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Joint Committee on
Human Rights

A Bill of Rights for the UK?

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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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Contents

Report	<i>Page</i>
Summary	5
1 Introduction	7
Background	7
Our inquiry	7
The purpose of our Report	9
The historical context	9
How much consensus?	12
2 Does the UK need a Bill of Rights?	13
Why is the Government interested in a Bill of Rights?	13
Other arguments in favour of a Bill of Rights	15
The case against a Bill of Rights	18
ECHR-plus?	19
What would a Bill of Rights add to the Human Rights Act?	21
Declaratory or aspirational?	22
Bills of Rights and historical moments	23
3 A “British” Bill of Rights and the Devolution Dimension	25
Introduction	25
British rights for British citizens?	25
Definition of “British”	27
British not European	29
Use of the term “British”: Conclusion	30
Devolution	31
4 What should be included in a UK Bill of Rights?	34
Introduction	34
“British values”	34
Additional rights	36
“UK rights”	36
The right to trial by jury	37
Right to administrative justice	38
Equality	38
Other candidates	39
Relationship between Bill of Rights and common law	39
Unincorporated international human rights	39
Rights for particular groups	40
Conclusion	42
5 Economic and social rights	43
Background	43
The Committee’s Report on Economic and Social Rights	44
The Government’s evolving position	45

The range of possibilities	47
Model (1): Fully justiciable and legally enforceable rights	47
Model (2): Directive principles of State policy	47
Model (3): A duty of progressive realisation of economic and social rights by reasonable legislative and other measures, within available resources	48
Objections to the inclusion of economic and social rights	51
Objection 1: The rights themselves are too vaguely expressed and will only raise expectations and encourage time-consuming and expensive litigation against public bodies	51
Objection 2: It hands too much power to the courts and so is undemocratic	51
Objection 3: It involves the courts in making decisions about resources and priority setting that they are ill-equipped to take	52
A suggested approach: a duty of progressive realisation with a closely circumscribed judicial role	53
6 “Third generation rights”	57
Conclusion	59
7 Relationship between Parliament, Executive and the Courts	60
Introduction	60
The possible models	60
The ‘parliamentary model’ of human rights protection	60
Enhancing Parliament’s role in the parliamentary model	62
Power of legislative override	62
Reasoned statements of compatibility	62
Enhanced role for Parliament following declaration of incompatibility	63
Five yearly independent review	63
Entrenchment	64
Emergencies	65
Judicial appointments	66
8 Responsibilities and duties	68
Introduction	68
The Government’s position	68
The relationship between rights and responsibilities	69
Responsibilities already implicit in human rights standards	72
The proper relevance of responsibilities in human rights law	73
Public function	74
The effect of the Bill of Rights on private parties	75
9 Process	79
The Government’s position	81
Comparative experiences	81
Northern Ireland	81
Australia	84
Minimum requirements of the process	85
Bottom-up not top-down	86
Inclusivity	87
Deliberative techniques	88

Independence from Government	89
Timing	89
Resources	90
The role of Government	90
Non-negotiables	91
Conclusions and recommendations	93
Annex 1: Outline of a UK Bill of Rights and Freedoms	105
Annex 2: Explanatory Notes to the Outline Bill of Rights and Freedoms	114
Annex 3: Northern Ireland Human Rights Commission Methodology	118
Annex 4: Examples of Economic and Social Rights Provisions	119
Formal Minutes	128
List of Witnesses	130
List of Written Evidence	131
Reports from the Joint Committee on Human Rights in this Parliament	133

Summary

There is an ongoing debate about whether or not there should be a Bill of Rights for the United Kingdom. The Government is committed to considering the need for a Bill of Rights and other political parties have expressed interest in developing one. We intend for our Report to contribute to this debate.

Over the last year, we have considered evidence from a range of witnesses about whether there is a need for a Bill of Rights, who the Bill of Rights should cover, what the Bill should include, whether it should incorporate social and economic rights, how a Bill of Rights would fit in with and affect the relationship between Parliament, the executive and the courts, whether the Bill should refer to responsibilities, and how Government should consult the public about a future Bill. We provide in Annex 1 an outline of what a draft Bill might look like. We intend this practical document to demonstrate the potential simplicity of a Bill of Rights.

We are of the view that the United Kingdom should adopt a Bill of Rights and Freedoms. Our work over the last few years has demonstrated that there are many groups in society, such as older people and adults with learning disabilities, whose human rights are insufficiently protected. We argue that a UK Bill of Rights and Freedoms is desirable in order to provide necessary protection to all, and to marginalised and vulnerable people in particular.

Adopting a Bill of Rights provides a moment when society can define itself. We recommend that a Bill of Rights and Freedoms should set out a shared vision of a desirable future society: it should be aspirational in nature as well as protecting those human rights which already exist. We suggest that a Bill of Rights and Freedoms should give lasting effect to values shared by the people of the United Kingdom: we include liberty, democracy, fairness, civic duty, and the rule of law.

There are some additional rights which we believe should be included in a Bill of Rights and Freedoms: we discuss these in chapters four to six. We recommend for inclusion, amongst others, the right to trial by jury, the right to administrative justice and international human rights as yet not incorporated into UK law. We believe that there is a strong case for a Bill of Rights and Freedoms having detailed rights for children, and we recommend that the public should be consulted about including specific rights for other vulnerable groups. In addition, we argue that there is a strong case for including the right to a healthy and sustainable environment in a Bill of Rights and Freedoms.

One of the biggest controversies in the debate on the Bill of Rights is whether it should include social and economic rights. We believe that there is strong public support for including rights to health, housing and education. Whilst we recognise that there are difficulties in including these rights, particularly in relation to the extent to which the courts could and should make decisions about issues normally determined by politicians, we set out an approach which we believe counters those problems. We suggest that the Bill of Rights and Freedoms should initially include the rights to education, health, housing and an adequate standard of living. Government would have a duty to progress towards realising these rights and would need to report that progress to Parliament. Individuals would not be able to enforce these rights through the courts, but the courts would have a role in reviewing

the measures taken by Government.

Adopting a Bill of Rights and Freedoms is a constitutional landmark, and could have a far-reaching impact on the relationship between Parliament, the executive and the courts. We recommend that the Bill of Rights and Freedoms should build on our tradition of parliamentary democracy, and we do not believe that courts should have the power to strike down legislation. A UK Bill of Rights and Freedoms should, as with the Human Rights Act, apply to legislation whenever enacted, unless Parliament decides to pass incompatible legislation, and makes clear its intention to do so.

We acknowledge that a UK Bill of Rights and Freedoms will have to provide for derogating from those rights in times of emergency. We recommend that a Bill of Rights and Freedoms should include parliamentary and judicial safeguards to make clear the conditions which must be satisfied to justify a derogation from rights.

We conclude that rights cannot be contingent on performing duties or responsibilities. We recommend that a Bill of Rights and Freedoms should not include directly enforceable duties. However, we acknowledge that responsibilities are implicit in human rights instruments. On that basis, and to that end we suggest that the language of responsibilities could have a role to play in a Bill of Rights and Freedoms, perhaps in the Preamble to the Bill. Private bodies who are performing public functions must be bound by a Bill of Rights and Freedoms. The Bill would also have an indirect effect on private parties because of the important role courts would play in protecting rights enshrined within the Bill of Rights and Freedoms. We recommend that courts and tribunals should interpret legislation both in a way which is compatible with the Bill of Rights and Freedoms, and which promotes the purpose of the Bill. The courts, as a public body, would also have a duty to act compatibly with, and promote, the rights within the Bill of Rights and Freedoms, which may require them to develop the common law to give a remedy for breach of a protected right or freedom.

The process by which Government consults on a Bill of Rights is vital to achieving public consensus and commitment. We make a number of recommendations to ensure that there is a broad, in depth and independent consultation on the Bill of Rights and Freedoms which gives the public an opportunity to deliberate on the issues. We recommend that the process should last for no more than six months to a year, and suggest a set of guiding principles which should provide the starting point for the consultation process.

We hope that parliamentarians and the wider public continue to engage in the debate about the need for and content of a Bill of Rights and Freedoms.

1 Introduction

Background

1. There currently exists an unusual cross-party consensus about the need for a “British Bill of Rights”. In its *Governance of Britain* Green Paper (July 2007)¹ and the Prime Minister’s statement to the House of Commons on 3 July 2007,² the Government committed itself to exploring the possibility of a British Bill of Rights as part of a wider programme of constitutional reform.³ The Conservative Party had previously announced that it proposes to replace the Human Rights Act 1998 (HRA) with a British Bill of Rights whilst remaining a party to the European Convention on Human Rights (ECHR) and has appointed a Commission of experts to consider how to achieve this.⁴ The Liberal Democrats have reiterated their longstanding commitment to a Bill of Rights as part of a written constitution for the UK.⁵

2. The consensus across the political parties appears to reflect a wider consensus amongst the public. In the 2006 Joseph Rowntree “*State of the Nation*” survey of opinion, 77% of those polled agreed that Britain needs a Bill of Rights to protect the liberty of the individual (51% agreeing strongly with that proposition).⁶

3. There is considerably less consensus, however, about the reasons why a British Bill of Rights is needed, what rights should be contained in such a Bill of Rights, its relationship with existing human rights protections such as the HRA and how it should affect, if at all, the existing relationships between Parliament, the executive and the courts.

Our inquiry

4. It was in the belief that these questions seemed likely to dominate the debates about human rights in the UK over the next year or so that we decided, in May 2007, to inquire into them. We considered one of the purposes of our inquiry as being to ascertain the extent of consensus on the major issues, including amongst ourselves as a cross-party Committee of both Lords and Commons members with no Government majority, so as to inform public and parliamentary debate on the issue, and to make recommendations about the future direction of the debate about a Bill of Rights in the light of those findings.

5. We issued a call for evidence on 22 May 2007, inviting submissions by 31 August 2007. We asked for submissions to focus on four principal questions:

- Whether and why a Bill of Rights is needed;

¹ *The Governance of Britain*, Cm 7170 (July 2007) (hereafter “*Governance of Britain*”).

² Prime Minister’s statement on constitutional reform, HC Deb 3 July 2007 col. 815 at col. 819.

³ The Prime Minister’s interest in the issue was foreshadowed in a number of speeches before he became Prime Minister: see e.g. speech of Gordon Brown, Chancellor of the Exchequer, to the Fabian Society, “*The future of Britishness*”, 14 January 2006, and at the launch of his campaign for leadership of the Labour Party, 11 May 2007.

⁴ See e.g. speech of David Cameron, Leader of the Opposition, to the Centre for Policy Studies, “*Balancing freedom and security – A modern British Bill of Rights*”, 26 June 2006; speech of Dominic Grieve, shadow Attorney General, to the Conservative Liberty Forum, “*Liberty and Community in Britain*”, 2 October 2006.

⁵ See e.g. Liberal Democrat Policy Paper 83, *For the People, by the People*, August 2007 at para. 4.2.4.

⁶ *State of the Nation* 2006, Joseph Rowntree Memorial Trust (poll conducted by ICM between 21st and 30th October 2006).

- The rights to be contained in a Bill of Rights;
- The relationship between a Bill of Rights, the HRA and the UK's other international human rights obligations; and
- The impact of a Bill of Rights on the relationship between the executive, Parliament and the courts.

6. We received 31 memoranda, of which 12 were from individuals and 19 from organisations. The written evidence we received is published in Volume II of this Report.

7. We held six formal evidence sessions, including one in Scotland:

- *3 December 2007* from Professors Klug and Fredman and Martin Howe QC; and Liberty, Justice and the British Institute of Human Rights (introduction to the issues);
- *14 January 2008* from Children's Rights Alliance for England, the Trades Union Congress and Unite the Union (on the inclusion of rights for children, unions and economic and social rights more generally);
- *28 January 2008* from Professors Sidoti and Dickson (on Northern Ireland); and Professor Smith (on methods of engaging with the public);
- *3 March 2008* from Baroness Hale and Lord Justice Maurice Kay; and Professor Vernon Bogdanor, Rt Hon Kenneth Clarke MP and Henry Porter (on the role of judges and constitutional reform);
- *10 March 2008* from Kenny MacAskill MSP, Cabinet Secretary for Justice in the Scottish Government; Law Society of Scotland (on the effect of devolution); and
- *21 May 2008* from Rt Hon Jack Straw MP, the Justice Secretary, and Michael Wills MP, the Human Rights Minister.

8. We also had informal meetings with Justice Kate O'Regan of the South African Constitutional Court, the Northern Ireland Human Rights Commission, and the Scottish Human Rights Commission.

9. From 19-23 November 2007, we visited South Africa to study that country's experience with a constitutional Bill of Rights since 1996. We met a wide range of people with first hand experience of the South African Bill of Rights: judges of the Constitutional Court and lower courts, Government Ministers, parliamentarians, human rights NGOs, leaders of civil society, members of the Human Rights Commission, legal practitioners, journalists and academics in both law and political science. We found the visit extremely instructive and we refer to what we heard and observed throughout this Report.

10. We are grateful to all those who have assisted with our inquiry.

11. For reasons which we make clear later in this Report, we refer throughout to a “UK Bill of Rights” or, our own proposal, a “UK Bill of Rights and Freedoms”, rather than a British Bill of Rights.⁷

The purpose of our Report

12. Our Report is designed to stimulate debate about a range of issues concerned with a UK Bill of Rights. We emphasise that, although we make certain recommendations and proposals, and express preferences for some options over others, all of the questions that we consider are matters that ultimately should be decided after a thorough and genuine consultation. If there is to be a UK Bill of Rights, questions such as: the form it takes; the human rights it protects; the way in which it is enforced; who it binds; must be subject to proper public deliberation and, eventually, decision. To have any prospect of taking root and flourishing in popular consciousness, a Bill of Rights must emerge from an inclusive and participative process of public discussion.

13. We have included as an Annex to our Report an outline of a possible UK Bill of Rights and Freedoms, which is meant to be indicative of the sorts of provision which could be made in a UK Bill of Rights, reflecting our recommendations and proposals where possible.⁸ We have been encouraged to produce an outline Bill of Rights and Freedoms by the positive response in both Houses to our recent practice of proposing amendments to Bills to give effect to our recommendations in our legislative scrutiny work. We hope that the existence of an outline text will provide a focal point for future discussions on what are often perceived to be somewhat abstract and technical issues. We also hope it will demystify to some extent issues which are often made more complicated than they really are. Like the HRA itself, a UK Bill of Rights could be a relatively straightforward document.

The historical context

14. We think it is important at the outset to refer briefly to the historical context in which today’s debate takes place, because this throws some light on current disagreements about what Bills of Rights are for.

15. The focus of the classic Bills of Rights, from Magna Carta in 1215 to those of the 17th and 18th centuries (the English Bill of Rights of 1689, the French Declaration of the Rights of Man and the Citizen of 1789 and the American Bill of Rights of 1791), was the protection of the individual’s liberty against the intrusive and interfering power of the overweening state. Liberty was conceived as negative liberty, the absence of restraint. It remains the view of many today that the protection of human rights by Bills of Rights should be confined to this set of broadly Enlightenment values, and that this is the only legitimate purpose of a Bill of Rights.

16. In the second half of the 20th century, however, conceptions of human rights began to change. In 1941, US President Franklin D. Roosevelt made his famous “Four Freedoms”

⁷ See para. 99 below.

⁸ Annex 1. The outline Bill only contains the most significant substantive provisions and omits many of the more detailed but largely technical provisions that would also be necessary in any Bill of Rights. Annex 2 contains Explanatory Notes to the outline Bill.

speech in his State of the Union address to Congress, at the height of the Second World War:

In the future days, which we seek to make secure, we look forward to a world founded upon four essential freedoms.

The first is freedom of speech and expression ...

The second is freedom of every person to worship God in his own way ...

The third is freedom from want ...

The fourth is freedom from fear ...⁹

17. The inclusion of freedom from want and freedom from fear in this list of the four essential freedoms, from the mouth of the President of the country with the most cited of the classical Bills of Rights, was a significant moment in the history of human rights protection. It redefined freedom to include not merely absence of restraint but absence of want and fear. These freedoms went beyond the traditional American constitutional values protected in the American Bill of Rights to embrace security as a foundational value, including economic security.

18. In 1944 President Roosevelt made his equally famous “Second Bill of Rights” speech, in which he suggested that America had now effectively accepted a second Bill of Rights, embracing freedom from want and freedom from fear:

This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty.

As our Nation has grown in size and stature, however—as our industrial economy expanded—these political rights proved inadequate to assure us equality in the pursuit of happiness.

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." People who are hungry and out of a job are the stuff of which dictatorships are made.

In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all regardless of station, race, or creed.

Among these are:

- The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;

⁹ *Annual Message to the Congress on the State of the Union*, 6 January 1941.

- The right to earn enough to provide adequate food and clothing and recreation;
- The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;
- The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;
- The right of every family to a decent home;
- The right to adequate medical care and the opportunity to achieve and enjoy good health;
- The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;
- The right to a good education.

All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.¹⁰

19. Roosevelt's "Four Freedoms" were explicitly incorporated into the preamble to the Universal Declaration of Human Rights (UDHR):

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.¹¹

20. The UDHR itself was given binding legal force in the two subsequent UN treaties, the International Covenant on Civil and Political Rights ("the ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("the ICESCR"), which, together with the UDHR, comprise the so-called "International Bill of Rights".

21. Today one of the central questions for any parliamentary democracy considering whether to adopt a Bill of Rights is whether that Bill of Rights should seek to reflect, so far as possible, *both* of these human rights traditions in the international human rights instruments. The response to our inquiry has certainly demonstrated that there is considerable support in the UK for both of these conceptions of the purpose of bills of rights. In our inquiry we have sought to explore the scope for agreement, across the political divide, that a Bill of Rights in a modern parliamentary democracy should attempt to combine these two traditions, by including *both* strong protection for traditional civil liberties *as well as* appropriately recognising the fundamental importance of the more recently recognised economic and social rights, such as the right to education and health.

¹⁰ *Annual Message to the Congress on the State of the Union*, 11 January 1944.

¹¹ General Assembly Resolution 217 A (III) of 10 December 1948.

How much consensus?

22. The contentious nature of a Bill of Rights also leads us to consider how much consensus is required in order for constitutional change of this kind to be successful. The HRA was passed with cross-party support. The Justice Secretary, who, as Home Secretary at the time, was responsible for piloting the Human Rights Bill through the House of Commons, told us that he was “anxious to achieve a situation where we had a consensus so far as was possible between the parties”.¹² We welcome his recognition that:

Whilst constitutional changes may well be contentious ... they are more likely to endure if you achieve a broad measure of agreement and should not be partisan tools for any one party.¹³

23. The Human Rights Minister showed the same commitment to proceeding by consensus as far as possible: “Any constitutional change as far as possible ought to be consensual in basis.”¹⁴

24. The Justice Secretary elaborated a little on what he meant by consensus:

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.¹⁵

25. We agree with those who say that a high degree of consensus is desirable. We do not, however, think that there need be unanimity about every aspect of a Bill of Rights. There needs to be sufficient consensus across party lines to make the process of adopting a Bill of Rights a truly constitutional event, rather than a party political one. In this Report we seek to identify those areas on which we detect a sufficient consensus to proceed, however cautiously, to the next stage of consulting about the detail of a Bill of Rights. We hope that our outline of a Bill of Rights and Freedoms will not only help to focus the discussion but also make it easier to identify the areas in which the necessary degree of consensus already exists.

¹² Q 420.

¹³ Ibid.

¹⁴ Q 470.

¹⁵ Q 499.

2 Does the UK need a Bill of Rights?

26. This chapter explores whether the case for a Bill of Rights has been made out.

Why is the Government interested in a Bill of Rights?

27. The Government has given a number of different reasons for being interested in the possibility of a Bill of Rights. It first signalled its intention to consult on a “British Bill of Rights and Duties” in the *Governance of Britain* Green Paper in July 2007.¹⁶ There the Government said that although the HRA gives effect to “rights which build on British values as old as Magna Carta”, it should not be regarded as the last word on the subject. Giving effect to Convention rights in UK law was intended to be a first, albeit substantial, step towards a more formal statement of rights. Two reasons were given for being interested in a Bill of Rights and Duties. First, a Bill of Rights could 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.¹⁷ Second, a Bill of Rights could provide explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others.¹⁸ The only mention of the possibility of such a Bill of Rights containing additional rights was a negative one:

If specifically British rights were to be added to those we already enjoy by virtue of the European Convention, we would need to be certain that their addition would be of real benefit to the country as a whole and not restrict the ability of the democratically elected Government to decide upon the way resources are to be deployed in the national interest.¹⁹

28. In his Mackenzie-Stuart lecture in October 2007, the Justice Secretary spoke of the impact of 9/11 and the end of totalitarianism in Europe but suggested that it is “deeper and, in the long-term, more profound social and economic developments that make the case for a Bill of Rights and Responsibilities in the UK.”²⁰ He blamed modern consumerism for encouraging a “selfish” approach to rights:

To an extent, they become 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 philosophical basis of inalienable, fundamental human rights.²¹

29. In his written evidence to the Committee, the Human Rights Minister stated:

We are bringing ... [the Bill] forward, not necessarily to add new rights, but above all to ensure the system works better to protect the individual against the powerful.

¹⁶ *Governance of Britain*, at paras 204-210.

¹⁷ *Ibid*, para. 209.

¹⁸ *Ibid*, para 210.

¹⁹ *Ibid*, para 209.

²⁰ Mackenzie-Stuart Lecture, University of Cambridge Faculty of Law, 25 October 2007 (hereafter “Mackenzie-Stuart Lecture”).

²¹ Mackenzie-Stuart Lecture.

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.²²

30. When we asked the Justice Secretary to explain what a Bill of Rights would add to the HRA he stressed two things. First, he said it would put human rights in their proper context by making clear that with rights go responsibilities.²³ The second addition to the HRA would be in the area of economic and social rights, which, he said, are not really covered to any significant degree by the ECHR, although they are covered in various EU texts, including the Charter of Fundamental Rights.²⁴ We consider each of these in detail later in this Report.

31. From the various speeches and public pronouncements by Ministers about a Bill of Rights we have discerned a number of possible motivating factors behind the Government's interest in a Bill of Rights:

- i) To provide a means of balancing rights with responsibilities;
- ii) To provide a framework for our shared national values as part of the Prime Minister's "Britishness" agenda;
- iii) To educate the public, by providing greater clarity for people about their rights and responsibilities;
- iv) To provide greater ownership of the protected rights than is the case with the HRA;
- v) To include some recognition of the importance of social and economic rights such as health and education; and
- vi) To protect the weak and vulnerable against the strong and powerful.

32. There does not, however, appear to be much of an appetite on the part of the Government for any additional human rights in any new Bill of Rights, although, as we noted above, the Justice Secretary has recently suggested that there might be scope for including certain additional human rights which are better protected under UK law than under international human rights law. We return to this question in chapters 4 to 6 below where we consider what the contents of a Bill of Rights might be.

33. We regret that there is not greater clarity in the Government's reasons for embarking on this potentially ambitious course of drawing up a Bill of Rights. A number of the Government's reasons appear to be concerned with correcting public misperceptions about the current regime of human rights protection, under the HRA. We do not think that this is in itself a good reason for adopting a Bill of Rights. As we have consistently said in previous Reports,²⁵ the Government should seek proactively to counter public misperceptions about human rights rather than encourage them by treating them as if they were true.

²² Ev 180.

²³ Qs 423-4.

²⁴ Q 424.

²⁵ Thirty-second Report of Session 2005-06, *The Human Rights Act: the DCA and Home Office Reviews*, HC 1716, HL Paper 278; Sixth Report, Session 2007-08, *The Work of the Committee in 2007 and the State of Human Rights in the UK*, HC 270, HL Paper 38, paras 3-4.

34. However, the Government also told us that the purpose of a Bill of Rights and Responsibilities will be “to ensure that the system works better to protect the individual against the powerful”.²⁶ We welcome this statement about the purpose of the proposed Bill of Rights. One of the principles agreed by the Northern Ireland Bill of Rights Forum was that a Bill of Rights for Northern Ireland “must address the needs of the poorest and most marginalised.”²⁷ **A great deal of our work in this Parliament has concerned the vulnerable and the marginalised: older people in healthcare, asylum seekers, adults with learning disabilities, and children in secure training centres for example. We have often pointed out serious shortcomings in the protection of the human rights of these vulnerable and marginalised people. Whilst not diminishing the obligation on Parliament to legislate effectively and in compliance with human rights principles, strengthening the legal protection for the rights of such people should in our view be one of the principal purposes of any new Bill of Rights.**²⁸

Other arguments in favour of a Bill of Rights

35. Witnesses suggested a number of other purposes of a Bill of Rights in addition to those we have set out above, including that it:

- would provide ownership and promote citizenship;²⁹
- would “help form a common bond across our increasingly mobile and diverse nation because it can help emphasise our togetherness and jointly shared political values”;³⁰
- would “reinvigorate our democracy” and “ingrain fundamental principles that otherwise might remain implied or implicit”;³¹
- would “renew[...] and strengthen[...] democracy in 21st century Britain, and empower[...] the individuals and communities in its embrace”;³²
- would be a “defence against incursions by transnational jurisdictions” and strengthen the position of the UK before international courts;³³
- would protect people from state power³⁴ and commercial bodies and strengthen the means of remedying individual grievances against such bodies;³⁵
- would have a “symbolic”³⁶ or “iconic” role;³⁷

²⁶ Ev 181.

²⁷ See para. 312 below.

²⁸ See para 198 below.

²⁹ Ev 131.

³⁰ Ev 139.

³¹ Ev 167.

³² Ev 153.

³³ Ev 131.

³⁴ Ev 125 & 173.

³⁵ Ev 95.

³⁶ Ev 143.

- would set out “the long-term values and commitments of society at large, around which it agrees to be ordered for the foreseeable future”;³⁸
- would “provide human rights with superiority over all ordinary law”;³⁹
- would provide a “unifying force in a diverse society”;⁴⁰
- could “restore the checks and balances that have been eroded by the torrent of counter-terrorism laws and practices ... [and] confer positive rights on all communities”;⁴¹
- would protect the right to privacy and other traditional civil liberties;⁴²
- would provide “constitutional stability”;⁴³ and
- could remedy the problems caused by the HRA.⁴⁴

36. However, Tom Hickman, of Blackstone Chambers, amongst other witnesses, strongly disagreed that a Bill of Rights should be enacted purely because of perceived deficiencies in the HRA, if those deficiencies could be remedied by amending the Act itself.⁴⁵

37. In his evidence, the journalist Henry Porter provided us with a brief list of the liberties he considered had been eroded over the past eleven years, which the introduction of the HRA 1998 had failed adequately to protect, and which led him to believe that a Bill of Rights, containing stronger legal protection than the HRA, was now necessary. This list included:

- The erosion of rights of assembly and protest, including through restrictions against protest in the vicinity of Parliament;
- Interferences with personal privacy and communications, including through the monitoring of individual communications and the introduction of a number of Government databases and information sharing gateways, including the Children Act database, ID cards and the National Identity Register;
- Restrictions on the right to freedom of expression, including through the ban on incitement to religious hatred and the broad prohibition of the glorification of terrorism;
- Changes to the powers of domestic courts which erode rights and liberties traditionally understood as inherent in our community, for example, by restricting

³⁷ Ev 147.

³⁸ Ev 135.

³⁹ Ev 135.

⁴⁰ Ev 147.

⁴¹ Ev 102.

⁴² Q 236.

⁴³ Ev 148.

⁴⁴ Ev 102.

⁴⁵ Ev 135.

the right to trial by jury and broadening the powers of bailiffs to enter residential and other properties;

- The extension of counter-terrorism legislation, including through increased powers to stop and search, increased powers of pre-charge detention for terror suspects and the introduction of control orders – in his view, “effectively indefinite house arrest.”⁴⁶

38. Many of these are issues on which we and our predecessor Committee have consistently reported similar concerns to Parliament. **We believe it is important that any UK Bill of Rights includes strong legal protections for freedoms such as freedom of assembly, freedom of expression, freedom from unreasonable search and seizure, and freedom from unwarranted intrusions on privacy, all of which are essentially negative liberties from state interference. For this reason, we believe any bill of rights should be called a UK Bill of Rights and Freedoms.**

39. Another argument which has been made in favour of a Bill of Rights is that countries with their own national bills of rights are given greater latitude by the European Court of Human Rights, particularly in the area of national security. Relying on the German Basic Law, David Cameron MP, the Leader of the Opposition, said in a speech to the Centre for Policy Studies:

The existence of a clear and codified British Bill of Rights will tend to lead the European Court of Human Rights to apply the “margin of appreciation”.

This means that the court in Strasbourg will tend to respect and uphold the principles laid down in the Bill of Rights whenever they can.

In other words we will be given the benefit of our own clearly stated statement of values.⁴⁷

40. The Justice Secretary disagreed that a Bill of Rights would have this effect:

... reliance on the German Basic Law is misplaced. Research by Oxford University demonstrates that in countries like Germany which have their own bill of rights alongside the ECHR, the courts are in fact stricter and less flexible in their approach to interpreting fundamental rights in national security cases than the UK courts and the German Government does not “win” security cases more often than the British government.⁴⁸

And:

The standard of protection given to individuals by the German Basic Law is greater, and less flexible than that given by the ECHR. As such, decisions made by the German Court are therefore rarely overturned by the European Court of Human Rights because they do not fall below the minimum floor of rights which the ECHR seeks to establish. The lack of interference is not because of the margin of

⁴⁶ Ev 165-166.

⁴⁷ *Balancing freedom and security – A Modern British Bill of Rights*, Centre for Policy Studies, 26 June 2006.

⁴⁸ *Towards a Bill of Rights and Responsibilities*, 21 January 2008.

appreciation but because the German Court takes a more stringent approach in protecting the individual in the first place.⁴⁹

41. Professor Klug, of the London School for Economics agreed, expanding on the academic research referred to by the Justice Secretary:

In jurisdictions that had additional Bills of Rights, as well as incorporating the Convention, the courts tended to ... 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, they took a more strenuous approach to the proportionality principle which is in play in security versus individual freedom cases ... 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 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 ... I am not aware ... 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.⁵⁰

42. Although a Bill of Rights may have many merits, it is both legally and empirically incorrect to suggest that a Bill of Rights would lead the European Court of Human Rights to give a greater margin of appreciation to the UK than is currently the case. This argument is not, in our view, a good argument for the adoption of a UK Bill of Rights.

The case against a Bill of Rights

43. Not all witnesses were persuaded that a Bill of Rights was required.⁵¹ Some witnesses suggested that a Bill of Rights was unnecessary as the UK already had a Bill of Rights, namely the ECHR as incorporated by the HRA.⁵² Some witnesses suggested that the debate was premature (when the HRA is working relatively well,⁵³ the potential of the HRA is at an early stage⁵⁴ or the HRA has not had sufficient time to “bed down” and be understood by the public⁵⁵). Witnesses also expressed fears that a debate about a Bill of Rights could weaken the protection of existing civil liberties,⁵⁶ particularly if a Bill of Rights offered lesser protection than the ECHR/HRA, or if there was variance between a Bill of Rights and international human rights standards.⁵⁷

⁴⁹ Mackenzie-Stuart Lecture, 25 October 2007.

⁵⁰ Q 10.

⁵¹ Q 236.

⁵² Ev 130 & 131.

⁵³ Ev 135.

⁵⁴ Ev 99.

⁵⁵ Ev 110 & 151.

⁵⁶ Ev 134.

⁵⁷ Ev 132.

44. A number of witnesses, including the British Institute for Human Rights and Liberty, expressed concern that the current political debate about a Bill of Rights was premised on a misunderstanding or negative perception of human rights.⁵⁸ As Liberty stated:

... 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.⁵⁹

45. Kenneth Clarke MP agreed that the current, in his view unwanted, debate about a Bill of Rights stemmed from the political background. As he put it:

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.⁶⁰

46. We share these concerns that some of the early statements of Ministers about the reasons for initiating a debate about a Bill of Rights suggested that one motivation was to dilute the HRA. The *Governance of Britain* Green Paper, for example, suggested that a Bill of Rights and Duties might provide a means of giving greater clarity and legislative force to the commitment to public safety, in order to ensure that Government agencies accord appropriate priority to protection of the public when balancing human rights.⁶¹ This was an idea which first surfaced in the wake of the infamous case of Anthony Rice, who murdered Naomi Bryant following his release from prison on licence. In our Report on the Department for Constitutional Affairs review of the implementation of the HRA, we demonstrated that there was no evidence that such an amendment to the human rights framework was necessary.⁶²

47. A surprising number of witnesses in our inquiry were opposed to a Bill of Rights on this ground alone: they were concerned that the real motivation behind the proposal was to dilute the protections for human rights already contained in the HRA.

ECHR-plus?

48. Many witnesses raised the significance of the case of *Chahal v UK*⁶³ as leading to the recent interest by the major political parties in a Bill of Rights,⁶⁴ but pointed out that even if a Bill of Rights were enacted, this would not change the existing ECHR caselaw, or lead to a watering down of ECHR rights, unless the UK withdrew from the ECHR. Withdrawing from the ECHR is not a realistic possibility, since being a signatory to the ECHR is now

⁵⁸ Ev 150.

⁵⁹ Ev 97-98 & 150.

⁶⁰ Q 236.

⁶¹ *Governance of Britain*, para. 210.

⁶² Thirty Second Report of Session 2005-06, *The Human Rights Act: the DCA and Home Office Reviews*, HL Paper 278, HC 1716.

⁶³ (1997) 23 EHRR 413 which prevents a state from deporting an individual to a country where there is a real risk that s/he will suffer torture or ill-treatment on return.

⁶⁴ Ev 106, 130, 132, 145 & 153.

effectively a condition of membership of the EU.⁶⁵ As the University of Cambridge Centre for Public Law stated:

... 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.⁶⁶

49. A number of witnesses therefore suggested that a Bill of Rights should be ECHR-plus: it should build on and enhance existing ECHR rights rather than water down their protection.⁶⁷ Professor Robert Blackburn of King's College London, for example, described the HRA and the rights in the ECHR as a "safety net" below which individuals should not fall.⁶⁸ The Justice Secretary appeared to subscribe to a similar view of existing human rights protection and assured us 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.⁶⁹

50. We agree that any UK Bill of Rights has to be "ECHR plus". It cannot detract in any way from the rights guaranteed by the ECHR.

51. However, as Professor Francesca Klug rightly, in our view, pointed out,⁷⁰ **the issue is not whether the Bill of Rights is going to be compliant with the ECHR, which is a fairly low threshold, but whether it is going to be "HRA-plus", that is, add to and build on the HRA as the UK's scheme of human rights protection.**

52. The Justice Secretary told us that "there is no question that it [the HRA] has become a received part of our constitutional arrangements."⁷¹ He also talked in terms of "building upon the achievements of the Human Rights Act".⁷² However, he acknowledged that the characterisation of the HRA as some sort of terrorists' charter, though inaccurate, is part of the framework for the current debate.⁷³

53. In our view it is imperative that the HRA not be diluted in any way in the process of adopting a Bill of Rights. Not only must there be no attempt to redefine the rights themselves, for example by attempting to make public safety or security the foundational value which trumps all others, but there must be no question of weakening the existing machinery in the HRA for the protection of Convention rights. The obligation on public authorities to act compatibly with Convention rights,⁷⁴ the obligation to interpret legislation compatibly with Convention rights so far as it is possible

⁶⁵ Ev 145.

⁶⁶ Ev 106.

⁶⁷ Ev 99, 109, 150 & 148.

⁶⁸ Ev 96.

⁶⁹ Q 442.

⁷⁰ Q 10.

⁷¹ Q 420.

⁷² Ev 184.

⁷³ Q 420.

⁷⁴ HRA s. 6(1).

to do so,⁷⁵ and the power of the courts to grant a declaration of incompatibility in relation to legislation which cannot be interpreted compatibly,⁷⁶ are all important features of our national framework of human rights protection. Any weakening of that framework would create space in our legal system for violations of Convention rights to take place with greater ease and frequency.

54. We therefore welcome the unequivocal assurance given to us by the Justice Secretary that there is nothing in the Bill of Rights project, as far as the Government is concerned, that is going to weaken the HRA.⁷⁷ He said that, although there was not a party-political consensus on this point, there was a consensus across Government about it.⁷⁸ We recommend that that this unequivocal assurance is made the starting point of any future consultation on a Bill of Rights.

What would a Bill of Rights add to the Human Rights Act?

55. A Bill of Rights is only worth pursuing if it would add to what the HRA already provides, and this has therefore been a recurring theme of our inquiry. Witnesses identified a number of ways in which the protection afforded under a Bill of Rights could be greater than under the HRA.

56. First, it would give courts the opportunity to move beyond what Professor Klug called the “mirror principle”⁷⁹ – the House of Lords’ ruling that the role of national courts under the HRA is merely to give effect to the Convention rights as interpreted by the European Court of Human Rights in Strasbourg, rather than to interpret Convention rights more expansively in the light of domestic traditions.⁸⁰ This ruling operates as a significant constraint on the scope of the rights protected by the HRA, particularly when combined with the Strasbourg doctrine of the “margin of appreciation”. The Strasbourg doctrine often operates to reduce the scope of a particular right in recognition of the fact that there may be a very wide divergence of views and practice across the member states of the Council of Europe. **There is therefore scope for a Bill of Rights to go beyond the “floor” of the Convention rights as interpreted in Strasbourg, and to supplement those rights with more generously defined indigenous rights.**

57. Second, a Bill of Rights would give an opportunity to update the 50 year old Convention with additional and more modern human rights which have become recognised since the ECHR was drafted. These human rights include rights of access to personal and official information, the right not to be discriminated against on grounds such as sexual orientation, and environmental rights.

58. Third, a Bill of Rights would give the opportunity to include some additional human rights and freedoms which could be recognised as fundamental in the UK, such as certain economic and social rights (e.g. the right to health and to education, the right of access to

⁷⁵ HRA s. 3(1).

⁷⁶ HRA s. 4.

⁷⁷ Q 422.

⁷⁸ Q 421.

⁷⁹ Q 1.

⁸⁰ *R (Ullah) v Special Adjudicator* [2004] UKHL 26 and *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.

court, the right to fair and just administrative action and (apart from in Scotland, bearing in mind its distinctive legal system) the right to jury trial).

59. Fourth, a Bill of Rights would allow for a more detailed articulation of some of the very broad and abstract human rights contained in some of the human rights treaties, such as the right to a fair trial.

60. Fifth, a Bill of Rights would enable a national debate to take place about why it is needed and what should be in it, a debate which did not happen when the HRA was introduced.

61. We would add a sixth reason as to what a Bill of Rights would add to the HRA. Adopting a Bill of Rights would provide an opportunity to enhance the role of Parliament in the UK's parliamentary model of human rights protection.⁸¹

62. Notwithstanding various arguments against a Bill of Rights, discussed in this Report, we consider that there is considerable scope for a Bill of Rights to add to what is already provided in the HRA and we are therefore satisfied that the case for a Bill of Rights is made out.

63. As far as the relationship between the HRA and any new Bill of Rights is concerned, JUSTICE said:

The HRA must remain intact while any proposed bill of rights is debated and (with approval) enacted ... in order to make sure that there is no gap in protection, any decision that the HRA will be repealed should be made – if at all – only after the new bill of rights is firmly on the statute book.⁸²

We agree that there must be no question of repealing the Human Rights Act unless and until a Bill of Rights, protecting human rights to at least the same extent as the Human Rights Act, is enacted.

Declaratory or aspirational?

64. The tone of many of the Government's initial statements about a Bill of Rights suggested that it was intended to be merely a consolidating measure: namely a list of the human rights already held and the responsibilities already owed by citizens.⁸³

65. Some witnesses, however, suggested that any Bill of Rights should be an aspirational document which looks to the future and does not merely encapsulate the present. For example, as Claire Methven O'Brien, from the European University Institute, Florence, contended:

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. Viewing historical constitutions and Bills of Rights in hindsight, it is easy to forget that, during their own times, they did not merely gather

⁸¹ See chapter 7 below.

⁸² JUSTICE, *A British Bill of Rights: Informing the Debate*, November 2007, p. 21, para. 2.

⁸³ See e.g. *Governance of Britain*, para. 209.

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.⁸⁴

66. Others, however, considered that they should not have an aspirational role. Professor Vernon Bogdanor's view was that:

One should not put aspirations in a Bill of Rights, that a Bill should be concerned to ... deal solely with what is justiciable.⁸⁵

67. The Justice Secretary accepted that a Bill of Rights could play an aspirational role. Relying on Professor Philip Alston's description of Bills of Rights worldwide, he noted that they could fulfil:

"A combination of law, symbolism and aspiration". One should not dismiss for a second the symbolic and aspirational role that Bills of Rights and Responsibilities can play. They can take on an iconic importance which goes beyond the explicit legal protections afforded.⁸⁶

68. During our visit to South Africa in November 2007, Justice Albie Sachs of the South African Constitutional Court told us that Bills of Rights should be about "the sort of society that you want to have – the values you want as a society." We agree.

69. We recommend that any new Bill of Rights should be both declaratory and aspirational. It should state and make fully enforceable all those fundamental rights which currently exist. But it should also look to the future by setting out a clear vision of the sort of society to which the country aspires. A preamble and an appropriate interpretive provision referring back to the preamble could provide the aspirational dimension which is missing from the HRA. We give examples of both in our outline Bill of Rights and Freedoms.

Bills of Rights and historical moments

70. Another recurring question in our inquiry has been whether a Bill of Rights can ever emerge from a calm, deliberative process, rather than being born out of some momentous event such as a civil war, foreign occupation or other conflict.

71. It is certainly the case that many of the best known examples of national Bills of Rights, such as the French Declaration of the Rights of Man and the Citizen, the US Bill of Rights and, more recently, the South African Bill of Rights, were forged in the heat generated by momentous conflicts and upheavals. The same could be said of the international bills of rights: as is well known, the Universal Declaration of Human Rights and the ECHR were both drafted in the aftermath of the Second World War, driven by the desire to avoid a repetition of the then recent horrors of war and genocide. The Northern Ireland Bill of

⁸⁴ Ev 154.

⁸⁵ Q 276.

⁸⁶ Q 444.

Rights process, which will lead to a sub-national Bill of Rights applicable only in Northern Ireland, also came out of a peace agreement, the Belfast (Good Friday) Agreement 1998.

72. It is fair to say that there is considerable scepticism about whether a truly lasting Bill of Rights can ever emerge from a deliberative process conducted in normal times. However, there are examples of Bills of Rights which were the products of such a process rather than some unique historical moment. The adoption of the Canadian Charter of Rights and Freedoms in 1982, for example, was principally the result of Prime Minister Pierre Trudeau's attempt to initiate a process to bind the Canadian federation together rather than any particularly momentous upheaval in Canadian society at that time. Yet, as we observed during a recent visit to Canada in connection with our work on Counter-Terrorism Policy and Human Rights,⁸⁷ the Canadian Charter of Rights and Freedoms is today one of the best examples of a Bill of Rights adopted by a democracy which has attained the status of a constitutional document in the popular imagination.

73. More recently, a number of Australian states have adopted state-level Bills of Rights following consultation processes which were also the product of political debate about the desirability of a Bill of Rights in a modern democracy rather than any particular upheaval in Australian society. Victoria, for example, enacted the Victorian Charter of Rights and Responsibilities in 2006. The Australian Capital Territories, Western Australia and Tasmania have adopted Bills of Rights, and there is now a debate at the federal level about the possibility of a federal Bill of Rights. Although it is too early to judge the durability of these state-level Bills of Rights in Australia, they do demonstrate that **Bills of Rights are capable of emerging from deliberative processes conducted in settled democracies in normal times.**

⁸⁷ See Twenty-fourth Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, HL Paper 240, HC 1576.

3 A “British” Bill of Rights and the Devolution Dimension

74. In this chapter we consider what is meant by “British” and the impact of devolution on a Bill of Rights.

Introduction

75. We have identified four different ways in which a Bill of Rights could be distinctively British:

- it might contain additional rights, over and above those set out in the ECHR and other international instruments;
- it could relate specifically to British citizens, rather than to everyone in the UK;
- it could relate specifically to people who associate themselves with a British Statement of Values or who consider themselves to be British; and
- by being “home-grown”, it might reassure those who are concerned that human rights were imposed on the UK by “Europe” that human rights have been formulated and agreed in the UK.

76. There is also a geographical aspect to the term “British” which is relevant, in that Northern Ireland is part of the United Kingdom but not part of Great Britain. A “British Bill of Rights” therefore could not, by definition, apply to Northern Ireland. We consider the implications of this below. We doubt whether leaving out Northern Ireland is the Government’s intention. We note that in the Government’s *Draft Legislative Programme* it is envisaged that the Bill of Rights and Responsibilities, which will soon be the subject of consultation, is not described as “British” but as applying to “people in the UK.”⁸⁸

77. We consider the issue of additional rights, over and above those set out in the ECHR, in chapters 4, 5 and 6. In this chapter, we consider the other aspects of ‘Britishness’ identified above.

British rights for British citizens?

78. An explicit link between a British Bill of Rights and citizenship was made in the *Governance of Britain* Green Paper, the two issues being considered in the same chapter. The Green Paper argued that “everyone in the UK should be offered an easily understood set of rights and responsibilities when they receive citizenship”.⁸⁹ It went on to state:

At the heart of British citizenship is the idea of a society based on laws which are made in a way that reflects the rights of citizens regardless of ethnicity, gender, class or religion. Alongside sits the right to participate, in some way, in their making; the

⁸⁸ *The Government’s Draft Legislative Programme 2008/09*, Cm 7372, May 2008, p. 65.

⁸⁹ *Governance of Britain*, para 186.

idea that all citizens are equal before the law and are entitled to justice and the protection of the law; the right of all citizens to associate freely; the right to free expression of opinion; the right to live without fear of oppression or discrimination; the idea that there is an appropriate balance to be drawn between the individual's right to freedom and the collective good of all and that, in the final analysis, the Government is accountable for its actions to the will of the people expressed in Parliament and through elections. [our emphasis]⁹⁰

79. As part of the *Governance of Britain* programme, Lord Goldsmith's *Citizenship Review* reported to the Prime Minister in March 2008. Part of the Review's terms of reference was to "clarify the legal rights and responsibilities associated with British citizenship, in addition to those enjoyed under the HRA, as a basis for defining what it means to be a citizen in Britain's open democratic society." The Prime Minister, the Justice Secretary and the Human Rights Minister have all spoken of the consultation on a British Bill of Rights and Duties being "informed" by the *Citizenship Review*.⁹¹ The Justice Secretary has spoken of the Bill of Rights as helping "to foster a stronger sense of shared citizenship".⁹²

80. Some legal rights are explicitly linked with citizenship. These include the right to vote (although, in the UK, this also extends to citizens of Commonwealth countries and the Irish Republic and, for local and European elections, citizens of other EU countries resident in the UK), the right to a passport, and the right to consular access abroad.⁹³ There are also, of course, certain rights in any Bill of Rights which only apply to citizens: these are the so-called "democratic rights" such as the right to vote and the right to stand for elections or otherwise participate in public life.⁹⁴ The *Governance of Britain* Green Paper spoke of "a general lack of clarity about the rights and responsibilities that come with being granted British citizenship".⁹⁵ But the place occupied by the category of rights related to citizenship in any Bill of Rights would be small.

81. Fundamental human rights are universal. Article 2 of the Universal Declaration of Human Rights states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

82. Concerns have been expressed at the suggestion that fundamental human rights, such as equality before the law, should or could be restricted so that they applied only to British citizens. Professor Conor Gearty, for example, suggested this would lead to a "hierarchy of

⁹⁰ *Governance of Britain*, para 204.

⁹¹ E.g. Ev 179.

⁹² *Towards a Bill of Rights and Responsibilities*, 21 January 2008; Mackenzie-Stuart Lecture, 25 October 2007.

⁹³ Qs 434-35.

⁹⁴ Eligibility for some of the economic and social rights included in Bills of Rights may also be justifiably defined by reference to nationality or immigration status: see chapter 5 on economic and social rights below.

⁹⁵ *Governance of Britain*, para 191.

rights-holders, with Britons at the top and others further down the pecking order”. He argued that “the very title [British Bill of Rights] suggests a flight from universalism into a parochial measure, offering rights to the British but not to others”.⁹⁶

83. The Justice Secretary qualified his comments on the link between rights and citizenship by acknowledging that “human rights are our birthright as human beings: they are not the gift of governments but part of our common humanity”.⁹⁷ He expanded on this theme in oral evidence, saying:

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 complete contrary to the Convention.⁹⁸

84. The rights enshrined in the HRA apply to everyone in the UK, irrespective of their citizenship or immigration status. Bills of Rights protect rights which people have by virtue of being human, not according to their legal status as citizen or non-citizen. It is regrettable that the loose language of the Governance of Britain Green Paper appeared to suggest that some of those rights – such as equality before the law – are associated with citizenship. We welcome the Justice Secretary’s acknowledgement that fundamental human rights cannot be restricted to apply solely to citizens. We also note that there are rights – such as the right to vote – which are legitimately linked to citizenship. Nevertheless, we are concerned that by making an explicit link between human rights and citizenship, the Government may foster the perception that non-citizens are not entitled to fundamental human rights. It risks turning the important debate about a Bill of Rights into a surrogate for anti-outsider sentiments, rather than an opportunity to define and celebrate the values regarded as particularly fundamental in the UK as a nation state. We call on the Government to decouple the debate about a Bill of Rights from the debate about citizenship and the rights and duties of the citizen, and to ensure that in future the universality of fundamental human rights is explicitly recognised in documents and speeches relating to a Bill of Rights.

Definition of “British”

85. The Government proposes to develop a British Statement of Values because, in its view, compared to the situation in other countries, “there is a less clear sense among the British citizens of the values that bind the groups and communities who make up the body of the British people”.⁹⁹ According to the *Governance of Britain* Green Paper:

It is important to be clearer about what it means to be British, what it means to be part of British society and, crucially, to be resolute in making the point that what comes with that is a set of values which have not just to be shared but also accepted. There is room to celebrate multiple and different identities, but none of these identities should take precedence over the core democratic values that define what it

⁹⁶ Ev 130.

⁹⁷ Mackenzie-Stuart lecture, 25 October 2007.

⁹⁸ Q 426.

⁹⁹ *Governance of Britain*, para 194.

means to be British. A British citizen, fully playing a part in British society, must act in accordance with these values.¹⁰⁰

86. In oral evidence, the Human Rights Minister explained the connection between a British Statement of Values and a Bill of Rights:

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 ... We would envisage a situation where the Statement of Values ... could form the preamble to such a Bill of Rights and Responsibilities and set out the values which inform those rights and responsibilities.¹⁰¹

87. Some other witnesses also saw a connection between British values and a Bill of Rights. Professor Robert Blackburn, for example, wrote:

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.¹⁰²

88. Whilst we have serious concerns about the link being made by the Government between human rights on the one hand and the duties of citizenship on the other, we acknowledge that there is an inevitable and entirely appropriate link with the question of national identity. A national Bill of Rights is an expression of national identity and the process of drawing one up deliberately invites reflection about what it is that “binds us together as a nation,” what we regard as being of fundamental importance, and which values we consider to guide us. It is potentially a moment of national definition.

89. Concern has been expressed, however, that a focus on “Britishness” could be detrimental to social cohesion.¹⁰³ In addition, Sunny Hundal suggested to us that the absence of an explanation of “British values” has led the debate to be focussed instead on cultural values which could be divisive.¹⁰⁴

90. Kenny MacAskill MSP, Cabinet Secretary for Justice in the Scottish Government, questioned the relevance of the concept of Britishness:

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? ... Are we British? No we are not. We consider ourselves Scottish and we consider those south of the border to be English ... We see the concept of Britishness as rather arbitrary, that it was founded for an empire and to

¹⁰⁰ *Governance of Britain*, para 195.

¹⁰¹ Q 434.

¹⁰² Ev 95.

¹⁰³ Ev 123.

¹⁰⁴ Ev 140.

some extent has begun to fragment ... so the concept of Britishness is something that we really do not buy into.¹⁰⁵

91. In the Northern Ireland context, Professor Dickson of Queen's University Belfast told us 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.¹⁰⁶

92. The Justice Secretary told us:

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 ... 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.¹⁰⁷

93. The Government is right to acknowledge that there will be significant practical obstacles to drawing up a Bill of Rights, extending across Britain or the UK, which is in harmony with the complexities of the devolution arrangements, particularly in relation to Northern Ireland which has already gone a long way towards agreeing its own Bill of Rights under the Belfast (Good Friday) Agreement 1998. In following up this inquiry we intend to visit Northern Ireland to learn more about the Bill of Rights process there and how it might relate to a UK Bill of Rights. **Unlike the Justice Secretary, however, we also see an issue which needs to be addressed, in that there would appear to be difficulties associated with establishing a Bill of Rights on the basis of a statement of 'British' values which may or may not be accepted by the people who consider themselves to be, for example, 'English', 'Scottish', 'Irish' or 'Welsh', but not 'British'.**

British not European

94. The Justice Secretary gave us another explanation of the 'British' aspect of a Bill of Rights:

The "British" adjective in my view is important because there is the implication in the air that these human rights which equal in some people's minds, not mine or yours, a terrorists' and criminals' 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 important that we break that down.¹⁰⁸

¹⁰⁵ Q 290.

¹⁰⁶ Q 94.

¹⁰⁷ Qs 430 & 432.

¹⁰⁸ Q 426.

95. He denied that this was purely a matter of presentation or spin, arguing that this was no different from practice in other countries:

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.¹⁰⁹

96. A note of caution about this approach was sounded by Democratic Audit:

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.¹¹⁰

97. We note the Government’s argument that the term “British” can help demonstrate that rights and responsibilities have been formulated and agreed in the UK and not ‘imposed’ from abroad. However, as Professor Klug observed, the emphasis on a British Bill of Rights appears to be deliberately inward looking, rather than celebrating the UK’s part in taking forward international human rights.¹¹¹ We understand the Government’s frustration with the tendency in some parts of the media to characterise the HRA as an alien imposition of non-British values merely because it gives effect to the ECHR. As the Justice Secretary points out, “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.”¹¹²

98. We doubt, however, whether giving people a greater sense of ownership of the same set of rights can be a sufficient justification alone for embarking on the process of adopting a Bill of Rights. We would also be concerned if this encouraged the view that human rights are linked to nationality or citizenship rather than being universal in their application.

Use of the term “British”: Conclusion

99. As we make clear later in this Report, **we accept that a Bill of Rights for this country should include indigenous rights, not in the sense of rights which can only be claimed by British citizens, but in the sense of rights and freedoms which have attained a status of fundamental importance in this country’s traditions and which therefore merit inclusion in any catalogue of the rights, freedoms and values which are considered to be constitutive of this country’s identity. However, we are not persuaded that the term “British” Bill of Rights is a helpful description of the Government’s proposal. It suggests a link with citizenship which, for many rights, would be inappropriate; it excludes Northern Ireland; and it is not necessarily inclusive of people in the UK who consider themselves to be English, Scottish, Irish or Welsh, for example, but not British. The term “UK” Bill of Rights would be more accurate and appropriate and**

¹⁰⁹ Q 439.

¹¹⁰ Ev 123.

¹¹¹ Q 26.

¹¹² Q 439.

would also serve to demonstrate that the rights it contained are “owned” by the people of the UK.

Devolution

100. Rather surprisingly, the devolution of power within the UK is not mentioned in the *Governance of Britain Green Paper*. Reviewing the Green Paper, the Political Studies Association stated, “When it comes to devolution the Green Paper has a primary focus on the need to consider its implications for Britishness”.¹¹³

101. In the Constitution Unit’s response to the Green Paper, Professor Robert Hazell stated:

The Green Paper is generally rather restrained on issues connected with devolution. One area of concern is the proposals for a British statement of values and a British bill of rights. These suggest that consultation will be directly with the general public across the UK, but not their governments. Presumably, however, any statement or bill will (to the extent it is binding) be binding on the devolved administrations and legislatures as well as UK-level institutions. If that is to be the case, those devolved institutions also need to be involved in the process of formulating the statement or bill, and to agree to it. Otherwise, the introduction of the statement or bill risks being seen as an imposition on the devolved institutions, and provoking a serious breach in relations with them.¹¹⁴

102. Professor Hazell went on to note that a similar issue arose in Canada during the introduction of the Canadian Charter of Rights and Freedoms without Quebec’s consent, which led to Quebec refusing to accept the new constitution as a whole. According to Professor Hazell, this “has proved to be an enduring sore point in Quebec-Canada relations generally”. He recommended that devolved institutions be involved in formulating any statement or Bill of Rights, and their agreement obtained, in order to avoid this.¹¹⁵

103. We asked Kenny MacAskill MSP, Cabinet Secretary for Justice in the Scottish Government, about the extent to which the Scottish Government had been involved in discussions on a Bill of Rights. He said:

Not really a great deal at all and I think the fact that devolution is not mentioned is perhaps an indicator of that.¹¹⁶

104. The Justice Secretary accepted that the Government had “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”.¹¹⁷ We agree. **A UK Bill of Rights must be based**

¹¹³ Political Studies Association, *Failing Politics? A response to the Governance of Britain Green Paper*, November 2007, p. 32.

¹¹⁴ Hazell, R., *Constitution Unit response to Cm 7170: The Governance of Britain*, July 2007, para. 3.1.

¹¹⁵ Hazell, *ibid.*, para. 3.1.

¹¹⁶ Q 288.

¹¹⁷ Q 432.

on a detailed dialogue between central government and the devolved administrations. We note that this dialogue does not yet seem to have begun.

105. The situation is further complicated by the work being undertaken to draw up a Northern Ireland Bill of Rights, as a result of the Belfast (Good Friday) Agreement 1998. Professor Brice Dickson and Professor Chris Sidoti, Chair of the Northern Ireland Bill of Rights Forum, who have both been heavily involved in this initiative, argued that the two processes could be run in parallel and be mutually reinforcing.¹¹⁸ Professor Dickson explained how the two Bills of Rights could complement each other:

There should be a Bill of Rights for the whole of the United Kingdom ... 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.¹¹⁹

106. Emphasising the need for dialogue with the UK Government, Professor Dickson said:

If certain rights ... 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 ... 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... 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.¹²⁰

107. The devolution settlement creates certain difficulties for a UK Bill of Rights, but we do not accept that it creates an insuperable obstacle to such a Bill. Ever since the Universal Declaration of Human Rights, human rights norms have gradually become embedded at global, regional and national level. Provided the hierarchy between these levels is clear, there is a positive virtue in the broadly defined rights in the international standards being fleshed out into more concrete norms and standards at the regional, national and sub-national level. Each Bill of Rights, from the global through the regional to the national and sub-national levels, becomes more specific and detailed in its provisions, and is free to be more generous but must not fall below the minimum floor of the higher level of protection. It is common for federated states, such as Canada, the US and Germany, to have both federal Bills of Rights and state-level Bills of Rights, and for any questions about the hierarchical relationship between these different levels of rights protection to be resolved by the federation's Constitutional Court. In our view, the devolution settlement creates fewer difficulties than face federated states in this respect, because constitutional matters, including human rights, are not devolved matters.

¹¹⁸ Qs 93 & 124.

¹¹⁹ Ev 122.

¹²⁰ Q 125.

108. Nevertheless, devolution raises complex issues, particularly if a UK Bill of Rights concerned devolved matters. Professor Carol Harlow of the London School of Economics argued:

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.... 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.¹²¹

109. We received some helpful evidence from the Law Society of Scotland about the difficulties of a UK Bill of Rights in a Scottish context. Some well known civil rights south of the border, such as the right to trial by jury, are not part of Scotland's constitutional heritage.¹²² In addition, an amendment to the Scotland Act 1998 would be required to ensure that provisions of a UK Bill of Rights relating to devolved matters could not be repealed or derogated from by the Scottish Parliament.¹²³

110. As we have noted, the Justice Secretary spoke of some “tricky” drafting issues, rather than matters of principle, arising from the devolution settlement.¹²⁴ **We agree with the Government that the UK's devolved governance arrangements do not preclude a UK Bill of Rights from being drawn up. We also agree with Professor Dickson that having Bills of Rights at both the national and the devolved levels is desirable. Early engagement with the devolved administrations is necessary, however, to deal with areas in a UK Bill of Rights which relate to devolved matters and to address differences between the UK's three legal jurisdictions.**

¹²¹ Ev 134.

¹²² Ev 148 & Q 343.

¹²³ Qs 344 & 346.

¹²⁴ Q 290.

4 What should be included in a UK Bill of Rights?

Introduction

111. In this chapter we consider what should be contained in a UK Bill of Rights. The question is very closely linked to the issue we have already considered: why is a UK Bill of Rights needed? As we saw above, one of the most important reasons put forward by advocates of a new UK Bill of Rights is that the rights currently protected by other means in the UK's legal systems, by the HRA, the common law and statute, are inadequate in various respects. In this chapter we seek to move beyond that account of the inadequacy of present arrangements to consider in more detail what the substantive content of such a Bill of Rights might be.

“British values”

112. As we noted above, the Government intends to consult on a “Statement of Values” which the British people consider to be fundamental and envisages that this could form the preamble to a Bill of Rights.¹²⁵ Preambles to Bills of Rights and constitutions often reflect the unique nature of the particular historical moment out of which those foundational documents were born. As such, they are usually inspirational in tone. The Preamble to the post-apartheid South African Constitution, for example, recites that the people of South Africa recognise the injustices of their past and honour those who suffered for justice and freedom in their land, and includes amongst the purposes of the adoption of the Constitution “to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”

113. With the important exception of Northern Ireland,¹²⁶ the other nations which make up the UK could not claim that the Bill of Rights, were the UK to adopt one, was the product of any particular historical moment. There are likely to be difficulties in attempting to draw up a statement of British values to go into a Preamble to a Bill of Rights in the absence of any particularly momentous historical occasion for drawing up such a Bill. In November 1999 Australia held a referendum in which the public were asked whether the constitution should include a new preamble. The first public draft of a new preamble, prepared by Prime Minister Howard with the help of a poet, included the controversial passage “We value excellence as well as fairness, independence as dearly as mateship.”¹²⁷ Although this was not the final version submitted to the people in the referendum, it demonstrates perhaps the difficulties for any country in attempting to draw up a statement of values in relatively normal times. Those dangers may be nowhere more acute than in the UK, where in November 2007 the most popular motto in a Times Online

¹²⁵ Q 434.

¹²⁶ The Northern Ireland Human Rights Commission, in its 2001 Consultation, *Making a Bill of Rights for Northern Ireland*, p. 17, proposed a preamble in similar terms to the preamble to the South African Bill of Rights.

¹²⁷ George Williams, *A Charter of Rights for Australia*, UNSW Press, 2007, (hereafter *Williams*) pp. 63-64.

competition to come up with a national motto for Britain was “No motto please, We’re British.”¹²⁸

114. Nevertheless, **we agree in principle that, if there is to be a UK Bill of Rights, as we believe there should be, it ought to have a Preamble which sets out, in a simple and accessible form, first, the purpose of adopting a UK Bill of Rights and, second, the values which are considered to be fundamental in UK society.** The HRA contains no such preamble and, in retrospect, might have benefited from one, as a source of guidance for courts and other decision-makers as to the purpose of that Act and its underlying values.

115. **In our outline Bill of Rights and Freedoms we suggest that the Preamble to a UK Bill of Rights could simply state that it is adopted to give lasting effect to the values which are considered fundamental by the people of the United Kingdom, followed by a short list of those values.** These sorts of values already underpin the ECHR. Obviously, what these values are can only be ascertained precisely by means of a public consultation, but in order to give an example for discussion we suggest some values which might be appropriate for a Preamble to a Bill of Rights, drawing on the sorts of values which were frequently invoked in the evidence submitted to our inquiry:

- The rule of law: the commitment to power being exercised lawfully as determined by an independent judiciary;
- Liberty: the freedom from both unwarranted restrictions and from want;
- Democracy: giving as much control as possible to individuals over the decisions which affect their lives;
- Fairness: the equal right of each and every person to be treated with dignity and respect;
- Civic duty: the responsibilities to each other and to the communities to which we belong.

116. **The list of values above is intended to cover some of the aspects of the principal human rights traditions referred to in chapter 1 above, embracing liberty in both its negative and positive senses, and fairness in both a procedural and substantive sense. Civic duty, is intended to reiterate the idea of responsibilities, which is already implicit in the very concept of rights. We also suggest including two fundamental values which define our institutional arrangements: democracy, and the rule of law.**

117. **We consider that the Bill of Rights should also have a strong interpretive clause requiring any body interpreting the Bill of Rights to strive to achieve the purpose of the Bill of Rights and to give practical effect to the fundamental values underpinning it, as set out in the Preamble.** We have suggested such an interpretive clause in our outline Bill of Rights and Freedoms.

¹²⁸ “Maverick streak makes mockery of hunt for a British motto”, *Times Online*, 27 November 2007. The competition was launched in response to the announcement that the Government was to draw up a Statement of British Values to underpin its constitutional reforms.

118. We have serious reservations, however, about consulting separately on a Statement of Values, which might or might not subsequently become the Preamble to a Bill of Rights. Public discussion and debate about a Bill of Rights should influence views about the values regarded as fundamental. There should also be complete clarity about the precise purpose of any Statement of British Values prior to consultation on the subject. **We therefore consider the Government’s consultation on a Statement of Values to be premature and we recommend that it be conducted at the same time, and using the same process, as the forthcoming consultation on a Bill of Rights. We suggest what that process should be in chapter 9 below.**

Additional rights

119. As we explained in chapter 2, it is imperative that any rights in a new Bill of Rights should supplement the ECHR rights, not detract from them: the model must be ECHR-plus not ECHR-minus. We now consider what rights, additional to those in the ECHR, might have a strong claim to be included in a new Bill of Rights. We deal with these under four broad headings: what the Government calls “British rights” but we prefer to call “UK rights” for the reasons given above; unincorporated international human rights; rights for particular vulnerable groups; and so-called “third generation rights”. Because of the complexity of the issues which they raise, and the controversy that surrounds them, we deal with economic and social rights and “third generation rights” in separate chapters.

120. The question of how to identify whether a particular right would genuinely supplement the rights already protected in UK law under the HRA is not a straightforward one. The Northern Ireland Human Rights Commission (NIHRC) is currently wrestling with the similar problem of how to determine whether a proposed right answers a need for extra protection arising out of the particular circumstances of Northern Ireland, with a view to advising the Justice Secretary as to what should be included in a Northern Ireland Bill of Rights. The NIHRC has developed a detailed methodology for approaching this question, which gives a flavour of the difficulty of reaching agreement on such a fundamental issue.¹²⁹ We do not propose to consider the appropriate methodology for deciding the “additionality” question. At this stage we confine ourselves to identifying whether there are any rights which are candidates for being included as additional rights in any new Bill of Rights.

“UK rights”

121. A new Bill of Rights gives the opportunity to include rights which are distinctive to the UK in two ways. First, by adding rights and freedoms which are recognised as fundamental in the UK but which do not currently have any equivalent in the ECHR or the UK’s other international human rights obligations. Second, there is scope for a UK Bill of Rights to go beyond the “floor” of the Convention rights as interpreted in Strasbourg, or any other rights in other treaties to which the UK is a party, by a more detailed articulation of some of the very broad and abstract rights contained in those treaties. Indeed, such specific implementation of international human rights norms at the national level, by more detailed domestic provisions giving effect to the international rights, is positively

¹²⁹ Annex 3.

encouraged by all the international treaty bodies, as a way of making the international norms more practical and effective.

122. Although the Government has said that the purpose of bringing forward a Bill of Rights is “not necessarily to add new rights”, it has also referred to the possibility of such a Bill adding “specifically British rights”. When we asked the Justice Secretary to give some examples of what he would consider to be specifically British rights which might be candidates for inclusion in a Bill of Rights, he mentioned four: education, health, administrative justice and equality.¹³⁰ We consider the strength of the case for including education and health as additional rights in chapter 5 below. He did not mention a right frequently mentioned in evidence to our inquiry: the right to trial by jury.

The right to trial by jury

123. A number of witnesses were of the view that a UK Bill of Rights should include a right to jury trial. Martin Howe QC, for example, made the general case for a Bill of Rights being more precise in its definition of Convention rights as they apply in the UK, and advocated the broad and general right to a fair trial in Article 6(1) ECHR being fleshed out with a guarantee of a right to a jury trial in serious cases.¹³¹

124. The Rt Hon Kenneth Clarke MP said in evidence to us that the protection of the right to trial by jury is the best argument that he has heard in favour of a Bill of Rights.¹³² He is a strong defender of the right, and has taken part in arguments in recent years defending it, but says that:

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.¹³³

125. According to the Rowntree State of the Nation poll, 89% of the public think that the “right to a fair trial before a jury” should be included in any Bill of Rights. We recently considered the legal status of the right to jury trial in our legislative scrutiny Report on the Fraud (Trials Without a Jury) Bill in the last session. We said:

We recognise ... that there is a considerable range of views about the precise status of jury trial. The question is one which divides parliamentarians, practitioners and commentators and not necessarily on party lines. At one extreme, some would consider there to be a constitutional right to jury trial in all but minor criminal cases which it is never justifiable to restrict. At the other extreme, some would regard it as a mere modality of trial, enjoying no fundamental status and always capable of restriction, modification or replacement by law. In between these two extremes others may regard jury trial as having attained a degree of special status at common law, requiring any interference with it to be by explicitly authorised by primary legislation and properly justified by reference to publicly articulated reasons.¹³⁴

¹³⁰ Q 445.

¹³¹ Q 5.

¹³² Q 236.

¹³³ *Ibid.*

¹³⁴ Second Report of 2006-07, *Legislative Scrutiny: First Progress Report*, HL Paper 34, HC 263, para. 5.8.

126. We did not take the view that jury trial in England and Wales enjoys the status of a constitutional right which is not capable of restriction or limitation even by legislation. Bearing in mind the many restrictions on jury trial which already exist, not least the fact that the vast majority of criminal cases in this country are dealt with by judges not juries, we considered that claim to be exaggerated. However, we did conclude that jury trial “has a sufficiently distinctive place in the legal heritage of England and Wales to have attained the status of a right recognised at common law, which therefore requires express authorisation in primary legislation to be limited or restricted, and careful justification.”¹³⁵

127. On this basis, we agree with those who say that a UK Bill of Rights should include the right to trial by jury in serious cases in England, Wales and Northern Ireland (there being no tradition of jury trial in Scotland’s separate criminal justice system). In the parliamentary model of human rights protection which we favour, as explained in chapter 7 below, this does not mean, as Kenneth Clarke MP feared, that limitations and restrictions on the right will be “ruled out of court” on human rights grounds. Limitations on rights included in any UK Bill of Rights will be possible, provided they can be shown to be justified. Parliament will therefore continue to be able to look at the question of limitations on the right, and entitled to restrict it where that can be shown to be necessary to meet another important objective. Inclusion of the right to trial by jury in a UK Bill of Rights should, however, ensure that only such demonstrably justifiable restrictions are imposed.

Right to administrative justice

128. We welcome the Justice Secretary’s indication that a right to administrative justice is being considered by the Government as a candidate for inclusion in any Bill of Rights. The right to fair and just administrative action is arguably one of the common law’s greatest achievements, and in other countries which have recently adopted a Bill of Rights it has been accorded constitutional status. The South African Bill of Rights, for example, provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.¹³⁶ **We agree that this right is a strong candidate for inclusion in a UK Bill of Rights as a nationally distinctive right.**

Equality

129. We also welcome the fact that the Government is considering a right to equality as an additional right in any UK Bill of Rights. In our view the UK’s statutory anti-discrimination laws are now sufficiently established to be regarded as the foundation, along with the common law’s regard for equality, for a general free-standing right. Including a right to equality in a Bill of Rights would not mean that the whole complex body of anti-discrimination law would have to be written into the Bill of Rights. A simply formulated, free-standing and overarching right to equality in a Bill of Rights would provide a secure underpinning for an Equality Act, which would contain the detail required in order to give effect to the underlying right in different contexts.

¹³⁵ Ibid, para. 5.10.

¹³⁶ South African Bill of Rights, s. 33.

Other candidates

130. In our view, both the common law and statute provide a number of other possible rights which are candidates for inclusion in a Bill of Rights as distinctively UK rights, either going beyond or giving more concrete content to international human rights. It is well established, for example, that the common law recognises a right of access to court which is often labelled “a constitutional right” by our courts because it is regarded as so fundamental that it requires clear and unambiguous statutory words to displace it. The right is wider than the equivalent right of access to court in Article 6(1) ECHR, because the latter right only applies to the determination of rights which count as ‘civil rights’ in the Strasbourg case-law, which means that the ECHR right has little purchase in administrative law contexts, such as immigration, education or social security. The indigenous common law right of access to court, by contrast, is often articulated most strongly by UK courts in precisely that context.

131. There are other human rights, associated with the common law right of access to court, which may also be candidates for inclusion, such as the right to legal aid where the interests of justice require it, in order to make the right of access to court practical and effective. There are also, in our view, certain statutory rights which would be candidates for inclusion, including the right of access to both personal and official information in the Data Protection Act 1998 and the Freedom of Information Act 2000. All these, in our view, should be the subject of public consultation.

Relationship between Bill of Rights and common law

132. **Any Bill of Rights should include a saving provision making clear that nothing in the Bill of Rights denies the existence or restricts the scope of rights or freedoms recognised at common law.** Our outline Bill includes an example of such a clause.

Unincorporated international human rights

133. A number of witnesses have pointed to the opportunity a Bill of Rights would provide for incorporating international and regional human rights standards such as the Children’s Rights and Disability Rights Conventions.¹³⁷

134. The Government does not appear to have any plans to use the Bill or Rights as an opportunity to give effect to any human rights in international law which are not yet part of our law. The Justice Secretary said “You have to make a judgment on a case by case basis whether you want to incorporate those into domestic law.”¹³⁸

135. We are disappointed that the Government’s approach to the human rights which should be contained in any Bill of Rights appears to be wholly inward looking. The Justice Secretary’s answer to our question about other international human rights treaties suggests that the Government will not be taking these into account at all when drafting the Bill of Rights. In our view this would be a missed opportunity. We and our predecessor Committee have called on the Government to incorporate into UK law provisions in

¹³⁷ See e.g. the Children’s Rights Alliance for England (Ev 109) and the Royal National Institute of Blind People (Ev 166).

¹³⁸ Q 489.

human rights treaties where, in our view, the protection offered by our national law is inadequate, for example in relation to certain provisions in the UN Convention on the Rights of the Child.¹³⁹

136. We recommend that the Government consults on whether there are rights in human rights treaties to which the UK is a party which are candidates for incorporating into a Bill of Rights. There may be rights contained in those treaties which do not yet find their articulation in domestic law and which could be included in any Bill of Rights if it were considered appropriate.

137. In addition, there is scope for including in any Bill of Rights an interpretive provision which addresses directly the relationship between the Bill of Rights itself and the UK's other international human rights obligations. **We recommend that a Bill of Rights include a provision requiring courts to pay due regard to international law, including international human rights law to which the UK is a party, when interpreting the Bill of Rights.** Our outline Bill contains such a clause.

Rights for particular groups

138. Many Bills of Rights contain, in addition to the rights which apply to everyone, more specific and detailed rights for particular groups whose vulnerability calls for special protection. The South African Bill of Rights, for example, makes specific provision for the rights of children, including such detailed rights as the right not to be detained except as a measure of last resort and the right to be protected from maltreatment, neglect, abuse or degradation.¹⁴⁰

139. The Justice Secretary said it was possible that there would be scope to include rights in a Bill of Rights for particularly vulnerable groups such as children.¹⁴¹

140. The Children's Rights Alliance for England advocate the incorporation of the UN Convention on the Rights of the Child into UK law through a Bill of Rights. They suggested that this would offer greater protection to the rights of children in a number of different situations including: dissemination of and access to human rights information; due weight to be given to the expression of children's views; family law including adoption; privacy in criminal and civil proceedings; and court proceedings and custody as a last resort.¹⁴²

141. When asked what a Bill of Rights could contain, Baroness Hale replied:

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

¹³⁹ See e.g. Tenth Report, Session 2002-03, *The UN Convention on the Rights of the Child*, HL Paper 117, HC 81.

¹⁴⁰ South African Bill of Rights, s. 28 (see Annex 4).

¹⁴¹ Q 448.

¹⁴² Qs 47 and 50; Ev 109-118.

course, include a stronger right to education than is in the European Convention although there is one in the European Convention.¹⁴³

142. Other witnesses have focussed on the rights of other vulnerable groups. The Royal National Institute of Blind People referred to the position of disabled people. It recognised the capacity of a Bill of Rights to ensure that “all members of society are able to participate properly”, and suggested that “an unwritten constitution that lacks a codified set of rights and responsibilities can serve disabled individuals poorly”:¹⁴⁴

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 ... 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.

143. As we said earlier, a Bill of Rights should apply to every person in the UK, whether or not they are citizens. Indeed, as Professor Fredman of Oxford University suggested, including rights for non-citizens in a Bill of Rights is even more important “because they do not have a say in the political process”.¹⁴⁵ In addition, as some witnesses have argued, the Bill of Rights also provides an opportunity to strengthen the human rights of particular vulnerable groups, who, because of their status, may require special protection from the law.¹⁴⁶

144. The TUC suggested that a Bill of Rights should “increase[e] the range of collective rights and trade union rights”¹⁴⁷ to allow “fuller rights for individuals to be represented by their trade unions collectively in workplaces, to bargain collectively, or indeed, to organise collective action.”¹⁴⁸ Unite the Union agreed, adding that collective rights might be wanted not only by trade unions but also by other organisations representing the people who belong to them.¹⁴⁹

145. We have often made reference in our Reports to the need to give better effect to provisions in the UN Convention on the Rights of the Child and have also called for the incorporation into UK law of some of the rights, principles and provisions in the Convention. We have also urged the Government to ratify the UN Convention on the Rights of Persons with Disabilities. There is a strong case for any Bill of Rights to include detailed rights for certain vulnerable groups such as children; and there should be consultation as to whether to include specific rights for other groups such as

¹⁴³ Q 202.

¹⁴⁴ Ev 167.

¹⁴⁵ Q 26.

¹⁴⁶ Eg. The Children’s Rights Alliance for England (Ev 109).

¹⁴⁷ Q 48 and Ev 168. See also the written evidence of the Trade Union and Labour Party Liaison Organisation (Ev 169-173) and Thompsons solicitors (Ev 173).

¹⁴⁸ Q 51.

¹⁴⁹ Q 67 and Ev 173.

disabled people, religious, linguistic and ethnic minorities, workers (including migrant workers) and victims of crime.

Conclusion

146. In our view the case is clearly made out for the inclusion of a number of additional rights in any UK Bill of Rights, particularly in relation to rights which can be distilled from the UK's distinctive traditions. However, it is important that both this question and the precise definition of any additional rights, be the subject of proper public consultation.

5 Economic and social rights

Background

147. In any country debating whether or not to adopt a national Bill of Rights, one of the most controversial issues is whether the Bill of Rights should include economic and social rights. This is hardly surprising: the debate is an outcrop of often deeply submerged but sincerely held differences between reasonable people about the most fundamental questions of political philosophy, including the nature of liberty and the appropriate role of the State in preventing inequality.

148. We therefore approach the issue under no illusions about the fact that opinion on including economic and social rights is currently polarised, and that the division of opinion often follows party political lines. Nevertheless, on an issue of this importance we believe that we should explore the scope, if any, for consensus by investigating in depth the variety of ways in which economic and social rights could be included in a national Bill of Rights.

149. In their evidence to us the human rights NGOs were all very much in favour of the inclusion of economic and social rights in any UK Bill of Rights, but were deeply pessimistic about the prospects of arriving at any political consensus on this issue.¹⁵⁰ At times, listening to the evidence of those who in principle support the idea, it sounded as though they were already resigned to there being no prospect of progress on this issue. However, we believe it is all the more important that we explore the scope for agreement on this question in light of the consistent evidence of opinion polls that including economic and social rights in a Bill of Rights is very popular with the public.

150. In the most recent Joseph Rowntree State of the Nation poll, in October 2006, 88% of people questioned thought that the right to hospital treatment on the NHS within a reasonable time should be included in a Bill of Rights. This was only 1% less than the 89% who thought that the right to a fair trial before a jury should be included. 65% thought that the right of the homeless to be housed should also be included.

151. Opinion polls conducted on behalf of the Northern Ireland Human Rights Commission as part of the consultation process leading towards the adoption of a Northern Ireland Bill of Rights convey the same message.¹⁵¹ The Commission found a high level of support in Northern Ireland for economic and social rights. 87% of Protestants and 91% of Catholics supported including the rights to health care and an adequate standard of living in a Bill of Rights.

152. It seems that the rights which have been gradually conferred over the last 60 years or so by the welfare state, such as the right to health, housing and education, are now seen in the popular imagination as being just as fundamental as what are perceived to be the ancient rights in Magna Carta.

¹⁵⁰ See e.g. Liberty, Qs 36 and 39 and Ev 149; JUSTICE, Q 39 and Ev 142; and the British Institute of Human Rights, Q 39 and Ev 97. See also written evidence of Democratic Audit: Ev 123-4.

¹⁵¹ Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland, Summary of Opinion Poll Findings*, October 2001.

The Committee's Report on Economic and Social Rights

153. We take as our starting point our predecessor Committee's Report of November 2004 on economic and social rights.¹⁵² That Report considered the extent to which the International Covenant on Economic, Social and Cultural Rights ("ICESCR") had been implemented in the UK. The ICESCR is the UN treaty which gives binding legal force to the economic, social and cultural rights proclaimed in the Universal Declaration of Human Rights of 1948. Along with the International Covenant on Civil and Political Rights ("the ICCPR"), which gives effect to the civil and political rights in the Universal Declaration, the ICESCR is the other half of what is colloquially known as the "International Bill of Rights." As our predecessors' Report points out, economic and social rights are a core element of international human rights protection. The rights in the ICESCR include rights such as the right to health, the right to education and the right to an adequate standard of living.

154. Our predecessor Committee's Report found that, although the substance of many of the ICESCR rights was protected through specific pieces of legislation (relating to health, housing, education, and social security for example), where there were gaps or inadequacies in this legislative protection (as there demonstrably were in the case of some rights) the domestic legal system could not always provide redress.¹⁵³ The Report therefore went on to consider the case for giving further legal effect in the UK to the economic and social rights contained in the ICESCR.

155. The Government gave three reasons for its view that economic and social rights are aspirational policy goals, not enforceable legal rights.¹⁵⁴ First, it argued that the ICESCR rights were formulated in such imprecise and general terms as not to be suitable for consideration in the courts. Second, the Government argued that incorporating the rights would allow the courts to usurp the proper functions of the democratically elected Government and Parliament. Third, it would lead to judicial involvement in resource allocation which would be constitutionally inappropriate.

156. Our predecessor Committee considered carefully the Government's arguments against incorporation. It accepted that Parliament and the Government must retain the primary responsibility for economic and social policy, in which the courts lack substantial expertise and have limited institutional authority.¹⁵⁵ However, it rejected the Government's argument that all economic and social rights are inherently non-justiciable. It concluded that certain aspects of the ICESCR rights were susceptible to judicial adjudication and, after considering the South African approach to the protection of economic and social rights, it thought it possible that, with appropriate safeguards, those rights could be given further legal effect without the constitutional impropriety feared by the Government.¹⁵⁶ It concluded:

In our view, the case for incorporating guarantees of the Covenant rights in UK law, either by incorporating the terms of the Covenant itself, or by developing domestic

¹⁵² Twenty-first Report of Session 2003-04, *The International Covenant on Economic, Social and Cultural Rights*, HL Paper 183, HC 1188.

¹⁵³ *Ibid*, paras 18-24.

¹⁵⁴ *Ibid*, paras 52-55.

¹⁵⁵ *Ibid*, para. 64.

¹⁵⁶ *Ibid*, paras 59-70.

formulations of the Covenant rights as part of a UK Bill of Rights, merits further attention. Any such measure should recognise the limits of the courts' institutional competence in relation to rights that are progressively realised, and should limit judicial scrutiny to grounds of reasonableness and non-discrimination.¹⁵⁷

157. We agree with the reasoning and conclusion of our predecessor Committee that the case for developing domestic formulations of economic and social rights as part of a UK Bill of Rights merits further attention and our Report now picks up where its Report left off.

The Government's evolving position

158. At the time of its Green Paper of July 2007, *The Governance of Britain*, the Government was clearly opposed to the inclusion of social and economic rights in any Bill of Rights. It said:

... some have argued for the incorporation of economic and social rights into British law. But this would involve a significant shift from Parliament to the judiciary in making decisions about public spending and, at least implicitly, levels of taxation.¹⁵⁸

159. That position was reiterated by the Justice Secretary,¹⁵⁹ and the message repeated again by the Human Rights Minister, who said on 19 November 2007 that he feared the Government was going to disappoint those who want to see social and economic rights in a Bill of Rights.

160. At the Liaison Committee on 13 December 2007, however, our Chairman pressed the Prime Minister on the issue, asking whether he saw a Bill of Rights playing a role in creating a sense of cohesion and why economic and social rights would be excluded from the Bill. The Prime Minister replied:

This has been the debate about modern constitutions round the world as to how far these constitutions can accommodate people's desire not simply for political rights to be enshrined in constitutions but social and economic rights. The issue actually comes down to not being against social and economic rights being accorded importance in constitutions but whether they are justiciable, whether people actually go to court or take actions in law on the basis of these rights being set down. That is part of the debate that I think you will see ushered in in January as to whether social and economic rights should be included in this statement but I think the issue becomes not so much whether you think they are important but whether you agree that you should take judicial action on the basis of trying to enforce these rights. That is where a lot of constitutions have had a great deal of problems in recent years.

Q40 Mr Dismore: So the suggestion that seems to come out of *The Governance of Britain* and other documents that social and economic rights are effectively off-limits in this debate is wrong?

¹⁵⁷ *Ibid*, para. 73.

¹⁵⁸ *Governance of Britain*, para. 209.

¹⁵⁹ Mackenzie-Stuart Lecture, 25 October 2007.

Mr Brown: I do not think they can ever be off-limits in a debate and I think when people look at what does hold Britain together, some of the social changes that happened in the 20th century are seen by people to be of such importance that they accord them the status of rights in the way they talk about them, as you have rightly said about the National Health Service. The question however is whether, if you are setting down in legislation rights, are you setting them down so that people can take legal action on the basis of enforcing them or not?¹⁶⁰

161. **We welcome the Prime Minister’s acknowledgment that rights such as the right to health are considered of fundamental importance to people and his indication that the forthcoming consultation and debate about a Bill of Rights would not seek to preclude discussion of whether economic and social rights should be included in any such Bill of Rights.** In his comments, the Prime Minister appears to accept that a constitution or Bill of Rights can “accord importance” to economic and social rights; his concern, however, appears to be the relatively narrow one that economic and social rights ought not to be directly enforceable by individuals in the courts.

162. Subsequently, in its written evidence to our inquiry, the Government suggested for the first time that it was open to the possibility of economic and social rights being included in any Bill of Rights, but in a declaratory, rather than a justiciable, form:

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.¹⁶¹

163. In oral evidence to us in May, the Justice Secretary appeared to go further, indicating that the Government is now contemplating the possibility of including provisions about social and economic rights in the form of “deliberative and interpretive principles”.¹⁶² In the Government’s view, there are essentially three positions on the continuum. At one extreme, economic and social rights are fully justiciable in the courts and can be enforced against the State by individuals. The Government rejects this possibility. At the other extreme, the Bill of Rights could contain declaratory principles about economic and social rights, which are of wholly symbolic rather than legal effect. The Government appears to be interested in this possibility, although in evidence to us the Justice Secretary did make the point that there ought not to be too great a mismatch between the aspiration in a Bill of Rights and the reality, or the Bill of Rights risks losing credibility. Between these two extremes, in the Government’s view, is the possibility of a set of interpretive and deliberative principles, which would not provide the basis for any legal action enforcing the

¹⁶⁰ Oral evidence taken before the Liaison Committee on 13 December 2007, HC 192-i, Qs 39-40.

¹⁶¹ Ev 180.

¹⁶² Q 420.

rights, but which might be relevant when legislation concerning health or education, for example, falls to be interpreted.

164. We welcome the Government’s preparedness to reconsider its position in relation to the inclusion of economic and social rights in any UK Bill of Rights and its recent acknowledgment that there is a continuum of possible positions. We agree that there is a continuum and we consider below the range of possible options for including economic and social rights in a national Bill of Rights.

The range of possibilities

165. The first option is what the Government describes as the purely declaratory model, in which statements of principles about economic and social rights are of wholly symbolic rather than legal effect. We have found no examples of economic and social rights being cited in a purely declaratory manner in bills of rights around the world, at the present time. Looking at the various ways in which economic and social rights are protected in different countries’ bills of rights, it seems to us that, broadly speaking, there are three main models.

Model (1): Fully justiciable and legally enforceable rights

166. In a number of Scandinavian and Eastern European countries, social and economic rights are protected as legally enforceable rights in the Constitution. Finland, for example, has a constitutional guarantee of “the right to basic subsistence in the event of unemployment, illness and disability and during old age as well as the birth of a child or the loss of a provider”.¹⁶³ In countries such as Latvia, Estonia, Poland and Romania, the Constitutional Court has struck down laws which unduly restrict constitutional rights to certain types of subsistence benefits.¹⁶⁴

167. We agree with the Government that including fully justiciable and legally enforceable economic and social rights in any Bill of Rights carries too great a risk that the courts will interfere with legislative judgments about priority setting. Like our predecessor Committee, we recognise that the democratic branches (Government and Parliament) must retain the responsibility for economic and social policy, in which the courts lack expertise and have limited institutional competence or authority. It would not be constitutionally appropriate, in our view, for example, for the courts to decide whether a particular standard of living was “adequate”, or whether a particular patient should be given priority over another to receive life-saving treatment. Such questions are quite literally non-justiciable: there are no legal standards which make them capable of resolution by a court.

Model (2): Directive principles of State policy

168. Other countries give constitutional recognition to social and economic guarantees as goals, but not as legally enforceable rights. The Constitution of India, for example, contains a number of “directive principles of State policy”, which the Constitution expressly says

¹⁶³ The Constitution of Finland (1999), s. 19 (the right to social security).

¹⁶⁴ Cass R. Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need it More than Ever* (Basic Books, 2004) at 215-6.

“shall not be enforced by any court”, but which are nevertheless recognised as fundamental in the governance of the country and the State is under a duty to apply those principles when making laws.¹⁶⁵ These principles include various duties to direct its policies towards securing, for example, the right to work, to education and to a higher standard of living and level of nutrition and public health. The Constitution of Ireland takes a similar approach.

169. This model avoids the pitfalls of the first model because it keeps the courts out altogether. In our view, however, it risks the constitutional commitments being meaningless in practice. When some possibility of judicial enforcement exists, it is more likely that the relevant rights will in practice receive respect. Even democratic societies which have declared their own commitment to a set of fundamental values can often fail to implement them and can ignore the needs of its most vulnerable members.

Model (3): A duty of progressive realisation of economic and social rights by reasonable legislative and other measures, within available resources

170. Is there a straightforward choice between economic and social rights as mere goals or as legally enforceable rights, or is some combination of the two possible? Baroness Hale was very clear in her evidence that there are certain things that judges simply cannot do, but she also made clear that this did not necessarily preclude *any* judicial role in relation to economic and social rights:

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. ... 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.¹⁶⁶

171. The South African Bill of Rights contains a number of social and economic rights, such as rights to housing, health care, food, water and social security, but qualifies the justiciability of those rights by providing that “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of these rights.¹⁶⁷ The South African Constitutional Court has used the English administrative law concept of “unreasonableness”, which has a very high threshold, to ensure that the courts will only very rarely intervene to uphold social and economic rights. This model therefore gives *some* role to the courts, but not a very substantial one. Unlike the directive principles approach, it does not seek to eliminate the judicial role, rather it confines it within narrow parameters, so as to allow courts to respond only to very serious or large-scale violations.

¹⁶⁵ See Annex 4.

¹⁶⁶ Q 214.

¹⁶⁷ See ss. 26-29 of the South African Bill of Rights (Annex 4).

172. Such a hybrid model combines the advantages of the other two models whilst avoiding their main disadvantages. On this third model, implementation of the basic commitments spelled out in the Bill of Rights is still primarily through democratic processes rather than the courts, but with the possibility of a degree of judicial involvement in extreme cases (eg. of unjustifiable omission of provision for a particular vulnerable group). Individuals do not have legally enforceable rights against the State to full protection of the rights recognised by the Bill of Rights. But resort to the courts might be possible if one particular vulnerable group was being neglected altogether, because then the State is failing to take reasonable legislative and other measures, within available resources, to achieve progressive realisation of the rights. So there is scope for some judicial role in enforcing the constitutional provision, but the caveats surrounding the definition of the rights mean that there is very little scope indeed for judicial interference with the setting of priorities.

173. Some examples from South Africa demonstrate how this model works in practice.

(1) The right to health

(a) No right to kidney dialysis treatment

174. Mr. Soobramoney was a diabetic with chronic kidney failure. He was refused admission to the dialysis programme of a state hospital because the hospital had a severe shortage of dialysis machines and trained nursing staff. Because of limited resources the hospital had adopted a policy of admitting only those patients who could be cured within a short period or those eligible for a kidney transplant. Mr. Soobramoney claimed that he had a constitutional right to receive kidney dialysis treatment, relying on the provisions in the South African Bill of Rights that no-one may be refused emergency medical treatment (section 27(3)) and that everyone is entitled to have access to health care services provided by the state (section 27(1)(a)).

175. The Constitutional Court rejected his claim.¹⁶⁸ It held that the right not to be refused emergency medical treatment did not mean that the treatment of terminal illnesses had to be prioritised over other forms of medical care such as preventative health care. It meant that a person who suffers a sudden catastrophe which calls for immediate medical attention should not be denied ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment.

176. The Court also rejected the argument based on the state's constitutional obligation, within its available resources, to provide health care. It held that if treatment had to be provided to Mr. Soobramoney it would also have to be provided to all others in a similar position and the resources available to the hospital could not accommodate the demand. The responsibility for making the difficult decisions of fixing the health budget and deciding upon the priorities that needed to be met lay with the political organs and the medical authorities and the Court would be slow to interfere with such decisions if they were rational and taken in good faith.

¹⁶⁸ *Soobramoney v Minister for Health*, CCT32/97 (27 November 1997).

(b) Failure to devise programme for combating mother to child transmission of HIV

177. In another case, *Minister of Health v Treatment Action Campaign*, the Court considered a challenge to the failure of the South African government to make available the anti-retroviral drug nevirapine, which would prevent the transmission of HIV from mothers to babies.¹⁶⁹ The Court found this to be an unreasonable denial of rights to healthcare and to children's healthcare under sections 27 and 28 of the Constitution. It held that the government had failed to discharge its obligations under section 27(1) to devise and implement a comprehensive and co-ordinated programme to combat mother-to-child transmission of HIV.

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

(2) The right to shelter

179. In *Government of South Africa v Grootboom*, the Constitutional Court found that the State's failure to provide emergency accommodation for homeless applicants was an unreasonable denial of their right to adequate housing in section 26 of the Bill of Rights.¹⁷⁰ The applicants had been evicted from an illegal squatter camp, and were living in a sports stadium in extremely difficult and unhealthy conditions. Whilst government programmes were in place to develop social housing in the medium and long-term, the Court found that the absence of any government programme to address the needs of those in immediate need of emergency shelter, within the available resources, was an unreasonable interference with the right to adequate housing. It held that:

.... to be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.

180. The Court ordered the Government to implement a programme, within available resources, to address the need for emergency housing as part of the right of access to adequate housing.

181. These cases show that the South African Constitutional Court has steered a middle path between Models 1 and 2 above. It has expressly rejected an approach which would require the State to provide certain minimum standards of economic and social rights to all, because it recognizes that the courts are ill-equipped to adjudicate on issues where court orders could have multiple social and economic consequences for the

¹⁶⁹ *Minister of Health v Treatment Action Campaign*, CCT8/02 (5 July 2002).

¹⁷⁰ *Government of South Africa v Grootboom*, CCT38/00 (21 September 2000).

community. But at the same time it has recognized that there is some, albeit restrained, role for the courts, namely to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of those measures to evaluation. In our view, the South African courts have shown that the courts can be given a limited role in relation to social and economic rights without becoming the primary decision makers. Moreover, they have done so using concepts and techniques borrowed directly from UK administrative law.¹⁷¹

Objections to the inclusion of economic and social rights

182. We now return to consider the most common objections to the inclusion of economic and social rights, in the light of the South African experience.

Objection 1: The rights themselves are too vaguely expressed and will only raise expectations and encourage time-consuming and expensive litigation against public bodies

183. A right to health, for example, might be thought to encourage every individual to litigate if they are denied a particular form of treatment, or a particular operation, and the concern is that courts will be over-influenced by the personal tragedy of the individual patient and make decisions which upset carefully balanced priorities based on much wider considerations.

184. The answer to this objection lies in the definition of the rights in the text of the Bill of Rights and in making clear in the drafting that the goal is one of progressive realisation and that while the courts have a role it is a limited one. The experience of the South African example in practice demonstrates that this objection can be answered with proper drafting.

Objection 2: It hands too much power to the courts and so is undemocratic

185. This is probably the most frequently heard objection: that including social and economic rights in a Bill of Rights hands decisions about resources and priorities to the unelected and unaccountable judges and therefore limits considerably the scope for Government action.

186. The courts already make decisions about social and economic rights in judicial review cases concerning the State's various statutory duties to provide education, social care or other welfare services.¹⁷² An example is the situation in which a local authority is failing to provide to a child the provision to which their Statement of Special Educational Needs entitles them. Such cases are key to ensuring that state organs do what is legally required of them. To this extent our courts are already very familiar with having some role in the enforcement of such rights. It is therefore untrue to say that such rights are currently non-justiciable.

¹⁷¹ Twenty-first Report of Session 2003-04, *The International Covenant on Economic, Social and Cultural Rights*, HL Paper 183, HC 1188, paras. 6.6-6.7.

¹⁷² See Maurice Kay LJ, Q 206: "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." See also the written evidence of Ellie Palmer, Ev 157.

187. This objection also ignores important recent developments in the constitutional protection of social and economic rights. The social and economic rights chapter of a Bill of Rights can be drafted in terms of a commitment to progressive realisation of a goal, within available resources, leaving it to detailed legislative measures to work out how to fulfil that goal and subject to budgetary constraints. If the rights are drafted in a way which squarely acknowledges the budgetary problem, this immediately constrains the scope for judges to behave undemocratically. Professor Fredman argued that it is possible to construct a role for the judiciary which is democratic and which in fact “energises the democratic process”.¹⁷³

Objection 3: It involves the courts in making decisions about resources and priority setting that they are ill-equipped to take

188. A variant of the anti-democratic argument is that including social and economic rights in a Bill of Rights inevitably involves the courts making decisions about resources or choosing between competing priorities, decisions which they not only lack the democratic legitimacy to take but which they also lack the practical capacity to make well.

189. It is true that, quite apart from the democratic objection, courts are not well equipped to perform this task, or to oversee the delivery of, say, education or adequate health care to those who need it. However, this does not mean that courts should have no role at all. As Baroness Hale said to us, “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.”¹⁷⁴

190. The question therefore is whether there is some role for courts which stops short of allocating resources or reassessing priorities set by the democratic branches (Government and Parliament). If the text recognises the dependence of the rights on available resources the role of the courts in allocating resources or setting priorities is extremely limited. We agree with Baroness Hale that the question is “how the right would have to be defined by parliament to give courts the appropriate task for a court to do. ... 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.”¹⁷⁵ Justice Kate O’Regan of the South African Constitutional Court similarly said that in her view it was all a question of drafting: the judicial role will to a very large extent be determined by the way in which the relevant part of the Bill of Rights is drafted.

191. In our view the main objections to the inclusion of social and economic rights in a Bill of Rights are not, in the end, objections of principle, but matters which are capable of being addressed by careful drafting. Having given the matter further attention, as recommended by our predecessor Committee, we are persuaded that the case for including economic and social rights in a UK Bill of Rights is made out. We agree with Justice Albie Sachs who told us during our visit to South Africa that a country which does not include social and economic rights in some form in its Bill of Rights is a country which has “given up on aspiration”. We consider that rights to health, education and housing are part of this country’s defining commitments, and including

¹⁷³ Q 3.

¹⁷⁴ Q 207.

¹⁷⁵ Q 208.

them in a UK Bill of Rights is therefore appropriate, if it can be achieved in a way which overcomes the traditional objections to such inclusion.

A suggested approach: a duty of progressive realisation with a closely circumscribed judicial role

192. We therefore put forward for consideration an approach which draws inspiration from the South African approach to economic and social rights, but which contains additional wording designed to ensure that the role of the courts in relation to social and economic rights is appropriately limited. The broad scheme of these provisions is to impose a duty on the Government to achieve the progressive realisation of the relevant rights, by legislative or other measures, within available resources, and to report to Parliament on the progress made; and to provide that the rights are not enforceable by individuals, but rather that the courts have a very closely circumscribed role in reviewing the measures taken by the Government.

Economic and social rights

Duty of progressive realisation

The Government must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights in this schedule.

Duty to report to Parliament

The Government shall report annually to Parliament on the progress made during the previous year in realising the rights in this schedule.

Parliament to determine eligibility

Eligibility for the rights in this schedule on grounds of nationality, residence or other status shall be determined by Parliament in primary legislation, subject to the rights in schedule 1.

Justiciability

(1) The rights in this schedule are not enforceable by individuals against the Government or any public authority.

(2) The rights in this schedule are justiciable only to the extent that they are relevant to:

(a) the interpretation of other legislation, or

(b) the assessment of the reasonableness of the measures taken to achieve their progressive realisation.

Judicial review

When evaluating the reasonableness of the measures taken by the Government to achieve the progressive realisation of the rights in this schedule, the courts shall have regard to the following relevant considerations:

- (a) the availability of resources
- (b) the latitude inherent in a duty to achieve the realisation of the rights progressively
- (c) the court has no jurisdiction to inquire into whether public money could be better spent
- (d) the fact that a wide range of measures is possible to meet the Government's obligations
- (e) the availability of an alternative means of realising the rights is not, of itself, an indication of unreasonableness
- (f) whether the measures include emergency relief for those whose needs are urgent
- (g) whether the measures are discriminatory
- (h) whether the measures have been effectively made known to the public
- (i) whether the measures are capable of facilitating the realisation of the relevant rights
- (j) whether any deprivation of existing rights is demonstrably justifiable in accordance with s. 5 of this Bill (Limitation of Rights).¹⁷⁶

Health care

Everyone has the right to have access to appropriate health care services, free at the point of use and within a reasonable time

No one may be refused appropriate emergency medical treatment

Education

Everyone of compulsory school age has the right to receive free, full-time education suitable to their needs.

Everyone has the right to have access to further education and to vocational and continuing training.

Housing

Everyone has the right to adequate accommodation appropriate to their needs.

¹⁷⁶ Section 5 of the Outline Bill contains a "general limitation clause", making clear that rights and freedoms can be limited in the wider public interest if the limitation is shown to be justified in a society based on the values in the preamble: see Annexes 1 and 2 below.

Everyone is entitled to be secure in the occupancy of their home.

No one may be evicted from their home without an order of a court.

An adequate standard of living

Everyone is entitled to an adequate standard of living sufficient for that person and their dependents, including adequate food, water and clothing

Everyone has the right to social assistance, including care and support, in accordance with their needs.

No one shall be allowed to fall into destitution.

193. One of the virtues of our suggested formulation is that it does not provide directly enforceable rights for individuals, but explicitly leaves it both to Parliament to take legislative measures and the Executive to take other measures to achieve the progressive realisation of the rights in question, subject only to “reasonableness review” by the courts to ensure that the commitments are not being ignored. In our view this goes a long way to meeting the concern that the inclusion of social and economic rights in a Bill of Rights amounts to handing over policy making and resource allocation to unaccountable judges. It gives effect to the constitutive commitment that everyone should be entitled, for example, to free healthcare within a reasonable time (on which we all agree), but leaves to the Government and Parliament what is essentially a policy question of how best to achieve that agreed aim.

194. The text we suggest also seeks to make clear that the role of the courts is confined to a relatively light touch review of whether the Government is discharging its obligation of taking reasonable measures to achieve the progressive realisation of these rights. It does this by spelling out explicitly the considerations which are to be taken into account by courts when evaluating the reasonableness of the measures taken by the Government to achieve the progressive realisation of the right. These considerations are based on the sorts of considerations that have emerged from the South African case law concerning economic and social rights.¹⁷⁷ By making it explicit, for example, that courts have no jurisdiction to inquire into whether public money could be better spent, that available resources are relevant and that the nature of the duty leaves considerable latitude to the Government, this approach ensures that the role of the judiciary is confined to that which is appropriate in a parliamentary democracy. They are designed to ensure that an individual cannot complain to a court that he or she is being refused a particular treatment, but leaves open the possibility of a role for the courts in a case such as *Grootboom*, where the Government has failed to provide a programme providing emergency relief for those most in need.

195. Our suggested approach also makes clear that Parliament is the appropriate forum in which to debate the adequacy of the Government’s measures towards progressive realisation by requiring the Government to report annually to Parliament on the progress made in the previous year in realising the relevant rights and goals.¹⁷⁸ It also makes explicit that it is for Parliament to determine eligibility for these rights on grounds such as

¹⁷⁷ In particular the *Soobramoney*, *Grootboom* and *Treatment Action Campaign* cases referred to above.

¹⁷⁸ See Outline Bill of Rights and Freedoms, Annex 1.

nationality or residence, subject to being compatible with other rights in the Bill of Rights, such as the right to equality.

196. We recommend that any Bill of Rights should in the first place include only rights to health, education, housing, and an adequate standard of living, with a view to reviewing the experience after a period and considering whether to add other social and economic rights not currently included.

197. We also agree with the view of our predecessor Committee that rights such as the right to adequate healthcare, to education and to protection against the worst extremes of poverty touch the substance of people's everyday lives, and would help to correct the popular misconception that human rights are a charter for criminals and terrorists.¹⁷⁹ In our view, the inclusion of such rights in a UK Bill of Rights would be far more effective in countering that misperception than the Government's attempt to link rights with responsibilities in the popular imagination.

198. While we recognise that the inclusion of economic and social rights in a UK Bill of Rights would not be a panacea to all economic and social ills, it would in our view make a real practical difference in relation to a number of ongoing human rights problems to which we have drawn attention in our reports, for example:

- the lack of security of tenure for older people in residential accommodation (the right to housing);
- the use of destitution as an instrument of policy to deter asylum seekers (the right to an adequate standard of living);
- the denial of free maternity services to failed asylum-seekers (the right to health); and
- the adequacy of educational provision for detained children (the right to education).

¹⁷⁹ Twenty-first Report of Session 2003-04, *The International Covenant on Economic, Social and Cultural Rights*, HL Paper 183, HC 1188, para. 30.

6 “Third generation rights”

199. We have considered during the course of our inquiry whether any so-called “third generation rights” should be included in a UK Bill of Rights. Third generation rights are rights which have attained international recognition as human rights but which are not easily classified as either civil and political rights or economic and social rights. They include rights such as the right to self-determination, the right to natural resources, the right to economic and social development and the right to intergenerational equity and sustainability.

200. The nature of many of these rights makes it difficult to enshrine them in legally binding documents, and for the most part they are therefore the subject of standards which are not, strictly speaking, legally binding. There is one right, however, which is commonly referred to as a third generation right, but which is increasingly taking legal form in international human rights instruments and constitutions throughout the world: the right to a healthy environment.

201. When asked whether a Bill of Rights should include so-called “third generation rights”, such as environmental rights, Baroness Hale said:

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.¹⁸⁰

202. We do not agree that the inclusion of environmental rights would be a “huge leap” bearing in mind the extent to which both the right to life in Article 2 ECHR and the right to respect for private life and home in Article 8 ECHR have already been interpreted as including certain environmental rights.

203. The European Court of Human Rights (ECtHR) has given clear guidance that both Article 2 (the right to life) and Article 8 (the right to respect for the home, private and family life) include environmental protections.

204. For example, in a case dealing with the environmental impact of smells, noise and polluting fumes caused by a waste treatment plant, the ECtHR has recognised that:

Severe environmental pollution may affect individual’s well-being and prevent them from enjoying their homes in a way as to affect their private and family life adversely, without, however, seriously endangering their health.¹⁸¹

205. The ECtHR has also recognised that people have a right to accessible information about Government engagement in activities which are hazardous to their health. The UK already has an obligation under the ECtHR to take action to meet certain dangerous environmental risks or hazards. So, for example, if the UK were to fail to take adequate

¹⁸⁰ Q 233.

¹⁸¹ *Lopez-Ostra v Spain* (1995) 20 EHRR 277, para. 51.

action in relation to known environmental hazards at a rubbish tip, where individuals subsequently were injured or killed, Article 2 ECHR would provide a remedy for the victims.¹⁸²

206. In addition, politicians across Europe have begun to recognise the need to for an enforceable right to a clean and safe environment. For example, in June 2008, the President of the Parliamentary Assembly of the Council of Europe, Lluís Maria de Puig, called for a legally enforceable Europe-wide right to a healthy and sustainable environment. He said:

Europeans are being asked to make major changes to their lifestyles – but in return, they should be entitled to a legal guarantee that their governments are also doing everything in their power to ensure a viable, healthy and sustainable environment.¹⁸³

207. The United Kingdom has already recognised its responsibility to protect the environment for future generation in its international obligations. For example, the UK is a signatory to the UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which confirms “the right of every person of present and future generations to live in an environment adequate to his or her health or well-being”.¹⁸⁴

208. The constitutions of various States also contain a right, equivalent to that of a right to a “clean” and “safe” environment. For example:

- There is a right to enjoy “an environment suitable for the development of the person” (Article 45(1) of the Spanish Constitution)
- “Everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it” (Article 66 of the Portuguese Constitution)
- “All peoples shall have the right to a general satisfactory environment favourable to their development” (Article 24 of the African Charter)
- “Everyone shall have the right to live in a healthy environment” (Article 11(1) of the 1988 San Salvador Protocol to the American Charter of Human Rights)
- “Everyone has the right to an environment that is not harmful to their health or wellbeing” (South African Bill of Rights, s. 24).

209. We therefore believe that certain carefully defined environmental rights have now attained a sufficiently recognised status to be made a legally binding human right. We note that in a recent case in the International Court of Justice it was acknowledged that ‘the protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous rights such as the right to health and the right to life itself’.¹⁸⁵

¹⁸² *Oneriyildiz v Turkey* App. No. 48939/99, Judgment of 30 November 2004 (Grand Chamber). See also Chamber Judgment, 18 June 2002.

¹⁸³ Press Notice, Council of Europe, PACE President urges a legal ‘right to a healthy environment’, 4 June 2008.

¹⁸⁴ Article 1.

¹⁸⁵ *Case concerning the Construction of the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, (1998) 37 ILM 162, at 206 (Judge Weeramantry).

Conclusion

210. In our view there is a strong case to be made for including the right to a healthy and sustainable environment in a UK Bill of Rights. The briefest consideration of the status of the right in international instruments and national constitutions shows that the right has evolved into one which is clearly capable of legal expression. We believe that a UK Bill of Rights should treat it as one of the social rights for which a particular legal regime can be devised. We have therefore included it in our outline Bill of Rights and Freedoms defined as follows:

A healthy and sustainable environment

Everyone has the right to an environment that is not harmful to their health.

Everyone has the right to information enabling them to assess the risk to their health from their environment.

Everyone has the right to a high level of environmental protection, for the benefit of present and future generations, through reasonable legislative and other measures that –

- (i) prevent pollution and ecological degradation;
- (ii) promote conservation and
- (iii) ensure that economic development and use of natural resources are sustainable.

We recommend that the forthcoming consultation on a Bill of Rights should expressly include the right to a healthy and sustainable environment amongst the rights treated as candidates for inclusion in a UK Bill of Rights.¹⁸⁶

¹⁸⁶ The inclusion of such a right in a UK Bill of Rights would make a real practical difference. In *Hunter v Canary Wharf* [1997] AC 655, for example, which concerned interference with the enjoyment of neighbouring land caused by the construction of Canary Wharf, the House of Lords decided, by a 4-1 majority, that a person could not bring an action for private nuisance unless they had a proprietary interest in the land affected. Mere residence was not enough. Lord Cooke, dissenting, pointed out that various international human rights standards protect the home against nuisances regardless of whether the person affected has a proprietary interest or merely lives on the land in question, and thought it legitimate for the courts to develop the common law of nuisance so as to allow a resident to bring a nuisance action. The inclusion of a right to a healthy environment in a UK Bill of Rights, combined with the duty on the courts to develop the common law so as to be compatible with the Bill of Rights (see chapter 8 below), would require the minority approach in the *Canary Wharf* case to be followed.

7 Relationship between Parliament, Executive and the Courts

Introduction

211. In this chapter we consider what should be the impact of a UK Bill of Rights on the existing relationships between Parliament, the Executive and the courts. Should a UK Bill of Rights seek to change significantly the existing constitutional relationship between the three branches, or should it seek to preserve that set of relationships as far as possible?

The possible models

212. As the JUSTICE Report on a Bill of Rights points out, there are, broadly speaking, four possible models for a national Bill of Rights:

- i) Judicial power to strike down legislation for breach of Bill of Rights (cf the US and European jurisdictions with a Constitutional Court, e.g. Germany);
- ii) Judicial power to strike down but subject to parliamentary override (cf. Canada);
- iii) Judicial obligation to interpret statute compatibly with the Bill of Rights and power to declare incompatible if not possible, giving opportunity for legislative response (cf the UK under the HRA);
- iv) Judicial obligation to interpret legislation consistently with the rights and freedoms contained in the Bill of Rights (cf New Zealand).

213. We received a range of views from witnesses about the model that should be adopted if the UK were to have a Bill of Rights. Some, but not many, suggested that courts should be able to strike down legislation.¹⁸⁷ Others were strongly opposed to that option. Martin Howe QC, for example, was against what he called “strong entrenchment” along the lines of the US model, because he was wary of transferring too much power from legislators to courts and also regarded a Bill of Rights as primarily a tool for Parliament to keep the Executive in check.¹⁸⁸ Professor Harlow of the London School of Economics suggested that there is an emergence of a more nuanced position in the UK “in which legislatures, 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”. She argued that such a “dialogue model ... best fits common law countries”.¹⁸⁹

The ‘parliamentary model’ of human rights protection

214. The HRA is often described as a “parliamentary model of human rights protection”, because although it involves a role for judges in the enforcement of the rights in question, it

¹⁸⁷ See e.g. the written evidence of British Irish Rights Watch (Ev 101) and Jonathan Doyle (Ev 125).

¹⁸⁸ Q 2.

¹⁸⁹ Ev 131.

also gives Parliament an important role in the interpretation of the Convention rights and in deciding how best to implement them in more detailed legislation.

215. In many other jurisdictions with constitutional bills of rights, or other legal protections of human rights, court judgments are the single most important source of interpretation of the rights protected. In the UK's institutional arrangements for protecting human rights, however, the intended design is that Parliament, as well as the judiciary, has a central role to play in deciding how best to protect the rights which are considered to be fundamental.¹⁹⁰

216. In practice, however, Parliament has not been as central to the scheme of rights protection under the HRA as the legislation would seem to intend. As we have pointed out in our reports monitoring the Government's responses to court judgments, under the HRA there is nothing more that Parliament can do to force the issue if the Government decides to take no further action following an adverse court judgment or drags its heels in bringing forward its response. In the Victoria Charter of Rights and Responsibilities in Australia, there are more detailed provisions designed to place the legislature central to the process of human rights protection, such as requiring the Government to make a statement to Parliament within a certain time from the date of a judgment finding a breach of the Charter.

217. Professor Fredman challenged the conventional dichotomy between questions of negative liberty being for the courts rather than Parliament and questions of positive provision of needs being for the democratic process.¹⁹¹ In her view, one of the great strengths of the HRA is that it places Parliament at the centre of the system of human rights protection. She believes that there is an opportunity in adopting a Bill of Rights to enhance Parliament's role even further.

218. We are not in favour of a Bill of Rights which confers a power on the courts to strike down legislation. We consider this to be fundamentally at odds with this country's tradition of parliamentary democracy. In our view the innovative and widely admired parliamentary model of human rights protection contained in the HRA is the appropriate model of rights protection for our democracy. Within that model, we consider that there is scope to enhance Parliament's role further, at the same time as strengthening the protection provided for human rights, as discussed below.

219. The Government has stressed that Parliament must remain at the heart of governance of this country.¹⁹² We therefore asked if it saw any ways of strengthening the role given to Parliament in a Bill of Rights, compared to the HRA. We are disappointed that the Government failed to answer our specific suggestions about ways in which the role given to Parliament by a UK Bill of Rights could be strengthened compared to that which it

¹⁹⁰ Sixteenth Report of Session 2006-07, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, HL Paper 128, HC 728, para. 1.

¹⁹¹ Q 19.

¹⁹² See e.g. Michael Wills MP, *The constitutional reform programme*, speech at the Leslie Scarman Lecture, 13 February 2008: "the solution is not to replace representative democracy. For this government, representative democracy – and therefore Parliament – must remain at the heart of the governance of this country."

currently plays under the HRA.¹⁹³ The Government has so far avoided any consideration of ways in which Parliament's role could be strengthened.

Enhancing Parliament's role in the parliamentary model

220. We suggest four ways in which the UK's parliamentary model of human rights protection could be strengthened under a UK Bill of Rights.

Power of legislative override

221. Section 33 of the Canadian Charter provides for the federal Parliament to pass a law notwithstanding a provision in the Charter.

222. Although the HRA does not contain an express power of legislative override equivalent to that in the Canadian Charter, Parliament effectively has such a power. If an Act of Parliament made it express that it was deliberately legislating notwithstanding a Convention right, all that the courts could do would be to give a declaration of incompatibility in respect of the relevant provision in that Act.

223. A UK Bill of Rights could make explicit (in a way that the HRA does not) that Parliament continues to have the power of "legislative override", by expressly declaring in an Act of Parliament that the Act or any provision in it shall operate notwithstanding anything contained in the Bill of Rights.

Reasoned statements of compatibility

224. The requirement in the HRA that all Bills must be accompanied by a statement of compatibility¹⁹⁴ is an important feature of the parliamentary model of human rights protection. The Justice Secretary acknowledged this and said that there may be a case for extending such statements so that they require a statement of compatibility with the Bill of Rights.¹⁹⁵

225. We welcome the Government's acknowledgment of the importance of statements of compatibility accompanying Bills and we agree that any Bill of Rights should include an equivalent provision. In our view, however, there is considerable room for improvement in the information currently provided to Parliament about whether a measure is compatible with human rights. Indeed, this opportunity was taken in the Victorian Charter of Rights and Responsibilities, which drew primarily on the experience of our Committee under the HRA in this respect.

226. Under the HRA, Ministers merely have to sign a certificate of compatibility. There is no requirement to give reasons for the Minister's view. In New Zealand, by comparison, the Attorney General's legal advice to the Government about compatibility with the New Zealand Bill of Rights Act 1990 is published in full when, in the Attorney General's view, the Bill appears to be inconsistent with the New Zealand Bill of Rights. **To enhance**

¹⁹³ Ev 184.

¹⁹⁴ Section 19, Human Rights Act 1998.

¹⁹⁵ Q 463.

democratic scrutiny of the compatibility of a Government measure with any Bill of Rights, the Bill could require Ministers to provide full statements of compatibility, containing the reasons for the Minister's view that a measure is compatible with the Bill of Rights. It could also extend its application to Government amendments to Bills and to other legislative measures such as statutory instruments and Orders in Council. We suggest the text of such a provision in the outline Bill of Rights and Freedoms, annexed to this Report.

Enhanced role for Parliament following declaration of incompatibility

227. Under the HRA, it is up to the Government to decide whether to remedy a judicially declared incompatibility and if so, how. In South Africa the courts have the power to make “suspended orders of invalidity” when they find a breach of the Bill of Rights, which gives the Government a period in which to respond to the judgment, and the court the power to supervise the Government's response to the judgment.

228. **In our view, suspended orders of invalidity would be at odds with our constitutional traditions. However, the Bill of Rights could seek to enhance Parliament's role following a declaration of incompatibility by requiring the Government to bring forward a formal response to Parliament within a defined timetable and to initiate a debate on its response, to guarantee Parliament the opportunity to express its view.** This is what happens in the State of Victoria in Australia under its recently adopted Charter. The outline Bill makes provision for this.

229. **The Bill of Rights could also require the Government to come back to court to account for what it has done to implement the court's judgment where it has declared legislation incompatible. The outline Bill provides for this.**

Five yearly independent review

230. The Victorian Charter of Human Rights and Responsibilities requires the Attorney General to cause a review to be made of the first four years of operation of the Charter and to lay a copy of the report of the review before each House of Parliament.¹⁹⁶ The review is expressly required to include consideration of matters which were considered for inclusion in the Charter during the consultation process but ultimately not included, such as economic and social rights and stronger remedies.

231. There is no equivalent provision in our HRA. The Department for Constitutional Affairs, as it then was, conducted a review of the HRA in 2006, after it had been in force for about five years, but this review was hastily arranged and rapidly executed. The review was responding to the suggestion that the HRA was to blame for the release on parole of Anthony Rice who subsequently committed murder. We reported on the outcome of that review, broadly favourably, but we noted the unsatisfactory circumstances in which the request for a review had been made in the first place.

232. In the context of our work on counter-terrorism policy and human rights, we have increasingly stressed the importance of opportunities for properly informed parliamentary

¹⁹⁶ Section 44.

review of the operation in practice of counter-terrorism powers.¹⁹⁷ The Government has also recently recognised the importance of post-legislative scrutiny as a function of parliamentary committees.¹⁹⁸ We see the Victorian example of a periodic review and report to Parliament as one which has the potential to enhance considerably Parliament's role in the protection of human rights. **We recommend that any UK Bill of Rights contain a similar provision, providing for a five yearly review and report to Parliament by an independent panel of reviewers.** We suggest a possible clause to achieve this in our outline Bill of Rights and Freedoms.

Entrenchment

233. A number of witnesses to our inquiry addressed the question of whether a Bill of Rights should be entrenched. They expressed a range of views. Some favoured entrenchment in order to ensure the superiority of a Bill of Rights and protect it from easy amendment by Parliament.¹⁹⁹ One witness suggested that entrenchment is required to protect the power of the UK courts to adjudicate upon claimed violations of human rights and ensure an effective remedy.²⁰⁰

234. On the other hand, other witnesses suggested that entrenchment may not be desirable. Professor Harlow opposed entrenchment because in her view the common law combined with parliamentary sovereignty allows rights to be easily updated as society changes, although she recognised that this could also mean that rights may be swept away more easily.²⁰¹

235. We are not in favour of entrenching a UK Bill of Rights against future amendment or repeal by requiring that any such amendments or repeal must satisfy a special procedure, such as approval by a special parliamentary majority or by the people in a referendum. In our view such forms of entrenchment are not compatible with our tradition of parliamentary democracy which has carefully preserved the freedom of each Parliament to legislate according to its view of the public interest.

236. We again prefer the approach adopted in the HRA, which provides for a much more limited form of entrenchment in the form of the obligation to interpret all legislation, including future legislation,²⁰² compatibly with Convention rights so far as it is possible to do so.²⁰³ That provision has been interpreted by the courts as a strong obligation which effectively prevents any later Act of Parliament from impliedly repealing the HRA to the extent that the later Act is inconsistent with a Convention right. However, every Parliament remains at liberty to legislate inconsistently with any of the Convention rights,

¹⁹⁷ See e.g. Tenth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008*, HL Paper 57, HC 356 at paras 19-34; Twenty-fifth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008*, HL Paper 132, HC 825 at paras 9-19.

¹⁹⁸ *Post-legislative scrutiny – The Government's Approach* (Cm 7320), announced by written ministerial statement by the Leader of the House of Commons, Harriet Harman MP: HC Deb 20 March 2008 c74WS.

¹⁹⁹ See e.g. written evidence of Law Society of Scotland (Ev 147).

²⁰⁰ Written evidence of Tom Hickman (Ev 135).

²⁰¹ Ev 131.

²⁰² Human Rights Act 1998, s. 3(2)(a) provides that the interpretive obligation applies to legislation "whenever enacted."

²⁰³ Human Rights Act 1998, s. 3(1).

provided the legislation expressly states that this is what it intends to do. In such a case, it would not be possible to interpret the legislation compatibly, and the most a court could do would be to make a declaration of incompatibility.

237. The interpretive obligation in the HRA therefore achieves a degree of entrenchment for the Convention rights (against implied repeal by future Acts), but preserves Parliament's ultimate freedom, in national law in any event, to pass legislation which is incompatible with any of the Convention rights. In our view, it achieves the right balance between protection of human rights against too easy infringement by Parliament on the one hand and Parliament's freedom to act on the other.

238. We therefore recommend that any UK Bill of Rights should follow the HRA model of a strong interpretive obligation, applying to legislation whenever enacted, entrenching the rights and freedoms against implied repeal, but leaving Parliament free to pass incompatible legislation if it makes it clear that that is its intention. We also regard it as very important that the strength of the interpretive obligation in the HRA is not diluted in any way in any UK Bill of Rights. We suggest a formulation of such an interpretive obligation in our outline Bill of Rights and Freedoms.

239. Consideration could also be given to requiring the consent of both Houses to any measure amending the Bill of Rights.

Emergencies

240. Any UK Bill of Rights will have to make provision for derogation from any of the rights or freedoms in times of genuine emergency. Although this was not a matter on which we specifically sought views, it clearly raises questions concerning the impact of any Bill of Rights on the relationship between Parliament, the Executive and the courts.

241. In our recent Report on *42 Days and Public Emergencies* we pointed out that the current legal framework governing derogations from human rights guarantees contains very little in the way of judicial or parliamentary checks.²⁰⁴ We therefore recommended, in the context of that Bill's particular proposal to provide a reserve power to extend the maximum period of pre-charge detention to 42 days, that the Bill be amended to provide a clear framework for any future derogation from the right to liberty, incorporating the necessary safeguards to ensure that any such derogation in the future is lawful.²⁰⁵

242. Derogation from human rights in times of emergency is currently an essentially executive function, performed under the executive's prerogative powers and accompanied by no formal requirement that Parliament be involved in any way, or any guaranteed opportunity of challenging it in court. We recommend that in any UK Bill of Rights the opportunity is taken to introduce parliamentary and judicial safeguards against wrongful derogation from rights and freedoms and to spell out clearly the conditions that would be required to be met in order to justify a derogation.

²⁰⁴ Twenty-first report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 Days and Public Emergencies*, HL Paper 116, HC 635, para. 50.

²⁰⁵ *Ibid.* para. 55.

243. We suggest a formulation of such a clause in our outline Bill of Rights and Freedoms. The clause would prescribe the conditions that have to be satisfied for a state of emergency to be declared (e.g. a serious threat to the life of the nation), and the criteria for any derogation to be valid (e.g. derogation may only be to the extent strictly required by the emergency and consistent with international obligations). The clause could also enhance the role of Parliament in the process by requiring that a state of emergency must be confirmed by Parliament before any derogation from rights and freedoms in the Bill can be made. It could also enhance Parliament's role by stipulating a strict time limit on the duration of such a declaration of a state of emergency and of any emergency legislation.

Judicial appointments

244. During our visit to South Africa, the importance of a truly independent and diverse judiciary to the success of a Bill of Rights was frequently raised by interlocutors.

245. Baroness Hale has been outspoken about the need for a more diverse judiciary. In her lecture, *Equality in the Judiciary: A Tale of Two Continents*,²⁰⁶ she referred to the HRA as one of the factors which has “clearly increased the social and 'small p' political content of the judging task.” This has made it all the more important that the judiciary becomes more diverse:

Judicial appointments have traditionally been dominated by the assumption that those best fitted for appointment - and thus fitted for the best appointments - are those who have done best in independent practice as barristers. This has excluded large numbers of very able lawyers from consideration and limits selection to a comparatively small and homogenous group. ... That homogenous group is very largely male, almost all white ... and from a comparatively narrow range of social and educational backgrounds.

246. In evidence, she confirmed that she would like to see the pool from which judges are recruited widened, including from amongst Tribunal chairs.²⁰⁷

247. The Constitutional Reform Act 2005 introduced a number of reforms to judicial appointments, including a new judicial appointments commission, which were intended to address the admitted problem of lack of diversity in the higher judiciary. Our predecessor Committee was concerned in its Report on the Constitutional Reform Bill that the new system for judicial appointments introduced by that Bill fell short of what is required by international human rights standards relating to the independence and impartiality of the judiciary, its diversity, and the right of women to have the same opportunity as men to participate in public life, including as judges.²⁰⁸

²⁰⁶ 10th Pilgrim Fathers' Lecture, 24 October 2003.

²⁰⁷ Qs 220 & 224.

²⁰⁸ Twenty-third Report of Session 2003-04, *Scrutiny of Bills: Final Progress Report*, HL Paper 210, HC 1282.

248. The Justice Secretary told the House of Commons Justice Committee that “expectations that the new system of appointing judges would lead to a more diverse judiciary have so far not been fulfilled.”²⁰⁹

249. We welcome the Government’s express recognition that a more diverse judiciary with increased understanding of the communities it serves will contribute to increased public confidence in the justice system, which will be especially important in the context of a UK Bill of Rights.²¹⁰ We look forward to the Judicial Appointments Commission giving practical effect to the widely shared view that the pool of people from whom judicial appointments are currently made is significantly widened as a matter of urgency.

²⁰⁹ Uncorrected transcript of oral evidence taken before the Justice Committee, 13 May 2008, HC 425-ii, Q 60. The year before the new Judicial Appointments Commission started work in 2006, about 14% of judicial posts, at all levels, were being given to black and Asian applicants, and 41% to women. Figures released last month showed that, under the JAC, those percentages had been reduced to 8% and 34% respectively.

²¹⁰ Q 13.

8 Responsibilities and duties

Introduction

250. In his speech on liberty on 25 October 2007, the Prime Minister indicated that the Government was initiating a national consultation on the case for a new Bill of Rights and Duties and that:

... this will include a discussion of how we can entrench and enhance our liberties - building upon existing rights and freedoms but not diluting them - but also make more explicit the responsibilities that implicitly accompany rights.²¹¹

251. In this chapter we ask whether there is any place for responsibilities or duties on individuals in a UK Bill of Rights. It is an issue on which we received a wide range of views in the evidence submitted to us.

The Government's position

252. The Justice Secretary told us of his long-standing desire to ensure that people realise that with rights go responsibilities.²¹² Indeed he mentioned this as the first reason why the Government is interested in moving beyond the HRA to a Bill of Rights. He said that he wants to be able to confront people who in his view assert their rights “selfishly”, without regard to the rights of others, by pointing to a text which says, yes, you have rights, but you also have responsibilities.²¹³ He was, he said, “really keen on getting that out specifically.”²¹⁴

253. It seems clear that the Government is contemplating the possibility of including within any Bill of Rights explicit responsibilities which are said to accompany certain rights. For example, the Justice Secretary suggested that it would be useful if the right to education was accompanied by an explicit statement that with this right come certain responsibilities, such as the responsibility of parents to ensure that their children attend school and “all sorts of more explicit responsibilities”.²¹⁵ However, “all parents do not realise this.” The thinking here appears to be that parents know all about their rights but are not aware of their responsibilities, and the inclusion of such responsibilities in a Bill of Rights would help to educate them about their responsibilities.

254. Elsewhere, the Justice Secretary appeared to contemplate the possibility of “non-justiciable duties” being included in a Bill of Rights. He pointed out that in some countries there is a duty to vote in elections, and although he did not think that this would be acceptable in this country, he did suggest that, with a right to vote and a right to take things up (i.e. complain) in a democracy, perhaps there should be a debate about whether to include, at a declaratory level, a non-justiciable duty to vote.²¹⁶

²¹¹ *Liberty*, 5 October 2007.

²¹² Q 420.

²¹³ Q 437.

²¹⁴ *Ibid.* See also Q 440.

²¹⁵ Q 425. See also Qs 437 & 486.

²¹⁶ Q 435.

255. In response to our question about whether the proposed responsibilities in any Bill of Rights will be enforceable in any way against individuals, the Justice Secretary said that the Government is looking at the possibility of framing certain responsibilities, such as the responsibility to respect the rights of others, as interpretive principles.²¹⁷ He said that there may be value in articulating and elevating some of the responsibilities so that they sit alongside rights in one place. “Responsibilities need not take enforceable form in order to achieve this objective.”²¹⁸

The relationship between rights and responsibilities

256. A number of witnesses expressed strong concerns that the inclusion of responsibilities in a Bill of Rights might mean that only the “deserving” would have full rights entitlement.²¹⁹ They argued that making rights protection contingent on compliance with responsibilities goes against the basic premise that human rights are universal and inalienable.²²⁰ As one witness stated:

... the notion 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 ... such standards are the hallmark of a civilised democracy, and should not be diluted by importing into rights legislation some kind of trade-off with responsibilities.²²¹

257. The Children’s Rights Alliance for England pointed out that the emphasis on responsibilities is particularly problematic for children:

... 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 important to understand they have innate rights that do not have to be ‘earned’.²²²

258. Others were quite trenchant in their criticism of the notion that there should be a Bill of Rights *and Responsibilities*. The journalist Henry Porter, for example, said:

I want to say something about the phrase “rights and responsibilities” ... 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.²²³

259. In similar vein, Professor Conor Gearty of the London School of Economics objected:

²¹⁷ Ev 183.

²¹⁸ Ev 183.

²¹⁹ E.g. Ev 146.

²²⁰ Ev 116, 144 & 152.

²²¹ Ev 104.

²²² Ev 115.

²²³ Ev 165.

The notion of responsibility is already weaved into the Human Rights Act ... 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.²²⁴

260. Professor Robert Blackburn was equally critical:

There are already responsibilities and obligations inherent in the concept of human rights ... These public interest factors are the other side of the same coin that stipulates our fundamental human rights and freedoms.

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 be compulsory ones, this must be done by way of some document or initiative other than through a new British Bill of Rights.²²⁵

261. When we pressed the Human Rights Minister on his suggestion that “there is a tendency among some people to assert [their rights] promiscuously and that devalues them”,²²⁶ he explained that there are certain people who fuel the public’s misunderstanding about the HRA by claiming rights under the Act in circumstances where in fact the limitation or restriction on their right is perfectly justifiable:

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.²²⁷

262. When we first saw the reference to “responsibilities” in the Governance of Britain Green Paper, we were concerned that the Government’s emphasis on responsibilities was another attempt to “rebalance” human rights law, by increasing the weight given to considerations such as safety and security. Including responsibilities within a Bill of Rights was seen by the Government as a way of ensuring that public authorities accord

²²⁴ Ev 131.

²²⁵ Ev 95-96.

²²⁶ Q 437.

²²⁷ Q 440.

appropriate priority to protection of the public when balancing rights.²²⁸ We demonstrated the falsity of the premise of this argument in our Report on the DCA Review of the implementation of the HRA.²²⁹ The HRA does not put prisoners' interests before public safety and there is no evidence that any public official had misinterpreted the Act as requiring that. **To the extent that the Government's interest in "responsibilities" balanced against rights is an attempt to reopen that argument about public safety, it is misconceived, for the reasons we have given in previous Reports.**²³⁰

263. It appears, on closer inspection of the Government's arguments, and in particular the evidence of Michael Wills MP cited above, however, that the Government's interest in "responsibilities", like its interest in characterising the rights in the HRA as "British", is primarily for presentational reasons: it is motivated by a concern to educate the public.²³¹

264. We find the Government's thinking about the relationship between rights and responsibilities extremely muddled. On the one hand, **we welcome the Government's apparently unequivocal acceptance that, in the words of Michael Wills MP, "rights are not contingent on discharge of responsibilities."**²³² **We agree and regard this as being of fundamental importance in this debate. Human rights are rights which people enjoy by virtue of being human: they cannot be made contingent on the prior fulfilment of responsibilities.**

265. On the other hand, we note that the Government also says that an individual's failure to carry out his or her responsibilities does have consequences for that individual's rights.²³³ We find the distinction between responsibility being a precondition of rights and loss of rights being a consequence of irresponsibility an elusive one to grasp. Notwithstanding the Government's unequivocal acceptance that rights are not contingent on the performance of responsibilities, we are left with a distinct unease about the message which is sent by the Government's determination to link rights to responsibilities. We appreciate the importance of educating the public about the true nature of human rights legislation, and displacing myths about human rights law only benefiting the undeserving. However, it is hard to escape the sense that the language of responsibilities is a rhetoric which plays well with those in the media and the public at large who are hostile to the HRA and indeed to any form of legal protection for human rights.

266. In our view, by insisting on the importance of "responsibilities" in any new Bill of Rights, Ministers tread a fine line between educating the public on the one hand and giving sustenance to the myths about the HRA which have been so damaging to that legislation. As we have observed before, in our Reports on the DCA Review of the HRA and our Annual Report for 2007, and in this Report in relation to the Government's

²²⁸ *Governance of Britain*, para. 210.

²²⁹ Thirty-second Report of Session 2005-06, *The Human Rights Act: the DCA and Home Office Reviews*, HL Paper 278, HC 1716.

²³⁰ See e.g., Thirty-second Report of Session 2005-06, *The Human Rights Act: the DCA and Home Office Reviews*, HL Paper 278, HC 1716.

²³¹ Qs 437-8.

²³² Q 487.

²³³ Martin Howe QC was similarly quite unequivocal that rights should not be contingent on the fulfilment of responsibilities, but at the same time he thought it is legitimate for the court to take into account, when an individual is seeking to enforce his or her rights, the extent, if it is relevant, that individual has failed to carry out his or her responsibilities: Q 20.

emphasis on “Britishness”, misperceptions about human rights should be countered by exposing them as misperceptions.

267. The responsibilities referred to by the Justice Secretary in relation to education, for example, are already legal obligations, enforceable under the ordinary law. It is an offence for parents to fail to ensure that their children attend school. **We cannot see what purpose is served by articulating a responsibility as general as the responsibility to obey the law, nor do we believe that a Bill of Rights is the place to set out legal responsibilities which are already legally binding on the individual. We do not accept that educating people about their legal responsibilities is an appropriate function of a Bill of Rights.**

268. The South African Constitution includes a reference to duties and responsibilities in its Founding Provisions concerning citizenship. It provides:

3 Citizenship

(2) All citizens are –

(a) equally entitled to the rights, privileges and benefits of citizenship; and

(b) equally subject to the duties and responsibilities of citizenship.

269. During our visit to South Africa we tried to ascertain exactly what this provision about duties and responsibilities means in practice and whether it has any practical application. We asked lawyers, academics, judges, politicians and NGOs, but no-one could provide us with an explanation of what it means. It does not appear ever to have been litigated, nor does it appear to feature very prominently in public discourse about the Constitution or the Bill of Rights.

Responsibilities already implicit in human rights standards

270. A number of witnesses noted that existing human rights standards already recognise responsibilities towards others which may, in certain circumstances, legitimately and proportionately restrict rights or imply a duty on an individual or body.²³⁴

271. The Justice Secretary cited Tom Paine, the author of *The Rights of Man*, in support of his view that a Bill of Rights ought to articulate the responsibilities owed as well as the rights to which people are entitled:

A Declaration of Rights is, by reciprocity, a declaration of duties also. Whatever is my right as a man is also the right of another and it becomes my duty to guarantee as well as to possess.²³⁵

272. Others before us have pointed out that this is a very selective quotation. As Sir Stephen Sedley recently observed:

... he [the Justice Secretary] may have overlooked the fact that Paine was making the point in order to demonstrate the shortsightedness of members of the French

²³⁴ Ev 100, 146 & 152.

²³⁵ *Modernising the Magna Carta*, 13 February 2008.

National Assembly who had demanded that the Declaration of the Rights of Man be accompanied by a declaration of duties. There was no need for the latter, Paine argued, because it was implicit in the former.²³⁶

273. It seems to us that the Government is saying no more, than that rights are capable of being limited by competing interests. That is already provided for in the text of the ECHR and to the extent that it is not appreciated, it is surely a matter for education of the public rather than any attempt to amend the text or to redefine in the text of any new Bill of Rights.

274. We are therefore strongly opposed to any UK Bill of Rights being called either a Bill of Rights *and Duties* or a Bill of Rights *and Responsibilities*. Rights should not be contingent on performing responsibilities, nor should a Bill of Rights impose enforceable duties on individuals or responsibilities which they are already required by the general law to discharge.

The proper relevance of responsibilities in human rights law

275. The evidence was by no means all one way on this issue, however. Some witnesses, such as the International Association for Human Values, supported including responsibilities within a Bill of Rights.²³⁷ Martin Howe QC was also, in principle, in favour of including responsibilities in a Bill of Rights, although he noted that this led to a broad range of choices as to what those responsibilities should be.²³⁸

276. The Equality and Human Rights Commission (EHRC) rejected the idea of including legally enforceable duties, but saw some value for responsibilities “as a discrete concept, [to] play a useful role in fostering a greater sense of greater social awareness, community cohesion and a culture of respect for others.”²³⁹ The EHRC referred to the example of the African Charter on Human and Peoples’ Rights:

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. 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.²⁴⁰

277. The JUSTICE Report on a Bill of Rights saw some value for including responsibilities in a preamble to the Bill but no further. Baroness Hale said:

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

²³⁶ *No Ordinary Law*, London Review of Books, 5 June 2008.

²³⁷ Ev 142.

²³⁸ Q 19.

²³⁹ Ev 129.

²⁴⁰ Ev 129.

in quite a few of the rights as they are and that seems uncontroversial and not difficult.²⁴¹

278. The fact that there was considerable support for there being *some* place for responsibilities in a UK Bill of Rights is not surprising when one recalls the shift which took place in the nature of human rights law in the mid-20th century. The broadening of the values which were the concern of human rights law, from the bundle of freedoms which make up negative liberty to include rights to a bare minimum of security, entailed the recognition by human rights law of positive obligations on states and duties and responsibilities on individuals. Article 1 of the Universal Declaration of Human Rights expressly states that human beings “should act towards one another in a spirit of brotherhood.” The preambles to both the ICCPR and the ICESCR also contain explicit references to duties and responsibilities:

... realizing that the individual having duties to other individuals and to the community to which he belongs is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.

279. **Responsibilities therefore often have some role to play in modern Bills of Rights, albeit falling far short of directly enforceable duties.** It may be in the form of a preamble referring to responsibilities; a limitation clause acknowledging that some rights can be justifiably limited to serve some other competing interest; positive obligations on the state to protect the rights of individuals against other private individuals; the indirect effect of the Bill of Rights on the law governing private relations because of the duty on courts to interpret the common law compatibly, including the common law governing private relations; or a prohibition on abuse of rights. All of these are manifestations of responsibilities being taken into account in Bills of Rights and none are controversial.

280. We now turn to consider two such examples of responsibilities playing a well established and accepted role in bills of rights: where private parties perform a public function they are bound by the Bill of Rights, and when courts apply the law in cases between private parties the court, as a public authority, must also act compatibly with the Bill of Rights.

Public function

281. One way in which the HRA was intended to impose responsibilities on private parties was by its definition of a public authority as including “persons certain of whose functions are of a public nature”. As is well known, in the *YL* case, a majority of the House of Lords held that a private residential care home was not performing a “public function” for the purposes of the HRA when providing services to an elderly person funded by the local authority pursuant to its statutory duties. We have consistently taken the view it was clear from the HRA that this was meant by Parliament in 1998 to be included within the definition of “public function” in the HRA.²⁴²

²⁴¹ Q 234.

²⁴² See e.g. Eighth Report of Session 2007-08, *Legislative Scrutiny: Health and Social Care Bill*, HL Paper 46, HC 303, paras. 1.8-1.10 & 1.14.

282. The Government has brought forward an amendment to the Health and Social Care Bill designed to reverse the effect of the *YL* judgment *on care homes*. It has not so far, however, brought forward any measure to reinstate what the Committee considers to have been Parliament's original intention when enacting the HRA. Instead it has said that it will consult on the matter as part of its forthcoming consultation on a Bill of Rights. This leaves unresolved the general problem of the meaning of "public authority" in the HRA, which continues to be a problem across a number of different sectors of Government activity. We have advocated resolving the general problem of the scope of the HRA by way of a separate bill amending or clarifying the meaning of "public function" in the HRA, to reinstate Parliament's original intention.

283. Professor Klug suggested that the Bill of Rights process provided an opportunity to get the public function test right, by undoing the House of Lords decision in *YL*.²⁴³ In our view, which we have frequently expressed in recent Reports, **the resolution of the *YL* problem in the HRA itself is relatively straightforward and need not await the outcome of the Bill of Rights process.** Our Chair has introduced private members bills designed to do so, but so far we have not persuaded the Government of the need to remedy this problem for all sectors as a matter of urgency.²⁴⁴

284. We asked the Government for its justification for not moving to solve this problem sooner in relation to the HRA, given the clarity of the Government's original intention when introducing the Human Rights Bill in 1997. We have still not received a substantive answer going beyond the assertion that there are those within Whitehall who are opposed to the HRA applying widely to those exercising a public function, and it appears that the Government would prefer to deal with these mysterious objections in private than expose them to the cold light of rational argument.²⁴⁵

285. Whatever happens in the interim in relation to the HRA, we are clear that **any UK Bill of Rights should find a way of achieving what was originally intended in the HRA, that is, binding private persons or bodies performing a public function.** In the outline Bill of Rights and Freedoms annexed to this Report we suggest the formulation put forward in our Chair's latest bill on this subject: it takes up a suggestion made by Baroness Hale in evidence to us,²⁴⁶ by listing the factors which have to be taken into account when deciding whether a particular function is a function of a public nature. The factors set out in the Bill are those referred to in the judgments of Lord Bingham and Baroness Hale in the *YL* case.

The effect of the Bill of Rights on private parties

286. In his lectures and speeches about the possible Bill of Rights, the Justice Secretary has referred to the "horizontal" of the South African Bill of Rights, that is, the fact that in certain circumstances it applies in disputes between private parties, such as in a defamation action against a newspaper. He cited Justice Kate O'Regan of the South African Constitutional Court, who explained that in South Africa when a court develops the common law, such as libel law, it must consider the obligations imposed by the Bill of

²⁴³ Q 25.

²⁴⁴ See, in the current session, the *Human Rights Act (Meaning of Public Function) Bill*.

²⁴⁵ Qs 470-480.

²⁴⁶ Q 229.

Rights. During the Committee's recent visit to South Africa, reference was frequently made to the "horizontal" of the South African Bill of Rights and a number of those with whom the Committee met expressed the view that any modern democratic Bill of Rights should have some horizontal effect because of the growing significance of private power. The Committee also heard that the courts in South Africa had been very cautious in the way in which they give effect to this aspect of the Bill of Rights, finding not that the Bill of Rights creates new free-standing causes of action against private parties, but that it imposes a duty on courts to develop existing causes of action where it is possible to do so.

287. Another way in which the HRA, through its application to public functions, imposes responsibilities on private parties is in the way that individuals employed to provide a public function are not able, without express statutory provision – which must itself be justified – to assert their right to manifest a personal belief (religious or otherwise) to deny access to public services to another person or persons, or to discriminate in the provision of such services. An example of the way this has been used is the restriction on the freedom of individuals or religious organisations working in adoption services to discriminate against gay and lesbian prospective parents. The balance of rights underpinning this is discussed more fully in our report on the Equality Act Sexual Orientation Regulations.²⁴⁷

We recommend that any UK Bill of Rights should make clear the responsibility, when performing a public function, to subordinate the manifestation of a personal belief which would discriminate against, or undermine the rights and freedoms of, others to the interests of those seeking to access public services.

288. We agree with the Government that any Bill of Rights should not have “direct horizontal effect”, that is, it should not give freestanding causes of action to individuals against other private parties for breach of their fundamental rights. We agree with Justice Kate O’Regan’s analysis that this would be a recipe for uncertainty and confusion, cutting across the well-established categories of private law liability, and giving rise in practice to difficult questions of practice and procedure.

289. However, we think it is important that any new Bill of Rights acknowledges the reality, already acknowledged by our courts under the HRA, that in certain circumstances certain rights impose a positive obligation on the State to ensure that some protection for the right is available against another private party, and that this may require the courts to develop the existing law governing relations between private parties where it is possible to do so. For example, in the well known case of Michael Douglas’s claim against *Hello* magazine for publishing his wedding photographs, the courts have developed the common law of breach of confidence in order to provide a remedy for a breach of the right to respect for privacy in Article 8, where that right imposed a positive obligation on the state to protect the rights against interferences by other private parties.²⁴⁸ Decisions about the right to respect for family life in Article 8 ECHR are frequently made by family law courts in cases between parents concerning custody and access. As Sir Stephen Sedley recently put it, writing in the *London Review of Books*:

²⁴⁷ Sixth Report of Session 2006-07, *Legislative Scrutiny: Sexual Orientation Regulations*, HL Paper 58, HC 350.

²⁴⁸ *Douglas and others v Hello! Ltd* [2001] 2 WLR 992. See also *Campbell v Mirror Group Newspapers* [2004] UKHL 22 and *HRH Prince of Wales v Associated Newspapers* [2006] EWCA Civ 1776.

One of the subtler but more profound shifts in the eight years of the HRA's operation has been the progressive realignment of a number of human rights from restrictions on the power of the state to positive standards of human conduct: in other words, from the vertical to the horizontal.²⁴⁹

290. The South African Bill of Rights includes a provision which expressly makes the Bill of Rights binding on a private party “if and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”²⁵⁰ On the face of it this looks like a radical departure from traditional conceptions of Bills of Rights, by imposing duties on private parties to act compatibly with the rights in the Bill of Rights (“direct horizontal effect”).

291. During our visit to South Africa we inquired whether this provision had resulted in frequent litigation against private parties for breach of fundamental rights. Justice Kate O'Regan told us that the provision in the Bill of Rights had been applied sensibly by courts, by the incremental development of existing causes of action, rather than as giving rise to any new free-standing cause of action.²⁵¹ In practice, it seems, the position under the South African Bill of Rights is therefore substantially the same as that which has been arrived at by UK courts under the HRA. It enables rights in the Bill of Rights to be relied on against private parties only where there is a positive obligation on the state to ensure that the right in question is protected against breaches by private parties and there is some pre-existing cause of action into which the claim can be fitted, if necessary by the courts developing the law to make the action possible (“indirect horizontal effect”). When we asked Baroness Hale how revolutionary it would 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, she said:

It would not be tremendously revolutionary because we have already, in a sense, applied concepts from the Human Rights Convention 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.²⁵²

292. In the light of the South African experience, **we recommend that any UK Bill of Rights should not include express provision along the lines of the equivalent South African provision giving full horizontal effect to the rights and freedoms in certain circumstances.** As Baroness Hale explained, the position of the indirect horizontal effect of the HRA has been arrived at as a result of the courts themselves being public authorities and therefore obliged to act compatibly with Convention rights, including in their

²⁴⁹ *No Ordinary Law*, London Review of Books, 5 June 2008.

²⁵⁰ Section 8(2) of the South African Bill of Rights.

²⁵¹ See also Q 25.

²⁵² Q 231.

application of the common law governing private disputes. The same effect can be achieved by similar means in any UK Bill of Rights.

293. In the outline Bill of Rights and Freedoms annexed to this Report, **we therefore suggest two provisions which should ensure the indirect horizontal effect of the rights and freedoms in the Bill.** They are both modelled on provisions already in the HRA but go slightly further, partly to spell out more clearly what our courts are already doing as a result of being public authorities under the Human Rights Act, and partly in the light of the lessons learned from South Africa.

294. **The first requires any court or tribunal interpreting any legislation or applying the common law, so far as it is possible to do so, to read and give effect to it in a way which is compatible with the rights and freedoms in the Bill and which promotes the purpose of the Bill.** This is modelled on the interpretive obligation in s. 3 of the HRA but it goes further by expressly making that obligation apply to the common law as well as statute and by requiring a reading of the relevant law which not only achieves compatibility with the rights and freedoms in the Bill but which promotes the purpose of the Bill as set out in the Preamble.

295. **The second includes the courts amongst the bodies under a duty to act compatibly with the rights and freedoms contained in the statement and to take active steps to promote and fulfil those rights and freedoms.** This is modelled on section 6(3)(a) of the HRA, which makes courts “public authorities” bound to act compatibly with Convention rights and has been the crucial provision requiring courts, in cases such as the *Hello* magazine case, to develop the common law to provide a remedy for violations of Convention rights in disputes between private parties. The provision in the outline Bill, however, goes slightly further by making clear that public authorities are under a positive obligation to take active steps to promote and fulfil the rights and freedoms, which in the courts’ case may require them to take the positive step of developing the common law in order to give a remedy for breach of a right or freedom.

9 Process

296. In the Hansard Society's recent *Audit of Political Engagement* (2008), people were asked to consider 11 constitutional issues and to rate their level of satisfaction or dissatisfaction with each.²⁵³ 63% of those questioned were "effectively neutral" on Britain not having a new Bill of Rights.²⁵⁴ When asked to consider the priorities for change, the most popular priority (26%) concerned how the HRA works in practice. A Bill of Rights was rated 8th out of 11 (14%). The Hansard Society concluded:

On all but two of the issues, a majority of the public at least takes sufficient interest to declare themselves satisfied or dissatisfied with the current arrangements. The two exceptions, which concern the unwritten Constitution and a Bill of Rights, are among the most technical and the vaguest, and it can reasonably be concluded that neither issue has any real resonance, at least when stated in these terms.²⁵⁵

297. On the basis of this research, the Government has an uphill task to stimulate and inspire public debate. As Professor Graham Smith of the Centre for Citizenship and Democracy told us, the Government will need to "drum up some interest" as "we are in a very unusual position here":

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.²⁵⁶

298. He also advised the Government to be innovative with its consultative process to capture the public imagination.²⁵⁷ He told the Committee:

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.²⁵⁸

299. Many witnesses stressed the importance of informed public debate on human rights and consultation on a Bill of Rights in order to ensure ownership by society as a whole: some regarded the process for creating a Bill of Rights as being as important as the end product.²⁵⁹

²⁵³ "The information in the Audit derived from the Political Engagement Poll undertaken by the Ipsos MORI Social Research Institute on behalf of the Hansard Society. Ipsos MORI interviewed a representative quota sample of 1,073 adults aged 18+ in Great Britain. Interviewing took place face-to-face, in respondents' homes, between 29 November and December 2007. The data have been weighted to the national popular profile." Hansard Society, *Audit of Political Engagement 5, the 2008 Report with a special focus on the Constitution*, (hereafter *Audit of Political Engagement*) p 8.

²⁵⁴ The Hansard Society concluded that 63% of people were "effectively neutral" as, in response to the question "thinking generally, to what extent are you satisfied or dissatisfied with [Britain not having a Bill of Rights]?" 21% responded that they did not know and 42% that they were neither satisfied nor dissatisfied. *Audit of Political Engagement*, p29.

²⁵⁵ *Audit of Political Engagement*, p 39.

²⁵⁶ Q 152.

²⁵⁷ Q 172.

²⁵⁸ Q 136.

²⁵⁹ Ev 99-100, 102, 136 & 145.

300. The Government appears to be alive to the importance of the process of agreeing and drafting a Bill of Rights, conscious perhaps of the failure of the HRA to secure a place in the public's affection. In recent lectures, the Justice Secretary has accepted that:

The [Human Rights] Act has not become an iconic statement of liberty like the US, or South African Bills of Rights. Perhaps this is because our statements of rights have been the production of evolution and not revolution.

We have not had to struggle for self-determination or nationhood, nor have we been torn apart by social strife, or had to fight bitterly for equality as in South Africa.²⁶⁰

And he noted:

If a Bill of Rights and Responsibilities ... is to be more than a legal document and become a "mechanism for unifying the population", it is vital that it is owned by the British people and not just the lawyers. For it to have real traction with the British people they must have an emotional stake in, and connection with it.²⁶¹

301. **We recognise that the UK is in a comparatively unusual position in embarking on a debate about a Bill of Rights at the present time. It is for this reason that it is vitally important that the Government gets the process for discussing a Bill of Rights right.** Many witnesses have stressed the importance of a full debate about any Bill of Rights, both politically and publicly. For example, Claire Methven O'Brien of the European University Institute said:

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 ... There can [...] be no substitute, in terms of democratic legitimacy and accountability, for the direct participation in constitution-making of 'ordinary' citizens and their representatives.²⁶²

302. Professor Sidoti agreed, noting "the importance of having ... fundamental issues debated not only in the community but also amongst some of the political leadership and ... across political and civil society."²⁶³

303. **Crucially, members of the public need to feel that any Bill of Rights is not a remote document, imposed on them by Government, but something they have helped create and which reflects their values. But discussion and agreement about a Bill of Rights should also include politicians, civil society organisations, private bodies, academics, and commentators. The key issue for the Government is how to create a process which is legitimate and accountable, facilitates full and effective engagement and participation and which answers three essential questions: (1) is a Bill of Rights necessary and desirable; (2) what should it contain; and (3) how should it work in practice?**

²⁶⁰ Mackenzie-Stuart lecture, 25 October 2007.

²⁶¹ *Modernising the Magna Carta*, George Washington University, 13 February 2008.

²⁶² Ev 155.

²⁶³ Q 104.

The Government's position

304. During the Prime Minister's statement on constitutional reform to the House of Commons on 3 July 2007, announcing the Government's intention to consult on the case for a Bill of Rights, he said:

... It is right to involve the public in a sustained debate about whether there is a case for the United Kingdom developing a full British Bill of Rights and duties, or for moving towards a written constitution. Because such fundamental change should happen only when there is a settled consensus on whether to proceed, I have asked my right hon. Friend the Secretary of State for Justice to lead a dialogue within Parliament and with people across the United Kingdom by holding a series of hearings, starting in the autumn, in all regions and nations of the country, and we will consult with all the other parties on this process.²⁶⁴

305. On 3 September 2007, the Prime Minister announced that:

...a Citizens' Summit, composed of a representative sample of the British people, will be asked to formulate the British statement of values that was proposed in our Green Paper on the future of government in Britain, a living statement of rights and responsibilities for the British people. It won't take root anyway unless there is a real sense that it has been brought forward by people themselves, and this will be part of the wider programme of consultation led by Jack Straw and Michael Wills on the British statement of values, the idea of a British Bill of Rights and Responsibilities, rights and duties, the components of the Constitutional Reform Bill...²⁶⁵

306. The Government has said that other engagement methods "might range from citizens' juries to deliberative polling and electronic and media-based outreach."²⁶⁶

Comparative experiences

307. The UK is not the only government to be embarking on discussions about a Bill of Rights. Two recent examples are Northern Ireland (where the process is ongoing) and some states in Australia (which have recently passed or are currently discussing federal Bills of Rights).

Northern Ireland

308. As Professor Brice Dickson, the former Chair of the Northern Ireland Human Rights Commission, told us, "many of the issues now arising for consideration concerning a British Bill of Rights had to be confronted in a Northern Ireland context".²⁶⁷

309. The Belfast (Good Friday) Agreement 1998 contemplates a Bill of Rights for Northern Ireland. In particular the Agreement requires the NIHRC:

²⁶⁴ HC Deb, 3 July 2007, col. 815.

²⁶⁵ Gordon Brown, *Speech to the National Council of Voluntary Organisations*, 3 September 2007.

²⁶⁶ *Governance of Britain*, para. 202.

²⁶⁷ Ev 121.

... to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and – taken together with ECHR – to constitute a Bill of Rights for Northern Ireland.²⁶⁸

310. A broad public consultation process was launched by the NIHRC in 2000, consisting of nine independently chaired working groups, a publicity campaign, seminars, conferences, training and education sessions, international visits, meetings with political parties, NGOs and the voluntary and community sectors and a series of consultation documents. The NIHRC published draft proposals in its consultation document *Making a Bill of Rights: A Consultation* which formed the subject of widespread debate. In April 2004, the NIHRC published *Progressing a Bill of Rights: An Update* which contained draft advice and a proposed Bill of Rights. Again, the NIHRC received responses to the *Progress Report*.

311. The process is widely considered to have lost momentum in 2002/03.²⁶⁹ This led to the establishment of the Northern Ireland Bill of Rights Forum, chaired by Professor Chris Sidoti. The Forum is an advisory body that was charged with making recommendations to the NIHRC on the content of a Bill of Rights by March 2008. It brought together the representatives of a broad range of political and civic society interests. The formal remit of Bill of Rights Forum was “to produce agreed recommendations to inform the Northern Ireland Human Rights Commission’s advice to Government.”²⁷⁰ As Professor Sidoti told us, the Forum is “much more a political process, attempting to negotiate common positions” which builds on the public consultation carried out by the NIHRC.²⁷¹

312. The Forum agreed five principles as the basis of its work:

- “A Bill of Rights is needed to provide strong legal protection for human rights for all the people of Northern Ireland;
- The Bill of Rights should be in accordance with universal human rights standards, reflecting the particular circumstances of Northern Ireland;
- The Bill of Rights must be effective, realistic and implementable;
- The Bill of Rights must address the needs of the poorest and most marginalised, recognising that, while the Bill of Rights is for everyone, assisting the poor and marginalised is the surest way of helping everyone;

²⁶⁸ Belfast (Good Friday) Agreement 1998, p. 20, para. 4.

²⁶⁹ Ev 26.

²⁷⁰ Available at http://www.billofrightsforum.org/index/what_we_do.htm.

²⁷¹ Q 92.

- While the past cannot be ignored but must be taken into account, the present spirit of optimism and hope should be reflected in the Forum’s work and the Bill of Rights should be aspirational and look to the future.²⁷²

313. The Forum met 18 times in plenary session and had seven working groups on discrete issues, which met regularly between July 2007 and February 2008. According to Professor Sidoti, the Forum did “not have a consultation role but we are engaged in a fairly limited outreach programme” consisting of 4 half-time outreach workers.²⁷³

314. The Forum published its final Report on 31 March 2008. The Report focuses on seven main areas:

- Equality
- Personal integrity
- Freedoms
- Social and economic participation
- Justice, including victims
- Citizens’ rights and
- Rights particular to specific groups, including children and young people and women.²⁷⁴

315. The NIHRC is currently considering the Report. It has developed and published guidelines which will inform its discussion on what rights should be included in its advice to the Secretary of State for Northern Ireland, to whom it is due to make recommendations by 10 December 2008.²⁷⁵

316. The Committee on the Administration of Justice and British Irish Rights Watch, along with Professors Sidoti and Dickson, suggest that there is much to learn, both good and bad, from the experience gained in Northern Ireland.²⁷⁶ As British Irish Rights Watch told us:

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

²⁷² *Bill of Rights Forum Final Report: recommendations to the Northern Ireland Human Rights Commission on a Bill of Rights for Northern Ireland*, 31 March 2008, p. 7.

²⁷³ Q 118.

²⁷⁴ *Bill of Rights Forum Report*, 31 March 2008.

²⁷⁵ Annex 3.

²⁷⁶ Ev 101-102 & 119, Qs 81-129.

content ... Secondly, that process must have the wholehearted backing of government and must be adequately resourced. Thirdly, content is also important ... 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.²⁷⁷

317. Discussions about a Bill of Rights in Northern Ireland have taken place against a very particular political background, which is not present throughout the UK. It would therefore not be appropriate for the UK Government to follow this model wholesale. However, there are positive aspects of the Northern Ireland approach which should be taken into account in designing the UK process, particularly its engagement with the public and its referral to an independent body for recommendations.

Australia

318. A number of Australian states have enacted or are discussing federal Bills of Rights or human rights protection.²⁷⁸ We consider the process leading to the Victorian Charter below.

Victoria

319. In the Australian state of Victoria, the Attorney-General issued a public statement that raised the possibility of a wide range of reforms to the justice system, including the desirability of a Charter of Rights and Responsibilities. A four person consultation committee was established²⁷⁹ and held a six month consultation based on the government's preferred human rights model.

320. A number of consultation methods were used, including:

- community meetings
- information sessions
- public forums
- various specific consultations targeting groups such as the judiciary, indigenous people, religious organisations, business, the police, academics and lawyers.

321. Special attention was paid “to meet[ing] people who knew little or nothing about human rights and who might be the most alienated from the political and legal system” and particular material developed for young people.²⁸⁰ The Chair of the Committee has described the meetings as follows:

²⁷⁷ Ev 102.

²⁷⁸ E.g. the Australian Capital Territory; and the states of Victoria, Tasmania, New South Wales and Western Australia.

²⁷⁹ Comprising Rhonda Galbally AO, renowned for her role in addressing disadvantage and her advocacy for people with disabilities, Andrew Gaze, basketballer and captain of the Sydney 2000 Olympic team, the Hon Professor Haddon Storey QC, a former Victorian Liberal Party Attorney General and Professor George Williams (Chair).

²⁸⁰ *Williams*, p. 75.

These were not open town hall meetings, but meetings arranged through community organisations or in some cases through information provided via the local media. The meetings were structured so that a large part of the time was spent listening to people and what they thought about the issues, followed by us providing the basic information they needed to have a say. We then directed the conversation to questions we needed help in answering. At the end of each meeting we encouraged people to reflect on the discussion, to talk to other people in their families and workplaces and to make a submission to the committee in writing. We also made a commitment to read every submission we received.²⁸¹

322. The Committee also issued a discussion paper, took written and oral evidence, and made extensive use of web and e-mail resources to distribute information and to consult. According to the Chair of the Committee, many people who would not have been prepared to attend a meeting or provide a written submission in the usual way were prepared to contribute evidence through online media.

323. Alongside the community process, the Justice Department set up an interdepartmental committee to shadow the process “so that as ideas emerged, but before our Report was written, departments had a chance to comment to make sure that our views were informed by current practice.”²⁸²

324. This led to a summary document being published in several languages and a draft bill being prepared by the state’s parliamentary counsel. This draft bill was enacted with minor modifications by the Victorian Parliament and most of it came into force on 1 January 2007. The process was therefore completed in just over a year.

325. The process in Victoria has been described by JUSTICE as a “good example of a thorough consultation which aimed at and succeeded in including all sections of society and generating a feeling of public ownership”.²⁸³ **We are impressed by the innovative approach to consulting on the Victorian Bill of Rights, and in particular its focus on public engagement.**

326. **Whilst we accept that every country is different, we urge the Government to take into account the processes which were run in the state of Victoria and in Northern Ireland, which in our view had many merits, including the effective engagement of the public.**

Minimum requirements of the process

327. In this section of the Report, we set out what we regard as the minimum requirements of the process for discussing a Bill of Rights, based on the evidence we have received and the comparative material reviewed.

²⁸¹ *Ibid.*, p. 75.

²⁸² *Ibid.*, p. 76.

²⁸³ *A British Bill of Rights: Informing the Debate*, November 2007, p. 94.

Bottom-up not top-down

328. In February 2007 JUSTICE published a paper, *A Bill of Rights for Britain: Discussion Paper* which stated:

Any move to introduce a British Bill of Rights must start with a comprehensive public education campaign and a major consultation process, as happened in Northern Ireland. This is essential to obtain sufficient public awareness and consensus over its content. We consider that the bill in its final form should also be confirmed by a referendum.²⁸⁴

329. Many witnesses agree with the Government that the public need to be fully involved in discussions about a Bill of Rights.²⁸⁵ As Democratic Audit explained, any Bill of Rights needs to be “a genuinely popular document.”²⁸⁶ Unlock Democracy told us:

... for the citizens to possess a constitution they need to have built it themselves.²⁸⁷

And:

Part of the process of public consultation is raising public awareness and understanding. The other part is legitimising a decision.²⁸⁸

330. However, Professor Vernon Bogdanor cautioned that “the danger is that the consultation is purely amongst the articulate.”²⁸⁹

331. Whilst recognising the importance of public ownership, the Government does not yet appear to have a clear view of the process it intends to follow. When we asked for further information on what the consultation process would entail, the Justice Secretary replied that “details will be given in the Green Paper” but that he expected “the engagement process to start from the date of publication and run for several months”.²⁹⁰

332. In oral evidence, the Justice Secretary said:

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 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.²⁹¹

²⁸⁴ JUSTICE, *A Bill of Rights for Britain: Discussion Paper*, February 2007, p. 4.

²⁸⁵ Ev 99-100, 102, 136 & 145.

²⁸⁶ Ev 123.

²⁸⁷ Ev 177.

²⁸⁸ Q 148.

²⁸⁹ Q 278.

²⁹⁰ Ev 183.

²⁹¹ Q 495.

333. The Human Rights Minister has spoken about the Government's intention to introduce new processes of democratic engagement (such as a citizen's summit on the British Statement of Values) but he cautioned against measures which "pass[...] control of our democracy to the wealthy and powerful." He suggested that any mechanisms to engage people with democratic processes must fulfil five conditions to be successful: (1) register with the public; (2) be credible; (3) be open and transparent; (4) be systemic and (5) be consistent with representative democracy.²⁹² In his letter to the Committee, the Human Rights Minister referred to the need to engage with harder-to-reach constituencies and of his desire to reach a cross-party consensus.²⁹³

Inclusivity

334. A number of different models for public engagement exist. From the evidence we have heard, and the experiences of other countries, it is clear that there is no single answer as to how best to run such a process. However, any process should strive for inclusivity, and be regionally, ethnically and culturally representative. According to Professor Brice Dickson, this was the main lesson to be learnt from the Northern Ireland experience.²⁹⁴

335. As Unlock Democracy put it:

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 ... 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.²⁹⁵

336. We heard convincing argument from the Children's Rights Alliance for England that children should be involved in any consultation on a UK Bill of Rights.²⁹⁶ The importance of involving children and young people is endorsed by the comparative experiences of Northern Ireland and Victoria. **We recommend that children and young people should be included in the consultation on a Bill of Rights.** As Claire Methven O'Brien told us, there is no "magic bullet" when aiming to consult difficult to reach groups.²⁹⁷ Instead we heard that "whichever approach is used the process has to be deliberative, open, representative, and most importantly independent of Government and political parties."²⁹⁸ **A number of different processes may need to be run in tandem, with particular methods being used to target specifically harder to reach groups.**

²⁹² *Kick-starting a national debate on a Bill of Rights and Responsibilities*, 5 March 2008.

²⁹³ Ev 179.

²⁹⁴ Q 82.

²⁹⁵ Ev 178.

²⁹⁶ Ev 116.

²⁹⁷ Ev 155.

²⁹⁸ Ev 176.

Deliberative techniques

337. A number of witnesses pointed to the advantages of using *deliberative* techniques to consult on a matter such as a Bill of Rights.²⁹⁹ For example, Unlock Democracy told us:

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.³⁰⁰

338. The Justice Secretary stated that:

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.³⁰¹

339. In *Deliberative Public Engagement: Nine Principles*, deliberative engagement is described as:

An approach to decision-making that allows participants to consider relevant information, discuss the issues and options and develop their thinking together before coming to a view.³⁰²

340. Some witnesses told us that people need to be able to set the agenda and raise issues, rather than responding to a set of pre-determined questions.³⁰³ However, not all witnesses agreed that this was the appropriate model to follow. For example, Kenneth Clarke MP was content to have a traditional process of consultation. He told us:

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.³⁰⁴

341. The Human Rights Minister said:

One of the keys to [consultation] 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

²⁹⁹ See para. 320 above for an example of deliberative engagement in Victoria.

³⁰⁰ Ev 178.

³⁰¹ Ev 183.

³⁰² National Consumer Council. *Deliberative public engagement: nine principles*, June 2008, p. 2.

³⁰³ Ev 155.

³⁰⁴ Q 278.

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.³⁰⁵

342. In our view, the process for consulting the public should be deliberative. It is not sufficient for people to be asked for their views once, without any prior opportunity for thought and reflection. Proper consultation on matters such as constitutional reform requires people to be able to understand the issue first, before they embark in a serious discussion about it. People need to have an opportunity to continue to discuss their views with others over a defined period, and to change their minds in light of those discussions. Additionally, people need to be able to bring issues to the table, and not be entirely constrained by an agenda set centrally by Government.

Independence from Government

343. However, witnesses have noted that public consultation should involve more than deliberative techniques alone. For example, Professor Blackburn recommended that the question of a Bill of Rights should be referred to a “genuinely independent” commission with a membership “having the confidence of the political parties represented in Parliament.”³⁰⁶ Similarly, “deliberative techniques alone are insufficient – the assembly has to be seen to be independent and have the power to propose change.”³⁰⁷ The Victorian consultation was conducted by an ad hoc committee of four independent people.³⁰⁸

344. Designing such a process is not easy and requires some sophisticated thinking and advice from organisations with expertise in effectively engaging the public. This is not, in our view, a role for Government. We recommend that an existing specialist body (with expertise in engaging the public in meaningful discussions about important constitutional issues) be employed or an ad hoc committee be appointed to conduct an effective and innovative consultation process and make recommendations to the Government. In order to command public and political confidence in the outcome, the body must be independent of Government.

Timing

345. The JUSTICE Report, *A British Bill of Rights: Informing the Debate*, advises:

Keep the process within a time limit. Momentum is crucial and support can dissipate quickly. A timeframe will maximise the chances of maintaining energy, commitment and discipline around the issue. A reason that the Victorian process in Australia worked was that it took place over six months with then another six or so months leading to the introduction of the law. The unlimited timeframe that has been established in Northern Ireland, for example, may have been less successful – even allowing for particular political circumstances in Northern Ireland – in encouraging crucial consensus.³⁰⁹

³⁰⁵ Q 495.

³⁰⁶ Ev 97.

³⁰⁷ Ev 178.

³⁰⁸ See para. 318 above.

³⁰⁹ *A British Bill of Rights: Informing the Debate*, p. 115.

346. The period for public engagement should be time limited, but long enough to permit a proper engagement by the public with the key issues. We suggest that a period of six months to one year would be appropriate.

Resources

347. Unlock Democracy described the innovative “cascading” process used to involve people in the Northern Ireland Bill of Rights Forum process,³¹⁰ but noted that “if we were to replicate the process and scale it up for a UK Bill of Rights there would need to be approximately 15,000 facilitators for the cascading element alone”.³¹¹ Another witness noted:

... legitimacy is directly related to the quantity of participation ... 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.³¹²

348. The Justice Secretary said that the Bill of Rights process will be resourced from the wider *Governance of Britain* programme.³¹³

349. Whilst we do not consider that the situation in the UK requires such an intense public consultation process as was carried out in Northern Ireland, nevertheless in our view, for the Bill of Rights process to be effective and have any legitimacy, it needs to be adequately resourced, in particular to ensure that harder to reach and less financially able or established groups or communities are able to contribute to the discussions in a meaningful way.

The role of Government

350. The Government has a number of specific roles to play at different stages of the process. We note that the Government intends to take the lead on the Bill of Rights programme. As the Justice Secretary told us:

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.³¹⁴

351. We recommend that the Government lead the overall process for drafting a Bill of Rights, but not for engaging with the public.

³¹⁰ Ev 178: “Cascading involved training just over 500 facilitators to go out into the community and talk about the Bill of Rights process.”

³¹¹ Ev 178.

³¹² Ev 155.

³¹³ Ev 183.

³¹⁴ Q 499.

Non-negotiables

352. Many witnesses agreed that the starting point for any discussion of a Bill of Rights should be that it builds on and does not weaken existing human rights protection, for example:

... 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.³¹⁵

353. We were reassured by the Justice Secretary's assurance that there would be no weakening of existing human rights protection if there were to be a Bill of Rights.³¹⁶ **We consider that there are certain non-negotiables, such as this, which the Government should set out at the start of the process. We recommend that a set of guiding principles be drawn up to provide a basis for the work of the body conducting the consultation, and we suggest that they could say something along the following lines (all considerations canvassed in this Report):**

The guiding principles are that any modern UK Bill of Rights must:

- **Build on the HRA without weakening its mechanisms in any way**
- **Supplement the protections in the ECHR**
- **Be in accordance with universal human rights standards**
- **Protect the weak and vulnerable against the strong and powerful**
- **Be aspirational and forward-looking**
- **Apply to the whole of the UK geographically**
- **Apply to all people within the UK**
- **Provide strong legal protection for human rights**
- **Enhance the role of Parliament in the protection of human rights.**

354. **Similarly, before the process for public engagement starts, the Government should set out its position on a range of key issues, as the state Government did in Victoria, in order to be clear about what is realistically achievable.** Having concluded the public engagement process, the independent body should publish its recommendations to the

³¹⁵ Ev 167.

³¹⁶ Q 422.

Government. **Following the report of the independent body, it would be a matter for the Government as to the next steps.**

Conclusions and recommendations

Does the UK need a Bill of Rights?

1. We agree with those who say that a high degree of consensus for a Bill of Rights is desirable. We do not, however, think that there need be unanimity about every aspect of a Bill of Rights. There needs to be sufficient consensus across party lines to make the process of adopting a Bill of Rights a truly constitutional event, rather than a party political one. (Paragraph 25)
2. We regret that there is not greater clarity in the Government's reasons for embarking on this potentially ambitious course of drawing up a Bill of Rights. A number of the Government's reasons appear to be concerned with correcting public misperceptions about the current regime of human rights protection, under the HRA. We do not think that this is in itself a good reason for adopting a Bill of Rights. As we have consistently said in previous Reports, the Government should seek proactively to counter public misperceptions about human rights rather than encourage them by treating them as if they were true. (Paragraph 33)
3. A great deal of our work in this Parliament has concerned the vulnerable and the marginalised: older people in healthcare, asylum seekers, adults with learning disabilities, and children in secure training centres for example. We have often pointed out serious shortcomings in the protection of the human rights of these vulnerable and marginalised people. Whilst not diminishing the obligation on Parliament to legislate effectively and in compliance with human rights principles, strengthening the legal protection for the rights of such people should in our view be one of the principal purposes of any new Bill of Rights. (Paragraph 34)
4. We believe it is important that any UK Bill of Rights includes strong legal protections for freedoms such as freedom of assembly, freedom of expression, freedom from unreasonable search and seizure, and freedom from unwarranted intrusions on privacy, all of which are essentially negative liberties from state interference. For this reason, we believe any bill of rights should be called a UK Bill of Rights and Freedoms. (Paragraph 38)
5. Although a Bill of Rights may have many merits, it is both legally and empirically incorrect to suggest that a Bill of Rights would lead the European Court of Human Rights to give a greater margin of appreciation to the UK than is currently the case. This argument is not, in our view, a good argument for the adoption of a UK Bill of Rights. (Paragraph 42)
6. We agree that any UK Bill of Rights has to be "ECHR plus". It cannot detract in any way from the rights guaranteed by the ECHR. (Paragraph 50)
7. The issue is not whether the Bill of Rights is going to be compliant with the ECHR, which is a fairly low threshold, but whether it is going to be "HRA-plus", that is, add to and build on the HRA as the UK's scheme of human rights protection. (Paragraph 51)

8. In our view it is imperative that the HRA not be diluted in any way in the process of adopting a Bill of Rights. Not only must there be no attempt to redefine the rights themselves, for example by attempting to make public safety or security the foundational value which trumps all others, but there must be no question of weakening the existing machinery in the HRA for the protection of Convention rights. (Paragraph 53) We therefore welcome the unequivocal assurance given to us by the Justice Secretary that there is nothing in the Bill of Rights project, as far as the Government is concerned, that is going to weaken the HRA. We recommend that that this unequivocal assurance is made the starting point of any future consultation on a Bill of Rights. (Paragraph 54)
9. There is scope for a Bill of Rights to go beyond the “floor” of the Convention rights as interpreted in Strasbourg, and to supplement those rights with more generously defined indigenous rights. (Paragraph 56)
10. Notwithstanding various arguments against a Bill of Rights, discussed in this Report, we consider that there is considerable scope for a Bill of Rights to add to what is already provided in the HRA and we are therefore satisfied that the case for a Bill of Rights is made out. (Paragraph 62)
11. We agree that there must be no question of repealing the Human Rights Act unless and until a Bill of Rights, protecting human rights to at least the same extent as the Human Rights Act, is enacted (Paragraph 63)
12. We recommend that any new Bill of Rights should be both declaratory and aspirational. It should state and make fully enforceable all those fundamental rights which currently exist. But it should also look to the future by setting out a clear vision of the sort of society to which the country aspires. A preamble and an appropriate interpretive provision referring back to the preamble could provide the aspirational dimension which is missing from the HRA. (Paragraph 69)
13. Bills of Rights are capable of emerging from deliberative processes conducted in settled democracies in normal times. (Paragraph 73)

A “British” Bill of Rights on the Devolution Dimension

14. The rights enshrined in the HRA apply to everyone in the UK, irrespective of their citizenship or immigration status. Bills of Rights protect rights which people have by virtue of being human, not according to their legal status as citizen or non-citizen. It is regrettable that the loose language of the Governance of Britain Green Paper appeared to suggest that some of those rights – such as equality before the law – are associated with citizenship. We welcome the Justice Secretary’s acknowledgement that fundamental human rights cannot be restricted to apply solely to citizens. We also note that there are rights – such as the right to vote – which are legitimately linked to citizenship. Nevertheless, we are concerned that by making an explicit link between human rights and citizenship, the Government may foster the perception that non-citizens are not entitled to fundamental human rights. It risks turning the important debate about a Bill of Rights into a surrogate for anti-outsider sentiments, rather than an opportunity to define and celebrate the values regarded as particularly

fundamental in the UK as a nation state. We call on the Government to decouple the debate about a Bill of Rights from the debate about citizenship and the rights and duties of the citizen, and to ensure that in future the universality of fundamental human rights is explicitly recognised in documents and speeches relating to a Bill of Rights. (Paragraph 84)

15. Whilst we have serious concerns about the link being made by the Government between human rights on the one hand and the duties of citizenship on the other, we acknowledge that there is an inevitable and entirely appropriate link with the question of national identity. A national Bill of Rights is an expression of national identity and the process of drawing one up deliberately invites reflection about what it is that “binds us together as a nation,” what we regard as being of fundamental importance, and which values we consider to guide us. It is potentially a moment of national definition. (Paragraph 88)
16. Unlike the Justice Secretary, however, we also see an issue which needs to be addressed, in that there would appear to be difficulties associated with establishing a Bill of Rights on the basis of a statement of ‘British’ values which may or may not be accepted by the people who consider themselves to be, for example, ‘English’, ‘Scottish’, ‘Irish’ or ‘Welsh’, but not ‘British’. (Paragraph 93)
17. We accept that a Bill of Rights for this country should include indigenous rights, not in the sense of rights which can only be claimed by British citizens, but in the sense of rights and freedoms which have attained a status of fundamental importance in this country’s traditions and which therefore merit inclusion in any catalogue of the rights, freedoms and values which are considered to be constitutive of this country’s identity. However, we are not persuaded that the term “British” Bill of Rights is a helpful description of the Government’s proposal. It suggests a link with citizenship which, for many rights, would be inappropriate; it excludes Northern Ireland; and it is not necessarily inclusive of people in the UK who consider themselves to be English, Scottish, Irish or Welsh, for example, but not British. The term “UK” Bill of Rights would be more accurate and appropriate and would also serve to demonstrate that the rights it contained are “owned” by the people of the UK. (Paragraph 99)
18. A UK Bill of Rights must be based on a detailed dialogue between central government and the devolved administrations. We note that this dialogue does not yet seem to have begun. (Paragraph 104)
19. The devolution settlement creates certain difficulties for a UK Bill of Rights, but we do not accept that it creates an insuperable obstacle to such a Bill. Ever since the Universal Declaration of Human Rights, human rights norms have gradually become embedded at global, regional and national level. Provided the hierarchy between these levels is clear, there is a positive virtue in the broadly defined rights in the international standards being fleshed out into more concrete norms and standards at the regional, national and sub-national level. Each Bill of Rights, from the global through the regional to the national and sub-national levels, becomes more specific and detailed in its provisions, and is free to be more generous but must not fall below the minimum floor of the higher level of protection. In our view, the devolution settlement creates fewer difficulties than face federated states in this respect, because

constitutional matters, including human rights, are not devolved matters. (Paragraph 107)

20. We agree with the Government that the UK's devolved governance arrangements do not preclude a UK Bill of Rights from being drawn up. We also agree with Professor Dickson that having Bills of Rights at both the national and the devolved levels is desirable. Early engagement with the devolved administrations is necessary, however, to deal with areas in a UK Bill of Rights which relate to devolved matters and to address differences between the UK's three legal jurisdictions. (Paragraph 110)

What should be included in a UK Bill of Rights?

21. We agree in principle that, if there is to be a UK Bill of Rights, as we believe there should be, it ought to have a Preamble which sets out, in a simple and accessible form, first, the purpose of adopting a UK Bill of Rights and, second, the values which are considered to be fundamental in UK society. (Paragraph 114)
22. In our outline Bill of Rights and Freedoms we suggest that the Preamble to a UK Bill of Rights could simply state that it is adopted to give lasting effect to the values which are considered fundamental by the people of the United Kingdom, followed by a short list of those values. (Paragraph 115)
23. The list of values above [in paragraph 115] is intended to cover some of the aspects of the principal human rights traditions referred to in chapter 1 above, embracing liberty in both its negative and positive senses, and fairness in both a procedural and substantive sense. Civic duty, is intended to reiterate the idea of responsibilities, which is already implicit in the very concept of rights. We also suggest including two fundamental values which define our institutional arrangements: democracy, and the rule of law. (Paragraph 116)
24. We consider that the Bill of Rights should also have a strong interpretive clause requiring any body interpreting the Bill of Rights to strive to achieve the purpose of the Bill of Rights and to give practical effect to the fundamental values underpinning it, as set out in the Preamble. (Paragraph 117)
25. We consider the Government's consultation on a Statement of Values to be premature and we recommend that it be conducted at the same time, and using the same process, as the forthcoming consultation on a Bill of Rights. We suggest what that process should be in chapter 9 below. (Paragraph 118)
26. On this basis, we agree with those who say that a UK Bill of Rights should include the right to trial by jury in serious cases in England, Wales and Northern Ireland (there being no tradition of jury trial in Scotland's separate criminal justice system). In the parliamentary model of human rights protection which we favour, as explained in chapter 7 below, this does not mean, as Kenneth Clarke MP feared, that limitations and restrictions on the right will be "ruled out of court" on human rights grounds. Limitations on rights included in any UK Bill of Rights will be possible, provided they can be shown to be justified. Parliament will therefore continue to be able to look at the question of limitations on the right, and entitled to restrict it where that

can be shown to be necessary to meet another important objective. Inclusion of the right in a UK Bill of Rights should, however, ensure that only such demonstrably justifiable restrictions are imposed. (Paragraph 127)

27. We agree that [the right to administrative justice] is a strong candidate for inclusion in a UK Bill of Rights as a nationally distinctive right. (Paragraph 128)
28. Any Bill of Rights should include a saving provision making clear that nothing in the Bill of Rights denies the existence or restricts the scope of rights or freedoms recognised at common law. (Paragraph 132)
29. We recommend that the Government consults on whether there are rights in human rights treaties to which the UK is a party which are candidates for incorporating into a Bill of Rights. There may be rights contained in those treaties which do not yet find their articulation in domestic law and which could be included in any Bill of Rights if it were considered appropriate. (Paragraph 136)
30. We recommend that a Bill of Rights include a provision requiring courts to pay due regard to international law, including international human rights law to which the UK is a party, when interpreting the Bill of Rights. (Paragraph 137)
31. We have often made reference in our Reports to the need to give better effect to provisions in the UN Convention on the Rights of the Child and have also called for the incorporation into UK law of some of the rights, principles and provisions in the Convention. We have also urged the Government to ratify the UN Convention on the Rights of Persons with Disabilities. There is a strong case for any Bill of Rights to include detailed rights for certain vulnerable groups such as children; and there should be consultation as to whether to include specific rights for other groups such as disabled people, religious, linguistic and ethnic minorities, workers (including migrant workers) and victims of crime. (Paragraph 145)
32. In our view the case is clearly made out for the inclusion of a number of additional rights in any UK Bill of Rights, particularly in relation to rights which can be distilled from the UK's distinctive traditions. However, it is important that both this question and the precise definition of any additional rights, be the subject of proper public consultation. (Paragraph 146)

Economic and Social Rights

33. We agree with the reasoning and conclusion of our predecessor Committee that the case for developing domestic formulations of economic and social rights as part of a UK Bill of Rights merits further attention and our Report now picks up where its Report left off. (Paragraph 157)
34. We welcome the Prime Minister's acknowledgment that rights such as the right to health are considered of fundamental importance to people and his indication that the forthcoming consultation and debate about a Bill of Rights would not seek to preclude discussion of whether economic and social rights should be included in any such Bill of Rights. (Paragraph 161)

35. We welcome the Government's preparedness to reconsider its position in relation to the inclusion of economic and social rights in any UK Bill of Rights and its recent acknowledgment that there is a continuum of possible positions. (Paragraph 164)
36. We agree with the Government that including fully justiciable and legally enforceable economic and social rights in any Bill of Rights carries too great a risk that the courts will interfere with legislative judgments about priority setting. Like our predecessor Committee, we recognise that the democratic branches (Government and Parliament) must retain the responsibility for economic and social policy, in which the courts lack expertise and have limited institutional competence or authority. It would not be constitutionally appropriate, in our view, for example, for the courts to decide whether a particular standard of living was "adequate", or whether a particular patient should be given priority over another to receive life-saving treatment. Such questions are quite literally non-justiciable: there are no legal standards which make them capable of resolution by a court. (Paragraph 167)
37. This model [social and economic guarantees as goals] avoids the pitfalls of the first model [legally enforceable rights] because it keeps the courts out altogether. In our view, however, it risks the constitutional commitments being meaningless in practice. When some possibility of judicial enforcement exists, it is more likely that the relevant rights will in practice receive respect. (Paragraph 169)
38. These cases show that the South African Constitutional Court has steered a middle path between the two models described above. It has expressly rejected an approach which would require the State to provide certain minimum standards of economic and social rights to all, because it recognizes that the courts are ill-equipped to adjudicate on issues where court orders could have multiple social and economic consequences for the community. But at the same time it has recognized that there is some, albeit restrained, role for the courts, namely to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of those measures to evaluation. In our view, the South African courts have shown that the courts can be given a limited role in relation to social and economic rights without becoming the primary decision makers. (Paragraph 181)
39. In our view the main objections to the inclusion of social and economic rights in a Bill of Rights are not, in the end, objections of principle, but matters which are capable of being addressed by careful drafting. Having given the matter further attention, as recommended by our predecessor Committee, we are persuaded that the case for including economic and social rights in a UK Bill of Rights is made out. We agree with Justice Albie Sachs who told us during our visit to South Africa that a country which does not include social and economic rights in some form in its Bill of Rights is a country which has "given up on aspiration". We consider that rights to health, education and housing are part of this country's defining commitments, and including them in a UK Bill of Rights is therefore appropriate, if it can be achieved in a way which overcomes the traditional objections to such inclusion. (Paragraph 191)
40. We therefore put forward for consideration an approach which draws inspiration from the South African approach to economic and social rights, but which contains additional wording designed to ensure that the role of the courts in relation to social

and economic rights is appropriately limited. The broad scheme of these provisions is to impose a duty on the Government to achieve the progressive realisation of the relevant rights, by legislative or other measures, within available resources, and to report to Parliament on the progress made; and to provide that the rights are not enforceable by individuals, but rather that the courts have a very closely circumscribed role in reviewing the measures taken by the Government. (Paragraph 192)

41. We recommend that any Bill of Rights should in the first place include only rights to health, education, housing, and an adequate standard of living, with a view to reviewing the experience after a period and considering whether to add other social and economic rights not currently included. (Paragraph 196)
42. We also agree with the view of our predecessor Committee that rights such as the right to adequate healthcare, to education and to protection against the worst extremes of poverty touch the substance of people's everyday lives, and would help to correct the popular misconception that human rights are a charter for criminals and terrorists. In our view, the inclusion of such rights in a UK Bill of Rights would be far more effective in countering that misperception than the Government's attempt to link rights with responsibilities in the popular imagination. (Paragraph 197)

“Third generation rights”

43. In our view there is a strong case to be made for including the right to a healthy and sustainable environment in a UK Bill of Rights. The briefest consideration of the status of the right in international instruments and national constitutions shows that the right has evolved into one which is clearly capable of legal expression. We believe that a UK Bill of Rights should treat it as one of the social rights for which a particular legal regime can be devised. We recommend that the forthcoming consultation on a Bill of Rights should expressly include the right to a healthy and sustainable environment amongst the rights treated as candidates for inclusion in a UK Bill of Rights. (Paragraph 210)

Relationship between Parliament, Executive and the Courts

44. We are not in favour of a Bill of Rights which confers a power on the courts to strike down legislation. We consider this to be fundamentally at odds with this country's tradition of parliamentary democracy. In our view the innovative and widely admired parliamentary model of human rights protection contained in the HRA is the appropriate model of rights protection for our democracy. Within that model, we consider that there is scope to enhance Parliament's role further, at the same time as strengthening the protection provided for human rights, as discussed below. (Paragraph 218)
45. A UK Bill of Rights could make explicit (in a way that the HRA does not) that Parliament continues to have the power of “legislative override”, by expressly declaring in an Act of Parliament that the Act or any provision in it shall operate notwithstanding anything contained in the Bill of Rights. (Paragraph 223)

46. To enhance democratic scrutiny of the compatibility of a Government measure with any Bill of Rights, the Bill could require Ministers to provide full statements of compatibility, containing the reasons for the Minister's view that a measure is compatible with the Bill of Rights. It could also extend its application to Government amendments to Bills and to other legislative measures such as statutory instruments and Orders in Council. (Paragraph 226)
47. In our view, suspended orders of invalidity would be at odds with our constitutional traditions. However, the Bill of Rights could seek to enhance Parliament's role following a declaration of incompatibility by requiring the Government to bring forward a formal response to Parliament within a defined timetable and to initiate a debate on its response, to guarantee Parliament the opportunity to express its view. (Paragraph 228)
48. The Bill of Rights could also require the Government to come back to court to account for what it has done to implement the court's judgment where it has declared legislation incompatible. The outline Bill provides for this. (Paragraph 229)
49. We recommend that any UK Bill of Rights should provide for a five yearly review and report to Parliament by an independent panel of reviewers on the operation of the Bill. (Paragraph 232)
50. We are not in favour of entrenching a UK Bill of Rights against future amendment or repeal by requiring that any such amendments or repeal must satisfy a special procedure, such as approval by a special parliamentary majority or by the people in a referendum. In our view such forms of entrenchment are not compatible with our tradition of parliamentary democracy which has carefully preserved the freedom of each Parliament to legislate according to its view of the public interest (Paragraph 235)
51. We therefore recommend that any UK Bill of Rights should follow the HRA model of a strong interpretive obligation, applying to legislation whenever enacted, entrenching the rights and freedoms against implied repeal, but leaving Parliament free to pass incompatible legislation if it makes it clear that that is its intention. We also regard it as very important that the strength of the interpretive obligation in the HRA is not diluted in any way in any UK Bill of Rights. (Paragraph 238)
52. Derogation from human rights in times of emergency is currently an essentially executive function, performed under the executive's prerogative powers and accompanied by no formal requirement that Parliament be involved in any way, or any guaranteed opportunity of challenging it in court. We recommend that in any UK Bill of Rights the opportunity is taken to introduce parliamentary and judicial safeguards against wrongful derogation from rights and freedoms and to spell out clearly the conditions that would be required to be met in order to justify a derogation. (Paragraph 242) We suggest a formulation of such a clause in our outline Bill of Rights and Freedoms. The clause would prescribe the conditions that have to be satisfied for a state of emergency to be declared (e.g. a serious threat to the life of the nation), and the criteria for any derogation to be valid (e.g. derogation may only be to the extent strictly required by the emergency and consistent with international

obligations). The clause could also enhance the role of Parliament in the process by requiring that a state of emergency must be confirmed by Parliament before any derogation from rights and freedoms in the Bill can be made. It could also enhance Parliament's role by stipulating a strict time limit on the duration of such a declaration of a state of emergency and of any emergency legislation. (Paragraph 243)

53. We welcome the Government's express recognition that a more diverse judiciary with increased understanding of the communities it serves will contribute to increased public confidence in the justice system, which will be especially important in the context of a UK Bill of Rights. We look forward to the Judicial Appointments Commission giving practical effect to the widely shared view that the pool of people from whom judicial appointments are currently made is significantly widened as a matter of urgency. (Paragraph 249)

Responsibilities and duties

54. To the extent that the Government's interest in "responsibilities" balanced against rights is an attempt to reopen that argument about public safety, it is misconceived, for the reasons we have given in previous Reports. (Paragraph 262)
55. We welcome the Government's apparently unequivocal acceptance that, in the words of Michael Wills MP, "rights are not contingent on discharge of responsibilities." We agree and regard this as being of fundamental importance in this debate. Human rights are rights which people enjoy by virtue of being human: they cannot be made contingent on the prior fulfilment of responsibilities. (Paragraph 264)
56. In our view, by insisting on the importance of "responsibilities" in any new Bill of Rights, Ministers tread a fine line between educating the public on the one hand and giving sustenance to the myths about the HRA which have been so damaging to that legislation. As we have observed before, in our Reports on the DCA Review of the HRA and our Annual Report for 2007, and in this Report in relation to the Government's emphasis on "Britishness", misperceptions about human rights should be countered by exposing them as misperceptions. (Paragraph 266)
57. We cannot see what purpose is served by articulating a responsibility as general as the responsibility to obey the law, nor do we believe that a Bill of Rights is the place to set out legal responsibilities which are already legally binding on the individual. We do not accept that educating people about their legal responsibilities is an appropriate function of a Bill of Rights. (Paragraph 267)
58. It seems to us that the Government is saying no more, than that rights are capable of being limited by competing interests. That is already provided for in the text of the ECHR and to the extent that it is not appreciated, it is surely a matter for education of the public rather than any attempt to amend the text or to redefine in the text of any new Bill of Rights. (Paragraph 273)
59. We are therefore strongly opposed to any UK Bill of Rights being called either a Bill of Rights *and Duties* or a Bill of Rights *and Responsibilities*. Rights should not be

contingent on performing responsibilities, nor should a Bill of Rights impose enforceable duties on individuals or responsibilities which they are already required by the general law to discharge. (Paragraph 274)

60. Responsibilities often have some role to play in modern Bills of Rights, albeit falling far short of directly enforceable duties. (Paragraph 279)
61. The resolution of the *YL* problem in the HRA itself is relatively straightforward and need not await the outcome of the Bill of Rights process. (Paragraph 283)
62. Any UK Bill of Rights should find a way of achieving what was originally intended in the HRA, that is, binding private persons or bodies performing a public function. (Paragraph 285)
63. We recommend that any UK Bill of Rights should make clear the responsibility, when performing a public function, to subordinate the manifestation of a personal belief which would discriminate against, or undermine the rights and freedoms of, others to the interests of those seeking to access public services. (Paragraph 287)
64. We recommend that any UK Bill of Rights should not include express provision along the lines of the equivalent South African provision giving full horizontal effect to the rights and freedoms in certain circumstances. (Paragraph 292)
65. We suggest two provisions which should ensure the indirect horizontal effect of the rights and freedoms in the Bill. (Paragraph 293) The first requires any court or tribunal interpreting any legislation or applying the common law, so far as it is possible to do so, to read and give effect to it in a way which is compatible with the rights and freedoms in the Bill and which promotes the purpose of the Bill. (Paragraph 294) The second includes the courts amongst the bodies under a duty to act compatibly with the rights and freedoms contained in the statement and to take active steps to promote and fulfil those rights and freedoms. (Paragraph 295)

Process

66. We recognise that the UK is in a comparatively unusual position in embarking on a debate about a Bill of Rights at the present time. It is for this reason that it is vitally important that the Government gets the process for discussing a Bill of Rights right. (Paragraph 301)
67. Members of the public need to feel that any Bill of Rights is not a remote document, imposed on them by Government, but something they have helped create and which reflects their values. But discussion and agreement about a Bill of Rights should also include politicians, civil society organisations, private bodies, academics, and commentators. The key issue for the Government is how to create a process which is legitimate and accountable, facilitates full and effective engagement and participation and which answers three essential questions: (1) is a Bill of Rights necessary and desirable; (2) what should it contain; and (3) how should it work in practice? (Paragraph 303)

68. Discussions about a Bill of Rights in Northern Ireland have taken place against a very particular political background, which is not present throughout the UK. It would therefore not be appropriate for the UK Government to follow this model wholesale. However, there are positive aspects of the Northern Ireland approach which should be taken into account in designing the UK process, particularly its engagement with the public and its referral to an independent body for recommendations. (Paragraph 316)
69. We are impressed by the innovative approach to consulting on the Victorian Bill of Rights, and in particular its focus on public engagement. (Paragraph 324) Whilst we accept that every country is different, we urge the Government to take into account the processes which were run in the state of Victoria and in Northern Ireland, which in our view had many merits, including the effective engagement of the public. (Paragraph 325)
70. We recommend that children and young people should be included in the consultation on a Bill of Rights. (Paragraph 335)
71. A number of different processes may need to be run in tandem, with particular methods being used to target specifically harder to reach groups. (Paragraph 335)
72. In our view, the process for consulting the public should be deliberative. It is not sufficient for people to be asked for their views once, without any prior opportunity for thought and reflection. (Paragraph 341)
73. Designing such a process is not easy and requires some sophisticated thinking and advice from organisations with expertise in effectively engaging the public. This is not, in our view, a role for Government. We recommend that an existing specialist body (with expertise in engaging the public in meaningful discussions about important constitutional issues) be employed or an ad hoc committee be appointed to conduct an effective and innovative consultation process and make recommendations to the Government. In order to command public and political confidence in the outcome, the body must be independent of Government. (Paragraph 344)
74. The period for public engagement should be time limited, but long enough to permit a proper engagement by the public with the key issues. We suggest that a period of six months to one year would be appropriate. (Paragraph 346)
75. Whilst we do not consider that the situation in the UK requires such an intense public consultation process as was carried out in Northern Ireland, nevertheless in our view, for the Bill of Rights process to be effective and have any legitimacy, it needs to be adequately resourced, in particular to ensure that harder to reach and less financially able or established groups or communities are able to contribute to the discussions in a meaningful way. (Paragraph 349)
76. We recommend that the Government lead the overall process for drafting a Bill of Rights, but not for engaging with the public. (Paragraph 351)

77. We consider that there are certain non-negotiables, such as no weakening of existing human rights protection, which the Government should set out at the start of the process. We recommend that a set of guiding principles be drawn up to provide a basis for the work of the body conducting the consultation, and we suggest that they could say something along the following lines (all considerations canvassed in this Report). The guiding principles are that any modern UK Bill of Rights must:

- Build on the HRA without weakening its mechanisms in any way
- Supplement the protections in the ECHR
- Be in accordance with universal human rights standards
- Protect the weak and vulnerable against the strong and powerful
- Be aspirational and forward-looking
- Apply to the whole of the UK geographically
- Apply to all people within the UK
- Provide strong legal protection for human rights
- Enhance the role of Parliament in the protection of human rights. (Paragraph 353)

78. Similarly, before the process for public engagement starts, the Government should set out its position on a range of key issues, as the state Government did in Victoria, in order to be clear about what is realistically achievable. Following the report of the independent body, it would be a matter for the Government as to the next steps. (Paragraph 354)

Annex 1: Outline of a UK Bill of Rights and Freedoms

This Annex sets out an outline Bill of Rights and Freedoms. The Bill broadly follows and adapts the basic structure of the Human Rights Act, which created a parliamentary model of human rights protection. The Bill aims to improve on that model, by giving Parliament an even more central role in the overall scheme. Annex 2 explains the clauses in the Outline Bill of Rights and Freedoms, and how its provisions might work in practice.

UK BILL OF RIGHTS AND FREEDOMS

Preamble

This Bill of Rights and Freedoms is adopted to give lasting effect to the values which the people of the United Kingdom of Great Britain and Northern Ireland, consider to be fundamental:

- The rule of law: the commitment to power being exercised lawfully as determined by an independent judiciary
- Liberty: the freedom from both unwarranted restrictions and basic wants
- Democracy: giving as much control as possible to individuals over the decisions which affect their lives
- Fairness: the equal right of each and every person to be treated with dignity and respect
- Civic duty: the responsibilities to each other, to the communities to which we belong and to future generations

The Rights and Freedoms

1. In this Act the “rights and freedoms” means –

- (a) the Civil and Political Rights and Freedoms set out in Schedule 1
- (b) the Fair Process Rights set out in Schedule 2
- (c) the Economic and Social Rights set out in Schedule 3
- (d) the Democratic Rights set out in Schedule 4
- (5) the Rights of Particular Groups set out in Schedule 5.

Interpretation of the Bill of Rights and Freedoms

2. Any court, tribunal or other person or body interpreting this Bill of Rights and Freedoms

- (a) must strive to achieve the purpose of the Bill and to give practical effect to the fundamental values underpinning it, as set out in the Preamble to the Bill;
- (b) must pay due regard to international law, including international human rights law; and
- (c) may consider the relevant judgments of foreign and international courts and tribunals.

Interpretation of legislation and common law

3. Any court, tribunal or other person or body interpreting any legislation (whenever enacted) or applying the common law (whenever laid down) must, so far as it is possible to do so, read and give effect to the legislation or common law in a way which is compatible with the rights and freedoms in this Bill and which promotes the purpose of the Bill as set out in the Preamble.

Power of Legislative Override

4. Parliament may expressly declare in an Act of Parliament that the Act or any provision in it shall operate notwithstanding anything contained in this Bill of Rights and Freedoms.

Limitation of Rights

5. The rights and freedoms contained in this Bill may be subject only to such reasonable limits, provided for by law, as can be demonstrably justified in a society based on the values of liberty, democracy, fairness, civic duty and the rule of law, and to the extent compatible with international human rights treaties to which the UK is a party, taking into account all relevant factors, including:

- (a) the nature of the right;
- (b) the importance and legitimacy of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) the availability of less restrictive means to achieve the purpose.

Obligations

6. (1) The legislature, the executive, the judiciary, public authorities and any person or body in the performance of any public function must

- (a) act compatibly with a right or freedom in this Bill of Rights and Freedoms and
- (b) take active steps to respect, protect, promote and fulfil the rights and freedoms in this Bill.

(2) The factors which may be taken into account in determining whether a function is a public function include:

- (a) the extent to which the state has assumed responsibility for the function in question
- (b) the role and responsibility of the State in relation to the subject matter in question
- (c) the nature and extent of the public interest in the function in question
- (d) the nature and extent of any statutory power or duty in relation to the function in question
- (e) the extent to which the state, directly or indirectly, regulates, supervises and inspects the performance of the function in question
- (f) the extent to which the state makes payment for the function in question
- (g) whether the function involves or may involve the use of statutory coercive powers
- (h) the extent of the risk that improper performance of the function might violate a right or freedom in this Bill.

Impact assessments and statements of compatibility

7. (1) A member of Parliament who introduces a Bill into either House of Parliament must, before Second Reading of the Bill, lay before Parliament

- (a) an impact assessment, assessing the impact of the Bill on the rights and freedoms protected in this Bill of Rights and Freedoms; and
- (b) a statement of compatibility stating
 - (i) whether, in the member's opinion, the Bill is compatible with the rights and freedoms in this Bill and, if so, the reasons for that view; and
 - (ii) if, in the member's opinion, any part of the Bill is incompatible with any right or freedom in this Bill, the nature and extent of the incompatibility.

(2) The obligations in sub-section (1) also apply on tabling or making of

- (a) Government amendments to Bills
- (b) statutory instruments
- (c) Orders-in-Council.

Enforcement

8. Any person or body who has a sufficient interest in the matter may bring legal proceedings in the appropriate court or tribunal concerning the alleged breach of any right or freedom in this Bill of Rights and Freedoms.

Remedies

9. (1) Subject to (2) below, a court may grant to any person or body whose rights or freedoms under this Bill have been violated such remedy, within its powers, as it considers just and appropriate and necessary to provide an effective remedy.

(2) If a court is satisfied that a provision of primary legislation is incompatible with a provision of this Bill of Rights and Freedoms and cannot be interpreted compatibly, it must make a declaration of incompatibility.

(3) A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given.

Process following declaration of incompatibility

10. (1) Within 3 months of a final declaration of incompatibility, the Minister responsible for the relevant statutory provision must lay before Parliament a written statement explaining

(a) whether the Government agrees that the provision is incompatible with a right or freedom in this Bill;

(b) if it disagrees, its reasons for so doing;

(c) if it agrees, whether it proposes to remedy the incompatibility.

(2) If the Government proposes to remedy the incompatibility, the Minister responsible for the relevant statutory provision must, within 6 months of the final declaration of incompatibility, lay before Parliament a written statement explaining in detail how the incompatibility will be remedied.

(3) A Minister of the Crown must, within six weeks of laying a statement under subsections (1) or (2) above, make a motion in both Houses to take note of the statement laid.

(4) The Minister may by order (“a remedial order”) make such amendments to the legislation as are necessary to remove the incompatibility.

(5) The court which made the final declaration of incompatibility has the power to re-open the case in order to consider whether the incompatibility has been remedied.

Relationship with European Convention on Human Rights

11. (1) Rights and freedoms in this Bill which correspond with rights guaranteed by the European Convention on Human Rights shall be interpreted as having at least the same scope as the Convention rights.

(2) Nothing in this Article shall prevent rights and freedoms in this Bill being interpreted as providing more extensive protection than the corresponding Convention rights.

Relationship with other existing rights

12. Nothing in this Bill of Rights and Freedoms denies the existence or restricts the scope of any other rights or freedoms recognised or conferred by common law, statute or

customary international law, to the extent that they are consistent with the rights and freedoms contained in this Bill.

Emergencies

13. (1) No derogation from any of the rights and freedoms in this Bill shall be lawful unless a state of emergency has first been declared and confirmed by Parliament.

(2) A state of emergency may be declared only when there is a public emergency threatening the life of the nation.

(3) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from any right or freedom in this Bill only to the extent that the derogation is strictly required by the emergency and is consistent with the UK's other international obligations.

(4) Any person or body who has a sufficient interest in the matter may bring legal proceedings in the appropriate court or tribunal challenging the validity of:

(a) a declaration of a state of emergency; or

(b) any legislation enacted, or other action taken, in consequence of a state of emergency.

(5) A declaration of a state of emergency, and any legislation enacted or other action taken in consequence of that declaration, shall be effective only

(a) prospectively from the date of the Act of Parliament making the declaration; and

(b) for no more than three months from the date of the declaration.

(6) No legislation enacted in consequence of a declaration of a state of emergency may permit or authorise any derogation from the non-derogable rights listed in Schedule 1.

Prohibition of abuse of rights

14. Nothing in this Bill of Rights, Freedoms and Responsibilities may be interpreted as implying for any person, group or body any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in this Bill or at their limitation to a greater extent than is provided for in this Bill.

Parliamentary Review

15. (1) The Secretary of State for Justice shall appoint an independent panel of reviewers of the operation of this Bill of Rights and Freedoms.

(2) The independent panel shall conduct a review of the first 5 years of operation of this Bill of Rights and Freedoms and lay its report before Parliament.

Schedule 1 - Civil and Political Rights and Freedoms

- **Equality**
- **Dignity**

- **Life**
- **Physical and mental integrity**
- **Freedom from torture and inhuman or degrading treatment or punishment**
- **Freedom from slavery and forced labour**
- **Liberty**
- **Private and family life, home and communications**
- **Freedom of thought, conscience and religion**
- **Freedom of expression**
- **Freedom of association**
- **Right of assembly and demonstration**
- **Right to marry**
- **Right to found a family**
- **Property**
- **Freedom of movement and residence**
- **Right to asylum**

Schedule 2 – Fair Process Rights

- **Rights of arrested and detained persons**
- **Right to a fair criminal trial**
- **Right of access to court**
- **Right to legal representation**
- **Right to a fair hearing**
- **Right to effective remedy**
- **Right of access to information**
- **Right to fair and just administrative action**

Schedule 3 - Economic and Social Rights

Duty of progressive realisation

The Government must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the rights in this schedule.

Duty to report to Parliament

The Government shall report annually to Parliament on the progress made during the previous year in realising the rights in this schedule.

Parliament to determine eligibility

Eligibility for the rights in this schedule on grounds of nationality, residence or other status shall be determined by Parliament in primary legislation, subject to the rights in schedule 1.

Justiciability

(1) The rights in this schedule are not enforceable by individuals against the Government or any public authority.

(2) The rights in this schedule are justiciable only to the extent that they are relevant to:

- (a) the interpretation of other legislation, or
- (b) the assessment of the reasonableness of the measures taken to achieve their progressive realisation.

Judicial review

When evaluating the reasonableness of the measures taken by the Government to achieve the progressive realisation of the rights in this schedule, the courts shall have regard to the following relevant considerations:

- (a) the availability of resources
- (b) the latitude inherent in a duty to achieve the realisation of the rights progressively
- (c) the court has no jurisdiction to inquire into whether public money could be better spent
- (d) the fact that a wide range of measures is possible to meet the Government's obligations
- (e) the availability of an alternative means of realising the rights is not, of itself, an indication of unreasonableness
- (f) whether the measures include emergency relief for those whose needs are urgent
- (g) whether the measures are discriminatory
- (h) whether the measures have been effectively made known to the public
- (i) whether the measures are capable of facilitating the realisation of the relevant rights
- (j) whether any deprivation of existing rights is demonstrably justifiable in accordance with s. 5 of this Bill (Limitation of Rights).

Health care

Everyone has the right to have access to appropriate health care services, free at the point of use and within a reasonable time

No one may be refused appropriate emergency medical treatment

Education

Everyone of compulsory school age has the right to receive free, full-time education suitable to their needs.

Everyone has the right to have access to further education and to vocational and continuing training.

Housing

Everyone has the right to adequate accommodation appropriate to their needs.

Everyone is entitled to be secure in the occupancy of their home.

No one may be evicted from their home without an order of a court.

An adequate standard of living

Everyone is entitled to an adequate standard of living sufficient for that person and their dependents, including adequate food, water and clothing

Everyone has the right to social assistance, including care and support, in accordance with their needs.

No one shall be allowed to fall into destitution.

A healthy and sustainable environment

Everyone has the right to an environment that is not harmful to their health.

Everyone has the right to information enabling them to assess the risk to their health from their environment.

Everyone has the right to a high level of environmental protection, for the benefit of present and future generations, through reasonable legislative and other measures that –

- (i) prevent pollution and ecological degradation;
- (ii) promote conservation and
- (iii) ensure that economic development and use of natural resources are sustainable.

Schedule 4 - Democratic Rights

- **Right to free and fair elections**
- **Right to vote and to stand as a candidate at elections**

- **Right to participate in public life**
- **Citizenship**

Schedule 5 - Rights of Particular Groups

- **Children**
- **Minorities**
- **People with disabilities**
- **Victims of Crime**

Annex 2: Explanatory Notes to the Outline Bill of Rights and Freedoms

Preamble

The purpose of the Preamble is twofold:

- (1) to state the purpose of adopting a modern UK Bill of Rights and Freedoms, and
- (2) to articulate the values on which the Bill of Rights and Freedoms is founded, and to give those values a nationally distinctive interpretation.

1. The Rights and Freedoms

The Bill of Rights and Freedoms contains the provisions concerning how it operates in practice, and the Schedules contain the Rights and Freedoms themselves. The schedules contain indicative lists of the rights and freedoms which might be included in a UK Bill of Rights.

2. Interpretation of the Bill of Rights and Freedoms

This clause would require a purposive interpretation of the Bill of Rights and Freedoms by requiring anybody interpreting the Bill itself (including judges) to strive to achieve its purpose and to give practical effect to the values underpinning it, as set out in the Preamble.

The interpretation clause could also seek to further the UK's tradition of internationalism by requiring anybody interpreting the Bill of Rights and Freedoms to pay due regard to international law, including international human rights law, and to consider relevant foreign and international judgments.

3. Interpretation of legislation and common law

A strong interpretation clause could seek to make the values underlying the Bill of Rights and Freedoms the touchstone of all law, by requiring anybody interpreting other law (e.g. statutes and case-law) to do so in a way that is compatible with the Bill of Rights and Freedoms, so far as it is possible to do so.

4. Power of Legislative Override

This clause could make explicit (in a way that the Human Rights Act does not) that Parliament continues to have the power of “legislative override”, by expressly declaring in an Act of Parliament that the Act or any provision in it shall operate notwithstanding anything contained in the Bill of Rights and Freedoms. The Canadian Charter of Rights and Freedoms has an equivalent provision.

5. Limitation of Rights

The Bill of Rights and Freedoms could have a “general limitation clause” which makes clear that rights can be limited in the general interest, but only if such limitations are

shown to be justified by reference to the underlying values identified in the Preamble. It also spells out the relevant factors which are to be taken into account when carrying out the balancing exercise that the clause requires.

6. Obligations

(1) would impose an obligation to act compatibly with the Bill of Rights and Freedoms on the legislature, the executive, the judiciary, public authorities and any person or body in the performance of a public function.

(2) would define “public function” in a way which ensures that private organisations providing services under a contract with a public authority are caught by the obligation, and so closes the loophole opened up by judicial interpretation of the Human Rights Act contrary to Parliament’s clear intention at the time. It retains the approach in the HRA of a functional test to be applied by the courts on the facts of each case, but tries to provide more explicit guidance for that exercise by listing the factors that may be taken into account by courts when deciding whether a function is a public function. The factors listed are taken from the dissenting judgments of Lord Bingham and Baroness Hale in *YL* and from the judgment of Lord Nicholls in the *Aston Cantlow* case. This is the approach which has been adopted by the Australian State of Victoria in its 2006 Charter of Rights and Responsibilities (though the factors listed there are different).

The clause could also seek to give better effect than the Human Rights Act does to the “positive obligations” imposed by rights: that is, the requirement that the State take active steps to ensure that the rights in the Bill of Rights and Freedoms are effectively secured for everyone. The clause does this by imposing an obligation on the State to take appropriate steps to secure effective protection for the rights and freedoms in the Bill.

7. Impact assessments and statements of compatibility

The Bill of Rights and Freedoms could take the opportunity to improve on the information provided to Parliament about whether a measure is compatible with the Bill. Under s. 19 of the Human Rights Act ministers merely have to sign a certificate of compatibility. There is no requirement to give reasons for the minister’s view. To enhance democratic scrutiny of the compatibility of a Government measure with the Bill of Rights and Freedoms, this clause could require any member of Parliament introducing a Bill to provide an impact assessment and a full statement of compatibility, containing the reasons for the member’s view that a measure is compatible with the Bill of Rights and Freedoms, and extend its application to Government amendments to Bills and to other legislative measures such as statutory instruments and Orders in Council.

8. Enforcement

This clause would define who would be entitled to bring legal proceedings concerning the alleged breach of any provision in the Bill of Rights and Freedoms. The Human Rights Act restricts this to those who are “victims” of Convention violations. Other jurisdictions (e.g. South Africa) use a wider test closer to the “sufficient interest” test which governs who can apply for judicial review against public authorities. This clause could use the same test as already applies to judicial review, in the interests of making the rights contained in the Bill more practically accessible to those without the resources to litigate on their own behalf.

9. Remedies

This clause would define the remedies available to a person whose rights or freedoms in the Bill have been unjustifiably interfered with. The clause could broadly follow the equivalent provisions of the Human Rights Act, giving courts and tribunals the discretion to award such remedy, within its powers, as it considers just and appropriate and necessary to provide an effective remedy. It could also provide for a declaration of incompatibility where primary legislation is incompatible, and for such legislation to continue in force notwithstanding the declaration of incompatibility.

10. Process following declaration of incompatibility

The Bill of Rights and Freedoms could seek to enhance Parliament's role following a declaration of incompatibility. Under the Human Rights Act it is up to the Government to decide whether to remedy a judicially declared incompatibility and if so, how. This clause could give Parliament a greater role by requiring the Government to bring forward a formal response to Parliament within a defined timetable, to guarantee Parliament an opportunity to express its view. It could also provide for the court which made the declaration of incompatibility to re-open the case to consider whether the incompatibility has been remedied.

11. Relationship with European Convention on Human Rights

This clause would address the relationship between the Bill of Rights and Freedoms and the ECHR, making clear that where rights or freedoms in the Bill correspond to rights in the ECHR they must be interpreted as having at least the same scope as the ECHR rights, but that rights or freedoms in the Bill can be interpreted as providing more extensive protection than corresponding ECHR rights: in other words, that the ECHR is “a floor not a ceiling.”

The clause would also make clear that limitations on rights or freedoms in the Bill under the general limitation clause could not be more extensive than limitations which are permissible under the ECHR.

12. Relationship with other existing rights

This clause would address the relationship between the Bill of Rights and Freedoms and other existing rights, making clear that nothing in the Bill denies the existence or restricts the scope of existing rights or freedoms already recognised by statute, common law or customary international law.

13. Emergencies

The purpose of this clause would be to make clear that certain rights in the Bill of Rights and Freedoms can be derogated from in situations of emergency, but the clause could seek to enhance the role of Parliament in the process by requiring that a state of emergency must first be declared and confirmed by Parliament before any derogations from rights or freedoms in the Bill can be made. It could also enhance Parliament's role by stipulating a strict time limit on the duration of such a declaration of a state of emergency and of any emergency legislation.

The clause would prescribe the conditions that have to be satisfied for a state of emergency to be declared (e.g. a serious threat to the life of the nation), and the criteria for any derogation to be valid (e.g. derogation may only be to the extent strictly required by the emergency and consistent with international obligations).

14. Responsibility not to abuse rights

This clause would lay down a clear responsibility on the holders of rights not to abuse those rights by making clear that nothing in the Bill of Rights and Freedoms implies any right to do anything aimed at the destruction of any of the rights and freedoms in the Bill or at their limitation to a greater extent than is provided for in the Bill. The ECHR contains a similar provision which has been relied on by the Court of Human Rights when upholding, for example, convictions for the offence of incitement to racial hatred.

15. Parliamentary review

This clause provides for an independent review of the operation of the Bill of Rights and Freedoms after five years, to be laid before Parliament.

Schedules

This part of the Bill contains the substantive rights and freedoms.

The rights and freedoms could be divided into five broad groups:

- Civil and political rights and freedoms
- Fair process rights
- Economic and social rights
- Democratic rights
- Rights of particular groups

Annex 3: Northern Ireland Human Rights Commission Methodology

A Briefing on the Methodology used in preparing the advice of the NIHRC to Government on a Bill of Rights, 9 June 2008

1. Is the case made that the need for this proposed right arises out of the particular circumstances of Northern Ireland?
2. Is the proposed right (a) supplementary to the Human Rights Act 1998 (b) supplementary to those provisions of the European Convention on Human Rights not reproduced in Schedule 1 to the Human Rights Act 1998 and (c) compatible with their existing provisions?
3. Is the case made that the right is not adequately protected under the European Convention on Human Rights and the Human Rights Act?
4. Is the proposed right in line with best practice according to international instruments and experience?
5. Will the proposed right help to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem?
6. In light of the above, taking into account what the consequences might be (positive and negative) of including this proposal in the Bill of Rights, the content of the Forum's Final Report, the support and opposition regarding the proposal, the context of human rights in the UK and on the island of Ireland and any submissions made to the Commission on the subject, does the Commission believe it would be in the interests of the people of Northern Ireland?
7. Taking into account all the above and having regard to the totality of rights considered for inclusion in a Bill of Rights, does the Commission consider (a) that this proposed right should be included in its advice to the Secretary of State and (b) that any amendments or additions are necessary or desirable in order to ensure the coherence and effectiveness of the Bill of Rights as a whole?

Annex 4: Examples of Economic and Social Rights Provisions

Universal Declaration of Human Rights (1948) Art.s 22-26

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.

Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

International Covenant on Economic, Social and Cultural Rights (1966) Art.s 2-13

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. 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.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Constitution of India Art.s 37-39, 41, 45 & 47

PART IV

DIRECTIVE PRINCIPLES OF STATE POLICY

36. Definition.—In this Part, unless the context otherwise requires, “the State” has the same meaning as in Part III.

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

38. State to secure a social order for the promotion of welfare of the people.—

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

39. Certain principles of policy to be followed by the State.—The State shall, in particular, direct its policy towards securing—

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

39A. Equal justice and free legal aid.—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

41. Right to work, to education and to public assistance in certain cases.—The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

42. Provision for just and humane conditions of work and maternity relief.—The State shall make provision for securing just and humane conditions of work and for maternity relief.

43. Living wage, etc., for workers.—The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

43A. Participation of workers in management of industries.—The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry.

...

45. Provision for free and compulsory education for children.—The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for

free and compulsory education for all children until they complete the age of fourteen years.

Constitution of South Africa (1996) ss. 26-29

26 Housing

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27 Health care, food, water and social security

1. Everyone has the right to have access to-
 - a. health care services, including reproductive health care;
 - b. sufficient food and water; and
 - c. social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
3. No one may be refused emergency medical treatment.

28 Children

1. Every child has the right-
 - a. to a name and a nationality from birth;
 - b. to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - c. to basic nutrition, shelter, basic health care services and social services;
 - d. to be protected from maltreatment, neglect, abuse or degradation;
 - e. to be protected from exploitative labour practices;
 - f. not to be required or permitted to perform work or provide services that-
 - i. are inappropriate for a person of that child's age; or
 - ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
 - g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
 - i. kept separately from detained persons over the age of 18 years; and

- ii. treated in a manner, and kept in conditions, that take account of the child's age;
 - h. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - i. not to be used directly in armed conflict, and to be protected in times of armed conflict.
- 2. A child's best interests are of paramount importance in every matter concerning the child.
- 3. In this section 'child' means a person under the age of 18 years.

29 Education

1. Everyone has the right-
 - a. to a basic education, including adult basic education; and
 - b. to further education, which the state, through reasonable measures, must make progressively available and accessible.
2. Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-
 - a. equity;
 - b. practicability; and
 - c. the need to redress the results of past racially discriminatory laws and practices.
3. Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-
 - a. do not discriminate on the basis of race;
 - b. are registered with the state; and
 - c. maintain standards that are not inferior to standards at comparable public educational institutions.
4. Subsection (3) does not preclude state subsidies for independent educational institutions.

Formal Minutes

Monday 21 July 2008

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	Dr Evan Harris MP
Lord Dubs	Mr Virendra Sharma MP
Lord Morris of Handsworth	
The Earl of Onslow	
Baroness Stern	

Draft Report (*A Bill of Rights for the UK?*), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 191 read and agreed to.

Paragraph 192 read.

Amendment proposed, to leave out lines 25 to 49—(*Lord Bowness.*)

Question put, That the Amendment be made.

The Committee divided.

Content, 2	Not Content, 6
Lord Bowness	Mr Andrew Dismore MP
The Earl of Onslow	Lord Dubs
	Dr Evan Harris MP
	Lord Morris of Handsworth
	Mr Virendra Sharma MP
	Baroness Stern

Paragraph 192 agreed to.

Paragraphs 193 to 354 read and agreed to.

Annexes read and agreed to.

Summary read and agreed to.

Several Papers were ordered to be appended to the Report.

Resolved, That the Report be the Twenty-ninth Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Baroness Stern make the Report to the House of Lords.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 7 October at 1.30pm.]

List of Witnesses

	<i>Page</i>
Monday 3 December 2007	
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, London School of Economics	Ev 1
Ms Katie Ghose , British Institute of Human Rights, Mr Jago Russell , Liberty, and Mr Roger Smith , JUSTICE	Ev 10
Monday 14 January 2008	
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	Ev 15
Monday 28 January 2008	
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	Ev 23
Professor Graham Smith , Centre for Citizenship and Democracy	Ev 30
Tuesday 4 March 2008	
Baroness Hale of Richmond , and Lord Justice Maurice Kay	Ev 39
Professor Vernon Bogdanor , Brasenose College, Oxford, Rt Hon Kenneth Clarke QC MP and Mr Henry Porter	Ev 46
Monday 10 March 2008	
Mr Kenny MacAskill MSP , Cabinet Secretary for Justice, Mr Brian Peddie , and Mr Paul Cackette , Civil and International Justice Directorate, Scottish Government	Ev 59
Mr Michael Clancy OBE , Director of Law Reform, and Ms Christine O'Neill , Convenor, Constitutional Law Sub-committee, Law Society of Scotland	Ev 69
Wednesday 21 May 2008	
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	Ev 78

List of Written Evidence

	<i>Page</i>
1 Professor Robert Blackburn, King's College London	Ev 95
2 British Institute of Human Rights	Ev 97
3 British Irish Rights Watch	Ev 101
4 Mr Robin Tso, BritishHongKong	Ev 105
5 Centre for Public Law, University of Cambridge	Ev 106
6 Children's Rights Alliance for England	Ev 109
7 Carolyne Willow, Children's Rights Alliance for England	Ev 118
8 Committee on the Administration of Justice	Ev 118
9 Professor Brice Dickson, School of Law, Queen's University Belfast	Ev 120
10 Democratic Audit	Ev 122
11 Jonathan Doyle	Ev 125
12 Equality and Human Rights Commission	Ev 127
13 Professor C A Gearty, Matrix and London School of Economics	Ev 130
14 Professor Carol Harlow, London School of Economics	Ev 131
15 Tom Hickman, Blackstone Chambers	Ev 135
16 Chris Himsworth, School of Law, University of Edinburgh	Ev 139
17 Sunny Hundal	Ev 139
18 International Association for Human Values	Ev 140
19 JUSTICE	Ev 142
20 Professor Francesca Klug, London School of Economics	Ev 145
21 Law Society of Scotland	Ev 147
22 Liberty	Ev 149
23 Claire Methven O'Brien, European University Institute, Florence	Ev 153
24 Ellie Palmer, Department of Law, University of Essex	Ev 157
25 Henry Porter	Ev 162
26 Royal National Institute of Blind People	Ev 166
27 Trades Union Congress (TUC)	Ev 168
28 Trade Union and Labour Party Liaison Organisation	Ev 169
29 Thompsons	Ev 173
30 Unite the Union	Ev 173
31 Unlock Democracy	Ev 175

Correspondence with Ministers

32 Letter from the Chairman to Michael Wills MP, Minister of State, Ministry of Justice, dated 23 January 2008	Ev 179
33 Letter from Michael Wills MP, Minister of State, Ministry of Justice, dated 24 January 2008	Ev 179
34 Letter from the Chairman to Michael Wills MP, Minister of State, Ministry of Justice, dated 21 February 2008	Ev 179
35 Letter from Michael Wills MP, Minister of State, Ministry of Justice, dated 6 March 2008	Ev 180

- | | | |
|----|--------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| 36 | Letter from the Chairman to the Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, Ministry of Justice, dated 27 May 2008 | Ev 181 |
| 37 | Letter from the Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, Ministry of Justice, dated 17 June 2008 | Ev 183 |

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.

Evidence received by the Committee but not printed can be inspected at the Parliamentary Archives, email: archives@parliament.uk

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501

Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554
Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007-08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC 755
Twenty-Fourth Report	Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports of Session 2007-08 and other correspondence	HL Paper 127/HC 756
Twenty-fifth Report	Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008	HL Paper 132/HC 825
Twenty-sixth Report	Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill	HL Paper 153/HC 950
Twenty-seventh Report	The Use of Restraint in Secure Training Centres: Government Response to the Committee's Eleventh Report	HL Paper 154/HC 979
Twenty-eighth Report	UN Convention against Torture: Discrepancies in Evidence given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq	HL Paper 157/HC 527
Twenty-ninth Report	A Bill of Rights for the UK?: Volume I Report and Formal Minutes	HL Paper 165-I/HC 150-I
Twenty-ninth Report	A Bill of Rights for the UK?: Volume II Oral and Written Evidence	HL Paper 165-II/HC 150-II

Session 2006–07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human Rights Act	HL Paper 77/HC 410
Tenth Report	The Treatment of Asylum Seekers: Volume I	HL Paper 81-I/HC 60-I

	Report and Formal Minutes	
Tenth Report	The Treatment of Asylum Seekers: Volume II Oral and Written Evidence	HL Paper 81-II/HC 60-II
Eleventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 83/HC 424
Twelfth Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 91/HC 490
Thirteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 105/HC 538
Fourteenth Report	Government Response to the Committee's Eighth Report of this Session: Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9 order 2007)	HL Paper 106/HC 539
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 112/HC 555
Sixteenth Report	Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights	HL Paper 128/HC 728
Seventeenth Report	Government Response to the Committee's Tenth Report of this Session: The Treatment of Asylum Seekers	HL Paper 134/HC 790
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume I- Report and Formal Minutes	HL Paper 156-I/HC 378-I
Eighteenth Report	The Human Rights of Older People in Healthcare: Volume II- Oral and Written Evidence	HL Paper 156-II/HC 378-II
Nineteenth Report	Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning	HL Paper 157/HC 394
Twentieth Report	Highly Skilled Migrants: Changes to the Immigration Rules	HL Paper 173/HC 993
Twenty-first Report	Human Trafficking: Update	HL Paper 179/HC 1056

Session 2005–06

First Report	Legislative Scrutiny: First Progress Report	HL Paper 48/HC 560
Second Report	Deaths in Custody: Further Government Response to the Third Report from the Committee, Session 2004–05	HL Paper 60/HC 651
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume I Report and Formal Minutes	HL Paper 75-I/HC 561-I
Third Report	Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters Volume II Oral and Written Evidence	HL Paper 75-II/HC 561-II
Fourth Report	Legislative Scrutiny: Equality Bill	HL Paper 89/HC 766
Fifth Report	Legislative Scrutiny: Second Progress Report	HL Paper 90/HC 767
Sixth Report	Legislative Scrutiny: Third Progress Report	HL Paper 96/HC 787
Seventh Report	Legislative Scrutiny: Fourth Progress Report	HL Paper 98/HC 829
Eighth Report	Government Responses to Reports from the Committee in the last Parliament	HL Paper 104/HC 850
Ninth Report	Schools White Paper	HL Paper 113/HC 887
Tenth Report	Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters	HL Paper 114/HC 888

Eleventh Report	Legislative Scrutiny: Fifth Progress Report	HL Paper 115/HC 899
Twelfth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006	HL Paper 122/HC 915
Thirteenth Report	Implementation of Strasbourg Judgments: First Progress Report	HL Paper 133/HC 954
Fourteenth Report	Legislative Scrutiny: Sixth Progress Report	HL Paper 134/HC 955
Fifteenth Report	Legislative Scrutiny: Seventh Progress Report	HL Paper 144/HC 989
Sixteenth Report	Proposal for a Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 154/HC 1022
Seventeenth Report	Legislative Scrutiny: Eighth Progress Report	HL Paper 164/HC 1062
Eighteenth Report	Legislative Scrutiny: Ninth Progress Report	HL Paper 177/ HC 1098
Nineteenth Report	The UN Convention Against Torture (UNCAT) Volume I Report and Formal Minutes	HL Paper 185-I/ HC 701-I
Twentieth Report	Legislative Scrutiny: Tenth Progress Report	HL Paper 186/HC 1138
Twenty-first Report	Legislative Scrutiny: Eleventh Progress Report	HL Paper 201/HC 1216
Twenty-second Report	Legislative Scrutiny: Twelfth Progress Report	HL Paper 233/HC 1547
Twenty-third Report	The Committee's Future Working Practices	HL Paper 239/HC 1575
Twenty-fourth Report	Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention	HL Paper 240/HC 1576
Twenty-fifth Report	Legislative Scrutiny: Thirteenth Progress Report	HL Paper 241/HC 1577
Twenty-sixth Report	Human trafficking	HL Paper 245-I/HC 1127-I
Twenty-seventh Report	Legislative Scrutiny: Corporate Manslaughter and Corporate Homicide Bill	HL Paper 246/HC 1625
Twenty-eighth Report	Legislative Scrutiny: Fourteenth Progress Report	HL Paper 247/HC 1626
Twenty-ninth Report	Draft Marriage Act 1949 (Remedial) Order 2006	HL Paper 248/HC 1627
Thirtieth Report	Government Response to the Committee's Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT)	HL Paper 276/HC 1714
Thirty-first Report	Legislative Scrutiny: Final Progress Report	HL Paper 277/HC 1715
Thirty-second Report	The Human Rights Act: the DCA and Home Office Reviews	HL Paper 278/HC 1716