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What are the implications of the coming into force of the Human Rights Act 2001? - The "Elephant Act?"


George Johnson Prize Trust Essay Winners: 2004

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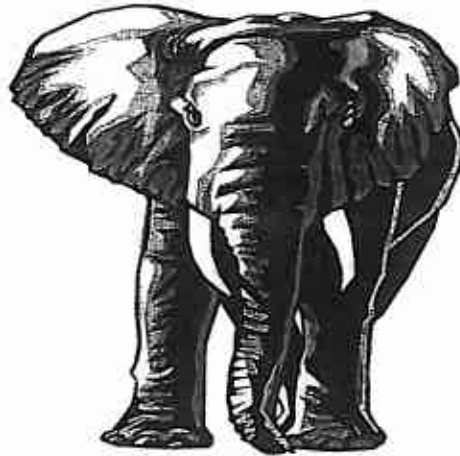
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N.B. Appendix I – Human Rights Act 2001, has been removed from the author's final version.

GEORGE JOHNSON PRIZE TRUST

WHAT ARE THE IMPLICATIONS OF THE COMING INTO FORCE OF
THE HUMAN RIGHTS ACT 2001?

THE ELEPHANT ACT?



RIGHT TO LIFE

PROHIBITION OF TORTURE

PROHIBITION OF SLAVERY AND FORCED LABOUR

RIGHT TO LIBERTY AND SECURITY

RIGHT TO A FAIR TRIAL

NO PUNISHMENT WITHOUT LAW

RESPECT FOR PRIVATE AND FAMILY LIFE

FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

FREEDOM OF EXPRESSION

FREEDOM OF ASSEMBLY AND ASSOCIATION

RIGHT TO MARRY

PROHIBITION OF DISCRIMINATION

RESTRICTIONS ON POLICIAL ACTIVITY OF ALIENS

PROHIBITION OF ABUSE OF RIGHTS

PROTECTION OF PROPERTY

RIGHT TO EDUCATION

RIGHT TO FREE ELECTIONS

GEORGE JOHNSON PRIZE TRUST

WHAT ARE THE IMPLICATIONS OF THE COMING INTO FORCE OF THE HUMAN RIGHTS ACT 2001?

*"Right... is the child of the law: from real laws come real rights; but from imaginary laws... come imaginary rights."*¹

The substantive parts of the Human Rights Act 2001 (the "Manx Act")² are not yet in force.³ It was envisaged that the substantive parts of the Act would come into force during 2003;⁴ however, the citizens of Mann are still waiting for the day when the rights enshrined in the European Convention on Human Rights (the "Convention") will become part of Manx domestic law.

Recently, in the case of *Keddie v Executors Estate of Spengler (decd)*⁵, it was confirmed that until the substantive parts of the Act come into effect, reference to the Convention may only occur where it "is necessary to resolve an ambiguity in a statute or uncertainty in the common law or to inform the exercise of an administrative discretion". His Honour Deemster Doyle has also pointed out that cases such as *O, Callaghan v Teare*⁶, suggest that reference to the Convention is permitted in relation to the exercise of a judicial discretion.⁷

A HUMAN RIGHTS TRADITION IN THE ISLE OF MAN

I Does the Isle of Man actually need additional legislation to protect human rights?

The Committee of the House of Keys on the Manx Bill of Rights produced its Final Report in September 1981 (the "Keys Committee"). The Keys Committee concluded:

"It is inconceivable that anyone in the Isle of Man is opposed to the principle of the protection of the individual's basic human rights. However, there is a large body of opinion which would argue that the rights of the individual are already fully protected not only through the unique machinery of either the petition for redress of grievance to Tynwald at St. Johns, or the Petition of Doleance to the Chancery Court, but also through a person's ready access to members of Tynwald for assistance in solving his

¹ Jeremy Bentham, *Anarchical Fallacies* in J. Bowring (ed.) *Works* vol. 2 (1843), p. 501 in *The Oxford Dictionary of Quotations* (1996) Oxford University Press, p. 64.

² See Appendix I.

³ The Human Rights Act 2001 (Appointed Day) (No 1) Order 2001 brought into effect limited provisions of the Act, such as the title, provisions which enable subordinate legislation to be made under the Act and definitions for certain limited purposes - See David Doyle, "A Note on Human Rights - The Administrative/Judicial Discretion Debate".

⁴ Isle of Man on-line "Human Rights Act 'Nothing to do with straight bananas'", 18 December 2001 cited at <http://www.iomonline.co.im> (source last accessed in May 2004).

⁵ January 2003, Manx Law Bulletin No. 36 (1st January 2003 - 31st July 2003), p. 18.

⁶ [1981-83] MLR 103.

⁷ Application for bail by *Ian McStein* to a Judge of the High Court - transcript of an oral judgment delivered by His Honour Deemster Doyle at Douglas on the 9 April 2003, CLA 2003/49 (9th April 2003), paragraphs 26-29. Also see *Stephen Barry Watterson v Attorney-General*, CLA 2003/131.

*problems. It is unthinkable that any Manx Government might seek to suppress any of their rights or the means of enforcing them. It is unthinkable that any Manx Government might seek to suppress any of these rights or the means of enforcing them. There is consequently a division of opinion over the need for additional legislation to ensure that such protection continues or is fortified".*⁸

HM Attorney General W.J.H. Corlett QC is of the opinion that whilst the above statement of the Keys Committee is indicative of the Isle of Man's commitment to the protection of human rights, it also demonstrates "an inbuilt caution in promoting change for change's sake", especially when there are identifiable methods by which Tynwald and Manx Courts are already able to protect human rights.⁹ However, quite apart from "change for change's sake", the Manx Act seems to be about attaining a "human rights culture"¹⁰. If successful, the implication of this new "human rights culture" could be a "widely-shared sense of entitlement to these rights, of personal responsibilities and of respect for the rights of others" which would impact upon "all our institutional policies and practices".¹¹

II The Isle of Man and the Convention

The Government of the United Kingdom (the "UK") extended the Convention to the Isle of Man in October 1953.¹² However, this was not done in a democratic manner¹³ - Tynwald was not consulted and the only concurrence received was that of the Lieutenant Governor.¹⁴

The highly publicised cases of *Tyrer v United Kingdom*¹⁵, which resulted in the European Court of Human Rights ("ECtHR") holding that judicial corporal punishment in the Isle of Man constituted degrading treatment and contravened Article 3 of the Convention, has done nothing to promote the Isle of Man as being a modern island which recognises and promotes human rights. Indeed, in that case, it was argued that birching was in fact a "local requirement". Furthermore, the Island is constantly battling against its history of a lack of tolerance towards homosexuality.¹⁶ One of the theoretical implications of the coming into force of the Manx Act, may be that these past events are finally confined to history books. Even though the Isle of Man may have had a "long standing commitment" towards the protection of human rights, the Manx Act provides tangible statutory evidence, which should go some way towards demonstrating that the protection of human rights forms a central tenet of the Manx legal system.

⁸ Final Report of the Committee of the House of Keys on the Manx Bill of Rights Bill, paragraph 3.2.

⁹ Address given by HM Attorney General W.J.H. Corlett QC, "The Human Rights Bill 2000" (Isle of Man Human Rights Seminar, Friday 23rd June 2000), p.2.

¹⁰ Address given by Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor, "Human Rights and Constitutional Reform", Law Society and Human Rights Lawyers' Association, 17 February 2004, cited at <http://www.dca.gov.uk/speeches/2004/lc170204> (source last accessed 28/06/04).

¹¹ *Ibid.*,

¹² HM Attorney General W.J.H. Corlett QC, *op. cit.*, p.3.

¹³ Final Report of the Committee of the House of Keys, *op. cit.*, paragraph 1.6; also see *ibid.*

¹⁴ HM Attorney General W.J.H. Corlett QC, *op. cit.*, p.3.

¹⁵ (1978) 2 EHRR 1.

¹⁶ It was not until the enactment of the *Sexual Offences Act 1992*, that certain homosexual acts were decriminalised.

III A display of independence?

The extension of the Convention to the Island, without prior consultation, arguably undermined the independence of the Isle of Man. The addition of the Manx Act to our statute books, provides the Island with an opportunity to assert its independence, and following Bentham's analogy, create a child of our law – a child that will be our own flesh and blood.¹⁷ On the other hand, it has been suggested that the incorporation of the Convention into Manx law would threaten the independence of the Manx Courts.¹⁸ Section 2 of the Manx Act specifies that a court or tribunal determining a question in connection with a Convention right must take into account, any judgment, decision, declaration or advisory opinion of the ECtHR. In *R (Anderson) v Secretary of State For The Home Office*¹⁹, the House of Lords outlined that the duty under section 2 of the English Act (which is equivalent to section 2 of the Manx Act) “meant that the courts must take into account any relevant judgments of the Strasbourg court and that the House of Lords would not, without good reason, depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber”.²⁰ It has been suggested that this could result in the Manx courts becoming “‘branch offices’ of the Strasbourg Court”.²¹

HM Attorney General W.J.H. Corlett QC is of the opinion “that it is necessary for the Island from time to time to demonstrate that it is able to adapt to change and to conform, when necessary, with international norms and standards of conduct”.²² The Isle of Man is heavily reliant upon its financial services sector, which has been AAA rated by Standard & Poor's and Moody's. It is therefore imperative that as much as possible is done in order to preserve the Island's reputation for financial services; “businesses would be loathe to invest in a jurisdiction which, although in the top division so far as regulation of financial services is concerned, did not recognise and enforce human rights”.²³ Bringing the Act into force “will undoubtedly enhance our reputation as a responsible jurisdiction, fully aware of its international obligations”.²⁴

¹⁷ Indeed, Mec Vannin, a political party seeking to achieve “national independence for Mann as a sovereign state, based on a republican form of government”, is in favour of the introduction of a Manx Bill of Rights – see Mec Vannin Policy Summary, February 2003, cited at <http://www.manxman.co.im/mecvan/mvpolicy.html> (source last accessed on 21 June 2004).

¹⁸ See the Final Report of the Committee of the House of Keys, *op. cit.*, p.28 (letter from J. Slinn, dated 9 June 1981).

¹⁹ [2002] UKHL 46.

²⁰ J. Wadham, H. Mountfield & A. Edmundson, *Blackstone's Guide to The Human Rights Act 1998* (Oxford University Press, 2003), p.63. Also see R. English “Autonomy and the Human Rights Convention” *NLJ*, May 31, 2002, p. 852, which discusses the implications of English Act on the doctrine of precedence. English suggests that as opposed to be bound by a decision of the House of Lords, a lower court would be free to follow a conflicting Strasbourg case (p.853).

²¹ Final Report of the Committee of the House of Keys, *op. cit.*, p.28 (letter from J. Slinn, dated 9 June 1981).

²² HM Attorney General W.J.H. Corlett, *op. cit.*, p.2.

²³ *Ibid.*,

²⁴ *Ibid.*, p.2 & p.16.

B DRAWING UPON THE EXPERIENCES OF THE UK

Following the decision of the Staff of Government Division in *Frankland v R*²⁵, decisions of the English courts concerning the Human Rights Act 1998 (the “English Act”), particularly the decisions of the House of Lords and the Court of Appeal are persuasive in the Manx courts but not binding – “unless either there is something to the contrary in a Manx statute or there is some clear decision of a Manx court to the contrary, or exceptionally, there is some local condition which would give good reason for not following the particular English decision”. Thus, an implication of the Manx Act will be that, in certain circumstances, decisions in relation to the English Act will be of persuasive authority in the Isle of Man.

It is important to remember that although the Manx Act and the English Act are largely the same, they are not identical. A significant difference is that section 10 and schedule 2 of the English Act provide for a fast-track procedure in order to amend legislation that cannot be reconciled with the Convention. Although section 4 of the Manx Act will enable the Manx courts to make a declaration of incompatibility if the law in question cannot be read in conjunction with the Convention, remedial orders may not be made even if there are “compelling reasons” for doing so.²⁶ Based upon the reasoning of Wadham, Mountfield and Edmundson, this suggests that the structure of the Manx Act is weaker than that of the UK Act.²⁷ Thus, in this respect, perhaps the impact of the Manx Act will not be as extensive as the UK Act – the Isle of Man will have to rely on Tynwald to efficiently deal with any legislation that is incompatible with the Convention.

C AGAINST WHOM ARE WE PROTECTED?

Section 6 of the Manx Act provides that “it is unlawful for a *public authority* (emphasis added) to act in a way which is incompatible with a Convention right”. Public authority includes “a court or tribunal and any person certain of whose functions are functions of a public nature”. More simply, this will include, for example, “government departments, government boards and local authorities”.²⁸ However, the definition of a public authority will not include Tynwald, the Legislative Council, the House of Keys or a person exercising functions in connection with proceedings in Tynwald, the Legislative Council or the House of Keys”.²⁹

The aforementioned definition appears relatively straightforward, although it has been suggested that the definition of public authority, is perhaps one of the most important issues to have emerged under the English Act.³⁰ This is because institutions are increasingly “becoming ever more involved in the provisions and management of “public” services”.³¹ Indeed, the emergence of private bodies, which provide public functions, has complicated the definition of public authorities in the UK.³² The scope

²⁵ 1978-80 MLR 275.

²⁶ Wadham, Mountfield & Edmundson, *op. cit.*, p.106.

²⁷ *Ibid.*,

²⁸ Report of Proceedings of House of Keys, 9 May 2000, (Human Rights Bill – Second Reading Approved – Reference to a Committee), citing Mr Brown.

²⁹ See section 6 of the Manx Act.

³⁰ J. Burton, “Mind the gap”, *NLJ*, December 20, 2002, p.1933.

³¹ *Ibid.*,

³² *Ibid.*,

of the definition of public authorities will clearly affect the potential impact of the Manx Act. A narrow interpretation of “public authorities”, which would enable the Isle of Man to “discharge its responsibilities by entering into private arrangements which are not subject to effective judicial control threatens to seriously undermine the effectiveness” of the Manx Act.³³ Strasbourg cases such as *Chassagnou v France*³⁴ suggest that “it is substance and not form” which determines whether an act is considered to be “public”. If this was not the case and countries could liberally decide whether an activity is public or private, “it might lead to results incompatible with the object and purpose of the Convention”.³⁵

Ideally, the implication of this protection against public authorities is that:

1. The “credibility and effectiveness” of public authorities will be increased;
2. Our “democracy and public engagement with decision-making” will be enhanced; and
3. “Trust and accountability in public bodies will be strengthened”.

D WHO IS PROTECTED?

Section 7(6) of the Manx Act indicates that “a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention” before the ECtHR. Thus, the Manx courts will be bound by Strasbourg case law when it comes to determining who is an actual victim.³⁶ The ECtHR and the European Commission on Human Rights, hold that a person is a victim if they are “directly affected by the act or omission” which constitutes the complaint.³⁷ Despite this, the applicant does not need to have suffered as a consequence of the complaint, on the condition that there is a “real risk” of being affected.³⁸

It would appear that in the majority of cases, the issue of standing under the Manx Act will not be problematic – for example, a litigant who endeavours to use Article 5 upon the refusal of bail, is undoubtedly a victim.³⁹ However, the issue of standing may become more complex when determining, for example, whether a public-interest group is a representative association or an actual group of victims under section 7(3) of the Manx Act. It would seem that section 7(3) of the Manx Act does not enable representative groups, who have not individually suffered, from relying on the Convention in Petitions of Doleance proceedings, except to the extent that one may do so regardless of the Manx Act.

In order to ensure that breaches of the Convention do not get swept under the carpet (i.e. because an “nominal applicant” cannot be ascertained), one must hope that the

³³ *Ibid.*,

³⁴ ECtHR, 29 April 1999.

³⁵ Burton, *op. cit.*, p.1933, citing *ibid.*

³⁶ Wadham, Mountfield & Edmundson, *op. cit.*, p.89.

³⁷ *Ibid.*,

³⁸ *Ibid.*, (referring to the decisions of the ECtHR in *Klass v Germany* EHRR 214 and *Marckx v Belgium* (1979) 2 EHRR 330.

³⁹ *Ibid.*, p.90.

judiciary will not use the provisions of section 7(3) to back-step from the more liberal interpretation that has recently been given adopted in relation to locus standi more generally.⁴⁰ There is no reason why the Manx courts should take a step back, especially in the light of section 10 of the Manx Act, which safeguards existing rights.⁴¹

In *Isle of Man International Broadcasting plc & Communications Commission v Cussons*⁴², reference was made to the *Fleet Street Casuals Case*⁴³, in which Lord Diplock stated that, in his view it would “be a grave lacuna in our system of public law if a pressure group, like a federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped”.⁴⁴ It is to be hoped that the courts will not interpret section 7(3) of the Manx Act as preventing an association of interested individuals from being able to bring a human rights challenge.⁴⁵ The implication of this would be that the scope of the Manx Act would be more limited than it may otherwise have been.

E WHAT CAN WE EXPECT?

When the UK courts have had to address a particular issue before the ECtHR, there has been a reluctance to disregard “what are seen as proper areas of Parliamentary control”.⁴⁶ An example of this can be seen in the Privy Council’s decision in *R v Brown*⁴⁷, in which the rule against self-incrimination was interpreted narrowly, so as to preserve section 172 of *Road Traffic Act 1988*⁴⁸ - this may be contrasted against the ECtHR’s broad interpretation of the rule against self-incrimination just weeks later.⁴⁹ Thus, it would seem entirely possible that the decision in *Brown* may not have been upheld if there had been an application to Strasbourg.⁵⁰ Perhaps then, the victim in *Brown* would have been better protected had the English Act not been used. However, one has to pragmatically consider whether the victim in *Brown* would have had the resources and/or the inclination to initially embark upon the long road to Strasbourg – if the answer to this is no, then the victim in *Brown* will not be in any worse position than he would have been in had the English Act not have been created. Nevertheless, the decision in *Brown* suggests that the Manx domestic courts may be furnished with opportunities to take a cautious and restrictive approach to the rights enshrined in the Convention, thus enabling the potential protection afforded by the Manx Act to be curtailed. However, this would only seem to be a short-term negative implication of the coming into force of the Manx Act, as the Strasbourg jurisprudence is constantly developing and thus setting a benchmark for the protection of human rights.

⁴⁰ *Ibid.*,

⁴¹ Wadham, Mountfield & Edmundson, *op. cit.*, p. 91.

⁴² 2DS 2002/59 (in the High Court of Justice of the Isle of Man Staff of Government Division).

⁴³ *IRC v National Federation of Self-Employed and Small Businesses Ltd* (1982) AC 617,

⁴⁴ *Ibid.*, paragraph 28.

⁴⁵

⁴⁶ J. Wadham and R. Taylor, “The Human Rights Act two years on” *NLI*, October 4 2002, p.1485.

⁴⁷ [2001] 2 All ER 97.

⁴⁸ Act of Parliament.

⁴⁹ *Supra* note 33.

⁵⁰ *Ibid.*,

Section 3 of the Manx Act requires the Manx courts to interpret present and future legislation in a way that is compatible with the Convention. The implication of this is that it entwines the Convention with the Manx legal system⁵¹ and requires “a new approach to the interpretation of statutes”.⁵² Where the legislation in question is the same, the Isle of Man will be able to draw upon the experiences of the UK in this regard, thus potentially saving a considerable amount of time and money. Nevertheless, the Island will have to take particular care in respect of some specifically Manx laws – for example, is the *Action of Arrest Act 1953* compatible with the Convention?

F POTENTIAL PROBLEMS

When one peruses the Hansard Papers in relation to the Human Rights Bill⁵³ (the “Bill”), there is much support for the substantive elements of the Act. However, the Bill was not free from opposition - one member of the House of Keys referred to it as a “criminal’s charter” which “really does not affect the man on the street” and suggested that the potential implications of the Manx Act will be as follows:

*“It will cause confusion in the legal profession; it will cost government an absolute fortune in the years to come; it will cause untold bureaucracy; it will lead to many amendments of Acts of Tynwald because of incompatibility reasons... it will lead to chaos and confusion, and really, in closing, I just think that this Bill, to sum it up, will actually negate the public’s fundamental right to see real justice being seen to be done.”*⁵⁴

The “informed view” is that the entry into force of the English Act has “proved to be a great success” and has “gone extremely smoothly”.⁵⁵ The Isle of Man should look with confidence upon this “smooth transition”⁵⁶, as much can be learnt from the experience of the UK. Lord Woolf has outlined five reasons for this “smooth transition” in the UK:⁵⁷

1. Although citizens of the UK were not “as well off under the common law”, the values enshrined in the Convention, are very similar to the values that have been engrained in the common law for hundreds of years – this is also true in the Isle of Man.
2. During the two-year interlude prior to the coming into force of the English Act, there was rigorous training for the judiciary and “official,

⁵¹ Wadam, Mountfield & Edmundson, *op. cit.*, p.12/13.

⁵² Lord Woolf, The Lord Chief Justice of England and Wales, “The Impact of Human Rights”, Speech at The Oxford Lyceum, 6 March 2003, cited at <http://www.lcd.gov.uk/judicial/speeches/lcj060303.htm> (source last accessed 28/06/04).

⁵³ See Report of the Proceedings of House of Keys, 30 May 2000; Report of Proceedings of House of Keys, 23 May 2000; Report of Proceedings of House of Keys, 30 May 2000; Report of Proceedings of Legislative Council 27 June 2000; Report of Proceedings of Legislative Council, 24 October 2000. Report of Proceedings of House of Keys, 9 May 2000 (collectively referred to the “Hansard Papers”).

⁵⁴ Report of Proceedings of House of Keys (Third Reading Approved), 30 May 2000, citing Mr Houghton.

⁵⁵ Lord Woolf, *op. cit.*,

⁵⁶ *Ibid.*,

⁵⁷ *Ibid.*,

Ministers and advocates were immersed in a human rights culture".⁵⁸ Furthermore, public bodies were evaluated in order to identify and modify any actions that could not be reconciled with the English Act. The Island has followed the advice of the Keys Committee⁵⁹ and His Honour J.W. Corrin C.B.E. and has hastened slowly with the Manx Act.⁶⁰ Nevertheless, there have been substantial seminars and literature published on the Manx Act.⁶¹

3. The jurisprudence surrounding the Convention has evolved "in very much a common law manner".⁶²
4. The UK, as a member of the European Union (the "EU"), had experience of "applying the Luxembourg jurisprudence".⁶³ The Isle of Man has a special relationship to the EU, by way of Protocol 3 to the UK's Act of Accession. Although the Manx courts are not obliged to follow decisions of the European Court of Justice with regard to aspects of European law that are not applicable to the Island by virtue of Protocol 3⁶⁴, it would still seem fair to claim that the Isle of Man has some experience of the Luxembourg jurisprudence.⁶⁵
5. The power of the UK courts has been limited to declaring, where relevant, that domestic legislation is incompatible, thus leaving Parliament to find an appropriate solution.⁶⁶ Section 4 of the Manx Act similarly limits the Island's courts.

⁵⁸ For an example of a training initiative see R. Ede, "Human Rights Act: defence solicitors invited to join magistrates' court training programme" *Criminal Practitioners Newsletter*, January 2000, p.2.

⁵⁹ Back in 1981, the Keys Committee also warned that "the history of the Isle of Man's participation in the Convention, particularly at the outset, is an object lesson against undue haste in enacting legislation, the implications of which have not been carefully scrutinised".

⁶⁰ HM Attorney General W.J.H. Corlett, *op. cit.*, p.9. Also see Report of Proceedings of House of Keys, 30 May 2000, (Human Rights Bill-Third Reading), citing Mr Rodan. Indeed, there has been a gap of more than three years between the passing of the Manx Act on the 16 January 2001 and the date upon which the substantive elements of the same will eventually come into force. It was reported in the Isle of Man Examiner on 29 June 2004, that the delay in introducing the Manx Act could soon be explained in the House of Keys, as Onchan MHK Peter Karran is due to ask Mr Corkill why the substantive parts of the same have not been brought into force and when the delay will end. The Hansard Paper in relation to the same has not yet been published.

⁶¹ For example, a brochure entitled *HuMann Rights: Further information about the Human Rights Act* (Office of The Council of Ministers, January 2003); a seminar held at the Mount Murray Hotel & Country Club on 29 November 2000, entitled *Human Rights: The impact of the new legislation*; the Isle of Man Human Rights Act Conference 2001, organised by Simcocks Advocates on 26 February 2003; The Human Rights Act 2001: An Introduction for Public Servants in the Isle of Man (The Chief Secretary's Office Isle of Man Government, January 2002); D. Doyle, Talk to the Isle of Man Young Lawyers Association, *The Human Rights Act 2001*, 13 June 2002; Presentation by the AIRE Centre, 14 May 2003 and The Isle of Man Law Society Warning to All Advocates 2The Human Rights Act creates important new rights for your clients – be ready for it" (October 2000).

⁶² *Supra* note 49.

⁶³ *Ibid.*,

⁶⁴ See *Fielding v Oak* 1999-01 MLR 28.

⁶⁵ See *Re Sharpe* 1996-98 MLR 64; *DHSS v Barr* 1990-92 MLR 243; *Re Manx Ices* 2001-02 MLR 64. Also see Address by Deemster T.W. Cain, "The Isle of Man and the European Union", 25 November 1995, which gives an overview of the Island's relationship to the EU, and also details the impact of the EU other than under Protocol 3.

⁶⁶ *Ibid.*,

Sir Robin Auld has reported that the fear that the English courts "would be overwhelmed by human rights challenges... has not happened".⁶⁷ Furthermore, declarations of incompatibility have been limited due to section 3 of the English Act (which is equivalent to section 3 of the Manx Act), as it provides that "Acts and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".⁶⁸

The relevant Hansard Papers repeatedly identify legal aid as being a potential problem. For example, a means-tested system of legal aid may mean that victims' who are just above the threshold for the full entitlement to legal aid may "not be able to afford to progress a human rights issue which could be quite costly and therefore they would lose out on trying to progress something of their rights."⁶⁹ On the other hand, the Convention itself may actually increase the availability of legal aid where the absence of assistance would prevent a fair hearing.⁷⁰ It has been suggested that the as opposed to a merits test, additional factors should be considered, such as "the ability of the individual to present his case without the assistance of a lawyer...the complexity of the case; and the resulting serious consequences if the party loses or is unable to adequately defend the case".⁷¹ An implication may be that the Manx Act itself could be used to gain funding that a victim may not otherwise have been entitled to. More generally, one should remember that legal aid is a controversial subject and that the legal aid debate is not particular to the Manx Act.⁷²

Furthermore, deserving victims may be assisted by "committed, professional and caring advocates [who] will appreciate the need on occasions to assist individuals and indeed the court where necessary on a pro bono basis where other funding cannot be secured".⁷³ The Manx Act therefore seems much more accessible than the present road to Strasbourg – on average, it costs approximately £30,000 and a wait of five years (after exhausting all available domestic remedies) to take a case to the ECtHR.⁷⁴

There will always be opposition to potential legislation and one can hardly expect the addition of such a substantial piece of legislation to Manx statute books to be trouble free. Bentham's analogy of rights being a "child" is perhaps more significant than one may first realise – after all, no one has ever been blessed with a child that comes in hand with a "trouble-free" guarantee! One has to focus on the joy and happiness that a child should bring, whilst positively nurturing that child through troubled periods, so that future lessons will be learnt.

⁶⁷ Cited in R. Epstein, "The Human Rights Act-will the law ever be the same again?" *NLJ* October 26 2001, p.1558.

⁶⁸ Lord Woolf, *op. cit.*,

⁶⁹ Report of Proceedings of House of Keys, (Human Rights Bill - Third Reading), 30 May 2000, citing Mr Henderson.

⁷⁰ R. Birch, "Human Rights, directors and legal aid-part 2" *NLJ*, February 23 2001, p.277.

⁷¹ *Ibid.*,

⁷² The Legal Services Commission completed a review into legal aid in December 2003 – see Tynwald Court Hansard, 20 January 2004 (written answer 35).

⁷³ See the judgment delivered at Douglas on 10 December 2003 by His Honour the Deemster Doyle in *R v C* DIV 2003/2004.

⁷⁴ See "Human Rights Bill: A Consultative Document prepared by The Council of Ministers" (August, 1999).

G POTENTIAL BENEFITS

Despite the unhappy record that the UK has had with Strasbourg, Lord Woolf has welcomed the English Act; he suggests that it will enable the judiciary to “play its proper role in the development of human rights” and has reduced the vulnerability of the government to the contravention of human rights.⁷⁵ - the Isle of Man has the opportunity to similarly benefit. In fact, the Manx Act could actually strengthen “our democracy by giving each member of the public the right to seek the help of the courts to protect his or her human rights in a manner that was not previously available”.⁷⁶ It will enable one to “go before the courts and say my right to life is threatened: it is the State’s duty and the Court’s duty to protect me”.⁷⁷

Petitions of Doleance are a simple and speedy means for the ordinary citizen to obtain redress against unfair, unlawful or unreasonable administrative actions.⁷⁸ Petitions of Doleance have been described as “a powerful weapon in the hands of those aggrieved”⁷⁹ and one may therefore argue that the Manx Act is therefore not necessary. However, the Manx Act will not remove this powerful weapon from those aggrieved by administrative decisions (section 10 specifically safeguards existing rights) and has the potential to enhance the protection available.

Following a successful Petition of Doleance “the most a court can usually do is to send the decision back to the decision-maker”, which may in fact be the same as the one that made the original decision,⁸⁰ whereas under section 8 of the Manx Act, a court “may grant such relief or remedy, or make such order, within its power as it considers just and appropriate” and damages will be awarded on a just satisfaction basis. Thus, an implication of the Manx Act will be the focus of the courts will shift “180 degrees” by directly protecting the rights of the individual as opposed to enforcing public duties.⁸¹

By taking individual Convention articles and referring to recent English cases, one can more specifically investigate the potential implications of the Manx Act. However, this detail is very much dependent upon the foundations of the Manx Act. For example, how will “public authorities” construed, who will have locus standi, who will be entitled to legal aid and who will satisfy the definition of a “victim”? It would seem that it is fundamental concepts such as these that enable the impact of the importation of the Convention into our domestic law to be widened or narrowed accordingly. The Manx Act has the potential to affect society at large, both young and old; children excluded from school may have a claim for damages⁸² as “no person shall be denied the right to education”⁸³ and in certain circumstances, elderly persons

⁷⁵ Lord Woolf, *op. cit.*,

⁷⁶ *Ibid.*,

⁷⁷ *Ibid.*,

⁷⁸ See for example *Re Kerruish* 1961-71 MLR 371.

⁷⁹ A. Corlett “Remedy of last resort?” cited at <http://www.simcocks.co.im> (source last accessed 26/06/04).

⁸⁰ *Ibid.*,

⁸¹ Lord Woolf, *op. cit.*,

⁸² See C. Sheldon, “Ali-the right to education” *NLJ*, 18 June 2004, p.928 (discussing the case of *Ali v The Head Teacher and Governors of Lord Grey School* [2003] EWCA Civ 382 (29 March 2004).

⁸³ See Article 2 of the First Protocol to the Convention.

may be able to claim that their right to liberty⁸⁴ has been breached if placed in a nursing home against his/her will.⁸⁵

The Manx Act will also have implications for the constitution of the Isle of Man, as “it represents a shift in power from the legislature to the judiciary”.⁸⁶ Lord Woolf acknowledges that this is “an additional tension” as although “administrators and Ministers are used to our judges reviewing their actions” the importation of the Convention into domestic law means that the “scrutiny can be more intense”.⁸⁷ The Deemsters of the Island are accustomed to reviewing and where necessary, quashing the decisions of Government tribunals and Ministers; the Deemsters “are well able to cope” with their role under the Manx Act and “human rights decisions can be safely committed to the Deemsters”.⁸⁸

H SUMMARY

By understanding the potential implications of the Act, both negative and positive, the Isle of Man as a whole can prepare for birth of Convention into our domestic law. The Manx Act is for us all and it is only by collectively believing in it that we can rely on the potential protection afforded by it. By collectively believing in the Manx Act, we can ensure that the child of our law is not an imaginary law that is “seen but not heard”. So long have we been awaiting the birth of this child, that perhaps we could be expecting “nature’s great masterpiece, an elephant”⁸⁹; this would be worth the wait as the elephant of our law would certainly be both seen and heard, and would never forget any breaches of our rights! In some parts of the world, the elephant symbolises good fortune - let us all hope (and believe) that the “*Elephant Act*” has the potential to be a masterpiece of Manx law.

⁸⁴ See Article 5 of the Convention.

⁸⁵ See R. English “In the Autumn of our lives” *NLJ*, March 29 2002, p.474.

⁸⁶ Report of Proceedings of House of Keys, (Human Rights Bill – Second Reading Approved – Reference to a Committee – Debate Commenced) 9 May 2000, citing Mr Quine.

⁸⁷ Lord Woolf, *op. cit.*,

⁸⁸ *Supra* note 10.

⁸⁹ J. Donne 1572-1631 (English poet and divine) “The Progress of the Soul” (1601), cited in *The Oxford Dictionary of Quotations* (Oxford University Press, 1996), p. 251.

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