

# COMMISSION ON A **BILL OF RIGHTS**

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## A Second Consultation

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July 2012

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## Chair's Foreword

Our Commission is now at a significant stage in its work. Over the last 15 months we have consulted widely, met with numerous groups and individuals from around the UK, including Northern Ireland, Scotland and Wales, and held a series of seminars at which we have asked for views on the key questions in our terms of reference.

Now we have to decide what to recommend. In particular, we have to decide whether to recommend a UK Bill of Rights and, if so, what form and content it should have.

I want to stress as the Commission's Chair that we have reached no conclusions on this key question at this stage. If we do decide to recommend a UK Bill of Rights we will want to explain why and set out what form we think such a Bill might take. If we decide not to recommend a Bill of Rights we will equally want to explain our reasons for arriving at that conclusion though we may still want to make some observations about such a Bill against the possibility that the Government nevertheless decides to introduce one.

This second public consultation gives you a further opportunity to influence our deliberations by giving us your views both on the fundamental question of whether you believe that a UK Bill of Rights would or would not be beneficial and on what form you believe any such Bill might take. It poses a set of questions on both of these issues on which we would greatly welcome your views.

Time is now important in that we are committed to reporting our recommendations to the Government by the end of this year. So we are asking for your views by the end of September at the latest to ensure that we can take them into account in reaching our final conclusions.

If you were one of the over 900 organisations and individuals who responded to our first public consultation last summer, you do not need to repeat what you said then which we have already taken into account in our work. But we would like to hear from you again on the questions set out in this paper. Equally if you did not respond to our first consultation that is no bar whatsoever to giving us your views now which we would greatly welcome.

The questions which our Commission is asked to consider go to the heart of the kind of country we want to be. You can help us to give the best answers we can by replying to this consultation. Thank you.



**Sir Leigh Lewis**

Chair of the Commission on a Bill of Rights

## Background

1. The Commission on a Bill of Rights was established by the Government in March 2011 to investigate the creation of a UK Bill of Rights and to provide advice on reform of the European Court of Human Rights.<sup>1</sup>
2. In July 2011 we provided interim advice to Government and a parallel letter to Ministers on reform of the Court (see <http://www.justice.gov.uk/about/cbr>). In August 2011 we published a discussion paper that sought views on certain key questions including: Do we need a UK Bill of Rights? If so, what should it contain? How should it apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?
3. We received over 900 responses to this discussion paper which have been very valuable to us in our consideration of the many issues raised by our inquiry. We have posted a list of respondents, as well as copies of all the responses we received, on the Commission's webpages (see <http://www.justice.gov.uk/about/cbr/consultation-prog>). We are very grateful for the effort and thought that went into providing these contributions to us.
4. In addition to our review of these responses, we have been carrying out a substantial programme of consultation on a UK Bill of Rights and on reform of the European Court of Human Rights. We have held meetings in Belfast, Cardiff, Edinburgh, Birmingham, Oxford, Strasbourg and in London; and we have met with a wide range of people and organisations from across the UK, including Parliamentarians from all of the legislatures in the UK, senior members of the judiciary, community and human rights organisations and members of the wider public. We have held three major seminars – the outcomes of which you can read on our website – and held many meetings with interested organisations, public authorities and academics. We have also regularly placed on our website information which we hope will help people to see the work we have been engaged on including:
  - a. minutes of all of the Commission's monthly meetings;
  - b. detailed summaries of our discussions on the issues of Parliamentary sovereignty, hypothetical options for a UK Bill of Rights and issues relating to Northern Ireland, Scotland and Wales (see the minutes of the Commission's meetings for November 2011, December 2011 and January 2012 respectively: <http://www.justice.gov.uk/about/cbr/meetings>); and
  - c. detailed summaries of the seminars that we co-hosted with the Arts and Humanities Research Council on 23 February 2012 and with All Souls College, Oxford on 21 March 2012, as well as a transcript of our seminar held in Birmingham on 13 June 2012 (see <http://www.justice.gov.uk/about/cbr>).
5. Our consultations to date have been valuable and have contributed to our deliberations and our thinking. Our consideration of the many issues that we face has evolved

considerably in the 15 months since we started our work. We are now at the point where we would like both to provide a final opportunity for people to give us their views on the key issue of whether they believe the UK should have a Bill of Rights and, if so, to ask some further questions about the kind of UK Bill of Rights that people might want to see if we were to recommend one. We wish to stress, however, that we have reached no decisions yet on whether to recommend such a Bill. Asking these questions should not in any way be assumed to mean that we are likely to make such a recommendation or that we are inclining towards doing so. But to help us make up our minds we do want to know more about people's views both on whether they favour a UK Bill of Rights or not and, if so, on what form they think such a Bill might take.

6. We are conscious that many respondents have already given us their views on some of these issues in their replies to our first discussion paper. We have already taken careful note of these replies, and we do not need respondents to write to us again with the same reply. But if your thinking has evolved or changed since your earlier reply or you did not respond to our earlier consultation this is a further opportunity to let us know what you think.
7. We are due to report to Government no later than December of this year. We not only welcome your contributions to these issues, but we consider them vital to our deliberations.
8. We therefore request that responses to this consultation should reach us by no later than **30 September 2012**.

## A UK Bill of Rights?

9. In the discussion paper that we published in August 2011, we asked whether you thought that we needed a UK Bill of Rights, which is the core question that we are asked to investigate in our terms of reference. We also asked what you thought any UK Bill of Rights should contain, how it should apply to Northern Ireland, Scotland, Wales and England, and whether there were any other matters on which you wished to provide your views. These are questions on which we have also received views throughout our consultations.
10. Of the respondents to our first consultation paper approximately a quarter advocated a UK Bill of Rights; just under half opposed such a Bill; with the remainder being neither clearly for nor against such a Bill.
11. A variety of models for a UK Bill of Rights were envisaged both by those advocating, and by those opposing, such a Bill. In particular, a section of those who were against a Bill of Rights opposed it because they considered that a UK Bill of Rights would be "HRA

(Human Rights Act) minus”, whilst a proportion of those supporting such a Bill did so because they envisaged it as building on the Human Rights Act by the inclusion of additional rights.

12. Views were expressed by opponents of a UK Bill of Rights in particular that the Human Rights Act 1998 was already a legally enforceable bill of rights and that it was working well, and that, even if it had flaws, a UK Bill of Rights was not the answer because it would pose risks to rights protections in the UK. These risks, in the view of some, stemmed from a political motivation to dilute human rights protections and to reduce the powers of the European Court of Human Rights.
13. Some respondents, in particular in Northern Ireland, Scotland and Wales, were also concerned that any attempt to introduce a UK Bill of Rights at this time could have adverse constitutional and political consequences for the UK, particularly if it were undertaken to the exclusion of a Bill of Rights for Northern Ireland or if it were undertaken without regard to the implications of the independence debate in Scotland. It was also argued by many of these respondents that there was little or no call for a UK Bill of Rights from people in Northern Ireland, Scotland or Wales. It was also argued by some that the protection of rights was now a matter for the devolved legislatures rather than for the UK Parliament. We discuss these issues later in this paper.
14. Finally, some respondents thought that, even if there were problems or perceived problems with the Human Rights Act, or its adjudication by the courts, there were other ways to address these, such as improved public education, and through amendments to the Human Rights Act or to other existing statutory or regulatory provisions.
15. Views were expressed by those who favoured a UK Bill of Rights that the Human Rights Act was negatively perceived, that it often resulted in decisions that were unpopular, and that a UK Bill of Rights would increase public confidence in the legal protection of their civil rights and liberties against the misuse of public powers.
16. Others who favoured a UK Bill of Rights thought that such a Bill would provide an opportunity to distance our fundamental rights from the European label which they have under the European Convention on Human Rights. Some believed that such rights should be called fundamental or constitutional rights and could be written in language that better reflected their UK heritage. Some thought such rights should be entrenched as part of a written constitution while others thought that it would be sufficient for such a bill of rights to be declaratory.
17. Either way, it was viewed by many of these respondents that a UK Bill of Rights would have an important symbolic and emotional appeal to the public that they believed that the Human Rights Act has lacked. Some also thought that a UK Bill of Rights would provide an opportunity to create or enshrine other constitutional rights and give them the same status as Convention rights.

18. As noted above we have reached no decisions on what we might recommend on the issue of a UK Bill of Rights. But through this consultation paper we want to provide a further opportunity to hear your views on the issue of whether changes to the existing arrangements are needed and whether a UK Bill of Rights might be desirable, in particular by seeking views on the main arguments that have been put to us opposing or supporting a UK Bill of Rights. We would like to reiterate that if you have already addressed these issues in your first reply to us, you do not need to reply again. However, if you would like to elaborate or change your earlier views, or if you did not respond to our first discussion paper, we would welcome knowing whether you believe that the UK would benefit or not from having a UK Bill of Rights, and whether you think there are alternatives to such a proposition. Against that background we would welcome your views on the first three questions below. The remaining questions ask about the form and content of a Bill of Rights if there were to be one.

**Q1: What do you think would be the advantages or disadvantages of a UK Bill of Rights? Do you think that there are alternatives to either our existing arrangements or to a UK Bill of Rights that would achieve the same benefits? If you think that there are disadvantages to a UK Bill of Rights, do you think that the benefits outweigh them? Whether or not you favour a UK Bill of Rights, do you think that the Human Rights Act ought to be retained or repealed?**

## Incorporation of the Convention

19. One of the principal effects of the Human Rights Act 1998 was that it ‘incorporated’ the rights in the European Convention on Human Rights which the UK had ratified. This meant that individuals in the UK could, for the first time, bring claims in domestic courts for alleged breaches of their Convention rights. Prior to the Act coming into force, individuals could only seek remedies in the European Court of Human Rights for breaches of their Convention rights.<sup>2</sup>

20. If a UK Bill of Rights were to be adopted, some have argued that the UK should return to the position prior to the Human Rights Act whereby individuals would have to petition the Strasbourg Court in order to seek a remedy for a breach of their Convention rights. Others argue that, since the UK would remain bound by its treaty obligations under the Convention, it would be regressive to remove the right of individuals in the UK to seek redress for alleged breaches of their Convention rights directly in UK courts.

**Q2: In considering the arguments for and against a UK Bill of Rights, to what extent do you believe that the European Convention on Human Rights should or should not remain incorporated into our domestic law?**



## Should the Human Rights Act be replaced, or might any UK Bill of Rights sit alongside the Human Rights Act?

21. A related question is whether a UK Bill of Rights should replace the existing Human Rights Act or sit alongside it. Some people believe that the existing Human Rights Act is working well and that a UK Bill of Rights should at most supplement that Act, perhaps by adding further rights to it, or by adding declaratory provisions which would not be enforceable but could play an important symbolic role. Others suggest that the negative perceptions of the Human Rights Act and the European Convention on Human Rights are such that a UK Bill of Rights should replace it.

**Q3: If there were to be a UK Bill of Rights, should it replace or sit alongside the Human Rights Act 1998?**

## How should the rights in any UK Bill of Rights be written?

22. At the moment, the rights in the Human Rights Act 1998 are written in identical words to those used in the European Convention on Human Rights. Many of those we have met have argued that if there were to be a UK Bill of Rights the rights it contained should still be written in these words to avoid confusion and legal uncertainty. But others have argued for a UK Bill of Rights to express rights in language that better reflects their UK constitutional heritage and/or changes in our society since the original European Convention was drafted in the late 1940s.

23. Most other countries that are signatories, like the UK, to the European Convention on Human Rights but which also have their own fundamental rights in a written constitution or other instrument have written these rights in a way that reflects their own national circumstances and heritage. Amongst these are other countries of the common law tradition i.e. Cyprus, Malta and Ireland as well as the UK's overseas territory of Gibraltar.

24. Some argue in this context that a UK Bill of Rights could usefully draw upon the more open-textured language of the UN International Covenant on Civil and Political Rights, or could specify more closely how the broad principles of the Convention are to operate in a UK context by, for example, defining more precisely the scope of certain rights or prescribing how certain rights should be balanced against each other (such as the balance between freedom of expression and personal privacy).

25. Some argue also that a further beneficial effect of changing the way in which rights were expressed through a UK Bill of Rights might be that both our own courts and the European Court of Human Rights in Strasbourg would pay greater attention to particular

UK circumstances in deciding UK cases coming before them. On the other hand, others believe either that a UK Bill of Rights would make little or no difference to the way in which the European Court interpreted and applied the Convention rights, or are concerned that differently worded statements of rights could lead in practice to a reduction in the protection currently afforded by our courts or the Strasbourg Court. Against that background we would welcome views on the following questions.

**Q4: Should the rights and freedoms in any UK Bill of Rights be expressed in the same or different language from that currently used in the Human Rights Act and the European Convention on Human Rights? If different, in what ways should the rights and freedoms be differently expressed?**

**Q5: What advantages or disadvantages do you think there would be, if any, if the rights and freedoms in any UK Bill of Rights were expressed in different language from that used in the European Convention on Human Rights and the Human Rights Act 1998?**

## Additional rights?

26. Our terms of reference require us to investigate the creation of a UK Bill of Rights that incorporates and builds on the UK's obligations under the European Convention on Human Rights, as well as seeking to protect and extend our liberties. Against that background, a number of people have suggested to us that a UK Bill of Rights should contain rights additional to those in the Human Rights Act. Others have suggested that the rights set out in that Act already place a considerable practical and financial burden on public authorities and that any additional rights would simply increase that burden.

27. Amongst the additional rights that have been proposed by those arguing that a UK Bill of Rights should contain such rights are the following.

## A Right to Equality

28. Proponents argue that a right to equality before the law is a well-established British constitutional value and legal standard at common law and in equality legislation. They argue that its inclusion in a UK Bill of Rights would reinforce the UK's international human rights obligations as well as bringing the UK more closely into line with a large number of other countries which have a constitutional guarantee of equality before the law and equal protection of the law. Most proponents of such a right suggest that it should be free-standing and thus build on the limited protection against discrimination that currently exists under the Human Rights Act.<sup>3</sup> On the other hand others question how such a right might operate in practice alongside existing equality legislation in the UK.

29. If there were to be a right to equality, there are a number of models of possible wordings. They fall into two main groups. The first are rights to equal treatment by the organs of the state. Such a right might be similar to the principle of domestic administrative law that similar cases should be treated similarly, that is, in a sense, a right to consistency on the part of the state. An example of a right in this general category is article 20 of the EU Charter of Fundamental Rights, which states simply that:

“Everyone is equal before the law.”

30. The second main category of equality rights are prohibitions on discrimination. An example of such a right is Article 21(1) of the EU Charter which states that:

“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”

31. Some texts of such rights prohibit discrimination generally: the EU article 21(1) set out above is an example. Other texts merely prohibit discrimination by the organs of the state. An example is Protocol 12 to the European Convention, articles 1 and 2 of which read:

“(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

(2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

32. Rights expressed in any such terms as the above would seem likely to extend the impact of the Equality Act 2010 in three ways. Firstly, they would extend its reach beyond the existing list of protected characteristics. Secondly, they would extend the scope beyond the activities, such as the provision of services, to which the 2010 Act applies. Thirdly, they would extend the right to equality without the balancing effect of the express exceptions which the Equality Act contains.

33. Such a potentially far-reaching impact may be considered by some to be unsatisfactory. States can and do restrict entitlements – for example, on the grounds of wealth in respect of eligibility for benefits, on the grounds of previous convictions in respect of eligibility for jury service, and so on. Accordingly, some might be attracted by a qualified right which is limited by some formula such as “...save as is reasonable in an open and democratic society.”

34. We would welcome views on both the principle and possible wording of a right to equality.

## A Right to Administrative Justice

35. Proponents argue that a right to administrative justice in a UK Bill of Rights could set out or build on a range of common law rights that exist in certain circumstances such as the right to a hearing or to reasons for certain decisions. Most such proponents believe that the current scope of Article 6 of the European Convention on Human Rights, referring only to “civil rights and obligations”, provides insufficient protection in respect of such issues. They also argue that inclusion of a right to administrative justice in a UK Bill of Rights would give the right the same status that the Convention rights have in domestic law. It would enable Parliament to enhance the visibility and value of these fundamental rights and to strengthen public confidence in good administration. On the other hand others question whether such a right is necessary given the foundation and standing of existing common law principles of administrative justice that have been developed by our courts for hundreds of years.
36. If there were to be a right to administrative justice in any UK Bill of Rights there are a number of ways in which such a right might be expressed. At a general level, it might simply take the form of a broad statement of a right to decision-making which is lawful, rational and procedurally fair. Alternatively, such a right might be expressed in more detail and include reference to the specific principles of administrative justice, derived from the common law.
37. Examples of a right to administrative justice can be found in other instruments. For example, Article 41 of the EU Charter of Fundamental Rights provides for a right to good administration:
- “1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
  2. This right includes:
    - a. The right of every person to be heard, before any individual measure which would affect him or her adversely is taken
    - b. The right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional business secrecy
    - c. The obligation of the administration to give reasons for its decision.”
38. We would welcome views on both the principle and possible wording of a right to administrative justice.

## A Right to Trial by Jury

39. Proponents argue that a right to trial by jury in a UK Bill of Rights would ensure that, at least in certain defined circumstances, an accused person would have a right to be tried by a jury of his or her peers, a right which has historically existed in the common law of England and Wales but which they argue has been eroded over the years. They would therefore like to see the current right to jury trial reinforced by its inclusion in a Bill of Rights. There are, however, complex questions about the appropriate scope of any such right in the light of the differences across the three legal systems within the UK in respect of the use of jury trials.<sup>4</sup> Others question whether jury trial should be treated as a constitutional right given the criticisms sometimes made about its operation. For example, some feel that trials before a judge with no jury deliver better justice in certain circumstances because the requirement on the judge to give reasons leads to increased transparency. Others consider it inappropriate to present complex cases such as those involving serious fraud to a lay jury.
40. There are a number of forms that a right to trial by jury in a UK Bill of Rights might take. For example, Article 11(f) of the Canadian Charter of Rights and Freedoms states that:
- “11. Any person charged with an offence has the right...
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.”
41. We would welcome views on both the principle and possible wording of a right to trial by jury in any UK Bill of Rights.

## Rights in criminal and civil justice

42. Proponents argue that the level of protection for accused persons in Articles 5 to 7 of the European Convention on Human Rights, which concern primarily the right to liberty and a fair trial, is insufficient. They argue that a UK Bill of Rights should spell out more clearly the protections already afforded by the common law, such as the right to be free from arbitrary arrest and detention, the standard of proof in criminal proceedings, the right to ‘confront’ one’s accuser and witnesses and the right of access to a court. Some also propose that any person facing a so-called “civil penalty” or any form of civil award should be entitled to a proper hearing on the substantive merits either at first instance or on appeal. Others argue that the fact that these protections already exist in the common law makes it unnecessary to include them in any UK Bill of Rights.
43. We would welcome views on whether in principle any UK Bill of Rights should contain rights of this kind for accused persons.

## Rights for victims

44. It is also often suggested in the context of a Bill of Rights that there should be recognition of, or specific provision for, the rights of victims of crime.
45. Proponents suggest that such recognition or provision would help ensure that the focus of rights is not just, as some perceive, on those accused of crimes, but also on those who have suffered harm as a result of crime. A Bill of Rights might also serve as a guarantee to victims of being treated with respect, fairness and dignity.
46. A Bill of Rights could give enforceable or declaratory expression to the protections currently afforded to victims by for example:
- highlighting the state's positive obligations to protect individuals' right to life under the Convention;
  - highlighting the protection afforded by the criminal law i.e. the fact that the state provides protection to victims or potential victims by criminalising certain conduct and prosecuting and punishing offenders;
  - highlighting or augmenting existing rights to a remedy, such as the protections afforded where negligence has caused injury; and/or
  - setting out procedural rights, such as the Victim's Personal Statement which gives victims a voice in their case before sentencing.
47. Others believe, however, that there is already an adequate level of protection and clear voice for victims in the criminal justice system and that no additional provision is necessary.
48. We would welcome views on whether in principle any UK Bill of Rights should contain rights of this kind for victims.

## Socio-economic rights

49. Proponents argue that neither the European Convention on Human Rights nor the Human Rights Act provide adequate protection for a category of rights known as economic, social and cultural rights. Such rights, which are found in a number of bills of rights in other countries, can include rights to adequate healthcare and housing, a right to education, a right to a minimum standard of living, and a range of other social security entitlements. For example, article 27 of the Constitution of the Republic of South Africa 1996 provides that:
- "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 dependants, 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.”

50. Others question whether rights of this kind are appropriate for adjudication by courts, since they necessarily deal with fundamental questions of public resources and policy, which they argue are more properly the responsibility of elected legislators who are democratically accountable rather than of judges who are not. Some suggest for this reason that if there were to be any recognition of such rights in a UK Bill of Rights the provisions should be declaratory or aspirational only, rather than enforceable by courts.

51. We would welcome views on whether socio-economic rights should be included in a UK Bill of Rights and, if so, what they should be and whether they should be enforceable.

## Children’s rights

52. Proponents argue that neither the European Convention on Human Rights nor the Human Rights Act provide adequate protection for children’s rights. They point out that the UK is bound under the United Nations Convention on the Rights of the Child to provide certain children’s rights, yet these have generally not been incorporated into domestic law or at least not in one consolidated instrument. They see a UK Bill of Rights as an opportunity to set out and consolidate children’s rights into one binding and enforceable domestic instrument. Others, however, believe that children’s rights are already adequately protected or could be further protected in the UK through ordinary legislation, and that the inclusion of certain of these rights in a UK Bill of Rights rather than in specific legislation might raise complex enforcement questions given that they relate to issues such as standards of living and services which many views as policy questions for elected legislators rather than for the unelected judiciary.

53. Again there are a number of different ways in which such rights could appear in a UK Bill of Rights. At one end of the spectrum a Bill might set out most or all of the rights in the UN Convention, but this is a long document running to 54 articles. At the other end of the spectrum a Bill might follow Article 24 of the EU Charter which states that:

- “1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests”.

54. We would welcome views on the principle and possible wording of children’s rights in any UK Bill of Rights.

### Environmental rights

55. Proponents argue that any UK Bill of Rights ought to contain environmental rights. They argue that the increasing awareness of the risks associated with an unsustainable environment, and the importance of environmental protection, support the inclusion of such rights. They point to the many links between the protection of human rights and the protection of the environment in international treaties and to the fact that a number of countries, including South Africa, have afforded constitutional protection to environmental rights.

56. Others, however, consider the range of existing statutory measures in respect of environmental protection to be sufficient. They question, as with socio-economic rights more generally, how such rights would be enforced given that issues of environmental protection involve policy and resource questions about the allocation of resources and political judgements that many consider should be for elected legislators and not for courts to decide.

57. There are a number of ways in which environmental rights could feature in a UK Bill of Rights. One possible precedent is Article 24 of the Constitution of the Republic of South Africa 1996 which provides that:

“Everyone has the right

- a. to an environment that is not harmful to their health or well-being; and
- b. to have the environment protected, 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) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

58. We would welcome views on the principle and possible wording of environmental rights in any UK Bill of Rights.



59. Against the background set out in the previous paragraphs we would welcome views on the following questions.

**Q6: Do you think any UK Bill of Rights should include additional rights and, if so, which? Do you have views on the possible wording of such additional rights as you believe should be included in any UK Bill of Rights?**

**Q7: What in your view would be the advantages, disadvantages or challenges of the inclusion of such additional rights?**

### Balancing certain rights

60. Any UK Bill of Rights could also seek to guide the courts on how they should strike the balance between qualified and competing Convention rights and freedoms which are sometimes held to be in opposition to one another, the most frequently cited example being the right to personal privacy under article 8 of the Convention and the right to freedom of expression under article 10. For example, when private information or defamatory allegations about an individual are published in the media, the courts are required to strike a fair balance between them. Section 12 of the Human Rights Act provides some guidance to the courts on how to proceed in such circumstances.<sup>5</sup> However, some believe that a UK Bill of Rights would enable Parliament to give clearer guidance to the courts on this issue than is currently given by either the Human Rights Act or by the European Court of Human Rights. Against that background we would welcome views on the following question.

**Q8: Should any UK Bill of Rights seek to give guidance to our courts on the balance to be struck between qualified and competing Convention rights? If so, in what way?**

### Definition of 'public authority'

61. Section 6 of the Human Rights Act 1998 makes it unlawful for public authorities in the UK to act in a manner that would breach a person's Convention rights. A UK Bill of Rights might place an identical or similar duty on public authorities in respect of the rights set out in that instrument. There might be scope, however, for a UK Bill of Rights to contain different or clearer provision on what types of bodies are covered by such a requirement.

62. Under the Human Rights Act 1998 the term ‘public authority’ includes Government departments, local authorities, statutory bodies and courts as well as some private bodies which exercise ‘public functions’ on behalf of the state (such as those companies who run private prisons). It is ultimately up to the courts to decide whether any particular body falls within this category. Following a House of Lords decision<sup>6</sup> that excluded from the scope of this duty private companies that provided residential care under contracts with a local authority, the Government brought forward legislation that clarified the scope of the Act in respect of certain care services<sup>7</sup>. Despite this move, many feel that there needs to be greater certainty on the range of bodies covered by such a duty, particularly as more public services are outsourced to private bodies. Others question such a need and argue that the existing scope is sufficiently flexible. Against that background, we would welcome views on the following question:

**Q9: Presuming any UK Bill of Rights contained a duty on public authorities similar to that in section 6 of the Human Rights Act 1998, is there a need to amend the definition of ‘public authority’? If so, how?**

## Responsibilities

63. It has been suggested by some, including a number of faith groups, that there should be inclusion of, or at least reference to, the notion of responsibilities in any UK Bill of Rights, and that its focus should not just be about rights. Those arguing for this position note that concepts of duty and responsibility figure in many aspects of our lives, such as our duty to obey the law and our responsibilities to our children. They also note that notions of responsibilities figure in current and historic bills of rights in some other countries, though these are generally in the form of aspirational or declaratory provisions. They argue that, at least for certain rights, the extent of the protection or compensation they provide should be determined at least in part by the actions of the individual seeking the protection of the right.

64. Others point out however, that most rights under the Convention and the Human Rights Act involve a concomitant responsibility to respect the rights of others. They note that there are very few absolute rights and even the right to life allows for self defence in appropriate circumstances or the sacrifice of life to preserve another in certain circumstances. They assert that rights are necessarily interconnected and require a daily balancing in many aspects of our lives. For example, a person’s right to religious observance must include the same right for others, even if their beliefs are anathema. And a person’s right to free speech must allow for another’s right, as a black or a gay person for example, to live in safety. Further, they ask which duties should be created or included and whether and how they would be made enforceable. For example, in the

case of parental responsibilities, there already exists in law a duty of care on the shoulders of parents with regard to their children, but arguably this duty could be too amorphous for a Bill of Rights. Similar questions could be posed regarding a duty to vote, a duty to protect the environment for future generations or a duty to protect the most vulnerable in our society. Or in the case of duties to obey the law or pay taxes, one could argue that these are already taken as read.

65. Some who raise the issue of responsibilities wish to see human rights made contingent upon good behaviour and feel for example that those who commit crimes should have their bad conduct weighed in the balance against their human rights. Others, however, argue strongly against any concept of responsibilities that would qualify or link the scope of an individual's human rights to his or her conduct or demonstration of responsibilities. They believe that one of the foundations of fundamental rights is that they are for all individuals, including those who are suspected of committing or who have committed crimes. They believe that it is in the nature of human rights that they exist for all human beings without reference to whether they are 'deserving' or not and cannot be made contingent. They argue that a Bill of Rights is intended to protect the individual against the misuse of public powers and not to impose legal liability upon the individual in addition to the duties imposed by criminal and civil law. To the extent that rights are qualified and require a fair balance, they argue that the Convention and the Human Rights Act correctly focus upon the rights of others and the wider public interest, and that Article 17 of the European Convention on Human Rights excludes protection for conduct aimed at the destruction of Convention rights.
66. A possible way of reconciling the desire to include some acknowledgement of the importance of responsibilities with the principle that some rights are absolute might be to emphasise the existing common law principle that public law remedies are discretionary. This is the current practice in judicial review. Arguably, therefore, courts could be encouraged when exercising this discretion to take into account the extent to which an applicant has complied with their responsibilities.
67. Recognising the strength of these arguments some have argued that responsibilities should figure in a declaratory way in any UK Bill of Rights; i.e. that they would not be enforceable, serving to remind all members of society that they owe certain duties and have certain responsibilities.
68. Responsibilities might be included in any Bill of Rights in a variety of ways, for each of which a parallel can be found in the Constitutions or Charters of Rights of other democratic countries:
  - (a) one or more responsibilities or obligations might be stated as "self-standing" obligations or societal values, such as a duty to society, a duty to uphold democratic values, or a duty to respect the rights of others;

- (b) some self-standing obligations might have legal effect, such as an obligation on citizens to perform military or community service when called upon to do so, or an obligation to vote in elections.
- (c) the enjoyment of certain rights might be made conditional upon their not being abused. For example, enjoyment of the right to freedom of expression could be conditional upon that right not being abused to attack the free democratic order; or
- (d) without being conditional in that sense, rights might be made subject to such exceptions as are necessary in a democratic society or protection of the rights and freedoms of others (see the formulation already in Articles 8, 9, 10 and 11 of the European Convention on Human Rights).

69. Against that background we would welcome views on the following question.

**Q10: Should there be a role for responsibilities in any UK Bill of Rights?  
If so, in which of the ways set out above might it be included?**

## The duty to take Strasbourg case law into account

70. One other provision of the Human Rights Act which has been the subject of recent public discussion is section 2 of the Act which requires our courts to “take into account” relevant judgments of the European Court of Human Rights when deciding cases involving Convention rights. Some commentators have expressed concern that this duty has been interpreted by the courts in a way that has caused them to apply Strasbourg case law too rigidly, without sufficient consideration of our legal system. Other commentators have said that even if this was the case in the past, our senior domestic courts are increasingly departing from Strasbourg case law where they consider this to be justified and appropriate.
71. It has been suggested by some in this context that any UK Bill of Rights could amend the duty in section 2 of the Human Rights Act 1998 to provide different and/or clearer direction to UK courts as to how to interpret and apply Strasbourg case law. For example, some commentators have suggested an amendment to the effect that our domestic courts “may” take into account Strasbourg case law, but should not do so if there is a clear expression of views by Parliament on the relevant issue (whether by statute or otherwise) or where the existing common law is clear.
72. Others have suggested that the section 2 duty should be expanded to direct courts to take into account also relevant case law from other countries, in particular from other common law countries. Proponents of this suggestion assert that this would mean that

the common law, as it has developed not just in the UK but elsewhere, would be given a more substantial and rightful place in the adjudication of domestic cases. Others, however, consider that such a change would be unnecessary as our courts (like the European Court of Human Rights) already have regard to case law from other international human rights courts and national courts. Against this background we would welcome views on the following question.

**Q11: Should the duty on courts to take relevant Strasbourg case law 'into account' be maintained or modified? If modified, how and with what aim?**

## Declaration of incompatibility

73. Under the Human Rights Act, if a court determines that a statute of the United Kingdom Parliament cannot be read and given effect in a way that is compatible with a Convention right, the court can issue a 'declaration of incompatibility'. Notwithstanding such a declaration however, the legislation remains valid and in force and it is up to Parliament to decide whether and, if so, how the incompatibility should be addressed. Unlike the position under the European Communities Acts and in many other European and Commonwealth countries the courts cannot declare the statutes of the UK Parliament invalid and unenforceable. The Human Rights Act therefore leaves it ultimately to Parliament to decide whether to amend the law in question.
74. In the view of many commentators the Human Rights Act in this way strikes a sensible balance between on the one hand the ultimate sovereignty of the UK Parliament which is democratically accountable and represents the people, and, on the other hand, the power and duty of the courts to declare and enforce the law and to provide effective remedies in accordance with the will of Parliament.
75. Some, however, have argued that this balance should be altered by giving courts the power to declare provisions of UK statutes invalid and unenforceable where it is found that they cannot be read compatibly with Convention rights. Others argue that the present position should be retained. Still others argue that the balance struck by the Human Rights Act is not the critical issue, because if Government and Parliament choose to do nothing following a declaration of incompatibility, individuals can still seek redress from the European Court of Human Rights for breach of their rights. If the Court agrees, the Government and Parliament are then bound by Article 46 of the Convention to comply with the Court's judgment.
76. To those who regard the Convention system as a threat to the British doctrine of Parliamentary sovereignty or supremacy, this is not satisfactory. They criticise the fact that Parliamentary sovereignty is in their view undermined by the mechanism of a

declaration of incompatibility, since Parliament is effectively bound by the judgments of the Strasbourg Court. Others counter that this is in the nature of the UK's obligations under the many international treaties which it has ratified in numerous areas of policy-making and that the UK made the decisions in ratifying these treaties that it wished to comply with the obligations found in them. Against this background we would welcome views on the following question.

**Q12: Should any UK Bill of Rights seek to change the balance currently set out under the Human Rights Act between the courts and Parliament?**

## Northern Ireland, Scotland and Wales

77. It is clear from the responses to our earlier discussion paper and our visits to Northern Ireland, Scotland and Wales that there are a range of views in different parts of the UK on whether, and the extent to which, a UK Bill of Rights might be desirable and/or possible in the light of the devolution settlements and the current political landscape in Northern Ireland, Scotland and Wales.
78. Many in Northern Ireland, Scotland and Wales have in particular questioned the viability, and legitimacy, of a UK Government-led initiative to enact a UK Bill of Rights, particularly if it were undertaken to the exclusion of a Bill of Rights for Northern Ireland, in parallel to the current debate on Scotland's constitutional future and in the wake of the recent increase in devolved powers in Wales. Many respondents in all three countries argued that a UK Bill of Rights is not a live issue on the public agenda except as a matter of English politics. These views were not, however, universally held, with some in different parts of the UK, including individuals, elected representatives and some non-Governmental organisations, saying either that a UK Bill of Rights was necessary or desirable, or that it could have potential benefits depending on its content.
79. Some respondents have questioned whether and how any UK Bill of Rights would affect the devolution settlements in Northern Ireland, Scotland and Wales, whether amendments to these settlements would be necessary, and whether the consent of the devolved legislatures would be required to the introduction of a UK Bill of Rights. While some saw these issues arising as a consequence of any attempt to introduce a UK Bill of Rights others suggested that this would depend on the form and content of such a Bill.
80. One possible model for a UK Bill of Rights in this context is a Bill that might sit alongside the existing Human Rights Act and contain substantially similar provisions and rights to those currently found in Schedule 1 to the Act. Under this model these rights might apply UK wide but be exercisable in respect of reserved matters only. Such an instrument might also include a separate chapter containing rights that applied only to England, as

well as a statement that acknowledged the competence of the Northern Ireland Assembly, the Scottish Parliament and the National Assembly for Wales to enact legislation conferring additional rights to meet the particular needs of those countries. Any additional rights passed by the devolved legislatures would, by virtue of the existing devolution statutes, relate to devolved matters only. In the view of some such a model might simply reflect what already happens in practice in respect of rights protection under the devolution statutes.<sup>8</sup>

81. Another possible model might be a UK Bill of Rights that contained additional rights in respect of Northern Ireland, Scotland and Wales but which would not enter into force in respect of those countries without the consent of the respective devolved legislature.

82. Against that background, we would welcome views on the following questions and proposals:

**Q13: To what extent should current constitutional and political circumstances in Northern Ireland, Scotland, Wales and/or the UK as a whole be a factor in deciding whether (i) to maintain existing arrangements on the protection of human rights in the UK, or (ii) to introduce a UK Bill of Rights in some form?**

**Q14: What are your views on the possible models outlined in paragraphs 80-81 above for a UK Bill of Rights?**

**Q15: Do you have any other views on whether, and if so, how any UK Bill of Rights should be formulated to take account of the position in Northern Ireland, Scotland or Wales?**

## Other issues

83. As set out in the introduction to this consultation paper, the questions which it contains do not repeat all of the questions which were posed in the Commission's earlier discussion paper. Nor does this consultation paper cover issues related to the role and operation of the European Court of Human Rights, on which the Commission has already provided advice to the Government, and the related issue of the effects of international treaty obligations on Parliamentary sovereignty, an issue which was discussed in some detail at one of the Commission's seminars (see <http://www.justice.gov.uk/about/cbr>).

84. Nevertheless the Commission does not wish in any way to discourage respondents from giving us their views. You are welcome, therefore, to give us views on these issues or any others which you believe to be relevant to our Terms of Reference.

## We hope to hear from you soon.

We look forward to hearing your views on the questions posed in this consultation paper or any other issues that you believe relevant to our Terms of Reference. We would like to receive your views by **30 September 2012**. Unless you specifically request otherwise, all responses will be made public.

All responses should be sent to the inbox or address below:

responses@commissiononabillofrights.gsi.gov.uk

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## List of Questions in this Consultation Paper

- Q1: What do you think would be the advantages or disadvantages of a UK Bill of Rights? Do you think that there are alternatives to either our existing arrangements or to a UK Bill of Rights that would achieve the same benefits? If you think that there are disadvantages to a UK Bill of Rights, do you think that the benefits outweigh them? Whether or not you favour a UK Bill of Rights, do you think that the Human Rights Act ought to be retained or repealed?**
- Q2: In considering the arguments for and against a UK Bill of Rights, to what extent do you believe that the European Convention on Human Rights should or should not remain incorporated into our domestic law?**
- Q3: If there were to be a UK Bill of Rights, should it replace or sit alongside the Human Rights Act 1998?**
- Q4: Should the rights and freedoms in any UK Bill of Rights be expressed in the same or different language from that currently used in the Human Rights Act and the European Convention on Human Rights? If different, in what ways should the rights and freedoms be differently expressed?**
- Q5: What advantages or disadvantages do you think there would be, if any, if the rights and freedoms in any UK Bill of Rights were expressed in different language from that used in the European Convention on Human Rights and the Human Rights Act 1998?**
- Q6: Do you think any UK Bill of Rights should include additional rights and, if so, which? Do you have views on the possible wording of such additional rights as you believe should be included in any UK Bill of Rights?**
- Q7: What in your view would be the advantages, disadvantages or challenges of the inclusion of such additional rights?**
- Q8: Should any UK Bill of Rights seek to give guidance to our courts on the balance to be struck between qualified and competing Convention rights? If so, in what way?**
- Q9: Presuming any UK Bill of Rights contained a duty on public authorities similar to that in section 6 of the Human Rights Act 1998, is there a need to amend the definition of ‘public authority’? If so, how?**
- Q10: Should there be a role for responsibilities in any UK Bill of Rights? If so, in which of the ways set out above might it be included?**

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- Q13: To what extent should current constitutional and political circumstances in Northern Ireland, Scotland, Wales and/or the UK as a whole be a factor in deciding whether (i) to maintain existing arrangements on the protection of human rights in the UK, or (ii) to introduce a UK Bill of Rights in some form?**
- Q14: What are your views on the possible models outlined in paragraphs 80-81 above for a UK Bill of Rights?**
- Q15: Do you have any other views on whether, and if so, how any UK Bill of Rights should be formulated to take account of the position in Northern Ireland, Scotland or Wales?**

## Endnotes

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- <sup>1</sup> The Members of the Commission are: Sir Leigh Lewis KCB (Chair), Professor Sir David Edward QC, Lord Faulks of Donnington QC, Jonathan Fisher QC, Martin Howe QC, Baroness Kennedy of The Shaws QC, Lord Lester of Herne Hill QC, Philippe Sands QC and Anthony Speaight QC. The Commission's Terms of Reference are:
- “...to investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties.
- To examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties.
- To provide advice to the Government on the ongoing Interlaken process to reform the Strasbourg court ahead of and following the UK's Chairmanship of the Council of Europe.
- To consult, including with the public, judiciary and devolved administrations and legislatures, and aim to report no later than by the end of 2012.”
- <sup>2</sup> They could also raise Convention rights and case law in domestic cases, and these were sometimes cited by courts in their decisions, but there was no ability to bring a direct claim and seek a remedy in a domestic court.
- <sup>3</sup> The Human Rights Act 1998 prohibits discrimination as set out in Article 14 of the Convention i.e. it only prohibits discrimination in the securing of the other rights and freedoms set out in the Convention. The UN International Covenant on Civil and Political Rights, by contrast, contains a free-standing right to equality but it has not been incorporated into UK law. Protocol 12 to the European Convention on Human Rights also contains a free-standing right to equality but this right has not been ratified by the UK and is not contained in the Human Rights Act. However, the Equalities Act 2010 contains detailed and specific protection for many forms of direct and indirect discrimination.
- <sup>4</sup> There are a number of differences in the right to a trial by jury across England and Wales, Northern Ireland and Scotland. For example, Scotland has a different system than England and Wales for determining whether an accused will be tried before a jury. Northern Ireland also has a particular statutory system, which includes, since the abolition of 'Diplock' courts, provisions excluding trial by jury in certain cases involving proscribed organisations (Justice and Security (NI) Act 2007). Further, in England and Wales, section 44 of the Criminal Justice Act 2003 excludes the right to jury trial in certain cases of risk of jury tampering.
- <sup>5</sup> Section 12 of the Human Rights Act directs courts to “have particular regard to” the importance of the Convention right to freedom of expression, and in cases involving journalistic, literary, or artistic material, to have particular regard to the extent to which the material has or is about to become public, and the public interest in the material being published, as well as any relevant privacy codes.
- <sup>6</sup> *YL v Birmingham City Council and others* [2007] UKHL 27.
- <sup>7</sup> Section 145 of the Health and Social Care Act 1998.
- <sup>8</sup> For example, the Scottish Parliament enacted the Scottish Commission for Human Rights Act 2006 and the National Assembly for Wales passed the Rights of Children and Young Persons (Wales) Measure 2011.







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