

The case for the Human Rights Act

PART 1 OF 3 RESPONSES TO THE
COMMISSION ON A BILL OF RIGHTS:
HRA PLUS NOT MINUS



**Equality and
Human Rights**
Commission

Foreword

The Commission welcomes this opportunity to respond to the consultation by the Commission on a Bill of Rights on whether a UK Bill of Rights should be developed to replace the Human Rights Act. As Britain's National Human Rights Institution we believe that we have a valuable role to play in providing evidence, advice and support in these discussions.

Britain has a proud and long tradition of developing human rights from the Magna Carta in 1215, the Bill of Rights in 1689, the involvement in drafting the European Convention on Human Rights, and the enactment of the Human Rights Act in 1998. This proud tradition continues with the UK government taking over the chairmanship of the Council of Europe for six months from November this year, and a British judge Nicolas Bratza being appointed the president of the European Court of Human Rights.

The Commission believes that the Human Rights Act has provided essential human rights protection to everyone in Britain and that it meets the needs of our British constitutional traditions. Our position is that if any Bill of Rights were developed it should only build on the rights and mechanisms contained in the Human Rights Act .

The Human Rights Act has had a significant positive impact on "bringing rights home" to everyone in Britain. Whereas before people would have to endure the considerable delay and expense of bringing a human rights claim in the European Court of Human Rights, the Act has meant that they could gain protection in our British courts. The Human Rights Act has also been designed to suit the particular British constitutional traditions of parliamentary sovereignty . Courts seek to interpret

legislation compatibly with Convention rights but if they cannot, they have no power to strike down legislation. In addition, the Human Rights Act and the Convention rights have been woven into the recent constitutional fabric of the devolution settlements with Scotland, Wales and Northern Ireland. This ensures that human rights are central to the decision making of the devolved legislatures.

However, despite the reality of the positive impact of the Human Rights Act, evidence from reviews of the Act by the Commission and the government demonstrate that there is a substantial lack of understanding of the Act. Worst still, there are significant misconceptions of whom it protects, where it derives from and the limits of its application among the public, politicians, lawyers, the media and public authorities.

Major work is required by the government, the Commission and other key stakeholders to improve the understanding and application of the Act. But it does not in our view justify amending or repealing the Act itself, which if done would make Britain the first European country to possibly regress in the levels of its human rights protection. We look forward to discussing our response in more detail with the Commission on a Bill of Rights over the coming months.

Geraldine Van Bueren

Lead Commissioner on Human Rights

Contents

Introduction

Chapter 1: Do we need a Bill of Rights?

1. The Commission's position
2. Human rights in British history
3. The Human Rights Act: a British model of human rights legislation
4. The effectiveness of the Human Rights Act

Chapter 2: Retaining the rights and mechanisms of the HRA

1. Section 2: Interpretation of Convention rights
2. Section 3: Interpretation of legislation
3. Section 4: Declarations on incompatibility
4. Section 6: Acts of public authorities and meaning of 'public function'
5. Section 8: Judicial remedies
6. Section 10: Remedial action
7. Section 12: Freedom of expression
8. Section 13: Freedom of thought, conscience and religion
9. Section 14 and 15: Reservations and Derogations
10. Section 19: Statements of compatibility

Chapter 3: Devolution implications

1. Scotland
2. Wales
3. Northern Ireland

Chapter 4: The process for developing any Bill of Rights

Introduction

'Do we need a UK Bill of Rights?' is the question posed by the Commission on a Bill of Rights (CBR). The Equality and Human Rights Commission's simple answer to that is we already have one in the Human Rights Act and we should keep it.

The longer answer requires an exploration of the development of human rights in Britain over 800 years, the development of international human rights frameworks in the aftermath of World War II, the path to incorporation of the European Convention on Human Rights (ECHR) in the UK by the Human Rights Act 1998 (HRA), and an analysis of the operation of the mechanisms in the HRA. This response provides that analysis, and argues that the path forward should build on the current rights and mechanisms in the HRA, rather than dilute or repeal them, to be 'HRA plus', not 'HRA minus'.

It was Winston Churchill who inspired and worked towards the creation of the European Convention on Human Rights to help prevent a repetition of the atrocities of World War II. In his opening speech to the Congress of Europe in May 1948, Churchill proclaimed that the new Europe:

*'must be a positive force, deriving its strength from our sense of common spiritual values. It is a dynamic expression of democratic faith based upon moral conceptions and inspired by a sense of mission. In the centre of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law.'*¹

¹ Winston S Churchill, *Complete Speeches, 1897-1963*, R.R.James (ed), 1974, pp7635-9.

It was also a British lawyer and politician, David Maxwell Fyfe who contributed significantly to the drafting of the ECHR, and the UK was the first country in the Council of Europe to ratify the Convention in 1951. Fast forward to the 1990s and after several decades of calls, on both sides of politics, for the incorporation of the ECHR into our domestic law, the HRA was born in 1998. It had three key aims. Firstly, it intended to 'bring rights home' by ensuring that the human rights of everyone in the UK could be protected in UK courts. Secondly, it sought to introduce key constitutional mechanisms to ensure that governments, parliaments and the courts embed human rights in their work to enhance the democratic processes. Thirdly, the government intended that the HRA would create a culture of better awareness of human rights throughout society.² Finally, in seeking to achieve all these aims the government created a human rights framework that would ensure parliamentary sovereignty.

The HRA is now eleven years old, but its early years have been turbulent. Misunderstood and misrepresented by politicians and the media, it has been variously portrayed as a threat to parliamentary sovereignty, a European imposition, and a villain's charter. Equally, it has sometimes been misrepresented by lawyers and their clients in making human rights claims that had no foundation.

The terms of reference of the CBR state that it will investigate the creation of a UK Bill of Rights that:

'...incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extends our liberties.'

² House of Lords, Second Reading, The Lord Chancellor (Lord Irvine), Official Report, House of Lords, 3 November 1997, vol 582 col 1227.

There is no commitment to retaining the HRA mechanisms for embedding the Convention rights in the three arms of the State: the government, parliament and the judiciary.

The Equality and Human Rights Commission believes that the HRA has substantially improved protection and enjoyment of human rights for everyone in Britain. The mechanisms under the HRA have provided a balanced and uniquely British model for protecting human rights and gaining justice in British courts.

The Commission considers that the primary focus should be on two inter-related factors: improving understanding and improving public authorities' application of the HRA. Substantial work is still required to improve understanding and reduce misconceptions of human rights by people working in public authorities, the general public, politicians and the media. Work is also needed to improve the application of the HRA by public authorities to their policies and practices, including identifying where it is not relevant. Together these measures will help improve the confidence of public service providers and help ensure that the HRA is applied sensibly and appropriately.

In our view, change to the HRA mechanisms is not required but substantial change is required in the understanding and application of the HRA.

The role of the Commission and our response

The Equality and Human Rights Commission (the Commission) has a statutory duty to promote equality and diversity, work towards the elimination of discrimination, promote human rights and build good relations between and among groups. The Commission has responsibilities in nine areas of equality (age, disability, gender, race,

religion or belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment) as well as human rights.

The Commission is an accredited 'A' status National Human Rights Institution (NHRI) with the United Nations which recognises our authoritative and independent role in promoting and protecting human rights in Britain.

Under section 9 of the Equality Act 2006 the Commission has duties to:

- promote understanding of the importance of human rights,
 - encourage good practice in relation to human rights,
 - promote awareness, understanding and protection of human rights,
- and
- encourage public authorities to comply with Convention rights³.

In addition, a key duty of the Commission under both the Equality Act 2006⁴ and the United Nations Paris Principles⁵ is to monitor and advise the government on the effectiveness of the Human Rights Act.

Responding to the consultation by the Commission on a Bill of Rights (CBR) is therefore central to our duties.

³ The rights under the European Convention on Human Rights.

⁴ Section 11 of the Equality Act 2006

⁵ These provide the requirements for effective NHRIs:

Our response to the consultation is structured in order to respond to the four questions asked:

(1) do you think we need a UK Bill of Rights?

If so,

(2) what do you think a UK Bill of Rights should contain?

(3) how do you think it should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?

(4) having regard to our terms of reference, are there any other views which you would like to put forward at this stage?

In Chapter 1 we focus on whether we need a Bill of Rights by analysing:

- our response to the last government's consultation on a Bill of Rights in March 2010;
- the historical developments towards the Human Rights Act;
- the uniquely British model of human rights protection that the HRA provides; and
- the reviews that have been conducted by the government, the Parliamentary Joint Committee on Human Rights (JCHR) and the Commission on the effectiveness of the HRA.

In Chapter 2 we analyse how the HRA works and why we believe that the current rights and mechanisms under the HRA are effective and should be retained. Where appropriate we have also considered how the mechanisms under the HRA could be improved: in particular to provide better clarity on the scope of which bodies are subject to the HRA (section 6 of the HRA) and to improve parliamentary involvement in discussions about the compliance of draft legislation with human rights obligations (section 19 of the HRA).

We are not at this point providing our views on the role of European Court of Human Rights (ECtHR), its relationship with domestic courts under the HRA and the proposals to reform the ECtHR.

This is for several reasons.

Firstly, the CBR has indicated it is not asking the public detailed questions on the ECtHR at this stage.

Secondly, we are undertaking a specific stream of work on the role of the ECtHR and have recently commissioned a research project. We plan to send the CBR a detailed submission on the role of the ECtHR in due course, as well as the report of the research findings.

In Chapter 3 we consider issues relating to devolution. In particular we discuss how the HRA and Convention rights are embedded into the devolution settlements, and what are the implications of any possible amendment or repeal of the HRA on the devolution settlements in Scotland, Wales and Northern Ireland.

In Chapter 4 we provide our position on the appropriate process and principles that should be followed by any government if any Bill of Rights is developed.

Finally we note that the Commission will be sending the CBR a separate submission which will consider human rights that are not currently directly protected by the HRA or the ECHR, but we believe merit further consideration in any discussions on a Bill of Rights. This analysis will be based on evidence from a number of sources, including our previous submission on a Bill of Rights in March 2010, recent inquiries we have conducted and other ongoing work. It will also be based on the principle that additional rights should only be considered if they build on the current rights and mechanisms in the HRA.

Chapter 1: Do we need a Bill of Rights?

The Human Rights Act is a Bill of Rights that was the culmination of several decades of debate, across all political parties, on the need to incorporate the European Convention on Human Rights. It gives British people access to justice at home and it provides an ingenious model tailored to British constitutional traditions. We do not believe that is necessary to replace the HRA with a new Bill of Rights.

This chapter provides the Commission's key positions on the HRA and possibility of any Bill of Rights; an explanation of British history of human rights protection and cross party involvement in the calls for the incorporation of the European Convention of Human Rights; an outline of how the Human Rights Act provides a British model for protecting human rights; and an analysis of the key findings of reviews of the Human Rights Act conducted by the government, JCHR and the Commission.

1. The Commission's position

In March 2010, the Commission published its detailed positions on the HRA in response to the last government's Green Paper consultation on a Bill of Rights ('HRA Plus').⁶ At the same time, the Commission also published research that it commissioned into the appropriate process for developing any Bill of Rights based on comparative experience in the United Kingdom and internationally.⁷ The findings of this research are discussed further in Chapter 4.

⁶ HRA Plus: Human Rights for 21st century Britain, March 2010, <http://www.equalityhumanrights.com/legal-and-policy/bill-of-rights/our-response-to-the-green-paper/>

⁷ Developing a Bill of Rights for the UK, Alice Donald with the assistance of Philip Leach and Andrew Puddephatt, Global Partners and Associates, London Metropolitan University, March 2010, http://www.equalityhumanrights.com/uploaded_files/research/developing_a_bill_of_rights_for_the_uk_report_51.pdf

HRA Plus provided the Commission's positions on retaining the HRA, and (on condition that those rights and mechanisms were retained) what further rights and mechanisms would or may be appropriate to better protect the human rights of everyone in Britain.

The Commission developed a set of principles for any Bill of Rights to ensure both comprehensive protection of the human rights of all and a greater understanding and ownership of human rights throughout society. These principles are:

- Principle 1: The Human Rights Act is essential for the protection of human rights in the United Kingdom and should be retained. Any Bill of Rights should build on the Human Rights Act. Any Bill of Rights that replaces the Human Rights Act should not be brought into force until and unless it contains at least the same levels of protection of rights and mechanisms under the Human Rights Act, and complies with obligations under international treaties.
- Principle 2: The government and any future government should ensure that the process of developing any Bill of Rights involves and includes all sectors of society, ensures that the process and result creates a feeling of ownership in society as a whole, that the consultation is conducted by an independent body, and that it is adequately resourced.
- Principle 3: In any Bill of Rights process, the government should actively promote understanding of the Human Rights Act and European Convention on Human Rights and the rights and mechanisms they protect, as well as countering any misconceptions.

- Principle 4: The Commission will use the results and recommendations from its Human Rights Inquiry to inform its response to any Bill of Rights and further develop the current human rights framework.⁸

In relation to the first principle we believe that:

- the level of protection and all the mechanisms provided by the Human Rights Act (HRA) should be retained and not diluted in effect in any way,
- any Bill of Rights must comply with international human rights obligations,
- there should be no additional limitations on the rights and mechanisms currently provided in the HRA, and
- if any Bill of Rights is legislated for in the future, the HRA should not be repealed unless and until the Bill of Rights comes into force.

The second and third principles are discussed in more detail in Chapter 4 on the process for developing any Bill of Rights. In relation to the fourth principle, we discuss below the findings from our Human Rights Inquiry in 2009 in relation to the effectiveness of the HRA.

2. Human rights in British history

In considering whether there is any need to replace the Human Rights Act with a Bill of Rights it is necessary to understand the evolution of human rights in Britain. Firstly, human rights are not a foreign concept that developed in other countries but are at the very heart of British

⁸ HRA Plus: Human Rights for 21st century Britain, March 2010, page 5.

traditions. Secondly, human rights do not belong to particular political parties. All the main political parties have played a crucial role in securing human rights protections, from the inspiration for the creation of the European Convention of Human Rights in 1950 to the enactment of the Human Rights Act fifty years later.

(i) From the Magna Carta to ratification of the ECHR

Britain has a long and proud history of developing human rights. It is incorrect, as some suggest, that human rights are a recent European imposition which somehow conflict with British traditions.

In 1215 the Magna Carta introduced the human rights concepts of habeas corpus and trial by jury.⁹ The Bill of Rights of 1689 contained several provisions relating to human rights including a requirement that no ‘cruel and unusual punishments’ could be imposed.¹⁰

In the eighteenth and early nineteenth centuries, many ideas that we regard as central to human rights and the rule of law—such as a philosophy of liberty, the notion of the freedom of the press and equality between women and men —were developed by English thinkers such as Thomas Paine, John Locke, Mary Wollstonecraft and JS Mill. Paine, who strongly influenced the American and French revolutions, spoke of the relationship between rights and the responsibilities we owe each other:

‘A Declaration of Rights is, by reciprocity, a Declaration of Duties, also. Whatever is my right as a man, is also a right of another; and it becomes my duty to guarantee, as well as to possess.’¹¹

⁹ Habeas corpus links to the article 5 right to liberty as it is a legal action which enables a prisoner to be released where they have been unlawfully detained.

¹⁰ This was a predecessor to similar future provisions on torture, inhumane and degrading treatment in Bills of Rights such as article 3 of the European Convention on Human Rights.

¹¹ Thomas Paine, On the Rights of Man 1792.

JS Mill observed in *On Liberty*,¹² democracy is not in itself a guarantee against the tyranny of the majority over unpopular minorities, to highlight the need to provide a check on parliament to prevent it from legislating to remove rights of particular groups.

Ahead of her time, Mary Wollstonecraft argued that instead of viewing women as ornaments to society or property to be traded in marriage, they should be viewed as human beings deserving of the same fundamental rights as men.¹³

The British common law as developed by the courts also recognised concepts relating to human rights long before the European Convention of Human Rights: for example the rights to personal security and liberty, private property, freedom of discussion, and assembly.¹⁴

The importance of human rights for all was etched into the minds of people across the world with the horrors of World War II and its atrocities. In the war's aftermath and in an attempt to prevent those atrocities from being repeated, leaders from Western countries called for the creation of a European organisation that would promote and ensure democratic values such as the rule of law and human rights. Winston Churchill was one of the main proponents of the European organisation, in 1946 proposing a 'kind of United States of Europe' and a Charter of Human Rights.¹⁵

The outcome of those international discussions was the creation of the Council of Europe in 1949, the European Convention on Human Rights (ECHR) in 1950 and the European Court of Human Rights in 1959. The British Conservative lawyer and politician David Maxwell Fyfe was

¹² Oxford: Oxford University Press, 1869.

¹³ Mary Wollstonecraft, *A Vindication of the Rights of Woman*, 1792. Her earlier work, *A Vindication of the Rights of Men* (1790), argued against the slave trade.

¹⁴ Blackstone, *Commentaries on the Laws of England*, 1765-1769.

¹⁵ Zurich 19 September 1946, http://assembly.coe.int/Main.asp?link=/AboutUs/zurich_e.htm

greatly involved in the drafting of the ECHR. The UK government signed the ECHR in 1950, was the first country to ratify the ECHR in 1951 and recognised the right to bring claims in the European Court of Human Rights in 1966. Today the ECHR continues to provide human rights protection to about 800 million people in 47 countries.

(ii) From ratification to incorporation of the ECHR

The debates on the incorporation of the ECHR demonstrate that all the political parties were involved in deliberations over several decades which eventually led to the Human Rights Act.

Despite the UK government having been the first country to have ratified the ECHR, it was one of the last of the Member States to have incorporated it into their domestic law.

For decades it was feared that incorporation of the ECHR would irreparably harm the constitutional doctrines of parliamentary sovereignty and separation of powers between the Executive (the government), legislature (the Parliament) and the Judiciary (the Courts). Over the past fifty years those views on incorporation have gradually changed as it was realised that the common law safeguards for human rights were inadequate.

In 1968 Anthony Lester (now a Liberal Democrat peer Lord Lester QC) published a pamphlet 'Democracy and Individual Rights' which called for incorporation of the ECHR. In 1974 Sir Leslie Scarman (later the cross-bench peer Lord Scarman) wrote of the need for an instrument to challenge the sovereignty of Parliament and to protect basic human rights which could not be adequately protected by the legislature alone. Scarman was in favour of entrenchment. He believed that only by

making a Bill of Rights superior to Parliament could such fundamental rights be protected.¹⁶

The Labour Party National Executive Committee unveiled a *Charter of Human Rights* in 1975. This document advocated an un-entrenched Human Rights Act. This proposal was regarded as insufficient by many who considered that such an Act would offer inadequate protection to individual interests against the growing power of the state. In particular, many Conservatives (including Sir Geoffrey Howe (now Lord Howe), Sir Leon Brittan and Roy Jenkins (the late Lord Jenkins)) preferred the concept of a Bill of Rights with entrenched clauses that would prevent even Parliament from granting the executive excessive power over the lives of individuals.

In 1976, the Liberal Democrat Lord Wade moved a Bill in the House of Lords which proposed to entrench the Convention as a part of all existing legislation and to make it an entrenched part of all subsequent enactments unless Parliament specifically legislated otherwise. Lord Wade and Lord Harris continued to be the chief advocates for a Bill of Rights in the Lords.

When the House of Lords set up a select committee in 1978 to inquire whether to introduce a Bill of Rights, it was the three Conservative members, and only one Labour, who supported its introduction. The committee unanimously agreed that 'if there were to be a Bill of Rights it should be a bill based on the European Convention'. Former Conservative home secretary Leon Brittan proposed the introduction of a bill of rights for Scotland, based on the ECHR, in the same year.¹⁷

¹⁶ Lord Scarman, *English Law—The New Dimension*, Hamlyn Lectures, 26th Series (London: Stevens, 1974).

¹⁷ Francesca Klug, Human Rights don't belong to political parties, *Guardian*, 2 February 2010.

Conservative MP Edward Gardner introduced a 'human rights bill to incorporate in British law the ECHR'. Other prominent Conservatives who have argued that the ECHR should be part of UK law, in the context of debates on introducing a Bill of Rights, include Richard Shepherd, Ivan Lawrence QC, Sir Michael Havers and Quintin Hogg QC (Lord Hailsham). It was Hogg, in his later incarnation as Lord Hailsham, just before his second stint as Conservative Lord Chancellor, who famously declared that 'in this armoury of weapons against elective dictatorship, a Bill of Rights, embodying and entrenching the European Convention, might well have a valuable, even if subordinate, part to play'.¹⁸

The Labour Party Conference in October 1993 adopted a two-stage policy supporting the incorporation of the European Convention of Human Rights to be followed by the enactment of a domestic Bill of Rights. The Labour Party planned to entrench Convention rights by the use of a 'notwithstanding clause' procedure. This was similar to the Canadian Charter of Rights and Freedoms, and would have led to the Convention overriding domestic law unless Parliament expressly provided for it to apply notwithstanding that it would violate the instrument.

Lord Lester of Herne Hill continued his human rights work in the Lords by introducing a bill in November 1994. The bill did not receive support from the Conservative Government. Particular aspects of the proposed bill were criticized by the Law Lords, but significantly they supported incorporation in so far as it allowed UK judges to interpret human rights domestically.

In December 1996, Jack Straw MP and Paul Boateng MP published a consultation paper, 'Bringing rights home', setting out the Labour Party's

¹⁸ Ibid, *The Dilemma of Democracy*, 1978

plans to incorporate the Convention if it won the election in 1997. When the Labour Party won the election the government introduced the Human Rights Bill into parliament in November 1997, it received royal assent in November 1998 and it came into force in October 2000.

3. The Human Rights Act: a British model of human rights legislation

The Human Rights Act is a novel and uniquely British model for incorporating the ECHR into our domestic law. In that sense it can be said that in the HRA we already have a Bill of Rights that is adapted to our particular needs. This section analyses: why it was appropriate to incorporate the ECHR to provide justice to people in British courts; and how the HRA meets the British constitutional traditions of maintaining parliamentary sovereignty.

(i) Why the HRA is needed: Bringing rights home

Jack Straw, the then Home Secretary, at the second reading of the Human Rights Bill highlighted that the purpose of the HRA was a practical one of 'bringing rights home'. It was to enable people in the UK to bring a human rights claim without having to go to the unnecessary expense and delay of bringing proceedings in the European Court of Human Rights. As he stated at that point it took approximately five years and cost £30,000 for a claim to reach the European Court of Human Rights after exhausting all domestic remedies.¹⁹ The HRA was therefore a means by which people could secure access to justice in British courts.

¹⁹ House of Commons Second reading. Official report, 16 February 1998, vol 307 col 769.

A good example of the previous practical problems associated with failure to incorporate the ECHR were the challenges mounted to a ban on gay men and lesbians serving in the armed forces.²⁰ The English courts applied the Wednesbury judicial review test and did not find the ban irrational, but at the same time were unable to determine whether the ban breached their human rights. The European Court of Human Rights unanimously found that the ban breached the persons' article 8 rights to privacy.

CASE STUDY: BRINGING RIGHTS HOME

O.O.O (and others) v Commissioner of Police for the Metropolis [2011] EWHC 1246

In a recent landmark judgment the High Court found that the Metropolitan Police Service had violated the human rights of four female victims of trafficking and child slavery by failing to investigate the alleged perpetrators.

The victims were trafficked to the UK from Nigeria when they were 11 to 15 years old. They were forced to work as unpaid servants for families in London and subjected to serious physical and emotional abuse.

The court found that the police had a duty to investigate credible allegations of ongoing or past slavery and that the failure to conduct an investigation was a breach of the claimants' human rights to be free from torture, inhumane and degrading treatment (article 3 of the Convention) as well as a breach of their human rights to be free from slavery (article 4 of the Convention).

The police eventually agreed to undertake an investigation into the claimants' abuse in 2009. This led to the conviction of Lucy Adeniji in

²⁰ Smith and Grady v UK (1999) 29 EHRR 493

February 2011 on charges of trafficking and slavery, and she was sentenced to 11 and a half years imprisonment.

If the Human Rights Act was not in place, the victims would not have been able to bring a claim in this country that their human rights had been breached. Instead, they would have had to wait until they had exhausted any other domestic claims, and then brought a claim in the European Court of Human Rights. This would have not only have been at considerable expense and delay, but also have caused further stress and anxiety. In addition, it is also probable that the police investigation would never have occurred and the convictions secured if the claim under the HRA had not been brought.

The HRA was vital for the victims to secure access to justice in British courts and to secure the prosecution of the perpetrator of the crimes.

(ii) How the HRA satisfies British constitutional traditions

The British constitutional model is a largely unwritten one in which the concept of parliamentary sovereignty is paramount. This means that parliament can alter any law, there is no legal distinction between constitutional and other laws, and that no judicial authority has the right to nullify an Act of Parliament or to treat it as void or unconstitutional.²¹

The HRA adheres to the concept of parliamentary sovereignty; therefore it is not possible for UK courts to declare void any legislation where it breaches Convention rights. This can be contrasted with many other jurisdictions around the world which often have written constitutions (including Bills of Rights) with a higher status than other laws. Those

²¹ Professor AV Dicey: Introduction to the Law of the Constitution, 1885.

constitutions also often permit other laws to be declared void if they breach any rights in the Bills of Rights.²²

Under the British model of the HRA, there are two mechanisms which relate to the concept of parliamentary sovereignty. Courts are firstly required to interpret legislation compatibly with Convention rights 'so far as is possible to do so'.²³ Secondly, where the courts cannot interpret legislation compatibly with Convention rights they can make a declaration of incompatibility.²⁴ It therefore remains for Parliament to decide what action to take regarding any declaration of incompatibility. The model is often described as a parliamentary model of Bill of Rights and said to create a model of 'dialogue' between the courts and parliament.²⁵ The Joint Committee on Human Rights has recommended that the current parliamentary model is the most effective to maintain parliamentary sovereignty.²⁶

4. The effectiveness of the Human Rights Act

This section provides a summary of the main findings of major reviews that have been conducted of the effectiveness of the Human Rights Act by the government, the Joint Committee on Human Rights and the Commission. The reviews indicated that the HRA had largely had a positive impact on public service delivery and the enjoyment of human rights. However there are a number of barriers to the HRA's effectiveness: significant misconceptions about the HRA are held by

²² See for example the models for entrenchment of human rights in the United States, Germany and France.

²³ Section 3 Human Rights Act

²⁴ Section 4 Human Rights Act

²⁵ 'A Bill of Rights for the UK?', Joint Committee on Human Rights, 29th report, session 2007-08

²⁶ Ibid paragraph 211-218.

sections of the media, general public and at times public authorities (including by frontline staff in public authorities on when the HRA is *not* relevant), a need to improve understanding and application of the HRA by public authorities, and a need for better leadership on human rights issues by the government and the Commission.

These issues are also linked to the discussion of the process for developing any Bill of Rights in Chapter 4.

Reviews by the government and the Joint Committee on Human Rights

There have been two reviews conducted by the government on the effectiveness of the HRA. In July 2006 the Department for Constitutional Affairs (DCA) published a review in response to the Prime Minister's request to the Lord Chancellor to consider any problems with the implementation of the HRA.²⁷ In addition, the Home Office conducted a review of the effect of the HRA in the context of a wider review of the criminal justice system to improve protection for victims of crime.²⁸ The Joint Committee on Human Rights examined the findings of the reviews and took further evidence from the government.²⁹

In relation to the review conducted by the DCA, it examined three aspects relating to the effect of the HRA: its impact on the development

²⁷ Review of the Implementation of the Human Rights Act, July 2006, Department for Constitutional Affairs.

²⁸ Rebalancing the criminal justice system in favour of the law-abiding majority. Cutting crime, reducing reoffending and protecting the public, Home Office July 2006.

²⁹ The Human Rights Act: the DCA and the Home Office Reviews Joint Committee on Human Rights, 32nd report of session 2005-06

of the law; its impact on policy formulation, and myths and misconceptions about the HRA.

Its key findings were:

Impact on the law

- Decisions of the UK courts under the HRA have had no significant impact on criminal law, or on the government's ability to fight crime.
- The HRA has had an impact upon the government's counter-terrorism legislation.
- In other areas the impact of the HRA upon UK law has been beneficial, and has led to a positive dialogue between UK judges and those at the European Court of Human Rights.
- The HRA has not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary.

Impact on policy formulation

- The HRA has had a significant, but beneficial, effect upon the development of policy by central government.
- Formal procedures for ensuring compatibility³⁰, together with outside scrutiny by the Parliamentary Joint Committee on Human Rights, had improved transparency and Parliamentary accountability.
- The HRA leads to better policy outcomes by ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered. It promotes greater personalisation and therefore better public services.

³⁰ Such as statements of compatibility under section 19 of the Human Rights Act.

Myths and misperceptions

- The HRA has been widely misunderstood by the public, and has sometimes been misapplied in a number of settings.
- Deficiencies in training and guidance have led to an imbalance whereby too much attention has been paid to individual rights at the expense of the interests of the wider community.
- This process has been fuelled by a number of damaging myths about human rights which have taken root in the popular imagination.

The second review was conducted by the Home Office and considered whether the HRA prevented balancing between the rights of individuals and the rights of victims and communities. The full findings of the review were not published but a summary of its key findings is contained in the JCHR's report on the DCA and Home Office Reviews.³¹

The Home Office review found that in general human rights legislation is perceived by the majority of agencies in the criminal justice system as being helpful by providing a useful framework in which to operate and balance the rights of different groups.³² They concluded that:

‘... the Act itself represents a powerful framework to deliver this, and repealing or amending the Act will not assist in rebalancing the system.’³³

³¹ The Human Rights Act: the DCA and the Home Office Reviews Joint Committee on Human Rights, 32nd report of session 2005-06

³² Ibid paragraph 100.

³³ Rebalancing the criminal justice system in favour of the law-abiding majority. Cutting crime, reducing reoffending and protecting the public, Home Office July 2006. page 4.

The Home Office Review did however identify perceived misconceptions about the extent of the effect of the HRA which had sometimes impacted on the decisions regarding criminal justice and balancing rights:

‘There is some evidence from the agencies of an occasionally cautious interpretation of the Human Rights Act and particularly those articles of the Convention that require the rights of the individual to be balanced with public safety. A culture needs to be developed that is less risk averse to ensure that misconceptions around human rights are not in any way preventing the effective delivery of policy. To an extent this may arise from a lack of central co-ordination and consistency on messages being circulated to agencies on the approach to adopt when balancing rights. However, there may also be a fear of litigation that may encourage those who develop guidance to be cautious in their interpretation.’³⁴

The review proposals included the establishment of a ‘Scrutiny panel’ to scrutinise legislation, practice and training in frontline agencies and front line staff in how to correctly apply the HRA to decision making.

Review by the Equality and Human Rights Commission

The Commission’s Human Rights Inquiry had terms of reference to:

- assess progress towards the effectiveness and enjoyment of a culture of respect for human rights in England and Wales, and
- consider how the current human rights framework might best be developed and used to realise the vision of a society built on fairness and respect, confident in all aspects of its diversity.³⁵

³⁴ The Human Rights Act: the DCA and the Home Office Reviews Joint Committee on Human Rights, 32nd report of session 2005-06, paragraph 101.

³⁵ Human Rights Inquiry, Report of the Equality and Human Rights Commission, June 2009, page 13.

The Inquiry was the most detailed evidence-based research project to date to assess the effectiveness of the current human rights framework of the HRA in England and Wales.³⁶ The Commission gathered evidence using the following methods:

- three research projects (the impact of a human rights culture on public sector organisations; the role and experience of inspectorates and regulators in promoting human rights; the evaluation of the impact of selected cases under the Human Rights Act on public service provision)
- a call for evidence from key organisations, service providers and individuals
- a national survey on public perceptions of human rights and a series of focus groups with members of the public, and
- Inquiry Panel hearings to hear oral evidence from key organisations, service providers and individuals.

The Commission published its final report in June 2009 and some of the key findings and recommendations of the inquiry have important ramifications for the CBR. These are detailed below:

General findings

- The fundamental principles set out in the HRA closely reflect our traditional values of fairness and justice, and the universal standards to which every democratic government is committed. Polling evidence

³⁶ In total 2,855 people provided evidence to the Inquiry between April and December 2008. Ibid page 15. The Inquiry comprised two phases: firstly an analytical literature review on the implementation of the Human Rights Act over the last decade; and secondly by gathering evidence directly from the public.

shows that 84 per cent of people want human rights enshrined in the law for themselves and their families.³⁷

- Human rights are not merely abstract concepts – they are also an effective tool for delivering organisational success and better services to the public.³⁸ A true understanding of human rights as a tool to improving people’s lives is not widespread: there is a general consensus that improved knowledge and understanding is essential.

Effectiveness of the Human Rights Act

- There are significant misunderstandings and misconceptions about human rights, and which remain largely unchallenged, leading to both service users and service providers being uninformed about their rights and responsibilities.³⁹
- The HRA makes a positive difference to people’s lives, and to the effective delivery of public services which focus on individual needs.⁴⁰ Human rights, by focusing on the needs of the individual, can help restore the power balance between the State and individuals, between service providers and service users, and can contribute to a fairer, equal and more inclusive society.⁴¹
- A human rights approach encourages participation by service users in service planning and delivery, increasing their autonomy, enhancing self-respect and building better relationships.⁴²

³⁷ Chapter 2, section 1.0, Human Rights Inquiry Report.

³⁸ Chapter 3, section 2.0, Ibid.

³⁹ Chapter 4, section 5.0, Ibid.

⁴⁰ Chapter 3, section 3.0 Ibid.

⁴¹ Chapter 3, section 2.0; Chapter 3, section 3.1 Ibid.

⁴² Chapter 3, section 3.5 Ibid.

Leadership

- There is a very strong demand from those who gave evidence, across all sectors, for positive leadership and visible support for human rights from the government, politicians, the Commission, and others whose responsibility is to formulate national and local public policy. Such positive leadership is necessary in many cases for public officials to have the confidence to give appropriate priority to human rights.⁴³
- Inaccurate statements about human rights by leaders inhibit both people's understanding of human rights and the development of a culture of mutual respect for rights and responsibilities.⁴⁴
- The Commission will take action on leadership by encouraging the government and other political leaders to provide positive and consistent leadership on human rights and the HRA and raising public awareness of the importance of human rights and the HRA.⁴⁵

Information and advice

- There is a very widespread concern that there is insufficient knowledge about human rights. There was a strongly expressed desire for accessible and relevant guidance as well as information and advice about human rights.⁴⁶
- Witnesses regretted the fact that the Commission has no power to assist members of the public who need to take legal actions which are based solely on human rights.⁴⁷

⁴³ Chapter 5, section 2.1-2.3 Ibid.

⁴⁴ Chapter 5, section 2.1 Ibid.

⁴⁵ Chapter 6, section 4.3 Ibid.

⁴⁶ Chapter 4, section 11 Ibid.

⁴⁷ Irish Traveller Movement, Call for evidence response; Sheffield Law Centre, Call for Evidence response; East Midlands Group evidence session.

- The Commission recommended that the government should review its decision not to give the Commission the power to assist members of the public in strategic cases involving only human rights legislation and that the Commission should be empowered to provide conciliation or mediation services on human rights.⁴⁸

Some clear conclusions can be drawn from the findings from all the reviews which have direct implications for the discussion about whether the HRA should be retained.

Broadly speaking the reviews found that the HRA had a positive impact on improving service delivery while better protecting people's human rights. The HRA has not been a major impediment to protecting the public from crime and there was therefore no justification to repeal the HRA. However, there is a great lack of understanding of what human rights are, as well as misconceptions and myths which extend throughout society among public service providers, the general public, politicians and the media.

The Commission is addressing these perceptions in a number of ways. It is currently undertaking an action research project with the public sector, which aims to identify which misconceptions about human rights are the most prevalent, and which are preventing public sector workers from applying the Human Rights Act accurately in their work. It will further identify how to best tackle these erroneous interpretations. The findings will be reflected in a specific report as well as be used to influence the type and nature of human rights guidance that the Commission produces.

⁴⁸ Chapter 6, section 9.3.

The production of guidance is another way that the Commission works to improve the understanding of the HRA among diverse audiences, including providers of public services. This both improves their confidence in applying the HRA to appropriate situations, but also allows them to identify when the HRA will have no application. A good example is our guidance on human rights for social housing providers.⁴⁹

The Commission clearly has a large role in the promotion and protection of human rights, including through outreach and education initiatives such as these. However, leadership from all levels of government is required to address challenges to the accurate and supportive implementation of human rights norms.

⁴⁹ Human Rights at Home: guidance for social housing providers, Equality and Human Rights Commission, 2011, http://www.equalityhumanrights.com/uploaded_files/humanrights/human_rights_at_home.pdf

Chapter 2: Retaining the rights and mechanisms of the HRA

This chapter examines the key mechanisms in the Human Rights Act:

- the duty on courts to take into account the Strasbourg judgments (s.2)
- the interpretation of legislation (s.3)
- declarations of incompatibility (s.4)
- the acts of public authorities and the meaning of public authority (s.6)
- judicial remedies (s.8)
- the power to take remedial action (s.10_)
- freedom of expression (s.12)
- freedom of thought, conscience and religion (s.13)
- reservations and derogations (s.14 & s.15)
- statements of compatibility (s.19)

Whatever domestic legislation is used to incorporate the Convention rights, there will need to be a supporting machinery for regulating the relationship between the Executive, Parliament and the courts, particularly in matters of public policy, and between the UK courts and the European Court of Human Rights. Ultimately, the machinery needs to maintain the sovereignty of parliament.

These were the objectives behind the mechanisms in the Human Rights Act. Far from undermining parliamentary sovereignty, the

evidence demonstrates that these mechanisms work effectively and are instrumental to an open and transparent democracy.

Section 2: Interpretation of Convention rights

Those familiar with the workings of the British legal system will be familiar with the doctrine of binding precedent, which is, that a decision by a superior court will be binding on inferior courts. It is a fundamental doctrine of common law jurisdictions. Steeped in this legal tradition, it is easy to understand why there is a mistaken belief that the judgments of the ECtHR ('Strasbourg judgments') - a supranational court - are binding on British courts.

However, as stated, this belief is a mistaken one, not least because it does not fit with the legal traditions of our European neighbours whose civil law systems do not usually follow the doctrine of binding precedent. However, the Human Rights Act also makes it clear that the Strasbourg judgments are not binding on British courts.

What is the duty 'to take into account'?

Section 2 of the HRA requires a court or tribunal, when determining an issue in connection with a Convention right, to 'take into account' any relevant judgment, decision, declaration or advisory opinion of the European Court of Human Rights as well

as relevant opinions or decisions of the European Commission of Human Rights⁵⁰ and the Committee of Ministers⁵¹.

How does it work?

The Convention rights are binding on the UK Government but their content inevitably needs to be interpreted by courts so that public authorities, including governments, and the public can understand them. The judgment of the European Court of Human Rights seeks to assist that understanding by interpreting the phrases used in the Convention. For example, that the right to respect for a private life conferred by article 8 means that homosexuality between consenting adults cannot be a crime.

The duty 'to take into account' the Strasbourg judgments means that when a court or tribunal in the UK is interpreting domestic law which affects a Convention right, then the court or tribunal must look at how the ECtHR has interpreted that right.

Why is there a duty?

Admittedly, section 2 places a duty on the courts and tribunals to take into account the Strasbourg judgments - there is no discretion and they are not free completely to ignore them - but it does not make binding precedents of the judgments. It is also true that courts have usually followed Strasbourg judgments, although the

⁵⁰ The European Commission of Human Rights was formerly the filtering body responsible for hearing all individual complaints under the European Convention on Human Rights ('ECHR'). In November 1998, following the adoption of Protocol 11 to the Convention, the Court was restructured and the Commission's functions were folded into those of the Court.

⁵¹ The Committee of Ministers of the Council of Europe is made up of the foreign ministers of all the Council of Europe member states, and is responsible under the Convention for the enforcement of the Court's judgments: see article 46(2) ECHR.

UK courts have consistently made it clear that they are free to depart from them and have done so on several occasions since the Human Rights Act came into force.

It is important to remember that before the enactment of the Human Rights Act, the other dominant model of incorporation of international law was the European Communities Act 1972. Section 2 of the 1972 Act makes the provisions of the various EU treaties directly effective and enforceable in UK law⁵² and all UK law shall have effect 'subject to' directly applicable EU law.⁵³

The effect of the 1972 Act is to make EU law binding on UK law to the extent that it prevails over domestic law where there is any inconsistency in the latter, leaving the courts without any discretion but to follow EU treaties and caselaw. In the case of *Factortame*,⁵⁴ section 2(4) of the 1972 Act was described as inserting an implied clause into all UK law statutes that they shall not apply where they conflict with EU law.

The HRA section 2 represents a deliberate rejection of the model created by the 1972 Act; instead, the HRA leaves it to the UK courts – and, in the case of any incompatibility, to Parliament – to determine how ECtHR rulings will be applied in UK law. Thus, the

⁵² See e.g. section 2(1) of the 1973 Act: '(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly'.

⁵³ section 2(4) European Communities Act 1972

⁵⁴ [1991] 1 All ER 70 ECJ Case C-213/89

intention to maintain parliamentary sovereignty and judicial control by British judges was clearly a priority for the legislators.

Given that a provision was needed to distinguish the Human Rights Act from the European Communities Act, a duty was preferred over discretion in order to promote consistency in decision making and to avoid different results from the same set of facts.⁵⁵

During the parliamentary debates, an amendment was tabled to replace the words 'must take into account any' with 'shall be bound by', something which would have forced UK judges to follow the decisions of the European Court in every case.⁵⁶ Its purpose was to tease out the circumstances when a UK court could depart from the Strasbourg judgments. The shadow Lord Chancellor Lord Kingsland explained the purpose of the amendment as follows:⁵⁷

The problem is that if our judges only take account of the jurisprudence of the European Court of Human Rights, we cast them adrift from their international moorings. The bill, crewed by the judges, will have no accurate charts by which to sail because the judges are obliged only to take into account the provisions of the Convention. That means that the bill is effectively a domestic Bill of Rights and not a proper incorporation of international rights. It means that the judges ... are not obliged to act on it and can go in whatever direction they wish. I have great confidence in Her

⁵⁵ The Parliamentary Secretary (LCD) House of Commons Committee Stage Official Report 3 June 1998 vol. 313 col. 404

⁵⁶ Hansard House of Lord Debates, 18 November 1997, col 511, amendment 9.

⁵⁷ Hansard, House of Lords L Debates, 18 November 1997, col 512.

Majesty's judges, but I believe that they need greater guidance than they receive from the expression 'take into account'.

During the debates it was explained that the Convention only obliges states to comply with those judgments of the Strasbourg Court 'to which they are parties'.⁵⁸ It was argued that it would be 'strange', for UK courts to be bound by Strasbourg decisions to which the UK had not been a party, and 'quite inappropriate' to do so 'since those cases were concerned first and foremost with the laws of other countries'.⁵⁹ Although cases before the ECtHR involving other countries might be persuasive authority, it would be a mistake to treat them as 'binding precedents which we necessarily should follow or even necessarily desire to follow'.⁶⁰ This approach is in keeping with the general principles of international law which applied before the Human Rights Act and which continue to apply.

Importantly, it was also explained that making Strasbourg judgments binding on UK courts would put 'the courts in some kind of straitjacket where flexibility is what is required'.⁶¹ Although it was generally expected that UK courts would apply Convention jurisprudence, the language of section 2 was nonetheless intended to allow UK courts the freedom:

⁵⁸ See Article 46 ECHR: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'.

⁵⁹ Hansards House of Lords Debates, 18 November 1997, col 514.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, col 515.

to depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so *and it is possible they might give a successful lead to Strasbourg*.⁶²

This should happen for example where ‘there has been no precise ruling [by the Strasbourg institutions] on the matter and a Commission decision which does so has not taken into account subsequent Strasbourg case law’. In other words, where the existing Strasbourg authority is unclear (or clear but evidently unsatisfactory) it would be better to leave the matter to the UK courts to suggest a way forward than to tie their hands. It was stated that ‘our courts must be free to try to give a lead to Europe as well as to be led’.⁶³

The importance of a flexible approach towards Strasbourg judgments was also consistent with the Labour government’s previous manifesto commitment to incorporate the European Convention as ‘a floor, not a ceiling, for human rights’,⁶⁴ as well as the arguments put forth in its 1997 White Paper, *Rights Brought Home*:

The effect of non-incorporation on the British people is a very practical one. The rights, originally developed with major help from the United Kingdom Government, are no longer actually seen as British rights Bringing these rights home will mean that the British people will be able to argue for their rights in

⁶² Ibid.

⁶³ Ibid.

⁶⁴ 1997 Labour Party Manifesto, emphasis added.

the British courts - without this inordinate delay and cost. **It will also mean that the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom**, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit.

British judges will be enabled to make a **distinctively British contribution** to the development of the jurisprudence of human rights in Europe.⁶⁵

Accordingly, the white paper promised that, when considering Convention points, 'our courts will be required to take account of relevant decisions of the European Commission and Court of Human Rights', although it also made clear that 'these will not be binding'.⁶⁶

Thus section 2 of the HRA has given the UK courts the flexibility to decide whether or not to follow judgments of the European Court of Human Rights. At the same time, it has also enabled our courts to make a distinctive contribution to the rulings of the European Court of Human Rights, a part already being played by the UK courts.

So for example, in *Osman v United Kingdom*⁶⁷ it was held that if an authority is immune from action in the law of negligence this

⁶⁵ 'Rights Brought Home: The Human Rights Bill' (Cm 3782, October 1997), para 1.14, emphasis added.

⁶⁶ *Ibid*, para 2.4. This led some to predict that section 2 of the HRA would enable courts in the UK to develop the Convention rights in Schedule 1 of the Act as free-standing rights: '[It would] be open to national courts to develop a jurisprudence under the Convention which may be more generous to applicants than that dispensed in Strasbourg, while remaining broadly consistent with it' (Beatson and Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet & Maxwell: 2000) at p 20). It is worth noting, however, that the 1997 manifesto speaks only of *Parliament* enhancing rights, rather than the courts themselves.

⁶⁷ [2000] 29 EHRR 245.

may deny the victim the right of access to the courts and to a legal remedy, and thus breach article 6.

However, in *Z v United Kingdom*,⁶⁸ the European Court rowed back from its own judgment in *Osman* and declared that the limits to suing public authorities allowed by *substantive* domestic law are not in breach of article 6. The Court held that *Osman* had been based on a misunderstanding of the law of negligence that cases were not automatically excluded but were struck out on their merits after applying policy factors which were part of the substantive law of negligence. Article 6 thus did not give protection from the *substantive* law but provided a *procedural* right to bring actions. The decision in *Osman* had also been heavily criticised by lawyers and academics.

At para 100, the ECtHR said:

The Court considers that its reasoning in *Osman* was based on an understanding of the law of negligence ...*which has to be reviewed in the light of the clarifications subsequently made by the domestic courts and notably by the House of Lords.* [emphasis added]

The reference to the House of Lords is to the decision in *Barrett v Enfield Borough Council* where the House of Lords refused to strike out a claim against a local authority where the claimant, who had been in care for 17 years, alleged that the local authority had failed to take reasonable care in protecting him from physical abuse. The House of Lords held that cases should only be struck out for policy reasons when the action was certain to fail and the

⁶⁸[(2002) 34 EHRR 3

policy should not be used where the law was uncertain and developing. Here the boy was actually in care as opposed to being taken into care and there were no sound policy reasons for exempting claims in such circumstances.

Why concerns are misplaced?

Since the HRA came into force, the general approach of the UK courts has been to follow the case law of the European Court of Human Rights unless there is some 'good reason' not to.⁶⁹ As Lord Bingham said in the 2004 case of *Ullah v Special Adjudicator*.⁷⁰

[T]he Convention is an international instrument.. [its] correct interpretation can be authoritatively expounded only by the Strasbourg court. [I]t follows that a national court... should not *without strong reason* dilute or weaken the effect of the Strasbourg case law. ..The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.

This has since become known as the 'mirror principle' – the idea that, absent good reasons to the contrary, a person in a British court can expect to obtain the same result as he or she would in Strasbourg.⁷¹

⁶⁹ *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 at para 18 per Lord Bingham.

⁷⁰ [2004] UKHL 26 at para 20. Emphasis added.

⁷¹ The term 'mirror principle' originates in J Lewis, 'The European Ceiling on Human Rights' (2007) *Public Law*, p720. See also Masterman, 'Section 2(1) of the Human Rights Act: binding domestic courts to Strasbourg' [2004] PL 725.

This principle is important for two reasons. First, as Lord Bingham pointed out, the Convention is an international instrument and it would be unhelpful for each country to develop its own, wildly divergent approach. Second, the very purpose of the HRA is to enable Convention rights to be applied in British courts; that objective would be defeated if the UK courts were to rule in a manner that they knew would inevitably be reversed by the Strasbourg Court.⁷² For these reasons, the UK courts will be very slow to depart from a clearly reasoned ruling of the Grand Chamber of the ECtHR.⁷³

At the same time, however, the UK courts have always made clear that the so-called 'mirror principle' is a general rule, and one that will not be invariably followed. As Lord Neuberger said in the case of *Manchester City Council v Pinnock* before the UK Supreme Court last year:⁷⁴

This Court is not bound to follow every decision of the ECtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the ECtHR which is of value to the development of Convention law

⁷² See also e.g. the speech of Lord Slynn in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at para 26: 'In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence'; see also e.g. Lord Slynn's statement in *R v Secretary of State for the Home Department ex parte Amin* [2003] UKHL 51 at para 44.

⁷³ See e.g. *Secretary of State for the Home Department v AF* [2009] UKHL 38, in particular the statements of Lord Hoffmann at para 70, Lord Rodger at para 98, Lord Carswell at para 108, and Lord Brown at 121.

⁷⁴ [2010] UKSC 45 per Lord Neuberger at para 48. See also e.g. Lord Hoffmann in the case of *R v Lyons* [2002] UKHL 44 at para 46.

As Lord Mance pointed out in *Doherty v Birmingham ...*, section 2 of the HRA requires our courts to ‘take into account’ ECtHR decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.

Indeed, since the HRA came into force in 2000, there have been no less than four cases in which the House of Lords and, more recently, the UK Supreme Court have declined to follow judgments of the Strasbourg Court:⁷⁵

In a series of cases on the fairness of the courts martial system, the House of Lords in *R v Spear*,⁷⁶ unanimously declined to follow the chamber judgment of the European Court of Human Rights in *Morris v United Kingdom*,⁷⁷ on the basis that the Court had failed to appreciate the existence of sufficient safeguards in the courts martial system.⁷⁸ In the subsequent case of *Cooper v United*

⁷⁵ Similarly, there have been a handful of cases in which the UK courts have gone further than the ECtHR, usually in circumstances where our courts have felt sufficiently certain of the likely result in Strasbourg to be able to anticipate it: see *Limbuella v Secretary of State for the Home Department* [2005] UKHL 56; *In re P (Northern Ireland)* [2008] UKHL 38; and *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64.

⁷⁶ [2002] UKHL 31

⁷⁷ [2002] 34 EHRR 1253.

⁷⁸ See e.g. Lord Bingham, *R v Spear* at para 12: ‘It goes without saying that any judgment of the European Court commands great respect, and section 2(1) of the Human Rights Act 1998 requires the House to take any such judgment into account, as it routinely does. There were, however, a large number of points in issue in *Morris*, and it seems clear that on this particular aspect the European Court did not receive all the help which was needed to form a conclusion ... In my opinion the rules governing the role of junior officers as members of courts-martial are in practice such as effectively to protect the accused against the risk that they might be subject to ‘external army influence’, as I feel sure the European Court would have appreciated had the position been more fully explained’.

Kingdom, the Grand Chamber of the European Court of Human Rights accepted that the House of Lords was correct.⁷⁹

In the 2008 case of *Doherty v Birmingham City Council*,⁸⁰ the House of Lords declined to follow the chamber judgment of the European Court of Human Rights in *McCann v United Kingdom*, largely on the basis that they thought it was impossible to derive clear guidance from the judgment.⁸¹ In the subsequent case of *Manchester City Council v Pinnock* in 2010, a nine member panel of the UK Supreme Court unanimously accepted that the Strasbourg case law was ‘now ... unambiguous and consistent’ and that it was right for English law to fall in line with the case law of the ECtHR.⁸²

In the 2009 case of *R v Horncastle*,⁸³ the UK Supreme Court unanimously declined to follow the chamber judgment of the European Court of Human Rights in *Al Khawaja v United Kingdom*, concerning the use of hearsay material in criminal cases, on the basis that it was concerned that the European Court may have failed to appreciate certain aspects of English criminal procedure.⁸⁴

⁷⁹ [2004] 39 EHRR 8, paras 117-134.

⁸⁰ [2008] UKHL 57.

⁸¹ See e.g. Lord Hope at para 20: ‘I am not convinced that the Strasbourg court – which did not hear oral argument in *McCann* – has fully appreciated the very real problems that are likely to be caused if we were to [reverse *Kay*]. [The judgment in *McCann*] suffers from a fundamental defect which renders it almost useless in the domestic context. It lacks any firm objective criterion by which a judgment can be made as to which cases will achieve this standard and which will not Until the Strasbourg court has developed principles on which we can rely on for general application the only safe course is to take the decision in each case as it arises’; see also e.g. Lord Scott at para 82 and Lord Walker at para 115.

⁸² [2010] UKSC 45 per Lord Neuberger at para 46.

⁸³ [2009] UKSC 14.

⁸⁴ See e.g. Lord Phillips at para 11: ‘The requirement to ‘take into account’ the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is

In May 2010, the UK government's appeal against the chamber decision in *Al Khawaja* was heard by the Grand Chamber of the European Court and a ruling is expected before the end of 2011.

In the October 2011 case of *R (Quila) v Secretary of State for the Home Department*,⁸⁵ a majority of the UK Supreme Court declined to follow the plenary judgment of the European Court of Human Rights in *Abdulaziz v United Kingdom*,⁸⁶ on the grounds that it was 'an old decision' and apparently inconsistent with subsequent judgments of the Strasbourg Court.⁸⁷

As cases such as *Doherty* and *Horncastle* show, the ability of the UK courts under section 2 of the HRA to decline to follow rulings of the ECtHR is essential to the process of judicial dialogue between the UK courts and Strasbourg.⁸⁸ This in turn makes it less likely that the European Courts will disagree with the conclusions of the

open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case'.

⁸⁵ [2011] UKSC 45.

⁸⁶ *Abdulaziz, Cabales and Balkandali v UK* [1985] 7 EHRR 471.

⁸⁷ See Lord Wilson at para 43: 'Having duly taken account of the decision in *Abdulaziz* pursuant to section 2 of the Human Rights Act 1998, we should in my view decline to follow it. It is an old decision. There was dissent from it even at the time. More recent decisions of the ECtHR, in particular *Boutif* and *Tuquabo-Tekle*, are inconsistent with it. There is no 'clear and consistent jurisprudence' of the ECtHR which our courts ought to follow'; see also e.g. Baroness Hale at para 72.

⁸⁸ See e.g. *R v Lyons* [2002] UKHL 447 per Lord Hoffmann at para 46: 'It is obviously highly desirable that there should be no divergence between domestic and ECtHR jurisprudence but section 2(1) says only that the courts must 'take into account' the decisions of the ECtHR. If, for example, an English court considers that the ECtHR has misunderstood or been misinformed about some aspect of English law, it may wish to give a judgment which invites the ECtHR to reconsider the question: compare *Z v United Kingdom* (2001) 10 BHRC 384. *There is room for dialogue on such matters*' [emphasis added]. See also Sedley LJ, 'Personal reflections on the reception and application of the Court's case-law', *Judicial Dialogue* (Council of Europe, 2006); Lord Neuberger MR, 'The current legal challenges facing social landlords: A judge's perspective', Social Housing Law Association Annual Conference, 27 November 2009; and Lord Judge LCJ, Judicial Studies Board lecture, Inner Temple, 17 March 2010, p7.

UK courts. As the Grand Chamber of the ECtHR itself noted in the 2006 case of *Roche v United Kingdom*:⁸⁹

Where ... the superior national courts have analysed in a comprehensive and convincing manner the precise nature of the impugned restriction, on the basis of the relevant Convention case-law and principles drawn therefrom, this Court would *need strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law.*

In most cases the judicial dialogue between UK courts and the ECtHR is one where the Strasbourg Court simply accepts the conclusions of the UK court, for example in *N v United Kingdom*⁹⁰, the judgment of the Grand Chamber which effectively endorsed the unanimous reasoning of the House of Lords in *N v Secretary of State for the Home Department*⁹¹.

On occasions, however, the ECtHR has referred to judgments of the UK courts in cases *not* involving the UK. In *Neulinger and Shuruk v Switzerland*⁹² the Grand Chamber referred to the approach taken by the House of Lords towards the definition of a 'child's best interests' under the Hague Convention and cited the judgment of Lord Hope in *In re D (a child)* [2006] UKHL 51; and in *Demir and Baykara v Turkey* (app no 34503/97, 12 November

⁸⁹ [2006] 42 EHRR 30, para 120, emphasis added.

⁹⁰ app no 26565/05, 27 May 2008

⁹¹ [2005] UKHL 31

⁹² app no 41615/07, 6 July 2010 paras 60 and 64

2008) the Grand Chamber cited the approach of the House of Lords in *Pinochet*.

Thus UK courts can and do give a successful lead to Strasbourg.

In November 2009, the then Shadow Lord Chancellor Michael Howard MP claimed that the Human Rights Act, 'requires our courts to apply the European Convention on Human Rights in every decision they make'.⁹³ Similarly, when he was shadow Justice Secretary, Dominic Grieve MP suggested that the 'marked deference' shown by British judges towards Strasbourg decisions under the HRA was problematic, and indicated that a Conservative government would, among other things:⁹⁴

reword it to emphasise the leeway of our national courts to have regard to our own national jurisprudence and traditions and to other common law precedents while still acknowledging the relevance of Strasbourg Court decisions.

The UK courts are not bound by rulings of the Strasbourg Court and they are perfectly entitled to invite Strasbourg to clarify its reasoning and to think again, if they believe there is good reason to do so. Indeed they have already done so on a number of occasions.

⁹³ 'We must replace the Human Rights Act with a British Bill of Rights', Conservative Party blog, 22 November 2009. Similar inaccuracies appear in the Denning Lecture given by Sir Malcolm Rifkind QC MP ('Governed by Law or by Lawyers? International Treaties and Human Rights', 28 October 2009), see esp pp16-17 where he refers to the UK courts' 'lack of flexibility' under the HRA.

⁹⁴ 'Can the Bill of Rights do better than the Human Rights Act?', Middle Temple Hall, 30 November 2009, p9.

For these reasons, we conclude that section 2 of the HRA has worked well, enabling the UK courts to strike an appropriate balance between consistency and flexibility. Moreover, any amendment would only reduce this flexibility, something that in our view would be deeply undesirable.

Section 3: Interpretation of legislation

An undisputed role of the UK courts and tribunals is that of statutory interpretation. The meaning of statutes is not always clear and explicit and may lead to litigation before the courts. The courts have developed a number of rules to assist with the interpretation of statutes. This is not controversial.

Since Convention rights are binding, the HRA requires that, **so far as it is possible to do so**, primary and subordinate legislation must be read and given effect in a way which is compatible with 'Convention rights'. Section 3(2) provides, however, that this power does not apply to legislation that is *incompatible* with Convention rights. Where it is not possible to interpret legislation compatibly with Convention rights, then it is open to the courts to make a declaration of incompatibility under section 4 (see below).

How section 3 works

Case study: *Ghaidan v Godin-Mendoza*⁹⁵

Section 3: interpreting legislation consistently with Convention rights

In this case section 3 of the HRA was effectively used to interpret legislation to prevent a breach of same sex couples' right to family life and non-discrimination in their living arrangements.

Mr Wallwyn-James was living in a flat in London as a tenant from 1983 until he died in 2001. He was living with Mr Godin-Mendoza at the flat in a long term same-sex couple relationship at the time of Mr Wallwyn-James death. The claimant Mr Ghaidan who was the owner of the flat applied to a court for the possession of the flat after Mr Wallwyn-James died.

The key issue in the case was whether Mr Godin-Mendoza's human rights to family life (article 8) and non-discrimination in the enjoyment of that right (article 14) would be breached if he was not entitled to a 'statutory' tenancy to live in the flat.

There are a number of benefits of a statutory tenancy as opposed to an 'assured' tenancy. the rent payable under an assured tenancy is the contractual or market rent, which may be more than the fair rent payable under a statutory tenancy, and an assured tenant may be evicted for non-payment of rent without the court needing to be satisfied, as is essential in the case of a statutory tenancy, that it is reasonable to make a possession order.

The Rent Act 1977 provided only that a 'person who was living with the original tenant as his or her husband or wife' would be eligible to succeed to the tenancy.

⁹⁵ [2004] UKHL 30

The House of Lords used section 3 of the HRA to interpret the provision 'as his or her wife or husband' in the Rent Act to mean 'as if they were his wife or husband'. As a result the court decided Mr Godin-Mendoza should have the right to a statutory tenancy in the same way as the survivor of a married couple. This also avoids the court having to make any declaration of incompatibility under section 4 of the HRA which should only be used by the courts as a last resort.

The reasons for the duty

This power to 'read down' legislation in a manner consistent with Convention rights is, in many ways, simply a statutory extension of the long-standing principle of our common law constitution that fundamental rights can only be overridden by express statutory language.⁹⁶ As Lord Hoffmann said in *Ex Parte Simms* in 1999:⁹⁷

Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom,

⁹⁶ See also e.g. Lord Browne-Wilkinson in *R v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539 at 575: 'basic rights are not to be overridden by the general words of a statute since the presumption is against the impairment of such basic rights'.

⁹⁷ *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33, emphasis added. See also e.g. Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998' [2009] 125 *Law Quarterly Review* 598.

though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

The power in section 3 is, moreover, consistent with the approach taken by other common law countries, for example, the approach of the Canadian Supreme Court under the Canadian Charter of Rights and Freedoms 1982⁹⁸ or section 6 of the New Zealand Bill of Rights Act 1990:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

It is clear from the parliamentary debates that this power to 'read down' legislation consistently with Convention rights was intended to be the primary remedy of the courts under the HRA. It was predicted in the Third Reading debate in the House of Lords, that 'in 99 per cent of the cases that will arise, there will be no need for judicial declarations of incompatibility'.⁹⁹ Similarly, the Home Secretary told the House of Commons during the Second Reading debate that the government expected that 'in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention'.¹⁰⁰ Since the Act came into force, the UK courts have

⁹⁸ See e.g. the reading-down of inconsistent legislation by the Canadian Supreme Court in cases such as *R v Butler* [1992] 1 SCR 452 or *Ruby v. Canada (Solicitor General)* [2002] 4 SCR 3.

⁹⁹ Hansard, HL Debates, 5 February 1998, col 840.

¹⁰⁰ Hansard, HC Debates 16 February 1998, col 778.

used section 3 to give effect to the Convention rights of individuals in a wide variety of cases.

Why concerns are misplaced

It is also worth remembering that by ratifying the Convention the UK government signalled its clear intent to honour its obligations; the interpretation of legislation in a way which is compatible with the Convention is part of that commitment.

In *Ghaidan* the Law Lords made it clear that 'a judicial reading down, or reading in, under section 3 did not flout the will of Parliament as expressed in the statute under examination'.¹⁰¹ As Lord Nicholls said in that case, the obligation on the courts to interpret legislation consistently with Convention rights was one that entrusted to them by Parliament:¹⁰²

Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights 'so far as it is possible to do so'. *This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention.*

¹⁰¹ Ibid, para 40 per Lord Steyn.

¹⁰² Ibid, para 26. Emphasis added.

Moreover, as Lord Steyn made clear, if Parliament disagreed with an interpretation by the courts under section 3, 'it is free to override it by amending the legislation and expressly reinstating the incompatibility'.¹⁰³

Lord Steyn also stressed that the use of the interpretative power under section 3 was intended to be 'the principal remedial measure' under the HRA, and that the making of a declaration of incompatibility under section 4 was 'a measure of last resort'.¹⁰⁴

There are nonetheless limits to the interpretative obligation under section 3. An example of these limits was the 2002 case of *Anderson*,¹⁰⁵ which concerned the power of the Home Secretary under section 29 of the Crime (Sentences) Act 1997 to release a prisoner serving a mandatory life sentence on licence. *Anderson* is a very good example of the court respecting the will of Parliament.

The House of Lords rejected the argument that it could 'read down' section 29 to exclude the role of the Home Secretary: as Lord Bingham put it:¹⁰⁶

To read section 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended

¹⁰³ Ibid, para 43.

¹⁰⁴ Ibid, para 39.

¹⁰⁵ *R v Secretary of State for the Home Department ex parte Anderson* [2002] UKHL 46.

¹⁰⁶ Ibid, para 30.

and would go well beyond any interpretative process sanctioned by section 3 of the 1998 Act

More recently, the UK Supreme Court considered its duty under section 3 in the case of *R(GC) v Commissioner of Police for the Metropolis*,¹⁰⁷ concerning the retention of DNA samples by police under section 64(1A) of the Police and Criminal Evidence Act 1984 in the wake of the ruling of the Grand Chamber of the European Court of Human Rights in *S and Marper v United Kingdom* in 2009 that it was a breach of article 8 to retain indefinitely the DNA samples of people who had not been convicted of a criminal offence.

Although replacement legislation had been enacted (the Crime and Security Act 2010), it had not yet been brought into effect. The Association of Chief Police Officers had for practical reasons kept operational its pre-2009 guidelines to local police forces directing continued indefinite retention. Ruling that the guidelines were unlawful, the Supreme Court did not compel the police service to obey the Strasbourg jurisprudence, in the absence of a change made by Parliament.

In conjunction with the reciprocal power to make a declaration of incompatibility under section 4, the interpretative obligation under section 3 has been widely acclaimed as a sensitive and proportionate means of giving effect to Convention rights in a way

¹⁰⁷ [2011] UKSC 21.

that is compatible with Parliamentary sovereignty. As the President of the UK Supreme Court Lord Phillips noted in a recent lecture:¹⁰⁸

Provided that the main thrust of their legislation is not impaired they have been happy that the courts should revise it to make it Convention compliant, rather than declare it incompatible. In my experience, counsel for the Secretary of State usually invites the court to read down, however difficult it may be to do so...

In April 2011, the think tank Civitas published a pamphlet which among other things called for the amendment of section 3 in order to:¹⁰⁹

prevent the courts from re-writing the express terms of legislation in order to pre-emptively avoid any inconsistency with the ECHR, where doing so would undermine the 'object and purpose' of the legislation according to the intentions of Parliament at the time of enactment.

The courts have repeatedly made clear in cases such as *Ghaidan*, that the obligation to interpret legislation consistently with Convention rights is one that has been placed upon them by Parliament itself in enacting the HRA. In other words, when interpreting legislation under section 3, the courts are not only giving effect to Parliament's intention behind that particular statute *but also* Parliament's intention when it passed the Human Rights

¹⁰⁸ First Lord Alexander of Weedon lecture, Inner Temple Hall, 22 April 2010, p44. Emphasis added.

¹⁰⁹ Dominic Raab MP, *Strasbourg in the Dock* (Civitas, April 2011).

Act. As Lord Steyn pointed out, if Parliament considers that the courts have misunderstood or frustrated their intention, 'it is free to override it by amending the legislation and expressly reinstating the incompatibility'.¹¹⁰

More generally, there is nothing particularly unusual about Parliament legislating in this manner, nor are the effects of judicial interpretation limited to cases under the Human Rights Act. In *HM Treasury v Ahmed*, for instance, the UK Supreme Court held that the Treasury had exceeded its power to establish a scheme for freezing the assets of suspected terrorists under the United Nations Act 1946, and used its inherent power to quash the orders as *ultra vires*. In a case that was nothing to do with the Human Rights Act, Parliament acted quickly to enact emergency legislation: the Terrorist Asset Freezing (Temporary Provisions) Act 2010.

Similarly in another case that did not involve the Human Rights Act – *R (Chief Constable of Greater Manchester Police) v Salfords Magistrates' Court and Paul Hookway*¹¹¹ – in which a High Court judge interpreted the time limits under section 41 of the Police and Criminal Evidence Act 1984 in a restrictive manner, Parliament again was able to act swiftly to introduce emergency legislation to correct it: the Police (Detention and Bail) Act 2011.¹¹²

¹¹⁰ Ibid, para 43.

¹¹¹ [2011] EWHC 1578 (Admin).

¹¹² Hookway was an unpopular decision, with one chief constable quoted as saying that he and his colleagues were 'running around like headless chickens' and on the 'verge of a disaster'.¹¹² The outrage had nothing to do with the Human Rights Act and whilst criticisms were temporarily directed at the court, the real object of the frustration was the legislation which Parliament subsequently corrected.

The possibility of the courts misapprehending Parliament's legislative intent is, therefore, not something which arises only in relation to the HRA. On the contrary, it is a general feature of our legal system. This is why it always remains open to Parliament to legislate in order to correct what it sees as mistakes by the courts or anomalies uncovered by judicial scrutiny.

Section 3 of the Act gives the courts the responsibility to interpret legislation in order to give effect to Convention rights. Although this interpretative obligation is stronger than the traditional common law principle of legality, the use of section 3 by the courts has been proportionate and effective in protecting Convention rights in a manner consistent with Parliament's intent.

As the parliamentary record makes clear, it was always Parliament's intention that most issues under the HRA should be resolved by reference to section 3 rather than section 4. As Lord Phillips points out, this is the solution that has generally found favour with government ministers as well. As with any court decision concerning the interpretation of legislation, it is always open to Parliament to legislate to correct any mistakes that may arise. Section 3 works well to protect Convention rights and consider criticisms of it to be misplaced.

Section 4: Declarations of incompatibility

Another important mechanism is the declaration of incompatibility which clearly marks the separation of powers between the courts and Parliament.

Section 4 of the HRA provides that, in any proceedings in which a court considers that a provision of legislation is incompatible with a Convention right, 'it may make a declaration of that incompatibility'. Section 4(6) makes clear, however, that a declaration of incompatibility 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given'.

How does it work?

As stated above, the primary obligation of the court is, so far as it is possible to do so, to read and give effect to primary legislation and subordinate legislation in a way which is compatible with the Convention rights. Where legislation is inconsistent with the Convention rights then the court may issue a declaration of incompatibility.

CASE STUDY

R (Wright and others) v Secretary of State for Health

The case of *R (Wright and others) v Secretary of State for Health*¹¹³ is an example of how declarations of incompatibility work. This case concerned care workers who did not have an opportunity to challenge their provisional classification as unsuitable to work with vulnerable adults. They claimed a breach of their rights to a fair trial (article 6) and to privacy (article 8).

The Protection of Vulnerable Adults (POVA) scheme in England and Wales was a system set out in the Care Standards Act 2000, which was developed, promoted and controlled by the Department of Health for the purpose of acting as a workforce ban on those people who had been proven to have harmed vulnerable people in their care. A care worker could be provisionally placed on a Protection of Vulnerable Adults List (POVA) pending the determination of an investigation.

In practice, care workers on the POVA List waited many months for a decision to be made. In the four cases reviewed by the House of Lords the care workers were kept on the list for between eight and nine months but at the end of this period only one of the four remained on the List. Three of the care workers had therefore been left without the opportunity to work for nine months. Listing prevented a care worker from being employed in any job that involved vulnerable people, including children.

¹¹³ [2009] UKHL 3

The House of Lords unanimously found the provisional listing without the opportunity to defend the allegations a breach of the rights to a fair trial and privacy. It also made a declaration of incompatibility, declaring that the relevant provisions of the Care Standards Act 2000 which set out the procedure for being placed on the POVA were incompatible with those rights. Importantly, the court did not decide how the provisions could be made compatible with Convention rights as it was held that was a matter for Parliament to decide.

The government responded by replacing POVA with the Vetting and Barring Scheme (VBS) with referrals to the Independent Safeguarding Authority (ISA). The new system was provided for in the Safeguarding Vulnerable Groups Act 2006 (SVGA). Under the new system, all new referrals of care workers to the ISA are not provisionally listed. Listing only occurs after an individual has had the opportunity to put forward their own representations and a full investigation has been completed.

Why do the courts have this power?

The declaration of incompatibility is one of the most innovative features of the HRA. It is also important to note that the power may be exercised only by the higher courts and as a measure of last resort, where the legislation cannot be read or given effect in a way which is compatible with the Convention. As Dominic Grieve, the then Shadow Attorney General stated during the parliamentary debates, '[the requirement for the courts] to set out the nature and the and extent of the incompatibility...is an indispensable

prerequisite to Parliament being able to make an objective and correct judgment on compatibility and on how it wishes to proceed...¹¹⁴

The power of the courts to make a declaration of incompatibility under the HRA was a deliberate compromise between two different models for protecting human rights: the 'strong' form of judicial review, under which the courts have the power to strike down any legislation that is incompatible with human rights, such as exists under the US Bill of Rights, the Canadian Charter of Rights and Freedoms, and the South African Bill of Rights; and a weaker, more 'parliamentary' model of protecting rights as exemplified by the New Zealand Bill of Rights Act, in which the courts have no such strike-down power but only the ability to interpret legislation consistently with basic rights along the lines of the power under section 3 of the HRA.

The former model is sometimes seen as a more effective way of protecting rights, but it involves real limitations on the power of democratic governments to decide certain areas of policy. The latter model is much more respectful of parliamentary sovereignty but has been criticised for offering too few safeguards against arbitrary interference with fundamental rights. As the Lord Chancellor explained to Parliament:¹¹⁵

The design of the bill is to give the courts as much space as possible to protect human rights, short of a power to set aside or

¹¹⁴ Hansard House of Commons Committee Stage 3 June 1998 vol 313 col 457

¹¹⁵ Hansard, House of Lords debates, 3 November 1997, cols 1228-1229. Emphasis added.

ignore Acts of Parliament. In the very rare cases where the higher courts will find it impossible to read and give effect to any statute in a way which is compatible with convention rights, they will be able to make a declaration of incompatibility. Then it is for Parliament to decide whether there should be remedial legislation. Parliament may, *not must*, and generally will, legislate.

Why concerns are misplaced

Declarations of incompatibility by the courts have no direct effect on the continuing validity of an Act of Parliament. It is not tantamount to striking down legislation: the law does not automatically change as a result of a declaration of incompatibility. Instead, Parliament must decide whether it wishes to amend the law.

The only formal effect is to enable the government to exercise a fast-track power to make a remedial order (see below). In particular, it allows Parliament to take the appropriate steps to correct the matter rather than wait for the inevitable, adverse judgment of the European Court of Rights. As Lord Hoffmann explained in *Ex Parte Simms* in 1999:

‘Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power.

The constraints upon its exercise by Parliament are ultimately political, not legal.’¹¹⁶

It is, of course, correct that the UK government is bound as a matter of international law to give effect to final judgments of the ECtHR to which it is a party.¹¹⁷ But this is because the UK as a sovereign power agreed to be bound by this when it signed and later ratified the European Convention on Human Rights. As Professor Jeremy Waldron explained to the parliamentary Joint Committee on Human Rights in March 2011, ‘Part of the point of being a sovereign is that you take on obligations’.¹¹⁸ The task of living up to one’s responsibilities may sometimes cause difficulties, but it is a mistake to think of this as any kind of violation of sovereignty. More importantly, it remains always for Parliament to decide what action to take in response to a declaration of incompatibility or an adverse judgment of the Strasbourg Court. As the Master of the Rolls, Lord Neuberger, noted in a recent lecture:¹¹⁹

[U]nder the 1998 Act the courts’ role is to try and interpret every statute so as to comply with the Convention, and, if that is impossible, to warn Parliament that the statute does not comply –

¹¹⁶ *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33, emphasis added. See also e.g. the speech of Lord Keith in *Derbyshire County Council v Times Newspaper Ltd and others* [1993] AC 534 at 551: ‘My Lords, I have reached my conclusion upon the common law of England without finding any need to rely upon the European Convention. My noble and learned friend, Lord Goff of Chieveley, in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, at p. 283-284, expressed the opinion that in the field of freedom of speech there was no difference in principle between English law on the subject and Article 10 of the Convention. I agree, and can only add that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the treaty in this particular field’.

¹¹⁷ See Footnote 58 above.

¹¹⁸ Evidence to the Joint Committee on Human Rights, 15 March 2011, Q57.

¹¹⁹ Second Lord Alexander of Weedon Lecture, 6 April 2011, paras 58-59. Emphasis added.

reflecting the alarm bell just mentioned. It is then for Parliament to decide whether to amend the legislation. *If it chooses not to do so, that is an end to the matter from a legal point of view.*

The court's limited privilege to review, not strike down, legislation cannot therefore impinge on parliamentary sovereignty. First, the court's power only arises because it has been bestowed by Parliament through the 1998 Act, and what Parliament gives it can take away. That is well demonstrated by the fact that the English courts had no power to apply the Convention for the first fifty years of its life – i.e. until the 1998. Secondly, where legislation does not comply with the Convention, the ultimate decision as to what to do about it is in the hands of Parliament, not the courts.

In fact, despite the continuing controversy over declarations of incompatibility under section 4, the power is used infrequently: between October 2000 and September 2011, only 27 declarations had been made, of which 8 were subsequently overturned on appeal.¹²⁰ Of the 19 final declarations:¹²¹

12 were or will be remedied by subsequent primary legislation;
2 were remedied by a remedial order under section 10 of the HRA;
4 related to provisions that had already been remedied by primary legislation by the time the declaration had been made; and
1 is under consideration by the government as to how to remedy the incompatibility.

¹²⁰ Ministry of Justice, *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2010-2011* (September 2011), p 5: 'Since the Human Rights Act came into force on 2 October 2000, 27 declarations of incompatibility have been made, of which 19 have become final (in whole or in part) and none of which are subject to further appeal'.

¹²¹ *Ibid*, Annex A, p29.

The best-known and undoubtedly the most controversial declaration was that in the Belmarsh case,¹²² in which the House of Lords declared the indefinite detention of foreign nationals under Part 4 of the Anti-Terrorism Crime and Security Act 2001 to be incompatible with the rights to liberty (article 5) and non-discrimination (article 14) of the Convention.

Other declarations have included the incompatibility of the Matrimonial Causes Act 1973 with the right of transsexual persons to marry (*Bellinger v Bellinger*)¹²³ the incompatibility of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 with the right of foreign nationals to marry (*R (Baiai and others) v Secretary of State for the Home Department*);¹²⁴ and the incompatibility of the Care Standards Act 2000 with the right to a fair hearing in respect of persons who had been provisionally listed by the Secretary of State as unsuitable to work with vulnerable adults (mentioned above).¹²⁵ Had a declaration of incompatibility not been made by a UK court in each of these cases, then it is likely that the complainant would have been successful before the ECtHR. To this extent, each declaration of incompatibility has enabled the UK government to forego the unnecessary additional burden of having to defend incompatible legislation in Strasbourg.

¹²² *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

¹²³ [2003] UKHL 21.

¹²⁴ [2008] UKHL 53.

¹²⁵ [2006] EWHC 2886 (Admin), subsequently confirmed by the UK Supreme Court.

The misconception that the courts are engaged in ‘overruling’ Parliament cannot be squared with the practical reality of how declarations of incompatibility operate under section 4. In our view, section 4 is an essential safeguard for the protection of Convention rights in the UK, and one that works by respecting the principle of parliamentary sovereignty. We see absolutely no case for either its amendment or repeal.

Section 6: Acts of public authorities and meaning of 'public authority'

Article 1 of the European Convention requires the State to secure ECHR rights to everyone within its jurisdiction: the Human Rights Act (HRA) ‘...gives effect to article 1 by securing to people in the United Kingdom the rights and freedoms of the convention.’¹²⁶

Under the Human Rights Act it is unlawful for a public authority to act in a way which is incompatible with a Convention right. This obligation does not apply if under the law the public authority could not have acted differently.

Section 6 HRA is designed to identify those bodies that are carrying out functions which will engage the responsibility of the United Kingdom before the European Court of Human Rights.¹²⁷ These bodies are termed ‘public authorities.’ However, section 6 contains no definition of ‘public authority’ apart from expressly

¹²⁶ Lord Irvine, formerly Lord Chancellor, Hansard House of Lords Debates (Committee Stage) col 475, 18 November 1997

¹²⁷ See *Aston Cantlow* (per Lord Nicholls at paragraph 6, per Lord Rodger at paragraph 160, per Lord Hope at paragraph 52, per Lord Hobhouse at paragraph 87 and per Lord Scott at paragraph 129).

including courts and tribunals, and other so-called 'hybrid' bodies when they are performing 'functions of a public nature'.

How has 'public authority' been defined?

Section 6 provides that:

It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

.....

(3) In this section 'public authority' includes—
a court or tribunal, and
any person certain of whose functions are functions of a public nature,
but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

.....

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

In parliamentary debates during the passage of the HRA, the Lord Chancellor gave an explanation of 'pure' public authorities:

'Clause 6(1) refers to a 'public authority' without defining the term. In many cases it will be obvious to the courts that they are dealing with a public authority. In respect of Government departments, for example, or police officers, or prison officers, or immigration

officers, or local authorities, there can be no doubt that the body in question is a public authority.’¹²⁸

Section 6(3) and 6(5) HRA extends obligations to ‘hybrid’ bodies by refining the definition of ‘public authority’. The policy intention behind this drafting was explained as follows:

‘...we wanted a realistic and modern definition of the state so as to provide correspondingly wide protection against an abuse of human rights. Accordingly, liability under the bill would go beyond the narrow category of central and local government and the police – the organisations that represent a minimalist view of what constitutes the state.’¹²⁹

It was further explained that this mechanism was designed to ensure that responsibility under the HRA would generally follow the outsourcing of state functions.

‘The second category contains organisations with a mix of public and private functions. One of the things with which we had to wrestle was the fact that many bodies, especially over the past 20 years, have performed public functions which are private, partly as a result of privatisation and partly as a result of contracting out. [.....] Private security firms contract to run prisons: what Group 4, for example, does as a plc contracting with other bodies is nothing whatever to do with the state, but, plainly, where it runs a prison, it may be acting in the shoes of the state.’¹³⁰

¹²⁸ Hansard House of Lords Debates Committee Stage, 24 November 1997, col 811

¹²⁹ The former Home Secretary Jack Straw MP Hansard House of Commons Debates Committee Stage col 314, 17 June 1998

¹³⁰ Hansard House of Commons Debates, 17 June 1998, cols 409-410

In the House of Lords debates, the Lord Chancellor confirmed that persons or organisations delivering privatised or contracted-out public services were intended to be brought within the scope of the Act by the 'public function' provision.

'The provision is there to include bodies which are not manifestly public authorities, but some of whose functions only are of a public nature. It is relevant to cases where the courts are not sure whether they are looking at a public authority in the full-blooded Clause 6(1) sense with regard to those bodies that fall into the grey area between public and private. The bill reflects the decision to include as 'public authorities' bodies which have some public functions and some private functions'.¹³¹

How section 6 HRA has worked in practice

Applying the definition of a 'pure' public authority has proved relatively straightforward and the courts appear to have had little difficulty identifying which bodies fall within the scope of section 6(1) HRA. In the case of *Aston Cantlow*, Lord Nicholls observed:

'.....the phrase 'a public authority' in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression. It is in respect of organisations of this nature that the government is answerable under the European Convention on Human Rights. Hence, under the Human Rights

¹³¹ . Hansard House of Lords Committee Stage) 24 November 1997, col 811. See also: House of Commons Debates, 16 February 1998, col 773 (Home Secretary); House of Commons Debates, 17 June 1998, cols 409-410, 433 (Home Secretary),

Act a body of this nature is required to act compatibly with Convention rights in everything it does.¹³²

CASE STUDY: Human Rights in Healthcare

The Commission's Human Rights Inquiry found that the Human Rights Act has generally had a positive impact on the delivery of public services. Where the HRA has been used effectively by public authorities it has improved the design and delivery of their services in a manner that respects people's human rights and improves staff satisfaction and confidence in their decision making.¹³³

The Human Rights Inquiry looked at a range of examples of how the HRA and improved public service delivery in sectors, including health and social care, policing and criminal justice, local authority services, and services for children and young people.

One important healthcare project was the Human Rights in Healthcare initiative. This involved five primary care and National Health Service trusts in England in a pilot scheme to adopt a human rights approach, sponsored by the Department of Health with the participation of the British Institute of Human Rights.¹³⁴

In evidence to the Commission's Inquiry the Permanent Secretary described its effects:

¹³² Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley v. Wallbank and Another [2003] UKHL 37, paragraph 7

¹³³ Human Rights Inquiry, Chapter 3, page 37-38, Equality and Human Rights Commission, 2009, http://www.equalityhumanrights.com/uploaded_files/hri_report.pdf

¹³⁴ Surrey and Borders Partnership Trust, Southwark Health and Social Care, Heart of Birmingham Teaching PCT, Mersey Care NHS Trust, Tees, Esk and Wear Valleys NHS Trust. See 'Human Rights in Healthcare – A Framework for Local Action', Department of Health / British Institute of Human Rights, March 2007.

‘What [the pilot project] does is help to focus attention of the organisation on things which are absolutely crucial to quality services which is about fair, effective and personal services to people. It goes right to the core values and service ambitions of both health and social care ... What it has proved is an energising way of using the human rights ambitions and features to get an organisation thinking about how it does its job better, which seems to me to be absolutely what it should be about.’

**Mr Hugh Taylor, Permanent Secretary, Department of Health – transcript
30.10.08**

During the period of the Inquiry, the Department of Health also published an independent evaluation of the Human Rights in Healthcare initiative, conducted by Ipsos MORI, which drew the following conclusion:

‘Our evidence to date does demonstrate that a human rights based approach to health and social care can, and will increasingly in the future, have a tangible impact on the treatment and care of service users.’

(Department of Health Evaluation, 2008)¹³⁵

The Human Rights in Healthcare initiative demonstrated how the HRA can tangibly improve the delivery of public services.

The scope of the ‘public function’ test

Defining the extent to which section (6)(3)(b) HRA encompasses the functions of private and third sector organisations has in practice proved more problematic than identifying ‘core’ public authorities under section 6(1). The courts have generally taken a

¹³⁵ ‘Human Rights in Healthcare Evaluation’, Department of Health, 31 July 2008, p.1.

conservative approach to functions performed by private or third sector bodies, showing reluctance to treat these as public functions under the HRA. As we observe below, the Joint Committee on Human Rights took the view that this is a more restrictive interpretation than Parliament intended, potentially depriving numerous people from the human rights protection offered by the HRA.

Case law from the European Court of Human Rights (ECtHR) gives little clear guidance on applying the public function test, apart from recognising that in some circumstances the State has positive obligations to regulate or control the activities of private persons, where the human rights of an individual would otherwise be at risk; and that the State may in some circumstances retain responsibility for the conduct of private law institutions to which it has delegated state powers.¹³⁶

There have been two key decisions by the House of Lords on this issue: the *Aston Cantlow* case, cited above; and *YL (by her litigation friend the Official Solicitor) v. Birmingham City Council and Others* [2007] UKHL 27. The House of Lords held that there is ‘no single test of universal application’ in determining whether a body is a public authority¹³⁷ and that the courts should adopt a factor-based approach to this question.¹³⁸ The YL decision confirmed that the factors to be taken into account include:

¹³⁶ See for example Lord Mance’s commentary in YL (paragraph 92).

¹³⁷ *Aston Cantlow*, paragraph 12

¹³⁸ YL per Lord Mance at paragraph 91.

- The extent to which, in carrying out the relevant function, the body is publicly funded; however, if a body receives public money in payment for commercial services under a contract, this would not suggest that the body is performing a public function.
- Whether the body is exercising statutory powers; however, this depends on why the powers have been conferred. If for private, religious or purely commercial purposes, it does not support the conclusion that the functions are of a public nature.
- Whether the body is taking the place of central government or local authorities; this principle may be easy to apply where powers are formally delegated to the body concerned.
- Whether the body is providing a public service, normally one of a governmental nature. This should not be confused with functions which are in the public interest or for the public benefit, as many private bodies (private schools, private hospitals, private landlords etc) provide goods or services that are in the public interest.
- The fact that the function is subject to statutory regulation, or is one normally carried out by a public body, does not necessarily mean that it is a public function when carried out by a potentially hybrid body. For example, applying these tests, the courts have confirmed that public functions were performed by hospital managers of a private psychiatric

hospital where patients were detained under the Mental Health Act 1983.¹³⁹

Areas where clarification of ‘public function’ has been needed

It has not always proved easy to determine whether certain types of function are ‘public’ within the meaning of section 6 HRA. There are two areas of public service provision where it has fallen to the courts to clarify whether private or third sector organisations are performing public functions under the HRA; and a third important area where the scope of the HRA has yet to be clarified.

Social care

In the *YL* case cited above, the House of Lords held by a 3-2 majority that the HRA does not apply to private and voluntary sector care homes providing residential social care services under contract to local authorities. This lacuna in the scope of the HRA was subsequently closed by Parliament, through section 145 Health and Social Care Act 2008. This section provides that the meaning of ‘public function’ under S 6(3)(b) HRA includes providing care home accommodation with nursing or personal care for an individual, where this care is publicly arranged.

The legal impact of the *YL* decision almost certainly extends to the majority of home care services, as these are arranged by local authorities under similar statutory provisions (section 29 National Assistance Act 1948). However, section 145 of the Health and

¹³⁹ *R(A) v Partnerships in Care Ltd* [2002] EWHC 529 (Admin)

Social Care Act 2008 only brings *residential* social care within the scope of the HRA.

This anomaly for home care, combined with significant changes in the provision of home care over the past two decades, has led to the majority of home care services falling outside the scope of the HRA. In 1993, the proportion of publicly funded home care provided by the private and voluntary sectors was less than 5%, but by 2009/2010 this had increased to 84%.¹⁴⁰

Provision of accommodation by registered social landlords

In the case of *R (Weaver) v London & Quadrant Housing Trust*,¹⁴¹ the Court of Appeal decided that a housing association was performing a function of a public nature when allocating and managing social housing. In drawing this conclusion, the court took into account the following factors:

- The work of the housing association was subsidised by the State
- The housing association was granted special intrusive powers by law, such as the power to apply for an anti-social behaviour order
- It was working closely with the local authority to help achieve the latter's duties under the law

¹⁴⁰ NHS Information Centre (2011) Community Care Statistics 2009-2010

¹⁴¹ *R (Weaver) v London & Quadrant Housing Trust* [2009] HLR 40, CA

- It was providing a public service of a type which would normally be provided by the government – ie, providing housing below market rents

In this case, the Court of Appeal made it clear that its decision only related to London and Quadrant Housing Trust. However, in the wake of the Weaver decision it seems likely that other, similar registered social landlords are also within the scope of the HRA¹⁴².

Options considered by the JCHR for expanding and clarifying the meaning of ‘public function’

The Joint Committee on Human Rights (JCHR) most recently considered the meaning of ‘public authority’ and ‘public function’ in an inquiry report published in March 2007.¹⁴³ The JCHR concluded that the inquiry evidence reinforced the conclusion of its predecessor Committee ‘that the disparities in human rights protection that arise from the case law on the meaning of public authority are unjust and without basis in human rights principles’. They also considered that these disparities frustrated the intentions of Parliament.

The JCHR looked at several options for overcoming this problem; further government guidance; further litigation; and a legislative solution.

¹⁴² See *Eastlands Home Partnership Ltd v White* [2010] EWHC 695 (QB) where the registered social landlord accepted for the purposes of the hearing that it was within the scope of the HRA

¹⁴³ Joint Committee on Human Rights: The meaning of public authority under the Human Rights Act 1998, Ninth Report of session 2006-07

Further government guidance: the JCHR recommended that, as a stop-gap solution, current guidance on building the HRA into contracts be improved and given wide circulation. However, they emphasised that this would not be an effective substitute for the direct application of the HRA as Parliament intended.

Further litigation: Referring to the *Johnson* case (this case was later consolidated with *YL* in the House of Lords) the JCHR doubted that litigation would lead to an enduring and effective legal solution: 'Waiting for a solution to arise from the evolution of the law in this area through judicial interpretation may mean that uncertainty surrounding the application of the HRA will continue for many years. It could lead to a serious risk of discrepancies across public service delivery.'

Further legislation: the JCHR concluded that that legislation was the only effective solution to ensure that 'public authority' was interpreted in the way that Parliament intended. It strongly resisted the idea of listing individual types or categories of 'public authority' in a schedule to the HRA, as this would be too inflexible.

Extending the scope of the HRA sector by sector was also rejected, on the basis that this would reduce the impetus to find a general solution and would compound legal uncertainty in other sectors. Although the JCHR did not favour a direct amendment to the HRA itself, it supported the idea of a separate, interpretative statute. This could be worded as follows:

'For the purposes of s. 6(3)(b) of the Human Rights Act 1998, a function of a public nature includes a function performed pursuant

to a contract or other arrangement with a public authority which is under a duty to perform the function.¹⁴⁴

Our conclusions and recommendations

The flexibility in the meaning of ‘public authority’ has been a defining feature of the HRA, and one of its most innovative legal mechanisms. We conclude that section 6(1) has been successful in defining ‘pure’ public authorities carrying out functions which engage the State’s responsibilities under the Convention.

However, the application of sections 6(2) and 6(3) has been more problematic.

As noted above, article 1 of the European Convention requires the State to secure ECHR rights to everyone within its jurisdiction. It can be argued that the interpretation by the courts of S6(3)(b) HRA, combined with the increasing role of the private sector – and to a lesser extent the third sector– in delivering public services, has undermined the UK’s compliance with article 1. Similar concerns were expressed by the JCHR in its 2007 report on this issue:

‘ We consider that the practical implications of the current case law on the meaning of public authority are such that some service users are deprived of a right to an effective remedy for any violation of their Convention rights, with a significant risk of incompatibility with the United Kingdom’s responsibilities under article 1 and article 13 ECHR. We consider that the practical

¹⁴⁴ Paragraph 150

implications of the current case law for vulnerable service users are particularly stark. In the absence of any compelling evidence that the public services market would be undermined by the application of the HRA, we consider there is an urgent need for action to ensure that the HRA is applied as in our view it was intended by Parliament.¹⁴⁵

The Commission shares the JCHR's conclusions. We therefore recommend that if any British Bill of Rights were developed, it should be used as a vehicle for clarifying the definition of 'public function' under HRA. As a starting point, the wording proposed by in the 2007 JCHR report to achieve this clarification could be adopted.

Section 8: Judicial remedies

Section 8 HRA provides that compensation (damages) for a breach may be awarded where it is necessary to do so to provide the victim with 'just satisfaction'. Therefore if another remedy - for example an injunction to prevent a breach continuing – will give the victim an effective remedy, compensation will not be awarded in addition. This is consistent with the requirements of the Convention and was designed to incorporate article 13, which does not otherwise appear in the Act¹⁴⁶, into UK law. Any bill which failed to provide for a full range of remedies being available for a violation of a Convention right would not comply with article 13.

¹⁴⁵ Joint Committee on Human Rights: The meaning of public authority under the Human Rights Act; Ninth report of session 2006 – 2007, paragraph 83

¹⁴⁶ The government argued at the time that Article 13 was not needed in Schedule 1 as the whole scheme of the Act was designed to provide an effective remedy.

In practice, damages awards in the domestic courts are rare, and where they are awarded, low. The principles for determining the quantum of any award have been set out by the House of Lords in *R (Greenfield) v Secretary of State for the Home Department*¹⁴⁷. They are based on the premise that a finding of a violation is in itself an important remedy, and that compensation should not be greatly higher or lower than a victim would expect to be awarded in Strasbourg. However, Lord Bingham also held that the English courts could depart from ECtHR scales where appropriate.

The application of *Greenfield* has in fact led to very few awards of damages at all, and those that have been made are much lower than comparable claims for race or sex discrimination¹⁴⁸. It has been argued that the courts have been so reluctant to award damages that it might amount to frustrating the intention of the HRA, if in fact an effective remedy is not available to individual claimants.

One of the principal reasons behind the availability of compensation for breaches of Convention rights is the deterrent principle – it is thought that a public body will more readily comply with its human rights obligations if not to do so would lay it open to damages claims. There is little evidence that the availability of damages in such cases does, at present, in fact drive greater compliance. It is in any event likely that it would only do so if the

¹⁴⁷ [2005] UKHL 14

¹⁴⁸ Awards are commonly in the range of £500 - £1500, whereas claims for discrimination might attract awards for injury to feelings of around £3000 - £15000, or more.

prospect of it happening in practice was greater than currently and if the likely amount of any damages award were higher.

Nonetheless the principle that damages should be available and accessible is an important provision that should be retained so that victims can obtain redress for a violation of their Convention rights.¹⁴⁹

Section 10: The power to take remedial action

A declaration of incompatibility will trigger the possibility of 'remedial action' being taken by the government to correct the incompatibility.

Section 10 provides that in the event that either:

- a UK court makes a declaration of incompatibility against a provision of legislation under section 4 and there is no prospect of any further appeal against the ruling; or
- it appears to the government that a provision of legislation has become incompatible following a judgment of the ECtHR;

then government ministers may make a remedial order to correct the incompatibility, but only if they believe there are 'compelling reasons' for doing so.¹⁵⁰

¹⁴⁹ Accessibility is in a particular problem in relation to claimants who would need legal aid/ public funding to bring a claim. Because awards are so low they do not usually meet the costs-benefit test for legal aid eligibility and claimants can only bring a claim if their claim also meets the 'public interest' test. Any damages awarded in those circumstances could be paid over to the Legal Services Commission as a contribution to the costs of bringing the case, so in fact a claimant could receive nothing.

¹⁵⁰ Section 10(2).

How this works in practice

The correction usually takes the form of secondary legislation.

Schedule 2 of the HRA sets out the relevant procedure for making the order, including the requirement for any draft order to be laid before Parliament and approved by a resolution of both Houses unless it is necessary to proceed as a matter of urgency, in which case it must be approved subsequently by both Houses.¹⁵¹

In November 2010, the then-shadow Justice Secretary Dominic Grieve MP wrote an article criticising the interpretation of the HRA by the courts. Among his criticisms of the HRA was the following: We should ... look at restoring a better balance between Parliament and the courts. It is wrong that primary legislation can be altered by Statutory Instrument if found incompatible with the Human Rights Act. Nor should our courts have power to stand a statute on its head.

In over a decade since the HRA came into force, however, the power under section 10 has only been used four times: once by the Labour government to remedy the incompatibility of sections 72 and 73 of the Mental Health Act 1983,¹⁵² and three times by the Coalition government in relation to stop and search,¹⁵³ the rights of

¹⁵¹ Schedule 2, para 2(b).

¹⁵² See *R(H) v Mental Health Review Tribunal for the North and East London Region* [2001] EWCA Civ 415 and the Mental Health Act 1983 (Remedial) Order 2001 (SI 2001/3712).

¹⁵³ See *Gillan and Quinton v United Kingdom* (2009) 50 EHRR 45 and the Terrorism Act 2000 (Remedial) Order 2011 (SI 2011/631).

foreign nationals to marry,¹⁵⁴ and introducing a right of appeal in relation to the sex offenders register.¹⁵⁵

Although we agree that it is generally undesirable that primary legislation may be amended by statutory instruments, section 10 does require that all such remedial orders are laid before Parliament and are thereby prevented from having any lasting effect unless and until they are approved by both Houses. In our view, this appears to be a sufficient safeguard against unnecessary resort to fast-track remedial orders. In addition, section 10(2) requires that a government minister must believe that there are 'compelling reasons' for doing so. Lastly, it is apparent that the power has in fact only been exercised in a handful of cases.

The lack of any evidence to show that the remedial power in section 10 has been in any way problematic only reinforces our view of it as an entirely sensible and practical measure.

Section. 12 Freedom of expression

Section 12 applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

It provides that no injunction is to be granted unless the court is satisfied that the claimant is likely to establish that publication

¹⁵⁴ See *R (Baiai and others) v Secretary of State for the Home Department*, n124 above, and the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2011

¹⁵⁵ See *R(F and another) v Secretary of State for the Home Department*[2010] UKSC 17 and the Sexual Offences Act 2003 (Remedial) Order 2011.

should not be allowed and by section 12(4) the court must have particular regard to the importance of the Convention right to freedom of expression and in the case of journalistic, literary or artistic material the extent to which:

- the material has, or is about to, become available to the public; or
- it is, or would be in the public interest for the material to be published, and any relevant privacy code, for example the Press Complaints Commission Code.

The inclusion of s.12 in the Human Rights Act was the result of press lobbying. Some quarters of the press were concerned that article 8 (privacy and family life) would infringe freedom of expression. Lord Wakeham, chairman of the PCC, welcomed its inclusion. He was confident it would mean no privacy law sneaked in through the back door as a result of the incorporation of the European Convention of Human Rights into British law.

The practical outcome of s.12 has been to set the standard of proof for claimants seeking injunctions. Section 12 makes the likelihood of success at trial an essential element in the court's consideration of whether to make an interim order. 'More likely than not', the words used in the Act, is a higher threshold to meet than 'a real prospect of success.'¹⁵⁶ Other than to set the standard of proof, s.12 adds very little to article 10 and to the qualifications provided in article 10(2). It has been used mainly in cases concerning breaches of confidentiality.

¹⁵⁶ Cream Holdings Ltd v Banerjee and the Liverpool Post Echo Ltd. [2004] UKHL 44

Section 13: Freedom of thought, conscience and religion

Section 13 requires the court to have 'particular regard to the importance of the article 9 right in any case where the court's determination of an issue under the Convention might affect the exercise by a religious organisation of the right to freedom of thought, conscience and religion.

Section 13 was added to the Human Rights Bill following concerns by the churches that Convention rights are enjoyed by individuals and not organisations such as the churches. Section 13 was designed therefore to make it clearer that the Convention rights would attach to religious organisations as well as to individuals. The then Home Secretary, Jack Straw, stated that the provision reflected Convention jurisprudence that a church body or other association with religious objectives is capable of possessing and exercising the rights in article 9 as a representative of its members.¹⁵⁷

Section 14 and 15: Reservations and Derogations

These sections provide the mechanism for derogations from and reservations to the Convention. They were passed by Parliament with few comments and without controversy.

¹⁵⁷ Hansard House of Commons Committee Stage 20 May 1998 col 1020 See also In the case of Gallagher (Valuation Officer) v Church of Jesus Christ Latter Day Saints¹⁵⁷ there Church relied on its religious beliefs as part of its argument that it should be exempt from liability to non domestic rates The House of Lords found that article 9 was engaged but that taxation would not interfere with the Church's right to manifest its faith.

The only reservation lodged by the UK to date is with respect to article 2 of Protocol No. 1 (right to education). The impact of the reservation is to qualify the duty on the State to ensure that education and teaching conforms to the religious and philosophical convictions of parents by making it compatible with the provision of efficient instruction and training and the avoidance of unreasonable expenditure.

The reservation was extended in 1988 and 2001 to different overseas territories where education legislation allows for further exceptions to article 2.

Currently there are no derogations from the Convention, although the UK government has registered some in the past. It registered a derogation to article 5(3) in 1988 in response to terrorism connected with affairs in Northern Ireland which was withdrawn in 2001.

However, following the attacks of 11 September 2001, the UK government passed anti-terrorism legislation which necessitated the registration of another derogation to article 5(1) (f) ECHR. The derogation permitted the indefinite detention without charge of foreign nationals suspected of being 'international terrorists', if the risk of torture prohibited their deportation or extradition. The derogation was withdrawn in 2005 following a House of Lords decision (*A & Others v Secretary of State for the Home Department* [2004] UKHL, 56).

Section 19: Statements of Compatibility

The importance to democracy of statements of compatibility is greatly underestimated if not overlooked. Statements of compatibility promote open and transparent government and allow Parliament to hold the Executive to account through scrutiny and discussion of the statement. It is key feature of the HRA and would need to be part of the machinery supporting a Bill of Rights. Since the commencement of the Human Rights Act, all proposed legislation being considered in the Westminster Parliament has had to be accompanied by a statement from the Minister in charge of the bill, before its second reading, that in his or her view the provisions of the bill are compatible with the Convention rights, or that despite being unable to make such a statement the bill should proceed.¹⁵⁸

In the Scottish Parliament, the relevant Minister and the Presiding Officer must make a statement of compatibility in relation to each bill being considered.¹⁵⁹ They cannot make a statement of incompatibility as legislation passed by the Scottish Parliament must be human rights compatible to be within the competence of the Parliament and can be invalidated by the Courts if not.¹⁶⁰

These provisions are generally acknowledged to be an important feature of the parliamentary model of human rights protection. They require government to assess whether proposed legislation is compliant with human rights legislation and state its intentions in that regard. They also facilitate parliamentary scrutiny and

¹⁵⁸ s.19 HRA 1998

¹⁵⁹ S.31 (1) and 31 (2) Scotland Act 1998

¹⁶⁰ See for example AXA General Insurance v The Lord Advocate & others [2011] UKSC 46

informed dialogue between the executive, Parliament and the courts. The effect is that instead of human rights being the property of judges and lawyers, it has been made part of the other two branches of government, the Executive and the legislature. To this end, they guarantee transparency, accountability and open democracy. Although a useful and effective provision, this mechanism could be strengthened by requiring that the Minister, and in Scotland the Presiding Officer, give reasons for making the compatibility statement, providing a fuller explanation of the human rights issues involved. We believe that this would consolidate and build on the emerging trend for Parliament and government departments to engage more actively with human rights considerations in the development of policy and legislative proposals.

How the current mechanism works

The usual practice, and all that is required by the HRA and the Scotland Act, is for the Minister (and Presiding Officer) to make a brief statement of compatibility, rather than to provide a detailed explanation of how the conclusion has been reached.

There have been some notable exceptions. When the Equality Bill was brought before the House of Commons on 3 December 2009 a detailed analysis was presented.¹⁶¹ It identified the most significant issues arising under the Convention as those ‘where exceptions to the prohibition on discrimination are provided or the rights to non-discrimination conflict with each other and there is a

¹⁶¹ Statement of compatibility by the Rt Hon Baroness Royall of Blaisdon under s.19(1)(a) HRA

need to balance them'. It has proved an extremely useful adjunct to the legislation itself and the explanatory notes in understanding of the purpose and meaning of the law.

More recently, when the Protection of Freedoms Bill was introduced into the House of Commons on 11 February 2011, it was certified as compatible by the Secretary of State for the Home Department, and at the same time the Home Office published a detailed Human Rights memorandum setting out the Government's views on the principal human rights implications of the bill.¹⁶² This was based on the Memorandum prepared for the Parliamentary Business and Legislation Committee. It provided a careful and thorough human rights analysis of the bill's provisions, including consideration of the UN Convention on the Rights of the Child. The Joint Committee on Human Rights commented favourably on this new initiative and commended the approach to other departments as an example of best practice. The Committee noted however that it would have been helpful to receive a further Memorandum on Government amendments to the bill which 'clearly have human rights implications.'¹⁶³

A detailed Human Rights Memorandum also accompanied the Government's Terrorism Prevention and Investigation Measures (TPIM) bill, which again provided invaluable analysis of the bill's human rights implications alongside the Ministerial statement of compatibility.¹⁶⁴

¹⁶² www.homeoffice.gov.uk/publications/.../human-rights-memorandum

¹⁶³ Human Rights Joint Committee scrutiny of the Protection of Freedoms Bill, 7 October 2011

¹⁶⁴ <http://www.homeoffice.gov.uk/publications/about-us/legislation/tpim-bill-docs/echr-memorandum>

The reasons for statements of compatibility

Statements of compatibility were included as a demonstration of the government's commitment to human rights. They have the advantage of drawing the mind of the Minister to the obligations under the Convention to which the government must adhere and ensure that these are given effect in legislation. However, the hidden value to such statements is that by highlighting the human rights implications, Parliament is also made aware of its role to give effect to the Convention when it considers proposals for legislation. This is of particular importance where a Minister cannot make such a statement and wishes to proceed with the bill in which case the statement acts a trigger for intense parliamentary scrutiny and debate.

Need to strengthen the mechanism

As stated above, it remains the exception rather than the rule in both the Westminster and Scottish Parliaments for a Minister (or the Presiding Officer) to provide reasons for stating that a bill is compatible with the HRA. We note that the JCHR, which plays a key role in legislative scrutiny, believes that the quality of the analysis of human rights compatibility issues in the explanatory notes to bills has improved.¹⁶⁵ However, it also draws attention to the practice of asserting in explanatory notes accompanying bills that a provision complies with the ECHR, without giving any reasons for the assertion.¹⁶⁶

¹⁶⁵Work of the Joint Committee on Human Rights in 2008-09

<http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/20/2006.htm>

¹⁶⁶An example given was the Borders, Citizenship and Immigration Bill, HL 62, HC 375, *ibid*

The JCHR has consistently asked the Westminster Government to provide a dedicated human rights memorandum with every bill it publishes, but this request has to date been rejected.

Making it a requirement to provide reasons explaining and supporting the statement of compatibility would increase transparency and improve the quality of 'dialogue' between the executive, Parliament and the courts. The human rights implications of any proposed law would be clearly identified and openly debated. Members of both Parliaments, including ministers, would become more familiar with the potential impact of new laws and policies on human rights. It would help increase awareness of, and a culture of respect for, human rights within the Parliaments and across the governments' departments. This would also ensure that courts are better informed of legislative intent and better able to construe statutes' compatibility with the Convention when called upon to do so.

In summary, the benefits of requiring a statement of reasons would be to increase the effectiveness of parliamentary scrutiny, and to improve understanding and awareness of human rights and what they mean in practice in the courts and legal system as well as in the wider community.

In its legislative scrutiny work the JCHR has identified nine human rights compatibility issues which recur in its scrutiny of Westminster legislation¹⁶⁷:

¹⁶⁷ Work of the Committee in 2008-09 - Human Rights Joint Committee (para 35)

- i. The adequacy of the safeguards contained on the face of bills conferring powers to disclose, share or match personal information;
- ii. Lack of clarity about whether private bodies are 'public authorities' for the purposes of the Human Rights Act where bills confer powers and functions on them;
- iii. The adequacy of judicial and procedural safeguards to protect liberty;
- iv. The danger of discrimination in the operation of certain provisions
- v. The right of access to a fair hearing before a court;
- vi. The adequacy of safeguards against powers to search a person or property;
- vii. The adequacy of procedural safeguards on preventative orders;
- viii. The adequacy of the powers and independence of human rights institutions; and
- ix. The adequacy of protection for children and young persons.

Chapter 3: Implications for the devolved nations

The third consultation question asks ‘...how do you think [a UK Bill of Rights] should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales.’

The devolution settlements, the Human Rights Act and the European Convention on Human Rights are interwoven elements of the UK's constitutional framework. The devolution settlements and the HRA were part of a package of constitutional reform introduced in 1998. In relation to Northern Ireland, it was also an integral part of the peace process. As a result, any consideration of amendments or repeal of the HRA must carefully consider the legal, constitutional and political implications concerning devolution.

The Commission has previously analysed the devolution issues in two documents: our response to the last government's consultation on a Bill of Rights,¹⁶⁸ and the research report on the process for developing any Bill of Rights.¹⁶⁹ Both of these were published in March 2010.

¹⁶⁸ HRA Plus: Human Rights for 21st century Britain, March 2010, <http://www.equalityhumanrights.com/legal-and-policy/bill-of-rights/our-response-to-the-green-paper/>

¹⁶⁹ Developing a Bill of Rights for the UK, Alice Donald with the assistance of Philip Leach and Andrew Puddephatt, Global Partners and Associates, London Metropolitan University, March 2010, http://www.equalityhumanrights.com/uploaded_files/research/developing_a_bill_of_rights_for_the_uk_report_51.pdf

In Scotland, Wales and Northern Ireland, the protection of human rights is embedded into the devolution statutes in a number of ways.

In summary these are:

- the rights under the European Convention on Human Rights as contained in the HRA form part of the devolution statutes¹⁷⁰
- the devolved institutions have no competence to act in a manner that is contrary to the Convention rights¹⁷¹
- in relation to Scotland and Northern Ireland, the devolved Scottish Parliament and Northern Ireland Assembly have no power to amend the HRA;¹⁷²
- the devolution statutes contain a number of mechanisms similar to the HRA, for example the requirement under section 3 of the HRA to interpret legislation consistently with Convention rights.¹⁷³

As a result, if the HRA was amended or repealed and/or a Bill of Rights was enacted covering the devolved jurisdictions, there would almost certainly be a need for amendments to the devolution statutes.¹⁷⁴ This in turn raises issues about whether the Westminster Parliament would in practice need consent from the devolved administrations for any such amendments or repeal of the HRA.

¹⁷⁰ Section 126 Scotland Act 1998 (SA), section 98 Northern Ireland Act 1998 (NIA), section 158 Government of Wales Act 2006 (GOWA).

¹⁷¹ Section 29 and 54 SA, section 6 and 24 NIA, and section 81(6) and 94 GOWA

¹⁷² Section 29 and Schedule 4 SA, sections 6(2f) and 7(1) NIA. The GOWA specifies which powers or matters are devolved and the HRA is not one of them (Schedule 5).

¹⁷³ Sections 83 NIA, section 101 SA and section 154 and Schedule 5 Part 2 GOWA.

¹⁷⁴ Devolution and Human Rights, Justice February 2010, page 3.

Further factors specific to Northern Ireland also need to be taken into account. Firstly the incorporation of the Convention rights was part of the Belfast (Good Friday) Peace Agreement (the ‘Good Friday Agreement’). Secondly, the Good Friday Agreement committed to consultation on the development of a Bill of Rights for Northern Ireland which would reflect the ‘particular circumstances of Northern Ireland’.

The nature of the different considerations in each of the jurisdictions is discussed below.

1. Scotland

The relationship between the Human Rights Act 1998 and the statute establishing the devolved institutions in Scotland is complex: unlike the Westminster Parliament, in Scotland any act incompatible with Convention rights would for that reason alone place it beyond the competency of the Scottish Parliament. The Human Rights Act is woven through the Scotland Act 1998 and any change to the HRA may entail significant revision and amendment.

While the challenges of drafting a Bill of Rights relevant to all the constituent nations of the UK have been described as ‘not insuperable’¹⁷⁵, these challenges go beyond the technical: in seeking to answer whether a British Bill of Rights should extend to Scotland, it is necessary to take account of the divergent political narratives in

¹⁷⁵ Michael Clancy & Christine O’Neill, evidence to the JCHR, 10 March 2008

London and Edinburgh. These essentially political considerations lie beyond the Commission's remit, but will have to be addressed by UK ministers in dialogue with the devolved institutions in Scotland.

Legal and constitutional considerations

The Scotland Act 1998 contains a number of provisions indicating the relationship between the HRA and the devolution settlements. The most important of these are the provisions indicating the place of Convention rights in the devolution framework; and the provisions concerning amending or repealing the HRA.

In relation to the place of the Convention rights, the Scotland Act ensures that Parliament and Scottish Ministers are unable to legislate or do any act which is incompatible with Convention rights.¹⁷⁶ As confirmed by the House of Lords, this means that it is unlawful for the Scottish Parliament or Scottish Ministers to pass legislation or act in a way which would violate the Convention rights.¹⁷⁷ This is a more robust model than that provided by the HRA which contains no such provisions.

In relation to amending or repealing the HRA, two provisions are central,¹⁷⁸ namely that:

¹⁷⁶ See section 29(2) and 57(2) of the Scotland Act 1998.

¹⁷⁷ *Somerville Scottish Ministers* [2007] UKHL 44.

¹⁷⁸ This draws on legal opinion commissioned in 2010 by the EHRC in Scotland: Colm O'Connell, 'The Potential Repeal of the Human Rights Act 1998 and its Consequences for the Devolved Entities', 2010

- the Human Rights Act 1998 is one of a number of ‘protected enactments’ (Schedule 4) whose provisions cannot be modified by the Scottish Parliament; and that
- the constitution is one of the policy areas reserved in its entirety to the UK Parliament (Schedule 5).

In addition, the Scotland Act confers no powers on the devolved institutions which would override the sovereign legislative authority of the Queen in Parliament¹⁷⁹, which remains absolute, as is made explicit at S28(7): ‘This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland’.

It would therefore appear that the UK Parliament and it alone has the power to amend, repeal or replace the Human Rights Act, and that there is no basis in law for the proposition that any of these options would require the consent of the devolved institutions. However, this does not take account of the convention which has grown out of the first decade of devolution, often known as the ‘Sewell Convention’ which, while it carries no legal weight, is set out in the Memorandum of Understanding between the UK and devolved governments.¹⁸⁰

The Sewell Convention, while recognising the legal authority of the UK Parliament to legislate on any matter, reserved or devolved, places a de facto requirement to seek the consent of the Scottish Parliament before (i) legislating on any devolved matter, (ii) varying the powers of the Scottish Parliament, or (iii) conferring new powers

¹⁷⁹ See Tom Bingham, *The Rule of Law*, London: Allen Lane, 2010, pp.160-170

¹⁸⁰ *Memorandum of Understanding between the UK Government, the Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee*, 2001, www.dca.gov.uk/constitution/devolution/pubs/odpm_dev_600629.pdf

on Scottish Ministers. The Scottish Parliament signals consent by passing a legislative consent motion, often known as a 'Sewell motion'. So, for example, before Scottish Ministers could bring forward draft regulations setting out the specific steps to be taken by devolved authorities to meet the requirements of the Public Sector Equality Duty in the Equality Act 2010, MSPs first had to pass a Sewell motion consenting to these new powers being conferred on Scottish Ministers.

It is not difficult to see how the repeal, substantial amendment or replacement of the Human Rights Act with a British Bill of Rights could either vary the powers of the Scottish Parliament (by altering one of the key tests for determining legislative competence) or confer new powers on Scottish Ministers (through, for example, the introduction of additional rights). The Sewell Convention, while not legally binding, could then come into play and the consent of the devolved institutions be required. These considerations stray however from solely legal and constitutional areas into political areas which, while clearly beyond the Commission's mandate, must also be recognised.

The political context

Any consideration of a proposed Bill of Rights cannot be separated from the political realities of a devolved Britain in 2011. Four different parties are in power in Edinburgh, Cardiff and London, and in Scotland's case, the SNP administration has made clear that it is

opposed to the idea of a Bill of Rights, for cultural and political, as much as constitutional, reasons.¹⁸¹

However, these are arguments not just about identity and history. As previously mentioned, the constitution is a reserved matter under the Scotland Act; nevertheless, the Scottish Government is committed to introducing a multi-option referendum on Scotland's future within or outside the UK by 2015. Scottish Ministers have also been particularly vocal on constitutional matters such as the locus of the UK Supreme Court in Scots criminal law.¹⁸² It is not the Commission's place to consider the merit of these proposals and disagreements, but they help illustrate the political complexities of an issue which cannot be seen in purely legal or constitutional terms.

2. Wales

Since the advent of devolution in Wales, and the establishment of the Welsh Assembly in 1999, clear constitutional conventions have emerged. For instance the use of legislative consent motions passed by the National Assembly to approve clauses in bills before the Westminster Parliament that make provision in respect of an area

¹⁸¹ What is meant by Britishness? Is there a concept of Britishness? Yes, just as there is a concept of being Scandinavian Are we British? No, we are not. We consider ourselves Scottish... .. Indeed, we wish to preserve our own integrity, certainly in legal matters, which, as I say, were specifically protected in the Act of Union From a Scottish perspective, ultimately in an independent Scotland a Bill of Rights seems to us to be sensible but, given that our founding principles in the Scotland Act incorporate ECHR, we have some scepticism about what could be added by a British Bill of Rights to what we already have, incorporated through ECHR, apart from our pronouncement of the principles that exist there.¹⁸¹

¹⁸² John Scott, 'Alex Salmond's attack on the UK supreme court smells political', *The Guardian*, 2 June 2011, www.guardian.co.uk/law/2011/jun/02/alex-salmond-attack-supreme-court

devolved to the Welsh Government. As is the case in Scotland consideration is required of the extent to which any changes to the Human Rights Act will require consent from the National Assembly as the Welsh legislature.

Legal and constitutional considerations

Similarly to Scotland, the power of the Welsh Government is constrained by the need to carry out its business in a manner that is compatible with the European Convention on Human Rights¹⁸³.

Section 81(1) of the Government of Wales Act states that;

‘(1)The Welsh Ministers have no power—
(a)to make, confirm or approve any subordinate legislation, or
(b)to do any other act, so far as the subordinate legislation or act is incompatible with any of the Convention rights.’

This section prevents the Welsh Ministers acting in breach of the European Convention of Human Rights. As is the case in Scotland, consideration as to the effect of any repeal or change to the Human Rights Act will need to take account of the use of the European Convention of Human Rights as a corner stone of constitutional law in the devolved nations.¹⁸⁴ The Supreme Court has recently stated in the context of a challenge to the legitimacy of a piece of Scottish legislation that

¹⁸³ Government of Wales Act 2006 section 81

¹⁸⁴ See in particular recent consideration by the Supreme Court (Lords Hope and Reed) in *AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents)* (Scotland)

‘.....Acts of the Scottish Parliament are not subject to judicial review at common law on the grounds of irrationality, unreasonableness or arbitrariness. This is not needed, as there is already a statutory limit on the Parliament’s legislative competence if a provision is incompatible with any of the Convention rights: section 29(2)(d) of the Scotland Act 1998’.¹⁸⁵

The political context

An important political factor in Wales is that the Welsh Government has been recently enacting further protection of human rights which go beyond the Convention rights.

The Welsh Government has given effect to rights within the United Nations Convention on the Rights of the Child via the Rights of Children and Young Persons (Wales) Measure 2011. This Measure of the National Assembly that pre dates the referendum on greater law-making powers in Wales provides for an eventual¹⁸⁶ due regard duty to be placed on the Welsh Ministers when ‘exercising any of their functions’¹⁸⁷. Whilst not justiciable as a private law action this Measure demonstrates the introduction of a non-justiciable rights framework within executive decision making.

Similarly the Welsh Language Measure (Wales) 2011 recognises the official status of Welsh in Wales as well as an individual freedom to

¹⁸⁵ Lord Hope *supra* paragraph 52

¹⁸⁶ This is from 2014, from 2012 until 2014 the duty covers a provision proposed to be included in an enactment, formulation of a new policy, a review of or change to an existing policy

¹⁸⁷ Section 1 (1) Rights of Children and Young Persons (Wales) Measure 2011

speaking Welsh.¹⁸⁸ It confirms the right previously enacted in the Welsh Language Act (1993) to be able to use Welsh in Court proceedings in Wales.¹⁸⁹ Ensuring the promotion of the Welsh language has been recognised internationally in the context of the UK government's obligations under the Council of Europe Framework Convention on the Protection of National Minorities.¹⁹⁰

As these examples demonstrate, devolved legislation in Wales has begun to incorporate into the domestic legal framework new rights for people in Wales. The extent to which any proposals in a Bill of Rights build on, alter or possibly diminish these rights will require careful consideration. An awareness is required of the increased divergence and political attitudes now present in the devolved nations that were not so on the passing of the Human Rights Act.

3. Northern Ireland

As in relation to the other jurisdictions, there are legal, constitutional and political considerations concerning Northern Ireland that must be taken into account in any discussions on amending or repealing the HRA.

¹⁸⁸ Welsh Language Measure (Wales) 2011, section 1(1) and (2)(e), also Part 6 section 111

¹⁸⁹ Section 23 Welsh Language Act (1993)

¹⁹⁰ For example see article 9 of the Framework Convention on the Protection of National Minorities, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=157&CL=ENG>

Legal and constitutional considerations

Similarly to Scotland and Wales, the Northern Ireland Assembly and Northern Irish Ministers cannot legislate or do any act which is incompatible with Convention rights.¹⁹¹ The Northern Ireland Assembly also has no powers to amend the HRA.¹⁹² Similarly to Scotland though, in practice it is likely that any amendment or repeal of the HRA would require the consent of Northern Ireland Assembly with a Sewell motion for the same reasons.

Considerations particular to Northern Ireland

In relation to Northern Ireland, further legal implications arise beyond those for Scotland and Wales. The Good Friday Agreement states that:

‘The British government will complete incorporation into Northern Ireland law of the European Convention on Human Rights, with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.’¹⁹³

As a result, any decision to repeal the HRA, or to amend the HRA and/or enact a UK Bill of Rights covering Northern Ireland in a way which diminished existing human rights protections, would be likely to breach the Good Friday Agreement. Further it may put the UK in

¹⁹¹ Section 6(2)(c) and 24(1) of the Northern Ireland Act 1998.

¹⁹² Section 7(1)(b) of the Northern Ireland Act 1998.

¹⁹³ Paragraph 2, Rights, Safeguards and Equality of Opportunity: Human Rights in the Multi-Party Agreement, Good Friday Agreement.

breach of its international treaty obligations owed to the Republic of Ireland as one of the guarantors of the agreement.¹⁹⁴

A second important consideration in Northern Ireland is that the Good Friday Agreement included a requirement to consult on the development of a Bill of Rights for Northern Ireland which would build on the Convention rights and reflect the 'particular circumstances of Northern Ireland'.¹⁹⁵

The Northern Ireland Human Rights Commission (NIHRC) was provided with responsibility to consult on a Bill of Rights Commission and produced its detailed recommendations in December 2008.¹⁹⁶ The government largely rejected the NIHRC's advice in 2009¹⁹⁷ and it is unlikely that a Bill of Rights for Northern Ireland will be proposed by the government in the current climate.

While the intention in Northern Ireland was to build on the current framework of the HRA and the Convention rights, the current discussions on a Bill of Rights could involve the repeal of the HRA and replacement with a Bill of Rights which does not contain the

¹⁹⁴ Page 75, Developing a Bill of Rights for the UK, Alice Donald with the assistance of Philip Leach and Andrew Puddephatt, Global Partners and Associates, London Metropolitan University, March 2010, http://www.equalityhumanrights.com/uploaded_files/research/developing_a_bill_of_rights_for_the_uk_report_51.pdf

¹⁹⁵ Paragraph 4, Rights, Safeguards and Equality of Opportunity: Human Rights in the Multi-Party Agreement, Good Friday Agreement.

¹⁹⁶

http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/51/A_Bill_of_Rights_for_Northern_Ireland_%28December_2008%29.pdf

¹⁹⁷ http://www.nio.gov.uk/consultation_paper_-_a_bill_of_rights_for_northern_ireland__next_steps.pdf

same level of protection. These sensitivities must be taken into account, particularly as to whether the Northern Ireland Assembly is likely to consent to proposals to possibly weaken the protection currently provided by the HRA.

The devolution implications for the any possible repeal of the Human Rights Act and replacement by a British Bill of Rights are complex given the degree to which the HRA is embedded in the devolution legislation. Even if the devolution settlements in Scotland, Wales and Northern Ireland do not represent formal legal impediments to any such proposals, it is likely that the agreed conventions which have emerged since 1998 would require the consent of the devolved institutions to any major change. These constitutional considerations cannot be separated from the wider political context, and the divergent political narratives in the devolved nations, which suggest such consent may be unlikely to be forthcoming.

Chapter 4: The process for developing any Bill of Rights

The fourth question asked by the consultation is:

'(4) having regard to our terms of reference, are there any other views which you would like to put forward at this stage?'

Part of the terms of reference are to:

'...examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties.'

The Commission believes that a fundamentally important aspect of developing any Bill of Rights is the process by which it is achieved. The process is crucial for a number of reasons including it being a means: to improve understanding of human rights; to engage with groups that are normally unlikely to participate in such democratic processes; to ensure that there is independence and transparency in the body making decisions; and to ensure that the scope of the possible outcomes is clear.

In October 2009, the Equality and Human Rights Commission commissioned Global Partners & Associates and the Human Rights and Social Justice Research Institute at London Metropolitan University to undertake research to identify and explore best practice processes for developing a new Bill of Rights for the UK. This considered not only aspects relating to improving understanding of human rights, but also other relevant considerations such as non-regression, transparency, independence of the process, inclusivity

and respect for the devolution settlements. The research was published by the Commission at the same time it published its response to the last government's consultation on a Bill of Rights.¹⁹⁸ The research aimed to analyse evidence drawn from related domestic and international experiences, identify key principles that should underpin the development of a Bill of Rights, and identify policy implications in relation to any future process, regardless of which political party is in power.

The research comprised:

- A review of literature on Bills of Rights processes, focusing on Canada, New Zealand, South Africa, Australia and Northern Ireland.
- Forty-three semi-structured interviews with people who have studied and/or been involved in Bills of Rights or analogous processes.
- A seminar on 1 December 2009, held under Chatham House rules, which involved colleagues from human rights commissions in the UK, legal practitioners, academics and non-governmental organisations.

The detailed findings of the research are contained in the final report. Below we only summarise the key principles derived from the research.

¹⁹⁸ Development a Bill of Rights for the UK, Alice Donald with the assistance of Philip Leach and Andrew Puddephatt, Global Partners and Associates, London Metropolitan University, March 2010, http://www.equalityhumanrights.com/uploaded_files/research/developing_a_bill_of_rights_for_the_uk_report_51.pdf

Key principles

The research report set out key principles based on the evidence from the processes of creating Bills of Rights in other jurisdictions. They were suggested as both (i) requirements for the conduct of any future process and (ii) a set of criteria to inform the decision about whether that process is worthy of engagement and against which it might be held up to scrutiny.

A process of creating a Bill of Rights should be:

Non-regressive

Any future UK Bill of Rights should not dilute existing protection provided by the HRA, either in relation to the specific rights protected, or by weakening the existing machinery for the protection of Convention rights. Any process that starts from a premise of going backwards would set a damaging precedent internationally. Any future government must commit unequivocally to retaining the HRA unless and until a new Bill of Rights, protecting human rights to at least the same extent as the HRA, is enacted.

Transparent

Politicians should be transparent about the purpose of a Bill of Rights and the terms of reference and methods of the process by which they propose to create it. This entails a clear procedural commitment to act on the results of public consultation and deliberation within clearly articulated parameters.

Independent

The body running the process should be demonstrably non-partisan, independent of government and have no vested interest in the outcome.

Democratic

For the outcome to be seen as having democratic legitimacy, the process must also be democratic. This principle recognises that Bills of Rights are not only a constraint on the exercise of arbitrary power; they are also a positive instrument to enable relatively powerless groups to have an effective say in the democratic process.

Inclusive

The process should place the highest premium on eliciting the views and experiences of groups whose human rights are most vulnerable to being breached, and should give those voices an elevated status in the assessment of responses and in the final outcome.

Deliberative and participative

The process should be an exercise in building citizenship, not merely 'market research'. It should provide multiple opportunities for participation and, ideally, properly constructed forum(s) for deliberation which should be used to educate and invigorate the wider consultation.

Educative

The public should be informed to the greatest extent possible about existing human rights protections and options for building on them, and about their duty to respect the rights of others. A minimum

requirement is the provision of accessible and impartial information and the correction of myths and misperceptions about human rights and the HRA.

Reciprocal

The process should be a two-way dialogue in which the government, too, is educated. The imprint of the process must be visible and acknowledged in the final outcome.

Rooted in human rights

The process of creating a Bill of Rights must be consistent with human rights principles. These include respect for the dignity and autonomy of individuals and the right to participation. These principles are internationally recognised and not subject to political whim or contingency; nor can they be trumped by considerations such as public safety or security or requirements to exercise individual responsibility.

Timed

Any process should have a clear timeframe including a period to build momentum. It should not be indeterminate.

Symbolic

The process should be suitably ambitious for the undertaking of a constitutional enterprise. A Bill of Rights that aspires to last for generations requires a process that is compelling to the public.

Designed to do no harm

The process should be adequately resourced and there should be a political commitment to act on the outcome of consultation.

Respectful of the devolution settlements

Choice should reside with the devolved assemblies and the process should respect their competency and self-determination.

Policy implications

Pre-conditions for engagement

The principles stated above are, to a degree, interdependent. However, the principle of non-regression is of a higher order. Without an unequivocal guarantee that the purpose of a Bill of Rights process is to augment international standards and to maintain their incorporation in domestic law, the other principles are likely to appear immaterial. We suggest that any actor concerned with the protection and promotion of human rights would be bound to reject a process predicated on regression in terms of formal endorsement or engagement.

The corollary of this is that any future government must provide (and non-governmental actors should demand) an unambiguous - and public - statement of intent and terms of reference for the consultation process, along with clear procedural commitments to act on the outcome of consultation within the stated parameters.

Certifying non-regression

Subject to these assurances, any future government should establish (and actors concerned with the protection and promotion of human rights should advocate for) an independent committee of experts, who might be appointed on a cross-party basis, to provide a 'kitemark' throughout the process that the principle of non-regression is being upheld.

Designing process to produce an outcome with democratic legitimacy

Any future government should, drawing from precedents in other jurisdictions, establish an independent body to run the consultation process. Contingent upon the assurances sought above, actors concerned with the protection and promotion of human rights should advocate for a consultative process that is run independently of government and designed to engender public trust.

The process must also be transparent: actors concerned with the protection and promotion of human rights should influence and monitor the process to ensure that any future government does not 'pick and mix' from available methodologies in order to manufacture apparent consensus behind measures which would not, in fact, have democratic legitimacy.

Influencing the terms of debate: a concordat

Actors concerned with the protection and promotion of human rights should advocate for a concordat that would bind all parties that signed it to certain rules of engagement; principally, an agreement not to use language or bring stories into the public domain that knowingly distort the purported impact of human rights and the HRA. This would help to ensure that all parties commit themselves to a process which

is avowedly educative and non-partisan and does not trade in myths or seek to use the Bill of Rights as a proxy for unrelated issues.

Devolution

Actors concerned with the protection and promotion of human rights should champion the principle that choice should reside with the devolved assemblies and that the process of creating a UK Bill of Rights should respect their competency and self-determination. It is imperative that those actors with appropriate expertise and authority highlight the legal, constitutional and political implications of devolution for any decision to amend or repeal the HRA and/or to enact a UK or 'British' Bill of Rights.

The Commission believes that the same principles and policy implications apply today in relation to this consultation process on a Bill of Rights. The Commission therefore calls on CBR to take them into account in conducting its consultation and in its final report.



**Equality and
Human Rights**
Commission