Strengthening the Human Rights (Jersey) Law 2000

10 December 2024

Jersey Law Commission
Consultation report

The Jersey Law Commission is an independent body appointed by the Chief Minister. Our remit is to identify and examine aspects of Jersey law with a view to their development and reform. This includes in particular: the elimination of anomalies; the repeal of obsolete and unnecessary enactments; the reductions of the number of separate enactments; and generally, the simplification and modernisation of the law.

The Law Commissioners are:

Professor Claire De Than (**chair**)
Advocate Barbara Corbett
Dr Elina Steinerte
Timothy Hart
Advocate Steven Pallot
Advocate Emma German
Professor Andrew Le Sueur FRSA (**topic Commissioner** and author of this report).

Contacting the Jersey Law Commission

The best way to contact us is by email staff@jerseylawcommission.org.je.

If you need to send a letter to the Jersey Law Commission, please address it to:

Jersey Law Commission
Care of: Corbett Le Quesne
1a West's Centre
St Helier
Jersey JE2 4ST

For the purposes of the UK Research Excellence Framework, the Jersey Law Commission acknowledges Andrew Le Sueur as the author of this report.

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Plain English summary

The Jersey Law Commission wants your thoughts on ways to improve the Human Rights (Jersey) Law 2000. Share your feedback by emailing commissioners@jerseylawcommission.org.je by Monday 10 March 2025.

Since 1953, people in Jersey are protected by the European Convention on Human Rights (ECHR), which guarantees basic rights like fair trials, privacy and respect for family life, and protection of property. However, these rights could not be directly enforced in Jersey courts. Islanders had to take their cases to the European Court of Human Rights in Strasbourg if they claimed that Jersey laws or actions by public bodies violated their rights.

To make ECHR rights easier to enforce locally, the States Assembly passed the Human Rights (Jersey) Law 2000 (HRJL), which came into effect on 10 December 2006. The HRJL also aimed to ensure that public officials and lawmakers in Jersey considered human rights when creating laws and making decisions.

The Jersey Law Commission is reviewing how well the HRJL is functioning. To make it more effective, we are suggesting 11 possible changes and want your input. Here's a summary of the reform ideas.

1. **Faster correction of laws**. Allow ministers and the States Assembly to quickly update Jersey laws ruled incompatible with human rights by the courts.

2. **New remedy**. Let Jersey courts issue a new kind of "quashing order" when they rule that Regulations or Orders made by ministers breach human rights.

3. **Damages for unfair trials**. Allow courts to award damages if someone is imprisoned after an unfair trial.

4. **Compensation for incompatible Laws**. Let Jersey courts award damages if a Law passed by the States Assembly causes harm because it breaches human rights.

5. **Ministerial accountability**. Require ministers to explain how all proposed laws, not just principal Laws, affect human rights.

6. **Use clear language**. Update the HRJL by using the term "draft Law" rather than "projet de loi".

7. **Resolve disputes without going to court**. Improve access to free and affordable mediation and other ways of resolving human rights grievances.

8. Clarify what kind of human rights cases are covered by Legal Aid. Redraft the guidelines so that eligibility for legal aid in human rights cases is clearer.

9. Simplify court rules. Make the rules about deadlines for starting human rights challenges against public authorities easier to understand.

10. Promote public awareness of human rights. Provide better resources and information to help everybody in Jersey know about their rights and how to protect them.

11. Coordinated approach with children's rights. Ensure there's a coordinated approach to assessing the impact of new laws on ECHR rights and children's rights.

Do you agree with these ideas? Have you got suggestions of your own?

Your feedback will help shape the future of human rights law in Jersey.

The Jersey Law Commission can't provide advice to individuals about human rights issues.

If you believe your ECHR rights have been violated in Jersey, you could contact Citizens Advice Jersey (telephone 0800 735 0249 or email advice@cab.org.je).

Alternatively, if you want advice from a Jersey lawyer but are concerned about costs, you could contact Legal Aid Jersey (telephone 01534 613999 or email@legalaid.je).

1: Introduction

How to respond to this consultation

We invite you to submit written responses to the consultation questions in this report, or on other issues related to the Human Rights (Jersey) Law, no later than Monday 10 March 2025.

Please send your response by email commissioners@jerseylawcommission.org.je

If you need to send a paper-based response, please use the postal address on page 1.

Please note that we may quote from your response in our final report. If do not want to be named, please tell us when you send your response.

We are planning to hold in-person workshops for our project in February 2025, in St Helier. To express interest in attending, please email staff@jerseylawcommission.org.je.

The topic commissioner Professor Andrew Le Sueur is available to speak informally to individuals and organisations about this project. You can contact him directly at alesueur@essex.ac.uk.

Background

The Human Rights (Jersey) Law 2000 ("HRJL") came into force on 10 December 2006.[1] It wrote 16 rights from the European Convention on Human Rights ("ECHR") into Jersey law.[2] It was regarded as a "major change in our laws and approach to the freedoms and duties we know as Human Rights".[3]

The Jersey Law Commission is reviewing the HRJL by exploring two main questions.

Does the HRJL need to be amended to improve its effectiveness? The HRJL is closely based on the UK's Human Rights Act 1998 ("HRA"). In 1999, some islanders were concerned that the HRA model "may not be appropriate for a small community"[4] or might "fail to reflect the particular circumstances of the island".[5] But under pressure from

[1] The text is available here https://jerseylaw.je/laws/current/Pages/15.350.aspx

[2] See Annex 1 at the end of this report for a list.

[3] Human Rights Working Group, *Let's Get it right!* (States of Jersey, St Helier 2000) p 1.

[4] Senator Pierre Horsfall, president of the Policy & Resources Committee. Reported in Leigh Peter, "Human Rights; Island criticised by Peer", *Jersey Evening Post*, 5 February 1998, p 3. The reference to the 'peer' was to Lord Lester of Herne Hill QC, who sought to have the HRA extended to the Crown Dependencies.

[5] Letter from the Bailiff (Sir Philip Bailhache) to the Lieutenant Governor of Jersey (General Sir Michael Wilkes), "Re: Human Rights Bill", 19 May 1998, House of Commons Library, Dep 98/561.

the UK Government to incorporate ECHR rights quickly, the HRJL used the HRA as its model.

Can the way the HRJL is being implemented be improved? In many countries, there is an implementation gap between the goals of human rights legislation and how these lead to practical improvements in people's lives and how they are governed. Jersey is no exception. We are looking at practical ways in which the HRJL could be made to serve the needs of islanders better.

In this consultation report, we invite your views on reform ideas. We will develop firmer proposals in the light of feedback received. We aim to publish a final report no later than February 2026.

Possible amendments to the HRLJ

In this consultation, we are seeking feedback on six possible amendments to the HRJL.

- After a Jersey court makes a declaration of incompatibility (finding a principal Law breaches an ECHR right), Jersey ministers and the States Assembly could have power to amend the principal Law by Regulations.
- When a Jersey court decides that subordinate legislation (Regulations, Orders) breaches an ECHR right, the court could have power to make a suspended or prospective quashing order. *It may be possible to make this change by ministerial Order rather than amending the HRJL.*
- Jersey courts could have power to award damages where a person is sent to prison at a hearing later held to breach ECHR article 6 (right to a fair trial).
- Jersey courts could have power to award damages to somebody who suffers harm because of a principal Law declared to be incompatible with ECHR rights.
- Ministerial compatibility statements under HRJL article 16 could be made not only when a draft principal Law is lodged, but also when "in principle" proposals are made, draft Regulations are lodged, and the Council of Ministers seeks the Assembly's agreement to extend UK legislation to Jersey. *The change could be made voluntarily rather than by amending the HRJL.*
- The terminology in HRJL article 16 could be modernised, replacing "projet de loi" with "draft Law". This is a minor point for the Law Revision Committee.

Possible implementation improvements

In this consultation we are seeking feedback on five areas where there may be room for improving how the HRJL is being implemented.

- Access to alternative dispute resolution (ADR) for grievances against public authorities involving ECHR rights could be improved.
- The Legal Aid Guidelines could be redrafted to clarify the scope of human rights legal aid.
- The Royal Court Rules could be amended to simplify the time limit for starting a legal challenge to a public authority.
- The quality of public information about the HRJL and ECHR rights in Jersey could be improved.
- There could be a more joined-up approach to preparing, publishing, and scrutinizing Children's Rights Impact Assessments (CRIAs) and HRJL ministerial compatibility statements.

In addition to the points set out above, we are interested in hearing about any other ideas you have for making the HRJL more effective.

A note on consensus about human rights

The Jersey Law Commission is a politically neutral law reform body. Our remit is "to identify and examine aspects of Jersey law with a view to their development and reform".

Jersey's political and legal culture is characterised by broad consensus in favour of incorporating ECHR rights.

In 1995, Jersey started exploring options for legally enforceable human rights. In the States Assembly, Deputy Gary Matthews, a member of the Jersey Rights Association,[6] successfully proposed an amendment to the 1995 Strategic Policy Review. This required Policy & Resources Committee (PRC) "to prepare a case for and against the introduction of a Bill of Rights in Jersey".

In September 1997, a civil servant working with Colin Powell (Chief Adviser to the States) completed a draft of a 193-page report. It identified 13 arguments in favour a Bill of Rights and 16 against.[7] The draft report, never published, considered policy work for Bills of Rights in New Zealand and the Isle of Man. It concluded that there were "constitutional complications" in progressing with a Jersey Bill of Rights, given the UK's opposition to

[6] The JRA was formed in 1990 with the aim "to seek out, collate, and draw public attention to the existence in Jersey of any significant social injustices, or denial of human rights in general" (see Jersey Rights Association, "Formal aims and objectives: draft 25/7/1990"). The JRA received funding from The Joseph Rowntree Reform Trust. It appears to have been active in lobbying until around 2014.

7. A copy of the report, and working drafts, are held under the 30-year closure rule at the Jersey Archive D/G/A1/20/A/8/1 (draft) and D/G/A1/20/8/5 (a more final version). The Jersey Law Commission requested permission to examine these documents under the Freedom of Information (Jersey) Law 2011 — a right of public access to official documents that Deputy Matthews had also championed.

incorporation of ECHR rights at this time. In 1998, the Bailiff Sir Philip Bailhache wrote to the Lieutenant Governor noting that a few years earlier "The Attorney General was informed by officials that the Home Office did not favour the Island's acting in advance of the United Kingdom Government and the matter was therefore shelved".[8]

When the ECHR incorporation policy of the UK Government changed after the 1997 general election, the debate in Jersey was not whether to incorporate ECHR rights, but how best to do this.

The HRA and ECHR have become politically contentious in the UK. Those debates are not relevant to Jersey or the Jersey Law Commission's project. We are concerned with the practicalities of making Jersey law work well for islanders.

[8] Letter from the Bailiff (Sir Philip Bailhache) to the Lieutenant Governor of Jersey, "Re: Human Rights Bill", 19 May 1998, House of Commons Library, Dep 98/561. This was also referred to by Jack Straw MP, Home Secretary, in the House of Commons: HC Deb, 3 June 1998 vol 313 c 466.; Sir Michael Birt served as HM Attorney General 1994-2000.

2: Ministerial remedial orders

Problem

Headline: the process of amending a principal Law held to be incompatible with an ECHR right may take too long.

Under HRJL article 5, a Jersey court has power to grant a declaration of incompatibility when it decides that a provision of a principal Law breaches an ECHR right. This does not affect the validity of the principal Law, but there is a strong expectation that ministers and the States Assembly will respond by repealing or amending the Law.

The are currently two ways of doing this.

- First, a new principal Law can be drafted, debated, adopted by the States Assembly, reviewed by the UK Ministry of Justice, presented for Royal Assent at the Privy Council in London, and registered in the Royal Court. This legislative process typically takes many months.

- Alternatively, if by chance the principal Law held to be incompatible confers powers on a minister to make subordinate legislation, it might be possible to remove the incompatibility in this way. This was the situation in the International Cooperation (Protection from Liability) (Jersey) Law 2018, which enabled the Chief Minister to make interim changes to the operation of the Law, trying to address the issues identified by the Jersey Court of Appeal in making Jersey's first declaration of incompatibility.[9]

A lengthy wait for an incompatible Law to be removed from Jersey's statute book is in nobody's interest. For the litigant who obtains the declaration of incompatibility, this could delay any retrospective effect of the new ECHR-compliant Law.. Ministers, public servants, members of the public and businesses would all benefit from relatively speedy certainty of a new, ECHR compatible Law.

How significant is this problem? The current pressures on policymaking, law drafting, and the States Assembly mean that amendments to principal Laws should be proposed only where there is a compelling reason for change. Our assessment of the problem – the absence of ministerial remedial orders – is that it is a high impact low probability risk ("HILP"). A scenario requiring a remedial order is unlikely to occur. Since 2006, there have been only three applications to Jersey courts for a declaration of incompatibility

[9] *Imperium Trustees (Jersey) Ltd v Jersey Competent Authority* [2024] JCA 014 (link). An application for leave to appeal to the Privy Council against the declaration of incompatibility is pending: see [2024] JRC 219 (link).

under HRJL article 5. Only one has been granted. But a future declaration of incompatibility could have a major impact on individuals and on areas of public administration or criminal justice that could call for speedy remedial action.

Solution

Headline: the HRJL could be amended to give Jersey ministers power by Order to amend a provision in a principal Law held to be incompatible.

The remedial order mechanism is one of the few features of the HRA not copied by the HRJL. This may be because in 2000 Jersey did not yet have a system of ministerial government, and it was thought inappropriate for an order-making power of this sort to be exercised by Committee. But there is useful lesson learning from the UK.

In the UK, remedial order-making powers are in HRA section 10 and schedule 2.[10] The power was initially restricted to ministers in the UK Government but later extended to Scottish ministers.[11] It was intended to be a rarely used power. Ministers must have a "compelling reason" to proceed by remedial order rather than removing the incompatibility by primary legislation. In the UK, ministers have exercised this power 11 times since 2000.[12] There have been more than 40 declarations of incompatibility in the UK courts.

UK parliamentary scrutiny of draft remedial orders involves the minister "laying" the order for 60 days,[13] during which time the Joint Committee on Human Rights (JCHR) carries out scrutiny and publishes a report.

There is also an urgent procedure under which a minister may make a remedial order without prior parliamentary approval. Three of the 11 UK orders were made under the urgent procedure.

In 2021 in the UK, the Independent Human Rights Act Review examined the use of remedial orders. The panel recommended that remedial orders should be retained but called for two changes.

- First, the panel said that HRA section 10 should be amended to clarify that remedial orders cannot be used to amend the HRA itself. One remedial order was used for this

[10] See https://www.legislation.gov.uk/ukpga/1998/42/section/10 and https://www.legislation.gov.uk/ukpga/1998/42/schedule/2.

[11] The Scotland Act 1998 (Consequential Modifications) Order 2000, SI 2040/200 (link).

[12] Independent Human Rights Act Review, CP 586 (December 2021), chapter 9 (link). This was set up by the UK Government, which subsequently rejected most of its recommendations.

[13] In Jersey, we would say "lodging *au Greffe*".

purpose, to remove a restriction on UK courts awarding damages to individuals imprisoned at a hearing later held to have breached ECHR article 6 (right to a fair trial). The use of remedial orders to amend the HRA itself was argued by some commentators to be unconstitutional.[14] The panel focused on the fact that the HRA was of such constitutional importance that any proposed amendment to it required full parliamentary scrutiny that could only be achieved by primary legislation.

- The panel also called for strengthened parliamentary scrutiny of remedial orders and endorsed principles previously set out by the JCHR. These include that ministers should inform the JCHR of a declaration of incompatibility within 14 days of the court's decision, explain whether an appeal would be made, where possible within one month provide a preliminary view of how the minister proposes to proceed, and that ministers make a final decision on how to respond within six months after the end of the legal proceedings.

Jersey remedial orders

Drawing on the UK model, the trigger for a Jersey minister being able to make a remedial order could be: (1) a provision of a principal Law has been declared by a Jersey court to be incompatible under HRJL article 5; or (2) a provision of a principal Law has been found to be incompatible with an ECHR right by the European Court of Human Rights.

HRA section 10 provides a starting point for a design for a Jersey version of remedial orders. Not all aspects, however, may be appropriate for Jersey.

Effective legislative scrutiny of draft remedial orders in the States Assembly would be crucial for two reasons.

- Obviously, the subject matter of a remedial order will engage with ECHR rights. A court has decided that the States Assembly made an error previously, which States members will not want to repeat.

- Remedial orders are subordinate legislation, so they would not be reviewed by officials in the UK Ministry of Justice after adoption by the States Assembly.

There is no specialist human rights committee in the States Assembly. One of the scrutiny panels could carry out the review. Alternatively, the Scrutiny Liaison Committee could set up a review panel for the specific purpose of reviewing the draft remedial order.

[14] See for example R Craig, "Why Remedial Orders Altering Post-HRA Acts of Parliament Are Ultra Vires", UK Constitutional Law Blog, 21 December 2017, available at https://ukconstitutionallaw.org. One strand of the argument is that a 'parent Act' should not be regarded conferring power to amend *future* Acts by subordinate delegation, such as a remedial order, unless the 'parent Act' states this expressly. The HRA does not state expressly that remedial orders may be used in this way.

Consultation questions on remedial orders

1. Should the HRJL include a power for Jersey ministers to remove an incompatibility from a principal Law using a remedial order?
2. The HRA 1998 section 10(1)(a) stipulates that a remedial order cannot be made while there is a pending appeal against the declaration of incompatibility. Should Jersey follow this? Or might there be circumstances in which ministers may need to make amendments before an appeal is determined?[15]
3. Should Jersey ministers need to have "compelling reasons" to make a remedial order rather than lodging a proposition for a draft principal Law?
4. What process should be used in the States Assembly to scrutinise draft remedial orders?
5. Should there be an urgent procedure, enabling a minister to make a remedial order without prior scrutiny by the States Assembly?
6. Should the HRJL itself be excluded from amendment by a remedial order?

[15] Remember that after *Imperium Trustees (Jersey) Ltd v Jersey Competent Authority* [2024] JCA 014, while an application for leave to appeal to the Judicial Committee of the Privy Council was pending, the Chief Minister made an order under the International Cooperation (Protection from Liability) (Jersey) Law 2018.

3: Quashing orders

Problem

Headline: when a court finds that Jersey subordinate legislation is incompatible with an ECHR right, a standard quashing order may be too blunt an instrument.

Declarations of incompatibility do not apply to subordinate legislation. If a Jersey court decides that an Order or Regulation breaches an ECHR right, the court may quash it. A quashing order has the immediate effect of invalidating (or cancelling) the subordinate legislation. Decisions and action previously taken by a public authority under the invalid subordinate legislation would themselves be without legal authority. This could have a drastic impact on public administration or criminal justice.

A Jersey court could:

- nevertheless issue a quashing order and leave ministers and officials to deal with the consequences, or

- exercise judicial discretion to withhold a quashing order and instead grant a declaration. This would leave the Regulations or Order valid. This could be of limited help to the litigant who brought the challenge.

How significant is this problem? We assess this problem – the absence of suspended and prospective quashing orders – to create a high impact low probability risk. Since 2006, there have been several legal challenges to the validity of subordinate legislation on ECHR and other grounds. To date, none have been successful. However, if there is a successful challenge in the future it could have significant repercussions.[16]

Solution

Headline: Jersey courts could be given power to make suspended and prospective quashing orders.

Two new types of remedy could be created.

[16] For interesting analysis of the situation in England, see Saba Shakil, "Bridging the gap between remedial reform and judicial practice: a study of challenges to delegated legislation", UK Constitutional Law Blog, 24 November 2024 (available at https://ukconstitutionallaw.org/2022/11/24/saba-shakil-bridging-the-gap-between-remedial-reform-and-judicial-practice-a-study-of-challenges-to-delegated-legislation/). The author provides evidence showing that in England, courts rarely grant regular quashing orders in this context.

- A suspended quashing order would come into effect on a future date or occurrence of conditions specified by the court, and would apply retrospectively from that date.

- A prospective quashing order quashes the subordinate legislation (or public authority decision) with immediate effect but does not apply retrospectively.

This would give ministers and the States Assembly time to make new subordinate legislation before the incompatible Regulation or Order ceases to have legal effect. It would avoid the court using its discretion to withhold a quashing order (to the detriment of the person bringing the legal challenge) out of concern that to do so would adversely impact on effective public administration or on third parties who have relied on the subordinate legislation.

In our view, Jersey courts do not currently have power to grant suspended or prospective quashing orders. In matters of administrative law, Jersey courts have generally followed English case law. The English case law on the point is not entirely clear.[17] But in *Ahmed* the Supreme Court held that it would be inappropriate to suspend the operation of a quashing order applying to subordinate legislation, which is the issue here.

The Ahmed quashing order

In *HM Treasury v Ahmed* [2010] UKSC 2, the court held that subordinate legislation relating to combatting the financing of terrorism was unlawful. The Government asked for 6-8 weeks to introduce new legislation in response to the ruling. In *HM Treasury v Ahmed (No. 2)* [2010] UKSC 5 the Supreme Court refused, saying there was no common law power to suspend the operation of a quashing order: the court "should not lend itself to a procedure that is designed to obfuscate the effect of its judgment".

In 2021, the Independent Review of Administrative Law considered whether in England there should be a statutory power for courts to grant suspended and prospective quashing orders.[18] It recommended that there should be, concluding "The better route, it seems to us, is to give the courts the freedom to decide whether or not to treat an unlawful exercise of public power as having been null and void ab initio".

The recommendation was accepted by the UK Government. The Senior Courts Act 1981 was amended by the Judicial Review and Courts Act 2022, so that section 29A reads:[19]

[17] For useful commentary, see L Graham, "Suspended and prospective quashing orders: the current picture" UK Constitutional Law Blog, 7 June 2021 (available at https://ukconstitutionallaw.org/2021/06/07/lewis-graham-suspended-and-prospective-quashing-orders-the-current-picture/). See also J Varuhas, "Remedial Reform Part 1: Rationale UK Constitutional Law Blog, 3 November 2021 (available at https://ukconstitutionallaw.org/2021/11/03/jason-varuhas-remedial-reform-part-1-rationale%ef%bf%bc/).

[18] Lord Edward Faulks QC (chair), *The Independent Review of Administrative Law* (2021) para 3.47 onwards (link).

[19] For the full text (link).

(1) A quashing order may include provision —

(a) for the quashing not to take effect until a date specified in the order, or

(b) removing or limiting any retrospective effect of the quashing.

In deciding whether to grant a suspended or prospective quashing order, the court must have regard to the following factors:

(a) the nature and circumstances of the relevant defect;

(b) any detriment to good administration that would result from exercising or failing to exercise the power;

(c) the interests or expectations of persons who would benefit from the quashing of the impugned act;

(d) the interests or expectations of persons who have relied on the impugned act;

(e) so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;

(f) any other matter that appears to the court to be relevant.

The Senior Courts Act 1981 section 29A applies generally: it is not confined to subordinate legislation challenged on ECHR grounds.

If this reform idea is taken forward in Jersey, suspended and prospective quashing orders could

- be limited to situations where a court finds that subordinate legislation is incompatible with ECHR rights,
- it could apply to all acts that are unlawful under the HRJL (for example, a minister's decision)
- or apply even more broadly (as it does in England) to any type of decision that is amenable to judicial review, either on ECHR or purely domestic law grounds.

If the new types of quashing order is only available in litigation under the HRJL, the reform could be implemented by ministerial Order. Under HJRL article 8(8), the Minister for Justice and Home Affairs has power to make Orders "to the extent that he or she considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act of a public authority" or the States Assembly in making subordinate

legislation. The Order may “add to the relief or remedies which the tribunal may grant or the grounds on which it may grant any of them”.

If the new types of quashing order are to apply beyond the HRJL, they would need to be introduced by a principal Law. We do not think that the Royal Court (Jersey) Law 1948 article 13 provides sufficiently broad power for the Royal Court Rules to be amended to create them.

Consultation questions on quashing orders

7. Should there be power under the HRJL for Jersey courts to grant suspended and prospective quashing orders?
8. Should this power be available only in relation to subordinate legislation or to any decision by a public authority amenable to judicial review?

4: Damages for incompatible Laws

Problem

Headline: if a Jersey court declares a principal Law is incompatible with an ECHR right, this does not affect the Law's validity. This maintains the principle of parliamentary sovereignty. However, it leaves the litigant without an effective remedy.

The declaration of incompatibility mechanism in the HRJL (and the HRA) was carefully crafted to maintain the principle of parliamentary sovereignty. HRJL article 5 empowers Jersey courts to rule that a provision in a principal Law violates an ECHR right. This does not affect the validity of the Law. Ministers and the States Assembly then need to make a political decision on how to respond. The expectation is that the incompatible Law will be amended.

Since the HRLJ (and HRA) were adopted, the European Court of Human Rights has ruled that the declaration of incompatibility mechanism is not an "effective remedy" for the purposes of ECHR article 35, which requires people to exhaust domestic remedies before going to Strasbourg.[20] This is because the declaration of incompatibility is

- "dependent on the discretion of the executive",
- there is "no legal obligation on the executive or the legislature to amend the law following a declaration of incompatibility",
- and the declaration of incompatibility is "not binding on the parties to the proceedings in which it is made and cannot form the basis of an award for monetary compensation".[21]

The European Court of Human Rights suggested that at some point in the future, evidence of a strong practice of ministers giving effect to declarations of incompatibility could be sufficient to persuade the Court of their effectiveness.

The practical result is that someone in Jersey, whose only domestic remedy would be a declaration of incompatibility, can bypass the Jersey courts and go directly to the European Court of Human Rights. This undermines the HRJL's goal of empowering

[20] Declarations of incompatibility do **not** violate a separate provision on effective remedies, EHCR article 13. This is because there is no obligation on contracting states to put in place measures for people to challenge primary legislation: see *Greens and MT v United Kingdom* (Applications nos 60041/08 and 60054/08) at para 90-92 (link).

[21] *Burden v UK* (Application no. 13378/05, Grand Chamber)(link).

Jersey courts to protect ECHR rights but is an unavoidable consequence of prioritizing parliamentary sovereignty over judicial protection of rights.

So, in two respects, the European Court of Human Rights can offer stronger judicial protection than the Jersey courts:

- a finding by the European Court of Human Rights that a Jersey principal Law is incompatible with an ECHR right will be binding on the UK and Jersey authorities as a matter of international law (see ECHR article 46) and

- the European Court of Human Rights may award financial compensation to the individual, even where the rights violation arises from a principal Jersey Law (see ECHR article 41).

How significant is this problem? We assess there to be a high impact low probability risk. As noted above, only one declaration of incompatibility has been made by the Jersey courts in the 18 years since the HRJL came into force.

The only time the European Court of Human Rights has awarded damages to a Jersey person for a violation of ECHR rights due to a principal Law was in *Small v UK* (Application no. 7330/06). For 16-year-old Luke Small it was argued that the Sexual Offences (Jersey) Law 1990 article 1(1) breached ECHR article 8 (right to respect for private and family life) and article 14 (prohibition of discrimination). The Law set the age of consent for anal sex between males at 18 years whereas for vaginal sex between a male and female it was 16 years. The Government of Jersey conceded the case and agreed to pay EUR 5,830. The age of consent was equalised by the Sexual Offences (Jersey) Law 2007.

Solution

Headline: the effectiveness of the declaration of incompatibility mechanism could be improved by giving Jersey courts power to award damages where harm has been suffered because of the principal Law held to breach ECHR rights.

This would be a novel solution. We are not aware of any discussion of this issue in the UK in relation to the HRA.

The reform idea is that when a Jersey court makes a declaration of incompatibility it should also have power to award damages for harm caused by the challenged Law. The remedy would achieve a better balance between the goal of preserving parliamentary sovereignty and the goal of providing islanders with effective remedies for breaches of ECHR rights through the Jersey courts. It would be better for the individual, and the

Government of Jersey, if the matter of compensation could be resolved in the Jersey courts rather than Strasbourg.

Under the HRJL, it is already possible for a person to be awarded damages for harm caused by subordinate legislation that breaches ECHR rights.[22]

We anticipate three objections to this reform idea. The first is it would expose the Government of Jersey to the risk of having to pay damages. We believe the proposed remedy would have little impact on the public purse. Declarations of incompatibility are rare in Jersey – just one in 18 years. HRJL article 9 makes clear that Jersey courts "shall not award damages unless … it is satisfied that the award is necessary to afford just satisfaction to the person whose favour it is made". Jersey courts must "take into account the principles applied by the European Court of Human Rights". The levels of damages are relatively modest. The remedy may even save costs. Having damages determined in St Helier rather than Strasbourg would ensure that legal costs are proportionate, for both individual and the Government. And, as discussed above, the Government of Jersey is already bound by international law to pay any compensation awarded by the European Court of Human Rights.

A second objection to the reform idea could be that it undermines the principle of parliamentary sovereignty. We think not. An order by the Jersey courts that the Government of Jersey pay damages for an incompatible principal Law does not affect the validity of the Law or require the States Assembly to change the Law.

A third objection could be that it is inappropriate for a Jersey court to have power to award damages for something that is not unlawful. Under the HRJL, it is not unlawful for the States Assembly to adopt a principal Law that is incompatible with ECHR rights.[23] A response to this point is that while there has been no unlawfulness, there is nevertheless a constitutional wrong that in some cases may justify compensation. The pragmatic point is that if the person takes their case to the European Court of Human Rights, they may be award compensation there.

Consultation question on damages for incompatible principal Law

9. Should Jersey courts have power to award damages for harm suffered by a principal Law declared to be incompatible with ECHR rights?

[22] HRJL article 7(4) states that it is unlawful for the States Assembly to make subordinate legislation which is incompatible with a Convention right, even though the States Assembly is not a "public authority" for the purposes of the HRJL.

[23] Because the States Assembly is not a "public authority": see HRJL article 7.

5: Damages for imprisonment after unfair trial

Problem

Headline: the HRJL article 10(3) prevents Jersey courts awarding damages to a person sent to prison at a court hearing subsequently held to breach ECHR article 6 (right to a fair trial). The European Court of Human Rights has held that this prevents people having an "effective remedy".

The policy of the HRJL is to severely limit the circumstances in which a person may obtain damages when the breach of an ECHR right *is by a court*. The limitation in HRJL article 10(3) was closely based on HRA section 9. In Jersey, damages are available only for breaches of ECHR article 5(5) by a court. This states, as part of the right to liberty and security,

> Everybody who has been a victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Since the HRJL was passed, the European Court of Human Rights has held that compensation should also be available where imprisonment was a result of a court hearing that breached ECHR article 6 (right to a fair trial). In *Hammerton v UK* (Application no. 6287/10) the English county court jailed Mr Hammerton for 3 months for contempt of court in breaching an order not to contact his ex-wife. Mr Hammerton was not legally represented at the hearing. The Court of Appeal held that the hearing breached ECHR article 6. Mr Hammerton could not claim damages in the English courts because of the limitation in the HRA. He had to start legal proceedings in the European Court of Human Rights, which awarded him EUR 8,400.

If a similar situation happened in Jersey, the Jersey courts would have no power to award damages because of HRJL article 10(3), which reads

> In proceedings under this Law in respect of a judicial act, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.

How significant is this problem? We suggest there is a medium impact low probability risk. The likelihood of a Jersey court breaching ECHR article 6 resulting in somebody being imprisoned is low. The impact of a successful case being taken to the European Court of Human Rights would include reputational damage to Jersey, additional costs compared to those incurred if the matter could be dealt with by Jersey courts, and the time and stress on the individual of going to Strasbourg. If a person in Jersey had to start

proceedings in Strasbourg to obtain compensation, this would be a failure in the HRJL's overarching goal of "bringing rights home".

Solution

Headline: HRJL article 10(3) could be amended to allow Jersey courts to award damages where a person is imprisoned after legal procedings later held to breach ECHR article 6 right to a fair trial.

The exact wording would be for the Legislative Drafting Office to determine. In the UK, an amendment was made to the HRA in 2020. [24] Based on this, the HRJL article 10(3) could be amended to read (new words underlined):

> In proceedings under this Act in respect of a judicial act, damages may not be awarded otherwise than—
>
> (a) to compensate a person to the extent required by Article 5(5) of the Convention, or
>
> (b) to compensate a person for a judicial act that is incompatible with Article 6 of the Convention in circumstances where the person is detained and, but for the incompatibility, the person would not have been detained or would not have been detained for so long.

Consultation question on damages for imprisonment

10. Should Jersey courts have power to award damages where a person is sent to prison at a hearing subsequently held to have breached ECHR article 6?

[24] The Human Rights Act 1998 (Remedial) Order 2020 (SI 1160/2020).

6: Ministerial compatibility statements for more legislation

Problem

Headline: HRJL article 16 requires ministers to make a statement on their view of compatibility when lodging a draft principal Law in the States Assembly. But no statements are made for "in principle" debates on proposed Laws, draft Regulations, or when ministers seek to extend UK legislation to Jersey.

HRJL article 16 states:

> (1) A Minister who lodges *au Greffe* a *projet de loi* must, before the second reading of the *projet* –
>
> (a) make a statement to the effect that in the Minister's view the provisions of the *projet* are compatible with the Convention rights (a "statement of compatibility"); or
>
> (b) make a statement to the effect that although the Minister is unable to make a statement of compatibility, he or she nevertheless wishes the States to proceed with the *projet*.
>
> (2) The statement referred to in paragraph (1) must be in writing and be published in such manner as the Minister making it considers appropriate.

To date, all statements have been under article 16(1)(a), with ministers providing assurance that, in their opinion, the draft Laws are ECHR compatible.

The practice adopted since 2013 is for the minister's proposition for a draft principal Law to include not only the minster's compatibility statement but also "human rights notes" prepared by the Law Officers' Department explaining the rationale for the statement. Where a draft principal Law has no ECHR implications, this is stated briefly in a sentence or two. If a draft principal Law engages with ECHR rights in complex and uncertain ways, there may be several pages of legal analysis. The human rights notes are capable of being a valuable resource for States members, courts, legal practitioners, and the public.

How significant is the problem? The current operation of HRJL article 16 leaves other types of legislative activity in the States Assembly without the benefit of ministerial assurance of its ECHR compatibility or published analysis from the Law Officers' Department.

All forms of legislation may contain provisions that engage with ECHR rights. In 2023, the Assembly debated 10 draft principal Laws and 23 draft Regulations.[25] In 2022, there were 35 propositions for draft Laws and 30 for draft Regulations.[26] So, in carrying out a significant proportion of the legislative scrutiny, States members (and others) do not see analysis of ECHR implications.

Ministers are, however, required to conduct and publish Children's Rights Impact Assessments for most Regulations and extended UK legislation, discussed below. It seems constitutionally illogical for States members (and others) to be briefed on analysis of the implications of "indirectly" incorporated rights from the UN Convention on the Rights of a Child but not about "directly" incorporated ECHR rights.

Solution

Headline: ministers compatibility statements and associated Law Officers' Department human rights notes could be published for a wider range of legislation brought to the States Assembly for adoption.

The extension of HRJL article 16 to other types of legislation could be agreed to by ministers and the Law Officers Department on a voluntary basis, without changing the HRJL.[27] Alternatively, HRJL article 16 could be amended to make this a legal requirement.

We anticipate arguments against the reform idea that there is no necessity for more ministerial compatibility statements and the Law Officers' Department does not have sufficient capacity to prepare human rights notes on propositions for legislation beyond principal Laws. It may be useful to set this in context.

Some historical context

Lack of resources and necessity were cited as reasons for the practice up to 2013 of not providing *any* explanation for ministerial compatibility statements. Deputy Bob Hill campaigned for greater transparency in this context. In 2008, he proposed that HRJL article 16 "should be amended to require ministers to state what articles of the European Convention on Human Rights, if any, have been considered in relation to the legislation being brought forward and the grounds on which the minister considers that the proposed legislation is, or is not, compatible with the Convention rights" (P.78/2008). This was rejected by the Assembly.

In 2010, Deputy Hill returned with a similar proposition (P.84/2010). He wanted to amend HRJL article 16 to require a minister to state "(a) what articles of the ECHR, if any, are engaged in relation to

[25] *States Assembly Annual Report 2023* (R.166/2024) p 8 (link).

[26] *States Assembly Annual Report 2022* (R.131/2023) p 58 (link).

[27] There is precedent. Ministerial compatibility statements started to be made before the HRJL came into force.

legislation being brought to the States; and (b) the reasons why the minister considers the proposed legislation is, or is not, compatible with ECHR rights".

The Council of Ministers led by Chief Minister Senator Terry Le Sueur opposed the proposal because "1. The suggested changes would be unnecessary; 2. Existing procedures are effective; and 3. The resource implications are not justifiable". [28]

Ministers took the view that either the Attorney General or Solicitor General was in the chamber during Assembly meetings and could provide advice to the Assembly on questions about ECHR compatibility, if requested. In addition, "the existing scrutiny process provides an important and effective opportunity for Scrutiny Panel members to consider any legislative proposal before it is brought to the Assembly, including assessment of any perceived human rights issues".[29]

During the debate, several members spoke against P.84/2010 in strong terms.[30] Senator Sarah Ferguson opposed Deputy Hill's proposal as seeking "to impose yet another layer of bureaucracy on our system". Senator Terry Le Main described it as "another luxury we cannot afford". The Connétable of St Clement (Len Norman) characterised the proposition as "nonsense", pointing out that "not one case has been brought before the Royal Court" questioning the compatibility of Jersey law. Senator Ben Shenton said it would be a "case of spending money for the sake of spending money". Deputy Ian Gorst quipped that "if you put 2 lawyers in a room you will get at least 3 opinions if not slightly more". Towards the end of the debate, HM Attorney General (Timothy Le Cocq QC) confirmed that the Law Officers' Department "are under-resourced in our ability to deal in a timely fashion with human rights matters". Deputy Hill's proposal was rejected by 28 contre to 20 pour.

Three years later, with no fanfare, Government practice changed in 2013 (under Chief Minister Senator Gorst). The proposition for the Draft Discrimination (Jersey) Law (P.6/2013) contained, for the first time, an appendix of "human rights notes" prepared by the Law Officers' Department.

Extend HRJL article 16 statements for "in principle" propositions?

Through "in principle" debates, States members are asked if they are of the opinion that a minister should "bring forward primary legislation" on a topic. This is an important mechanism for early testing of controversial or complex policy ideas. Such a proposition may engage with ECHR and other human rights. But States members, expert groups, and the public do not benefit from Law Officers' Department human rights notes analysing how the envisaged policy is likely to be compatible with ECHR rights.

Examples: in principle debates on assisted dying

In 2021 the Council of Ministers by Proposition P.95/2021 enabled States members to discuss legislating for assisted dying. The proposition did not include a draft Law, so no HRJL article 16 statement of compatibility was required. A States member asked the Attorney General to elaborate on human rights issues during the debate. Mr Temple QC referred to comments he had circulated to

[28] P.84 Com./2010.

[29] There has been very little ECHR-focused review of legislation by scrutiny panels since 2005.

[30] States of Jersey Official Report (Hansard), 21 July 2010, 3.1.2. Subsequent quotes are from the same source.

Members the previous week and discussed ECHR article 2 (right to life) and *Lambert v France*, a 2015 judgment of the European Court of Human Rights on stopping medical treatment (*Hansard*, 24 November 2021 para 3.1.15). But the written comments circulated to States members do not appear on the public record (or we could not find them).

In March 2024, the Council of Ministers lodged P.18/2024 asking whether the Assembly agreed the Minister for Health and Social Services should bring forward primary legislation that permits assisted dying in Jersey. The 245-page proposition referred only once to ECHR rights, in relation to risks: "A lobby group / individual may challenge decision of Jersey to permit assisted dying in European Court of Human Rights (ECHR)". The mitigation was described thus: "Work has been undertaken with Law Officers Department to ensure development of proposals aligns with European Convention on Human Rights and with key international conventions including UNCRC (United Nations Convention on the Rights of the Child) and UNCRPD (United Nations Convention on the Rights of Persons with Disabilities). Throughout development of draft law, continue consideration of issues under international human rights frameworks" (p 159). This brief comment does not fully reflect the status of the HRJL and the directly incorporated ECHR rights in Jersey law. No guidance was given on which ECHR rights were engaged. An *Assisted Dying in Jersey Ethical Review* by three academics was considered by the Assembly's Panel on Assisted Dying. This referred to ECHR article 9 and led them to proposing an amendment adopted by the Assembly with little debate. The Solicitor General provided advice to members during the 2-day debate that referred to ECHR rights.

When the draft Assisted Dying (Jersey) Law is lodged, it will include a HRJL article 16 statement by the minister and human rights notes by the Law Officers' Department. But formal assurance from ministers and analysis of ECHR rights at a formative stage is equally important.

A further reason for requiring compatibility statements is that for many "in principle" debates on proposed Laws, ministers must now carry out a Children's Rights Impact Assessment (CRIA) required by the Children (Convention Rights)(Jersey) Law 2022. It is illogical to require ministers to assess and inform the Assembly of their assessment of indirectly incorporated rights (UN Convention on the Rights of the Child) but not on directly incorporated ECHR rights. Under the Children's Rights Scheme (R.46/2024, link),

> CRIA, like any impact assessment process, is intended to inform and shape decisions in a positive way. CRIA should therefore commence as early as possible in the policy development cycle, to enable any negative impacts on children's rights to be mitigated.

The same point can be made about ECHR rights.

Extend HRJL article 16 statements to Regulations?

Many Regulations deal with uncontroversial details unlikely to engage with ECHR rights. But, in some schemes, the principal Law is a "skeleton" or "framework", and important aspects are left to be filled in by Regulations. Examples can be found in areas such as planning, welfare benefits, and control of housing and work. Ministers benefit from using skeleton Laws subsequently filled in by Regulations. It gives the Government flexibility to

develop policy to suit changing circumstances without having to amend or propose a new principal Law.

In Jersey's legislative process, the States Assembly debates draft Regulations in the chamber. Draft Regulations may also be referred to a scrutiny panel, like draft principal Laws – though they rarely are. They are not, however, reviewed by officials in the UK Ministry of Justice after adoption.

Ministers and officials have recognised that draft Regulations legislation should in some contexts be accompanied by an explanation as to why the minister believes the provisions to be ECHR compliant.

Recognition of the need for ECHR statements for draft subordinate legislation

In 2022, Chief Minister (Senator John Le Fondré), Assistant Chief Minister (Deputy Rowland Huelin) and three officials gave evidence to the Migration and Population Review Panel (Common Population Policy Review). A central issue was whether married and unmarried couples coming to work in Jersey should be treated the same. The Head of Policy, Strategic Policy, Planning and Performance told the panel[31] "In terms of very important legal rights around human rights and children's rights, when the regulations that lie underneath the Control of Housing and Work Law are published, we will publish a full human rights assessment of the regulations. Now, you do not normally do that. You only provide [HRJL] statements for primary law. Acknowledging the importance of the regulations in this particular case, we will publish a full ECHR statement for the regulations and I would imagine we will publish a full CRIA [Children's Rights Impact Assessment] at the time for the regulations as well".

In April 2023, the Chief Minister lodged au Greffe the Draft Control of Housing and Work (Residential and Employment Status) (Amendment No. 2) (Jersey) Regulations 202- (P.20/2023). When the States Assembly debated the draft Regulations on 23 May 2023, the Assistant Chief Minister (Deputy Lucy Stephenson) said "The Council of Ministers is committed to addressing the labour shortages that many employers are currently facing and these regulations will remove a barrier which stops an unmarried partner of a migrant worker or local resident from accessing the local employment market" (Hansard, 23 May 2023, 9.1). Deputy Sam Mézec, then a backbench member, said "So I raise that simply to say on record, while this is most certainly a positive step, when wider work is done on our population policy and how we accord people working and housing rights in Jersey that the consideration we have to those people's human rights must be a greater consideration than it appeared to be when the Control of Housing and Work Law was originally put together" (Hansard, 23 May 2023, 9.1.1).

Extend HRJL article 16 statements for UK extended legislation?

HRJL article 16 does not currently apply to ministers' propositions to extend a UK Act of Parliament or UK subordinate legislation to Jersey. The reform idea would change this.

31. Migration and Population Review Panel, Common Population Policy Review, Witnesses: The Chief Minister and Assistant Chief Minister, 24 January 2022.

As this UK legislation will have been scrutinised in the UK Parliament before receiving Royal Assent, it may be thought that the States Assembly does not need reassurance that the legislation is ECHR compatible. However, the States Assembly is an autonomous legislature that ought to form an independent view on ECHR compliance in the Jersey context.

UK law extended to Jersey can greatly impact on freedoms. Some of the UK Acts of Parliament extended (or which may be extended in the future) to Jersey have sparked controversy regarding ECHR rights while in the UK Parliament. The Communications Act 2003, subject to a "nevertheless statement" in the UK Parliament, was with some changes brought into Jersey law by the Communications (Jersey) Order 2003, including the blanket ban on paid political advertising on broadcast media. UK immigration legislation is also often extended to Jersey by Order in Council.

Another reason for having ECHR compatibility statements for extended UK legislation is that Jersey ministers are required by the Children (Convention Rights)(Jersey) Law 2022 to carry out and publish a Children's Rights Impact Assessment (CRIA) in this context. It is illogical to require ministers to assess and inform the Assembly of their assessment of indirectly incorporated rights (UN Convention on the Rights of the Child) but not on directly incorporated ECHR rights.

Consultation questions on extending ministerial statements

11. Should "in principle" propositions for a draft Law contain a ministerial compatibility statement and Law Officers' Department human rights notes?
12. Should propositions for draft Regulations contain a ministerial compatibility statement and Law Officers' Department human rights notes?
13. Should propositions to extend UK legislation to Jersey contain a ministerial compatibility statement and Law Officers' Department human rights notes?
14. If ministerial compatibility statements and Law Officers' Department notes are extended beyond propositions for draft principal Laws, should this be through voluntary agreement from Ministers and HM Attorney General, or secured through formal amendment of the HRJL?

7: Modernise terminology

Problem

Headline: HRJL article 16 uses outdated terminology.

HRJL article 16 currently uses the term “projet de loi”. This terminology has fallen out of regular use in official Jersey documents since the HRJL was drafted in 1999.

- The Legislation (Jersey) Law 2021, a piece of consolidating legislation, does not use the terminology of projet de loi.

- The States of Jersey Standing Orders explain the article 16 requirement saying a “Minister who lodges a draft Law” must make a statement before “the 2nd reading of the draft Law” (para 21).

- A search of the States Assembly website shows the phrase “projet de loi” was used between 21 and 74 times annually from 2000 to 2012. But, in recent years, usage has declined sharply. It was used just once in 2021 and 2022 and not at all in 2023.

- In the UK, the Royal Assent to Legislation and Petitions (Bailiwick of Jersey) Order 2022 uses the term “Law”. (The equivalent Guernsey Order continues to use “projects de loi”).

“Draft Law” is a term more likely to be understood by members of the public than “projet de loi”. While some people may regret erasing French language terms from Jersey’s legal system, it is more important that legislation is as simple to understand as possible. It is also desirable for there to be consistency in terminology across legislation and official publications.

How significant is this problem? This is a relatively small matter, that could be considered by the Law Revision Board, which exists to examine such issues.[32]

Solution

Headline: replace the words “projet de loi” with “draft Law”.

Consultation question on projet de loi

15. Should HRJL article 16 be amended to replace the words “projet de loi” and “projet” with “draft Law”?

[32] See Legislation (Jersey) Law 2021 schedule 1.

8: Better ADR

Problem

Headline: there may be unmet needs for ADR relating to grievances against public authorities that engage ECHR rights.

The HRJL focuses on ensuring islanders have court-based processes for enforcing their ECHR rights: see articles 8, 9 and 10. ECHR rights are seen a *legal* rights requiring *legal* execution. However, this does not mean that other ways of resolving grievances are irrelevant. This was recognised in the *Let's Get it Right!* booklet in 2000, which said "Going to court is always a last resort".[33]

Our hypothesis is that there may be unmet needs for ADR in Jersey relating to HRJL matters. **But to understand problems and find solutions, we are seeking input from individuals, advisers and lawyers with relevant experience. We have posed an open-ended consultation question to help identify the extent to which there is unmet need.**

When and how could people use ADR for grievances involving ECHR rights? Several limitations should be acknowledged.

First: many disputes involving ECHR rights may be unsuitable for ADR.[34] The purpose of a challenge to a public authority under the HRJL may be to obtain a binding ruling from the court that the public authority has acted unlawfully. The challenge may raise issues that it is in the public interest to be determined in open court rather than by confidential negotiations between the parties, for example through mediation.

In at least one HRJL case started in the Royal Court, an application was made to transfer the matter to the Petty Debts Court.[35] The dispute related to ECHR article 8 (right to respect for family and private life) where a father was stopped by the police from removing his child from a care home. The Master of the Royal Court declined to transfer the case. Although the amount of damages in issue were relatively small, the "subject matter, complexity and significance of the underlying claim" meant it should stay in the Royal Court. A transfer from the Royal Court to Petty Debts Court is not ADR in the conventional sense, but the case illustrates the public interest in some HRJL claims being decided in the Royal Court.

[33] Human Rights Working Group, *Let's Get it Right!* (States of Jersey, St Helier 2000). This was a 16-page booklet published to explain the implications of the HRJL to islanders.

[34] See generally M Supperstone, D Sitlitz and C Sheldon, "ADR and public law" [2006] *Public Law* 299 (not open access).

[35] *JJ and BB v Chief Officer of the States of Jersey Police Force* [2023] JRC 262 (link).

Cases involving ECHR rights that may be suitable for mediation include:

- where the public authority concedes an ECHR right was violated and the question remains whether compensation should be paid, and if so at what level;

- where the individual's motivation for pursuing the grievance is to find out why the action took place, to be assured it will not recur, and to be offered an apology.

A second limitation is that using ADR may not be free or low-cost. In the case just mentioned, at an earlier stage of proceedings the parties were willing to participate in mediation, but the "cost of engaging a mediator (estimated at £1,500) will exceed the amount of any possible award of damages".[36] If legal proceedings are stayed to allow the parties to mediate, if they fail to reach an agreement and continue with the case in court, overall costs will be increased.

A third limitation is time. There may not be enough time for a person to use ADR before they must start proceedings in the Royal Court.[37] The judicial review procedure requires proceeding to start "promptly and in any event within 3 months" of the action being challenged.[38]

A fourth limitation could be that court procedures are so flexible and user-friendly that there is little need or demand for ADR. The Royal Court is experienced in handling HRJL challenges brought by islanders without legal representation. Our research shows that 12 of the 27 HRJL challenge cases (44%) brought between 2007 and 2023 were by litigants in person. The Royal Court deployed different techniques to assist litigants in person.

Where the litigant in person had used the wrong originating process, directions were given by the Master of the Royal Court on the appropriate procedural route at an early point in proceedings.[39]

The court showed procedural flexibility to enable the case to be heard.[40]

[36] *JJ and BB v Chief Officer of the States of Jersey Police Force* [2023] JRC 159 (link).

[37] Cases challenging public authorities must be started in the Royal Court (HRJL article 8(1)(a).

[38] See below.

[39]. The *Gosselin v Minister for Social Security* [2016] JRC 032, the litigant in person used a representation. The Master decided that the case should continue as an appeal from the Social Security Tribunal not as an application for leave to apply for judicial review.

[40]. In *In the matter of the representation of Pearce* [2022] JRC 135, the Royal Court noted "The Applicant's application was not in the prescribed form for a judicial review application, we elected to treat it as such. The Applicant was unrepresented, this was an urgent matter and, in these circumstances, we accepted it was difficult for him to comply with the correct procedure". Under Royal Court Rules Part 16, the Court considered whether "leave would have been given to move for judicial review if an application for leave had been made".

In another case, the litigant in person chose to reply on their written case rather than make oral representations to the court.[41]

It may also be open to the court to appoint an advocate as amicus curiae ("friend of the court") to assist the court (paid for out of public funds) where fairness required this.

If a person does want to resolve their dispute without going to court, what are the current options in Jersey?

Mediation

A mediator, trained in conflict resolution, helps both sides reach a negotiated agreement.[42] The individual and public authority must be willing to engage with the mediator. In selecting a mediator, the parties may need to consider whether the mediator should be legally qualified with knowledge of human rights. A venue will also be required, typically with three rooms. The individual may be accompanied by a friend or engage a legal representative. In some settings, however, lawyers are excluded as legal representation would undermine the ethos of informal resolution. In a dispute involving ECHR rights issues, it is crucial for the mediator to be aware of the inherent power imbalance between the individual and public authority.

A review of mediation services was carried out as part of the Access to Justice Review in 2016.[43] The review found that "While effective mediation services are available in Jersey to meet the core needs of the local community, the use of mediation, other than in respect of disputes dealt with in the Petty Debts Court, is relatively low". The final recommendation was

> It is suggested that the Judicial Greffe, together with [Jersey Legal Information Board], [Citizens Advice Jersey] and any other mediation and alternative dispute resolution service providers continue to work together to:
>
> – Increase publicity and information on the availability of such services;
>
> – Align and co-ordinate, where possible, such services; and
>
> – Encourage greater use of such services, in a wider range of disputes, where appropriate and with necessary safeguards, as an initial alternative to court proceedings.

41. *Holmes v The Law Society of Jersey* [2018] JRC 010.

42 A useful resource is V Bondy and M Doyle, *Mediation in Judicial Review: A practical handbook for lawyers* (Public Law Project/Nuffield Foundation, London 2011) (link).

43 Chief Minister, Access to Justice: Third Interim Report, R.85/2016 (link).

Citizens Advice Jersey (an independent charity receiving government funding) runs the **Community Mediation scheme**. It explains[44]

> Going to court to resolve a dispute costs time, money and causes stress. Citizens Advice Jersey provides a confidential mediation service that can bring all parties together with a trained mediator to help talk through differences and bring about an outcome which everyone is comfortable with.
>
> The service is meant to offer help in settling small scale disputes between neighbours, friends and between those doing business together.
>
> Both parties must live in Jersey and be able to attend the mediation in person. It will not be possible for lawyers to attend these mediations but parties will be able to bring a friend or interpreter.

A fee of £20 charged to each party for a 2-hour session. **The service is not advertised as available or suitable for ECHR-related claims against public authorities.** Parties will therefore need to find and fund the services of a professional mediator. As noted above, in one case the mediator's fee was said to be £1,500, which would exceed the likely damages to be negotiated or recovered in court.[45]

States of Jersey Complaints Panel

Another possible non-court resolution service for a human rights dispute is the States of Jersey Complaints Panel. Operating under the Administrative Decisions (Review)(Jersey) Law 1982, the Complaints Panel handles disputes from decisions of Ministers and Government Departments. It does not currently have jurisdiction over other types of public authority, but this is currently under review within the Cabinet Office.[46] There is no charge for using the process. If the case is accepted for review, a Complaint Panel member seeks to achieve an informal resolution. If this is not successful, a public hearing is held at which the complainant and representatives of the public bodies present their cases. A report is then published in the States Assembly containing findings and recommendations. These are not binding on the public authority.

The law governing the Complaints Panel does not mention ECHR rights but grounds for challenge include that a decision is "contrary to law" or "unjust, oppressive or improperly discriminatory, or was in accordance with a provision of any enactment". These grounds could be broad enough to encompass a complaint that one of the ECHR rights was breached.

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[44] Citizens Advice Jersey website https://www.citizensadvice.je/community-mediation-440/

[45] *JJ and BB v Chief Officer of the States of Jersey Police Force* [2023] JRC 159 (link).

[46] Ministerial Decision, *Public Services Ombudsman: Terms of Reference*, 11 October 2024 (link).

In 2009, the Complaints Panel adopted the view that it was not an appropriate body to handle complaints where the aggrieved person wanted to raise ECHR rights issues. So far as we can see, the Complaints Panel has not handled any complaints that expressly engage with ECHR rights in recent years.

What the Complaints Panel said about ECHR rights in 2009

One report, about planning permission for a fence, said: "The Board did not consider itself to be competent to determine any human rights issues which might be involved and considered that, in any event, if human rights aspects were to be raised by a Complainant, relevant precedents should be presented by the Complainant or his/her representative".[47]

In another case that year, a Minister refused to grant housing qualifications. The Complaints Panel said: "With regard to the specific allegation that the refusal breached the HRJL 2000, the Board considered that this was a matter for the Courts to decide and that the threat of the Human Rights claim (successful or otherwise) was no reason to overturn the refusal".[48]

In June 2009, Deputy Roy Le Hérissier asked a written question to the chair of Privileges & Procedures Committee: "Will the Complaints Board be able to comment on whether alleged contravention of Human Rights are a factor in cases placed before it?"[49] The PPC chair responded: "I think it is … important to stress that the complaints system is a way for complainants who are aggrieved by a specific decision of a Minister, Department or person acting on their behalf to have the complaint reviewed and it would not therefore be possible for a Board to consider human rights matters unless they were directly relevant to a particular decision.[[50]] In addition the only remedy that the Board can recommend, if it finds in favour of the complainant, is that the Minister should reconsider the original decision in the light of the Board's findings. Although the current Chairman and Deputy Chairmen are legally qualified there is no statutory requirement for them to be lawyers and a Complaints Board is not a court. When PPC meets the members of the Complaints Panel it will be keen to discuss the extent to which the Panel should be alert to human rights issues that are raised by complainants even if it is only to know when further information or advice on matters raised should be sought. When PPC discussed this issue on 19th June 2009 it was interested to note the views of the UK Parliamentary Commissioner for Administration, Ann Abraham, who, in response to the inquiry launched in April 2008 by the UK Equality and Human Rights Commission, wrote in August 2008 that "Formal findings of human rights infringements are of course a matter for the courts. But Ombudsmen need to ask human rights questions, use human rights language and play their part in nudging public authorities towards the sort of human rights culture that the Government envisaged with the Human Rights Act in 1998".

47. R.43/2009. https://statesassembly.gov.je/assemblyreports/2009/14544-7623-2842009.pdf

48. R.123/2009. https://statesassembly.gov.je/assemblyreports/2009/38379-5649-10112009.pdf

49. 30 June 2009. Deputy Bob Hill asked for a progress report in a written question on 9 March 2010 and received substantially the same answer (1240/5(5175)).

50. Note: This applies to legal proceedings in the Royal Court too. To rely on an ECHR right, the individual must have been a "victim" of the alleged breach (see HRJL article 8(1)).

Proposed Jersey Public Services Ombudsperson

The advanced plans to establish the JPSO have been put on hold while a Cabinet Office review examines alternative options.[51] If Jersey does one day have an ombudsperson, how would it handle ECHR rights complaints? Like the Complaints Panel, ombudsperson schemes typically make recommendations that are not binding on the public authority.

There may be useful lesson learning from the UK. In March 2023, the UK Parliament's Joint Committee on Human Rights (JCHR) reported on an inquiry on *Human Rights Ombudsperson*.[52] The JCHR received evidence about the kinds of investigations that "touched on rights-based issues" including in relation to ECHR article 8 (right to respect for family and private life): a husband and wife who had been separated after the wife was moved into a care home against her wishes; a stepdaughter who had been stopped from visiting her dying father; and a family of seven who had been placed in unsuitable accommodation. The two main ombudspersons told the JCHR

> [H]uman rights are an integral part of the relationship between citizen and state and are therefore necessarily within our remit. We currently treat human rights failings as part of our consideration of maladministration.

The JCHR concluded that (para 33):

> Ombuds play an important role in upholding human rights and identifying where there may be systemic issues affecting individuals' rights. We were pleased to hear that the PHSO[53] and LGSCO[54] take seriously their role in relation to human rights. *We encourage the PHSO and LGSCO to continue to embed human rights in their work. To this end, it would be helpful for them to refer to human rights standards and principles in their decisions whenever possible. The PHSO and LGSCO should continue to monitor and collect data on the number of decisions they make that engage human rights issues and make that data publicly available onlin*e.

The JCHR said that a specialist human rights ombudsperson was unnecessary in the UK. It "recommended ways in which the current framework could be altered to make it easier for people to bring complaints, including those involving their human rights" through the existing UK ombudspersons.

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[51] See Jersey Law Commission, *Keeping the Complaints Panel or setting up the Ombudsperson? Consultation report* (2024) (link) and *Follow-up report* (2024) (link)

52. Eleventh Report of Session 2022-23, HC 222, HL Paper 175, 28 March 2023, para 30 (link).

[53] Parliamentary and Health Services Ombudsman.

[54] Local Government and Social Care Ombudsman.

Solution

Headline: there are a variety of proposals that could be considered as ways of improving access to ADR for disputes that engage with ECHR rights.

To develop possible solutions for any gaps that exist in ADR provision for complaints against public authorities that engage with ECHR rights, we need evidence of current practice and ideas from islanders, advice workers, lawyers, public authorities and others.

Ideas worth exploring further could include the following.

- The Community Mediation service run by the Citizens Advice Jersey could be extended to cover public law matters, including grievances that engage with ECHR rights.

- Mediation could be integrated into the Royal Court process through which people bring HRJL challenges. In appropriate cases, parties could agree to mediate rather than proceed directly to a court hearing. Or the court, applying the Royal Court Rules' (RCR) overriding objective of dealing "with cases justly and at proportionate cost" could direct the parties to engage in mediation. Free mediation has been built into other court processes in Jersey, notably the Petty Debts Court. In other legal systems, referral of parties to a publicly funded mediation service is regarded as an important efficiency saving.[55]

- The current Cabinet Office review of the Complaints Panel and proposed Jersey Public Services Ombudsperson could consider the role of Jersey's independent complaints service in resolving grievances that engage with ECHR rights.

Consultation question on ADR

16. How could access to alternative dispute resolution (ADR) for grievances against public authorities engaging ECHR rights be improved?

[55] In England, see Ministry of Justice, "New justice reforms to free up vital court capacity" 25 July 2023 (link).

9: Clearer Legal Aid Guidelines

Problem

Headline: the Legal Aid Guidelines could be clearer about eligibility for human rights cases

In April 2022, a new Legal Aid Scheme started in Jersey. It expressly recognises "human rights" as category of legal proceedings eligible for public funding. Three types of human rights claim are set out in the Legal Aid Guidelines:

> Asylum applications (subject to a favourable opinion on the merits of the claim)
>
> Deportation where a Deportation Order has been served and you are appealing against the decision [56]
>
> Human Rights breaches (only in exceptional cases where there are legitimate human rights entitlements (subject to a favourable opinion on the merits of the claim)).

We are concerned only with the last of these.

To be clear: it is uncontroversial that a legal aid authority must select cases. The European Court of Human Rights recognised there is a "legitimate concern that public money should only be used for legal-aid purposes [where cases] have a reasonable prospect of success" and "it is obvious that a legal-aid system can only operate if machinery is in place to enable a selection to be made of those cases qualifying for it".[57]

In most legal aid schemes, there are three elements in deciding whether somebody is awarded legal aid:

- **Scope:** is the case one for which legal aid is available? Is the applicant covered? This could include a residency test, as in Jersey.

- **Means test:** does the person's financial situation meet the eligibility rules? Legal aid schemes have precise rules about income and capital that determine this question.

- **Merits test:** does the applicant's case have a reasonable prospect of success? This may require an opinion from a legally qualified person with knowledge of the relevant field of law.

[56] It is not clear why appeals against a deportation order is not "subject to a favourable opinion on the merits of the claim" whereas the other two areas are.

[57] *Gnahoré v France* (application no. 40031/98), para 41.

We are concerned that there is a lack of clarity in how the scope for human rights legal aid is defined in the Jersey Legal Aid Guidelines. The modifiers "only in exceptional cases" and "legitimate" human rights could be problematic.

What makes a case "exceptional"? It is not clear to us what the test is for an applicant's case to be "exceptional", and the human rights claimed to be "legitimate". As the English Court of Appeal has observed, "Exceptionality is not a test".[58]

In defining the scope of human rights legal aid in Jersey, there are a variety of policy considerations that the Legal Aid Guidelines Committee and Minister for Justice and Home Affairs may want to pursue. For example, the policy could be that human rights legal aid should only be granted in the following circumstances:

- if the case will raise a point of wider public interest, for example it will clarify an important point of law or the legality of an area of administrative decision-making affecting people in addition to the applicant for legal aid.

- if proceeding with the case will be proportionate, having regard to the benefits to the individual and others against the likely costs of the case.

- if a decision to refuse legal aid would breach of ECHR article 6 (right to a fair trial) or another ECHR right.

The terminology "exceptional" and "legitimate" do not show what the policy goals are. They create too much unstructured discretion in the context of islanders seeking to protect their ECHR rights.

A better starting point for defining the scope of human rights legal aid would be for the Guidelines to recognise that it would be unlawful for a legal aid decision-maker to act in a way that is incompatible with ECHR rights. The use of the words "exceptional" and "legitimate" in this context are problematic. In English case *R (on the application of Gudanaviciene) v Director of Legal Aid Casework and The Lord Chancellor,*[59] the Court of Appeal held that (English) legal aid guidelines were not compatible with ECHR article 6 and 8. The guidance and context were different from the Jersey Legal Aid Guidelines, but it is of note that the Court of Appeal was critical of the notion that there were ECHR article 6 obligations to provide legal aid only in "exceptional" cases. It was wrong for the English legal aid guidelines to suggest that refusal of legal aid would breach ECHR article 6 only in "rare and extreme cases" (para 44).

[58] *R (on the application of Gudanaviciene) v Director of Legal Aid Casework and The Lord Chancellor* [2014] EWCA Civ 1622 para 29.

[59] *R (on the application of Gudanaviciene) v Director of Legal Aid Casework and The Lord Chancellor* [2014] EWCA Civ 1622.

The English Court of Appeal also examined the obligation to provide legal aid under ECHR article 8 (right to respect for private and family life), noting “Effective involvement in the decision-making process may require the grant of legal aid” (para 66).

In short, the problems with the Jersey Legal Aid Guidelines statement “Human Rights breaches (only in exceptional cases where there are legitimate human rights entitlements (subject to a favourable opinion on the merits of the claim)) are:

- the test for whether an application is in scope of human rights legal aid is not clear
- it is not clear how, as currently drafted, this guideline reflects ECHR duties on the Government of Jersey to provide legal aid.

Solution

Headline: the Guidelines could be amended to clarify their policy intent and compliance with ECHR rights.

We draw our discussion to the attention of Legal Aid Jersey and the Legal Aid Guidelines Committee.

Under the Access to Justice (Jersey) Law 2019 article 16, there is a Legal Aid Guidelines Committee, responsible for “advising and assisting the Minister for Justice and Home Affairs in making the Legal Aid Guidelines”. The Guidelines are made and revised under the Access to Justice (Legal Aid Guidelines)(Jersey) Order 2021.

Consultation question on legal aid guidelines

17. Do you agree that the Legal Aid Guidelines on “human rights breaches” should be redrafted?

10: Clearer deadline for starting a legal challenge

Problem

The rules on time limits for starting proceedings under the HRJL are convoluted.

HRJL article 8(1) states: "A person who claims that a public authority has acted, or proposes to act, in a way which is made unlawful by article 7(1) … may bring proceedings against the authority …under this law in the Royal Court".

In almost all areas of law, a limitation period applies. Challenge cases based on ECHR rights are no exception. There is a public interest in having time limits. Effective administration and the rights of others could be unfairly impacted if a claim is made long after the event. Memories of who did what, when, and why fade over time.

HRJL article 8(3) states

> A person wishing to bring proceedings under paragraph (1)(a) must do so before the end of – (a) the period of one year beginning with the date on which the act complained of took place; or (b) such longer period as the court considers equitable having regard to all the circumstances, unless Rules of Court made by the Royal Court impose a stricter time limit in relation to the procedure in question.

The Royal Court Rules (RCR) do "impose a stricter time limit" in relation to several originating processes. The most generally applicable is RCR Part 16, which states that "an application for leave to apply for judicial review must be made promptly and in any event not later than 3 months from the date when grounds for the application first arose". It goes on to state that the Bailiff

> may refuse an application made within the period of 3 months if satisfied (a) that the application is not sufficiently prompt; and (b) that if the relief sought were granted, on an application made at this stage, it would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or be detrimental to good administration; …
>
> application may be made after the end of the period of 3 months if the Bailiff is satisfied – (a) that there is good reason for the application not having been made within that period; and (b) that if the relief sought were granted, on an application made at this stage, it would not be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or be detrimental to good administration.

The combined effect of HRJL article 8(3) and RCR Part 16 is a convoluted method for deciding what the time limit is for starting legal proceedings using ECHR rights to challenge the decision of a public authority. *It is effectively: X months, or a longer period than X, unless another legal document says it is Y months, but the judge could decide that it longer or shorter than Y months*. The Jersey Law Commission's mission includes simplification of the law. This convoluted arrangement for setting a timeline for raising ECHR rights points in legal challenges is difficult to justify having regard to

- the significant proportion of challenge cases brought by litigants without legal representation (our research shows that more than four in 10 challengers are litigants in person)

- the fact that the subject matter of the claim is fundamental human rights

- and the headline of "one year to make a HRJL challenge" is often cited in public information about using the HRJL and ECHR rights in Jersey.

Solutions

Headline: there may be scope for simplifying the rules about time limits.

The most straightforward solution would be for the time limit to be expressed as:

(a) the period of one year beginning with the date on which the act complained of took place; or (b) such longer period as the court considers equitable having regard to all the circumstances.

This is the default rule stated on the face of the HRJL, in article 8. The RCR could be amended to make clear that the shorter time limit for applying for judicial review does not apply to a ground based on the HRJL.

Consultation questions on simpler Royal Court Rules

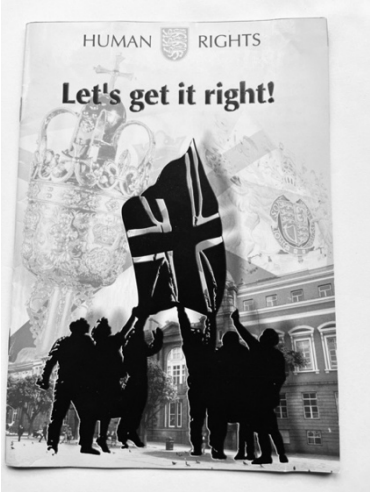
1. How could rules about time limits for starting legal proceedings under the HRJL be simplified?

11: Better public information

Problem

Headline: the quality and quantity of public information about the HRJL and ECHR rights in Jersey is poor.

When the HRJL was adopted, it was recognised islanders needed to be informed about the new law. A 16-page colour booklet titled *Let's Get it Right!* was prepared and published Human Rights Working Group.[60] It included an introduction by the then Bailiff, Sir Philip Bailhache, and words by Senator PF Horsfall OBE, then president of the Policy and Resources Committee. The endnotes explain



> This booklet has been adapted from one produced by the Citizenship Foundation, which was written by Martin Wainwright and based on material prepared by Aishling Reidy of the Constitution Unit, School of Public Policy, University College, London.

Since *Let's Get it Right!* there has been little or no investment in public resources about the HRJL and ECHR rights in Jersey. (This contrasts with the considerable attention given to public information and awareness about the UN Convention on the Rights of the Child, through the work of the Children's Commissioner).

The general issue of information about Jersey law, written in ways that most islanders can understand, was highlighted by the Access to Justice Review in 2016: "plain English legal information should be more widely available".[61]

To grasp the scale of the problem, we looked for public information about the HRJL and ECHR rights on several websites. We could not find any information in Portuguese or other minority languages.

Information for the public about the HRJL (snapshot 18 July 2024)

Government of Jersey website.
https://www.gov.je/Government/Departments/JusticeHomeAffairs/About/Pages/HumanRights.aspx
The information seems not to have been updated for many years. It is not written in a user-friendly style or format. For example, it is misleading to say, "In order to take the authority to court for beaching your rights, you have to bring proceedings within a year of the act complained of", as the

[60] Human Rights Working Group, *Let's Get it right!* (States of Jersey, St Helier 2000).

[61] Chief Minister, Access to Justice Review: Third Interim Report, R.85/2016 p 18.

time is normally much shorter. There is a clickable link to a document “Jersey Human Rights Working Group: Main provisions of Human Rights Jersey Law. A brief explanatory statement”, written more than 20 years ago.

States Assembly website. https://statesassembly.gov.je. The main search box returns 4,406 items for [human rights jersey law] and 1,139 for [“human rights jersey law”]. The “How new laws and regulations are made” page has a clear explanation of HRJL article 16 ministerial compatibility statements.

Citizens Advice Jersey website. https://www.citizensadvice.je/human-rights-jersey-law-2000/ offers a single page containing two links. One is the full text of the HRJL, which will be difficult to understand for anybody without legal training and familiarity with the Jersey legal system and human rights generally. The other link is to a Government of Jersey webpage entitled “Human Rights” https://www.gov.je/Government/Departments/JerseyWorld/Pages/HumanRights.aspx that discusses the Government’s external relations policy and says nothing about enforcing ECHR rights in Jersey.

Jersey Legal Aid. https://www.legalaid.je/human-rights A dedicated page on “Human Rights Claims and Proceedings” exists but it contains limited information. It explains that Human Rights Legal Aid is available for: “Asylum applications (subject to a favourable opinion on the merits of the claim); Deportation where a Deportation Order has been served and you are appealing against the decision; and Human Rights breaches (only in exceptional cases where there are legitimate human rights entitlements (subject to a favourable opinion on the merits of the claim))”. A link is provided to the text of the HRJL.

Children’s Commissioner for Jersey. https://www.childcomjersey.org.je/ There is well-written information about the United Nations Convention on the Rights of the Child, but nothing on EHCR rights.

States of Jersey Complaints Panel. https://statesassembly.gov.je/Pages/Complaints-Board.aspx No reference to the HRJL.

Judicial Greffe. https://www.gov.je/Government/NonexecLegal/JudicialGreffe/Pages/WhoWeAre.aspx No information about the HRJL.

The lack of accessible information about the HRJL and ECHR rights has two significant consequences. First, islanders may not recognise when and how ECHR rights can help them in disputes with public authorities due to a lack of rights awareness. Second, lack of basic information will hinder development of a general human rights culture in the island, which goes against the raison d’etre of the HRJL.

Solution

Headline: better public information about the HRJL and ECHR rights could be developed, published and maintained.

Since 2000, a revolution in communications has taken place. Social media has become all-pervasive. The power of filmmaking and storytelling about human rights is now better understood and put into practice.[62] While there remains a place for text-based information, a HRJL communications strategy would need to incorporate media and approaches not available in 25 years ago.

Responsibility for promoting awareness and understanding of the HRJL and ECHR rights is dispersed cross several bodies, and coordination would be necessary.

- The Jersey Legal Information Board (JLIB) has a vision "for access to Jersey's legal information to be amongst the best".[63] JLIB has in the past provided funding to Citizens Advice Jersey for "rewriting advice in plain English".

- The Minister for Justice and Home Affairs has executive responsibility for the legal system.

- The Children's Commission has as one of their general functions "promoting awareness and understanding of rights of children and young people".[64]

- In 2000, the Bailiff contributed to the *Let's Get it Right!* booklet.

Consultation question on public information

18. What improvements are needed to raise islanders' awareness of the HRJL and ECHR rights, and who should lead this work?

[62] See e.g. EachOther, a UK charity "that uses independent journalism, storytelling and filmmaking to put the human into human rights" https://eachother.org.uk/about/

[63] JLIB website https://www.jerseylaw.je/Pages/About.aspx

[64] Commissioner for Children and Young People (Jersey) Law 2019 article 5.

12: Joined-up approach to CRIAs and ECHR scrutiny

Problem

As discussed above, the HRJL article 16 introduced a mechanism for ministers to make ECHR compatibility statements when they lodge a proposition for a new principal Law.

Twenty-two years later, the Children (Convention Rights)(Jersey) Law 2022 ("CCRJL") introduced a requirement for ministers and other public authorities to carry out Children's Rights Impacts Assessments. Under the Children's Rights Scheme (R.46/2024, link),

> CRIA, like any impact assessment process, is intended to inform and shape decisions in a positive way. CRIA should therefore commence as early as possible in the policy development cycle, to enable any negative impacts on children's rights to be mitigated.

There is a screening stage. Only if this indicates that a decision will have direct or indirect impact on children and young people is a full CRIA needed. Ministers and other elected members must demonstrate they have "due regard" for UNCRC rights by completing a CRIA when lodging any proposition (unless exempt) or amendment to a proposition. Duty-bearers or officials on their behalf can complete a CRIA through an online portal on the Government of Jersey website.

The problem is that there seems to be little coordination and integration of these different requirements in the legislative process.

The starting point in analysing the problem is to recognise that there are significant overlaps in UNCRC rights and ECHR rights.

UNCRC right **Applies to humans below the age of 18 years**		**ECHR right** **Applies to humans of any age (and some corporate entities)**
UNCRC article 2 non-discrimination	⇔	Overlaps with ECHR article 14
UNCRC article 6 right to life	⇔	Overlaps with ECHR article 2
UNCRC articles 7, 8, 9, 10, 16	⇔	Overlaps with ECHR article 8 right to respect for private and family life
UNCRC articles 12-13 expression of views	⇔	Overlaps with ECHR article 10 freedom of expression

UNCRC article 14 freedom of thought, conscience and religion	⇔	Overlaps with ECHR article 9 freedom of thought, conscience and religion
UNCRC article 15 freedom of association and peaceful assembly	⇔	Overlaps with ECHR article 11 freedom of assembly and association
UNCRC article 28 education	⇔	Overlaps with ECHR Protocol 1 article 2
UNCRC article 27 torture, cruel, inhuman or degrading treatment or punishment	⇔	Overlaps with ECHR article 3
UNCRC article 40	⇔	Overlaps with ECHR article 6 right to a fair trial

The two approaches to ensuing Jersey complies with international human rights obligations have been designed separately and little consideration seems to have been given as to how they intersect.

Published in different places. ECHR compliance analysis for HRJL article 16 is published within each proposition for a new principal Law. CCRJL article 12 CRIAs are sometimes published within the proposition but at other times on a separate page of the States Assembly website.

Completed by different personnel. ECHR compliance analysis for HRJL article 16 is completed by legally trained staff in the Law Officers' Department. CCRJL article 12 CRIAs are completed by wider range of people, who may not be legally trained or qualified (this is not a criticism of them).

Carried out in isolation. Where both HRJL article 16 and CCRJL article 12 compatibility exercises must be completed (a minister lodging a draft principal Law), they seem to be carried out in isolation from each other. The template used for CCRJL article 12 CRIAs does not include a way of cross referencing to ECHR rights, which may impact on children. HRJL article 16 human rights notes do not routinely point to areas of overlap between ECHR and UNCRC rights.

Published in different formats. The analysis is reported to States members and the public in quite different formats. CCRJL article 12 CRIAs use a series of tick boxes and open text boxes. HRJL article 16 human rights notes are in the style of law office memorandum.

Differential reach. HRJL article 16 human rights notes (for directly incorporated ECHR rights) are required only for propositions for a principal Law. CCRJL article 12 CRIAs (for indirectly incorporated UNCRC rights) have a broader reach to all propositions lodged by ministers.

Solution

Headline: Preparation and publication of HRJL compatibility statements and Children's Rights Impact Assessments (CRIAs) could be better integrated and coordinated.

Consultation question on CRIAs and HRJL article 16

19. Could there be a more joined-up approach to preparing, publishing, and scrutinizing Children's Rights Impact Assessments (CRIAs) and HRJL ministerial compatibility statements?

Annex: ECHR rights written into Jersey law

Schedule 1 to the HRJL reproduces in full the text the following rights from the European Convention on Human Rights.

Article 2: Right to life

Article 3: Prohibition of torture, inhuman or degrading treatment

Article 4: Prohibition of slavery and forced labour

Article 5: Right to liberty and security

Article 6: Right to a fair trial

Article 7: No punishment without law

Article 8: Right to respect for private and family life

Article 9: Freedom of thought, belief and religion

Article 10: Freedom of expression

Article 11: Freedom of assembly and association

Article 12: Right to marry

Article 14: Prohibition of discrimination in relation to other ECHR rights

Protocol 1, article 1: Protection of property

Protocol 1, article 2: Right to education

Protocol 1, article 3: Right to free elections

Protocol 13, article 1: Abolition of the death penalty.