

YOUNGLAWYER

discrimination, does this then transgress traditional rules of formation? If a decision not to proceed is based on discrimination, would courts award damages to an 'injured party' even though a contract did not exist?

Would the outcome be different if the discriminatory act had taken place pre-contract? The case does not test this. Surely this would represent a serious erosion of the freedom of individuals to do business? Was it the intention of the court to interfere with commercial decisions in such a draconian way? The judgment is contradictory and, for this reason, media reporting has voiced concerns.

The freedom to enter into a contract has not altered following this judgment, but it does demonstrate that demographic forces could lead to changes ahead. Jurisdictional issues aside, consequences will only flow if the judgment is upheld on appeal. **SJ**

enough to

awareness of PCCM's Now TV channel, and it would therefore be of no benefit if Sky were to be passing off PCCW's brand.

This judgment also highlights the importance of IP protection and the need for this to be considered at the inception of a brand. Words such as 'now' are difficult to protect and are unlikely to be registered as trade marks due to their descriptive nature.

This leaves a company or brand inherently vulnerable, as companies in the same industry are able to use the same descriptive words, and it is then the business' responsibility to prove that a large proportion of the target market associates the word with their brand, to prevent others capitalising on it. **SJ**

What's next for the Human Rights Act?

The government needs to understand the uses (and abuses) of human rights legislation before deciding whether to replace it, says **Mary Hodgson**

One of the widely reported aims of the new government is the proposed replacement of the Human Rights Act 1998 (HRA) with a British Bill of Rights and Responsibilities.

The complaints about the HRA are that it has given the European Court of Human Rights (ECtHR) sovereignty over the Supreme Court; the decisions of the ECtHR have moved away from the original intentions of the creators of the European Convention on Human Rights (ECHR); and there is no common-sense approach.

The intentions of the (undrafted) Bill are to: reclaim final decisions on cases for UK courts, end the ECtHR's ability to change UK laws, reclassify decisions of incompatibility as advisory rather than binding, and limit human rights law to 'the most serious cases'. Examples of serious cases are those involving criminal law, threats to liberty, and the right to property.

As a junior litigator, most of the instances in which I have faced arguments invoking the HRA have involved unrepresented litigants in person using it in inappropriate circumstances. Those parts of their cases involving the HRA were often dismissed swiftly without any real consideration or argument.

Likewise, references to the HRA can turn up in pleaded cases alongside arguments of estoppel and business efficacy, included almost as a catch-all rather than a stand-alone head of claim or point of defence.

In such circumstances, should lawyers be concerned about the proposed repeal of the HRA and what requirements should we have for the Bill?



Even without the Act, UK citizens would be able to apply to the European courts

If, as stated, the intention is to reclaim sovereignty for the Supreme Court, it will not be sufficient to stop at the HRA. Even without the Act, UK citizens would be able to apply to the ECtHR in the same way they did pre-HRA. Likewise, the European Court of Justice (ECJ) would still interpret ECtHR judgments, and the UK courts would enact the ECJ judgments. If the UK were to remain in the EU, it would be difficult to justify a refusal to be bound by the judgments of either the ECtHR or the ECJ.

Further, what does 'the most serious cases' mean? The examples provided so far do not

seem to fit with what we might think to be the obvious use of human rights legislation: providing protection for those unable to protect themselves, such as vulnerable adults, children, victims of crime, and minority groups.

The HRA may be a divisive issue, but it is important to understand its uses (and abuses) before we can understand whether or how to replace it. The repeal of the HRA, if it happens, is not going to be simple. The process is likely to, and should, take time; it should involve scrutiny at each stage as well as wide consultation throughout the legal profession. Whether we use the Act regularly or not, we should be willing to be involved in this process to ensure that the right balance is struck and nothing valuable is lost. **SJ**



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