



Commission on a Bill of Rights: *Do we need a bill of rights?*: JUSTICE's Response

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Executive Summary

JUSTICE is committed to ensuring that human rights are protected and respected by each of the institutions of Government in the UK. Individuals should have a right to an effective remedy in our domestic courts for violation of those rights and, in practice, should enjoy each of the substantive human rights enshrined the European Convention on Human Rights and the UN human rights treaties to which the UK is a party.

In our view, the HRA 1998 currently performs the core functions of a bill of rights for the UK. We are not persuaded that there is any evidence-based argument for change to the substantive and procedural guarantees in the Act, or that the current debate about a bill of rights for the UK is appropriate, at this time.

In our view, there are minimum criteria which must be met in order to justify a constitutional change of the magnitude proposed (we consulted widely with our members on the establishment of these criteria):

- **Any bill of rights must be based on a broad consensus, not just of lawyers and politicians but also the public at large.**

The language of the Glorious Revolution of 1688 and the Bill of Rights 1689 cannot be appropriated by any one political party.

- **The process of agreeing a UK bill of rights, and its content, must reflect the increasingly devolved nature of the United Kingdom**

The HRA is built into the devolution settlements for Northern Ireland, Scotland and Wales. Any amendments to the HRA and any enactment of a bill of rights would almost certainly, from a legal perspective, require amendments to be made to the devolution statutes.

- **A UK bill of rights must guarantee, and should extend beyond, the rights protected by the European Convention on Human Rights**

All the main national political parties accept that the UK must remain subject to the European Convention on Human Rights (ECHR). Therefore, the content of any UK bill must comply both with the provisions of the ECHR and subsequent relevant case law of the European

Court of Human Rights (ECtHR). The UK is bound by international law to implement decisions of ECtHR to which it is a party. No attempt can be made to fudge that commitment.

- **Any domestic bill of rights should be compatible with the international obligations of the UK**

- **The key enforcement mechanisms of the HRA should be re-enacted**

The HRA imposes a duty on public authorities to comply with the ECHR; requires the courts to interpret legislation 'so far as it is possible' in accordance with the ECHR; obliges them to take account of ECtHR jurisprudence; and allows for the making of declarations of incompatibility. In our view, these minimum obligations are essential to ensure that the Convention is fully and predictably applied both by UK public authorities and courts. The direct application of Convention rights to public authorities ensures that rights are not limited to litigation or dispute resolution, but become part of the essential decision-making framework for the provision of public services and the relationship between individuals and government.

- **Any statement of responsibilities or duties must not detract from the protection of human rights**

Most rights are qualified and, in practical terms, depend on the responsibility of everyone in society to respect one another's freedoms. Very few rights are unconditional – for example, the right against torture and inhuman treatment (Article 3 ECHR) and against slavery (Article 4 ECHR). These rights cannot be subjected to any all-encompassing limitation, such as that they are legally contingent on performance of set of duties and responsibilities. Many duties are already enshrined in statute and the legal value of restating a duty is unclear.

- **The scope for reform should not be oversold**

There is little point in a bill of rights which is sold to the public on the basis of limiting the ECHR, or restricting the involvement of the courts, but which cannot achieve that aim.

In the current climate, we are not persuaded that these criteria can be fulfilled. Any change to our existing constitutional arrangements which reduces the level of substantive or procedural protection offered by the Human Rights Act 1998 will damage the ability of the UK to meet its obligations both under the European Convention on Human Rights, the equivalent guarantees in the International Covenant of Civil and Political Rights (ICCPR) and other international instruments.

Tinkering with our constitutional framework for the protection of individual rights without full public support would do little to address existing myths and anxieties about the scope of these most fundamental of guarantees. The process for securing that support must involve an effective, educated and engaged public debate which includes even the most disenfranchised groups.

We urge the Commission to focus primarily on how public engagement and understanding of human rights principles can be encouraged. Any national discussion about constitutional change must tackle the current low level of public education on rights and the individual's relationship with Government (including widespread myths and misunderstandings about the role of the HRA 1998).

While we welcome the Commission's decision to engage in a public consultation, we consider that the process for constitutional change of the magnitude embodied by a UK bill of rights must involve a much wider, and more representative, national discussion than can be achieved within the Commission's limited resources and terms of reference. As part of their work, we urge the Commission to consider what the next steps in an effective national debate might look like, as a precursor to any concrete recommendations on the necessity for and the structure of any possible bill of rights for the UK.

Background

1. Founded in 1957, JUSTICE is a UK-based, all party, human rights and law reform organisation. Its council contains Parliamentarians from both Houses of Parliament and all three major political parties. Its mission is to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists. JUSTICE is a registered charity in England and Wales but is about to register under Scottish law to reflect the concerns of group of members in Scotland, including those about the future of human rights. We have intervened in cases before the Supreme Court in relation to the implementation of human rights both in England and Wales and Scotland.
2. We have published extensively on the issue of a Bill of Rights for the UK, including *A British Bill of Rights: Informing the Debate* (2007) (enclosed as Annex 1) and *Devolution and Human Rights* (2010) (Annex 2).¹ We are aware that many organisations have submitted very detailed arguments and evidence on various aspects of this debate, including in relation to the operation of the Human Rights Act 1998 (HRA 1998) and on the extent to which additional rights might be included in any UK Bill of Rights. We have addressed many of these issues in our earlier writing on this subject. This submission is designed to provide summary answers to the questions posed by the Commission and cross-refers to our earlier work. Where necessary, it is intended to update our earlier research.

Introduction

3. Constitutions should embody society's long-held principles, and point towards its aspirations. In this, one of the concluding lines of our earlier report, *A British Bill of Rights*, we acknowledged the potential opportunities and risks associated with a national debate on a bill of rights for the UK. At the time of that report, published almost five years ago, we welcomed what then appeared to be political consensus on the need for a full and effective national debate on the role of a bill of rights.
4. This report was designed to be a contribution to that debate and did not reach any conclusion on whether the UK should have – or needed – a new bill of rights. At that

time, we highlighted certain procedural and substantive minimum criteria for an effective debate on the establishment of a new constitutional document for rights protection in the UK. We identified the main advantages of adopting a UK bill of rights as enhancing public ownership of individual rights in the UK through increased public education on the role of individual rights and shared values within our society.² We considered that a national debate would provide a valuable opportunity to revisit the range of rights guaranteed by the HRA 1998 and to increase and enhance the rights afforded legal protection within the UK.³

5. Our reservations about any “British Bill of Rights” project were plain and we cautioned against any national debate being used as an opportunity to provide less, rather than more protection for fundamental rights.⁴
6. In light of the polarised and highly political nature of the development of this debate between 2007 and 2011, our reservations remain firmly in place. It is clear that the creation of the Commission – and its terms of reference – has been motivated in significant part by open criticism by the Prime Minister and other senior figures in the coalition Government of the HRA 1998 and the role played by the courts in the protection of Convention rights since its introduction. The implication of these statements has been that rights are democratically unaccountable, inconvenient and must be reformed in order to restore power and responsibility to the legislature and the executive.⁵ In this context, we are worried that a rational debate designed to enhance public understanding and education on individual rights and the relationship between the individual and the State will be difficult to achieve.
7. The Commission is presented with an unenviable task: to consider and analyse the benefits of a major constitutional change for one of the oldest constitutions in the world against a fraught political background where the key players appear to have already taken a view. We welcome the opportunity to contribute to its analysis.

¹ Two members of the JUSTICE Council are also members of the Commission on a Bill of Rights; Baroness Helena Kennedy QC (who is Chair of Council) and Lord Lester of Herne Hill QC. This submission has been prepared without reference to Council.

² *A British Bill of Rights (Annex 1)*, Chapter 6, para 25.

³ *Ibid.*

⁴ *A British Bill of Rights (Annex 1)*, Chapter 1, para 26.

⁵ We return to some of this criticism below. See for example, HC Deb, 16 Feb 2011, Cols 955, 959.

1) Do we need a UK bill of rights?

8. The question whether we need a bill of rights is at once deceptively simple and unimaginably complex. Our relatively brief response breaks this question into several parts:

- Do we need a legislative or constitutional instrument which provides for rights protection in the UK?
- Is there evidence that the HRA 1998 is not working?
- Are there other reasons for reform which support the case that a bill of rights for the UK is needed now?

Do we need an instrument for rights protection in the UK?

9. Bills of rights form the cornerstone of most modern democracies. It is likely that the first task of any new Government emerging from the Arab Spring will be to draft a new bill of rights which will govern its relationship with its people. Bills of rights are unusual in that they are a constitutional combination of law, symbolism and aspiration. As an understandable heritage of the UK's unwritten constitution, until the introduction of the HRA 1998, the UK was rare in having no statutory or constitutional way of guaranteeing the protection of most fundamental, modern human rights standards.⁶

10. The HRA 1998 satisfies the basic, core criteria which characterise all bills of rights: it represents a commitment to the human rights considered of particular importance to the UK; it binds the Government and can only be overridden with considerable difficulty. It provides an essential means of redress for violations of rights within the UK.⁷ It was described, on its introduction as a 'bill of rights' for the UK.⁸

⁶ *A British Bill of Rights (Annex 1)*, Chapter 1, para 26. In our 2007 Report, we outline the historical background to the then current Bill of Rights debate. In this, we accept that the UK is not without important historical documents which have contributed to the development of democracy, the rule of law and human rights across the world, not least in Magna Carta (1215), the Petition of Right (1628) and the Bill of Rights (1689). However, although these documents provide the foundations for many modern rights instruments and set the foundation for our own constitution, they would be unrecognisable as a modern bill of rights, incorporating such minimum guarantees for the relationship between the individual and the state as the right to life or the right to be free from forced labour or slavery.

⁷ Philip Alston, *Promoting Human Rights through Bills of Rights*, 1999, p10. See *A British Bill of Rights (Annex 1)*, Chapter 1, para 29.

⁸ Jack Straw, Institute for Public Policy Research, 13 January 2000.

11. Although the HRA 1998 has been criticised as going too far by some (see below) and not far enough by others,⁹ in our view, any step to remove (or reduce) the minimum statutory guarantees introduced by the HRA 1998 would be a regressive and regrettable step backward for rights protection in the UK.

Is there evidence that the HRA 1998 is not working?

12. The HRA 1998 was famously designed to “bring rights home”. It has been in force for barely a decade. The past ten years have seen minimal investment in public education on the Act; a lack of political leadership on its establishment as a core constitutional instrument and positive hostility from senior Government figures concerned to limit public scrutiny and judicial criticism of their activities.¹⁰ The national and international landscape has ensured that domestic policy development has been dominated by security issues and political decision makers now face similar challenges in the guise of global economic crisis and domestic recession.

13. However, key decisions and judgments based on the HRA 1998 have advanced the protection of individual rights in the UK significantly. These include decisions on topics as diverse as equality in housing allocation for people with disabilities; on the amendment of the procedures for challenging detention on mental health grounds; equality in tenancy rights for same-sex couples and the declaration of the incompatibility of the administrative detention of foreign nationals suspected of terrorist offences without trial.¹¹ We are concerned that the discussion on a bill of rights for the UK has so far failed to recognise the value which the Act has added to the protection of individual rights within the UK.

14. Since the enactment of the HRA 1998, democratic dialogue on rights has changed significantly. Every piece of legislation considered by Parliament is accompanied by a

⁹ See for example, *A British Bill of Rights (Annex 1)*, Chapter 1, paras 13, 20, 22. See also, for example, Raab, Dominic, *The Assault on Liberty*, 2009 (where the author argues that the HRA 1998 is both too strong and too weak); Joint Committee on Human Rights, Twenty-ninth Report of Session 2007-08, *A Bill of Rights for the UK?*, HL 165/HC 150, paras 55 – 61 and Chapters 4 - 8.

¹⁰ *A British Bill of Rights (Annex 1)*, Chapter 1, paras 23 and 24.

¹¹ *R (Bernard) v Enfield London Borough Council* (2003) UKHRR 4; *H v Mental Health Review Tribunal North & East London Region (Secretary of State for Health Intervening)* [2001] EWCA Civ 415; *Ghaidan v. Godin-Mendoza* (FC) [2004] UKHL 30 and *A and others v Home Secretary* [2005] 2 AC 68. This selection deliberately refers to both cases involving interpretation under Section 3 and declarations of incompatibility under Section 4. Others have, in their submissions to the Commission outlined in greater detail the evidence to support the contribution that the HRA 1998 has made to the development of rights protection in the UK, including the Equality and Human Rights Commission, Liberty and BIHR. We do not intend to repeat this detailed exercise in this short submission.

statement of the Government's views on human rights compatibility.¹² Increasingly, this statement is supported by a full explanation of the Government's reasons to believe that the legislation fulfils the minimum standards required by the Convention and (less frequently) wider international human rights law.¹³ Parliamentarians now have access to reports by their own Joint Committee on Human Rights in scrutinising legislation; the Government's response to human rights judgments and wider Government policy and practice on issues of controversy.¹⁴ Preliminary research supports the conclusion that the introduction of the HRA 1998 has increased the frequency and quality of parliamentary debate on human rights issues.¹⁵

15. We regret that the core criticisms of the HRA 1998 are not evidence-based, and in many cases, are based on myths and misunderstandings:

- *'The Act takes power away from Parliament and hands it to unelected judges'*¹⁶

The scheme in the HRA 1998 does precisely the opposite. Of each of the models considered in our 2007 Report, bar a declaratory model which would have no real effect, international comparative research on bills of rights show that the parliamentary model adopted in the HRA 1998 reserves a relatively rare degree of sovereignty for Parliament.¹⁷

- *'The HRA means that judges in Strasbourg have all the real power'*¹⁸

¹² Section 19, HRA 1998.

¹³ The Joint Committee on Human Rights has acknowledged that although this practice is becoming more widespread, it is not strictly required by the HRA 1998. See Twenty-ninth Report of Session 2007-08, *A Bill of Rights for the UK?*, HL 165/HC 150, para 226.

¹⁴ The JCHR has recommended that any Bill of Rights for the UK should adopt the parliamentary model in the HRA, but that additional changes could be made to bolster the scrutiny of Government by Parliament, including by requiring the Government to report to Parliament on a regular basis on the operation of the relevant instrument. Twenty-ninth Report of Session 2007-08, *A Bill of Rights for the UK?*, HL 165/HC 150, paras 228 – 239.

¹⁵ See for example, Francesca Klug and Helen Wildbore, *'Breaking new ground: the Joint Committee on Human Rights and the role of Parliament in human rights compliance'*, EHRLRev, 3 (2007).

¹⁶ See for example, HC Deb, 16 Feb 2011, Col 955. Here the Prime Minister said that the reason for the establishment of the Commission was 'because it is about time we ensured that decisions are made in this Parliament rather than in the courts.'

¹⁷ In our report we identify four distinct models which Bills of Rights follow. We discount as aspirational a purely declaratory model or code of principles with limited associated enforcement or adjudication role for the courts, for whom it would provide only guidance (except in so far as such a document would be ancillary to the HRA 1998). See also, Twenty-ninth Report of Session 2007-08, *A Bill of Rights for the UK?*, HL 165/HC 150, paras 211 – 218.

¹⁸ See for example, Policy Exchange, *Bringing Rights Back Home*, 2011. pages 39 – 47.

There is nothing in the HRA which requires domestic judges to stick rigidly to the judgments of the ECtHR. Section 2 of the HRA 1998 requires our judiciary to “take into account” the jurisprudence of the international court, not to rigidly apply it.¹⁹ It is clear that, if our domestic courts were to ignore the case-law of the Court, there would likely be legitimate grounds for an application to Strasbourg. However, there is nothing in the HRA 1998 which requires them to apply the rights as interpreted by the ECtHR as either a floor or a ceiling. The HRA is however distinct from the international obligations of the United Kingdom under the Convention to give effect to judgments of the ECtHR (Article 46 ECHR). This international obligation will continue to apply regardless of the scope of the HRA or any domestic bill of rights. Similarly, the common law of the United Kingdom presumes that the UK intends to comply with its international obligations when interpreting domestic statute law and developing the common law. If those obligations are defined in a specific manner by the relevant international court, that definition will continue to be relevant to the development of rights protection in the UK, regardless of the scope of Section 2 HRA 1998.²⁰

- *‘The HRA leads to odd or perverse judgments’*²¹

It is unclear which judgments the critics of the HRA 1998 consider ‘odd’ or ‘perverse’. As the ‘cat-gate’ affair illustrated, a number of myths and misconceptions have grown up around misrepresentations of specific cases which have never been decided on HRA 1998 grounds or where the influence of the HRA 1998 has been misrepresented.²²

For example, the decision of the Supreme Court in *Thompson*, on the need for an independent review when offenders are listed on the sex offenders register for life,

¹⁹ In fact, the Supreme Court has indicated that there must be a clear and settled line of case-law in place before they will follow it. See for example, *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295; *Cadder v HM Advocate* UKSC [2010] 43. There is a range of domestic judicial opinion expressed on the scope of Section 2 HRA 1998. The latest extra-judicial analysis is offered by Lord Judge and Lord Phillips in their evidence to the Joint Committee on Human Rights in November 2011.

²⁰ See for example, the role of Convention rights in the Court’s analysis in *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770.

²¹ *Guardian*, *David Cameron answers Questions*, 25 November 2011. <http://www.guardian.co.uk/politics/2011/nov/25/david-cameron-answers-questions>

²² *A British Bill of Rights (Annex 1)*, Chapter 1, para 23. Others have outlined the degree of mythology and misreporting which has grown up around the HRA, including Professor Francesca Klug and Helen Wildbore, the Equality and Human Rights Commission and Liberty. We do not repeat that exercise here.

has been heavily criticised in public by the Prime Minister and the Home Secretary. This judgment has been subject to widespread misreporting. The impact of the judgment is extremely limited, in fact, requiring only the creation of an opportunity for independent review. The Court accepted the legitimate aim (and value) of the sex offenders' register, and indicated that significant weight should be given to the benefit in addressing risk through registration. The only violation in the system was the ability to list someone for life without any opportunity to ask for a review of whether registration was necessary.²³

Under any bill of rights worth having, there will be decisions and judgments of which the executive disapprove. By their nature, bills of rights exist to limit the boundaries of state action. The Government (and other public authorities) will regularly be on the receiving end of judgments which have implications for their policies or practices which are inconvenient, but which are designed to protect individual rights. The greater understanding of human rights principles in public bodies, the fewer judgments there will be. This inevitable tension is part and parcel of the value which a modern bill of rights (such as the HRA 1998) adds to the rule of law and the promotion of good Government.²⁴

There is nothing in the HRA 1998 which requires the Government to act when a declaration of incompatibility is made by our domestic courts. Similarly, although Section 10 HRA 1998 provides for a fast-track means of legislating to remove a violation, there is nothing which requires parliament to accept any change in the law. Under the existing system, Parliament remains sovereign and may refuse to act. Similarly, if the Government is unhappy with an interpretation adopted by the Courts under Section 3 HRA 1998, there is nothing to prevent the Government (or an individual parliamentarian) introducing legislation to designed to reverse that interpretation (for the avoidance of doubt, it would be entirely open to the Government to attach a certificate under Section 19(b) HRA 1998 indicating that the Government intended the legislation to pass despite doubt over its compatibility with Convention rights).²⁵

²³ See for example, the analysis of the Joint Committee on Human Rights of this case and the Ministerial response: Nineteenth Report of Session 2010-12, *The Proposal for a Sexual Offences Act 2003 (Remedial) Order*, HL 195/HC 1549, paras 6 – 11, 25.

²⁴ *A British Bill of Rights (Annex 1)*, Chapter 4.

²⁵ *A British Bill of Rights (Annex 1)*, Chapter 4, para 49. See also Joint Committee on Human Rights, Thirty-first Report of Session 2007-08, *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008*, HL 173/HC

- *We need to set out our rights in our language, 'so that we don't have strange decisions handed down by Strasbourg'.²⁶*

This argument is an amalgam of each of the arguments above and set to confuse the national obligations set out in the HRA 1998, which incorporates limited Convention rights, subject to the interpretation and application afforded to them domestically and the international law obligation on the UK to give full effect to the treaty and the judgments of the ECtHR. The language adopted by the Convention in defining the rights is said to be vague and could be modernised or updated to make it more easily understood by a modern audience. The Convention was drafted over 50 years ago and there are linguistic anachronisms within it (for example, it contains no express protection against discrimination on the grounds of sexuality). Similarly, we have accepted that there are rights which could legitimately supplement those right set out in the Convention, including common law rights and other rights recognised in our existing international obligations, such as economic and social rights.²⁷

However, it appears that for critics of the HRA 1998, any amendment to the language in the HRA 1998 would be designed to restrict the rights guaranteed by the Convention by, for example, excluding protection guaranteed by the case-law of the ECtHR; by redrawing the balance to render lawful actions currently considered disproportionate, or by limiting the enforcement mechanisms in the HRA 1998. Such a retrogressive step would be unique internationally; would undermine the ability of people in the UK to secure redress for violations of rights in UK courts and would damage the ability of the UK to meet its international obligations in the ECHR and the UN human rights treaties, irreparably.

In so far as critics of the HRA 1998 have suggested that a UK bill of rights is necessary to secure a wider 'margin of appreciation' for the decisions of domestic courts, we are concerned that this argument is misleading. Any examination of post-HRA 1998 case-law illustrates the detailed consideration which the ECtHR gives to decisions of the Supreme Court (and the predecessor House of Lords) in reaching a

1078, para 101; Fifteenth Report of Session 2009-10, *Enhancing Parliament's role in relation to human rights judgments*, HL 85/HC 455, para 14.

²⁶ *Guardian*, David Cameron answers Questions, 25 November 2011. <http://www.guardian.co.uk/politics/2011/nov/25/david-cameron-answers-questions>

²⁷ *A British Bill of Rights (Annex 1)*, Chapter 2.

conclusion in UK cases. Constitutional bills of rights apply across Europe: from Belgrade to Berlin.²⁸ There is no evidence that the ECtHR varies the standard of scrutiny it applies according to the nature or language of domestic rights protection; as opposed to the compatibility of domestic legislation, policy or practice with international human rights standard or the quality of domestic judicial decision making.²⁹

16. The HRA 1998 is working: it brings rights home to the UK and integrates rights-based decision-making into the UK constitution. We are not persuaded that there is an evidence-base to support the argument for any change that would reduce the protection it offers.

Are there other reasons for reform?

17. In our 2007 report, we concluded that the primary value in a bill of rights would be greater public ownership of any new constitutional document.

18. It is widely recognised that since its implementation, the HRA has met a negative response, largely based, in our view, on the type of myths and misunderstandings set out above. Such hostility has often been fuelled by inaccurate press coverage. Outside of the courts and the legal profession, political and cultural entrenchment of rights has been slow. Newspaper headlines have encouraged scaremongering and prominent politicians, from the major political parties, have attacked its operation.

19. Some comparable rights instruments – such as the French or US bills of rights – have had centuries to become embedded in the public consciousness. For the UK, as a country without a history of a written constitution with ingrained rights protection, the HRA 1998 represented a clear departure from previous practice. It is perhaps inevitable that some tension would arise as a rights-based supplement to our traditional approach to the rule of law and legality in Government was integrated into our public law. It could have

²⁸ Chapter 2 of the Constitution of Serbia lists the “Human and Minority Rights and Freedoms” it protects. Similarly Chapter 1 of the German Basic Law sets out the constitutional rights protected therein.

²⁹ The President of the European Court of Human Rights, Sir Nicolas Bratza has recently published an article explaining the relationship between the HRA 1998 and the margin of appreciation in the decision making process at the Court. See *The relationship between the UK Courts and Strasbourg*, EHRLRev, 5 (2011) 505-512.

easily been predicted that successive Governments would criticise decisions of the courts during its bedding-down period.

20. However, public opinion polls continue to suggest that the people of the UK – while not fluent in the rights language of lawyers – are very much in favour of protecting their rights.³⁰

21. There is a need to build public confidence in, and ownership of, the post World War II consensus on human rights generally. In our view, a Bill of Rights which satisfies the minimum criteria necessary may be an unrealistic prospect until the existing legal protection of human rights across the UK is acknowledged and respected. As we said in 2007:

It would be an undesirable effect if a new British Bill of Rights were distorted according to populist notions of, for example, the balance of freedom and security in an age of terrorism. It would also reduce the likelihood that such a bill would provide the enhanced rights protection that could benefit British citizens.³¹

22. Since 2007, the debate has become even more polarised. Myth and misreporting continue to drive the discussion. We accept that the HRA 1998 has failed to capture the public imagination, in the way that Bills of Rights instituted in other countries after major constitutional upheaval have done. However, the need to build public interest, engagement and understanding of the protection of rights in the UK is an argument in favour of investment in popular teaching and education campaigns, not a justification for a major constitutional change.³²

23. Time, leadership and public education is necessary in order to establish a concrete constitutional basis for the protection of rights in the UK. While we consider that there is evidence for greater public ownership of the HRA 1998, this is evidence for better investment in and promotion of public education on the operation of that Act, not a case for an entirely new Bill of Rights.

³⁰ See for example, Liberty, *Human Rights or Citizen's Privileges*, pages 79-80. See also ICM/Joseph Rowntree State of the Nation poll (2006) (77% of the public believes the UK needs a bill of rights to protect the liberty of the individual); and Disability Rights Commission Poll (2003) (63% support legislation to protect human rights in the UK).

³¹ *A British Bill of Rights (Annex 1)*, Chapter 1, paras 26-27.

³² *A British Bill of Rights (Annex 1)*, Chapter 1, paras 27.

2) What do you think that a UK Bill of Rights should contain?

24. Despite our keen concern that the need for change has not been evidenced we consider that, as a minimum:
- **A UK bill of rights must guarantee, and should extend beyond, the rights protected by the European Convention on Human Rights;**
 - **Any domestic bill of rights should be compatible with the international obligations of the UK;**
 - **Any statement of responsibilities or duties must not detract from the protection of human rights; and**
 - **The key enforcement mechanisms of the HRA should be re-enacted.**
25. **In short, any Bill of Rights must be not only ECHR ‘plus’ but HRA ‘plus’ in its effect: improving the baseline for the protection of individual rights within the UK.**³³
26. We welcome the clear statement in the Commission’s terms of reference limiting their work to that which builds on the rights in the European Convention on Human Rights, but note the conspicuous absence of any reference to the HRA 1998.
27. We stress that any proposals made by the Commission which explore the ‘true scope of these obligations and liberties’ must be compatible with our international obligations, as defined in the Convention (and the jurisprudence of the ECtHR and our domestic courts), in the fundamental rights case-law of the European Union³⁴ and in the UN human rights treaties. The emphasis on enhancing liberties in the Commission’s terms of reference must not be allowed to detract from the positive obligations which international human rights law places on States to secure individual rights in practice. For example, every State has the positive obligation, grounded in human rights law, to protect the public from

³³ *A British Bill of Rights (Annex 1)*, Chapter 2 (content) and 4 (enforcement and adjudication). A fuller discussion of the rights which JUSTICE considers could be explored in any new bill of rights is provided, together with its conclusion that the minimum substantive and procedural guarantees must build on those in the HRA 1998.

³⁴ With its foundation in Article 2 TEU, on respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, and the binding impact of the EU Charter on Fundamental Rights upon member states enacting EU law. See for example, Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* (22 December 2010) and C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v Council of the European Union and Commission of the European Communities* (3 September 2008).

risks which may endanger life, including by criminalising homicidal and other violent behaviour and by providing an effective police and judicial system which both acts as a deterrent and provides a means of investigating and prosecuting crime which endangers life and the right to physical integrity. These positive obligations are at the heart of both international human rights instruments and domestic constitutional bills of rights.

28. In our 2007 report, we outlined a number of areas where the rights in the ECHR could be supplemented or enhanced, including in relation to economic and social rights and traditional common law rights, such as the right to trial by jury.³⁵ However, the starting point, in our view, for any discussion on a Bill of Rights for the UK, must be the consolidation of protection for the existing substantive and procedural rights guaranteed in the HRA 1998.³⁶
29. In our 2007 Report, we concluded that nothing in any Bill of Rights could legitimately limit its application to only citizens of the UK or make rights conditional upon the exercise of certain responsibilities, without violating our international human rights obligations.³⁷
30. We have explored a number of models for the protection of human rights in the UK, from declaratory instruments to those which would incorporate an enhanced role for the domestic courts in striking down primary legislation incompatible with the rights protected by any constitutional bill of rights. The great value in the tripartite structure adopted in the HRA 1998, is that it is specifically designed to respect the constitutional traditions of the UK and in particular, to reflect the commitment to parliamentary sovereignty which forms the cornerstone of our constitutional development.³⁸ It would be regrettable if the current debate were to undermine the role reserved for Parliament under the existing arrangements, and specifically, in the careful balance drawn by the Courts in interpreting Sections 3 and 4 of the Act and in Sections 10 and 19, which establish a clear role for parliamentary scrutiny of human rights judgments and legislation.³⁹

³⁵ *A British Bill of Rights (Annex 1)*, Chapter 2

³⁶ *A British Bill of Rights (Annex 1)*, Chapter 2, paras 1- 4

³⁷ *A British Bill of Rights (Annex 1)*, Chapter 2, paras 34 – 40, 132.

³⁸ *A British Bill of Rights (Annex 1)*, Chapter 4, paras 47-50, 70-71.

³⁹ See for example, the discussion of the role of Parliament in Joint Committee on Human Rights, Twenty-ninth Report of Session 2007-08, *A Bill of Rights for the UK?*, HL 165/HC 150, paras 211 – 218.

31. Principally, however, we are concerned that at the heart of the enforcement mechanisms for the HRA 1998, is the assumption that all public authorities (including hybrid bodies and private bodies exercising public functions) should act in a way which respects the minimum guarantees it provides for individual rights. This obligation, which imposes a direct requirement on individual authorities, is not entirely unique. In constitutional bills of rights the world over, public authorities and other emanations of the State are required to act compatibly with the constitutional rights guaranteed. Other activity is unconstitutional. A failure to do so will often result in a cause of action and/or judicial review before domestic courts (although different mechanisms may apply in relation to remedy).⁴⁰ However, far from legalising the concept of rights, these provisions are designed to ensure that rights-based decision-making is integrated into all of our public processes, violations of fundamental human rights are avoided and courts left as the venue of last resort. Research done by other organisations, and notably, by the British Institute of Human Rights and the Parliamentary Joint Committee on Human Rights, has illustrated that it is this obligation that is capable of making rights real for people in their everyday lives.⁴¹
32. Despite high-profile criticism of the impact of the duty to act compatibly with Convention rights on the efficiency and efficacy of public decision making, in our view, there is no evidence that the HRA 1998 has undermined local or administrative decision making.⁴² Where confusion has arisen has often been as a result of misunderstandings over the implications of the Act, or confusion over its requirements. This does not point to a flaw in the legislation, but rather to a lack of investment in public understanding and training of public authorities on the implications of the Act for public service provision.

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

33. **The process of agreeing a UK bill of rights, and its content, must reflect the increasingly devolved nature of the United Kingdom.** Our work so far has highlighted the complexity of agreeing any rights settlement which departs from the

⁴⁰ See for example, the Constitution of Georgia (Article 6(1)); the Constitution of Lebanon (Article 17) and the Constitution of Mozambique (Article 38). These each provide different models which in effect provide that executive action which is inconsistent with the Constitution and the rights it protects, that action is unlawful.

⁴¹ See for example, BIHR, *The Human Rights Act – Changing Lives* (Second Edition). See also Joint Committee on Human Rights, Seventh Report of 2007-08, *A life like any other?* HL 40/HC 73, 45 – 54.

⁴² See for example, Joint Committee on Human Rights, *The HRA: Home Office and DCA Reviews*, HL 278/HC 1716.

current nuanced integration of the HRA 1998 and existing devolution settlements, as a 'legal and political nightmare'. While differential forms of rights protection are considered the norm in most federal systems, the UK is not a federal state. Equally, even within those systems, there is broad agreement on a national minimum standard of rights protection which applies across the State, despite variations within individual states or regions.⁴³ We are extremely concerned that the current legal and political climate in the UK would make agreement on a system which reflects – and respects – the devolution settlement, impossible. At a minimum, we consider that any proposals for change which depart from the substantive and procedural rights in the HRA 1998 would provoke very different public responses in Scotland, Wales and Northern Ireland; these different approaches would be politically divisive and far from simple to resolve. At worst, it may be impossible to secure the agreement of the devolved assemblies to any decision which would establish a UK-wide bill of rights and could ultimately lead to four separate models. This would be an unnecessarily complex outcome, not least because there would be division between the treatment of non-devolved and devolved rights, and it would make the task of the UK Supreme Court in ensuring uniform compliance with our international human rights obligations far more onerous.⁴⁴

34. It is extremely disappointing that a feature of the debate so far has been largely to ignore the full process of consultation on a bill of rights for Northern Ireland. We hope that the Commission will fully recognise the international obligation on the UK to implement the Good Friday agreement, and the recommendations of the Northern Ireland Human Rights Commission for a Bill of Rights for Northern Ireland, into its work.⁴⁵

4) Are there any other views that you would like to put forward at this stage?

35. The Commission's terms of reference are limited to the *investigation* of a UK bill of rights. We consider that the Commission has an unenviable task, but it is a limited one. The limited nature of the Commission's role is reflected in the limited resources at its command and its membership.

⁴³ JUSTICE, Press Release, 'A legal and political nightmare': Report on devolution and human rights warns of major difficulties ahead, 8 February 2010.

⁴⁴ See Annex 2, JUSTICE, *Devolution and Human Rights*, February 2010.

⁴⁵ Annex 2.

36. There are many lessons to be learned for the procedural steps required for an effective national discussion on a Bill of Rights, which we set out in our 2007 report. Any process of national discussion about a constitutional change as major as the institution of a bill of rights for the UK must be representative.⁴⁶ It must also involve a significant element of public education on the operation of the HRA 1998 and any proposed models for reform.⁴⁷
37. As a precursor to any recommendations on a UK bill of rights – or any conclusion on the need for any change – the Commission should recognise that its work is a tentative first step in a much fuller national conversation that would be necessary for any new UK bill of rights to have the kind of public ownership and inspiration that we regret the HRA 1998 has missed.
38. A core part of the Commission’s terms of reference is to promote a better understanding of the obligations of the UK under the European Convention on Human Rights. We urge the Commission to call on the Government to make public education on fundamental human rights, the role of rights in Government and the operation of the HRA 1998 a priority. As we stressed in 2007, no change to the existing arrangements in the HRA 1998 should take place without equivalent or enhanced substantive and procedural guarantees meeting the minimum criteria for a legitimate Bill of rights having first been brought into force.

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⁴⁶ Shortly after its establishment, we wrote to the Commission to highlight our view that its composition was not representative. JUSTICE, Press Release, *All white and all (but one) male: membership of commission on bill of rights challenged*, 8 February 2010.

⁴⁷ *A British Bill of Rights (Annex 1)*, Chapter 5 sets out a number of comparative examples on processes for the agreement of constitutional bills of rights. See also Joint Committee on Human Rights, Twenty-ninth Report of Session 2007-08, *A Bill of Rights for the UK?*, HL 165/HC 150, Chapter 9.