

## Commission on a Bill of Rights: A Second Consultation

Response by Professor Francesca Klug and Amy Ruth Williams, London School of Economics

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This response makes the following principal observations:

- It is reasonable to argue that the Human Rights Act already constitutes a UK Bill of Rights which, contrary to popular perception, preserves parliament's sovereign law-making capacity and does *not* oblige UK judges to follow decisions of the European Court on Human Rights.
- If the link with the European Convention on Human Rights (ECHR) is entirely broken in any new UK Bill of Rights, not only could this effectively 'de-incorporate' the Convention, but it would almost certainly result in more cases being decided by the European court in Strasbourg, thereby thwarting efforts being made at the international level to reduce the court's backlog and reducing the influence of UK judges on ECHR jurisprudence.
- In order to comply with the terms of reference of the Commission and the Brighton Declaration, any new UK Bill of Rights must offer protection of the Convention rights to all within the jurisdiction and therefore cannot exclude 'unpopular groups' or those whose behaviour has made them seem less 'deserving' of rights (notwithstanding the qualifications built into most of the Convention rights).
- Arguments about decisions being made in parliament and not the courts, or issuing further guidance to the courts about how to adjudicate rights conflicts, overlook the fundamental overarching 'higher law' nature of Bills of Rights. These may be legitimate arguments for having *no* Bill of Rights, but it is misleading to suggest they offer support to the case for a new UK Bill of Rights, which would inevitably involve the courts in interpreting broad principles.

Despite the significant overlap between a number of the questions, efforts have been made not to repeat material unless absolutely necessary. As per the consultation document instructions, this response does not repeat what was said in the context of the previous consultation, but since these questions address issues raised last time, that response is provided in Appendix One and referred to where appropriate.

### 1.

#### a. What do you think would be the advantages or disadvantages of a UK Bill of Rights?

This question fails to acknowledge that, in the view of many commentators, the Human Rights Act 1998 (HRA) is a UK Bill of Rights in all but name, as highlighted by several respondents to the Commission's first consultation<sup>1</sup>, various legal and

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<sup>1</sup> Commission on a Bill of Rights, Second Consultation, July 2012 p. 5 at [12].

academic analysts<sup>2</sup> and architects of the HRA, one of whom described it as ‘the first Bill of Rights this country has seen for three centuries.’<sup>3</sup> As per Alston’s criteria for Bills of Rights, the HRA provides for judicial protection of human rights considered of particular importance, is binding on the government and provides redress where violations occur.<sup>4</sup>

One advantage of a new UK Bill of Rights, suggested by David Cameron as Leader of the Opposition, is that, by analogy with the German Basic Law, it would lead the European Court of Human Rights to apply the “margin of appreciation” more often and therefore make fewer findings against the UK government.<sup>5</sup> According to research by Oxford University, however, the relatively fewer findings against the German government are not because of an enhanced margin of appreciation but because the German Court, which has a ‘strike down power’, takes a more stringent approach in protecting the individual in the first place (with particular reference to national security issues)<sup>6</sup>. Any new UK Bill of Rights would need to provide *greater human rights protection* to attract a wider margin of appreciation from the Strasbourg court therefore.

**b. Do you think that there are alternatives to either our existing arrangements or to a UK Bill of Rights that would achieve the same benefits?**

The HRA was drafted to achieve particular benefits, namely judicial protection of the fundamental rights in the Act (sections 3 and 6), public authority respect for these rights with a view to minimising recourse to litigation (section 6), the preservation of parliament’s final say on rights issues (section 4), executive involvement in rights protection as a primary responsibility on government (section 19) and consideration by the courts of the UK’s obligations under the ECHR (section 2). The drafting of the HRA was informed by comparative research into the operation of Bills of Rights in other jurisdictions, where attempts have been made to reconcile some or all of these demands.

It is important to be clear about *which* benefits any new UK Bill of Rights would be aiming to achieve and which of the current benefits might accordingly be sacrificed. Given that the primary purpose of any Bill of Rights is to provide *legally enforceable*

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<sup>2</sup> E.g. Wadham et al. 2007 *Blackstone’s Guide to the Human Rights Act 1998* Fourth ed. Oxford: Oxford University Press p. v; Gardbaum, S 2011 How successful and distinctive is the Human Rights Act? An expatriate comparatist’s assessment *Modern Law Review* 74(2) 195-215; Hiebert, J 2006 Parliamentary Bills of Rights: an alternative model? *Modern Law Review* 69(1) 7-28.

<sup>3</sup> Straw, J. *Speech*, Institute for Public Policy Research, 13 January 2000.

<sup>4</sup> Unless it is not possible for the courts to read a piece of legislation compatibly with the rights in the Act, in which case it is for parliament to decide which course of action to take, in line with the UK’s tradition of parliamentary sovereignty. Alston, P *Promoting Human Rights through Bills of Rights*, OUP, 1999.

<sup>5</sup> Cameron, D 26 June 2006 *Balancing freedom and security – A Modern British Bill of Rights*, Centre for Policy Studies.

<sup>6</sup> Goold et al, 2007 Public Protection, Proportionality and the Search for Balance *Ministry of Justice Research Series* 10/07.

*protection* of fundamental rights, to suggest as some critics have done, that a new UK Bill of Rights will return further powers to *parliament* is to make an argument for something very different from a Bill of Rights as commonly constitutionally and legally defined (cf. Question 12 response). This is especially the case as parliamentary sovereignty was intentionally retained under the HRA, with the result that the courts have significantly less powers than under many comparative models in other jurisdictions.<sup>7</sup> Equally, to suggest that by labelling a new Bill of Rights 'British' or 'UK', fewer decisions will be made favouring unpopular groups, whilst still remaining committed to the UK's obligations under the ECHR (as the terms of reference of the Commission require) calls into question the capacity of such a measure to achieve the 'benefits' that some critics of the HRA seek. Whilst a change of name to 'UK' or 'British' might enhance ownership of a Bill of Rights in many quarters, if the same groups and individuals who are apparently unpopular still receive similar protection, the name change could soon be viewed as a cynical rebranding exercise, in all likelihood causing greater alienation from the new measure.

**c. If you think that there are disadvantages to a UK Bill of Rights, do you think that the benefits outweigh them?**

Without an outline of an alternative UK Bill of Rights, it is impossible to say which benefits would accrue, and which of the current benefits might be sacrificed.

**d. Whether or not you favour a UK Bill of Rights, do you think that the Human Rights Act ought to be retained or repealed?**

In order to comply with the Commission's terms of reference, the HRA should not be repealed without the same or stronger provisions in its place, including all the protections currently provided in the HRA. Crucially, repeal of the HRA would not be necessary to build on the protections provided under the Act, either by adding to it or through a supplementary Bill of Rights.

**2. In considering the arguments for and against a UK Bill of Rights, to what extent do you believe that the European Convention on Human Rights should or should not remain incorporated into our domestic law?**

In order to comply with the Commission's terms of reference, the ECHR must remain incorporated in domestic law, either through retention of the HRA or through any successor Bill of Rights that encompasses all of the provisions in the HRA. Were the UK to be left without the ECHR incorporated into domestic law, it would be alone among the Council of Europe state parties to the Convention.<sup>8</sup> The method of incorporation in the HRA strikes a balance between having regard to the UK's obligations under the Convention and

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<sup>7</sup> Cf. FN 2.

<sup>8</sup> In many European countries with monist legal systems, the Convention automatically forms part of domestic law on ratification (e.g. France). In others, with dualist legal systems, specific legislation provides for the rights to be protected in domestic law (e.g. Ireland).

interpreting them within the traditions of the legal systems of the United Kingdom (see Question 4 and 5 responses below).

The importance of implementing the Convention at the national level (in order to ease the burden on the European Court) was in fact underlined in the Brighton Declaration adopted by the 47 Council of Europe Member States in April, under the UK chairmanship of the body. The State Parties agreed to do this by, among other things:

“Considering the introduction if necessary of new domestic legal remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention.”<sup>9</sup>

Given that this is the function currently performed by the HRA, to repeal the latter without equivalent provision in its place would not only fall outside the terms of reference of the Commission but would almost certainly result in more Convention cases being determined by the European Court rather than UK courts. One of the principal purposes of the HRA was to remove the requirement of travelling to Strasbourg to bring a complaint against the government, as reflected in the title of the White Paper ‘Rights Brought Home’.<sup>10</sup>

**3. If there were to be a UK Bill of Rights, should it replace or sit alongside the Human Rights Act 1998?**

As indicated above, in order to comply with the Commission’s terms of reference, any new UK Bill of Rights would need to encompass all of the provisions in the HRA. There is no need to repeal the HRA in order to achieve this and risk that repeal could advertently or inadvertently lead to a weakening of protections.

**4. Should the rights and freedoms in any UK Bill of Rights be expressed in the same or different language from that currently used in the Human Rights Act and the European Convention on Human Rights? If different, in what ways should the rights and freedoms be differently expressed?**

Whilst a supplementary Bill of Rights could of course use different language from the HRA, repeal of the HRA with replacement by a differently word Bill of Rights could effectively ‘de-incorporate’ the ECHR, in contravention of both the undertakings of the Brighton Declaration mentioned above and the Commission’s terms of reference.

**5. What advantages or disadvantages do you think there would be, if any, if the rights and freedoms in any UK Bill of Rights were expressed in different language from that used in the European Convention on Human Rights and the Human Rights Act 1998?**

The rights in the ECHR and the HRA are expressed in broad terms in the mode of all Bills of Rights and international human rights treaties. Unlike ordinary laws, which are often

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<sup>9</sup> High Level Conference on the Future of the European Court of Human Rights Brighton Declaration 20 April 2012 <http://hub.coe.int/20120419-brighton-declaration> <Accessed 25 September 2012> at 9.C.(iii)

<sup>10</sup> White Paper Rights Brought Home [CM 3782] 1997.

detailed and drafted to address a specific set of issues, Bills of Rights constitute broadly framed 'higher law' standards against which all other laws and practice (by those exercising a public function) are evaluated. Critics of Bills of Rights oppose their open-textured nature, since it is more difficult to predict how broad values might be applied in given circumstances by the courts. It is important to note, however, that under the scheme of the HRA, it remains open to parliament to 'correct' any judicial interpretation by passing clear legislation/amendments to this effect or by ignoring a section 4 Declaration of Incompatibility made by one of the higher courts. It is misleading to suggest, therefore, that arguments for more detailed language offer support for a *new* UK Bill of Rights rather than opposition to the very *notion* of a Bill of Rights. If the language of the rights becomes too detailed, as advocated by some HRA critics, a Bill of Rights can no longer serve its purpose of providing overarching fundamental, basic guarantees against which other laws, policies and decisions by public bodies are assessed.

A further reason advanced for changing the language from the ECHR wording is that this would result in the development of a more 'British' human rights jurisprudence. As well as disregarding the different legal systems in the UK, this suggestion proceeds on the false assumption that since the HRA includes Convention rights, domestic courts must *interpret* these rights in the same way as the European Court of Human Rights. The HRA is not an ECHR incorporation Act that requires domestic courts to 'follow' decisions of the European Court or import the European court's case law into domestic law wholesale. In fact, when interpreting the ECHR rights, the UK courts are only obliged to 'take into account' decisions of the ECtHR.<sup>11</sup> This provides for flexibility in interpreting the rights and represents a sensible accommodation of the various sources of our domestic law, including statute and common law. There are many examples of where statute<sup>12</sup> and/or common law<sup>13</sup> have informed and complemented interpretation of the ECHR rights in the HRA. See further the response to Question 11 below.

It is because the UK government is anyway bound by the ECHR that the rights in the HRA were phrased in such terms in the first instance. Any change in the language, for example to further qualify the circumstances in which rights can be claimed,<sup>14</sup> could lead to a direct breach of the ECHR and therefore of the UK's international obligations. Such a proposal would accordingly also fall outside the Commission's terms of reference.

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<sup>11</sup> Section 2 HRA.

<sup>12</sup> E.g. *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; *R v Horncastle and another* [2009] 2 AC 373.

<sup>13</sup> E.g. Laws L.J. in *Runa Begum v Tower Hamlets* [2002] EWCA Civ 239; *R(Burke) v General Medical Council (Official Solicitor and others intervening)* [2005] EWCA Civ 1003 ; *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71 at [10-22]; *R(Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55.

<sup>14</sup> E.g. prohibiting groups of claimants in all circumstances from accessing rights because they've breached the rights of others.

- 6. Do you think any UK Bill of Rights should include additional rights and, if so, which? Do you have views on the possible wording of such additional rights as you believe should be included in any UK Bill of Rights?**
- 7. What in your view would be the advantages, disadvantages or challenges of the inclusion of such additional rights?**

There are many additional rights that could be included in a supplementary UK Bill of Rights, as outlined in Appendix One [2.3-2.6]. Some of these are included in Bills of Rights in other jurisdictions, such as South Africa or India. Given the current hostility to judicial determination of rights issues in some quarters, however, in particular in respect of social and economic rights in the current political climate, it is important to highlight that more rights would mean *increased* judicial involvement.

- 8. Should any UK Bill of Rights seek to give guidance to our courts on the balance to be struck between qualified and competing Convention rights? If so, in what way?**

In contrast to, for example, the US Bill of Rights, the HRA already provides grounds for limiting or qualifying rights in this respect.<sup>15</sup> As noted in the response to questions four and five above, given the nature of Bills of Rights, there is a limit to how much can be prescribed in the document itself whilst still enabling it to perform its overarching ‘higher law’ function.

Giving more guidance to the courts in this regard in a bid to prevent decisions being made in favour of unpopular groups and individuals may well be incompatible with the Commission’s terms of reference. Unless very carefully drafted, such guidance could contravene the universality principle that underpins the ECHR and the human rights project more broadly, namely that the fundamental rights of *everyone* within a state’s jurisdiction are protected. See further the response to Question 11 below.

- 9. Presuming any UK Bill of Rights contained a duty on public authorities similar to that in section 6 of the Human Rights Act 1998, is there a need to amend the definition of ‘public authority’? If so, how?**

The arguments for broadening the public authority definition in light of increased outsourcing of public service provision are well rehearsed.<sup>16</sup>

The section 6 duty on public authorities is one of the hallmarks of the HRA and should be replicated in full in any UK Bill of Rights that were to succeed it, if it is to retain the same level of protection. The purpose of this duty is to reduce the need for litigation by placing human rights obligations on public authorities. The recent revelations about the failures of the investigations into the tragic Hillsborough Disaster further highlight the value of the legal obligations now placed on public authorities under the HRA; in that instance, to investigate the loss of life at the hands of state authorities. Complying with such obligations may be

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<sup>15</sup> See e.g. the qualified rights in Articles 8-11 and sections 12 and 13 HRA.

<sup>16</sup> See for e.g. Joint Committee on Human Rights, the Meaning of Public Authority under the Human Rights Act 1998, Ninth Report of Session 2006-07 HL Paper 77 HC 410.

seen as a practical and/or financial burden by those on whom they fall, as indicated in the Commission’s consultation paper,<sup>17</sup> but for those at the receiving end of state activity, they provide important guarantees that certain fundamentals will be upheld.

It is important in this context to recall that the HRA is still relatively new; it has only been in force for 12 years. The longer the HRA stays on the statute books, the more public authorities might assimilate its values and the more people will experience its relevance to their lives without having to resort to the courts for redress. See further the Human Rights Futures Project briefing *Human Rights Act impact on everyday life*.<sup>18</sup>

**10. Should there be a role for responsibilities in any UK Bill of Rights? If so, in which of the ways set out above might it be included?**

Responsibilities are implicit in the scheme of the HRA; see Appendix One [4.17-4.18].

**11. Should the duty on courts to take relevant Strasbourg case law ‘into account’ be maintained or modified? If modified, how and with what aim?**

As indicated in response to questions four and five, the ‘take into account’ wording clearly instructs domestic judges to consider the jurisprudence of the European court, as one of a number of considerations, when interpreting the rights in the HRA. It was not the intention of the drafters of the HRA that British judges should be bound or ‘hamstrung’ by the European case law, as its architects have made clear.<sup>19</sup> As indicated in Appendix One, there are many instances in which the domestic courts have adopted a different approach to the interpretation of the Convention rights under the HRA from the European court. Some commentators argue further guidance is necessary to clarify the position, which may be appropriate. However, to repeal the HRA and replace it with a new measure for this purpose would be a questionable use of parliamentary time, particularly in light of comments made recently by the Lord Chief Justice and President of the Supreme Court to the effect that instruction to “take account of common law and case law in other common law countries like South Africa, Canada, Australia and so on” when deciding cases under the HRA, would be a statement of what the judges already do.<sup>20</sup>

**12. Should any UK Bill of Rights seek to change the balance currently set out under the Human Rights Act between the courts and Parliament?**

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<sup>17</sup> P.8 at [26].

<sup>18</sup> Human Rights Futures Project, Human Rights Act impact on everyday life – some examples February 2012 <http://www2.lse.ac.uk/humanRights/research/projects/humanRightsFutures.aspx> <Accessed 25 September 2012>.

<sup>19</sup> Lord Irvine of Lairg, 2012 A British Interpretation of Convention Rights *Public Law* Apr 237-252.

<sup>20</sup> Transcript of Oral Evidence to the House of Lords and House of Commons Joint Committee on Human Rights, ‘Human Rights Judgments’, HC 873-ii, 15 November 2011, available at: <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/> [Q72].

David Cameron has suggested that a new UK Bill of Rights would ensure that decisions are made in parliament rather than the courts.<sup>21</sup> It is well rehearsed that under the scheme of the HRA the courts cannot overturn Acts of Parliament. If a higher court cannot read and give effect to an Act of Parliament in a way that is compatible with the Convention rights in the HRA, it must issue a Declaration of Incompatibility, which has no legal effect.<sup>22</sup> The government is under no obligation to even respond to such a declaration and the law remains as it was. It was highly misleading therefore to suggest, as the Prime Minister and the Home Secretary have done in respect of a judgment about appeals over registration on the sex offenders register, for example, that the government is *obliged* to act to change the law in light of an adverse ruling from a UK court.<sup>23</sup> This is not an accurate reflection of the law.

It is sometimes suggested that through the section 3 interpretive obligation in the HRA judges can effectively 're-write' statutes. Section 3 states that 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' Before having recourse to the section 4 Declaration of Incompatibility, therefore, where the courts find a rights violation arising from an Act of Parliament, they are first invited to read the Act in question in a way that is compatible with the HRA rights. But as stressed above, parliament remains at liberty to 'correct' any judicial interpretation arising from this process by passing clear legislation/amendments to this effect, such that it becomes impossible to read the Act compatibly with the Convention rights in the HRA and the courts are compelled to issue a non-binding Declaration of Incompatibility (should they choose to do so).

It is certainly the case that, although parliament retains its final say on rights issues, UK courts have a far greater role to play under the HRA than previously, since they can now hear allegations of Convention rights infringements, which could previously only be heard by the European court. It must be acknowledged, however, that to advocate the *removal* of this judicial competence is to argue against the very concept of having a *legally enforceable* set of standards against which the government, and others providing public services, are to be held to account. It is questionable whether a new UK Bill of Rights that would return yet more power to parliament relative to the courts could constitutionally or legally be described as a Bill of Rights at all.

**13. To what extent should current constitutional and political circumstances in Northern Ireland, Scotland, Wales and/or the UK as a whole be a factor in deciding whether (i) to maintain existing arrangements on the protection of human rights in the UK, or (ii) to introduce a UK Bill of Rights in some form?**

**14. What are your views on the possible models outlined in paragraphs 80-81 above for a UK Bill of Rights?**

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<sup>21</sup> Prime Minister's Questions, House of Commons, 16 February 2011.

<sup>22</sup> Section 4 HRA.

<sup>23</sup> House of Commons Hansard Debates, Wednesday 16 February 2011 Column 939 at columns 955 and 959.



**15. Do you have any other views on whether, and if so, how any UK Bill of Rights should be formulated to take account of the position in Northern Ireland, Scotland or Wales?**

It is important to recognise the Bill of Rights process in Northern Ireland, established by the Belfast (Good Friday) Agreement, and the outstanding commitment to the implementation of a Bill of Rights there. As highlighted by the three UK Human Rights Commissions, that process is separate from the investigation into the possibility of a UK Bill of Rights and should not be delayed by the latter.<sup>24</sup>

See further Appendix One [Question 3]. These questions are more appropriately elaborated on by experts on, and/or people directly affected by such proposals.

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<sup>24</sup> UK Human Rights Commissions call for Northern Ireland Bill of Rights  
<http://www.equalityhumanrights.com/news/2010/september/uk-human-rights-commissions-call-for-northern-ireland-bill-of-rights/> <Accessed 27 September 2012>.

## APPENDIX ONE

Response to first consultation paper

### **Commission on a Bill of Rights Discussion Paper: 'Do We Need a UK Bill of Rights?'**

Response by Professor Francesca Klug and Helen Wildbore, LSE

We are responding to this Discussion Paper in our capacity as Director<sup>25</sup> and Research Officer (respectively) of the Human Rights Futures Project (HRFP) at the LSE and on the basis of many years of academic research and scholarship on the Human Rights Act (HRA) and how it operates (see *Appendix 1 for a description of HRFP and our biographies*). We will respond to each of the four consultation questions below. **Under Question 4 we attempt to address the main issues of contention that are driving the current debate on whether the HRA should be replaced by what is usually described as a 'British Bill of Rights.'** (*A list of appendices is attached.*)

#### **Question 1: Do you think we need a UK Bill of Rights?**

1.1 This question raises the interesting legal and constitutional issue of what comprises a Bill of Rights? Responding to calls over many decades for a UK Bill of Rights from constitutional reform groups like Charter 88, and a number of politicians and lawyers, **the HRA was intended to be more than the incorporation of a human rights treaty into domestic law.** When the HRA came into force in October 2000, the then Home Secretary, Jack Straw, described it as “the first Bill of Rights this country has seen for three centuries”.<sup>26</sup> Most informed legal and political commentators at the time the Act was passed, and since, have recognised that the HRA is a Bill of Rights by any other name.<sup>27</sup> **Bills of Rights can have different titles (e.g. the Charter of Rights and Freedoms in Canada and the Human Rights Act in the Australian Capital Territory) but this is not material as to their legal and constitutional function.** The 1689 Bill of Rights, the first document to boast that name, also remains on the statute book although it protects few of the individual rights that are in the HRA.<sup>28</sup> An

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<sup>25</sup> Professor Klug was previously a Senior Research Fellow at the Human Rights Incorporation Project at King's College Law School where she assisted the government in devising the model for incorporating the European Convention on Human Rights into UK law reflected in the HRA. She was a Member of the Government Human Rights Task Force, to oversee implementation of the HRA, from 1998-2000 and acted as a Consultant on the HRA at the Home Office from 2000-01. Professor Klug was also appointed by former Minister Michael Wills to sit as a member of the small Bill of Rights and Responsibilities Reference Group at the Ministry of Justice from 2007-2009.

<sup>26</sup> *Speech*, Institute for Public Policy Research, 13 January 2000.

<sup>27</sup> For example, see Professor Philip Alston, *Promoting Human Rights through Bills of Rights*, OUP, 1999, pp 1 and 11. Professor Robert Wintemute has described the HRA as “*de facto* a domestic bill of rights”, whilst lamenting the absence of a judicial strike down power in "The Human Rights Act's First Five Years: Too Strong, Too Weak or Just Right?" (2006) 17 (2) King's College Law Journal, 209.

<sup>28</sup> It included the right not to be inflicted with cruel or unusual punishment, to no excessive bail or fines, freedom from fines or forfeitures without trial, freedom for Protestants to bear arms, freedom to petition the monarch without fear of retribution, no royal interference with the law, no right of taxation without Parliament's agreement and free election of members of Parliament.

alternative title for the Discussion Paper might therefore have been ‘Do we need an additional, stronger or different Bill of Rights for the UK than the 1689 Bill of Rights and the HRA?’.

1.2 **The HRA 1998 was preceded by a number of written proposals for a bill of rights**, most of which were based on incorporating the European Convention on Human Rights (ECHR) into UK law. These included:

- the Liberal Peer, Lord Wade’s, proposals for a Bill of Rights in 1969, 1976, 1977, 1979 and 1981, based on incorporating the ECHR.<sup>29</sup>
- Conservative Peer, Lord Aaran’s Bill of Rights Bill in 1970.<sup>30</sup>
- Lord Scarman’s call for “the law of the land [to] meet the exacting standards of human rights declared by international instruments, to which the UK is a party, [through] entrenched or fundamental laws protected by a Bill of Rights” in his 1974 Hamlyn lectures.<sup>31</sup>
- the Society of Conservative Lawyers’ recommendation in 1976 that “the ECHR should be given statutory force as overriding domestic law” in their report *Another Bill of Rights?*
- the all-party House of Lords Select Committee on a Bill of Rights in 1978, which unanimously agreed that “if there were to be a Bill of Rights it should be a Bill based on the European Convention”.<sup>32</sup>
- Margaret Thatcher’s 1979 manifesto pledge to establish all-party talks on a “possible Bill of Rights”.<sup>33</sup>
- Conservative MP Edward Gardner’s Human Rights Bill “to incorporate into British law the ECHR” in 1987.<sup>34</sup>
- Social and Liberal Democrat MP Robert Maclennan’s attempts to gain support for incorporation of the ECHR into UK law, for example his motion in 1989 for a debate on a Bill of Rights.<sup>35</sup>
- Neil Kinnock’s 1992 manifesto commitment to a “democratically enforceable Bill of Rights”.<sup>36</sup>
- Lord Lester’s Bills attempting to incorporate the ECHR in 1995 and 1997.<sup>37</sup>

1.3 **In most cases, proposals for a UK Bill of Rights were modelled on the ECHR** on the basis that the government, but not the courts or other public authorities, was already bound to comply with its terms. In some cases this proposal was presented as the first stage towards a “constitutional Bill of Rights”,<sup>38</sup> **but in no case was it ever suggested that an Act to incorporate the ECHR would need to be repealed to introduce a subsequent Bill of Rights.**

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<sup>29</sup> See Aisling Reidy, ‘The House of Lords: in defence of human rights?’, UCL Constitution Unit, October 1999.

<sup>30</sup> Bill of Rights Bill debate, House of Lords, 26 November 1970.

<sup>31</sup> ‘English Law – the new dimension’, Hamlyn Lectures, 1974.

<sup>32</sup> Bill of Rights: Select Committee Report, HL Deb 29 November 1978 vol 396 cc1301-97.

<sup>33</sup> *The Conservative Manifesto*, April 1979.

<sup>34</sup> Human Rights Bill, HC Deb 06 February 1987 vol 109 cc1223-89.

<sup>35</sup> House of Commons, 19 June 1989.

<sup>36</sup> ‘It’s time to get Britain working again’, Labour Party Manifesto, 1992.

<sup>37</sup> Human Rights Bill debates, House of Lords, 25 January 1995 and 5 February 1997.

<sup>38</sup> Lord Lester, ‘First Steps Towards a Constitutional Bill of Rights’, (1997) 2 EHRLR 124.

1.4 Whilst the HRA is an ‘ordinary Act of Parliament’, and in that sense could *not* be described as a ‘constitutional Bill of Rights’, **most of the features that characterise bills of rights in other jurisdictions are present in the HRA.** In a book on comparative bills of rights that includes the HRA, the internationally renowned expert, Professor Philip Alston, lists the “common characteristics” of bills of rights.<sup>39</sup> These are all, to at least some degree, present in the HRA in the following form:

- **The rights in the HRA (Schedule 1) were drawn from the ECHR; a treaty which was inspired by the Universal Declaration of Human Rights with significant input from UK government drafters. It reflected a long pedigree of rights recognition in the UK.**<sup>40</sup> Although UK governments had been committed to securing the rights in the ECHR “to everyone within their jurisdiction”<sup>41</sup> since it came into force in 1953, individuals could not lay claim to them before UK courts before 2000. These rights were augmented by HRA ss12 and 13 concerning freedom of expression and freedom of thought, conscience and religion (respectively) and **could be supplemented by other additional rights, drawn from international treaties or the common law, in the future.**
- **Like all bills of rights, the HRA was deliberately crafted as a ‘higher law’,** to which all other law and policy must conform “so far as it is possible” (s3 HRA). The courts can both hold the executive to account (a power they were already developing for themselves, to some degree, through judicial review) **and can review Acts of Parliament for compliance with human rights standards;** a competence they did not possess before the HRA (outside the context of EU law).
- **This review power does not allow judges to strike down Acts of Parliament** but only empowers them to issue a “Declaration of Incompatibility” where the courts deem a statute or statutory provision to be incompatible with HRA rights (s4 HRA).<sup>42</sup> **Once such a Declaration has been made, it is then for Parliament to decide whether and how to proceed.**<sup>43</sup> Whilst some experts would argue the absence of a strike down power calls into question the status of the HRA as a Bill of Rights, Professor Alston suggests this is not a definitive characteristic of bills of rights.<sup>44</sup> **The HRA model was deliberately crafted to work within the grain of the UK’s tradition of parliamentary sovereignty,** which the then Home Secretary, Jack Straw, labelled ‘the British model’<sup>45</sup> (see Appendix 2 for Klug and Singh’s proposals for a ‘British model’ of incorporation). **Partly for this reason, there was no requirement in the HRA for the domestic courts to ‘follow’ the European Court of Human Rights (ECtHR) case-law (see paras 4.8-4.12).**
- Individuals can seek and obtain remedies for breaches of human rights in the domestic courts under the HRA in circumstances which were not available to them before. There is also an **opportunity for individuals to seek redress outside the court room, by reminding**

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<sup>39</sup> Three common characteristics of bills of rights identified by Professor Alston can be summarised as: 1) “A formal commitment to the protection of those human rights which are considered, at that moment in history, to be of particular importance”; 2) “binding upon the government and can be overridden...only with significant difficulty”; 3) “some form of redress is provided” if “violations occur”. *Promoting Human Rights through Bills of Rights*, note 3, p10.

<sup>40</sup> For example, Magna Carta 1215, Declaration of Arbroath 1320, Habeas Corpus Act 1679, Bill of Rights 1689, Claim of Right Act 1689.

<sup>41</sup> ECHR Article 1

<sup>42</sup> 27 declarations of incompatibility have been made: 19 are still standing and 8 have been overturned on appeal.

<sup>43</sup> *R v Shayler* [2002] 2 WLR 754 at para 53. See para 4.5 below.

<sup>44</sup> Note 3, p10.

<sup>45</sup> Used in speeches and conversations.

**public authorities of their duty to comply with the HRA (s6)**, which has led to changes in practice and policy that would not have occurred before the HRA (*see Appendix 3*).

## **Question 2: What do you think a UK Bill of Rights should contain?**

2.1 To comply with the terms of reference of the Commission on a Bill of Rights, any additional Bill of Rights for the UK must be one that “incorporates and builds on all our obligations under” the ECHR, most of which are contained in HRA Schedule 1. **It is sometimes suggested that these rights could (or should) be further qualified, or given clearer interpretation**, to address criticisms of the HRA that rights are claimed by unpopular groups or individuals.<sup>46</sup> **To comply with the Commission’s terms of reference, great care would be needed if the language in HRA Schedule 1 (the Convention rights) were to be changed, or new interpretations of the rights were to be added.** The majority of these rights are already qualified or limited (see para 4.17 below) but it is difficult to see how any narrowing of the scope of these rights to apply only to certain categories of people, for example, would comply with the Commission’s terms of reference.

2.2 We note that the Commission’s terms of reference do not include any specific reference to the HRA. Nevertheless **the ‘spirit’ of the terms of reference is widely understood as augmenting, and certainly not decreasing, the level of protection currently afforded to individuals in the UK by the HRA.**<sup>47</sup> Support for an *additional or supplementary* Bill of Rights is commonly conditional on this being ‘HRA plus’.<sup>48</sup> For example, s6 HRA makes it unlawful for a public authority to act in a way which is incompatible with the rights in the HRA. This is not present in the ECHR but, as explained in para 1.4 above, this duty has provided significant protections to some of the most vulnerable members of our society (*see Appendix 4*). Many informed commentators who support a Bill of Rights would consider it to be highly regressive if such an obligation were to be watered down or removed.

2.3 It would, of course, be perfectly possible to introduce a Bill of Rights that is wider in scope and stronger in enforcement powers than the HRA. To ensure a new Bill of Rights fulfilled the Commission’s terms of reference, **any additional rights** would need to cover new ground, or transparently supplement ECHR rights. They **should demonstrably enhance rights protection.**

2.4 The Bill of Rights and Responsibilities Reference Group at the Ministry of Justice (on which Francesca Klug sat; see footnote 1) considered which additional rights could be added to the rights in

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<sup>46</sup> For example, Dominic Grieve, then Shadow Attorney General, has said that a new Bill of Rights would provide “an opportunity to define the rights under the European Convention in clearer and more precise terms and provide guidance to the judiciary and government in applying human rights law when the lack of responsibility of a few threaten the rights of others” (‘Liberty and Community in Britain’, speech to Conservative Liberty Forum, 2 October 2006).

<sup>47</sup> In particular ss3-10 which have made the substantive rights in Schedule 1 enforceable in UK law.

<sup>48</sup> For example, response to the Commission on a Bill of Rights Discussion Paper by the Equality and Diversity Forum, British Institute for Human Rights and Rene Cassin.

the HRA. These included: dignity; individual autonomy and independence; equality; good administration; justice; rights for victims and children; education; health; food, clothing and shelter; environment; access to public facilities and services; participation in the community.

**2.5 Several other models for bills of rights that could fairly be described as ‘ECHR plus’ (and post HRA, ‘HRA plus’) have already been drafted.** For example:

- IPPR published *A British Bill of Rights* in 1990 drafted by Anthony Lester QC and others, based on the ECHR and the UN’s International Covenant on Civil and Political Rights.<sup>49</sup>
- The Civil Liberties Trust drafted *A People’s Charter* in 1991 which drew on a wide range of international and domestic provisions, including the Magna Carta and 1689 Bill of Rights.
- Richard Gordon QC published a draft constitution in 2010, which includes the HRA augmented with additional social and economic rights.<sup>50</sup>
- The Joint Committee on Human Rights produced ‘A Bill of Rights for the UK?’ in 2008, based on the model of the HRA with additional rights.<sup>51</sup>
- In 2008 the Northern Ireland Human Rights Commission (NIHRC) proposed a Bill of Rights for Northern Ireland,<sup>52</sup> in keeping with its mandate from the Belfast (Good Friday) agreement, suggesting rights “supplementary” to those in the HRA, including economic, social and cultural rights, children’s rights and environmental rights (see para 3.2).

**2.6** Many who are supportive of a new Bill of Rights are likely to call for economic and social rights to be included. Polling evidence suggests this would be strongly welcomed by many people.<sup>53</sup> However, based on the response to HRA cases involving access to healthcare or housing<sup>54</sup> (Articles 2, 3 or 8) it is unclear whether, at this time, there is sufficient consensus or political support for expanding the role of judges in decisions involving resource allocation.

### **Question 3: How do you think it should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?**

**3.1** Experts on devolution have emphasised that **the HRA is an “important pillar of the constitutional framework of devolution”**.<sup>55</sup> It underpins the devolution settlements, whilst

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<sup>49</sup> *A British Bill of Rights*, Anthony Lester et al, foreword by Francesca Klug, IPPR, 1990.

<sup>50</sup> Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change*, Hart, 2010.

<sup>51</sup> Twenty-ninth report of session 2007-08, July 2008.

<sup>52</sup> ‘A Bill of Rights for Northern Ireland: advice to the Secretary of State for Northern Ireland’, Northern Ireland Human Rights Commission, 10 December 2008.

<sup>53</sup> Polling results show that there are high levels of support for the right to hospital treatment on the NHS being included in Bill of Rights, as well as for the right to housing for the homeless, the right to strike without losing one’s job and the right to an abortion. See Joseph Rowntree Reform Trust and ICM ‘State of the Nation’ polls.

<sup>54</sup> For example, *R (Rogers) v Swindon NHS Primary Care Trust* (2006); *R (Condliff) v North Staffordshire PCT* (2011).

<sup>55</sup> Alan Miller, Chair, Scottish HRC, ‘The Human Rights Act from a Scottish perspective’, in *Common Sense: reflections on the Human Rights Act*, Liberty, 2010.

“simultaneously elucidating the common values of the constituent nations”.<sup>56</sup> The ECHR is tied and embedded into the devolution statutes. These provide that the devolved institutions have no competence to act in any manner that is contrary to the ‘Convention rights’, defined as having the same meaning as in the HRA (section 1).<sup>57</sup> From a legal perspective, if the HRA were repealed or impliedly amended by a subsequent UK Bill of Rights, there would almost certainly be a need for amendments to the devolution statutes.<sup>58</sup>

3.2 In **Northern Ireland** further complications arise due to the ECHR and “subsequently the HRA” being “crucial parts of a peace accord”.<sup>59</sup> The Belfast Agreement mandated the NIHRC “to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience”.<sup>60</sup> There has been over 10 years of widespread consultation and consideration in Northern Ireland on a Bill of Rights which builds on the ECHR and HRA. Whilst there has not been all-party consensus on the *contents* of a supplementary Bill of Rights (despite evidence of cross-community, popular support for such a Bill) there *has* been **cross-party consensus for retaining the HRA**. According to Monica McWilliams, former Chief Commissioner of the NIHRC, recent “proposals to amend the HRA have created a sense of particular unease among those concerned to preserve and maintain the fragile constitutional balances that have been painstakingly put in place” given that the HRA is “central to the constitutional DNA of the UK”.<sup>61</sup>

3.3 There is already arguably greater human rights protection in Scotland than at the UK level. Scottish courts can invalidate Acts of the Scottish Parliament that breach Convention rights. **Repeal of the HRA could arguably cement a two-tier system of human rights protection within the UK**, given that it is unlikely that the Scottish Parliament would seek to lower the level of protection of human rights in Scotland in relation to devolved areas (such as health and criminal justice).<sup>62</sup>

3.4 According to the Director of *Justice*, Roger Smith, repealing or significantly amending the HRA would be “a legal and political nightmare” in the context of the devolution frameworks in

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<sup>56</sup> Monica McWilliams, NIHRC Chief Commissioner, ‘Human Rights Act underpins devolution’, in *Common Sense*, *ibid*.

<sup>57</sup> Scotland Act 1998 s29, 54, 126; Northern Ireland Act 1998 s6, 24, 98; Government of Wales Act 2006 s81, 94, 158.

<sup>58</sup> See ‘Devolution and Human Rights’, Qudsi Rasheed, *Justice*, February 2010.

<sup>59</sup> Note 32.

<sup>60</sup> Good Friday Agreement 1998, section 6, para 4.

<sup>61</sup> Note 32.

<sup>62</sup> Note 31.

Scotland, Wales and Northern Ireland.<sup>63</sup> It is reasonable to predict that the **introduction of a new UK Bill would understandably lead to demand for specific Bills of Rights for Scotland and Wales whilst the mandate for a Northern Ireland Bill of Rights will not be met by a UK bill.**

**Question 4: Having regard to our terms of reference, are there any other views which you would like to put forward at this stage?**

4.1 **To consider the case for a new UK bill of rights, it is useful to survey the different currents which are driving this debate**, many of which are largely incompatible with each other. It is also important to consider the main arguments for repealing and replacing the HRA.

4.2 In addition to supporting supplementary rights to the ECHR as discussed above, some human rights advocates and constitutional lawyers would welcome the introduction of a new bill of rights which is 'judicially entrenched', in the sense of granting the courts the power to strike down legislation deemed to breach its terms (as in the American or German models). There is also support from similar sources for a '**constitutionally entrenched**' bill of rights, requiring special parliamentary majorities before it can be amended or repealed.<sup>64</sup> On the other hand, some legal academics like Nicholas Bamforth, whilst not claiming "special constitutional status" for the HRA, concedes that it has "a special constitutional role", in so far as s3 lays down overriding and general rules of statutory interpretation.<sup>65</sup> Judges have on occasion commented similarly, for example Lord Bingham who remarked on the "constitutional shift"<sup>66</sup> introduced by the recognition of a right to freedom of assembly in the HRA, a right once declared missing from "our constitution" by the famous 19<sup>th</sup> century legal theorist, A.V. Dicey.<sup>67</sup>

4.3 Other vocal supporters of a new UK bill of rights have a **diametrically opposed view**. When the Prime Minister announced the establishment of the Commission on a Bill of Rights, he suggested that a **major purpose of any new Bill of Rights would be to remove powers from the courts to Parliament:**

"a commission will be established imminently to look at a British Bill of Rights, because it is about time we ensured that decisions are made in this Parliament rather than in the courts."<sup>68</sup>

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<sup>63</sup> Quoted in the law reform group, Justice, *press release*, 8 February 2010, see <http://www.justice.org.uk/data/files/resources/58/8feb10-Report-on-devolution-and-human-rights-warns-of-major-difficulties-ahead.pdf>

<sup>64</sup> For example, Geoffrey Marshall, 'Two kinds of compatibility', [1999] *Public Law* 377 and Tom R. Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998', [2005] *Public Law* 306.

<sup>65</sup> 'Same-sex Partnerships: some comparative constitutional lessons', (2007) 1 EHRLR 47.

<sup>66</sup> A phrase first employed by Justice Sedley in *Redmond-Bate v DPP* (2000) HRLR 249.

<sup>67</sup> *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55.

<sup>68</sup> Prime Minister's Questions, House of Commons, 16 February 2011.



Were a new Bill of Rights to be introduced for this purpose, this would probably be without precedence. On the basis of our research on comparative Bills of Rights<sup>69</sup> there is no instance we can find where a Bill of Rights has been passed in order to *reduce* the accountability of the executive or legislature to the courts, rather than the other way round.

4.4 **A similar debate, with similarly polarised views, was evident in the period preceding the introduction of the HRA.** Many of us who were involved in advising the government on the proposal, held the view that the interpretation of broad values inherent in all bills of rights – such as the right to free speech or the legitimate limits to a private life – often involves philosophical or quasi-political judgements that are better determined by elected representatives, with the **courts acting as a check on the executive, rather than as a primary decision taker or law maker.** The model adopted in the HRA (s3 and s4) was **deliberately designed to reflect this view.**

4.5 **Lord Hope**, in *Shayler*, emphasised that **where clearly expressed legislation cannot be interpreted to remove an incompatibility under HRA s3, “the position whether it should be amended so as to remove the incompatibility must be left to Parliament”**, and the only option left to the courts is to issue a Declaration of Incompatibility (DOI).<sup>70</sup> **Lord Hoffman** further clarified in the famous Belmarsh case<sup>71</sup> on indefinite detention of foreign nationals that, following a DOI, the decision as to *whether* to respond lies with parliament:

“Under the 1998 Act, the courts still cannot say that an Act of Parliament is invalid. But they can declare that it is incompatible with the human rights of persons in this country.

**Parliament may then choose whether to maintain the law or not.** The declaration of the court enables Parliament to choose with full knowledge that the law does not accord with our constitutional traditions.”<sup>72</sup>

4.6 The then Home Secretary, Jack Straw, emphasized when introducing the Human Rights Bill that higher courts “could make a Declaration [of Incompatibility] that, subsequently, Ministers propose and Parliament accepts, should *not* be accepted”.<sup>73</sup> The example he gave was abortion law, but he might have added advertising restrictions, gun controls and election expenditure limits,<sup>74</sup> all issues that courts with strike down powers in other jurisdictions have controversially determined breach their bills of rights<sup>75</sup> but where Parliament, under the HRA, would retain the final say.

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<sup>69</sup> Professor Klug teaches comparative bills of rights on the LLM at the LSE.

<sup>70</sup> *R v Shayler* [2002] 2 WLR 754 at para 53. Our emphasis.

<sup>71</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56, where s23 of the Anti-terrorism, Crime and Security Act 2001 was held to be incompatible with the Articles 5 (right to liberty) and 14 (freedom from discrimination). Parliament responded by repealing the provisions and putting in place a new regime of control orders.

<sup>72</sup> Para 90. Our emphasis.

<sup>73</sup> 317 HC 1301 (21 October 1998). Our emphasis.

<sup>74</sup> Although, constitutionally speaking, there was no obligation on the government to comply with the Belmarsh indefinite detention ruling (see note 47), realistically the ECtHR was likely to take a similar approach to the domestic courts on this issue. However in many other instances the ECtHR has or could apply the ‘margin of appreciation’, leaving the final decision with the domestic courts, whether a DOI is issued or not (for example, see *Evans v UK*, 2006; *Mosley v UK*, 2011; *Hatton v UK*, 2003; *Pretty v UK*, 2002).

<sup>75</sup> Notably in the USA.

4.7 **Applying this model, from the government’s point of view, the current controversy over foreign nationals relying on the right to respect for family life (Article 8) to challenge deportation on completion of their prison sentence, could be addressed through primary legislation** which is clear in its intention and express purpose and therefore could not, (on the *Shayler* principle) be re-interpreted to comply with the HRA. **Although the domestic courts may well issue a DOI as a consequence, the final decision as to whether and how to respond to this would rest with Parliament which could decide to take no further action.** There is varying opinion on whether the ECtHR would find against the UK in such circumstances. Most likely this would depend on the facts in a particular case, which vary considerably and often turn on the rights of children and partners rather than the deportee<sup>76</sup> (see *Appendix 5 for a discussion of the impact of ECHR Article 8 on deportations*).

4.8 A related source of support for a UK or British Bill of Rights to replace the HRA (more often described as *British* in this context) is the **erroneous view that it requires the importation of ECHR case law along with the rights.** The Conservative MP, Dominic Raab, said recently that there was a “serious flaw in the Human Rights Act. We should not be importing the Strasbourg case law wholesale...”.<sup>77</sup> This reflects confusion about the status and function of the HRA which has been compounded by domestic courts at times acting as if they are bound by the ECtHR jurisprudence.<sup>78</sup> **The plain words of the HRA, and the parliamentary debate which introduced it, make it clear that this is not what the Act requires.** There is a duty in s2 HRA for domestic courts to “take into account” Strasbourg jurisprudence, but there is no duty to follow it. Rejecting an amendment to the Human Rights Bill by the Conservative peer Lord Kingsland, which would have made our courts “bound by” ECtHR jurisprudence, the then Lord Chancellor, Lord Irvine, explained:

“this amendment...suggests putting the courts in some kind of straitjacket where flexibility is what is required...our courts must be free to try to give a lead to Europe as well as to be led.”<sup>79</sup>

4.9 Conservative MP, Edward Leigh, subsequently observed that as a result of not tying domestic courts to Strasbourg case law the UK was “not simply incorporating the convention in our law but going much further”. It was “creating...an entirely new bill of rights”.<sup>80</sup> **The point of incorporating the rights in the ECHR into UK law, in other words, was to allow domestic courts to rule on their application and interpretation in the manner of a bill of rights,** rather than applicants

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<sup>76</sup> See for example, *AA v UK* (ECtHR, 2011) which found a breach of Article 8 and *Grant v UK* (ECtHR, 2009) which found no interference with Article 8 on the facts. See **Appendix 5** for more details on this issue.

<sup>77</sup> Quoted in the Times, ‘Britain can ignore Europe on human rights: top judge’, 20 October 2011.

<sup>78</sup> For example, Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] UKHL 26 said that the courts’ duty under the HRA is “to keep pace with the Strasbourg jurisprudence as it evolves over time, no more, but certainly no less”.

<sup>79</sup> *Hansard*, HL vol.583, cols 514-5, 18 November 1997. The “distinctly British contribution” our courts would make to developing human rights jurisprudence was emphasised in the White Paper which heralded the HRA (*Rights Brought Home: The Human Rights Bill*, CM 3782, October 1997) and in the parliamentary debates on the Human Rights Bill.

<sup>80</sup> 313 HC 398 (3 June, 1998).

having to go to the ECtHR in Strasbourg to claim a breach of their rights. As **Lord Hoffman** put it, if the **HRA** was “interpreted by United Kingdom courts as the American Bill of Rights is interpreted by American courts, [it] **would be a perfectly serviceable British bill of rights**”.<sup>81</sup>

4.10 Lord Gabor QC recently confirmed that “if Parliament had intended our courts to be bound by [Strasbourg] decisions it could and would have said so in terms. Instead the [HRA] adopted the ‘must take into account’ formula, which suggests that in an appropriate case it would be open to our courts, having taken account of the Strasbourg decision, to reach a different conclusion.”<sup>82</sup> Both the Lord Chief Justice and the Attorney General have also recently confirmed that the duty in s2 HRA is to ‘take into account’, not to follow.<sup>83</sup>

4.11 Our research suggests that whilst the interpretation of s2 has varied, **domestic courts interpreting the HRA do not act as if they are bound by ECtHR case law in a range of circumstances, relying on common law principles or other sources of law as well or instead** (see *Appendix 6*). There is nothing in the HRA to prevent this and there are indications this is likely to increase. In these cases the domestic courts give their own interpretation of the rights in the HRA, even when they conflict with Strasbourg case law.<sup>84</sup> For example, Justice Laws said in 2002: “...the court’s task under the HRA...is not simply to add on the Strasbourg learning to the corpus of English law... but to develop a municipal law of human rights...case by case, taking account of the Strasbourg jurisprudence as s2 [of the] HRA enjoins us to do.”<sup>85</sup> The Supreme Court more recently held that on the “rare occasions” when the courts have concerns as to whether a decision of the ECtHR sufficiently appreciated particular aspects of our domestic process, our courts can decline to follow the ECtHR decision, giving Strasbourg the chance to reconsider, so that “a valuable dialogue” may take place.<sup>86</sup> Although clear on the face of the statute, **it may well be that further guidance to the courts is required to clarify the intent and purpose of s2 HRA.**

4.12 **The duty of domestic courts under s2 HRA is, of course, distinct from the obligation on member states or governments to “abide by” judgments of the ECtHR in cases against them,**

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<sup>81</sup> ‘The universality of human rights’, Judicial Studies Board Annual Lecture, 19 March 2009, p26.

<sup>82</sup> ‘Courts are free to ignore Strasbourg’, Letter to the Editor, The Times, 28 October 2011.

<sup>83</sup> Giving evidence to the House of Lords Select Committee on the Constitution on 19 October 2011, Lord Judge said: “it is at least arguable that, having taken account of the decisions of the court in Strasbourg, our courts are not bound by them. They have to give them due weight; in most cases obviously we would follow them but not, I think, necessarily.” Dominic Grieve in a speech on ‘European Convention on Human Rights – Current Challenges’ on 24 October stated: “British courts are not bound to follow the jurisprudence of the Strasbourg court. They must take it into account.”

<sup>84</sup> See for example, *In Re P* [2008] UKHL 38; *Campbell v MGN* [2004] UKHL 22; *EM (Lebanon) v SSHD* [2008] UKHL 64; *R (Limbuella) v SSHD* [2005] UKHL 66; *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; *R v Spear* [2002] UKHL 31.

<sup>85</sup> *Runa Begum v Tower Hamlets* [2002] 2 All ER 668 para 17.

<sup>86</sup> *R v Horncastle* [2009] UKSC 14.

contained in Article 46 of the ECHR. This obligation has applied since the ECHR came into force in 1953.<sup>87</sup> David Cameron has argued that the “existence of a clear and codified British Bill of Rights will lead the European Court of Human Rights to apply the ‘margin of appreciation’” which gives states greater discretion in their interpretation of ECHR rights.<sup>88</sup> It is difficult to understand how a Bill of Rights which is less closely tied to the ECHR than the HRA (for example, by removing the obligation in s2 to take account of ECtHR jurisprudence altogether) is likely to have this effect. **Comparative research by Oxford University** has demonstrated that, if anything, **a British Bill of Rights would likely result in less leeway to parliament and stricter rights protections in British courts.**<sup>89</sup> In addition, Lord Hope, Deputy President of the UK Supreme Court, has argued that were the HRA to be repealed, “...we will still have to recognise that if we take a decision which is contrary to the [ECHR] somebody is going to complain to Strasbourg...So it’s very difficult to see how simply wiping out the Human Rights Act is really going to change anything...”.<sup>90</sup>

4.13 **One of the most compelling reasons given for introducing a new Bill of Rights is “so that all British citizens of different backgrounds feel ownership of it”.**<sup>91</sup> Whilst the HRA may never have never been properly ‘owned’ as a bill of rights by the general public, there is consistent polling evidence that the rights in the Act *are* popular.<sup>92</sup> It is often argued that the greatest benefit of introducing a new Bill of Rights is the process that would lead to it, which can help educate the public and create ‘ownership’. It is true that besides the Labour Party discussion paper<sup>93</sup> and manifesto, alongside meetings with NGOs and lawyers, the HRA was not widely consulted upon, and there was almost no public education on it by the government which introduced it. Polling by Liberty found that less than 10% of people remember ever having received or seen information from the government explaining the HRA.<sup>94</sup> Most people therefore obtain their information on the HRA from

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<sup>87</sup> For inter-state petitions to Strasbourg (such as *Ireland v UK* in 1978) and for individual petitions from 1966.

<sup>88</sup> David Cameron ‘Balancing freedom and security – A modern British Bill of Rights’, Speech to the Centre for Policy Studies, 26 June 2006. The ECtHR developed the ‘margin of appreciation’ doctrine to apply in situations where national authorities with “direct democratic legitimation” are “in principle better placed than an international court to evaluate local needs and conditions” (*Hatton v UK*, 2003). Its applicability varies with the issue and right at stake.

<sup>89</sup> ‘Public Protection, Proportionality and the Search for Balance’, Benjamin Goold et al, Ministry of Justice, 2007.

<sup>90</sup> Quoted by Joshua Rozenberg, ‘Are Supreme Court justices more assertive than they were as law lords?’, *Law Society Gazette*, 5 August 2010.

<sup>91</sup> Dominic Grieve, ‘Liberty and Community in Britain’, Speech for Conservative Liberty Forum, 2 October 2006.

<sup>92</sup> Liberty polling results show for example that 95% of respondents believe the right to a fair trial is vital or important, 91% believe the right not to be tortured or degraded is vital or important and 94% believe that respect for privacy and family life is vital or important. 96% supported a law that protects rights and freedoms in Britain. <http://www.liberty-human-rights.org.uk/media/press/2010/britain-agrees-what-s-not-to-love-about-the-human-rights.php>

<sup>93</sup> ‘Bringing Rights Home’, Jack Straw and Paul Boateng, December 1996.

<sup>94</sup> Note 68.

the media<sup>95</sup> (see Appendix 7 for corrections and clarifications of selective media reporting of the HRA).

4.14 However, **it is difficult to understand how simply labelling a new bill of rights *British*, as some commentators propose, would make it more popular.** If the terms of reference of the Commission are upheld, and a new Bill were to be based on all the rights in the ECHR without redefining their scope, our case law would be unlikely to change substantially. Indeed, **one of the prime purposes of Bills of Rights is to correct the tendency of all democracies based on majoritarian principles to ride roughshod over the needs of minorities** of any kind. Any honest consultation on a new UK Bill of Rights has to be clear about this point. Responding to popular perceptions of the way the HRA has operated, some grossly inaccurate, **it would be possible to claim that a ‘British Bill of Rights’ would remove rights from some of the most marginalised, or least popular, groups in our society but this would not be the case if the terms of reference of the Commission are respected.** To introduce a Bill of Rights for this purpose would anyway be without precedence anywhere in the modern democratic world.

4.15 There is no precedent for the introduction of a Bill of Rights resulting from the type of ‘conversation’ that is currently taking place in the UK. Research by the London Metropolitan University into the processes for developing bills of rights in other countries concluded that **“all previous Bills of Rights have been designed either to supplement existing human rights protection or to incorporate international human rights into domestic law. No Bill of Rights process in a modern democracy has permitted even the possibility of regression.”**<sup>96</sup> Another key finding of the London Metropolitan University research was that “politicians should be transparent about the purpose of a Bill of Rights”. A coherent explanation from government is needed about why it is seeking a new Bill of Rights. The Prime Minister has spoken about the “twisting and misrepresenting of human rights” that is “now exerting such a corrosive influence on behaviour”.<sup>97</sup> **If there is evidence that some public authorities have misunderstood the scope of their duties under the HRA, this could be rectified by suitably tailored education and training** but does not necessarily require a new bill of rights.

4.16 **There have also been calls by senior politicians to replace the HRA with “a clear articulation of citizen’s rights that British people can use in British courts”.**<sup>98</sup> The underlying philosophy of human rights is that every human being is entitled to fundamental rights simply because they are human. Whilst voting rights and many benefits are usually dependent on citizenship or residence, **the fundamental rights in democratic bills of rights, like a fair trial, freedom from torture, privacy and free expression, generally apply to everyone within the**

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<sup>95</sup> ‘Human Rights Insight Project’, Ministry of Justice, 2008, page 27: “In terms of sources of knowledge about human rights and the Human Rights Act, the strongest was the media (64%).”

<sup>96</sup> Developing a Bill of Rights for the UK’, Alice Donald et al, Equality and Human Rights Commission, 2010.

<sup>97</sup> David Cameron, speech following the riots, Oxfordshire, 15 August 2011.

<sup>98</sup> David Cameron, Note 64.

**jurisdiction of a state.** A new Bill of Rights that attempts to exclude non-citizens or unpopular groups from certain of its provisions, could certainly result in successful challenges at the ECtHR.

4.17 **Both the current government and the previous one have sought to give the impression that they will introduce a Bill of Rights to remedy a ‘responsibilities deficit’** in society. In the wake of the riots, the Prime Minister promised to look at “creating our own British Bill of Rights” to address the way “misrepresenting” human rights had allegedly “undermined personal responsibility”<sup>99</sup> and the Labour government introduced a Green Paper in 2009 making the case for a non-justiciable Bill of Rights and Responsibilities.<sup>100</sup> Very few rights in the HRA are absolute.<sup>101</sup> Some can be ‘limited’ in certain circumstances.<sup>102</sup> Many are ‘qualified rights’<sup>103</sup> where interference with an individual’s right can be justified where it is “necessary in a democratic society” to protect the rights of others or the common good, as the Home Secretary pointed out in her recent speech to the Conservative Party conference<sup>104</sup> (see *Appendix 8 on how the HRA has protected the rights of victims of crime*). For example, ‘wanted posters’ of suspects or convicts who have absconded can be justified under Article 8(2) as necessary for public safety, although there are often misleading reports in the press and by some politicians to the contrary.<sup>105</sup>

4.18 Responsibilities can be said to be implicit within the basic concept of human rights. As Lord Bingham has remarked: **“inherent in the whole of the ECHR is a search for balance between the rights of the individual and the wider rights of the society to which he belongs”**.<sup>106</sup> **If it is desirable to highlight that responsibilities are implicit within the concept of human rights in any new Bill of Rights, this could be achieved by including references to responsibilities in a pre-amble.** Francesca Klug and others suggested this to the Ministry of Justice Bill of Rights and Responsibilities Reference Group in 2007-09. For example, the Australian state of Victoria has a Charter of Human Rights and Responsibilities Act 2006, largely modelled on the UK HRA, which includes in its preamble: “human rights come with responsibilities and must be exercised in a way that respects the human rights of others”.

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<sup>99</sup> *Speech*, 15 August 2011, note 73.

<sup>100</sup> ‘Rights and Responsibilities: developing our constitutional framework’, Ministry of Justice, March 2009.

<sup>101</sup> The prohibition on torture, inhuman or degrading treatment (Article 3), the prohibition of slavery (Article 4) and the protection from retrospective criminal penalties (Article 7) are absolute rights.

<sup>102</sup> For example, the right to liberty (Article 5) can be limited only in specified circumstances, such as detention following conviction of an offence.

<sup>103</sup> For example, the right to respect for private and family life (Article 8), freedom to manifest one’s religion or belief (Article 9), freedom of expression (Article 10) and freedom of assembly and association (Article 11).

<sup>104</sup> Theresa May pointed out that “the right to a family life is not an absolute right” and read out Article 8(2) HRA. ‘Conservative values to fight crime and cut immigration’, Manchester, 4 October 2011.

<sup>105</sup> See **Appendix 7** and <http://www.liberty-human-rights.org.uk/human-rights/human-rights/the-human-rights-act/human-rights-act-myths/index.php>

<sup>106</sup> *Leeds City Council v Price and others* [2006] UKHL 10, para 32.

4.19 The UK is widely seen as a leader on human rights and civil liberties protection, particularly within Europe.<sup>107</sup> Many people in this country are rightly proud of this reputation. When the Prime Minister says he wants to “...show that we can have a commitment to proper rights, but they should be written down here in this country”,<sup>108</sup> this could be interpreted as distancing ourselves from the European and international human rights framework that we demand other states adhere to.<sup>109</sup> Currently, every other member state of the Council of Europe has absorbed ECHR rights into its law through one mechanism or another. Whilst the UK has a much stronger record of compliance with ECtHR judgments than many other European states, being seen to effectively de-incorporate the ECHR from UK law (by further qualifying the rights or preventing the courts from ‘taking account’ of Strasbourg case law altogether) could start a precedent that other less compliant states may well wish to follow. **Repealing the HRA and replacing it with something less effective (either in terms of the rights themselves, or the mechanisms to protect them) would send a strong message to the rest of the world** about our commitment to international human rights norms, particularly to countries with far poorer human rights records than the UK.

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<sup>107</sup> See ‘Churchill’s Legacy: The Conservative Case for the Human Rights Act’, J. Norman and P. Osborne, Liberty, 2009.

<sup>108</sup> Prime Minister’s Questions, House of Commons, 1 December 2010.

<sup>109</sup> See also ‘Developing a Bill of Rights for the UK’, note 72.