

HRA PLUS

Human Rights for 21st-century Britain

A response to the Green Paper
Rights and Responsibilities:
developing our constitutional
framework



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*Rights and Responsibilities: developing our constitutional
framework*

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Executive summary

1. Our vision for human rights in 21st-century Britain

The government's Green Paper may be seen as a first step in re-invigorating a human rights culture in Britain and building on our current human rights protections.

The Equality and Human Rights Commission (the Commission) believes that its mandate provides a unique perspective and opportunity to address these challenges. Having duties to promote equality, human rights and good relations between groups provides the Commission with the tools to ensure that human rights are embraced at all levels of society: from the relations between the individual and the State to the relations and responsibilities we owe each other.

The time may be right to consider the next steps in the development of human rights in Britain, but only if the development of any Bill of Rights reinforces and builds on our current human rights protection and framework of the Human Rights Act (HRA). The HRA is under threat and possible repeal, while at the same time there are opportunities and reasons for seeking to improve human rights protection. The Commission will act as both a defender of our current protections and advocate for better protection.

2. The Commission's principles

The Commission has developed four principles for its approach to the development of any Bill of Rights:

- Principle 1: The HRA is essential for the protection of human rights in the United Kingdom and should be retained. Any Bill of Rights should build on the HRA. Any Bill of Rights that replaces the HRA should not be brought into force until and unless it contains at least the same levels of protection of rights and mechanisms under the HRA, 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, 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, European Convention on Human Rights (ECHR) 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.

3. Relevant results from the Human Rights Inquiry

The Commission's Human Rights Inquiry (HRI) found that there was strong support from the public for the protection of human rights in law, and that, when used effectively, the HRA made a positive difference to peoples' lives as well as improving the effectiveness of public service delivery.

However there is a substantial lack of understanding of human rights, significant misconceptions and misreporting of human rights, as well as a lack of leadership from the government, politicians and others with responsibility to formulate national and local public policy.

As a result the Commission will provide leadership by encouraging positive and consistent leadership in government and public authorities on human rights issues, by producing guidance, and raising awareness of human rights issues.

The HRI also highlighted that new duties and mechanisms may be appropriate to further mainstream human rights in the work of public authorities and to ensure that individuals have access to justice in seeking to enforce their rights.

4. A Bill of Rights framework: the essential components

There are a number of vital elements to the content of any possible Bill of Rights which the Commission considers should be adhered to, no matter what structure of Bill of Rights is used. These are:

- the level of protection and all the mechanism provided by the HRA should be retained and not diluted in effect in any way
- that any Bill of Rights must comply with international human rights obligations
- that there are no additional limitation on rights and mechanisms currently provided in the HRA, and
- that 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.

Compliance with international human rights obligations requires:

- that the fundamental human rights as recognised in the ECHR have universal application, applying to everyone in the United Kingdom
- that the fundamental human rights as recognised in the ECHR are enforceable and remedies are available for a breach of those rights, and
- that human rights obligations will only be derogated from in times of emergency and that certain rights (such as the right to life, not to be tortured and to be free from slavery) can never be derogated from.

The enforcement mechanisms under the HRA should be retained, unless they are further strengthened in any Bill of Rights. The evidence available indicates that the key mechanisms (statements of compatibility; requirements to interpret primary and secondary legislation compatibly with Convention rights; declarations of incompatibility, and the duty on public authorities to comply with Convention rights) have worked effectively and not prejudiced parliamentary sovereignty.

An essential element in any future Bill of Rights framework should be the continued existence of the three Commissions (the Equality and Human Rights Commission, the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission) as the independent national bodies to promote understanding of and protect human rights in the UK. The duties and powers of the Commission in relation to human rights and any Bill of Rights should be maintained to at least the same level as currently provided for in the Equality Act 2006. It is also important that the Commission continues to receive adequate funding in order to be able to properly perform its statutory and international duties as a National Human Rights Institution.

In relation to devolution issues, the Commission considers that there are significant legal and political implications of any possible repeal of the HRA and/or replacement with any Bill of Rights which warrant great caution and careful deliberation before any further steps are taken.

5. A Bill of Rights framework: beyond the HRA

5.1 Responsibilities

Responsibilities are already embedded in a number of ways into the domestic and international human rights frameworks. The current debate however, indicates that not only is there a lack of understanding of human rights generally, but that there is a particular lack of understanding of the existing role of responsibilities in human rights.

The Commission's position is that human rights can never be made contingent on the exercise of responsibilities. This position reflects requirements under international human rights treaties to which the UK government is a party.

However, there may be merit in recognising in any Bill of Rights the responsibilities we have to protect each others' human rights. This could help to promote mutual respect, tolerance and a more cohesive society.

There is a need to strike a balance between reminding everyone of the important place of responsibilities in a human rights framework, and ensuring that rights are in no way made contingent on the exercise of responsibilities. The Commission believes the following criteria and safeguards should be applied in consideration of including any responsibilities in any Bill of Rights:

- there may be merit in including responsibilities, but the most important of these that is not currently made express in the HRA is the responsibility to respect the rights of others as contained in a number of international instruments
- it is preferable that any statement of responsibilities should be either in a preamble or related document rather than the substantive provisions. This would be both to indicate their symbolic value, as well as to ensure that the provisions are not interpreted as being directly enforceable against individuals
- if any responsibilities are included in the substantive provisions, there should be an express provision to make it clear that the rights are not contingent on the exercise of responsibilities and that the responsibilities are not directly enforceable, and

- the process for developing any Bill of Rights should involve education of the public on the way in which the human rights framework includes the responsibilities we owe each other.

5.2 Right to dignity

The right to dignity is of fundamental importance in the exercise of all rights and freedoms. The government also agreed to the inclusion of the right to dignity in the EU Charter of Fundamental Rights which is now legally binding. The Commission therefore believes that if any Bill of Rights is developed, the right to dignity should be considered for inclusion.

5.3 Right to equality

Our evidence indicates that a considerable amount of work needs to be done to ensure that all persons in society have the same levels of enjoyment of fundamental human rights. Particular groups such as women, ethnic minority persons, disabled persons, older persons, children and the poor continue to face barriers to the full realisation of their human rights and often remain marginalised and vulnerable to abuse.

A Bill of Rights could build on the current framework in relation to equality issues in two ways: a fully enforceable constitutional right to equality, and by consideration of new provisions relating to improving the rights of particular groups.

Constitutional right to equality

The government should incorporate in any Bill of Rights a fully enforceable free-standing right to equality. The Commission's model of a right to equality would apply to all public authorities (including Parliament and the courts), include the grounds covered by the Equality Bill but go further to include 'other status', and employ the same mechanisms as under the HRA (for example requiring courts to interpret legislation compatibly with the right where possible and permitting declarations of incompatibility).

Rights for particular groups

An area of human rights protection which may benefit from the elaboration of specific rights for vulnerable groups relates to freedom from violence and the physical and mental security of the person. The government should consult on and consider inclusion in any Bill of Rights provisions relating to hate crime, domestic violence, sexual violence, trafficking and exploitation.

The government should consult on and consider inclusion in any Bill of Rights provisions requiring measures to increase participation and representation of particular groups such as women, ethnic minorities, disabled persons and older persons as provided for in relevant international conventions and principles.

The government should consult on and consider inclusion in any Bill of Rights special protection of the right to family and social life. This may be appropriate to safeguard the enjoyment of this right by particular groups such as groups based on their sexual orientation or gender identity, disabled people and children.

The government should consult on and consider inclusion in any Bill of Rights particular rights for children, including the best interests principle and the right to be heard.

5.4 Socio-economic rights

In relation to socio-economic rights, there has been insufficient awareness-raising by the government of the rights; a failure to conceptualise those rights as 'human rights'; and, as a result, a failure to either take a human rights-based approach to their fulfilment or to make appropriate links between socio-economic rights and civil and political rights.

In relation to particular rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR), in a number of areas the gap in attainment between the least and most successful members of society has either stalled or widened. Significant progress needs to be made in order that disadvantaged groups are able to fully realise their rights under the ICESCR.

The Commission believes it is important for the scope of the government's consultation on socio-economic rights be broader than it is in the Green Paper which states that it would not create any new and individually legally enforceable rights.

The government should consult on the full range of possibilities regarding the possible incorporation of socio-economic rights; which could have immediate effect; and whether some or all could be justiciable in some way. It should consult in this manner in relation to all the key socio-economic rights: the right to an adequate standard of living including housing; the right to physical and mental health; the right to education; the right to work, and the right to social security.

5.5 Other potential key rights

In relation to criminal processes, the government should consider incorporating in any Bill of Rights the right to trial by jury, strengthening fair trial rights and making provisions for victims' rights.

The government should ratify Optional Protocol 7 to the ECHR as soon as possible and incorporate in any Bill of Rights a right of appeal in criminal matters, the right to compensation for wrongful convictions, and protection against an individual being tried or punished twice. The government should include in any Bill of Rights a legally enforceable right to administrative justice.

The government should include in any Bill of Rights the right to good administration.

There should be a review of the current protections of the right to privacy and consideration of provisions to strengthen their protection in any Bill of Rights.

The government should ratify Optional Protocol 4 of the ECHR which provides for rights such as the right to freedom of movement within a state's territory for those lawfully there, a right to choose one's residence, a right to leave any country, and a right to be free from expulsion. These rights should also be incorporated in any Bill of Rights.

5.6 Improving the human rights mechanisms

The government should consult on and consider the inclusion of further or strengthened mechanisms in relation to: a public sector human rights duty; providing greater clarity on the definition of private bodies carrying out public functions; broadening the scope of who can commence proceedings under the HRA; incorporating the right to an effective remedy; better entrenchment of any Bill of Rights, and increasing the involvement of Parliament in the implementation and monitoring of any Bill of Rights.

6. The process for developing any Bill of Rights

The Commission agrees with the government that the process for developing any Bill of Rights must involve extensive and appropriate consultation. Constitutional reform raises fundamental questions of the relationship between individuals and the State, the relationships between groups in society, and implications for devolution in Scotland, Wales and Northern Ireland.

Given our concerns about the process for developing any Bill of Rights, in October 2009 the Commission commissioned independent research to identify and explore best practice processes for developing a new Bill of Rights for the UK. 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. That research is being published at the same time as this response to the Green Paper.

The Commission refers the government to the full research report and in particular the principles and policy implications. The Commission hopes that the research findings and recommendations will be of great practical benefit for the next government in developing any possible Bill of Rights that is truly democratic and inclusive of all sectors of society.

1. Our vision for human rights in 21st-century Britain

1.1 The Commission's human rights work

The Equality and Human Rights Commission (the Commission)'s vision for human rights is of a Britain in which:

- there is a dignified life for everyone
- people's freedom and opportunities to achieve their life goals are progressively expanded and are unhindered by prejudice, discrimination or arbitrary restraint, and
- human rights are recognised as the values we share with one another, not simply rights we claim for ourselves, helping to build a more cohesive, civilised and fair society.

Human rights principles provide a basis from which to build and maintain a safer, more prosperous, cohesive society, with care and consideration for the wellbeing of everyone at its heart.

The government's Green Paper may be seen as a first step in re-invigorating a human rights culture in Britain and building on our current human rights protections in the Human Rights Act 1998 (HRA). The Commission is working to provide a fresh vision of human rights where they are viewed in positive terms, benefiting everyone in their daily lives and improving services by public authorities.

The Commission believes that its mandate provides a unique perspective and opportunity to address these challenges. Having duties to promote equality, human rights and good relations between groups provides the Commission with the tools to ensure that human rights are embraced at all levels of society: from the relations between the individual and the State to the relations and responsibilities we owe each other.

In its short life the Commission has already achieved much in promoting and protecting the human rights of everyone in Britain. In January 2009 the Commission became the first statutory body in Britain to receive "A" status accreditation from the United Nations as a National Human Rights Institution. This recognised the Commission as an authoritative and independent national human rights body. In June 2009 the Commission published the final report of its Human Rights Inquiry which provides a detailed analysis of the current enjoyment of human rights in England and Wales. The Commission has also recently published its three-year human rights strategy (for 2009-12) building on the work done to date and the findings of the Human Rights Inquiry.

1.2 Britain's proud history of human rights protection

Britain has a long and proud history of human rights protection. The Magna Carta signed nearly 800 years ago limited the absolute power of the monarch and upheld individual liberty and justice. In 1689 the first Bill of Rights in England prohibited torture. The English philosopher Thomas Paine was highly influential in the American and French revolutions and in 1791 wrote the human rights commentary, *On the*

Rights of Man. In the wake of the atrocities of the Second World War, it was two British Conservative politicians who were instrumental in the drafting of the European Convention on Human Rights: Winston Churchill and David Maxwell Fyfe.¹ Britain signed the Convention in 1950 and became the first country to ratify it in March 1951. The Convention now provides fundamental human rights protection to approximately 800 million people in the 47 Member States of the Council of Europe.

The HRA implemented into our domestic law many of the rights under the European Convention on Human Rights. Its intention was to 'bring rights home' by mainstreaming human rights into the work of the Executive, Parliaments and Assemblies, and Judiciaries as well as, most importantly, providing people with the opportunity to bring human rights claims in UK courts. The HRA is a form of Bill of Rights as it contains a number of mechanisms that make it constitutional.² In the Commission's view, it is important to recognise this as the current debate often appears predicated on an assumption that we don't already have a Bill of Rights.

Most recently in October 2007 the Commission was established as the first British human rights statutory body, taking on the role as a guardian of human rights promotion and protection in Britain.³

1.3 Current challenges and opportunities

The time may be right to consider the next steps in the development of human rights in Britain, but only if the development of any Bill of Rights reinforces and builds on our current human rights protection and the framework of the HRA. The HRA is under threat and possible repeal, while at the same time there are opportunities and reasons for seeking to improve human rights protection. The Commission will act as both a defender of our current protections and advocate for better protection.

The threat to the Human Rights Act

The Commission warmly welcomes the government's commitment in the Green Paper to retain all the rights and mechanisms provided by the HRA in any Bill of Rights, and to not attempt to reverse the incorporation of the European Convention on Human Rights into domestic law.⁴

The Conservative Party has committed to repealing the HRA and made this its third top manifesto priority if they were elected. It has stated however that it would create its own Bill of Rights, as the HRA in its view has not been effective in a number of respects. The Conservatives argue that amendments are needed to the current framework: for example regarding the relationship between parliament and the Courts (parliamentary sovereignty issues), and the relationship between national courts and the European Court of Human Rights.⁵

¹ Churchill's Legacy: The Conservative Case for a Human Rights Act, Jesse Norman and Peter Osborne, Published by Liberty, October 2009.

² The Constitutionalisation of Public Law, Lord Steyn, May 1999, <http://www.theory.phys.ucl.ac.uk/spp/publications/unit-publications/38.pdf>

³ We also welcome the establishment of the Scottish Human Rights Commission which has jurisdiction over human rights issues in Scotland which relate to devolved powers and commenced operating in December 2008.

⁴ Green Paper paragraphs 4.29 and 4.31.

⁵ Dominic Grieve Guest Lecture, Middle Temple Hall, 30 November 2009.

The Commission therefore believes that it is important that we address in this response to the Green Paper both the effectiveness of the HRA to date, and why we believe it must be retained in terms of the rights and mechanisms it provides. These issues are examined in more detail in Chapter 4.

Opportunities to build on the Human Rights Act

On the assumption that a Bill of Rights would build on the HRA, the Commission believes there are a number of reasons why it is now appropriate to have a conversation on further developing human rights for 21st-century Britain.

Firstly, both globally and domestically there are enormous pressures and changes affecting everyone and many of these have evolved rapidly over the last few years. Terrorism raises threats to the most fundamental human rights such as the right to life; the global recession is jeopardising people's economic and social rights to work, housing and an adequate standard of living; the destruction of the environment which risks the future of all humanity has placed a new emphasis on environmental rights; increased migration has led in some cases to increased tensions between communities, and changing demographics are forcing us to reconsider how we ensure that groups such as older persons can continue to fully participate in society.

Underpinning many of the above issues is the need for individuals to take greater responsibility in their lives, for now more than ever, an individual's actions can have ramifications for others.

The Dalai Lama has said in relation to responsibilities:

'I believe that to meet the challenges of our times, human beings will have to develop a greater sense of universal responsibility. Each of us must learn to work not just for oneself, one's own family or nation, but for the benefit of all humankind. Universal responsibility is the key to human survival. It is the best foundation for world peace.'⁶

These new pressures and the need to reconsider the place of responsibilities in our human rights make the consideration of a Bill of Rights timely.

Secondly, the findings from the Commission's Human Rights Inquiry indicate that significant work needs to be done to ensure that human rights capture the imaginations and understanding of people in Britain. We need to move from the goal of 'bringing rights home' under the HRA to inspiring peoples' hearts and minds on human rights. As the Human Rights Inquiry found, there is a general lack of understanding of human rights, dangerous myths and misconceptions about human rights among the public and the media, some inaccurate statements made by leaders about human rights, and a failure to imbed human rights in the work of public authorities. The development of a Bill of Rights is a vital opportunity to educate the public about the importance of and positive aspects of our current human rights protection. The failure to do so in relation to the HRA has had serious negative consequences.

Thirdly, our evidence and experience to date is that the current human rights framework is or may not be sufficient to ensure everyone in society is not only

⁶ The Dalai Lama, http://www.wisdomquotes.com/cat_responsibility.html

protected from abuse but is able to flourish in society. A Bill of Rights could build on the current human rights protection in a number of ways, such as by incorporating: references to the responsibilities we owe each other; rights for particular groups; socio-economic rights; new rights recognising uniquely British rights and values; other rights recognised in international human rights law, and creating new mechanisms to enhance the implementation and enforcement of human rights.

Finally a Bill of Rights could have symbolic and inspirational value in setting the values and vision of a British society we all aspire to and own. The Commission agrees with the statement by the Justice Secretary on the role of Bills of Rights as:

‘A combination of law, symbolism and aspiration. One should not dismiss for a second the symbolic and aspirational role that Bills of Rights and Responsibilities can play. They can take on an iconic importance which goes beyond the explicit legal protection afforded.’⁷

For example, a preamble could set out the values and aims of the Bill of Rights providing an aspirational dimension missing from the HRA.

This discussion paper on a Bill of Rights contains the following elements. Chapter 2 indicates the overarching principles the Commission developed for its approach to a Bill of Rights, irrespective of which political party is in power. Chapter 3 indicates the key findings of the Human Rights Inquiry which have implications for the development of a Bill of Rights. Chapter 4 reviews the effectiveness of the HRA and indicates what we believe are the essential components of a Bill of Rights framework. Chapter 5 analyses the rights and mechanisms that could be incorporated into a Bill of Rights to build on the current protection provided by the HRA. Finally, Chapter 6 considers the best practice principles regarding the process for the development of a Bill of Rights, and refers to the research report published by the Commission at the same time as this response to the Green Paper.

⁷ A Bill of Rights for the UK? Joint Committee on Human Rights, 29th report session 2007-08, 10 August 2008, page 23.

2. The Commission's principles for developing a Bill of Rights

All three of the main political parties currently agree that there is a need for a Bill of Rights but significantly they differ in terms of their positions on the content of any such Bill of Rights, and the effectiveness of the HRA over the last 10 years. There is also no consensus on the best process for developing any Bill of Rights which is inclusive and promotes ownership of it among all in society.

As a result, and following the publication of the government's Green Paper in March 2009, the Commission developed a set of general principles by which it would approach the Bill of Rights debate as it evolves over the coming years. These are intended to: set a minimum standard in relation to the content of any Bill of Rights; highlight the importance of the process for developing any Bill of Rights, and utilise the evidence and findings from the Human Rights Inquiry on the effectiveness of the HRA to inform our future work on the issues. The principles were published in July 2009 and were revised and strengthened following consultation with key human rights stakeholders in January 2010. 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.⁸
- 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.⁹
- 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.¹⁰
- 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.¹¹

⁸ This is discussed in more detail in Chapter 4 in relation to the essential components of a Bill of Rights framework.

⁹ This is discussed in more detail in Chapter 6 in relation to the process for creating a Bill of Rights.

¹⁰ This is discussed in more detail in Chapter 3 on the results of the Human Rights Inquiry.

¹¹ This is discussed in more detail in Chapter 3 on the results of the Human Rights Inquiry and Chapter 4 on the essential components of a Bill of Rights Framework.

3. Relevant results of the Human Rights Inquiry

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.¹²

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.¹³ 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 development of any Bill of Rights. 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 shows that 84 per cent of people want human rights enshrined in the law for themselves and their families.¹⁴
- Human rights are not merely abstract concepts – they are also an effective tool for delivering organisational success and better services to the public.¹⁵ 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 which are reported about human rights, and which remain largely unchallenged, leading to both

¹² Human Rights Inquiry, Report of the Equality and Human Rights Commission, June 2009, page 13.

¹³ 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.

¹⁴ Chapter 2, section 1.0, Human Rights Inquiry Report.

¹⁵ Chapter 3, section 2.0, Ibid.

service users and service providers being uninformed about their rights and responsibilities.¹⁶

- The HRA makes a positive difference to people's lives, and to the effective delivery of public services which focus on individual needs.¹⁷ Human rights, by focusing on the needs of the individual, can help restore the power balance between the State and individuals, and between service providers and service users, and can contribute to a fairer, equal and more inclusive society.¹⁸
- A human rights approach encourages participation by service users in service planning and delivery, increasing their autonomy, enhancing self-respect and building better relationships.¹⁹

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.²⁰
- 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.²¹
- 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.²²

Duties on public authorities

- The duty on public authorities not to act incompatibly with the HRA has sometimes produced a 'compliance only' culture in some public authorities. Witnesses recommended that there should be a new statutory duty to promote human rights, similar to the duties imposed by anti-discrimination legislation, to create an integrated approach to equality and human rights.²³
- The Commission recommended that the government should consult as to whether or not a statutory duty should be imposed on all public authorities to take into account human rights before they implement new policies.²⁴

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.²⁵

¹⁶ Chapter 4, section 5.0, Ibid.

¹⁷ Chapter 3, section 3.0 Ibid.

¹⁸ Chapter 3, section 2.0; Chapter 3, section 3.1 Ibid.

¹⁹ Chapter 3, section 3.5 Ibid.

²⁰ Chapter 5, section 2.1-2.3 Ibid.

²¹ Chapter 5, section 2.1 Ibid.

²² Chapter 6, section 4.3 Ibid.

²³ Chapter 5, section 11.0 Ibid.

²⁴ Chapter 6, section 8.2 Ibid.

²⁵ Chapter 4, section 11 Ibid.

- 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.²⁶
- 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/mediation services on human rights.²⁷

These findings have direct implications for the development of any Bill of Rights as they indicate that the public strongly supports the protection of their human rights in law, but that the public and service providers currently have a lack of understanding of their rights and responsibilities.

It is therefore crucial that in any Bill of Rights process, the government and the Commission provide leadership by actively promoting understanding of the rights, responsibilities and mechanisms under the HRA. In addition, the Human Rights Inquiry highlights that new duties and mechanisms may be appropriate to further mainstream human rights in the work of public authorities and to ensure that individuals have access to justice in seeking to enforce their rights.

²⁶ Irish Traveller Movement, Call for evidence response; Sheffield Law Centre, Call for Evidence response; East Midlands Group evidence session.

²⁷ Chapter 6, section 9.3.

4. A Bill of Rights framework: the essential components

What are the essential components of any possible UK Bill of Rights framework?²⁸

This requires consideration of a number of issues: the content of any Bill of Rights, the national human rights institutions that are mandated to promote and protect human rights, and the United Kingdom's system of devolution which embeds human rights into the devolution statutes and the functions of the devolved legislatures.

There are a number of vital elements to the content of any possible Bill of Rights which the Commission considers should be adhered to no matter what structure of Bill of Rights is used. These are:

- that the level of protection and all the mechanism provided by the Human Rights Act (HRA) should be retained and not diluted in effect in any way
- that any Bill of Rights must comply with international human rights obligations
- that there are no additional limitation on rights and mechanisms currently provided in the HRA, and
- that 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.

In relation to the role of a national human rights institution, the Commission believes that it is essential that the Commission's powers and functions should be retained if any Bill of Rights were developed. In relation to devolution issues, the Commission considers that there are significant legal and political implications of any possible repeal of the HRA and/or replacement with a Bill of Rights which warrant great caution and careful deliberation before any further steps are taken.

This chapter firstly provides an analysis of the evidence of the effectiveness of the HRA to date. It demonstrates why the HRA has overall had a positive impact on UK law and policy formulation. Secondly, it summarises the position of the government and the other main political parties on the HRA and its retention or repeal. Thirdly, it considers the crucial elements that should be contained in any Bill of Rights based on international human rights obligations and the HRA. Fourthly, it analyses the role that the Commission should play in that framework as a national human rights institution. And finally it considers why it is essential to carefully consider the legal and political implications of the devolution settlements in Scotland, Wales and Northern Ireland in the possible process of amending or repealing the HRA and/or developing any UK Bill of Rights.

4.1 The effectiveness of the Human Rights Act

In Chapter 3 we set out some of the key findings of our Human Rights Inquiry. The Inquiry examined the effectiveness of the HRA in improving people's lives and delivering better public services. It found that, where human rights were effectively

²⁸ We note that we use the terminology of a UK Bill of Rights rather than a British Bill of Rights to recognise that the Bill should have application to the whole of the UK. This would not detract from the effect of a Bill of Rights for Northern Ireland which would have effect in Northern Ireland only. We agree with the reasons of the JCHR as to why a UK Bill of Rights is appropriate: see A Bill of Rights for the UK?, Twenty-ninth report of Session 2007-08, published 10 August 2008.

mainstreamed into the work of public authorities, practical benefits were realised by both service users and providers.

There have also been 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.²⁹ 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.³⁰

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 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. The main difficulties in this area arise not from the HRA, but from decisions of the European Court of Human Rights.
- 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 compatibility³¹, 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.

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.

²⁹ Review of the Implementation of the Human Rights Act, July 2006, Department for Constitutional Affairs.

³⁰ Rebalancing the criminal justice system in favour of the law-abiding majority. Cutting crime, reducing reoffending and protecting the public, Home Office July 2006.

³¹ Such as statements of compatibility under section 19 of the Human Rights Act.

- This process has been fuelled by a number of damaging myths about human rights which have taken root in the popular imagination.

In the review conducted by the Home Office it was considered whether the HRA prevented balancing between the rights of individuals and the rights of victims and communities. 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.’³²

The findings from the reviews highlight that in practice the HRA has generally benefited individuals and not impeded the prevention of crime, and has also improved policy formulation. The government concluded that it was not necessary to amend the HRA to improve public safety.

Finally, it is important to recognise that the use of the HRA both in terms of number of claims and enforcement mechanisms has not been excessive. The use of the enforcement mechanisms are discussed below. In relation to the numbers of claims, a recent analysis has demonstrated a downward trend. The figure for 2008 (327) was down 13.7% on the figure from 2007 (379). And that is less than half the figures in the peak year of 2001-2 when it reached 714.³³

4.2 The positions of the political parties on the Human Rights Act

Although all three of the main political parties have engaged in a debate calling for the development of a Bill of Rights, the implications of their policies for the rights and mechanisms under the HRA are very different.

The Commission warmly welcomes the government’s statement in the Green Paper that it is committed to protecting both the rights under the European Convention on Human Rights and the mechanisms to secure those rights as contained in the HRA. It also welcomes the commitment not to attempt to reverse the incorporation of the European Convention on Human Rights into domestic law.³⁴ However, the government’s position in practice on the possible role of responsibilities in a Bill of Rights calls into question the degree to which the government is completely committed to the current structure and interpretation of the HRA. This is discussed in more detail in Chapter 5.

The Conservative Party has made it clear that its policy and third priority if elected is to replace the HRA with a British Bill of Rights and Responsibilities. Although it has indicated that it would not withdraw the UK government’s ratification to the European Convention of Human Rights, the repeal of the HRA could mean that the Convention rights are no longer incorporated into our domestic law and, as a result, a person would no longer be able to bring a claim in domestic courts for an alleged breach of their human rights.

³² Ibid page 4.

³³ ‘Human Rights Act being applied to ever broader range of issues’, press release issued by Mattison Public Relations on behalf of Sweet and Maxwell, 27 January 2009.

³⁴ These mechanism include a duty on public authorities to act in compliance with the rights; a right to challenge infringements in the UK courts; an obligation on the higher courts to interpret legislation compatibly with the Convention rights; and powers for the courts to make declarations of incompatibility where they cannot do so. Green Paper, para 4.29 and 4.31

The Conservative Party has also argued that the HRA has not been effective either in the mechanisms it utilises or in striking the right balance between individual rights and responsibilities.³⁵ As a result they have indicated that it would change some of the current mechanisms and provisions under the HRA. The exact formulation of such changes has yet to be developed. In addition, Conservative Party statements have not always been consistent so therefore should be considered with caution. However, the Conservatives have given some indications of what a Bill of Rights may include. They have said that:

- they would place greater emphasis on responsibilities such that irresponsibility (for example criminal activity) could be taken into account in deciding whether a person's human rights had been breached, or that general responsibilities owed by individuals to society could be included³⁶
- they would amend the mechanisms relating to human rights protection by possibly reducing the powers of courts to interpret legislation compatibly with human rights and remove the courts' power to strike down secondary legislation incompatible with Convention rights³⁷
- they would reconsider section 2 of the HRA which requires domestic courts to take into account Strasbourg jurisprudence in order that greater emphasis is placed on national jurisprudence³⁸, and
- they would introduce new rights such as the right to trial by jury, strengthening the protection of freedom of expression and clarifying privacy law.³⁹

The Liberal Democrats support the establishment of a Bill of Rights within a written constitution and maintain that any Bill of Rights should only build on the level of protection provided by the HRA. They have also called for the introduction of a Freedom Bill to reinstate a number of civil liberties that they say have been eroded by both the Labour and Conservative governments.⁴⁰

4.3 Non-regression from current human rights protection

Given the evidence of the effectiveness of the HRA, both from our own Human Rights Inquiry and government reviews, the Commission's fundamental position is

³⁵ For the Conservative Party positions see for example David Cameron's speech, 'Balancing Freedom and Security - A Modern British Bill of Rights', Centre for Policy Studies, 26 June 2006; Nick Herbert's speech (then Shadow Secretary of State for Justice) 'Rights without responsibilities - a decade of the Human Rights Act', Lecture at the British Library, 24 November 2008; recently the statements of Dominic Grieve (the current Shadow Secretary of State for Justice) in a parliamentary debate on a Bill of Rights Green Paper, 23 March 2009: <http://www.parliament.the-stationery-office.com/pa/cm200809/cmhansrd/cm090323/debtext/90323-0006.htm>; <http://conservativehome.blogs.com/platform/2009/04/dominic-grieve-.html>; and Dominic Grieve's Guest Lecture, Middle Temple Hall, 30 November 2009.

³⁶ <http://www.lawgazette.co.uk/features/clear-blue-water>. More recently in the Guest lecture to Middle Temple Hall, Dominic Grieve stated that reference to responsibilities could be included in a preamble and that an interpretation clause could be developed to better balance rights where the assertion of a right undermines the rights of others.

³⁷ <http://www.lawgazette.co.uk/features/clear-blue-water>. More recently in the Guest Lecture to Middle Temple Hall, Dominic Grieve has stated a different position, that he would wish to retain the system of declarations of incompatibility as being 'a sensible way of the courts to rule on the Bill of Rights without infringing parliamentary sovereignty'.

³⁸ Dominic Grieve Guest Lecture, Middle Temple Hall, 30 November 2009.

³⁹ <http://www.lawgazette.co.uk/features/clear-blue-water> and Dominic Grieve Guest Lecture, Middle Temple Hall, 30 November 2009.

⁴⁰ <http://freedom.libdems.org.uk/the-freedom-bill/>

that the HRA should be retained. As we have stated in our principles, any Bill of Rights that replaces the HRA should not be brought into force until and unless it contains at least the same levels of protection of rights and mechanisms under the HRA, and complies with obligations under international treaties.

Non-regression in the context of the HRA has two essential components: the international standards it implements and the UK enforcement mechanisms and other provisions that it created.

Compliance with international standards of protection

The legislation must meet the standards of human rights protection required by the European Convention on Human Rights (ECHR) and other international human rights treaties to which the UK government is a party.

International treaties (including the ECHR) do not require their direct incorporation into domestic law, but any method of implementation must fully respect and further the rights and include effective mechanisms to secure those rights. Three key principles and mechanisms relating to the rights under the ECHR are:

- most of the rights are universal, and therefore are to be enjoyed by everyone within the jurisdiction of the Member State
- the rights must be enforceable, and
- obligations under the ECHR can only be derogated from in times of emergency.

Universality of rights

In relation to the universality of the rights under the European Convention on Human Rights, article 1 of the Convention provides that the Member States must secure 'to everyone within the jurisdiction' all the primary rights under the Convention (articles 1 to 18). This highlights that human rights (particularly civil and political rights) are enjoyed by everyone, by reason alone of their common humanity, not according to their legal status as citizens or non-citizens.

The Green Paper repeatedly makes references and links between the development of a British Bill of Rights and the enjoyment of those rights by British citizens. This is particularly evident in Chapter 2 on Rights and Responsibilities. While the Commission agrees that the development of a British Bill of Rights necessitates a debate on British identity and values, there is a danger in failing to sufficiently emphasise the universality of most human rights. This is also why we use the term UK Bill of Rights rather than British Bill of Rights.

The Commission acknowledges that some legal rights are explicitly linked with citizenship (including the right to vote, the right to a passport and the right to consular access abroad). In addition certain rights in any Bill of Rights could be limited to citizens, or otherwise by immigration status: for example socio-economic rights such as the rights to social security and secondary healthcare.⁴¹

⁴¹ This is discussed in more detail in the sections on democratic rights and economic and social rights.

However, the government may need to better articulate these nuances in future discussions on a Bill of Rights, for example when it consults with the public on a Bill of Rights.⁴²

Enforceability of rights

The European Convention on Human Rights (ECHR) makes it clear that the rights must be enforceable and where it has been established that there has been a breach of a person's human rights, they are entitled to a remedy.⁴³ The right to a remedy is provided for in section 8 of the HRA. However it is also arguable that article 13 of the Convention should be expressly incorporated into the HRA as it does not provide sufficient remedies. This is considered in Chapter 5 on potential further mechanisms.

Non-derogation except in times of emergency

In addition, most international treaties (including the ECHR⁴⁴) confer powers on the government to suspend certain human rights obligations, but only in times of national crisis or emergency. Further, certain rights are recognised as so fundamental that they are incapable of derogation: for example the right to life (except in respect of deaths resulting from lawful acts of war), torture and slavery. This type of provision must be maintained and may require improvements to the current model.⁴⁵

Enforcement mechanisms

The HRA provides what is commonly described as a 'parliamentary model' of human rights protection as it provides parliament with a central role in enforcing the HRA and retaining the UK concept of parliamentary sovereignty.⁴⁶

The HRA contains the following key mechanisms: a duty on public authorities to comply with the Convention rights⁴⁷; a requirement on Ministers to make a statement on whether the provisions of Bills passing through Parliament are compatible with Convention rights⁴⁸; a requirement on courts to interpret primary and secondary legislation (so far as is possible to do so) compatibly with Convention rights⁴⁹; the ability of courts to make declarations of incompatibility where primary legislation cannot be read compatibly⁵⁰, and the ability of a Minister to make an order amending

⁴² The Commission agrees with a similar recommendation made by the Joint Committee on Human Rights, 'A Bill of Rights for the UK?', Twenty-ninth report of session 2007-08, 10 August 2008, paragraph 84.

⁴³ Article 13 of the ECHR states that: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

⁴⁴ Article 15(1) of the ECHR states that: 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

⁴⁵ See for example the advice of the NIHR on non-derogation provisions, A Bill of Rights for Northern Ireland, pages 141-147.

⁴⁶ Professor A V Dicey has described the doctrine of parliamentary sovereignty having the following key features: that the parliament may alter any law; there is no legal distinction between constitutional and other laws; and that no judicial authority has a right to nullify an Act of Parliament or to treat it as void or unconstitutional: 'Introduction to the Law of the Constitution', 1885.

⁴⁷ Section 6 HRA

⁴⁸ Section 19 HRA.

⁴⁹ Section 3 HRA.

⁵⁰ Section 4 HRA.

primary legislation where it is necessary to rectify the effect of secondary legislation which is incompatible with Convention rights (remedial orders).⁵¹

The model has been described as an innovative and appropriate model for Britain as it creates a 'dialogue' between the Judiciary and Parliament by which judges can apply the legal principles and where appropriate suggest to Parliament to reconsider the compatibility of legislation with the Convention rights. This retains parliamentary sovereignty as Parliament is not compelled to amend the legislation.⁵²

In addition, the experience of these mechanisms in practice has demonstrated that they have been used sparingly.⁵³ In all cases where a declaration of incompatibility was made final the government took corrective measures and in only one case was a remedial order made.

As stated above, the DCA review of the implementation of the HRA in 2006 concluded that the enforcement mechanisms had not significantly altered the constitutional balance between the Executive, Parliament and the Judiciary and that arguments to the contrary 'have therefore been considerably exaggerated'.⁵⁴

4.4 The essential role of the Commission

An essential element in any future Bill of Rights framework is the continued existence of the Commission as an independent national body to promote understanding of and protect human rights in Britain. The Commission also strongly supports the valuable work and continued functioning of the Northern Ireland Human Rights Commission in Northern Ireland and the Scottish Human Rights Commission in Scotland. The Commission believes that the general public and public authorities' understanding of human rights suffered from the fact that a national human rights institution was only established in Britain seven years after the HRA came into force in 2000. As a result, our role as guardian of the Human Rights Act is even more important.

As the evidence from our Human Rights Inquiry demonstrated, there are still significant misconceptions among the public about what human rights are and why they are important. There is also insufficient mainstreaming of human rights considerations into the delivery of public services and understanding of how a human rights-based approach can deliver better outcomes for all. It is therefore crucial that the Commission retains its central role in providing leadership, guidance and support to the general public and public authorities on human rights issues.

It should also be noted that the Commission was accredited with "A" status as a national human rights institution in January 2009 by the United Nations. This recognises that the Commission's powers and practices regarding promoting and protecting human rights are sufficiently independent, robust and effective. The

⁵¹ Section 10 and Schedule 2 HRA.

⁵² Justice, A British Bill of Rights, page 82; JCHR A Bill of Rights for the UK?, pages 60-61.

⁵³ Since the Human Rights Act 1998 came into force on 2 October 2000, 26 declarations of incompatibility have been made. Of these: 17 have become final (in whole or in part) and are not subject to further appeal; eight have been overturned on appeal, of which two remain subject to further appeal; and one remains subject to appeal: Ministry of Justice, 'Responding to Human Rights Judgments', January 2009.

⁵⁴ Department for Constitutional Affairs, 'Review of the Implementation of the Human Rights Act', July 2006.

Commission therefore believes that the duties and powers of the Commission in relation to human rights and any Bill of Rights should be maintained to at least the same level as currently provided for in the Equality Act 2006. It is also important that the Commission continues to receive adequate funding in order to be able to properly perform its statutory and international duties as a National Human Rights Institution.

4.5 Consideration of devolution issues

Any possible repeal of the HRA and replacement with a UK Bill of Rights requires careful consideration of both legal and political implications. This is because the devolution statutes weave the HRA and the protection of human rights into the fabric of that legislation and all the work of the devolved legislatures.

The Green Paper states:

‘Consideration of a Bill of Rights and Responsibilities for the UK will clearly need to include Parliament, the devolved legislatures, the devolved executive bodies as well as the human rights commissions which operate in different parts of the UK. Each has its own history, conventions, identity and has different responsibilities and obligations in relation to fundamental rights, how they are safeguarded, and how they are respected in the delivery of key public services. In order to generate the degree of consensus appropriate ... each will have an important contribution to make about the way rights and responsibilities should be expressed. This will require further careful consideration.’⁵⁵

The Commission has considered these issues in the context of its jurisdiction over England, Wales and Scotland,⁵⁶ and the research that it commissioned on the process for developing a Bill of Rights which included consideration of devolution issues.⁵⁷ In addition it has taken into account the recent report by Justice on devolution implications of a possible repeal of the HRA and development of any Bill of Rights.⁵⁸

We also note that although the Commission does not have jurisdiction over Northern Ireland, we believe that it is important to consider the implications of devolution in Northern Ireland for a possible UK Bill of Rights. We also note that the Commission fully supports the conclusion of the process in Northern Ireland as soon as possible, in order that a robust Bill of Rights for the people of Northern Ireland can be enacted to reflect their particular circumstances.

The legal implications

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:

⁵⁵ Green Paper, para 4.42.

⁵⁶ The Commission has jurisdiction over human rights matters that are reserved to the Westminster Parliament under section 7(1) of the Equality Act 2006.

⁵⁷ Developing a Bill of Rights for the UK, Alice Donald with the assistance of Philip Leach and Andrew Puddephatt, Global Partners & Associates, Human Rights & Social Justice Research Institute, London Metropolitan University, 1 March 2010.

⁵⁸ Devolution and Human Rights, Justice, February 2010:
<http://www.justice.org.uk/inthenews/index.html>

- the rights under the European Convention on Human Rights as contained in the HRA form part of the devolution statutes⁵⁹
- the devolved institutions have no competence to act in a manner that is contrary to the Convention rights⁶⁰
- in relation to Scotland and Northern Ireland, the devolved Scottish Parliament and Northern Ireland Assembly have no power to amend the HRA⁶¹, and
- the devolution statutes contain a number of mechanisms similar to the HRA such as the requirement under section 3 of the HRA to interpret legislation consistently with Convention rights.⁶²

In light of the above, Justice have indicated in their report that 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.⁶³

In relation to Northern Ireland, further legal implications arise beyond those for Scotland and Wales. As stated in the research report commissioned by the Commission, the 1998 Belfast (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.’

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 breach of its international treaty obligations owed to the Republic of Ireland as one of the guarantors of the agreement.⁶⁴

The political implications

There are a number of political implications that must also be taken into account.

Firstly, the Scottish National Party minority government in Scotland has made it clear that any Bill of Rights would need to build on the current protection provided by the HRA, but that in any event there was little discernable value in developing a British Bill of Rights. Setting out the Scottish government’s position in March 2008 when giving evidence on the *Governance of Britain* Green Paper, Justice Secretary Kenny MacAskill stated that the Scottish government sees no legal need for a Bill of Rights, as the Scotland Act 1998 hardwires the Convention Rights (via the HRA) into the workings and powers of the devolved institutions⁶⁵.

⁵⁹ Section 126 Scotland Act 1998 (SA), section 98 Northern Ireland Act 1998 (NIA), section 158 Government of Wales Act 2006 (GOWA).

⁶⁰ Section 29 and 54 SA, section 6 and 24 NIA, and section 81(6) and 94 GOWA

⁶¹ Section 29 and Schedule 4 SA, sections 6(2f) and 7(1) NIA.

⁶² Sections 83 NIA, section 101 SA and section 154 and Schedule 5 Part 2 GOWA.

⁶³ Justice report page 3.

⁶⁴ Section 5, Developing a Bill of Rights for the UK.

⁶⁵ Kenny MacAskill MSP, giving evidence JCHR, 10 March 2008, Q289, www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/8031002.htm

Secondly, the debate raises concerns about national identity and issues of self-determination. The Scottish government took issue with the stated aim of nurturing and embedding a shared sense of Britishness as stated in the Green Paper:

‘What is meant by Britishness? Is there a concept of Britishness? Yes, just as there is a concept of being Scandinavian. We eat fish and chips, we eat chicken masala, we watch *EastEnders*. 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, so the Britishness we do not see any relevance to. 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.’⁶⁶

The research commissioned by the Commission on the process for developing any Bill of Rights raised similar concerns regarding identity. In relation to Northern Ireland the research report states that the development of a British or UK Bill of Rights (as opposed to a Northern Ireland Bill of Rights) risks inflaming sectarian divisions in Northern Ireland. David Russell of the Northern Ireland Human Rights Commission noted that:

‘For many people in Scotland, Northern Ireland and Wales, the idea of a British or UK Bill of Rights suggests a centralisation programme that runs counter to their understanding of the devolution settlements ... in Northern Ireland, which is part of the island of Ireland, not Great Britain, but which remains constitutionally part of the UK, the very notion that a UK Bill of Rights should reinforce a sense of Britishness is geographically nonsense and politically loaded, if not dangerous.’⁶⁷

Thirdly, it would also be important to take into account differences in legal and constitutional traditions of the devolved nations as well as the manner in which human rights have been implemented. In relation to Scotland for example, trial by jury is one very clear difference between Scottish and English constitutional traditions. The right to trial by jury is not regarded as a fundamental right in Scotland. On the other hand, in Scotland some rights are more extensive, for example a statutory requirement to provide free personal care is an example of a socio-economic right which pertains to Scotland, but not England. In relation to the implementation of rights, the Scottish Parliament has legislative responsibility for a large number of areas such as children’s rights, justice and social care. This has resulted in different and sometimes further enhanced protection of human rights.

For example, the European Court of Human Rights recently found England and Wales to be in contravention of the article 8 Convention right to privacy in relation to the retention of DNA while commending the system used in Scotland.⁶⁸

⁶⁶ *ibid.*

⁶⁷ *ibid.*, section 5.

⁶⁸ *Marper v UK* [2008] ECHR 1581.

5. A Bill of Rights framework: beyond the HRA

In this chapter we consider how our constitutional framework could build on the rights and mechanisms in the Human Rights Act (HRA). In particular it considers a number of issues:

- the possibility of giving greater prominence in a text to the importance of the responsibilities we have to each other to fully enjoy our human rights
- recognising the right to dignity, providing a freestanding right to equality and possibly including human rights for particular groups who are often vulnerable or marginalised
- the possibility of including socio-economic rights
- including other rights appropriate for British society, and
- improving the mechanisms to mainstream and enforce human rights.

Although the Green Paper does consider what additional rights and mechanisms may be appropriate to recognise in any Bill of Rights, the Commission has a broad concern that the government discounts the possibility that any of the further rights would be legally enforceable.⁶⁹ In the Commission's view this approach lacks both aspiration and fails to consider whether there is a need for certain rights to be enforceable. It also does not constitute a sufficiently open consultation on the issues.

In relation to some of these issues the Commission has established a final position (such as the need for a constitutional and fully enforceable freestanding right to equality) and this is indicated where relevant. In other areas (such as rights for particular groups and socio-economic rights) the Commission believes more in-depth consultation is required by the government, while at the same time in some areas the Commission believes it needs to further consult its stakeholders to determine its own definitive position.

We also note that the fact that particular rights or mechanisms have not been addressed in the discussion paper does not necessarily mean other rights or mechanisms are or may not be worthy of inclusion in a Bill of Rights. The paper focuses on some key issues but we may want to explore other issues in the future.

5.1 Recognising responsibilities we owe each other

Responsibilities are already embedded in a number of ways into the domestic and international human rights frameworks. The current debate, however, indicates that not only is there a lack of understanding of human rights generally, there is a particular lack of understanding of the existing role of responsibilities in human rights frameworks.

⁶⁹ 'The government does not consider that a generally applicable model of directly legally enforceable rights or responsibilities would be the most appropriate for a future Bill of Rights and Responsibilities.' Green Paper, para 4.25.

The Commission's position is that human rights can never be made contingent on the exercise of responsibilities. This position reflects requirements under international human rights treaties to which the UK government is a party.

However, there may be merit in recognising in any Bill of Rights the responsibilities we have to protect each others' human rights. This could help to promote mutual respect, tolerance and a more cohesive society. This section analyses the current debate on responsibilities and the research that was commissioned by the Ministry of Justice on the relationship between rights and responsibilities; sets out the Commission's criteria and safeguards for any possible inclusion of responsibilities in a Bill of Rights based on international experience, and refers to possible responsibilities that could be included if those criteria and safeguards are employed.

The current debate

Since the introduction of the HRA, the political and popular debate in the United Kingdom has increasingly focused on the need for greater responsibility of individuals in society and the need for human rights to be better balanced by responsibilities.

The Green Paper argues that there is a case for greater recognition of responsibilities in any Bill of Rights given our increasingly individualistic and consumerist society. It states:

'The challenge is how better to remind people of the importance of individual responsibility and give this greater prominence. Individual rights must be promoted and protected without losing sight of the essential contribution of responsibilities to collective harmony and prosperity.'⁷⁰

However, the government recognises that human rights cannot be legally contingent on the exercise of responsibilities:

'The government is clear that fundamental rights cannot be legally contingent on the exercise of responsibilities. Building on the existing human rights framework, it may be that responsibilities can be given greater resonance in a manner which does not necessarily link them to the adjudication of particular rights.'⁷¹

The Green Paper then goes on to provide examples of responsibilities which may be appropriate to include in any Bill of Rights including treating National Health Service and other public sector staff with respect; safeguarding and promoting the wellbeing of children in our care; living within our environmental limits for the sake of future generations; participating in civic society through voting and jury service; reporting crimes and cooperating with the prosecution agencies; as well as more general duties such as paying taxes and obeying the law.⁷²

The Conservative Party has also placed responsibility at the centre of its vision of modern Conservatism. In his foreword to *Built to Last*, the Conservative Party's summary of its aims and values, David Cameron called for a 'responsibility

⁷⁰ Green Paper, para 2.20.

⁷¹ Green Paper, para 2.22.

⁷² Green Paper para 2.26.

revolution'.⁷³ The Labour Party takes a similar approach; for example, Jack Straw made a statement in parliament during the passage of the HRA that 'there can be no rights without responsibilities, and our responsibilities should precede our rights'.⁷⁴

Research on the relationship between rights and responsibilities

The Ministry of Justice commissioned research around its Green Paper on the relationship between rights and responsibilities which was published in December 2009.⁷⁵ The key aim of the research was to answer the question of whether responsibilities can be incorporated into the existing human rights framework of the UK without jeopardising fundamental human rights safeguards. It analyses in detail the development of the international responsibilities movement, as well as the place of responsibilities in international human rights law and national laws.

The conclusion of the report was that:

'... duties are already inherent in human rights, and the risks of giving duties explicit legal meaning are significant. Any move towards constitutional recognition of such duties will need to be accompanied by safeguards against the possibility that they will be invoked with a view to eroding existing human rights protections. Without such safeguards, the Green Paper's objective of avoiding contingency cannot be guaranteed.'⁷⁶

The report also made three key recommendations:

'First, there may be value in stating within any Bill of Rights and Responsibilities a general duty to respect the human rights of others. Such a duty could serve to reinforce a shared commitment to the importance of rights and to make clear that the exercise of these rights is constrained by respect for the rights of others ... Moreover, to the extent that the law exists to protect individual rights, the duty to respect the rights of others might also be said to encompass a duty to obey the law. In this sense, the duty to respect the rights of others is preferable to the more coercive and less rights regarding obligation to obey the law.

Secondly, the report suggests that there is little to be gained from – and significant risk associated with – incorporating lists of specific duties within the body of a Bill of Rights. Any statement about responsibilities should be general and rhetorical only, and preferably located within the preamble. This would ensure that such a statement is seen as educative and inspirational, and also guard against any suggestion that the duty is directly enforceable against individuals.

Finally, if individual duties are to be incorporated into the main body of any Bill, then precautions must be taken to ensure that the duties remain non-justiciable, preferably by an explicit statement of non-justiciability.'⁷⁷

⁷³ <http://www.conservatives.com/pdf/BuiltToLast-AimsandValues.pdf>.

⁷⁴ House of Commons debate, Hansard 3 June 1998, Col.1358.

⁷⁵ The relationship between rights and responsibilities, Liora Lazarus, Benjamin Goold, Rajendra Desai and Qudsi Rasheed, University of Oxford, Ministry of Justice Research Series 18/09, December 2009.

⁷⁶ Ibid, page 1.

⁷⁷ Ibid page ii (summary).

The Commission has carefully taken this detailed and comprehensive research report into account in considering its position on responsibilities.

The Commission's position on the relationship between rights and responsibilities

The enjoyment of human rights is inextricably linked to the responsibilities we owe each other in society and underpins all human rights frameworks. Thomas Paine, an English political philosopher who strongly influenced the American and French revolutions, declared:

‘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.’⁷⁸

The Commission is well placed to consider the place of responsibilities in a human rights framework. The Commission's duties are not only to promote equality and human rights, but also to promote good relations between groups in society. The Commission has a specific duty to promote:

‘mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.’⁷⁹

The notion of mutual respect between groups requires responsibility to be taken by individuals and groups to develop respect, understanding and trust of each other. The Commission therefore agrees with the government that in order to build a more cohesive society based on equality and respect for human rights, there is also a need for individuals and groups to act responsibly towards each other.

However the Commission is concerned that often statements by the political parties regarding responsibilities fail to recognise or deliberately misrepresent the existing role of responsibilities in our UK human rights framework. This is also reflective of the general lack of understanding of human rights by the public and public authorities delivering services. The Commission therefore has a vital role in setting out clearly why rights cannot be made contingent on the exercise of responsibilities; how responsibilities are already part of our human rights framework; the criteria and safeguards for inclusion of any responsibilities in a Bill of Rights, and what type of responsibilities could be included if those criteria and safeguards are adhered to.

Rights not being contingent on exercise of responsibilities

The Commission's starting point is that if responsibilities are to have any place in any Bill of Rights it must be made clear in the text that rights are not contingent on the exercise of responsibilities and that they do not create legally enforceable duties. We agree with similar conclusions of the Joint Committee on Human Rights and Justice in their reports on a Bill of Rights as well as the research report commissioned by the Ministry of Justice on responsibilities.⁸⁰

⁷⁸ Thomas Paine, *On the Rights of Man* (1792).

⁷⁹ Section 3(e), Equality Act 2006.

⁸⁰ *A Bill of Rights for the UK?*, JCHR paragraph 279; *A British Bill of Rights, Justice*, page 18 paragraph 39; *The Relationship between Rights and Responsibilities*, pages 29-30.

The Commission welcomes and agrees with the statement in the Green Paper that 'fundamental rights cannot be legally contingent on the exercise of responsibilities'.⁸¹ Human rights are by their nature universal in that they belong to everyone, and inalienable in that they cannot be surrendered. For example, a person who is convicted of a serious crime and is imprisoned has failed to fulfil a responsibility to comply with the law, but the person's right to be free from inhumane or degrading treatment (an absolute right) cannot be lost or limited as a result as to do so would be contrary to our international human rights obligations. On the other hand, most human rights⁸² can be legitimately qualified in certain circumstances. For example a person's right to liberty can be restricted for a period where a person has committed a serious crime and is imprisoned to protect the public.

The existing relationship between rights and responsibilities

As the Ministry of Justice's research report indicates, there are a number of ways in which responsibilities have been embedded in international and national human rights instruments. In summary these are: duties to respect the rights of others (correlative duties); duties not to exercise rights contrary to certain state or individual interests (rights limitations), and freestanding duties (non-correlative).⁸³

Examples of general duties to respect the rights of others are contained in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), which were developed from the UDHR. Article 29(1) of the UDHR states:

'[E]veryone has duties to the community in which alone the free and full development of his personality is possible.'

Both the preambles of the ICCPR and the ICESCR state: 'the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of ... rights'.

The legitimate limitation of rights also involves the concept of responsibilities and is embedded in most of the existing human rights protected by the European Convention on Human Rights (ECHR). For example, in relation to freedom of expression article 10(2) of the ECHR provides:

'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others...'

This is also reinforced by article 17 of the ECHR which provides that:

'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed

⁸¹ Green Paper, paragraph 2.22.

⁸² Other than the right to life and the rights to be free from torture and slavery.

⁸³ Ibid page 15.

at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.’

Further, the conduct of a person (claimant) is relevant to whether or not the actions of the State have been proportionate in determining both whether there has been a breach of a person’s human rights, and the extent to which they are entitled to damages even if a breach is established.

For example, in relation to police surveillance and potential breaches of a person’s article 8 rights to privacy, a relevant factor in determining whether there has been a breach is the seriousness of the alleged crime that has been committed. The more serious the alleged crime, the less likely there has been a breach of their article 8 rights.

In terms of freestanding duties (non-correlative), there are a number of national human rights instruments that refer to explicit duties. For example:

- duty in respect of the family, including parental duties (Iran, South Korea, Venezuela, Germany, Gabon, Senegal, Italy)
- duty to defend country/perform military service (Portugal, China, North Korea, Poland, Cuba, Thailand, South Korea, Morocco, Iran, Spain, Egypt, Turkey, Venezuela, Dominican Republic, Mexico, Finland, Italy)
- duty to pay taxes (China, Venezuela, Thailand, Egypt, Spain, Morocco, Italy, Turkey), and
- duty to vote (Cuba, Venezuela, Dominican Republic, Italy, Australia).⁸⁴

In most democratic countries these duties are not directly enforceable whereas they are more likely to be enforceable in countries with a strong authoritarian or socialist element (for example the People’s Republic of China).⁸⁵

Criteria, safeguards and possible responsibilities in a Bill of Rights

What place then could responsibilities have in any Bill of Rights? There is a need to strike a balance between reminding everyone of the important place of responsibilities in a human rights framework, and ensuring that rights are in no way made contingent on the exercise of responsibilities. The Commission believes the following criteria and safeguards should be applied in consideration of including any responsibilities in a Bill of Rights:

- there may be merit in including responsibilities, but the most important of these that is not currently made express in the HRA is the responsibility to respect the rights of others as contained in a number of international instruments
- it is preferable that any statement of responsibilities should be either in a preamble or related document rather than the substantive provisions. This would be both to indicate their symbolic value, as well as to ensure that the provisions are not interpreted as being directly enforceable against individuals
- if any responsibilities are included in the substantive provisions, there should be an express provision to make it clear that the rights are not contingent on the exercise of responsibilities and that the responsibilities are not directly enforceable, and

⁸⁴ The Relationship between Rights and Responsibilities, page 23.

⁸⁵ Ibid page 24.

- the process for developing any Bill of Rights should involve education of the public on the way in which the human rights framework includes the responsibilities we owe each other.⁸⁶

There are several examples of provisions in other jurisdictions which indicate how these principles could be applied in practice.

In Australia, several States have recently adopted human rights charters similar to the HRA which refer to responsibilities in their preambles. For example the preamble to the Australian Capital Territory's Human Rights Act 2004 states:

'This Act encourages individuals to see themselves, and each other, as the holders of rights, and as responsible for upholding the rights of others.'

The preamble of the Victorian Charter of Rights and Responsibilities 2006 states:

'Human rights come with responsibilities and must be exercised in a way that respects the human rights of others.'

In addition, the National Human Rights Consultation on a Federal Human Rights Act for Australia published its final report in September 2009. A finding of the report was that there was widespread concern about the inclusion of responsibilities in the substantive provisions of a Human Rights Act but there may be some merit in their inclusion in a preamble or some other instrument. The Committee conducting the consultation recommended a non-legally binding statement of human rights principles be issued by the Federal Parliament which should include the following responsibilities:

- to respect the rights of others
- to support parliamentary democracy and the rule of law
- to uphold and obey the laws of Australia
- to serve on a jury when required
- to vote and to ensure to the best of our ability that our vote is informed
- to show respect for diversity and the equal worth, dignity and freedom of others
- to promote peaceful means for the resolution of conflict and just outcomes
- to acknowledge and respect the special place of our indigenous people and acknowledge the need to redress their disadvantage
- to promote and protect the rights of the vulnerable
- to play an active role in monitoring the extent to which governments are protecting the rights of the most vulnerable, and
- to ensure that we are attentive to the needs of our fellow human beings and contribute according to our means.⁸⁷

It is worth noting that many of these responsibilities relate to the responsibilities that people owe each other.

⁸⁶ This was a finding of the research commissioned by the Commission, Developing a Bill of Rights for the UK, section 3.12.

⁸⁷ National Human Rights consultation report, page 354-355, http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads

An example of a limitation clause on the effect of any responsibilities in the substantive provisions of a Constitution is the Indian Constitution. It provides that:

‘The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.’⁸⁸

This could be adapted to the particular needs of the UK.

5.2 The right to dignity

The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. The 1948 Universal Declaration of Human Rights enshrined human dignity in its preamble: ‘Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’

The right to dignity has been incorporated into the EU Charter of Fundamental Rights. Article 1 states that "Human dignity is inviolable. It must be respected and protected". The Lisbon Treaty amended the Treaty of the European Union (TEU) such that the Charter of Fundamental Rights is now legally binding and has the same status as the TEU and the Treaty on the Functioning of the European Union. As a result it must be complied with in the development and implementation of EU law in Member States.

Given the fundamental importance of the right to dignity in the exercise of all rights and freedoms, and that the agreement by the government to its inclusion in the EU Charter which is now legally binding, the Commission believes that if any Bill of Rights is developed, the right to dignity should be considered for inclusion.

5.3 The right to equality

Given our mandate to promote equality and eliminate discrimination, prejudice and hatred, the issue of how to enhance the levels of equality in British society in a Bill of Rights is of primary importance to the Commission. This relates both to the enjoyment of civil and political rights and enjoyment of socio-economic rights which is discussed in the following section.

The Commission has been doing considerable work and fully supports the government on the development of the Equality Bill. The new measures will help to create a fairer society in which everyone can maximise their potential whatever their race, gender, gender identity, age, sexual orientation, religion or belief, or disability.

However the Commission is also conscious, from its work over the last two years in relation to human rights, that much work needs to be done to ensure that everyone in society has the same level of enjoyment of fundamental human rights. For example violence against women and hatred against people based on their race or sexual orientation remain significant problems; disabled and older people continue to

⁸⁸ The Relationship between Rights and Responsibilities, page 48.

face barriers to participate and fully realise their potential in society; and children's rights and views are still often not sufficiently taken into account.

Although in a number of areas (such as violence against women and children's rights) there are criminal or civil laws which further protection and advancement of these groups' human rights, our evidence indicates that there are often gaps in those laws or that the obligations are not conceptualised in human rights terms. This has inhibited the realisation of those rights by particular groups which are often in marginalised or vulnerable situations.

There are two ways in which a Bill of Rights could build on our current framework in relation to equality issues. Firstly the Commission believes that a Bill of Rights should include a fully enforceable and freestanding right to equality which has the same status as other human rights under the HRA. Secondly, consideration should be given as to what further provisions relating to improving the enjoyment of human rights by particular groups may be required.

5.3i A constitutional right to equality

The Green Paper consults on the inclusion of a right to equality in a Bill of Rights but the scope of the consultation is too narrow. It does not consult on the possibility of the right to equality being legal enforceable, as it is under many Bills of Rights or Constitutions around the world.

The government states:

'There are justifiable exceptions to the principle that all should be treated alike; for example in accordance with eligibility rules on benefits, rules on immigration and citizenship and exceptions to discrimination law permitted or required by EU law. Generally these exceptions are already subject to detailed legislation, which would remain unaffected by any Bill of Rights and Responsibilities.'⁸⁹

The very intention of a constitutional right to equality is that it would take precedence over all other laws, including exceptions in discrimination law. This would not mean that exceptions to the right to equality could not be permitted, but that they must be demonstrably a proportionate means of achieving a legitimate aim. This prevents potential arbitrary exceptions from being enacted or used in practice.

Since the Commission commenced operating more than two years ago it has made submissions to the government on a number of occasions on why it is essential that an enforceable right to equality is incorporated into our human rights or equalities legislation framework.⁹⁰ Most recently these arguments have been set out in detail to the Government Equalities Office in our submissions relating to the Equality Bill currently passing through Parliament. We have proposed a model based on a combination of international models of the right to equality, and the mechanisms of

⁸⁹ Green Paper, paragraph 3.38.

⁹⁰ See the EHRC shadow report to the UK government's sixth periodic report on the ICCPR, June 2008: <http://www.equalityhumanrights.com/legislative-framework/human-rights-submissions/civil-and-political-rights/>; EHRC shadow report to the UK government's fifth periodic report on the ICESCR, May 2009: <http://www.equalityhumanrights.com/legislative-framework/human-rights-submissions/economic-social-and-cultural-rights/>; Submission to the Government Equalities Office regarding and Equality Guarantee for the Equality Bill, March 2009.

enforcement in the HRA. A copy of our submissions and model will be sent to the Ministry of Justice with this response to the Green Paper.

The government has argued that a Bill of Rights and not the Equalities Bill is the appropriate place for any possible constitutional right to equality. The Commission's position is that the Equality Bill presented a unique opportunity to modernise equality law, including by the incorporation of a right to equality. Alternatively, such a freestanding right to equality should be incorporated in any Bill of Rights.

Our model of a right to equality would apply to all public authorities (including Parliament and the courts), include the grounds covered by the Equality Bill but go further to include 'other status'⁹¹, be fully enforceable as a justiciable right, and employ the same mechanisms as under the HRA (for example requiring courts to interpret legislation compatibly with the right where possible and permitting declarations of incompatibility).

In many jurisdictions around the world the right to equality is given some constitutional status in the same manner as other fundamental rights and freedoms. This recognises the right to equality as being one of the fundamental rights associated with our common humanity. However currently in the United Kingdom there is no constitutional right to equality and equality legislation has no constitutional or higher status than other legislation.⁹² The government has failed to fully implement its international obligations regarding the right to equality such that all persons are not only equal before the law but also have the right to the equal protection and benefit of the law.⁹³

The government enacted the HRA to give domestic effect to most of the rights contained in the European Convention on Human Rights, including the article 14 right to non-discrimination. However article 14 only provides a right to non-discrimination in the enjoyment of other rights in the Convention, for example that a State shall not discriminate in the enjoyment of the rights to liberty, privacy or freedom of expression unless it can be justified. The Council of Europe adopted Optional Protocol 12 which does create a freestanding right to equality; however the UK government has also refused to date to sign and ratify that Protocol.⁹⁴

Equality legislation either has the same status, or in some cases actually is subordinate to other mandatory statutory measures the government can enact. Examples of this are exceptions for acts done under statutory authority or Ministerial

⁹¹ This would be consistent with article 14 of the European Convention on Human Rights.

⁹² We note however that in Northern Ireland the report of the Northern Ireland Human Rights Commission recently recommended the inclusion of a right to equality in its report on a Bill of Rights for Northern Ireland: A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland, 10 December 2008.

⁹³ The government has failed to implement articles 26 of the ICCPR, article 5 of CERD and article 15 of CEDAW regarding the right to equality.

⁹⁴ Optional Protocol 12 has now been ratified by 19 Member States of the Council of Europe: Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Montenegro, Netherlands, Romania, San Marino, Serbia, Spain, The former Yugoslav Republic of Macedonia, Ukraine.

Order.⁹⁵ These are replicated in similar terms in the Equality Bill in Schedule 22 Paragraph 1 and 23 Paragraph 1.

The negative effect of Equality legislation having the inferior status to other legislation can be seen from the case of *R v. Cleveland County Council ex parte CRE* [1992] LGR 139. A white parent of a mixed heritage pupil in a majority non-white school expressed a preference for her child to be educated at a majority white school.

This preference triggered the local education authority's duty under education legislation to comply with parental preference, despite the fact that the reasons behind the preference were racial. The Commission for Racial Equality's principal argument in the case, that the non-discrimination and non-segregation provisions in the Race Relations Act 1976 (RRA) qualified the local education authority's duty to comply with parental preference, racial or otherwise, failed.

The Court of Appeal ruled that the provisions of the Education Act 1980 requiring local education authorities to comply with parental preferences in the allocation of school places took precedence over the RRA, even though this required local education authorities to give effect to choices based on race.

A constitutional right to equality would have the following benefits:

- ensuring the right to equality has the same status as other human rights meeting international human rights standards
- it would provide protection from any unjustified and disproportionate discriminatory laws as all legislation would need to satisfy the test of being for a legitimate aim and proportionate in order to be lawful
- courts would need to interpret legislation compatibly with the right to equality
- it would help to achieve substantive equality by requiring all legislation to be considered for its discriminatory impact, and
- it would help to further mainstream equality considerations into all functions of the State including Parliament and the courts.

5.3ii Rights for particular groups

The need for specific protection of certain groups is recognised at the international level in a number of Conventions.⁹⁶ The rights set out are targeted to the particular needs of the groups they intend to protect and also serve to draw special attention to the most pressing human rights concerns of those whose human rights are most vulnerable to neglect.

A useful starting point for considering the extent of enjoyment of human rights, and whether further rights should be expressly included in a Bill of Rights, are equality and human rights indicators.

⁹⁵ Sections 41 Race Relations Act 1976; section 51A Sex Discrimination Act 1976; section 59 Disability Discrimination Act 1995; section 56 Equality Act; and Regulation 12 Sexual Orientation Regulations 2003.

⁹⁶ Convention on the Elimination of all forms of Racial Discrimination 1966 (CERD), the Convention on the Elimination of all forms of Discrimination against Women 1979 (CEDAW), the United Nations Convention on the Rights of the Child 1989 (CRC), the Convention on the Rights of Persons with Disabilities 2006 (CRPD).

The Commission has a statutory duty to monitor progress on equality and human rights⁹⁷ and has developed a set of equality indicators to measure progress to achieving equality. This is based on the international human rights framework and called the Equality Measurement Framework.⁹⁸ The 10 indicators of equality are life⁹⁹; health¹⁰⁰; physical security¹⁰¹; legal security¹⁰²; education and learning¹⁰³; standard of living¹⁰⁴; productive and valued activities¹⁰⁵; individual family and social life¹⁰⁶; identity, expression and self-respect¹⁰⁷; participation, influence and voice.¹⁰⁸ Many of these indicators also link to the key human rights under the United Nations Conventions protecting and promoting the right of particular groups.¹⁰⁹

The government's Green Paper only consults on the possible inclusion in a Bill of Rights of rights relating to children and states that these would not be enforceable in any event. Below we examine some of the rights which the government may need to consult on including in a Bill of Rights, including the extent to which these rights should be justiciable.

Freedom from violence, hatred and exploitation

One area of human rights protection which may benefit from the elaboration of specific rights for vulnerable groups relates to freedom from violence and the physical and mental security of the person. A number of Conventions and international declarations refer to these rights and the Northern Ireland Human Rights Commission in their advice on a Bill of Rights have recommended the inclusion of a fully enforceable provision relating to violence hatred and exploitation.¹¹⁰

Although there is general protection under article 3 of the European Convention on Human Rights to be free from torture and inhuman and degrading treatment, it only applies to treatment which has reached a certain level of severity. Further, much (though not all) of the violent treatment which affects vulnerable groups is perpetrated by private individuals, rather than emanating from States. Article 3 places positive obligations on the State to prevent treatment between individuals.

⁹⁷ Equality Act 2006, section 12.

⁹⁸ <http://www.equalityhumanrights.com/fairer-britain/equality-measurement-framework/>

⁹⁹ The life indicator relates to aspects such as homicide rates for certain groups and life expectancy.

¹⁰⁰ The health indicator relates to aspects such as dignity and respect in health treatment and the health of particular groups such as disabled persons.

¹⁰¹ The physical security indicator relates to aspects such as violent crime and hate crime.

¹⁰² The legal security indicator relates to the criminal justice system in terms of its effectiveness for example in prosecuting rape cases or equal treatment of minorities.

¹⁰³ The education and learning indicator relates to the attainment and involvement of particular groups in all levels of education.

¹⁰⁴ The standard of living indicator relates to the levels of poverty and access to housing and care.

¹⁰⁵ The productive and valued activities indicator relates to issues of employment and pay levels, as well as discrimination in employment.

¹⁰⁶ The individual family and social life indicator relates to factors such as being able to be yourself and to pursue the relationships you want.

¹⁰⁷ The identity, expression and self-respect indicator relates to aspects such as freedom to practise religions and beliefs, cultural expression and communicating in your language of choice.

¹⁰⁸ The participation, influence and voice indicator relates to aspects such as political participation and representation of particular groups.

¹⁰⁹ The Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Rights of Children (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD).

¹¹⁰ A Bill of Rights for Northern Ireland, pages 94-98.

But this obligation is not explicit on the face of the provision and so fails to send a clear message to the State as to its obligations, and to victims as to their rights.

Provisions protecting groups from violence are contained in several of the UN Conventions.¹¹¹

Importantly, international provisions also address the need to properly investigate and punish acts of violence. For example, the Declaration on the Elimination of Violence Against Women requires states to:

‘Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.’¹¹²

Hate crime

People continue to experience targeted violence, harassment and abuse because of their disability, race, religion or belief, sexual orientation, gender identity or other aspects of their identity. Research commissioned by the Commission has found that a fifth of gay men (19 per cent) report having been physically assaulted and six per cent of lesbians report having been sexually assaulted as a result of their sexual orientation.¹¹³ While criminal law prohibits hate crime as such, for example by providing that crimes motivated by discrimination attract aggravated penalties¹¹⁴, there remains concern both at the levels of hate crime and low reporting and conviction rates of such crimes.

It is 10 years since the Macpherson Inquiry investigated the police’s inadequate response to the racist murder of Stephen Lawrence, yet we know that hate crime remains under-reported owing to a lack of trust that the criminal justice system will deal properly with it.¹¹⁵ Research commissioned by the Commission has found that an estimated 75 per cent of homophobic crimes are not reported, making official statistics on the prevalence of homophobic hate crimes and incidents unreliable.¹¹⁶

CERD¹¹⁷ contains specific rights addressing violent crime motivated by discrimination. Declarations at the international level recognise the need to address hate crimes related to sexual orientation and gender identity,¹¹⁸ and religion or belief.¹¹⁹ Similar provisions in a Bill of Rights could not only draw attention of public

¹¹¹ Article 5(b) of CERD, for example, sets out: ‘The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.’ The CRPD requires States: ‘to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects’.

¹¹² Article 4(d).

¹¹³ Ellison and Gunstone, 2009, cited in Equality and Human Rights Commission, *Beyond tolerance: Making sexual orientation a public matter*, page 11.

¹¹⁴ Criminal Justice Act, sections 145 and 146.

¹¹⁵ Home Office, *Hate Crime – The Cross-Government Action Plan*, p. 2.

¹¹⁶ Dick, 2009, cited in Equality and Human Rights Commission, *Beyond tolerance: Making sexual orientation a public matter*, page 30.

¹¹⁷ Art 4 CERD.

¹¹⁸ The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, principle 5.

¹¹⁹ For example, para 12 of the preamble to the outcome document of the Durban Review Conference deplores the global rise and number of incidents of racial or religious intolerance and violence,

authorities to the need to address this particular form of violence, and result in measures best tailored to deal with the problem, but would also be of symbolic value, in enhancing the confidence of victims in their rights to demand that their treatment be addressed.

Domestic violence and sexual violence

Domestic violence accounts for 14 per cent of all violent incidents.¹²⁰ Women are more likely than men to experience repeated and severe violence from a current or former partner, more likely to be injured and more likely to live in fear.

It is generally accepted that in spite of general legislation dealing with assault and violence, specific measures are necessary to combat the specificities of psychological, physical, sexual or emotional violence in the family, including honour-based violence, female genital mutilation and forced marriage. There are many Government programmes and services aimed at tackling violence against women, including the establishment of specialist domestic violence courts, training of health professionals in the early identification of domestic violence and the establishment of a forced marriage unit.¹²¹

Although both men and women experience rape and sexual assault, the majority of victims are female. Approximately three-quarters of a million women in Britain have been raped on at least one occasion since the age of 16.¹²² Rape and sexual assault is associated with negative impacts on women's physical and mental health¹²³ and fear of rape means that many women restrict their lives. Levels of reporting, prosecution and conviction are low and a number of specific measures have been introduced in some areas such as sexual assault referral centres and specially trained prosecutors.

Yet the provision of such measures is not seen as a human right, and thus remains subject to changing resources and political priorities. The Commission's Map of Gaps 2 Report addressed the fact that while three million women in Britain experience rape, domestic violence, stalking or other violence each year, one in four local authority areas provide no specialised support services in their area for women who experience violence. Yet the human rights treaties and international declarations recognising the rights of women are clear that these issues should be dealt with as a matter of human rights.¹²⁴

including Islamophobia, anti-Semitism, Christianophobia and anti-Arabism manifested in particular by the derogatory stereotyping and stigmatisation of persons based on their religion or belief.

¹²⁰ Walker, A., Flatley, J., Kershaw, C. and Moon, D. (2009) Crime in England and Wales 2008/09. Home Office Statistical Bulletin 11/09. London: Home Office.

¹²¹ See the Home Office, National Domestic Violence Delivery Plan, Annual Progress Report 2008-09.

¹²² Domestic violence, sexual assault and stalking: Findings from the British Crime Survey, Walby and Allen, 2004, British Crime Survey.

¹²³ World Health Organisation, Violence Against Women: Health Consequences, July 1997.

¹²⁴ For example, the United Nations Declaration on the Elimination of Violence against Women, General Assembly resolution 48/104 of 20 December 1993, requires states to 'Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms' (Article 4(d)). The DRC provides requires states: 'to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects'. Article 19 of the CRC provides: '1. States Parties shall take all appropriate legislative, administrative, social and educational measures to

Trafficking and exploitation

Trafficking and exploitation, including forced prostitution, is acknowledged as an issue of major global concern¹²⁵, affecting, among others, vulnerable groups such as women and children and people from ethnic minorities. The UN High Commissioner for Human Rights has confirmed the primacy of human rights to all efforts to prevent and combat trafficking, explaining that violations of human rights are both a cause and a consequence of trafficking in people.¹²⁶ Human rights treaties relating to vulnerable groups also address the right to be free from trafficking as a human right.¹²⁷

While Article 4 of the European Convention on Human Rights, incorporated in the HRA, includes an obligation on states to criminalise trafficking, this is not referred to on the face of the Act, nor does it imply any more detailed and extensive obligations to protect the victims of trafficking. Yet the UK has recently ratified the European Convention Against Trafficking In Human Beings, which contains detailed provisions recognising the need to address the particular needs of those who have been subject to trafficking. The government should consider whether a specific provision dealing with this issue should be included in the Bill of Rights.

In conclusion, the government should consult on and consider inclusion in any Bill of Rights provisions on hate crime, domestic violence, sexual violence, trafficking and exploitation.

Participation in society

The capacity to participate in society at all levels and stages of life is a key aspect of the enjoyment of human rights. This ranges from participation in education, employment to participation in the democratic processes of elections and standing for public positions. This is recognised in a number of international Conventions. For example, Article 25 of the International Covenant on Civil and Political Rights provides that everyone should, without discrimination, have the opportunity to participate in public life. Of note, the Australian report on a Human Rights Act for Australia has recommended the inclusion of a right to take part in public life in a future Human Rights Act.¹²⁸

protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.'

¹²⁵ United Nations Economic and Social Council, 49th Session of the Commission on the Status of Women, Review of the implementation of the Beijing Platform for Action and the outcome documents of the special session of the General Assembly entitled 'Women 2000: gender equality, development and peace for the twenty-first century', para 78.

¹²⁶ Principles and Guidelines on Human Rights and Trafficking, E/2002/68/Add.1 (2002), Guideline 1.

¹²⁷ CEDAW obliges states to take appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women (article 6). CRC recognises the right of children to be protected from economic exploitation (art 32), sexual exploitation and abuse (art 34) and abduction, sale and trafficking of children (art 35). The Yogyakarta Principles draw the attention of the State to the need to address factors that increase vulnerability to trafficking, including inequality and discrimination on grounds of sexual orientation or gender identity (principle 11).

¹²⁸ Ibid, Final report page 369.

In relation to participation in public life, the evidence available to the Commission is that there remain significant barriers to certain groups.

In relation to women, the Commission published in 2008 its Sex and Power report analysing the proportion of women in 25 categories of public positions. The report found that for the period of 2007/08 compared to 2006 there are fewer women holding top positions in 12 of the 25 categories for which figures are available.¹²⁹ In another five categories, the number of women remains unchanged since the 2006 index.¹³⁰ Women's representation has increased in just eight areas.¹³¹ In relation to specific sectors, in the judiciary in 2008 only nine per cent of senior judiciary were women.¹³² In the Westminster Parliament only 19.3% and 19.7% of Members of Parliament in the two Houses of Parliament are women.¹³³

The Commission is also concerned at the very low levels of representation of ethnic minorities in public life.¹³⁴ We believe that elected and appointed positions in public life should broadly reflect the diversity which exists in Britain today.¹³⁵ Ethnic minority women make up more than five per cent of the population and yet they account for less than one per cent of England's 20,000 councillors. To create a more representative picture the number of ethnic minority women councillors needs to increase more than fivefold - from just 149 to nearer one thousand.¹³⁶

The government should consult on and consider inclusion in any Bill of Rights provisions requiring measures to increase participation and representation of particular groups such as women, ethnic minorities, disabled persons and older persons as provided for in relevant international conventions and principles.¹³⁷

In relation to improving more general participation in society, particular consideration needs to be given to older and disabled persons. In relation to older persons, a

¹²⁹ Westminster MPs, Cabinet members, Members of the Scottish Parliament and Welsh Assembly, editors of national newspapers, people in public appointments, senior police officers and judges, health service chief executives, local authority chief executives, trade union general secretaries and heads of professional bodies.

¹³⁰ UK Members of the European Parliament, top media bosses, directors of major museums and galleries, chairs of national arts companies and holders of senior ranks in the armed forces.

¹³¹ There are more female members of the House of Lords, FTSE 100 company directors, chief executives of national sports bodies and voluntary organisations, local authority council leaders, principals of further education colleges, vice-chancellors of universities and top managers in the civil service.

¹³² High Court judges or above: Judiciary of England and Wales (2008) Statistics - women judges in post as at 1 April 2008.

¹³³ 19.3% of Members of the Parliament are women: UK Parliament (2008) Members of Parliament by gender: numbers updated 25 July 2008. 19.7% of Members of the House of Lords are women: UK Parliament (2008) Her Majesty's government, updated 11 March 2008. 34.1% of Members of the Scottish Parliament are women: Scottish Parliament (2008) Female MSPs: session 3, updated January 2008. 46.7% of Members of the National Assembly for Wales are women: National Assembly for Wales website (2008) member profiles, accessed 10 June 2008.

¹³⁴ For example, currently only 15 of the 646 (2.3%) Members of Parliament are ethnic minorities: Speaker's Conference Submissions at: <http://www.equalityhumanrights.com/legislative-framework/parliamentary-briefings/speaker-s-conference-the-commission-s-submission-march-2009/>

¹³⁵ The ethnic minority population in the United Kingdom in the 2001 census was 7.9%. This has since increased: National Statistics, <http://www.statistics.gov.uk/cci/nugget.asp?id=455>

¹³⁶ Figures from GEO Fact Sheet available via:

http://www.equalities.gov.uk/women_councillors_taskforce.aspx

¹³⁷ For example article 7 of CEDAW and Article 5(c) CERD.

sample of the indicators compiled in 2009 by the charity Age Concern and Help the Aged indicated:¹³⁸

- People aged 65+ who believe that once you reach very old age people tend to treat you as a child – 53%
- Proportion of pensioners with less than 60% of median income after housing costs – 19%
- Households with someone aged 85+ who has no bank account – 7%
- People aged 65+ who say they are lonely – 11%
- People aged 75+ who find it very difficult to access a supermarket – 10%
- People aged 65+ who leave their home once a week or less – 6%

The need to support participation was recognised by the UN Principles for Older Persons, adopted by the UN General Assembly in 1991; ‘participation’ is one of five overarching headings within the document. Under this heading, Paragraph 7 states that older people should remain integrated in society, participate actively in the formulation of policies that affect them and share their knowledge and skills with younger generations. Paragraph 8 refers to the need for older people to be able to contribute to the community, including by service as volunteers in positions appropriate to their interests and capabilities. The right to form movements or associations of older people is set out in Paragraph 9.

It has been the aim of the United Nations to encourage governments to build the UN Principles into their national programmes for older people. This has been achieved in Wales. The Welsh Assembly embraced the UN Principles in its first strategy for older people, and has also embedded them into the role of the Commissioner for Older People in Wales, who is required to have regard to the Principles in considering what constitutes the interests of older people.¹³⁹ However, this approach has not been followed in England. For example, *Building a Society for All Ages*, the government’s revised strategy for an ageing society published in July 2009,¹⁴⁰ is not informed by a human rights approach and makes no reference to the UN Principles for Older Persons. Its predominant theme is to manage the economic consequences of demographic change – although it does acknowledge the damaging impact of age discrimination and the need to encourage older people’s participation in society - in particular, within the workforce, as volunteers and in activities that encourage healthy, active lifestyles.

The right to participation is also enshrined in the revised version of the Council of Europe, European Social Charter (1996). Under Article 23, parties undertake to adopt measures to enable elderly persons to remain full members of society as long as possible, including by means of adequate resources enabling them to live a decent life and play an active part in public, social and cultural life. The same Article also requires parties to guarantee that elderly people living in institutions are able to participate in decisions concerning living conditions in the institution. Although the UK ratified the original version of the Charter, adopted in 1961, it has not ratified the revised version and is therefore under no reporting obligations in relation to Article 23.

¹³⁸ One Voice – shaping our ageing society, Age Concern and Help the Aged, 2009.

¹³⁹ Section 25, Commissioner for Older People (Wales) Act 2006.

¹⁴⁰ Building a Society for All Ages, <http://www.hmg.gov.uk/buildingasocietyforallages/foreword.aspx>

In relation to disabled people, the UN Convention on the Rights of Persons (CRPD) with Disabilities, ratified by the UK in June 2009, is a human rights instrument of key importance for disabled people. Full and effective participation and inclusion in society is set out as one of the General Principles of the Convention, and the theme of participation recurs through the text.

The government should therefore consult and consider the need for provisions relating to ensuring the participation of all groups in society.

Family and social life

Everyone has the right to respect for his family and social life, which is essential to the ability to develop and fulfil one's personality and to lead one's life as one chooses. This right is protected under various articles of the HRA, including article 8 (right to respect for private and family life, home and correspondence) and article 12 (right to marry and found a family). Yet vulnerable groups are more likely than others to be denied full enjoyment of this right.

This can be because the diversity of people's family experience is inadequately recognised and taken account of in law and policy. For example, while the HRA incorporates the right to marry, case law has established that this right does not extend to grant a right to gay people to form a state sanctioned relationship such as marriage. We have the Civil Partnership 2003, but the right to enter into a civil partnership is not guaranteed as a human right.¹⁴¹ The right of transgender people to marry can be inhibited if rules are not carefully constructed to take account of their new gender.

Certain groups may require the State to take specific measures to protect, enhance or facilitate their right to family life. The Yogyakarta Principles recognise the diversity of family forms and elaborate that the right to found a family without discrimination on the basis of sexual orientation or gender identity requires states to take measures to facilitate this right.¹⁴² The CRPD recognises that disabled people may require assistance in child-rearing in order to fully realise the right to found a family and requires states to take measures to prevent concealment, abandonment, neglect and segregation of children with disabilities to ensure that they have equal rights with respect to family life.¹⁴³ There may be specific aspects of the right to family life which would gain greater attention if they were elaborated explicitly. The particular circumstances of children affecting their enjoyment of the right to family life may merit specific treatment in any Bill of Rights, such as the right not to be separated from one's parents (art 9 CRC and art 23 CRPD), the right to family reunification and special protection and assistance of children deprived of their family (CRC 20).

The government should consult on and consider inclusion in any Bill of Rights special protection of the right to family and social life. This may be appropriate to safeguard the enjoyment of this right by particular groups such as groups based on their sexual orientation or gender identity, disabled persons and children.

¹⁴¹ For example, the NIHR has recommended that there be a right to marriage or civil partnership, A Bill of Rights for Northern Ireland, page 32.

¹⁴² Principle 24.

¹⁴³ Article 23.

Specific rights for children

One group whose rights are not strongly or sufficiently articulated in the current domestic framework is children. At international level, the UN Convention on the Rights of the Child sets out a comprehensive charter of rights for children which ensures that the child's best interests is central to all areas of policy and decision-making which have an impact on children, not just children specific legislation.

There is no proposal in the Green Paper to incorporate the Convention; rather, the Green Paper assumes that the Convention rights are given effect in the UK through a mix of legislation (such as the Children Act 1989, the Children Act 2004 and policy initiatives such as Every Child Matters) and underpinned by the provisions of the HRA. This was the evidence given to the UN Committee on the Rights of the Child in the UK government's Third and Fourth Periodic Report:

'175. Core civil rights and freedoms for children and young people in the UK are those set out in the European Convention on Human Rights, which are enshrined in UK law through the Human Rights Act 1998. In addition, the UK government has set in place, and keeps under review, a range of measures to provide additional protection for the rights and freedoms of children.'

Since there is no age limit in the HRA it is assumed that it applies to children as well as to adults. Certainly, some of the Convention's provisions are analogous to those in the HRA, the civil and political rights in particular, for example article 6 (right to life); article 13 (freedom of expression); article 14 (freedom of thought, conscience and religion); article 16 (privacy); article 28 (right to education); article 37 (prevention of torture, cruel inhuman or degrading treatment and freedom of liberty), and article 40 (fair hearing).

However, although providing general protection, the HRA has no discrete provisions for children; there is no concept of 'best interests' and its focus on participatory rights can make it difficult to understand how it should apply to children in practice. By contrast, the participation rights in the Convention are to be exercised by children progressively in accordance with their evolving capacities.¹⁴⁴ This principle of evolving capacities is an important guiding and interpretative principle which is not found in the HRA.

Aside from the HRA, the guiding principle and bedrock of the Convention - that the best interests of the child shall be a primary consideration - is not implemented in all areas of policy and legislation. While the Children's Act 1989 requires a court when determining any question with respect to the upbringing of a child, or the administration of a child's property to have the child's welfare as the court's paramount consideration, there is no similar duty on the criminal courts when dealing with children and young people or in immigration policy.

The Green Paper seeks views on how a Bill could be used to improve children's wellbeing and their standing and respect for children in the UK. It is suggested that the Bill of Rights could contain a right for children to achieve wellbeing. 'Wellbeing' is explained in Every Child Matters as improving the lives of children and young people

¹⁴⁴ UN CRC General Comment No.7 Implementing Child Rights in Early Childhood para 17 and CRC article 5.

in five broad areas: health, safety, enjoyment and achievement, making a positive contribution, and achieving economic wellbeing.

A right to achieve wellbeing is a useful starting point but it is not clear how the duty bearers (parents, carers or public bodies) are to achieve wellbeing. There will be some limited opportunity to develop the right to achieve wellbeing through the new public sector equality duties in the Equality Bill which will apply to children as part of advancing equality of opportunity on grounds of age. However, in the absence of full incorporation of the Convention, there are two Convention principles which, if imported and codified, have potential to help define a right to achieve wellbeing: the best interests principle and the right to express views and be heard. These rights are also included in article 24 of the EU Charter of Fundamental Rights.¹⁴⁵

Best interests principle

The Convention states that the best interests of the child are a *primary* consideration in all actions concerning children. It is not a paramount consideration but a leading consideration which may not always prevail of all other considerations. The Best Interests principle has been recognised in the Council of Europe as being a binding principle of international human rights law.¹⁴⁶

In England and Wales the best interests principle was codified in the Children Act 1989 before the Convention was ratified by the British government. There are parallel provisions in the Children (Scotland) Act 1995. However, there is no such statutory duty in other areas of law or policy such as youth justice, health, education or immigration.

The absence of a statutory best interests principle is sharply felt in policy areas outside family and care proceedings, in particular immigration and asylum policy. For example, the Immigration and Asylum Act 1999 restricts support for failed asylum-seeking families to accommodation and food or vouchers. Nowhere is there a requirement for the best interests of children to be a primary consideration. This policy has far-reaching effects for asylum-seeking families who as a result will commonly experience destitution. Research by The Children's Society found cases of children living in poor housing conditions and going without food for days; mothers turning to prostitution to survive;¹⁴⁷ and pregnant women who 'cannot afford to eat or access healthcare'. The result of this is that children living in destitution do not have opportunities to play and develop and may not have access to healthcare or education which ultimately affects their wellbeing.

Similarly, as many organisations working with asylum seekers note,¹⁴⁸ welfare is not a paramount consideration for the government when detaining children in immigration detention centres and even providing access to facilities within.

¹⁴⁵ 'Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.'

¹⁴⁶ Child Rights in Europe, Geraldine Van Bueren, Council of Europe, December 2007.

¹⁴⁷ *Child Destitution Report Summary - living on the edge of despair: destitution amongst asylum seeking and refugee children*, The Children's Society, February 2008.

¹⁴⁸ Bail for Immigration Detainees (March 2008) Briefing paper on children and immigration detention - March 2008 BID.

Right to be heard

The Convention states that the child has the right to express his or her views freely in all matters affecting the child and to have them taken into account in any decision-making process that affects him or her. The Committee, in its General Comment no.7¹⁴⁹, refutes the suggestion that young children lack the capacity for understanding and making choices:

‘As holders of rights even the youngest children are entitled to express their views which should be given due weight in accordance with the age and maturity of the child ... They make choices and communicate through feelings ideas and wishes in numerous ways long before they are able to communicate through conventions of spoken or written language.’

The Convention taken together with General Comment no.7 places obligations on the responsible authorities to take appropriate measures to ensure that the right to be heard and consulted is implemented, with specific obligations in judicial and administrative proceedings affecting the child.

The right to be heard is consistent with developments in British law and so it is not a huge leap to codify this right. The Gillick competency¹⁵⁰ test allows a child to consent to medical treatment ‘if and when the child achieves sufficient understanding and intelligence to understand fully what is proposed’. Also, the Children Act 1989 requires that the wishes and feelings of children who are subject to family court proceedings be ascertained. The Children (Scotland) Act 1995 specifies the child’s 12th birthday as the age at which a child is presumed to be of sufficient age and maturity to form a view. Similarly, the Children Act 2004 requires that, when working with children in need, their wishes and feelings need to be ascertained and used to inform decision-making. Also the Education Act 2008 has put in place a duty on schools to consider children’s views.

Although there are good examples of consultations with children either through school councils or youth parliaments, the right to be heard in proceedings is narrowly applied. For example, looked-after children¹⁵¹ with special educational needs (SEN) do not have a general right to have their views taken into account when a local authority makes a statement¹⁵² on their educational needs or on the content of any statement made; more specifically looked-after children do not have a separate and individual right to appeal.

The right of appeal is restricted to the parent of the child which includes any person with parental responsibility. In the case of looked-after children, it is the local authority which has parental responsibility and, for those children who no longer have contact with the biological parent and have no foster parent, it is the local authority which has a de jure right of appeal to the Special Educational Needs Tribunal (SENDIST) or Special Educational Needs Tribunal for Wales (SENTW). The position is the same in Scotland. Although the statutory Special Education Needs

¹⁴⁹ Implementing child rights in early childhood 2005.

¹⁵⁰ Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402 (HL)

¹⁵¹ This refers to children in the care of a local authority

¹⁵² A statement of SEN is a legal document which sets out a child’s Special Educational Needs as assessed by the LEA; sets out the provision (support) which the LEA feels is needed; names the school, type of school or other provision which will give this support. The aim of the statement is to make sure a child with SEN gets the right kind of support to enable him to make progress in school.

(SEN) Code of Practice recommends that children with SEN should be involved in and have a say in decisions made about them, the child has no separate and independent right of appeal.

The government should therefore consult on and consider inclusion in any Bill of Rights particular rights for children, including the best interests principle and the right to be heard.

5.4. Socio-economic rights

Justice Albie Sachs of the South African Constitutional Court has said that a country which does not include socio-economic rights¹⁵³ in some form in a Bill of Rights has 'given up on aspiration'.¹⁵⁴ Socio-economic rights relate to some of our most basic needs and aspirations as humans: to have adequate food, to have a home, to be able to work and contribute to society, and to live healthy lives.

Polls indicate that when the British public is asked about which human rights should be guaranteed, support for socio-economic rights is actually very high.¹⁵⁵

The Commission has not had an opportunity to consult with key stakeholders on whether socio-economic rights should be incorporated in any Bill of Rights and if so with what effect. The Commission will consider these issues in more detail in the coming months. However, the Commission has already worked on various projects relating to socio-economic rights and wishes to provide an overview of the factors that the government needs to consider in more detail. Below consideration is given to the status of socio-economic rights internationally and in other jurisdictions; their status in Britain; evidence of the enjoyment of socio-economic rights in Britain, and the possible ways in which socio-economic rights could be incorporated in any Bill of Rights based on the experience in the UK and internationally.

Status of socio-economic rights internationally and in other jurisdictions

The starting point for any discussion of socio-economic rights is that all human rights are universal and interdependent. The Universal Declaration on Human Rights from which all subsequent United Nations Conventions derive (including the ICCPR and the ICESCR) treats all rights as inseparable. The government also acknowledges this and that socio-economic rights have the same status as civil and political rights.¹⁵⁶

The United Nations International Covenant on Economic Social and Cultural Rights sets out the key socio-economic rights which include: the right to work and adequate pay and working conditions; the right to an adequate standard of living including food and clothing; the right to education; the right to enjoyment of the highest standard of

¹⁵³ The Commission uses the term socio-economic rights to incorporate economic, social and cultural rights protected by the ICESCR.

¹⁵⁴ Evidence to the Joint Committee on Human Rights, A Bill of Rights for the UK, paragraph 191.

¹⁵⁵ The ICM 'State of the Nation' Poll of 2000 asked which rights should be in a Bill of Rights: 94% supported a right to hospital treatment within a reasonable time; 87% supported the right to join a trade union; 76% supported the right of the homeless to be housed. Published in Dunleavy, Margetts, Smith and Weir, Popular attitudes to Democratic Renewal in Britain, 2001. More recently a Joseph Rowntree State of the Nation Poll indicated 88% of people supported the right hospital treatment by the NHS within a reasonable period of time and 65% supported the right of the homeless to be housed. October 2006.

¹⁵⁶ Human Rights Annual Report 2006, Foreign and Commonwealth Office, p233.

physical and mental health; the right to housing; the right to social security, and the right to non-discrimination in the enjoyment of those rights.¹⁵⁷ Many of these rights are also set out to varying forms in regional instruments.¹⁵⁸

The rights under the ICESCR differ in the manner in which they must be realised. Many require progressive realisation (such as the right to an adequate standard of living and the right to attainment of good physical and mental health) given that they involve decisions about the extent of use of public resources. Others however require immediate action: for example the right to education and particularly primary education; the right to a minimum wage in employment, and the right to non-discrimination in the enjoyment of socio-economic rights.

States that are parties to the Covenant have a duty to give effect to it in their domestic legal order and appropriate means of redress or remedies must be available for persons who believe that their rights have been breached.¹⁵⁹

Around the world, a number of countries' constitutions or Bills of Rights have given effect to the international obligations under the ICESCR by incorporating socio-economic rights in some way.

There are broadly two models for incorporation: justiciable and legally enforceable rights, and directive principles of state policy.¹⁶⁰

In relation to the first model of directly enforceable rights, in a number of Scandinavian and Eastern European countries, socio-economic rights are protected as legally enforceable rights in the Constitution. Finland, for example, has a constitutional guarantee of 'the right to basic subsistence in the event of unemployment, illness and disability and during old age as well as the birth of a child or the loss of a provider'. In countries such as Latvia, Estonia, Poland and Romania, the Constitutional Court has struck down laws which unduly restrict constitutional rights to certain types of subsistence benefits.¹⁶¹

In South Africa individuals and groups have the right to bring claims for breaches of their socio-economic rights, which are clearly set out in the Bill of Rights. Courts apply the test of reasonableness to assist them in assessing whether the laws and policies of public authorities are consistent with the Bill of Rights.

Socio-economic rights protected are rights to housing, healthcare, food, water and social security. The Bill of Rights provides that 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of these rights.

The courts can interpret the reasonableness of the actions of public authorities. For example in relation to the right to health, in *Minister of Health v Treatment Action*

¹⁵⁷ <http://www2.ohchr.org/english/law/cescr.htm>

¹⁵⁸ For example the European Social Charter, the International Labour Organisation Conventions and the EU Charter of Fundamental Rights.

¹⁵⁹ General comment 9 on the Domestic Application of the Convention, E/C.12/1998/24, CESCR 3 December 1998.

¹⁶⁰ Chapter 2 Taking Socio-economic rights seriously: The Substantive and Procedural Implications, David Bilchitz in *Freedom from Poverty as a Human Right*, Volume 4, *Law's Duty to the Poor*, Edited by Geraldine Van Bueren, UNESCO, 2009.

¹⁶¹ *Ibid* para 166.

Campaign¹⁶² the Court considered a challenge to the failure of the South African government to make available the anti-retroviral drug nevirapine, which would prevent the transmission of HIV from mothers to babies.

The Court found this to be an unreasonable denial of rights to healthcare and to children's healthcare under sections 27 and 28 of the Constitution. In reaching this conclusion, the Court took account of the reliable evidence available, both nationally and internationally, that nevirapine was safe; the minimal cost, which was well within the State's resources, of making the drug widely available, and the fact that its prescription did not involve complex additional training for healthcare staff. The Court ordered the removal of restrictions on the availability of nevirapine, and the taking of reasonable measures to extend testing and counselling facilities throughout the public health service, to facilitate and expedite the use of the drug.

In relation to the right to housing, in the Modderklip case¹⁶³ the South African Court of Appeal held that the State breached its constitutional obligations regarding the right to adequate housing by failing to provide alternative land to vulnerable occupiers of land that were to be evicted.

In relation to the second model of directive principles of state policy, in several countries the rights are not legally enforceable but nevertheless recognised as fundamental in the governance of the country and the State has a duty to apply those principles when making laws. An example is the Constitution of India. These principles include various duties to direct its policies towards securing, for example, the right to work, to education and to a higher standard of living and level of nutrition and public health. The Constitution of Ireland takes a similar approach.¹⁶⁴

Status of socio-economic rights in Britain

Aspects of some socio-economic rights are weaved into domestic legislation but the rights are not directly incorporated in the same way as civil and political rights are under the ECHR by the HRA. For example in relation to the right to work there are specific laws relating to the minimum wage and health and safety conditions at work; in relation to the right to housing there are homelessness laws requiring the government to provide accommodation for homeless people, and in relation to the right to health, the NHS must provide medical treatment without charge to those requiring emergency treatment.

The courts already do play a key role in making decisions about socio-economic rights in judicial review cases concerning the State's various statutory duties in areas such as education, mental health and social care, and housing.

In addition certain aspects of socio-economic rights have been addressed by the courts in the context of the HRA. For example the right to housing of Gypsies and Travellers has been considered in a number of cases relating to the article 8 right to family life and the article 14 right to non-discrimination.¹⁶⁵ The right to education has been considered as it is also a right under Protocol 1, Article 2 of the European Convention on Human Rights.¹⁶⁶ The case of Limbuela¹⁶⁷ related to the right to

¹⁶² CCT8/02 5 July 2002.

¹⁶³ Modder East Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd, SCA 187/03

¹⁶⁴ Ibid para 168.

¹⁶⁵ For example, Chapman v United Kingdom [2001] 33 EHRR 399.

¹⁶⁶ Ali v Head Teacher and Governors of Lord Grey School [2006] UKHL 14.

housing. The government policy was to refuse asylum seekers accommodation and other support if they had not claimed asylum on entry to the UK. This left many asylum seekers destitute and living on the streets. The House of Lords found that this breached their right under article 3 of the ECHR not to be subject to inhumane and degrading treatment.

In relation to legislative developments, the government has also made a series of recent legislative proposals that will further increase judicial scrutiny of issues relating to socio-economic rights. For example, the Equality Bill seeks to introduce a socio economic duty which will require key public authorities to have 'due regard' in deciding how to exercise its functions to 'reduce the inequalities of outcome which result from socio-economic disadvantage'. Although this does not provide a private cause of action, it would be possible to bring a claim by judicial review to challenge whether a public authority has complied with the duty in a similar way to the equality duties. The socio-economic duty links with the right under article 11 of the International Covenant on Economic, Social and Cultural Rights to an adequate standard of living and to be free from poverty.

The Child Poverty Bill is also currently passing through Parliament and will create a duty on local authorities to make arrangements to promote cooperation to reduce child poverty in the area. In addition the Secretary of State is required to produce a strategy to reduce child poverty, set targets and report on progress on the targets and strategy. This again links with the right to an adequate standard of living under the ICESCR and the issue of child poverty was one of the main areas of concern of the Economic and Social Committee during its examination of the UK government in May 2009.

The conduct by the Secretary of State would be open to judicial review but only to a limited degree, for example where they failed to produce a strategy within the timeframes. The Joint Committee on Human Rights has stated that this strikes the right balance between ensuring the government retains a discretion in how it uses its resources while giving the courts a limited role in scrutinising the conduct of the government as to whether they have complied with their duties.

Evidence of enjoyment of the rights in Britain

In April 2009 the Commission submitted a report to the United Nations on the performance of the UK government in relation to the progress made in the enjoyment of socio-economic rights in Britain.¹⁶⁸

While the government has made progress in relation to a number of issues, the Commission raised a number of concerns both in relation to its overarching approach to the implementation and application of the rights under the Covenant, and in the failure to sufficiently realise a number of the rights particularly for the most disadvantaged groups. In relation to the implementation of rights under the Covenant, we noted that to date there has been insufficient awareness raising by the government of the rights; a failure to conceptualise those rights as 'human rights'; and as a result a failure to either take a human rights-based approach to their fulfilment or to make appropriate links between socio-economic rights and civil and political rights. This has resulted in public authorities generally failing to embed in the

¹⁶⁷ *Limbuella and Others v Secretary of State for the Home Office* [2005] UKHL 66.

¹⁶⁸ Submission on the UK government's fifth periodic report under the ICESCR, April 2009: http://www.equalityhumanrights.com/uploaded_files/icescrsubmission.pdf.

development of legislation and policy appropriate consideration of what is required to fully comply with the rights under the Covenant.

In relation to particular rights under the Covenant, in a number of areas the gap in attainment between the least and most successful members of society has either stalled or widened, and significant progress needs to be made in order that disadvantaged groups are able to fully realise their rights under the Covenant. For example, our submission highlighted the need to: drastically improve the levels of participation of women and ethnic minorities in senior public positions; increase the opportunities for disabled persons to gain employment and enter higher education; reduce the number of children, older people and women in poverty; reduce health inequalities particularly of low socio-economic group; and the need to significantly improve the linked issues of housing provision and educational attainment for Gypsies and Travellers.

Following the examination of the UK government in May 2009, the United Nations Economic and Social Committee made a series of recommendations in its Concluding Observations including that: the government take effective measures to increase awareness of socio-economic rights as human rights; and that it take various measures to ensure that everyone and particularly marginalised and vulnerable groups are able to better enjoy their socio-economic rights. The Concluding Observations are attached to this paper.¹⁶⁹

Possible incorporation of and justiciability of the rights in a Bill of Rights

In light of all the above factors, the Commission considers that it is important for British society to fully debate whether incorporation of socio-economic rights in some form in any Bill of Rights is appropriate. Consideration should be given in the consultation as to whether this could help to increase awareness of socio-economic rights; mainstream consideration of socio-economic rights in the delivery of public services, and most importantly improve outcomes for everyone in society in terms of enjoying the rights.

In relation to justiciability, the government's position in the Green Paper is that if socio-economic rights were incorporated in a Bill of Rights they would not be directly justiciable by individuals:

'In drawing up a Bill of Rights and Responsibilities, the government would not seek to create new and individually enforceable legal rights in addition to the array of legal protections already available.'¹⁷⁰

The Joint Committee of Human Rights in its report on a Bill of Rights has proposed a model based on the South African Bill of Rights.¹⁷¹ That model requires the progressive realisation of key socio-economic rights (right to health, education, housing and an adequate standard of living) within available resources and provides that the rights are only justiciable in determining the reasonableness of

¹⁶⁹ For example, to reduce the numbers of children, ethnic minorities, older and disabled persons in poverty; to increase the numbers of disabled persons in employment; to increase the levels of social housing and sites for Gypsies and Travellers and to reduce the current high health inequalities faced by persons with mental disabilities.

¹⁷⁰ Green Paper Chapter 3, paragraph 3.52.

¹⁷¹ A Bill of Rights for the UK, pages 43-56.

the measures taken to achieve the progressive realisation of the rights.¹⁷² It also requires the government to report annually to Parliament on the progressive realisation of the rights.

Another model has been provided in Australia in relation to its planned HRA, proposing the incorporation of the rights to adequate standard of living including housing, the right to physical and mental health, and the right to education. They also recommended that although those rights should not be justiciable, public authorities should be required to give proper consideration of socio-economic rights when making decisions.¹⁷³

The Commission believes it is important for the scope of the government's consultation on socio-economic rights be broader than it is in the Green Paper for a number of reasons. Firstly, given the public support for the inclusion of socio-economic rights, they should be consulted on whether they consider that socio-economic rights should be justiciable in some way. Secondly, the current consultation fails to take into account that there are nuances in the nature of socio-economic rights with some aspects which are more crucial and immediate, not requiring progressive realisation (for example emergency medical treatment). As a result different approaches may be required to different aspects of the rights. Thirdly, it fails to take account of the views expressed by the United Nations Committee on Economic and Social Rights that incorporation of socio-economic rights is appropriate. Fourthly it fails to consider alternatives, for example as proposed by the Northern Ireland Human Rights Commission (NIHRC) in relation to a Bill of Rights for Northern Ireland, or the proposal by the Joint Committee on Human Rights described above.

The UN Committee has stated on justiciability:

'While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.'¹⁷⁴

Most recently, the UN Committee in May 2009 stated that it:

'... urges the State Party to ensure that the Covenant is given full legal effect in its domestic law, that the Covenant rights are made justiciable, and that

¹⁷² Joint Committee on Human Rights, A UK Bill of Rights, 29th report of session 2007-08, para 192

¹⁷³ Final Report pages 366 and 376.

¹⁷⁴ General comment 9 on the Domestic Application of the Convention, E/C.12/1998/24, CESCR 3 December 1998, paragraph 10.

effective remedies are available for victims of all violations of economic social and cultural rights.¹⁷⁵

In relation to alternatives, the NIHRC provided its advice to the government on a Northern Ireland Bill of Rights in December 2008. The UK government will be shortly consulting with the public on its recommendations. On socio-economic rights the NIHRC recommends that they should be justiciable on the same basis as any judicial review. In addition, although their proposals refer to many rights being subject to a duty of progressive realisation, for some socio-economic rights the obligations are immediate reflecting international human rights standards and domestic laws. For example they propose a right that no one is refused emergency medical treatment and essential primary healthcare and that everyone has the right to appropriate emergency accommodation.¹⁷⁶

It is therefore important for the government to consult on the full range of possibilities regarding the incorporation of socio-economic rights, consider which could have immediate effect and whether some or all could be justiciable in some way. It should consult in this manner in relation to all the key socio-economic rights: the right to an adequate standard of living including housing; the right to physical and mental health; the right to education; the right to work, and the right to social security.

5.5 Other potential key rights

Rights associated with criminal processes

The area of criminal justice is the area where most attention to rights has been focused, and where both understanding of rights is most developed, and where issues engaging rights most often come to public attention and concern.¹⁷⁷

The protection of basic rights in the criminal justice system - the right not to be tortured, the right to liberty, and the right to a fair trial - are seen as being at the cornerstone of UK values, dating (in England) back to the Magna Carta, enshrined in the common law of England and Scotland, and more recently being given effect through the European Convention on Human Rights, and domestic statutes including the Police and Criminal Evidence Act and the HRA.

Protection of these rights is a fundamental requirement of any future Bill of Rights. Both the government and opposition parties have committed to their continuing protection, to at least current common law and HRA standards.

The different criminal justice systems across the UK have developed over the centuries in different ways. In Scotland, the criminal justice system has developed separately from in England and Wales. As the Bill of Rights consultation document recognises, the interaction between any forthcoming Bill and the devolution settlement needs very careful consideration. This part of the submission therefore concentrates on how the Bill of Rights could develop and improve the criminal justice system in England and Wales.

¹⁷⁵ Concluding Observations, Committee on Economic and Social Rights, E/C.12/GBR/CO/5, 22 May 2009, paragraph 13.

¹⁷⁶ A Bill of Rights for Northern Ireland, NIHRC, pages 114 and 120. The right to emergency accommodation is provided for in sections 175-218 of the Housing Act 1996.

¹⁷⁷ Review of the implementation of the Human Rights Act, Department for Constitutional Affairs, July 2006 - the HRA has not become a 'charter for criminals and terrorists'.

There are however a number of areas within the criminal justice system where consideration can be given to inclusion of further rights, to reflect the concerns and development of modern society, and to improve protection of fundamental freedoms, in particular in relation to vulnerable groups. These can be considered in a number of areas; extension or codification of protections in the criminal justice system for those facing criminal charges; extension or codification of protection given to others in the criminal justice system, in particular victims and vulnerable groups, and codification or recognition of the responsibilities that attach to all in respect of the criminal justice system.

There are a number of rights, provided for in other international treaties or standards, or particular to English and Welsh traditions and common law, that could be included in a Bill of Rights. These include the right to trial by jury for serious offences, strengthening fair trial rights and incorporating additional protections under international law. Consideration of rights for victims is also important. All these are examined below.

The right to trial by jury

The right to trial by jury for certain categories of offences is deep rooted in the common law, and English and Welsh traditions of criminal justice. The right to jury trial is not necessary to meet the obligations of a right to a fair trial under Article 6 of the European Convention on Human rights. Nor is a jury trial either automatic, or universal, indeed over 95 per cent of cases are non jury trial cases. Scotland has no legal tradition of jury trials.

A recent case indicates concerns where it has been decided that a major criminal trial will not be conducted by a jury. It has been decided that the criminal trial for armed robbery of John Twomey, Peter Blake, Barry Hibberd and Glen Cameron will not be by jury as there was a risk of jury tampering. It is the first time in 400 years that a major criminal trial is being conducted without a jury.¹⁷⁸

The Joint Committee on Human Rights concluded that the right to jury trial does not enjoy the status of a constitutional right that is not capable of restriction or limitation by legislation. However it did conclude that the right was one that:

‘has a sufficiently distinctive place in the legal heritage of England and Wales to have attained the status of a right recognised at common law, which therefore requires express authorisation in primary legislation to be limited, or restricted and careful justification’.¹⁷⁹

It is clear that the right to a jury trial holds strong support. An ICM State of the Nation poll found that 89 per cent of the public thought that the right to a fair trial by a jury should be included in any Bill of Rights. Both the Joint Committee on Human Rights and Justice supported the inclusion of the right to jury trial in a Bill of Rights. As Justice noted, the strong support for the right to a jury trial increased public confidence in the criminal justice system, and the democratic accountability of citizens sitting in judgement over their peers. As such, the right to jury trial not only supports the right to a fair trial but also wider concerns of confidence in and legitimacy of the criminal justice system.

¹⁷⁸ <http://news.independentminds.livejournal.com/5570292.html>, 13 January 2010.

¹⁷⁹ Second report 2006-7, legislative scrutiny; first progress report, HL Paper 34, HC 263, para 5.8.

In addition to criminal proceedings, juries are also used in the coroners system. Article 2 of the European Convention on Human Rights requires that where a violation of the right to life has occurred, there should be an investigation that is independent, in public, and fulfils various other criteria. In England and Wales this requirement has usually been met by the use of the coroners system. Within this, the use of juries has been viewed as an important protection, in enabling there to be public investigation and oversight of such deaths.

Recently, concern was raised that provisions in the Coroners and Justice Bill would allow the Secretary of State to dispense with a jury in the inquest on grounds related to protection of national security, and in order to prevent real harm to the public interest. Widespread concerns were raised regarding the provision. Inclusion of the right to a jury trial in inquests engaging Article 2 issues in a Bill of Rights would protect such rights.

Strengthening fair trial rights

A number of rights traditionally associated with the right to a fair trial have in recent years been eroded. The government has sought to restrict the right to jury trial on complex fraud cases. In addition, there has been a worrying trend to re-classify behaviours that might previously have been regarded as criminal - and which can still potentially attract criminal penalties - as civil, and therefore subject to civil forms of trial, and burdens of proof. Rules of evidence have changed to enable evidence of previous convictions to be adduced, and the right to silence has been amended. Many of these provisions have been brought in by governments concerned to be seen to be strong on crime, and the law and order agenda. All these provisions have impacted on previous common law fair trial protections, and while compliant with the ECHR, it would be worth considering in a Bill of Rights whether there is a need to revisit these protections.

Additional protections under international law

The ECHR contains a number of additional protections in relation to the criminal justice system that have not been ratified by the government or incorporated through the HRA.

Optional Protocol 7 provides for the right of appeal in criminal matters, the right of compensation for wrongful conviction and the right not to be tried or punished twice. We are pleased that the government is taking steps to ratify this Optional Protocol. Lord Lester has tabled amendments to the Equality Bill relating to equality of spouses which the government has indicated it will support and are the last barrier to ratification. As stated in previous submissions to the government in relation to the ICCPR, we urge the government to ratify the Optional Protocol 7 as soon as possible after the Equality Bill is enacted.¹⁸⁰

The right of appeal against criminal conviction is defined within domestic law, and as such the fair trial rights under Article 6 of the ECHR attach to these rights. As such, it would seem appropriate to consider inclusion of such appeal provisions within a Bill of Rights.

¹⁸⁰ Submission of the EHRC to the United Nations on the government's sixth periodic report under the ICCPR, June 2008.

There is a currently limited right for compensation for wrongful conviction in criminal proceedings in compliance with Article 5 of the ECHR, which provides for compensation for false detention. England and Wales give effect to this provision, and the requirement for compensation for criminal convictions under Art 14 (6) ICCPR through the provisions of section 133 of the Criminal Justice Act 2003. Again it may be worth giving consideration as to whether such rights should be contained within a Bill of Rights.

The government has recently in part repealed the old common law protection in relation to double jeopardy in England and Wales. Post the Macpherson Inquiry the Criminal Justice Act 2003 allowed for further prosecution following an acquittal in certain limited circumstances, for particular classes of offences. There is clear interest in justice to be served by enabling subsequent prosecutions in limited circumstances for serious cases, in particular in the light of technological advances such as in DNA. However the list of offences to which this exception applies is wider than the English Law Commission's recommendations of offences in relation to murder and genocide. In Scotland the double jeopardy principle continues to apply to all offences. Discussion on any proposed Bill of Rights as to the extent to which the exception to the double jeopardy law should apply would be welcome.

Victims' rights

Traditionally human rights protection in relation to criminal justice has been formed, and viewed, as primarily involving protection of the rights of the individual defendant when subject to the powers of the State. While such an approach is consistent with UK traditions, increasing realisation has developed that the rights of victims in the criminal justice system also needs recognition. The government's Green paper recognises this interest.

While the HRA itself includes no direct provision for the rights of victims these have to an extent been developed through jurisprudence, in particular in relation to Article 2, 3 and 8 of the European Convention on Human Rights.

As discussed earlier in this chapter on hate crime, there is a responsibility on the State to provide an effective mechanism for the protection of all victims of crime, including hate crime. In the UK there is increasing concern, and recognition of victims' rights within the criminal justice system. However protection of victims tend to be piecemeal, and spread across a variety of legislation, both EU, common law, civil and criminal law, policy and practice.

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 provides basic standards for the protection of victims. It recommends States take measures, including in the following areas:

- (a) Informing victims of their role and the scope, timing and progress of the proceedings.
- (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings.
- (c) Providing proper assistance to victims throughout the legal process.

(d) Taking measures to minimise inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.’

A number of these principles are already covered in UK law and practices. However the principles enshrined in the UN declaration are not set out within one law in England and Wales. Victims’ rights are encompassed in a wide-ranging set of laws, policies and practices, with different regimes in Scotland to England and Wales. Consolidation of these laws, policies and practices, under clear principles as set out in the UN declaration, may be of considerable benefit in establishing and protecting the rights of victims in the criminal justice system.

Good administration

The Green Paper consults on whether a right to good administration should be included in a Bill of Rights. The Commission supports the inclusion in any Bill of Rights of a right to good administration. In our view this could comprise at least those rights set out article 41 of the EU Charter of Fundamental Human Rights:

- ‘1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the Institutions, bodies and agencies of the Union.
2. This right includes:
 - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken
 - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy
 - the obligation of the administration to give reasons for its decisions.’

However, good administration is a broader concept than the right of the individual to administrative justice: it requires that public bodies follow decision-making processes which are lawful, fair, transparent and accountable. It has been described as:

‘... an essential element of good governance, including economic governance. It concerns not only the organisation, the management, the functioning, the action and the review of public authorities in general but also the status and the conduct of their officials ... its implementation can be broken down into individual rights which can be applied against the administration, as different rules at national and European levels already show. Developing these rights requires adopting legislation or rules and implementing good practices; their safeguard can be ensured by means of judicial review, the role of which has been underlined, as well as by specialised bodies such as ombudsmen.’¹⁸¹

This broader concept of good administration underpins the right of individuals to good administrative justice but goes further: as the Council of Europe observes, it requires rules or good practices. The core principles derived from the law of judicial

¹⁸¹ COE Conference: In Pursuit of Good Administration Conclusions Warsaw, 29-30 November 2007.

review should be adopted in any Bill of Rights to place fair decision-making at the heart of the UK's constitutional arrangements.

In addition to the case law, the requirements of the race, gender and disability equality duties are transforming public decision-making. The aim of the duties is to mainstream the elimination of discrimination and the promotion of equality of opportunity and good race relations by making these an integral part of the way public functions are carried out. It is recognised that this cannot itself be achieved without fair transparent processes. Thus, the current structure of the duties requires public bodies to identify clearly their objectives, to implement measures which are proportionate, to consult, to carry out impact assessments and to publish results of consultations and assessments. It is an approach which complements the requirements of proportionality under the HRA (as well as proportionality under the anti discrimination laws).

The practical outcome is a move towards more evidenced based decision making and greater communication with the public leading to greater transparency and accountability.

Enhancing privacy protection

The right to privacy has developed from Article 8 of the ECHR which provides an important framework for the protection of privacy, and the balance with the legitimate and proportionate needs of the State to capture and hold information on individuals for a variety of reasons, including prevention of crime, national security and the protection of health.

The Regulation of Investigatory Powers Act 2000 (RIPA) and the Data Protection Act 1998 (DPA) provide legislative regimes in respect of specific forms of surveillance and collection and storage of information respectively. However there are widespread concerns regarding the increased use of surveillance and collection of information about individuals, and the inadequacy of the current laws and practices to provide sufficient legislative and regulatory framework for the right to privacy.

As Justice note:

'The rights to private life and family (Article 8) and the obligation on public authorities (including the courts) from acting incompatibly with the HRA (s6 HRA) provide an important check against arbitrary and intrusive measures, but judicial supervision cannot maintain a sufficient guarantee of privacy in Britain. Nor can Parliament leave to the courts its responsibility for good governance, in particular by restraining the executive's enthusiasm for the administrative benefits of surveillance and data-gathering.'¹⁸²

RIPA provides a system of authorisation and warrants, in respect of targeted invasive surveillance activities. The original intention of RIPA was to address the most serious forms of crime and the initial number of authorised bodies under RIPA were just 9. As such, the proportionality of the legislation under Article 8 of the ECHR was clear. However there are now over 800 bodies that have some form of RIPA authorisation and RIPA has been used for activities including councils checking dogs fouling, or whether people live at the address given for school admission purposes.

¹⁸²A British Bill of Rights, Justice 2007, p 30

There has been concern that such uses are disproportionate within Article 8 terms, and whether RIPA provides sufficient protection to privacy rights.¹⁸³ In its response to the government's consultation on RIPA, the Commission has made various recommendations for improvements to the RIPA regime, including that there be a more comprehensive review of the legislation.

The DPA provides a regulatory basis for the storage and processing of information about individuals. However again the capacity of this act to deal with the challenges modern data techniques pose is under scrutiny, with increasing collection, processing and retention of data. Concern has been expressed over a number of other proposed or actual databases, including in particular the National Identity Register, which will store biographical and biometric data linked to the national ID card and ContactPoint, and the national database of all children in England.

The national DNA database holds DNA profiles of approximately four million people, half a million of whom have never been convicted. The European Court of Human Rights has recently found the permanent retention of fingerprints and DNA from those arrested, but not subsequently convicted of a criminal offence, breaches Article 8 of the ECHR.¹⁸⁴ Particular concern was voiced regarding the retention of DNA from juveniles. The Commission is particularly concerned that one in two of all black men are on the database. Concerns have been voiced that the government intends to continue to hold DNA of unconvicted individuals for up to 12 years. The House of Lords expressed concern that the national DNA database was not subject to a single statute and recommended that the government introduced legislation to reassess the length of time information was kept and to provide a regulatory framework for the database.¹⁸⁵ In Scotland a different system exists, whereby DNA can be retained for those arrested but not convicted, only in respect of violent and sexual offences, for a period of up to five years.

Both the Conservative and Liberal Democrat parties have pledge to review this use of databases, including scrapping the National Identity Register and reviewing principles for the DNA database.

The use of CCTV has grown exponentially in recent years, with there now being over 4.2 million CCTV cameras - one for every 14 people.¹⁸⁶ Neither the DPA - which applies only to processing and retention of personal information - nor RIPA, which only applies to CCTV used for pre-planned covert surveillance, provide a comprehensive regulatory framework for the use of CCTV. The House of Lords Constitution Committee has recommended that the government propose a statutory regime for the use of CCTV and introduce binding codes of practice.¹⁸⁷ The Liberal Democrats have called for a Royal Commission to investigate the issue of privacy and CCTV.¹⁸⁸

A final concern is the regulation of privately held data. Although regulation schemes have traditionally been more concerned with information held by the state, increasing

¹⁸³ See for example the Freedom Bill <http://freedom.libdems.org.uk/the-freedom-bill/5-ripa/>

¹⁸⁴ S. AND MARPER v. THE UNITED KINGDOM, (*Applications nos. 30562/04 and 30566/04*).

¹⁸⁵ Constitution Committee report, *ibid* pp212

¹⁸⁶ A report on the Surveillance Society. The Surveillance Studies Network, ICO 2006.

¹⁸⁷ Constitution Committee second report; Surveillance: Citizens and the State. House of Lords 21 January 2009 pp 219.

¹⁸⁸ Freedom Bill *ibid*.

amounts of information are held be private and commercial organisations. For example it is thought that Tesco's Crucible database has a profile of every person in the UK, regardless of whether they have ever shopped at Tesco.¹⁸⁹ A number of actors, including the Conservative Party, have called for engagement with the private sector on guidelines.¹⁹⁰

There is a strong case for review of current protections and consideration of further development of the right to privacy. An Ipsos Mori for the Inquiry found that 63 per cent of respondents were concerned about 'respect for private and family life' and 43 per cent of respondents listed it in their top five of Convention rights.¹⁹¹ Various proposals around a bill of rights, most notably those of the Conservative and Liberal Democratic parties have focused on the need for a better framework for the protection of privacy rights. The House of Lords has made a number of recommendations for the better protection of privacy, including an enhanced role for the Information Commissioner.

The government should consider whether better protection of the right to privacy is necessary in any Bill of Rights.

We also note that the Commission has commenced a research project scoping the current protections and gaps in relation to informational privacy. This includes a seminar and round table of experts to consider the issues. We anticipate the findings of this research will be available by June 2010 and we hope that this research will inform discussions on these issues.

Rights connected to free movement

International human rights instruments contain a right to freedom of movement within a State's territory for those lawfully there, a right to choose one's residence, and a right to leave any country.¹⁹² These rights may be relevant to the proportionality of restrictions on liberty which are not so severe that they can be considered under article 5 of the HRA. For example, conditions attached to bail and restrictions on movement imposed under a control order or an anti-social behaviour order, might be insufficiently serious to amount to a deprivation of liberty or inhuman or degrading treatment, but may nevertheless deserve scrutiny as to their proportionality. These rights apply to non-citizens as well as citizens.

Additional rights related to free movement which may merit inclusion within a Bill of Rights are the right not to be expelled from one's own country and the right to enter the territory of the State of which one is a national. These rights have a long-standing resonance in the UK and deserve consideration for incorporation in a Bill of Rights intended to serve, in part, as a statement of national values.¹⁹³ Rights which might be particularly important to refugees, asylum seekers and others seeking residence in the UK are the right of aliens to be free from collective expulsion and procedural safeguards relating to the expulsion of aliens.¹⁹⁴

¹⁸⁹ Overlooked, Liberty 2007 p 18.

¹⁹⁰ Reversing the rise of the surveillance state. Dominic Greive and Eleanor Lang 2009.

¹⁹¹ Public perceptions of human rights, Ipsos Mori, June 2009.

¹⁹² See Article 2 of the Fourth Protocol to ECHR and Article 12 of the ICCPR.

¹⁹³ The Magna Carta, ch 42 provided that '[i]t shall be lawful for any person, for the future, to go out of our Kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the Kingdom...'.¹⁹⁴

¹⁹⁴ Article 1, Seventh Protocol to the ECHR and Article 4, Fourth Protocol.

As stated in previous submissions to the government, the government should ratify Optional Protocol 4 of the European Convention on Human Rights and incorporate those right in any a Bill of Rights.¹⁹⁵

5.6 Improving the human rights mechanisms

It is also important for the government to consult on a range of other mechanisms either for the content of a Bill of Rights or which may help to improve its effectiveness. We highlight several issues below.

Mainstreaming human rights: a public sector duty

The Commission's Human Rights Inquiry found that a key difficulty face by service providers is that human rights were not sufficiently mainstreamed and embedded into all aspects of their work which impacted on the enjoyment of human rights. Human rights considerations were not mainstreamed into a range of functions of public authorities: from strategic and business planning¹⁹⁶ to training of staff on human rights issues.¹⁹⁷ The findings of the Inquiry also indicated that where public authorities had mainstreamed human rights in their work, better outcomes had been achieved both for the public and the public authority. A good example of this was the Department of Health's pilot project with five primary care NHS trusts in England to adopt a human rights approach to their work with patients.¹⁹⁸

As a result of the above findings, the Commission recommended in its final report on the Inquiry that the government should consult the public on whether or not a statutory duty should be imposed on all public authorities to take into account human rights before they implement new policies.

It is also to be noted that the NIHRC's recent advice to the UK government on a Bill of Rights for Northern Ireland recommended that a mainstreaming human rights duty be introduced. The provision stated that public authorities must not only act compatibly with the rights in the Bill, but also that they must:

- '(b) in making a decision, have due regard to the a relevant right in a Bill of Rights for Northern Ireland; and
- (c) take active steps to respect, protect, promote and fulfil the rights in a Bill of Rights for Northern Ireland.'¹⁹⁹

Similarly the Joint Committee on Human Rights also proposed that the provision relating to the obligations of public authorities require them to 'take active steps to respect, protect, promote and fulfil' the obligations.²⁰⁰

A human rights duty could be have a number of goals similar to the existing equality duties in relation race, gender and disability. It could assist public authorities to consider the possible human rights implications of their policies and practices at an early stage; help them to be more proactive rather than reactive to their human rights

¹⁹⁵ Submission of the EHRC to the United Nations on the government's sixth periodic report under the ICCPR, June 2008.

¹⁹⁶ Human Rights Inquiry, Chapter 5, Section 4, page 120 to 122.

¹⁹⁷ Human Rights Inquiry, Chapter 4, Section 12, page 108-109.

¹⁹⁸ Human Rights Inquiry, Chapter 3, Section 3, page 39.

¹⁹⁹ A Bill of Rights for Northern Ireland, page 149-154

²⁰⁰ A Bill of Rights for the UK?, page 106 and 115.

obligations; and have an educative role in informing staff of the relevance and importance of human rights in their work.

Private bodies carrying out public functions

A key concern associated with the implementation of the HRA has been its application to private bodies. The Act provides that it applies not only to public authorities, but also to private bodies carrying out public functions.²⁰¹ In light of increasing levels of public procurement, this provision was intended to ensure that private bodies acting in the role of public authorities by exercising public functions would have human rights obligations. A good example of this is private prisons.

The Commission notes that the Green Paper states the government is considering separately whether the definition of a public authority in the HRA should be clarified, as a result of the House of Lords decision in *YL v Birmingham City Council and Ors* [2007] 3 All ER 957.²⁰² To date no such consultation has been launched by the government.

In our view the court in the *YL* decision took an overly narrow approach to the issue and we advised the government on introducing an amendment to the Health and Social Care Act 2008 to ensure that private care homes providing care for the elderly and disabled were covered by the HRA.²⁰³

There is a need to secure a more comprehensive solution.²⁰⁴ This could be achieved by indicating in any Bill of Rights a list of relevant factors as to whether a private body is carrying out public functions.²⁰⁵ We also note that the Joint Committee of Human Rights and the Northern Ireland Human Rights Commission have made similar proposals in relation to their models of a Bill of Rights.

Who can bring proceedings

The Commission believes that the government should consider expanding the scope of who can bring proceedings under the HRA. Currently, under section 7 of the HRA proceedings can only be brought by a person who is (or would be) a victim of an unlawful act. An exception to this is that the Commission has the power to bring judicial review proceedings in relation to a human rights matter even where there is no actual or potential victim.²⁰⁶ Although this power has yet to be used it provides the

²⁰¹ Section 6(3)(b) of the Human Rights Act.

²⁰² Green Paper, Chapter 4 paragraph 4.23.

²⁰³ See section 145 of the Health and Social Care Act. The Joint Committee on Human Rights has also criticised the effect of the *YL* decision and called for legislative clarification of the provisions relating to private bodies carrying out public functions.

²⁰⁴ The Commission has expressed these views publically in our submission to the government on a Constitutional Right to Equality (March 2009) and in our submission to the Joint Committee on Human Rights Inquiry into Business and Human Rights, June 2009.

²⁰⁵ Such factors could include: the extent to which the State has assumed responsibility for the function in question; the role and responsibility of the State in relation to the subject matter in question; the nature and extent of the public interest in the function in question; the nature and extent of any statutory power or duty in relation to the function in question; the extent to which the state, directly or indirectly, regulates, supervises and inspects the performance of the function in question; the extent to which the State makes payment for the function in question; whether the function involves or may involve the use of statutory coercive powers.

²⁰⁶ Section 30 of the Equality Act 2006.

Commission with a vital role in bringing proceedings regarding legislation that may breach human rights.²⁰⁷

The model under the South African Bill of Rights is an example that should be considered in more detail. It provides:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- anyone acting in their own interest
- anyone acting on behalf of another person who cannot act in their own name
- anyone acting as a member of, or in the interest of, a group or class of persons
- anyone acting in the public interest, and
- an association acting in the interest of its members.²⁰⁸

This would enable other organisations with particular interest in human rights to bring claims (such as non-governmental organisations or NGOs) in the same way that they can bring judicial review proceedings in other areas of law.²⁰⁹

The right to an effective remedy

Article 13 of the European Convention on Human Rights requires an effective remedy where there has been a breach of Convention rights. However this has not been incorporated into the HRA. This was because it was believed that the provisions in the Act itself were sufficient remedies.

However, in a number of cases, the European Court of Human Rights has found that declarations of incompatibility issued under section 4 of the HRA are not an effective remedy. The main problem with section 4 is that it places no legally binding obligation on the executive or the legislature to amend the law, nor can it form the basis of an award of damages.²¹⁰

In order to fully comply with the provisions of the Convention, the Commission believes that the government should consider incorporating in any Bill of Rights article 13 of the Convention.

Entrenchment

There are a number of possible models by which any Bill of Rights could be entrenched. The Green Paper does not discuss this issue.

²⁰⁷ For example the Commission wrote to the government stating that it would commence judicial review proceedings against the government if it passed legislation to increase possible pre-charge detention periods for suspected terrorists to 42 days.

²⁰⁸ Article 38 of the Bill of Rights.

²⁰⁹ For example *R v Lord Chancellor, ex p Child Poverty Action Group* [1998] 2 ALL ER 755; *R v Sefton Metropolitan Borough Council, ex p Help the Aged* [1997] 4 All ER 532.

²¹⁰ See for example *Dodds v UK App No 59314/00*, 8 April 2003 and *Walker v UK App No 37212/02* 16 March 2004.

The model under the HRA only gives a limited form of entrenchment by requiring that all legislation, including future legislation must be interpreted compatibly with Convention rights.²¹¹ The Westminster Parliament remains free to amend the HRA or pass legislation which is incompatible with Convention rights, provided the legislation expressly states that this is what it intends to do.

There are differing views as to whether this is an effective model. The Joint Committee on Human Rights believes that the current model appropriately protects parliamentary sovereignty and should be retained.

It is arguable that the current model also allows flexibility by permitting a Bill of Rights to be amended to meet changing social circumstances, such as the rights of older persons or persons on grounds of sexual orientation. However, on the other hand it is also arguable that this approach is not appropriate for a constitutional document which involves the protection of fundamental rights and that it leaves open the possibility of the provisions being weakened in their effect, or worse still, repealed as the Conservative Party is proposing.²¹²

A number of models of greater entrenchment of Bill of Rights exist in other jurisdictions, most of which involve special legislative procedures in Parliament to amend the legislation. One possible and simple model based on our current constitutional framework is to amend the Parliament Acts to require both Houses of Parliament to approve any amendment to a Bill of Rights.²¹³ Currently the Parliament Acts allow the House of Commons to overrule the House of Lords in certain circumstances.²¹⁴

This model has been put forward as a possible model by Justice.²¹⁵ In addition the Conservative Party has also indicated they support this model.²¹⁶

Given the fundamental nature of the issue of entrenchment the government should consult on these issues.

Increasing involvement of Parliament

There are a number of ways in which the role of Parliament in the implementation and monitoring of a Bill of Rights could be strengthened. This is only briefly touched upon by the Green Paper.²¹⁷

The Joint Committee of Human Rights has referred to a number of models from other jurisdictions which provide greater parliamentary scrutiny and it has recommended several ways in which the current parliamentary model can be strengthened. For example it suggests that the requirement of Ministers to sign certificates of compatibility in relation to draft legislation could be enhanced by a

²¹¹ Section 3(2)(a) Human Rights Act.

²¹² A British Bill of Rights, Justice, page 54-55.

²¹³ All that would be required is an amendment of the Parliament Act 1911, excepting amendments to the Bill of Rights from the terms of its provisions.

²¹⁴ Exceptions are made for the life of a Parliament and money bills. The House of Lords may delay other primary legislation for up to one year. If the same Bill is blocked by the Lords in the second session, it can be submitted for royal assent without the consent of the House of Lords.

²¹⁵ A British Bill of Rights, Justice, page 55.

²¹⁶ <http://www.dominicgrieve.org.uk/record.jsp?type=speech&ID=67>

²¹⁷ Green Paper, Chapter 4, paragraph 4.4

requirement to give reasons for the view.²¹⁸ It also suggests that there should be a requirement of an independent five-year review of the effectiveness of a Bill of Rights which reports to Parliament.²¹⁹

The government should consult on these types of issues, including which body should conduct such a review. Given the present requirement of the Commission to produce a State of the Nation report on the enjoyment of human rights every three years, consideration could be given as to whether the Commission should also be responsible for reviewing the effectiveness of a Bill of Rights.

²¹⁸ This is based on the model in New Zealand under the New Zealand Bill of Rights Act 1990.

²¹⁹ This is based on the Victorian Charter of Human Rights and Responsibilities which requires a review on the operation of the Charter after four years.

6. The process for developing any Bill of Rights

The government stated in their *Governance of Britain* Green Paper that any new Bill of Rights could come into being only 'over an extended period of time, through extensive and wide consultation, and not without broad consensus upon the values on which they were based and the rights and responsibilities which derived from them'.²²⁰

The Green Paper on a Bill of Rights and Responsibilities states on process that:

'We intend to involve all parts of our country and our society in discussions both about the fundamental arguments for and against such a Bill of Rights and Responsibilities as well as the advantages and disadvantages of the individual components of any such Bill. Full consultation and debate about such a constitutional development will inevitably take some time. It cannot be the property of one Parliament and one government. All sections of the UK will have a view. As part of the consultation process, we expect that Parliament will want to make a contribution to the debate and we will bring forward proposals for that in due course. The need for such extensive consultation means that, if it were concluded that the time was right for a Bill of Rights and Responsibilities, it would not be possible to bring forward any legislation before the next general election.'²²¹

The Commission agrees with the government that the process for creating a Bill of Rights must involve extensive and appropriate consultation. Constitutional reform raises fundamental questions of the relationship between individuals and the State, the relationships between groups in society, and implications for devolution in Scotland, Wales and Northern Ireland.²²² It is therefore vital that any future government adheres to our principle that it:

'... 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 [it] is adequately resourced.'

Given our concerns about the process for developing any Bill of Rights, in October 2009 the Commission commissioned independent research to identify and explore best practice processes for developing a new Bill of Rights for the UK. 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

²²⁰ The Governance of Britain CM 1770 p.63 para 213
<http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf>

²²¹ Green Paper, para 5.3

²²² Some of the implications for devolution were considered in Chapter 4 in relation to the essential components for a Bill of Rights framework.

which political party is in power.²²³ That research is being published at the same time as this response to the Green Paper.

The Commission refers the government to the full research report and in particular the principles and policy implications. The Commission hopes that the research findings and recommendations will be of great practical benefit for the next government in developing any possible Bill of Rights that is truly democratic and inclusive of all sectors of society.

²²³ Developing a Bill of Rights for the UK, Alice Donald with the assistance of Philip Leach and Andrew Puddephatt, Global Partners & Associates, Human Rights & Social Justice Research Institute, London Metropolitan University, 1 March 2010.

Conclusion

The enactment of the Human Rights Act (HRA) 10 years ago represented a landmark moment in the proud history of Britain's protection of peoples' human rights. It is a fundamentally important foundation for not only the enjoyment of human rights, but also in providing mechanisms which embed the promotion and protection of human rights in all functions of the State.

However that foundation is still relatively young, fragile and now under threat. Any debate on a possible Bill of Rights must have as a non-negotiable starting point the retention of all the rights and mechanisms in the HRA. It must also involve education of the public and public authorities of our current human rights framework and the importance of human rights in developing a society which embraces values of dignity, respect and fairness.

If we protect and build on the foundations of the HRA, the development of a Bill of Rights represents an opportunity to further enhance and improve our human rights framework. Opportunities exist, for example, to provide greater protection of the right to equality and the human rights of particularly disadvantaged groups, possibly incorporating economic and social rights, and providing better protection for other rights such as the right to privacy.

The Commission will provide an integral role in the discussion as guardian of the HRA and human rights, and hopes that this response and the research report on the process for developing any Bill of Rights will inform and stimulate that discussion.

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www.equalityhumanrights.com

This publication is the Equality and Human Rights Commission's response to the government's Green Paper *Rights and Responsibilities: developing our constitutional framework*. The response analyses why the development of any Bill of Rights should only build on: the levels of protection and mechanisms provided by the Human Rights Act; other essential elements of a human rights framework such as national human rights commissions and devolution arrangements, and those further rights and mechanisms that are or may be appropriate to include in any Bill of Rights to improve protection of human rights.