceedings, the person is not legally represented AND the breach of Article 6 ECHR results in the person spending more time in prison than they would otherwise have spent.

The amendment is required by way of Remedial Order rather than by way of primary legislation because the UK Government is satisfied that there are compelling reasons to do so notwithstanding that the UK Government is not aware of a single person who is currently affected by this incompatibility.

¹ Hammerton v The United Kingdom [2016] ECHR 272

We do consider that the circumstances outlined in the Remedial Order if then in force would not have applied to the recent Tommy Robinson /Stephen Yaxley-Lennon case. Stephen Christopher Yaxley-Lennon (also known as Tommy Robinson)² was sentenced to 13 months' imprisonment for contempt of court after publishing a Facebook Live video of defendants entering a law court, contrary to a court order to prevent reporting those trials while proceedings are ongoing. That sentence included the activation of an earlier three-month suspended sentence for a similar contempt of court finding at Canterbury.

On 1 August 2018, he appealed against his contempt convictions at Canterbury and at Leeds. His appeal against the Leeds conviction succeeded and the sentence was quashed. A new trial was ordered. His appeal against the Canterbury conviction failed except for the wrong recording of his sentence that affected how he would be managed in prison. The Court of Appeal ordered the court records be amended to reflect the correct sentence so there was a procedural correction.

Mr Yaxley-Lennon was legally represented which tends to indicate that that his case falls out with the circumstances to be covered by the Remedial Order. Perhaps has he not been legal y represented and there had been a reconviction and custodial sentence imposed that was shorter than the earlier one then it might apply. However, it is assumed that the operation of the Remedial Order is not intended to be retrospective. That emphasises how rarely the circumstances envisaged by the Remedial Order would be likely to arise

The principle of judicial immunity is preserved in the Remedial Order.

We trust that these comments are helpful for your purposes.

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² ([2018] EWCA Crim 1856