House of Lords
House of Commons

Joint Committee on Human Rights

A Bill of Rights for the UK?

Twenty-ninth Report of Session 2007-08

Volume II

Oral and Written Evidence

Ordered by The House of Lords to be printed 21 July 2008
Ordered by The House of Commons to be printed 21 July 2008

HL Paper 165-II
HC 150-II
Published on 10 August 2008
by authority of the House of Commons
London: The Stationery Office Limited
£18.50

Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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List of Witnesses

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NOTE:

The Report of the Committee is published in Volume I, HL Paper 165-I, HC 150-I.
The Evidence is published in Volume II, HL Paper 165-II, HC 150-II.

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Oral evidence

Taken before the Joint Committee on Human Rights

on Monday 3 December 2007

Members present:

Mr Andrew Dismore, in the Chair

Dubs, L
Morris of Handsworth, L
Onslow, E
Stern, B
Dr Evan Harris
Mr Virendra Sharma
Mr Richard Shepherd

Witnesses: **Professor Sandra Fredman**, Professor in Law and Fellow of Exeter College, Oxford University, **Mr Martin Howe QC,** member of the Conservative Party's Policy Commission on a Bill of Rights, and **Professor Francesca Klug,** Centre for the Study of Human Rights, gave evidence.

Q1 Chairman: Good afternoon, everybody. This is our first formal evidence session in our new inquiry into the issue of a British Bill of Rights. We are joined by Professor Sandra Fredman, Professor in Law and Fellow of Exeter College, Oxford; Martin Howe QC, who is a member of the Conservative Party's Policy Commission on a Bill of Rights, but I understand he is here in a personal capacity; Professor Francesca Klug, Professorial Research Fellow, Centre for the Study of Human Rights at the LSE. So welcome to you all. Does any of you want to make a short opening statement or shall we go straight in? Then perhaps I could start with you, Francesca. Is a British Bill of Rights needed?

Professor Klug: Well, Thomas Jefferson, I think we all know who he was, said that a Bill of Rights is what the people are entitled to against every government on earth. I think he was probably right, but it is slightly more complicated here because we have, I would put it to you, at least one if not two Bills of Rights already on the statute book. Leaving the 1689 Bill of Rights to the side, when the Human Rights Act was introduced, both the then Home Secretary and Members of the Opposition recognised the Human Rights Act as our Bill of Rights, and the academic literature has described it in those terms ever since, including Professor Philip Alston, who is probably the world expert on Bills of Rights. So on the face of it, the question is whether we need a better or stronger Bill of Rights, rather than whether we need a Bill of Rights. In my view, the answer to that question is yes, and there are three reasons for that. The first could be summed up, I think, by the fact that the mirror principle has now entered the jurisprudence of our domestic courts. I shall explain what I mean. Lady Justice Arden described this as the self-denying ordinance that the domestic courts have taken upon themselves- with no requirement to do so under the statute- whereby they are now interpreting the Human Rights Act as no more and no less than what the courts are saying in Strasbourg. That is what I mean by the mirror principle. So instead of developing our own British case law, which they began to do in the early days under the Human Rights Act, (and that was one of the features that really determined it as a Bill of Rights: section 2 of the Human Rights Act requiring the courts to take the European Convention on Human Rights into account, but not to be bound by it) they are now effectively reading in the words "bound by", increasingly in their judgments since the cases of *Ullah* and *Clift*, so essentially, the courts themselves appear to be turning the Human Rights Act into an incorporated treaty rather than the Bill of Rights I believe it was intended to be. That could be reversed quite easily by the courts should they choose to do so, which is why Lady Arden described it as a self-denying ordinance, but the situation being as it is, I think that is the kind of legal reason why we need a British Bill of Rights. But there are, if you like, non-strictly legal or technical reasons for it, and one is that Bills of Rights are far more than a legal technical document. They are there, if you like, to establish the identity of a society; they are there to establish what the fundamental principles of a democracy are. I think the reality is that the British people, for many reasons, have not taken the Human Rights Act to their hearts as their Bill of Rights. That is largely because there has been no real leadership until now to explain what it is, to clarify its terms. I heard Geoff Hoon, Chief Whip, on the radio, in a debate about the Oxford Union debate on Any Questions; he was asked his view on that, and he said, "We have to understand that in the Human Rights Act under Article 17, people cannot use their fundamental rights to deny the rights of others." I have never heard a Government Minister explain the basic philosophy behind the Human Rights Act before. Had they done so, and had the Human Rights Commission come on stream a long time ago, I do not think we would necessarily need a Bill of Rights, but it has not, and therefore I think this is an opportunity to consult with people, to have the conversation we never had about what Bills of Rights are and how they reflect our fundamental identity as a society. Finally, and I will not go into any detail here at this point, I think it is an

opportunity to refresh what is a 50 year plus Convention, with rights that, if you like, are current for the modern age, and I could say a bit more about that later.

Q2 Chairman: Martin?
Mr Howe: Yes, Mr Chairman. Thank you for indicating at the beginning that although I am a member of the Conservative Party's Policy Commission on the Bill of Rights, anything I say today is purely in my personal capacity, and other members of the Commission might violently disagree with every word I say. Now, do we need a Bill of Rights? One has to look here at the fundamental relationship between Parliament and the courts, because any Bill of Rights, to some extent, will shift more power to the courts from the elected legislators. Therefore, I think you would have to be clear as to what you are seeking to achieve by making such a shift. It strikes me that the way to look at a Bill of Rights, apart from, and on this point I agree with Francesca, the necessity for general public support for it, is in a way it is Parliament's own restraint on the executive. If we bear in mind that something like 99 per cent of our law is now made by statutory instrument, rather than by Act of Parliament, and we also bear in mind the way that the Parliamentary system works, the value of having a Bill of Rights is to have a set of objective standards that does not strictly bind Parliament not to pass laws that are in contravention of it, but it means that if Parliament chooses to do that, it has to be done by an explicit process. If, if you like, Whitehall wants to formulate statutory instruments which contravene its principles, at that level, it cannot be done, it all has to go through Parliament in the form of a Bill. So I think as long as a Bill of Rights is not the US Constitution's type, with strong entrenchment, but is seen primarily as a tool by which Parliament can lay down principles which bind Whitehall and the executive, then it has enormous value.

Q3 Chairman: Sandy?
Professor Fredman: Yes, thank you. Well, yes, I think we do already have a Bill of Rights, and it is a British Bill of Rights, in that Britain was very much involved in the European Convention, but I think it is important to remember that the Council of Europe, from which the European Convention arises, also had another document, which was on socio-economic rights, and when the Human Rights Act was enacted, there was no debate but that the Human Rights Act should incorporate the European Convention on Human Rights. I think that having a debate, opening the idea of a British Bill of Rights, raises the possibility of thinking again about socio-economic rights. It is generally thought that socio-economic rights are alien, and many politicians view them as simply giving a lot of power to the judges to make decisions about public spending and even about taxation, but in fact, I think there are two reasons why in a debate about a British Bill of Rights, these rights need to be considered. The first is they are actually fundamental to the values of the society, and have been ever since the end of the Second World War. I think it is widely recognised that the state should be responsible for preventing destitution, for providing healthcare, for providing free compulsory education, for providing housing for those who are unintentionally homeless. I think a recent survey showed that when people were asked what rights we should have, 88 per cent said we should have a right to free hospital care. So the values and the principles behind socio-economic rights are already embedded in the unwritten constitutional framework of this country. The second reason is that when the Council of Europe produced these two different documents, it was thought that somehow socio-economic rights were very different from civil and political rights, but it is increasingly recognised that these boundaries are artificial, and cannot be sustained. We can see that by the fact that even the European Convention on Human Rights is being developed in an organic manner to incorporate what one might think of as socio-economic rights. Socio-economic rights are often thought of as positive duties on the state to make provision for people in need, but many civil and political rights also give rise to those kind of duties. If we want to have a right to trial, we have to have a duty on the state to provide courts, a legal system; even legal aid is part of Article 6. The same thing is true of the right to equality: if you do have housing, you cannot provide the housing in a discriminatory way. So I think that really what needs to be had in this debate is more of a discussion about the role of the judiciary. I am South African, and I am very familiar with the developing jurisprudence around socio-economic rights in South Africa. I think it is possible to construct a role for a judiciary which is democratic, which energises the democratic process, and as both previous speakers have said, it is not only the judiciary that are involved in human rights, they should be essentially pro-active and come through Parliament and other bodies.
Chairman: I think that is very interesting. I certainly would take your point about the importance of checks and balances which we have seen in the South African system. I would prefer today not to get too bogged down in the socio-economic rights issue, because we will be looking at that in a later session in a lot more detail.
Mr Shepherd: No, but it is fundamental, it is a line that runs through this whole inquiry, Mr Chairman, and I wanted to just ask Professor Fredman on that.
Chairman: I do not have a problem with that, Richard. Before you arrived, we were talking about this, and we will be coming back to this in a lot more detail, so there is no problem asking it, but that is not the main focus of today, we are on the broader principles today.
Mr Shepherd: This is part of the broader principle: what is the nature of a Bill of Rights? Is it socio-economic as well as the traditional liberties, I think you would call it. It is not really until Roosevelt gives his additional freedoms that you start this whole debate. It strikes at the very democratic principles of a free society that has tried to entrench in its Bills of Rights freedom from prosecution, **habeus corpus** and all those elements, that are common both to our—I

should say 1689, both to the American Bill of Rights and also to the British input into the European Convention on Human Rights. There is quite a clear separation, and the same socio-economic rights are coming in like that; that was always the decision of the electorate, free people in a free country being able to identify the priorities that they associate to individual needs of the society. There is a distinction between these two elements, and a very clear one in some of our minds, so we do not necessarily accept the internationalisation of what is so fundamental as to what is essential to our liberty. Thank you.
Earl of Onslow: May I come in on exactly that point?
Chairman: Not at the moment, Michael.

Q4 Dr Harris: I thought I was going to get an answer from our witnesses. I am interested in this question about whether a British Bill of Rights would provide potentially more rights than we have through the combination of our signing up to the European Convention on Human Rights and the Human Rights Act, or less, by definition less rights; we just write in less rights, or there is greater margin of appreciation for rights not to be insisted upon by individuals; or perhaps more rights, less margin of appreciation, or more actual rights. I would like to ask you, Mr Howe, first, if I may, what your personal view is about whether, if we had one, a British Bill of Rights would be ECHR minus, if you like, or ECHR plus.
Mr Howe: Well, the query you are putting is ECHR plus or ECHR minus; may I suggest there is actually a third category, which is ECHR more precise. Let me explain what I mean by that, because the Convention is, of course, very broadly drafted, and leaves in many areas a large area for interpretation. It would be possible to reflect the rights in the Convention, first of all, in a way which more precisely interfits with our legal system. Let me give you an example: at the moment, there is quite a lot of case law of the Strasbourg Court seeking to categorise proceedings for penalties, as to which side of the line they fall on when it comes to Article 6, whether they count as criminal proceedings or as civil proceedings. Some types of penalty proceedings under our legal system count as criminal for that purpose and others do not, and some very, very fine distinctions are made. Ironically, we had provisions protecting us from proceedings for penalties in the first Bill of Rights of 1689, and it would be possible, by a Bill of Rights that more precisely interfits with our legal system, to across the board apply the criminal standards of protection to all proceedings for penalties in our legal system.

Q5 Dr Harris: That is the only way you can do that, you cannot just write laws that do that?
Mr Howe: Well, there are so many individual laws relating to penalties; everything from, you know, traffic cameras through to Inland Revenue or Customs penalties. Actually, there are growing issues, because every new regulator that is created seems to have power to impose fines on the regulated industry, and some common principles under which these can be imposed could well be a fit subject matter for a Bill of Rights. But the second area where one can be more precise is in areas where the Convention itself allows a wide area of discretion to contracting states. A particular example in this country is since the incorporation of the Convention via the Human Rights Act, our courts have developed what is in effect a judge-made freestanding law of privacy, something that Parliament has shied away from doing many times before. The case law under that is rather imprecise, because in effect what the courts are doing is they are triangulating between the very general words of Article 8, of respect for private and family life, and Article 10 on freedom of expression. It strikes me that within that area, it would be possible to be more precise in the guidance that Parliament is giving the courts, in effect, to try and increase the certainty of the law, possibly to shift the balance more towards freedom of the press than heretofore in the courts' decisions we have seen, but still remaining within the ambit of the Convention as to the balance between these two rights. I think a third respect in which a Bill of Rights could be useful would be with certain rights, which are necessarily defined at very broad level, because of the nature of the Convention; for example, the right to a fair trial is defined just generally, and has to be defined; the Convention covers many different legal systems. Obviously, there is the divergence between the common law legal system and the Continental legal system; in the Convention, it has to cover both. It would be possible, in a domestic Bill of Rights, to look at making provision for protecting specific features that we in our tradition regard as important aspects of the right to a fair trial, for example, the right to jury trial in serious cases. So I think those are some examples of the way in which a Bill of Rights could, if you like, reflect the general principles contained in the European Convention on Human Rights, but reflect them in a way which is more precise, and in some respects actually goes further than the existing rights that are in there.

Q6 Dr Harris: I understand that, and so that is an extra option. So it is using the margin of appreciation that exists to allow a British own Bill of Rights to be more precise in those areas and not rely on judges, who could be described as random, or at least not democratic. But for those who rail against, if I can use that term, or complain that the rights granted under the ECHR and therefore through the HRA are too wide, I have heard say, "We should have our own Bill of Rights"; it may not be your view, I am not saying it is your view, but I have heard that said. I wanted to ask you, and then the others, what sorts of things have you heard said, or you believe yourself are the sorts of things that might actually be narrowed by having a British Bill of Rights? If you do not think that is possible, could you say so, because it would be helpful, I think, to public discourse to understand if that is the case, that a British Bill of Rights could not really narrow from the ECHR without us resiling in some way from the ECHR.

Mr Howe: Let us be precise on the points we are looking at. The answer is certainly, as a matter of legal mechanics, a British Bill of Rights could be narrower than the ECHR and we could still remain members of the ECHR. In effect, we would be going back in certain areas, but only limited areas, to the system that existed before the 1998 Act, under which if there was an adverse judgment at Strasbourg, then the Government and Parliament would have to consider how to react to that, and to change the law. So as a matter of mechanics, it does not follow that, if you like, everything in the Convention has to be reflected in a domestic Bill of Rights, if it is otherwise provided for in our law.

Q7 Dr Harris: Do you think that is sensible, or do you think incorporation or its equivalent is a good thing? Because otherwise you have a two-stage process and it takes you years to get your rights.
Mr Howe: No, I am not advocating it as a general solution, but I am just pointing out that if there is a divergence, it is not inconsistent with our continued membership of the Convention.

Q8 Dr Harris: But I am asking you if you think that is a good thing overall, because of the problem I have just suggested, meaning people would have to go to Europe to get the rights that you say they would still have, they just would not be able to get them here.
Mr Howe: This comes on to the issue of the vagueness of some of the rights in the Convention. The issue I think is not so much what happens once you go through the court system, and all the way to the House of Lords, but the way in which the Convention rights are framed puts people in a position to put forward contentions and arguments which may ultimately prove unsuccessful if taken to court, but which nonetheless can have an effect on the way administrative bodies work, perhaps an unwarranted fear.

Q9 Dr Harris: A chilling effect.
Mr Howe: Possibly you can call it chilling, that is a bit of a pejorative word, but an unwarranted fear that acting in a certain way will infringe someone's human rights, whereas had the thing gone through the court system and gone up to the House of Lords, they might have decided the opposite. Let me give an example.

Q10 Dr Harris: Can I just ask you: how does a Bill of Rights, which still enables individuals to petition the ECHR, solve that problem? Because you will always still be able to petition the ECHR, it just makes it more difficult and longer and more drawn out.
Mr Howe: No, this is the sort of case where a petition to the ECHR would be very likely to fail. If one has clearer drafting, that knocks it out of contention in the domestic system at stage one, and does not allow, if you like, frivolous claims to work their way through the system, I think that could be a benefit.
Professor Klug: The technical answer to your question is found in this research, which I commend to all members of the Committee, if you have not already read it. It is by the Ministry of Justice and Oxford University, called "Public protection, proportionality and the search for balance". It is a comparative study of jurisdictions where the Convention is incorporated and there is an additional Bill of Rights. In every case, in a nutshell, it was found that actually, in jurisdictions that had additional Bills of Rights, as well as incorporating the Convention, the courts tended to, if you like, let the Government off the hook far less frequently: they were far more diligent and rigorous in their application of the fundamental rights that were in their Bills of Rights and they took a more strenuous approach to the proportionality principle which is in play in security versus individual freedom cases, which I think you are probably alluding to, Martin. So I think this idea that having your own Bill of Rights somehow means that you get Strasbourg off your back is not based on any evidence or research. I think quite to the contrary, Strasbourg will only, if you like, exercise a greater margin of appreciation when a state has its own Bill of Rights if it considers that that Bill of Rights goes beyond the Convention rather than resiles from it in any way, or is narrower in any way. But I think there is a much more fundamental issue at play, and I welcome this question, if I can say that, Dr Harris, because I am not aware- I do not know whether Professor Fredman can contradict me- of any Bill of Rights in the modern world, post 1948, where there has ever been a discussion about introducing one on the basis of wanting to curtail a human rights instrument or Bill of Rights that is already in place. There are 46 countries in the Council of Europe that have incorporated the European Convention in their law; 21 have their own Bills of Rights. No one, to my knowledge, other than the sort of conversation that is going on on the periphery here, has ever discussed deincorporating from the European Convention on Human Rights or doing the equivalent. When Canada found their Bill of Rights was not sufficiently robust, the kinds of points I was making in response to the initial question, they proceeded to add to it, to supplement it with a Charter of Rights. They did not resile from their Bill of Rights. The Northern Ireland Good Friday Agreement (of course Northern Ireland is part of the UK) is working on this process as we speak, a Bill of Rights Forum has been set up, led by a renowned international human rights jurist, Chris Sidoti, who through a Bill of Rights Forum is taking evidence, consulting with people at the moment on a Bill of Rights, and I quote from the Good Friday Agreement, " . . . rights supplementary to those in the ECHR . . . taken together with the ECHR, to constitute a Bill of Rights for Northern Ireland". So my own view is that it is quite unimaginable, in terms of us being part of a global discourse on human rights, which we have led and promoted, to be having this discussion on the back of going backwards, resiling from what we already have in our law. So I think the issue is: is it going to be HRA plus, rather than is it going to be compliant with the ECHR, which, as Martin said, was the argument that successive governments made before we ever had the Human Rights Act.

Q11 Dr Harris: Could I ask Martin if he thinks that deincorporation, if that is the right noun, unincorporation, is thinkable, is plausible, given what you have just heard; do you have a different view?
Mr Howe: Sorry, perhaps you could be precise what you mean by deincorporation.

Q12 Dr Harris: As part of a Bill of Rights, that would be associated with the repeal of the HRA and no replacement that incorporates the ECHR. So it would be thinkable to bring in a Bill of Rights at the same time as deincorporating the ECHR through repeal of the HRA where the new Bill of Rights was not direct incorporation of the ECHR into our law. I hope that is precise enough. I am just a medic, not a lawyer.
Mr Howe: I think certainly one workable model would be that if you adopt a domestic Bill of Rights, and it covers the ground of the ECHR, then the domestic Bill of Rights is what you look to within the domestic legal system for the content and interpretation of those rights. You do not look outside that to the ECHR itself.
Chairman: But people could still go to the European Court in Strasbourg—
Mr Shepherd: We have just done away with it.

Q13 Chairman: He can correct me, but my understanding of what Martin is saying is the Bill of Rights would be justiciable in the UK courts, UK nationals would not be able to bring an action on the European Convention in the UK courts but only Strasbourg.
Mr Howe: Yes, otherwise, you get a confusion of two overlapping texts.

Q14 Dr Harris: But your neighbour on the right, Professor Klug, says that no one else has done that; that is not proof that it cannot or should not be done, I thought that no one else in Europe had done that.
Professor Klug: No one else has done that. My point, I suppose, is we are part of a global discussion on human rights. We encourage and promote other jurisdictions to protect and respect global human rights that we have been at the forefront of developing. So the implication here is that we are moving away from that as a process of getting a Bill of Rights, which is, as far as I know, unique in terms of the purpose of a Bill of Rights, because Bills of Rights are purposive, they are not just technical.
Dr Harris: Mr Howe is shaking his head. I am looking for a difference of opinion, you see.
Chairman: One at a time.

Q15 Dr Harris: I am keen to get your view on that, because you seem to be disagreeing, and I am keen to identify any difference of witness evidence.
Mr Howe: What I would say is a comment like that must depend upon the content of such a Bill of Rights. If such a Bill of Rights covers the entire ground of the ECHR, goes further in some areas, and what it does is defines those rights effectively in clearer and more precise terms that intermesh more clearly with our legal system and law, then a comment along the lines of saying it is going backwards I do not think is justified.

Q16 Dr Harris: But if it was set up with the rhetoric and the legislation to try and reduce the scope of rights in some way, and I know that is partly a subjective view until it is tested, then you would accept that that would be an unusual approach in the modern Council of Europe world; you would agree that under those circumstances, in that context, Professor Klug would be right to say that that would be unusual, not usually done, not comradely in terms of the community of rights approach.
Mr Howe: Yes, but whether that means one should not do it is another matter.

Q17 Earl of Onslow: I think it is arguable that this Government has abused liberty more than any other, and so I come to the thing that we need a Bill of Rights plus the ECHR. I particularly would like to ask you, when you were talking about penalties just now, we have ASBO legislation which produces people who can be sent to prison on hearsay evidence and for things which are not a crime; you have the Criminal Justice Act 2003, which says that if they think they are going to tamper with a jury, you can get rid of it, it does not have to be there; you have the Proceeds of Crime Act 2002, which gives the state powers to confiscate assets in circumstances where it does not have evidence for prosecution. I have a long list here, and these things seem to me to show an absolute necessity for a Bill of Rights, but a Bill of Rights which reinforces 1689, like jury trial, nobody can be arrested without a warrant, somebody has to be charged and found guilty, and all of those ancient British liberties which seem to me—how we got into the pickle, we have the Human Rights Act on one side, and the actions of a Government which has taken away liberty after liberty after liberty after liberty over the last ten years.
Professor Klug: I would agree with a lot of that analysis, except to say the Human Rights Act has unquestionably provided a check on the capacity of the executive to do that to the extent that it wished to do so. That is all that we have had!

Q18 Mr Shepherd: Sorry, it is like a running commentary, is it not? There is clearly a vision—it is an international system. I would adhere to the United Nations: this is an extraordinary situation in which we have a court to which we are deferential, and this does not happen with the United Nations generality of what I would call civil liberties law, and is now called human rights, encompassing a much wider area. It is trying to get a clarity as to what does protect the very point about it, the liberty side of it, because if you have liberty, you can therefore develop all the social instruments you want, if that is the will of the people. It is this contradiction between this march of saying that a foreign court, because that is what it is, operating largely for its members, with the exception of England, Wales and Ireland, is

operating a different legal system; the very point, I think, that Mr Howe was alluding to in the nature of the civil law tradition as opposed to the common law tradition. All of those are the things that seem to me at the heart of this. What do you want this for? An argument has just been put forward that you want a Bill of Rights to protect our liberties and our freedoms as have traditionally been understood. You present the newer world which says that this should encompass many of the instruments that deal with social injustices, et cetera. That is why I mentioned earlier President Roosevelt's adding on freedom from want, freedom from hunger. In the more stringent age when I was brought up, those were legitimate, good and virtuous aspirations, not a matter of rigorous law. That is why I was trying to set out a distinction there, and therefore, following the line through, I do not mean to be dominating, but this interests me, because I think we muddle the greatest trust of all, which is to protect these political rights, the freedom of the people to decide whether one has a priority over another, as opposed to judges. Now you come back.

Professor Klug: A small point of clarification, which is, of course, that the point of the Human Rights Act was so that British judges should take those broad rights and develop British jurisprudence, rather than, as you put it, "a foreign court". That is a separate point to your second one, but just to clarify that one point you made.

Professor Fredman: Yes, I think it is very often thought that there is a dichotomy between what should be decided by the people through the democratic process, and what should be decided by human rights through the courts. It is often set up as a dichotomy that these fundamental liberties are appropriate for courts because they are restraining the state from interfering with people's fundamental liberties, and that that is separate from the democratic process whereby we decide how and in what way people's needs are addressed. So that is the way in which it is often thought of. I think we should contest that, because of course it is extremely democratic as well to protect people's liberties, and when the courts protect people's liberties, they cannot avoid, at the same time, requiring the Government to do certain things which require expenditure, which require the state to actually take positive action. We saw this very clearly in the House of Lords decision in the *Limbuela* case, where people had no option but to be destitute, because of the way in which the Government had set up the system- they were not permitted to work, and they were not given the right to social security. The court held that Article 3, which is the basic right not to be tortured, and not to be subject to inhuman treatment or punishment, was breached. So in protecting those very basic liberties, the court is also involved in dealing with people's basic needs. The argument about it being undemocratic needs to be addressed by thinking about what is the role of the courts, and human rights are not only about courts. Human rights are also about what Governments, what Parliaments, what the people think are the values which should be pursued by the country. I think one of the main strengths of the Human Rights Act is that it actually sees Parliament, and now the Human Rights Commission, but primarily Parliament, as central in pursuing human rights. So I really want to go beyond that dichotomy between thinking of judges as inhibiting the state from interfering in freedom, and somehow interfering with democracy, and the opposite. One last point is, of course, when judges protect people's liberties in the areas in which the Earl of Onslow suggested, they are also pursuing democracy, and the judges are actually strengthening democracy in those respects as well, which is exactly the same intermingling between the two. I mean, when the courts prevent those sort of things, when they protect liberties against government action in that way, then the courts are also promoting democracy, so the courts in civil and political rights are also promoting democracy as they are in all kinds of rights.

Chairman: Could I just remind everybody on the Committee and witnesses, we have a limited amount of time, we have another panel to get through, we may have votes in either House, so if our people could be short in the questions, and the witnesses could be succinct in the answers, that would be very helpful. Baroness Stern?

Q19 Baroness Stern: Thank you very much. I have two questions to ask; you only get to answer the second one if you say yes to the first one. This is about rights and responsibilities, and the "and responsibilities" is in italics, is underlined, stress it, because that is what I am now asking about. So question one is: do you agree with the Government's view that what is needed is a Bill of Rights and Responsibilities? That is question one. If you say yes to that, I am then going to ask you, I am asking you now: what sort of responsibilities in your view would it be appropriate to include in a British Bill of Rights? I do not mind who wants to start. Martin?

Mr Howe: Right, I think the answer is, in principle, yes. However, you then open up a very, very broad range of choices on what should the responsibilities be. My own view is that actually, the responsibilities so referred to should actually be quite narrowly defined, and the impact of them should be in some sense coming in in some areas where balancing exercises are required in the application of the law. In other words, what I would not like to see are some generally defined responsibilities which then have direct legal force as between the state and the citizen, because some of these charters of responsibilities are extremely frightening. There is the African one, which contains responsibilities to respect the government, and not agitate against its proposals and policies. But if one has, if you like, a narrow definition of responsibilities, such as obeying the law, not engaging in crime, that sort of thing, and if they come in, not as a direct legal responsibility of citizens, but simply as something that comes into account where someone is seeking to enforce their rights, then I think they have a legitimate role to play. But, of course, it does not follow that just

because you fail to carry out your responsibilities, you become an outlaw and are entitled to no rights. I think that would be taking it too far.

Q20 Baroness Stern: But you are going to lose some of your rights if you do not obey the law.
Mr Howe: I think it is legitimate for the court to take into account, when an individual is seeking to enforce his or her rights, to consider to the extent, if it is relevant, that individual has failed to carry out his or her responsibilities.

Q21 Baroness Stern: Thank you. Professor Fredman?
Professor Fredman: I think that the European Convention does already have rights and responsibilities. What is crucial is that rights are not conditional on responsibilities, so it should not be a question that you have to earn your rights by somehow discharging certain responsibilities. But I think there are already responsibilities; for example, Article 10 already says that because the right to freedom of speech carries with it responsibilities, it can be limited in certain ways, but there are two specific ways in which there are already responsibilities. The first is that the state has a duty to protect individuals against other individuals infringing their rights. For example, the European Court of Human Rights has said that there is a duty on the state to enact legislation or provide systems so that individuals do not infringe on the right of life of others or cruel and inhuman punishment. The second one is that the court has a duty to interpret the common law, which is between private individuals, so as to reflect the European Convention. But the underlying principle of both of those is that responsibilities should lie on those people who have the kind of power which could infringe on other people's rights, and it is those people who should have responsibilities in respect of other people's rights. Responsibilities should also lie on those who have the power to promote other people's rights, for example, there are now duties to promote equality as between other people, which might potentially involve private power as well as public.

Q22 Baroness Stern: What about Francesca?
Professor Klug: I will be very succinct, as requested. I agree with everything that Professor Fredman just said. I think what is needed, to be honest with you, is the philosophy of human rights to be more transparent than it is, the philosophy that is already in the Human Rights Act, which is that you cannot get a society that respects and protects human rights unless people respect each other and act responsibly towards each other, and this could be addressed in a preamble. In fact, there could be a preamble to the Human Rights Act which suggests this, and in fact, I personally wanted that at the time.

Q23 Lord Morris of Handsworth: Just a supplementary. If we agree that the range of responsibilities are too far to be codified, does that not take us back to judges and the courts' interpretation?
Professor Klug: I think basically, the duties of individuals and the duties of citizens are reflected in the criminal law and a lot of civil law, and the whole point of Bills of Rights was to say, "These are the rights of individuals in relation to the state and other public authorities". But you talk about the modern and the past—

Q24 Lord Morris of Handsworth: But they are the broad principles, are they not?
Professor Klug: They are principles, exactly, and the modern human rights principles very much reflect the fact that we live in a society, we cannot just be individuals, trying to enforce our individual rights in a kind of market of who wins most, but there has to be a recognition of the common good within a human rights treaty, and that is reflected, as Professor Fredman said, very well in the European Convention on Human Rights. But it is not transparent to the people of this country. The tabloid press have done their best to ensure that is the case. So I think this is one of the strongest arguments for consulting on a Bill of Rights, or at the very least adding a preamble to the Human Rights Act to make this clearer.

Q25 Baroness Stern: Thank you. This is a question about private power. Should a British Bill of Rights follow the South African example of imposing the duty on courts to develop existing private law rights where possible to give remedies for breaches of rights committed by private power? You do not have to all answer if one of you agrees with what the other one said. Professor Fredman?
Professor Fredman: As I said, there is already a duty under the Human Rights Act for courts to interpret legislation and the common law so that it is in compliance with the European Convention, but the point that has emerged in the South African courts is that it is much better to do that by developing existing common law remedies, rather than creating new causes of action directly from constitutional provisions. I think Justice O'Regan has been at the forefront of developing that notion. So the idea would be that if there is already a cause of action, for example, it has already been mentioned about confidentiality, that you can then develop that cause of action to protect privacy rather than expecting the common law to develop entirely new self-standing causes of action which derive directly from the constitutional rights.
Mr Howe: Personally, I would be very cautious about, if you like—sorry to be jargonistic, but extending the effect of the Bill of Rights to have horizontal effects between citizens, as distinct from vertical effects between the citizen and the state, because I think one of the key problem areas which has emerged from the bringing into force of the Human Rights Act 1998 is actually the horizontal

effect that has appeared in the context of the judge-made law of privacy. Nominally, this is done by the mechanism of re-interpreting the common law of confidence, but in fact the new right created is wholly different in principle from the obligation under the law of confidence that was limited to information of a confidential nature, or arising out of a confidential relationship. It is now enough to come within the ambit of that right if it is information of a private nature. The problem with that is the great uncertainty that is created, and also, I think if Parliament had chosen to introduce a law of privacy, I tend to think it would contain a lot of public interest defences. Any law of privacy, of course, is inherently imprecise, but it could not possibly be less precise than the so-called development of common law that we are left with at the present moment.

Professor Klug: One of the disadvantages of Bills of Rights is they are imprecise, I think you have to face that. I think the Human Rights Act approach was about right, with the development of the common law and the positive obligation theory. We do not have the time to go through this, and it is probably not very useful. But what I do see though is a Bill of Rights giving the opportunity to get the public function test right, to address the issues that are very well-known to this Committee, that have arisen through the case of YL, because that was a kind of clever way, if you like, of increasing the direct ambit of the Human Rights Act into public functions that are carried out by the private sector without direct horizontal effect, as Martin called it, being too expansive. So I think that is another opportunity that a Bill of Rights presents.

Q26 Baroness Stern: Thank you. One more. Do you think the Government is right to link the debate about a British Bill of Rights with the question of the rights and duties of citizens? Here I am underlining and putting in bold the word "citizens". Do you think that is right?

Mr Howe: They are sort of linked at the level of general debate. Whether there is any linkage in the drafting of a Bill of Rights is another matter. I suppose where it comes in is that there are possible areas where citizens ought to have different rights from people who are non-citizens, but, you know, I think that is a subject that requires some rather careful thought.

Professor Klug: There are Bills of Rights that have chapters that say "Citizens' rights; right to vote; duty to serve in the army", but I think this goes to the heart of what Dr Harris was raising before, and why it really matters whether the Bill of Rights that is being discussed is building on the human rights principles that we have promoted round the world and are part of, or is something wholly new and different, because the whole point about human rights, of course, is that you have them because you are human, you need them wherever you happen to live, because that is the jurisdiction you are living under. If we go to Portugal, if we go to America, we want the protection of those constitutions, and people expect it here, but the fundamental principle driving that is that Bills of Rights are about protecting the rights of human beings as human beings rather than their legal status. If we are to resile from that through this process, we will indeed be resiling from the framework that is currently part of our law, and I think this needs to be transparent, and it needs to be part of the debate from the beginning.

Professor Fredman: Can I add to that that when we think about citizen, the meaning of citizen is the right to vote, so the rights to vote will be limited to citizens, but the European Convention says very clearly that everyone has these human rights. In a way, it is even more important for those who cannot vote, because they do not have a say in the political process, and if we think that it is the political process which primarily protects people, it is exactly those people who do not have the right to vote who are in even greater need of protection of human rights.

Mr Shepherd: But that in this country is only prisoners, is it not? Who else does not have the right to vote?

Lord Dubs: We do not.

Q27 Mr Shepherd: And you make the law, and determine the issues in these cases, as often as not.

Professor Klug: Non-Commonwealth permanent residents in this country do not have the right to vote. EU residents—

Q28 Mr Shepherd: If they are here lawfully, they do have the right—

Professor Klug: Non-Commonwealth do not; and EU citizens can vote in local elections but not in national elections, as things currently stand.

Q29 Lord Dubs: May I move the questioning on to the relationship between the powers of the judiciary and the powers of legislators? I think, Martin, you referred to that in one of your earlier answers, but my question specifically is this: should the courts be given the power to strike down legislation if in their view it is contrary to the British Bill of Rights, or should the driving force come from Parliament?

Mr Howe: My personal view is no, the courts should not be given the power to strike down legislation. The existing system under the Human Rights Act, as you are aware, is they have a power to declare it incompatible. That mechanism could equally be carried forward in the context of the British Bill of Rights. In that respect, it would be, you could argue, more strongly entrenched, soft entrenchment, but still more strongly entrenched than the Bill of Rights of 1689, which suffers from the defect that it has the status of an Act of Parliament, but any subsequent Act or indeed subordinate instrument can repeal it if it is inconsistent with it.

Q30 Earl of Onslow: But if we pass a Bill of Rights, Parliament, in its wisdom, can repeal that Bill of Rights; no Parliament can bind its successor. So however hard you entrench, you can always unentrench if people are so minded.

Mr Howe: There are mechanisms by which you could go further. For example, as a matter of constitutional mechanics, you could exclude any Bill

that amended or repealed the Bill of Rights from the scope of the Parliament Act, so that it would require the assent of the House of Lords as well as the Commons to do it. I suppose you could go further and say any Bill which contradicts the Bill of Rights is excluded from the scope of the Parliament Act, so if the House of Lords dug its feet in, then it could block it. That would be a constitutional possibility. It is one I would be very cautious about, because the effect of any form of entrenchment is to transfer power from our legislators to the judiciary. It is one thing to have a Bill of Rights that forces, if you like, the Government of the day and the Parliamentary majority, if they have it, to jump through a political hoop, and take the public flak for departing from the Bill of Rights, which seems to me is a legitimate thing to require them to do; it is another thing to have a mechanism that actually blocks a Bill going through, because if you do that, you do risk the danger of transferring the political arguments into the courts. Of course, the long-term prognosis of that is perhaps what we see in the United States, where political decisions are taken by a political body consisting of nine people, the Justices of the Supreme Court, and then the president of each party then has a strong incentive in, if you like, packing the court with judges of either conservative or liberal persuasion, in order to shift the majority in the court one way or the other. This is a point, I think, that can be made without any particular left or right bias, but over historical periods, this is what has happened in the States. So I think that is a possible consequence of strong entrenchment that one has to be very careful about leading on to.

Professor Klug: I am glad to say I agree with almost everything that Martin Howe just said. I think there is no appetite in this country for judicial strikedown power. Indeed, the Human Rights Act was known initially as the British model, precisely because it did not have one, and it has been copied by other jurisdictions, particularly in Australia, since. I also think, though, the idea of suspending the Parliament Act, certainly in relation to direct amendment to any Bill of Rights- which I think was an idea that emanated from the leader of the Conservative Party, David Cameron- is one that I think is well worth entertaining.

Professor Fredman: I agree, I do not think there should be a strikedown power, and I think that makes us think a bit more about what the judges are doing when they are adjudicating on human rights. The point has to be that judges need to be strengthening and reinforcing the democratic process, and they do it by making Government accountable. Government has to come to court and explain what it is doing, and be transparent, and provide the kind of reasons which are compatible with human rights and which can persuade people. It is also the case then that the courts can feed into the political process in a unique kind of way, which has got to do with the judicial process, which is much more deliberative and based on a reasoning process rather than on interest bargaining. So the judges' role is to augment democracy by making decision-makers accountable to people who might otherwise not have a voice in the political process, but it should not be done by a strikedown, it should be done in the very sensible way that the Human Rights Act does it, through the declaration of incompatibility.

Q31 Earl of Onslow: Relationship with the Human Rights Act, other international human rights obligations. I think we have probably gone over whether the British Bill of Rights should replace the HRA or merely supplement it, but it then says: what relationship is there between, for instance, that and the European Charter, the new one signed at Nice, in the EU Charter of Human Rights, and what would be the relationship of the British Bill of Rights to the UK's other international rights and obligations? Anybody like to answer that? And answer came there none.

Professor Klug: It is just I think we did kind of review this debate earlier in response to Dr Harris's point. My own view is that it would be an extraordinary development and a very large mistake to do anything other than they are doing in Northern Ireland, which is consulting on rights supplementary to the European Convention on Human Rights. In terms of what would be the relative priority, should we have a Bill of Rights which goes on incorporating the European Convention in our law as the Human Rights Act does, and has additional supplementary rights, and perhaps some better-worded rights in it, no problem with that, or are you asking what would then be the relationship between that Bill of Rights and the European Convention on Human Rights?

Q32 Earl of Onslow: The EU Charter says dignity, freedoms, equality, solidarity, citizens' rights, justice and general provisions.

Professor Klug: Some of the values in the EU Charter, stripped of their context as the EU Charter, could indeed be part of the consultation process on a Bill of Rights. The word "dignity", for example, does not appear in direct terms in the Human Rights Act, although it is in the UN treaties, and this is an opportunity to look at a more modern way of presenting what is fundamental about being human, which is what Bills of Rights are about. For example, to disabled people, to elderly people, a concept like dignity is hugely important in terms of establishing that it is not just a question of not being discriminated against, but receiving treatment by public authorities that is respectful and reflects your worth as an individual. We keep hearing about scandals every day; this would be an opportunity to consult on whether values like that should be directly in a Bill of Rights. At the moment, they are indirectly there through case law.

Q33 Earl of Onslow: We have been looking at the human rights of old people and the human rights of people with learning difficulties, and we have really discovered that why the professionals in those two spheres of interest are interested in the Human Rights Act is they use it as a lever to behave how I would think people should behave anyway. So in

that way, the Human Rights Act is being used for something that it was not originally intended for, I would suggest.

Professor Klug: I would suggest it was intended for that purpose actually, having been part of those deliberations. If I could just make a personal comment, as an ex-social worker in at least two former lifetimes, it is extraordinarily useful, when you do operate in a sort of legal vacuum- because the law cannot possibly account for the day-to-day kind of decisions that you are having to take- to have a sort of ethical framework that helps you think how to address difficult dilemmas, if I can put it as broadly as that. It is extraordinarily helpful, which is why the police, for example, both in Northern Ireland and here, really welcomed the Human Rights Act as a potential tool in operational decisions.

Chairman: We have a division in the Commons, I think we have finished our questioning for this panel anyway, so thank you very much. While we are away doing our duty, perhaps we could swap the panels over and start straight away. Thank you very much. Sorry to be a bit curtailed, but we have to go and vote.

The Committee suspended from 5.20 pm to 5.30 pm for a division in the House of Commons.

Witnesses: **Ms Katie Ghose**, British Institute of Human Rights, **Mr Jago Russell**, Liberty, and **Mr Roger Smith**, JUSTICE, gave evidence.

Q34 Chairman: We are now coming into our second panel, sorry for the disruption during the division, for which we are joined by Roger Smith, who is the director of JUSTICE, Jago Russell, the policy officer from Liberty, and Katie Ghose, who is the Director of the British Institute of Human Rights. Welcome to you all, I am sorry it has been a bit of a curtailed session. Perhaps I could start off by asking Katie whether you think a British Bill of Rights is needed.

Ms Ghose: It would depend on what kind of Bill of Rights it was. I would like nothing more than to see an all-singing, all-dancing, comprehensive protection of the rights of all people in the UK, a package that would see not just the civil and political rights, which we have protected to some extent in our Human Rights Act, but the things that people actually say they really want, the economic and social rights, the right to housing, to education, to have an adequate standard of living. If we were talking about that sort of Bill of Rights, and it is exciting to see something like that happening in Northern Ireland, where people themselves are being asked the kind of rights they would like, then I would say yes, that would be wonderful, it would be an addition to the foundation we already have in the Human Rights Act. But if you are asking me whether I am in favour of what looks to be on the table, I have to say there has been no indication from the Government that the intention of the Bill of Rights process is to add rights to what we already have in the Human Rights Act.

Q35 Earl of Onslow: Sorry, can I interrupt you there? In the Human Rights Act, there is no right to a trial by jury. I happen to think it is extremely important that that should be entrenched, or rather put in, so that is a major addition.

Ms Ghose: That is certainly an example of a civil or political right, yes. I think there are many other examples of rights, what we would call economic or social rights, to use the jargon, but are things, as I have said, that when people are actually given the opportunity to say the kind of rights they care about in their day-to-day lives, as well as the civil and political rights, they do talk about things like housing, education and health. As I was saying, the current process, the process that is coming up, there has not yet been anything put on the table, if you like, other than perhaps the right to trial by jury, that would give an indication that the process was really being driven by a desire to add to the rights that we already have.

Q36 Chairman: Jago?

Mr Russell: I think it is probably worth starting by saying that actually, I do not think any of the organisations at this table, and definitely not Liberty, asked for this debate. This is not a debate that we have been calling for. Actually, I have to say, it is a debate which Liberty approaches with a degree of trepidation, rather than something we welcome with open arms in the current political climate. Really, you only have to ask yourselves, why have politicians started talking about a British Bill of Rights? They have not done it because of a progressive desire to incorporate a greater range of rights, or to give greater human rights protection; they have actually made statements about ripping the Human Rights Act up, David Cameron's recent comments, because of things like cases which have established that Article 3 will not allow a person to be deported to torture, and other controversial decisions; those are the kinds of things that have given rise to this debate. In that context, of course we will engage in a debate on the British Bill of Rights, but I am pretty sceptical at the moment about where that debate will take us. I think some of the things you heard from the previous panel actually reiterated the fact that there are lots of people that are engaged in this debate, in all of the political parties, who actually would like it to take us backwards in terms of human rights protection and not forwards, and that is clearly something that Liberty would be very concerned about.

Mr Smith: Personally, I too am agnostic as to the result. Paradoxically, I think if one could get agreement on a British Bill of Rights, political consensus over the spectrum, I would go for one. Short of that, I think it is difficult. What JUSTICE has been concerned about at this stage in the debate has been to work through the issues and try to put in the debate all the things you have to consider if you

want a Bill of Rights. You just have to start opening the Pandora's lid of content to realise what comes out, and if we are going to have a serious discussion about a Bill of Rights, then there are a lot of serious issues, and they are wider than socio-economic cultural rights. I think, yes, jury trial is in there, a whole series of issues come out, and this is not a quick and easy debate. If we are going to have a Bill of Rights of any kind, it is only going to be the result of a long process, and I think, frankly, anything that deserves the title Bill of Rights probably requires a degree of political consensus which in the current circumstances is rather hard to see obtaining.

Q37 Baroness Stern: You may think you have answered this already, but I do not think you have. Do you think a Bill of Rights should be aspirational, setting out the sort of society that we want to be, or should it have a more modest aim?

Mr Smith: I went to South Africa relatively recently, and I was really enthused by the way that South Africans of every colour were energised by the aspirational rights in their constitution. So I have seen it, and it is a wonderful thing. Do I think that is in any way transplantable to the United Kingdom that I recognise; is there any hope of any consensus of a right to end child poverty, or even a right to medical care? I do not think so. So as a sceptic, I would like to see it, I would love to see it, I would love to see agreement, I do not think we have a hope of that at this moment.

Earl of Onslow: Can I come in on that?

Q38 Baroness Stern: No, you cannot.

Mr Russell: I think it needs to be a combination of both, I think it should be aspirational and contain real hard-edged legal rights, and I think in terms of the Human Rights Act, which I would actually say is a Bill of Rights in all but name, we have achieved one of those things: we have a very sound collection of enforceable human rights in there, but that actually the aspirational side of the Human Rights Act has been missed out. There was a huge amount of judicial education before the Act came into force, but there were not the same levels or types of education in terms of explaining to the public sector, the kinds of work that BIHR have been doing, about how human rights principles can actually help us to aspire to a better public service and to a better society. So I think the Human Rights Act itself could deliver both the hard-edged legal rights and the aspirational side.

Ms Ghose: I would endorse that. BIHR works with a very wide range of voluntary community and public sector organisations, and we find that the way we talk to people about the Human Rights Act reflects the aspirations it contains. The right to a private and a family life, that means so much to people working with people with learning disabilities, whose children are routinely taken away and put up for adoption, because the local authority frankly does not want to put the resources into supporting them at home. What an aspiration for that family to have a family life, to be living under the same roof together. So I think human rights in and of themselves are aspirational, and I think there should always be a combination, and there usually is a combination, in law and in wider practice, of wonderful aspirations, but also of concrete legal standards that people can use in and outside the courtroom.

Q39 Baroness Stern: Thank you. I think we know what Katie thinks, but do you think the Government is right to have effectively ruled out the possibility of a British Bill of Rights including social and economic rights such as health and education? Roger?

Mr Smith: No, if one takes the view that one could get consensus on those issues. If one takes the view one would not get consensus on those issues, then I think it is a realistic decision to have taken. I would love to see socio-economic rights which everybody agreed, in a formulation which everybody agreed. I do not think that is realistic in our politics as they are at the moment, and I regret that. What I hope is that as part of the debate which is gone through, we inch our way towards more of an acceptance of that, but do I think there is a consensus, enough for a Bill of Rights at this point? I do not think so.

Mr Russell: I would reiterate the comments that Roger has made. I think in the current climate, it is very unlikely that there will be consensus around that. I personally do think that when you are talking about some socio-economic and cultural rights, although not all, that there could be difficulties with judicial enforcement of some of those rights, and I think that would need to be looked at. So it would not necessarily be that exactly the same model of enforcement of rights should apply to all kinds of rights in the political spectrum or in a British Bill of Rights, but that is not to say that they are not incredibly important in the human rights framework, and that there could not be real advantage in making some of those rights enforceable in the courts, and some of those rights enforceable through other structures, perhaps the democratic structures and through Parliament. Indeed, in the context of many economic, social and cultural rights, there is actually at the moment very little political disagreement about the fact that there should be some form of a welfare state, although exactly what form that takes—so to some extent, actually economic, social and cultural rights are already being delivered quite effectively, although it clearly could be improved in some areas, through the political process and through Parliament.

Ms Ghose: Can I add to what I said, just very briefly, three words: ask the people. People have not been given an opportunity in the country to learn about existing rights, and to have their say about whether they might even want to see economic, social and cultural rights become part and parcel of our law, over and above how they already are. It is tiring to hear Ministers and other politicians set their face against further rights for people, on the basis that somehow it is not democratic, or judges are stealing power from Parliament. Other countries manage to do it. I think it is going to be a long run thing, and I think politicians should have the decency to actually

ask people what they think about this. I think what you will find is there is an appetite and an interest in things like poverty and housing and health, and how can we do better for all our people, and that could be well translated into further human rights.

Q40 Lord Dubs: You may have heard, with the previous witnesses, some questions about whether there should be a Parliamentary or fully entrenched model as regards the Bill of Rights. I want to move on from that though and ask you this: if there were to be a British Bill of Rights, would you like to see any changes in the way in which judges are appointed to comply with international human rights standards, which require an independent judiciary, and indeed the possibility of equal participation in public life, or would you stick with the present way in which we appoint judges?

Mr Smith: I would like to see no change in how we appoint judges, it being the case that we now have a Judicial Appointments Commission, and new arrangements to come in for the Supreme Court. I think it is a useful myth that judges are non-political. I think anything that raises another myth against it, that judges are political, is highly dangerous. I think the methods we have now in the Constitutional Reform Act for appointing the senior judiciary, as they will be taken forward into the Supreme Court, are the right ones to have. I think also the way that the judiciary are beginning to formulate their areas of responsibility, "relative institutional competence" is the phrase they are coming up with, I think is a very good way of articulating what areas should be theirs and what areas should be for Ministers and politicians.

Mr Russell: In terms of the specific question about appointment, I have really nothing to add to what Roger said, but in terms of the way that the courts and the judiciary have played their role in terms of enforcing the rights in the Human Rights Act, when you consider the case law, you have seen that they have not been as activist as some politicians and some parts of the media would like to suggest. In many, many contexts, they have said, "Actually, we are not as well placed to answer this question as the democratically elected limbs of Government", so it would be a great shame if that misconception or misperception of how the courts have played their role under the Human Rights Act were to inform future debate on the shape of a Bill of Rights.

Q41 Earl of Onslow: What I would like to ask is this: in the last ten years, I think there has been an abuse of liberty of an astronomical scale: for instance, fingerprinting and DNA on children, 500,000 secret intercepts a year, 700 agencies have access to all landline and mobile telephone records, no primary legislation, no debate in Parliament. We now have a surveillance society. We have identity cards coming up. All of these things seem to me something which we should have stopped via a Bill of Rights of some sort. Those to me are so fundamental; are we not overlooking dealing with these by not having a proper Bill of Rights which should deal with these issues?

Mr Russell: In that context, the first point is that there is a right to privacy under the Human Rights Act, and I agree that one area in which a British Bill of Rights could build on that would be to add greater clarity in terms of the right to privacy. I share your concerns about the extent to which a surveillance society has arisen in the UK without a debate, that is a real concern for Liberty too. What is interesting about the right to privacy, though, is it is one of those rights which raises very interesting questions about which limbs of government are best suited to protect particular rights. It is one area in which the courts have not actually been that effective in protecting rights, and the reason is this: a court has a case before them, they see a relatively minor privacy infringement in the case of one person, so one person who complains that their DNA is being permanently retained on a database, the court is adjudicating on that one individual's case. Courts find it very difficult to think of the broader and wider social impact of schemes like the DNA database on the broader public. So actually courts find it very difficult to protect the right to privacy, and it is one right where I think that Parliament actually needs to be playing a far stronger role in questioning whether new government databases which are being established by statute are really necessary, and it is one role where perhaps it would not be appropriate to necessarily expect huge amounts more of the courts.

Q42 Earl of Onslow: When fingerprints were discovered, they made very strict rules about how fingerprints could be retained. You are supposed to get a warrant to search somebody's house. All these things which Parliament beforehand would have regarded as odious now seem to pass, and it seems to me that the need for a Bill of Rights is actually to stop the executive more than anything else. I would rather stop the executive doing something than give it duties to do which actually would not necessarily be actionable. To go back to your socio-economic duties, the Government at the moment has pledged to reduce poverty by whatever it is; the Rowntree report, out today, says actually that has retrograded. If that had been in your Bill of Rights, who sues who for what for how to get it put right?

Mr Smith: Can I come back to you on a number of points? One, I have no dissent from the substance of what you are saying, and absolutely no problem if we were able to put those kind of rights into a Bill of Rights, fine. I have some doubts about whether a Bill of Rights would be so detailed as to cover every example you have put forward. Secondly, a Bill of Rights gives politicians, in a way, no excuse. A Bill of Rights sets the parameters, in a way, it draws the boundary lines round the field, and you are still out there playing, and we as a society are still engaged in these issues. So a Bill of Rights is useful in its part, it is a reflection of the political culture, but actually, politics continues, and the issues that you bring up are issues which should remain in the political and which I think politicians should largely be taking different decisions on. Thirdly, I think there is a problem about detail. Any Bill of Rights will

necessarily set principle. So if we just come to the number of days of imprisonment before trial, 28, 56, 90, 14, whatever the number, I doubt whether a Bill of Rights properly should put a number in relation to that. The Bill of Rights should probably do what the European Convention effectively says, that you should act proportionately in depriving people of liberty, and it is then for the political process, for Parliamentarians in a Parliamentary democracy, to decide initially and indeed at the end what number of days' detention in all the circumstances is right. So I think as Parliamentarians, it is for you to decide whether you are persuaded by 28, 56 or 90, it is for the judiciary to look over your shoulder and see if you have justified your reasoning and if you are making a proportionate judgment, but that is correctly, it seems to me, a political judgment to be made by Parliamentarians on legislation.

Q43 Dr Harris: Can I ask a question? The previous panel argued that there should not be the ability of judges to strike down legislation, arguing that that would undermine the role of—well, the question is: did they then say Parliament, or did they then say the Government as democratically elected? Would you say that your view or a view on how much power judges should have to point out incompatibility, declare incompatibility, strike it down on a temporary basis, depends on whether you actually have a Parliament that holds the executive to account, or can that not be relevant? In other words, if you have an executive that just does what it likes, and Parliament has no way of pressing a Government to rectify an incompatibility, say over the housing rights of gypsies, or the rights of prisoners to vote, just to take two issues at random, then would that influence your view as to whether judges should be more active at all on this question?
Mr Russell: In a way, what is interesting is that is what already happens under the Human Rights Act. Where Parliament does not exercise its responsibility to prescribe the parameters of Government power by putting limitations in primary legislation, or requiring the powers themselves to be set out in legislation, the result is that they are then put in secondary legislation, with the result that the courts then do have a strikedown power. So in a way, if Parliament is requiring, as it should, in my view, detail to be put on primary legislation, and it is taking very seriously human rights concerns, human rights considerations and the kind of things raised by this Committee, then I do not think that we would need to expand beyond the current model of the Human Rights Act. I think it is absolutely right that in the current model, the court should have the power to strike down secondary legislation where that kind of detail is not provided in the statute itself.

Q44 Dr Harris: But actually, that is an argument against itself, because you can argue when Parliament has failed, in other words it has failed to force the Government to provide primary legislation as debatable to do something, actually, Parliament protects people from the executive directly. I know some people would argue you need to be protected from judges, but I happen to think that protection from the executive, given our electoral system, is important. Parliament has effectively done that by failing to prevent secondary legislation having these issues which judges can strike down. So my concern, do you see my point—
Mr Russell: I do not see the contradiction, no. I think that when Parliament has failed to require its being primary legislation, then it is absolutely right that the court should have the strikedown power to control the executive.
Dr Harris: What about where Parliament is rubbish when it comes to primary legislation? Let us say you have a country where the executive is embedded in the legislature, there is very strong whipping, you very rarely get proper scrutiny, some things go through Parliament with primary legislation never being scrutinised in Committee because of guillotines. I will not name the country. You have a slavishly loyal sometimes, particularly in the run-up to a general election, governing party, elected on, say, 25 per cent of the vote of the people who are entitled to vote.
Earl of Onslow: This is Ruritania incidentally that he is talking about.

Q45 Dr Harris: As I say, I am not naming the country. What do you then do? Do you think that has any bearing on whether judges should be given the ability to declare incompatible, especially if you have a Bill of Rights that, say, is passed by a two thirds majority, would you, unlike the previous panel, give any thought to giving judges more power in those circumstances?
Mr Smith: I would give thought, but I would reject it. I understand what you are saying. A weakness of our system, the Parliamentary democracy, is that the executive controls the legislature, at least one House of the legislature, clearly. I think if we had a written constitution, somebody has to protect a written constitution, so there is a large logic for the judges doing that. I think that pragmatically—the Human Rights Act is a very British sort of compromise, and it seems to me rather good. It is a bit lumbering, it is a bit clumsy, you pass legislation which allows foreigners to be locked up, the judges declare it incompatible, the Government has to come back again, it comes back with something which the judges still ask questions about, you have another go at it. It seems to me that that to and fro, which retains for Parliament the ultimate power of deciding at the end of the dialogue what the legislation should be, but also gives a voice to the European Convention, and the values which the UK has signed up to in the abstract, it seems to me absolutely right. I would not want a situation where ultimately—I want a situation in which we would have the *Belmarsh* judgment, but not *Roe v Wade*. I want you to decide on abortion, and I want you to stand up before your constituents, or if you are not elected, the public, and defend the position on abortion. I do not want the judges to do it, and I certainly do not want to have arguments about who is appointed to the judiciary on the basis of whether they are pro-life or pro-choice.

Q46 Dr Harris: But we have not decided on *Hirst* or *Morris* or *Gabaj*, it has been years, so I accept *Belmarsh* they did get a move on for other reasons, but if you do not happen to be a high-profile rights case, then you just wait years before the Government, if it ever does, gets round to dealing with the incompatibility. I suggest that in our current situation, Parliament is not strong enough to push the Government into dealing with these things as urgently as one might require, let alone individual redress.

Mr Smith: I would agree there is a whole other debate about how you strengthen Parliament to loosen the power of the majority party in the Commons, and I think you should get on with that, and not make that debate stray into giving the judiciary greater powers.

Ms Ghose: If I can briefly raise another important point which is sometimes missed, given that public information and understanding about the Act has been largely confined to courtroom cases: if you really care about protecting and promoting everybody's rights, you look at human rights as a system, and you look at everybody in society having a role, so you look at Parliament actually really pro-actively scrutinising legislation, as this Committee does, before things come on the statute books. You look at the judges having a role, you look at people having a role, and you look at NGOs actually robustly holding the Government to account on its human rights standards. It seems to me that this point that is coming up, notwithstanding the different models that there are about laws being batted to and from courts and Parliament, strongly suggests that the whole system would be strengthened if everybody in society was having a much more robust role, was much more aware of their rights, and was holding the different bits of the Government, broadly speaking, to account.

Chairman: Thank you very much. I am sorry it has been a curtailed session, but we had the division which I am afraid ate into the time a bit.

Monday 14 January 2008

Members present:

Mr Andrew Dismore, in the Chair

Dubs, L.	John Austin
Morris of Handsworth, L.	Dr Evan Harris
Onslow, E.	Mr Virendra Sharma
Stern, B.	

Witnesses: **Mr Roger Jeary**, Director of Research and **Mr John Usher**, Legal Officer, Unite the Union; **Ms Hannah Reed**, Senior Employment Rights Officer, Trades Union Congress; **Ms Carolyne Willow**, National Co-ordinator, Children's Rights Alliance for England, gave evidence.

Chairman: We are now going into our second session for the afternoon. We are joined by Carolyne Willow, who is the National Co-ordinator for the Children's Rights Alliance for England; Roger Jeary, Director of Research, and John Usher, Legal Officer of Unite the Union; and Hannah Reed from the Trades Union Congress. Welcome to you all. I think we have got some declarations of interest at the start.
John Austin: Could I just place on record that I am a member of Unite,
Lord Morris of Handsworth: And me.
Mr Sharma: Me too.
Earl of Onslow: I am not!
Dr Harris: I am a member of the BMA, I do not know whether that counts.

Q47 Chairman: No, the BMA does not count, not in this context. We have got four of you so do not feel that everybody has to answer every question if it has been answered already otherwise we will be here for an awfully long time. We are a little bit late so if you could make your answers as succinct as possible. Perhaps I could start off by asking Carolyne, do you welcome the debate on a Bill of Rights?
Ms Willow: Yes, we do. We have set out five main reasons for that. First, despite the Human Rights Act and all the international treaties that the UK has helped to draft and has ratified there continues to be grave lack of public awareness and understanding of human rights in the UK, so we see this as an opportunity to assert human rights principles and requirements. Secondly, we believe that children now enjoy a much higher political priority nationally, internationally and across all the main political parties, so we very much hope that something substantial and good comes out of this process for children. Thirdly, given the cross-party support to end child poverty, we very much hope that social and economic rights, which we may come to, will not be dismissed out of hand and will be given serious consideration. Fourthly, there is now a mass of evidence of the UK's human rights failings and in my sector, the children's rights sector, this is very well documented so we feel that there is unprecedented pressure to actually increase the rights that children in particular have. Finally, we hope that this process allows us to revisit questions about what an effective remedy is for vulnerable groups of people like children, so not only the content of a Bill of Rights but also the process. We do have serious reservations, as I am sure you would expect, in relation to any dilution of the UK enforceable rights as they currently stand, the Human Rights Act, but we are very willing to be optimistic at this stage.

Q48 Chairman: Hannah, could I ask you, from the trade union point of view do you think it is a good idea to have a debate?
Ms Reed: The TUC welcomes the debate and, indeed, the Government's Green Paper on *The Governance of Britain* looking again at our constitutional arrangements and opening up a national debate as to whether there should be a Bill of Rights. The TUC's view is that if we do move towards developing a Bill of Rights in the UK there are two bottoms lines. First of all, we believe that the existing European Convention rights are non-negotiable and we would be very concerned about any moves to derogate from existing Convention rights. Perhaps more importantly from the trade union perspective, we hope that the debate on the Bill of Rights gives us an opportunity within Britain to explore the possibility of building on existing Convention rights, particularly increasing the range of collective rights and trade union rights across the UK. Trade union rights to bargain collectively, for trade unions to organise and, indeed, the right to strike are well-established within international human rights principles and laws. We are signatories within the UK to those minimum standards and we welcome the debate on the Bill of Rights as a means of ensuring that individuals and trade unions across the UK are able to access those rights within the UK.

Q49 Chairman: Roger, how do you think the people you represent would benefit from a British Bill of Rights?
Mr Jeary: Firstly, we would have to say from Unite that we share the views Hannah has just expressed about welcoming a debate on this issue, but in terms of a Bill of Rights itself we would be concerned as to what was in fact included within it and the extent of a Bill of Rights before we came to a conclusion that was the answer for our members. We do see a Bill of Rights as potentially providing a mechanism for benefiting our members within Unite to extend the collective rights which currently exist within the UK. As Hannah has referred to, there are many

international standards which the UK Government has signed up to but a number of those, as has been recorded on a number of occasions, the UK Government has failed to provide or deliver and, in fact, has been in breach of those rights. A Bill of Rights for our members would certainly provide the opportunity, provided that a Bill of Rights included collective rights. We would have severe reservations were we to go down the road of a Bill of Rights which did not include collective rights and we would see that as worse than not having a Bill of Rights at all. We think the potential for a Bill of Rights does provide our members with an opportunity to actually address one of the issues which Unite has been hammering on about for the last two or three years and that is creating a level playing field within Europe which we believe currently British workers do not enjoy. We have registered our views on that on a number of occasions with different select committees and government ministers and the disadvantages that brings to British workers when choices are made about closures of factories and outsourcing of jobs, we believe as a result of most of the other Member States, in particular the 12 new accession states to the EU, all of which have included, with the exception of Malta, the issue of collective rights within their constitutions and that is something which we believe would be of great benefit to our members, to share the same level of benefit that gives to workers.

Q50 Baroness Stern: I want to ask you a few questions about the content of a possible Bill of Rights and we have already started this discussion. I would like to start by asking Carolyne, you have already said that you would like a British Bill of Rights to incorporate the UN Convention on the Rights of the Child in order to give better protection to children and I wonder if you could give some practical examples of what difference this would make and why it would be a good thing to do.

Ms Willow: Okay. There are some specific examples where children would benefit right now were the CRC incorporated. Those include the duty on the state to disseminate human rights information, which is a fairly uncontroversial duty, and right to access information. There is an overarching right in the Convention on the Rights of the Child in Article 12 to express views and to have those views given due consideration, so that would apply in all settings and in all decision-making processes. The right of the child to know who their parents are and to give consent to adoption. These are examples that are not currently reflected in domestic law. The right to privacy in civil and criminal proceedings. Article 40 of the Convention on Rights of the Child gives an extremely strong privacy protection to children which is not reflected in domestic law. Appearance in court and custody as a very last resort, that is another example of where the Children's Convention has tailor-made human rights for taking account of children's developing states and particular vulnerabilities. Our current position is that we would want the Convention on the Rights of the Child incorporated in its entirety without the reservations and with the optional protocols and, in addition, we would see there is a strong case for a children's section within a Bill of Rights so they have the incorporated rights within the CRC. This is where the evolution of the Convention on the Rights of the Child has brought us: new thinking and new jurisprudence from the Committee on the Rights of the Child. The children's section could include a range of things, including a duty on all those bodies carrying out a public function to positively uphold the rights of the Convention on the Rights of the Child having particular regard to Articles 2, 3, 6 and 12. These are the four Articles in the Convention on the Rights of the Child that the UN Committee has designated as general principles which run across all the rights in the Convention and they relate to non-discrimination, the child's best interest, the right to life and maximum development and to the child's views, which I mentioned earlier. The right to an effective remedy tailor-made for children. This would be a fairly innovative and new provision, not just for us but internationally. There are currently international debates about a complaints mechanism for the Convention on the Rights of the Child itself. These debates are happening internationally about what a complaints mechanism would look like to really be effective for children. The kinds of things that are being thought of include a duty on bodies carrying out a public function to inform children of their rights and remedies that are available to them; flexible time limits taking into account that it might not be until they are out of a situation that they feel strong and confident enough, or even are aware of their rights, to seek a remedy for past violations, children who come out of prison or long-term residential care, for example; the ability of interested organisations and class actions, which I think colleagues here would be interested in, on behalf of children, availability of Legal Aid, access to independent advocates, and decisions and judgments written in accessible language. You are probably short of time so let me give a couple more substantive examples of what might be in a children's section: a requirement on public authorities making decisions about the best interests of individual children to ensure any decisions take full account of the child's ascertainable wishes and feelings; a duty on the state to provide information on the Bill of Rights and children's rights in the National Curriculum; a duty on the state to provide information to parents at key moments, parents of newborns, entry into the formal education system, maybe at particular moments, a child who has been considered for custody, a child entering long-term residential care and so on. Finally—the list is longer but I am saying "finally" because I do not want to take too much time—the right to family life and to remain in contact with parents and siblings. There is not a specific provision in the Convention on the Rights of the Child in relation to the value and importance of sibling relationships and contact but that is part of children's rights thinking today. You will be aware that the Convention was adopted in 1989, drafted from 1979-89, so expectations and norms around children's rights have changed significantly.

Baroness Stern: Thank you.

Q51 Lord Morris of Handsworth: From what has been said so far and in the submissions, collective rights for both Unite and the TUC are a must-have in any Bill of Rights. Can I ask particularly the TUC, why do you think it is necessary to include collective rights, such as the right to organise, strike and to free collective bargaining, in a British Bill of Rights? Can you give some practical examples of where it would make a real difference?

Ms Reed: Thank you, Lord Morris, for the invitation to respond to that question. I would like to say at the outset that we believe there is much independent research within the UK and internationally which shows the beneficial role which trade unions play within the civic, democratic and social arenas. Trade unions play a very positive role in promoting equality, ensuring dignity within the workplace and encouraging individuals to participate in our democratic processes. However, there is a concern within the UK that due to the failure of our law to recognise the fundamental human rights of trade unions and of our members, the ability of trade unions to fully participate is being constrained. We recognise that the European Convention which is implemented into UK law through the Human Rights Act does protect the rights to freedom of association, however Article 11 is very limited and effectively only gives rights to individuals to join trade unions or, indeed, to choose not to join trade unions. It does not include the fuller rights for individuals to be represented by their trade unions collectively in workplaces, to bargain collectively or, indeed, to organise collective action. The conclusions of international agencies, such as the ILO Committee of Experts and, indeed, the supervisory bodies of the European Social Charter, have repeatedly found over the last ten years that UK law breaches the rights of trade unions and breaches the rights of individual members of trade unions. What practical difference would incorporating ILO Conventions, such as ILO Conventions 97 and 98, or, indeed, Article 5 and Article 6 of the European Social Charter make within the UK. First of all, it would ensure that all individuals would have the right to be represented by their trade union collectively in a workplace. Just this year the ILO Committee of Experts raised concerns about the threshold for small firms, which excludes individuals working in small firms employing fewer than 20 individuals, to access statutory recognition rights within the UK. Secondly, in guaranteeing these rights it would also ensure that individuals who participate in lawful industrial action are adequately protected from victimisation and dismissal. Thirdly, as was indeed highlighted in the recent *ASLEF* case before the European Court of Human Rights, by enshrining these collective rights within UK law it would ensure that trade unions' rights to autonomy, to set their own rulebooks, to determine how they operate, was reinstated. Unlike most other voluntary sector organisations within the UK, the unions are severely restricted in how we govern ourselves, how we determine who can be in our membership and who should not, and how we operate our democratic processes. We would like to see basic human rights confirming the rights of trade unions' own autonomy reinstated within UK law.

Q52 Lord Morris of Handsworth: You have made reference to Article 11 of the European Convention on Human Rights dealing with freedom of association. Can you say whether you think the protection for collective rights is adequate or not? You have touched on it and I am not sure what the message is.

Ms Reed: The TUC very much welcomes the slightly more expansive interpretation undertaken by the European Court of Human Rights in recent years on Article 11 but, as I have already said, there are concerns that the rights of freedom of association included within Article 11 are very limited. Basically it only gives rights to individuals to join trade unions, to be members of trade unions or, indeed, as we now know post the closed shop, to opt out of being in a trade union. Article 11 does not cover the fuller employment rights recognised by the ILO and the European Social Charter, rights to bargain collectively and, indeed, rights for unions to organise. We would very much welcome advances in UK law to guarantee these fundamental human rights for trade unions and for individual members.

Q53 Lord Morris of Handsworth: Thank you. My last question is primarily one for Unite based on what we understand Unite's position to be. Your comment says that: "A Bill of Rights that favours property and trade rights over collective or individual rights is worse for those who live in Britain than no Bill of Rights". Why do you think it would be better not to have a Bill of Rights than to have a Bill of Rights which excludes collective rights?

Mr Jeary: I think the answer to that, Lord Morris, is very simple. If you introduce a Bill of Rights in the UK and Britain you are establishing a set of rights which are fundamental to the citizens and human beings who live within the borders of this country. If by excluding, or not including, collective rights you are, in fact, diminishing the value of those collective rights still further, because people will see that as being not something which this country believes is a basic right of the people living in this country, that would seriously undermine our ability to take forward some of the issues that Hannah has referred to when we talk about freedom of association and the need for that. Freedom of association in itself for trade unions is worthless if it does not come with the collective right to recognition, the collective right to bargain on behalf of its members and the collective right to take action where necessary to defend the rights of its members. It is those collective rights which we see as being essential to redress the balance of power for the individual. Collective rights, and we make reference to this in our written submission, was looked at very carefully by the Supreme Court of Canada where they said: "Recognising that workers have the right to bargain collectively as part

of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the Canadian Charter for Rights". There is a clear linkage between expressing very clear collective rights with the individual as well.

Q54 Lord Morris of Handsworth: I recognise the interest that you promote, and that is quite legitimate, but a Bill of Rights would benefit the millions of citizens of the United Kingdom and some of those citizens would not have the collective rights because they are not subjected to, if you like, collective bargaining. Are you saying that it would be better for the rights that a Bill of Rights would confer on millions of people not to be conferred if collective rights is absent from the provision?
Mr Jeary: First, let us look at the right to collectively bargain. Millions of workers are excluded from that right at present because of UK legislation because they work for smaller firms and the redistribution of jobs that we have seen over recent years has increased the number of smaller employers quite significantly. Already people there are being excluded from their rights. Surely the point of having a Bill of Rights is to provide the sort of human rights that we would expect to see in any civilised nation state. That must include, in our view, the collective rights, and to exclude the collective rights from a Bill of Rights, as I have said, would in effect diminish collective rights to be of no real importance and, whether they be members of trade unions or not and, therefore, choose to participate in the collective right process, millions of individuals benefit from the collective rights process, first because they happen to work in places where collective rights exist and which are pursued and they benefit from them whether they are members or not, but, second, generally it is recognised by the research and actions of trade unions that trade unions do indeed bring, not only to the workplace but the community at large, a great deal in terms of the benefit of rights of individuals, not just to the workplace but through the social campaigns that collectively we are able to organise if we have those rights. I think the exclusion of those rights would be to the detriment of the nation as a whole and that is why we say quite clearly that if a Bill of Rights is to be introduced which does not include collective rights then we would rather not have a Bill of Rights at all.

Q55 Dr Harris: While the trade unions have the floor, I would like to ask whether you have any views on the language the Government uses, presumably with policy intent, of having a Bill of Rights that is not just a Bill of Rights but a Bill of Rights and Responsibilities, implying some onus on the individual or at least the citizen. Do you have any views on that?
Mr Jeary: I think we clearly accept that if you have rights then you have responsibilities as well. Whether a Bill of Rights is the right place to enunciate those responsibilities we have some concerns because that could lead to undermining the individual rights by making them conditional upon exercising certain responsibilities.

Q56 Dr Harris: Why do you say where you have rights you have responsibilities? A one-year old child probably has rights, I think you would accept that, but what responsibilities would you impose on a child?
Mr Jeary: Personally, I would not.

Q57 Dr Harris: You just said that—
Mr Jeary: I am talking in general terms. Where there are rights in general terms then they very often are accompanied by some responsibility. If I take the right of freedom of speech we would see there is a responsibility to use that freedom carefully and without inflaming any hatred of any sort whatsoever. That is a responsibility.

Q58 Dr Harris: I would like to explore that because it sounds great, but let us say there was a Nazi somewhere and I wanted to incite hatred against Nazis because I feel quite strongly about that and I use inflammatory language to do that, should I not be entitled to do that or should my right to free speech be constrained by your view of what should be polite in that circumstance?
Mr Jeary: What I am really saying is that the responsibilities that individual humans have within a nation state are more than adequately covered by other legislation than to be included within a Bill of Rights. Quite clearly when we talk about the issues about political speeches and the right of people to express views of a political nature, for example, that is a fundamental right, but not where it incites hatred of one part of the community or another.

Q59 Dr Harris: Even when it is lawful to do that, because we have laws, do we not?
Mr Jeary: We do, and that is what we are saying in terms of the responsibility issues, that there are adequate laws or adequate means to establish criminal and civil law to ensure that individuals exercise their responsibilities in a manner which is acceptable.

Q60 Dr Harris: Are you not just saying, and I do not mean to paraphrase you wrongly, that the responsibility is the responsibility to stay within the law, not a wider responsibility and, therefore, it is essentially otiose because it is self-evident that you have a responsibility to stay within the law or face the consequences, or would you say it is more than staying within the law?
Mr Jeary: We are saying exactly that, that it is the responsibility of individuals to stay within the law and the exercise of that responsibility is covered by criminal and civil law.

Q61 Dr Harris: Do you have anything to add?
Ms Reed: Our understanding of a Bill of Rights is a statement of human rights and we would have an understanding that human rights apply to all human beings and, therefore, would have some concern

about entitlement to human rights being contingent upon compliance with certain responsibilities. However, it is important to note that the debate that has taken place so far around the Bill of Rights and responsibilities is not necessarily very clearly defined. As a membership organisation with the TUC we are continuing to develop our policy on a Bill of Rights and as the Government publishes any future consultation documents and maybe spells out in greater detail what is meant by responsibilities in this context then we will, of course, engage in that wider debate.

Q62 Dr Harris: Carolyne, your written evidence gives quite a lengthy view about your concerns about this. Without repeating what is in there, because we already have that, do you want to add to your concerns where you say that linking rights and responsibilities is especially dangerous for children?
Ms Willow: Yes. It is especially dangerous to children but it is not a new debate for us in the children's rights movement because almost as soon as the notion of children being rights holders established international pressure and force then politicians and others started to discuss and put on the table the notion of children also having responsibilities. Just to reiterate: a Bill of Rights tends to be a statement of accepted human rights and human rights are not contingent on behaviour. We can see through the playing out of antisocial behaviour legislation, for example, that even if a parent says, "If you do this, you lose these rights", that is not intentionally defined to hit hard on children but in reality because of their stage of development and particular vulnerability it can disproportionately impact them both in the numbers of children affected and the injurious harm on children. This is why children have their own Human Rights Treaty, the international community have recognised the preciousness of that period of life both in terms that it is very easy to harm development but equally we have the best of chances to really help the positive development and growth of human beings.

Q63 Dr Harris: The Government in some of its speeches has talked about, at least for citizens, that with rights comes duties and it has got a bit more flexibility when it comes to citizens because one always has extra rights as citizens, such as to vote, for example. How do you feel, particularly for children? Do you think there is a distinction between children being thought of as citizens if, for example, there was a citizenship ceremony for 18-year olds to participate in and do you think that would have an impact on the status of sub-18 year olds who have not gone through that ceremony?
Ms Willow: It would have an impact on the one-year old that you referred to. The idea that human beings become full members of society at the age of 18 and that ought to be marked with a ceremony immediately raises questions about all the other human beings who are below the age of 18. We have consistently urged caution about the idea of citizenship ceremonies. Whatever individuals or families want to do in their own private lives to mark the passing of particular ages and the acquisition of additional legal rights and responsibilities, we believe that should be left to individuals and families to determine.

Q64 Dr Harris: Would you object to a coming of age ceremony which was state-sponsored and made compulsory which did not imply citizenship implications but just celebrated or recognised the additional rights that people attain at the age of 18?
Ms Willow: We cannot see the arguments for it in terms of the benefits for the individuals and for children *per se*. Our focus is on having political commitment and will and legal enforceability for the rights that are there in the international Human Rights Treaty for Children. It is not evident to us from the Green Paper what the gains or the benefits for individual children or for children collectively are meant to be.

Q65 Mr Sharma: Can I go to the Prime Minister's famous speech on 6 June to the GMB when he said that it is time to train "British workers for British jobs". What is your view of the human rights implications of the Prime Minister's wish to train "British Workers for British jobs"?
Mr Jeary: First, it is not for me to interpret what the Prime Minister meant by that phrase. From a Unite perspective, what we are concerned about is a Bill of Rights is about human rights regardless of someone's citizenship or nationality. If somebody is living in the jurisdiction of a Bill of Rights then they should be able to access those rights and be treated with the dignity that those rights give to people. I take the point you are making, but I suspect perhaps the Prime Minister might choose his words differently if he was given a second chance because it is open to misinterpretation and I am sure he did not mean it in the way that some mischievously interpreted it. Nevertheless, from our point of view we are quite clear that a Bill of Rights is about human rights, it is about everybody living within the area that the Bill of Rights covers and that has got nothing to do with being necessarily British, it is to do with living in the United Kingdom.
Ms Reed: The TUC would certainly share those views. Indeed, we would recognise that many of the individuals in the UK who are perhaps in greatest need of protection under any potential Bill of Rights are asylum seekers and refugees and, indeed, some migrant workers and, therefore, as Roger has already said, our understanding of a Bill of Rights is a Bill of Rights setting out human rights and qualifications for human rights should be the fact that you are a human being.

Q66 Chairman: Earlier on you mentioned the socio-economic rights, how detailed do you think the rights should be?
Ms Willow: The Convention on the Rights of the Child, as I am sure you are aware, has very broad requirements in relation to social and economic rights. Our proposal is to incorporate them as they stand, which other countries have done, notably

Norway most recently, and then it would be for the courts to determine and interpret the applicability of those rights. We believe that we should not skip from the first generation rights, civil and political rights, straight on to third generation rights, to issues around the environment and so on, without giving proper and serious consideration to social and economic rights. The indivisibility of civil and political and social and economic rights is well-established. The Committee itself in its 2004 report on the international covenant emphasised that nearly a third of Council of Europe Member States have accepted the complaints mechanism for the European Social Charter which indicates growing acceptability, at least among Council of Europe States, and in Central and Eastern European States their revised constitutions have often incorporated social and economic rights. At this point in time we think the debate should be open on social and economic rights for all, although we do think there is a particular strength in the argument around children given the cross-party support to end child poverty. If it is ended by 2020 as the three main political parties want, then what happens in 2021, 2022 and so on? Particularly with this Prime Minister who has made the eradication of child poverty not just a national priority but an international priority it absolutely makes sense at this point in time that that is given serious consideration. I was going to answer some of the arguments against but maybe I should wait for you to give me the arguments against.

Q67 Chairman: Roger, what is your view on social and economic rights? Do you think we should have them? How detailed do you think they should be? Carolyne earlier on indicated that she felt there should be a separate section for children in a Bill of Rights, do you think there should be a separate section in a Bill of Rights for trade unions?
Mr Jeary: I will come to that final point in a moment. On the question of economic and social rights, the whole issue of a Bill of Rights is still very much a matter of debate within Unite and within the trade union movement as a whole as to what should be included and what should not. Were it to be decided through debate that there should be the inclusion of such rights as are included in the South African constitution, the right to adequate housing, the right to healthcare, the right to basic education, these are all very much in line with Unite's policies and ones which we would be quite happy to support. A reservation that we might have at this moment in time is the interpretation in law of these rights and how they would be interpreted in law and that is something which through the detailed consultation mechanism which this type of legislation requires would have to be looked at very, very closely before we decided exactly how we might include what all of us in this room, hopefully, would agree are basic human rights. On the issue of whether we should have a separate entity for trade unions, again it is something we have not considered specifically as to whether that should be the case. If the arguments that we have put forward are adhered to in terms of collective rights, some of that clearly reflects very heavily on trade unions rather than other bodies, but the collective rights that we demand in many respects are similar to collective rights that other organisations would want to have in representing the people who belong to their organisations. I am not sure that it is absolutely necessary to have a separate section on trade union rights within this. Again, as I say, this is us evolving our own ideas and policies as we go along and the important thing is to ensure that there is widespread consultation on these aspects of any proposed Bill of Rights.

Q68 Chairman: One of the key issues is justiciability, which is the one you have just touched on, and I will ask Hannah about this because, on the one hand, the Prime Minister when I put it to him was very concerned about justiciability, and I raised that with him at the Liaison Committee at the end of last year, and, on the other hand, in South Africa they seem to have found a reasonable balance as to the right way to do it if you look at what the Constitutional Court in South Africa has been able to achieve. What are the TUC's views on justiciability?
Ms Reed: May I start off by saying, if you will give me the time, that the TUC is still having ongoing consultations internally about the content of a Bill of Rights and, therefore, on the scope of which economic or social rights should be included within any future Bill of Rights. As we have already stated, we do believe that there are certain collective rights which may well be defined as social and economic rights which, if there is a Bill of Rights, should be included in a Bill of Rights. Regarding justiciability, first of all as regards collective rights relating to trade unions, we do not believe there is a problem of justiciability in terms of rights to bargain collectively or rights of trade unions to organise. The jurisprudence of bodies such as the ILO and the Council of Europe already demonstrate that those are substantially procedural rights which can be accessed and determined through the courts. We do recognise if you go beyond those rights into other areas of social and economic rights there may be other issues of justiciability which come to the fore but, as Roger has already highlighted and as you have raised, other accession states within Europe and, indeed, South Africa have a very comprehensive Bill of Rights which do include social and economic rights and different legal systems have found ways of adjudicating on such matters. The TUC at this stage is still consulting our affiliates as to which rights, if any other social and economic rights, should be included within a Bill of Rights debate. We will happily return to this issue, including justiciability, at a future point.

Q69 Chairman: Carolyne, you raised the issue of justiciability, is there anything you would like to add briefly?
Ms Willow: The principle that the courts should be able to interfere in policy making and in relation to children especially has already been established in terms of the Human Rights Act. If there were to be a very broad public debate and consultation on what

ought to be in a Bill of Rights we are absolutely certain that economic and social rights would be high up on people's agendas and if we were to ask for the characteristics and features of what is important to British values and living here in Britain, everybody having a minimum income guaranteed, an adequate standard of living, and for that to be enforceable is the other—

Q70 Earl of Onslow: What happens if you do not have a minimum income and the money is not there, how do you enforce it?
Ms Willow: Well, we are the fourth richest country—

Q71 Earl of Onslow: That was not my question. How do you enforce it? Surely that is a policy objective rather than a Bill of Rights objective.
Ms Willow: If it was a challenge with a victim rather than a challenge on a piece of legislation that contravened the Bill of Rights then there would be redress and remedy for that individual. If it was a challenge on a piece of legislation that allegedly contravened what was in the Bill of Rights then presumably there would be a process like we currently have with the Human Rights Act, the Declaration of Incompatibility and so on.

Q72 Earl of Onslow: Surely standards of living and how rich a country is, is not something which is amenable to a Bill of Rights.
Ms Willow: It is relevant because—

Q73 Earl of Onslow: If you do not have the money or the wealth to do something, if an Act says you have to have it and it is not there, there is nothing the Act can do about it.
Ms Willow: I use it as a comparison because debates around economic and social rights in this country are often predicated with, "Well, what about the resource implications?" and it is absolutely relevant that we are an extremely rich country.

Q74 Earl of Onslow: I understand all of that but you cannot legislate for water to go uphill. You cannot do that, it does not work. That is all I am saying.
Ms Willow: These minimum standards are already established in Human Rights treaties and instruments that we have ratified. The law of treaties requires that governments that ratify human rights instruments implement them, so there is already a legal and moral obligation on states like the UK to be implementing economic and social rights.

Q75 Chairman: Would you see them qualified in the same way as the South African constitution, for example, in relation to the availability of resources and future growth of the economy and so on?
Ms Willow: Like my colleagues here, we are evolving our policy. At this present time our position is that we want full incorporation and there are no get-out provisions within the Convention on the Rights of the Child in relation to resources, in relation to an adequate standard of living, access to health and healthcare services, for example. This is the start of the debate. We have looked at the South African constitution and have seen that is one obvious option that the UK could take.

Q76 Lord Dubs: Could we turn briefly to the process of how we get there. In other words, how would you like to see the public and, indeed, if I can call trade unions civil society groups, civil society groups involved in formulating a British Bill of Rights? How do we ensure that the ownership is there for your members?
Mr Jeary: To start with is the need to have the widest possible consultation and the mechanism for that has to be very seriously considered by government. This is such an important area of constitutional law that simply going through the motions of having a website with the opportunity for people to express a view is not good enough, quite frankly. It may be part of the mechanism to engage the wider population but what we would want to see is a properly structured debate which enables representative groups as well as individuals to ensure that a full debate on all the issues, some of which we have touched on today and many more which we have not, are given a full and frank airing and that is open not only to trade unions but all other organisations, collective organisations, alongside the individual right to make representations. Maybe that could be through some form of commission which would provide that opportunity to have detailed evidence presented to it.

Q77 Lord Dubs: As far as children are concerned, is there any way in which you would envisage children and young people being involved in such a process?
Ms Willow: Absolutely. It is absolutely essential. We believe that the Equality and Human Rights Commission could take a strong lead here. We think the debate needs to be above party politics to engender trust, openness and the active engagement we are led to believe is wanted. The Children's Commissioners in England, Wales and Scotland could be part of the process because of their good links with children and expertise in producing materials and going out and engaging with children. As a starting point we would want information to the public to set out the bottom lines as they currently stand. We do not think it would be beneficial for the discussion we had right at the beginning to present this as a blank sheet of paper, we want people, and within that children, to be informed of the human rights obligations that the UK currently has accepted and is required to implement as a starting point. That has to be where we travel from. There has to be human rights education as part of this process because it has not happened before.

Q78 Lord Dubs: My last question is this: I think you would accept that there is a certain amount of media and political hostility in this country as regards human rights legislation, the press and some of the papers are not very sympathetic and so on. Do you think that a full public debate of the sort we have just been discussing, and to which you have given your

backing, would lead to enhanced protection for human rights within a Bill of Rights? Would the outcome be positive or is it liable to exacerbate the opposition?

Mr Jeary: I think a lot depends on how informed the debate is that takes place. There is always a danger in the sort of open debate that we are advocating that it is taken over by vested interests which perhaps are not interested in the broader concept of a Bill of Rights and would see it as an opportunity to attack, as others have already, the effect of the limited Human Rights Act provision that we have in this country currently. I do not think that is a reason not to have the debate. I do think there is a need for this debate and we have got to give the opportunity to responsible people to come forward and take forward, as Carolyne has just said, where we go from where we are. The one thing we have made absolutely clear is the one thing a Bill of Rights should not be doing in any way is undermining those human rights that exist already in this country.

Q79 Mr Sharma: Carolyne, you would like to see an entrenched Bill of Rights, not easily capable of being amended, but you also see a need to "review and evolve the Bill in recognition of the organic nature of human rights". How would this work?

Ms Willow: We see that there seems to be a growing consensus that any amendment to a Bill of Rights ought to be supported by two-thirds in each House of Parliament. In our opening position of not only the Convention on the Rights of the Child but all the international treaties that the UK has ratified to be incorporated as part of the Bill of Rights we would see that there could be some provision within that to take into account where treaties and the option of protocols are added, for example, and the interpretations of the human rights monitoring bodies.

Q80 Chairman: Thank you very much. Does anybody want to add anything to what you have had to say?

Ms Willow: Can I just add a point in terms of the public debate and the media hostility. Now would be the time for political leaders to stand shoulder to shoulder in terms of strong and clear commitment to human rights in terms of trying to tackle and get over some of the inbuilt conservatism within the British media. Also I would say that the media hostility for children and other vulnerable groups is not uniformly hostile and there are ways in, there are areas around human rights that the public and the media are not aware of and when they become aware they share the same level of shock and disbelief and intolerance that those of us working in human rights have. I do not think we should automatically assume that the media is fully informed and has taken a fully informed position on human rights, they can be lacking in information and understanding just like the rest of us.

Chairman: Thank you very much.

Monday 28 January 2008

Members present:

Mr Andrew Dismore

Dubs, L.
Morris of Handsworth, L.
Onslow, E.
Stern, B.

John Austin
Dr Evan Harris

Witnesses: **Professor Chris Sidoti**, Bill of Rights Forum for Northern Ireland, and **Professor Brice Dickson**, formerly Chief Commissioner of the Northern Ireland Human Rights Commission, now Professor of International and Comparative Law at Queen's University, Belfast, examined.

Q81 Chairman: Good afternoon, everybody. This is another session of our evidence in public on our inquiry into the British Bill of Rights. Can I welcome Professor Chris Sidoti and Professor Brice Dickson to the inquiry. Do you want to make any opening remarks or shall we go straight into the questions?
Professor Dickson: I have no opening remarks, Chairman.
Professor Sidoti: Similarly, Chairman, I am happy to go straight to the questions.

Q82 Chairman: As a starting point, Professor Dickson, perhaps you could tell us what you think are the main lessons that can be learned from Northern Ireland's experience of developing a Bill of Rights.
Professor Dickson: The key lesson I would say, Chairman, is the importance of being inclusive in the consultation process. The experience of the Human Rights Commission to date has been that getting out and about in Northern Ireland and talking to a very wide variety of groups and people, including groups and people who are otherwise difficult to reach, is really crucial because that way you get a real sense of what people on the ground want. Obviously, you have to talk to political representatives and NGOs as well but talking to ordinary people, so-called, on the ground has been immensely influential. As well as getting their initial suggestions as to what should be in a Bill of Rights, going back to them with practical proposals as to what should be in a Bill of Rights has also been very important. Using all of that as firm evidence, as was the case in Northern Ireland where there is a real demand for a Bill of Rights, helps to put pressure on the politicians and makes it more difficult for the politicians to gainsay the need for a Bill of Rights. It is unfortunate, I think, that, up to now anyway, the politicians have not been able to reach consensus on what should be in a Bill of Rights for Northern Ireland, but getting the views of Joe and Mary Public has, I think, been extremely important.

Q83 Chairman: Do you think it is ever possible to get consensus on these issues, bearing in mind that there can be quite different positions?
Professor Dickson: About consensus among the politicians, do you mean?

Q84 Chairman: Yes.
Professor Dickson: Yes, I am hopeful, and Chris will be more able to talk about that than I am because he is talking to the local politicians these days in a way that I am not. Yes, given the impetus of the formation of the new Assembly in Northern Ireland last May and given the apparent desire on the part of the main parties there to make matters work in Northern Ireland, I think it is distinctly possible that consensus on a Bill of Rights can be reached.

Q85 Chairman: Chris, do you think that is right?
Professor Sidoti: I think it is right but it is a challenge. It is certainly a great challenge in any society, more perhaps challenging for you, I suspect, than it may be for the politicians in Northern Ireland. Most Bills of Rights are developed following periods of some kind of either national trauma or national re-establishment. It is fairly rare to have the kind of process that you are engaged in where a society stops and looks and says, "Well, this is what we see our future as being", unless pushed to that by some external event. I think that in Northern Ireland there are external events. Whether we can bring everybody to a common position at the end, of course, is the great challenge that we face, but at least we have that impetus and I think what is happening here at the Westminster level is very good, that, even without that kind of impetus, you are able to stop and look and discuss the future.

Q86 Chairman: In Northern Ireland has there been any consideration of social and economic rights?
Professor Sidoti: There certainly has.

Q87 Chairman: Is there consensus emerging around that?
Professor Sidoti: Not at this stage but it may come. From my perspective I think that, if you are talking about a Bill of Rights which is an accurate reflection of where human rights law is internationally now, you need to talk about economic and social rights. It is a critical part of the broad perspective of international human rights law. That is not to jump to any conclusions about the way in which economic, social and cultural rights can be incorporated. We have seen many models of that and I must say I get exceptionally irritated at the ignorance of those who say that the only way to recognise economic and social rights is to hand over

power to the judges. That is not the way things necessarily need to work. I use the word "ignorance" quite deliberately because it is ignorance about the nature of Bills of Rights. In Northern Ireland we see some of that ignorance, particularly at the level of the media where you would expect it, but unfortunately sometimes from some of the political leaders as well who do not stop and look at what international practice is.

Q88 Chairman: And horizontal rights?
Professor Sidoti: Human rights in international law are primarily responsibilities of governments, that is, individuals, except in the area of international criminal law (which is expanding), are not normally held to account in human rights terms. But simply because internationally it is the responsibility of governments, nationally it is appropriate to look at the ways in which individuals are held responsible.

Q89 Chairman: Is this repeated in Northern Ireland?
Professor Sidoti: It certainly is one of the issues in Northern Ireland about what the scope of the Bill of Rights may be.

Q90 Chairman: We have three questions along those lines—third generation rights and environmental and social rights. Do those reach the discussions?
Professor Sidoti: The environmental issue is coming up. We have in our Forum a number of working groups, one of which is dealing with economic and social rights, and that group is discussing questions of environmental rights.
Professor Dickson: All the evidence from opinion polls in Northern Ireland, three of which were conducted by the Human Rights Commission in 1999, 2002 and 2004, showed that there is a great deal of support, 70 to 80 per cent, across both communities for the protection of economic and social rights and third generation rights.

Q91 John Austin: Professor Sidoti, you accused those who argued that inclusion of economic and social rights meant handing things over to the judges of ignorance. When we were in South Africa there were some who made that suggestion, not from a position of ignorance but from the reality of some specific cases. It may be that they had a vested interest but they were saying that decisions were in fact being taken by judges which were overtly political decisions.
Professor Sidoti: I accept what you say in terms of the description of what happens there but I would not say it was necessarily overtly political. It depends upon the drafting of the law. That would be my response. If the law says that judges have a role then they do have a role. If the law provides for other processes, one process can be, for example, that a Bill of Rights recognises the fact that there are binding international obligations in relation to a particular right and places the responsibility on the parliament or parliamentary committees to ensure implementation of the right. In many areas like this a Bill of Rights has much more to do with the relationship between the executive and the legislature than the relationship between the legislature and the judiciary.

Q92 Chairman: If we were to look at Northern Ireland's process do you think that could be used as a model for the way in which we should go about developing the British Bill of Rights?
Professor Sidoti: I think that each model is different, and so I would not answer that question with either a yes or a no. It depends upon the particular circumstances. In Northern Ireland the process has involved an initial starting point in the Agreement of 1998, and then a very broad public consultation undertaken by the Commission when Brice was Chief Commissioner in Northern Ireland. The process that we are engaged now in our Forum is much more a political process, attempting to negotiate common positions. I certainly see each of those items as important. It is essential that there be a process of public consultation and public engagement for precisely the reasons that Brice has outlined. Whether that should be undertaken here by the new Commission or whether it should be undertaken by the Government or a parliamentary committee I think is a very open question. Certainly the ingredients of the approach taken in Northern Ireland need to be part of an approach taken here through the Westminster process. That should involve consultation, it must involve negotiation, it must involve public documents where people have an opportunity to respond, and it must involve as well a process of sheer information provision and awareness raising. Bills of Rights and the way in which they work are very new in common law systems in many cases, including in my own system in Australia. Canada and India, as common law countries, have much longer traditions of dealing with human rights in these ways, but in some of our common law systems a process of public information and awareness raising is an essential part of the process of considering a Bill of Rights.

Q93 Chairman: Should we wait for you to finish before we start?
Professor Sidoti: I think that what we are doing—I hope that what we are doing—can be very helpful for your process. I think though that there is no necessity in terms of one waiting for the other. We are hearing from some in Northern Ireland who say that we should put our process on hold until you have finished yours. I think we are talking here about parallel processes. The Northern Ireland process began a long time ago, in 1998, and I certainly do not think that Northern Ireland can afford to have its process delayed until the process has been considered here through this committee and elsewhere and is completed. Of necessity, given that the process here has started later, our process will have gone a long way while here there is first the Green Paper preparation through which the consultation takes part. So I would hope that simply because of different kinds of timetables what we are

doing in Northern Ireland will be of great assistance to what is being done elsewhere in the United Kingdom.

Q94 Chairman: Brice, do you want to come in?
Professor Dickson: I would just agree with what Chris has said and add that what is true, I think, is that the current talk of a British Bill of Rights is at the very least complicating the process in Northern Ireland, and I gather that there is now talk of a UK Bill of Rights as opposed to a British Bill of Rights, and you can appreciate, I imagine, that the use of those terms is itself a complicating factor in Northern Ireland where there are certain politicians who identify with the British way of doing things.

Q95 Earl of Onslow: This was exactly the point I was going to raise. You cannot surely in one country have different Bills of Rights for different parts of that country.
Professor Sidoti: Why not? My country does.

Q96 Earl of Onslow: I am afraid, sir, that I think you would then have a competition between the Victoria Bill of Rights and the New South Wales Bill of Rights. Are they the same document?
Professor Sidoti: No, they are different documents. New South Wales at this point does not have one but Victoria does and the Australian Capital Territory does and Western Australia and Tasmania.

Q97 Earl of Onslow: But there is not an Australian Bill of Rights?
Professor Sidoti: No, but that is on the agenda now for our new Government.

Q98 Earl of Onslow: But then if you do have an Australian Bill of Rights you cannot, I would have thought, by its very nature, have a Canberra one, a Melbourne one, a New South Wales one. After all, a Bill of Rights applies to all the states in the United States. The constitutional amendments which form the Bill of Rights apply to all the states in the United States.
Professor Sidoti: Again, like any law, it depends upon what the law says. In Australia we have a federal system where responsibilities are different at different levels and so it is appropriate to have different laws. You are moving into a system of devolution where you have different laws already applying in different parts of the United Kingdom.

Q99 Earl of Onslow: So are you telling me a Bill of Rights is a constitutional document; it is a document which at least says, or should say, "You will have trial by jury, et cetera"? You cannot have, at least in my view, different Bills of Rights in different territories.
Professor Sidoti: You could.
Earl of Onslow: Well, you could, but it would—

Q100 Chairman: Scotland has a completely different attitude to jury trial, for example.
Professor Sidoti: Yes, I know.

Q101 Chairman: So that is an example of how it could be different. Sorry; we are debating amongst ourselves now, but if we take healthcare, for example, healthcare is devolved to the different administrations and if you are talking about social and economic rights some part of the United Kingdom might decide that they wanted to have healthcare as part of the social and economic rights and other parts might not.
Professor Dickson: As is the case in Canada, where there is a federal charter, but also most of the provinces of Canada have their own Bills of Rights governing issues that are devolved to them.

Q102 Lord Dubs: You may have dealt with most of my first question but is there anything else about the process in Northern Ireland that you want to mention? You have talked about a lot of it already.
Professor Dickson: I perhaps would emphasise the need to have regard to the international standards on human rights. Certainly the Human Rights Commission found in its work that having regard to those international obligations which the UK Government has already signed up to was immensely helpful, and indeed in the drafts that we produced of the Bill of Rights we ended up incorporating by reference documents like the UN Convention on the Rights of the Child or the European Framework Convention for National Minorities because we thought they summed up very well what needed to be done on the ground in Northern Ireland and incorporating by reference is a shorthand and easy way of protecting rights without over-lengthening your document.

Q103 Lord Dubs: If you looked at it overall in Northern Ireland what would you say are the advantages and disadvantages of the process that you have gone through?
Professor Dickson: The disadvantages are that it is quite time-consuming and quite expensive, although the Human Rights Commission has never received the funding it really needed for this type of work. You risk creating divisions between people because these issues are extremely controversial. On the other hand, the advantages to my mind outweigh the disadvantages in that you get everything out into the open. You make it clear to people that any fears they might have about the protection of rights are misplaced and that nobody has anything to be scared of with a Bill of Rights. A Bill of Rights can only help society. It cannot disadvantage society.

Q104 Lord Dubs: Is that your view, Professor Sidoti?
Professor Sidoti: Yes, it is my view. I would add though one other part, and that is the importance of having these kinds of fundamental issues debated not only in the community but also amongst some of the political leadership and, in the case of the Forum, across political and civil society. It is difficult at times to find forums where these issues can be debated and they are fundamental issues. Much of politics, much of the work of community

organisations as well, is tied up with day-to-day pressures, whatever is the crisis of the day that dominates the media, whatever are the demands of people who are seeking social welfare assistance. The opportunity to stand back and discuss seriously what are the fundamental natures of our relationships and where we as a society want to go are very limited and I think that the Bill of Rights debate has given rise to those opportunities in ways that would not otherwise have occurred.

Q105 Lord Dubs: You have had ten years of this. It seems to me a killingly long time for you. Do you think you should have had a time limit at the outset or something else to stop this ten years, or is this inevitable?
Professor Sidoti: Maybe I should jump in first this time, and I do so because I think that Brice's Commission had great difficulties. In large part the length of time that has been taken in Northern Ireland from my perspective as an outsider is that, because the Bill of Rights debate was so intimately connected with the broader political process there, when that process ground into the sand in about 2003/2004 so did the Bill of Rights discussion with it. The ten years that things have taken in Northern Ireland are very much a result of the broader political problems of Northern Ireland, and now we do have a deadline. I was appointed from the beginning of April last year. We are due to report by 31 March this year, so those kinds of time limits have now been imposed, but I think the long period that was taken is very much a product of the broader political situation there. At the same time proper consultation, getting people to be able to understand first and then seriously discuss such complex and important issues, does need some time, but not necessarily a decade.
Professor Dickson: That is right. The Commission, when it first launched its campaign for a Bill of Rights in March 2000, thought that it would take between 18 months and two years. The Commission did succeed in producing its draft Bill of Rights within the 18 months deadline in September 2001, but that provoked such controversy amongst the politicians and others in Northern Ireland that the whole process got elongated. It has taken much longer than I myself had hoped. At the end of the day there is only a certain limited number of options in this whole field and decisions need to be taken by those who have the political responsibility for taking them.

Q106 Lord Dubs: One of you said earlier that there was inadequate funding for the whole process. I think it was you, Professor Dickson.
Professor Dickson: That was clearly the case with the Human Rights Commission, which had to beg the Government to give it more money, which was forthcoming to the tune, I think, of about £350,000 in 2001/2002. I would estimate that probably less than one million pounds has been spent on the Bill of Rights in the last ten years in Northern Ireland.

Q107 Lord Dubs: I think you both have said that the process was very political in Northern Ireland. Do you think it is inevitable that the process was as politicised as it was or would your advice to us be that there are different ways of doing it, or was that unique to Northern Ireland?
Professor Dickson: I think the process is inevitably going to be political in any society, but in Northern Ireland, obviously, there was an extra dimension to the political nature of the controversy, not least because the Good Friday Agreement seems to suggest that whatever Bill of Rights is put in place for Northern Ireland (if one is put in place) there has to be a reciprocal protection of rights in the Republic of Ireland, and there are particular rights which, let us say, the Nationalists or the Unionists in Northern Ireland would be campaigning for, which inevitably provokes opposition from the other side, so there was that extra level of politicisation of the process in Northern Ireland.

Q108 Lord Dubs: Professor Sidoti, has that difficulty now been overcome?
Professor Sidoti: No, it has not, but I do not think it will ever be overcome. At a more general level, human rights are of their nature political. They are about the relationship between the governors and the governed and there is no more essentially political issue than that. There are particular political questions in Northern Ireland relating to the relationship with Westminster and the relationship with the South and so forth. In every society there will be particular political issues that have to be addressed but there is no avoiding the discussion of the political when you are discussing human rights.

Q109 Chairman: Can I just ask you about these political differences? When you are talking about political differences in Northern Ireland are you talking about political differences effectively between the Protestant and Catholic communities and their representatives or are you talking about political differences as we would recognise them between the left and right of politics, for example, on social and economic rights?
Professor Sidoti: Yes, and that is the nature of it. The politics of any community are enormously complex. In Northern Ireland it is almost as though past politics of political parties based around particular communities were an artificial political factor. When you look at what we would normally consider to be normal politics in society, where mainly there are debates on ideological terms, I think, very fortunately, we are seeing a longed-for normalisation of life in Northern Ireland where hopefully we can have politics that have parties far more based on ideology than on confessional or particular views about the nature of international relationships and identity. At this stage I think we are in a transitional period and we are seeing political parties that on the one hand continue to have that concept of identity-based politics but on

the other are moving increasingly towards differences of politics, differences of approach, differences of ideological view.

Q110 Chairman: So at the moment, within the discussion in Northern Ireland, when you talk about politics it is both the politics of ideology and the politics of identity that are causing the differences?
Professor Sidoti: At the level of the political parties certainly so.

Q111 Earl of Onslow: You have very interestingly told us that there are differences, as I understand it, on the content of the Bill of Rights which are taken by the Green and the Orange factions, for want of a better expression. Could you enlighten us as to what some of those differences are?
Professor Sidoti: I suppose I have to look back historically at at least the political representatives. It is very difficult to talk about completely iron-clad community views when in fact the views across the community do span spectrums.

Q112 Earl of Onslow: I know, but you said that there have been differences on confessional lines. What are the differences?
Professor Sidoti: Sure, and what I said was that the political parties have been organised along the lines of community identity and that remains the case predominantly, and the parties that were identified as Unionist in the past tended to take either a hostile or a narrow view towards a Bill of Rights; the parties that were identified as Nationalist tended to take a more expansive view on a Bill of Rights. I think that was largely because of the history of Northern Ireland that originally saw civil rights (but now broadened into human rights) as being related to a particular historic community[1].

Q113 Earl of Onslow: I understand that absolutely. What I am still trying to get at is can you say clause X in the draft Bill was liked by the Nationalists and disliked by the Unionists or vice versa, and what was the reason? I am trying to get to what they actually objected to.
Professor Sidoti: When it comes to the particulars, we have not got clauses at this stage but I can talk about categories. The Unionist parties tend to be more hostile towards the inclusion of economic and social rights. The Nationalist parties tend to be more positive towards the inclusion of economic and social rights. The Unionist parties have had a particular concern about such issues as parades, symbols and cultural identity in that sense; the Nationalist parties have tended to be far more concerned about increasing tensions or harassment of particular communities. So on those two issues I think we see very clear historic divisions between the parties[2].
Earl of Onslow: That is exactly the information I wanted. Thank you very much.

Q114 Chairman: Sorry to pursue this issue further with you but on some of the latter points it is quite understandable, given the history. If you take social and economic rights, and you look at where the political support for any of the parties you talk about comes from, given the fact that, for example, the Loyalist parties, the Unionist parties, have significant working-class support, you would think that in a traditional left/right perspective that would be quite an important feature for Unionist politics to pick up because they would be the sorts of issues that their electorate would in "normal politics" be concerned about.
Professor Sidoti: Certainly the community organisations in Northern Ireland, who are the experts of that, say they see exactly the same issues of the socio-economic kind right across the community of Northern Ireland—issues of education, of healthcare, of employment and so forth. Coming, as I do, not from a Northern Ireland position but from an international human rights law position, I certainly see human rights as the business of all human beings and as affecting each individual in exactly the same way.
Professor Dickson: The evidence from opinion surveys shows that Protestant working-class people are just as supportive of economic and social rights as Catholic Nationalist working-class people would be.

Q115 Chairman: That would follow from the opinion polling that you mentioned earlier on, so it would also follow therefore that their political organisations are behind the game compared to their grass-roots support.
Professor Dickson: I think that is the case, Chairman, yes.

Q116 John Austin: You said at the beginning that most moves towards a Bill of Rights have arisen from situations of conflict or trauma within communities and that is clearly not the case here. In Northern Ireland one can understand why there is an engagement among the public—a history of conflict, a history of discrimination of one community against the other, and that engagement might be much more difficult in the UK situation, but perhaps you would like to tell us a little about what have been the best methods of engaging with the public in Northern Ireland.
Professor Sidoti: I defer to Brice to talk about the work done by the former Commission and then perhaps I can make a couple of comments about what is happening at the moment.

[1] I have been advised by a representative of the Ulster Unionist Party on the Bill of Rights Forum that I did not correctly state the position of his party on the Bill of Rights. He advised me that his party was one of the earliest proponents of a Bill of Rights for Northern Ireland and that it considered that most of its concerns had been met by the passage of the UK Human Rights Act. Accordingly, the scope for further protection for human rights through a Bill of rights specific to Northern Ireland at this point was limited. He also advised me that his party supported economic and social rights but did not consider a Bill of Rights as necessarily the best means to achieve their implementation and fulfilment.

[2] See footnote 1.

Professor Dickson: The former Commission went to great lengths to engage with as great a variety of people as possible. It produced a range of documents in different languages, in different levels of complexity, about different issues. It was then circulated widely, it inserted documents in the newspapers, it put adverts on TV, on buses, on bus shelters, it sent contributions to magazines that were widely circulated. It went to great lengths to get out and about to meet all sorts of groups and organisations and raise the profile of the issues. We found that there was a tremendous take-up on the part of children and young people in Northern Ireland. They were extremely enthusiastic about the Bill of Rights. We produced material that was specific to them, we included some of them in the working group on children and young people, and we had a public exhibition of the submissions they made to the Commission, many of which were of an artistic nature. All that, I think, created a great head of steam in favour of the Bill of Rights which in the year 2001 was palpable in Northern Ireland, and to me that makes it all the more regrettable that the politicians at that point were not able to find a consensus position on what should be in the Bill of Rights.

Q117 John Austin: Apart from the production of leaflets and material in different languages were there any specific efforts made to contact the black and minority ethnic communities?
Professor Dickson: There certainly were, although in the intervening six or seven years the number of black and minority ethnic people in Northern Ireland has increased enormously, to the extent that Polish people now outnumber the Chinese people.

Q118 John Austin: And would not have been part of the past conflict?
Professor Dickson: No, certainly not. Yes, efforts were made in that regard and we did have a member of the Commission who was from the black and minority ethnic communities and that was obviously very helpful.
Professor Sidoti: So far as the Forum is concerned, we do not have a consultation role but we are engaged in a fairly limited outreach programme. We have at the moment four half-time outreach workers who are making contact with different aspects of the community. What we are finding though is that community organisations are coming to us in significant numbers and seeking our involvement in events that they are organising, and certainly I see one of my roles as Chair as to attend and participate in as many of those as possible. However, there has been still a very healthy community sector engagement in both awareness raising and information and in encouraging people to participate. One organisation, the Community Foundation of Northern Ireland, has had the resources to put into support for a large number of community groups and has been running programmes in large parts of Northern Ireland. The Human Rights Consortium, which brings together 120 community organisations, has had significant resources for an awareness raising campaign, so the question of the Bill of Rights is actually quite prominent there, and particularly over the last month has achieved a great deal of media attention.

Q119 John Austin: How important do you think the independence of the consultation exercise has been?
Professor Sidoti: Our process at the moment is not entirely independent in the sense that we have people who are representative of either political parties or different sectors. The independence of the consultation process undertaken by the Human Rights Commission I think was critical. It had to be seen as a process that did not have an association with any of the particular parties or particular groupings in Northern Ireland. Now, as I have mentioned, our role is much more as a negotiating forum rather than as a consulting body, and so I think the independence issue *per se* is not as significant for us, but again our recommendations go back to the Northern Ireland Human Rights Commission and the independence at that level of the final adviser to the Westminster Government I think is extremely important.

Q120 John Austin: Has it been useful to have the different political parties as well as the civil organisations together in one forum?
Professor Sidoti: In Northern Ireland I think it is absolutely essential. This process has to move forward with the full engagement of those who are involved in the political parties. The extent to which we reach agreement is an open question. I cannot answer that at this particular point, but certainly it has required the engagement of all of the major political parties.

Q121 Chairman: But has the delay involved in searching for that consensus been worthwhile? Does there not come a time when you can say you have got 80 per cent support but that you run the risk of that support waning away as the internal discussions keep going on and on and nothing comes out the other end?
Professor Sidoti: I think that is absolutely correct.

Q122 John Austin: Could it be that in returning to normalcy the appetite for the Bill has waned?
Professor Sidoti: I think that is right too. There are different factors that give rise to momentum, and certainly the fact that the process basically ground to a halt in 2004 and was only revived late in 2007 has meant that the issues are no longer seen as being quite as urgent, but also that people are saying, "We have been at this for a hell of a long time. Is it going to go anywhere?". The heat is very much on our Forum at the moment to deliver, and my view right from the start has been that the people of Northern Ireland are entitled to a product from this process.

Q123 Chairman: But if you cannot reach consensus what will you do?
Professor Sidoti: Our commitment is to provide recommendations to the Northern Ireland Human Rights Commission that indicate the extent and

nature of the support or opposition to any aspects of them. I am not necessarily expecting that a Forum that consists of 28 disparate members and a Chair will come to a unanimous view on every single issue. What is important, however, is that the extent of the support and the nature of the support and the nature of the opposition are quite transparent.

Q124 Baroness Stern: Can we come back, if you do not mind, to something that was raised earlier, which was the relationship between what you are doing and the Bill of Rights for Northern Ireland and our considerations of a British Bill of Rights, or even maybe a UK Bill of Rights and a British statement of values? You have already said a bit about this, but can I ask if you have anything more to say about whether you think that the consideration of a British Bill of Rights will be detrimental to what you are doing?

Professor Dickson: The only thing I would add to what I have said already is that to me, and indeed to the Commission that I was the Chief Commissioner of, the Human Rights Act has been a tremendous success and a very important document, and I for one would like to see a Bill of Rights for Northern Ireland (and indeed a UK Bill of Rights) build upon the Human Rights Act. One of the complicating factors in the Good Friday Agreement is that it was agreed prior to the passing of the Human Rights Act and one of the commitments in the Agreement was to incorporate the European Convention on Human Rights which then happened a few months later. Some people in Northern Ireland therefore think that we already have a Bill of Rights; it is the Human Rights Act, but another bit of the Good Friday Agreement specifically says that the Bill of Rights for Northern Ireland is to have rights supplementary to those in the European Convention on Human Rights, and most of the work of the Human Rights Commission while I was there was focused on trying to identify the supplementary rights that there should be. We found there was a great variety of such rights that should be included, so whatever happens to the current process my own view is that it should build upon the Human Rights Act, and that should not be a threat, as some people have recently suggested, as regards the position in the Republic of Ireland because it too has fairly recently incorporated the European Convention in a way that is not hugely dissimilar to the process in the UK, and that again should be built upon in my view.

Professor Sidoti: I hesitated when you asked the question because ultimately I do not know. The process that is going on with the consideration of a British or potentially UK Bill of Rights may be detrimental to what is happening in Northern Ireland but it need not be. It may be, to take up Brice's point, which I agree with entirely, that this process challenges the current scope and operation of the Human Rights Act. The one thing that we have agreement on in Northern Ireland is that whatever we will be recommending and proposing will not displace or minimise the Human Rights Act and its application. We are not seeing any weakening of existing law in the United Kingdom, and equally—and this is part of the basis that we agreed upon at our very first meeting—there should be no weakening, undermining or anything inconsistent with existing human rights protections in the United Kingdom or with international human rights standards. If what starts to be suggested through this process here starts undermining the existing protections in the United Kingdom, then yes, it will be detrimental to what we are doing in Northern Ireland, but, as I said earlier, I can see these processes occurring concurrently and positively and being mutually reinforcing. Whether that proves to be the case is out of my hands.

Q125 Baroness Stern: What issues are raised in the context of devolution and the development of separate Northern Irish and British Bills of Rights? We have touched on this but I am sure there is more to say.

Professor Sidoti: This is the issue that the Earl of Onslow raised and I responded to briefly. It really goes back to the question of how these things are drafted. We have a basis of international human rights law. That is where I am coming from and so it is no surprise that I keep going back to it. This is an agreed international statement of what are the fundamental rights of all human beings. What happens then at the national level is that decisions are taken appropriately about the extent to which and the ways in which these rights are protected in national law and through national practice. It is not just a matter of law; it can be a matter of administrative action, public policy and so forth. There is no single prescriptive way in which human rights should be protected and promoted, and so it really becomes a matter for national legislatures to decide the form in which human rights are protected. It could be that a British Act only applies in Great Britain itself while a Northern Ireland Act applies only in Northern Ireland. It could be that there is Westminster legislation that governs the actions of the Westminster legislative process and the courts that are implementing and enforcing Westminster laws while leaving the devolved parts of the United Kingdom to deal appropriately within their own jurisdictions with different aspects of it. It may be that there are things that need to be addressed in Northern Ireland because of its history that do not need to be addressed in legislative form at the level of either Britain or the United Kingdom. I think these are issues that are quite properly the subject of debate, but there is no necessary starting point in this debate that things are automatically by definition inconsistent or that something should happen and something should not. The way in which the law is developed will vary not only from state to state but also at times from parts of states, whether in federal systems or in systems of unitary devolved government.

Professor Dickson: If I could just add a supplementary point, I think what is important is that if certain rights, especially in the economic and social field, are to be protected by the Bill of Rights for Northern Ireland or for the UK, regard should be had to the fact that devolved administrations

have responsibilities in those areas—education and health, for example, in the case of Northern Ireland, so it would be appropriate at the very least that the Assembly in Northern Ireland consciously debated the enactment of any such protection of rights that would have effect in Northern Ireland because that Assembly is going to have responsibility for ensuring that the requisite resources are put into protecting those rights. I am in favour of a national Bill of Rights that protects core rights but if the devolved administrations want to go further and protect additional rights for their part of the country then well and good.

Q126 Earl of Onslow: I can see where you can say in Northern Ireland, "We are fed up with sectarian education so we are going to have all schools non-sectarian", but I can also see that that would not necessarily be appropriate to the rest of the United Kingdom. Where I get into a muddle is where you get a clash where there might be a less good right in Northern Ireland. Would that not be overridden by the UK Bill of Rights which might say something similar? That is what I get myself in a muddle over. Do you see what I am getting at? Am I making myself clear?
Professor Sidoti: I can see what you are getting at. Again, it would depend upon the law that was passed here in the Westminster Parliament. If it said, "This law is paramount over laws that apply elsewhere", the devolved law would be overruled of itself. It depends upon how you go about drafting the law.

Q127 Earl of Onslow: Does that in itself add tension? It seems to me that all the Queen's subjects ought to have the same rights and liberties as they have always had. This is the great tradition of common law, the magic of common law which has gone back for 1,000 years. That is why I have this terrible, nagging doubt of different rights, different privileges, different parts of the kingdom.
Professor Sidoti: In terms of the application of human rights, I have to answer in two parts. Part one is that every single person anywhere in the world has exactly the same human rights which are expressed in international human rights law. Part two is that the way in which enforcement or implementation is provided can vary. It may be that somebody in, say, Northern Ireland will have exactly the same rights as somebody here in England but the process of implementation or enforcement will vary. One can go to the court and the other cannot. We do not have here a difference in human rights but we have a difference in the way in which those rights are enacted, protected, promoted at the local level.

Q128 Earl of Onslow: We could not have a Human Rights Act which applied only to Great Britain, England, Scotland and Wales, and not apply it to Northern Ireland or just apply it to Scotland, Northern Ireland and Wales and not to England. That would have been a constitutional abortion, would it not?
Professor Sidoti: You could not have the European Convention for Human Rights only partially applying because the state of the United Kingdom has ratified that and it applies to everybody. There is no reason in legal theory—I can see a great reason in principle—why you could not have the Human Rights Act applying to one part of the UK and not to another. In Northern Ireland it has been said explicitly at the level of the Forum that that is not wanted.

Q129 Chairman: Is there anything you would like to add to what you have had to tell us? It has been very helpful.
Professor Sidoti: Just a personal message. You are much more polite than Australian parliamentary committees.

Q130 Chairman: I have observed Prime Minister's question time in Australia and if you think it is rude here you should see it there.
Professor Sidoti: Your level of attendance is also much better, so thank you.
Chairman: Thank you very much.

Witness: **Professor Graham Smith,** Centre for Citizenship and Democracy, gave evidence.

Q131 Chairman: We are now into our second session of the afternoon and we are joined by Professor Graham Smith of the Centre for Citizenship and Democracy. Welcome to you. Is there anything you would like to say before we start?
Professor Smith: One thing to stress is I assume the reason I have been asked to come and talk to you is not because I am a human rights specialist, because I would never claim that. If you start asking me details of Human Rights Acts and those kinds of things I am going to have a bit of a problem. My background is mostly studies of public participation so I hope that the reason I have been invited to come here is to talk about methods of public participation, pros and cons and different structures that have been put in place elsewhere.

Q132 Chairman: That is exactly why.
Professor Smith: Then we are on the right wave length.

Q133 Chairman: What do you think are the key lessons for the UK that can be learned from looking at democratic innovations around the world?
Professor Smith: What is very interesting at the moment is I think we are going through a period of a lot of experimentation with public participation in a way that we maybe had not done a decade ago. There are some really interesting examples of where governments have taken quite bold steps to engage the public in innovative ways which take us beyond simple, traditional modes of consultation. The one that pops into my mind here is what happened in

British Columbia and Ontario. They were not looking for whole scale constitutional change but they were looking to change their electoral system. Politicians being politicians could not decide what the best electoral system would be, as we would witness in our own Parliament. They decided that what they would do was set up an assembly of 160 randomly selected citizens from all over British Columbia and they would let them learn about the issues, deliberate, consult themselves with the public over an 11 month period so they would become "experts" in electoral form. They put a recommendation forward. They recommended a change and the government had agreed that if there was a recommendation for change that would go to a referendum, something completely different from what we would be used to. There are what I take to be quite amazing experiments going on in advanced liberal democracies.

Q134 Chairman: Are they getting it right?
Professor Smith: No. That is the interesting question. The referendum was lost in British Columbia but only by two per cent. They are going to rerun it because they had two thresholds, one which was based on winning in a number of localities and that was fine, but they hit 57.7 per cent rather than 60 per cent overall so it was very close. The answer may be that people do not want electoral reform or that people do not want a new Bill of Rights. That is one answer, is it not?

Q135 Chairman: What was the turn out like on that referendum? If you have had this huge public engagement process, what sort of turn out do you achieve generally?
Professor Smith: I am afraid I would have to give you the details of the turn out. There was a lot of criticism of the government that they supported the assembly but they did not support the public debate that followed it. One of the criticisms is that a lot of people were not aware of the assembly. They did a very good job in institutional design but not in publicity.

Q136 Chairman: That begs the question is the process as important, more important or less important than the outcome?
Professor Smith: It depends where you stand, does it not? I think it is critical, if you are going to look at something at this level of potential impact on a political system, that the process is carefully constructed. I am not necessarily arguing the case for the British Columbia method; I am just saying that that is an example of the sort of thing that was done. If you are going to look at creating a Bill of Rights that shapes the relationship between the governed and the governors, the process by which that is brought about is incredibly important.

Q137 Chairman: Let me give you a couple of examples. One is human rights, although you would not see it in those terms. If public consultation produces a significantly weighted outcome in favour of something, to what extent is it necessary for politicians to respond, even if it is the wrong thing to do? Suppose we had a referendum on the death penalty, for example, and it came out with an enormous majority in favour of restoring the death penalty, clearly in breach of our European Convention rights and probably contrary to what informed opinion would hold in this place. How do you square the circle?
Professor Smith: Would a state hold a referendum on that because it would be limited by the Convention of Human Rights? We would not have held a referendum on that issue but I understand your point. I am not arguing the case for a referendum necessarily. You asked me whether there had been any interesting practice and I was saying that this was an example.

Q138 Chairman: This came out of the previous discussion. We heard for example that support for social and economic rights was generating 80 per cent approval in opinion polling; yet some politicians were extremely nervous about it. If you did the same thing on the mainland, I suppose a lot of politicians here across the political persuasions are nervous about it because of the implications of changes or whatever. How would you try to square that sort of circle?
Professor Smith: Surely part of the consultation process is a desire to know what citizens believe?

Q139 Chairman: If citizens come up with something that you do not like and you do not think is workable, do you run the risk therefore of undermining the wider political process by creating this groundswell of opinion that you cannot deliver?
Professor Smith: It is interesting that you use the term "groundswell of opinion" because sometimes I know that consultation exercises are so badly organised that this groundswell of opinion is often not informed opinion. It is constructed by particular political groups. That is why the sorts of things that I was talking about in British Columbia were quite important because they gave citizens a chance to develop reflective opinions. We do opinion polls all the time. We ask people about things they have not thought about. What does that mean? I do not understand how useful that information is. It is just people's raw preferences. That is why I think the process is crucial. Another example you might want to talk about is the example in Victoria where they had a commission that went around over a period of six months engaging in consultations with local community groups etc. They were criticised because the agenda that they had been set by the government in Victoria ruled out social and economic rights, so they got a bit of a backlash on that particular issue. It is a difficult one. If you are planning to engage in a consultation process and you do not want to hear what people have to say, I would say don't engage in a consultation process. I would think very carefully about how you construct that consultation process.
Earl of Onslow: Additional to that, are we back with the great Burke address to his Bristol electors, "You elect me for my judgment". The people of Hendon very wisely say that our chairman is a splendid

chairman and he shall represent them in Parliament. They ask him to take decisions. How do you square that one with modern, participatory democracy, which is terribly important?

Q140 Chairman: By consulting my constituents on all sorts of things.
Professor Smith: A lot of that is down to your opinion on the nature of a representative, is it not? Something like establishing a Bill of Rights is a constitutional moment. This is a Bill that will structure the way that we govern. Therefore, it is a particular event. There are people who write in this area who ask, "Are politicians and perhaps even appointed officials the best people to make judgments about a Bill that is going to limit their activities?" Are they best placed to do that because it is going to affect the nature of their work?

Q141 Earl of Onslow: I see a Bill of Rights as a Bill which limits politicians and the state's abilities, not something that limits the ability of the subjects to do what they want.
Professor Smith: I agree with you. The return on that is saying are the people who are going to be limited the people who should be making a decision about where those limits are?

Q142 Earl of Onslow: No. They are going to complain like hell. What in your view are likely to be the most effective methods for engaging the public in a meaningful debate? How would you do it, in other words?
Professor Smith: If I was given carte blanche, how would I do it?

Q143 Earl of Onslow: Yes.
Professor Smith: I believe the idea is to establish an independent commission. That is what I have heard. First of all, it is important who is on that independent commission. If you take the Victoria example which is seen as reasonably good practice in this regard, it is not a commission which acts like a select committee might here which asks for consultations to be sent in but actively goes out and engages with those communities where those communities are, not expecting everybody to come to London or whatever. They spent six months going around Victoria, meeting groups, particularly hard to reach groups. If you are going to set up an independent commission, that is how that independent commission should act. I also think there is room for what I discussed earlier, this idea of a citizens' assembly that is protected from political and social pressures. We might have to agree to disagree on this one, might we not? The reason why is because you learn a lot from allowing citizens to deliberate with each other under conditions when they are not being influenced by the pressures that normally would structure their decisions. When you go out to do a consultation, most of the people who are going to engage with you are people with a very strong interest in that area, unless you do what Victoria and others have done and go to a much lower level and engage with groups there. If you want to hear the voice of the informed public, how are you going to get the voice of the informed public? That is where these sorts of assemblies may have a place. I am not necessarily arguing you do what they did in British Columbia or to then say, "Whatever that assembly comes up with, that should be the Act." I think there is a role for that kind of forum because it gives a different sort of input from the input that comes from interest groups.

Q144 Lord Morris of Handsworth: How do you keep the pressure group out of that debate?
Professor Smith: You do not keep them out of the debate. I will go back to British Columbia. The assembly met maybe every second or third weekend over the period of about 11 months and also engaged in a consultation exercise during the middle of that period. They would meet and learn about issues. Part of the learning about issues was being exposed to the arguments of interest groups who would come and be witnesses and be cross-examined. Those witnesses would then leave the room and those citizens would then be able to deliberate amongst themselves about the issue at hand. It is not that you protect them in the sense of saying that they do not hear those arguments. What you are saying is that if you have a consultation exercise where policy professionals are in the room, they dominate. My argument is you do not get the informed view of citizens then.

Q145 Earl of Onslow: How do you choose these people?
Professor Smith: In British Columbia and also the practice with citizens' juries and deliberate opinion polls, it is based on a form of random sampling. In British Columbia they decided they wanted a man and a woman from each electoral area within the province. They decided that they wanted to ensure that there was age difference amongst those selected. They also added two indigenous people at the end because they realised the process had not managed to do that. Other juries have selected on the basis of ethnicity. Others have done it on the basis of social class. There are different ways of doing it. You do it on the basis of what you take to be politically salient characteristics. You produce a statistically representative sample of the people. That is as good as you can get.

Q146 Earl of Onslow: The people of the electoral district have no choice in who is going to make up ----?
Professor Smith: The traditional mode of accountability that you are familiar with with the Westminster system is a different process. Again, remember, I did not necessarily say that you would give that group the final say. I am just saying that would be an extremely interesting input and the kind of input, if I was creating policy, I would like to see. We are always making claims on what informed public opinion is. In fact, most of us have no idea what informed public opinion is. Creating those kinds of forums allows you to do that. As well as, I would argue, going down to community groups to

find out what sorts of issues are raised at that level as well. Take the Westminster Village here. People listen to each other and they take that to be public opinion but it is not informed public opinion.

Q147 Lord Dubs: It seems to me a lot of the legislation on our statute book has component elements in it which could be part of a Bill of Rights.
Professor Smith: Of course.

Q148 Lord Dubs: Yet none of that went through the process you have mentioned—in other words, the Human Rights Act and so on. Does that mean that legislation has been flawed?
Professor Smith: Some people would say it is less legitimate in many ways. I was reading through some of the previous evidence given in previous sessions and I noted that somebody said, when the Human Rights Act was enacted, there was no real leadership or public debate around it. It was just enacted. It meant there would be no opportunity to raise public awareness. People did not really understand the Act. They did not know what it meant. They did not know how it worked. There was a lack of public understanding. Part of the process of public consultation is raising public awareness and understanding. The other part is legitimising a decision.

Q149 Earl of Onslow: The legitimacy of passing the Human Rights Act was that the Labour Party had won an election and part of its manifesto was that. That seems to me an absolutely rock solid piece of legitimate Act passing.
Professor Smith: Do you think that if you went back to all the Labour voters they would be able to say, "I voted for Labour because of the Human Rights Act and I know what it means"?
Earl of Onslow: No, I am not saying that. The point is that people have chosen who they wish to govern them. Under those circumstances those people have a mandate to do it and the difficulty with all these—
Chairman: We can contrast this argument with the devolution argument where it was party policy to go down that route but it was carefully prepared with the big debates beforehand, consultation and a referendum in London and also in regional government where, despite all the efforts, the north east voted against it. I suppose I am supporting Professor Smith here in saying that part of it is preparing the ground and arguing the case. Just because it is in the manifesto does not mean to say that that is the end of the story.

Q150 Earl of Onslow: I am not saying what my views are.
Professor Smith: I will take the devolution example. People knew what they were voting for if they were voting for Labour on the basis of devolution. But there are a hundred reasons why people voted.

Q151 Lord Morris of Handsworth: Was there not a Scottish Convention established to prepare through the formality of the process?
Professor Smith: Yes.

Q152 Lord Morris of Handsworth: There was a preparatory exercise which ensured that by the time it reached the wider public opinions were settled.
Professor Smith: Yes. This goes back to what was being said earlier about the political emphasis behind it. The interesting thing about the Bill of Rights here is that there is not a massive cry for a Bill of Rights at the moment. Most of the Bills of Rights that emerge come out of some form of constitutional conflict. We are in a very unusual position here. So you are going to have to drum up some interest in a way that you do not have to in Northern Ireland or you did not have to in Scotland with devolution.

Q153 Lord Morris of Handsworth: We will leave it to the government to drum up some interest.
Professor Smith: They are very good at that. Going back to the earlier point, in no one's manifesto as far as I remember was there the argument that there was going to be a Bill of Rights. We are in a very unusual situation. Unless we take your Burkean view, which is that people have voted for an individual to make their judgment whatever, people voted when they did not know there was going to be a Bill of Rights and maybe that might have affected their votes. I do not know.

Q154 Earl of Onslow: I think you can argue that there is no likelihood of a Bill of Rights being enacted before the next General Election. At the next General Election I strongly suspect that probably in both parties' manifestos there will be a commitment. What we are doing is part of the very correct part of the consultation process which you rightly believe to be so important.
Professor Smith: I think you do need to actively engage citizens in this because it is going to pass them by otherwise in the same way that the Human Rights Act has passed people by. And the misunderstanding of it has created all sorts of problems with the kinds of things that you hear in the media, *The Today Programme,* Radio 5, the phone ins about what the Human Rights Act has done or is going to do. People just do not know what it is. Part of the consultation process is raising awareness as much as it is about getting informed opinion about what should be in it.

Q155 Dr Harris: Although I am no expert on the Liberal Democrat manifesto, I believe it has been a longstanding manifesto commitment to bring in a Bill of Rights and I commend that document to you for your research so that you are in a position to know what the parties are doing.
Professor Smith: Unlike your colleagues!

Q156 Dr Harris: I will direct myself to it as well. In contradistinction to the argument that the government has a mandate to do things the government is elected to do, simply because it is elected, in the case of devolution as Lord Morris rightly said there was more of a consensus and of course more than one party was calling for that. In

a system we have at the moment where 35 per cent of that relatively low number of people who turn out to vote vote for the party that has a majority, would you agree it is harder to argue that there is a mandate based on 35 per cent of a 63 per cent turn out?
Professor Smith: You are trying to tempt me into discussions of electoral reform here, I think.

Q157 Dr Harris: I am talking about the nature of the mandate.
Professor Smith: I think it relates to something else as well. I think you are right there but also, it related to the level of public dissatisfaction and distrust in Westminster politics and in politicians and political institutions. I see that the kind of consultation exercise that some states and provinces have gone in for can be part of the process of re-engaging citizens in the political process. What can be more important than what is in a sense a founding document that describes the relationship between governed and governors?

Q158 Earl of Onslow: That question has set a lot of hares running. If you think that engaging the majority of people is difficult, is it not infinitely harder to get minority interests engaged? I have the normal, standard black and minority ethnic communities down here.
Professor Smith: That is why the Chair talked about why the process is important. I would say process is absolutely important. If you do a bad consultation then you fail to engage hard to reach groups. If you engage people who know those communities, then yes, you can do it well. It is a question of who is organising the consultation, how committed they are and importantly how many resources—I am talking about time and money here—they have to spend on this. There is no reason to say that a consultation process could not be established that engaged black and minority ethnic communities and other vulnerable and hard to reach groups. Again, I refer you back to the earlier idea of a randomly selected public. You ensure that minority groups are there. You can even over sample them if that is your decision.

Q159 Baroness Stern: The government is proposing to have a public debate and it has announced the creation of a Citizens' Forum. Professor King at Essex University has argued that a Citizens' Forum would invariably attract the elderly. I do not know what is wrong with that. It would invariably attract the elderly, the male, the white, the middle class and the people with both bees in their bonnets and time on their hands. Assuming that the government really does want to consult and within our context in the UK, what sort of body should be established that would be useful in considering the range of options and making recommendations?
Professor Smith: In some sense I agree with what Professor King is saying if he is saying that the Forum would be similar to the other kinds of forums that have been run recently by the government. They will be highly unrepresentative. They will tend to attract people who are all politically active. That is why again I would suggest that the government seriously considers alternative forms of organisation like a randomly selected forum in order to ensure that you have different types of voices in there and to ensure that you do not just get the politically active. That, I would imagine, would be run alongside a consultation process that went out to groups. One of the problems with the Citizens' Forum is always that these mythical citizens are expected to come to you. Lots of people do like coming to London but this is not always the best way of hearing marginalised voices, particularly from poor communities etc. I would suggest again that serious consideration is given to setting up some sort of citizens' assembly which is randomly selected, stratified along significant characteristics and that runs alongside a consultation exercise which not only consults with the interest groups within this area but is a commission that actively engages with hard to reach communities and goes to speak to them on their turf. It is time and money though again.

Q160 Baroness Stern: Do you see merit in specialist representatives of different civic society groups being able to debate with political parties in a single grouping?
Professor Smith: Do you mean like a constitutional convention or something like that?

Q161 Baroness Stern: I suppose I do.
Professor Smith: What those sorts of events can do is at least make clear where the differences are. That might be something which is useful as a precursor to public engagement, where people are clear where different groups stand. One would hope that the kind of consultation document that was produced and the consultation materials that were produced would fairly represent where differences were. Would I want to see that being the only mode of engagement? No, because I think representatives of peak associations are not representative of citizens. They are citizens but they are not necessarily representatives of public opinion. One thing we know about organisation is that some communities find it easier to organise than others so whoever happens to be there at the time very much represents who is politically and economically able at that particular time.

Q162 Lord Morris of Handsworth: We take as a given your strong support for public engagement on major constitutional issues. What I am not quite clear about from what you have said to us so far is who should do it.
Professor Smith: Do you mean who should organise it?

Q163 Lord Morris of Handsworth: Who should be involved. Can I ask whether you think the consultation process should be independent of government?
Professor Smith: Yes.

Q164 Lord Morris of Handsworth: Who, in your view, should lead the process?

Professor Smith: You need to have probably cross party support for a small commission if you are going to approach it that way. The easiest thing to say about a consultation exercise is that it was skewed from the start. You need to be careful. I noticed in Australia, in Victoria, they selected a professor who was well known in the media, who does not have party affiliations. They picked someone who was very active in the voluntary sector. They picked someone who was coming into politics but had been known as a basketball star. Why not? They engaged a QC as well. They did not get accused of political bias. The feeling was that the different views of political parties were represented in that group. What they were criticised for was a failure to have black and ethnic minority voices and indigenous community voices. It is crucial that the construction of that commission is really carefully considered. The last thing you want is for that commission to be seen as a puppet of the government.

Q165 Lord Morris of Handsworth: What I draw from your answer is that you can take steps to make the process independent of government but, from what you have said, it does not sound to me as if it would be independent of politics if the government or whoever appoints this cross party grouping is still political.

Professor Smith: That is one of the arguments that politicians in British Columbia made for saying, "Let us create this assembly that is protected from politics in that way." They made the decision that, whatever their recommendation, that would then go to a referendum. I feel that is not the kind of thing that this government is going to accept. A more realistic solution is trying to find people who have good public standing, who are seen as trustworthy. There are some of those people still left. You have to be so careful because if that commission is poorly chosen that becomes the focus of anybody who does not agree with what is coming out.

Q166 Lord Morris of Handsworth: Shortly this Committee is due to spend some time with the Equality and Human Rights Commission. Do you think there is a role for that body in the process and, if so, what should their role be?

Professor Smith: I would argue there is a very big role for an organisation like that that has a lot of knowledge of issues facing very diverse communities who would feed into a consultation process. But also, I would argue, probably as an organisation that could point a commission towards people who could help them access hard to reach groups. The organisations that have been amalgamated into the Equalities and Human Rights Commission are organisations who do, to a certain degree, know their communities.

Q167 Lord Morris of Handsworth: Do you think the Commission could still play that role and preserve its independence?

Professor Smith: Yes. I do not see any problem for it in terms of my second point which is giving access to those communities. In terms of my first point, I would have thought there were very technical issues that the Commission would want to put forward. The work of the CRE and other organisations before may not have been political in a party political sense but it was political in the sense of the types of issues they were raising. I cannot see any problem. I would not suggest that that organisation is an organisation be charged with being the Commission to lead the consultation process because I just think it is too controversial an organisation.

Q168 Earl of Onslow: We heard earlier on that the Victorian Government in Australia had a six month consultation, six months to do it and did it. The Northern Irish people have been banging on in a slightly Irish way *ad infinitum*. How would you get round those two problems? Do you think that the Australian way is the way to do it?

Professor Smith: As the speakers before said, Northern Ireland is a very particular case. What they are trying to do is part of a larger process. Victoria is a bit more like the situation here which is that there was a decision that they should investigate whether there should be a Bill of Rights. Because that was the first question: should there be a Bill of Rights? 90 per cent of people who were consulted said yes. Our situation in many ways is more similar to Victoria although we have to deal with the Northern Ireland issue. I have noticed in your discussions you could not decide whether it was a UK Bill of Rights or a British Bill of Rights. I do not know what the decision is on that one but it would seem to me that, because of the fact that we are in a stable political position generally, we are similar to Victoria. We are trying to create a document where there is not necessarily a groundswell of demand for it. We do not have that kind of political conflict which is underneath it.

Q169 Earl of Onslow: The corollary of that is that if you do set these time limits and the consultative body comes to no conclusion, you then say that obviously it is not necessary to have a Bill of Rights, do you, or would you give them more time or what? Am I being illogical?

Professor Smith: No, you are not. Six months is probably too short because we are talking about Victoria compared to the United Kingdom and a difference in terms of scale and numbers. I think you can give a commission a charge for what it is expected to do. In Victoria they came up with a draft bill which they gave to the government. I can imagine a situation where you could have a draft bill and if there was a disagreement amongst the commissioners you would say, "These are the areas of disagreement." That would be an extremely worthwhile thing to do. What happened in Victoria was that there was general agreement within the confines of what the government allowed them to do. For example, there was criticism that there could be little substantive discussion of social and economic rights. That was a decision that was made

that framed the debate. That is something you need to be aware of. When you start a consultation process, how do you frame the debate? What is allowed to be discussed and what is not has to be explained to citizens; otherwise, they are going to say, "Why cannot we talk about this particular issue?". You have to be careful about the scope of the consultation. You have to ensure that hard to reach groups are reached and that the consultation is well resourced. One of the problems with government consultation is that they have tended not to resource consultation very well. If you are going to do it, do not do it badly.

Q170 Earl of Onslow: Should the process be aimed at achieving a broad consensus or, if there is not consensus, should a fairly large minority be ignored?
Professor Smith: In the end, that is a political judgment. That is part of the decision about the scope of the consultation process. If you are looking for 100 per cent consensus, you are not going to get it. In Victoria they were extremely pleased at a 90 per cent consensus. If you find that you have a consensus except for one particular social group all of whom think it is a bad idea, then you need to be thinking quite carefully.

Q171 Earl of Onslow: This is like God arguing with Abraham over Sodom and Gomorrah, is it not? Peradventure there will be just one man in all of Sodom and he starts at a much higher level. At what level do you start ignoring the minority?
Professor Smith: I cannot give you an answer to that. That will be part of the work of the Commission to ensure that in any result it produces it expresses quite clearly if and where there were systematic disagreements within a particular community. Because of the type of political system we have, this is going to be something that comes back before Parliament, so that people are aware of where any divisions lie.
Lord Dubs: I am a bit nervous of asking this question on a day when the Commons are discussing the Lisbon Treaty. Do you think a popular referendum should be part of the process?
Chairman: Not the Lisbon Treaty.

Q172 Lord Dubs: You have talked a lot about the method of consultation. I ask the question without any personal enthusiasm, but still.
Professor Smith: It is an interesting question. I have no firm answer for you. It very much depends on what we are doing. My feeling is that on this particular issue, because there is not political conflict around it and it is not a salient political issue in that sense, if you had a referendum you would get a pretty poor turn out, to be honest. It is not like devolution. What you are talking about here is, in a sense, moving a few things around from other bills, maybe adding a bit extra but making sure that you have the right things covered in one document. The worst things are referendums that have incredibly low turn outs. I just do not see this as an issue that is going to capture the public imagination in the same way. The only way I could imagine it could capture the public imagination is if you did something really innovative in the consultation process. Even then I would be concerned that people would not necessarily use the referendum for the reason of looking at that particular legislation. It may well be more of a case of being able to vote on a range of other issues. That is part of the public information process. I often am a supporter of referendums. It just depends very much on the issue. I feel on this issue we are not facing political conflict here at the moment, but I would like to see clearly that public engagement has an effect. This is one of the problems that public authorities have. They engage people and there is no clear relationship between the engagement they have and the decision that is made. Some of the best local authorities were looked at by the Audit Commission and in 75 per cent of the decisions they made they could not show how the consultation related to the decision. They just did the consultation because that was what was expected of them. If you are going to do it, do it well. If not, do not.

Q173 Chairman: You mentioned the importance of the process. What about the issue of the content? Supposing there is something very innovative in the content—social and economic rights for example—would that make a difference? I am trying to draw a distinction between what you said about the importance of the process in terms of generating turn out and innovation in that respect. Equally, if there is significant innovation in the content—for example, social and economic rights, environmental rights, horizontal rights—would that make a significant difference?
Professor Smith: The difficulty for me with a referendum is that it is yes or no to everything. There is no sensitivity there. We have no idea whether people are voting it down because they just do not like the government, because they do not like the environmental rights or whatever. It is a very crude way of making a decision. If you are saying something like, "Should we change the electoral system?" that is very simple. When we are talking about a Bill of Rights which contains so much, unless you can think of a very careful way of doing the referendum so that you can work out what it is people are arguing against, almost doing it clause by clause, the referendum may not be the right way of doing things.

Q174 Chairman: If you were to look at the Lisbon Treaty as an example, putting aside what people may or may not have promised, that answer would be that it would be rather silly to have a referendum on the Lisbon Treaty.
Professor Smith: If we can show that something has major constitutional change, there are stronger arguments for referendums.

Q175 Chairman: A Bill of Rights would.
Professor Smith: Take the Australian referendum to become a republic. I think public opinion was that a republic was a good idea. They voted against it because of the format they were given. They did not

want a president. They were given no choice, so lots of people voted it down because of the method of selecting a president. The problem with a referendum that we need to get around in some ways is, when people vote no, what is it they are voting no against? Unless you are willing to have quite a complicated referendum which started with say a minimal Bill of Rights and a maximal Bill of Rights. With the Lisbon Treaty it is not entirely clear to people what they would be voting on. It is a bit like the Human Rights Act. The amount of misinformation and misunderstanding around the Lisbon Treaty means that people do not have an informed opinion about it. If you have a referendum process, which I am not necessarily against, we have to make sure that there is a process of public education. I think we do not have that very well established at the moment.

Q176 John Austin: Was there not an example given earlier, the Canadian example, where you got a body of people together to create an informed opinion?
Professor Smith: Yes.

Q177 John Austin: You then had an informed opinion, put it in a referendum and it was lost?
Professor Smith: Yes. Most commentators say the reason it was lost is because the government did not put enough money into publicising it. When people were asked, "Do you agree with the Assembly's recommendation?" most people were voting without knowing even what the Assembly was.

Q178 Earl of Onslow: How do you know that most people did that?
Professor Smith: Because they did polling afterwards. The question was something along the lines of, "Do you agree with the Citizens' Assembly's recommendation that we should move to a single transferable vote?" and the pollsters afterwards said, "What did you vote? Do you know what the Citizens' Assembly is?". They found a significant proportion of people had no idea that the Citizens' Assembly even existed. The publicity issue becomes incredibly important.

Q179 Chairman: Does this not come back to the Earl of Onslow's original point about the nature of representative democracy? I suspect that, if you did opinion polling after people had voted in a General Election and asked them in detail about each party's political programme, they may know one or two headlines but the chances of knowing the full picture would be absolutely zero.
Professor Smith: This was a referendum on one thing. The recommendation had been put forward by a citizens' assembly, so you would have thought that that would be a case when people would know.

Q180 Chairman: That is the point. By extension, I am taking some of the more complicated issues where you are looking at a whole range of things. Ultimately, you come back to saying that in the end it is a representative democracy and they are deciding it.
Professor Smith: Are you trying to make a distinction here? I do not necessarily think a referendum undermines representative democracy. What you are saying is that, for one decision, we are having a referendum. I do not think there is a tension there. This may not answer your question but it goes back to the earlier question. The interesting thing about British Columbia was that those people who did know about the citizens' assembly were more likely to vote in favour because they knew that a group of citizens had come together and deliberated. The polling evidence there suggests that the more people had known about the assembly the more positive was the result. Those people who knew about the citizens' assembly were much more positive about electoral reform. Those who did not were not. That is my point about people being aware of it.

Q181 Chairman: Is the consequence of that perhaps that a referendum should never be seen as binding but as informative for the representative democracy in the end to make the decision?
Professor Smith: That is our way of doing things. People mistakenly think that the fact that the Scots voted for devolution was the reason they were devolved. It was not. It was because there was an Act of Parliament.

Q182 Earl of Onslow: They voted after the Act of Parliament.
Professor Smith: Parliament had to enact it afterwards. As far as I am aware, all referendums in this country have been advisory. The government has said that it will respond but they have been advisory. We do not have a Californian or Swiss approach to this.

Q183 Earl of Onslow: Is that simply because whatever it is no parliament can be bound by anything outside parliament?
Professor Smith: Yes. It is the nature of the system.

Q184 Earl of Onslow: That is a Magna Carta right.
Professor Smith: It is the nature of our political system, yes. I am not sure it mentions referendums in the Magna Carta.

Q185 Chairman: It does not mention elections either.
Professor Smith: We have to be realistic. Any referendum is advisory in this country. If the Labour Party had not enacted devolution it would have been in all sorts of trouble. There was a political will there. I do not want to argue the case that there should not be a referendum. I am just thinking about how it is structured and the fact that referendums only work well when people are informed. Around Europe at the moment people are not necessarily well informed and you have to think very carefully about how you do that.

Q186 Chairman: Can you, no matter how hard you work, create sufficient information to the public to make a decision through a referendum on an

incredibly complex issue? The Lisbon Treaty is incredibly complex. Could you ever get to the stage where the public is sufficiently well informed to make a decision on it as opposed to the representative democracy model where in theory at least we have to go away and do our homework and make sure we know what we are voting about?

Professor Smith: One of the problems I was trying to get at with the idea of a Bill of Rights is that there are so many different reasons why people might be against a Bill of Rights. A referendum is a fairly insensitive way of dealing with it, unless you offer two or three different alternatives. Are people informed enough? Are politicians informed enough? I sometimes wonder. That is one of the reasons why something like a citizens' assembly is interesting because at least it gives you a sense of informed opinion. Citizens can look at this assembly and say, "These are my peers. They spent however many months deliberating over this issue. They believe this. There are good reasons why that would also be what I would believe." It is a different kind of input. It is not the kind of input we are used to.

Q187 Lord Dubs: Going back to the other methods of consultation and deliberation you have been talking about before we talked about a referendum, how would you judge whether such a process had been a success or not?

Professor Smith: For a referendum?

Q188 Lord Dubs: No, not for a referendum. I am talking about the process of consultation that you have talked about before we got on to the question of a referendum, which I think is your favoured approach. If you want to answer by way of an example using Victoria, please do so.

Professor Smith: Where we can see that whoever is undertaking the consultation has gone out of their way to engage the different sections of the community, where we have had a process where the scope of consultation is clear to citizens who are engaging in it, those are the sorts of criteria I would use. One of the problems with consultation in the past is people do not know why they are engaging and very often we do not hit the hard to reach groups. Has it been a process that has been inclusive? Have we managed to reach different black and minority ethnic groups, groups of different age, groups of different gender etc? Were they clear about what they were being engaged on? If you are going to go down the commission route, the idea of charging a commission to go and do that is clear. The success of that is that people who felt they wanted to say something on this issue were able to. And people who did not know they had a view on it were able to as well.

Q189 Chairman: Is there anything you would like to add to the discussion?

Professor Smith: No. I wish you great success with your deliberations.

Chairman: Thank you very much.

Tuesday 4 March 2008

Members present:

Mr Andrew Dismore, in the Chair

Bowness, L
Morris of Handsworth, L
Onslow, E
Stern, B
Mr Virendra Sharma

Witnesses: **Baroness Hale of Richmond,** a Member of the House of Lords, and **Lord Justice Maurice Kay,** examined.

Q191 Chairman: Good afternoon everybody. This is another of our evidence sessions in our ongoing inquiry into a British Bill of Rights. In this session we are joined by Baroness Hale of Richmond and Lord Justice Maurice Kay. I should mention that you are being televised and how many people are watching I could not possibly comment. It is a very important session and that reflects the importance of it. Do either of you want to make any opening remarks or do you want to go straight into opening?
Baroness Hale of Richmond: I have no opening remarks to make.
Lord Justice Kay: No, thank you.

Q192 Chairman: Perhaps we can start with you Lady Hale. Do you think the courts in our country would ever be comfortable with a power to strike down legislation passed by parliament?
Baroness Hale of Richmond: I think we would find it extremely novel, quite alarming and would hesitate to use it. That is about as far as I need to go.

Q193 Chairman: Do you think there is any judicial appetite for more extensive powers than those in the Human Rights Act, the certificate of incompatibility and so forth?
Baroness Hale of Richmond: I have not detected any in the cases we have heard so far. Perhaps that is partly because of the approach we have taken to declarations of the incompatibility and because of the approach that the government and parliament have then taken to what to do about declarations of incompatibility.

Q194 Chairman: Do you think the Human Rights Act system is a good model to follow, if there is to be a Bill of Rights, in terms of judicial intervention?
Baroness Hale of Richmond: It is the one we know. We are becoming more and more comfortable with it as we get more experience of how it operates. I am sure that the judiciary would do whatever parliament told them to do but it is the one with which we feel most comfortable. There is another one which, although it looks very different, is in practice quite similar and that is the Canadian model, with which I am sure members of the Committee are completely familiar.

Q195 Chairman: Some of us have been around a bit longer and might be more familiar with it than others. We went to Canada a while ago and looked at some of these issues. Do you think the certificate of incomparability could be improved on in any way, that we could build on what we have got or is it fine as it is?
Baroness Hale of Richmond: As I say, it is obviously for parliament to decide what, in the end, they would like the judiciary to do. But certainly a model that says that the courts can declare an Act of Parliament invalid but that parliament can override that declaration, which is more or less the Canadian model; or one in which the courts quite regularly, as in both Canada and South Africa, say "this is our view of the constitutionality of this particular piece of legislation and we are going to give Parliament an appropriate length of time to try and put it right", coupled with a "notwithstanding" power, would not, in practice, as the Canadians have pointed out to us, be that different from the current declaration of incompatibility. There are arguments either way.
Lord Justice Kay: I have a high regard for the structure of the Human Rights Act as a model. It is not the most aesthetically pleasing statute. It is quite a terse, ugly looking little thing but it works remarkably well. Some statutes are rather beautifully designed and are very difficult to operate in practice. I do not think the Human Rights Act is of that kind. I think the experience is that the declaration of incompatibility works rather well. It has cropped up in a relatively small number of cases where declarations have been made, to the best of my knowledge, they have always been properly considered and acted upon by government within a reasonably short period of time. It is a curiously British way of doing things but it seems to me to be a working way of doing things. I have no criticism of it at all.
The Committee suspended from 4.21 pm to 4.26 pm for a division in the House of Commons

Q196 Chairman: Before we adjourned, Lord Justice Kay was answering the previous question. I was not sure you had finished.
Lord Justice Kay: I had, thank you.

Q197 Earl of Onslow: Lady Hale, before 1688—and you are bound to correct me if I am wrong—Chief Justice Coke assumed, I believe, that parliament could not pass Acts of Parliament contrary to common law, is that right?

Baroness Hale of Richmond: I am not sure it was entirely contrary to common law. I would have to check the answer to that question. There is a statement in Coke to the effect there were certain things parliament could not do and that is as far as I am can recall it.

Q198 Earl of Onslow: Am I right in saying this was then stopped by the Bill of Rights of 1668/9 which said no court may interfere with parliaments?
Baroness Hale of Richmond: It says that freedom of speech and debates and proceedings in parliament shall not be called into question in any court or place out of parliament. That is what the Bill of Rights says. That is virtually an exact quotation. That does not answer the question of what, if any, limits there might be.

Q199 Earl of Onslow: There is still a very slim theoretical possibility to put your wigs together and say parliament is talking rubbish.
Baroness Hale of Richmond: It is extremely slim.

Q200 Earl of Onslow: I accept that. I would also agree with you that Lord Irvine of Lairg's solution in the Human Rights Act was extremely elegant. Are there, therefore, some fundamental rights which are better protected in UK law than in the ECHR?
Baroness Hale of Richmond: That is quite hard a question to answer because the rights that are protected in the ECHR and the Human Rights Act are better protected than any other rights. The protection they get from the Human Rights Act, bringing with it not only the duties of public authorities but also the interpretative obligation in section 3 and the declaration of incapability protection in section 4, gives to those rights a better protection than any other right protected in United Kingdom law. There are, of course, things like access to justice which in ordinary domestic law have greater protection than they do under the Convention; that is one example, because of Legal Aid and the like. As I say, the rights that are protected under the Human Rights Act are better protected than other rights.

Q201 Earl of Onslow: Do you think there are rights which are missed out by the Human Rights Act which should be protected by a Bill of Rights?
Baroness Hale of Richmond: A sort of shopping list of things that one could expand into?

Q202 Earl of Onslow: I can think of things but I am not as clever as you by any means and so you are more capable.
Baroness Hale of Richmond: I could give you two things from my shopping list, but it is a purely personal opinion, and the first is children's rights. There is virtually nothing in the ECHR about children. The UK is party to the UN Convention on the Rights of the Child and there are aspects of that Convention which could, it seems to me, be with profit put into any British Bill of Rights; better to accord with our existing international obligations and with our understanding of children and what they should have. That would, of course, include a stronger right to education than is in the European Convention although there is one in the European Convention.

Q203 Earl of Onslow: Do you say a stronger right to education?
Baroness Hale of Richmond: Yes. We could go into detail on that but now is perhaps not the time and place. The other thing on my shopping list would be a better equality provision than there is in the European Convention. At the moment the equality provision in the European Convention only requires no discrimination in the enjoyment of the Convention rights. There is a protocol to the Convention which gives a broader guarantee of equal protection and non-discrimination which the United Kingdom has not yet ratified. Those would be the two obvious things on my shopping list. One could also think in terms of dignity.

Q204 Earl of Onslow: You would not think of anything like the right of trial by jury?
Baroness Hale of Richmond: I would myself personally not want to be prescriptive about what was a fair trial. The right to a fair trial is laid down in the European Convention. Let us think that the American constitution protects the right of trial by jury and I believe that it protects it for civil trials as well as for criminal trials. One could see that one could get into great difficulties by being prescriptive about the ingredients of a fair trial. Lord Justice Kay might take a different line on that.

Q205 Earl of Onslow: If there were to be a British Bill of Rights, should it go beyond the "floor" of the rights protected by the ECHR and include additional rights which are indigenous to Britain? I think you have answered that question. That is the printed version of the question and the other version was my version.
Baroness Hale of Richmond: Yours was a great deal simpler to understand.
Lord Justice Kay: I do not have a shopping list and if I had it is one that I might not find it comfortable to disclose. You are really asking how the Human Rights Act should be amended or what a Bill of Rights should include. With respect, they are political questions for others to answer. As to the first part of your question, things being dealt with in domestic law rather than through the Human Rights Act or any Bill of Rights, I do not quite share Lady Hale's perspective on that. I agree with her entirely when she says that the Human Rights Act and the Convention are themselves inadequate protection against discrimination and inadequate security of equality but that particular source of law does not need to provide the answer. We have now highly developed equality and discrimination laws. It has been on our statute book in different forms and in increasing areas of protection for 30 years, much of it derived from our membership of the European Union. There is no shortage of discrimination law, quite the contrary. It seems to me to be a highly developed field of law that is forever being added to.

In my view, it simply does not need either amendment in the Human Rights Act or a Bill of Rights to secure it further. I say I do not have a shopping list and I do feel a degree of inhibition about expressing views on what should and should not be included in future legislation. I have difficulty with the notion of a legal right to dignity, not because I am against people's dignity obviously, but because as a legal concept and as an enforceable concept and as a tool with which judges should be asked to work, I would want to know far more about how it was expressed in legislative form before I would feel comfortable about it. It seems to me that it may be one of those subjects that is aspirational, a motherhood and apple pie type of law rather than strictly enforceable law. That may have a role but that is for politicians to decide. I do think it is a difficult subject for law enforcement and for justiciability.

Q206 Baroness Stern: Could I begin by asking you, Lord Justice Kay, some really straight forward factual questions if I might. If a public authority is failing in its statutory duty to provide accommodation to an elderly person in need, or a home help to a disabled person, or a speech therapist to a child of special education needs, or a home tutor to a child who is unable to attend school, could that person go to the High Court to ask it to enforce the duty?
Lord Justice Kay: In principle, yes. In principle any decision of a public authority is susceptible to judicial review on traditional grounds. If you are asking as to the extent to which it is done—and I was forwarned that you might have an interest in that—the answer is that if one were looking just at the figures absolutely you would say that in quite a lot of cases a year it is being done. I retrieved these figures for you earlier today. In three years, 2005, 2006 and 2007, in the Administrative Court there were 439 applications in the Administrative Court in respect of community care decisions; 559 education; 188 on mental health; and 110 on other public health (not disciplinary). That is nearly 1,300 cases, which sounds quite a lot but as a fraction of the workload of the Administrative Court it is now infinitesimal because since I left the Administrative Court four and a half years ago it has doubled its case load. It has gone up from 6,000 cases a year to 12,000 cases and overwhelmingly they are immigration and asylum cases. If you take out the immigration and asylum cases, if you take out the criminal cases which involve appeals from Magistrates and Crown Courts on case stated procedures and go to the pure judicial review, then those 1,296 would not seem quite so insignificant. They are not all judicial reviews. Some are statutory appeals, for example in connection with SENDIST, the special needs tribunal, there is a right to appeal to the Administrative Court on a point of law. The principles are the same as judicial review when you get there. To make the obvious point, it is judicial review and it is not a judge deciding whether a speech therapist should or should not do anything in particular. It is procedural and is a challenge on public law grounds as to the decision-making process; it is not a substitution of a judicial review as to what a speech therapist should or should not do.

Q207 Baroness Stern: Could I ask Lady Hale that the governance of Great Britain Green Paper stated that "the incorporation of economic and social rights into British law . . . would involve a significant shift from Parliament to the judiciary in making decisions about public spending and, at least implicitly, levels of taxation." Would you agree with that statement?
Baroness Hale of Richmond: Yes, I think that would be likely to be the case depending upon the model chosen. If one looks at the constitution of South Africa, they do incorporate certain social and economic rights into the constitution but they do it in a rather careful way, within the limits of available resources and so on and so forth. My very limited understanding is that the constitutional court of South Africa has been also very ready to take into account constraints on the appropriate level of provision for such reasons. It does depend how you do it. It is not impossible to do it in a way which would not turn the judiciary into a taxing body. The judiciary cannot be a taxing body and the judiciary cannot make hard choices in certain types of discretionary assignment. That is another limit that Lord Justice Kay would have mentioned when dealing with judicial review of certain types of decision. There are things we can do and things we cannot do and we have to be very careful.

Q208 Baroness Stern: If a British Bill of Rights were to include justiciable rights to education, health and housing, could you say something about what courts would have to do to ensure they do not usurp the legitimate role of democratically elected decision-makers?
Baroness Hale of Richmond: Could I put it a different way, which is not what courts would have to do but how the right would have to be defined by parliament to give courts the appropriate task for a court to do. Courts will do their best to do what parliament has asked them to do; it is what we spend our time doing, especially in the Administrative Court but also under the Human Rights Act and so on. If parliament would like there to be some sort of bed rock entitlement, it would have to find a way of putting that in such a way as not to put the courts in a position of trying to do that which they cannot do.

Q209 Baroness Stern: Is that doable?
Baroness Hale of Richmond: I am not necessarily the right person to ask. I understand there are places in the world where such rights are enshrined in constitutional documents and the courts find it possible to do it.

Q210 Chairman: There are a number of different ways of looking at it: one would be to bring together all the different statutory rights and try to formulate those in a traditional statutory way; and the other would be to do that but also underpin it with something akin to the South African bottom line, as

it were—bottom line in both senses of the word—with the restrictions that the South African courts have in having to take account of available resources and the aspirations of the country. Would it be possible to try to get a mix of those two that would provide a certain underpinning for the most extreme cases which might not be directly provided for by statute but using the statute as a way of formulating the ball park figure as it were?

Baroness Hale of Richmond: It might be. It would depend upon the kind of rights you were talking about. If you are talking about rights to financial benefits, which are actual rights in domestic law, you might want to have an over-arching right not to be allowed to starve, or something to that effect. You would probably want to put some sort of way of ensuring that that was a bottom line right. You would not want to translate all the hugely detailed social security law into a constitutional document for all sorts of reasons. If you are talking about education, that is supposedly a universal right so it is not a problem to turn it into a right but of course you then have to say what do we mean by education and how suitable does it have to be to "age, ability, aptitude and any special educational needs he may have", which is the current phrase. In fact, SENDIST is entitled to say to a local authority: "you provide that". It is the one social care tribunal that is entitled to say that. If you get onto health care, you can set a bottom line of health care but unless the decision is being irrational, courts are not likely to want to say "you must provide this particular person with this particular operation" or the like. It does depend on what thing you are looking at.

Q211 Chairman: In South Africa the health care cases have been very few and far between. They have effectively been the supposed issue of new test and the one of two cases that have got through as opposed to the overall problem of Aids for example. If you take the rights of the child, which you mentioned earlier on, there are two ways of approaching it. One would be to say we will incorporate into UK law the UN Convention, like the European Convention on Human Rights. The other would be to have an over-arching phrase like they have in the South African constitution.

Baroness Hale of Richmond: There are things in the UN Convention on the Rights of the Child which would not be readily translatable into rights here but there are other aspects, some which have been translated in Sought Africa, which could be.

Q212 Chairman: It is a question of how do you keep it up to date. What struck me when we were debating the Charter of Fundamental Rights on this Lisbon Treaty, putting to one side is this enforceable in the UK, that was a much more up-to-date document than the European Convention on Human Rights because in the 60 years life has moved on. 60 years ago we did not have computers and now the big issue of the day is data protection which is not referred to at all in the Convention. You can argue around privacy and things like that but is that the sort of thing we should be trying to deal with. If so, is there a mechanism where we can try to bring these things and make sure they keep up to date with modern society?

Baroness Hale of Richmond: You can look at the principle, can you not, of privacy of information and communications which is sitting there in the European Convention and you can restate the principle to include things which were not thought of in 1950. The fundamental principle would be the same, just as the fundamental principle of a fair trial would be the same, but you might bring into that, for example, the modification that the trial has to be appropriate to the subject matter and the people who are being tried, which is a later modification of the European Convention and brings me back to UN Convention as well.

Q213 Earl of Onslow: How would you regard this? It seems to me that a Bill of Rights is something which says to an over-mighty and over-keen executive you shall not do this because that is beyond the pale. You should not say to a government you shall provide free education or free health because that is a policy matter. It is only a very short step to saying not only free education, free health but free socks and shoes and free sweeties on Tuesdays. That is a *reductio ad absurdum*—a latin phrase which you are not allowed to use in court any more—that is how it goes and surely that is what a Bill of Rights should be doing: protecting the subject from an over-mighty executive. That is what we are suffering from, in my view, at the moment.

Baroness Hale of Richmond: Let us be clear. Whether to have such a piece of legislation and what it should contain and its underlying purposes and values are political questions which are for politicians and parliamentarians to decide; they are not for judges to decide. What we are talking about are the mechanisms by which you do whatever it is that you decide to do.

Q214 Earl of Onslow: It is perfectly reasonable for you to say actually—and you are nearly saying it already—we cannot decide on the issue of sweeties because we do not know the implication behind it. I thought you were agreeing with Lady Stern that it is a question of money and policy.

Baroness Hale of Richmond: There are some things that are easier to decide upon than others. There are certain basic threshold entitlements from the fact of being a human being that it might be possible to say. I am only saying it might be possible to say. There are modern human rights documents and modern constitutions which do include certain basic social and economic entitlements. It is possible to do. It is a question for parliament entirely whether it wants to go beyond the pure protection from the over-mighty executive into that. The European Convention does so a bit because of its education provision, and it also allows for it, because its protection of property allows for property to be controlled in its use or even taken away for social and economic purposes. It has not fallen into the trap of making it impossible. All I am saying is it is possible within certain limits to do that but you have

to bear in mind that there are things that judges cannot decide. They cannot decide as between X, Y and Z: if you only have two dialysis machines and you have three kidney patients, who gets them? They can ensure that the people who do decide are using rational criteria to so decide and are not being biased and are not discriminating and so on and so forth.

Q215 Lord Bowness: The Chairman introduced the question of the Charter of Fundamental Rights. That is based on the Convention and a whole series of international instruments that the Member States are signed up to in any event. It seeks to draw, whether successfully or not, a distinction between the rights and principles. Most of the economic and social rights fall into the principles and they are almost all, without exception, expressed subject to the national laws, the laws of the Member States or the Convention of Member States. That was done precisely to preserve the rights of the Member States and not to take away from them the political decisions about how you carried out certain things. We would probably all take great differences about how you do it and questions of resources. My question is really if you had a Bill of Rights, and that is a major question, do you think you would have to draw it in a similar way to ensure that the Bill of Rights and the courts were not trespassing into those political questions which many of us rightly say lie with parliament.
Baroness Hale of Richmond: As I said previously, it is for parliament to decide how to do that. All I am saying is there are some constitutions which have managed to lay a basic minimum without requiring the judges to do things that judges cannot do.

Q216 Lord Bowness: I was asking whether you thought the Charter was a reasonable blueprint on which parliament could work.
Baroness Hale of Richmond: I think I had better not answer that.
Lord Justice Kay: I agree with all that Lady Hale so eloquently said. It is a matter of parliament defining the terms, the rights and the remedies, and parliament is on notice as a result of experience under the Human Rights Act. The High Court and the Court of Appeal struggled for two or three years on proportionality and Article 8 cases, never being quite sure whether it was carrying out a qualitative judgment or a judicial review of whether the minister had acted reasonably in the circumstances. Then Lady Hale and her colleagues put us right. We know now we have to, in some circumstances, make qualitative decisions this proportionality exercise. If parliament enacts a Bill of Rights and does not want us to engage in that kind of exercise, parliament will have to say so and I am sure it will.

Q217 Lord Morris of Handsworth: My questions are primarily about judicial appointments and they are principally directed at you, Lady Hale. If Lord Justice Kay feels moved to comment then we would love to hear you. If there were to be a British of Bill of Rights, would you like to see any changes in the way in which judges are appointed?
Baroness Hale of Richmond: At the moment we have very recently established the Judicial Appointments Commission and that preserves the principle that all appointments should be on merit but also involves a duty in the Commission to try and widen the pool from which the most meritorious candidates are selected. It seems to me to be rather early days for saying that we should seek further changes in what has so recently been changed. The Commission has to get into its stride and it has to see what it can do in the pool widening sense and it has also got to see what it can do in this really thorny question of defining merit.

Q218 Lord Morris of Handsworth: Do I take it you have great faith in the Commission to break the historical mould and to be more diverse in terms of the complexion particularly in the higher courts?
Baroness Hale of Richmond: I think it is hope rather than faith.

Q219 Lord Morris of Handsworth: In view of the new system, and you made reference to the Commission, could you say whether you believe that the appointments are perhaps somewhat too much under the control of the judiciary itself?
Baroness Hale of Richmond: I genuinely do not know the answer to that because obviously the Commission has a substantial lay element and the lay people are all pretty powerful people. The judiciary who are involved are, one hopes, the sort of people who are going to understand the approach that the Commission is taking to things and are not necessarily going to say "this is the way we have always done it so this is the way we are going to go on doing it". That is why I say I hope that the machinery is there to make, over time, the moves in the direction which I suspect that both you and I would like to see, which is a more reflective judiciary than the one we have at the moment but without any sacrifice to what I call the four "in-quotients" which are, intelligence, industry, incorruptibility and impartiality.

Q220 Lord Morris of Handsworth: Taking a neutral dispassionate view some would argue that the Commission's way of operating is more about process and the pool from which it draws has not been widened at all. Would you share that view and, if you do, would you wish to see the pool widened?
Baroness Hale of Richmond: I definitely want to see the pool widened but I would not want to cast any aspersions on the Commission at this early stage of its operation. I would be saying things for which I do not have the evidence and it would be unfair.

Q221 Lord Morris of Handsworth: My invitation is still open to you, Lord Justice Kay.
Lord Justice Kay: Your invitation is appreciated. I am not forthcoming on this subject for a number of reasons. One is I am not a member of the Judicial Appointments Commission; two, in spite of that, I am, in the very near future, going to be involved in

the selection process for the next round of High Court appointments and I would rather not say anything about it in public at this stage.

Q222 Lord Morris of Handsworth: We respect your reasons entirely.
Lord Justice Kay: The third is, with respect, I am not sure how this subject fits into this Committee's jurisdiction. That is your concern rather than mine.

Q223 Chairman: I will try to be a little enlightening. This question comes from the South African experience where we saw, in relation to the new constitutional court in South Africa, a very different approach to finding where new able judges come from to try and break the mould of the hierarchical promotion of the judiciary from the lower courts to try and inject some new blood. The way you, Lady Hale, come from the academic world.
Baroness Hale of Richmond: Lord Justice Kay was also a very distinguished academic but he went to the bar thereafter, whereas I started at the bar and then became an academic which is the other way around.

Q224 Chairman: I use that as an example. Can I put to you a couple of my hobby horses about this? This is an area where we overlook the potential of widening the pool and the question is how do you think the pool could be widened. One thing which would be good to look at would be the pool of tribunal chairs who are much more reflective in terms of ethnic minorities and women who are often judging quite complex areas of the law and quite complex factual disputes as well. It seems to me that by looking solely at the traditional judicial tree we are overlooking some very competent people, who are judging quite complex cases, from the judicial selection process.
Baroness Hale of Richmond: Could I say that the UK Association of Women Judges, which of course has members from all branches of the judiciary, takes the view that you have expressed and thinks that, although we are not talking about a career judiciary on the Continental model, there is much to be said for being much more explicit about the possibility of good people moving from one section of the judiciary to a different section of the judiciary, that there should be a more recognised way of bringing on good district judges to become circuit judges, good circuit judges to become High Court judges and the like, and similarly that the pool for appointment to all levels of the court judiciary should include people who have judicial experience in the areas of jurisdiction outside the ordinary courts. I quite agree with you.

Q225 Chairman: That was a bit of a digression. The real issue here is, looking at the South African model, whether you see any merit in looking at a completely different way if we are trying to create a new constitutional court arrangement? Do you think we simply look at the existing House of Lords and rename it the Supreme Court or do we look at something somewhat separate to judge the more difficult constitutional issues?
Baroness Hale of Richmond: It is a start to have a Supreme Court. That is a move that has already been done and one which I am very glad to see happen. The idea of having a constitutional court that is separate from the ordinary courts of the land I am not so keen on. It is not the common law way of doing things. Most common law jurisdictions have a hierarchy through the ordinary courts ending up at whatever the apex court is, but that court has jurisdiction in things other than constitutional questions. Of course one's experience of judging ordinary questions feeds into one's experience of judging constitutional questions. We do that in the Privy Council. We do that in the House of Lords at the moment. Just to be landed with constitutional questions, it is not always easy to find out when they are going to come up. Human Rights Act questions come up in any sort of case. In my own former jurisdiction of the family court, human rights were involved in any decision where you were going to take a child away from her parents. That involved Article 8 automatically so one was into Article 8 as well as the domestic law and that can happen in other areas of the law as well. To hive them off to be dealt with by a separate institution that only dealt with that does not seem to me to be practical.

Q226 Earl of Onslow: I have heard said among some of my judicial friends that the move from the Judicial Committee of the House of Lords to a new Supreme Court will give the judges, in the old fashioned language, ideas above their station and they will start acting much more as a Supreme Court in the way we know it in possibly the United States or Germany or Canada and not in the way that the House of Lords Judicial Committee did. Do you agree with that judgment or am I getting the wrong end of the stick? Is there some substance in it?
Baroness Hale of Richmond: With respect, I do not agree. I think that we will continue to do the jobs that we think parliament and the common law have given us to do. I do not see us becoming more adventurous just because we are in a different building.

Q227 Earl of Onslow: You will do exactly what the old Judiciary Committee of the House of Lords did at twenty times the cost, is that right?
Baroness Hale of Richmond: Pass.
Chairman: That is not a fair question. That is a resources question.

Q228 Mr Sharma: In principle, should it be a relatively simple matter for parliament to legislate to reinstate what you consider to be clearly its original intention about the meaning of public function when passing the Human Rights Act?
Baroness Hale of Richmond: Thank you for asking me that. I do not think there is any case I have been involved in since I was in the House of Lords that has caused me more grief, because I like to try and respect Judge Learned Hand's advice, which is that "the spirit of liberty is that spirit which is not too

sure that it is right". As a judge I try not to be too sure that I am right. But I was absolutely sure that Lord Bingham and I were right in that case.

Q229 Chairman: We were sure you were right as well.

Baroness Hale of Richmond: How to put it right? One of the problems is that putting it right is not straight forward because the object of the provision was to be capable of applying to a wide range of functions rather than having a little list. Of course, one way of putting it right is to have a little list but you will always miss something of a little list, or possibly sometimes put something on that should not be there, but there is a much greater risk of leaving something off. It can be put right in relation to the particular context of that decision but even that is not particularly straight forward. How to legislate is a matter for parliamentarians and not for judges. Going back to when I was a Law Commissioner and did recommend legislation, I wonder whether it would be possible to do it by reference to a list of factors which had to be taken into account in deciding whether something was a function of a public nature. The factors are fairly clearly listed in the opinions of Lord Bingham and myself in that case. If it says if you tick enough of those factors that is a public function, that might be a way of putting it but I merely put that on the table as a possibility. Parliamentary Counsel will no doubt rubbish it.

Chairman: I will bear that in mind for my Private Member's Bill.

Q230 Mr Sharma: If there were to be a British Bill of Rights with the same intended scope of application as the HRA, how could parliament ensure that the courts do not do the same as they have done to the scope of the HRA.?

Baroness Hale of Richmond: I have made a suggestion and that may be the best way of doing it.

Q231 Mr Sharma: How revolutionary would it be to follow South Africa's example and provide for some rights to have a degree of application to private parties according to the nature of the rights.

Baroness Hale of Richmond: It would not be tremendously revolutionary because we have already, in a sense, applied concepts from the Human Rights Commission in situations between private parties, the Naomi Campbell case being one of them, in which we obviously balanced her right to respect for her private life against the newspaper's freedom of expression. We did that explicitly by reference to the two Convention rights involved. Our reason for doing that was that we, as courts, are public authorities and we, therefore, have to act compliantly with the Convention rights. We cannot make orders that are incompatible with the Convention rights of either party so in that way we introduce obligations on private individuals and companies to respect the rights of others. It is not that revolutionary. Again, the way the South African constitution does it is rather neat, is it not? It is quite vague but it provides a mechanism for saying we will do it in appropriate cases and not in inappropriate ones.

Q232 Chairman: This is an issue of quite general concern to the public. You get people who come into your constituency surgery and they bang the table and say "I know my rights" and that is the last thing they usually do and most of the things that people think are human rights are not at all. The real issue is when you tell people, take the YL case, even if you were right in your interpretation of that, and we think you are but you are in the minority, even then private funders would still be excluded from the Human Rights Act as against their carer potentially people are horrified at that concept. What is quite interesting is the consequence and the fall-out as to how this debate has actually broadened out beyond the narrow confines of what parliament intended into this wider social question. I suppose what we are at looking is horizontality in a more general way. If we were to look at things like what has become known as third generation rights, such as rights to a clean environment, they would not have any meaning if you had that horizontality approach beyond the State. There is going to be the kind of case you referred to where you are effectively balancing up two conflicting rights and trying to find where the fair balance between the two lies. I am not sure there is a question there.

Baroness Hale of Richmond: I was trying to work out the question.

Q233 Chairman: It was more of a comment from me and I do not know if you want to say what you think of that as a proposition.

Baroness Hale of Richmond: My shopping list did not include environmental rights. That is one reaction to your question, largely because I think the British way is to do things in small stages, is it not, and not to leap from a Convention which is mostly along the lines of the ones we were talking about into these very third generation rights which would be a huge leap. Of course if parliament wants to take it, we will do our best with it. But using the existing ones to balance two individuals or private parties' rights in the existing ones or in slightly developed ones would not be a huge leap forward I do not think.

Lord Justice Kay: I have nothing to add. I agree with that.

Q234 Chairman: That last question is the issue of responsibilities and whether you feel responsibilities should be included in a Bill of Rights. When we were in South Africa we kept asking the judges there what responsibilities meant, and although responsibilities, or an equivalent phrase, are in the South African constitution nobody had the faintest idea what it meant. I do not whether (a) you think it is a good idea or (b) what you think it might mean.

Baroness Hale of Richmond: I am very reluctant to say anything that trespasses on issues that might appear to be different as between different political parties. I get a slight sense that they might be. What we have just been talking about, the balancing of rights between different individuals, there are obviously responsibilities involved in that. There are responsibilities involved in a free press not to trespass on certain people's privacy rights. There are responsibilities involved in having a family not to do harm to your children. There are responsibilities inherent in quite a few of the rights as they are and that seems uncontroversial and not difficult. The approach to horizontality that we talked about, is uncontroversial and not any more difficult than any other bit of judging is, but going further than that would be quite difficult. I say no more.

Q235 Chairman: Do either of you want to add anything to what you have said?

Lord Justice Kay: I would agree with what Lady Hale has said about responsibilities. It seems to me to be a difficult area. I think it is probably an area that comes within the scope of what I was saying before about aspirations and generalities. I do not think anybody has suggested that fundamental rights should be dependent upon a discharge of personal responsibility and once one goes beyond that one may be getting outside the area of justiciability. I do not think there is anything I want to add.

Chairman: Thank you both for your time. I know you are both very busy people and we appreciate you coming to talk to us today.

Witnesses: **Professor Vernon Bogdanor**, Brasenose College, Oxford, **Rt Hon Kenneth Clarke QC MP** and **Mr Henry Porter**, examined.

Q236 Chairman: We are going to start our second set in the afternoon. We are joined by the Rt Hon Kenneth Clarke MP QC, Professor Vernon Bogdanor of Brasenose College, Oxford and Henry Porter. Is there anything you would like to say by way of opening statement? If not, the starting point is we have heard from a wide range of people. Do you think a British Bill of Rights is needed in your view?

Mr Porter: I certainly think it is. I did not used to think it was but in the last five to six years my mind has changed. It has changed because in the area of civil liberties rather than human rights, and I think there is a distinction which we all understand, we have come to see an attack on the ordinary what I call elementary headline rights that we were all used to in this county. In my submission I gave you a list of those. In some ways they are controversial and in other ways they are incontestable but my main concern is in the area of privacy. I think we are facing the most amazing growth technologically where data bases can link into each other, exchange information horizontally, vertically, without the subject, that is us as citizens, knowing what is happening. That places us all at a great disadvantage to the State. We all have a great faith in the State and in the benevolence of the government but in five, ten, 15 years' time we do not know what kind of government we are going to have and we do not know in what sort of condition the world will be. I happen to think it will be quite a troubled century. I believe now that it is time for us to concede what has happened in the last ten years and to say we have to get a grip on this. We have to understand the direction society could go in. The front line for me is this question of privacy. If we look at what data base is being built now, you have the national identity register, you have every car journey, truck journey, taken and recorded on motorways and in city centres. You have the potential, not yet in law but the Home Secretary has announced the desire, to collect information as people travel out of this country, 19 pieces of information including credit card numbers and telephone numbers and all this may link up. I was having an argument with a friend of mine this morning who said if you have nothing to hide, you have nothing to fear. I just do not think that is a grown-up response these days. Your innocence does not protect you from bad things and does not protect you from what might happen in the future. I have become a great convert for a limited Bill of Rights which underlines these rights that we have all taken for granted and entrenches them in a way that parliament finds acceptable and the judiciary find acceptable. There is no argument about it, we just realise we have to make this new covenant, this new act of faith between the two branches of our constitution to go forward and to protect the average citizen from the kinds of invasion and intrusiveness that I think are beginning to happen. In the street I live, Westbourne Grove in Bayswater, there has suddenly sprouted the most amazing number of globe CCTV cameras which are all linked by microwave and radio controlled. Of course that may or may not help the security of the area but it does give you a sense of the watchfulness of the State which I am beginning to worry about.

Mr Clarke: I am not persuaded by the case for a British Bill of Rights and I will not be persuaded until I can see with clarity precisely what the content of the legislation is going to be. I would also like to be able to anticipate with clarity what kind of litigation that is going to give rise to. The idea is now very current but I do not think that degree of clarity surrounds the idea at all. I think human rights have become more important in every modern society. I do agree with that implication of what Henry Porter has just said. I think the European Convention on Human Rights is an absolute floor as a minimum defending human rights in this country and always has been. We have moved on steadily. We have allowed individuals to bring actions under that Convention since the mid-'60s. I was opposed to the Human Rights Act and I have changed my mind. I

was wrong. I feared that it would transfer power to the judges from parliament. I feared that we would have a rash of political and campaigning cases that would give rise to judges getting involved in things that should be resolved by the political process. With hindsight I was wrong. I think we are in a very comfortable position. The idea of judicial review, developed over the last 20 years, has been extremely important. I am wholly supportive of that although I sometimes found it a nuisance when I was a minister. I always credit Harry Woolf with having led the way in developing the concept of judicial review in its modern form and it is a valuable protection against arbitrary decision by ministers, their bureaucracy and the like which, with the size of the modern executive and its interface with individuals, is very, very important. Why have we got into a debate on more? I am afraid I think there is a political background to all this. There is the right-wing press's attack on the European Convention on Human Rights which was a wholly non-controversial document until about 15 years ago but once it became part of our European debate in this country suddenly it became the object of attack with the growing insistence that foreigners were making laws which were being applied at the expense of our institutions. Politicians should have been more robust in resisting that. For a variety of other reasons, which I certainly would not raise in a Joint Committee, Britishness has become frightfully important to a lot of British politicians, some because they want to prove they are not just Scottish and some because they want to prove they have listened to the feelings about immigration but do not want to say much about it so we have a lot of Britishness. People go into areas that imply that somehow a new British set of laws is required to defend our human rights. Where I get off the bus is when I say to press people what do you wish to add to the existing European Convention and the Human Rights Act assuming that you are not going to persuade me you want to subtract in any way from what we have got; vagueness rapidly results. You get into a debate about rights and responsibilities which gets canvassed in all directions which is a very important debate. I do not think it is a great new political insight. I think it is platitudinous and should be regarded as rather cliche-ridden by anybody who understands how a democratic society works. Of course there are rights and responsibilities but you would not want to put those into law. The idea that you are going to have litigation enforcing responsibilities on people, individual citizens, in the name of the Human Rights Act I find rather bizarre. The duties are already covered by what we have. The best argument I have heard is to protect the right of trial by jury. As it happens, I have taken part in arguments in recent years defending the right to trial by jury which I strongly defend. It has been raised several times in parliament. I have to say I am wobbly on details of it such as the question of whether or not you have jury trial in long complicated commercial fraud. When I was Home Secretary I believed that we did not prosecute enough commercial fraud because the complexity of it made it highly unlikely that you would have a satisfactory trial by jury. Perfectly distinguished jurists recommend that change and I think parliament should continue to look at it. I do not think it should be decided on some human rights argument and be ruled out of court as an argument. I have to say all the other suggestions I have heard get into the area of social and economic rights which I really would not transfer from parliament to the judges and which take on too much of a political context. Mr Porter puts it very eloquently. I read the document he put in and listened to his evidence and Henry Porter feels very strongly about the surveillance society which is quite rightly a current topic of debate. I share his unease about it. I do not share his feeling that we are all acquiescing and setting out machinery of a police state but a police state could make great use of what we are setting out and we ought to take check of it. The question of whether and where, what sort of DNA bank you have, whether you should regulate the spread of CCTV, all these things, I go back to my feeling that if parliament and political debate cannot resolve that public concern on that issue then I do not think we should transfer it across to the judges with some statement of human rights and say you tell us what kind of DNA bank, if any, the police are allowed to hold on the ordinary citizen. Not least public opinion will change at times, public opinion resolve, the political process is more flexible, more responsive to change, and I think that is what parliament has got to be capable of resolving. It should not become a matter for strictly protected law being applied by judges who might actually be more intelligent and more capable of resolving many of these issues in the collective mind of parliament but are not accountable in the same way. Part of the public debate, and the way parliament is, you might think parliament is the best place for those cases to be resolved.

Professor Bogdanor: Whether we want a British Bill of rights depend on what we want it to achieve. The European Convention was first drawn up 50 years ago in a very different sort of society from the one in which we now live. I suspect that if the framers of the Convention could be brought back to life they would probably say that more rights ought to be added on to it, rights which were not thought of perhaps at that time. That would be one purpose of a British Bill of Rights. One might think that not enough rights are protected by the Human Rights Act. Secondly, one may think we need better protection for human rights. We are one of the few countries where the European Convention is not actually incorporated into our law. Whether one has a right or not depends on the discretion of government or parliament. The judges cannot enforce that right. Many people in Britain believe that this is a sensible compromise but we are very much out of line with most other democracies in Europe. Thirdly, it seems from various surveys that the British people do not really feel they own the Human Rights Act. Although, as others have said, it is a mistake to regard it as an alien imposition, nevertheless many people do feel that it is. I was talking recently to a

senior Conservative who is strongly in favour of the Human Rights Act and he said that he cannot persuade his constituents in his rather leafy constituency that the Human Rights Act has anything to do with them. His constituents believe that it is only for prisoners and suspected terrorists and the like. We would, therefore, achieve a firmer basis for the Human Rights Act if somehow the British people could feel that they owned a British Bill of Rights. That would be a third basis for such a Bill. The fourth issues is very largely that discussed by Kenneth Clarke about citizenship, identity and so on. But in this area I doubt if the Human Rights Act would be of much use. It does not seem to me a mechanism that can resolve these very difficult social problems of how to hold a multicultural and multi-denominational society together. That, after all, is one of the most fundamental problems we face as a country. I very much doubt if legal mechanisms can do much to help in that direction except perhaps at the margins.

Q237 Chairman: I think the question about the Human Rights Act being somewhat out of date is an important one. I do not know if you were here when I put that point to Baroness Hale. I contrast that with, for example, the Charter of Fundamental Rights—putting to one side for a moment its justiciability and its enforceability—if you look at the Charter of Fundamental Rights *per se* it is a much more modern document dealing, for example, with issues like data protection in a way that the European Convention could never do, in that they are the sort of things we can now do which Mr Porter was talking about which were not even dreamt of in 1950. So could we learn things from the Charter of Fundamental Rights which might be transferable?
Professor Bogdanor: Indeed, it is not difficult to think of further rights which should be or might be in a British Bill of Rights and which would perhaps be there if it was being drawn up afresh. The right of privacy is certainly one. There are other rights which are recognised in international treaties and it may be argued that they also ought to be in a Bill of Rights. Some have argued against social and economic rights but there is one important social right which is in the European Convention and that is the right to education. Some would argue that if the right to education is there, why not the right to health care as well. That seems in many ways a complementary right. There are further rights which have been mentioned, rights connected with the environment, which of course were not thought about in the early 1950s, so I do not think it is difficult to draw up a list of further rights which ought to be given basic protection. Finally, some people have suggested that there ought to be a fundamental right to equality in the British Bill of Rights. We have recently set up an Equality Commission and it would seem natural perhaps to put a right to equality, possibly parallel to the right to equal protection in the American constitution. We ought to perhaps have that in a British Bill of Rights if we were to have one.

Q238 Chairman: Your view, Mr Porter, is that we should be looking at something rather more narrow and looking primarily at civil rights, not these wider things. In that context, could I put to you one last question from me and that is partly building on what Ken has said. If you take, for example, the issue of CCTV which you take great exception to, there is huge public demand for CCTV as they see this as a way of protecting themselves from crime, is it the role of the Bill of Rights to try to square that circle by saying, "Thou shalt not have CCTV" or by saying, "You can have it but only under a certain set of circumstances", when on the other hand people are saying, "We want it on every street corner because it helps protect us against crime"?
Mr Porter: It is not my only fear and I do see the point of CCTV.

Q239 Chairman: I use that as an example.
Mr Porter: I raised it obviously along Westbourne Grove. Partly because people do not understand the advantages of technology, but my real worry is what is called transformational government, the way that databases do naturally grow to each other, they reach out to each other, and then there is function creep, people think of new ways of using that database. If I can just set aside the CCTV point, I think if people knew and understood the power of these databases, of collecting and sharing and processing information, they would begin to think, "We need to think about it as a society" and that should be done by Parliament. I am very in favour of Canadian privacy protection. As you probably know, there are two privacy laws in Canada, one of which protects information which is collected by the Government, federal and state, and the other which is about commercial collection of data. I do think we should have something like that in this country and for my taste it would be backed by a Bill of Rights which ensured, as the Human Rights Act does, privacy for people's communications and their family. We do live in a society, and it may be argued it is necessary, where there are something like half a million interceptions—email, internet, post and anyway you can think—per annum. The idea of that 15 years ago, the way we have accepted that, seems to me extraordinary. I make the point that it is not just about CCTV, it is about databases and we have to be very careful of them.

Q240 Chairman: Can I put one further point about the issue of databases because they are a tool of modern society? Is your concern more that we are drifting into this unconsciously or is it an objection *per se*? I will give you an example, the other day I renewed my tax disk over the phone and it was all "press buttons" and they were able to access straight away the fact I had insurance, an MOT certificate, from all the different databases, and it took me a matter of minutes to do something where previously I had to queue up at a post office and produce all these bits of paper, so for me although it was matching up all these databases it was extremely convenient and I did not have any objection to that.

On the other hand, I suppose, you could say, "Is it the right of the state to know whether I have insurance and an MOT and all the rest of it?"

Mr Porter: I totally get that, I am not a Luddite about these things, I just think there is inbuilt in these very large databases we are building a problem for the individual. Over the last ten years, and you could extend it way beyond the Labour Government, it does not matter to me, the relationship between the individual and the state has slowly shifted and the state is requiring the individual to prove him or herself at many more turns during the day or the week than previously. In my belief that sets the individual at a disadvantage to the state, it is something which happens very quietly and very gradually. You perhaps know the metaphor about the boiling frog—if you put a frog into a pan of water and it is boiling, the frog will hop out, but if you put a frog into a pan of cold water and gradually heat it, the frog never realises it is going to die. So that boiling frog metaphor does help us understand I think how we are drifting into a state without anyone saying, "Let's think about this, let's really ensure that the average citizen has a right to privacy." I did mention in my submission there is extraordinary work going into children's databases; there are four or five children's databases. I have a feeling it is unhealthy for people to be so much the prisoner of their early history. I was dyslexic when I was a kid and I would not want that to blight my whole career, but lots of children have problems with discipline, or their parents are having divorce problems and so forth, and this is all reported in care assessment frameworks. I dislike the idea of that history of a child pursuing somebody into adult life and being available to numberless, nameless civil servants. I think we should have a greater grasp on our personal information.

Q241 Chairman: Presumably therefore you would not object to a paper file for the purposes it would be required for to deal with that kid within the local authority, what you are objecting to is the computerisation of it?

Mr Porter: It is not only the substance, if it were my own personal information I want to know who is looking at it and I want access to that information and to be able to correct mistakes. This is not a perfect system and databases do not always work. It is impossible to get a database which has large scale accessibility and security; I think there is a formula which says you cannot make a database with all those characteristics. So we have to realise that technology, while making the renewal of your tax disk very much easier, is not the only answer for managing society. I think we have to also understand it does have implications for the relations between the state and the individual. It is a difficult concept. I know when I am arguing with my friends they say, "You feel free, don't you?" I do feel free but I am aware of what is down the road.

Mr Clarke: I agree with Henry Porter, the issues he raises need to be addressed. The issue for me is, without narrowing it too much, are they best addressed by some declaratory Bill of Human Rights, which then facilitates the judges looking on a case by case basis on challenges to the use of data, or is it not better to address it in Parliament? Some of these things have been; things like the expiry of criminal records. Parliament could address the use to which CCTV footage can be used. Is it legitimate to sell it, is it legitimate for it to be made available to people who are surveying individuals whether the state or private agencies and so on? Data protection we have already addressed on quite a large scale. To take the example of interceptions which is very important—far too many agencies now are allowed to have access to what is intercepted and the scale of interception is so great that it is not properly under control—I would prefer Parliament to address that rather than leaving it to individual people to discover they have been the object of an interception and then to challenge it before the courts under a rather broad Bill of Rights. That is the issue it seems to me. It is not for exactness that I argue this, it is not because I think the decisions of Parliament would be necessarily superior to the decisions of the courts in all cases, but because that is what I think the political process is for; it absorbs more argument, it sensitizes things, it listens to people and then in the end has to protect against abuses, and then when it finds out there is some deficiency in the law it is the politicians who take it in the neck and they have to change the law and amend it to cover some loophole they had not thought of. I do not think it would work making all this in effect judge-made law by having a British Bill of Rights.

Q242 Earl of Onslow: I, like you, Mr Clarke was originally against a Bill of Rights because I, like you, thought the Houses of Parliament, founded in Oxford in 1258, was the defence of the Englishman's liberty. My family have been in the House of Commons since 1560 or something like that, so I feel very, very emotionally attached to it. But what has happened is that Parliament has become wet, it does not control the executive. It was not as if Mrs Thatcher took disagreement lightly, because she certainly did not, but the whipping system makes sure that things get rammed through Parliament. This is why those of us who, like you, wish the House of Commons did its job properly feel disillusioned because we see the House of Commons has not stopped 500,000 people being intercepted, it has not stopped the police suddenly bringing up without statutory authority a vehicle licence reading system, it has not stopped the DNA profiling of innocent children and then biasing it against black children as well. These are abuses of what I call our island story's liberties to which I am so passionately attached. This is why one is saying, "Perhaps we ought to have something else which says to Parliament, 'You have done it wrong.'" I do not come to a Bill of Rights because I want to but because I see the House of Commons failing in its job, and also ourselves as well because we do not accept our own legitimacy—we are always terrified of it, so we are too frightened to be beastly to the House of Commons which we ought to be much

more frequently. I think all Parliaments should be thoroughly beastly to ministers on principle anyway. How do you answer that charge?

Mr Clarke: Firstly, I am extremely keen on parliamentary reform and alongside the arguments I have given you I do believe Parliament has to be made stronger vis-à-vis the executive, it has throughout my life become weaker and that process has gone too far and needs to be reversed. That is a whole separate subject which no doubt this Committee and many others will look at. I respect that view, but Parliament has not become too powerless. Let me take some examples. I am going to be voting against my whips and with the Government most of this week as it happens and the cross-party voting for most of this week will be quite considerable, so an analysis of what is wrong with Parliament—and a lot is wrong with the Commons—is sometimes a bit wide of the mark. Take what we have done, and the upper House played a bigger part perhaps than the lower House but both did, the 90 days' detention without trial was blocked in Parliament. I voted against the renewal of control orders the other day when my party did not, and I do not think they are going to last much longer and I think Parliament is eventually going to throw them out. We have not done too badly against some of the stuff recently. The reason we have allowed things to happen is I am afraid because of public opinion. As an elected politician I am under no illusion that probably the majority of my constituents agree with the friend of Mr Porter this morning who said, "If you have not done anything wrong, what have you got to worry about when it comes to DNA databases, CCTV and the rest?" I do not think the majority of my constituents are against 90 days' detention without trial, the majority would say, "If they are terrorists you should detain them for as long as you need before you get proof you have the right man." So the weight of public opinion, because of reaction, an understandable reaction perhaps, an hysterical reaction perhaps, to recent events and the constant fear of terrorism and organised and violent crime, tends to press for these things. Parliament only defuses it to an extent, Parliament resists those pressures to a certain extent, but when Parliament does I think it is more effective, and to hand it over to judges would lead to constant populist campaigning for the law to be changed and for judges to be over-ruled. Indeed I think the reason we have this bizarre public view of the European Convention on Human Rights and considerable hostility to the Human Rights Act, which you and I have both been persuaded of the need of, is because the public are constantly being told that all kinds of villains are thriving because this foreign law keeps protecting them. The press love to feed the public with allegedly outrageous cases of ridiculous things being done in the name of the human rights of a prisoner. I think the political process handles that better, although I do think both Houses of Parliament need to be made stronger vis-à-vis the modern executive. You cannot dismiss altogether the restraint that Parliament does impose when Parliament has the courage to do so.

Q243 Earl of Onslow: I have heard obviously the same views you have from the public on the Human Rights Act. I completely accept that I am not elected, I am here because my forebear got a title from George IV, which is a perfectly good reason.

Mr Clarke: I am familiar with the history of Speaker Onslow.

Q244 Earl of Onslow: A very great man; very great. Three of them!

Mr Clarke: You are elected by one of the more curious processes of English democracy.

Q245 Earl of Onslow: I say to Lady Jay, "We elected peers" which goes down like a lead balloon. The point I was going to make is, if you explain to people what the Human Rights Act is, it is quite surprising how very rapidly they change away from the "*Daily Mail*" view. But there is also a rising worry about an over-mighty executive and the boiling frog metaphor seems to me exactly right. If Parliament does not do something about it, and Parliament has let these things through, if somebody evil gets into power the machines of tyranny are there and it is that which worries one.

Mr Clarke: But if you have a Bill of Rights defending privacy, obviously the drafting would go well beyond that, how do you draft a Bill of Rights which protects people against the universal DNA database, if that is one of the things you are worried about? Actually on that I find my own views are ambiguous and so are the views of the public actually, because I agree with you that a sensible conversation with a member of the public rapidly moves most people away from simplicity. It obviously can be very important to have the DNA of people who have a history of a particular type of violent or sexual attack, and that leads people to say, "Why should we not have the DNA of every adult male in order to deal with this because the others will have nothing to fear." I am uncomfortable about that, I think most of my constituents are uncomfortable about that. If it ever has to be resolved, I would prefer legislation laying hard and fast rules about which people can be obliged to have their DNA kept on a national database and which cannot. I think the judges will find it very difficult if you faced a judge with the argument, "You draw up the rules for a database because Parliament thinks this should be decided under a Bill of Rights."

Q246 Earl of Onslow: But when we invented fingerprints, Parliament came to a perfectly sensible view, that you had a fingerprint file and if you were found not guilty they were destroyed.

Mr Clarke: Yes.

Q247 Earl of Onslow: But Parliament has not done that with DNA files. That is the point. Do not think I do not understand the difficulties because I do, I understand the difficulties of drafting, I understand all of these things, but I am almost saying that dreadful cliché, "Something must be done." Mr Porter has shown with extreme clarity where the abuses have come.

Mr Clarke: Do you not think the climate of opinion has changed? Fingerprints were introduced when fascism, totalitarian states were part of everybody's experience, people had been fighting such things, they had seen examples of such states and there was extreme sensitivity to the idea that the authorities could hold your fingerprints even when it turned out you had been cleared of any suggestion of criminality. The mood nowadays, and in my opinion taken to excess, is fear of terrorism, fear of crime, fear of disorder, and I think some of these things get canvassed. Some of these things have been defeated recently precisely because governments feel it necessary to respond to these public concerns and look tough about them. Resisting those kind of pressures, it is up to Parliament to stand up to it, I agree.

Q248 Earl of Onslow: But you are the sort of person who does stand up for what you think is right—
Mr Clarke: A lot of politicians do.
Earl of Onslow: Surely it is Parliament's job to stand up for what it thinks is right rather than to follow meekly. That is what Burke said, is it not?

Q249 Chairman: The problem is that Parliament in thinking what is right or wrong may disagree with you. To take Ken's point and I perhaps put this to Mr Porter, looking at the parliamentary approach to this, thinking of DNA databases and also databases generally, I see the force of your argument that we sort of drifted into this without a conscious decision, I do not know if Parliament made a conscious decision that a DNA database would include everybody who was arrested for anything. I do not think we did.
Mr Porter: It has not, no.

Q250 Chairman: Would it satisfy you if Parliament had made a conscious decision, one way or the other, that we should have databases on everybody or a database of suspects or a database of convictions?
Mr Porter: Absolutely we need that debate now rather than the drift.

Q251 Chairman: Would that satisfy you?
Mr Porter: What would satisfy me is, first of all, if this had been debated, but it just happened. This is a statutory instrument. I do not think there is any statutory basis for the database, in fact I am fairly sure there is not. I do not think there is any statutory basis for the collection of people's car journeys down motorways on automatic number plate recognition cameras. What worries me is that this thing does not ever come before Parliament so the issues can be explored and ventilated so we can have the argument about DNA and what it tells you. I think in the South African constitution, and you can correct me on this, there is an article which says that people have the right to biological integrity and I think that is what we need in this country. Let us at least have it debated in Parliament. That is what worries me. All this stuff is happening without debate in Parliament, it just happens, your phone records are suddenly the state's property. That is what worries me and that is why I agree with Lord Onslow that Parliament is not standing up and not allowing the public really to understand the issues by having a debate.

Q252 Chairman: On the database issue, we find ourselves in this Committee frequently recommending in our reports on Bill scrutiny, that the various safeguards and protections for a particular given database should be explicitly stated on the face of the Bill rather than in subordinate legislation. That I suppose is Ken's approach which is that Parliament should decide on these issues. The trouble is, they are all buried in affirmative resolutions or indeed negative regulations from time to time. Would it satisfy you if we saw more of that, ie the purpose of the database and the safeguards surrounding it expressed on the face of the Bill?
Mr Porter: Yes, the packaging, the warning on the label, should be much more explicit. I am no expert in these things, I have become interested in the last three years writing for the *Observer*, and I am struck by how astonishingly ignorant people are about such things as databases, about the potential of reading people's DNA and what that will mean in 25 years' time; you will be able to tell an awful lot, maybe about people's personalities, their intentions, the way their lives are likely to go. Of course we trust our governments to use them properly now but I am just saying we are laying up a hostage for the future if we do not really think about these things and allow the public to debate and understand these issues by having them ventilated in Parliament.

Q253 Chairman: Going back to the Bill of Rights debate, is your advocacy for the need for a Bill of Rights a frustration of the fact that these things are not happening because Ken's parliamentary model is not working, or do you see the need for a Bill of Rights as a fundamental safeguard as well as the need for Parliament working properly?
Mr Porter: It grows out of the fact that I do not think Parliament has protected us. The list of encroachments of liberty I have given you in my submission I think is an astonishing list and I would not have believed 20 years ago that I could ever have made that list. I am astounded by it. It has grown out of my frustration with these things being passed through Parliament, like the Civil Contingencies Act, which I have severe doubts about, or the Inquiries Act, which seems to be Parliament voting against its own sovereignty and powers. I wish that there was leadership in Parliament which stood for Parliament, not for the parties.

Q254 Chairman: But the consequence of that is ultimately a system of complete separation of executive and Parliament, is it not? Is that not where the logical consequence of that leads to? A presidential system?
Mr Porter: I suppose it does, although of course the executive is the first born of Parliament in a sense, it emerges, it is made from Parliament. I do not wish for things to be that radically separated, I want the thing as it was designed to work better. I want

Parliament to call the executive to account and scrutinise its decisions, particularly statutory instruments, much, much more.

Q255 Earl of Onslow: May I also put in another point? I seem to remember in the Wilson Government the criticism of Michael Foot when he introduced five guillotine motions in one Parliament, and the House of Commons was in uproar, saying this was monstrous and the Government was kept up all night and there was general mayhem all round. Now—and it is not for me to criticise another House—you do seem timetable motion after timetable motion after timetable motion. We have seen the Criminal Justice and Immigration Bill come to our House in a state of complete undigested pap, ill-thought through, and it has had to have about four out of the six parts taken out of it because it was guillotined in the House of Commons and did not have enough time. Some people have criticised, whichever view you take, the process over the Lisbon Treaty. It is the executive controlling the timetable as ruthlessly as it now does which has seriously undermined Parliament in my view.

Mr Clarke: I think that is one of the problems. I took part in the timetable debate and it is not only the timetable, governments are not the only initiators of key legislation and the Government has not felt under adequate political pressure to produce legislation in these areas, possibly because a lot of the public and a lot of the legislators do not agree it is needed, but we all do and I think eventually somebody will want to legislate on DNA which is quite an interesting one to stick to as an illustration. The test of human rights tends to be when it protects somebody who is unpopular and does so in controversial circumstances, so the first time that the police have a really nasty and highly publicised case on their hands and the chief constable says, "We could actually clear this up but unfortunately the law does not allow us to have an adequate DNA database, if we only had a nationwide database I could give you the name of the man who committed this offence tomorrow", you have to ask who does the *Daily Mail* blame and who is going to defend themselves in that action? I think it is better if the politicians defend themselves. The politicians amend the legislation, if the chief constable is right and you have actually gone far too far. I do not think an unfortunate judge—I suspect the judges would not like all this landed on them—should be left saying in a particular case that his or her ruling is that DNA is taken in these cases and then find the whole case is the centre of wild political –with a small p—controversy a year or two later when it is put to the test.

Professor Bogdanor: It seems to me that Lord Onslow has raised a very important general issue which we ought to discuss, namely that we rely upon Parliament at least as much as we do on the judges to protect our rights, and that the judges can never be a substitute for Parliament. Behind Parliament of course lies the people. That brings us back to the problem which I raised earlier, that at present the British people do not feel that they own the Human Rights Act. This perhaps brings us back also to the case for a British Bill of Rights. If the British people felt that they owned it, they might put pressure on their MPs in Parliament to scrutinise the executive more carefully on human rights issues. That might be one way of trying to achieve what Lord Onslow would like to achieve, a more assertive Parliament.

Mr Clarke: I do blame the political class for that. We should not have got into this situation over the European Convention on Human Rights, which was completely uncontroversial until 15 years ago. The allegation was made in the heat of debate about the European Union, "This is Brussels-made law", and the best argument to use, even with the most vociferous ultra-nationalist Euro-sceptic, is to recount the history of it. This is post-Second World War legislation, written by British lawyers—David Maxwell Fife and others—to demonstrate the values we fought the War for and to try to encourage continental Europeans to embed those values into their own future laws and society. You could make the most patriotic defence of the European Convention on Human Rights and far too many otherwise responsible politicians have preferred to flirt with this idea that this is funny, foreign-made law. Personally, I think some of those are now the advocates of a British Bill of Rights and they are a bit stuck when it comes to saying exactly what they want to put into this British law as opposed to the foreign law which is going to protect them. Of course, not surprisingly, they keep going to social and economic rights which take you straight into political controversy between left and right as to exactly what is a right and what is an issue about priorities and so on.

Q256 Chairman: We may come on to that later. I certainly do not think we disagree with you about the way the Human Rights Act/Convention has been misinterpreted by politicians, and we have published various reports to that effect. It has become the sort of Health and Safety modern-day excuse for incompetence and taking bad decisions and it just gets the blame for everything even when the decision has absolutely nothing whatsoever to do with it. What is quite interesting is, picking up on Professor Bogdanor's point, the fall-out from the *YL* case, the one about care homes, has been quite interesting because actually we now have quite a strong powerful movement coming from the elderly demanding that the consequence of the *YL* case is to make sure they have their human rights in their care homes. Partly I suppose that is because of our wonderful report on this issue, which we will be debating in Parliament next week—to give it an advert—but what we are now seeing is potentially people starting to realise they do have some importance in those sort of circumstances.

Professor Bogdanor: This is an excellent example because part of the difficulty about the Human Rights Act is that when the Convention was drawn up it was concerned, as Kenneth Clarke indicated a moment ago, with the problems arising out of the experience of fascism and national socialism. People

were very worried about the stability of democracy. But the problem is that the Human Rights Act has had to deal with very small and vulnerable minorities who cannot easily get into the electoral arena. Many people find it difficult to empathise with the rights of prisoners or suspected terrorists. Therefore the case you mention, Chairman is, if I may say so, extremely important because many people can identify with that particular issue. It is a general problem concerning the Human Rights Act that we need to persuade people of its importance. Perhaps we could persuade them that they at any time could be part of a very small and vulnerable minority, they could be detained in error, as people have been detained in error, and they would want their rights protected in such a situation.

Q257 Lord Bowness: Could I ask why you believe, Professor Bogdanor, people would own a British Bill of Rights? Would not the same people who look at the Human Rights Act view it as something introduced into Parliament as another political stunt, probably introduced to guarantee the rights of minorities they do not happen to like? What is the thinking behind that because we call it a British Bill of Rights they would somehow all line up behind it?
Professor Bogdanor: Survey evidence indicates that people very much want to see a British Bill of Rights and that they feel it ought to contain trial by jury which people feel is an issue concerning large numbers of people; a very large majority also feel that it ought to contain something like the right to National Health Service care. So there are certain rights one could add to the Human Rights Act which would make people feel that human rights belong to them and that it was not just a matter for very small and often unpopular minorities.

Q258 Lord Bowness: I think our three witnesses have given very full and informative answers and covered many of the things I was going to ask. I think our witnesses have made it clear, and no doubt they will correct me if I am wrong, they would not want to see any lesser protection than the European Convention on Human Rights. We have had different views on economic and social rights. There are just two things left, I suppose. If you had, and I am not suggesting you should, a Bill of Rights with economic and social rights, would there be any point in having it unless those rights are actually justiciable? Secondly, ought one to get into the area, either by giving the courts the power to develop the law or through the Bill of Rights itself giving the citizen the right, of actually challenging breaches of rights by private power as it is described?
Mr Clarke: I think law which is not justiciable is pointless; gesture politics. So when you legislate you should know who is going to litigate and what is the nature of the litigation, which is one of the things which worries me. For example, on health, which Vernon Bogdanor has mentioned, I think if you give a right which people believe means they can go to court to demand a particular treatment for a particular condition that they want and that is going to be decided by the judge, you will find it very, very difficult indeed to manage a National Health Service which is chasing infinite demand out of finite resources. I think we will also have a lot of arguments about clinical decisions, about alternative treatments, experimental treatments and so on, so I am very wary of that. On private institutions being subject to a Bill of Rights, that is the point raised by the very important nursing home case. Again I am hesitant on that because again there is problem why we do not legislate on nursing homes.

Q259 Earl of Onslow: Because you haven't!
Mr Clarke: If you alter the existing Bill of Rights, which is what I think is proposed by most people, so that the Human Rights Act we have got should apply to private institutions, sometimes acting as an agent of government when it is more arguable, as well as public ones, along will come a steady procession of people who want every powerful institution to be made subject to it—banks, building societies, multinational companies, supermarkets, farmers who go in for factory farming—I can just see a flood of people coming along with human rights cases. I concede I may be wrong because these are exactly the fears I had about the Human Rights Act in the first place and—

Q260 Chairman: Is that necessarily a bad thing?
Mr Clarke: I think it is!

Q261 Chairman: Let us take Mr Porter's example of the databases, it is not just the state that maintains databases, I am sure my bank has a huge database about me and my transactions and my credit cards—
Mr Clarke: Your supermarket has.

Q262 Chairman: The supermarkets monitor what food you buy—
Mr Clarke: --- and what time of day you buy it.
Lord Bowness: Tear up your loyalty card then.

Q263 Chairman: If Mr Porter is right about the need to monitor databases, it is not just the state, it is all these private, big business people we need to control as well.
Mr Porter: That is why I go for a double-barrelled privacy law which I think would be very important. The Canadians have shown it works and it is constantly finessed and tuned to take in different commercial factors as well as changes in society and so forth. I think we need that backed up by a Bill of Rights. In a sense I do not think it is a Bill of Rights issue, I would like the principle established in a Bill of Rights and then I would like a privacy law, and I think people would come round to my thinking eventually.

Q264 Earl of Onslow: On the point somebody was making just now about the Bill of Rights entering into social and economic areas, when I first came on this Committee we were looking at human rights in old people's homes and my immediate reaction was, "This is nothing to do with the Human Rights Act, this is to do with policy and how it should be done,

the Human Rights Act should be about great big principles of law, of liberty of the subject, et cetera, et cetera, et cetera." But I went along a footpath to a Damascus conversion which was simply this, it was found to be an immensely useful tool, both to the nurses who wanted to put things right and to patients to do things which they should be doing anyway, and because somebody said it was against human rights they all got frightened and did it. That is a very bad reason to have it but in some ways it is useful, untheoretically, just practically. Again this is the conversion I had originally because Parliament was not doing its job. They are tools to make people do their jobs and you were saying just now, "Surely we should do something about . . . .", I am sorry I cannot remember.

Mr Clarke: I said why do we not legislate on nursing homes.

Q265 Earl of Onslow: Yes, that was it, and I interrupted and said, "But you have not". That is what gets those of us who are libertarians, in the oldest sense of the word, because Parliament lets these things happen.

Mr Clarke: Parliament does not get invited to legislate. Let me be plain, I am not coming out in favour of new legislation on nursing homes but say this Committee advocates new legislation on nursing homes, the Minister consults a bureaucracy which is very, very close to people who own nursing homes, work in nursing homes, represent those in nursing homes, with great respect there will be a tremendous consultation which will be responded to by people who say, "The nursing home movement in this country is a fantastic contribution to human welfare", and it does require quite a long process before legislation is brought forward to make a real difference to the way nursing homes are run. It is amazing when you are a minister in these individual areas that sometimes your bureaucracy, certainly most of the lobbies you work with, constantly bombard you with the need for more surveillance, more information, more data and more protection against dreadful newspapers who try to claim there is some deficiency in the system for which you are responsible. That is why we get so little reforming legislation. If the Government brought forward a Bill on nursing homes designed to raise nursing home standards and to stop the abuses of individual residents, scarcely a Member of Parliament would dare to speak against it and nobody would vote against it; it would be in favour of motherhood. It is the bureaucracy in the system which makes it slow to bring these things forward.

Q266 Chairman: We have made a lot of progress in getting the Government to legislate on *YL*, but by focusing on nursing homes we are missing the point about what the *YL* case is actually about, and what it is about is the applicability of the Human Rights Act to public services delivered by privatised contracted-out services in the broadest sense. To resolve the issue we have to make a decision ultimately whether we think it is right that if services are continually being privatised, contracted out, the people who receive those services suddenly lose the rights they have to enforce those rights against the organisation delivering the services. We have talked about this particular aspect, there is a whole series of other things which are affected which came out of the debate we had.

Mr Clarke: But if you are going to be able to sue your gas company on some new basis beyond contract or beyond the ordinary law of tort, should that not be as a result of a new piece of legislation and not because some judge has suddenly decided to interpret the Human Rights Act in a way which goes in your favour?

Q267 Chairman: But this goes beyond that, this is actually looking at the general applicability of the rights rather than the specifics.

Mr Clarke: Yes. Your supermarket database, if you are worried about that, does it not need a Bill on supermarket databases not a judge struggling to decide what your human rights are about what a database should have on you and who they should sell it to?

Q268 Lord Morris of Handsworth: Can I try to clear up in my mind the positions that Ken and Henry take. You said, Ken, at the outset that you were not persuaded we needed a Bill of Rights and your response is that we should leave it to Parliament, on the other hand we have Henry's paper which demonstrates that Parliament is not really working. So between the two situations the problem still exists; some problems still exist. Could I ask whether you think the human rights model of protection gives sufficient importance to the role of Parliament? Would you want to see the role of Parliament strengthened in order to ensure that human rights, which you passionately believe in, are in fact protected?

Mr Clarke: I said I am not persuaded, which is less strong to my mind, because I have gone through the same process as Lord Onslow of being persuaded that things were correct which I was previously against. I understand the feeling Parliament is not satisfying Henry Porter so I therefore fall back on the argument that parliamentary reform and the strength of Parliament's ability to scrutinise the executive would be my preferred route. I think you should ask Vernon Bogdanor to decide what is the key argument. It is the balance between the Bill of Rights and therefore a judicial review, particularly if the judiciary have been given the right to override legislation and so this legislation is contrary to this entrenched Bill of Rights, which some people would argue, and whether—and I am not a pure parliamentary democrat because I accept that Parliament can commit excess—normally the parliamentary process should suffice.

Professor Bogdanor: I wonder if we are not being perhaps slightly geographically and historically parochial in our arguments here. It seems to me the onus might be on those who think we should not have a British Bill of Rights to argue why it is that the rights which were created in the 1950s are just the rights we need now and no more. We all of us think,

I suppose, that society has changed enormously in nearly 60 years, why are the rights which people drew up in 1950 exactly the sort of rights we need now and no more? That seems to me historically the parochial argument. The geographically parochial argument is that we are in such a small minority amongst countries where our rights depend upon the discretion of Government and Parliament. The judges can do more than say, "Your rights have been infringed, there is nothing we can do about it, but we hope that Government and Parliament will put things right." So far Government and Parliament have put things right but there is perhaps no reason why that should continue indefinitely. We are in a very small minority of countries which have not fully incorporated the Convention.

Q269 Lord Bowness: Supporters of the European Convention will say that it is not frozen in the early 1950s, surely the courts interpret it in the light of the jurisprudence of the courts? I put it to you, is it entirely fair to say it is frozen at that point in time?
Professor Bogdanor: It is not frozen in that sense but it is frozen in another sense that there are certain rights which now occur to many of us, such as for example rights connected with the environment, which were not thought of at that time. There is also an argument, and obviously it is a very controversial matter, about the right to health care but I am sure people can think of other rights as well—the information society sort of questions which Henry Porter has raised—people did not consider those very seriously in 1950—why should they have done, they did not seem to pose such serious problems then. But we do live in a very different sort of society now. I would like to repeat what I said earlier, that if the framers of the Convention, which included British Conservative lawyers, were here today they would probably imagine a wider set of rights than were in that Convention which was good for its time but of course society advances.

Q270 Lord Bowness: Chairman, forgive me, I asked the question and I should not challenge the answer but, if you are going to include those sort of matters, do you not get into the same difficulty that the framers of the Charter of Fundamental Rights got into, whereby including principles as opposed to the Convention rights means they have to virtually make all principles subject to national laws? Yes, the environment might well be a great issue that people would want to see mentioned, but you can hardly have it on the basis of something universal across the piece as a principle. It would either have to be subject to national laws or, in our case and the case of 26 other countries, possibly European Union laws on the environment, but it would be on laws produced by some legislative process rather than a statement of principle in a document.
Professor Bogdanor: Yes, indeed, it would be a standard which Member States of the Council of Europe would be expected to conform to. I happen to think that is a very good example for those in favour of a British Bill of Rights because obviously the right to environmental protection depends upon certain duties being fulfilled by numerous people and organisations. So that would bring out one point, that rights involve correlative duties and responsibilities. Many are talking about a Bill of Rights and Responsibilities; in areas that does not make sense, but I think it perhaps does make sense in the area of the environment.

Q271 Lord Morris of Handsworth: My understanding of your position, Professor, is that our rights are not to be frozen in the 50s, 60s, 70s, or whatever period in time. Would you therefore support the possibility of amending a Bill of Rights, were we to have one, to make it much more flexible in order that it could in fact represent social attitudes or infringements of human rights at a particular point in the future?
Professor Bogdanor: Certainly it ought to be amended but not I think by the normal parliamentary process.

Q272 Lord Morris of Handsworth: What law would you use then if you support an amendment?
Professor Bogdanor: I think it might be reasonable to say that the House of Lords should have an absolute veto over amendments, as it does over extending the date of a general election. If one did not have that provision it would be possible for a temporary majority in the House of Commons to alter the Bill of Rights for purely political purposes which obviously one wants to avoid. But my proposal would depend I suppose on retaining the current House of Lords, a non-elected House of Lords. We give the House of Lords power to stop the Commons extending the period between general elections beyond five years—the Lords has an absolute veto—and that is a kind of constitutional long-stop. So perhaps that kind of constitutional long-stop would be appropriate to prevent the Bill of Rights being amended by the normal parliamentary process, and that would emphasise its importantance as a constitutional document.

Q273 Baroness Stern: Could I come in and ask something about responsibilities because you did mention this in your answer before last. I know that Henry Porter thinks the idea of a Bill of Rights and Responsibilities is a bad idea, and I understand that Kenneth Clarke thinks it is "platitudinous and bizarre"—is that right?
Mr Clarke: It is a perfectly sensible debate to have but it tends to become a platitude because everyone accepts one's rights in society carry with them certain duties and responsibilities, it is not a great original insight which is being claimed by people who are suddenly making themselves philosopher kings on the subject at the moment.

Q274 Baroness Stern: Could I ask Professor Bogdanor, who did say—at least I thought I heard you say—maybe there is something in this idea about rights and responsibilities, in the sense it could apply to the environment? Do you think it would be appropriate to have any responsibilities in a British

Bill of Rights and do you think there is a connection between, "You will only get your rights if you are good with your responsibilities"?

Professor Bogdanor: It seems to me that all our rights depend upon others discerning their responsibilities. For example, if I have a right to freedom of speech, you and others have a responsibility not to interfere with my exercising that right. The point I was making about environmental rights is that this is a situation where the correlative responsibility is absolutely obvious. As you suggest in your question, the issue of rights and responsibilities has been taken much further in two different ways. The first is to try to answer the problem of social cohesion, and there I agree with Kenneth Clarke very strongly that a Bill of Rights and Responsibilities makes no sense, it is confuses what can be achieved by the law with what we need to achieve by social and political means; the problem of social cohesion is very complex. As to the other point, that our rights should depend upon our responsibilities, that cannot be correct. I think the former Lord Chancellor, Lord Falconer, said that there were only two criteria for our having rights, the first was that we were human and the second was that we were here in Britain. Obviously some people who are here in Britain are not citizens but they have rights just as much as citizens, so I think the suggestion that rights should depend upon responsibilities argument is a very poor one. Some people have implied that, that if you are not a responsible citizen you do not have any rights, and that I think is quite mistaken.

Q275 Earl of Onslow: I think actually it is all right to be irresponsible but take the consequences if you are.

Mr Clarke: I think you have a right to do whatever you want until Parliament and the law forbids it, in any free society. You are open to criticism if you exercise your freedoms in a way which makes a thorough-going nuisance of yourself, and it is up to Parliament to do something about it if a lot of people are doing it. I think it is dangerous if people start saying that people do not have human rights in a society unless they demonstrate they are behaving responsibly in some other way. For welfare benefits, of course, you should lay down rules and say, "It is perfectly open to Parliament to agree the rules which say you are not entitled to the benefits if you won't do this to qualify for it", but to dress that all up in human rights' language I think is a mistake and I agree with Professor Bogdanor. The whole question of how do you get a society to feel mutual obligations to each other and get people to behave in a responsible way, whilst appreciating they should not take for granted all the rights they have, is not something I would either legislate for or litigate about.

Q276 Chairman: Can I come back to the issue of social and economic rights which we did not fully explore? Perhaps I can ask Professor Bogdanor to start with. I think Ken's view is, if they are aspirational there is no point having them, to summarise, but if you look at the South African constitution they have very, very tightly constrained justiciability of rights which are subject to resource implications. So there is a degree of justiciability but it is very, very difficult in the way it is phrased. Albie Sachs said to us, "There is nothing wrong with aspiration and a country without aspiration is a country which does not really think about its future", or something along those lines. Do you think there is a role for social and economic rights if they are properly worded and constrained in a similar way to South Africa?

Professor Bogdanor: I accept that one should not put aspirations in a Bill of Rights, that a Bill of Rights should be concerned, to refer to an earlier question by Lord Bowness, solely with what is justiciable. Within that limit, I think one can require a certain minimum from Government in the modern world in social and economic matters and there already is, as I said earlier, one social right in the Convention, which is the right to education. No one supposes that this gives you a right to a certain sort of education or a certain standard of education. Principle for a very minimal floor, and I cannot see why by analogy the right to health-care, for example should not also be there. I cannot see the force of the argument that social and economic rights as a matter of principle are not suitable for inclusion in a Bill of Rights.

Q277 Earl of Onslow: On this issue of right to education, what is education? Does it mean at the age of 6 you can count to three, or does it mean that everybody has to be a professor of nuclear physics by the age of 30 or a professor of law at Oxford? How do you define education and how do you actually make it, as Mr Clarke says, justiciable?

Professor Bogdanor: This is a matter for the courts and there is a large case law I believe on this issue. The only point I was concerned to make was that it does not seem to involve insuperable difficulties. Obviously no one suggests that everyone has a right for example, become a professor of nuclear physics by the age of 30, but I think one can rely on the judges to interpret this sort of issue fairly sensibly.

Mr Clarke: It has never actually been used, as far as I am aware. I am not aware of any litigation because everyone has a state education system and nobody seems to have used it, but on health they might. Do I have a right to demand homeopathic treatment—that would be a very controversial case.

Chairman: If we look at how South Africa has done it, they seem to have squared the circle quite well on health, but that is going into a lot of detail we have not got time for today.

Q278 Mr Sharma: What kind of consultation should there be about a British Bill of Rights?

Professor Bogdanor: That is an extremely difficult question to answer because of course the danger is that the consultation is purely amongst the articulate. I believe that the Government is thinking of adopting a procedure which was used in British Columbia over the electoral system whereby a random selection of people is to be brought together in some sort of convention to consider what they

regard as the essentials of a British Bill of Rights. I am not convinced that is necessarily the right solution but I find it difficult to think of anything which would be more suitable. There obviously needs to be very widespread consultation and not just amongst interested pressure groups and the articulate. The great danger is consultation only amongst the articulate, and one has to try and secure an institutional solution which will enable a very large number of British people to be involved in the arguments and to feel they owned a British Bill of Rights. This is perhaps a part of citizenship education. Your question is fundamental but very difficult question to answer!

Mr Clarke: I would have the ordinary consultation. I think it is quite important to consult on it. I am afraid I think that normal consultation, of which I approve, tends to get a not-completely-representative set of responses but as long as you realise the responses you are getting are from articulate interest groups—and actually there are not any particular vested interest groups in this area—the response you get back tends to cover a range of issues. I would be very dubious about citizen's juries and random selections, particularly if they are going to start debating Britishness and what British values are and how British society should be made to recognise British values more. I do not have excessively patronising or scornful views of public opinion, I usually agree that the public are more intelligent than either their politicians or their journalists and if you talk it through for a bit, people begin to get a hang of what you are talking about, you tend to get more sensible ideas than the first reaction. But this is a very dangerous area. As far as the press is concerned, there is a section of the press for whom the mention of human rights tars somebody as being a wet, liberal, hopeless character who is failing to stand up for British interests in society, and there is no point in encouraging that too far.

Mr Porter: I agree with that. It is astonishing how the reputation of human rights, the thing which guarantees us all our freedom, is so denigrated. It is one of the most astonishing turn of events in these last ten years. You can blame the papers—I get large numbers of emails when I write a column and you get some of this in the emails and it is fascinating to respond to them and say, "Why do you think this" and just go through the motions of explaining it. I do believe in consultation. I was at a dinner in Hay-on-Wye at the book festival, the literary festival, last year, and the dinner was set up by the *Guardian* to discuss human rights and the Bill of Rights particularly, and in that room were a number of very distinguished people—Lord Bingham, Sir Martin Rees, the Astronomer Royal, Simon Schama, the historian, the head of the British Museum, and so forth, and I was very struck by how at 1 o'clock in the morning there was a really fascinating discussion of what should be in a Bill of Rights. If you put a group of individuals like that together to form some kind of proposal you can then push it out to the public—and I would include in that group lawyers as well as scientists and writers, scientists particularly who understand where we may be going. I certainly do believe in, first of all, educating people about the possibilities, what might be in a Bill of Rights, before you ask them for their opinion, so you have something to which they can react.

Q279 Mr Sharma: What sort of body should be established to consider the range of options and make recommendations to the Government and Parliament?

Mr Clarke: A Select Committee is not a bad start! I would not set up a special body. In recent years everybody has been very fond of setting up expert studies and having reports as a basis for government policy, the present Prime Minister is very fond of that method of proceeding but although he has had some very distinguished people advising him I have always had a strong suspicion that the conclusions they supposedly reached were pretty well determined before the process started. In practice I do not think any Government will completely let loose control in the end of the first draft at least of anything which gets canvassed, but I think they should listen to Select Committees and indeed groups of people at 1 o'clock in the morning at book festivals wherever they are.

Q280 Chairman: It sounds a bit like a Royal Commission.

Mr Clarke: Yes, you could have a Royal Commission.

Q281 Chairman: Mr Porter's idea sounds like a Royal Commission.

Mr Porter: It is.

Q282 Earl of Onslow: Would it be possible to sum up what you three have said that, yes, there is a problem but you do not agree on how to solve it? Is that fair?

Mr Clarke: Yes, a giant executive, surveillance society, we are not quite sure where we are going. I would agree with that. That almost puts Henry Porter and myself together and although Vernon has not covered that so much today I think it covers him as well. Then we disagree about methodology.

Professor Bogdanor: Our problem is that because we do not have a constitution when we introduced the Human Rights Act many people were not aware of what precisely we were doing. We were not aware of the nature of human rights, the status of human rights and so on, and therefore part of the purpose of having a British Bill of Rights is an educative one, to provide an answer to Mr Sharma's earlier question problem that people may not understand what the basis of our human rights actually is. I think this is particularly important in the kind of society we have become. It is a very different society from that of the 1950s, it's a multi-cultural, multi-ethnic, multi-denominational society, where we face the fundamental problem of how we are all to live together. The law can only make a comparatively small contribution to answering that problem but it is nevertheless basic, it is a framework for everything else. It seems to me very important for our country

that we understand those issues. But we do not, because we do not have any formal constitutional processes by which we—

Q283 Chairman: But going back to your earlier answer, could the glue which holds all that lot together be the aspirational nature of social and economic rights, something we could all agree on as to where our society should go?
Professor Bogdanor: That might certainly be the case. As I said earlier, there would be a minimum of social and economic rights be in the Bill of Rights, but there is also a large area of aspiration on which we certainly might all agree. I accept that would make a contribution to making us a more cohesive society. As I also said earlier, this is a very large and fundamental problem, perhaps one of the most serious we face as a country, and I think that the law can only make a comparatively small contribution to resolving it.

Q284 Mr Sharma: You have suggested that a constitution should be ratified by a referendum. Would you also advocate a referendum for the adoption of a British Bill of Rights?
Professor Bogdanor: That is an interesting question. I think it would be a good idea, probably, because if supported in a referendum the British people would certainly feel that they owned it. I believe however that most countries have not had a referendum to ratify Bills of Rights though they do have referendums to ratify constitutions, or at least many countries do. But I accept your suggestion that there is a very strong case for a referendum to ratify a British Bill of Rights if we were to have one.
Mr Clarke: I personally am opposed to referendums because I think the only purpose of a referendum is to endorse something despite having a parliamentary majority in the other direction possibly. It is a replacement for Parliament and is usually advocated, and has been throughout history, by people who are very worried they do not have a parliamentary majority for their particular point of view. It drives me back to my belief that Parliament does have to be reformed because the growing demand for referendums is in part a reflection of people's growing lack of confidence in their Parliament and whether it does its business. Leaving aside the very controversial issues which we will be debating in two days' time on the floor about a referendum on the current topic, my fear has always been that once you have one or two referendums people will start saying, "These are part of the British constitution" and demanding them on every subject under the sun. I actually do not think that is a way which one can sensibly govern a modern democratic state in an increasingly complicated world.
Mr Porter: I pretty much agree with that actually.

Q285 Chairman: Thank you all very much for coming, we have gone way over time. Is there anything which you would like to say which you think we have not covered?
Mr Clarke: We will read your report!
Chairman: If we can reach agreement amongst ourselves! Thank you all very much.

Monday 10 March 2008

Members present:

Mr Andrew Dismore, in the Chair

Bowness, L.
Dubs, L.
Onslow, E.
Stern, B.

John Austin

Witnesses: **Mr Kenny MacAskill**, a Member of the Scottish Parliament, Cabinet Secretary for Justice, **Mr Brian Peddie** and **Mr Paul Cackette**, Civil and International Justice Directorate, Scottish Government, examined.

Q286 Chairman: We will now start our formal evidence session on our inquiry into the British Bill of Rights. We are joined by Kenny MacAskill, who is the Cabinet Secretary for Justice in the Scottish Government. Mr MacAskill, do you want to introduce your colleagues?
Mr MacAskill: I have Brian Peddie and Paul Cackette from our Civil and International Justice Directorate here to assist me.

Q287 Chairman: Thank you. Do you want to make any opening remarks?
Mr MacAskill: No. I am happy simply to take any questions that you may have.
Chairman: Thank you. Baroness Stern wants to make a declaration of interest.
Baroness Stern: Before the session starts could I declare that I am the Convenor of the Scottish Consortium on Crime and Criminal Justice and I am a Member of the Scottish Government's Advisory Body on Offender Management.

Q288 Chairman: Perhaps I could start, Mr MacAskill, by asking you about the fact that it seems that in the Green Paper from the Government, *Governance of Britain*, there is no mention of devolution. It seems to be pretty well missing. To what extent has the Scottish Government been involved with the UK Government in discussions on a British Bill of Rights and Responsibilities?
Mr MacAskill: Not really a great deal at all and I think the fact that devolution is not mentioned is perhaps an indicator of that. Our general perception is that it has started from a premise that is not one upon which our legal system is constructed and has reached a juncture that we have since moved on from, and that in that first of all a great deal of assumptions were made. Indeed, I read Henry Porter's evidence to your committee in *The Observer* yesterday and, as with many matters that I have read, it concentrates on the Magna Carta and the Act of 1689. None of these matters is of any great relevance to Scotland. We have a distinctive legal system that predates the Act of Union. Secondly, it does not seem to take into account the current situation that we have with devolution, and on that basis, whilst we are happy to assist, the position seems to be that it has come from a juncture that is not particularly relevant to our legal system and has reached a point from which we have since departed and indeed are now accelerating from at some particular pace as there seems to be general acceptance across the political world now that devolution has to move on. It is simply the final destination that is in dispute.

Q289 Chairman: So do you think a Bill of Rights is needed? Do you welcome the debate about it?
Mr MacAskill: In terms of a Bill of Rights, any debate that helps promote human rights and keep them in the public eye is welcome. That is clearly helpful in a democracy. In terms of a British Bill of Rights, do we see it as necessary? No. I adopt many of the legal points that were made by the Law Society of Scotland who will give evidence hereafter, and to some extent I think some of their matter is predicated upon a scepticism in relation to why here in the Scottish Parliament we have the Human Rights Act and ECHR incorporated into our founding principles and these are dealt with by our courts and we are subject to challenge not simply on what we seek to legislate upon but also what we have legislated upon. We are happy with that and as a Government party we seek to expand upon that if and when the constitutional settlement changes. The other aspect as well as the legal basis is simply the concept of Britishness. It seems to us that we are constituent part of the United Kingdom of Great Britain and Northern Ireland. Within that jurisdiction there are different political entities and that is why, as I say, I think the current premise is predicated on pre-1999 matters. Our political sovereignty is referred to in that and is a matter that will be discussed. Equally, the 1707 Union of the Crowns protected Scotland's distinctive education, church and legal systems. Our legal system, whilst there has been a great deal of fusion and interaction with the system south of the border because of legislation at a UK level, is still predicated in a different manner and it is still run in a different way, so for those two matters, whilst any discussion is to be welcomed because anything that promotes the concept of human rights should be supported, it does appear to us almost to predicate the question, "Why? Where would it fit in with us?", and, given that we do not see this concept of a British identity as such, it lacks relevance.

Q290 Baroness Stern: I think you have started to answer this but I am going to see if I can perhaps draw you out a bit more. In your view to what extent is a debate on a British—and I am emphasising "British"—Bill of Rights relevant to the people of Scotland, and, in view of what you have just said, perhaps you could explain why you feel it is not relevant or in what form it is not relevant to the people of Scotland.

Mr MacAskill: I think first of all the whole concept of Britishness has to be discussed. It is *de rigueur*; certainly it would seem to be from 10 Downing Street, but I myself and I think we as a Government party perceive ourselves as citizens or subjects of the United Kingdom but our nationality is Scottish. 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 *East Enders*. Are we British? No, we are not. We consider ourselves Scottish and we consider those south of the border to be English. That is perfectly legitimate. Robbie Burns is Scottish, not British. William Shakespeare is English, not British, and we should respect the different jurisdictions and the different identities that live in this very devolved world, and therefore we see the concept of Britishness as rather arbitrary, that it was founded for an empire and to some extent has begun to fragment. It was indeed forged in two world wars but it began to fragment and fray at the edges, it could be argued, as soon as conscription and national service ceased. As people now grow up they see themselves, correctly, as English south of the border, Scots north of the border, Northern Irish or whatever, so the concept of Britishness is something that we really do not buy into. 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. Indeed, as per the Law Society of Scotland's submission in writing which I have seen, there are difficulties that may be compounded by having these matters layered onto what already is within our system.

Q291 Earl of Onslow: May I interrupt here? It is a matter of historical record that the concept of Britishness was invented by a Scots King, not by the English. Secondly, you say that there is possibly no relevance to Scotland in a British Bill of Rights, but there is legislation passed by the Westminster Government which in my view has a major impact on the rights and liberties not only of the English but also of the Scots in the forms of the databases which are built up in, for example, the Regulation of Investigatory Powers Act, the concept of national identity cards, public order acts, the Race Relations Act and terror laws. All of those are acts which apply just as much to Scotland as they do to England or Northern Ireland. Under those circumstances you do not think that there is an overarching United Kingdom, if you do not like the Scottish word "British"? You see that it is irrelevant to Scotland, do you, that the Westminster Parliament can pass these Acts and you do not see any need for a Bill of Rights which would protect your liberties as much as I hope it would protect mine?

Mr MacAskill: Perhaps you can tell me how this Bill of Rights is going to protect them. If, as seems to be suggested, it is not going to be legally enforceable in any way, then what is the relevance of it?

Q292 Earl of Onslow: It would be legally enforceable in exactly the same way as the Human Rights Act is. In Scotland it could be enforced because the devolution Act comes from Westminster; Westminster enacted certain powers, so therefore, presumably, the actions of the Scottish Government become subject to the ECHR, which is justiciable. It is justiciable in England in the very elegant way which Derry Irvine introduced. He said that this Act was wrong, and then there was a fast-track way of appealing. It cannot overturn an Act of a sovereign Westminster Parliament but it can point out the error of its ways. There is a very elegant way of doing it. That is surely how it should work. There is a precedent for it.

Mr MacAskill: But that goes back to the fundamental difference in perception about how matters should exist. North of the border we have always believed in the sovereignty of the people and that was encapsulated by Lord Cooper many years ago in a legal judgment. It clearly says that south of the border there is the acceptance that Parliament is sovereign and therefore there is a fundamental schism between us. The points you made regarding national identity cards and other things of course are relevant here and we as a Government are having to seek to take steps to make sure that we mitigate what we believe is something that has potentially great dangers for our people as well as huge cost implications, so there are obviously matters where there is a clear interaction. As I say, however, to some extent it goes back to the position that we come from a different direction. We are almost operating in a parallel universe. The matters that seem to be pursued south of the border as being sacrosanct, such as the Magna Carta in 1689, are not relevant here, so are there instances—

Q293 Earl of Onslow: Does *habeas corpus* not apply here?

Mr MacAskill: We have different ways of dealing with that. We no longer have the 110-day rule. We have extended it but the principle of being brought to court at the earliest possible juncture applies.

Q294 Earl of Onslow: That was not the question I asked. Does the act of *habeas corpus* apply in Scotland?

Mr MacAskill: In my understanding, no.

Q295 Earl of Onslow: It does not?
Mr MacAskill: No. It has nothing to do with us.

Q296 Lord Dubs: May I go back to something you said earlier? You said that you did not have a need for a Bill of Rights because you felt ECHR and other things were sufficient, but that would apply in England as well, would it not?
Mr MacAskill: As I say, you come from a different legal jurisdiction. It is vastly different. I can see an argument south of the border because Magna Carta is vastly different from how we have always proceeded in our criminal jurisdiction. That is not to say that we are arguing that our system is perfect. There are matters that we clearly seek to amend and protect but, as I say, our systems have started at different positions and therefore I can see an argument for those south of the border, but north of the border we are bound by ECHR. That is within our founding principles. Sometimes it has worked to our benefit. Sometimes as a Government, as we have seen in a variety of matters, including slopping out payments to prisoners, it has worked contrary to what we had anticipated and indeed has caused some angst. Therefore, we have always felt that our position is regulated. We cannot legislate for matters that are contrary to ECHR. If we as a Government breach it then our people have access to the courts and that seems to us to be fundamentally a good thing.

Q297 Lord Dubs: Can I just add though that it seems to me that it is the same position in England as well as regards ECHR. On the other matters, the different legal systems and so on, of course I accept that, but as regards ECHR we are bound in England in the same way that you have said you are bound by it.
Mr MacAskill: That is a good thing.

Q298 Lord Dubs: So the argument that you are using could also apply in England, although you are not seeking to do that?
Mr MacAskill: I think what is fundamentally different is the perception of parliamentary sovereignty versus sovereignty of the people. That is one of the fundamental differences north and south of the border.
Chairman: The difference also is that the courts here can strike down Scottish Parliament legislation, whereas they cannot in England.

Q299 Baroness Stern: My next question is going to draw out a bit more something we have already started talking about. You may have seen that Professor Alan Miller has suggested that there is a "distinctive Scottish perspective on rights and sovereignty". If I could just tell you what he says, "The essence of this perspective ... is that an individual's rights are essentially seen as a 'right to personality'. It views the individual's personality, rights and duties being dependent not upon the grant of the state but upon the enjoyment of such rights by the community as a whole within which the individual interacts". I wonder if you would like to comment on that and perhaps explain to us how that Scottish approach, if you accept it, impacts on the Bill of Rights debate.
Mr MacAskill: I think that shows the fundamental difference. That is the position I would accept, the position encapsulated by Lord Cooper decades ago, and I think the fundamental difference relates to the problems caused by the argument south of the border that exists about the sovereignty of Parliament. At the end of the day that is a fundamental schism, which is why the Bill of Rights would not necessarily, it could be argued, provide the same protection south of the border as it would here in terms of the perception as to who is ultimately sovereign: is it the people or is it Parliament?

Q300 Baroness Stern: What are the implications of the people being sovereign rather than Parliament?
Mr MacAskill: I think that simply gives recourse to individuals to have far more rights. You cannot have democracy resulting in almost a democratic dictatorship. There can be times when Parliament does get it wrong. There can be times when Parliament is out of kilter with the will of the people and it seems to me that this provides some checks and balances. It is the same in any democracy. We have the separation of powers. At the end of the day there have to be some instances where Parliament can be seeking to go against the fundamental will, value and ethos of what is perceived as that of the people and they should be protected from it.

Q301 Chairman: But how is the will of the people established if it is not through the representative democracy of the Parliament?
Mr MacAskill: These are matters that ultimately have to be tested in court, and you have no guarantee that ultimately you can protect it against these things, but ultimately the right of the people to be able to say that they think Parliament has got it wrong and that the fundamental ethos and will of the country is perhaps different in values or whatever else is where it comes from as opposed to being able or willing to legislate willy-nilly.

Q302 Chairman: But the will of the people in those circumstances is ultimately expressed by a judge. It is his interpretation what the will of the people may be, which presumably is quite a subjective assessment.
Mr MacAskill: That is true, but that applies in the Bill of Rights if you make it legally enforceable. It is always going to be subject to the will of a judge deciding. In whatever jurisdiction in which we have a Bill of Rights ultimately these matters do go to the courts, but, given that they are perceived as independent, that they are part of the separation of powers, legislator, executive and judiciary, it does seem to provide some final arbiter as opposed to the arbiter being those who can simply rack up the numbers and vote something through.

Q303 Earl of Onslow: Surely the doctrine of the supremacy of Parliament still holds good in Scotland because the Act of devolution is an act of a sovereign Parliament. In 1707 the Scottish Parliament decided to subsume itself into the Parliament of the United Kingdom, thus establishing the supremacy of Parliament, I would suggest, over the whole of Great Britain. The United Kingdom and Ireland were still different. Once that happened Parliament was sovereign, and until or if Scotland becomes independent—and it is up to you what you do—it is Parliament that is still sovereign because the Act of devolution is an act of a sovereign Parliament which theoretically could be repealed.
Mr MacAskill: No. I think our perception and take on history is that we adjourned our Parliament for a variety of reasons. We extracted concessions such as the integrity of our church, law and education systems, which have served us well, and indeed that was why, when this institution reconvened in 1999, my colleague Winnie Ewing then said that the Parliament adjourned in 1707 had reconvened. We ceded various matters for a variety of reasons and debate has waxed and waned, certainly over recent years with 2007 being the 300th anniversary, but this idea that we gave up everything to be subsumed within Westminster is something that we would disagree with.

Q304 Earl of Onslow: Yes, but Westminster could still theoretically repeal the Act of devolution.
Mr MacAskill: Absolutely. Power devolved is power retained but at the end of the day—
Earl of Onslow: You have made my point for me, absolutely made my point. We have now established that the Parliament in Westminster still is supreme in Scotland, and you have accepted that by saying—
Baroness Stern: No.
Lord Dubs: No.

Q305 Earl of Onslow: Yes, by saying that the Act of devolution could theoretically be repealed.
Mr MacAskill: I accept the premise that the Act of devolution could be repealed because that is a creature of statute. There are further fundamental matters though that were preserved by the Treaty of Union which we see as capable of litigation and challenge. It turns upon the rights of Scotland to protect and preserve its integrity and its legal, judicial and religious freedoms.

Q306 Lord Bowness: Chairman, I may be the only person round this table who is not familiar with Lord Cooper's judgment distinguishing between sovereignty of the people and sovereignty of the Parliament. I think it would be very useful, bearing in mind that we are talking about the Bill of Rights, not devolution, if the Justice Secretary or his staff could let us have that reference or a note about it because I think it is very relevant to the discussion.
Mr MacAskill: I am sure we can. I have to say it is—I am trying to remember how long ago—38 years or something since I did my law degree and whether what little I knew I have long since forgotten, but we can happily provide it to you and I am sure the subsequent witness from the Law Society will be able to give you much more information on it than I, but it is something that runs deep in Scotland and something that not simply ourselves as a nationalist party but also others have sought to adhere to.
Chairman: He has had notice of the questions but he has got a very fat law book with him so hopefully when he comes to give evidence he will be able to tell us.

Q307 Baroness Stern: I think Lord Onslow mentioned ID cards, and I know there are one or two other matters on which the Scottish Government is subject to matters decided in Westminster, such as the actions of the British Transport Police or the Glasgow Station stopping certain people, so there are matters on which you have views which you might feel have a human rights implication, but there is not a lot you can do about them. I just wondered if you felt from that perspective that a discussion of a British Bill of Rights was helpful or relevant.
Mr MacAskill: This goes back to raising the question of rights and responsibilities and whilst I am persuaded by the argument that putting responsibilities in is actually probably a step too far, it is a consequent corollary to the question of rights. I think all of these things add to the general debate. We live in a fast-changing society in troubled times, and the points you make, whether about section 44, stop and search, or the cost and implications of ID cards, they are all matters that cause us concern here and over which we have limited room for manoeuvre but we do feel required to speak out as a Government on behalf of the people we represent.

Q308 Earl of Onslow: What would you like to see in a British Bill of Rights, if there were one? Should the object of a British Bill of Rights be to build on the ECHR or "ECHR plus", or to give the UK greater leeway than it currently enjoys under the ECHR, ie, "ECHR minus"?
Mr MacAskill: Our view is first of all predicated on the fact that we do not see the necessity or relevance for it. That said, if there is to be one then it does seem to us that the ECHR encapsulates fundamental values. Whatever criticism we have had, and we have had criticism as a Government on matters that have happened, such as slopping out, these are judgments; they do not relate to the fundamental values that are contained within it, so we would certainly not wish to see anything of "ECHR minus". That would seem to us to be a retrograde step going against fundamental matters that, frankly, are universal, and although the American Declaration of Independence in its Bill of Rights was a model of its time, as indeed was James, depending which category you give him in terms of your concept of Britishness, it does seem to us that ECHR is something that should be retained. Is it foolproof? No. There are probably good reasons why some things could perhaps be added to it, so it does seem to us that if you are going to have something then it should be ECHR plus anything that may be viewed as perhaps appropriate. What that may be I am open

to persuasion about and I think you view it as the minimum, not the maximum, but you certainly do not seek to move away from what are, as far as we can see, fundamental universal values that should be protected either side of the border, and indeed in any other jurisdiction anywhere in the world.

Q309 Earl of Onslow: If you are me you get frightened by what the Government has done. You think that the object of a Bill of Rights should be "ECHR plus quite a lot". I became converted to the ECHR because I thought that the House of Commons was not doing what it should do in protecting British citizens, subjects of the Crown, call them whatever you will, from the actions of an over-mighty executive. That for me is the argument for "ECHR plus". You would not agree with that?
Mr MacAskill: No, I have a great deal of sympathy with that. I have forgotten the name of the journalist/author that wrote about the centralisation of powers, how things operate south of the border where you do not have proportional representation and where you can have the situation of a government with a very limited mandate, and we north of the border are conscious that the Tory Party got the largest number of votes in the last general election south of the border. These things are matters that we remember, though not necessarily with the same pain as some might south of the border but we note these things. These matters are there to be built upon and certainly I do accept that an executive in a situation like that can do things that are fundamentally wrong. After all, we as a Government are conscious that we have been taken into a war that was not sanctioned by the United Nations and that we ourselves did not have a real opportunity to comment on and in which many of our young men continue to tragically die in a situation where we want to get them out as quickly as possible.

Q310 Earl of Onslow: If there were to be a Bill of Rights, and I can see you do not feel there is the necessity to have one, do you think socio-economic rights should be included?
Mr MacAskill: I am open to persuasion. I think it is very difficult to quantify socio-economic rights. How do we define them? There is the right to work and so on, but once you start getting much more into socio-economic rights then poverty is a relative concept. What is viewed as fundamental to quality of life in 2008 is not necessarily what will be perceived as fundamental to quality of life or a necessity in 2018, so I think some reflection of socio-economic rights has merit. As to whether it can be encapsulated beyond what are the fundamental matters contained within ECHR or some other matters, I remain to be convinced, but the concept that socio-economic rights are pivotal to an individual is something that we would subscribe to. If you are poor in this country and you are on unemployment benefit or social security benefits and you are in a council house where your rent is paid directly by the state then your ability to act is limited. You cannot withdraw your labour, you cannot withhold your rent, so if you object to the economic situation you are in difficulties. If you object to the quality of house you live in and the dampness you cannot do what the rest of us would do and seek redress. These things, as I say, have to be reflected, that socio-economic matters do impact upon your individual rights as a citizen. How you reflect that in a Bill of Rights I am not sure because it becomes very difficult when, as I say, these matters do ebb and flow. It might be best simply to leave them as matters that should be taken into account by courts in pursuing these matters and be borne in mind by governments. As I say, I am open to persuasion but I find it difficult to see how you can encapsulate some of these things in what would be an additional matter to ECHR.

Q311 Earl of Onslow: That could be a Tory hereditary peer speaking on that, not a Scottish Nationalist Minister, so on some things we do obviously see eye to eye.
Mr MacAskill: Absolutely!

Q312 Earl of Onslow: How do you answer the question, when we were discussing this among ourselves last night, from our legal adviser, who said to me, "How do you allow that there should be an asylum seeker who has his benefit taken away from him and is forbidden to work? Are his socio-economic rights not being abused under that process?".
Mr MacAskill: I would have thought that the argument for that is to recognise that, whilst they might not have the same rights as a citizen or subject in the passport they carry, everybody has some fundamental human rights on dignity and treatment and, frankly, we are not happy in this Government to comment further on points made by Baroness Stern about how asylum seekers are being treated in this country and it is a matter that we will be raising, whether with the BIA or with others, so I see where you are coming from on that. I do tend to think these things should be capable of being dealt with by what should be fundamental matters within the Bill of Rights, whether it is ECHR without being specified, because that is not simply about financial rights; that is about treating people with dignity and compassion, because in this country we recall that not only are we a nation of immigrants; we are also a nation of emigrants, and wherever we went in the world we were almost uniformly treated with dignity, compassion and respect, whether we were cleared off our lands or went because we were economic migrants, and therefore, whilst there has to be an immigration policy in any society and at times it does have to be enforced, we do think that fundamentally you have to do so with compassion and with some cognisance of how we were treated and how we are still treated.

Q313 Chairman: I do not think any of us would disagree with that, and our report on this last year came to that conclusion, but, for example, could we have a right written into the Bill of Rights which would say that nobody should be subjected to

destitution, nothing to eat, nowhere to live, as a bottom line, so that if a Government, north or south of the border or anywhere else, were to pass a law through the Parliament saying, "Asylum seekers shall have no money and no food", that could either be struck down or be subject to a certificate of incompatibility, depending which system we work through, because that would infringe that basic fundamental right?
Mr MacAskill: I have to say I have a great deal of sympathy with that.

Q314 Earl of Onslow: What about environmental and third generation rights?
Mr MacAskill: Again, I think it comes back to the comments made on social and economic matters. I am open to persuasion. As the Chairman has said about destitution, that seems to me to have a great deal of logic to it. Environmental rights—again, these are matters where we need to see how they are going to be specified. We have a current situation where, for example, south of the border there is a desire by some to build more nuclear power stations and we north of the border have a clear desire that we want no more new nuclear power stations, and what might be seen as enforcing environmental rights in one jurisdiction is seen as damaging fundamental environmental rights in another. As I say, these things in the abstract, in the round, sometimes sound quite engaging and endearing but there are significant difficulties here, so it is back to the previous matter, that we remain to be persuaded, that it cannot simply be dealt with within the fundamental matters that are contained within the ECHR but we are open to persuasion.

Q315 Earl of Onslow: Especially as there is a very strong pro-environmental argument for building nuclear power stations, and so if they were included a judge could say, "Actually, nuclear power stations are very much better for the environment than are coal or oil-fired power stations", if you accept the premise that CO_2 is the great danger to climate warming.
Mr MacAskill: Although, having read Henry Porter's piece, I also read another piece in *The Observer* about the demise of humanity and the human race and how, 400,000 years down the line or whenever it was, we were about to be obliterated by the sun. The consequences and problems created by nuclear waste still remained long after we had disappeared off this planet.

Q316 Earl of Onslow: I am not saying which is right. I am just saying there is an arguable case where, in a Bill of Rights with environmental possibilities, somebody could go to the Scottish Government and say, "O, Scottish Government, stop polluting the countryside with great CO_2 burning gas stations", or ruining the sea lochs with tidal races, or whatever they are called, "and build nuclear power stations because they are environmentally much more friendly". It would then be down to a judge to decide which was which, whereas in my view that is absolutely down to a democratically elected government. Whether you are right or wrong on nuclear power stations from the point of my argument is totally irrelevant.
Mr MacAskill: I think we tend to agree with you on that. As I say, these are matters which fundamentally come down to political judgments, whether it is nuclear power or whether it is on-shore wind with the difficulties we get in some communities over the size of developments, and we are a Government that is supportive of wind developments but they have to take cognisance of the environment and the beauty of the area in which we live, so yes, I think these matters are fundamentally matters that should be decided by the Government because they are not necessarily the inalienable rights that were initially encapsulated in the American declaration.

Q317 Chairman: Can I try another environmental one on you which might be a more interesting one to try? Supposing somebody wanted to set up a commercial fish farm, non-organic, somewhere up in the Highlands, or wherever they do these things, and the local planning committee decided,—and I am not sure how planning works but whatever the local planning authority says—"Okay, this is important for our local economy. It is going to create a lot of jobs. We think this is a good idea despite the environmental impact on the local sea", or loch or whatever. There is no right of appeal against the grant of planning consent but it would have a significant environmental impact. If you had, for example, environmental rights would it provide a way of having that decision reviewed in the context of its impact on the environment at the instance of the local community disagreeing, for example?
Mr MacAskill: I think you are right. That is why, as I say, we are sceptics about the Bill. We do not necessarily rule it out but you would have to persuade us. As I say, we currently have these matters in Scotland going on in similar debates relating to planning legislation, which is, I think, accepted by many as not necessarily going quickly enough, especially for matters of national infrastructure where a clear decision has to be made for the national good, whether it is a road or some other matter, so you can go from a very small-scale development to a much larger development, and there are difficulties there. That is why, as I say, there are fundamental problems because somebody's fish farm in some areas that is seen as commercially beneficial could equally be seen downstream as having consequential problems with diseases or whatever else may go with them. These matters do take place on a regular basis, a fish farm basis (usually it is problems with the Crown Estates), up to the larger examples mentioned by the Earl of Onslow in terms of nuclear power and wind energy. That is why I think in these matters public perception changes, attitudes change, science and technology change. Some things, about not being tortured, about having fundamental rights, always remain, it seems to me, fundamental and universal.

Q318 Earl of Onslow: If there were to be this Bill of Rights what should the relationship between private individuals or bodies be to that Bill of Rights?
Mr MacAskill: It seems to us that the Bill of Rights should be there for every individual. This is back to the recourse that individuals should have to exercise their rights subject to available constraints.
Earl of Onslow: I think what we are getting at is that we had a situation in England about how the ECHR applied to old people paid for by the local authority in privately run nursing homes, and the House of Lords, in its Appellate Committee existence, decided that it did not apply. I think that is a slightly illogical argument and so does Brenda Hale, but that is neither near nor there, but in other words it could force the Scottish Parliament, when it runs its old people's homes, to see that the ECHR applies—

Q319 Chairman: We are talking about the *YL* case and I think you are legislating north of the border to deal with it and we are looking at ways of dealing with it as well. The issue really is that the problem arises because the Human Rights Act is not directly enforceable against private bodies.
Mr MacAskill: I can understand the logic of the argument, that though public sector provisions are passed out to private sector or arm's length agencies clearly there is a difficulty in enforcing some rights. I am not necessarily convinced that the Bill of Rights is the best way to deliver that. It seems to me that these are matters that should be delivered by the state, whether or not it is the state that does it or contracts its rights or whatever. It seems to me that it is better to seek to be able to enforce your rights against the state as a citizen as opposed to having tangential litigation, so, whilst I do not necessarily rule it out, it does seem to me that it becomes much more complex and also undermines the whole ethos that this is your right as a citizen of the state that you are seeking to enforce a contractual obligation that should be enforced by the Government, and therefore I think I am much more comfortable with the concept that the Government should be more open in terms of their relationship to the contracts, that the agents should enforce them better, but it does seem to me that these matters are maybe better dealt with by the individual against the state with the state delivering its obligations, whether it has done so itself or has sought to do so through a third party.

Q320 Chairman: If somebody decides to be a private funder and just pay for their own care in a particular care home, at which there may be people who are paid for by the state as well, but that is their choice, they would, as things stand, have less protection than that provided by the contracted-out service or whatever.
Mr MacAskill: I think that is where the Government has to seek to ensure proper and adequate regulation, and that might be the better way to do it rather than having a further bean feast for litigation in our courts. It is better to regulate and enforce than having people always seeking to have recourse.

Q321 Earl of Onslow: This is you now arguing, with respect, for "ECHR minus" slightly, is it not?
Mr MacAskill: No, I do not think so. I think fundamentally it is your right as a citizen; it is your relationship with the state. How the state seeks to deliver and what method it seeks to use is for them to decide, but if you fail to get those rights, if the state has failed to deliver, you should seek to enforce it against the state and the state should seek to regulate it or indeed make sure that whatever is done is done better, but I think it is better by enforcing it against the state than going tangentially. I do not think that is "ECHR minus"; that is simply ECHR and it is having the Government stand up and deliver its responsibilities.

Q322 Earl of Onslow: But you are asking the Government to do it, quite rightly so. We then get the *YL* case, which says that government paid-for people in private nursing homes are not subject. That is rectified by making them subject. You then have people who are not in receipt of means-tested benefits and who have to pay for their own care in the same care home not being able to take advantage of rights that people who are paid for by the Government in relation to breaches of human rights by that care home should they arise. As I understand it, and I may be wrong here, you are saying that this should be done by general standards and you should be able to enforce them without access to the ECHR. Those would, of course, be allowable to anybody. I agree with you, by the way. I tend to think that it is better that you should do it that way round, but again I find that it is a very useful tool to lever up standards with as well. I can see both sides of this question. It seemed to me—and I know I got shouted down by all my colleagues and by you for saying it—that you were slightly arguing for "ECHR minus".
Mr MacAskill: No, not at all. I just fundamentally think that the whole concept of a Bill of Rights is your right as a citizen against the state, and where the state seeks to deal with matters that should be a fundamental right by contracting out then I do think that you should still seek to enforce your rights against the state and it is for the state to deliver. We come from the fundamental ethos that there is such a thing as society. The direction of travel that seems to be delivering in a Keith Joseph-like situation, where the Government meets up once a year to contract out services and you are then left as an individual to enforce it, is something that we do not subscribe to, and therefore I think it is up to the state to ensure that its citizens' rights are protected. If they are not then it should be for the citizen to seek to take issue with the state; otherwise, as I say, not only do we have to have recourse to litigation between, arguably, third parties; it also allows the Government in some instances to evade its responsibilities by passing matters and the buck on to others. It also undermines people's rights because it is those who are in the know who have access to funds, courts, legal advice or whatever, as opposed to, as I say, the Bill of Rights being a fundamental check against Government. I would hope that Government would seek to deliver these rights. It is

only when they do not that you pursue them and that is where the Bill of Rights is the safety valve. This idea that you have rights and it is really up to you to enforce them and it is up to you to chase third parties who have not done this or do not do that does not seem to me to be correct. That is the job of the state because we are a society.

Q323 Chairman: But we do live in an age of globalisation, big multinational companies. You could envisage a situation perhaps where a big multinational company wanted to build a big plant or something and the Government did not want to take them off. It is potentially polluting or environmentally hazardous or whatever and the Government says, "We are not going to deal with this. We think this is a good thing, fine". It is a big multinational company, probably bigger than some countries in its national turnover. Should the individual be able to bring an action against that company?
Mr MacAskill: That comes back to the earlier concept that if the Government is acting contrary to the will of the people in all these matters then we believe that they should be challenged. You are right to say that in a world of globalisation there are difficulties. That is though why we accept that there has to be co-operation by governments, large or small, whether it is on a pan-UK basis or whether it is on a pan-European or indeed a much wider global basis. These matters we would hope would be dealt with by the Government. If the Government seeks in some arbitrary way to flout the fundamental right that people should have recourse against them, the way of delivering it is to challenge the Government, I believe, because otherwise the Government flouts and abdicates its responsibility, which is to look after the rights of its citizens, and it seeks to pass the buck to those who can acquire or obtain legal advice and recourse.

Q324 Chairman: So ultimately it all comes down to regulation by the Government?
Mr MacAskill: Not everything comes down to regulation by the Government but it does seem to me that it is much better that you enforce your rights against the Government and the Government resolves matters. They have the clout and the machinery and while, understandably in a globalised world and for a more productive economy, many matters are dealt with by the private sector or arm's length agencies, our view is that you should it enforce it against the state and the state should enforce your rights. That is the whole concept of why we go to court. Your go to court and you argue in the court and it is the court that enforces your rights. They may pass it back to you and you then go to the bailiffs or the sheriff's officers but fundamentally the court enforces your rights as an individual and it seems to us that in the concept of a Bill of Rights you go to the state and the state recognises that something has happened and seeks to deliver for you.

Q325 Earl of Onslow: Do you think, if we were to have this Bill of Rights, it should be rights and responsibilities, that it should in turn impose responsibilities on the citizen?
Mr MacAskill: I think that argument is well intentioned because I have certainly argued publicly that responsibilities are the corollary to rights. Citizens do have rights but they equally have responsibilities. I do tend to think though that what we are talking about here is a Bill of Rights. Once we get into responsibilities it is very difficult to quantify and encapsulate responsibilities in matters that do not become almost dictatorial. I did read the arguments about how the former Soviet Union did seem to encapsulate this and that seems to me to be one good reason for not so doing. As I say, I can understand on the face of it the logical arguments for it. I do tend to think though that it is far too problematic and it is much better dealt with by reminding citizens that they have responsibilities and that they breach those duties if they flout other laws, but fundamentally what we are talking about is a Bill of Rights that is about rights.

Q326 Earl of Onslow: I must admit again you sound like a Tory hereditary peer. It seems to me that citizens only have one responsibility and that is to obey the law, and if they do not want to do that they get slotted by the law. That is the only responsibility that a citizen has.
Mr MacAskill: I tend to think that we are not encapsulating simply what might be put forward by—

Q327 Earl of Onslow: I mean legally, not socially or economically.
Mr MacAskill: I think the position you are coming from is the position that this Government takes as its fundamental. We are a social democratic party in the tradition of north European nations, whether they are Scandinavia or the Netherlands. I think you will find there that they have rights and the responsibilities are viewed as being consequent upon the citizens but they are not encapsulated in any formal legal bill of rights. As I say, as a social democratic party we believe that we have to protect people's rights. If that in many instances overlies with Conservatism, that is fine by us, we are relaxed about it, but, as I say, we are a social democratic party and it is from that ethos that we come.

Q328 Lord Bowness: Can I go back to this question of the ability of the courts in Scotland to strike down acts of the Scottish Parliament, and we have already highlighted the difference in that situation from that which prevails throughout the United Kingdom Parliament? Can you perhaps tell us what have been the practical effects of that power?
Mr MacAskill: I think it has been good discipline. The Lord Advocate indeed has statutory responsibilities within the Scotland Act to make sure that the Government does not seek to proceed in matters that are either *ultra vires* in our constitutional powers or otherwise. I think it is a good and salutary reminder to Government not to

proceed in ways that would either be illegal or politically embarrassing and therefore matters are dealt with that way. That is not to say that there have not been judgments, for instance, in the slopping out case, that have caused some angst but, as I say, we recognise the legitimacy of the courts and we accept it and are simply seeking to follow on. I think it is a good discipline for government.

Q329 Chairman: Can you tell us how many times the courts have struck down Scottish Parliament legislation?
Mr MacAskill: Never. There was one challenge which related to our banning order of fox hunting, I understand, and that was dismissed but, apart from that, I think the discipline has always been dealt with there and it has been enforcing other rights such as, I say, the slopping out matter.
Earl of Onslow: Has the ban on fox hunting in Scotland had the same effect as it has had on England, which was to increase the number of hunts and the number of foxes killed?

Q330 Chairman: That is nothing to do with this.
Mr MacAskill: I have to say, as somebody whose grandparents were crofting, we forget that there was never a hunt north of the Tay, which is a substantial amount of our land mass, and therefore the short answer is, I do not know, but I do think Scotland is a better place.
Earl of Onslow: I meant it with a slight element of flippancy.

Q331 Lord Bowness: Just going back to the question of striking down, and I understand your reservations about there being a British Bill of Rights, would you foresee problems in extending the right to strike down across the whole of the United Kingdom in the event of that coming about?
Mr MacAskill: The problem obviously is the sovereignty of Parliament, so it is the different routes that our legal systems have travelled upon. Is it a good thing that Parliament can be struck down? Yes, I think it is. I think at the end of the day you cannot have a parliament that acts arbitrarily and wrongly, and that should be subject to challenge within the courts.

Q332 Lord Bowness: We have talked about the possibility of economic and social rights being included in any Bill of Rights, and no doubt we all have opinions about whether that would be a good thing or a bad thing, but if it was there, with particular reference to the devolution settlement, some of those economic and social rights will almost inevitably touch on matters which are currently devolved to the Scottish Parliament, and education is highlighted as an example. Does it worry you that a UK Bill of Rights with economic and social rights might lead to a situation where in fact the United Kingdom Government was given an *entrée* into matters which are devolved?
Mr MacAskill: To some extent that situation already exists and that is part of why the devolution settlement has not really been resolved and we are having to move forward because there is a whole array of matters. As the Justice Secretary I am in charge of criminal justice in Scotland; I am not in charge of narcotics or firearms and I do not think there is a legal jurisdiction in the world in which serious and organised crime is not predicated upon narcotics and firearms. We have a significant problem on air weapons. We are precluded from being able to act. We wish to protect our young population from the carnage on our roads by reducing the drink/driving limit and we are precluded from doing that, so there is a whole variety of areas where we are currently precluded, but if the concept was to add value to the totality of our citizens then clearly it would be a good thing. As I say, it goes back to the earlier points I made about social and economic rights in that the devil is in the detail. On paper it looks a very worthy thing to do, but being able to encapsulate it in snappy sentences is --- to be fair to the Americans, and I have been critical of America in many ways, the fundamental bill of rights that they came out with in the Declaration of Independence for the time it was written was clearly an extremely good and progressive document. It is not difficult to see that some areas had to be expanded upon because at that time the rights of people of different colour and the rights of women were not perceived as being rights at all, but the fundamental concept is as well written as any. As I say, I am open to persuasion about social and economic rights and if that can be done I think we would welcome it irrespective of whether it then caused problems for us as a jurisdiction. There are fundamental matters that run beyond the short-term advantages of a particular government of a particular political hue.
Mr Peddie: Can I add a point here in further amplification of the response? Obviously, the Cabinet Secretary has dealt with that issue. There are two points that arise in relation to what Lord Bowness has said but also in relation to something that was said earlier about the justiciable nature of the Bill of Rights were it to develop in that kind of way. I would just like to say two things for the record, one of which, as has been recognised earlier in discussion, is that the interaction between the Human Rights Act and the Scotland Act is different from the interaction as far as the rest of the UK is concerned. There is the *vires* test that has been referred to earlier, the issue of incompatibility which will not operate in quite the same kind of way, but also the ability of a United Kingdom Government by Order in Council to disapply the Human Rights Act in certain circumstances. If the model were to develop, standing points being made by the Cabinet Secretary, so that a Bill of Rights would be similar to the way ECHR operated, that might lead to a proposition that Acts of the Scottish Parliament would be *ultra vires* if they failed to comply with the Bill of Rights. That is not necessarily how it will develop but I just want to record the fact that what that would mean is that it would have an impact on the legislative competence of the Parliament in defining what is devolved competence.

Q333 Chairman: Can I try this out on you, which is on a similar theme? Under the Human Rights Act the Scottish higher courts can declare Westminster legislation applying in Scotland incompatible with ECHR, so if you have a British Bill of Rights which does not extend to Scotland but provides rights that go beyond ECHR, for example, the right not to be destitute, the thing we were explaining with asylum seekers earlier on, are you saying that those wider rights should not be relevant in Scottish courts even in relation to Westminster legislation, so, for example, it would be possible for English courts to declare incompatible Westminster legislation which makes asylum seekers destitute but not Scottish courts even though the legislation applies in Scotland?
Mr Cackette: That depends on whether the Bill of Rights is extended to reserved as opposed to devolved areas.

Q334 Chairman: That is the point I am making. Mr MacAskill was saying earlier he did not see the relevance of a Bill of Rights to Scotland. That is probably too simplistic a view of what he was expressing, but in that context?
Mr Cackette: That would be a consequence of that, I think.

Q335 John Austin: It is not necessarily the view that the British Bill of Rights has been irrelevant, but clearly the implication is that there are potential implications for Scotland, and in that context you are now engaged in a national conversation on the future constitution of Scotland. Does the British Bill of Rights feature in that in any way, and, if so, how?
Mr MacAskill: Tangentially, it may. Clearly our national conversation is more about engaging with people about what the constitutional settlement should be and we have noted that since we launched our national conversation it was to some extent criticised by other political parties, but they have since accepted that the status quo is not tenable and have persuaded themselves to go on their own commission. They are doing it by way of a commission. We are doing it by way of a national conversation. Will a Bill of Rights factor into that? To some extent it will but clearly what we are talking about is an evolving situation and it does seem to us that to some extent the Bill of Rights is predicated on a United Kingdom of Great Britain and Northern Ireland as at 1999. We are trying to get up to 2008 but the outcome of the national conversation, and indeed the commission, is that it is likely that the ground is moving under our feet. The constitutional situation is going to change and to some extent it already has. Within my lifetime of being a Member of this Parliament we had the devolution of railways. Powers are being devolved down, so will the Bill of Rights be discussed? In some shape or form it will because obviously part of the national conversation is the Scotland that we seek. I tend to think though that matters are more likely to be dealt with on fiscal powers, on emigration powers, on firearms and so on that perhaps impact with the body politick and with our people.

Q336 John Austin: How would you want to see the public, civil society, particularly hard-to-reach groups, involved in the formulation of a British Bill of Rights?
Mr MacAskill: I think we take the view that it is the responsibility of good government to look after even hard-to-reach groups, and at the end of the day it is up to us to try and encourage good citizens, not create model citizens, which is a very totalitarian ethos, but to promote and allow our people to be all they can be. Part of that is about understanding, about education, not simply in terms of the three Rs and these such things but encouraging people in civic democracies, civic participation. There is not one simple way but we do look at matters such as the Scandinavian democracies as things that we aspire to. That is the kind of thing the Scottish Commission for Human Rights could be asked to look at, to improve awareness. Professor Miller is a very knowledgeable and talented man and no doubt he will be considering these aspects now that he is in power but, as I say, I have been persuaded to some extent that a lot of these matters are not simply about enforcing rights. It is about education, it is about public broadcasting, it is about early intervention and encouraging literacy at an early juncture. That is one of the advantages in the Scandinavian democracies and it is one of the reasons why, when we have a declining turnout in many elections in the British, American and Australian models, they have managed to sustain substantial participation in democracy.

Q337 Chairman: Just following up that answer and the points you make about the Scottish Commission, in Northern Ireland they have been discussing their own Northern Ireland Bill of Rights for some time, years, in fact. Have you got any plans for a Scottish Bill of Rights?
Mr MacAskill: Ultimately, as a political party in an independent Scotland, as part of our constitution we would wish a Scottish Bill of Rights. It would be predicated upon the ECHR with a few additional matters and the logic that it is the minimum and it can be added to, so that is ultimately where we would like to get to, but that is a matter for our national conversation to some extent.

Q338 Chairman: Thank you. We have finished our questions. Is there anything you would like to add that we have not covered?
Mr MacAskill: No. Thank you very much for your time and your invitation.
Chairman: And thank you for yours.

Witnesses: **Mr Michael Clancy OBE,** Director of Law Reform, and **Ms Christine O'Neill**, Convenor, Constitutional Law Sub-committee, Law Society of Scotland, gave evidence.

Q339 Chairman: Could I welcome Michael Clancy, Director of Law Reform, and Christine O'Neill, Convenor, of the Constitutional Law Sub-committee at the Law Society of Scotland. Do either of you want to make an opening statement?
Mr Clancy: Only to welcome the committee to Edinburgh, Chairman. It is a great pleasure to have you here on this historic occasion as it is the first meeting of a UK Parliament committee in the Scottish Parliament. I congratulate you on making the trip.

Q340 Chairman: Thank you very much. We like to get out and about.
Mr Clancy: The more often you come here the better.

Q341 Chairman: Could I ask you whether you welcome the debate about a British Bill of Rights and whether you think a Bill of Rights is needed?
Mr Clancy: Yes, I think we do welcome the debate, the debate, of course, having started some years ago with one of the committee's membership, Mr Anthony Lester (as he then was) writing articles and making speeches in the 1960s. Of course we welcome these debates. The concept of human rights is a continually evolving one. It is one which develops as litigation expands and illuminates its various courses and we think that it is a good thing to have these issues debated. Do we agree with the idea of a Bill of Rights for Britain? That really depends, does it not? It depends on what the Government is going to consult upon in the not too distant future in terms of its proposed Green Paper on a Bill of Rights and Responsibilities. It depends on the way in which things are framed when eventually that comes to be, and I think that is where we stand at the moment.

Q342 Chairman: Is there a particular rights perspective in Scotland which needs to be reflected in the debate?
Mr Clancy: Sometimes it is not so much that there are particular rights in Scotland which need to be reflected. It is more that there are some rights which apply in England which do not apply in Scotland.

Q343 Earl of Onslow: Such as?
Mr Clancy: Such as the right to trial by jury, my Lord. I think it is important that whenever we are talking about the issue of a Bill of Rights for Britain we see this through the prism of the three jurisdictions which apply in the United Kingdom, through England and Wales, Scotland and Northern Ireland, because there is a risk that someone writing simply from the perspective of Scotland will take a different view from someone writing simply from the perspective of England and Wales, and I think that is an important feature. It is not so much, we would say, rights for Scotland which need to be reflected; it is that when we are coming to compose this Bill of Rights (if that happens) we should have a holistic view of the rights of citizens in this country.

Q344 Chairman: Mr MacAskill seemed to be making quite a big deal, rightly or wrongly, of the significant constitutional difficulties that would arise from a British Bill of Rights. I get the impression from what you are saying that you do not think they are insuperable difficulties but we have to look at the differences in the traditions, the structures and the constitutional arrangements. Do you think there are insuperable differences to producing a British, ie, for the United Kingdom as a whole, Bill of Rights, or is it simply a question of making sure that what is done reflects those different compartments, as it were?
Ms O'Neill: If we take it from a legal perspective I do not think there are insuperable difficulties but there are issues around the mechanics of a Bill of Rights which would have to be addressed by Parliament. One of those is that, of course, the Scottish Parliament, while it cannot presently amend the Human Rights Act, does have competence to legislate for human rights outside of that Act. If a Bill of Rights was passed by the Westminster Parliament and the Act incorporating that Bill of Rights was not in some way entrenched then the Scottish Parliament could repeal those parts of the Bill of Rights which fall within its devolved competence or it could legislate to derogate from the Bill of Rights in relation to these issues.

Q345 Earl of Onslow: Can I ask a question here solely to clear my own mind? The Scottish Parliament cannot repeal the Human Rights Act. It is responsible for human rights in Scotland and because it cannot repeal the Human Rights Act it cannot act outside the Human Rights Act. Would that little encapsulation of the Human Rights Act not apply exactly to a Bill of Rights were it to be enacted?
Ms O'Neill: Only if relevant amendments were made to the Scotland Act, and that is all the point to be made about it.

Q346 Earl of Onslow: What, to have a Bill of Rights which was UK-wide would require amendment to the Scottish Act, would it?
Ms O'Neill: In order to ensure that the Scottish Parliament could not legislate in contravention of that Bill of Rights would require an amendment to the Scotland Act.

Q347 Chairman: You would have to entrench it for the Scottish Parliament in the same way as the Human Rights Act?
Ms O'Neill: Yes.

Q348 Lord Dubs: In your evidence you say that a Bill of Rights should be a "citizen-centric mechanism". Could you elaborate on that please?
Mr Clancy: We will try.

Q349 Lord Dubs: Your words!
Mr Clancy: Yes, indeed. We did not mean that it should only relate to those who are citizens. What we were trying to convey was that it should not depend

simply on rights bestowed on people but rather that the people should be involved in some way in the construction of those rights.

Q350 Lord Dubs: And that would be a political process, a consultative process? What are we talking about?
Mr Clancy: It would be both a political and a consultative process. I think the Lord Chancellor, when he made a speech in January, was talking in terms of looking at citizen meetings and summits where such a concept could be floated.

Q351 Baroness Stern: I would like to move on to the content of a possible Bill of Rights. You have written to us, very interestingly, on that matter and you suggest that a Bill of Rights should be "ECHR plus", so I will not ask you which you think. Could you say something about what rights you would wish to see included within a British Bill of Rights, and also you have told us that you are cautious about including rights, such as the right to trial by jury, which does not exist in Scotland, and I know Lord Onslow is about to get agitated about this but I am afraid this is the case, and whether there are any other problematic areas which could not be included in a Bill of Rights which apply to Scotland? That is a big question.
Mr Clancy: What would be additional to a Bill of Rights building on ECHR? One could envisage, dependent upon what Parliament eventually decided, that there should be social and economic rights included, and perhaps cultural rights as well. It was in that kind of area that one was thinking in terms of "ECHR plus". When one is talking about the development of these things, as the Cabinet Secretary said, there is an issue about the detail which a prospective Bill of Rights would contain and it would need a lot of discussion and a lot of consideration, and remember that if one included rights such as a right to education some people might say that they wanted a right to a private education. If one included issues about a right of healthcare, some might say that they wanted a right to private healthcare, so it is a very broad, quite politically-orientated issue, and, of course, one on which the Law Society could not legitimately have a prescriptive view.

Q352 Earl of Onslow: May I ask my question about jury trials, and again this is solely for my own understanding because I frankly do not understand it? Are all serious crimes in Scotland, in other words, the equivalent of the ones which would be tried by jury in England, actually tried by jury as a matter of fact rather than as a matter of right?
Mr Clancy: Yes, is the answer. The nature of the jury in Scotland is different from the nature of the jury in England.

Q353 Earl of Onslow: You can produce a "not proven" verdict, can you not?
Mr Clancy: There are three verdicts—guilty, not guilty and not proven, and, of course, our jury number is different. We have 15 people rather than 12, and, of course, the structure of our criminal courts is different from that which obtains in England and Wales. The High Court of Justiciary, which is our supreme criminal court, was founded in 1672, so it is a 17th century creation, and that date might chime in terms of some of the other documents which we mention in our submission, like the Claim of Right or the Bill of Rights, but the 1672 foundation of the High Court of Justiciary included in it that it should have a jury. The determination as to whether a case is tried in that court is at the instance of the prosecutor, in Scotland the Lord Advocate, and it is really the determination of the forum where the crime is to be tried which determines whether or not there is a jury involved. Therefore, in a sense, we do not have the Magna Carta. The Magna Carta did never apply in Scotland and when clauses 39 and 40, which apply to this particular issue, that "no freeman should be taken or imprisoned or decised or exiled or outlawed or anyways destroyed"—

Q354 Earl of Onslow: Can we have it in the original Latin?
Mr Clancy: Now, now. I only have a translation at home, so you will have to bear with me on that.

Q355 Earl of Onslow: Thank goodness!
Mr Clancy: Having a judgment of his peers under clause 39 was never in the Scottish imagination and it is always dependent upon the court.

Q356 Chairman: Magna Carta does not guarantee jury trial, actually. Magna Carta says trial by peers "or in accordance with the law", not "and in accordance with the law".
Mr Clancy: Indeed, that is correct. Thank you, Chairman.
Ms O'Neill: In terms of the more general question of Scottishness and the content of a Bill of Rights, the only thing I would add to that is that, as I heard the question framed, it referred to the Scottishness of a Bill of Rights giving rise to difficulties, and I wonder if it might be viewed not in terms of difficulties but in terms of opportunities? I do not think the Law Society would necessarily view a Bill of Rights as being something which had to be British and could not be Scottish or Northern Irish, and certainly I would endorse quite a lot of the evidence which was given to this committee by Professor Sidoti in terms of the Northern Ireland experience and the existence within a single state of multiple rights documents.

Q357 Chairman: Just to take the example of jury trial, if a Bill of Rights were to include the right to trial by jury, would the sky fall in in Scotland or would that be seen as a civil rights enhancing measure in Scotland to be embraced?
Mr Clancy: The prosecutorial independence of the Lord Advocate is one of those issues which is as effectively entrenched in the Scotland Act as you can get, and so therefore, whilst the sky would not fall in, I am sure the Lord Advocate would be disappointed.

Q358 Lord Dubs: May I just pursue the point that you made a moment ago, to be quite clear? You were saying that it is possible that there could be a Bill of Rights for England, one for Scotland, one for Wales and one for Northern Ireland, and that these might be different to some extent and that that would be a workable arrangement. I do not want to put words in your mouth but is that what you said?
Ms O'Neill: Yes. There is no reason why not.

Q359 Lord Dubs: Would there by any difficulties in, as it were, enforcing the rights in these different Bills of Rights, given that there might be people who would argue that they come under England or Scotland or whatever?
Ms O'Neill: We have issues with enforceability within different jurisdictions of the United Kingdom at present. Those issues are before the courts. There are issues which come to the Scottish courts which involve decisions about applicability of Scots law to those who are perhaps not Scottish. It is not conceptually novel.

Q360 Lord Dubs: But it is workable?
Ms O'Neill: Yes.

Q361 Chairman: But you end up with the anomaly which I put to the previous witnesses, that under the Human Rights Act the Scottish High Courts can declare Westminster legislation incompatible, but, if you have a British Bill of Rights that does not apply in Scotland and provides rights that go beyond the ECHR, you could have the position, taking the asylum seeker example again, where, even though the legislation applies in Scotland, the Scottish courts could not strike it down or declare it incompatible, although an English court could.
Ms O'Neill: I wonder if you might ask that question again.

Q362 Chairman: Okay, I will try again. Suppose you have a British Bill of Rights which does not apply in Scotland but that provides rights that go beyond the Convention rights. Let us take the case of a right not to be destitute, for example. What would happen is that an English court could declare incompatible Westminster legislation which makes asylum seekers destitute, but even though that law about asylum seekers applies in Scotland as well the Scottish courts could not strike it down or declare it incompatible because the Bill of Rights does not apply north of the border.
Ms O'Neill: Yes, I agree. I think that must be right.

Q363 Earl of Onslow: Mr Clancy was saying earlier on, as I understood him, that if you are going to have one it has got to apply to England, Scotland, Wales and Northern Ireland. Did I understand you to say that or did I get that the wrong way round?
Mr Clancy: What I said was that you would have to view any British Bill of Rights through the different perspectives of the various legal systems.

Q364 Chairman: So you would have to have a British Bill of Rights plus (Scotland) or a British Bill of Rights minus (Scotland), or (Northern Ireland) or whatever?
Mr Clancy: Yes.

Q365 Lord Dubs: Is that to do with enforceability or the basic principles?
Mr Clancy: That is an interesting question. It may have a bit of both. There may be different principles involved, for example, a right to jury trial, but there may also be issues of enforceability.

Q366 Chairman: If we take the jury trial example, because I think that is quite a good one, we have got in the ECHR the right to a fair trial and everybody is happy with that because the right to a fair trial can mean different things in different places.
Mr Clancy: Indeed.

Q367 Chairman: But if it were to go beyond that and say, "You have a right to a jury trial", going back to our original question, would it be seen as a human rights enhancing measure in Scotland or Westminster stamping its big boots all over the Scottish legal system?
Mr Clancy: It would be a considerable innovation in the Scottish legal system.

Q368 Chairman: Ah, but that is not answering the question. Would it be seen as, if you like, an enhancing measure?
Ms O'Neill: It might well be by some and not by others. The point that we would make is that, if the content of a Bill of Rights is determined at a UK level without giving consideration to the sensitivities of the different jurisdictions, that is more the issue. I do not think we are saying for a moment that there cannot be British rights incorporated in a Bill of Rights but that those have to be agreed in light of the differences which exist within the different jurisdictions.

Q369 Chairman: There may well be rights that you have in Scotland that we do not have south of the border which we might want to import the other way round.
Mr Clancy: Indeed.
Earl of Onslow: I rather got the impression, and I would like to get it right in my mind, that the difference on right to trial by jury is more in appearance because you do things, as you said, at the same level as we do in England. It is in fact a gloss rather than a matter of substance. You have the right of trial by jury.
Chairman: No, you do not.
Earl of Onslow: Yes, you do, because it has been established for such a long time.
Chairman: No, it is not a right. The prosecution has the right to trial by jury, not the citizen.

Q370 Earl of Onslow: Yes, but I particularly asked you, "Is the level of trial by jury the same as it is in England?", to the same level, and if I remember rightly you said yes.

Mr Clancy: Yes, I did.

Q371 Earl of Onslow: What that means is that that has actually been established for a sufficiently long time that to try and overturn it would, quite rightly, produce an uproar. What I am suggesting is that, because it has been established by custom and practice for such a long time, it is in effect a right to trial by jury even though technically the Chairman is absolutely right: it is the prosecutor's right to choose. Does that make sense or not?
Mr Clancy: I can see where you are coming from, but if you are talking about who owns the right, is it the person who is accused or is it the prosecutor, in Scotland it is the prosecutor who owns the right, whereas you might contend that under Magna Carta it is the accused who owns the right. Remember that we have not had a series of approaches to criminal law such as offences triable either way. That never existed in Scotland. Whilst the net effect is that if I murder someone I will be tried with a jury, so I effectively can secure a jury by killing someone,—

Q372 Earl of Onslow: It seems rather extreme!
Mr Clancy: I know, but that is really what it is about. It is about the seriousness of the offence and the forum in which it is prosecuted rather than a right inherent in me as a citizen to claim a jury trial.

Q373 Chairman: Supposing, taking that example, that the prosecutors were to go a bit off the rails and say, "We have had this murder but I think it should be tried in the sheriff's court", what could anybody do about it?
Ms O'Neill: Perhaps I might re-frame that question because there is legislation which governs the types of offences which are tried in particular ways. Perhaps one could phrase it in this way: if the Scottish Parliament decided tomorrow to legislate in a way which removed jury trial from the prosecution of certain offences there is no right entrenched anywhere in Scots law which would prevent the Scottish Parliament from so doing.
Mr Clancy: And remember, for example, that the Lockerbie bombing was prosecuted before a bench of three judges with no jury involved, so the High Court, sitting as the principal criminal court, is in a position to have its procedure modified in certain circumstances.

Q374 Chairman: Just to square this circle, going back to my earlier point about human rights enhancing measures, I think you have a maximum time when somebody has to be brought to trial.
Mr Clancy: Yes.

Q375 Chairman: That is the sort of thing that we might want to look at the other way round.
Mr Clancy: Indeed, and comments were made earlier about whether *habeas corpus* applied in Scotland, which it does not. We instead have what used to be the 110-day rule. I am not entirely sure what the number of days is now in which someone has to be brought to trial. We will write to you on that point.

Q376 Lord Dubs: May I interpose with this question? We have talked a bit about certain rights just now which we have in England but which you do not have here. Are there any rights, other than the 110-day rule, that you can think of that you have here but that we do not have in England and maybe we should consider adopting them? You could write to us about it if that is an unfair question to throw at you like this.
Mr Clancy: It is not an unfair question. We are here, after all, to talk about a Bill of Rights. We were just thinking perhaps about the right to free personal care which applies in Scotland but does not, as far as I am aware, apply in England and Wales. Remember that there is a right to free prescriptions which applies in Wales but does not apply in England, and there is currently a proposal to extend that provision to Scotland, so there are these different areas which are more in the social area than the substantive human rights arena. Those are a couple of examples.

Q377 Baroness Stern: We were talking, before we moved around a bit, about what you think should be in a British Bill of Rights and I asked you if there were other areas which could not be applied to Scotland other than the jury trial, and if you answered it I have already forgotten whether you said there were any other areas apart from jury trial. Did you?
Mr Clancy: I think that was the only one which came to mind.

Q378 Baroness Stern: I thought I had not missed anything. You also said you were thinking about the possibility of cultural rights. I wonder if you could say a little bit more about what you meant by that.
Mr Clancy: Perhaps rights in relation to language. Remember, as you will have come into this building you will have seen a sign which was both in English and in Scots Gaelic, and there are legislative provisions applying to the use of the Gaelic language in Scotland so that people in certain parts of the country may employ the language in court and, of course, in this place speeches by Members can be made in that language and committees have heard evidence in that language.

Q379 Baroness Stern: Thank you. That is very helpful. Under this heading of "Content" I would like to move on to talk about how wide a Bill of Rights might go and how far it might be a statement of aspirations. Would you see any benefit in including rights which are not justiciable and do you think there is any merit in a Bill of Rights being a document that does not just set out what we could have now but also sets out what an aim would be for what human beings should ideally have in their society?
Ms O'Neill: I would have no difficulty with a Bill of Rights containing aspirational statements provided there was clarity as to which parts of the Bill of Rights were intended to be aspirational and which were intended to be legally enforceable. From the perspective of the Law Society the aim would be to achieve certainty about the law and anything which

muddled those parts which were aspirational and those parts which were enforceable would be very likely to cause us difficulty.

Q380 Lord Dubs: In your evidence you state that you do not think that a British Bill of Rights should include responsibilities, and you say that this is "fundamentally a political question". Could you expand further and say why you think that responsibilities should not be included?
Mr Clancy: I was reading a speech by the Lord Chancellor. I did actually prepare for this session, you see. He made the speech in January and he makes an interesting comment: "Let me say here that I fully understand that there is not and cannot be an exact symmetry between rights and responsibilities. In a democracy rights tend to be vertical, guaranteed to the individual by the state to constrain the otherwise overweening power of the state. Responsibilities, on the other hand, are more horizontal. They are duties we owe to each other, to our neighbour in the New Testament sense", so in a sense I think that is where I am finding some difficulty in terms of responsibilities. What the Lord Chancellor seems to be indicating in this speech is that we are moving into almost a theological field about responsibilities and, whilst looking at the Gospel of St Luke, chapter 10, verses 25-37, you can see that the neighbour principle lies at the heart of many of our legal institutions –remember the case of *Donoghue v Stevenson* and Lord Atkin's famous judgment about the snail and the ginger beer bottle and the responsibilities, the liability, of a manufacturer for the ultimate consumer's detriment in the event that there comes to be a problem—that is all very well in a legal setting where the House of Lords makes a decision, but when we are talking about politicians setting out their responsibilities in words which tend towards the theological then it may be the case that the Lord Chancellor and the Archbishop of Canterbury will get into some trouble together.
Baroness Stern: Can I just find out a little more about the snail and the ginger beer bottle?
Chairman: I will tell you about it later.

Q381 Earl of Onslow: It was a stone bottle; you could not see the snail inside it and the retailer was not found responsible, is that not right?
Mr Clancy: It was an opaque bottle, you are right; it was glass. I have actually seen a Stevenson's ginger beer bottle.

Q382 Chairman: Not the original exhibit?
Mr Clancy: The original exhibit cannot be found, Chairman, but this lady poured out some ginger beer which allegedly contained parts of a decomposed snail. She drank it in what is known as an "ice cream float" and then suffered gastroenteritis. The case went to the House of Lords in 1932 on a point of law because earlier the Court of Session had decided that you could not find a liability in the manufacturer in the case of *Mullen v Barr*, but in the House of Lords Lord Atkin came to the conclusion that there was a responsibility on the part of the manufacturer because it was within reasonable foreseeability that someone would be consuming the product and that there was a duty of care by the manufacturer to the ultimate consumer. Therefore, Mrs Donoghue won her point of law and settled the case out of court for £500.

Q383 Chairman: We will never know whether there was a snail or not because it was never reported.
Mr Clancy: It was never proved. It never went to proof. It was only a point of law.

Q384 Earl of Onslow: When I was doing my national service I was flipping through the Army Book or Manual of Law and it is in there somewhere, and that was in 1956 before most people in this room were alive, I suspect.
Mr Clancy: It would be very interesting to see what kind of ginger beer the Army was drinking in those days.

Q385 Earl of Onslow: The questions I have down have more or less been asked but I would like to encapsulate my question to you, which is this. Would you see a Bill of Rights solely as protecting the Queen's subjects from an over-mighty state, which Jack Straw talks about, because it seems to me, and we have probably all read the Henry Porter article; that was basically his evidence to the JCHR the other night? That is where I come from. I find that it is the over-mighty state which is passing law after law which offends my sense of justice, and that is where I see the necessity for a Bill of Rights. That seems to me to apply to England, Scotland, Wales and Northern Ireland, so it is supra-British and a protection of the subject against an over-mighty state.
Ms O'Neill: Standing what we have already said to the effect that the Law Society would be hesitant about saying too much about the precise of a Bill of Rights, I think the traditional view of a Bill of Rights is certainly to protect the citizen against the power of the state. All I would say in addition to that is that as the jurisprudence of, for example, the European Convention on Human Rights has developed it has become clear that the protection against state action can also be extended to a requirement for positive state action, for example, to provide housing or to provide welfare assistance for those who without that assistance would have their rights breached. I think already we are in a position where we have a rights framework which imposes positive duties on the state to give things as well as imposing restraints on the state not to do things.

Q386 Earl of Onslow: Could you elaborate that a little bit more?
Ms O'Neill: An example which comes to mind and which I think may have been referred to in the previous session is in relation to, for example, asylum seekers or aliens and the obligation not to treat those persons in a way which is inhuman or degrading. That obligation not to do something on the part of the state can be interpreted and has been interpreted by the courts as extending to providing

positive welfare assistance to asylum seekers, so, although the right is in language of "Do not do X", the interpretation of that right includes "You must do Y".

Q387 Earl of Onslow: I follow that, but that has been the case all along, has it not?
Ms O'Neill: Absolutely.

Q388 Earl of Onslow: That applies to things that do not apply to you, like *habeas corpus*, Magna Carta or the Declaration of Rights. They presumably had those to upsize as well, did they?
Ms O'Neill: Yes.

Q389 Earl of Onslow: So there is nothing new in that?
Ms O'Neill: Agreed.

Q390 Lord Bowness: Just before we leave this section, you answered one of my colleagues' questions as to what rights might exist in Scotland and elsewhere but do not exist in England, and you gave as examples free prescriptions in Wales and free personal care in Scotland. Are those really rights in the sense that we are discussing rights in a Bill of Rights or are they in fact benefits which flow from the political policies pursued by those particular administrations? In deciding to do both those things it is surely a question of political choice how you use your resources, not as a matter of principle whether you provide health and social care, which can be done in a variety of different ways? If we include those sorts of things in any Bill of Rights is it not going to restrict the ability of the devolved administration here, or indeed administrations elsewhere in the United Kingdom, to make those political determinations?
Mr Clancy: The reason why I gave those examples is that they are couched in terms of rights to free personal care, rights to free prescriptions, but I can see exactly where you are coming from. You have touched a nerve in terms of what is meant by a "right". Whilst we can see that ECHR provides a list of rights, and in certain instances responsibilities because there are co-related aspects, it is quite difficult to see beyond those rights enumerated in ECHR, ones which would not stray into the areas of social and economic policy; I think that is probably right. When one compares ECHR with other international human rights instruments, such as the UN Declaration on Human Rights, it is possible to see that in terms of basic fundamental human rights probably the ambit of them has been circumscribed by the ECHR. It is when we make the political decision—when you make the political decision—and when the country agrees to such a political decision that we move into other areas where that which has not been yet considered as a right becomes a right and it really depends on how we define what a right is.

Q391 Lord Bowness: Would you not have to make the same kind of saving clauses as are made in the Charter of Fundamental Rights, of which half essentially is a re-statement of the Convention rights? The other half is matters which probably could be described as social and economic rights. I think there is an attempt to describe them as principles, but they are almost all made subject to the provisions of national legislation.
Mr Clancy: Yes, I think so. We would have to make such a saving provision.

Q392 Chairman: Or you could approach the question of social and economic rights by circumscribing them in relation to issues related to resources as they do in the South African constitution. However, if we are to take the example of healthcare I think it would be a very strange Bill that had that very detailed level of specificity to which you were referring, as to prescription charges, but if, for example, you had a right to healthcare, however it were framed, there could be a bottom line that said, "If you cannot afford the prescription the state should provide it for free", which would be a different thing. It is effectively the system we have in England at the moment. We could argue whether it goes too far or not far enough, but that would be an example of how you might be able to deal with that.
Mr Clancy: Another example might be where the current Article 6 provisions for right to a fair trial do not actually say that you have a right to legal aid, and we rely on jurisprudence from Strasbourg in *Airey v Ireland* to provide for that consequent right to legal aid, which I referred to as a right of access to justice in the context of our memorandum. Maybe what we should look to do is elaborate the rights as they are enumerated, which would be to search through the jurisprudence of the court and see where there are these gaps which have been filled by jurisprudential extension.

Q393 Chairman: Could I raise the issue of horizontality again? I put to the previous witnesses the issue of the big multinational. Supposing we had a right to privacy. Why should an employee of a big multinational not be able to rely on that right against surveillance by their employer, for example?
Ms O'Neill: Our perspective is that the way the Human Rights Act is drafted at present there is at least the potential for such an interpretation already.

Q394 Chairman: But it is not enforceable against a private employer?
Ms O'Neill: Not a wholly private employer unless that private employer can be viewed as a public authority against whom direct rights would lie. In terms of the law of privacy I do not think we have any difficulty with the general obligation on the courts to interpret the common law in a way which is compatible with Convention rights and to extend Convention rights in a horizontal way by that mechanism.

Q395 Chairman: So you would not like to see horizontality directly enforceable in that context? You have to rely on the courts interpreting it in that way?

Ms O'Neill: To the extent that the Cabinet Secretary referred to the protection of rights being a state responsibility, I think there is something in that. Where we would like to see greater activism is in relation to the definition of "public authority" within the Human Rights Act as it stands at present.

Q396 Chairman: I think we all agree with that—I hope we all agree with that anyway—based on our previous discussions on the *YL* case, but this is a slightly different issue. This is where you have got an entirely private big company, nothing to do with the state at all, that decides that it wants to spy on its employees and what they are up to and that sort of thing.
Ms O'Neill: I think, with respect, that that in some respects is an easy example to give. The more difficult example is the small employer who is not a multinational and the extent to which we as a society want to impose those obligations on all other citizens in all of their other dealings, and, without taking the easy route out, I think that is a bigger question than the Law Society of Scotland can answer.

Q397 Baroness Stern: Since we are talking about what else it could be, I wonder if you have any views on how well the ECHR does with the rights of children, for instance. We have ratified but not incorporated the Convention on the Rights of the Child and it might well be felt that in that area there is a lot more we could do to make ourselves much more bound by the basis of the Convention on the Rights of the Child. Do you have any views on that?
Mr Clancy: The Children (Scotland) Act 1995 gives children many rights which emanate from the UN Convention on the Rights of the Child, and, of course, we have a Commissioner for Children and Young People here in Scotland, Dr Kathleen Marshall. Without being cheeky, I suspect that she would be better placed to answer this question than other people, but maybe I could take that question away and write to you after I have talked to Christine about it in a place where we can discuss it, if you do not mind.

Q398 Lord Dubs: In your view what would be the appropriate balance between the powers of the judiciary and the power of the legislature under a Bill of Rights? Does this have any implications for parliamentary sovereignty?
Ms O'Neill: We again start from the perspective, in Scotland at least, where the notion of the judiciary having the power to strike down legislation is not novel or shocking. That being said, the judiciary in Scotland have not yet struck down any legislation of the Scottish Parliament, so we are still waiting for the impact of that sort of ruling. In terms of the sovereignty of Parliament and the balance of the powers of the judiciary and the legislature, again, looking at what we have already, we, of course have a situation in the UK at present where sovereignty of Parliament is not entirely unlimited. In the context of the European Union our domestic courts—-

Q399 Earl of Onslow: May I just interrupt you? It is unlimited because it was found in the Appeal Court by Lord Justice Laws that Parliament is quite entitled to pass legislation which says, let us say, that the Common Fisheries Policy does not apply, by specifically repealing sections of the 1971 European Accession Act. That has become established as a slightly constitutional act in that the doctrine of implied repeal does not apply to that Act. You have to specifically repeal it and then it can be repealed, so the doctrine of the supremacy of Parliament is still there. Okay, it is pushed back a little further, but the absolute supremacy of Parliament is still there because no Parliament may bind its successor.
Ms O'Neill: I would go no further than to point to the decisions of the House of Lords to date where legislation of the UK Parliament has been disapplied. I would not go any further than that.

Q400 Earl of Onslow: What was that? The fishing boat case was the important one, was it not?
Ms O'Neill: Yes.

Q401 Earl of Onslow: But since then John Laws has said that if that Act had said "irrespective of the 1971 Act" it would have been a sovereign Act of Parliament. I think that should be always borne in mind when we discuss these things.
Ms O'Neill: I suspect there are books we could write on this particular topic. In terms of the balance between the judiciary and the legislature, it is not inconceivable that a power to strike down legislation as being incompatible could co-exist with the supremacy of Parliament. As things currently stand, if an Act of the UK Parliament is found to be incompatible with the Convention then the most that a court can do is make a declaration of incompatibility. There is nothing conceptually which would prevent an amendment which would have the result of allowing the courts to strike down that legislation but leave it open to Parliament to reinstate that legislation by, for example, a greater than absolute majority if that was one way of looking to protect the rights of an individual who was affected by the breach. There are different ways in which you could order things so as to provide both a judicial power of strike-down but retain the ultimate supremacy of Parliament should Parliament decide to reinstate that legislation.
Earl of Onslow: An easy way of doing that is to make a law not subject to the Parliament Acts of 1911 and 1949.
Chairman: That is you trying to entrench your position, is it?

Q402 Lord Dubs: You have just said the courts do not have the power to strike down Scottish legislation.

Ms O'Neill: My apologies. The Scottish courts do not have the power to strike down Acts of the UK Parliament. They have power to strike down Acts of the Scottish Parliament.

Q403 Lord Dubs: But there has been no occasion when they have done so?
Ms O'Neill: No.

Q404 Lord Dubs: Therefore it would follow, you would agree, that the courts should also be given the right to strike down legislation if in their view it is contrary to the British Bill of Rights? A bit hypothetical, that.
Ms O'Neill: Yes.

Q405 Lord Dubs: There is no reason why that should not be the practice?
Ms O'Neill: No, none at all.
Chairman: But only if the Bill of Rights applies in Scotland, which goes back to my earlier question.

Q406 Lord Dubs: Yes, of course.
Ms O'Neill: Yes, and, without over-complicating it, of course the Bill of Rights could apply in Scotland in relation to reserved matters but not to devolved matters. It could have partial application.
Mr Clancy: I think that is the Government's intention, that the Green Paper will have application to reserved matters rather than devolved matters. There was an indication given after a speech by Michael Wills MP on Wednesday last week at the Constitutional Unit.

Q407 John Austin: Does it matter whether they are devolved or reserved matters? One of the witnesses has said to us that as human rights are not reserved to Westminster the Scottish Parliament's consent would be required for the enactment of any British Bill of Rights. Is that your interpretation?
Ms O'Neill: That is a matter of politics rather than law. As a matter of political convention the Scottish Parliament's consent is sought whenever Westminster legislates on something which the Parliament could itself legislate about, but that has no legal foundation.

Q408 John Austin: Let me take it further to clear my mind. Reference was made to the UN Convention on the Rights of the Child. In ratifying that Convention it would be the UK Parliament that ratified on behalf of the UK, but the Home Secretary has said that the UK will ratify by the end of this year the Convention on trafficking, which will be therefore legally binding not only on British institutions but also on Scottish institutions which are responsible for delivering certain services, so is the Scottish Parliament's consent required for the UK's ratification of the Convention on trafficking, for example?
Mr Clancy: No, it is not. That is a prerogative power.

Q409 Chairman: Even though it would impact on the Scottish legal system?
Mr Clancy: Yes.

Q410 John Austin: And you will be responsible for complying?
Mr Clancy: Yes.
Earl of Onslow: When the Government signs a treaty the articles in the treaty have to be brought in by legislation rather than by royal prerogative, so presumably the Government signs the treaty, the UK Parliament passes it where England is concerned and the Scottish Parliament passes it where Scotland is concerned.

Q411 John Austin: If it were, say, the Convention on trafficking, the UK Government are saying it has to be compliant before it can ratify but it cannot be compliant unless it is assured that the devolved Parliaments and Assemblies are also compliant?
Mr Clancy: Yes, that is right. We were just thinking about an example where a recent treaty has been implemented in the UK. The International Criminal Court came to mind and you will remember that there was legislation to implement that treaty, the Rome Statute, in the Houses of Parliament in 2003, I think it was, and that applied throughout the United Kingdom. But there were also provisions which related exclusively to devolved aspects, and so therefore a Bill was brought forward by now Lord Wallace of Tankerness to implement those provisions in the devolved setting and it related to things like the powers of the police and search warrants and things like that.

Q412 Earl of Onslow: What happened over the American extradition treaty? Did that apply automatically?
Mr Clancy: The fact is that in international law the state party to any international treaty is the United Kingdom. When the United Kingdom is bound by that treaty all parts of the United Kingdom are bound by that treaty. If it were the case that a devolved administration, either here, in Belfast or in Cardiff, refused to implement some aspect of an international treaty, then the United Kingdom would be obliged, through the United Kingdom Parliament, to implement it effectively directly through the powers in the Scotland Act. Remember that under section 28(7) of the Scotland Act, "This section does not affect the power in Parliament of the United Kingdom to make laws for Scotland", so the legal position is that the UK Parliament could enact legislation which would apply in Scotland. The Sewel Convention, which operates through a process of legislative consent motions in this Parliament, is one which is a constitutional convention. It is not a matter of law. The matter of law is contained in section 28(7) of the Scotland Act I think that in the unhappy circumstance where an international treaty was being flouted by a devolved administration to the UK's peril by being put in breach of those international obligations the UK would only have one option.
John Austin: So there is not a requirement of the Sewel Convention? There is a desirability to achieve consensual agreement?

Q413 Chairman: But the bottom line is that the Westminster Parliament can enforce its will over Scotland if Scotland does not comply with an international treaty requirement.
Mr Clancy: Section 28(7) is the embodiment and I know the Earl of Onslow will be happy at this, of the supremacy of the United Kingdom Parliament, or the Imperial Parliament!

Q414 Lord Dubs: Could I go back to something we were discussing a little while ago? If the British Government was set on introducing a Bill of Rights and if there was reasonable support for the principle in Scotland, is it therefore possible that the British Government could have its Bill of Rights but have a Scottish version to allow local circumstances to be included for that part which is applicable to Scotland?
Ms O'Neill: Yes, there is no reason why not.

Q415 Lord Dubs: Is that the way forward?
Mr Clancy: That is a political question.

Q416 Lord Dubs: It is partly political but partly in terms of the feasibility. It would be quite feasible, would it not, to have a Bill of Rights for England and then, in consultation with Scotland, such changes as were appropriate to Scotland could be added and the whole thing would then stand up legally?
Mr Clancy: If the Scottish Parliament agreed to that course of action then there would be no let or hindrance on it.

Q417 Earl of Onslow: The question I would like to ask, and this is again for my own information, for those of us who felt that the American Extradition Act was an act of barbarism, which I do feel, is, did the Scottish Parliament have to change their law for that or does extradition apply?
Ms O'Neill: My understanding is that extradition is a matter which is reserved to the Westminster Parliament and therefore the Scottish Parliament would have—

Q418 Earl of Onslow: No say?
Ms O'Neill: Has no legislative say. I cannot recall whether there was any political debate in this Parliament about the advisability or not of the Extradition Treaty but there would be no legislative input from this Parliament in terms of ratifying that treaty.

Q419 Chairman: That is our questions exhausted. Is there anything you would like to add to anything you have had to say to us today, which we think has been very helpful?
Mr Clancy: No, I do not think so. Thank you very much for your consideration and for your interesting questions.
Chairman: Thank you for your interesting answers.

Wednesday 21 May 2008

Members present:

Mr Andrew Dismore, in the Chair

Bowness, L	Stern, B
Dubs, L	John Austin
Morris of Handsworth, L	Mr Andrew Dismore
Onslow, E	Dr Evan Harris

Witnesses: **The Rt Hon Jack Straw MP,** Secretary of State for Justice and Lord Chancellor and **Mr Michael Wills MP,** Minister of State, Ministry of Justice, examined.

Q420 Chairman: Good afternoon. This is our last open session in our inquiry into the British Bill of Rights. We are joined by the Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, and Michael Wills MP, Minister for State, Ministry of Justice. Welcome to you both. I think you wanted to make an opening statement, Jack?

Mr Straw: Chairman, we thank you for the opportunity to give evidence here. I wanted to make a few remarks in terms of opening to try and set the context for a British Bill of Rights and Responsibilities. When we had the idea of incorporating the European Convention into British law, which was actually in opposition in the mid 1990s in co-operation with the Liberal Democrats, and then when I brought the Bill forward sometime in 1997, and during its parliamentary passage I made it clear, as did everybody else, that this was not a destination. It was bound to be the start of a new chapter of the development of British rights and concomitant responsibilities. Interestingly at the time there was some contention about whether it was appropriate to incorporate the European Convention itself and I was anxious to achieve a situation where we had a consensus so far as was possible between the parties. During the process, both in our House and in the Lords, as well as just explaining what we were doing, various changes were made to the Bill, not to detract—we could not and would not—from articles of the Convention, but for example over issues of remedies to try and provide some satisfaction for worries by the churches and religious establishments. At the end of that I recall, and it is shown in the record, that Lord [Nick] Lyle, who was the Shadow Attorney General, leading for the Conservatives used the phrase that he "wished the Bill well" at third reading and there was no vote against it at third reading. Reflecting on what has subsequently happened, there is no question that it has become a received part of our constitutional arrangements. It is highly valued by many people. At the same time, and particularly given the shock and the extreme stress-testing to which all legal regimes and democracies have been under since 9/11, it has also been suggested by some that it is some kind of "terrorists" charter. That is inaccurate but part of the framework against which we are working today. The question then arises what is the purpose of developing from the Human Rights Act, building on it and not detracting from that Act or the Convention, but into a British Bill of Rights and Responsibilities? First, I think there is a platform in our politics to develop the Human Rights Act because, although I am quite sure that whatever we propose at the first stage will obviously be subject to a debate, and I hope it is, all three parties now accept contemporaneously that the Convention rights remain. That is true of our party, true of the Liberal Democrats and it is also now true of the Conservatives. That is a really important building block because I have always been conscious that whilst constitutional changes may well be contentious—you cannot always achieve this—but they are more likely to endure if you achieve a broad measure of agreement and should not be partisan tools for any one party. What are we doing? The first thing is to broaden the base of what it means to have a Bill of Rights. To say what everybody knows intellectually, or if they think about it they appreciate that with rights go responsibilities, with privileges go duties, but it is not necessarily obvious to people because that fact is reflected in parts, although not all explicitly, of the European Convention. Therefore it has certainly been my judgment for a long time, and it is shared now across government, that we should have what amounts to a single text which says yes, these are your rights, but along with rights goes responsibilities. I was asked this question earlier today: how would I explain that in my constituency? I would actually find it very easy because I have people coming to see me often who have run into trouble with the law who are claiming rights and I wish them to be able to claim those rights, but I wish them to understand that they also have responsibilities to their victims, to their neighbours and to wider society. I would also say to them if you think about other countries which you may well have visited—France, the United States or South Africa—in each of those countries people have a better idea of what their rights and responsibilities are because they have single texts which have often come out of real internal or external conflict—France, internal conflict, in the United States a bit of both, in South Africa out of internal conflict—and so people have had to articulate what their rights and responsibilities are. It gives people a better set of handholds as citizens. That is one thing we want to do. The second is to look at whether, within what would amount to a single text, it is possible safely to develop what is grouped as economic and social rights. There are some economic rights whereby in my judgment and across government you run straight into resource allocation and that it is simply not appropriate for the courts to make those decisions in place of government. That is also the position of the

judiciary—Baroness Hale recently and Lord Bingham—but there are other social rights particularly and some economic rights which are already the subject of a great body of detailed specific legislation. What we are looking at is whether in many of these fields—education and health are two obvious ones—it is not possible to distil the basic rights and responsibilities that people have in these areas into a clearly comprehensive statement and be subject to the detailed law as well, but it would still give people a sense of what they are entitled to from others because the state in a democracy is everybody else and what they are expected to give; in other words, what they give and what they get. The last point I wanted to make as far as that is concerned, as you and your Committee are better aware than most, there are really three alternative models if you are going to put rights in a text. You can have declaratory text which is non-justiciable; you can have deliberative and interpretive text, which I will come back to, or you can have text which itself is deliberately and explicitly justiciable in its own terms. Where we are in the development of these rights is first of all to say there is a point in having just declaratory text. It is not an idle exercise if, in an overall statement of rights and responsibilities, you simply end up with declarations because declarations can serve an important purpose. My understanding is that that is the case for certain declarations of rights in the Irish constitution. At the other end of the scale I am very cautious to say, nearly opposed, and so is Michael, to the idea that we should develop new generic rights which were themselves justiciable because I think that would cause more problems than it solved, but we both believe that this is going to be a long-running and iterative process. There is quite a case for developing deliberative and interpretive principles in these fields which would not give rise to a cause of action themselves, but would be used when, for example, people were accessing their rights of education or health. That is a sketch of where we are and I hope that is helpful.

Q421 Chairman: Thank you for setting out why you are pursuing the Bill of Rights issue and why you think it is needed. Is it consensus across government or is it a MOJ project? Is everybody signed up to it?
Mr Straw: There is indeed a consensus across government. What was in the *Governance of Britain* Green Paper which came out in early July last year was discussed and explicitly agreed in Cabinet. The Prime Minister, in his statement in the House on 3 July, made explicit reference to the possibility of developing a Bill of Rights and Responsibilities. It falls to Michael and to me to develop this and to officials and lawyers in my department who, if I may say are extremely good, to do the legwork but we cannot possibly deliver everything here unless we have the rest of the Government on board. This is not just a narrow discrete area of criminal procedure where most of the rest of Whitehall, provided it does not cost anything, leave it to MOJ Ministers; this is across government.

Q422 Chairman: You mentioned that there is a broad consensus now about Convention rights. Does the same apply in relation to the Human Rights Act? Can we have your assurance that there is nothing in the project that is going to weaken the Human Rights Act?
Mr Straw: You have that assurance, yes. There is consensus across government about that and I have said that on endless occasions. There is not a political consensus about that at the moment. It is for the opposition to speak for themselves essentially. What they have said, as I understand it, is that they would wish to modify the Human Rights Act and they believe that if they were to modify the use of the articles of the Convention this would give them greater benefit of the margin of appreciation. One of my pedagogical enterprises at the moment is to explain that this will not happen and there is no way, as long as we remain committed as a nation, which the Conservatives have said we should to the Convention, that we can arbitrarily legislate the domestic legislation to change what Strasbourg is going to do and subject to Strasbourg; indeed, we would end up in a worse situation. If your colleagues will accept that one of the benefits of the Human Rights Act, and one of the many ones I argued for myself ten years ago, was that we had been in the worst of all worlds. We were subject to the Convention and Strasbourg but we were not able to develop our own jurisprudence with the benefit of our extremely good judiciary. We have now and actually it is helping to mould what happens in Strasbourg. There is a last point here which is there is a reference made in Mr Cameron's speech as to what happens in Germany where it is believed that they get a better margin of appreciation. That is not the case. There is this arcane argument for us—not for the German lawyers—about competence versus competence. Leave that aside for a second. The reason why it is not an issue in Germany is because the German constitution provides a greater level of protection than does the European Convention on Human Rights for reasons that everybody historically will understand. All of us, those who have been, say Home Secretary, Foreign Secretary or Justice Minister, have concerns about the interpretation of *Chahal*, for example. *Chahal* was a judgment given in 1996, four years before the HRA came into force, and there is no way if we want to stay within the Council of Europe and the Convention that we ourselves can legislate round that and I do not believe any British Government would do so.

Q423 Chairman: The follow on question from that is, perhaps on that point you make about Germany having rights that go beyond the Convention, what will the Bill of Rights do that the Human Rights Act does not do? Will it give people additional rights beyond as the general constitution?
Mr Straw: It does two things: one is it brings out that with rights go responsibilities. I could go into this.

Q424 Chairman: We will ask you about that as we go along.

Mr Straw: There are plenty of examples in the texts of other nations' constitutions where this balance is provided explicitly. If I think about my relationship with my constituents, to be able to say to people you have certain basic rights and responsibilities and here is one little booklet or a few pages on the net that you can access that tells you this would be terrific. Other countries have arrived at a position like that and I do not see why we cannot. That is not more new rights but it is putting rights in a proper context. One of the things that has concerned me is that the upside of a consumer society is that people have all sorts of consumer goods and they can get what they want now. The downside is that relationships tend to be commoditised and people see rights as some good which in some ways they do not even have to pay for and they can just take and that is not the case. Although the balance between rights and responsibilities is not symmetrical, rights of the Convention kind are those which we have against the otherwise over-weaning power of the state. Responsibilities tend to be more horizontal to your neighbour in the biblical sense as well as to the community which sits above the state. They are really a very important part of helping to make a democratic society operate; that is one thing. The other is in this area of economic and social rights, which is not really covered to any serious degree in the Convention. It is in plenty of EU text and to a degree in the Charter of Rights in the Lisbon Treaty but not here.

Q425 Earl of Onslow: Secretary of State, those of us who come to the Bill of Rights from what can best be classed as an old-fashioned libertarian state, it seems to me there are two points here: one is the only responsibility the subject has is to obey the law and nothing else, so you cannot legislate for any other responsibility. Secondly, what has been concerning me, and I think quite a lot of other people, is the increasing power of the executive to pass acts of parliament—for instance, the abolition of double jeopardy, the attempt to abolish trial by jury for fraud—there is a whole list of these things. Henry Porter is a perfect example of somebody who writes them, which I feel extremely strongly about. The latest one that has come up is this thing of saying that all telephone records, all email messages, all internet access, should be kept and logged for a year is what it is. Those seem to me something which the State should not do. It is no business of the State. It is an abuse of the individual liberty and the liberty of the subject. We have on one side a, for want of a better word, the intellectual side of Tom Paine and on the other side you have the intellectual side which is the common law side—the lovely, wonderful English side—which says the point of the law is to limit the power of the state. The subject can do anything it likes unless it has been told it cannot by the Queen in parliament. It seems to me what is missing in the whole thing of the Government's approach to it.

Mr Straw: My Lord, I am not sure where you are putting Tom Paine, but funnily enough I quoted Tom Paine in a lecture I gave in October where he was making the point that it is important that rights and obligations are reciprocal. He said: "A declaration of rights is, by reciprocity, a declaration of duties also. Where there is my right as a man is also the right of another and it becomes my duty to guarantee as well as to possess." I am as concerned as you are, and Mr Henry Porter is, about ensuring that people have access to their rights in the criminal procedure and not to have unnecessary, unjustifiable interference by the State. But where I depart from you is in what appears to be your belief that it is possible to run a society today—indeed, it has never been possible—based entirely on libertarian principles which I see as essentially selfish where people are simply claiming their rights and saying I have no obligations to anybody else. Yet the issue about your only obligation is to obey the law begs the question in any event about what is in the law. I can argue about the abolition of double jeopardy or fraud trials. The issue there is not about taking people's rights away explicitly, and bear in mind that juries are the exception, not the rule, across Europe and indeed in most countries in the world which are perfectly democratic and libertarian, so these two do not go together, although I happen to think that juries play an important role in our criminal law and in our culture, the issue there is when you are faced with a clear choice do you come down, say on double jeopardy, on the side of someone who is unquestionably guilty for whom there is DNA evidence that they are guilty of a rape or a murder because of a double jeopardy law, or do you adapt that to take account of changing circumstances and say actually the rights of the victim and of the public to ensure that somebody who is plainly guilty of the most egregious crime ought to be tried and locked up and should not be able to dodge round the law just because of a rule which was brought in in very different circumstances. On the issue of telephone records, I can talk about this, and I am as concerned as anybody who I phone, who I send a text to, boring though these things are, should not be accessible with any facility save for the real need of criminal investigation or counter-terrorism and so on. There is a balance here and I was going to give you this last example, my Lord, which is this. In the law children and parents have various rights of education. What is also in the law, and we have tightened this, is responsibilities on parents not only to make sure their children go to school, but all sorts of more explicit responsibilities. All parents do not realise this. There is text used in other countries that there is a case—I put it no higher because this is a developing process—for saying to parents yes, you have rights and so have your children but you have also got responsibilities and this is what it says and this is what through representatives and debate has been agreed by the British people.

Q426 Dr Harris: I wanted to ask you about the question of the British Bill of Rights. You call this a British Bill of Rights. Does that mean a Bill of Rights for British citizens?

Mr Straw: Dr Harris, a lot of Convention rights, for example, are there for anybody in the jurisdiction. I do not think anybody is suggesting a system where you had one set of rights in a criminal trial under habeas corpus if you were a British citizen or if you were not, that would be risible and completely contrary to the Convention, so let us be clear about that. The "British" adjective in my view is important because there is this implication in the air that these human rights which equal in some people's minds, not mine or yours, a terrorist's and criminal's charter, are a European imposition and by Europe it is meant "the other", that somehow we are not part of Europe. I think it is really important we break that down. One can do it in longhand by pointing out that we were the architects of the European Convention, and we were the draftsmen, but in shorthand by saying what we are doing here is having a British bill.

Q427 Dr Harris: It is spin in a good cause, not in a negative way.
Mr Straw: I do not accept that term because it is a pejorative term. It is explanation. I wish now we had called it the British Human Rights Act, but there was not that same sort of climate then. Given how the word "Europe" has become to mean something foreign, other, unpleasant, I think it is quite important to say if the British Parliament decides on something then—

Q428 Earl of Onslow: Fog in Channel, continent isolated you mean?
Mr Straw: Yes.

Q429 Dr Harris: You could seek to reclaim the meaning of that rather than sidestep it. Maybe you could do both.
Mr Straw: I think one could do both is the answer.

Q430 Dr Harris: I notice in the draft legislative programme it talked about giving people in the UK a clear idea. Is that because of the distinction between Britain and the UK with respect to Northern Ireland?
Mr Straw: There is a drafting issue about what is Britain and what is the UK. There are some quite difficult issues about the geographical extent of specific rights in any new bill, not so much responsibilities but certainly new rights because of devolution and different jurisdictions. In fact, in Northern Ireland, which is in the United Kingdom, it is not Great Britain, they already have developed quite a lot of instruments rather further than we have. I do not wish this to be disruptive of the Good Friday Agreement so we have to work round those.

Q431 Dr Harris: You are saying that basic human rights might be a devolved issue?
Mr Straw: The United Kingdom is a single unitary country and it is the United Kingdom Government which is a signatory to the Convention and which represents all the parts of the UK which have devolved, but not federal, government. Our obligations under the Convention therefore apply everywhere. If there is a case taken here, the public authority against whom a case is taken here is, for example, the Scottish Executive or the Scottish Health Board, and that ends up in Strasbourg, the United Kingdom Government is the respondent. It is just a drafting problem and one which requires us to work in co-operation with the devolved assembly.

Q432 Dr Harris: You are not saying there will not be certain rights that are England and Wales specific or Britain specific and some that will not be extended to Northern Ireland? I know that ultimately it is as you have explained under the ECHR.
Mr Straw: Some of these areas—education and health are two—are overwhelmingly devolved, although not all parts—embryology, for example, is not, as you know and it is a GB-wide issue. Embryology is UK, abortion of course is GB, so there are these complications. The Human Rights Act was drafted and, although it received Royal Assent the same month as the Scotland Act, the two were running in parallel. I was present at the birth of both. What happened to the Scotland act and also the Wales act, but the Scotland act more explicitly was that the Scottish administration was made subject to the Convention in advance of the UK. It was a slightly odd arrangement but there we are. The thinking preceded devolution. We just have to ensure that what we say does not collide with the Devolution Settlement and, if there is a question of that, it has the consent of the devolved administrations. It is a tricky issue but it does not raise issues of principle.

Q433 Dr Harris: It is a process issue.
Mr Straw: Yes.

Q434 Dr Harris: What about the question of the proposed British Statement of Values? How does that relate to it? Secondly, the issue of whether there are certain rights like the right to vote that could be applied selectively to certain people within the jurisdiction and to citizens and whether the responsibilities part relates to those rights or not?
Mr Straw: I will ask Mr Wills to come in on the Statement of Values and I will come back on the right to vote.
Mr Wills: It feeds in because any statement of rights, historically and as a matter of principle, derives in the end from the values of the society to which these rights and responsibilities apply; it is inevitable. It is true of the Magna Carta, it is true of the 1689 [Bill of Rights] and it will be true of this. We see very much the process which is an innovative process, of formulating a Statement of Values will feed into this. We will have to see how that process evolves and we quite deliberately have let go of the process as a government and want it to be driven fundamentally from the British people themselves, so we will have to see how that evolves. Certainly we could envisage a situation where the Statement of Values, which we hope will emerge from that process, could form the preamble to such a Bill of Rights and Responsibilities and set out the values which inform those rights and responsibilities. Going back to an

earlier point about why this is a British Bill of Rights, although a lot of the rights are universal in their application and in their origin, the way that they apply, the way that they are articulated inevitably are particular to this society. This is not aspirational in the sense that where we use the word "British"; it is descriptive. We see the Statement of Values as being part of that process.

Mr Straw: On the right to vote there are a number of rights which follow directly from being a citizen. It is slightly complicated because in this country the right to vote in general elections extends to citizens of Commonwealth countries, of the Irish Republic and to vote in local and European elections to resident EU citizens, so it is complicated.

Q435 Dr Harris: Other than that, is there any other area you think might apply just to British citizens?

Mr Straw: There are obvious ones which go with citizenship like a right to a passport and the right to consular assistance which are directly linked to being a citizen of this country. Lord Goldsmith in his review looked at some of these. On the right to vote, people do have a right to vote. I have had plenty of discussions on doorsteps, and I am sure you have too sometimes, about whether people have a duty to vote if they want to have a complaint. Some countries have compulsory voting. I do not think people would find that acceptable in this country. The idea that at a declaratory level with a right to vote and a right to take things up in a democracy and maybe a non-justiciable duty to vote is one we should debate.

Q436 Dr Harris: On this question of responsibilities—I am not going to go far because I think Lord Morris has some specific questions on this—the state has some responsibilities within the system, for example, to remedy and implement judgments of the Strasbourg Court in good time. The *Connors* case, the *Hirst* case, which is actually about citizens who the European Court of Human Rights thinks have a right to vote—some prisoners—and then some of these Northern Ireland cases—*Jordan, McKerr, Finucane*—they have been sitting around for a long time. In my view the Government has abrogated its responsibilities, its part of the deal, by not sorting these out. Would you accept without taking personal responsibility perhaps that there is a responsibility to do your side of the deal?

Mr Straw: I accept that in general terms, of course, that the State, Parliament has all sorts of responsibilities and, self-evidently, the Executive has responsibilities to meet its obligations in international instruments that we have signed. Our record in terms of compliance with Strasbourg judgments is pretty good and better than some Members of the Council of Europe. We are running a second consultation on prisoners' voting rights, which is a tricky issue.

Q437 Dr Harris: I think there has been a significant criticism about delay. My last question is about this issue where you used the term "selfish". You said in your speech last year on Magna Carta—this is the thing the press picked up on perhaps because you pointed them at it—that you feel that "some people seek to exercise their rights in a selfish way without regard to others." Is that fair? One can say that one is claiming one's rights but you also want to be polite and obey the law as was said and all those sorts of things, but can you claim rights in a selfish way? Does that mean you just write a strong letter via your lawyer to be selfish? You either claim your rights or you do not. They are my rights and I suppose it is selfish. I cannot understand how I can possibly claim my rights in a non-selfish way.

Mr Straw: It is a nice point you have made but I was thinking about the kind of situation which our constituents encounter where, for example, they will encounter bad behaviour by juveniles, sometimes parents who assert the right of their child to do essentially whatever the child wants to regardless of its impact on other people. Getting across the sense in a text that there are responsibilities as well will not overnight for a second change that behaviour but it will actually enable people to have a better argument with such people when they are asserting that they have legal rights, which of course is true. You also remind them that they have responsibilities as well. I am really keen on getting that out specifically. That is why on specifics we have changed the law so far as parents' responsibility in schools in respect of their children because for sure parents have rights to have facilities and teaching of their children, but parents have also got very clear responsibilities. Most parents meet those and more; some do not and expect others to do this for them.

Mr Wills: If you focus on the word "claim", I think what the Secretary of State is saying as well was that these rights are very precious and that there is a tendency among some people to assert them promiscuously and that devalues them. What is important is that when people lay claim to these things they are precious. They have been fought for, they are rightly entrenched in our society but they are precious and they should be asserted and claimed with a proper sense, as the Secretary of State is saying, of the responsibilities that go with that inevitably.

Q438 Dr Harris: Free speech only if it is responsible.

Mr Wills: That is not what I am saying. You know as well as I do the famous analogy of shouting fire in a crowded theatre.

Q439 Lord Bowness: Lord Chancellor, I hope I have not misinterpreted what you said earlier in your reply to Dr Harris' question but it did seem to me, and you might want to clarify this, that you were really saying a British Bill of Rights was more acceptable than the European Convention on Human Rights which was seen by members of the public as a somehow foreign concoction and therefore not something they wanted to subscribe to. Does this mean you are suggesting a Bill of Rights which will somehow include the Convention rights and that you would be doing it in a way for presentational purposes to the public? If that were

the case, I would have thought that that was not really very tactful towards our partner states either in the European Union or in the Council of Europe. The European Convention really is a common thread which runs through their democracies and that they see as extraordinarily important. You may say that it is really off the point, but if we are going to be sitting here on this side of the Channel saying we have to have a British Bill of Rights which does not obviously refer to any of you people the other side of the water, that would seem to me to be extraordinarily unfortunate.

Mr Straw: Lord Bowness, I am sorry, I do not agree with you. It is possible to trivialise anything but this is a far from trivial exercise. My historic points are two: one is the European Convention is a profoundly important legal instrument which has benefited British citizens amongst many others, particularly in recent years, but secondly it has been parodied as a "terrorists" or "criminals" charter. I understand why because you cannot remove rights even from people who have done really horrible things. You can take away their liberty but you cannot then deny them the right to sue the prison authorities or to sue me, as they often do because they have these basic rights, that is what is going to happen. I am concerned that this has then run in in some areas of the popular imagination to an assertion that this is a European imposition. You and I know that it is not a European imposition. We all know the history of this which is that the UK led the way, although it was extremely nervous—both parties were—about incorporation, but these rights which were drafted, not least by David Maxwell-Fyfe, a distinguished Conservative jurist, were essentially a distillation of what he and the other British drafters thought were British rights. I think it is far from just being a presentational matter. I think it is really important that we get that across. You can do that by shorthand or you can do it by longhand and going through the explanation I have just offered or saying these are British rights and they were developed by the United Kingdom, they were endorsed by the British Parliament and they are British and, what is more, we have built on the Convention to ensure that they work better within the United Kingdom. That is no different from what other countries do. Yes, they subscribe to the European Convention but in their own constitutional texts they have clear statements about what it means to be a French citizen, a German citizen, an Italian citizen, a Spanish citizen and so on.

Q440 Baroness Stern: I have a supplementary question to Mr Wills. I am still pondering this notion that there are people around claiming their rights promiscuously. I am thinking about the work that we have done on this Committee on old people in care and adults with learning difficulties and children in custody and I am wondering have you got an example you could give us of someone you have met lately or read about who claims their rights "promiscuously"? I cannot imagine who this person is.

Mr Wills: Certainly none of the groups that you have mentioned would fall into the category that I was referring to, just so that we are absolutely clear about that and of course we are proud of this legislation that we brought in. We are proud of it, it has done a lot of good and it will continue to do good as it evolves; there is no question about that. What we are trying to say is that there is no question that it has been misunderstood and there are certain people who fuel the misunderstanding about this. Most of the rights are not unfettered. There are very few absolute rights. That is another way of articulating what I am trying to say. It is important that people understand that. That is why we want to articulate the responsibilities better than perhaps we have managed to do up until now. It is very important that any legislation in this area is owned by the British people as a whole otherwise you get the sorts of problems that we have been having—problems of misunderstanding—and the more that people are encouraged to believe that these rights are proportionate, they are accompanied for the most part by responsibilities, the greater the degree of ownership. The more the majority of the British people feel that these rights somehow privilege unfairly certain groups of people and they are encouraged to do so by people who claim, often usually without any justification whatsoever rights, that is the point. That is what I mean by promiscuous. You can claim these rights but it does not mean that the courts will uphold them. They are often based on a profound misunderstanding of what the Human Rights Act actually does, but we have to be very clear about that. I think that is the point we are trying to get across.

Mr Straw: Baroness, the examples you quoted are all very good examples of where law-abiding British citizens have been able to make use of the Human Rights Act—elderly people who have been forced into different care arrangements in different places have been able to make use of the Human Rights Act to see out their declining years together—there are all sorts of things which this Committee is aware of but which the public are less aware of. I had to see somebody not long ago who has a terrible criminal record but who spent a large part of the conversation with me explaining about how his rights had been broken. I dealt with it patiently and I thought about this as I was listening to this and reading all sorts of documents relating to this that it would have been helpful to this conversation and to build an understanding about his exaggerated sense of his rights if I was able to say: Yes, but the text you are quoting also includes in this same paragraph text about your responsibilities and if you are pondering your current situation—he was not in prison by the way—it is because you have only read the first bit, not the second bit. That is a very practical way in which this certainly would have helped me in this difficult conversation and plenty of other people in similar situations—probation officers talking to the offenders they have to deal with, prison officers, all sorts of people who, for understandable reasons, the offenders in such a situation are very assertive of their rights. Getting across to them with these

rights comes responsibilities and continuing responsibilities, for example, to their victim and society whom they have offended and that they are not the victim is very important.

Q441 Earl of Onslow: Firstly, the American constitution has the first ten amendments—a Bill of Rights—would they not be enough for a British Bill of Rights? Those are the protection of the citizen. The second point is that on the continent you can be locked up on suspicion while they investigate for an extraordinarily long time, which would not be acceptable to English courts. I think it is reasonable to say that the common law tradition, the tradition of the King being subject to the law, a long historical and mature development of the English liberty approach is, I would suggest, superior to people who tear up their constitutions every 20 minutes, which has been known to happen on the continent so we should not be ashamed of being proud of things which do provide better liberties. I go back to what I was saying earlier which is the worry that all governments, and it is not only your government, of not understanding the rights of British subjects is to be stroppy, is to stand at market places and say "It is my right" and then get shouted down and it is wrong. This is the whole point of liberty and sometimes I do not think that the Government understands that deep gut thing of it is nothing to do with you and I can be stroppy if I want to.
Mr Straw: I understand that. I stand in market places as I did in Crewe last Saturday.

Q442 Earl of Onslow: Did they call you a toff?
Mr Straw: They could have done. They called me all sorts of things. I do it regularly in the town centre in Blackburn and have done for the last 25 years. I happen to think it is other people's right to call me whatever they want to, and indeed they do. It is an important part of the rough and tumble of British political discourse. It is not for the evidence session but I wish there were more of that. What you have just said about the fact that in many areas British rights and liberties are actually stronger than Europe is making my point in a way which is that the European Convention is a platform and I want to build on that. It is not about taking people's rights away, far from it, but when I listen to you—you may disagree with me because of the name on my plate—I do not feel a profound sense of disagreement. In terms of government, which I have worked in and observed over 35 years, any government has to be checked because the tendency of government is to use the power you have got. I can only say to you that, having worked in the previous Labour administration for three years in two departments, and having observed, albeit from the opposition benches, the administration between 1979 and 1997, and then actually being in this administration right at the sharp end of people's liberties as Home Secretary, Foreign Secretary and now this job, the Human Rights Act has shifted the balance from the State to the citizen. It has changed the behaviour of all public authorities, in my view for the better, in favour of the citizen. It is terrific. Let me say that it is a damn nuisance from time to time. I literally saw before my eyes when I was working for the Department of Health and Social Security and the Department of the Environment shortcuts over people's liberties taken. Those of us who were in practice at the Bar in the early Seventies will remember that as well. Apparently it was a high point of British liberty but we all remember that suspects were quite routinely dealt with entirely inappropriately inside the cells. If your client said to you they had been fitted up, verballed or punched in the stomach and they wanted you to advance this as a defence you would say "Yes, I will do all that", but if you knew that the judge will put the boot in on the summing-up, or find you guilty if it is a stipe and you will go down for longer and everybody turned a blind eye to that. It was at the high point of British liberty. The Human Rights Act, along with some other things, has made a very big difference to people's liberties and I celebrate that.

Q443 Earl of Onslow: The answer is I completely agree with the Human Rights Act. I want it to be better. I do not think the Human Rights Act goes far enough.
Mr Wills: This Government does fundamentally agree with you in a whole range of ways, not just on the Human Rights Act, but the Freedom of Information Act gives huge power to the individual to be stroppy, as you say, against the state and that is right and proper and we are proud of it all.

Q444 Lord Dubs: When we were in South Africa we met Judge Albie Sachs who said that in his view the Bill of Rights should be about the sort of society that you want to have, the values you want as a society. Is that your approach or do you think our Bill of Rights and Responsibilities should be merely declaratory of rights and responsibilities which already exist?
Mr Straw: I have tried to set out our store on that in my introductory remarks. There is a jurist called Philip Alston who has describes Bills of Rights across the world as "a combination of law, symbolism and aspiration". One should not dismiss for a second the symbolic and aspirational role that Bills of Right and Responsibilities can play. They can take on an iconic importance which goes beyond the explicit legal protections afforded. The examples of South Africa and the United States are just two where people got a sense of their rights and, certainly in South Africa, their concomitant responsibilities. That is in their constitution which people then have as explicitly here. As I indicated in my opening remarks, the approach we are most actively considering is of the three on the spectrum between just declaratory of rights, deliberative and interpretive ones, and wholly justiciable rights is to go for the second.

Q445 Lord Dubs: A moment or two ago we were talking about British rights. Can you give some examples of what you would consider to be

specifically British rights which might be candidates for inclusion in our Bill of Rights? You have talked about the European situation.

Mr Straw: In terms of education, health, administrative justice, equality, in these areas I am not for a second going to say that these would have no parallel anywhere else in the world—of course they would because most democracies have developed details of these—but we want to ensure that the language was suitable for our society and the aspirations of our people. For example, on healthcare in many societies people do not have a right to healthcare.

Q446 Lord Morris of Handsworth: What about the British rights to have British jobs for British people?

Mr Straw: That begs quite a few questions. My view and the view also taken by parliament is that if people are lawfully here and they have a permit to work then they are lawfully here and have a permit to work. Quite a lot of us around this table, either in our own person or in our forebears, were not British citizens once and this applies to me. My great-grandfather was not a British citizen but came from Germany. There are plenty of other examples around the table so you have to be rather careful. The idea of British jobs for British people, however, not in this context but in ensuring there were sufficient opportunities for the people who are settled here and that runs into wider issues about how you, for example, take people off invalidity benefit, what you do about those who are on job seekers' allowance, how you raise skills for people.

Mr Wills: You could, for example, argue, and some people do, that British people should have the right to the skills to enable them to fill jobs in this country. That is the key thing. We are going to lose millions of unskilled jobs and part of the debate that we need to have is should people have a right to have the opportunities to fulfil those jobs—the right to get the sort of skills that everybody is going to need to fill the jobs that are going to be available in this country and everywhere else in the world. It is a different way of looking at it. It is not a restrictive formulation; in some ways it is an enabling formulation in talking about the right to skills.

Q447 Lord Morris of Handsworth: This is taking us away from the principles of universality of rights and cocooning in the overall context of so-called "Britishness".

Mr Straw: So far as this development of the Bill of Rights and Responsibilities is concerned, as I answered to Dr Harris, if there were to be in this, and it is not currently anticipated that there would be in this Bill, but there might be as a result of the consultation rights which were confined to British citizens, they would be the ones which are obviously confined to British citizens like the right to a passport and the right to consular protection, and even the right to vote. It may be down the track Parliament decides that the right to vote would be entirely related to being a British citizen, which is the practice of almost all the other countries, including Commonwealth countries and the Irish Republic, but for the time being we have had a more complicated definition.

Q448 Lord Dubs: You mentioned equality a moment ago. Is there scope for including equality, administrative justice and rights for particularly vulnerable groups, such as children, all as part of this?

Mr Straw: There is certainly scope, Lord Dubs. We have not made final decisions about this. It is an absolutely fascinating exercise just getting to where we have got to in government, intellectually as well as politically. The current buzz word is it is challenging, but it is very challenging indeed. Those are all possibilities, yes.

Q449 Chairman: Can I come on to the question of social and economic rights. Albie Sachs said to us when we met him that a country which did not include social and economic rights in some form in its Bill of Rights is a country which has "given up on aspiration". I had the impression from your opening statement that social and economic rights are not excluded from the process. The real issue is where it fits in the continuum between declaratory and fully justiciable. Is that right?

Mr Straw: Yes. He also said, "There is nothing wrong with aspiration. A country without aspiration is a country not really thinking about its future." I agree with that which is why I do not rule out the idea of some rights within this Bill being declaratory. I would just say to the Committee that the only worry I have there is the worry of being parodied. I get the sense that this Committee understands the importance of aspiration and the role that it can play within an otherwise legal instrument. That is the point which is made by the jurist, Philip Alston, who I quoted a moment ago. What I am also conscious about is space for there to be a serious debate about this. I do not want to end up in a position where people say it is not worth the paper it is printed on because it says this but you cannot go to court for it. That is the difficulty here. If you think about the other countries which have explicit constitutions, almost all of them right across Europe and much of the rest of the world had to argue what became their constitutions in the wake of civil war, occupation, colonisation and they went through an acute period of disruption. If you are in South Africa, or even the United States, India or France, you are going to sit down and do that in a convention in a very intense way and say what are the rights we think people should have? We will worry about how we enforce them later on but let's have a statement that we can all agree with or disagree with. Our situation is very different and I am pleased it is. The last civil war we had was in the 17th century and we are still living with the consequences. Albie's forebears were absolutely right, I was on the side of Parliament and everything went with the 1689 Bill of Rights, just so we know.

Q450 Earl of Onslow: We were on the side of the House as well.

Mr Straw: I know you were, sir. I had a submission the other night which I started reading and it started talking about Article 9 and I thought this has nothing to do with Article 9 of the European Convention, what is this about? It was a whole submission about a very contemporary issue which raised the question of Article 9 of the Bill of Rights. That is a slight digression, but I say the declarations can be important. People are going to say where is the beef in this Bill, so I am concerned to ensure that there is beef. In some areas, explicitly economic rights, we say look, these are the rights to have at this particular level public spending on this service you have to leave that to the Executive and Parliament.

Q451 Chairman: It is a question of finding the right balance. One of the issues raised in the *Grootboom* case (a housing case in South Africa) is an important point that it is all very well having all the political rights, a right to vote and all that sort of thing, but if you do not have the basic fundamentals of life, which is what socio-economic rights provide—a roof over your head, food to eat—those rights are pretty meaningless because you are never going to be in a position to exercise them. That is why I think that those socio-economic rights become very important. If you look at the formulation of the South African constitution, they seem to have got it pretty well workable in a way that the judges do not really get involved in the decisions about resource allocation, jumping the queue and that sort of thing, but they do have that basic fundamental issue. If you contrast the housing cases in South Africa, basically the *Grootboom* case was saying you do not have to live in a hole in the ground but you are not entitled to a flashy house; you are entitled to basic living standards of shelter. If you look at the two health cases, one health case was somebody who tried to jump the queue and was told no, you cannot; the other is where the resources were available to do with provision of antiretrovirals to pregnant women where it had been a policy decision by the South African Government not to provide them though resources were available and they were told that they had to. There you had quite an interesting way that the constitutional court was able to find the right balance.

Mr Straw: In any democracy there is going to be a continuing tension between the rights of individuals and minorities and the rights of the majority and you cannot have a democracy unless you can have both a means of fulfilling the majority expression but in a way which respects the rights of minorities and individuals, however unpopular; indeed, it cannot be a democracy. I have often said about parliamentary democracy that it is not so much about the rights of the majority—it is about the rights of the minority. The question is how do you resolve those inevitable tensions? What we have done osmotically in a typically British way over the years until the Human Rights Act was to say that there are these basic rights to do with habeas corpus and all sorts of other things, jury trial, subject to odd exceptions, where there is consensus between the parties but also it is built into the common law that, unless Parliament is absolutely explicit they are going to take away these rights, the judiciary will lean over backwards to assert them. We do not have a basic law and an entrenched constitution and for all sorts of quite separate reasons I am not in favour of that. Given that we do not, ultimately Parliament has to be supreme and sovereign and it does. That is also the sentiment of the majority of the senior judiciary. That is my starting point, Mr Chairman. On your housing cases, South Africa is self-evidently a poorer country and there are much greater extremes between poverty and riches. We have all sorts of rights which are both built into the legislation by the welfare state and are explicitly enforceable. There is then a question do you try and wrap those up to interpretive principles? Can I make another point on one area of jurisdiction. In India the High Court there, as many will know, out of complete frustration by the public about the unbelievable pollution which I have witnessed in Delhi, and the failure of the governments controlling the environment in Delhi to enforce environmental articles in the Indian constitution, they finally said they had had enough and banned two-stroke engines. The improvement which has followed has been dramatic in air quality in Delhi and there has been a decline in deaths. That was judicial activism but without any question with the support of the populous. I understand why it happened in the Indian system—I am not criticising the Indian courts—but in my view in a British system that issue stands to be resolved by British Parliament.

Q452 Chairman: I want to come back to the question of environmental rights, but before we do can we stick to socio-economic rights. What you are basically saying is what you wanted to do was to pull together disparate bits from all over different pieces of legislation into one place, which may or may not be justiciable. Is it not possible to have some overarching basic principles? For example, when we looked at the position of asylum seekers—you probably would not agree with our conclusion—we came to the conclusion there was a policy of destitution towards failed asylum seekers, people living on the streets with no money, no shelter, no nothing, below the minimum standards that any civilised society should see anybody within its boundaries living in. Would you say, for example, that there ought to be a justiciable right somewhere along that continuum not to be destitute which can be refined to the very basic needs of food and shelter?

Mr Straw: I would rather not get into a debate about how we treat asylum seekers.

Q453 Chairman: I used that as an example.

Mr Straw: I understand that. I am happy to but I think we are careful with asylum seekers.

Q454 Chairman: The basic point I am putting to you is should there not be a basic fundamental right not to be destitute?

Mr Straw: There are going to be exceptions. I was having this conversation with a woman who came to see me last Friday who is a wholly failed asylum

seeker from a country which I know to my certain knowledge is perfectly safe for her to go back and she wanted to stay and was complaining that she did not have any money and I explained to her that there are limits to the British taxpayers' patience. I understood her anxiety but I promised her there was zero reason for her not to go back and that therefore she needed to go back and that is my view. I think we just lose the public entirely in these areas if we are not firm at that point. It is very different in other areas. There is a case of whether we can encapsulate basic principles of the welfare state in interpretive principles, certainly declarations for sure. This is a new area in terms of developing law, not discussion of course. When Michael and I produce our Green Paper I am certainly not going to say we have got the answer—this is for debate and discussion—and your Committee will have a very important role to play in saying why can you not do this, why can you not do that, or you have got that wrong. It really has to be a collaborative process.

Q455 Chairman: How will this fit together with the constitution for the NHS?
Mr Straw: How it would fit together is the constitution for the NHS is a more detailed, by definition, document than the single article. They literally have to fit together in terms of statements but there are plenty of areas where you can overlap anyway. In some of these areas we have highly developed specific rights in the economic and social field. It is about encapsulating the generic principles and celebrating them, being aspirational in Albie Sachs' phrase, and query whether you also make them interpretive and deliberative.

Q456 Chairman: If you use the South African formulation, which seems to have worked, and I think the problem was also mentioned in South Africa if a country with such a disparate range of wealth between the very poor people in the townships and the wealthier people, if they can achieve this balance in their constitution why we, as a comparatively wealthy country, cannot and their formulation was the state should take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the rights. I think that comes ultimately from a UN document. Why can we not use that formula?
Mr Straw: We are looking at all of these. I have a feeling that they also go on at some length about responsibilities as well.

Q457 Chairman: We asked them about what the responsibilities meant and nobody knew. Nobody could answer the question. We asked judges, politicians, NGO's and nobody knew what "responsibilities" meant in the South African constitution.
Mr Straw: There are various Australian instruments—the Australian Capital Territories Human Rights Act, the State of Victoria's Charter of Rights and Responsibilities, the preamble to the ICCPR: *'realising that individuals having duties to other individuals and to the community into which he or she belongs is under the responsibility of the individual to strive for promotion and observance of the rights recognised in the present covenant'* [*italicised* / citation] and Article 20 of the UDHR and so on. There are plenty of examples one can come up with.

Q458 Chairman: There are examples of responsibilities but that is not what I am asking you about. I am asking you about the specific question of the degree of justiciability on that scale which maybe they want to achieve.
Mr Straw: The discrete issue about the level of justiciability has to be made country by country. We have moved over the last 40 years to a much higher level of justiciability for all sorts of what was seen previously as administrative action. When I studied law at university in the Sixties and practised at the Bar in the early Seventies we did some work on public law and judicial review. Famous authorities like *Wednesbury* were still there but judicial activism was developing. It has developed hugely since then. It was fast-moving before the Human Rights Act and will move. At the same time my own sense is that because we do not have the huge disparities of wealth, nor the huge disparities historically in people's rights that they do in South Africa, and we have very long-functioning institutions, that maintaining the sovereignty of Parliament at the apex of this system is absolutely fundamental. The senior judiciary recognise that. Lord Bingham, in a very important speech he gave, quoted a senior Australian judge as saying that if judicial activism goes too far you undermine the rule of law and I believe that. The only way you can maintain public confidence in what government is doing is by giving the public the regular choice to change the Government and to change everything, if they want to, with that.

Q459 Chairman: I would not disagree with that. That was the view in the Human Rights Act formulation with the declaration of incompatibility and so forth and I think it is a very useful model that perhaps we will talk about here. The last point from me is on environmental rights—the third generation rights as they are sometimes called. Do I take it from what you were saying that you are not supportive of rights to clean air, clean water, that sort of thing, as part of this constitution?
Mr Straw: Of course I am supportive of the right to clean air and not to be poisoned.

Q460 Chairman: Can you enforce it?
Mr Straw: They are indeed enforced. I had the right to clean air by people living around a bone works very actively enforced because they were being poisoned by the pollution from this bone works in the middle of Blackburn. It is how you enforce it that is the question. Environmental rights are slightly different in terms of conception. I am not ruling these things out. They are not currently under active consideration but you may well come up with a better answer than we put forward.

Q461 John Austin: I do not want to go into the whole area on the policy of failed asylum seekers but if you have whether it is the right not to be destitute or the right of access to health treatment, if that is linked in some way to a qualified process or a responsibility, then you have denied the absolute right.
Mr Straw: Some of these rights are in any event. You cannot just claim rights for schooling because you land up in the country. We lean over backwards in respect of children, but in rights to healthcare the British taxpayer rather objects to health tourism which arises because we do not have an insurance-based system in this country and we have taken active steps to deal with it. It does not mean that healthcare is confined only to British citizens. Most of my constituents earn a lot less money than I do. I do not see why they should have to pay for healthcare which should be properly the responsibility of the individual or their own country.

Q462 John Austin: We are not referring to elective healthcare; we are talking about people being destitute or starving.
Mr Straw: No asylum seeker or anybody else is denied emergency care in this country. To my certain knowledge, and no doubt to yours, the range of healthcare that asylum seekers need is no different from anybody else's. That runs into the separate issue of ethical responsibilities of the medical profession because they would never leave somebody destitute just because they did not have a passport or something.

Q463 Lord Bowness: I do not seek to disagree with what you have said, but you said in answer to the Chairman's question about destitute people well of course there have to be some exceptions and you referred to the lady who asked you for some money and you have talked about the maintenance of the sovereignty of Parliament with which personally I would agree. I am trying to see how all this works when you produced your Bill of Rights. If it is going to have any resonance with people it cannot be qualified at every turn. In fact, if there have got to be exceptions, and I suggest you are probably right, and if you are going to maintain the sovereignty of Parliament, are you not just making some sort of broad assumptions of the kind of things that would be in a Bill of Rights? Are you not every time you have a Bill that deals with immigration, asylum, the police, the armed forces, you are going to have to have something in the act which exempts certain bits and pieces of it from what will presumably be broad statements in the Bill of Rights?
Mr Straw: I do not think so. I draw on the parallel of the Human Rights Act. A lot of these issues came up when we were preparing the Human Rights Act. There was this question of bills coming through the system which may or may not be consistent with Convention rights. I had a lot to do with the Bill but the basic architecture of the Bill, particularly what became Section 4, to achieve this very elegant and important balance between the courts and the sovereignty and Parliament was not mine. It was the First Parliamentary Counsel and the officials but I do claim credit for what became Section 19. Under Section 19 the minister responsible for a bill does not have to certify that the bill is consistent with the Human Rights Act but he has to say whether or not it is consistent and it means there is a proper process of examination. I once signed a certificate to say it was not. I cannot remember what it was about now but it was not consistent, or at least I did not think it was. We are not under a kind of international obligation to the bill to the extent that the British Bill of Rights and Responsibilities adds to the Convention or is in different areas, but there may be a case for saying we extend Section 19. When ministers bring forward legislation it would be handy if Parliament could be informed whether in the judgment of the Minister it is consistent with what is there or not. It is then for Parliament to decide whether to legislate but useful to know on one side or another where the minister sits. Michael and I have been doing this exercise now for a long time and we are conscious of the risk of parody here just to the degree that the Human Rights Act can be turned, and was by some people who asked what on earth are we doing this for. We will not be able to finally win the argument until it has happened. We are very anxious indeed that there is substance here but not substance in a way that breaks open key tenets of our British constitution, like the sovereignty of Parliament or the right of the executive to make proposals to Parliament about resource allocation. I think we can, as well as not ignoring the importance of aspiration within a legal instrument, we can do something really rather important in terms of building up British people's sense of additional rights to which they are entitled and the responsibilities that go with them.
Mr Wills: I think what lies behind your question, Lord Bowness, is a perception that somehow we are going to bring in new rights and that will create new challenges and therefore to meet those new challenges we somehow have to neuter the original intention of bringing in the new rights, if I understood you correctly. As we embark on this process there will be all sorts of people who argue from particular perspectives that we do need new rights and it is not necessarily our view. Where we are on much firmer common ground is that when people look at this whole terrain I think most people would agree that we certainly need a new awareness and consciousness of rights and responsibilities and a new understanding of what they will be. I think there is a way of looking at this which would not necessarily bring into play the sorts of concerns that you were raising. The second point I want to raise is that a virtue of this process on which we embark could be to bring greater clarity to the respective roles of the various arms of the constitution. As the Secretary of State has said, we believe that parliamentary sovereignty should be just that. That is the ultimate arbiter of our constitutional arrangements and nothing we propose to do will threaten that if we have anything at all to do with it. That is fundamental. Nevertheless, the courts do take a view on these things. There has been an increase in judicial activism and it could be a virtue

of this process that Parliament sets down clearly where it thinks the boundaries are in certain areas in the process of good administration, for example. There are lots of virtues to this process other than in the sort of area that you have been discussing where many people would say there was considerable virtue but others would have considerable concerns as well.

Q464 Earl of Onslow: I think we really ought to always remember that there is no way that parliamentary sovereignty can ever be enacted against because one parliament says it is rubbish, all that will happen is the Sovereign calls a new parliament which says no it is not rubbish and that goes back to Anglo Saxon times and thank goodness for that. That seems to me a core issue. To go to the destitution point, surely you could get round this one by saying all people should be treated equally? In other words, if you have a social parliamentary tax system which allows people to be destitute, then okay destitution is all right, but because we do not have it and you say people should not be destitute, it therefore comes into the estopping of a government allowing somebody to be destitute unless an act is passed specifically to do it. The more you put in social and economic rights—this is where I know that the Chairman and I do not always agree on this—that is entering straight into policy. It is a policy to have a national health service. One day it may be that we will provide health in a different way and that is for the electorate to decide. You cannot say we will have a national health service because that will be taking away from the sovereignty of Parliament. That is why I feel very cagey about social and economic rights, but I feel very strongly about stopping old bossy boots in the Cabinet. Every Cabinet Minister gets this habit of being a bossy boots; it is in their bones.
Mr Wills: There are exceptions.
Mr Straw: You are right but we are not going down this road of having directly enforceable generic rights of equal treatment, for example. That would be a piece of primary legislation of the British Parliament and there is absolutely nothing to stop the British Parliament later from saying—it does this all the time with more prosaic stuff—later we assert that this right which is in the British Bill of Rights and Responsibilities which, after all, is just an ordinary standard act of Parliament, can be modified for these purposes in this way. The reassurance I would give you is that because these rights we are talking about, economic and social rights, are not covered by the Convention or its jurisprudence, the British Parliament has, in practice, as long as we remain in the Convention, freer rein over these things. It can change them if it wants and I, like you, think that a fundamental reason why our democracy for all its warts works and also why people have not had to resort to violent revolution is because this Parliament is sovereign and people can change the government. I say this to people in Blackburn when they may be complaining about the European Convention, if you have a party that stands on a platform and says we are going to come out of the Convention, we are going to renounce our membership of the Council of Europe and we will take our chances about what that means for membership of the European Union, if that is what they have said they are going to do, that is their right.

Q465 Baroness Stern: In your Memorandum which you sent us you said that the purpose of a Bill of Rights and Responsibilities is "to ensure that the system works better to protect the individual against the powerful", which sounds really good.
Mr Straw: It is really good, Baroness.

Q466 Baroness Stern: Who did you have in mind when you talked about "the powerful"?
Mr Straw: People running public authorities who have power in that area.

Q467 Baroness Stern: That is a really helpful answer. It is the answer I wanted to take me into where I am going to try and take you next. Do you include the concentrations of private power that now exist in the globalised world?
Mr Straw: It is a good question.

Q468 Baroness Stern: I did not write it. It is a very good question.
Mr Straw: You obviously have good clerks. There are certain rights in the Human Rights Act which relate to the exercise of these rights by public authorities. This Committee, and indeed the Government, would wish to see that where they are exercised by individuals or private corporations they are nonetheless subject to the Human Rights Act. That runs into the whole area of *YL*. It is not the purpose of this Act to impose particular rights and responsibilities to deliver directly on private individuals or corporations because it has implications. However over-weaning a large private multinational X may be, they do not have the power of the State, especially not big states like the United Kingdom. They are also of course the subject of the domestic law in which they find themselves and also all sorts of international instruments.

Q469 Baroness Stern: In this Memorandum you talk about citizens having "mutual obligations" and you refer to the Bill of Rights and Responsibilities and you have already said this today "giving people a clearer idea of what we can expect, not only from the State, but from each other." You liken this to the notion of "horizontality" which is recognised in the South African constitution. Would you think that a British Bill of Rights and Responsibilities should follow the South African example by imposing a duty on courts to develop existing private law rights, where possible, to give remedies for breaches of rights committed by private power?
Mr Wills: I certainly think we are going to learn from the South African constitution in this process without any doubt. We need to focus on where these rights are located and they are primarily for the individual against the State. There are all sorts of other problems about the concentrations of power in

our society but we do have other remedies for it. The state is not powerless and Parliament is not powerless against these concentrations of power and we act all the time in all kinds of ways to do just things. We protect agency workers, for example, against some of the great forces of globalisation which can be very destabilising, just to take one current contemporary example, but this primarily has to focus on the protection of the individual against the State. That is fundamental. Where you may be going with this is about definitions of how we should define the scope of the State because as public services are contracted out there is a question about the definition of public authority. I do not want to pre-empt you but I do not know if that is where you were going?

Q470 Baroness Stern: I was about to move in that direction to say that there is this issue of the *YL* case and public services provided by private providers. Tomorrow we shall make a little progress on that when the amendment is put forward on the care homes in the Health and Social Care Bill, but that is only about care homes. It leaves the larger issue untouched. I understand that the larger issue is going to be part of the consultation you are having on the British Bill of Rights. How do you justify putting that in with this broader consultation about a new Bill of Rights when I understand that it was always the intention that the Human Rights Act should cover public services provided by a private provider?

Mr Wills: That to my understanding was the intention of Parliament and the Government at the time. You will recall when I last appeared in front of this Committee in an informal circumstance that I did undertake, and as you know at that meeting there was a great deal of anxiety about the effect of the *YL* case. We have always made it clear that we share that concern and we wanted to find a way to put this right. There was a very widespread sentiment at that meeting that, rather than get it perfect, rather than try and deal with all the complexities of what it means to be a public authority, which I will come back to in a moment, that we should get on with it, we should not delay and I recall that I did give an undertaking saying that if we could find a workable solution that could be brought forward within a proper legislative framework quickly we would do so and that is precisely what we have done. We have moved with great speed. It was not very long ago that I appeared in front of you and we have an amendment with a great deal of trouble and extraordinarily good work by the Ministry of Justice and also the Department of Health. They have done a huge amount of work trying to resolve very problematic issues and have come up with something that we believe is workable which, as you rightly say, is very narrow in scope, it deals with a very specific problem and we think it will deal with it and we brought it forward with great despatch—that is what we said we would do and we have done it. We also accept that there is a wider issue and what the *YL* case has thrown up is a wider issue to do with the definition of "public authority". It is not easy to resolve. Everyone wants to resolve it. There is no issue between us on where we want to end up. We want to end up at a proper definition which covers contracted-out public services in a way that Parliament originally intended but we must be certain we are not going to end up with unintended and perverse consequences. There are real issues here. We have to take the whole of government with us. The Secretary of State said right at the beginning that we are moving forward on the basis of consensus, rightly and properly with something that is important. This is very important that we do so and we will try and do it with all political parties as well. That is the basis on which we are moving forward across the piste here. Any constitutional change as far as possible ought to be consensual in basis. There are issues around this definition. We want to take it forward in the context of this. We are going to consult on this and what it means and I am sure we will be back in front of you, God willing, to discuss this further. Please do not have any illusion that we do not take this anything other than extremely seriously. We did move with great speed on the particular circumstances of *YL* and we will continue to move as quickly as we possibly can on the broader issue as well.

Q471 Chairman: When you were Home Secretary in 2000 you gave a list of the sort of things that you thought were public authorities like housing associations, nursing homes we have been talking about, charities like the NSPCC when they are doing enforcement activity. Our concern is, going back to your original answer to me, that we are not going to row back from the Human Rights Act; that this sort of discussion gets us nervous that what is actually being done is rowing back from the original intention of the Human Rights Act that all these bodies would be covered. There is a formulation that I have put in my Private Member's Bill, which so far does not seem to be getting very far, as to how this can be resolved.

Mr Straw: Absolutely not. We made a deliberate decision in the Human Rights Act not to do what we did in the Freedom of Information Act, where there is simply a designated list of what is a public authority. You are either in the list or you are not, full stop. It can be amended but that is how it works. For the purpose of this Act it was left at large for I think very sensible reasons that if a body was exercising duties under this Act it was a public authority for these purposes. You have a better memory or better files than I, Mr Chairman, but you are dead right that I said those things and I believed them and I still do. It is a question in the light of the *YL* case how you go from where you are to where you want to be. In a quite different context, if you have an adverse decision from the most superior court in the land, it is sometimes quite complicated to put the clock back. I just give you the example of *Pleural Plaques* where there had been settled law for 15 years that *Pleural Plaques* did itself give rise to cause of action and compensation. It goes to the Law Lords and they decided last October that it does not. You cannot suddenly snap your fingers and say

we are going to put the clock back from 17 October last year to the law as people thought it was on 16 October. It is strange but it is true. It is much more complicated than that.

Q472 Chairman: *Pleural Plaques* is quite complicated as I remember from my previous life. The formulation that we have come up with in my Bill is to look at factors that go to something being a public authority or not, but in the interim these issues are coming up all the time with legislation going through Parliament, for example, would the Government support the amendment that we are suggesting to the Housing Bill to make housing associations public authorities for the purposes of the Human Rights Act in the same way that we do with care homes in the Health and Social Care Bill?
Mr Straw: These are questions which are under active consideration at this time. One of the reasons why the chemistry in these decisions changes if you get an adverse judgment is, let's say that everybody had assumed that housing associations were indeed subject to the act and that had been endorsed by the court because we were quite deliberate when we passed this that it would be a matter of decision by the courts on that. If that had happened then housing associations would just have to get on with it. When it appears that the opposite has happened, then government departments get twitchy, they say there will be resource costs and people start from a different status quo. That is the difficulty.

Q473 Earl of Onslow: My concern is I was approached by the minister and it is my amendment now to the Housing Bill—on my way here I was stopped in the passageway and asked would I go and see the Minister after the recess to discuss this very point. She is going to be armed with 853 civil servants and I will argue my case as to why it should go in, so we will see what happens.
Mr Straw: Looking at Section 6(3): "A public authority or court of tribunal and (b) any person certain of whose functions are functions of a public nature."

Q474 Chairman: It is not easy to follow.
Mr Straw: No, it begged a question; that is the problem. It does not exclude institutions not set up as public bodies with a capital "P".

Q475 Chairman: How can there be resource implications? If you think something applies and have worked on the basis that it does apply and then you say it does not apply there are no resource implications because you are working on the basis—
Mr Straw: That is a very good question but I promise you that at the moment there cease to be resource implications but when you try and change it people say there are and to a degree there are; that is the problem.
Mr Wills: It is not resource implications alone. There are other desirable policy objectives which colleagues in other government departments are concerned about. When this happens, as the Secretary of State says, when we get these decisions clearly people look at it all again. One thing we have got to do is to produce some certainty into this area because what we know from the *YL* case is that very vulnerable people have been rendered very anxious by the result of this particular court judgment and what we must do is be certain that we are going to produce something that will endure and provide certainty.

Q476 Chairman: We certainly want to see a comprehensive solution to it all, but more importantly in the interim having all these things going on all the time where you need to pick them off as you go along otherwise they may be left there.
Mr Straw: I understand that. There are a lot of people around who would prefer that this set of institutions was not subject to the Human Rights Act. When the courts say they are not, they say very good.

Q477 Earl of Onslow: When you said that colleagues come up with these rabbits out of a hat which have suddenly grown since the *YL* case, could you tell us what some of these rabbits are and what shape they are? How long are their ears and what colour they are and so forth?
Mr Wills: I do not think they are rabbits as such out of a hat.

Q478 Earl of Onslow: They did not exist when they thought the law was what it was before, did they, so suddenly they have grown?
Mr Wills: They may well have existed. They perhaps were not quite as present in the consciousness of some of our colleagues.

Q479 Earl of Onslow: What are they? Can you give us an example?
Mr Wills: If you will take my word that they exist and that they are real animals, we are trying to resolve it as quickly as possible. I would be perfectly happy to come and share some of the problems with you.

Q480 Earl of Onslow: Why can we not know what these rabbits are?
Mr Wills: Because at the moment some of these discussions are at a fairly delicate stage and I would rather get them resolved rather than discuss them in this forum today.

Q481 Lord Morris of Handsworth: I would like to return to the issue of duties and responsibilities which Dr Harris was exploring with you. In particular, I would like some clarification on a point made by Mr Wills who gave an example of irresponsible behaviour like shouting fire in a theatre. It might be socially irresponsible but the fact is it is an offence under the Public Order Act and it is against the law and unlawful. That is not irresponsible behaviour in the context that we are having the conversation about duties and responsibilities. The key question for me is will the exercise of responsible behaviour go further, as you see it, than just obeying the law?

Mr Straw: That was giving a very good answer to the implication of Dr Evan Harris which was that there were no limits to the freedom of speech which in my view is incorrect. It is also not consistent with the Convention which does qualify the right of freedom of speech quite explicitly. On the issue of responsibilities, ultimately everything could be reduced to what are the duties on people to what is in the law. If you are saying what duties are going to be enforceable, by definition anyone's wish can be enforced which impose an obligation on individuals which are the subject of enforcement either by the criminal or civil law. That is a tautologous statement of obvious truth. There is a wider issue here which is how do you better get people to live as neighbours in the biblical sense to understand that they do have responsibilities to people they are living alongside and that of course the law is the longstop as a way of arbitrating these disputes, but to enable people to be better neighbours. Upbringing and all sorts of things play a fundamental part in this and also the conditions in which people are living. As I know from my own experience, if you are living in a decent home of your own it is actually easier to be nice to your neighbours than if you are living in a rather grotty council maisonette because people are living on top of each other. I would like to see this Bill of Rights and Responsibilities developing a better understanding by the British people about their rights and responsibilities and the discussion that we have had here that these are theirs and they are British—they may be other countries as well almost certainly—but they are something which they can own. They are not foreign, they have not been imposed by a political elite—they own them and they are fundamental to their lives—and they can live their life better if everybody has a better sense of responsibility, and thirdly that they have all sorts of rights as well which we encapsulate in some cases just in declaratory form, in other cases in semi-enforceable form being interpretive.

Q482 Lord Morris of Handsworth: Will the test of being able to exercise your rights be somewhat contingent on the performance of your duty?
Mr Straw: It depends on the specific right. I said in my introductory remarks that rights and duties are not symmetrical. You have for these purposes rights against the State.

Q483 Lord Morris of Handsworth: So we take them separately.
Mr Straw: You have responsibilities to your neighbour, to your fellow citizens. You also have responsibilities to the community which in a democracy sits above the State but it is a means by which the State gains legitimacy. As I know as a minister, it is perfectly possible if you are a minister and you have got power to exercise it in a way that does not have the proper consent of the community. These relationships are complicated.
Mr Wills: I absolutely understand the question and it goes to the heart of what this discussion will be about in many ways. A lot of the responsibilities that people would normally think about are already enshrined in law. You have to pay tax, for example. What we are looking at, if I can put it another way, is trying to find a way of expressing the underlying picture. I think the Chairman started by talking about trying to find generic principles to underline right at the beginning of this session. If you take the same model for responsibilities that underpinning all this is a notion of our mutual responsibility, our mutual obligations to each other and articulating that is profoundly important. It is not a meaningless exercise at all in our view.

Q484 Lord Morris of Handsworth: I will put it another way as simply as I can. Do you envisage that there will be some rights in the Bill of Rights that people can lose or be disqualified from if they fail to perform their duties and responsibilities?
Mr Straw: The most obvious one which happens already is their right to liberty and you have responsibilities obviously to behave.

Q485 Earl of Onslow: At the moment you are proposing to take it away in 42 days.
Mr Straw: We are very happy to have that discussion too, my Lord.

Q486 Lord Morris of Handsworth: I need an answer to my question. If you go to the town hall to complain about your local council not delivering your rights, will there be a checklist to see whether you have fulfilled all your duties?
Mr Straw: Going back to my education example, children have rights and parents are the means by which those rights are exercised, but the parents also have responsibilities. In practice now, but in any kind of encapsulation of rights to education, rights for children, these two will need to be balanced. I am not anticipating that such a statement of rights would be directly justiciable but it would be interpretive and when it came to remedies in respect of explicit rights I would hope the courts would take into account how far parents had exercised and showed responsibility that these things are not a one-way street.

Q487 Chairman: What you are suggesting is probably along the lines of the Criminal Injuries Compensation Scheme where if you make a claim from a crime, if you yourself have perpetrated crimes your compensation will be docked or refused.
Mr Straw: That is a very good example which is built into the law. Neither Michael nor I are suggesting for a second that there is no sense of responsibility already built into the existing law—of course there is in all sorts of ways—but what we are saying however is we think precisely because in all sorts of ways responsibilities are implicit and sometimes explicit in individual texts of individual statutes or authorities, then we ought to bring this out and it is safe to do so as a framework for how people should behave towards each other.
Mr Wills: Rights are not contingent on discharge of responsibilities. In answer to your checklist, no, of course not, but there are consequences for people not fulfilling their responsibilities and the Secretary

of State just sent it out. The fact that some of those consequences may actually mean that one of your rights is temporarily forfeited, if it is not the same thing, the punishment is in the law. The basic human rights say the same and so they should. It does not mean there is no value in articulating responsibilities for all the reasons the Secretary of State has so cogently outlined.

Q488 Lord Morris of Handsworth: It is a secondary loss rather than a primary loss.
Mr Straw: I am not quite sure I follow.

Q489 John Austin: You said in your original opening statement that this Bill of Rights would not qualify anything which is in the European Convention or take away anything; it would be a Human Rights Act plus, not a Human Rights Act minus. There are of course other international obligations that we have under various treaties and international agreements which are not, unlike the European Convention, in the Human Rights Act at the moment and therefore not part of UK law. What would you see the relationship between the new Bill of Rights and those other international obligations, such as the Convention on the rights of a child or the Convention on the discrimination against women?
Mr Straw: You have to make a judgment on a case by case basis whether you want to incorporate those into domestic law. I speak from memory, but one of the problems about incorporating those into domestic law and making that therefore enforceable here is that there is no appropriate international court equivalent to the Strasbourg Court to come to consistent decisions about these matters across jurisdictions. What we have sought to do with a lot of these international instruments is we have signed them, we have ratified them, but we have made deliberate decisions not to incorporate them into our law, but we have sought to ensure that the rights in these instruments are reflected in our law. I think that is the appropriate and safe way to do things.

Q490 John Austin: On the Convention on Trafficking, for example, you have said we will not ratify it until we have in place the mechanism to ensure that it can be implemented.
Mr Straw: Of course. That is really important.

Q491 John Austin: But we have ratified these other treaties.
Mr Straw: It depends inevitably on the precise text of the legal instrument, its scope, and above all what obligations it imposes on the British state.

Q492 John Austin: Would you say in principle to incorporate your obligations in those conventions in the Bill of Rights?
Mr Straw: The only principle is what is in the interests of the British people in these things. You have to do it on a case by case basis. I do not think in principle that just because we have signed and ratified an international convention we should be obliged to incorporate it into our domestic law. If we go down that route we end up in the position of the United States where in fact they do that so they end up not being party at all to all sorts of international instruments because they cannot get them through their Senate.

Q493 Chairman: When I go door-knocking around the streets of Hendon, as I do every weekend, I cannot recall anyone actually asking me where the Bill of Rights debate had got to. It does not seem to have chimed with public opinion. What are you going to do to try and generate public interest around it? Where have we got to in planning for the consultation and how are you going to make sure that it is not just the usual suspects?
Mr Straw: It was not raised with me when I was door-knocking in Blackburn and other towns before the local elections but it has been raised with me plenty of times indirectly in my open air meetings in the town where people have a go at the Human Rights Act "villains charter" and I have said the things I have said just now and then go on to say we are going to produce a British Bill of Rights and Responsibilities and I hope you find that appropriate. When I was doing *Talk Sport*, Mr John Gaunt, who has views to the right of anybody around this table by some margin—

Q494 Chairman: Even the Earl of Onslow?
Mr Straw: Certainly the Earl of Onslow because he is undiscriminating in his belief about who should have rights.

Q495 Earl of Onslow: I do get a trickle of letters from people saying to me yes, well done on what you have said, keep it up, et cetera.
Mr Straw: There is an interest in it. How do we engage people? First of all, we get a document out and start engaging Parliament. You then generate debate and this will have a ripple effect. You get people from the Women's Institute to the UK Youth Parliament to everybody else debating it and I will address my constituents in the town centre of Blackburn about this. They may flee because you do not have a captive audience in that situation at all but I think they will be interested in it. It is inevitable that quite a number of these constitutional changes generate much more interest once they have been brought into force than they did beforehand. That was true of Human Rights, although there was some interest in it. It is certainly true of Freedom of Information which was debated over many hours with only the enthusiasts of Mike O'Brien and myself there. Even on devolution, although people understood the importance they did not really understand the significance until these things happened. I hope we are able to generate a bigger debate.
Mr Wills: One of the keys to doing that will be not to plonk it down in front of people as we go round the consultation process in one big wodge of paper, but to produce a document and then consult on different bits of it because the different bits of the document will have different effects. They will not all have the same legal effect and the more that we can

crystallise it and bring it home and root it in people's own experience like, for example, in relation to the *YL* case, the better it will be.

Q496 Earl of Onslow: When we had the Northern Irish Human Rights Commission here they had a document in front of them which obviously was a document which nobody could agree on, so everything went in from you should do the washing-up on Tuesday afternoon only—I am exaggerating only a little—to get an agreed document. This was not a satisfactory document at all.
Mr Straw: It has to be finished but it must not be banal, but you cannot get to a point where it drops to the most common denominator.

Q497 Earl of Onslow: That is what this document in a way did.
Mr Straw: It is work in progress.

Q498 Lord Dubs: If I could ask you about the relationship between Parliament and the Bill of Rights and Responsibilities, you have both said Parliament has a crucial part to play in governance. Would you like to develop your thoughts about the relationship between Parliament and the Bill of Rights?
Mr Straw: Parliament will ultimately decide. Parliament can repeal it if it wishes. If it goes on the statute book, as I hope it will do, I have a shrewd idea that this Committee will be there to supervise its implementation.

Q499 Lord Dubs: I want to go back to the process. In a letter Michael Wills said that you wanted to take the opposition parties with you. Clearly you are aiming for consensus. The Earl of Onslow has referred to the Northern Ireland Commission—I think he was referring to the people who came to the forum rather than to the Commission—to what extent will the Government take the lead on this or do you envisage setting up an independent body to drive the process forward along the lines that was done in Northern Ireland?
Mr Straw: I think the Northern Ireland example is not appropriate here. We have to take the lead on it and we have decided to take the lead on it and we will see who follows. It will generate debate within parties as well as between parties. By consensus on this I do not mean unanimity any more than there was unanimity over the Human Rights Act, but we moved by a careful process of deliberation to a much broader consensus than we had started with.
Chairman: Thank you very much.

Written evidence

1. Memorandum from Professor Robert Blackburn, PhD, LLD,[1] Professor of Constitutional Law, King's College London

In response to the questions in the Call for Evidence, my views are:

1. *Is a British Bill of Rights needed?*

1.1 A new British Bill of Rights would benefit the country and its people, so long as it was constructed in a manner that was compatible with other constitutional and legal arrangements operating at the same time. Its purpose—the aims behind such a measure—would be to assist in controlling oppressive acts of state agencies and commercial bodies, and strengthen the means of remedying individual grievances against such bodies.

1.2 A Bill of Rights would enhance the existing state of affairs by providing a higher standard, and more sophisticated version, of a British citizen's fundamental rights and freedoms to those drafted for the international purposes of the European Convention on Human Rights (incorporated in the Human Rights Act 1998).

2. *What should be in a British Bill of Rights?*

2.1 Enacting a Bill of Rights will be an opportunity to articulate a British statement of citizens" rights and freedoms more closely attuned to our national circumstances, the indigenous traditions of our legal and political systems, and the progressive values our society and people seek to espouse.

2.2 The traditional or core civil liberties of Britain must be written into the document. British constitutionalism as it has evolved has placed special emphasis on tolerance and free speech, absence of arbitrary official conduct, due process and fair trial, freedom from inhuman or degrading treatment, freedom of political and religious expression, and equality of treatment. These and the other fundamental principles which are already expressed in the ECHR (extending in its subsequent protocols to matters including protection of property, right to education, and free elections) should be prescribed by the Bill of Rights in a manner compatible and complementary to the Convention.

2.3 The real challenge for those drafting the Bill of Rights—and its most interesting intellectual aspect—will be to identify and articulate those further rights and freedoms which are, or shortly will be, of fundamental importance to the dignity and quality of human life in the future. In order to express these principles, it is essential to focus on the problems and threats that lie ahead in the future.

2.4 For example, two of the greatest threats to our freedoms, dignity, and quality of life, are posed by runaway new technologies and the potential for their misuse, and by environmental degradation. Coupled with this is the fact that those who govern us and control our lives, both in the state and commercial sectors, are increasingly institutionally motivated by overriding factors of administrative and financial convenience.

2.5 In some cases, human rights already recognised need considerable further articulation and adaptation in Britain. For example, the field of equality and non-discrimination should extend its range from gender and sexual matters to age and genetic make-up. Freedom from degrading treatment should be elaborated in diverse areas such as interrogation techniques, care of the elderly, and surveillance of employees. The right to life should address issues of human cloning and voluntary euthanasia of the terminally ill. In other cases, new principles must be articulated, for example providing standards of environmental impact by which commercial and governmental bodies must operate.

2.6 The precise drafting or wording of particular rights should reflect awareness of good models in existing international treaties or foreign Bills of Rights; for example, respectively, the EU Charter of Fundamental Rights and the South Africa Bill of Rights.

2.7 In my view, the British Bill of Rights should not be a Bill of *Rights and Duties.* It should not seek to instruct citizens by way of a list of state approved public responsibilities owed to society and the state, as suggested in the government green paper *The Governance of Britain,* CM 7170, 2007. There are already responsibilities and obligations inherent in the concept of human rights, expressed for example in the provisos to many of the articles of the ECHR. These public interest factors are the other side of the same coin that stipulates our fundamental human rights and freedoms.

2.8 The key question here is on what side of the coin do you wish to place the primary emphasis? In a free society the emphasis must be on the side of the rights and freedoms of the individual. If the government wants to promote ideas or obligations of civic responsibility and active citizenship, especially if they are to

[1] See Robert Blackburn, *Towards a Constitutional Bill of Rights for the United Kingdom* (Pinter, 1999); Robert Blackburn & Jrg Polakiewicz, *Fundamental Rights in Europe* (OUP, 2001) esp. Ch 36 "The United Kingdom"; Robert Blackburn, "Legal and Political Arguments for a Bill of Rights" in *Human Rights for the 1990s,* ed Blackburn & Taylor (Mansell, 1991); Robert Blackburn, "A British Bill of Rights for the 21st Century" in *Human Rights for the 21st Century,* ed Blackburn & Busuttil (Mansell, 1997).

be compulsory ones, this must be done by way of some document or initiative other than through a new British Bill of Rights. Its proposed content would need to be carefully scrutinised by the Joint Committee on Human Rights and other civil liberties watchdogs.

3. *What should be the relationship with the Human Rights Act and international human rights obligations?*

3.1 The content of a Bill of Rights, and the way it is interpreted and applied, has to be consistent with Britain's international human rights obligations, including those arising from our membership of the Council of Europe, the European Union, and the United Nations. Any inconsistency would be tantamount to repudiation of our membership of those important international bodies. Such consistency and harmonisation of national with international law will become increasingly important as time goes on and we continue to move towards more structured forms of global governance.

3.2 The ECHR (and therefore the Human Rights Act) seeks to provide a common denominator—a "safety net"—below which the legal and administrative practices of each member state will not fall. Its expectation is that the laws and practices of individual member states will in fact reflect human rights standards significantly higher than those guaranteed by the Convention and its enforcement machinery. Most of the other 46 Council of Europe member states already possess, and operate, their own national Bill of Rights or statement of basic citizens" rights and freedoms in their constitution alongside their international human rights obligations.

4. *What should be the impact of a British Bill of Rights on the relationship between the executive, Parliament and the courts?*

4.1 The impact of the new Bill of Rights on the balance between the three major branches of government will depend on the document's status in law. One key factor is to disentangle which human rights are capable of judicial enforcement from those which are not. A second is the need to create a scheme of legal priority for the judicially enforceable rights in the Bill which work and fit in with the operation of the British constitution and legal system as a whole.

4.2 Most jurists recognise that the freedoms and rights most capable of being actionable and enforceable through the courts are those of a civil and political nature, similar or closely associated to the type of rights in the European Convention. However, even if human rights relating to the workplace, housing, social security, health and the like are accepted as not being amenable to the legal process of judicial enforcement under a Bill of Rights, consideration could be given to drafting a statement of social and economic rights to serve as an authoritative declaration of principles on which government policy should be conducted.

4.3 This declaration of social and economic rights could appear in a separate part of the Bill of Rights, making reference also to the relevant international covenants and charters to which the UK is a treaty signatory, such as the Council of Europe Social Charter and the UN Covenant on Economic, Social and Cultural Rights. The value of this declaration would therefore not lie in the realm of actionable legal remedies but as a point of public and parliamentary reference and to assist in judicial interpretation of unclear statutory measures. It might also form part of the responsibilities of the Commission for Equality and Human Rights in preparing advisory reports on the compatibility of legislative and administrative developments with the social and economic principles expressed in the Bill.

4.4 A Bill of Rights would necessarily have a significant impact on the relationships between executive, Parliament and judiciary, elevating the roles of Parliament and the courts over the executive and public administration. A Bill of Rights would be a genuinely constitutional document—indeed, effectively a part written constitution—and it would be a nonsense if it were not "entrenched" in some form or other.

4.5 Such entrenchment would involve the Bill of Rights having a higher status and priority over ordinary Acts of Parliament, and amendments to the Bill of Rights being subject to some special parliamentary process. There are various options for entrenching the Bill of Rights, which are discussed in my book *Towards a Constitutional Bill of Rights for the United Kingdom* (London: Pinter, 1999), "Methods of Entrenching a UK Bill of Rights" at pages 55 – 67 and 700 – 744.

4.6 A Bill of Rights would require judicial review of primary legislation by the superior courts, a process regarded as normal in other jurisdictions. The judiciary already has experience of such a task. For although section 4 of the Human Rights Act does not enable the courts to invalidate a statutory provision in an Act of Parliament, its "declaration of incompatibility" procedure requires the courts in substance to go through a similar process of judicial review of primary statutory provisions.

5. *Are there any other issues not covered by the above questions?*

5.1 Yes, the integrity of the process through which the Bill of Rights is prepared and implemented.

5.2 It is of real concern that, particularly since 2001, the government has taken upon itself a forceful self-asserting role with respect to constitutional reform. The truth is that governments of all persuasions have a vested interest in moulding our constitutional arrangements in a manner that suits their own political or managerial convenience.

5.3 Indeed this explains why some present opposition to a Bill of Rights comes from surprising quarters among the civil liberties lobby. For whilst in principle they may be enthusiastic supporters of a Bill of Rights, in practice they are worried the government will misuse its legislative power to construct a measure that actually facilitates draconian activities by the state. Nothing is more dangerous and Orwellian than corrosions of liberty dressed up as constitutional safeguards.

5.4 The construction of a British Bill of Rights should be referred to a commission that is genuinely independent, though one that is set up with a membership having the confidence of the political parties represented in Parliament. Its recommendations with an accompanying draft Bill of Rights should be presented directly to Parliament.

14 January 2008

2. Memorandum from the British Institute of Human Rights

1. The British Institute of Human Rights (BIHR) is an independent human rights charity with a UK-wide remit. Our focus is on the value of human rights ideas, laws and practice to tackle inequality and promote social justice. We have three main aims: (i) to lead the development of a fresh and ambitious vision of human rights that encompasses the full range of internationally recognised rights and is relevant to everyone in the UK, especially the most marginalised people; (ii) to build the capacity of other organisations to develop their own human rights practice that helps them deliver more effective services and campaigns; and (iii) to influence people with power to make this broader vision of human rights an integral part of their policies and plans. We do a range of policy, research and influencing activities and we develop and deliver practical human rights supports (including information, consultancy and training) for voluntary, community and public sector organisations.

2. There is no doubt that the concept of a "British Bill of Rights" is highly topical in political circles currently. The Conservative Party has pledged to replace the Human Rights Act with a "British Bill of Rights" that "we can write ourselves that sets out clearly our rights and responsibilities",[2] while the Government in its recent "Governance of Britain" Green Paper has foreshadowed a "British Bill of Rights and Duties" that "would build on the basic principles of the Human Rights Act, but make explicit the way in which a democratic society's rights have to be balanced by obligations".[3] Against this backdrop, we are not surprised that the Joint Committee on Human Rights has decided to launch its inquiry into a British Bill of Rights. Nevertheless, we believe that the debate as it stands to date has not been informed by an understanding of the "basics" about human rights: what they are, who they are for, and how they relate to all of our lives in Britain today. We therefore urge the Joint Committee to play a role in ensuring that any debate about further human rights legislation is informed by a foundation of this kind.

3. BIHR is deeply concerned by a number of core premises of the current political debate. For example, assumptions are made that the Human Rights Act is not British, that it is not a Bill of Rights, and that it ignores responsibilities. We hope that the Joint Committee will consider each of these assumptions very critically.

4. BIHR feels strongly that the starting point for debate about legal protection of human rights for people in Britain must be an honest commitment to building on the existing foundations provided by the Human Rights Act. We are pleased to see the "Governance of Britain" Green Paper recognise that the Act "provides a contemporary set of common values to which all our communities can subscribe" in accordance with "British values as old as Magna Carta".[4] It cautions against repealing the Act on the basis that it would dilute British control over the application in Britain of rights set out in the European Convention on Human Rights, which, the green paper reminds us, was principally drafted by British lawyers. This follows the Government's 2006 "Review of the Implementation of the Human Rights Act" which concluded that the Act has had "a positive and beneficial impact".[5]

5. Reacting to a controversial human rights case involving a man convicted of murdering head teacher Philip Lawrence, the leader of the Conservative Party recently threatened to "abolish" the Human Rights Act, warning, somewhat inexplicably, that it "bypasses humanity".[6] However, an internal Conservative Party Commission continues to examine a range of human rights issues, and we hope to see a more sophisticated analysis emerge of the role that the Human Rights Act plays in safeguarding individuals from an overweening state.

6. The value of the Human Rights Act is therefore still contentious politically. In our view, this is symptomatic of a deeper problem—very low public awareness of human rights and the Human Rights Act—and must be understood as such.

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[2] "Conservatives would abolish the Human Right Act" 21.08.07 available at http://www.conservativefuture.com/news/conscom.cfm?obj_id=138115. Last accessed 29 August 2007.
[3] The Governance of Britain (July 2007), p 61.
[4] The Governance of Britain (July 2007), p 60.
[5] Review of the Implementation of the Human Rights Act (July 2006) p 4.
[6] "Conservatives would abolish the Human Right Act" 21.08.07 available at http://www.conservativefuture.com/news/conscom.cfm?obj_id=138115. Last accessed 29 August 2007.

7. The Human Rights Act is a relatively new piece of legislation and is still far from embedded. There are many reasons for this. Unlike in many other countries, the Human Rights Act was not born out of public debate. Instead of being driven by demands from civil society, the Act emanated from a commitment by a newly elected Government. CEHR Commissioner Jane Campbell describes this as a "peculiar position" of having "solid human rights foundations on paper" that "do not seem to have reached people's hearts'.

8. The passing of the Act was not followed by the establishment of a statutory body tasked with promoting the Act and the core values it protects. Little guidance or support has been available to those seeking to put the Act into practice. As a result, the Human Rights Act has languished in the legal domain, fuelling misperceptions that it is only useful for lawyers, or for "chancers" seeking to frustrate our justice system. The salience of these misperceptions in parts of the media, their endorsement by some politicians, and poor provision to the public of practical, accessible, and accurate information about human rights make a dangerous context in which to hold a debate about alternatives to the Human Rights Act. There is therefore a risk that we end up with less rather than more protection.

9. BIHR therefore has grave concerns about the context of the current Bill of Rights debate. We want to play our part in ensuring that further discussions are informed by evidence about the current state of human rights protection, promotion and fulfilment in Britain today. Below we address some of the specific questions asked by the Joint Committee.

Is a British Bill of Rights needed?

10. What we need is for people's human rights to be promoted, protected and fulfilled in Britain. The UK has worked hard internationally in the post- World War II period to elaborate a set of universal human rights spanning the full set of civil, political, economic, social and cultural rights. The key question then is how best to implement these in the unique British context.

11. The UK has no written constitution and for many decades we had no specific human rights legislation. Pioneering human rights work nevertheless occurred, but it lacked a broad social traction in the absence of a domestic legal framework. Individuals who felt their human rights had been breached in the UK had to travel all the way to Strasbourg, France to have their cases heard by the European Court of Human Rights, applying the European Convention on Human Rights to which the UK is a party.

12. The Human Rights Act, adopted by Parliament in 1998, was a milestone in efforts to "bring rights home" by incorporating into domestic law most of the rights protected by the European Convention. It offered a uniquely British solution to the "dilemma" of parliamentary sovereignty, via a mechanism that saw primary responsibility for human rights protection shared across all three branches of government.[7] This "democratic dialogue" between the executive, the courts and Parliament has been much lauded for its innovation and effectiveness to date.

13. When the Human Rights Act was passed, the Government described its hope that in addition to permitting human rights cases to be heard in our domestic courts, the Act would support a culture of respect for everyone's human rights. The idea was that human rights would become a feature of everyday life—principles such as dignity, equality, respect, fairness and autonomy would be used by individuals and groups to negotiate improved public services, and by public service providers as a tool to improve the quality of their services. Thus the Human Rights Act would have its greatest impact not in our courts of law, out of the reach of the public at large, but in the wider community, especially in the hands of those who provide public services and those who use them. Through this process, a culture of respect for human rights would take root in the UK.

14. For this ambition of the Government's to be realised, it was essential that practical information about the Human Rights Act be made widely available to the public and voluntary and community sectors, and the general public. In the absence of a statutory body tasked with promoting human rights, when the Act was introduced in 2000 there was some important activity, but not enough. The Department for Constitutional Affairs (now Ministry of Justice) developed guidance for public authorities, and voluntary sector organisations such as BIHR provided capacity-building and other crucial supports to public and voluntary and community sector organisations. Over the past seven years, work has gradually begun to develop but not to the extent needed to have an impact across our society. The advent of the Commission for Equality and Human Rights (CEHR) brings opportunities to build on this work and for it to attain the necessary prominence and scale.

15. The CEHR represents a turning point in the promotion, protection and fulfilment of human rights in Britain, remedying the institutional vacuum at the statutory level that has existed since the Human Rights Act entered into force. The CEHR has responsibilities, among other things, to:

- promote understanding of the importance of human rights;
- encourage good practice in relation to human rights;
- promote awareness, understanding and protection of human rights; and
- encourage public authorities to comply with the Human Rights Act.

[7] See in particular sections 3, 4 and 19 of the Human Rights Act 1998.

16. We believe it is premature to draw conclusions now about what type of legal instrument will best protect human rights in Britain when the work of exploring the potential of the Human Rights Act is at such an early stage.

17. For example, a national consultative roundtable meeting of voluntary and community sector leaders held jointly by BIHR and the National Council for Voluntary Organisations (NCVO) in November 2006 confirmed the enormous potential benefit of human rights to the voluntary and community sector as a whole, but also low levels of awareness and human rights capacity.[8] Until the general human rights capacity of the voluntary and community sector is built, meaningful involvement of these organisations and those they seek to work with and for in a specific human rights debate about a Bill of Rights will be severely hampered. In so far as this sector can also be a vital link to some of the most excluded people, these groups" opportunities to take part in such a discussion will also be limited.

18. Despite the large amount of work required, there are already positive signs that diverse groups across society are beginning to explore the potential of the Human Rights Act. BIHR's work over the years to build the capacity of both public and voluntary and community sector organisations to raise awareness of the Act and, beyond this, to develop wider human rights based approaches in their work (ie putting human rights principles into practice), has consistently revealed an appetite for information and practical support. We know from this experience that when the ideas behind the Human Rights Act and its potential "beyond the courtroom" are explained, any negative attitudes that people may have about the Human Rights Act and human rights more generally are quickly transformed.

19. Our recent report "The Human Rights Act—Changing Lives" showcases a range of ways in which the Act has been used in practical, non-legal ways to secure positive outcomes for younger people, older people, victims of domestic violence, parents, asylum seekers, people living with mental health problems, disabled people, and others facing discrimination, disadvantage and exclusion.[9] These examples provide a glimpse of how a culture of respect for human rights, supported by the Human Rights Act, might begin to take root.

20. The first "green shoots" of good practice in relation to the Human Rights Act are also emerging. Our "Human Rights in Healthcare" framework, developed in partnership with the Department of Health and five NHS Trusts, is one example of a practical human rights tool for public service providers.[10] It has been very enthusiastically received in the healthcare sector and beyond, and was recently described by the Joint Committee as "one of the best pieces of practical guidance on the impact of the HRA on public services that we have seen".[11]

21. BIHR is actively engaged in developing, with partners, a range of other projects aimed at "bringing rights to life". These include a Human Rights in Schools project and "Principles to Practice", a three year programme aimed at building the capacity of voluntary and community sector organisations to use human rights as a tool to be more effective in delivering services, policy and campaigns. The positive responses that are emerging from this work show a different side to the "human rights story". In particular they demonstrate the potential for human rights ideas, laws and practice to be harnessed by organisations, helping them to achieve their goals and especially to have an impact on discrimination and disadvantage.

22. We therefore believe that the pressing issue is how to embed the Human Rights Act and achieve the culture of respect for human rights it was meant to inspire. Only then can we have a positive, meaningful debate about how best to build upon the human rights protection it affords, via a new Bill of Rights or otherwise.

What should be in a British Bill of Rights?

23. It is absolutely crucial that any new British Bill of Rights does not fall below the minimum protections provided by the Human Rights Act. To do so would cause an impractical "disconnect" between our domestic system and our international obligations under the European Convention on Human Rights, since a right to take cases to the European Court of Human Rights would remain in relation to any human rights "amputated" from our domestic law.

24. It is worth reminding the Joint Committee that these European obligations are "not negotiable" as they are a term of our membership of the European Union. Nor should they be negotiable, since the UK played a central role in the development of these human rights standards and we have campaigned long and hard for their adoption and realisation in other states. It is inconceivable that we would renounce them now.

25. Ultimately, the question of which additional rights to include in any British Bill of Rights must be decided via a broad and participatory public debate. However, as explained above, we believe that an effective debate of this sort is only possible once organisations and individuals—equipped with practical,

[8] The report of this meeting is available at http://www.bihr.org/downloads/NCVO.pdf. Last accessed 29 August 2007.
[9] Available at http://www.bihr.org/downloads/bihr_hra_changing_lives.pdf. Last accessed 29 August 2007.
[10] Available at http://www.bihr.org/development/health.html. Last accessed 29 August 2007.
[11] Joint Committee on Human Rights, The Human Rights of Older People in Healthcare, Eighteenth Report of Session 2006–07, p 38.

accessible and accurate information—have had more time to explore and assess what human rights are, how they relate to their lives, and the potential of the Human Rights Act not only in individual cases but more widely to bring about positive social change.

26. Disquiet in the media and elsewhere that the Human Rights Act promotes rights at the expense of responsibilities and the interests of the community is emblematic of low levels of awareness (and misinformation) currently. In fact, the notion of responsibilities is central to the concept of human rights. It is self-evident that human rights cannot be truly effective unless "rights holders" fulfil their corresponding duties to uphold the human rights of others. These duties are reinforced by "positive obligations" on the state to protect people from human rights violations caused by individuals and other non-state actors. Indeed the interrelationship between human rights and responsibilities is explicitly recognised in Article 29 of the Universal Declaration of Human Rights which states that "Everyone has duties to the community in which alone the free and full development of his personality is possible".

27. The notion of responsibilities is also deeply embedded in the Human Rights Act, for example in the requirement that decision-makers (including the courts) consider the rights and freedoms of others and the interests of the community, for example the need to protect national security and public order, when applying a wide range of rights including the right to respect for private and family life, the right to freedom of expression, and the right to manifest one's religion or belief. Poor understanding of this must be tackled in any serious public debate about a British Bill of Rights.

28. We have argued above that any British Bill of Rights must build upon the minimum protections in the Human Rights Act, and that any additional rights should be determined via a public debate that is properly informed and inclusive. Without pre-empting the outcome of such a process, there are strong arguments for strengthening the minimum protections afforded by the Human Rights Act. For example, to use a phrase coined by Stuart Weir, Director of the Democratic Audit, the Human Rights Act is only "half built" since it focuses on civil and political rights and almost completely neglects economic, social and cultural rights, in defiance of the international recognition that all these rights are indivisible, interdependent and interrelated.[12]

29. In our extensive experience of delivering human rights supports including training to a wide range of public bodies and voluntary and community organisations, economic, social and cultural rights have a very strong resonance for people in Britain. During the human rights training sessions we provide, people from a range of backgrounds refer very frequently to rights such as the right to health and an adequate standard of living when asked what human rights are and what they "mean" to them. They typically react with surprise and disappointment when they learn that the UK's Human Rights Act does not in the main protect these rights and that the UK has not otherwise "brought these rights home" by making them part of domestic law. Grassroots consultation in relation to a Northern Ireland Bill of Rights has likewise confirmed the popular attachment to economic, social and cultural rights. We believe on this basis that any truly participatory public debate about a British Bill of Rights will result in calls for domestic protection of economic, social and cultural rights.

30. It is very important to stress that human rights by definition apply to all human beings. In the context of the UK, this means they protect everyone within the UK's jurisdiction—as the former Lord Chancellor once remarked, to qualify for human rights in the UK "you need to be human, and you need to be here". It is crucial that this fundamental tenet of human rights—their universality—is not corrupted by an improper conflation of human rights with citizenship rights.

31. BIHR believes that we need a public debate about human rights and that this must involve a very wide range of people in society, including, most importantly, people on the margins whose human rights are often most at risk yet who have the least say. Our programme, "Changing the Face of Human Rights" is to be launched later in the year. Critically it will involve a participatory inquiry that explores the relevance and value of human rights and the Human Rights Act to people in the UK generally. Partnership with a broad spectrum of organisations capable of facilitating meaningful participation will be essential to its success. In giving people the chance to have the far-reaching public debate that did not happen when the Human Rights Act was introduced, we hope to stimulate discussion and gather evidence. This will help provide a foundation for a meaningful debate both about how to make existing legal protections real and the scope for further protections to be introduced.

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[12] This was famously affirmed by the United Nations in the Vienna Declaration and Programme of Action (1993).

3. Memorandum from British Irish Rights Watch

1. Introduction

1.1 British Irish RIGHTS WATCH (BIRW) is an independent non-governmental organisation and registered charity that monitors the human rights dimension of the conflict and the peace process in Northern Ireland. Our services are available to anyone whose human rights have been affected by the conflict, regardless of religious, political or community affiliations, and we take no position in the eventual outcome of the peace process.

1.2 BIRW welcome this opportunity to respond to the Joint Committee on Human Rights' call for evidence on whether and why a British Bill of Rights is required. BIRW has been involved in the debates over the Northern Ireland Bill of Rights for many years. We believe there are lessons to be learned from the Northern Ireland experience which should inform the debate about a British Bill of Rights. In particular, Northern Ireland is in the midst of working on its own Bill of Rights at this very moment. It seems to us that there would be every advantage in waiting for the outcome of that process before embarking on a debate about a British Bill of Rights. However, given the anti-human rights sentiments that underlie much of the present debate in England, we feel that we should engage with at least some of the questions raised by the Joint Committee on Human Rights.

1.3 Before doing so we think it might be helpful if we explain our thinking on the Northern Ireland Bill of Rights, and the lessons we believe must be drawn from Northern Ireland when considering the question of whether a British Bill of Rights is required.

1.4 When it began to look as if a peace agreement was in the offing in Northern Ireland, BIRW argued for a UK-wide Bill of Rights and an Irish Bill of Rights that would mirror the provisions of the UK version. We believed that both the UK and Ireland would benefit from having a Bill of Rights that would expand on the rights conferred by the European Convention on Human Rights (the Convention), which at that time had not been incorporated into domestic law in either country. We also considered that, whatever the outcome of the peace process, one of the two main communities in Northern Ireland would find itself in a minority—either the Catholics would remain a minority in a Northern Ireland that stayed within the UK, or Protestants would find themselves in a minority within a united Ireland. If both the UK and Ireland had adopted Bills of Rights that gave identical rights, whoever was in the minority would enjoy the same protections either side of the border.

1.5 As it turned out, both countries "incorporated" the Convention imperfectly. In Ireland, the Convention is subordinate to the Irish Constitution,[13] an elderly and in many ways outmoded instrument that is less liberal than the Convention in a number of its provisions. In the UK, the Human Rights Act 1998 omitted Article 13, which provides for an effective remedy for violations of Convention rights, and the rulings in McKerr[14] and Hurst[15] in the House of Lords mean that only violations that occurred after the Human Rights Act came into force in October 2000 are justiciable in the UK courts; violations occurring before that date must revert to the European Court of Human Rights.

1.6 It also became apparent that, while the Labour government had brought in the Human Rights Act, it was only willing to contemplate a Bill of Rights in the Northern Ireland context. The government appeared to recognise that a Bill of Rights was a necessary confidence-building measure in the Northern Ireland peace process, but to regard a Bill of Rights elsewhere as an optional, even undesirable, extra.

1.7 While BIRW were not happy with this state of affairs, we could see that with the development of regional devolution we were swimming against the tide, and we preferred to see a Bill of Rights in Northern Ireland than no Bill of Rights anywhere. We also hoped, and still hope, that a Northern Ireland Bill of Rights might provide a model for the rest of the UK and for Ireland and pave the way for the synchronisation of rights which we had originally advocated.

1.8 Unfortunately, the history of the Bill of Rights debate in Northern Ireland to date has not been happy, although we are still hopeful that Northern Ireland will achieve an exemplary Bill of Rights and we are dedicated to trying to help to bring that about.

1.9 The Good Friday Agreement provided not only for a Bill of Rights but also for a Human Rights Commission, again unique to Northern Ireland. While there was some cross-party support for a Bill of Rights, the Commission had no significant political champion, which was unfortunate because it was charged with advising the Secretary of State for Northern Ireland on the Bill of Rights. The government and the Northern Ireland Office were both remiss in depriving the Commission of the support it deserved and the resources it required to carry out its mandate. Although the Commission consulted very widely on a draft Bill of Rights, the draft it ultimately produced was unwieldy and not fit for purpose. It fatally sought

[13] The European Convention on Human Rights Act 2003 does not cover the Constitution.
[14] In re McKerr [224] UKHL 12.
[15] R (Hurst) v Commissioner of the Metropolitan Police of the Metropolis [2007] UKHL 13.

to assert equal rights for all communities in Northern Ireland, failing to recognise that minorities need protection from the majority, and it failed to address contentious issues vital to the people of Northern Ireland, such as parades and abortion. A second draft corrected the error on minority rights, but what not much better then the first draft and by then the Commission, abetted by government indifference, has allowed the Bill of Rights to become so politicised that it became necessary to wait for the appointment of a new Commission, in terms of membership, and the establishment of a Bill of Rights Forum made up of representatives of the political parties and civil society, to try to rescue the project. That Forum is at work at the moment and there is yet real hope that their work will produce a Bill of Rights which will strengthen the rights of all communities in Northern Ireland.

1.10 However, the unfortunate history of the Northern Ireland Bill of Rights process prior to the establishment of the Forum provides food for thought for anyone contemplating a Bill of Rights for Britain. Firstly, it tells us that the process is as important as the content. The process started well in Northern Ireland, but went wrong and hopefully has now been put right. Secondly, that process must have the wholehearted backing of government and must be adequately resourced. Thirdly, content is also important. A Bill of Rights cannot afford fundamental flaws such as that made in the first draft in Northern Ireland in relation to minority rights, itself a vital issue in Britain. Fourthly, if there is one overriding lesson to be drawn from experience in Northern Ireland, it is that political expediency is a poor foundation on which to build a Bill of Rights. Human rights are inevitably political, in that they recognise the rights of everyone, including the marginalised and the unpopular. It is, however, a grave mistake to allow human rights, and by extension Bills of Rights, to become politicised, as happened in Northern Ireland. A Bill of Rights is not about who gets what. It is about ensuring that fundamental human rights are conferred upon and are exercisable equally by everyone in society. Acts of extreme terrorism carried out around the world, including here in the UK, by some fundamentalist followers of Islam, have led to a potential crisis in the relationship between the Muslim community and other communities in Britain. The government's reaction, some would say over-reaction, to the threat of such terrorism has been to produce a plethora of repressive legislative measures. Now is not the time to ditch the European Convention on Human Rights and replace it with a "British" Bill of Rights designed, as former Home Secretary David Blunkett MP put it, to "reconcile security and liberty". On the other hand, now is a good time to think about designing a Bill of Rights that vindicates and strengthens the rights of all communities, enhancing our democracy and giving those who suffer discrimination legitimate tools to combat it, thus undermining the underlying causes that lead a small minority of people to espouse terrorist tactics. In that regard, Northern Ireland has much to teach us.

1.11 One question that the Joint Committee on Human Rights has not asked, although it seems to us to be implicit in those questions it has posed, is whether or not the UK needs a written constitution. In our view, it does. As advocates of respect for international human rights law, we regard the "unwritten constitution" by which the United Kingdom is governed as an anachronism. The theory underpinning the unwritten constitution is that everything is permissible unless it is prohibited by law. The difficulty with such a theory is that in practice positive rights are never articulated or defined, while a body of legislation is developed which is focused on denying and/or limiting rights. It is unclear to us how an autonomous Bill of Rights, whether in Northern Ireland or in Britain, can function effectively without a written constitution to underpin it and a constitutional court to enforce it. All our comments on Bills of Rights should be viewed in this context.

1.12 In the rest of this submission, we attempt to answer the questions posed by the Joint Committee on Human Rights.

2. Is a British Bill of Rights Needed?

Do you think there should be a British Bill of Rights? Please explain the reasons for your view

2.1 Yes, but only if the process and the timing are right. The reason we say yes is that the Convention has been imperfectly incorporated into domestic law. The Human Rights Act does not provide for an effective remedy for human rights violations, and the judgments in McKerr and Hurst mean that there is a twin-track system for the vindication of people's human rights, depending on when the violation occurred. Also, the enforcement mechanisms in the Human Rights Act are weak.

2.2 However, a Bill of Rights is not merely needed in order to remedy the problems created by the Human Rights Act and its interpretation by the courts. A Bill of Rights is required in order to restore the checks and balances that have been eroded by the torrent of counter-terrorism laws and practices, which have been adopted in the name of countering terrorism but have led to human rights abuses such as the tacit condoning of torture, periods in detention so lengthy as to amount to internment without trial, virtual house arrest, the exclusion of defendants from parts of their own trials, the erosion of the right to trial by jury, and so on.

2.3 A Bill of Rights also offers an opportunity to confer positive rights on all communities which will help to promote democracy and to encourage tolerance and mutual understanding at a time when British society is more diverse than at any time in its history.

What would be the purpose of a British Bill of Rights?

2.4 The purpose of a Bill of Rights would be to entrench those human rights which are either not included in or are imperfectly articulated by the European Convention on Human Rights.

What would a British Bill of Rights add to the protection for human rights already provided by the Human Rights Act?

2.5 As we have already pointed out, the Human Rights Act is defective. A Bill of Rights could remedy these defects, could expand on those rights conferred by the Convention, and could help to promote mutual respect by ensuring that everyone in society has the same rights and can exercise them fully.

3. What Should be in a British Bill of Rights?

If there were to be a British Bill of Rights, what rights and freedoms should it contain?
Should it include any rights currently recognised as common law rights and freedoms, and if so which?
Should it include any rights and freedoms currently contained only in legislation, such as rights not to be discriminated against, of data protection and freedom of information, and if so which?
Should it include social and economic rights, such as health and education, and if so which?.
Should it include rights and freedoms currently contained in international treaties but not yet part of our law, and if so which?
Should it include rights and freedoms contained in other countries" bills of rights and if so which?

3.1 We believe that the process by which a Bill of Rights is drawn up is as important as the end product, if a Bill of Rights is to be inclusive and command the widest possible ownership. Unless the Joint Committee on Human Rights is planning to draw up a draft Bill of Rights, then we do not think this consultation exercise is the right vehicle for answering this question. If a British Bill of Rights is to be under serious contemplation, then there needs to be a wide-ranging consultation exercise, preferably conducted by those with human rights expertise (which could, of course, include the Committee), but crucially with the backing of a commitment from government to implement and enforce the recommendations those experts would make concerning a Bill of Rights.

3.2 Absent any such commitment from government, the Committee should be very careful not to allow this consultation exercise to become a substitute for an effective consultation process, should a British Bill of Rights become a reality.

3.3 The Committee should also guard against providing a vehicle which might derail the Northern Ireland Bill of Rights process now that it is back on track. Those forces which were antipathetic to the Northern Ireland project could very well seize on a British Bill of Rights to try to sink the Northern Ireland process altogether. This is one of the reasons why we urge the Committee to strongly recommend waiting for the outcome of the Northern Ireland process before embarking on a British process.

3.4 That said, in general terms, a Bill of Rights should include those human rights contained in international human rights instruments not yet incorporated into domestic law, and should also include economic, social and cultural rights, which have tended to be overshadowed by political and civil rights. A person who is living below the poverty line, or homeless, or lacking in education, for instance, is not equipped to take full advantage of the right to a fair trial, for example. Since much of the disadvantage in our society stems from social and economic disadvantage, and much of the discrimination stems from social and cultural inequalities, these are vital rights that cannot be overlooked in a Bill of Rights.

3.5 Experience around the world has shown that Bills of Rights vary in the degree of their success in direct proportion to their ability to meet certain universally-applicable criteria. These can be summarised as follows:

- ownership;
- relevance;
- protection of minority rights;
- entrenchment;
- enforcement; and
- flexibility.

3.6 First and foremost, a Bill of Rights must belong to as wide a cross-section of the public as possible, including in particular those who are marginalised in society and who by definition find it more difficult to access their rights.

3.7 Secondly, a Bill of Rights must be relevant to the population it protects. It must reflect their concerns and must deal with issues that matter to them fairly and equally.

3.8 Thirdly, it must protect the disadvantaged. Bills of Rights must recognise that minorities need protection from the majority, especially in a democracy, where minorities can always be outvoted.

3.9 Fourthly, a Bill of Rights must be capable of delivering change on the ground, not just for groups of people but also for individuals. It must enjoy a statutory basis and must contain strong enforcement mechanisms.

3.10 Lastly, a Bill of Rights must be capable of amendment to reflect changes for the better in society, while at the same time being protected from changes that are the result of political ideology or public panic.

3.11 In Northern Ireland, the Bill of Rights is still work in progress. If the Forum is to succeed in its work, then it must produce a Bill of Rights which meets the six criteria set out above. The Forum is wrestling with these matters at this very moment. There seems to us to be every benefit in waiting to see what solutions they find before embarking on a similar process in Britain.

Should it include responsibilities as well as rights and freedoms, and if so, what sorts?

3.12 Most human rights imply some kind of responsibility. For example, the right to freedom from discrimination implies that others must not exercise discrimination. However, the responsibility for enforcing rights lies with the state and with emanations of the state. A Bill of Rights should be just that, a bill which confers rights. It should not seek to lay responsibility for upholding human rights on individual citizens by creating a set of responsibilities. To do so would lead to endless litigation between individuals, with human rights becoming a battleground between competing and conflicting rights and responsibilities. Suppose, for example, a Bill of Rights were to impose a responsibility on everyone to respect each other's right to live peacefully. Such a responsibility might seem quite reasonable, on the face of it. However, it would open the door to legal disputes in which the courts would have to balance the right of one person to hold a party against the right of another to get a good night's sleep. Another citizen, exercising the same right, might litigate against an individual soldier fighting in Iraq on the grounds that the soldier, by invading another country, had deprived the litigant of the right to live peacefully by increasing the risk of terrorist attacks in the UK.

3.13 As legislation designed to outlaw racial discrimination in this country has shown, it is possible to modify behaviour through legislation, but it is not possible to eradicate prejudice. In our view, the notions that with rights come responsibilities, or that rights have to be earned, are essentially questions of morality, which cannot be legislated for, however much one might agree with them. Rights, in our view, belong to everyone equally, even to those who abuse the rights of others, which is why every criminal is entitled to a defence and a fair trial. Such standards are the hallmark of a civilized democracy, and should not be diluted by importing into rights legislation some kind of trade-off with responsibilities.

4. What Should be the Relationship with the Human Rights Act and International Human Rights Obligations?

What should be the relationship between a British Bill of Rights and the Human Rights Act?

4.1 First and foremost, there should not be any question of a British Bill of Rights leading to the repeal of the Human Rights Act or the UK's opting out of the European Convention on Human Rights. A Bill of Rights should not be seen as a substitute for the Convention, but rather as an instrument that builds on the platform provided by the Convention to strengthen and augment human rights in this country. The message that the UK would send to the rest or Europe, and indeed the world, were it to abandon the Convention would be entirely negative and counter-productive.

4.2 Having said that, some modifications might be needed to the Human Rights Act in order to give the Bill of Rights the force of law and to remedy the present defects in the Human Rights Act. As we have pointed out earlier, the lack of a written constitution and a constitutional court rob both the Human Rights Act and any Bill of Rights of the framework such instruments need if they are to be fully effective. Without a written constitution, the Human Rights Act and the Bill of Rights would simply have to operate alongside one another as best they can.

What should be the relationship between a British Bill of Rights and the ECHR/other international human rights treaties?

4.3 Hopefully, a properly drafted Bill of Rights would give more powerful effect to the Convention than currently exists in domestic law and would also incorporate into domestic law other international human rights standards not currently included in our laws.

Are there any other relevant issues not covered by the above questions?

4.4 As we have already pointed out, the whole debate about a Bill of Rights begs the question of the lack of a written constitution and a constitutional court.

5. What Should be the Impact of a British Bill of Rights on the Relationship Between the Executive, parliament and the Courts?

5.1 One of the greatest weaknesses of the Human Rights Act lies in the area of enforceability. If a court is unable to interpret a piece of primary legislation so as to make it compatible with the Convention, it has no power to strike that legislation down, but may only declare it to be incompatible. It is then for Parliament to decide whether to repeal or amend the legislation. While this preserves the doctrine of parliamentary supremacy, it undermines the rule of law. Were there to be a written constitution and a constitutional court, then the rule of law would trump the intentions of a parliament which may have drafted a law prior to 1998 without having had any regard to the Convention.

5.2 In our view, any British Bill of Rights should not be hampered by parliamentary supremacy, but should be fully enforceable through the courts. It should therefore be binding on the Executive and have the power to strike down incompatible legislation.

5.3 Such a proposal may sound as if it would radically alter the relationship between the three arms of governance and give the courts supremacy in practice over the Executive and Parliament. However, since the Bill of Rights would be enacted by Parliament, Parliament would merely be delegating to the Courts the power to enforce legislation that Parliament had created, which is the position in relation to most other laws.

5.4 A more radical, yet entirely desirable, effect, in our view, would be that a Bill of Rights would counter the huge power gap between the individual and the state. The great disadvantage of our unwritten constitution is that everything is permitted until it is forbidden, so that the emphasis swings towards forbidding rather then permitting or enabling. A Bill of Rights would grant the individual some ungainsayable rights that could not be taken away by powerful institutions against which the individual has no defence. This would give everyone a tangible stake in society, undermining those elements both within and without who would like to subvert those who are weak and disenfranchised by lack of realisable rights.

6. Conclusion

6.1 BIRW gives a guarded welcome to a debate about a British Bill of Rights. However, we warn against the agenda that wants to use a Bill of Rights as an instrument for actually curtailing rights.

6.2 We also emphasise that a debate about a Bill of Rights is already far advanced in Northern Ireland, which is well versed in dealing with terrorism and is no stranger to diversity. It is already possible to learn from their pioneering work what to avoid in designing a Bill of Rights. The Forum deserve the space they need to finish their work, and we in Britain could profit by waiting to see what positive lessons they may have for us in the not-too-distant future.

16 August 2007

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4. Memorandum from Mr Robin Tso, BritishHongKong

I am writing to you on behalf of BritishHongKong, an organisation in Scotland. Our aim is to lobby on behalf of all British Nationals (Overseas) of all ethnicities for the basic human rights that we deserved as British Nationals, ie the right to abode in the UK and the right to full British Citizenship.

Recently, Lord Goldsmith QC completed a Citizenship Review which addressed various issues relating to the different categories of British nationalities and their rights and responsibilities. Our organisation has produced a formal response to Lord Goldsmith's review to express out views and concerns. As suggestions from this review are likely to be debated as part of the upcoming Citizenship and Immigration Bill, I have attached a copy of this response[16] with this letter for your information.

A summary of our main points:

(1) We welcome Lord Goldsmith's suggestion to allow British nationals to register for British citizenship in order for the categories of British nationality to be reduced and to equalise the rights among all British nationals.

(2) We are disappointed that Lord Goldsmith had not extended this recommendation to British Nationals (Overseas), citing the Joint Declaration with Chinas as a potential barrier.

(3) However, the part of the Declaration which refers to BN(O)s is a unilateral declaration by the UK. Thus its legal standing is questionable.

[16] Not published here.

(4) We suggest that the UK take action to equalise the rights of BN(O)s in ways that do not cause problems with the Joint Declaration (if these problems do exist). A list of our recommendations can be found in our enclosed full response.

(5) We also appreciate Lord Goldsmith's reminder to consider the ratification of Protocol 4 of the European Convention of Human Rights in any future changes to British nationality laws.

15 May 2008

5. Memorandum from the Centre for Public Law, University of Cambridge

The following is the response of members of the University of Cambridge Centre for Public Law to the Joint Committee's call for evidence as part of its enquiry entitled "A British Bill of Rights". We have chosen to focus on what we believe to be the central question of the relationship of any such Bill of Rights with the Human Rights Act 1998 ("HRA") and the European Convention on Human Rights ("ECHR").

The United Kingdom's International Obligations Under the ECHR

In contemporary political discourse on human rights issues, the possibility of a British Bill of Rights has been mooted, at least in some quarters, as a way of addressing perceived difficulties arising under the current system. For example, it has been argued that a clearer/perhaps different/balance needs to be struck between the rights of individuals and the interests of society as a whole,[17] and that the HRA, in adopting an off-the-peg solution through the giving of effect in domestic law to certain ECHR provisions, has failed to supply a regime that is adequately tailored to the needs of the United Kingdom.[18] The principal focus of such dissatisfaction with the HRA has been the absolute prohibition, held by the European Court of Human Rights ('ECtHR') to be inherent in Article 3 ECHR,[19] on the deportation of individuals to states where they face a real risk of torture or of inhuman or degrading treatment/something which has obvious implications for the so-called war on terror.[20]

Against this background, it is important to emphasise that the rights to which the HRA gives effect in domestic law derive from a treaty which is binding upon the UK as a matter of international law.[21] Consequently, if it is felt that the ECHR strikes an inappropriate balance between individual and collective interests, replacing the HRA with a British Bill of Rights is not the solution: whatever the terms of such national legislation, the UK would remain subject to the ECHR in international law. Due appreciation that the legal position is thus/something which has regrettably not always been in evidence thus far in the debate about human rights protection in the UK[22]—suggests that a British Bill of Rights would have to take effect on one of the two following bases.

A Bill of Rights as an Alternative to the ECHR

The UK could repeal the HRA and withdraw from the ECHR, replacing the current regime with a domestic Bill of Rights. Since none of the major political parties appears to be seriously contemplating such drastic action at present, we will comment only briefly on this issue, pointing out that, while legally possible,[23] withdrawal would be a far from straightforward matter.

First, considerable political difficulty/both domestically and internationally/would presumably attend a decision by the UK government that it was unwilling to guarantee to those within its jurisdiction a set of human rights currently binding upon 47 European states. As a member state of the EU, it would seem curious for the UK to appear to be repudiating its human rights obligations in international law at a time when human rights compliance is one of the accession criteria applied by the EU to aspiring new members as part of its enlargement process.

[17] See, eg, David Cameron, "Balancing freedom and security—A modern British Bill of Rights', speech to the Centre for Policy Studies, London, 26 June 2006, http://tinyurl.com/39nrza. Cameron confirmed in a media statement on 21 August 2007 that a Conservative government would "abolish the Human Rights Act and replace it with a British Bill of Rights" (http://tinyurl.com/2sztct). It is unclear whether in its recent green paper (Cm 7170, The Governance of Britain (London 2007)) at 60-1 the government intended to advocate any "rebalancing" between existing rights and other interests; see discussion below.

[18] We note, in passing, the irony inherent in this view, bearing in mind the central role played by the UK in the drafting of the ECHR. See A W B Simpson, Human rights and the end of Empire: Britain and the genesis of the European Convention (OUP 2001).

[19] *Chahal v UK* (1996) 23 EHRR 413. The UK was recently given leave by the ECtHR to intervene in the case of Saadi v Italy (no. 37201/06); it argued the absolute nature of the Chahal prohibition should be revisited.

[20] This prohibition lay behind the regime contained in Part 4 of the Anti-terrorism, Crime and Security Act 2001 (now repealed) for executive detention of foreign terrorist suspects who could not be deported. Article 3, as interpreted in Chahal, op cit n 3, has been criticised by Tony Blair (Downing Street press conference, 5 August 2005, http://tinyurl.com/2vlhor) and David Cameron, CPS speech, op cit n 1.

[21] State parties to the ECHR are obliged to abide by the judgments of the Strasbourg Court (article 46) and to "secure to everyone within their jurisdiction" the Convention rights (article 1).

[22] Eg in the wake of the terrorist attacks in London on 7 July 2005, Tony Blair, op cit n 4, said that he would consider seeking the amendment of the HRA if it proved to be an inhibition to the effective prosecution of the war on terror.

[23] Provision is made for "denunciation" of the ECHR in Article 58.

Secondly, the ECHR would remain binding upon the UK whenever the implementation of European Community law was at stake.[24]

Thirdly, the UK is a party to other human rights instruments, some of which include wider rights than those contained in the ECHR.[25] Unless those treaties were denounced at the same time as the ECHR, they would remain binding upon the UK in international law.

Fourthly, it is far from clear that repeal of the HRA coupled with withdrawal from the ECHR would yield a blank canvas upon which a domestic Bill of Rights could be formed: human rights norms akin to those enshrined in the ECHR were applicable in domestic courts in certain circumstances prior to the entry into force of the HRA,[26] and more recent judicial decisions have highlighted Convention rights that reflect or have been absorbed into the common law.[27]

Indeed it is likely that repeal of the HRA and withdrawal from the ECHR would create a situation of great complexity and uncertainty, to the disadvantage of individuals and public authorities alike. This would run counter to the view advanced last year by the Government that the principal difficulty with the HRA has not been the content of the Convention rights to which it gives effect, but uncertainty about the extent to which they curb executive action, leading certain government bodies to exhibit unnecessary caution in acting as guardians of the public interest.[28]

A Bill of Rights as a Supplement to the ECHR

A limited consensus appears to be emerging—at least within the two main political parties/that a British Bill of Rights should supplement, rather than replace, the ECHR. However, while such an approach is less inherently problematic than withdrawal, a number of difficulties would have to be addressed. Here, we focus on a set of issues emanating from the central question of the relationship between a domestic Bill of Rights and the ECHR. We do so by reference to three (inter-related) strands within current political discourse.

The Content of a British Bill of Rights

A distinction is presumably envisaged between the rights that would be protected by a domestic instrument and those enshrined in the ECHR: if the position were otherwise, the former would serve no purpose. Such a distinction may take one of two forms.

First, a British Bill of Rights may confer broader rights on individuals than those which they enjoy under the ECHR—a possibility canvassed in the recent green paper.[29] One possibility is that a domestic Bill of Rights might include a right to trial by jury (although such a right would curtail some of the policies of recent Conservative and Labour governments). Another possibility might be to include a right to administrative justice, or some social rights, for example to adequate housing or health care. However, such rights, included in South Africa's Constitution Act 1996, raise their own problems in their relationship to government policy-making and other rights. While an "ECHR-plus" model would be legally straightforward in that the ECHR sets minimum standards for human rights protection, difficulties could nevertheless arise in respect of the relationship been domestically enhanced rights and standard ECHR rights. For example, if a domestic Bill of Rights conferred a right to respect for private life broader than that recognised under the ECHR, this may lead British courts to make decisions placing greater restrictions on the right to freedom of expression than those permitted under the Convention, raising the prospect of subsequent challenges in the ECtHR.

Secondly, domestic law may confer fewer rights on individuals than those currently provided for under the ECHR. (Indeed, the Leader of the Opposition has indicated that a British Bill of Rights may be narrower in scope than the ECHR.)[30] This would be more obviously problematic in that individuals would remain able to enforce their ECHR rights but would have to do so in the ECtHR, thus undermining the HRA's central objective of "making more accessible the rights which the British people already enjoy under the Convention"—"[i]n other words, . . . bring[ing] those rights home".[31] Removing the jurisdiction of UK courts to enforce the full range of Convention rights would be a retrograde step, reinstating what the government in 1997 called the "long and hard" "road to Strasbourg", the existence of which, according to the white paper which made the case for the HRA, would serve the interests of a "government which was half-hearted about the Convention" but which would not be "in keeping with the importance which this Government attache[s] to the observance of basic human rights".[32]

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[24] Article 6(2), Treaty on European Union.
[25] Eg International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights.
[26] See Murray Hunt, Using Human Rights in English Courts (Oxford, Hart Publishing, 1997).
[27] See, eg, R (Daly) v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532; A v Secretary of State for the Home Department [2005] UKHL 71, [2006] 2 AC 221 at [11]-[14].
[28] Department for Constitutional Affairs, Review of the Implementation of the Human Rights Act (London 2006), http://tinyurl.com/3555hn
[29] Op cit n 1 at 61.
[30] This is implicit in his views (CPS speech, op cit n 1) that a domestic Bill of Rights would "define the core values which give us our identity as a free nation" while facilitating a "hard-nosed defence of security and freedom".
[31] Cm 3782, Rights Brought Home: The Human Rights Bill (London 1997) at 7.
[32] Ibid, loc cit.

Defining the Rights Protected by a British Bill of Rights

The Leader of the Opposition has called for "[g]reater clarity and precision" in this area, "as opposed to vague general principles, which can be interpreted in many different ways",[33] while the government's recent green paper on constitutional reform also emphasises the need for human rights to be defined with greater clarity.[34] The argument that the law should be clear is an obviously attractive one, but these proposals require further thought in terms of both their purpose and execution. If the intention is to produce a text which will in itself be sufficient to convey to citizens and public authorities the precise content and limits of relevant human rights,[35] this would require a Bill of Rights drafted in highly detailed terms which would risk making it inflexible, potentially necessitating regular amendment.[36] Such an approach would also raise the prospect of a disjunction between a domestic Bill of Rights and the ECHR, as it is possible to envisage circumstances in which a detailed domestic instrument laid down clear restrictions on a given right which later turned out to go beyond the restrictions permissible under the ECtHR's developing case law. The UK would be bound under international law by the ECtHR's construction of the right,[37] but UK courts would presumably be bound by the less generous domestic provisions. Finally, we note that politicians" calls for rights to be defined more clearly overlook a more fundamental difficulty. However a bill of rights is framed, there will always be intricate questions of interpretation to be resolved in the context of practical instances; and when courts embark on this task they do so against the background of the values already embedded in the common law, legislation and international rights treaties. In a common law constitution like that of the UK, the common law itself is inevitably a key repository of the most important and pervasive values and rights. The assumption that the reach of individuals' rights can be prescribed through the precise wording of a bill of rights therefore implies an incomplete understanding of the nature of our common law constitution.

Balancing Rights and Responsibilities

It is noteworthy that the government's recent green paper raises the prospect not of a "Bill of Rights", but of a "Bill of Rights and Duties" which "could provide explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others".[38] The green paper notes that this approach would "build on the basic principles of the Human Rights Act"—a recognition, presumably, of the fact that many of the Convention rights to which the HRA gives effect are qualified—but does not indicate how it would differ from the HRA.

It may be envisaged that a British Bill of Rights would impose more severe restrictions on individual rights than those which the ECHR embraces. The Leader of the Opposition clearly had something of this nature in mind when in August 2007 he advocated repeal of the HRA,[39] in response to a decision of the Asylum and Immigration Tribunal that the Act precluded deportation, upon his release from prison, of an Italian national convicted of murder.[40] Although an intention to restrict existing ECHR rights is by no means clearly stated in the 2007 green paper, it is important to emphasise that any such narrowing of domestically-protected human rights would be highly problematic in that there would be no corresponding attenuation of the rights the UK is obliged under the ECHR to secure to those within its jurisdiction. Indeed, the Convention specifically provides that nothing in it "may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention".[41]

Of course, it may simply be that it is envisaged that a domestic Bill of Rights should reiterate, in clearer terms, that balance between individual and public interests which is inherent in the Convention; and it is important to note that, to a limited extent, there is some scope for the UK Parliament to strike that balance for the UK as it sees fit, provided that it does not exceed the national margin of appreciation in doing so.[42] However, such an approach risks arriving—albeit by a more circuitous route—at the same problems as those identified in the previous paragraph. Even if a domestic Bill of Rights were to succeed in articulating the balance between individual rights and the public interest consistently with contemporary ECtHR

[33] Op cit n 1.
[34] Op cit n 1 at 61.
[35] An alternative to this would be a programme of education to make individuals and public bodies more aware of the implications of existing human rights law: see op cit n 12 at 41 – 2.
[36] This would sit uncomfortably with the Leader of the Opposition's view that such a Bill of Rights should be entrenched: see op cit n 1.
[37] See n 5 above.
[38] Op cit n 1 at 60–1.
[39] Media statement, op cit n 1.
[40] *LC v Secretary of State for the Home Department* (appeal number IA/13107/2006, decision promulgated on 17 August 2007). In fact, the case was decided principally under European Community law, although the Tribunal (at paras 97-103 of its decision) also considered the position under the HRA, concluding that "the Secretary of State has not shown that the breach of the Article 8 right to family life that would be occasioned by the appellant's removal to Italy would be proportionate".
[41] Article 17 ECHR.
[42] The ECtHR has indicated a willingness to concede a measure of discretion—or "margin of appreciation"—to states in certain contexts. Ovey and White, The European Convention on Human Rights (Oxford 2006) at 233 explain that this is of relevance "both in considering the scope of a State's choices when interfering with a right protected by Articles 8–11, and in considering the steps which a State must take to guarantee the rights protected for individuals within their jurisdiction".

jurisprudence, there is no guarantee that a detailed legislative elaboration of that balance would remain compatible with the Court's case law, bearing in mind that it regards the ECHR as a "living instrument" the interpretation of which is susceptible to change.[43]

Conclusions

Our conclusions can be briefly stated. Unless the UK chooses to withdraw from the ECHR—which itself would be fraught with difficulty, and is not a step we favour—any British Bill of Rights ought, as a matter of legal policy, to give effect to the Convention rights and permit British courts to apply those rights in a manner which is compatible, subject to any margin of appreciation, with the jurisprudence of the ECtHR. To this extent, a Bill of Rights would, in essence, need to do what the HRA currently accomplishes. Any attempt to define the relevant rights in terms different from those of the ECHR may be problematic for the reasons advanced above, although a domestic Bill of Rights could legitimately protect a range of rights wider than that recognised by the ECHR provided that new (or expanded) domestic rights did not encroach upon existing Convention rights.

Professor Trevor Allan.

Dr Mark Elliott.

Professor David Feldman.

Professor Christopher Forsyth.

Dr Stephanie Palmer.

Dr Amanda Perreau-Saussine.

Mr Jake Rowbottom.

Professor Sir David Williams.

29 August 2007

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6. Memorandum from the Children's Rights Alliance for England

About CRAE

The Children's Rights Alliance for England ("CRAE") is an alliance of over 380 voluntary and statutory organisations committed to the full implementation of the United Nations Convention on the Rights of the Child ("CRC").

Our mission is to transform the lives and status of children[i] in England by lobbying for laws and policies to be fully compliant with children's human rights, monitoring Government action on implementing the CRC and other human rights instruments, and disseminating children's rights information to the public.

Our response to this inquiry focuses on the crucial importance of a British Bill of Rights which addresses children's distinct need for rights protection by incorporating the CRC.

Incorporation of the CRC—Overview

We very much welcomed the 2002–03 examination by the Joint Committee on Human Rights ("JCHR") of the Concluding Observations made by the UN Committee on the Rights of the Child in October 2002 on the UK Government's 1999 periodic report.

We submitted written and oral evidence to that inquiry, and welcomed your expression of support for incorporation of the Convention into UK law in your Tenth Report of that session. Your comments followed the UN Committee's recommendation in its 2002 Concluding Observations for full incorporation of the CRC into UK law.[ii]

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[43] *Tyrer v United Kingdom* (1979–80) 2 EHRR 1 at 10.

Responding to comments made by the then Minister for Children and Young People that the Government was "not looking to incorporate the Convention or, indeed, individual elements of it" and that it "is really framed, virtually all of it, in very aspirational language and not in the sort of language that seems easy to put into primary legislation . . .",[iii] the JCHR stated:

> ". . . We do not accept that the goal of incorporation of the Convention into UK law is unrealisable. We believe the Government should be careful not to dismiss all the provisions of the Convention on the Rights of the Child as purely 'aspirational' and . . . we firmly believe that children will be better protected by incorporation of at least some of the rights, principles and provisions of the Convention into UK law.
>
> In view of the general importance of this issue, we intend to examine further the possibilities for incorporation of the CRC and other unincorporated human rights instruments. We believe that the assent of Parliament to these rights and principles, which could be secured by incorporation, would be a positive step towards enlarging and reinforcing the 'culture of respect for human rights' which we wish to see in the UK, as well as enhancing their democratic legitimacy".[iv]

We welcomed the above comments, including your commitment to examine incorporation further. The Government's response indicated a willingness to consider the merits of incorporation:

> ". . . we look forward to seeing practical suggestions for how this might be achieved".[v]

Less than six months after the JCHR's report, the All-Party Parliamentary Group for Primary Care and Public Health issued a report on children's policy that advocated full incorporation of the CRC. This group of MPs and Peers argued that incorporation "would provide a means for children, young people and their advocates to challenge any failures to consider their needs or respect their rights within the British courts".[vi]

We would also draw your attention to the UN Committee's "general measures general comment",[vii] quoted in response to question 2(f) below, in which practical suggestions for the full incorporation of the CRC are set out. It seems highly likely that the UN Committee will make similar recommendations to the UK Government following its forthcoming examination in autumn 2008.

We believe incorporation of the CRC is long overdue, and that a British Bill of Rights that enhances current UK rights protection would create an ideal opportunity for incorporation of the CRC in order to address the distinct needs of children. We urge the JCHR to develop its position in this light.

We would welcome the opportunity to expand upon our submissions in oral evidence, as we did in the JCHR's earlier inquiry into the CRC.

1. Is a British Bill of Rights Needed?

(a) *Do you think there should be a British Bill of Rights? Please explain the reasons for your view?*

The development of a British Bill of Rights presents a unique and very welcome opportunity for increasing the protection of children's fundamental rights and freedoms by incorporating them into UK law in the strongest possible way—entrenched, so that they cannot be undone by future governments, and enforceable by UK courts.

It is 16 years since the CRC was ratified by the UK. However, there is a continuing and unacceptable failure by the UK Government to uphold the rights and freedoms contained within it, and to withdraw the reservations it has made in relation to child immigrants and children in detention. Despite an increasing political commitment to children, there is continuing resistance to a rights-based approach. Courts are not making sufficient use of the CRC in their decision-making, and many children, parents and professionals are unaware of the Convention's existence.

We are deeply concerned about current media and political hostility to UK human rights legislation, particularly as it relates to children. Within the human rights community itself, concerns have been raised by some that the Human Rights Act 1998 ("HRA") has not had enough time to bed down, and that efforts should be focused on championing the HRA before embarking on a discussion about a Bill of Rights which may be dominated by media and political pressure to weaken the protection currently provided by the HRA. We understand these concerns but believe the opportunity should be seized to strengthen the human rights of everyone living in Britain, especially children.

Concerns about the potential dilution of existing justiciable human rights are to some extent borne out by the Government's proposal, in its recent Green Paper The Governance of Britain for a "Bill of Rights and Duties" and its focus on citizenship. The Government proposes, for example, that young people may be required to undergo "citizenship ceremonies" upon reaching 18 years, implying that under 18 year olds are not citizens.

We are fundamentally opposed to this proposal and seek a British Bill of Rights giving rights protection that is not contingent on compliance with responsibilities, and is available to all from birth, regardless of immigration status.

The process of creating a British Bill of Rights presents the opportunity for a wide-ranging, well-informed and positive public debate on human rights.

(b) *What would be the purpose of a British Bill of Rights?*

The creation of a British Bill of Rights that incorporates the CRC is crucial to provide adequate protection to children's rights in the UK. While the CRC has important influence, the UK's 11 million children currently have no mechanism to enforce their rights under this treaty. Many of those rights go beyond protection provided by the HRA and at common law which, in any event, are not entrenched rights and are of limited effect (the Courts do not presently have the power to strike down incompatible legislation).

Incorporating the CRC into a British Bill of Rights would give children entrenched, inalienable and enforceable rights, with the potential to effect real change for the better. As with other British residents, these rights would belong to the child, rather than be reliant upon their circumstances or the setting they are in. Children are especially vulnerable to their rights being dependent upon their circumstances rather than belonging to them, be they at home, school, looked after by the state or in custody or immigration detention. For example, children have full legal protection from corporal punishment in school, in care and in health settings but not in the family home and, since the recent changes to secure training centre rules,[viii] not in all custodial settings. The right to participate is embedded in health, social care and local government legislation but not in education. Children in care have rights in relation to family contact that children detained in custody do not. A Bill of Rights would make children's rights portable—travelling with them at all times.

(c) *What would a British Bill of Rights add to the protection for human rights already provided by the Human Rights Act?*

The HRA provides some protection to children's rights as its provisions apply to children and adults equally. However, it fails to address many of children's distinctive needs. Further, it does not adequately protect individuals" social, economic or cultural rights.

As well as providing "mainstream" protection for the rights of children together with adults (as in the HRA), a British Bill of Rights must provide distinct protection for children's rights by incorporating the CRC. To the extent that the Convention's provisions overlap with those of the HRA,[ix] children's rights should be "levelled up" in the Bill of Rights, to provide the maximum protection.

The CRC confirms that children are people with an equal right to that of adults to express their views and be heard. Lacking the right to vote, children merit special attention to their right to participate in other ways in the democratic process.[x] Increasing weight has been given by the UK Government to children's right to participate in decision-making on matters that affect them, through Every Child Matters and other initiatives, as well as through legislation. A British Bill of Rights incorporating the CRC would elevate children's right to participate in decision-making as being central to our national values.

Children's vulnerability and crucial stage of development also mean that they need distinct rights protection, which is why they have their own human rights treaty. The CRC grants children a comprehensive set of economic, social, cultural and civil and political rights. Adopted by the UN in November 1989, many of the rights in the CRC are transposed from other human rights instruments but the treaty was tailor-made for children and introduces distinctive human rights necessary to ensure for the world's two billion children a childhood characterised by dignity, respect and maximum fulfillment.

The UN Committee on the Rights of the Child has selected four articles in the CRC as general principles: article 2, which guarantees all children all the rights in the treaty without discrimination; article 3, which requires that children's best interests be a primary consideration in all actions concerning them; article 6, the child's right to life and maximum development; and article 12, children's right to express their views and have these views given due weight in all matters affecting them, having regard to their age and maturity. In all, there are more than 40 substantive rights in the Convention, which the UN Committee on the Rights of the Child has grouped together (stressing the rights are indivisible) as general measures of implementation, definition of the child, general principles, civil rights and freedoms, basic health and welfare, education, culture and leisure and special measures of protection.

The potential is also there for a positive shift in the public's understanding of rights culture as it relates to children, although the method of introduction of the Bill of Rights, and education about its effect, would be crucial to ensuring this.

2. What Should be in a British Bill of Rights?

(a) *If there were to be a British Bill of Rights, what rights and freedoms should it contain?*

A British Bill of Rights should build on the HRA by incorporating the CRC and its Optional Protocols in full, as well as all other treaties the UK has ratified (see below).[xi] To the extent that the Convention's provisions overlap with those of the HRA, protection for children's rights should be "levelled up" in the Bill of Rights to provide maximum protection (see above and Appendix 1). Further, the organic development of human rights means that, for example, the UN Convention on the Rights of Persons with Disabilities, which opened for signature in March 2007, is in many respects a superior treaty for disabled children than the CRC. The UN Committee on the Rights of the Child, with its concluding observations, general

comments and discussion days, has extensively developed the interpretation of most aspects of children's rights in the CRC and this must be reflected in the British Bill of Rights. Some rights in UK legislation, such as protection from discrimination on the grounds of sexual orientation are not explicit in the CRC (though article 2 provides this protection in its reference to "other status").

There is a strong case for many (if not most) of the CRC rights and freedoms, once incorporated, to become non-derogable rights. This would mean, in practice, that these rights would be much more difficult for Parliament to amend, and they would be subject to even greater protection during any public consultation. Similar arguments can be made for other groups in society who experience high levels of rights violations, for example disabled people.

(b) *Should it include any rights currently recognized as common law rights and freedoms, and if so which?*

With the above provisos, the CRC contains the most comprehensive set of children's rights and we consider it to be the best source of content for children's rights and freedoms in a British Bill of Rights.

(c) *Should it include any rights and freedoms currently contained only in legislation, such as rights not to be discriminated against, of data protection and freedom of information, and if so which?*

We want all of children's rights and freedoms in the CRC to be incorporated in a British Bill of Rights. This would include, and improve for children, the three examples of domestic legislation cited by the JCHR.

(d) *Should it include social and economic rights, such as health and education, and if so which?*

The inclusion of social and economic rights in a British Bill of Rights is essential for the creation of a more equal and just society. The incorporation of the CRC will provide the UK's children with enforceable socio-economic rights relating to matters such as their health and welfare, social security and standard of living. Children are at a unique and crucial stage of development and particularly vulnerable to the damaging effects of inequality.

The ways in which inequality manifests itself for children in the UK today are too many and wide-ranging to cover adequately in this paper. By way of example:

- Figures released by the Department for Work and Pensions in March 2007 show that in 2005–06 3.8 million children in the UK lived in poverty.[xii]
- A consultation paper published by the Department for Communities and Local Government in 2006 estimates that there are between 350,000 and 410,000 families with dependent children in England living in overcrowded conditions.[xiii] High rates of overcrowding persist among lone parent families.[xiv]
- The Local Government Association has reported that local councils and charities are picking up the pieces of families refused help from the Social Fund in order to avoid children going into care as a result of destitution.[xv] One hundred children in England started to be looked after in the year ending 31 March 2006 because of poverty: this is unacceptable in a rich country like ours.[xvi]
- Health inequalities are growing. In a Parliamentary answer (October 2006), Health Minister Caroline Flint MP explained that the gap in life expectancy for babies under one year had increased by 6% between families on lower incomes ("routine and manual" groups) and average income families between the periods 1997–99 and 2002–04.[xvii]
- A British Medical Association report shows that children from poorer families are at risk of developing mental health problems and that mental health disorders are on the increase for children and young people.[xviii]

We seek an open, national debate on the inclusion of socio-economic rights in a British Bill of Rights, and believe that this could be of particular benefit to children. Indeed, we think this would greatly assist the End Child Poverty campaign, which has cross-party support.

While concerns are sometimes raised as to the justiciability of socio-economic rights, and their impact on Parliamentary sovereignty in public spending decisions, many modern national human rights instruments have incorporated socio-economic rights, including nine CEE states (Belarus, Croatia, Czech Republic, Moldova, Poland, Romania, Russia, Slovakia and Ukraine).

(e) *Should it include rights and freedoms currently contained in international treaties but not yet part of our law, and if so which?*

We want all of the international treaties and Optional Protocols that the UK has ratified to be incorporated into the British Bill of Rights.

The incorporation of the CRC is critical for children. Already ratified by the UK together with most countries in the world, the CRC presents the most universally recognised standards for children's rights. Article 4 of the Convention requires the UK to "undertake all appropriate legislative, administrative, and other measures for the implementation" of the Convention.

While the Government's recent Green Paper The Governance of Britain acknowledges the crucial importance of the ECHR and HRA, it fails to mention any other international treaty, including the CRC. However, the Government has previously indicated its willingness to consider incorporation of the Convention (see above) and it may find it easier to include so-called "aspirational" language in a Bill of Rights than in a conventional Act of Parliament.

The JCHR has previously recommended incorporation of "at least some" of the CRC into domestic law, and we urge the Committee to develop its position in line with the UN Committee's repeated recommendations for full incorporation, as well as those of the APPG for Primary Care and Public Health (see above).

Methods of Incorporation

The general principles of the CRC as well as other distinct rights for children could be expressed within the Bill of Rights in a dedicated children's section. Alternatively, the Convention could be incorporated by a single provision making reference to it (the approach adopted by Norway when it amended its Human Rights Act). A further possibility would be for both these methods to be used together—this is our current preference. The "incorporation plus" method reflects the approach being advocated by children's rights organisations for Northern Ireland's Bill of Rights. As described above, the incorporation process must accommodate the developing nature of human rights and, in relation to the CRC, the UN Committee of the Rights of the Child's "jurisprudence".

South Africa is a good example of a Bill of Rights that protects children generally but also specifically: article 28 of its Bill of Rights grants children additional rights relating to name and nationality, family life and alternative care, adequate standard of living and health and social care, protection from maltreatment and exploitation, juvenile justice and armed conflict. Significantly, it requires that the child's best interests be accorded paramount importance in every matter concerning the child.

Why the CRC must be Incorporated

The CRC can and should be used in judicial decision making to a greater degree than presently occurs. However, it will always be of limited effect until it is incorporated into our domestic law.

The Declaration of the Rights of the Child was adopted by the League of Nations in 1924. This set out for the first time adult obligations towards children: its preamble urged, "mankind owes to the child the best that it has to give". Nearly 80 years later, Gordon Brown, as Chancellor of the Exchequer, announced:

> "Our country's future lies with the hopes, dreams and potential of our children".[xix]

The CRC is the second most widely ratified international treaty[xx] and the most far-reaching and comprehensive of all human rights treaties. Just after the UN voted to adopt the Convention in 1989 the then head of UNICEF said at a press conference in New York:

> "For children, [the CRC] is the Magna Carta. To get one common doctrine is a near miracle in its own right … It creates a new international norm".[xxi]

Some years later, Nelson Mandela described the Convention as:

> "that luminous living document that enshrines the rights of every child without exception to a life of dignity and self-fulfillment".[xxii]

At the UN General Assembly Special Session on Children, in May 2002, member states emphasised the centrality of human rights and the CRC in particular in transforming children's lives. The "World Fit for Children" outcomes document declared:

> "We reaffirm our obligation to take action to promote and protect the rights of each child . . . We are determined to respect the dignity and to secure the well-being of all children. We acknowledge that the Convention on the Rights of the Child. . . and its Optional Protocols contain a compehensive set of international legal standards for the protection and well-being of children. We also recognise the importance of other international instruments relevant for children".[xxiii]

John Denham MP, then Minister for Young People, in his speech to the UN General Assembly explained:

> "The way to ensure children's well-being is to take full account of their rights".[xxiv]

The CRC is not enforceable in its own right though it can—and should—inform judicial decision-making. There are some very good examples of UK courts applying the CRC, for example in Mabon and Mabon, which concerned the rights of three brothers to have separate representation in proceedings relating to their parents' separation and who the boys should live with. Lord Justice Thorpe considered the obligations under article 8 of the ECHR and article 12 of the CRC. He ruled that the boys should have separate representation, emphasizing that:

> "Unless we in this jurisdiction are to fall out of step with similar societies as they safeguard Article 12 [of the CRC] rights, we must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare".[xxv]

The House of Lords applied many aspects of the CRC when considering a case relating to the prohibition of corporal punishment in private schools. Corporal punishment was outlawed in state schools in 1987 but it was not until 1998 that it was prohibited in private schools.

In the *Williamson* case, a group of Christian head teachers, teachers and parents of four independent schools argued that the corporal punishment of children is central to their religious beliefs and to prohibit this in private schools is to violate their right to practise their religion under article 9 of the ECHR. The law lords found the ban on corporal punishment to be legitimate and proportionate. Citing the obligations of articles 3, 37, 19 and 28, Baroness Hale of Richmond used the CRC as her framework. She explained:.

> ". . . the state has a positive obligation to protect children from inhuman or degrading punishment which violates their rights under article 3 [of the ECHR]. But prohibiting only such punishment as would violate their rights under article 3 (or possibly article 8) would bring difficult problems of definition, demarcation and enforcement. It would not meet the authoritative international view of what the CRC requires".[xxvi.]

In the Axon case, a mother of five children claimed that Department of Health guidance for doctors and other health professionals on advice and treatment to young people under 16 on contraception, sexual and reproductive health was unlawful. Mr Justice Silber referred to articles 12, 16 and 18 of the CRC and stated:

> "It is appropriate to bear in mind that the ECHR attaches great value to the rights of children . . . Furthermore the ratification by the United Kingdom of the United Nations Convention on the Rights of the Child (UNC) in November 1989 was significant as showing a desire to give children greater rights. The ECHR and the UNC show why the duty of confidence owed by a medical professional to a competent young person is a high one, and which therefore should not be overridden except for a very powerful reason. In my view, although family factors are significant and cogent, they should not override the duty of confidentiality owed to the child".[xxvii]

Clearly, when the courts apply the CRC there can be significant gains for affected children. Yet, too few cases concerning children make use of the CRC, despite the very strong ECHR Chamber judgement in the Sahin case:

> "The human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child".[xxviii]

If the CRC largely remains locked out of the courtroom, children themselves are not far behind. Of almost 430 HRA cases analysed by the Human Rights Research Project at Doughty Street Chambers, children initiated less than 20.[xxix] This by no means reflects a positive picture of children's human rights in Britain today. UNICEF reported this year that the UK ranks overall bottom of 21 industrialised countries for children's well being.xxx In 2002, the UN Committee on the Rights of the Child examined the UK and made more than 80 recommendations for improvements in law, policy and practice.[xxxi]

The UN Committee criticised the lack of UK Government engagement with even the concept of children's rights and urged a national implementation plan for the CRC, together with the creation of an independent human rights institution for children, compatible with the Paris Principles, in each of the four jurisdictions of the UK.

In some areas of policy, the UN Committee's observations were justifiably harsh—in relation to the very high level of child poverty and inequalities in education and health, lack of legal protection from violence in the home, the treatment of children in trouble with the law and the discriminatory treatment of asylum-seekers and Roma and Gypsy Traveller children.

The UN Committee welcomed the HRA whilst stressing the broader obligations of the CRC. Since 2002, other human rights bodies—the Committee against Torture, the European Social Rights Committee, the Council of Europe's Human Rights Commissioner and the JCHR itself—have criticised the UK's children's human rights record. Government policy is not the only target: the practices of public authorities have also been put under the spotlight.

The Audit Commission found that 58% of public bodies had "not adopted a strategy for human rights" and had "no clear corporate approach" and concluded, "in many local authorities the Act has not left the desk of the lawyers". It reported that 73% of the health trusts surveyed were "not taking any action".[xxxii]

Introducing his first annual report, Professor Sir Al Aynsley-Green, Children's Commissioner for England, said, "It is incredible that in one of the world's richest economies children and young people continue to live in poverty, suffer abuse and be denied their human rights".[xxxiii] CRAE, in its preparations for the next UK examination by the UN Committee on the Rights of the Child, has identified at least 40 examples of outright breaches of the CRC.[xxxiv]

An opinion poll carried out for the Northern Ireland Human Rights Commission found overwhelming support for "special rights for children"[xxxv] in that country's emerging Bill of Rights, and similar support can be anticipated across the rest of Britain.

(f) *Should it include rights and freedoms contained in other countries" bills of rights and if so which?*

It is clear from international comparisons that any obstacles to the incorporation of the CRC in the UK can be overcome.

In November 2003, the UN Committee on the Rights of the Child published guidance on what states must do to ensure the full implementation of the CRC (its "general measures general comment"). Paragraphs 18 to 23 explore the different legislative measures that can be taken to realise children's human rights, from the specific inclusion of children and/or children's rights in national constitutions to amendments to sectoral laws relating to juvenile justice, education, health and so on. On incorporation the Committee says:.

> "The Committee welcomes the incorporation of the Convention into domestic law, which is the traditional approach to the implementation of international human rights instruments in some but not all States. Incorporation should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice. Incorporation by itself does not avoid the need to ensure that all relevant domestic law, including any local or customary law, is brought into compliance with the Convention. In case of any conflict in legislation, predominance should always be given to the Convention, in the light of article 27 of the Vienna Convention on the Law of Treaties. Where a State delegates powers to legislate to federated regional or territorial governments, it must also require these subsidiary governments to legislate within the framework of the Convention and to ensure effective implementation".[xxxvi]

A study carried out by the UNICEF Innocenti Research Centrexxxvii examined the status of the CRC in 29 countries[xxxviii] and reported that:

> ". . . the CRC has been incorporated directly into the national law of most of the countries whose legislation was reviewed… Many of the new constitutions adopted by countries in Central and Eastern Europe over the last 15 years contain relatively generous provisions concerning the rights of the child. In contrast, only two of the Western European countries covered by this study [Belgium and Iceland] have amended their constitutions to enhance the rights of the child… All of the countries have made substantial changes in their legislation to better protect the rights of children".[xxxix]

Further useful international comparative research and analysis was reported in another Innocenti study, Laying the Foundation for Children's Rights: An independent study of some key legal and institutional aspects of the impact of the Convention on the Rights of the Child.[xl]

(g) *Should it include responsibilities as well as rights and freedoms, and if so, what sorts?*

CRAE recognises the important role the state has in encouraging positive behaviour. However, we are deeply concerned at the erosion of civil liberties and welfare rights which has occurred in the UK over the last 10 years, particularly under the auspices of tackling terrorism and anti-social behaviour. We strongly oppose the erosion of fundamental rights and freedoms as a response to these challenges.

We believe that respect for the fundamental rights and freedoms of individuals continue to be crucial to the long-term well-being of UK society as a whole. This is particularly important for children, who are at a crucial stage of development and potential, and for whom it is essential to understand that they have innate rights that do not have to be "earned".[xli] Linking rights to responsibilities is especially dangerous for children, because it exposes them to disproportionately harmful penalties and does not recognise their particular needs. For example, benefit reduction and the eviction of families where an individual has behaved in an anti-social way and not accepted support will inevitably have a serious and disproportionately harmful impact on any children in that family, as the JCHR has pointed out.[xlii] The recent announcement by the Secretary of State for Children that ASBOs are a sign of policy failure in relation to children is a prime example of the (unintended) consequences of the rights and responsibilities discourse being played out in some of our most deprived communities.[xliii] To avoid harm to children (and others who are vulnerable) responsibilities would have to be so tightly qualified in any Bill of Rights to make them meaningless.

Helping to create and sustain a socially responsible society is a vital task of any government but, in this context, we would oppose any linking between individual rights and responsibilities, particularly any move to make rights contingent upon individuals' compliance with duties or obligations. We believe this would be seriously detrimental to UK society and would disproportionately harm children and other vulnerable people.

3. What Should be the Relationship with the Human Rights Act and International Human Rights Obligations?

(a) *What should be the relationship between a British Bill of Rights and the Human Rights Act?*

The rights and freedoms protected by the HRA should be afforded the same status as those covered by the British Bill of Rights. The best solution may be to incorporate them all within one instrument, "levelling up" rights protection.

(b) *What should be the relationship between a British Bill of Rights and the ECHR/other international human rights treaties?*

The British Bill of Rights should draw on relevant international human rights treaties for its content—including the CRC. There should be a commitment to review and "evolve" the Bill in recognition of the organic nature of human rights. We note there have been 27 amendments to the Irish constitution since 1939, the most recent, in June 2004, to accord citizenship rights to children of non-nationals. A further amendment to entrench some other CRC rights is now being considered, following the commitment given by the Irish Children's Minister after the 2006 state party examination by the UN Committee on the Rights of the Child. The Ombudsman for Children in Ireland has criticised the proposals as being "a restricted application of the principles of the CRC to the position of children in the Constitution. They do not appear to meet the specific recommendations of the UN Committee on the Rights of the Child set out in its Concluding Observations on Ireland's Second Report issued in September 2006".[xliv]

(c) *Are there any other relevant issues not covered by the above questions?*

The Prime Minister has urged widespread public consultation on a Bill of Rights,[xlv] and children must be part of this. Article 42 of the CRC requires the state to widely disseminate information about children's rights to the public, including children and parents, and professionals. Clearly, if this is to be an informed debate, public consultation must be coupled with measures to raise awareness of the UK's existing human rights obligations. We welcome the work of the Ministry of Justice in tackling misinformation about the HRA but urge much stronger, consistent and cross-Government activity to tackle the smear tactics of our largely human rights hostile media.

As in Northern Ireland, debates about protecting children's rights must extend to implementation and enforceability, inviting creative solutions to deal with the particular challenges faced by children in claiming and defending their rights. In this respect alone, children's own views and reflections could lead us towards a truly progressive Bill of Rights.

4. What Should be the Impact of a British Bill of Rights on the Relationship Between the Executive, Parliament and the Courts?

The Courts must have at least the same powers in relation to the Bill of Rights as they hold in relation to the HRA. However, particularly given recent threats by the opposition to abolish the HRA, we believe it is crucial that the Bill of Rights has a more entrenched status.

We recognise the need to choose a model that fits the UK, and this will clearly depend to a large extent on the outcome of current proposals for constitutional reform.

As part of the consultation on constitutional reforms, we therefore seek an open, well-informed national debate as to the appropriate model for the British Bill of Rights. This should include consideration of a US-style system,[xlvi] under which the Courts would have the ultimate power to interpret legislation and would be entitled to strike down laws which were incompatible with the Bill of Rights, and comparison with systems such as that in Canada where the "not-withstanding" clause allows Parliamentary sovereignty and judicial supremacy to co-exist. The aim must be to obtain consensus on a model that would allow the British Bill of Rights to be a meaningful and powerful instrument for positive change for all, especially for the most vulnerable.

References

i We use the CRC definition of children—any person below the age of 18 years.

ii Para. 9, Concluding Observations of the UN Committee on the Rights of the Child: United Kingdom, October 2002.

iii Evidence given to the Joint Committee on Human Rights, Tenth Report, 2002–03, Question 51.

iv Joint Committee on Human Rights, Tenth Report, 2002–03, paras. 22 − 23.

v Joint Committee on Human Rights (November 2003) Government's Response to the Committee's Tenth Report of Session 2002-03 on the UN Convention on the Rights of the Child.

vi All Party Parliamentary Group for Primary Care and Public Health (November 2003) Do we need a more conventional nanny? Report of an inquiry into effective cross-departmental policy on children's issues.

vii Committee on the Rights of the Child General Comment No 5 (2003) General Measures of Implementation of The Convention on the Rights of the Child (Arts 4, 42 And 44, Para 6).

viii The Secure Training Centre (Amendment) Rules 2007 (SI 2007/1709) permit restraint to be used for the purposes of good order and discipline. Nose, rib and thumb "distraction" techniques have been approved for use in these centres—these methods involve the infliction of severe pain on children.

ix See Appendix 1 for a list of overlapping provisions.

x CRAE is a founder member of the Votes at 16 campaign and strongly believes the franchise should be extended to 16 and 17 year-olds. This has wide-ranging support and was a key recommendation of the Power Inquiry chaired by Baroness Helena Kennedy and reporting in February 2006.

xi See Appendix 2 for a summary of the CRC's provisions.

xii Department for Work and Pensions (2007) Households below average income.

xiii Department for Communities and Local Government (2006) Tackling overcrowding in England: A discussion paper.

xiv *Ibid.*

xv Local Government Association (January 2006) The Social Fund and local government.

xvi Children looked after by local authorities, year ending 31 March 2006. Table 10 children looked after by category of need.

xvii Written answer to Parliamentary question, 25 October 2006: Column 1962W.

xviii British Medical Association (2006) Child and adolescent mental health—a guide for healthcare professionals.

xix Chancellor of the Exchequer to the Children And Young People's Unit conference at the Design Centre, Islington, 15 November 2001.

xx There are now 192 States Parties to the CRC. The CRC is surpassed by only the Geneva (1949) Conventions, which achieved universality in August 2006.

xxi "Assembly adopts new Convention . . . for the children of the world. . .—international Convention on the Rights of the Child', UN Chronicle, March 1990.

xxii Statement by Nelson Mandela on Building a Global Partnership for Children Johannesburg, 6 May 2000.

xxiii A World Fit for Children, adopted by the UN General Assembly at the twenty-seventh special session, 10 May 2002.

xxiv Statement by John Denham MP, Minister for children and young people to the United Nations General Assembly special session on children, New York, 10 May 2002.

xxv [2005] EWCA CIV 634.

xxvi [2005] UKHL 15.

xxvii [2006] EWHC 37 (Administrative).

xxviii Extract from Sahin v Germany, Chamber judgment of the ECtHR, 8 July 2003.

xxix O'Brien, C and Arkinstall, J (2002) Human Rights Act Project Database of Cases under the Human Rights Act 1998: http://www.doughtystreet.co.uk/hrarp/summary/index.cfm

xxx UNICEF Innocenti Research Centre (2007) Child well-being in rich countries. A comprehensive assessment of the lives and well-being of children and adolescents in the economically advanced nations.

xxxi Committee on The Rights of the Child Thirty-first session Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain & Northern Ireland, 4 October 2002.

xxxii Audit Commission (2003) Human rights: improving public service delivery.

xxxiii http://www.childrenscommissioner.org/annualreport.htm

xxxiv Independent on Sunday "What happened to childhood? How we are failing the young", 10 June 2007

xxxv Northern Ireland Human Rights Commission (October 2001) A Bill of Rights for Northern Ireland. Summary of opinion poll findings.

xxxvi Committee on the Rights of the Child General Comment No 5 (2003) General Measures of Implementation of The Convention on the Rights of the Child (Arts 4, 42 And 44, Para. 6).

xxxvii The General Measures of the Convention on the Rights of the Child: The Process in Europe and Central Asia (UNICEF Innocenti Research Centre, 2006).

xxxviii Austria, Belarus, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, the Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Iceland, Italy, Latvia, Lithuania, Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, Slovenia, Spain, Sweden, the Former Republic of Macedonia, Ukraine and the UK.

xxxix The General Measures of the Convention on the Rights of the Child: The Process in Europe and Central Asia (UNICEF Innocenti Research Centre, 2006).

xl UNICEF Innocenti Research Centre, 2005.

xli See: How the Bill of Rights can best protect and promote the rights of children and young people in Northern Ireland: Learning from international law and the experience of other jurisdictions (Dr Ursula Kilkelly, November 2005), para 10.

xlii JCHR (January 2007) Legislative Scrutiny: First Progress Report. Second Report of Session 2006–07 Report, together with formal minutes and appendices.

xliii Ed Balls quoted in Daily Mirror article "Asbos are a failure" 27 July 2007.

xliv Ombudsman for Children (March 2007) Report to the Oireachtas on the Twenty-Eighth Amendment of the Constitution Bill 2007.

xlv House of Commons debate on Constitutional Reform, Hansard, 3 July 2007: Column 815.

xlvi This would involve the new UK Supreme Court which is due to start work in October 2009.

30 August 2007

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7. Letter from Carolyne Willow, National Co-ordinator, Children's Rights Alliance for England

I was very pleased to have the opportunity to give oral evidence on the Bill of Rights, and would like to offer some further information relating to any qualifications on the enjoyment of economic and social rights that be introduced into a British Bill of Rights.

As I indicated in the session, we are aware of the provisions in the South African constitution relating to the right to health care, food, water and social security that permit the State to take reasonable measures within available resources, to achieve the progressive realisation of these rights.

I said in the session that there is no fully equivalent provision in article 24 of the Convention on the Rights of the Child, dealing with the child's right to health and health care. I regret that I omitted to mention that in article 27, dealing with the child's right to an adequate standard of living, there is reference to States Parties acting "in accordance with national conditions and within their means". However, these qualifications must be seen against the overarching requirement in article 4 that, in relation to economic, social and cultural rights, "States Parties shall undertake such measures to the maximum extent of their available resources". UNICEF considers it is "doubtful" whether the qualifications in article 27 dilute the requirements of article 4.[44]

I hope the inquiry is going well, and very much look forward to reading the Committee's report.

24 January 2008

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8. Memorandum from Committee on the Administration of Justice

The Committee on the Administration of Justice (CAJ) is an independent cross community group affiliated to the International Federation of Human Rights, working to uphold and promote human rights in Northern Ireland. Since its establishment in 1981, the organisation has campaigned for a Bill of Rights for Northern Ireland, and attached is a list of the key submissions and publications we have issued on this topic over that period. Of particular interest to the Joint Committee on Human Rights may be a publication we issued in 2003 which brought together in one place the stance taken by the various Northern Ireland political parties over the years regarding the value of developing a Bill of Rights ("A Bill of Rights: through

[44] UNICEF (2002) Implementation Handbook for the Convention on the Rights of the Child.

the years—the view of political parties").[45] The publication reaffirms our long-held belief that there has often been wide cross-community and cross-party support in Northern Ireland for some kind of "constitutionalising" of rights.

As the Joint Committee is no doubt aware, the Good Friday/Belfast Agreement (1998) determined that there should be a consultation process, undertaken by the to-be-established Northern Ireland Human Rights Commission (NIHRC), "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". The NIHRC subsequently engaged in an extended period of consultation but for a number of reasons was unable to conclude its work and submit advice to the Secretary of State.

The Northern Ireland move towards developing a Bill of Rights has been "intermittent" with short bursts of great energy and long periods of apparent inactivity. Disregarding the years of debate throughout the height of the conflict, the recent chronology can be summed up as follows:

- April 1998—Commitment in Good Friday/Belfast Agreement to discussion of a Bill of Rights.
- April 2000—Bill of Rights consultation process formally launched by NIHRC with numerous seminars, working groups, public events, hundreds of detailed written submissions.
- September 2001—NIHRC issues and consults on first draft text.
- 2002/2003—NIHRC resignations, some associated with BoR; stasis.
- April 2003—Commitment in Joint Declaration to establish a Round Table Forum of political parties and civil society representatives to move the Bill of Rights ahead.
- October 2006—St Andrews Agreement establishes the Forum.
- December 2006—inaugural meeting of Forum.
- March 2007—Chair appointed and Forum work begins.

One of the reasons for the failure to progress the debate about a Bill of Rights for Northern Ireland was the lack of active engagement by political parties in the process, and the belief by all concerned that this was a pre-requisite to a successful product.

Accordingly, in 2003 the Joint Declaration by the British and Irish governments determined that the former would work with political parties to facilitate the response to the proposal for a "round table forum on the Bill of Rights, involving the parties and civic society. . . it is envisaged that the round table forum will have an independent chair and its own secretariat, will be as inclusive as possible of Assembly parties and civic society, will appropriately involve the Human Rights Commission, mindful of its statutory role, and will be adequately supported and resourced". As outlined above, this Forum was eventually established in December 2006 and is currently in full session, with its work expected to be completed by March 2007.

Despite this very protracted discussion, CAJ believes that Northern Ireland is now very firmly on the road of deliberating and hopefully agreeing on a Bill of Rights that would both reflect its particular needs and reflect best international practice to date. If this is the case, Northern Ireland can expect to have a draft text available for consideration here—and indeed potentially also for study in Britain—in a period of six to nine months.

Therefore, rather than respond to the detailed questions raised in your Call for Evidence (which have been discussed and debated in the Northern Ireland context, and which are addressed in much of the background material noted in attachment),[46] CAJ would like to address in this short note the specific issue of the TIMING of a debate about a British Bill of Rights. In particular, we would urge the JCHR to consider deferring serious debate until the experiences to date of Northern Ireland can be put to best use.

CAJ's remit is limited to Northern Ireland, and as such we have no strong views about the best way forward in terms of the protection of rights in neighbouring jurisdictions. At the same time, we believe that the particular experiences of Northern Ireland in terms of human rights violations, and the deep roots for this debate here, are likely to mean that IF we secure a Bill of Rights, it is likely to be a valuable role-model (in process and content) for elsewhere.

Accordingly, CAJ would caution the Joint Committee on Human Rights in its timing of any move to launch a debate of a British Bill of Rights. Clearly there are genuinely positive experiences that could be transferred between the different legal jurisdictions if the Bill of Rights Forum proves successful. However, the primary concern for CAJ in any immediate move to debate of a British Bill of Rights is the negative impact this could have on the discussion in Northern Ireland. Politicians across the unionist and nationalist divide are currently engaged in developing a shared vision of how we might live in a human rights respecting society. If there is a proposal for a British Bill of Rights, it might polarise people again along political lines, and will certainly risk having all the work to date put on the back-burner until the British product can be assessed. At the very time that nationalist and unionist politicians are being encouraged to see a Bill of Rights as something that could unite rather than divide them, it could become divisive once again.

[45] Not published here.
[46] Annex A.

On the other hand, in the best case scenario where Northern Ireland arrives at a consensus text, subscribed to by its very diverse political parties and civic society, the agreed text would be an invaluable starting point for debate in Britain about its own needs. A lot of the work would already have been done, and lots of lessons would be available as to how, and how not, to go about developing a British/UK equivalent.

In the worst case scenario where the effort in Northern Ireland is unsuccessful, and the Bill of Rights Forum does not arrive at consensus, or for some other reason the eventual conclusions are considered unsatisfactory, the debate about a British/UK Bill of Rights will only have been delayed by a relatively few months. In the intervening period, some useful lessons may have been learnt from the failures here, and could be put to good effect in the process of securing a better British product.

Accordingly, we believe that from a purely British campaigning point of view, there would be value in allowing the work here to proceed apace, with a view to benefiting from the final product. We have not consulted directly with our British colleagues, so would hesitate to get too drawn into the nitty-gritty details of the debate without learning of their views. However, our—admittedly inexpert—view of the current debate in Britain is that there is limited public support for such an endeavour, and that some of the impetus (though obviously not all) derives from those who may want to restrict rather than extend the protection of rights (moving away from incorporation of the European Convention etc).

In sum, therefore CAJ urges the Joint Committee on Human Rights to:

— Welcome the current debate about a Bill of Rights for Northern Ireland and the importance of moving ahead quickly;

— Endorse the fact that it could set an important role model for Britain, or the UK generally, and indicate a desire to follow the debate closely; and

— Agree that the launch of a wider public debate about a British Bill of Rights would be best done in summer/autumn 2008 when the lessons and experience of Northern Ireland will prove an invaluable reference point.

We hope you find these views useful in your deliberations, and we are happy to provide any further information you might require.

20 August 2007

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9. Memorandum from Professor Brice Dickson, Professor of International and Comparative Law, Queen's University Belfast

Is a British Bill of Rights needed?

Yes, because the Human Rights Act is not as comprehensive a human rights document as Britain requires in this day and age. A more comprehensive Bill of Rights would emphasise that Britain is committed to upholding human rights not just because the Council of Europe requires it to protect "Convention rights" but also because the people of Britain want to live in a society which places a high value on adherence to a wider range of human rights standards. Although such a Bill of Rights would not be fully entrenched (it could not be in a legal system that is built upon the doctrine of Parliamentary sovereignty) it would be a clear and (politically) hard-to-repeal statement of some the fundamental values underpinning the governance of the nation. It would help to promote solidarity and a concept of Britishness.

What should be in a British Bill of Rights?

In short, the Bill should set out a list of the rights which the UK Parliament feels are fundamental to the British way of life. Many of these are already listed in the Human Rights Act 1998 (ie the "Convention rights" set out in Schedule 1 to that Act), so the Bill should embrace that list. As well, the list should include the right to fair administration, the right to jury trial for serious offences, the right to health care, the right to a home for those who are not intentionally homeless, the right to an adequate standard of living, the right not to be discriminated against on the grounds of disability, sexual orientation, genetic features, possession of a criminal conviction or residence, and the right to privacy.

Most of these "non-Convention rights" are already recognized to some extent by the legal systems of England and Wales and Scotland, but the Bill of Rights is an opportunity to ensure that the rights are better protected and given a status equivalent to the Convention rights protected by the Human Rights Act. They would not, of course, be unlimited rights: limitations could either be written into each relevant section in the Bill of Rights or (preferably) set out in a more generally worded section on limitations. It is totally anomalous that rights which happen to have been protected by the European Convention in 1950 should be given a higher legal status in the UK today than other rights which are every bit as fundamental to the British way of life in the early part of the 21st century. It is not enough that some of these non-Convention

rights are to some extent protected by case law or by legislation. They need to be strengthened by giving them a status equivalent to Convention rights—so that senior judges can declare legislation which violates those rights to be incompatible with the Bill of Rights.

Should the British Bill of Rights include responsibilities?

I see no difficulty in including some responsibilities in the Bill of Rights, provided it is made clear that a person's entitlement to rights is not dependent on his or her having fulfilled these responsibilities. The Convention rights in the Human Rights Act 1998 already include some responsibilities—see the wording of Articles 8 (2), 9 (2), 10 (2), 11(2) and 17, and also Article 1 of Protocol 1. Article 17 of the European Convention is often forgotten: it effectively says that no State, group or person has the right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set out earlier in the Convention, or at limiting them to a greater extent than the Convention allows. This is tantamount to asserting that everyone has the responsibility to recognize the rights and freedoms of others (including those which Articles 8 (2), 9 (2), 10 (2) and 11 (2) accept can limit other individuals' rights).

Responsibilities, or duties, are already mentioned in some modern Bills of Rights, such as the African Charter on Human and People's Rights of 1981 and the Victorian Charter of Rights and Responsibilities of 2006. India amended its Constitution in 1976 by inserting a new section 51A listing more than 10 duties of every citizen of India. These include the duties to "renounce practices derogatory to the dignity of women", "to safeguard public property and abjure violence", and "to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement'. Inserting some responsibilities in a British Bill of Rights could help to sell the notion of a Bill of Rights to a sceptical public and the provisions would not have to go beyond existing legal duties (eg to respect the law, to recognise the value in having a diverse and pluralistic society, and to treat people with dignity). It would be better if the Bill of Rights did not say what the sanctions are for not meeting one's responsibilities: this should be left to existing law.

There are precedents for such hortatory provisions within UK law. For example, section 1 of the Constitutional Reform Act 2005 asserts that there is an "existing constitutional principle of the rule of law', while section 3 (1) states that the Lord Chancellor, other Ministers and everyone who has responsibility for matters relating to the judiciary or otherwise to the administration of justice "must uphold the continued independence of the judiciary".

What should be the relationship with the Human Rights Act and international human rights obligations?

The Human Rights Act 1998 has served the country well to date. Allowing senior judges to declare primary legislation to be incompatible with Convention rights, rather than giving them the power to declare such legislation to be invalid, is a good compromise between the doctrine of absolute Parliamentary sovereignty and a US-style doctrine of constitutional judicial review. A British Bill of Rights should therefore build on the Human Rights Act by placing the additional rights within the same implementation framework as is used for Convention rights, although, of course, there would not necessarily be the option of lodging an application in Strasbourg if the UK courts did not uphold the interpretation of the additional right argued for by a litigant.

To the extent that the British Bill of Rights is to include rights already recognized by international human rights treaties which the UK has ratified, care should be taken to ensure that the wording of the right in the Bill is not inconsistent with the wording of the right in the treaty. This would apply, for example, to children's rights, the rights of persons with disabilities, and economic and social rights.

What should be the impact of a British Bill of Rights on the relationship between the executive, Parliament and the courts?

As noted above, I am firmly of the view that the new Bill of Rights should build upon the model of the Human Rights Act, which means that the relationship between the executive, Parliament and the courts created by that Act should be perpetuated by the British Bill of Rights. The new Bill should contain a provision comparable to section 19 of the Human Rights Act, whereby a Minister in charge of a Bill in either House of Parliament should have to make a statement to that House on the extent to which the proposed Bill is compatible with the Bill of Rights. Section 10 of the 1998 Act (power to take remedial action) should also be mirrored in the new Bill of Rights.

The relevance of the Northern Ireland dimension to this debate

Having chaired the Northern Ireland Human Rights Commission for its first six years (1999 to 2005) I have been centrally involved in trying to devise a "Bill of Rights for Northern Ireland" (a document which the Belfast (Good Friday) Agreement contemplates but does not actually require). During that time many of the issues now arising for consideration concerning a British Bill of Rights had to be confronted in a Northern Ireland context. I am convinced that the best way forward, both in Northern Ireland and in the

rest of the United Kingdom, is to build upon the Human Rights Act, especially its implementation mechanisms. Those mechanisms have allowed a conversation to develop between the executive, Parliament and the judges as to how best to reform the legal system to ensure that human rights are appropriately protected. The Northern Ireland Human Rights Commission, in 2004 and 2005, stated that it was in favour of a Bill of Rights for Northern Ireland which would take the form of a Bill of Rights for Northern Ireland Act, passed at Westminster after being approved by the Northern Ireland Assembly and by a referendum in Northern Ireland. The Bill of Rights for Northern Ireland Act would include a provision stating that "The Convention rights as set out in the Human Rights Act 1998 shall be considered a part of the Bill of Rights for Northern Ireland". I am not sure if this is still the thinking of the Northern Ireland Human Rights Commission—the Commission may well be officially agnostic on the point at present because none of the current members of the Commission was a member at the time of the 2004 and 2005 statements and the Commission is in any event awaiting the recommendations of the Bill of Rights Forum in Northern Ireland, which is due to report to the Commission by the end of March 2008.

The suggestion that there should be a British Bill of Rights has complicated the debate in Northern Ireland. Does "British" embrace Northern Ireland or not? If yes, where does that leave the suggestion in the Belfast (Good Friday) Agreement that there could be a Bill of Rights just for Northern Ireland? If no, might this not alienate people of a unionist frame of mind in Northern Ireland, who could feel that somehow their Britishness was being compromised if they were given a Bill of Rights which was different from the one applying elsewhere in the United Kingdom and which, if the Belfast (Good Friday) Agreement is followed to the letter, was to be supplemented by a comparable human rights document in the Republic of Ireland? My own view is that there should be a Bill of Rights for the whole of the United Kingdom (just as the Human Rights Act applies throughout the United Kingdom) but that each separate legal system within the UK should then be free to devise an additional Bill of Rights going further than the national Bill of Rights has gone and dealing with particular matters that are of concern to that legal system. These additional Bills of Rights would best be enacted as Westminster legislation, thereby placing them beyond repeal or amendment by any devolved legislature.

7 January 2008

10. Memorandum from Democratic Audit

Introduction

Democratic Audit failed to notice that the Joint Committee on Human Rights had issued a call for evidence on proposals for a British Bill of Rights. We apologise for the lateness of this submission which we have kept short to facilitate the Committee's consideration.

Democratic Audit is a research organisation attached to the Human Rights Centre, University of Essex. Our primary function is to "audit" the quality of democracy and human rights in the United Kingdom against a democratic framework. This framework has been adopted by the inter-governmental International Institute for Democracy and Electoral Assistance (IDEA), and by the UNDP, governments, universities and civil society organisations in 24 countries around the world for the purpose of evaluating their democratic arrangements. Professor Paul Hunt, of the Department of Law, Essex, and the UN Rapporteur on the Right to Health, is chairman of the Audit Board; and Dr Todd Landman, of the government department at Essex, and head of the joint Essex-IDEA "State of Democracy" programme, is deputy chair.

1. *Is a British Bill of Rights needed?*

Yes. In our experience, the Human Rights Act has in practice been bedding down satisfactorily, except that both media and political comment have distorted public perceptions of its role. We also understand that research for the Equality and Human Rights has found that the idea of "human rights" is unpopular while there is public backing for the substance of the rights that the Act protects.

It is established that the real protection of human rights, or civil liberties, depends ultimately on having the support of the public. Civil society organisations can of course act to promote and protect human rights, but they do not have the purchase on public opinion sufficient to counter ill-informed and biased commentary in popular sections of the media.

The HRA was introduced almost by stealth. The then government shirked the task of explaining and popularising its contents, let alone consulting the public in advance and engaging their participation. Thus it never commanded sufficient popular support to withstand media campaigns and misrepresentations, nor the political view that it represents an alien curb on the UK's autonomy.

There is therefore in our view an urgent need to create an informed and involved public engagement in framing a "Bill of Rights" so that it commands popular support; and the use of the familiar title, "Bill of Rights", and what it stands for in the popular imagination should facilitate this engagement. Opinion polls

repeatedly show high levels of popular support for a "Bill of Rights". But it is important that there should be no dilution of present protections under the Act and that these protections should primarily be enforced in the British courts and not at Strasbourg.

The purpose of a British Bill of Rights would be two-fold; in the first instance to gain public support for such an instrument through inclusive and extensive consultation; and secondly, through free and deliberative debate in Parliament to consider and act upon the wishes of those consulted in respect of the rights and freedoms that such an instrument should protect. Any future Bill of Rights should be a genuinely popular document that entrenches certain principles and values that Parliament cannot alter and yet affords the democratically elected legislature a key role in establishing the rights it contains.

Democratic Audit has been "auditing" democracy in the UK since 1992 and has come to the conclusion, through three successive audits and a series of specific research reports, that the United Kingdom requires a written constitution. We therefore see an additional value in establishing a Bill of Rights as a major component of a written constitutional settlement in this country, especially if the measure were given a higher status than that of an ordinary statute.

Reservations

Democratic Audit has reservations about aspects of the government's approach. We are not sure how we should construe the addition of "British" to the rubric. We would be reassured if it is merely advanced as a way of giving an inclusive sense that the new measure is "owned" by the various publics and communities of the United Kingdom. However, we believe that it would be detrimental to social cohesion in this country if it becomes a signal of rejection of "European" or minority rights or values, and profoundly wrong if it in any way reduces the universality of human rights for non-citizens resident here.

Equally, the addition of "responsibilities" or "duties" to he putative title gives rise to concern. Once again, if this is a way of signalling the significance of responsibilities in the existing Act and the European Convention, then so be it. Better still, it could encourage government to spell out the state's responsibilities to citizens and residents. However, though vaguely, the intention seems to be to go beyond the responsibilities inherent in the approach of the HRA and in human rights instruments generally and to set out the duties of citizens to "society" or in effect to the state. How such duties will be enforced is quite unclear. As Professor Keith Ewing has recently asked, Will they be directly enforceable against those who owe the duty, and if so by whom? Ewing reviews some examples of citizens' duties to the state, the most striking of which are set out in Articles 39 to 69 of the 1997 USSR Constitution.

2. *What should be in a British Bill of Rights?*

A British Bill of Rights must obviously continue to protect the civil and political rights set out in the Human Rights Act and not seek to resile from any of them through qualifications. But there are ways in which it could go further:

(a) *Traditional and common law rights*

As JUSTICE suggests in *Informing the Debate,* the right of access to the courts could be made more robust, given the differences between continental and British legal systems, and this right ought also to give protection to the legal aid scheme that is being dangerously undermined. Trial by jury is an archetypal "British right" that is not fully protected under the European Convention's provisions for "fair trial". It is of course the case that the great majority of criminal cases are heard by magistrates without juries, but parliamentary and public opinion strongly support trial by jury in serious cases (see, for example, the Rowntree State of the Nation poll, 2006).

(b) *Social, economic and cultural rights*

Democratic Audit's framework for assessing the quality of democracy in any country includes include social and economic rights, such as to health, housing and education, on the grounds that they are integral to modern liberal and inclusive democracy. This framework has been adopted by the International Institute for Democracy and Electoral Assistance and two dozen nations around the world. Civil and political rights, the building blocks for democratic engagement, require the existence of social, economic and cultural protections to be workable. The UK government's position is that "all human rights are universal, indivisible, interdependent and interrelated", but alas, it is a position for export only.

It is increasingly recognised in this country that social and economic rights are vital to democratic well-being; the JCHR's report on compliance with the United Nations Covenant on Economic, Social and Cultural Rights made an important contribution to this growing recognition. We do not mean here to travel again on the roundabout of argument in the face of the government's intransigence on their incorporation into British law (see Unequal Britain, Politico's, 2006 for our full statement). But we do wish to make several comments:

1. A series of ICM polls for the Joseph Rowntree Reform Trust's State of the Nation have shown public support for the inclusion of social and economic rights in a Bill of Rights; and the experience of consultations in Northern Ireland on a Bill of Rights for the province has borne these indicative findings out in practice;
2. It is said that social and economic rights are not "justiciable", but this is evidently not the case:
   - Some social and economic rights are already guaranteed in the UK by EU laws and directives, with the European Court of Justice as the final arbiter; and a range of domestic statutes and the HRA itself provide limited protection to such rights in the public sphere;
   - Certain social and economic rights, especially those relating to trade union and workplace matters, do not engage major issues of provision (ie, state investment in education or housing) are not fully protected currently in the UK, although they are equally as "justiciable" as protected civil and political rights;
   - As under the UNCESCR doctrine of progressive realisation, employed in South Africa, the courts are not asked to issue immediate orders that would usurp the government's role, but instead pass judgment on the seriousness of government plans over time to provide for housing, education, health care, etc. This provision encourages the type of "dialogue" between the executive and courts that is developing slowly under the HRA; and
   - It is said that judges do not have the knowledge or expertise to rule on often complex and costly public programmes for housing, education, etc. The South African judge Albie Sachs has one answer to such arguments—that is, they are experts on human "dignity", the law and human rights; and they can of course develop judicial review to hear expert evidence.
3. It is argued that giving the courts the power to review and protect social and economic rights would replace the democratic rule of elected government with rule by unelected judges. This is a crude and wrong-headed argument. The point of giving people social and economic rights is to give them some power over public decisions that affect their lives. Our imperfect electoral and other arrangements tend to deny the majority of people any such power or influence. At best it may be said that the most vulnerable groups in our society—those who most need social and economic provision—have to rely upon the good will of the governing party at any one time. The recognition of social and economic rights may empower the judiciary, but more importantly, it would empower citizens, who may be in need of redress; or sufficient state provision, to use the courts to assert their rights to housing, education, health, care, etc; or simply to the basic necessities of life.
4. Debate about the effects of the HRA and its extension into social and economic rights concentrates almost wholly on what happens in the courts and in Parliament. The British Institute for Human Rights has demonstrated in practice that the HRA's provisions can be used outside the court-room to protect the dignity and rights of vulnerable people (see the BIHR report, The Human Rights Act—Changing Lives).
5. The right to a clean and healthy environment has become an increasingly important social and economic issue that affects not only the current population of the United Kingdom, but through the phenomenon of global warming and pollution, the citizens of nations around the world; and it is of course an issue that affects future generations as well as our own. France and South Africa are two nations that have given constitutional protection to the environment.

(c) *Children's rights*

The JCHR has already addressed the question of children's rights in a report on the UJN Convention on the Rights of the Child (CRC). The European Convention, and hence the HRA, and gave support for the CRC's incorporation into British law. As the JUSTICE report, cited above, states, the current legal framework in the UK fails to protect children's rights adequately.

(d) *Weaknesses in the HRA*

Judicial rulings have in part weakened the beneficial effects of the HRA. Two rulings are of particular significance and their negative effect could be remedied in any revision of the HRA. First, the law lords held in the case of Marper and LS, July 2004, that the inclusion of innocent people on the national DNA register does not violate their right to privacy, as the "interference" is "very modest indeed". The "interference" is made worse by the fact that an unspecified may be able to access the database over time. This is one aspect of privacy that is of far greater importance than media reports on the lives of the rich and famous. In our view the CHR ought to initiate a debate on how far Article 8 of the Convention is able to protect the privacy of the individual in relation to surveillance and data protection. Secondly, in Southern Cross Nursing Homes, June 2007, the law lords ruled that the Human Rights Act does not apply to private care homes in England and Wales, even when they are performing a public function. This ruling leaves unprotected large numbers of people requiring care who are placed by public authorities in private care homes.

Finally, there is the issue of derogation. Most bills of rights and international human rights instruments give executives the power to suspend certain human rights obligations in a national emergency. Such a time is also of course when civil liberties are most at risk. Most bills of rights therefore lay down strict conditions and safeguards in the derogation process. In the UK, the government can turn to its royal prerogative powers to derogate from its obligations under the European Convention without any form of parliamentary control, as it did in its derogation from Article 5, the right to liberty, after 9/11 (the only Council of Europe member state to have done so). The government's green paper, The Governance of Britain, recognises that this anachronistic hang-over from monarchical rule is in need of reform. A British Bill of Rights should strengthen protections against amendment of its provisions and set in place a parliamentary process for the acceptance or rejection of proposed derogations with clear rules for the conditions in which derogation may be permissible. But we also urge the JCHR to take up this issue in relation to the European Convention and Human Rights Act in any consultations about the royal prerogative.

13 March 2008

11. Memorandum from Jonathan Doyle

1. *Is a British Bill of Rights Needed?*

A bill to protect the rights of the citizen from the state is needed, as the gentleman's agreement between government and people is no longer working, as politics has changed over the past century, The respect the people in our government have for such informal arrangements has diminished, and will continue to do so in the future and we should act to safeguard those rights from further abuse by government. Constitutional change in Britain only ever happens just enough to solve the crisis of the moment laying down such rights now would pre-empt such a crisis and bring the UK into line with the rest of the free world.

The key reason for a bill of rights is to limit the sphere of interest over which the government can exercise power, reserving certain rights and freedoms for the citizen and recognising that it is the citizen not the government that is the source of sovereignty in a democracy.

The key difference between a Bill of Rights and the existing human rights act would not be in the content but the character, it should give the Judiciary the power to overturn laws that contravene it, thus giving priority to the liberty of the citizen rather than licence of the state.

2. *What should be in a British Bill of Rights?*

The bill of rights should first protect the citizen from the power of the state, and second guarantee those acts that are self regarding in nature from the inference of the state. In this way the rights contain would be negative rights, freedom from the state, requiring only the absence of action on the state's part, as opposed to positive rights such as healthcare or education which would require the state to take action. The reason such a bill should focus on our freedoms from government rather than on those which the state can provide, is three fold. First this bill should act as a shield from the power of the state and the inclusion of social and economic rights can weaken its effectiveness as such. On a practically level Freedom of Speech, Conscience and Assembly only requires the absence of action on the government's part. Whereas Education, Healthcare and Housing would require massive government action, especially to maintain equality to such rights, it is relatively easy to ensure that the residents of Plymouth enjoy the same free speech as the citizens of Newcastle, however it's another matter entirely to guarantee the same level of medical treatment. The scope of such right would open the government to many lawsuits simple because the quality was not universally uniform. This leads to the third reason; the inclusion positive rights would remove democratic choice since they would bind government to massive costs in perpetuate, whereas negative rights would protect the democratic system by limiting government action, positive ones would force policy on all parties regardless of their ideologically perspective, this country is a liberal democracy, that is at the core of our political values however if we are a social democracy also is to earlier to tell and the decision over such policies should remain within the democratic arena. There is however strong argument that social equality is vital to a fair democracy, particularly in regards to education since without it some will always have greater advantage than others. The statistics on Judges the majority of whom attend public school and went to university at Oxford or Cambridge is testament enough to this. The equal provision of such positive rights is simply unattainable in a capitalist economic as some will always have more resources to ensure their greater advantage. So you would be left with two options make it an unenforceable document of ideals or limit the scope of such rights to guarantee only a clearly defined minimum the complexities of which would lessen the impact of the Bill and prevent it from being future proof.

If you were to include positive rights the key document in my opinion to use as the source for drafting such rights would be the Beveridge report its five evils translate into what could be consider the five basic positive rights, health, housing, employment, education and economic security.

Many of the international documents on rights and those of other nations such as the constitutions of the USA and India are based on the British tradition. It is writers like Locke, Mill and Berlin that have shaped not only ours but the world's theory of rights. So many of those contain in both the bill of rights of others and in international law have their roots in this country. This does not mean we should disregard the elegance of the American Constitution or ignore the importance of the Universal Declaration, but the principles that they find to be self evident such as life, liberty and the pursuit of happiness are British principles already. One document I feel would be worth referring to would be the Atlantic Charter and the four freedoms it states are the birth right of all people, Freedom of Speech, Freedom of Worship, Freedom from Want, and Freedom from Fear. One aspect that could be taken from many countries practice but sadly no longer one of our is the requirement of warrants and reasonable suspicion for searches and arrests, in this country we demand greater efficiency from our public services when they fail to meet what is required, in the case of our polices and security services we do not we simple take more rights from the citizen to make their job easier, This would never be the case in other democratic countries. The rights and liberties of British citizen is scattered through a myriad of documents, from the Magna Carta to the Mansfield judgement, the English bill of rights to the Wilcock case. Two bills that are worth including are the Data Protection act and the Freedom of Information act since it is the government that should be accountable to the people not the reverse.

The essential freedoms that such a bill must remove from the grasp of government interference are Habeas Corpus, freedom from being coerce, tortured or killed by the government, Fair and speedy trial by a jury, the right to privacy from government intrusion including warrantless searches, arbitrary arrests, and blanket surveillance, never to have to make account of yourself and your actions to anyone other than a jury of your peers. These rights would limit the power of government, once this is done we must limit the scope of government. Essential to this are the absolute rights, to freedom of Speech, Conscience, Assemble and Association. As without these absolute rights you can not have democracy. As they protect the ability of the citizen to dissent from the decision carried out in there name. There are some qualified rights which are also essential such as freedom of movement the right to participate in the government, to vote in a secret ballot without fear, and to hold those elected officials to account. Lastly the most important facet to all these rights is equality, they can be no qualification placed upon any free person in order to exercise these rights, regardless of wealth race gender or sexual preference.

3. *What should be the relationship with the Human Rights Act and international human rights obligations?*

This bill should be the law of government limiting its action against any over who it exercises authority, so should apply to any person in this country. Britain liberal tradition has seen it as a refuge from those fleeing persecution for centuries a stalwart against oppression this bill should see to it that Britain remains as such, that those values we hold true are not the special reserve of the British but the preserve of all mankind. Protecting those seeking our protection in asylum as it does British citizens.

In international regards it should be a guide to our nation's actions and set a clear example of what liberal principles mean, to the rest of the world. So our conduct in warfare or in UN and NATO operations as in Iraq and Afghanistan, it should be illegal for a soldier to follow any order that breaches this Bill.

The Bill should supersede all previous legislation, so for simplicity sake in may be appropriate to include those rights that are in the current human rights act. As this bill should give British courts the power to overturn government legislation that does not comply with the bill it would no longer be necessary for the lengthy and costly ECHR appeals which has seen the British government become the most often judged against of any of the signatory nations.

4. *What should be the impact of a British Bill of Rights on the relationship between the executive, Parliament and the courts?*

The Bill should finally establish a separation of powers in this country, giving the Legislature greater power to hold the Executive to account, and the Judiciary finally given the power to guard against the worst excesses of both.

The main reason for such a bill is to protect the citizen from the state, since throughout human history it has been the state that has posed the biggest threat to the life and liberty of the individual. Such a bill would also remind government that sovereignty does not lie in the state but with the citizens.

30 August 2007

12. Memorandum from the Equality and Human Rights Commission

Does Britain Already Have a Bill of Rights?

1. Before considering the opportunities and challenges in formulating a bill of rights in the 21st century, it is helpful to reflect on the rich tapestry of Britain's constitutional arrangements. No consideration of this topic would be complete without reference to, at least, the Magna Carta, the 1689 Bill of Rights and the Human Rights Act 1998. Given this range of significant constitutional documents, it is appropriate to ask: does Britain already have a bill of rights? In answering this question, it is helpful to refer to the jurist Philip Alston, an internationally renowned bill of rights expert, who has outlined three common characteristics for a bill of rights:

- it provides protection for those human rights which are considered, at a given moment in history, to be of particular importance;
- it is binding upon governments and can only be overridden with significant difficulty; and
- it provides some form of redress in the event that violations occur.[47]

2. Applying these criteria in the UK, the Magna Carta and the 1689 Bill of Rights constitute bills of rights for the UK. These instruments continue to inform values and legal tradition even if they rarely provide a specific basis for litigation.

3. The modern law of rights in Britain is rooted in the United Nations Universal Declaration of Human Rights (UDHR) of 1948. The UDHR formed the basis for the European Convention on Human Rights (ECHR), which was adopted by the Member States of the Council of Europe in 1950.[48] The ECHR represented the first step for the detailed enforcement of many of the rights set out in the UDHR.

4. In 1966 the UK agreed to permit those alleging breaches by the UK state the right of individual petition to the European Court of Human Rights. At that moment, applying the Alston criteria, arguably the UK had effectively established a bill of rights, but it was off-shore.

5. Given that the enforcement of this bill of rights lay in the hands of judges in Strasbourg, it is not difficult to see why, by the end of the 20th century, it was recognised that there was a need to provide domestic remedy for a breach of these constitutional rights. The most recent public debate on whether Britain needed a bill of rights was in the context of the decision to incorporate the ECHR into British law and the Parliamentary debate that led to the Human Rights Act. That bill of rights debate was largely restricted to the need to create a British framework with the ECHR at its core. Nevertheless this facilitated the development of British jurisprudence on the EHCR and maintained parliamentary sovereignty. The then Home Secretary, Jack Straw MP, described the Human Rights Act as "the first Bill of Rights this country has seen for three centuries",[49] and it indeed meets the Alston criteria for a bill of rights.

6. The Human Rights Act is a meaningful and substantial bill of rights. The constitutional operation of the Act is generally regarded as a good model for any future British bill of rights. Parliamentary sovereignty is retained, while a dialogue about the legislation is permitted (as a result of the courts being able to make "declarations of incompatibility"). There is scope for consideration of the values of the ECHR, while also allowing British values and traditions to be recognised and protected in the interpretation of ECHR rights. It has been noted, however, that for a number of reasons the HRA has not been wholly embraced by the British public as their bill of rights.

The Governance of Britain Process, Including the 2008 Debate on a Further Bill of Rights

7. In July 2007, the UK Government announced a programme of constitutional renewal, addressing two specific issues: how should we hold power accountable; and how should we uphold and enhance the rights and responsibilities of the citizen.[50] A future public consultation on a British Bill of Rights and Duties was proposed in Chapter 4 of this Green Paper.[51]

8. That Green Paper notes that the Human Rights Act provides a "contemporary set of common values to which all our communities can subscribe" and provides the core basis for the protection of human rights in the UK. The Green Paper proposes that a bill of rights could "build upon the basic principles of the Human Rights Act", to "give people a clear idea of what we can expect from public authorities, and from each other, and a framework for giving practical effect to our common values".6[52]We support this starting point. A future bill of rights should build upon the significant constitutional changes introduced by the Human Rights Act, adopting this Act and its mechanisms as the minimum for affirming the constitutional protection of rights.

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[47] Promoting Human Rights through Bills of Rights, OUP, 1999, p10.
[48] The full name of the Covenant is the Convention for the Protection of Human Rights and Fundamental Freedoms, although it is commonly referred to the European Convention on Human Rights.
[49] Jack Straw MP, Speech to Institute for Public Policy Research, 13 January 2000.
[50] The Governance of Britain, July 2007, Cm 7170.
[51] Ibid, paras 204–10.
[52] Ibid, para 209–10.

9. We understand that the Green Paper on a bill of rights for Britain is likely to be published in early to mid 2008. The Lord Chancellor and Secretary of State for Justice, Jack Straw MP has discussed the purpose and content of this Green Paper in broad terms in two recent speeches.[53]

10. It has been recognised that the formulation of a bill of rights to complement the Human Rights Act will require extensive and wide consultation, including the development of broad consensus on the core values underpinning the bill of rights.[54]

Opportunities for Furthering the Protection of Human Rights and Equality

11. The public consultation on a further bill of rights is, in itself, a good opportunity to heighten public understanding and support for the protection of human rights, and an opportunity to continue to challenge some of the myths and misinformation which have persistently circulated around the Human Rights Act. We consider that this public debate, and the contribution which the Equality and Human Rights Commission can make to this debate, could mark a turning point in the perception and understanding of our legal framework for the protection of human rights.

12. The public consultation is also an opportunity to consider how we might continue to develop the protection of human rights and equality law. An area of particular interest to the Equality and Human Rights Commission is the introduction of a constitutional guarantee of the right to equality. Equality is recognised as the bedrock of a society built on fairness and respect, and it is a key principle of human rights law. Such a guarantee is found in bills of rights around the world, including countries like Canada, with whom we have much in common, as well as in numerous international and regional human rights conventions.

13. A constitutional guarantee of equality is an effective way of embedding the promotion of substantive equality in all functions of the State. As the Equalities Review 2007 reported, we have a long way to go in achieving equality of opportunity and attainment in British life, and efforts have to be significantly "stepped up" in the coming years if we are to make progress.[55] Structural barriers to equality have to be challenged, and anti-discrimination laws alone will not achieve this. The values which underpin a constitutional guarantee of equality include respect for the dignity of the individual, achieving equal opportunity and equal participation, and realising the significance and value of diversity within society. The creation of this guarantee will mean that the right to equality will be mainstreamed into government planning, policies and practices. We need ambitious and far-reaching measures such as these if we are to realise meaningful change.

14. In addition to a constitutional guarantee of equality, there are some additional issues which a future bill of rights could encompass. These include:

- Constitutional protection of the positive duty on public bodies to promote equality, and the creation of such a duty in respect of human rights, also accorded constitutional protection (implementing Article 1 of the ECHR).
- A commitment to adhering to minimum standards in international human rights law. The UK has shown a strong and longstanding commitment to the international human rights framework and has, over the past 60 years, signed and ratified the vast majority of human rights instruments. Enshrining this commitment in a bill of rights will ensure that these commitments continue to inform the protection of human rights domestically, for example, by requiring legislation to be read in a manner consistent with the UK's treaty obligations, in so far as is reasonably possible and in line with the purpose of the legislation.

15. There may also be scope for codifying a right to good administration in order to set out what individuals can expect in their everyday dealings with public authorities, for example by imposing some express obligations on public authorities to provide answers, to respond in time to requests, and to meet reasonable expectations of service delivery. This would be a significant contribution to a bill of rights for Britain, an appropriate emphasis on meaningful procedural justice. Encapsulating some of the principles of administrative law into an express constitutional right will increase public confidence in accessing public bodies and underscore the importance of continual improvement within public services.

16. Finally, we welcome a debate on possible mechanisms for promoting socio-economic rights in Britain. Jack Straw MP specifically addressed this issue in his speech on 21 January 2008,[56] noted that such rights already receive constitutional protection in a variety of ways. South Africa, Canada and India provide different models for protection of socio-economic rights which could be considered within the context of a public debate.

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[53] See Jack Straw MP, "Modernising the Magna Carta", Speech at George Washington University, Washington DC, 13 February 2008; and "Towards a Bill of Rights and Responsibility", Speech at JUSTICE/Guardian public debate, 21 January 2008.

[54] Note 4, para 213.

[55] "Freedom and Fairness: the final report of the Equalities Review", February 2007. The Equalities Review was commissioned by the (then) Prime Minister in February 2005 to investigate the causes of persistent discrimination and inequality in British society.

[56] See note 7 above.

Fundamental Principles to Guide the Bill of Rights Debate

17. In revisiting the bill of rights debate, it is important that developments are guided by the fundamental principles grounding our human rights legal framework, and that we maintain the legal protections already in place.

18. We emphasise the critical importance of the universality of human rights protection, which is at the core of the ECHR as well as all other international human rights instruments. It has been suggested that a bill of rights should spell out ". . . citizens' rights that British people can use in British courts".[57] This proposition conflicts with a fundamental principle of human rights standards, seeking to qualify every individual's entitlement to protection of their human rights, regardless of their citizenship status.

19. Another area of concern is a proposal of "reciprocity". We understand this to mean there should be a direct relationship between the rights to which an individual is entitled, and the responsibilities that an individual owes to his or her community and the State. We recognise that there may be real value in articulating responsibilities which an individual might owe to his or her community and the State and we discuss this in greater detail below. But we are seriously concerned by a proposal to make human rights protection conditional on an individual's conduct. The human rights framework is expressly designed to strike a balance between restrictions on rights in order to ensure the protection of the rights of others and society at large—not to restrict who is entitled to claim human rights protection. The right to a fair trial illustrates the issue. Even where a person is accused of the most appalling crime, we accept that that person is still entitled to a fair trial in the determination of that person's guilt or innocence prior to the imposition of an appropriately sufficient penalty.

20. Another difficulty in making responsibilities a qualifier on the content or availability of rights is the potential to impact on individuals who are unable to assume responsibilities, for reasons relating to an impairment or health condition or through lack of support. This is an issue of serious concern to the Commission, in respect of both our human rights and equality mandates.

21. For these reasons we recommend that the idea of responsibilities is addressed with clarity. Fairly and properly phrased, articulating responsibilities, as a discrete concept, could play a useful role in fostering a greater sense of greater social awareness, community cohesion and a culture of respect for others. The notion of responsibilities is embedded in international human rights law—the vast majority of human rights are not absolute, they are subject to respect for the rights of others and the public interest. There are a number of ways in which responsibilities could be given greater prominence in the context of a bill of rights, to complement individual rights and freedoms in articulating an overall set of societal values.

22. We note here that there may be a distinction between the language of "responsibilities" against the language of "duties", and we consider that the language of "duties" may imply legal obligation. For this reason, we prefer the language of "responsibilities".

23. The African Charter on Human and Peoples' Rights usefully illustrates the issue. The Charter contains both legally enforceable rights, as well as a series of non-enforceable social responsibilities which individuals owe to their family, their community and the State.[58] The Charter elevates core social values to the status of constitutional protection in their own right, without compromising the relationship between the individual and the State in respect of individual rights and freedoms. This is a model of how values of mutual respect can be expressed in a bill of rights.

24. We also consider that the creation of responsibilities can be viewed in a positive light, in respect of furthering the statutory duty imposed upon the Equality and Human Rights Commission to promote and encourage a society in which:

(a) people's ability to achieve their potential is not limited by prejudice or discrimination;

(b) there is respect for and protection of each individual's human rights;

(c) there is respect for the dignity and worth of each individual;

(d) each individual has an equal opportunity to participate in society; and

(e) there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.[59]

25. Turning to another issue of particular note, the Equality and Human Rights Commission is also concerned by the suggestion that the state should be able to take national security into account when considering the deportation of foreigners to countries where they may face torture or inhuman or degrading treatment. Article 3 of the ECHR prohibits torture or inhuman or degrading treatment or punishment. In contrast to the other provisions in the ECHR, Article 3 is cast in absolute terms, without exception or proviso. No derogations from Article 3 are permitted in times of war or other public emergencies, unlike in respect of other Articles. There are no circumstances in which torture or inhuman or degrading treatment can be performed in the interests of the State; and there is no balancing of the right against public interest.

[57] David Cameron MP, British Bill of Rights, Speech to Centre for Policy Studies, 26 June 2006.
[58] African Charter on Human and Peoples' Rights, Articles 27 – 29.
[59] Equality Act 2006, s 3.

26. The European Court of Human Rights (ECtHR) has specifically confirmed that where a proposed deportation runs a risk of ill-treatment which would violate Article 3, then the deportation must not proceed.[60] In a unanimous judgment in February 2008, the Grand Chamber of the ECtHR affirmed that the Article 3 prohibition in respect of the removal of individuals must remain unqualified.[61]

27. The UK Government has intervened in the forthcoming case of *Ramzy v The Netherlands* seeking a reconsideration of this principle by the ECtHR.[62] We note that the Joint Committee on Human Rights considers that the grounds of the Government's intervention "sit uneasily"[63] with the Government's statement that it does not wish to tamper with the absolute nature of the prohibition of torture, or deportation to face torture:

> . . . in arguing for deportations of terrorist suspects despite a real risk of torture on their return, [this] may send out a signal that the absolute prohibition on torture may in some circumstances be overruled by national security considerations. . ..
>
> . . . even if the Government were to succeed, the absolute prohibition on torture, and on expulsion to face a real risk of torture, would in any event remain binding on the Government under the Convention Against Torture, and any expulsion carried out despite a real risk of torture or inhuman or degrading treatment would be likely to breach these obligations.[64]

CONCLUSION

28. The Equality and Human Rights Commission has sought to identify and comment upon some of the key issues likely to arise in the public consultation on a future bill of rights for Britain. We welcome the Committee's initiative in fostering debate on this key issue and confirm our willingness to provide oral evidence to the Committee if called upon to do so.

20 March 2008

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13. Memorandum from Professor C A Gearty, Matrix and London School of Economics

1. *Is a British Bill of Rights needed?*

No. No such bill is required. The Human Rights Act works perfectly adequately within Britain's parliamentary system of government to guarantee freedoms and human rights to an appropriate extent. The international human rights framework rightly puts international obligations on the UK to secure compliance with these international human rights obligations. Such compliance is best achieved by a combination of executive enforcement and precisely targeted legislative action—it is not best achieved by a generalised bill of rights seeking to deliver such rights via a judicially enforceable code of rights. This is too abstract and question-begging to be of serious use. It also imposes too many quasi-executive (indeed quasi-legislative) tasks on the judicial branch, damaging its core mission (adjudication) while also at the same time creating an increased risk of politicisation.

On the other hand, if the British bill of rights is to be separate from the range of international human rights to which the UK is already committed, what is to be its content? How will such content be arrived at? Which forces in our culture will succeed in translating their political goals into rights and which will not? The very title of such a measure suggests a flight from universalism into a parochial measure, offering rights to the British but not others. While this may not be the intention of many of those arguing for a British bill of rights, there is a risk that this will be how the initiative is perceived. If this were to happen, the bill of rights would be very damaging to the universalism which is at the core of human rights. It might also cause the important safeguards in the current Human Rights Act to be diluted—without any compensation in the new Bill for such dilution.

The Human Rights Act offers a very well-judged compromise between the language of rights and the imperatives of democratic government. Its system of declarations of incompatibility allows judicial interventions in relation to legislation which nevertheless do not strike such legislation down. This is exactly as it should be. The system works well, as is evidenced by the Belmarsh detention case (A v Secretary of State for the Home Department [2004] UKHL 56).

The rights contained in the Human Rights Act frequently involve judgments as to the proportionality of proposed interferences with their substance. Very few of the rights in the Convention are absolute. The test of proportionality provides the means by which the interests of the community and the responsibilities of us all as members of the community can be weighed against the intrusion into rights which such interests and responsibilities are said to warrant. There are also additional aspects to the Convention system, which

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[60] *Chahal v United Kingdom* (1996) 23 EHRR 413.
[61] *Saadi v Italy*, judgment 28 February 2008, Application No. 37201/06.The UK Government intervened in this case.
[62] Application No. 25424/05. The UK Government advanced the same argument in its intervention in *Saadi v Italy*.
[63] Joint Committee on Human Rights, Report on the UN Convention Against Torture, 26 May 2006, para 24.
[64] Ibid, paras 26 – 7.

find expression in the Human Rights Act, which allow for emergency action and which permit defensive action against those who would destroy the whole system were they given the chance. The notion of responsibility is already weaved into the Human Rights Act in this way and requires no additional exposition. Indeed generalised qualifications to rights rooted in vague notions of "responsibility" would be subversive of the structure of the Act. Such pseudo-contractual approaches to rights are battering rams with which to undermine the universality of rights while seeming to preserve their essence

To say that the Human Rights Act is all the legislation on rights the UK needs is not to say that rights-talk is not important. Of course there is still scope for the reliance on broader rights in the course of parliamentary debate, rights drawn from the international human rights framework as well as rights deduced from the speaker's reflections on freedom and liberty. Such language belongs in the political sphere, underpinning calls for legislative action to realise rights in practice. It should not be made the basis of a wide-ranging and judicially enforceable bill of rights.

2. *What should be in a British Bill of Rights?*

See above. I do not think such a measure should be enacted.

3. What should be the relationship with the Human Rights Act and international human rights obligations?

It should be exactly as it is at present. International human rights law carries its own enforcement mechanisms via international (occasionally judicial/quasi-judicial) fora.

4. *What should be the impact of a British Bill of Rights on the relationship between the executive, Parliament and the courts?*

I am not sure about "should be" but "would be" would include: (i) dilution of parliamentary sovereignty; (ii) a move towards constitutional inflexibility, making the rights decisions of the drafters of any such bill difficult to override however long ago the drafting took place; and (iii) a shift in power away from the elected to the judicial branch of government, with more large-scale cases tackling issues of what are perceived presently to be policy matters: eg resource allocation; employment policy etc. What might also happen would be a move to differentiate between types of persons resident within Britain (eg British/non-British; EU/non-EU). While some distinctions along these lines are inevitable, the enactment of a document like this might introduce a hierarchy of rights-holders, with Britons at the top and others further down the pecking order. Such a hierarchy might even seep into the basic rights framework, affecting what we now think of as universals. This would greatly damage the equality of esteem of the person on which the idea of human rights hangs.

14 March 2008

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14. Memorandum from Carol Harlow, Emeritus Professor of Law, London School of Economics

1. *Is A British Bill of Rights Needed?*

Britain already has a Bill of Rights: the European Convention. To add something further would in all probability merely be confusing, especially as the European Union has approved a further text, which although not binding is likely to prove influential: the ill conceived and badly drafted Charter of Fundamental Rights and Freedoms (ECFR).

The main purpose of a specifically British Bill of Rights would be to provide "ownership" of the document, which would add something positive to the current debate about the nature of British citizenship. Since the content would be controversial (see below) the effects might, however, be less positive than anticipated.

A further important function for a British Bill of Rights would be to act as a defence against incursions by transnational jurisdictions. A previous Lord Chancellor once argued that the Strasbourg Court misunderstood and was unsympathetic towards the unwritten common law. The absence in the United Kingdom of a Bill of Rights at a time when the Convention was not incorporated created a suspicion that the United Kingdom did not recognise human rights. Steps were taken (of which arguably the Human Rights Act was one) to remedy this problem. This was a strong underlying argument for the Human Rights Act. A similar argument is mounted in respect of Luxembourg, to the effect that the German Constitutional Court, with firm footing in the widely respected Basic Law has been able to argue with the European Court of Justice and has advanced the cause of human rights (and German law) much more effectively than the British House of Lords, with only a tenuous foothold in an unwritten constitution and common law. A British Bill of Rights would in this way strengthen the position of the United Kingdom before international courts.

On the other hand, there is a very real danger in a proliferation of texts on human rights (and more especially of jurisdictions concerned to enhance their competence) that protection will be watered down because signatories and the judiciary will be able to "cherry pick" between the texts: see notably Dame Rosalyn Higgins "The United Nations: Some Questions of Integrity" (1989) 52 Modern Law Review 1. A similar argument in respect of the ECFR was advanced prior to acceptance by Professor Giorgio Gaja, an international lawyer of repute: G GAJA, "New Instruments and Institutions for Enhancing the Protection of Human Rights in Europe?" in P ALSTON (ed), The European Union and Human Rights, Oxford University Press, 1999.

If we were to add a further text to what we already have, the United Kingdom would be subject to the ICCR and specific UN conventions; the European Convention as implemented by the Human Rights Act and interpreted by the ECtHR and domestic courts; the ECFR as interpreted in binding judgements of the ECJ; and a British Bill of Rights as interpreted by our Supreme Court. There is considerable variance between the texts.

2. *What Should be the Content of a British Bill of Rights?*

This is very much a matter of opinion and is likely to provoke considerable controversy. There are two main bodies of opinion and two main fields of controversy:

(a) Economic and social rights:

Those who want to see greater protection of economic and social rights argue that these are the rights with which the public, when consulted by opinion polling, actually engages. A right to healthcare, for example, would be very widely supported, though arguably the constraints that such a right might impose would not be widely understood.

Opponents argue that such a move would, on the one hand, greatly curtail scope for political action by government and, on the other, bring judges more directly into policymaking. Several recent cases lend support to their argument, notably the Herceptin case (R(Rogers) v Swindon NHA [2006] EWCA Civ 392) and the Watts case in the Court of Justice (Case C-372/04 R(Yvonne Watts) v Bedford Primary Care Trust and Secretary of State for Health [2006] ECR I-4325), which is one of a line of cases imposing an obligation on Member States to pay in certain circumstances for citizens to travel for purposes of obtaining healthcare in other European Member States. Whether or not this is desirable is not the point; the point is whether or not the policy should be introduced by judges.

(b) Civil liberties, especially those traditional liberties recognised by the common law:

For many, the main objective of a British Bill of Rights should be to stop the erosion of "traditional" civil liberties, which they see as a feature of government in the era of supranational terrorism. It is widely felt that freedom from arrest, stop-and-search and detention without trial, freedom of association and expression of political opinion are not strongly enough protected by the unwritten common law and cannot be protected by Parliament in face of a determined executive. While the European Convention does cover much of this subject area, it is felt to give insufficient protection to non-citizens and where it does give protection, as in the widely publicised A cases: (A(FC) and others v Home Secretary [2004] UKHL 56; A(FC) and others v Home Secretary [2005] UKHL 75), Chahal v United Kingdom (1997) 23 EHRR 27 and the recent House of Lords decision on extra-territorial application of the Convention (Al-Skeini v Ministry of Defence [2007] UKHL 26), it is too easy for politicians to present the law as "foreign" interference with British policies and institutions. The very strong argument presented by Lord Hoffmann in the first two cases that the rights involved spring not only from the Convention but primarily from the common law is at the same time a strong argument for a British Bill of Rights as a more visible codification of common law rights. But what these rights actually amount to is less than clear. Many see the main objective of a British Bill of Rights as being both to "domesticate" this body of due process law and formulate it.

My personal opinion is that protection of the rights of suspects and the rights of the defence has been eroded rather than merely updated (as successive Home Secretaries suggest) and that further protection is necessary. I am less clear as to how this could best be done. As matters stand, it is easy to present the case for procedural due process rights first as a self-interested preoccupation of lawyers and secondly as something alien to British law imposed on us by Strasbourg. Protection would undoubtedly be enhanced if such rights could find their way into a British Bill of Rights. This step would, for example, have precluded ongoing arguments over the retention/abolition of jury trial and possibly have prevented statutory dilution of the common law "right to silence'. As argued later, however, I cannot see much scope for consensus on these issues.

On the other hand, there is much evidence that this area of civil liberties law is not particularly cherished by the public or the main political parties. Indeed, the present debate over a British Bill of Rights began with statements from both party leaders (Blair and Cameron) to the effect that a British Bill of Rights was necessary precisely to curtail these rights and more particularly to overturn the decision of the Strasbourg Court in Chahal. As was pointed out at the time, to cut down on the protections of the Convention would

mean either wide derogations (not necessarily easily achieved) or withdrawal from the Convention, with obvious negative repercussions on the reputation of the UK. This suggests that, on the one hand, it would be difficult to insert new and enhanced guarantees into a British Bill of Rights but, on the other, that the Convention rights are a useful "floor" with which it would be difficult to dispense. It might indeed be easier to upgrade due process rights via Strasbourg than through a British Bill of Rights.

Rights and freedoms contained in legislation, notably those to which the Committee makes reference such as freedom of information; data protection; and discrimination, should certainly find a place in a Bill of Rights. It has to be borne in mind, however, that we are not entirely free to regulate in these areas. Much anti-discrimination law, for example, comes from the European Union and has to be negotiated at that level.

We are also bound by the Data Protection Directive (Regulation No 45/2001/EC of the European Parliament and Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L/8, p.1) and about to be bound by the Prum Convention, which contains inadequate protections for data held on EU police and judicial databases, and the EU freedom of information legislation (Regulation EC 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission Documents, 2001 OJ L 145/43). We are only free to regulate these areas to the limited extent that we are permitted to take action by the Commission and Court of Justice (see, eg, Case C-105/03 Criminal Proceedings against Pupino [2005] ECR I-5285.) there is a very strong case for topping up protection and access to information rights through a British Bill of Rights. Competence in the areas is shared; accountability for policy-making is limited; and the Court of Justice has limited jurisdiction. A British Bill of Rights would certainly help to underwrite the rights of British citizens in the sensitive matters of data protection and due process in criminal trials.

We should, however, realise that much of our most progressive legislation, such as the Abortion Act, Race Relations Acts or Equal Opportunities legislation, might not have been possible in the context of a Bill of Rights: compare for example, the protracted battles fought over abortion and the complexity of the case law in the United States Supreme Court; or the negative attitude to abortion law reform shown by the German Constitutional Court. These examples do not suggest that "rights" are "better" protected under a Bill of Rights though they do raise the perennial question "whose rights?" They merely demonstrate a transfer of power in each case from a representative and reforming legislature to "unelected judges'.

I would like to make specific reference to international treaties. To many it seems intolerable that the state should set its name to treaties that it is prepared not properly to implement or even to violate (arguments set out cogently by Philippe Sands in Lawless World). There is, however, an equally strong argument that international treaties have an important normative function. They set standards to which peoples aspire even when they cannot yet be reached. It is not always appropriate therefore to crystallise them as, or grant them the status of, rights. There is too a danger of trivialisation through over-inclusiveness: "when everyone is somebody, then no one's anybody'. There is also some evidence to suggest that, where treaties contain provisions making them legally enforceable, states tend to opt out of these procedural provisions or fail altogether to ratify. Domesticating treaty obligations by giving them the status of "rights" might in the end prove counter-productive, especially for classes of person seeking entry to protected status (eg, in the area of discrimination, older persons).

In sum, I should regret a change from a "dualist" legal system or any provision such as Article 55 of the French Constitution, which incorporates international law directly into the national legal order. Thought needs to be given as to when the provisions of international treaties are incorporated into the domestic legal system. It follows that a domestic Bill of Rights would, like other UK legislation, take precedence in domestic courts over international treaties other than the Convention, for which the Human Rights Act makes special arrangements.

3. *Constitutional Relationships*

Although in theory a Bill of Rights strengthens the hand of the judiciary against the executive, in practice much depends on culture and the relative power of the two institutions. Whether the judges possess a "strike down" power is also a significant factor (see, eg, per Lord Steyn in Jackson v Attorney General [2005] UKHL 56). This is certainly the Canadian experience.

In the British constitution, the primacy of parliamentary legislation necessarily raises the question of entrenchment, the legal niceties of which are too complex to deal with in this short response. Assuming, however, that a Bill of Rights could be entrenched, would this really be desirable? Serious problems arise with updating entrenched Bills of Rights—such as the argument in the United States over "gun law". (See T Macklem, "Entrenching Bills of Rights" (2006) 26 Oxford Journal of Legal Studies 107).

I have already referred to the argument that the European Convention is "outdated"; it is certainly very weak in Article 14, which deals with anti-discrimination. Changing the Convention would not be easy; topping it up through the medium of domestic law is much easier as we can see from the experience of anti-discrimination legislation, easily amended to take inside (eg) religious discrimination or with abortion law to take on board medical progress. To put this differently, the common law method combines with parliamentary sovereignty to make law much easier to update. The argument of those who favour an

entrenched or semi-entrenched Bill of Rights is, of course, precisely that rights may be swept away too easily, as they have been recently in a series of criminal justice and public order measures; to put this differently, updating is not always what it seems. Which risk can more safely be taken is largely a matter of opinion. (Consider the debate between Lord Lester of Herne Hill and Professor Keith Ewing: K Ewing, "The Futility of the Human Rights Act" [2004] Public Law 829; A. Lester, "The Utility of the Human Rights Act: A Reply to Keith Ewing" [2005] PL 249).

What appears to be emerging in the common law countries of Australia, New Zealand and the United Kingdom is a more nuanced position in which legislature, courts and administration all feel obligations and join in the attempt to strike appropriate balances between individual human rights protection and interests of the collectivity. A useful academic literature on the subject is beginning to emerge, discussing the respective roles of the institutions and, in particular, the strengthened role of parliamentary committees, particularly the Joint Committee and the House of Commons and Lords Constitutional Committees. (See: D Nicol, "Law and Politics after the Human Rights Act" [2006] Public Law 722; D. Feldman, "The Impact of Human Rights on the UK Legislative Process', (2004) 25 Statute Law Review 91; J Hiebert, "Parliamentary Bills of Rights: An Alternative Model?" (2006) 69 Modern Law Review 7 and "Interpreting a Bill of Rights: The Importance of Legislative Rights Review" (2005) 35 British Journal of Political Studies 235 and "A Hybrid-Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia's Model of Parliamentary Scrutiny" (1998) 26 Federal Law Review 115; C. Evans and S. Evans, "Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights" [2006] Public Law 785. Danny Nicol has argued that Parliament, arguably the most representative forum for the discussion of human rights, deserves its own "voice" independent from government. Arguably, recent institutional changes, including the emergence of new Select Committees is bringing about this effect. The number of committees that now scrutinise draft legislation with human rights in mind is increasing.

This "dialogue model" of human rights is the one which I am firmly convinced best fits common law countries. We have a powerful media and civil society organisations are already able to join in the media debate and by giving evidence to select committees. It is very desirable that new machinery should be set in place to encourage ordinary people to join in, if only electronically, through "blogs" and so on (see Report of PASC Public Participation: Issues and Innovations 6th Report of 2000/2001, HC 373). The taking of evidence from the public by parliamentary general committees is another step forward.

4. *The Human Rights Act and other rights texts, including a British Bill of Rights*

As indicated earlier, the primary purpose of a Bill of Rights would be to make the rights more visible and allow them to be "owned.".

An alternative worth considering is to bring the substantive rights protected into the text of the Human Rights Act. This simple change would make them more visible and allow a greater sense of "ownership" to be developed. However, since any attempt to make such a change would almost certainly bring into issue the text of the Convention, often argued to be old-fashioned, outdated and overly weighted towards civil liberties, it may be wiser to let sleeping dogs lie. Change might just as easily provide an opportunity to weaken the protection of civil liberties as strengthen it. Arguments formulated in terms of human rights protection are already being advanced for weakening the protection of unpopular minorities, notably prisoners, suspects, Roma gypsies. To open the question of substantive rights would give these arguments a new forum in which they might easily prevail. This could, of course, be seen as an advantage, as a full debate could occur of issues that at present crop up on an ad hoc basis, and may even pass entirely un-debated or even unnoticed. The outcome might then be seen as representing a negotiated consensus to which for the time being governments might feel obliged to adhere.

More fundamentally, what should that forum be? The present legislation originated in the manifesto of a political party and followed the normal pattern of parliamentary debate and legislation. Whether this would have been thought sufficient had substantive rights been in issue is very questionable: the current dispute, short-circuited by Downing Street, over a referendum for an EU Constitution or Constitutional Treaty suggests otherwise. Would a document drafted by a parliamentary committee, such as the Human rights committee, or a group of committees, possess sufficient legitimacy, even if it/they could agree? A Royal Commission is another and more magisterial traditional answer, giving an impression of greater objectivity. Royal Commissions have been used to handle similar issues, as for example, the closely related issue of police powers. We should, however, bear in mind that the Philips Commission on Criminal Procedure, Cmnd. 8092, 1981, did not manage to achieve consensus.

The matter is now complicated by devolution. Human rights are not, of course, a devolved issue, a division of functions that perhaps remains largely uncontroversial so long as the matter is governed by the Convention and our shared heritage in that respect. Were this to change and more particularly if a proposed new text were to penetrate deeply into economic and social rights, devolved areas would be involved. A British Bill of Rights might then become Bills of Rights for Scotland, Wales and England and Northern Ireland; there is of course already a move for devolution coming from the Northern Ireland Human Rights Commission, interested in promoting a regional Bill of Rights. Whether further regionalisation is desirable and what the relationship of regional texts could be with the ECHR and Strasbourg courts are very difficult and delicate questions.

In conclusion, I believe that the Human Rights Act is working relatively well and should be left to "bed in". It is by and large an adequate basis for the protection of human rights in what is inherently a "political constitution'. There are of course grave weaknesses but where the weaknesses lie is a contentious issue. In recent years, it has been the areas of pre-trial and trial procedure, sentencing and treatment of prisoners and asylum-seekers that have stimulated the loudest calls for reform: but whether the liberties in issue are to be maintained, extended, shored up or curtailed are hotly contested and very political questions. Human rights are not written in stone. They are as controversial as any other area of politics and have, if they are to be truly effective, to be fought for in the same way as all political and social rights. In our political system, discussion tends to crystallise around projected laws or focus on high visibility court cases. Whether a Bill of Rights would change this situation is, I feel, unlikely.

20 June 2007

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15. Memorandum from Tom Hickman, Blackstone Chambers

1. In response to the Joint Committee's request for evidence, I have briefly set out some thoughts in this subject below in the hope that they may be of some interest. I have also enclosed a short paper written for the LSE Student Law Journal Obiter in Michaelmas 2006.

2. Although this is an issue of great interest to me, I was prompted to respond to the request by the nature of the questions that the Committee has chosen to pose. As a reflection of informed thinking on a Bill of Rights they are not unsurprising and they are the sort of questions that other bodies have asked themselves when addressing this issue. Nonetheless, I find such a focus concerning, and in particular the focus on (i) the legal effects and benefits of a Bill of Rights (as contrasted with the Human Rights Act 1998 ("HRA")), such as what rights (and duties) should be included, and (ii) the mechanics of a Bill of Rights,—how it would be related to the European Convention on Human Rights ("ECHR") and so on. In my view, this focus risks overlooking, or at least underplaying, the fundamental importance of the prior questions: why do we need a Bill of Rights and, crucially, how should we go about it?

3. The principal reason for having a Bill of Rights is to set out the long-term values and commitments of society at large, around which it agrees to be ordered for the foreseeable future. It follows that questions about what a Bill of Rights says and the manner that it says it are of secondary importance. In general terms, the answer to these questions is: whatever society chooses through an appropriate and properly informed process. That process will, of course, require the secondary questions to be asked and the issues resolved; but first of all we must work-out what an appropriate process would be, and that in turn requires a clear understanding of why we need a Bill of Rights. If the issue is not approached in these stages, there is a real risk that we will end up with a Bill of Rights in name only, which suffers from the same infirmity of acceptance as the HRA.

4. For this reason (as well as for reasons of time) I have concentrated my response on the first of the questions asked, although I have touched on other questions in my response to this question.

Is a Bill of Rights Needed?

5. A Bill of Rights is needed, but it is necessary that the reasons why are carefully examined. In my view, a Bill of Rights is necessary and desirable for two principal reasons:

5.1 as an exercise in state-building; and

5.2 to provide human rights with superiority over all ordinary law that will provide a fully effective and appropriate remedy for such abuses.

6. There are a number of reasons why the Human Rights Act 1998 ("HRA") is deficient or could be improved upon. However, few of these when scrutinised are truly arguments for a Bill of Rights. They are arguments for amending or extending the HRA. Of course, the process of conceiving a Bill of Rights provides an opportunity to make improvements, but these are not in themselves reasons for enacting a Bill of Rights.

7. So, for example, the HRA can be criticised for not including a general equality or non-discrimination right. This, however, is not a reason for introducing a Bill of Rights. Introducing such a right by means of a Bill of Rights would have the advantage of conferring an added constitutional status and importance to such a right, but such a right could be introduced by amendment to the HRA. The same point can be made about a number of other deficiencies in the HRA: its restrictive application to public authorities; the absence of children's rights; the absence of any reference to access to basic health care, food, water and a home (which when we reflect upon it we all probably regard as more fundamental rights than the right to respect for our correspondence or the right to be married).

8. This is not simply a technical point. It clarifies thinking about a Bill of Rights by exposing what are the true reasons for introducing such a measure. Put shortly, the reasons are not those relating to the scope of rights protection, but to the status of the rights in question.

State building

9. A Bill of Rights is legislation that sets out the core principles around which society agrees that it should be ordered. The use of the worded "ordered" must be preferred to the word "governed" to take account of the potential for Bills of Rights to apply to non-governmental organisations and private persons as well as to Government.

10. A Bill of Rights is something more than an ordinary piece of legislation. It is even more than a piece of legislation that protects fundamental rights. After all, there are plenty of those besides the HRA, such as legislation governing racial and sex discrimination and legislation providing for "legal aid". Moreover, to say that a Bill of Rights is legislation which is especially firmly entrenched or which confers higher-order power on the courts is also to risk missing the key point. This is a lawyers' definition of Bill of Rights which puts the cart before the horse. The reason why Bills of Rights prevail over majority will expressed from time-to-time in legislation is because of their special significance in society. Adherence to the protected rights is considered to be overriding importance because they represent the long-held values and long-term commitments of society.

11. In my view the most significant argument for a Bill of Rights is the social benefit that would come from setting out society's core values and long-term commitments. Of course, this means that the principal reasons in favour of a Bill of Right are sociological, political and cultural, rather than legal. And they are multifaceted. At risk of oversimplification, the following general and overlapping considerations seem to me to be of particular importance (but not necessarily in order of importance):

11.1 First, there is generally an extraordinary lack of awareness and education as to the workings of the state and in particular of the constitution. This is clear to anyone who has taught constitutional law to first-year undergraduates. My own limited experience suggests that that most school leavers/even those with straight As at A Level who choose to study law at university/cannot explain the basic workings of Parliament and the courts, still less do they know anything much about the HRA. The constitution is the bedrock of society. It is the basis on which power is exercised legitimately. It is one of the most important things that everyone in society shares. It constantly amazes me that so little is known about its workings and its importance. A Bill of Rights has a vital educative role, not only in making people aware about the importance of civil and human rights, but also the importance of the constitution and the separation of powers more generally. It also provides a unique opportunity for people to engage with the constitution through an exercise of state building.

11.2 Secondly, the past ten years has witnessed one of the most significant periods of constitutional reform (Professor Bogdanor has identified fifteen separate reforms with constitutional significance since the Labour Government took office in May 1997: "Our New Constitution" (2004) 120 LQR 242). These reforms have not been accompanied by any significant engagement with society generally. A Bill of Rights offers such an opportunity as well as the opportunity to take stock and set out the core constitutional principles that should form the basis of our new constitution.

11.3 Thirdly, since 11 September 2001 numerous statutes have been passed which have seriously encroached upon basic human rights, and there has been a concerning transfer of power to the executive. One only needs to refer to indefinite detention of foreign nationals; police powers to stop and search without reasonable suspicion; laws against public protest; ASBOs and control orders. The HRA has had some successes in court in defending human rights in the face of such legislation. Even where legislation has not been declared incompatible with the ECHR, the courts have blunted some of the worst excesses by robust interpretation. The key point that I want to make, however, is that whatever its legal effects have been, the HRA has not provided society at large with a set of rights and basic values against which Government projects are held up to critical examination in the press, in Parliament and in society at large. On the contrary, the HRA has successfully been portrayed as the enemy of the people rather than their guardian.

11.4 Fourthly, the past few decades has seen Britain transform into a multi-ethnic, pluralistic society. Traditional cultural and religious norms have been replaced by a huge diversity of different ways of life. The state has assumes a secular role. There is an obvious need for disparate ethnic and cultural groups in society to identify commonalities, and to do so in a way that affirms a mutual respect for individuals and groups making up society. A Bill of Rights is not only capable of expressing common values and principles but the exercise of drawing-up a Bill of Rights is in itself a way of engaging disparate groups in a common enterprise of state building.

Process

12. It is apparent from these reasons for enacting a Bill of Rights that the process by which we get there may be as important—and is possibly more important—than what it actually says. It is only through an adequate process of engagement with society at large that politicians can hope to produce a document that will satisfy the needs set out above and that will command a sense of ownership throughout society as a whole.

13. Contrast the ECHR. This document does not benefit from any sense of ownership or association on the part of the British people. No amount of pontificating about Britain's instrumental role in framing the ECHR can alter this. After all, the ECHR is the product of a quintessentially executive act: the

Government's treaty making power. It was drafted by people who more ninety percent of the population have almost certainly never heard of, in terms that they have never read, and at a time unknown. Much the same can be said for the HRA. For most of society, had they thought about it at all, people would have been considered the proposal something of an obscure manifesto commitment which little concerned them. It was drafted and enacted in much the same way as any other piece of legislation without any exceptional process of community participation and consultation.

14. Put simply, the ECHR and the HRA do not fulfil the role of that is fulfilled by modern Bills of Rights from the US Bill of Rights onwards, and they may not ever be able to do so. The HRA does not establish rights as totems, as the foundations and the guardians of British civic society. This is a function that a Bill of Rights cannot fulfil unless society feels a sense of association and ownership with the document. The best way for this to be achieved is for them to be involved in its conception.

15. The Committee has not asked about how we should go about framing a Bill of Rights. Every country and every situation calls for a different response.[65] It would be possible to establish a major constitutional project designed to reach out to different sections of society, especially young adults. It would involve society learning about, considering and making proposals for a future constitutional document. It could be part of a wider effort to achieve a written constitution. There is no reason why we need to aim to achieve such a goal in one step. A Bill of Rights would be a good start.

Superiority

16. In terms of its legal effects, what distinguishes a Bill of Rights from an ordinary statute protecting rights (and even a so-called "constitutional statute" as the HRA has been dubbed) is that it has a significant degree of superiority over ordinary law and legislation. This is a reflection of the fact that it is a product of a "constitutional moment" in which society has itself set out the principles around it must be ordered. Since these include the activity of legislating for society, it follows that fundamental rights should prevail over the will of the majority from time to time (still more so, as is usually the case, a minority commanding a Parliamentary majority).

17. This usually manifests itself in two ways: (a) by a degree of entrenchment, and (b) by conferring power on the courts to override ordinary legislation. In my view, these characteristic features of a Bill of Rights are necessary to give adequate protection to basic rights. It is important to stress, however, that it need not be the case that majority will ultimately be displaced. For example, section 33 of the Canadian Charter of Rights and Freedoms 1982 allows for provincial legislatures and the national Parliament to enact legislation notwithstanding a breach of the Charter. Importantly, however, the courts have the power to strike down such legislation in the first instance.

Entrenchment

18. The need to secure human rights principles from a determined Parliament is a separate and independent argument in favour of enacting a Bill of Rights because a Bill of Rights would confer a greater degree of protection on such rights in broad terms than is afforded by the HRA. In today's Guardian, David Cameron has again called for the HRA to be abolished. It is clearly precarious. It is quite wrong that the rights that it sets out should be capable of repeal by a simple Parliamentary majority (usually representing a minority of the population) for party political capital. Such rights must be put beyond party politics by making any amendment or repeal subject, at least, to a supermajority requiring cross-party support.

19. Again, it is important to be clear about this argument. The argument is not that it is necessary to entrench rights in order to ensure that Parliament does not abolish the state's obligation to observe human rights. It is difficult to conceive of a situation in which the UK would renounce its international obligations under treaties such as the ECHR. The argument is rather that entrenchment is necessary to protect the jurisdiction of the UK courts to adjudicate upon claimed violations of human rights. This is not a mere formality, it is fundamental to making rights practical and effective for those living in the UK.

Ability to quash/declare unlawful primary legislation

20. The compromise adopted by the HRA by which courts have been given the power to make a declaration of incompatibility with the ECHR does not go far enough. A declaration of incompatibility is neither effective nor appropriate, in that, (a) a declaration of incompatibility does not guarantee a person with an effective remedy for the violation of their basic rights, and (b) it does not appropriately reflect the fact conformity with basic rights is a condition of governing.

21. To elaborate briefly. There can be no doubt that a declaration of incompatibility does not provide an effective remedy in itself. An individual may obtain an adequate remedy in certain cases and they may achieve this by first obtaining a declaration of incompatibility. But the declaration is not itself the effective remedy that they obtain. It is simply the means by which the individual has managed to obtain such a remedy

[65] Many options are canvassed in Chapter 6 of a recent JUSTICE report on a Bill or Rights for Britain and I believe the question is also being considered by a working group at the LSE.

from Parliament or the Government. It is not however true to say that a declaration has no legal effects: it does. A declaration triggers the fast-track amendment power in section 10 of the HRA. However, because a declaration triggers a power rather than a duty to change the law to make it ECHR compatible, an effective remedy is not guaranteed.

22. Furthermore, even where Parliament or the Government does act to remove incompatibility, this does not itself usually provide a fully effective remedy in any event. It may not erase the injustice or alter the legal position of the individual concerned, most obviously because legislation is not generally retrospective. Thus, whilst Mrs Bellinger's victory, in obtaining a declaration that the Matrimonial Causes Act 1973 was a violation of her rights under Article 8 of the ECHR (*Bellinger v Bellinger* [2003] 2 AC 467), may have hastened the enactment of the Gender Recognition Act 2004, it had no effect whatsoever on her petition that her marriage to her husband (in 1981) was valid. The marriage was invalid and her petition had to be dismissed.

23. The injustice is even more stark in a situation where primary legislation denies an individual a defence to a claim or prosecution brought against him or her. In such a case, it is quite unacceptable that that person should be prevented from relying on the incompatibility as a defence to the proceedings. For this reason the courts have been forced to go to extreme lengths (some commentators have suggested too far) to interpret such legislation in a way that is renders it compatible with Convention rights: see *R v A* (No 2) [2002] 1 AC 45 in which the House of Lords held that a prohibition on leading evidence about a complainant's sexual history had to be read subject to the right to allow an accused to present his defence.

24. An often overlooked facet of this problem is that there is no incentive for individuals to litigate human rights cases because there is no opportunity of overturning the law in question. It is impossible to say how many claims have never been brought or defended or have fallen by the wayside. Even high-profile "human rights cases" may not, for this reason, actually be about the rights of any particular claimant because they will have no direct interest in the proceedings. Take for instance *Wilson v First County Trust (No 2) Ltd* [2004] 1 AC 846, a leading case on Article 1 of the First Protocol and Article 6, as well as on judicial review of primary legislation more generally. The issue in the House of Lords was whether the Consumer Credit Act 1973 breached these articles. However, neither the claimant nor the defendant had sought a declaration of incompatibility and the question of compatibility was of no significance to either, since it would not affect the dispute between them (whether sums paid to recover a pawned car had to be repaid). The Court of Appeal raised the issue of its own motion and the point was argued out in the House of Lords in the absence of the parties by various Insurance companies, the Secretary of State for Trade and Industry, Counsel for Houses of Parliament authorities and the Finance and Leasing Association. In my view, this underscores the fact that a declaration of incompatibility is not an effective remedy to protect individuals from violations of their human rights: It provides a means for legislation to be tested against the Convention in the context of a concrete dispute but with no bearing on the dispute itself and offers no remedy to the victim.

25. As noted above, declarations of incompatibility also do not appropriately reflect the fact that conformity with basic human rights is today regarded as a condition on which state power is exercised. Despite the fact that the courts do not have power to strike-down legislation, the wider legal and political context increasingly reflects the idea that the state must always act consistently with basic human rights and its international obligations to observe human rights principles. The idea is embodied in the devolution statutes which make clear that the Scottish Parliament and the Northern Ireland Assembly—both of which have power to enact primary legislation—have no power to act in breach of the ECHR. Even the power to make declarations of incompatibility reflects and reinforces the idea that legislation which breaches the ECHR lacks legitimacy. If laws that breach the ECHR are not legitimate then the courts should not be required to enforce them.

26. Lastly, it is worth emphasising that maintaining the bar on the courts invalidating Acts of the Westminster Parliament is becoming increasing anomalous when considered alongside the superiority of human rights principles under the Scotland Act 1998 and Northern Ireland Act 1998 as well as under EC law. Take legislation banning fox hunting as an example. This was introduced in England and Wales by the Hunting Act 2004 and in Scotland by the Protection of Wild Mammals (Scotland) Act 2002. Looking at the matter from the perspective of individual rights, it is quite anomalous and unjustified that a successful challenge in Scotland would have led to the law being held void whereas the English 2004 Act would have stood even if the challenge had succeeded. The position is more absurd when one considers that the courts could have declared the 2004 Act unlawful on essentially the same grounds as a violation of EC law if the ban had had a more direct inhibiting effect on European trades that are associated with hunting with dogs: see *R (Countryside Alliance) v A-G* [2006] 3 WLR 1017; *Adams v Scottish Ministers* 2004 SC 665.

[66] I have not referred to a Bill of Rights "for Britain" because difficult issues arises as to whether we ought to have a Bill of Rights for Britain, the UK, the British Isles or even just England.

Conclusion

27. In this note I have attempted to set out some of my views on the question whether or not we need a Bill of Rights and why.[67] I have suggested that a Bill of Rights is desirable as, (i) an exercise in state building, and (ii) in order to confer on human rights norms superiority over ordinary legislation. Most importantly, a Bill of Rights provides an opportunity for the country to renew the social contract—the unspoken pact between citizens themselves and between citizens and the state. It follows that significant attention must be paid to the process by which a Bill of Rights is conceived and questions of content and mechanics are of secondary importance. The process must be inclusive and wide-ranging. It cannot be rushed. Bills of Rights are commonly the result of great constitutional disruptions or crises. We are not in this situation. We need a Bill of Rights project that will educate, excite, and engage all sections of society. Only in this way will we produce a document deserves to be called our Bill of Rights.

REFERENCE

Tom Hickman MA, LLM, PhD, Barrister. Publications include "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998" [2006] Public Law 306-345. Full CV available online at http://www.blackstonechambers.com

22 August 2007

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16. Memorandum from Chris Himsworth, School of Law, University of Edinburgh

I wonder if I might respond very briefly to this call for evidence to make one "devolutionary" point about the notion of a UK Bill of Rights? At least in relation to Scotland, "human rights" are not, as such, a matter reserved to the UK Parliament—although certain rights-related matters such as equality laws are reserved and there are limitations on the Scottish Parliament's powers to modify the terms of the Human Rights Act 1998. If, therefore, there were an intention to legislate in the human rights area at UK level and with effect, by definition in the case of a UK Bill of Rights with purported effect in Scotland, any Bill would presumably be subject to the Sewel convention and would require legislative consent from the Scottish Parliament? It has to be doubted, in the light of arguments which might, in any event, tend in the direction of a preference for "devolved" Bills of Rights for eg Scotland and Northern Ireland but especially in the light of the current political dispensation in Scotland, whether it would be diplomatic to seek the consent of the Scottish Parliament for such a Bill and, if sought, whether it would be granted.

24 August 2007

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17. Memorandum from Sunny Hundal

1. A British Bill of Rights can help form a common bond across our increasingly mobile and diverse nation because it can help emphasis our togetherness and jointly shared political values, expressed through things such as a strong parliamentary democracy, freedom of speech and expression, secularism, stronger civil liberties and more transparent political engagement. I think it is a welcome development.

2. As Britain moves on from a shared identity expressed along racial or cultural lines, emphasising common political values has the advantage that they do not impinge on people's other racial, cultural or religious identities.

3. But the language is important here. A British Bill of Rights should always be about empowering people. If it does not do that, by giving them more power and rights, then it is unlikely to be adopted with pride and held as a source of citizen empowerment. To that extent, it is also vital that the Bill contains economic and social rights, otherwise there is less chance that citizens will adopt it as a document that empowers them.

4. A British Bill of Rights should also explicitly talk of political freedoms as "values" in order to emphasise the importance of a shared sense that our political and personal freedoms are non-negotiable and guaranteed by the Bill of Rights. This can then be used to build a national narrative and an imagined community with shared political values and common civic responsibilities.

5. Young, second generation Britons do want to feel part of this country. But much of the language when holding such debates is patronising and gives the impression that they will have to relinquish their cultural or religious identities as a result of being British. A discussion of common values should be avoided in cultural and social terms. These can only be expressed in modern multi-racial Britain as political values.

7. The British Bill of Rights should become the main focus of citizenship education for students and new immigrants, as a "conveyor belt to becoming British'.

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[67] I have not referred to a Bill of Rights "for Britain" because difficult issues arises as to whether we ought to have a Bill of Rights for Britain, the UK, the British Isles or even just England.

8. The problem with the current debate on Britishness has been two-fold. Firstly, there was never an explanation of "British values', which meant the debate inevitably became caught up in a discussion of cultural values—which would never bring a homogenous response anyway. The debate launched by the Prime Minister should have focused on political values from the start. Secondly, the debate was never really focused on empowering all British citizens, focusing instead on new immigrants or Muslim youths. That had the effect of ignoring most of the population in the debate, and colouring the debate as a focus on trouble-makers.

9. The government must use positive, aspirational language with a clear focus on where it wants to go. It also has to be part of a broader attempt to make parliament more accountable to citizens. Otherwise, the historic nature of these developments is lost.

June 2008

18. Memorandum from the International Association for Human Values (UK)

1 Summary

This response is from the UK branch of the International Association for Human Values, IAHV (UK). IAHV is an international volunteer-based NGO which was founded in Geneva in 1997 to foster a deeper understanding of the human values that unite us as a global community and to foster a reawakening of these universal human values in all sectors of society throughout the world.

In this response, IAHV (UK) gives strong support to the inclusion of responsibilities, as well as individual rights, in a British Bill of Rights.

We particularly wish to draw to the attention of the Joint Committee the importance of human values in achieving the vision of universal human rights first set out in the United Nations Universal Declaration of Human Rights in 1948. Human values are those attributes and qualities that represent the very essence of what it means to be human, including non-violence, a deep caring for all life, compassion, friendliness, cooperation and service to society.

We also wish to make the Joint Committee aware of a proposed draft Universal Declaration of Human Values, launched in March 2007, which provides a roadmap for achieving universal human rights as well as understanding and harmony among different people and cultures throughout the world.

We make a case that it is vital for human values to be part of a British Bill of Rights, and we call upon the Joint Committee to assist with reawakening human values by incorporating in the Bill provisions which emphasize the urgent need at all levels of society to acknowledge, encourage, and reward universal human values. It our strong belief that only in this way will universal human rights become a reality.

2 Introduction

This document is a response to the Call for Evidence from the Parliamentary Joint Committee on Human Rights (JCHR) and the inquiry it is undertaking into whether and why a British Bill of Rights is needed and what rights should be contained in such a Bill of Rights; what should be the relationship between a British Bill of Rights, the Human Rights Act and the UK's other international human rights obligations; and what should be the impact of such a Bill of Rights on the relationship between the executive, Parliament and the courts. Among specific questions are whether the Bill should include responsibilities as well as individual rights.

This response is from the International Association for Human Values, IAHV (UK), a UK Registered Charity. The International Association for Human Values (IAHV) was founded in Geneva in 1997 to foster a deeper understanding of the human values that unite us as a global community and to foster a reawakening of these universal human values in all sectors of society throughout the world.

IAHV is an international volunteer-based NGO in special consultative status with the Economic and Social Council (ECOSOC) of the United Nations. IAHV's UK branch has been a UK registered charity since 2003, registration number 1103261.

This response focuses on the vital importance of human values in achieving the vision of universal human rights first set out in the United Nations Universal Declaration of Human Rights in 1948. In particular, this response considers how a British Bill of Rights could incorporate the issue of human values. Finally, it considers the question of whether responsibilities, in addition to individual rights, should be included in a British Bill of Rights.

3 Universal Declaration of Human Values: Implications for a British Bill of Rights

We would like to bring to the attention of the Joint Committee the vital importance of human values in achieving universal human rights as well as fostering the harmonious coexistence of different peoples and cultures throughout the world. We would also like to make the Committee aware of a proposed draft Universal Declaration of Human Values, recently launched, that offers a new approach to achieving universal human rights, as well as greater understanding and harmony among different people and cultures around the world.

What Are Human Values?

By human values we mean those attributes and qualities that are at the very heart of humanity, representing the highest expression of the human spirit. Human values represent the essence of what it means to be human. They include non-violence, a deep caring for all life, compassion, friendliness, cooperation, generosity and service to society.

Human values do not depend on, and are not derived from, any external authority. As the innate potential within all people, human values are already present in every human being; they need only be rekindled to thrive and grow.

What is the Universal Declaration of Human Values?

With the aim of starting a global discussion about human values, a proposed Universal Declaration of Human Values was launched on 28 March 2007 in Washington DC, USA, by the principle founder of the International Association for Human Values, His Holiness Sri Sri Ravi Shankar.

Drafted in the form of a proposed resolution of the United Nations General Assembly, the *Universal Declaration of Human Values* represents a vision for a fresh approach to fostering understanding and harmonious coexistence among different peoples and cultures, offering a roadmap for the way out of the increasing conflict and violence that is engulfing the world today. It emphasizes the urgent need to rekindle human values throughout the world in order to achieve peace, security and universal human rights. It is the intention that this Declaration serve as a tool to begin a global discussion of the issues it raises. The text of the declaration is attached as an Annex to this submission.

The United Nations Secretary-General, Ban Ki-Moon, referring to the launch of this Universal Declaration lent his support to the importance of these values: "It is reassuring to know that you—a diverse assembly of origins and cultures—have gathered to celebrate your commitment to global harmony and peaceful coexistence. The values you champion, including non-violence, compassion and the sanctity of all life, go to the heart of what the United Nations stands for.".

It is our view that this Declaration contains key points that should be considered in drafting a British Bill of Rights.

Human Values and Human Rights

What are the implications of this proposed Universal Declaration of Human Values for a British Bill of Rights?

The preamble of the proposed Universal Declaration of Human Values makes specific reference to a commitment to the principles of the Universal Declaration of Human Rights and to the subsequent existing international human rights instruments. However, it points out that grave human rights violations continue around the world, despite more than half a century of efforts to achieve human rights and fundamental freedoms for all.

The Declaration then goes on to propose a solution. The Declaration emphasizes the vital importance of human values in any strategy to achieve human rights. A global resurgence of human values is essential not just to achieve universal human rights, but also to foster harmonious coexistence among different peoples and cultures generally, and to achieve peace and security on the planet. To achieve such a resurgence of human values, efforts are needed by all levels of government, all institutions of society, all organisations and each and every individual, to nurture and strengthen universal human values. It is essential that human values be acknowledged, honoured, encouraged and rewarded throughout all sectors of society.

Education is key in this strategy. Broad-based education in universal human values is essential. Multi-cultural, multi-religious education is urgently needed to bring people together and foster harmony in diversity.

As in the Universal Declaration of Human Values, it is our view that a British Bill of Rights should also contain an aspirational component, as opposed to a purely legalistic approach. In particular, a British Bill of Rights should emphasize the urgent need for educational initiatives to foster human values in order to achieve universal human rights.

4 Human Values and the British Bill of Rights

It is vital for human values to be part of a British Bill of Rights, and we call upon the Joint Committee to assist with reawakening human values by incorporating in the Bill provisions which emphasise the urgent need at all levels of society to acknowledge, encourage, and reward universal human values. It our strong belief that only in this way will universal human rights become a reality.

Particular attention, we suggest, should be given to the inclusion in the Bill of Rights of:

1) Emphasising the need to foster human values such as non-violence, a deep caring for all life, compassion, friendliness, cooperation and generosity, as a common standard of achievement for all British citizens.
2) The need for broad-based education in universal human values.
3) The provision by citizens of service to society—what we would today call "volunteering" or "voluntary work".

5 The Need for Responsibilities in a British Bill of Rights

The inclusion of responsibilities, in addition to individual rights, in a British Bill of Rights is strongly supported by IAHV (UK).

It is our view that for every individual "right" that is guaranteed, there is a concomitant "responsibility" to others that is implied in that right. For example, if I have the right to life / freedom of speech, etc, I also have the responsibility to accord to others that same right. At the very least, I have the responsibility not to deprive them of that right. Responsibilities are the flip side of rights; they imply an obligation on the part of all to give something back to that society which has guaranteed their individual rights.

A recognition that rights imply concomitant responsibilities is, we believe, very much in keeping with a heightened social awareness and commitment to the welfare of society generally that results naturally from the increased emphasis on human values that we advocate.

To sum up, it is our view that human values are a key consideration on both sides of the human rights "equation". First, a rekindling of human values is essential in order for individual human rights to flourish. Secondly, a rekindling of human values will also give rise to a greater sense of social responsibility and concern for the general welfare: eg, "What can I contribute to society?" "How can I help?"

For these reasons, IAHV (UK) strongly supports the inclusion of responsibilities, in addition to individual rights, in a British Bill of Rights.

6 Conclusion

For a British Bill of Rights to recognise that rights imply concomitant responsibilities is, we believe, very much in keeping with a heightened social awareness and commitment to the welfare of British society generally that flows naturally from an increased emphasis on human values.

In addition, a British Bill of Rights provides an opportunity, by means of the inclusion of human values, both to encourage the reawakening human values, and to set a standard of behaviour of British citizens that will serve as a reference point for the next half century and beyond.

IAHV (UK) would be pleased to work further with the Joint Committee to develop the contents of a British Bill of Human Rights and to encourage the reawakening of human values.

31 August 2008

19. Memorandum from JUSTICE

I am pleased to respond on behalf of JUSTICE to the call for evidence by the Joint Committee on Human Rights (JCHR), concerning its inquiry into a British bill of rights.

JUSTICE is an all-party organisation, largely of lawyers, dedicated to advancing access to justice, human rights and the rule of law. We are also the United Kingdom section of the International Commission of Jurists.

JUSTICE has recently completed its own inquiry into a British bill of rights. Our report is due to be published in November 2007. We published an interim discussion paper "A bill of rights for Britain?" in March 2007, which is attached to this letter[68]. In response to the call for evidence, this letter summarises and supplements what is covered in more detail in the discussion paper and in our forthcoming report.

[68] Not published here

JUSTICE welcomes the JCHR's inquiry and the wider debate on a British bill of rights. We are conscious that the continuing hostility towards the Human Rights Act 1998 (HRA) creates a fragile atmosphere in which to explore the issues. We wish to stress that while the debate is ongoing, and at least up until the enactment of any new bill of rights, the current HRA must stay firmly on the statute book. Frequent misunderstandings of the HRA's application on the part of the public (and Parliamentarians), perpetuated by inaccurate press coverage, mean that informed and constructive discussion is all the more crucial.

Is a British bill of rights needed?

A British bill of rights which respects the minimum level of protection for fundamental rights afforded by the European Convention on Human Rights (ECHR) and which engages the British public in shaping its content is a potentially worthwhile and valuable project.

Many view the HRA as our current bill of rights. There is not strictly a "need" for a new bill of rights in the same way that there was a "need" for the HRA. In making EHCR rights justiciable in domestic courts and in laying the ground for a human rights culture which would frame policy decisions and guide public services, the HRA performed a function which arguably has rendered a British bill of rights unnecessary.

However, a domestic bill of rights which builds on the substance of the ECHR, as incorporated in the HRA, can also serve an important symbolic role. At a time when national identity and cohesion are a political priority, a bill of rights presents the opportunity for debate and consensus on a core set of common principles appropriate for a modern British democracy.

Purpose

A British bill of rights may serve a number of purposes. It may give greater constitutional protection to fundamental rights;[69] it may increase the scope of rights provided for in the HRA; it may emphasise the constitutional principle of the rule of law;[70] it may have the educative function of building public awareness of constitutional rights and enhancing its legitimacy through public consultation; it may also draw attention to the rights and duties of citizenship and the positive duties of the state towards all individuals in its jurisdiction.[71].

Beyond the protection for human rights already provided by the HRA, a domestic bill of rights might therefore "entrench" fundamental rights, making it more difficult to amend its provisions; it might increase protection by guaranteeing a broader range of rights, for example including a right to free healthcare or to a clean environment. A more concrete suggestion is to go beyond the HRA by incorporating Article 13 ECHR, which provides that everyone whose rights and freedoms under the Convention have been violated are entitled to "an effective remedy" before the domestic courts.

Content[72]

There is scope for enhancing the protection of existing rights as well as protecting rights not previously recognised in British courts. JUSTICE does not prescribe a list of rights for inclusion. We believe that a range of rights should be debated, paying attention to the experience of other countries" bills of rights, while focusing on the British context. Beyond the rights already protected by the HRA, we should consider common law constitutional rights which expand on the EHCR, such as the right to a trial by jury (as part of the right to a fair trial in serious criminal cases). While there is a network of equality legislation which has a hugely beneficial impact in many areas, there is scope for a single, freestanding right to equality.[73] Economic, social and cultural rights are more controversial, prompting disagreement over whether such entitlements, crucial as they are, should be the subject of judicial rulings. Their inclusion might be limited to guiding "principles" rather than justiciable rights.[74] Much can also be learnt from international rights instruments and foreign bills of rights, some of which encompass children's rights and "third generation" rights such as the right to a clean environment.

[69] For example, by requiring special Parliamentary or other procedures for amendments to its provisions.
[70] In the sense that it can renew government accountability against a core set of principles.
[71] Though a British bill of rights can have special significance for British citizen, its application to non-citizens with the British jurisdiction is just as important, particularly for some vulnerable (and unpopular) minorities such as asylum seekers who are unable to vote and therefore have no political voice in the electoral process.
[72] See paras 16–30 of the discussion paper.
[73] As seen, for example, in Article 26 of the International Covenant on Civil and Political Rights and Article 15 of the Canadian Charter of Fundamental Rights and Freedoms.
[74] See paras 25–27 of the discussion paper. It should be noted that the right to education is already guaranteed in Art 2, Protocol 1 ECHR. Otherwise, the right to free healthcare is most frequently prioritised for a bill of rights in public opinion polls on the question.

Rights and responsibilities[75]

Much of the discussion about a British bill of rights has emphasised responsibilities as a necessary counterpart to rights. One option is to include the notion of responsibility in a preamble to the bill of rights.[76] The essential point is that moral responsibilities are incumbent on all of us so that society functions cohesively. Already, most rights require balancing with other rights and the interests of the community as a whole. However, to argue that the enjoyment of rights should be legally contingent on the exercise of responsibilities is to misunderstand the concept of universal and inalienable rights.

Relationship of a British bill of rights to other rights instruments[77]

In relation to international obligations, the UK's "dualist" legal system means that while the state is bound by international obligations in treaties it has ratified, the courts are not bound to apply (although they tend to interpret in line with) their provisions in the absence of incorporating legislation. Given the UK's broad network of international obligations and their increasing importance in domestic law, a British bill of rights might draw from the South African model, which obliges courts to consider international law and permits them to consider foreign law.[78] In addition, there is scope for including a requirement that new legislation being considered for compatibility with the ECHR (and which requires a S19 certificate of compatibility by the relevant minister) is also examined for compatibility with the UK's other international obligations.

As for the relationship of a British bill of rights to the HRA, there are a number of possibilities, which will clearly depend on the scope and the terms of the bill of rights. A bill of rights may explicitly repeal the HRA. Given the recognised constitutional importance of the HRA, such an occurrence may prove a constitutional upheaval and the bill of rights will inevitably have to provide a new and comprehensive framework for interpretation, addressing the status of the ECHR and the jurisprudence of the ECtHR. Another option is for both documents to exist side by side, with the new bill of rights as a supplement to the rights guaranteed by the HRA. The risk here is causing confusion in the courts. There is also the fact that S3 HRA will still apply and so the HRA will be used to interpret the provisions of the new bill of rights. A further possibility is that the HRA may simply fall into disuse, though again its constitutional significance indicates that reference to its status on enactment of the new bill of rights must be made explicit.

In relation to the EHCR, it is important that the provisions in a British bill of rights (which distinguishes itself from the HRA) are "ECHR-plus" and not "ECHR-minus". As to their interpretation by British judges, there is an argument that the scope of rights should not exceed the parameters set by the European Court of Human Rights (ECtHR) at Strasbourg.[79] Even under the HRA, however, there seems little reason why British judges should not go further than the ECtHR in protecting certain rights, particularly in areas where there is little guidance or no Europe-wide consensus and where they can use their knowledge of the application of rights in the British context. Such an approach is in line with the government's intention on enacting the HRA.[80] A specifically British bill of rights may give judges more impetus to depart from Strasbourg where the core ECHR rights are concerned and generally to develop a "British" body of human rights jurisprudence.

Impact of a British bill of rights on relations between Parliament, government and judiciary

Discussions on a British bill of rights should be seen against the backdrop of the broader process of constitutional change in Britain.[81] The effective maintenance of the constitution and the rule of law depend on constructive relationships between the three branches of government. The nature of relations between these branches has changed in recent years, partly as a result of changes in the system of governance and

[75] See paras 31–33 of the discussion paper.

[76] The Victoria Charter of Human Rights and Responsibilities 2006 has a preamble stipulating that "human rights come with responsibilities and must be exercised in a way that respects the human rights of others".

[77] It is assumed here that a British bill of rights will take the form of an Act of Parliament, albeit with a special status attached. Should the government decide to draw up a less substantial document in the form of a "statement of values" then of course this will have little or no practical effect other than a requirement that its principles are taken into account by public authorities, policy makers and judges. If a bill of rights forms part of a written constitution, it may be that, as in Germany for example, the domestic constitution ranks as supreme over international law; or that, as in France, the constitution is taken to comply with international law and automatically incorporate ratified treaties.

[78] Article 39 (1) (b) and (c) respectively, Constitution of the Republic of South Africa.

[79] Lord Bingham stated that "the duty of the national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less", *R (Ullah) v SS Home Dept* [2004] UKHL 26 at para 20. See also *R (Countryside Alliance) v HM Attorney General* [2006] EWCA Civ 817; *R (Clift v SSHD)* [2006] EWCA Civ 817.

[80] Judges are required under S2 HRA to "take account of" the European Court case-law, but are not bound by it. It was, in fact, the Conservative front bench who tabled amendments in the House of Lords, during the passage of the HRA, aimed at *binding* the domestic courts to Strasbourg jurisprudence. These were rejected by Lord Irvine, then Lord Chancellor, rejected conservative amendments aimed binding UK courts to Strasbourg jurisprudence on the grounds that there could arise occasions when it would be right for UK courts to depart from Strasbourg. He anticipated that UK courts would "give a lead to Europe as well as. . .[be] led", 583 HL debates, 515 (18 November 1997). A well known example of departure from previous Strasbourg authority is found in *Ghaidan v Mendoza* [2004] UKHL 30, where LJ Buxton explicitly departed from *S v UK* (1986) 47 D&R 247 to provide protection for homosexual partnerships.

[81] The last decade has seen a number of major constitutional reforms, including the Human Rights Act 1998 (HRA); devolution; the abolition of the traditional role of the Lord Chancellor; the judicial-executive "concordat" which led to the Constitutional Reform Act 2005; the creation of a new Supreme Court; and, most recently the creation of a Ministry of Justice which came into being on 9 May 2007.

partly because of changing attitudes and perceptions.[82] The role of the judiciary has become more prominent since the HRA, with judges being required to decide issues with highly sensitive and often political implications. There have also been moves to establish a more explicit separation of powers, most notably between the executive and the judiciary.

The consequence of a more prominent judiciary with greater autonomy has created a more dynamic relationship between the branches of government in which the judiciary have a more structured and active role in defending their decisions from criticism. A British bill of rights, in the same vein as the HRA, should heighten the awareness of each branch of government in relation to its distinctive role in protecting fundamental rights and upholding core principles. It should also emphasise the joint responsibility of all branches in this respect and should prompt consideration of better means of communication between them. A degree of cross-institutional tension is natural and productive. However, a renewed effort to ensure fundamental rights in Britain will benefit from increased interaction and mutual understanding of institutional perspectives.

30 August 2007

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20. Memorandum from Francesca Klug Professorial Research Fellow, Centre for the Study of Human Rights, London School of Economics

GOVERNANCE OF BRITAIN GREEN PAPER—FOUR QUESTIONS CONCERNING THE PROPOSAL TO CONSULT ON A BRITISH BILL OF RIGHTS AND DUTIES

1. *How compatible is consultation on a British Bill of Rights with one of the main purposes of Bills of Rights: protection for minorities—of all kinds—on the principle that democracies value everyone equally even if majorities don't?*

I agree that the lack of consultation on the Human Rights Act (HRA) was one of the factors which led to the misunderstandings and lack of "ownership" which have dogged the HRA. I also agree that any consultation on a British Bill of Rights needs to thoroughly engage a wide spectrum of opinion of British society.

But if Bills of Rights are not about the fundamental ethical values that define democracies, they are nothing. What if a wider engagement unearths what we all know already—that it is not the idea of rights that is unpopular as is sometimes claimed in the debate on the HRA—but some of the groups who lay claim to them? What if 95% of respondents say they believe in a right to a fair trial but not for terrorist suspects or people accused of child abuse. What if they support due process but not for travellers seeking planning permission?

How have other jurisdictions that have consulted on bills of rights addressed this issue?

Every post-war bill of rights—certainly in democracies—is based on a human rights treaty emanating from the UN (including the European Convention on Human Rights (ECHR) which is a creature of the Universal Declaration of Human Rights (UDHR); adapted largely by British lawyers). Canada, New Zealand, the various Australian states now introducing rights charters, have all based their bills of rights on international human rights treaties. None of the consultations I have ever looked at—and some have been pretty extensive—have started with a blank sheet, let alone a blank cheque.

In the Australian state of Victoria the consultation process started with a "statement of intent". In Northern Ireland the terms of reference of the consultation on a Northern Ireland Bill of Rights—which has gone on for nearly a decade now—are established in the Good Friday agreement. These stipulate that any NI Bill of Rights will build on the ECHR; it will be ECHR plus. The Green Paper affirms that this approach will be replicated in the consultation on a British Bill of Rights which is to be strongly welcomed.

In reality it is difficult to see how a domestic bill of rights could be anything else, if the UK stays within the Council of Europe and European Union. Contrary to some suggestions, a British Bill of Rights cannot be used to dilute the rights in the ECHR or provide a specifically British interpretation of well established case law on fundamental, non-derogable rights. If the government wants to change the treaty—and I'm not recommending this—that has to be done through intervening in a case at the European Court of Human Rights (which the UK government is currently doing[83]) or by negotiating a new protocol with the Council of Europe. As things currently stand, the ruling that has caused most controversy—that the courts should not deport people where they have evidence that there is a genuine risk they will be tortured or executed[84]—applied before the HRA was introduced and would continue to apply if it were repealed.

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[82] *Relations between the executive, the judiciary and Parliament*, House of Lords Constitution Committee, Sixth report of session 2006–07, HL 151.
[83] *Ramzy v the Netherlands* and more recently *Saadi v Italy*.
[84] *Chahal v UK*, 1996.

In addition there are the foreign policy implications of such a stance. The message to the rest of the world—that a domestic bill of rights can be used to opt out of a global commitment to fundamental human rights—could be quite catastrophic. Any dictatorship would have carte blanche to do likewise. I have lost count of the number of people from all over the world who have said this to me in the last couple of years.

2. *So what do we mean by a British—or home grown—bill of rights?*

I have used these terms myself in the past; I was part of the group that advised the Labour Party under John Smith to follow the incorporation of the ECHR with a so-called "home grown" Bill of Rights.

Given that we now already have what is effectively a bill of rights on the statute book, the HRA, and the intention is to build on the ECHR, what does a specifically British bill of rights signify?

It might mean a Bill of Rights characterised by British pedigree rights—like the right to jury trial or stronger privacy rights that could reduce data sharing or prevent the introduction of ID cards (although I am not sure that is what the new PM has in mind exactly).

Perhaps it means a modernised bill of rights—which would include independent living rights, children" s rights, carer's rights, a stronger equality clause and maybe some social and economic rights; this could certainly amount to a distinctively British Bill of Rights.

However the Green Paper hints at another meaning. The terms British citizen and British society are used pretty interchangeably in the Green Paper. They are not the same thing and this confusion needs to be clarified in any consultation.

Whilst election rights and access to many public services and benefits might be restricted to citizens or permanent residents, citizenship is not a signifier of fundamental civil and political rights in democracies.

The US government built Guantanamo Bay so as to opt out of the due process protections that apply to everyone on US soil through the American bill of rights. Only citizens sit on juries, but everyone in the jurisdiction of the UK has a right to jury trial.

It is one thing to use a bill of rights to clarify the rights of citizens that already exist (which are quite complex under British law); it is another to use one as a means to narrow the protections of people who are not citizens in the UK. This is obviously not the intention but given the designation of the proposed Bill of Rights as British, this needs to be clear from the outset.

3. *What does the Green Paper mean by duties?*

Consulting on a bill of rights and duties could be a means of clarifying that human rights can only be protected if we all treat each other with dignity and respect, as reflected in the UDHR Article 29 and the preamble to the UN International Covenants. This could go some way to countering the misconception of the HRA, promoted by much of the tabloid press, as a charter to protect those who break the law.

The proposed duties might take the form of a non-enforceable declaration for use in citizenship ceremonies and schools or as a preamble to a bill of rights [or even the HRA].

It is rare, but there have been a few bills of rights [notably the Soviet Bill and African UN Charter] which do enunciate legal duties. This is conceivable, although caution is required, if restricted to what the green paper describes as "civic responsibilities" like jury trial or paying taxes, which are already established in law.

However, if the reference to duties is taken to mean only the dutiful and deserving are eligible for rights—quite a popular idea—this would effectively mean using a British bill of rights to overturn human rights values now accepted by the whole of the democratic world. It was the philosophy of the undeserving or untermenchen—the idea that some people fall so low they are entitled to no rights at all—that bills of rights were partly designed to counter in the first place; from the US bill of rights to the UDHR. It is precisely because the responsibilities and duties of individuals and citizens are established in a raft of other legislation that bills of rights were conceived as a counterbalance.

This is not to imply that human rights are absolute; with a couple of exceptions, they clearly are not. Modern bills of rights everywhere recognise legitimate and proportionate limits to rights, to protect the rights of others and the common good. This is quite different from limiting categories of people who are ineligible to claim rights in any circumstance.

The exercise of every right implies a duty on some individual or body. Often the duty bearer is the state, sometimes other individuals, as with the responsibility of parents and carers to children in the UN Children's Convention or the requirement that all of us exercise free speech responsibly under the ECHR, Article 10.

4. *How will a British bill of rights be used to establish a "stronger shared national purpose"; one of Gordon Brown's stated aims?*

Bills of rights throughout history and throughout the globe have been used for this purpose. But there are different pulls at work in addressing the "national question" and the government's so-called "hearts and minds strategy".

Although they can overlap, nation building—the forging of a national identity—is not the same as society binding or creating a greater sense of common purpose.

The 1982 Canadian Charter of Rights and Freedoms failed as an exercise in nation building—Quebec is still secessionist—but was very successful as an exercise in society binding. Over 80% of Canadians consistently point to Charter values as signifying what it means to be Canadian—even though the Charter is based on an international human rights convention, as virtually all post war bills of rights are.

If the South African and American bills of rights—admittedly introduced in very different circumstances to ours—have, by contrast, helped to nation build as well as society bind, this is because they are based on common values not kith and kin. They are an attractive signifier of what it means to be part of those nations and they have played that iconic role without denying rights to non citizens or claiming that the rights they uphold have a specific nationality.

The Green Paper refers to a British statement of values not a statement of British values. I think that is absolutely the right way of putting it.

Jack Straw, Secretary of State for Justice, acknowledged in a recent Chatham House essay that values like freedom, fairness, and tolerance are not exclusively British or western but are the values common to humanity. They are drawn from all the great religions and philosophies, east and west, and are reflected in the human rights charters of the UN.

Former South African minister, Kader Asmal, who spent many years in the UK, made a similar point in a Chatham House lecture last year. He said "a shared vision of national identity" could, if based on a "mythical past", rather than the future, bring with it "the alienation of many immigrants and communities" whose experience belies the "imagining" of a Britain "that has always held dear the values of liberty, tolerance and social justice".[85]

The strongest case for consulting on a British bill of rights in this period of ongoing debate on our national identity, is that we have no iconic equivalent to the American or South African bills of rights to turn to at times of national tension. The Human Rights Act has not achieved this status. A bill of rights can provide a unifying force in a diverse society but it will not do this if the process of adopting such a bill is used to suggest that liberty has a nationality or if it ignores the contribution of many nations, and most religions and cultures, to the human rights values recognised throughout the world today.[86] Britain's role has been formative and crucial but it must be placed in a context that makes sense to all the people of Britain.

24 July 2007

21. Memorandum from the Law Society of Scotland

Introduction

The Bill of Rights Working Party has considered the Call for Evidence from the Joint Committee on a British Bill of Rights. The Working Party has the following comments to make.

The Working Party is unsure about the scope and purpose of the Joint Committee's Inquiry. There is a debate about the need for a Bill of Rights inspired by organisations like Justice: "A bill of rights for Britain" (2007) and The Constitution Unit: "Towards a New Constitutional Settlement" (2007) however, the Inquiry Call for Evidence does not explain why the Joint Committee is of the view that this topic needs parliamentary attention. The Working Party notes that the Inquiry does not consider changes in the Constitution of the United Kingdom which have taken place since 1997 other than the enactment of the Human Rights Act 1998.

Question 1: *Is a British Bill of Rights needed?*

In discussion whether a British Bill of Rights is needed it is necessary to ascertain what a "British Bill of Rights" would contain and what the definition of "British" would be. Does "British" relate to the United Kingdom, Great Britain or the constituent parts of the United Kingdom eg England and Wales, Scotland and Northern Ireland? The citizen's rights differ in each of the constituent parts due to the different legal regimes which apply in each jurisdiction.

[85] Chatham House, 10 November 2006.
[86] The UDHR reflects the insights and values of all major religions and cultures and directly spawned the ECHR, in spite of its European designation.

The Working Party is concerned about the scope of such rights. Are political and unilateral rights included? Is the Bill of Rights to be limited to legal rights only?

In a UK context a British Bill of Rights can only relate to the constitution of the United Kingdom formed by the Treaty of Union (1707) and the relevant Acts of the English and Scottish Parliaments and the Union with Ireland Act 1801. "British" Rights can only be identified as seen through the prism of the Union instruments as built upon by 300 years of legislation some of which applies only to England and Wales, to Scotland and to Northern Ireland, or to Great Britain or to the United Kingdom. Furthermore, the impact of EU legislation in a variety of areas eg employment, equality, international treaties and the application of other rights instruments should not be forgotten.

The separate constitutional and rights structures of England and Scotland prior to the Treaty of Union in 1707 create different strands of constitutionality. For example Magna Carta (1215) did not apply in Scotland nor did the Petition of Right of 1628 or the Bill of Rights of 1689. The corresponding Scottish Documents could be said to be the Declaration of Arbroath (1320) and the Claim of Right (1689). However, as these documents are limited to Scotland in their effect in much the same way as Magna Carta and the Bill of Rights are limited to England, the Society's contention is that analysing British rights emanates, at the very best, from the Treaty of Union in 1707 and probably more properly from 1801. Even then there are rights which reach from before 1707 and apply in each jurisdiction separately. Similarly there are rights which have been enacted since then which are limited to one jurisdiction of the other. Since the Scotland Act 1998, the Government of Wales Acts 1998 and 2006 and the Northern Ireland Act 1998 diversity of rights is more evident. Indeed in the case of the Scottish Parliament, although the Parliament cannot amend the Human Rights Act 1998 it can and does legislate positively in the field of Human Rights.

A British Bill of Rights could be seen as entrenching "British" values. The Working Party would question how these "values" could be identified and articulated. This has a political overtone.

A Bill of Rights for the United Kingdom would be able to set out the expectations and rights of UK citizens and the obligations of the executive, legislature and judiciary. One substantial advantage of a Bill of Rights for the United Kingdom, were it entrenched and the possibility of repeal restricted, would be constitutional stability.

A Bill of Rights for the United Kingdom should not be used as a mechanism for supporting a party political objective but should be a citizen-centric mechanism for ensuring that human rights are enhanced in the UK. A Bill of Rights should ensure that the rights of British citizenship and the obligations of the State to the individual are set out clearly. Whether a British Bill of Rights would add to the protection of the Human Rights Act 1998 would depend on its content, its enforcement mechanism and its entrenchment.

Question 2: *What should be in a British Bill of Rights?*

In the Society's view any proposed Bill of Rights for the United Kingdom must build on and enhance the European Convention on Human Rights.

A Bill of Rights for the UK could also include rights which have commonly been characterised as constitutional, for example, the right to access to justice, however, arriving at consensus on this proposition may be difficult.

The Society is cautious about including other rights which are characteristically considered as rights within one legal system in the United Kingdom, such as, "the right to trial by jury". In Scotland there is no such right as whether a case goes to jury trial is determined by the forum which is at the instance of the prosecutor.

A UK Bill of Rights could include i) rights which are contained in EU and UK legislation ii) economic and social rights iii) rights contained in other international treaties, for example the Convention on the Rights of the Child or the International Covenant for Civil and Political Rights and iv) the EU Charter on Fundamental Rights.

On the question of whether the Bill of Rights should include identification of the citizens" responsibilities the Society is of the view that the fundamental purpose of a Bill of Rights is to ensure that certain human rights are guaranteed and protected against the State's capability to legislate in a way which is contrary to those rights. These rights can be limited only to the extent which it is absolutely necessary in order to protect the common good and the rights of others. Inclusion of responsibilities is fundamentally a political question. The Working Party recognise the call to enhance the responsibilities of the citizen but do not hold to the view that a Bill of Rights is the correct place for such a statement. Many rights in eg ECHR have qualifications which provide a balance of the rights of the individual with competing interests. Including responsibilities is conceptually difficult in a Bill of Rights.

Question 3: *What should be the relationship with the Human Rights Act and International Human Rights Obligations*

A Bill of Rights for the United Kingdom should add to the ECHR rather than subtract from it. The concept of parliamentary sovereignty as applicable to the UK Parliament creates difficulties in respect of the role of the judiciary in striking down incompatible legislation. The Human Rights Act 1998 only allows for declarations of incompatibility in respect of Westminster legislation, relying upon Ministers to take the initiative to change the law in the light of a declaration of incompatibility.

This, however, is not the only way of dealing with Human Rights legislation or the ECHR. Under the Scotland Act 1998 ECHR compliance is a pre-requisite for the legality of Scottish parliamentary legislation. The Scottish Parliament is not a sovereign legislature but is subject to the powers and capabilities provided for in the Scotland Act 1998. Nevertheless, if the Scottish Parliament or Scottish Ministers enact or carry out actions which are contrary to ECHR the courts can nullify the legislation and the actions involved.

This seems to be a much stronger way of dealing with non compliance with ECHR than that which the Human Rights Act 1998 provides for the UK Parliament and UK Ministers.

Accordingly, a stronger judicial role would be needed if a Bill of Rights for the United Kingdom were enacted. That stronger judicial role would imply restrictions on the concept of Parliamentary sovereignty and allow for the judiciary to strike down legislation which was incompatible with the Bill of Rights for the United Kingdom. In other words a Bill of Rights would need to be constitutionally superior to other statutes.

This also brings into view the necessity for a Bill of Rights for the United Kingdom to be entrenched. The Society favours procedurally entrenching the Bill of Rights for the United Kingdom by way of the creation of a special majority voting system for both Houses of Parliament and an amendment to the Parliament Acts requiring both Houses to consent to the Bill subject to the special majority.

Question 4: *What should be the impact of a British Bill of Rights on the relationship between the executive, Parliament and the courts?*

If a Bill of Rights were enacted in the manner suggested eg as an entrenched piece of legislation with a superior constitutional status it would lead to a re-alignment and re-balancing of the relationship between the executive, Parliament and the courts.

Inevitably, the executive and Parliament would be limited in their powers and the courts would accrue a role as the guardian of the constitution, holding the balance of power between the other two branches of government. The adoption of a Bill of Rights would reinforce the separation of powers in the United Kingdom. The distribution of powers which has until recently characterised the British Constitution would fade away as the courts would exercise a role to strike down non compliant legislation. This would shift the focus of the British constitution considerably.

August 2007

22. Memorandum from Liberty

Introduction

1. The Joint Committee of Human Rights (the "JCHR") has asked for evidence on recent calls for a British Bill of Rights. Sadly, these calls have not, in general, arisen out of a progressive desire to increase human rights protection in the UK. In fact, the opposite is true. A "Modern British Bill of Rights" is most often proposed as an alternative to the existing protection provided by the Human Rights Act 1998 (the "HRA" or "1998 Act").

2. The 1998 Act has been the target of a concerted media campaign which has unfairly portrayed it and the rights it contains as a charter for criminals and terrorists and as a threat to public safety. Prominent politicians have attacked judicial decisions to protect even the most fundamental human right, the absolute prohibition against torture. The official opposition has called for the 1998 Act to be scrapped. This was most recently demonstrated in David Cameron's outburst in response to the judgment not to allow Learco Chindamo (killer of the head teacher Philip Lawrence) to be deported to Italy:

> "It has to go. Abolish the Human Rights Act and replace it with a British Bill of Rights, which sets out rights and responsibilities. The fact that the murderer of Philip Lawrence cannot be deported flies in the face of common sense . . . It is a glaring example of what is going wrong in our country. What about the rights of Mrs Lawrence?"[87]

[87] *Telegraph*, "David Cameron: Scrap the Human Rights Act", 24 August 2007. In reality, the case had little to do with the HRA and was more about the right to free movement of people under EU law.

3. Liberty has long supported the idea of a British Bill of Rights that goes beyond the incorporation into domestic law of the key rights contained in the European Convention on Human Rights.[88] We would be keen to engage in constructive public conversations about ways of enhancing and building upon the rights protection that is currently provided in the HRA. We are not, however, convinced that this is politically realistic in the current climate and do not consider it to be the first priority.

4. Liberty is concerned that moves towards a new Bill of Rights for Britain would, in the current climate, be dominated by public, media and political pressure to weaken the protection currently provided by the HRA. In this short response we consider how criticisms of the 1998 Act have fed the calls for a "Modern British Bill of Rights" and have distorted discussions about what such a Bill should contain. We explain why we consider most of these criticisms to be unfounded. Liberty believes that the existing 1998 Act, and the basic rights it contains, must form the minimum level, or floor, for human rights protection in the UK.[89]

Is a British Bill of Rights needed?

5. In this section we do not attempt to contribute to the fascinating debate about whether the current 1998 Act can fairly be described as a "Bill of Rights".[90] Instead, we identify and respond to two of the key arguments most frequently used to support calls for a British Bill of Rights:

BRITISHNESS

6. The Bill of Rights called for is frequently described as "British". In part, this seems to be in response to the common misperception that the existing HRA was imposed on us by Europe and is in some way tied-up with the European Union and Brussels. The Act is, of course, nothing to do with Brussels or the EU. It was debated and passed by the UK Parliament and is based on the European Convention on Human Rights, drawn up by the Council of Europe.[91] The British also played a major role in drafting the Convention and included in it many of the rights and freedoms enjoyed for centuries in this country. We are delighted that the "Britishness" of the existing HRA and the rights it contains has been emphasised in the Green Paper, "The Governance of Britain".[92]

7. Most worrying is the suggestion that the Bill of Rights would be "British" because it would only protect the rights or British people. Calls for a British Bill of Rights are often made in response to criticisms of the HRA for protecting the rights of foreign citizens to the perceived detriment of British citizens (David Cameron's response to the Chindamo judgment, cited above, is a perfect example). The "Governance of Britain" paper itself describes a Bill of Rights as "the articulation of the rights of each citizen" [emphasis added].[93] It also suggests that basic rights might be something that one "earns" as a result of becoming a British citizen or permanent resident.[94] A Bill of Rights which reserves basic rights and freedoms to British citizens would be unacceptable, flying in the face of the principle of universality which is a fundamental feature of the post-war human rights framework. After the horrors of the Holocaust the international community recognised "the inherent dignity . . . and inalienable rights of all members of the human family".[95] People have basic rights by virtue of being human. They are not earned by paying taxes to a particular government and do not come with possession of a particular passport. As the Belmarsh internment policy and treatment of asylum-seekers have demonstrated, it is indeed non-citizens that are most often in need of human rights protection.

[88] In 1991, for example, we published a draft Bill of Rights for consultation which differed in a number of significant respects form the protection accorded by the HRA and from the range of rights it protects. For example the Bill contained: a stand-alone right against discrimination; clearer and more restrictive limitations on rights; more extensive protection for personal liberty, fair trial rights, privacy and democratic participation; express rights for children and those seeking asylum in the UK.

[89] Not only because any less would put us in breach of our obligations under the European Convention on Human Rights

[90] Cf Professor Francesca Klug, Irvine Human Rights Lecture 2007, University of Durham, Human Rights Centre, 2 March 2007, "A Bill of Rights: Do we need one or do we already have one?" and Philip Alston, ed., *Promoting Human Rights Through Bills of Rights* (Oxford: Oxford University Press, 1999)

[91] An institution set up after the Second World War in response to the twin horrors of Nazism and Stalinism whose founding father was Winston Churchill.

[92] July 2007, CM 7170, paras 206–207

[93] July 2007, CM 7170, para 211

[94] Para 186 states: "The Government believes that everyone in the UK should be offered an easily understood set of rights and responsibilities when they receive citizenship. This might serve to make citizenship more attractive but also to make it clearer to potential citizens what it is to be a member of Britain's democratic society. There might also be a case for extending this to those who have the right to permanent residence in the UK."

[95] Preamble to the Universal Declaration on Human Rights.

Greater Public Understanding and Ownership of Human Rights?

8. Another argument often used in favour of a new Bill of Rights for Britain is the need to encourage public buy-in and ownership of the legal instrument itself as well as the rights and freedoms it protects. It is, in our view, undeniable that a failure to get the public to understand, appreciate and own the HRA is to some extent responsible for the recent hostility to the Act. As Professor Klug has argued:

> "the HRA appeared like a bolt out of the blue to most people. . .there was no prior consultation in the UK. Very little was done to prepare for the introduction of the HRA beyond the publication of *Bringing Rights Home*, the discussion document Labour issued before it came to power, and a large-scale training programme for the judiciary prior to the Act coming into force . . . This has been compounded, until recently, by an absence of consistent political leadership and no statutory Human Rights Commission to explain the role and purpose of the HRA."[96]

It is disappointing that more was not done to explain human right principles and to sell the HRA to the British public. This might well have encouraged greater buy-in to the legislation and made the recent attacks on the HRA less likely.

9. It is, however, far from clear that tearing up the HRA and starting afresh with a new Bill of Rights would rectify this failure. As long ago as 1976, a Committee of the Society of Conservative Lawyers acknowledged:

> "A Bill of Rights can only operate as an effective safeguard if it commands the respect and confidence of those whom it seeks to protect. This it cannot do unless the public can reasonably expect it to be a permanent feature of our constitution, at least for the foreseeable future".[97]

Basic human rights and civil liberties must be given a chance to "bed down" if they are to stand any chance of being understood, appreciated and owned by the public. If we don't defend the 1998 Act and the rights it contains, any new Bill of Rights would inevitably be damaged, no matter how well it is crafted or how great the public participation prior to its creation.

10. Liberty is not convinced that it is too late to encourage the British public to better understand and appreciate the existing HRA and the rights it contains. Indeed, we hope that this will be a priority for the new Commission for Equality and Human Rights. Concerted efforts must be made, not only to explode the myths and misunderstandings about the 1998 Act, but also to communicate the constitutional value of the post-war human rights framework—its ability to provide a unifying set of values in a diverse society, to hold an increasingly powerful and overbearing Executive to account, and to protect and empower some of the most vulnerable people in society.

What should be in a British Bill of Rights?

11. The range of rights protected by the 1998 Act (15 well-established fundamental rights and freedoms) is far more limited than those contained in rights instruments in many other democracies and in many regional and international human rights treaties. Liberty would welcome a public conversation about ways of extending the rights that are protected under the 1998 Act. We would also welcome proposals to make more explicit the ways in which the British legal system has historically protected rights like the right to a fair trial, ie by highlighting the right to trial by jury for more serious offences and the right to legal aid. Sadly, however, calls for a British Bill of Rights are usually justified on the basis that the rights protected in the HRA are too extensive and need to be limited or restricted. In the following paragraphs we look at three of the most common ways those calling for a British Bill of Rights have argued that the rights protected by the HRA should be restricted.[98]

Rights and Responsibilities

12. A frequent criticism of the HRA is that it has helped to create a culture of rights without responsibilities. David Cameron has argued that we need "a modern British Bill of Rights that . . . balances rights with responsibilities" and which "spell[s] out the fundamental duties and responsibilities of people living in this country".[99] The "Governance of Britain" green paper also states that a "Bill of Rights and Duties could provide explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others."[100]

[96] Professor Francesca Klug, Irvine Human Rights Lecture 2007, University of Durham, Human Rights Centre, 2 March 2007, "A Bill of Rights: Do we need one or do we already have one?"

[97] "Another Bill of Rights for Britain?", A Report by a Committee of the Society of Conservative Lawyers, 1976, page 10

[98] We do not consider criticisms of the 1998 Act arising from obvious misunderstandings about what rights are actually covered (ie media reports that the 1998 Act gave a person evading justice a right to Kentucky Fried Chicken and fizzy drinks—Cf "KFC meal 'ensures siege man's rights'", *Daily Telegraph*, 8 June 2006)

[99] David Cameron, "Balancing freedom and security—A modern British Bill of Rights", Speech to the Centre for Policy Studies, 26 June 2006

[100] July 2007, CM 7170, para 210

13. Liberty does not dispute that individuals owe moral and legal obligations to the society they live in. We are not, however, convinced that the HRA is responsible for undermining the public's sense of social responsibility or that a British Bill of Rights is needed to make individual responsibilities explicit:

— As the "Governance of Britain" paper acknowledges, in some respects the 1998 Act itself enunciates the "balance of rights and responsibilities that are now common to most of the democratic world."[101] With few exceptions the rights in the HRA are not absolute. This means that the rights to privacy and freedom of expression can, for example, be restricted for a number of legitimate reasons, ie to protect public safety or national security. It is therefore permissible to make laws which restrict a person's rights in order to ensure compliance with individual responsibilities to society. Furthermore, one cannot use a human right as a justification for violating the rights of another person.[102]

— A mass of criminal and civil laws have existed for centuries to ensure that people act in accordance with their responsibilities to the state and other individuals. These laws already operate to punish those who breach the criminal law and to provide redress where a person violates its civil law responsibilities to others, ie by acting negligently. There has been a huge growth in the body of our criminal law, in particular, over recent years and we are far from convinced that additional obligations are needed.

— As a constitutional instrument one would expect a British Bill of Rights to express rights in relatively broad terms, to enable the Bill to stand the test of time and to be applied in a wide variety of contexts. We would, however, have serous concerns about framing new legal duties or responsibilities on individuals in such broad terms. It is a central feature of the rule of law and of the post-War human rights framework that legal obligations placed on individuals are expressed with sufficient clarity to enable people to predict the likely consequences of their actions.

— Calls for a British Bill of Rights and Responsibilities are often accompanied by the suggestion that individual rights should in some way be contingent upon compliance with one's responsibilities. This would clearly undermine the principle of universality referred to above. Self-evidently a person could not, for example, be denied a right to a fair trial because they are suspected of having committed a crime. A failure to afford rights protection to everyone within a state's jurisdiction would violate the UK's obligations under international law and would also undermine the state's moral standing in the international community and with its own citizens.

National Security

14. Another perceived weakness with the HRA is the idea that it does not have sufficient regard to public safety and national security. The "Governance of Britain" paper, for example, states:

> "The Government itself recognised, in its review last year of the implementation of the Human Rights Act, the importance which must attach to public safety and ensuring that Government Agencies accord appropriate priority to protection of the public when balancing rights. A Bill of Rights and Duties might provide a means of giving greater clarity and legislative force to this commitment."[103]

This is also a common feature of David Cameron's criticisms of the 1998 Act. He has argued, for example, that "the time has now come for a new solution that protects liberties in this country . . . and . . . at the same time enables a British Home Secretary to strike a common-sense balance between civil liberties and the protection of public security". He has argued that a modern British Bill of Rights "should guide the judiciary and the Government in applying human rights law when the lack of responsibility of some individuals threatens the rights of others".[104]

15. Liberty does not accept these criticisms of the HRA. Public protection is at the core of the human rights framework.[105] Not only do rights instruments like the 1998 Act play a vital role in protecting individuals against abuses by the state; they also require the state to take positive steps to protect the rights of those within their jurisdiction, including from the actions of other private individuals. The HRA requires criminal laws to be put in place to deter people from committing serious offences like murder, terrorism and rape. It also requires allegations of such offences to be investigated by the police and requires people who commit serious, violent offences to be prosecuted. The HRA does not give convicted criminals the right to enjoy the same freedoms as the rest of us. For example, the 1998 Act provides that people convicted of crimes can, and in some cases must, be deprived of their liberty and that they should not be released early if they present a serious danger to others.[106] It is also worth reiterating in this context that most of the rights in the

[101] Ibid, para 106
[102] Article 17 of the European Convention
[103] Ibid, para 210
[104] David Cameron, "Balancing freedom and security—A modern British Bill of Rights", Speech to the Centre for Policy Studies, 26 June 2006
[105] Indeed, this is inherent in the talk of human rights in the context of other countries like Zimbabwe—we speak of "human rights protection".
[106] This is why Liberty has sought to challenge, on human rights grounds, the early-release decision for Anthony Rice, a convicted sex offender serving a life sentence, enabling him to commit the murder of Naomi Bryant.

HRA are not absolute. One of the legitimate reasons for placing proportionate legal restrictions on the rights protected is public safety. This means, for example, that the rights to privacy, freedom of expression and free speech can be restricted where necessary to protect the public.

Deportation to Torture

16. The one absolute in the post-war human rights framework is the prohibition on torture. While few critics of the HRA have argued publicly that a new British Bill of Rights should allow torture, there is one aspect of the right against torture that has faced severe criticism. Article 3 prohibits states from removing a person to a country where there are substantial grounds to believe that s/he will face a real risk of torture.[107] The former Prime Minister referred to this as "an abuse of common sense".[108] David Cameron has described it as "an invitation for terrorists and would-be terrorists to come to Britain, safe in the knowledge that whatever crime they may have committed in their home country and whatever suspicion there may be that they might be planning a terrorist attack in the UK or elsewhere they won't be sent back to their country of origin and may not even be detained."[109] For some, the removal of this protection would be reason enough to tear up the 1998 Act and start afresh with a new Bill of Rights.

17. Liberty does not accept these criticisms of the rule against deportation to torture. We believe it to be an inevitable and important aspect of the absolute prohibition on torture in Article 3 which must form part of any new Bill of Rights for Britain. Like the prohibition on using evidence obtained by torture in British courts, this principle is vital if we are to ensure that the UK is not complicit in torture elsewhere in the world. If we do not comply with it we would not only breach international law, but would also undermine our claims to civility, could be seen as condoning torture or could actually encourage its practice in other countries. The practice of "extraordinary rendition" clearly demonstrates why these wider aspects of the prohibition on torture are needed.[110] Without them, human rights law would not prevent countries getting other states to do their dirty work by effectively "contracting out" torture.

August 2007

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23. Memorandum from Claire Methven O'Brien[111]

This submission strongly urges on the Joint Committee the view that a new articulation of constitutional aims, embodied in a British Bill of Rights and / or statement of values, could play a valuable role in renewing and strengthening democracy in 21st century Britain, and empowering the individuals and communities in its embrace.

Achieving this purpose, however, would require at least the following four conditions to be met:

1. Relevance

The content of any new constitutional instrument must resonate with people's experience of living in Britain today. It will only succeed in doing this if it acknowledges the complex conditions of, and challenges to, the individual's exercise of autonomy, and full participation in community and society, in the here and now of British life—not its 1215, 1689 or 1950, or even its 1998, version.

Crucially, this means that any 21st century Bill of Rights, or similar instrument, must journey beyond the domain of traditional civil liberties, and into the social and economic dimensions. Recent years have provided frequent reminders of the importance of the state's role in protecting physical security, whether in the context of terrorist activity, teenage knife crime, or human trafficking. But within an integrated global economy, of no less human rights importance is the state's role in enabling individual, family and, ultimately also our collective, economic security—for example, by ensuring access for everyone to advanced as well as basic education, and work-related training opportunity; and through measures allowing individuals to reconcile the demands of paid and unpaid work, such as the provision of essential care for children, the elderly or persons with disabilities or special needs.[112]

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[107] Most famously enounced by theGrand Chamber of the European Court of Human Rights in Chahal. The protection against deportation to torture has, for example, been criticised in the context of stories about the inability of the state to return a number of men to Afghanistan who hijacked a plane to get to the UK (cf "Afghan hijackers win right to remain", *Telegraph*, 11 June 2006)

[108] "Blair dismay over hijack Afghans", BBC, 10 May 2006

[109] David Cameron, "Balancing freedom and security—A modern British Bill of Rights", Speech to the Centre for Policy Studies, 26 June 2006

[110] Refers to allegations that western democratic states have kidnapped terror suspects and flown them to states that practice torture with the aim of gaining intelligence

[111] Doctoral Candidate, Law Department, European University Institute, Florence.

[112] More detailed argumentation on this point, and in general in relation to the need for recognition of social and economic rights in Britain's constitutional arrangements, is presented in C Methven O'Brien, "Entrenching social citizenship: the case for social and economic rights", 16 *Renewal* 1 (2008), 45–57.

Unlike post-colonial Bills of Rights,[113] recent discussion of British constitutional reform has all too often been silent on economic issues, and the close links between individual and family economic well-being, the enjoyment of human rights, and democratic participation.[114] Rather there has been a tendency, albeit unintentional, to portray individuals in passive terms, as either potential victims of state interference or recipients of state supports and benefits. People do, indeed, often require protection, from and by the state. Highlighting this is entirely legitimate and an integral part of the human rights agenda. However, a constitutional vision that fails to address the contribution of work and economic activity to human rights' enjoyment denies a fundamental dimension of people's individual and social agency. At best, this is unflattering. At worst, it is paternalistic and, in failing to acknowledge the social and economic value of unpaid work, still largely undertaken in Britain by women, it is chauvinistic.[115] As such, a menu of rights restricted to the civil and political realm is unlikely to attract higher levels of interest, loyalty and support from the population in general than has HRA 1998. If that is true, then the role of a Bill of Rights, envisaged in the Green Paper,[116] in galvanising the relationship between individual citizen and state in Britain can be expected to be nugatory.

Any proposal for a new Bill of Rights, and certainly public consultation and deliberation about one, should therefore advert to, as possible elements of our constitution, goals including the following: universal access to the means of earning a decent standard of living for oneself and one's family; universal access to world-class primary, secondary, and higher education and lifelong skills training; full recognition and the fair reward of caring work, including parenting and with respect to the elderly and those with special needs. Ample authority for such goals can be found in international human rights materials, should that form of legitimation be considered necessary.

2. Aspiration

Constitutions do not merely regulate the exercise of power. Whether explicitly or by implication, they also specify its ends and, in doing so, they help shape our collective political and ethical horizons.[117] Viewing historical constitutions and Bills of Rights in hindsight, it is easy to forget that, during their own times, they did not merely gather together and repeat aspects of the legal status quo. They encapsulated radical political aims. Their authors dared to imagine more just and more democratic futures for their respective countries than those they inherited, and they projected these ambitious visions through new constitutional texts. Bills of Rights, historically, have mapped where people wanted to go, not where they were at.

The Joint Committee needs to recall this history. True, no tumultuous revolution has precipitated the current government's legislative initiative. Yet chronically declining interest and participation in formal politics, especially amongst younger age groups, make it imperative for the organs of formal politics in Britain and foremost Parliament, as its primary custodian, to act decisively now to reengage the public.

Including broad aspirational goals in a Bill of Rights or statement of values, as an outline of, and set of signposts to, a fairer and more democratic British future, it is suggested, would in that context mark an important step forward. Certainly, some candidate goals for aspirational status can be derived from the enduring values that have found expression in Britain's political past: liberty, equality, tolerance and, indeed, democracy itself.[118] However, many of today's pressing social issues, such as climate change and environmental stewardship; inter-generational justice, in the context of sustainability and rising longevity; and social inclusion, community cohesion and integration, were beyond the contemplation of the earlier generations of parliamentarians, judges, and indeed of the jurists who drafted the post-World War II international human rights treaties. A contemporary Bill of Rights or statement of values recognising aspirations to such objectives explicitly, and articulating collective responsibility and commitment to address them, by bringing the horizons of formal politics into line with those of the people it today represents and whose interests it affects, would mark an important strengthening of our democratic fabric.

[113] See, for instance, Constitution of Ireland (1937), Chapter XIII, Article 45 (Directive Principles of Social Policy, which include eg the right of all citizens to "an adequate means of livelihood" and the responsibility of the state to protect the economic interests of the weaker in the community); Indian Constitution (1949), Part IV; South African Constitution (1996), Chapter II, Section 25 (establishing the public interest in the distribution of property, including but not limited to land, on an equitable basis), and Section 22 (freedom of occupation and trade profession).

[114] S. Weir (ed.), Unequal Britain: Human Rights as a Route to Social Justice (London: Politico's, 2006) marks an exception.

[115] See further, *Montréal Principles on Women's Economic, Social and Cultural Rights*, 26 Human Rights Quarterly (2004), 760, and UN Committee on Economic and Social and Cultural Rights, General Comment No.16, The equal right of men and women to the enjoyment of all economic, social and cultural rights, UN doc.E/C.12/2005/4 (11 August 2004).

[116] Ministry of Justice, *The Governance of Britain* (London: TSO, 2007). See further *Citizenship: Our Common Bond. Lord Goldsmith QC Citizenship Review* (London: Ministry of Justice, 2007).

[117] J Dunn, *The Cunning of Unreason: Making Sense of Politics* (London: HarperCollins, 2000), 258.

[118] *The Governance of Britain*, above n.5, para.204 presents further suggestions.

3. Authorship

If it is going to have any chance of being viewed as legitimate, people and elected politicians in Britain must be directly involved in the drafting of any new Bill of Rights or statement of values.[119] A number of consequences follow.

Firstly, it militates against the appointment of a constitutional convention comprised exclusively of experts. The specialist knowledge of academics is valuable, and there may be scope for an advisory role within a broader consultation process. NGOs can serve the vital purpose of articulating the viewpoints of disparate, socially less powerful groups. But constitution-making is at root a political exercise: it can proceed on the basis of accurate fact or misinformation, but the ultimate decision is a value-driven one, in which none of us can be truly "objective". There can therefore be no substitute, in terms of democratic legitimacy and accountability, for the direct participation in constitution-making of "ordinary" citizens and their representatives.

Second, the need for public authorship extends to agenda-setting. This means that, instead of merely being asked for an opinion on a set of pre-determined questions, lay people should be able to raise issues, both at the outset and repeatedly during the course of any consultation or deliberation, for inclusion in a Bill of Rights. There should also be mechanisms to allow them, if they secure an adequate level of support from others, to get those ideas onto the agenda for wider discussion.

Some have expressed concern that an open agenda approach would yield outcomes undermining existing human rights protections in Britain. However, there are means of avoiding this risk, while preserving the bottom-up democratic quality of a consultation process. For instance, proposals with any negative human rights implications could be identified by an independent moderator, and be made subject either to immediate exclusion from discussion on that basis, or following a vote. Alternatively, a special majority, or consensus, of participants could be required for any such proposal to be included on the meeting agenda, and again amongst the forum's conclusions. Adoption of any final Bill of Rights text, it seems likely, would in any case require the approval of both Houses of Parliament, probably by special majority. Undeniably, there is a greater likelihood, with an open agenda approach, of genuine and heated disagreement amongst participants. Nonetheless, it is submitted, the gains, in terms of the greater "buy-in" that goes with at least partly-devolved control over deliberative agenda, and the demonstrably stronger commitment that attaches to the outcomes of processes in which people feel procedural fairness has been observed,[120] exceed those costs.

Third, in the abstract, legitimacy is directly related to the quantity of participation: the greater the number of people involved in debating and deciding a constitutional framework, other things being equal, the greater its normative authority. In reality, in a country of 60 million inhabitants, there are practical constraints on the scale of exercise that can be undertaken without simultaneously compromising the quality of discussion. Some balance must be struck between the two. Certainly, whatever the scale of consultation, it will require the allocation of substantial public resources to be effective and to ensure equality of access to it. Resources should be available on a grant basis to local government and third sector organisations to support the contributions of people from less powerful socio-economic groups.

All this leaves open the question of the precise mechanisms of public deliberation about a Bill of Rights or statement of values. There is no magic bullet here, and whatever approach is taken will not be perfect. The point is therefore to maximise, as far as practicable, the extent to which consultation about a democratic constitution is itself injected with democratic values.[121]

With this in mind, the preference of this submission would be for consultation at local level (but at least at regional level) through a network of mini-conventions; meeting repeatedly over time, rather than on a one-off basis; according to a flexible agenda over which participants could exercise some control; and to reach conclusions to a final deadline within two years of commencing the process. Arrangements for appointment of delegates to participatory budgeting processes, for instance, as developed in Porto Alegre, may provide some useful templates for local citizen involvement.[122]

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[119] See, for general support of the arguments made in this section, A. Fung, "Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences", 11 *The Journal of Political Philosophy* 3 (2003), 338, and A Fung & E Olin Wright (eds.), *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (London: Verso, 2002).

[120] Fung, above n.8, at 344. See further, "Toward justice fall all: procedural justice and the review of citizen complaints", in W. Geller and H. Toch (eds.). *Police violence : understanding and controlling police abuse of force* (New Haven: Yale University Press, 1996), 234.

[121] For consideration of various participatory decision-making designs, see contributions in B. de S. Santos (ed.), *Democratizing democracy : beyond the liberal democratic canon* (London /New York: Verso, 2005), *Part IV: Participatory Democracy in Action*.

[122] B. de S Santos, "Participatory Budgeting in Porto Alegre: Towards a Redistributive Democracy", and L. Avritzer, "Modes of Democratic Deliberation: Participatory Budgeting in Brazil", Ch.12, in Santos, supra n.10.

4. OWNERSHIP

Public authorship is clearly one way of generating a sense of public ownership over a Bill of Rights. It may be the main one. But as the experience of the Human Rights Act 1998 has shown, if it is going to have significant impact on the conduct of politics and the making of law and policy, and enjoy broad public understanding and support, political discussion of a Bill of Rights, little "p", cannot be a one-off event, nor can it be confined to the constitutional cognoscenti. Simultaneously, political discussion of a Bill of Rights, big "P" must go far beyond that provoked by contentious arguments made in court and the specious observations of hostile news media. Neither can adequate public awareness and interest be sustained by the inquiries of a single dedicated Parliamentary committee, however assiduous it might be in the pursuit of its mandate.

So, the formal status and character of a new Bill of Rights must make it amenable to ongoing, widespread and spontaneous citizen engagement.[123] This leads to four further points, that may be counter-intuitive to anyone whose thinking about a Bill of Rights has been framed with reference to the high-profile legal models of HRA 1998 or the US Constitution.

i) *Constitutional diversity*

Save in the most technical legal terms, the HRA 1998 incorporates into law in Britain the text of an international treaty signed by the United Kingdom of Great Britain and Northern Ireland. Accordingly, its function is to ensure universal coverage across that territory of the ECHR's protected human rights. Yet, on top of pre-existing legal (not to mention political, linguistic and cultural) heterogeneity within the UK, the 1997 devolution package triggered a process of constitutional differentiation which, it seems, has grown legs of its own and will continue marching. As a result, a federal UK, and /or formal devolution to English regions, are no longer unthinkable scenarios. Any new Bill of Rights or statement of values must engage with these possible future realities. At minimum, that means contemplating different bills of rights, with variable, or "asymmetric" content (eg linguistic rights) across devolved jurisdictions, as is the case in Canada.[124] Maximally, it might mean that rights and processes of secession are included in a Bill of Rights. At any rate, in terms of the relevance requirement state above, and unfolding political events, such issues should certainly be put on the agenda for consultation.

ii) *Home-grown rights*

As we in Britain know well, constitutional laws, rights, and values have a range of avatars. They need not emanate from a single formally binding legal document. Nor do they necessarily originate in statute or court decisions, or international human rights treaties. In addition, there are political and ethical principles and values that are constitutive of Britain, and which many of us feel strongly committed to, that are not written down anywhere in positive law, but are instead embodied in the institutions, conventions and practice of government, politics, public services and collective life, and in people's relationships with, beliefs and expectation about them. Think, here, of: the gradual abolition of the death penalty, slavery, cruel and unusual punishments, bonded labour and servitude, child labour; the extension of the franchise; the regulation of hazardous working conditions; the right to form and be part of trade unions; gradual recognition of the equal rights of women; the establishment of unemployment and sickness insurance; the prohibition of employment discrimination; due process of law, including the right to defence counsel in criminal proceedings; and access to basic education and health care free at the point of delivery. All these developments it is suggested, embody constitutional values that, nowhere explicitly identified as such, are nonetheless sunk within British institutions.

It is important that a Bill of Rights/statement of values, as well as the preceding consultation, draw attention to this indigenous constitutional and human rights heritage, and offer scope for their formal recognition as such, along with the content of international human rights instruments, for three reasons.

First, these precious and proud achievements provide a solid basis for an inclusive constitutional patriotism in which everyone in Britain has, and can see themselves to have, a stake—instead of the atavistic ethnic and cultural patriotism to which social exclusion and divided communities can occasionally lead. Second, in light of public disinterest and cynicism, already noted above, flagging up that these precious political advances were hard-won historically, through former generations' collective engagement in democratic politics and activism, would give a much needed boost to the public image of our formal politics.

Third, drawing attention to the close alignment of Britain's constitutional heritage with the content of international human rights standards, and that, in fact the former provided precedent for much of the latter, would counteract the misapprehension, following from inaccurate media coverage of HRA 1998, of human rights as "foreign impositions", alternatively, as non-sensical rules dreamt up by lawyers.

[123] Note: the term citizen is not used in its technical legal sense in this submission.

[124] Constitution Act 1867 (UK), 30 & 31 Vict., c.3, reprinted in RSC 1985, App.11, No.5 ("British North America Act"). For discussion, see G. A. Beaudoin and E. Mendes (eds.), *The Canadian Charter of Rights and Freedoms* (Toronto: LexisNexis/Butterworths, 2005).

iii) *Dynamism and revisability*

It is a human impulse to hold on to something good. This explains the desire to "nail down for all time" Bills of Rights through entrenchment. On the other hand, all things, including constitutions, must change. Relationships between individual, state and community are not immutable: they continue to be influenced by technological, economic, social and cultural trends—and constitutions and the political institutions they govern must find ways of updating themselves to reflect the positive aspects of such evolution.

As a consequence, it is suggested, though on one hand, a Bill of Rights must not in any way diminish the UK's existing duties under international human rights law, on the other, it must be invested with the qualities of dynamism and revisability. As constitutional characteristics, moreover, these are endogenously British: dynamism and revisability are the very essence of the principle of Parliamentary sovereignty, the lifeblood of British constitutionalism and democracy for at least a few centuries.

In keeping with that tradition, Parliament and other democratically elected bodies should be appointed to the role of principal guardian of a Bill of Rights. And Parliament, and devolved bodies, as well as the people, through referenda, should be able to add to or amend the Bill of Rights, with appropriate safeguards in place—but not to the extent that it would be fixed in stone.

iv) *Justiciability*

The courts, for their part, should retain all their existing responsibilities for constitutional and human rights adjudication under the common law, HRA 1998 and other international human rights treaties. Were it decided a Bill of Rights should ground additional rights of action, it would certainly be one option to allocate their oversight to the courts, too.

However, that should not be a foregone conclusion. There is no obstacle to the adoption of a variable geometry for protection of constitutional rights in Britain. Indeed, given that some constitutional protections sound only in the common law, and not under HRA 1998, and vice versa, and some do not operate via the courts at all,[125] a patchwork regime is what we already have.

In conclusion, this means that full consideration should be given, in addition to the option of a Bill of Rights litigable before the courts, to the following: a Bill of Rights grounding actions before a non-judicial constitutional body[126]; a wholly or partly non-justiciable Bill of Rights, with oversight via Parliamentary Committee or other Parliamentary body, and through similar bodies at the level of devolved regions. A final implication is that the non-justiciability of specific rights or values presents no ground whatsoever for their exclusion from a new constitutional instrument. Even in a text in general devoted to the establishment of justiciable rights, non-justiciable goals could, according to the reasoning advanced above, be usefully and legitimately included in a dedicated chapter, or a wide-ranging Preamble.

June 2008

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24. Memorandum from Ellie Palmer, Senior Lecturer, Department of Law, University of Essex

THE CONTENTS OF A BRITISH BILL OF RIGHTS

1. *The central question posed by the JCHR—"is a British Bill of Rights Needed?" is considered here in light of two subsidiary questions raised by the Committee:*

(i) What would a British Bill of Rights add to the protection for human rights already provided by the Human Rights Act 1998? (Question 1. 3)

(ii) Specifically should it include social and economic rights such as health and education and if so which? (Question 1.6)

2. *Background and impetus for change*

2.1 Much has happened in the political landscape of the United Kingdom since the enactment of the HRA 1998. As Lord Lester and David Pannick observed in the second edition of their textbook *Human Rights Law and Practice* (2004)[127] "it had become clear six years after the election of the Blair government that it would not now have enacted the HRA 1998 if it were considering whether to do so afresh".[128]

[125] Eg Ombudsmen, complaints and investigations in relation to public authorities, and of private organisations under anti-discrimination legislation.
[126] As is France's *Conseil Constitutionnel*.
[127] 2nd ed. (Butterworths, Oxford 2004)
[128] *Ibid* 20, 1.64

2.2 Commenting on New Labour's disenchantment with the role of courts under the HRA 1998, the authors noted that in a television interview on 5 February 2003, the Prime Minister Tony Blair had said that the position regarding asylum and illegal immigration was "unacceptable" and that if necessary the ministers would "fundamentally" re-examine Britain's obligations under the "Convention"[129]. Further, commenting on criticism by the Joint Committee of Human Rights of proposals for "fundamental changes to the asylum and review system"[130] by David Blunkett, then Home Secretary, (deemed by the Minister to be compatible with the Convention rights') the authors sternly concluded.

> "Unless the present and future administrations recognise the HRA 1998 as no ordinary law, but a constitutional measure that except in highly exceptional circumstances takes precedence over ordinary legislation the case will become overwhelming to entrench human rights by means of a new constitutional settlement and written constitution."[131]

2.3 However, approximately two years before the end of New Labour's third term of office, the call for a new constitutional settlement has come from rather different quarters. David Cameron, leader of the Conservative opposition has said that if elected to government, he will introduce a new distinctively British bill of rights for the United Kingdom and Gordon Brown, before replacing Tony Blair as New Labour Prime Minister also expressed his commitment to a "new constitutional settlement".

2.4 Thus, in light of emphasis on a bill of rights for the United Kingdom as opposed to one with a European focus, the possibility that the HRA 1998 might be repealed has become more than an idle threat.

2.5 In the prolonged campaign, which preceded the HRA, little attention was paid to the content of the rights to be incorporated into UK law.[132] Indeed, it had been narrowly assumed by most campaigners that liberal democratic rights and freedoms of the kind enshrined in the ECHR would provide an entirely apposite foundation and that there would be no need to fashion a home grown Bill of Rights for the United Kingdom.

2.6 Since then however, constitutional commentators have raised concerns, about the lack of balance reflected in the incorporation of an "outmoded" treaty such as the ECHR, into the fabric of UK constitutional law.[133] Thus, critical of what has been perceived as the limited potential of the ECHR rights, to protect at best, a very basic minimum standard of living,[134] appeals have been made for the International Covenant on Economic Social and Cultural Rights the (ICESCR) to be incorporated into UK law[135] or for the adoption of a novel constitutional framework which protects civil and political and socio-economic rights;[136] or for courts, in following the example of the Strasbourg organs, to have regard to other international treaties, to which the UK is signatory, such as the ILO Convention or the Council of Europe's revised Social Charter in their interpretation of the ECHR rights.[137]

2.7 The extent to which orthodox perceptions about differences in the nature of civil and political rights and socio-economic rights[138] are embedded in the thinking of the political establishment, can be seen in a dismissive response by the Blair government, following the HRA, to a proposal that the ICESCR might be incorporated into UK law. When asked by the Joint Committee on Human Rights (JHCR), to comment on the concluding observations of the UN Committee on Economic Social and Cultural Rights (UNCESCR) following the UK's 4th periodic report in 2002,[139] in reply, the Minister said:

> "I think there would be real difficulties with full legal incorporation. To give you a flavour of what I mean by that, if you look at the rights of adequate food, clothing and housing, these are issues for which there is no absolute standard, and are rightly the business of governments and their electorates through general elections, to determine what standard we should achieve."[140]

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[129] *Ibid* 20 1.64

[130] See Clause 11 of the Asylum and Immigration (Treatment of Claimants etc) Bill 2003, Fifth Report, Session 2003–04 (HL 35, HC 304) 10 February 2004. The purpose of Clause 11 was to replace the existing immigration and asylum appeal and review systems with a single level of appeal from a decision of an immigration officer in most cases. It also sought to "oust" judicial review where it was claimed that the Immigration Appeal Tribunals decision was a nullity by reason of lack of jurisdiction, or irregularity or error of law, breach of natural justice or any other matter.

[131] L. Lester and D. Pannick above at note 1 at 1.67

[132] In the UK, socio-economic rights have continued to be viewed as policy matters of discretionary entitlement which are subject to democratic change, inherently non—justiciable and therefore different from civil and political rights.

[133] See K D Ewing "Constitutional Reform and Human Rights: Unfinished Business" (2001) Edinburgh Law Rev 297; G. Van Beuren, "Including the Excluded: the Case for an Economic Social and Cultural Rights Act" [2002] PL. p. ?

[134] Eric Metcalfe, Justice Response to the *"Inquiry into the Concluding Observations of the UN Committee on Economic Social and Cultural Rights"* (E/C.12/1/Add.79) by the Joint Committee on Human Rights (JHCR) www.justiice.org (2003) at para 17

[135] Eric Metcalfe *ibid*

[136] G Van Beuren above, at note 8.

[137] K. Ewing, "The Unbalanced Constitution" in *Sceptical Essays in Human Rights* above at n. 5.where the author highlights use made by the Strasbourg organs of other international treaties, such as the ILO Convention or the Council of Europe's Social Charter of 1961. Thus, although remaining highly sceptical, he suggests that when taking account of relevant Strasbourg jurisprudence under section 2, UK courts should engage with other international treaties, which reflect social values as well as liberal constitutional values enshrined in the ECHR.

[138] The composite term socio- economic rights has been used throughout the paper to highlight the inextricable link between social and economic facilitative labour rights intended in the amorphous drafting of the International Covenant on Economic Social and Cultural Rights.

[139] The concluding observations were made on 5 June 2002, following an unfavorable periodic report, (the UK's 4th under the International Covenant on Economic Social and Cultural Rights), in which the Committee (CESCR) expressed its regret that "the Covenant has still not been incorporated in the domestic legal order and that there is no intention by [the UK] to do so in the near future".

[140] Evidence of Bill Rammell MP, then Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, 15 September 2003. Reply to Q24.

2.8 Thus, since the HRA it has been left largely to the efforts of strategic human rights campaigners and practitioners,[141] to determine the potential to protect socio-economic rights in accordance with developments in Strasbourg jurisprudence that have recognised the indivisibility of civil and political and socio—economic rights.

2.9 Recognising the urgency of an informed debate, JUSTICE has established its own "Constitution Project" to examine issues surrounding a new domestic bill of rights.[142] The Committee, which is composed of leading academic lawyers, practitioners and constitutional scholars, who are likely to have very different views on the implications of such a bill of rights,[143] has published its first discussion paper.[144]

2.10 Important issues to be considered by the Project Committee include: contents; amendability; enforcement; the process by which it might be agreed; relationship with a written constitution and most crucially the relationship of such a bill of rights with the European Convention on Human Rights and with the HRA 1998.[145]

2.11 Against this background, in May 2007 the JCHR has called for evidence inter alia on whether a new bill of rights is needed; what such a bill of rights would add to the HRA; and specifically whether it should include "social and economic rights such as the right to health".

2.12 Conclusions

2.12.1 A traditional distinction has been drawn between rights with an economic component, such as labour rights or social security benefits[146] and so- called social rights such as the right to health. In the call for evidence, question 1.6 refers to social and economic rights such as the right to health. However, as elsewhere, in this paper we have preferred the use of the composite nomenclature of socio- economic rights. This is not only because of its familiar deployment in human rights discourse by way of contrast with the traditional canon of civil and political rights, but also because its use reflects the inextricable link between the economic and social policy spheres intended by the drafters of the ICESCR. Moreover, this is an approach which can be contrasted with efforts in the post-welfare era to dissociate them.[147] Thus the nomenclature of economic rights is now often used with the purpose of asserting the ascendancy of unregulated market freedom over state obligations to protect public welfare.[148]

2.12.2 It is beyond the scope of this paper to engage in detailed discussion about the well known difficulties of including justiciable socio- economic rights in a country's constitution; or to consider the possibility of an effective marriage between the goals of economic liberalism (so-called economic rights) and expressions of state responsibility for the protection of public welfare implicit in a right to health or to social housing.[149]

2.12.3 However the attention of the Committee is drawn to the fundamental tension in modern constitutional arrangements, where so-called economic rights and freedoms are so often found sitting incongruously side by side with a set of protective social rights[150] such as the right to health or an adequate standard of living of the kind enshrined in the International Charter of Economic Social and Cultural Rights (ICESCR) 1996.[151]

2.12.4 Thus, although welcoming the need for informed debate about the inclusion of social rights such as a right to health in a new bill of rights, and recognising the ostensible imbalance in the protection afforded by the HRA, this author questions how far the inclusion of an amorphous social right to health in a bill of rights, might assist courts in the adjudication of sensitive socio-political disputes concerning access to medical services in the post welfare landscape of the United Kingdom.

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[141] Campaigning lawyers with the support of Justice and large pressure groups such as Shelter, Help the Aged, and the Public Law Project, had for the previous decade been active in the pursuit of socio economic rights protection, through ordinary principles of public administrative law.

[142] See http://www.justice.org.uk/parliamentpress/index.html

[143] The Committee members include: Francesca Klug and Lord Lester, who played leading roles in the promulgation of the HRA 1998; Professors Carole Harlow and Maurice Cranston and the political scientist Professor Vernon Bognador.

[144] For the discussion paper, "A British Bill of Rights for the United Kingdom?" held on 23 March 2007. See JUSTICE above at note 15. The Committee invited JUSTICE members to partake in a public meeting on grounds that: "Gordon Brown talks of a "new constitutional settlement" and the Labour Party originally saw the Human Rights Act as the first step to establishing a deeper human rights culture. David Cameron wants a new bill of rights.' (*Ibid*)

[145] *ibid*

[146] A group of rights, the majority relating to employment, which precede those relating to health and welfare, have generally been regarded as the economic rights. These include rights, freely to give and be remunerated for the fruits of one's labour (articles 6 to 8), and the right to social security in article 9. It is notable that no mention has been made of the right to property in this cluster of rights, which does however makes its appearance elsewhere in the International Bill of Rights, for example in the ECHR and in the UDHR.

[147] See T Daintith, "The constitutional protection of economic rights" ICON Vol. 2 No1 in (2004) pp 56–59.

[148] See S. Fredman, "Social Economic and Cultural Rights" in *English Public Law*, D Feldman ed. (OUP 2004) at p. 534–536. For further discussion of this tension see Chapter 2.

[149] See E Palmer, *Judicial Review Socio- economic Rights and the Human Rights Act 1998* (Hart, Oxford 2007), 8–9 On the difficulties of effectively protecting the goals of economic liberalism by the drafting of so-called economic rights in a bill of rights see T Daintith, "The constitutional protection of economic rights" ICON Vol. 2 No1 (2004) pp 56–59.

[150] See for example the amalgam of rights in the Charter of Fundamental Rights of the European Union 2000.

[151] A group of rights: to an adequate standard of living (article 11) to health (article 12); to education (articles 13 and 14), (not confined to persons who are economically active) have generally been viewed as the "social rights" referred to in the title to the ICESCR.

3. *What would a British Bill of Rights add to the protection for human rights already provided by the Human Rights Act 1998? (Question 1. 3)*

3.1 The following evidence considers the impact of the HRA on the protection of human rights in the socio-economic sphere. It draws on an extensive study of the role of courts in the protection of socio-economic rights following the HRA.[152] The project started with a paper entitled, "Can the Human Rights Act 1998 address inadequacies and inequalities in public services?" which I presented in 1992 at the 4th annual JUSTICE / Sweet & Maxwell conference, *Making Human Rights Work*. At that time, the administrative law courts had already begun to struggle with a number of subsidiary issues concerning the potential for protecting socio- economic rights through the HRA:

(i) the relationship between article 6 of the European Convention on Human Rights (ECHR) and the role of courts in "ordinary" administrative law disputes over discretionary housing and welfare benefits;

(ii) (ii) dynamic interpretations of article 8 ECHR by the ECtHR, so as to impose positive obligations in welfare needs contexts;

(iii) the interpretative limits of section 3 HRA 1998 in socio-political disputes; and

(iv) the meaning of "public function" in section 6 HRA.

3.2 Since then, the House of Lords has had opportunity to address many of the issues raised in my 1992 conference paper—most recently the interpretation of section 6(3) (b) in the long awaited decision of *YL v Birmingham City Council and Others* [2007] UKHL 27. Disappointingly however, contrary to the expectations of many commentators, the majority in the House of Lords has applied a restrictive interpretation to the meaning of public function in section 6(3)(b) thereby, excluding many elderly and vulnerable persons from the human rights protection afforded by the HRA.[153]

3.3 Thus, despite the protracted efforts by academic commentators, campaigning lawyers and the JCHR to persuade courts in the UK of the constitutional propriety of a more expansive compassionate "human rights" response to the interpretation of section 6(3)(b), the majority in the House of Lords has allowed itself to be persuaded by powerful strands of economic liberal thought which are hostile to the regulation of private power through public law mechanisms.[154]

3.4 Thus, at the heart of the decision in *YL v Birmingham City Council* lies a fundamental tension (See above 2.12–13) between the prevailing ethos of economic liberalism which now dominates the political landscape of the United Kingdom and the welfarist connotations of social rights such as a right to health or housing embodied in the International Covenant on Economic Social and Cultural Rights (ICESCR).

3.5 In light of the disappointing decision by the House of Lords in *YL v Birmingham City Council and Others* [2007] UKHL 27 it is suggested that the following questions may be pertinent when considering whether an express right to health should be included in a British bill of rights:

> "Would the majority in the House of Lords have been more readily persuaded to demonstrate a compassionate human rights response to the interpretation of public function in section 6(3)(b) had the House been required to interpret the provisions of the HRA in light of an express right to health included in a British Bill of Rights?
>
> Does a general right to respect for human dignity provide a more apposite basis for the protection of human rights of vulnerable individuals in the social sphere?"

4. *The protection of human rights under the HRA—recognising the indivisibility of civil and political and socio-economic rights*

4.1 The European Convention on Human Rights (ECHR) is a repository of core liberal values such as respect for dignity, equality and personal autonomy which have increasingly been relied on by the Strasbourg organs for the protection of human rights in the socio- economic sphere.

4.2 Thus, a dynamic interpretation of the ECHR rights by the ECtHR has been used (albeit sporadically) for the protection of socio- economic rights such as the right to health or to an adequate standard of living.

4.3 Therefore, in taking account of Strasbourg jurisprudence, courts in the United Kingdom have accepted that, in addition to protecting the traditional canon of negative freedoms such as the right not to be tortured or to be killed, there is important potential to protect socio- economic rights of vulnerable individuals through the development of positive obligations in the ECHR rights; particularly in articles 3 (a right to be treated with human dignity, and article 8 (a right to personal and physical integrity) Thus, there have been significant developments in which courts in the United Kingdom have recognised the potential to protect human rights of vulnerable and disadvantaged individuals in the socio economic sphere. (See

[152] Generally see E. Palmer op.cit. above at note 23

[153] For the view that the HRA was not generally intended to have direct horizontal effect see M. Hunt, "The Horizontal Effect" of the Human Rights Act [1998] P.L. 423–443. However, compare HWR Wade, "Horizons of Horizontality" (2000) 116 L.Q.R. 217, who appealed for maximum horizontality and R. Buxton, "The Human Rights Act and Private Law" (2000) 116 L.Q.R 48, who argued that the effect of the HRA should be "vertical" only.

[154] For a discussion of the impact of economic liberal theory on the interpretation of section 6(3) (b) see E Palmer *opus cited* above at note

Bernard and Another v Enfield LBC [2002] EWHC 2282, [2003] HRLR 4 *Anufrijeva v Southwark London Borough Council* [2003]EWCA Civ 1406; *R (on the Application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66.

4.4 However, consistent with traditional institutional and constitutional barriers to the adjudication of disputes where questions of resources may be at issue, developments have been constrained by judicial deference to the authority of the executive and other public authorities.[155]

4.4.1 Thus, despite carefully drafted collaborative constitutional safeguards embodied in the HRA, courts have resisted the use of section 3 HRA for the scrutiny of health and welfare legislation. (See for example the approach of courts to the interpretation of section 17 of the Children Act 1989. *(R (on the Application of G) v Barnet LBC* [2003] UKHL 57; [2004] 1 All ER 97-214.))[156]

4.4.2 Despite suggestions to the contrary, in sensitive political disputes such as national security and immigration, courts have been slow to intrude on the authority of the executive or other public authorities in performing their obligations under section 6 HRA.31 Thus, in highly controversial political disputes, since the HRA courts have defined the boundaries of their legitimate intervention in accordance with a context-sensitive doctrine of deference, whereby attempts have been made to exercise a constitutionally appropriate degree of restraint, without ceding questions about the legality of decisions under scrutiny to public authorities themselves.

4.4.3 Moreover, although there has been a division of opinion among senior members of the judiciary as to the manner and extent of judicial deference, the need for utmost deference to the executive or other public authorities has been almost consistently defended when courts are exercising their powers of scrutiny under section 6 HRA in socio-political disputes raising issues of resource allocation.[157]

4.4.4 Courts have also adopted a restrictive approach to the meaning of public authority in section 6(3)(b) despite the cogency of arguments for a more generous interpretation. Thus, the decision by the House of Lords in *YL v Birmingham* has clearly gone against the grain of government thinking in the drafting of section 6(3) (b).

4.4.5 Conclusions

4.4.5.1 Clearly there is potential to protect socio- economic rights through the development of core liberal values of dignity and personal autonomy embodied in the ECHR.

4.4.5.2 Courts in the UK have accepted the potential to impose positive obligations on government and public authorities to in the socio- economic sphere- particularly in socio economic disputes where articles 3 and 8 ECHR are engaged.

4.4.5.3 However, despite the carefully drafted collaborative constitutional safeguards in the HRA, a consistently deferential approach has been adopted by courts in relation to their interpretative powers under sections 3 and 6 HRA.

4.4.5.4 Moreover, the majority in the House of Lords has interpreted section 6(3)(b) in light of a prevailing ethos of economic liberalism which is antithetical to the ideals of social protection embodied in the International Covenant on Economic Social and Cultural Rights; or the revised Economic Social Charter (1996) European regional counterpart to the ECHR.

5. *Courts and the development of a culture of human rights under the HRA*

5.1 On a more positive note however, during the past six years, a sophisticated understanding has grown among senior members of the judiciary, that their responsibility under the HRA 1998 is to develop a "domestic code of human rights jurisprudence" which should not only be "in tune with Strasbourg jurisprudence", but also "fully reflect where it is appropriate to do so, our own cultural traditions and perhaps unique historic perspective of the importance of individual freedom in society".[158]

5.2 Thus, in the context of socio- economic rights, as in other areas of jurisprudence, confidence in what it means to take account of, without necessarily following Strasbourg jurisprudence has grown. For example, in *Limbuela*)[159] in order to affirm its own dynamic interpretation of the scope of Article 3 ECHR, the House of Lords placed emphatic reliance on what they identified as a strong line of Article 3 jurisprudence. By contrast however, in cases such as *Begum*[160] *Carson*[161] and *Kay*[162] a delicate balance has

[155] Generally see E Palmer op. cit. above at note 23, 165–196
[156] See E Palmer, Courts Resources and the HRA: Reading Section 17 of the Children Act 1989 Compatibly with Article 8 ECHR [2003] EHRLR Issue 3
[157] For the controversy over deference under the HRA see E Palmer *op cit* above at note 23, 175–173
[158] The Rt Hon Lord Woolf of Barnes, *Foreword*, in L. Lester and D. Pannick (eds), *Human Rights Law and Practice*, 2nd edn (London, Butterworths, 2004) page vi
[159] *R v Secretary of State for the Home Department, ex parte Limbuela* [2005] UKHL 66, [2006] 1 AC 396.
[160] *Runa Begum v Tower Hamlets London BC* [2003] UKHL 5, [2003] 1 ALL ER 689
[161] *R (on the Application of Carson) v Secretary of State for Work and Pensions;* [2005] UKHL 37, [2005] 2 WLR 1369, [2005] 4 All ER 545
[162] *R (on the Application of Kay and Others) v London Borough of Lambeth* [2006] UKHL 10

been struck by the House of Lords between adhering to dynamic interpretations of Articles 6, 8 and 14 ECHR in Strasbourg, and the constitutional mandate of courts in the United Kingdom to interpret and to develop the ECHR rights in a morally defensible and culturally appropriate manner.

6. *Should people have a say in the content a British bill of rights?*

6.1 There is indeed much to be said for informed participative debate, of a kind that did not precede the HRA 1998, about a bill of rights for the United Kingdom. For example, should a bill of rights in which citizens have "a say" include civil and political and socio-economic rights, such as a right to housing or a right of access to health? If so, what would be the anticipated role of courts in protecting those rights?

(i) For example, if an express right to health were included in a bill of rights, would courts be expected by citizens to have a greater role than they have cautiously assumed under section 3 HRA 1998 in reviewing legislation for the provision of health or welfare services to vulnerable individual caught up in the care system? What would the right to health mean in the privatised post welfare political landscape of the United Kingdom? (See the Canadian case of *Chaoulli v Quebec* [2005] SCC 35; [2005] 1 SCR 791.

(ii) Would citizens anticipate that the inclusion of an express right to health might more successfully prevent the closure of local hospitals—a matter of widespread public concern over which courts currently have little control?

6.2 In sum, would citizens expect that a bill which included express socio- economic rights (such as the right to health) allow courts more effectively to hold government to account for failure to meet the basic health and welfare needs of citizens?

Conclusions

This is not the place to second-guess the outcome of the JUSTICE project, or indeed the likely contents of a new constitutional settlement for the United Kingdom, whether of David Cameron's or Gordon Brown's design.

However, we wish to express a degree of scepticism that in the post-welfare landscape of the United Kingdom, a future Conservative or indeed New Labour government would allow a greater role for courts in the scrutiny of health and welfare legislation in accordance with human rights values than currently afforded by the collaborative safeguards under the HRA 1998.

A useful contrast can be drawn with the role of courts in socio- economic rights under the South African constitution. The extent to which the historic rejection of the divisive past of South Africa provided concerted political will for the meaningful protection of socio-economic and civil and political rights in the transformative South African constitution is well documented.

By contrast, we have seen the continuing resistance of New Labour government during the past seven years to what has proved to be the measured and enlightened constitutional review by our senior courts, of government's interference with fundamental human rights, whether designated as civil and political or socio- economic rights.[163]

6 September 2007

25. Memorandum from Mr Henry Porter

(1) Two things are striking as you read through the oral evidence presented to the Joint Committee on Human Rights. The first is the measured calm of the majority of your witnesses, and indeed of the majority of the committee, in the face of the most serious attack on personal freedom and privacy ever mounted during peacetime in this country British democracy is on the brink of being changed beyond recognition, yet nothing seems to disturb the equanimity of your proceedings. Even allowing for the well-mannered traditions of parliamentary committees, the lack of urgency and of a sense of crisis seems remarkable.

(2) The second point that occurs to an outsider unfamiliar with parliamentary routines is that this campaign against Britain's historic rights and freedoms began at almost the precise moment the European Human Rights Convention was incorporated into British law as the Human Rights Act in 1998. In other

[163] See the Guardian Unlimited 23 May 2007, http://www.guardian.co.uk/international/story/0,,2086261,00.html reporting the historic decision of the Court of Appeal on the previous day to allow families expelled from the Chagos Islands in order to make way for the Diego Garcia US airbase 30 years ago, to return home: "Explaining the court's decision, Lord Justice Sedley said that 'while a natural or man-made disaster could warrant the temporary, perhaps even indefinite, removal of a population for its own safety and so rank as an act of governance, the permanent exclusion of an entire population from its homeland for reasons unconnected with their collective well-being cannot have that character and accordingly cannot be lawfully accomplished by use of the prerogative power of governance'. After the ruling, a Foreign Office spokesman said ministers were 'disappointed' that judges had not granted the department leave to appeal the decision. 'We now have one month to lodge an appeal with the House of Lords,' he added."

words, the HRA—a Bill of Rights by any other name- has allowed the executive and civil service to roll back individual choice, liberty and privacy and has done almost nothing to defend the British public from the accumulation of centralised power.

(3) Let me first make it clear that the HRA has brought many benefits to ordinary people, for instance insuring that foreign prisoners who may be tortured in their countries are not deported. It has been responsible for countless cases where people have won the right to dignity, fairness and equality in their treatment. Despite the many advantages of the HRA which has been tirelessly championed by Liberty, the reality is that it does not work effectively as a Bill of Rights and cannot guarantee the headline rights necessary for a free society—a point perhaps tacitly admitted by the appearance of Gordon Brown's Green Paper last summer.

(4) At the end of this submission there is a brief list to remind the JCHR of the liberties and rights which have disappeared from the inventory since Labour came to office in 1997 and the HRA came into law in 2000. Though incomplete, it is a shocking picture of developments in Britain that are now being noticed with bafflement abroad by people who do not understand this turn of events in one of the oldest democracies in the world. On a book tour last month in France, I was repeatedly asked by journalists, "Why in Britain? What has happened in the British people to make them so compliant? Why are there no demonstrations?"

(5) There are complex answers to these questions but an obvious one is that in each case where freedom is compromised the Government has advanced the argument that a new law meets a singular threat from crime, terror and anti-social behaviour. The British have accepted these appeals with a rare faith in the wisdom and benevolence of our leaders—a faith, incidentally, which I increasingly do not share. After a decade the account shows a devastating loss of the freedoms that we once regarded as our birthright, the self-evident and self-perpetuating virtue of the British people and their Constitution.

(6) The shocking part of it all is that it has occurred with almost no coherent analysis, scrutiny or opposition in parliament, no debate about the direction of our society, and only a little understanding and exposition in the media. The truth is that we may have taken a false sense of security from the presence the HRA on the statute book. Indeed, there seems every reason to suspect that the act has served the executive and civil service as an alibi while the balance between state power and individual freedom has been critically altered in the state's favour. It is for this reason that I find it very hard to share Liberty's courageous enthusiasm for the act, even though I concede its good points. If the maintenance of rights and liberty is the best measure of a code of rights, then the HRA must surely be declared a failure.

(7) It seems to me that this is not due to any innate problem with the act but rather to the state of parliament and the decline of British democracy. I will touch on this later.

(8) To show how the act fails us in practice, I want to draw the committee's attention to the key Article Eight in the HRA, the one that guarantees "the right to respect for private and family life, home and correspondence". By far the most dramatic threat to ordinary people's freedom in the last decade has been the growth of the database state. Under Labour's plans for "transformational government" an almighty surveillance structure is envisaged, through which, by the admission of the man in charge, Sir David Vamey, the state will know "a deep truth about the citizen based on their behaviour, experience, beliefs, needs or desires". As Jill Kirby pointed out in a recent CPS pamphlet, the intention is for government to centralise and share all information on the citizen both horizontally and vertically, without the citizen's knowledge. It is hard to imagine a more sinister apparatus of control, but the project advances untroubled by the scrutiny of parliament or the memory of George Orwell's vision in 1984.

(9) The state's nightmarish lust for our personal data does not stop there. Already all journeys undertaken on motorways and through town centres are recorded by the network of automatic number-plate recognition (ANPR) cameras, and the information retained for two years. Surveillance is possible in real time. Imagine that ability in the hands of a government desirous of preventing demonstrators making their way to London for a legitimate protest, or wishing to track political dissidents. Under the ID-card scheme, 49 pieces of information will be required by the state and every important transaction in a citizen's life will be recorded by the National Identity Register during ID verification. And there is a new proposal to collect 19 pieces of information, including mobile-phone and credit-card numbers from people travelling abroad, which the government plans to use to fight terrorism and international crime, and for "general public policy purposes—ie, the mass surveillance of a free people. I remind the committee of something the American cryptographer and computer expert, Bruce Schneier, wrote: "It is poor civic hygiene to install technologies that could someday facilitate a police state."

(10) The story of the HRA's failure gets worse when you reach the guarantees on the privacy of family life, home and correspondence. The act simply doesn't perform. There are now five databases that will in various degrees breach the privacy of children and their families. The home is threatened for the first time since 1604 by new regulations concerning bailiffs who, under the Tribunals, Courts and Enforcement Act, are about to be allowed to offer violence against the householder. As to our correspondence, with over half a million intercepts of post, email, and internet connections a year, with nearly 700 authorities allowed to apply for phone records and to intercept a person's communications on the thinnest possible pretext, it is clear that the HRA has not, and will not guarantee the privacy of our correspondence.

(11) I hope I will not be thought melodramatic when I say that if this trend continues, there will be many who will not feel able to continue to live in this country. From the emails I receive in response to my columns for *The Observer*—sometimes as many as 500 a week—I would suggest that there is deep bewilderment and anger about the way things began to go sour under a prime minister who said that "civil liberties arguments are not so much wrong as made for another age". (Tony Blair)

(12) There is a profound but unacknowledged crisis in this country. Our liberties have been attacked, but we have also suffered a collapse in what I would call the liberty reflex, both in and outside parliament. Twenty years ago the measures I have described above, which are often brought into law by Statutory Instrument—effectively ministerial decree—would have been unthinkable. The media would have been inflamed; former members of the National Council for Civil Liberties (now Liberty) such as Harriet Harman and Patricia Hewitt would have been talking about a police state; and there would almost certainly have been marches and protests. But today we just let it go.

(13) This is why I believe a new Bill of Rights is imperative. But it must be a Bill of Rights that is clearly British in origin and that draws its potency from our traditions and culture, and from the settlements of 1689 and Magna Carta, insisting for example on the right to trial by jury, which is not found in European charters and conventions. There is no question that such a bill would overlap with some of alleged guarantees in the HRA, but, crucially, the drafting would be part of a process of general political renewal, in which there was a rebalancing of powers at the very top of our democracy. To my mind it should be restricted to what I have referred to as headline rights and should not include economic rights, which seem to me to be aspirations that can dilute the potency of a Bill of Rights. At any rate it, should be a work of simplicity and eloquence in which the British people, not parliament or a team of ministerial scribblers working from some bogus consultation process, define their inalienable rights as part of a new covenant between the people and parliament and between the executive and parliament. It goes without saying that it should be entrenched: that is placed beyond the reach of the authoritarian tendencies that are obviously alive in the civil service and the current administration and permitted by an easily manipulated parliamentary majority.

(14) Conventional thinking says such laws cannot be "entrenched" and that no parliament can bind its successors. But in reality this is nonsense. All constitutions however strongly codified always allow for a process of amendment. I am not asking for an Act that would be set in stone and entrenched forever. Besides, an important point discussed by the Chairman of Mischon de Raya, John Jackson, in OpenDemocracy, based on the views of Lord Bingham, suggests that Parliament has already bound its successors in a largely noticed way by a sentence in the Constitutional Reform Act 2005. It says: "Part 1 provides that the Act does not adversely affect the existing constitutional principle of the Rule of Law." This surely means that the principles of the Rule of Law override the sovereignty of Parliament.

(http://www.opendemocracy.net/ourkingdom/article5/who_makes_the_law in_ britain)

(15) It is not naive to suggest that things should be arranged, perhaps by the deployment of the parliament Act, so that the new Bill of Rights could not be altered without very great difficulty and only in circumstances where there was a considerable consensus. The result would be the people's prized possession, a thing that every child would learn at school and might perhaps quote at will later in life.

(16) As you see I do not recoil from the idea of unelected judges deciding where parliament has overstepped the mark, because in the slow descent that we are all witness to it has been judges who have often supported the principles of liberty and rights. MPs would be wise to agree with this and stop pretending to the public that they are the sole defenders of the public realm.

(17) The second, more compelling reason for an entrenched British Bill of Rights revolves round the definition of sovereignty. In the political context, the OED defines the word thus: "Supremacy in respect of power, domination or rank; supreme dominion, authority or rule." It must be evident to members of both houses that parliamentary sovereignty is a hollow phrase. Parliament is not sovereign, because the executive runs everything. The government decides on and schedules parliamentary business, appoints the chairs of select committees and smothers debate by means of Standing Orders and Standing Committees. One of your previous witnesses suggested in his oral evidence that 99% of law was made by secondary legislation. Even if only roughly accurate, this is an astonishing statistic and it explains why so many laws affecting our fundamental freedoms are passed without debate and take their toll on our society without proper scrutiny. Here are some examples. There is no statutory basis for the ever-expanding Police National DNA database, which contains the biological essence of hundreds of thousands of innocent people; or for the expanding network of ANPR cameras; or for the proposals to take 19 pieces of information from people travelling abroad; or for the Transformational Government Project. These things just happen without debate of the issues or any attempt to defend the people from these oppressive and high-handed measures. For MPs to protest about parliamentary sovereignty in such circumstances seems odd. Of course it is argued that Parliament is the authority for all SIs but it must be clear that it has no real control over the way Ministers use these delegated powers. As the story of the HRA shows us, the truth of the matter is that parliament can offer the public little effective protection because it is itself in the control of the executive.

(18) There is a real temptation in this debate to think in rather academic terms about concepts of law and sovereignty, yet I am struck by the vivid examples of change that you hear about every day—the spread of unnecessary and intrusive CCTV; the appearance of immigration officials—plus heavies with earpieces—randomly stopping people outside London Tube stations to question them about their status; the examples

of arrogance of the police in the pursuit of people who have committed any of the 3,000 new offences introduced by Labour; the pupils being fingerprinted at their school library; the use of the "mosquito" to control young people; the commands barked through speakers telling people to behave. Certainly our society has its problems, but I feel sure that this bossy, hectoring attitude stems from the government's fundamental disrespect for the people and their rights. Measure by measure the government has come to see us a subjects who must endlessly submit to checks and verification. This attitude is at the heart of the transfer of power from the individual to the state.

(19) Entrenching a Bill of Rights, which as I have hinted would be part of much greater process of democratic renewal, would go a long way to arresting this trend and reasserting the rights of the citizen. But what we do not need is a placebo bill drawn up by this government to act as a further alibi while our rights and freedoms are stolen in the night. I suspect there is a very good reason why a Bill of Rights has been put on the political agenda by a party that is already responsible for the HRA. It recognises the strength of the case that has been made against it by civil libertarians, and wants to answer that case before the next election with a bill that appears incontestably wedded to the principles of a free society. It is a shrewd and cynical exercise, because at the same time they will own the process and so make sure that nothing that remotely threatens the government's power will reach the statute book.

(20) Finally, I want to say something about the phrase "rights and responsibilities" used by Jack Straw and Gordon Brown in respect of a new bill. This springs from the telling belief among ministers that rights are somehow in the gift of the government and that they are entitled to require people to sign up to a list of responsibilities in exchange. This is arrogant nonsense. The citizen's responsibilities are defined by common, civil and criminal law, and ministers display a constitutional impertinence by suggesting otherwise.

3 March 2008

APPENDIX

A BRIEF GUIDE TO THE LOSS OF LIBERTY AND RIGHTS SINCE 1997

Protest and Assembly

— Protests are banned within one kilometre of Parliament Square without police permission (penalty: 51 weeks in jail and/or a £2,500 fine).

— Groups may be dispersed under antisocial-behaviour laws.

— Groups may be dispersed within designated areas under the terror laws.

— The new offence under SOCPA of trespass within a designated site (no justification for designation is required).

Communications

— Under the Regulation of Investigative Powers Act, government agencies may intercept email, internet connections and standard mail without seeking a court's permission (the latest figure is 500,000 secret interceptions a year).

— Since summer 2007, the government and some 700 agencies have had access to all landline and mobile-phone records. There was no primary legislation and no debate in parliament.

Databases

— Without primary legislation, police introduced a national network of all ANPR cameras. The travel data may be stored for two years.

— The National Identity Register will store details of every verification made by an ID-card holder and give access to government agencies without the knowledge or consent of the private citizen.

— ID-card enrolment requires every citizen to offer up 49 piece of personal information to the national database, with heavy and repeated fines for non-compliance.

— All children details are to be stored on a central database, with access granted to a wide range of public bodies.

— The Children's Common Assessment Framework database stores all details of children with problems, indefinitely.

— The Home Office has announced that it wishes to take 19 pieces of information, including mobile-phone and credit-card numbers, from everyone travelling abroad.

Free Expression

— Public-order laws have been used to curtail free expression. A man wearing the slogan "Bollocks to Blair" on his T-shirt was told to remove it by police.
— The Race and Religious Hatred Act (2006) bans incitement of hatred on religious grounds.
— Justice Minister Jack Straw proposes new laws which would ban the incitement of hatred towards the disabled and on the grounds of a person's sexual orientation.
— Terror laws are used to ban freedom of expression in designated areas. Walter Wolfgang was removed from the Labour party conference for heckling Jack Straw. People have been searched simply for wearing slogans on their T-shirts or for carrying banners. A man was detained while collecting signatures against the ID card.
— The Protection from Harassment Act (1997) bans the repetition of an act. People prosecuted for repeated protest by email.
— Terror laws ban the glorification of terrorism, which has resulted in the prosecution of a young woman for writing poetry.

The Courts

— ASBO legislation introduces hearsay evidence, which may result in a person being sent to jail.
— The Criminal Justice Act (2003) allows the prosecution to make an application to be heard without a jury where there is a danger of jury tampering. This will include fraud trials.
— The admissibility of evidence concerning a person's bad character, previous convictions and acquittals.
— The Proceeds of Crime Act (2002) gives the state powers to confiscate assets in circumstances where it does not have enough evidence for prosecution.
— Special Immigration Appeals Court hearings are held in secret. Those terror suspects whose cases come before the court are not allowed to know the evidence against them or to be represented by a lawyer of their own choice.
— The Courts and Tribunals Enforcement Act abandons the tradition of an Englishman's home being his castle, which since 1604 has made breaking into a home by bailiffs illegal.

Terror Laws

— Terror laws have been used to stop and search ordinary citizens. The current rate is 50,000 per annum.
— A maximum of 28 days without charge is allowed under terror legislation. The government has announced plans to double this in new legislation.
— Control orders, effectively indefinite house arrest, were introduced after the Belmarsh decision.

26. Memorandum from the Royal National Institute of Blind People

Call for Evidence (Joint Committee on Human Rights)

The Royal National Institute of Blind People (RNIB) welcomed the Prime Minister's July 2007 commitment to strengthen our democracy. In particular we were pleased that in his statement on constitutional reform the Prime Minister agreed to involve the public in a "sustained debate" about whether there is a case for the United Kingdom to develop a full British Bill of Rights and Duties.

1. *RNIB supports a British Bill of Rights*

The RNIB believes there is a strong case for establishing a British Bill of Rights or a Statement of British Values. As a member of the Equality and Diversity Forum, the RNIB shares a deep commitment to ensuring that all members of our society are able to participate properly, including via political processes. An unwritten constitution that lacks a codified set of rights and responsibilities can serve disabled individuals poorly.

The achievements of recent years, with greater disability equality and discrimination in many areas of public life outlawed, represents the outcome of many years of hard work. The progress achieved over the last few decades has been the result of many different interventions, with the executive, the legislature and the judiciary all acting as levers for positive change.

Under the current arrangements, disabled individuals looking to protect or further advance their rights must either hope that elected politicians will the necessary changes in legislation or in some cases they will need to directly challenge the law themselves. For all its benefits, the current constitutional framework doesn't entrench people's rights in a single or binding document. Disabled individuals can of course call on and refer to numerous pieces of statute and common law, including European Union law, to help them determine and exercise their rights. What they cannot do, and of course this is true for the entire population, is refer to an accessible Bill that enshrines these fundamental rights.

Although there is merit in arguing that an unwritten constitution serves minority or disadvantaged groups well, the RNIB believes the Government needs to take this opportunity to reinvigorate our democracy by affirming its commitment to introducing a Bill of Rights. It needs to lead the process for establishing a consensus about what it should contain and it should confidently set out what it believes to be the purpose of a Bill of Rights.

2. *The purpose of a British Bill of Rights*

The RNIB understands that producing a Bill of Rights (or a Statement of British Values) isn't a panacea. We also understand the unique nature of Britain's constitution, and how one of its strengths is the ability to evolve over time. It has been able to endure because it has proved so flexible. However, it is in that flexible, amorphous set of arrangements that we detect some areas for improvement. A Bill of Rights or a Statement of British Values would serve as a coherent proclamation of the rights the state confers to its citizens.

— Although the adoption and incorporation of European law into our own statutory law means certain "negative" rights have now been codified, the rights covered by statute are fairly limited in scope. A Bill of Rights could positively add to these by entrenching core social and economic rights, such as the right for disabled people to access education and health.

— Being derived from a range of sources means the British Constitution is complex and difficult to understand. A Bill of Rights would positively set out the rights and duties the state confers to its population and it would attain the permanence that statute and common law all too easily lose.

— A Bill of Rights or Statement of British Values would ingrain fundamental principles that otherwise might remain implied or implicit. The RNIB believes the purpose of the Bill of Rights should be to support the rights and freedoms currently contained in international treaties, such as the UN Convention on the Rights of Persons with Disabilities. In fact the UK Government has not yet ratified this Convention and we are calling for them to do so as a matter of priority. Ratification and subsequent incorporation of the Convention on the Rights of Persons with Disabilities into UK law is a necessary first step. Only then can a Bill of Rights support the rights contained in that Convention. RNIB is arguing that ratification of the Convention needs to take place without reservations, as these would surely undermine this vital human rights treaty.

— Establishing a Bill of Rights would help reaffirm the universality and indivisibility of all human rights and freedoms, but it should also confirm the interdependence of these rights and freedoms for disabled individuals. The RNIB would like to see a Bill of Rights that clearly spells out that disabled people are to be guaranteed the enjoyment of all human rights and freedoms without discrimination.

3. *The Debate Ahead*

As a member of the Equality and Diversity Forum the RNIB strongly believes that reforms designed to promote meaningful participation must be shaped by those who are supposed to benefit. For this reason, along with other disabled people's led organisations we have begun to discuss the processes surrounding proposals for a British Statement of Values and a British Bill of Rights, both of which will touch directly on matters of relevance to our members including equality, diversity and human rights.

RNIB believes that any attempt to produce a Bill of Rights should complement the Human Rights Act 1998. It should not be used as an exercise to re-interpret or supersede that landmark piece of legislation. The incorporation of the European Convention on Human Rights into British law has been of great benefit to disabled individuals. RNIB is concerned by a number of recent attempts to question its efficacy. We would therefore urge the Committee to speak out against proposals for a Bill of Rights to replace the Human Rights Act.

In conclusion, one particular principle which we hope will be used by the Government to inform its consultation processes is that the process for discussing a Bill of Rights should be clearly premised on the fact that the rights protected by the Human Rights Act 1998 represent a non-negotiable baseline.

January 2008

27. Memorandum from the Trades Union Congress (TUC)

Introduction

The Trades Union Congress (TUC) welcomes the opportunity to submit evidence to the Joint Select Committee's Inquiry on a British Bill of Rights. The TUC has 59 affiliated unions in membership, representing nearly 6.5 million people working in a wide variety of UK industries and occupations.

The TUC welcomed the publication of the Government's Green Paper *The Governance of Britain*, which launched a national debate on constitutional arrangements, including whether there should be a British Bill of Rights. The TUC looks forward to participating in this wider debate. This submission concentrates on the role of collective rights, in particular trade union rights, in any future Bill of Rights.

The TUC believes that if a Bill of Rights were to be adopted in the UK, it must include collective rights for trade unions. In particular, a Bill of Rights should include rights to freedom of association (including protections for trade unions and employers' associations), the right to organise effectively (including the right to strike), and the right to free collective bargaining. These fundamental human rights are recognised and protected by a range of international treaties including the ILO Conventions 87 and 98 and Articles 5 and 6 of the European Social Charter 1961. Although Article 11 of the European Convention of Human Rights protects freedom of association for trade unions, this Convention right has been interpreted narrowly. The TUC believes that the wider ILO and Council of Europe standards should be incorporated into UK law and should form part of any future Bill of Rights.

The Benefits of Greater Protection for Trade Union Rights

Guaranteeing fundamental rights for trade unions in the UK would benefit workers, the economy and wider civic society. Through collective bargaining and effective worker representation trade unions play a central role in reducing inequality as well as enabling organisations to adapt to increased global competitive pressures. In its 2004 Jobs Study[164] the OECD found: "consistent evidence that overall earnings dispersion is lower where union membership is higher and collective bargaining more encompassing and centralised."

In July 2007, the Joseph Rowntree Foundation published a report "Poverty and wealth across Britain" which charted the national proportions of poverty and wealth at each period in time. It found that "the proportion of houses that were core poor and breadline poor declined during the 1970s, but then increased again during the 198Os".[165] During the 1990s, while the proportion of core poor households declined, the breadline poor continued to rise. The rise in social equality in the 1970s, tracked by the Joseph Rowntree report, coincided with high levels of collective bargaining coverage and union membership density. The growth in poverty experienced in the 1980s and 1990s was accompanied by a decline in union recognition and collective bargaining arising in part from the introduction of legal restrictions on trade union freedoms.

Since 1997, the UK Government has introduced a range of welcome measures increasing the rights of trade unions, including the right to be accompanied, the statutory recognition scheme and extended protections for trade union members and officials from discrimination and victimisation. Nevertheless, many of the restrictions on trade union rights, introduced during the 1980s and 1990s, remain in place. These restrict trade union autonomy and limit the ability of unions to represent union members' economic interests effectively.

Complying with International Standards

The inclusion of trade union rights within a Bill of Rights would also assist in ensuring that the UK complies with international human rights standards to which we are signatories.

As the Committee will be aware, since 1989 the ILO Committee of Experts has consistently found that UK trade union laws fail to comply with ILO Convention 87 (on freedom of association and protection of the right to organise) and ILO Convention 98 (on the right to organise and bargain collectively. Similarly, in its latest report, published in 2005, the Social Rights Committee of the Council of Europe reiterated the view that UK laws do not comply with Article 5 and 6 of the European Social Charter 1961 in a number of key respects. Issues of concern raised by these international supervisory bodies include limitations on the right to strike, including inadequate protection from dismissal for striking workers; restrictions on trade union autonomy, including the inability of unions to determine who should be admitted into union membership and the exclusion of small forms from statutory recognition provisions. In its Report on the International Covenant on Economic, Social and Cultural Rights[166], the Joint Select Committee concluded "The CESCR [Concluding Observations of the UN Committee on Economic Social and Cultural Rights] concludes that current law places undue restrictions on the right to strike, as protected in Article 8 ICESCR.

[164] E*mployment Outlook 2004*, Chapter 3, OECD, 2004

[165] Joseph Rowntree Foundation (2007) *Poverty and wealth across Britain 1968–2005 by* Daniel Dorling, Jan Rigby, Ben Wheeler, Dimitris Ballas and Bethan Thomas from the University of Sheffield, Eldin Fahmy, David Gordon and Ruth Lupton. The Policy Press

[166] Joint Committee on Human Rights (2004) *The International Covenant on Economic, Social and Cultural Rihts:* Twenty-first Report of Session 2003–04.

We consider that the Government should take seriously the successive findings of the authoritative international bodies overseeing treaties to which the UK has become party, and should review the existing law in the light of them."

Most recently, the European Court of Human Rights ruled that the UK was in breach of Article 11 of the European Convention. The court held that ASLEF's right to freedom of association under Article 11 of the European Convention on Human Rights had been violated by section 174 of TULR(C)A 1992 which prevented it from expelling one of its members on the ground of his membership of the British National Party. The TUC welcomes the provisions contained in the Employment Bill currently being considered by Parliament. However, the TUC believes that further measures are needed to comply with the finding of the Court in the *ASLEF case* that "under Article 11 unions must be free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union." In the light of the ECHR's judgment TUC believes that the Government should carry out a review of all trade union laws to assess whether they comply with Article 11 of the European Convention.

The inclusion of core trade union rights in a Bill of Rights would also bring UK law and practice into line with the constitutional arrangements of many other countries. Trade union rights are incorporated in national constitutions or constitutional arrangements of the majority of EU Member States. In its recent judgement in the *Viking* case[167], the European Court of Justice also recognised that "the right to take collective action, including the right to strike, is a fundamental right which forms an integral part of the general principles of Community law". Most other G8 countries' constitutions also recognise trade union rights. Recently, the Canadian Supreme Court introduced constitutional protection for collective bargaining. The Court concluded "Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the [Canadian] Charter [of Rights]"[168].

Conclusion

If a Bill of Rights were to be adopted in the UK, the TUC believes it must include rights to freedom of association (including protections for trade unions and employers' associations), the right to organise effectively (including the right to strike), and the right to free collective bargaining. These rights should be based upon standards recognised and protected by ILO Conventions and the European Social Charter 1961.

19 December 2007

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28. Memorandum from the Trade Union and Labour Party Liaison Organisation

TRADE UNION RIGHTS WITHIN A BRITISH BILL OF RIGHTS

Background

1. The Trade Union and Labour Party Liaison Organisation (TULO) welcomes this opportunity to contribute to the debate about a British Bill of Rights. TULO is the organisation that represents the 16 trade unions currently affiliated to the Labour Party, with a combined affiliated membership of 2.4 million. In this submission TULO wishes to add its voice to the debate about a British Bill of Rights in the belief that if there is to be such a measure, it must make full provision for trade union rights.

2. Strong trade unionism is essential in an era of globalisation and the continuing growth of powerful trans-national corporations. Yet trade union rights are constantly undermined and are the subject of steady erosion. The British government is now regularly found to be in breach of ILO Conventions on fundamental trade union rights by the ILO Committee of Experts; as well as in breach of the European Social Charter of 1961 by the European Committee on Social Rights. Most recently, the United Kingdom was found to be in breach of article 11 of the European Convention on Human Rights in the landmark *ASLEF* case.

3. As a result, TULO believes that constitutional protection of trade union rights in a Bill of Rights—with ILO standards as a minimum—is necessary if working people are to be adequately protected from the misuse of governmental and corporate power.

Trade Union Rights in Britain

4. TULO welcomes the fact that a number of measures have been taken by the Labour government since 1997 to extend the rights of trade unions. The statutory recognition procedure was a particularly welcome initiative, though as we shall explain below there are concerns that the procedure is too narrowly drawn. TULO remains concerned, however, that many of the restrictions on trade union rights inherited from the Thatcher/Major era remain in place, seriously circumscribing trade union freedom. Some of these restraints

[167] *Viking case (International Transport Workers' Federation and Finnish Seamen's Union v' Viking Line Abp)*
[168] Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27

and the impact which they have on trade union freedom were outlined in evidence submitted to the JCHR in 2004 at the time of its inquiry into the International Covenant on Economic, Social and Cultural Rights. Submissions were made to the Committee by CWU, GMB, TGWU and UNISON, as well as the RMT which is no longer a member of TULO. Little has been done since then to rectify the shortcomings of British law, and indeed the government has emphasised its isolationist position in Europe by negotiating an opt out from the EU Charter of Fundamental Rights. This is a move greatly regretted by TULO.

5. Trade union rights are protected by a number of international human rights treaties to which the United Kingdom is a party. They include ILO Conventions 87 and 98 and the Council of Europe's Social Charter of 1961. So far as the ILO Conventions are concerned, these deal specifically with freedom of association, and the United Kingdom has been found in breach of these provisions consistently since 1989 by the ILO Committee of Experts.

— In its most recent report on Convention 87, the Committee repeated concerns about the statutory restrictions on trade union autonomy, taking strong exception to the inability of trade unions to exclude or expel individuals on the ground of their membership of political parties hostile to the interests of the union. These provisions—which have already been considered by the JCHR—were also held by the European Court of Human Rights to breach article 11 of the European Convention on Human Rights. Apart from these concerns about trade union autonomy, the Committee of Experts also renewed its concerns about the tight restrictions on the right of trade unions to defend the economic and social interests of their members by taking collective action in appropriate cases. In particular, it renewed its findings that the total ban on solidarity action in British law violated the requirements of Convention 87.

— In its most recent report on Convention 98, the Committee broke new ground by raising concerns for the first time about the new recognition procedure introduced by the Employment Relations Act 1999. Four questions in particular were raised, three of these relating to the exclusion of small businesses from the procedure; the fact that an application for recognition under the procedure can be blocked by an employer voluntarily "recognising" a non—independent trade union; and the failure to provide adequate protection for workers from anti—union conduct by employers. The other concern raised by the Committee was that recognition can only be granted where the union can show majority support, whereas under ILO jurisprudence a trade union should be entitled to bargain on behalf of its members, even where the union does not have support from a majority of the workforce.

6. So far as the Social Charter is concerned, compliance with obligations under this treaty is reviewed by a rolling programme of scrutiny undertaken by the Social Rights Committee of the Council of Europe. In its last report published in 2005, the Committee examined British compliance with 7 articles of the treaty, including the trade union rights provisions of article 5 (on the right to organise) and 6 (on the right to bargain and the right to strike). These 7 articles contain 23 separate obligations, with which the United Kingdom was found to be in conformity with only 13. The cases of non conformity were said to include articles 5 and 6, in each case for several reasons.

— In the case of article 5 (on the right to organize), three grounds of non—conformity were given. These related to (i) section 15 of the Trade Union and Labour Relations (Consolidation) Act 1992 which makes it unlawful for a trade union to indemnify an individual union member for a penalty imposed for an offence or contempt of court (ii) section 65 of the 1992 Act which severely restricts the grounds on which a trade union might lawfully discipline members represent unjustified incursions into the autonomy of trade unions; and (iii) section 174 of the 1992 Act (as amended by the Employment Relations Act 2004) which entitles a trade union to exclude members for reasons linked exclusively or mainly to the fact that they have taken part in the activities of a political party and not because they were affiliated to the party. These measures were said to constitute "an excessive interference by the law with trade union membership conditions".

— In the case of article 6(4) (on the right to strike), the non—conformity related to (i) the scope for workers to defend their interests through lawful collective action, which was said to be "excessively circumscribed"; (ii) the requirement to give notice to an employer of a ballot on industrial action, which was said to be "excessive" in light of all the other procedural hurdles on trade unions, such as the duty to issue a fresh notice before commencing strike action; and (iii) the protection of workers against dismissal when taking industrial action was said to "insufficient", apparently notwithstanding the changes to unfair dismissal introduced in 2004. In the case of the first of these grounds of non conformity, the right to strike was said to be excessively circumscribed for a number of reasons, in the case of the second the conclusion was reached notwithstanding the simplification of the procedures introduced in 2004, and in the case of the third concern was expressed that the protection against dismissal applied only where the strike was lawful, and that specific forms of legitimate industrial action were not lawful in British law.

Trade Union Rights and Bills of Rights

7. These continuing violations of fundamental trade union rights form part of the background to TULO's concern that any future British Bill of Rights should include core trade union rights. That is to say the right to organise, the right to bargain and the right to strike. There is no reason why trade unions in Britain should have rights which are inferior to those of their counterparts in Europe; there is no reason why trade unions in Britain should have rights that fall short of minimum international standards; and there is no reason why trade unions in Britain should not have access to a domestic legal forum to uphold these rights. It is now standard practice in modern constitutions for trade unions to be expressly included, and it is increasingly important that they should be included, in light of the growing power of trans-national corporations.

8. Trade union rights are included in national constitutions the world over, from South America to South Africa to Japan. In terms of the European Union, the express inclusion of trade union rights is to be found in various forms in the national constitutions in all but a few of the original 15 member states.

> In Ireland, the scope of trade union rights hardly extends beyond the protection currently provided in article 11 of the ECHR, that is to say a right to form and join trade unions. Luxembourg guarantees a right to trade union freedom.
>
> In Greece, Italy, Portugal, Spain and Sweden, in contrast, there is express recognition of the right to freedom of association generally, as well the right to strike in particular, albeit expressed differently in each case.
>
> In Finland and Germany there is express recognition of the right to freedom of association generally, a right which has then been implied by the courts to include the right to strike in particular.
>
> In France and Portugal there is express recognition not only of the right to freedom of association but also the right to collective bargaining and the right to strike.
>
> In the Netherlands, the courts have directly applied the right to strike guarantees in the European Social Charter as a result of a constitutional guarantee that international treaties are to be enforced in domestic law.

9. It is thus clear that of the first 15 EU member states trade union rights are excluded from only a small minority of national constitutions. These include Belgium and Denmark, constitutions which survived the Second World War. In constitutions crafted since the end of the war, there has been a tendency to include social rights generally and trade union rights specifically. Apart from questions of national characteristics, prevailing political philosophy and the need for constitutional consensus, it would be reasonable to speculate that these constitutional arrangements reflect a changing awareness about the functions of Bills of Rights and that modern Bills of Rights must embrace a wider range of values than those to be found reflected in the US Constitution drafted at the end of the 18th century. Modern thinking about Bills of Rights is most visible in the constitutional arrangements of the 12 new EU accession states where we find a commitment to the protection of trade union rights in the constitutions of Bulgaria, Cyprus, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. The only exceptions are Malta and the Czech Republic, though the former is a much older constitution and belongs to an earlier generation of documents, and in the case of the latter it is expressly provided that international human rights treaties which have been duly ratified are "immediately binding and are superior to law".

Trade Union Rights and a British Bill of Rights

10. In the light of the foregoing, it would thus be eccentric to contemplate a modern Bill of Rights which did not fully include trade union rights. Not only would we be going against the grain of current practice, but we would do so in a way that placed among a very small minority of states within the EU, with many of the countries which include trade union rights being much less fully developed economically than the United Kingdom. It would also place us in a minority position in the G8 countries, with Canada (following a recent Supreme Court decision introducing constitutional protection for the right to collective bargaining) joining France, Germany, Italy, Japan and Russia as countries with formal constitutional protection of trade union rights, leaving the United Kingdom and the United States isolated. As already indicated in paragraphs 4 to 7 above, in the case of the United Kingdom the exclusion of trade union rights from a future Bill of Rights cannot be justified on the ground that these rights are adequately protected in British law without the need for constitutional protection. Constitutional protection of trade union rights would ensure that these rights stopped being the political playthings of political parties.

11. Questions arise about the content of any provision in a Bill of Rights dealing with trade union rights. TULO believes that this should cover the three core trade union rights recognised by a collection of international human rights treaties, namely:

I. *The right to organise*

I.i) The right of trade unions to draw up their own constitutions and rules and to elect their representatives in full freedom.

I.ii) The right of trade unions to organise their administration and activities and to formulate their programmes, including political activity.

I.iii) The right of trade unions to organise on a trans-national basis without impediment in national law.

II. *The right to bargain*

II.i) The right of trade unions to engage in collective bargaining on behalf of their members and others.

II.ii) The right of trade unions to engage in collective bargaining to apply to all workplaces, regardless of size.

II.iii) The right of trade unions to engage in collective bargaining to include the right to bargain on all matters relating to employment.

III. *The right to strike*

III.i) The right of trade unions to organise industrial action in defence of their social and economic interests.

III.ii) The right of trade unions to organise industrial action in solidarity with other workers at home or overseas.

III.iii) The right of trade unions to organise co-ordinated trans-national action again trans-national corporations.

12. TULO recognises that rights of this kind are unlikely to be unlimited, even when entrenched in a constitution. Indeed the ILO allows a range of qualifications to fundamental trade union rights, while the European Social Charter states expressly that limits may be imposed on trade union and other rights where this is "necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals". There is thus a concern that any trade union rights in a Bill of Rights could easily be trumped by other rights or interests. In order to avoid this risk, TULO believes that any trade union rights provision in a British Bill of Rights should follow the example of the International Covenant on Economic, Social and Cultural Rights. In article 8, this too purports to provide international protection for trade union (and other) rights, and in doing so anticipates the possibility that there will be limits on these rights. It is also provided, however, that:

> "Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention."

A similar provision in a British Bill of Rights would ensure that any statutory restrictions on fundamental trade union rights would at least have to satisfy ILO Conventions, and that the ILO standard would be the minimum below which British law could not fall.

Conclusion

13. TULO believes strongly that any future British Bill of Rights must include trade union rights. This should not be confined to a provision that simply mimics the weak provisions of the European Convention on Human Rights, article 11, already part of our law as a result of the Human Rights Act 1998. This provides simply that as part of the general right to freedom of association, everyone has the right to form and join trade unions for the protection of their interests. It is true that this provision has been fairly widely interpreted by the European Court of Human Rights in two cases brought from the United Kingdom in recent years, one by the NUJ and the RMT, and the other by ASLEF. In the latter case it was established that:

> "trade unions enjoy the freedom to set up their own rules concerning conditions of membership, including administrative formalities and payment of fees, as well as other more substantive criteria, such as the profession or trade exercised by the would-be member."

Yet despite these developments, the article 11 right remains primitive and poorly developed and falls a long way short of the full protection of trade union rights to be found in the Council of Europe's Social Charter and ILO Conventions 87 and 98 as construed by the supervisory bodies.

14. These limitations of article 11 of the ECHR were recently revealed in a case brought by UNISON where the Strasbourg court refused to give full recognition to the right to strike as an incident of the right to freedom of association. In the human rights era, it is no longer acceptable that the fundamental rights of trade unions should be compromised by law to the extent that they are in the United Kingdom. The British

government is increasingly being pulled up by international agencies supervising treaties that the United Kingdom voluntarily agreed to be bound by. This is a process that is likely to continue as trade unions develop new strategies to reclaim the rights that were lost during the Thatcher and Major years. It is time that this was brought to an end and time that internationally recognised trade union rights were entrenched in domestic law, so that British trade unions could seek a remedy in the British courts when their rights were violated rather than be compelled to take their grievances to various international forums. Human rights should be protected from—and entrenched against—political interference: this applies as much to the human rights of trade unions and trade unionists as it does to any other human rights. TULO welcomes the Bill of Rights debate and the opportunity for the constitutional entrenchment of trade union rights, following the example of other modern democracies.

23 August 2007

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29. Letter from Thompsons Solicitors

We note the call for evidence in relation to a British Bill of Rights.

Thompsons is the UK's largest trade union, employment rights and personal injury law firm. We have a network of offices across the UK including in the separate legal jurisdictions of Scotland and Northern Ireland. Our specialist Employment Rights Unit acts only for trade unions, employees and workers.

Recently we were privileged to be instructed by ASLEF in their successful ECHR case *ASLEF v UK*. Previously we were instructed by the NUJ on behalf of their member Dave Wilson in *Wilson and Palmer v UK*.

We do not make a separate submission in relation to your call for evidence. However, we have seen the submission made by the Trade Union and Labour Party Liaison Organisation (TULO) and endorse its contents.

We consider if there is to be a British Bill of Rights it is essential that trade union rights are included. If we can assist your committee in any way, please do not hesitate to be in touch.

30 August 2007

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30. Memorandum from Unite the Union

This response is submitted by Unite the Union. Unite is the UK's largest trade union with two million members across the private and public sectors. Our members work in a range of sectors including manufacturing, financial services, print, media, construction, local government, education and not for profit.

Executive Summary

1. Unite the Union considers that any Bill of Rights must contain fundamental rights of a collective nature, such as ILO Conventions 87 and 98 and those in the 1961 European Social Charter. Freedom of Association (including for trade unions and employers' associations), the right to organise effectively and the right to free collective bargaining are basic essential human rights.

2. This issue is fundamental to response to the basic question of whether there should be a British Bill of Rights. A Bill of Rights that favours property and trade rights over collective or individual rights is worse for those who live in Britain than no Bill of Rights.

3. Further, a Bill of Rights that only contains rights for the individual is considerably less effective without such rights. In June the Supreme Court of Canada recognised and expressed this, saying: "Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the [Canadian] Charter [of Rights]." See below paragraph 14.

4. Although the focus of this submission is on collective rights, Unite the Union supports individual rights such as the right to be treated fairly and with dignity, free health care and like rights such as those included in the European Social Charter. We also emphasise the need to be able to pursue collective rights over those of the individual and the need to pursue rights to dignity and health, for example, over property rights and to free trade. Only by this means can we expect to redress the imbalance of power between the governments and corporations on the one hand and people on the other.

5. Unite the Union endorses the submission from TULO and commends it to the Committee.

THE NEED FOR COLLECTIVE RIGHTS

6. The Joseph Rowntree Foundation published a report into poverty on 17 July 2007 showing that inequality between rich and poor has now reached levels not seen in Britain for 40 years. A second report, published simultaneously, found that the public thinks the gap between rich and poor is too large. This is an issue relevant to trade union freedom. Unions are a force for good in dealing with such inequality and unionised workers are generally not those who suffer most from low pay.

7. It is no coincidence that inequality has grown in Britain at a time of restrictive anti trade union laws found to be in breach of fundamental human rights.

8. The DTI survey of trade union activity in 2006 confirmed that union members earn 17.6% more than non-union members. Securing fairness at work demands freedom for trade unions.

9. At the EU Summit in June 2007, it was agreed that the Charter of Fundamental Rights will be legally binding in the Union, but the UK alone insisted on an opt out. Twenty six countries agree that fundamental rights are just that—they are prepared to be subject to scrutiny. Gordon Brown insisted on 10 July 2007 that further developments towards a new Treaty should reflect every aspect of the deal secured by Tony Blair at the summit the previous month.

10. Yet, as the Joint Committee is aware, the UK Government is told repeatedly of violations particularly about laws that tie up trade unions. Repeatedly the response of the UK Government is that fundamental human rights are merely aspirational in this context. (See, for example the most recent European Social Rights Committee Report 2004).

11. In ASLEF v UK the European Court of Human Rights stated that "under Article 11 unions must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union" (Application no. 11002/05: paragraph 39). Although the Government accepts that the UK law must be changed, the proposals for change are too limited for the Trade Union and Labour Relations (Consolidation) Act 1992 to comply with Article 11.

12. David Cameron's Conservative Party has gone further. Although he talks of the need for a Bill of Rights, he agrees with those in his party that the UK should withdraw from the Social Chapter altogether. We disagree.

13. It is inevitable that Unite the Union must be concerned that a British Bill of Rights would not reflect the need for effective collective rights.

14. This is in spite of increased recognition of collective human rights everywhere else in the world. Modern Constitutions and Bills of Rights, as in South Africa include such rights. On 8 June 2007 the Canadian Supreme Court recognised collective bargaining as a fundamental right—reversing its earlier position. (See Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27).

15. In the "Laval" case before the European Court of Justice the Advocate General's opinion dated 23 May 2007 says this: ". . .the right to resort to collective action to defend trade union members' interests is a fundamental right. It is therefore not merely a 'general principle of labour law', . . .but rather a general principle of Community law, within the meaning of Article 6(2) EU. That right must therefore be protected in the Community." (Case C-341/05).

16. In the 21st Century and in a globalised economy, everyone needs effective collective rights. For reference to the comparative position in other countries we refer the Committee to the TULO submission.

THE QUESTIONS RAISED BY THE JOINT COMMITTEE FOR HUMAN RIGHTS

1. *Is a British Bill of Rights needed?*

— Do you think there should be a British Bill of Rights? Please explain the reasons for your view.

— What would be the purpose of a British Bill of Rights?

— What would a British Bill of Rights add to the protection for human rights already provided by the Human Rights Act?

17. A Bill of Rights could be positive, but one that favours property and trade rights over collective and or individual rights is worse for those who live in Britain than no Bill of Rights.

18. Purpose of a British Bill of Rights is to protect the people who live in Britain from abuse of power by the state and business. An integral part of that are collective rights. We refer to our comments elsewhere in this submission, including on page 2.

19. The Human Rights Act does not constitute an effective Bill of Rights, but whether a British Bill of Rights will add to the protection provided by the Human Rights Act depends on what is in the Bill of Rights and how it is framed.

2. *What should be in a British Bill of Rights?*

- If there were to be a British Bill of Rights, what rights and freedoms should it contain?
- Should it include any rights currently recognised as common law rights and freedoms, and if so which?
- Should it include any rights and freedoms currently contained only in legislation, such as rights not to be discriminated against, of data protection and freedom of information, and if so which?
- Should it include social and economic rights, such as health and education, and if so which?
- Should it include rights and freedoms currently contained in international treaties but not yet part of our law, and if so which?
- Should it include rights and freedoms contained in other countries' bills of rights and if so which?
- Should it include responsibilities as well as rights and freedoms, and if so, what sorts?

20. We have expressed above the need for effective collective rights to be included in a any modern Bill of Rights. We agree that there should also be rights such as those contained in the European Social Charter. The right to health protection in a British Bill of Rights should be for free health care. There should be a right to dignity and fair and equal treatment.

21. Such rights should be enforceable. Limitations and restrictions, including in relation to collective rights, should only apply where necessary and proportionate. Otherwise a Bill of Rights is illusory.

3. *What should be the relationship with the Human Rights Act and international human rights obligations?*

- What should be the relationship between a British Bill of Rights and the Human Rights Act?
- What should be the relationship between a British Bill of Rights and the ECHR/other international human rights treaties?
- Are there any other relevant issues not covered by the above questions?

22. Again much depends on the content and framework of any proposed Bill of Rights. We also refer to the words of the Advocate General in the "Laval" case (see paragraph 15 above). The UK should now comply with existing international human rights obligations.

4. *What should be the impact of a British Bill of Rights on the relationship between the executive, Parliament and the courts?*

23. We repeat that all is contingent on the content and framework of any proposed Bill of Rights. We hope we have made our position clear and established a just case for effective collective rights. Should there be developments as to a proposed British Bill of Rights we would welcome the opportunity to comment further on such matters.

CONCLUSION

24. Unite the Union believes that any Committee for Human Rights cannot fail to agree that clear and effective collective rights must be included in any modern Bill of Rights.

25. We would be happy to assist the work of the Committee further in relation to a British Bill of Rights.

22 May 2007

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31. Memorandum from Unlock Democracy

Is a British Bill of Rights needed?

Charter88, now joined with the New Politics Network as the new organisation Unlock Democracy, has campaigned for a written constitution, the primary purpose of which would be to set out the limits of what governments may and may not do in our name. We have argued that a written constitution must contain a Bill of Rights, thereby granting every citizen a legal remedy, should they need it, if their rights are infringed by the State.

There are a number of reasons why we feel a Bill of Rights is essential for the UK.

1. Checking the power of the Executive

The need for citizens to have the power to limit the actions of government is as great now as it has ever been. The modern experience of politics is one that has a House of Commons dominated by one political party. The power of the Party ensures that the government gets its legislation through the Commons. The House of Lords, fatally weakened by the lack of any democratic legitimacy, is then browbeaten into accepting this legislation and the Crown automatically gives assent.

Far too often, therefore, the checks and balances placed on the powers of the Executive are too weak to be effective. This not only leaves the citizens out of the picture, it also leaves them vulnerable to repressive legislation. The limits placed on the right to silence by previous Conservative Governments are a case in point, as is the restriction on trial by jury that the current Labour government keeps trying to enact. So too is the detention without charge of alleged terror suspects.

2. Creating a new Britain

The constitutional reforms that have taken place since 1997 have made the need for a Citizens' Constitution even more urgent. The Labour Party in government has continued the process of centralisation. Most of those things which used to characterise the British constitution have either now been removed or are irreparably damaged:

— we no longer have a unitary state;
— the sovereignty of Parliament has been undermined by the Human Rights Act;
— Cabinet government is no more than a convenient fiction;
— the move towards politicisation of key sections of the civil service has continued; and
— the monarchy no longer commands immediate respect nor does it play its once unifying role.

With the exception of the rule of law, all that is left of the old constitution are its least desirable elements: winner-takes-all elections and Prime Ministerial power—the latter is, of course, greater than ever.

Constitutional reform has taken place in a piecemeal fashion in the UK. Radical change there has been, but with no overall sense of the kind of country that these reforms were designed to help build. Each reform seems to have been enacted in isolation without a real idea of how it would impact on the others. So, for example, we have had:

— devolution to Scotland, Wales and London whilst the England question has remained dangerously unanswered. The result has been a destabilising sense of unfairness in England;
— a welcome Human Rights Act which the Government insists does not impact on the sovereignty of Parliament, but has yet to capture the public imagination and which few see as having relevance to them;
— reform of local government that may actually reduce its openness and accountability; and
— top-down reform which has helped to foster growing voter disenchantment and cynicism with politics in a period of unprecedented constitutional change.

If voters are to become citizens they must have a fundamental document. Without one, they remain powerless to exercise control over those who govern in their name between general elections.

It has become very fashionable to talk about British values and yet we have no shared understanding or document to outline what these values are. A citizen-led formulation of a Bill of Rights would be one way of starting that discussion. However when passed, it must be entrenched within the constitution.

As a member of a European Union, which with the Charter of Fundamental Rights has continued the process of constitutionalising itself, the need for Britain to be clear about its self-definition is all the greater. The process of creating a Bill of Rights would help to foster this.

For all these reasons the time has come for a new constitutional settlement. That is why Unlock Democracy wants to see a citizen-led Bill of Rights.

What would a Bill of Rights add to the protection for human rights already provided by the Human Rights Act?

Charter 88 was instrumental in campaigning for the Human Rights Act. It was a significant constitutional development, an important first step, and we are concerned that it is currently under attack. However this does not mean that we believe it should be preserved in aspic.

There are a number of flaws in the Human Rights Act, which is one of the reasons we believe the need for an entrenched Bill of Rights is particularly urgent.

Unlock Democracy believes that the process is as important as the outcome. The Human Rights Act is an excellent case in point. It was developed by lawyers and passed with very little in the way of public deliberation or education. The public have never really understood what is in it and therefore have never owned it as something that protects them and should be defended. This has been easy for the tabloid media to portray the HRA as a criminals' charter or the preserve of celebrities. In each example cited it was possible

to refute these charges but only if you knew what was in the Act. The government often talked about the need to embed the HRA but this was always in the context of public authorities who had responsibilities in terms of the Act not the citizens whose rights it protects. This has begun to change but more must be done to ensure a real culture of respect for human rights emerges across Britain.

To be clear we do not want to repeal or undermine the rights we have; we see the development of a citizen led Bill of Rights as building on the Human Rights Act certainly not diminishing it. Under no circumstances should the HRA be repealed as a result of a Bill of Rights process.

What should be in a British Bill of Rights?

We believe that for the citizens to possess a constitution they need to have built it themselves. When the new South Africa wanted to write a constitution following the end of apartheid it embarked on a wide-scale process of public discussion, debate and participation. This is what we want for the UK.

For this reason we believe that it is not the place or role of Unlock Democracy to predefine what should be in the Bill of Rights. We are confident that a democratic process would lead the country to a creative resolution of the problems of representation, legitimacy and accountability. But we can offer a set of principles which will help to describe what we think citizen-led Bill of Rights would be like. It should:

- be created with maximum public involvement;
- guarantee political equality and help society aspire towards social equality;
- protect democratic representation in and authority over government and public affairs;
- provide a framework for the stable rule of law;
- ensure that individuals can claim and protect their rights;
- empower citizens as individuals and members of communities of all types, defending every citizen's right to be free from discrimination;
- define being a "good citizen" as exercising the power to say "no", to hold authority of all kinds to account, and to resist as well as endorse and assist elected authority; and
- describe what citizens share and protect the differences we enjoy; indeed, it should map and enable differences and help to ensure they are protected as a common, living inheritance.

We also believe it is important to have a debate about social and economic rights and whether they should be included in any new Bill of Rights. By incorporating the European Convention on Human Rights into British law, the government accepted that we have basic civil and political rights, which should be legally protected. Yet, it did not incorporate the European Social Charter, which would have afforded the same status to our social and economic rights. This, in effect, says that some rights are more important than others, and that the rights of some people are more important than those of others. We recently produced a pamphlet exploring whether incorporating civil and political rights is enough or whether we should also be looking at social and economic rights. "A Human Rights approach to social Justice" is available on our website (http://www.unlockdemocracy.org.uk/?p=724) and the Stuart Weir article in particular may be of interest.

Other concerns about a British Bill of Rights

We believe a Bill of Rights should protect everyone in Britain—not just those with formal British Citizenship. To exclude people on this basis would render the Bill of Rights discriminatory and fatally undermine ideas of the universality of human rights that we believe should be at the heart of any Bill of Rights. That some of those most vulnerable in society would be excluded if the Bill of Rights was limited in scope to citizens surely cannot be acceptable—for example refugees and asylum seekers.

We are also concerned that Northern Ireland's relationship with any process is unclear at this point, given their own ongoing Bill of Rights process, and think that it would be vital to ensure that the people of Northern Ireland are empowered to decide their own role in any process.

We do not believe that rights should in all instances be attached to responsibilities—some rights should never be breached, regardless of the failure of an individual to adhere to their responsibilities.

Public Involvement in creating a Bill of Rights

Unlock Democracy believes that it is essential for the public to be involved in the process. There are a number of ways that this could be achieved, for example through citizens assemblies, citizens juries or broader engagement techniques such as those used in Northern Ireland. Whichever approach is used the process has to be deliberative, open, representative, and most importantly independent of Government and political parties.

Deliberative techniques such as citizens' juries have been used at all levels of governance to involve citizens in evaluating service delivery or to develop priorities for an organisation. These mechanisms are effective because they allow participants to learn about the subject, quiz experts and develop an informed opinion rather than simply capturing an immediate view in an opinion poll or referendum. They recognise that different views and interests have to be balanced in society, and also enable people to change their minds.

One of the criticisms made of involving citizens in complex or controversial topics is that they won't understand the subject, or will make reactionary judgments based on populist headlines. The evidence on mechanisms such as citizens' juries, panels and assemblies suggests that this isn't so. The experience of the British Columbia Citizens' Assembly on Electoral Reform shows that citizens are able to work through complex policy issues. We have also found when running community panels to assess views on Europe that listening to other views and debating the issues influences participants' opinions even when they don't feel their views have changed.

The openness of the process, selection of participants and availability of opportunities for people to contribute, are key factors in whether the public buys into the process. One of the limitations of deliberative mechanisms is that to be effective they have to involve a relatively small number of people. If groups are too large people become passive audience members rather than engaged participants. Citizens' juries typically involve 10–12 people and while citizens' assemblies such as those held in British Columbia and the Netherlands can involve hundreds, this would still be a tiny percentage of the UK population. If this process is going to be genuinely national, individuals must believe that they could have been selected to take part and that the participants represent them.

This is partly about ensuring the selection process takes account of the UK's regional, gender and ethnic diversity. But it's also about creating a relationship between the participants and the public; a key factor in the British Columbia experience was that the members of the Citizens' Assembly felt that they were participating on behalf of all Province citizens. This helped create high levels of commitment among Assembly members. Public meetings can assist, as the public can debate the issues facing the participants and quiz them on their experiences of being part of the process. In British Columbia they also published materials that were given to participants on the Assembly website and videoed the evidence session so that anyone could follow exactly the same process as the participants and then submit their own views. While many people would be content to not be involved, it is crucial that those who would, can.

The Northern Ireland Bill of Rights Commission used a slightly different approach to engage citizens in the debate. Rather than having an event, such as a citizens assembly, as a focal point of the public engagement process they used "cascading", "piggy backing" and entertainment, to stimulate debate. Cascading involved training just over 500 facilitators to go out into the community and talk about the Bill of Rights process, while piggy backing involves using existing community organisation and networks to publicise the process for you. They also used entertainment—videos and drama workshops to highlight the process and explore the issues. This was a very innovative process and certainly succeeded in involving people in the process. However it is important to recognise that the Northern Ireland has a much smaller population that the UK as whole. If we were to replicate this process and scale it up for a UK Bill of Rights there would need to be approx 15,000 facilitators for the cascading element alone.

The process, assembly or convention must be genuinely independent of government, and have a clear outcome. Citizens' assemblies succeed when there are defined stages to the process and it's known from the outset what will happen to the findings. This could be going straight to a referendum or reporting to Parliament before being put to a referendum but the process itself has to be independent of government. The British Columbia experience succeeded because once the Premier and legislature had agreed the terms of reference and appointed the Chair, their involvement ended. The Assembly made recommendations and they were put to a referendum. Political parties were able to campaign on the proposals before the referendum, and did not have to agree with them. Even when the proposals failed to pass one of the two thresholds for the referendum the process was still seen as beneficial. The assembly was perceived as independent and consequently the public and media engaged with it.

Where it is unclear what the outcome will be the assembly is dismissed as a talking shop. This was certainly the case with the Citizens' Assembly on Electoral Reform in the Netherlands, where the only outcome was making recommendations to Parliament. As there was no expectation that anything would change as a result of the Citizens' Assembly, the process was largely ignored. Deliberative techniques alone are insufficient—the assembly has to be seen to be independent and have the power to propose change.

Involving citizens in constitutional reform can be hugely beneficial both for the participants and in terms of developing public policy; but it needs to be done well.

June 2008

32. Extracts from a letter from the Chairman to Michael Wills MP, Minister of State, Ministry of Justice

I am writing with a number of points to follow up from correspondence with the Ministry of Justice in the summer and your oral evidence on 26 November 2007.

When you appeared before the Committee in November you mentioned that the consultation process on a British Bill of Rights would begin early in the new year (Q40). Could you let us know what is being planned? We are still awaiting a Government memorandum for our British Bill of Rights inquiry, which was announced last May. Perhaps you could set out your plans for the consultation process in this memorandum which I would be grateful to receive as soon as possible.

23 January 2008

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33. Letter from Michael Wills MP, Minister of State, Ministry of Justice

As you know, in July last year the Prime Minister announced the publication of The Governance of Britain Green Paper, which set out the Government's programme for Constitutional change and signalled our intention to consult on a Rights and Duties. Both he and Jack Straw confirmed the planned publication of a Green Paper on the subject at separate events on 25 October.

Since then, we have been working within the Ministry of Justice to draft a paper which will set rights and responsibilities in context, both historical and philosophical, and will ask a range of questions about content, process and outcomes.

The paper will not be prescriptive. It is our intention to carry out a thorough consultation process going, we hope, far beyond the views of constitutional experts, from whom we are already seeking advice. A key aim of the public engagement process will be to target those harder-to-reach constituencies who stand to benefit most from our work.

The responses we anticipate receiving are very much in line with those you are likely to receive from your own enquiry presaged in your call for evidence by way of Press Notice No. 38 of Session 2006–07 A BRITISH BILL OF RIGHTS.

Our preparations for the Green Paper have reached the stage of inter-Departmental discussions, which we hope to have completed shortly. We also await Lord Goldsmith's report to the Prime Minister on his citizenship enquiry, the outcomes of which we would expect to inform our paper.

We want to work as closely as may be with everyone who has an interest in this matter. It is not a proper subject for "quick wins" or party based spinning. Indeed, we expect the results of this exercise to last well into the future. If that is to be the case, we would hope to take opposition parties with us and we will endeavour to do that as the process goes on.

Meanwhile, it would be most helpful to know the timetable for your own enquiry. I will happily come to give oral evidence if invited in due course, but would very much like to be able to take advantage of your final report as an important source of wisdom on the topic, whether or not it comes in time for the eventual publication of the Green Paper, scheduled for sometime in the first part of this year.

24 January 2008

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34. Letter from the Chairman to Michael Wills MP, Minister of State, Ministry of Justice

Thank you for your letters of 24 January, about our Bill of Rights inquiry, and 8 February, in reply to my letter of 23 January.

In your letter of 24 January you asked about the timetable for our Bill of Rights inquiry. I am sorry for the delay in responding, but this matter was only discussed by my Committee yesterday. Our intention is to conclude taking oral evidence before the April recess with a view to publishing our Report before the Whit break. With that aim in mind, I wish to invite the Secretary of State for Justice and you to appear before the Committee on Tuesday 1 April at 2.30pm. I am copying this letter to the Secretary of State and would be grateful to know as soon as possible whether this date and time is convenient for you both.

In my letter of 23 January I noted that the Government had yet to provide written evidence to our Bill of Rights inquiry. Your reply does not address this issue directly but refers to your letter of 24 January being your contribution to the inquiry. I would not be satisfied to accept this letter as a memorandum from the department. Although I understand that you are still finalising your Green Paper, I would expect a fuller memorandum giving some more detailed reasoning as to why the Government wishes to consult on this issue at this time, perhaps drawing on some of the speeches that you and the Secretary of State have been giving in recent weeks. Could you clarify whether or not you will be providing us with a written memorandum ahead of your oral evidence?

I would be grateful if you could reply by Thursday 6 March.

21 February 2008

35. Letter from Michael Wills MP, Minister of State, Ministry of Justice

In the Green Paper *The Governance of Britain* the Government signalled its intention to embark on a radical process of constitutional renewal, focussed on redistributing and diffusing power away from the centralised state and forging a new relationship between the citizen and the state. This process continues the programme of radical reform the Government has undertaken since coming to power. Devolution has transferred power away from Westminster to the devolved legislatures and administrations in Scotland, Wales and Northern Ireland and London and to local authorities. The Human Rights Act has brought home fundamental rights of the individual against the state, putting them at the heart of our domestic legal culture. The Freedom of Information Act has established transparency as a mechanism for empowering the individual against the state.

The debate that we intend to undertake on the Bill of Rights and Responsibilities is a crucial part of this wider debate about the location of power in our society, and can only properly be understood through this prism. The Bill will set out fundamental principles which shape our democracy and which should inform the decisions of government, parliament and the courts. We are bringing it forward, not necessarily to add new rights, but above all to ensure the system works better to protect the individual against the powerful. Alongside this will be a clear articulation of the responsibilities we owe to each other, that are intertwined with the rights we enjoy, as members of our society.

In the United Kingdom many duties and responsibilities already exist in statute, common practice or are woven into our social and moral fabric. But elevating them to a new status in a constitutional document would reflect their importance to healthy functioning of our democracy. We live in an individualistic, consumerist age and that presents us with new challenges.

Profound social and economic change accelerated by globalisation make the case for a new Bill of Rights and Responsibilities in the UK. People are more independent, more "empowered", but this can lead to rights becoming commoditised, yet more items to be "claimed". This is demonstrated in how some people seek to exercise their rights in a selfish way without regard to others—which injures the political case for inalienable, fundamental human rights.

Over many years there has been debate about the idea of developing a list of the rights and obligations that go with being a member of our society. A Bill of Rights and Responsibilities could give people a clearer idea of what we can expect from the state and from each other, and a framework for giving practical effect to our common values.

There is not, and cannot be an exact symmetry between rights and responsibilities. In a democracy, rights tend to be "vertical"—guaranteed to the individual by the state to constrain the otherwise overweening power of the state. Responsibilities, on the other hand, are more "horizontal"—they are the duties we owe to each other. But they have a degree of verticality about them too, because we also owe duties to the community as a whole.

In seeking to bring greater clarity and status to the relationship between the citizen, the state and the community, we agree with the words of former Lord Chief Justice Lord Bingham (now the Senior Law Lord) when he said that the importance of predictability in law must preclude "excessive innovation and adventurism by the judges". That was echoed by Justice Heydon of the High Court of Australia who suggested that judicial activism, taken to extremes, could spell the death of the rule of law.

If, for instance, economic and social rights were part of our new Bill, but did not become further justiciable, this would not in any way make the exercise worthless. There is great power in symbols. As the jurist Philip Alston described, Bills of Rights are "a combination of law, symbolism and aspiration". What he makes clear is that the formulation of such a Bill is not a simple binary choice between a fully justiciable text on the one hand, or a purely symbolic text on the other. There is a continuum. And it is entirely consistent that some broad declarative principles can be underpinned by statute. Where we end up on this continuum needs to be the subject of the widest debate.

A Bill of Rights and Responsibilities could give people a clearer idea of what we can expect from the state and from each other, and provide an ethical framework for giving practical effect to our common values.

A Bill of Rights and responsibilities will impose obligations on government: but will also makes clear that the citizen has mutual obligations. As to the extent of this 'horizontal' relationship, we can look more recently than Tom Paine to the example of South Africa as to how this could work in practice.

Justice Kate O'Regan, Judge of their Constitutional Court describes the operation of this idea of "horizontality":

> "What is clear already is that when a court develops the common law, for example, libel law, the court must consider the obligations imposed by the Bill of Rights. In the case of libel, this involves several rights: freedom of expression on the one hand and the right to dignity and privacy on the

other. The court has to consider these rights in developing the rules of common law liability"—she says, and crucially, she goes on: "Our constitution does not carry a notion that one forfeits one's rights entirely if one does not observe ones obligations".

We need to look at the lessons from South Africa as from other jurisdictions, as to how they have applied a Bill of Rights in their own national contexts and how this might apply to the United Kingdom.

However, if specifically British rights were to be added to those we already enjoy by virtue of the European Convention, we would need to ensure that it would be of benefit to the country as a whole and not restrict the ability of the democratically elected government to decide upon the way in which resources are to be employed in the national interest. For example, some have argued for the incorporation of economic and social rights into British law—as they have in South African law. But this would involve a significant shift from Parliament to the judiciary in making decisions that we currently hold to be the preserve of elected representatives including decisions around public spending, and implicitly, levels of taxation.

The Green Paper we will be publishing shortly on a new Bill of Rights and Responsibilities will set out fundamental principles which shape our democracy and should inform the decisions of Government, Parliament and the courts. Alongside this will be a clear articulation of the responsibilities we owe to each other, that follow the rights we enjoy. As Lord Hope has said, "Respect for the rights of others is the price we must all pay for the rights and freedoms it guarantees." This needs to be more widely recognised if we are to secure popular acceptance of the importance of these rights in our constitutional arrangements.

This Bill will set out the rights we enjoy and the responsibilities we owe as members of society. We are bringing it forward, not necessarily to add new rights, but above all to ensure that the system works better to protect the individual against the powerful—and that it is recognised as doing so. As citizens become more aware of their rights, so governments become more sensitive to them. In a democracy, education can be as important as litigation in protecting the individual. The greater the cultural change, the less need there is for litigation to secure it. In articulating the rights we enjoy and the responsibilities we owe, this Bill will have a fundamental role to play.

6 March 2008

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36. Letter from the Chairman to the Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, Ministry of Justice

BILL OF RIGHTS

Thank you to you and Michael Wills for giving evidence to the JCHR on 21 May in our inquiry into a Bill of Rights. I am writing to follow up on a number of issues, including a few questions that we were not able to cover in the time available, and would be very grateful if you could answer the questions below.

In evidence, you both talked of the relationship between rights and responsibilities or duties.

1. *Will these responsibilities be enforceable in any way against individuals?*

Towards the end of the evidence session, you touched on the relationship between a Bill of Rights and international human rights treaties to which the UK is already a party and told us that the Government would consider their incorporation on a case by case basis but that there were problems with incorporation and enforceability.

2. *What will be the relationship between any British Bill of Rights and the international human rights treaties to which the UK is a party? For example, would you expect it to include a provision similar to s. 3 of the Human Rights Act, requiring it to be interpreted compatibly with the UK's international human rights obligations, or a similar provision to s. 2 of the Human Rights Act, requiring courts to take into account other international and regional human rights standards when interpreting the Bill of Rights?*

You spoke of the need for a general debate on a Bill of Rights and touched on the process that you envisage.

3. *Can you provide any further information on what the consultation process will entail?*

4. *What dedicated financial and human resources are available for the process?*

5. *What is the timetable for the consultation process on a Bill of Rights?*

In his letter to the Committee, Michael Wills wrote of the need to engage with harder-to-reach constituencies.

6. *How will you ensure that the process does not simply involve "the usual suspects" but is relevant to and involves members of the public (including harder to reach constituencies)?*

7. *What will be done to inform people about the process so that they can contribute in a meaningful way?*

8. *Will the consultation only cover the content of a Bill of Rights, or will it be concerned also with enforceability, justiciability and implementation?*

In your evidence, you spoke of the Government's desire for political consensus, although not necessarily unanimity.

9. *What degree of consensus will you be looking for and how will you ascertain whether there is such consensus?*

When you were referred, in evidence, to the independent Northern Ireland Bill of Rights Forum, you said that you do not consider that this is an appropriate model for a UK Bill of Rights and that the Government has to take the lead.

10. *Do you propose that there will be a role for any body, independent of Government, in considering the range of options for a Bill of Rights and making recommendations?*

11. *What role, if any, do you envisage for the Equality and Human Rights Commission in this process?*

In your speeches, you and Michael Wills have both stressed that Parliament must remain at the heart of governance of this country.

12. *Do you see any ways to strengthen the role given to Parliament in a Bill of Rights and Responsibilities, compared to the Human Rights Act? For example, should the Bill provide for a power of legislative override by Parliament, such as that contained in the Canadian Charter? Should it go beyond s. 19 of the Human Rights Act by requiring that reasoned statements of compatibility accompany every Bill, as does the Victorian Charter of Rights and Responsibilities? Should it require the relevant Minister to lay before Parliament, within a prescribed time, a detailed written response to a judicial declaration of incompatibility with the Bill (as also required by the Victorian Charter)?*

In your evidence to the House of Commons Justice Committee last week, you said that "expectations that the new system of appointing judges would lead to a more diverse judiciary have so far not been fulfilled."

13. *How important is a diverse judiciary to the success of any British Bill of Rights?*

14. *How could the pool of people from whom judicial appointments are currently made be widened in practice?*

We have received evidence on the devolution context in both Northern Ireland and Scotland. Little consideration seems to have been given by the Government to the issue of devolution: it was almost entirely absent from the Governance of Britain Green Paper. During our evidence session in Scotland (10 March 2008), we were told by the Scottish Cabinet Secretary for Justice that there had been no real discussion with the Scottish Government about the Bill of Rights.

15. *Can you confirm that the UK Government had no discussions with the Scottish Government about the Bill of Rights prior to 10 March 2008?*

16. *What discussions have the UK Government had since March 2008 with the Scottish Government about the Bill of Rights?*

17. *How does the UK Government plan to involve the devolved assemblies (Northern Ireland, Scotland and Wales) in future discussions on a Bill of Rights?*

18. *Do you foresee any problems with having a national Bill of Rights alongside separate Bills of Rights for Northern Ireland and Scotland?*

19. *How would this work in practice?*

I would be grateful if you could reply by 10 June 2008 and if an electronic copy of your reply, in Word, could be emailed to jchr@parliament.uk.

27 May 2008

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37. Letter from the Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor

Thank you for your letter of 27 May 2008, following up on a number of issues not covered in the time available at the evidence session on the Bill of Rights and Responsibilities on 21 May.

The Government looks forward to considering the JCHR's report on its inquiry into a Bill of Rights and drawing on its expertise in the forthcoming debate. My responses to your questions are as follows:

1. *Will the responsibilities [in a British Bill of Rights and Responsibilities] be enforceable in any way against individuals?*

The question of the legal effect to be given to responsibilities in any Bill of Rights is linked to the legal effect to be given to the Bill as a whole. Work on this is developing, but we are looking at the possibilities of framing certain responsibilities, for example the responsibility to respect the rights of others, as interpretive principles. Equally, we are aware that the law features numerous enforceable duties upon individuals, for example in relation to parents sending their children to school, and it is not our intention to cut across the existing statutory framework in such cases. As I said in my evidence before the Committee, there has always been an implicit, albeit asymmetrical balance between rights and responsibilities, and between liberties and duties. There may be value in articulating and elevating some of these responsibilities so that they sit alongside rights in one place. Responsibilities need not take enforceable form in order to achieve this objective.

2. *What will the relationship between any British Bill of Rights and the international human rights treaties to which the UK is a party? For example, would you expect it to include a provision similar to s.3 of the Human Rights Act, requiring it to be interpreted compatibly with the UK's international human rights obligations, or a similar provision to s.2 of the Human Rights Act, requiring courts to take into account other international and regional human rights standards when interpreting the Bill of Rights?*

I would not expect a Bill of Rights to affect the basic rule that international treaties to which the UK is a party have to be incorporated by Parliament in order to become part of domestic law. That said, of course, the courts can, and do, take international treaties into account in certain circumstances, and, again, I would not expect this to change.

3. *Can you provide further information on what the consultation process will entail?*

Details will be given in the Green Paper.

4. *What dedicated financial and human resources are available for the process?*

The Bill of Rights and Responsibilities is part of the broader Governance of Britain programme. The costs of the consultation process will be met from the resources allocated for the wider programme.

5. *What is the timetable for the consultation process on a Bill of Rights?*

We remain committed to publishing a Green Paper on a Bill of Rights and Responsibilities soon. We expect the engagement process to start from the date of publication and run for several months.

6. *How will you ensure that the process does not simply involve "the usual suspects" but is relevant to and involves members of the public (including harder to reach constituencies)?*

Deliberative mechanisms can help involve a broad range of members of the public and harder to reach constituencies, because they can include a general sample of the population, but they also allow for a more thematic approach; so specifically targeting those groups (or their representatives) who might not normally take part in a Government led consultation.

7. *What will be done to inform people about the process so that they can contribute in a meaningful way?*

We want the process to engage as many people as possible from all walks of life. Whatever mechanisms we adopt must be open and transparent and we will aim to ensure participants are aware in advance of the degree of influence they have. We will ensure there is a shared understanding of what is needed from the engagement mechanisms. It is worth noting that any consultation process must be consistent with representative democracy and feed into Parliamentary consideration of issues.

8. *Will the consultation only cover the content of a Bill of Rights, or will it be concerned also with enforceability, justiciability and implementation?*

I expect any consultation to be broadly based on the Green Paper's content in which we are likely to cover these issues, even if only in general terms.

9. *What degree of consensus will you be looking for and how will you ascertain whether there is such consensus?*

We anticipate informed and lively political debate in Parliament as well as a wide public debate. We believe the Government's proposals will command wide support as presenting a mature and progressive way of building upon the achievements of the Human Rights Act. And, like the Human Rights Act itself, we hope the Bill of Rights and Responsibilities will be passed into law with the support of all the main political parties.

10. *Do you propose that there will be a role for any body, independent of Government, in considering the range of options for a Bill of Rights and making recommendations?*

We have no plans to set up any new body. There is a wide range of independent statutory and non-statutory bodies in this field already.

11. *What role, if any, do you envisage for the Equality and Human Rights Commission in this process?*

We hope the Equality and Human Rights Commission will play a full and active part in the public debate around our proposals.

12. *Do you see any ways to strengthen the role given to Parliament in a Bill of Rights and Responsibilities, compared to the Human Rights Act? For example, should the Bill provide for a power of legislative override by Parliament, such as that contained in the Canadian Charter? Should it go beyond the s.19 of the Human Rights Act by requiring that reasoned statements of compatibility accompany every Bill, as does the Victorian Charter of Rights and Responsibilities? Should it require the relevant Minster to lay before Parliament, within a prescribed time, a detailed written response to a judicial declaration of incompatibilty with the Bill (as also required by the Victorian Charter)?*

As I made clear in evidence, I am proud of the architecture of the Human Rights Act in that it strikes the balance between protection of fundamental rights whilst preserving Parliamentary sovereignty. Section 19 of the HRA provides a sound mechanism by which Parliament can examine the compatibility of proposed legislation with Convention rights. Whether any new rights should be subject to the same requirement is one of the issues on which we would welcome views.

13. *How important is a diverse judiciary to the success of any British Bill of Rights?*

A more diverse judiciary with increased understanding of the communities it serves will contribute to increased public confidence in the justice system. This will be especially important in the context of a Bill of Rights and Responsibilities, which is of fundamental importance to our liberties and to our constitutional settlement.

14. *How could the pool of people from whom judicial appointments are currently made be widened in practice?*

The Ministry of Justice, judiciary and the JAC are committed to increasing the diversity of the legal profession and the judiciary at all levels. The Ministry of Justice is working closely with the Judicial Appointments Commission and the Judiciary to increase the diversity of the judiciary through a trilaterally agreed Judicial Diversity Strategy. Work underway as part of the strategy includes legislative chances to widen the pool of those eligible for judicial appointment; judicial workshadowing and mentoring schemes; the JAC's Diversity Forum; outreach events by the JAC; and work to support Diversity and Community Relations Judges in engaging with communities The statistics for the JAC's Selection Exercises for 2007–08 demonstrated that the JAC had successfully attracted a higher proportion of applications from women and those from BME groups than ever before (35% of applicants for legal judicial posts were women, and 12% were from BME groups).

The Tribunals Courts & Enforcement Act 2007 widened the pool of candidates even further, by reducing the number of years of practice/qualification in law needed to be eligible. However, it is clear that we still have a long way to go before we have a judiciary that fully reflects the communities it serves. All measures that could help to improve diversity in the judiciary are being considered. This will ensure that we maintain the highest possible standards of those appointed.

15. *Can you confirm that the UK Government had no discussions with the Scottish Government about the Bill of Rights prior to 10 March 2008?*

16. *What discussions have the UK Government had since March 2008 with the Scottish Government about the Bill of Rights?*

17. *How does the UK Government plan to involve the devolved assemblies (Northern Ireland, Scotland and Wales) in future discussions on a Bill of Rights?*

The Government had a number of exchanges at official level prior to the 10 March and officials met with their counterparts in Edinburgh in April, where they also had an informal discussion with the new Scottish Human Rights Commissioner. My officials went to Northern Ireland in March for a meeting with the then Chair of the Bill of Rights Forum, Chris Sidoti, and Professor Monica McWilliams, the Northern Ireland Human Rights Commission's (NIHRC) Chief Commissioner. Professor McWilliams and a number of her commissioners have since met Michael Wills. My officials plan to meet their counterparts in the Welsh Assembly Government shortly.

We will continue to engage with the devolved administrations and legislatures given the important contribution they can make to a discussion about rights and responsibilities and I hope that they will be involved in the consultation process over the coming months.

18. *Do you foresee any problems with having a national Bill of Rights alongside separate Bills of Rights for Northern Ireland and Scotland?*

19. *How would this work in practice?*

The Government believes it is possible to take forward work on a Bill of Rights and Responsibilities in such a way as to respect the UK's governance arrangements. There could, for example, be a principled framework on rights and responsibilities but still with freedom of choice on those subjects that are within the legislative competence of the devolved legislatures. A real benefit of this approach is that human rights would be better and more consistently understood and received across the UK, emphasising the shared nature of the important principles which bind us together. These are of course matters on which we wish to consult and so it would be premature to go into detail on how such an approach might work in practice at this stage.

17 June 2008

Printed in the United Kingdom by The Stationery Office Limited
8/2008 404479 19585