



Commission on a Bill of Rights for the UK

Response to Second Consultation

September 2012

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Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists. We welcome the opportunity to contribute to the Commission's second consultation exercise.¹

2. In line with the Commission's request that repeat submissions be avoided, this brief document is designed to supplement our first response to the Commission's earlier consultation.² These documents should be read together. For the avoidance of doubt, JUSTICE considers that:
 - a. Fundamental rights and liberties must be protected and respected by each of the institutions of Government in the UK. Individuals should have a right to an effective remedy in our domestic courts for violation of those rights and, in practice should enjoy each of the substantive human rights enshrined in the European Convention on Human Rights (ECHR) and the UN treaties to which the UK is a party;
 - b. The Human Rights Act 1998 (HRA 1998) performs the core functions of a bill of rights for the UK;
 - c. We are not persuaded that there is any evidence-based argument for change to the substantive and procedural guarantees in the Act, or that the current debate about a bill of rights for the UK is appropriate, at this time.
 - d. Minimum criteria must be satisfied in order to justify a constitutional change of the magnitude proposed:
 - i. Any Bill of Rights must be based on a broad consensus, not just of lawyers and politicians, but also the public at large;
 - ii. The process of agreeing any such Bill, and its content, must reflect the increasingly devolved nature of the UK;
 - iii. It must guarantee the rights protected by the European Convention on Human Rights and should be compatible with the international obligations of the UK;

¹ Commission on a Bill of Rights, *A Second Consultation*, July 2012

² Full copies of our first submission are available. here: <http://www.justice.org.uk/resources.php/309/commission-on-a-bill-of-rights-discussion-paper-do-we-need-a-uk-bill-of-rights> (Herein "First submission")

- iv. The key enforcement mechanisms of the HRA set a minimum bar for the protection of rights and should be replicated in any other mechanism for the protection of rights in the UK;
 - v. Any statement of responsibilities or duties must not detract from the protection of human rights; and
 - vi. The scope for reform should not be oversold.
- e. In the current political climate, we are not persuaded that these criteria can be fulfilled.
3. We are concerned that this debate – and the work of the Commission – should take place fully informed by the existing political tension in the UK around the role of rights and liberties. The Commission’s work should not provide the foundation for changes to our existing constitutional arrangements which would reduce the level of substantive or procedural protection offered by the HRA 1998. Such a retrogressive step would, in our view, damage the ability of the UK to meet its obligations under the European Convention on Human Rights, the equivalent guarantees in the International Covenant on Civil and Political Rights and other international instruments. In practice, this would make it more difficult for people in the UK to protect their rights and liberties against the State and the demands of the majority.
4. In the rest of this submission, we provide brief responses to the Commission’s questions for consultation. Nothing in these more detailed responses, including any failure to respond to any specific question, should be taken as JUSTICE support for a diminution in the standards of protection offered by the HRA 1998 read together with the ECHR.

Q1a: What do you think would be the advantages or disadvantages of a UK Bill of Rights?

5. This question appears premature. The Commission’s terms of reference require it to “investigate” the creation of a bill of rights for the UK. The first task for the Commission, in our view, must be to consider the existing mechanisms for the protection of human rights in the UK – provided in the HRA 1998 – and whether there is an evidence base for change. As drafted, this question appears impossible to answer coherently without an

understanding of what any proposed UK bill of rights might include in terms of substantive rights, procedural guarantees and enforcement mechanisms.

6. If this question is designed to illicit how any bill of rights might improve upon the existing system in the HRA 1998; in our 2007 Report, *A Bill of Rights for Britain*, we concluded that, in keeping with UK constitutional traditions, a new bill of rights would have limited benefits.³ The main advantages could be enhanced public ownership through increased public education and the opportunity to consider the inclusion of new and additional rights to those guaranteed by the HRA 1998. However, even in 2007, we had reservations about the ability to achieve agreement on any bill of rights which met these criteria, and cautioned against any national debate being used to provide less protection for fundamental rights. In our first submission, we confirmed that since 2007, our reservations over the political nature of the debate on a bill of rights have grown. We are deeply concerned that any recommendations from the Commission should not provide the foundation for a political movement to retrogressively reduce the degree of protection offered to individual rights by the HRA 1998.⁴

Q1b: 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?

Q1c: If you think that there are disadvantages to a UK Bill of Rights, do you think that the benefits outweigh them?

7. For reasons that we set out in our first submission, we are not persuaded of the arguments made that a UK bill of rights drafted now could improve upon the benefits of the HRA 1998, which is designed to integrate rights and liberties into public decision making, to provide individuals with a remedy in domestic courts and to respect parliamentary sovereignty.⁵ At the outset, we stress that the HRA 1998 fulfils the key functions of a bill of rights for the UK and has brought significant advantages to the protection of individual rights within the UK.

³ JUSTICE, *A Bill of Rights for Britain*, 2007, Chapter 6, paras 25 – 26. (Herein, *A Bill of Rights for Britain*)

⁴ First submission, paras 4 – 7.

⁵ First submission, paras 11 – 16.

8. It is extremely difficult to answer this question in the abstract. A bill of rights which provided substantive and procedural protection which was both “HRA +” and “ECHR +”, and satisfied the other minimum criteria outlined by JUSTICE, outlined above, could give some additional protection to individual rights within the UK and could provide an opportunity to begin a programme of public education on the role of rights and liberties in our constitution. However, within the existing political climate, a cross-party consensus on this model is extremely unlikely.⁶ Any other model would, in our view, be retrogressive and would have serious disadvantages for the protection of individual rights and the ability of the UK to meet its international obligations.
9. In light of the limited benefits likely to accrue – being mostly limited to renewed public commitment to rights through public education – direct investment in public education and engagement on rights and liberties, including on the role of the HRA 1998 and the responsibilities of public authorities under the Act, would be a better investment of public time and money.

Q1d: Whether or not you favour a UK Bill of Rights, do you think that the Human Rights Act ought to be retained or repealed?

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

10. While we see no evidence base for change; any change agreed must retain the minimum procedural and substantive guarantees in the HRA 1998. The Act should not be repealed. If agreement were sought on a model which enhanced rights protection (HRA/ECHR +), we consider that any additional protection could sit alongside the Act.⁷ In any event, repealing or amending the current structures before the introduction of guarantees of protection to a higher or equivalent standard would be retrogressive, would leave the people of the UK without a remedy (except in so far as one could be achieved at the European Court of Human Rights) and would be unprecedented in diplomatic terms, setting an example for other Governments seeking release from the minimum obligations in the international and European minimum standards reflected in the ECHR.⁸

⁶ First submission, paras 17 – 23. See also paras 24 – 32. *A Bill of Rights for Britain*, paras 11 – 15.

⁷ *A Bill of Rights for Britain*, Chapter 2, para 2.

⁸ *A Bill of Rights for Britain*, Chapter 2, para 2.

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?

11. The rights contained in the European Convention on Human Rights (ECHR) and incorporated into domestic law in the HRA have enabled major progress in the protection of fundamental rights in the UK. The ECHR rights included in the HRA are the logical and necessary starting point for any debate. The UK's relationship with the Council of Europe and the ECHR is now woven into our legal and political fabric. As a matter of political reality, any move to debate the model of rights protection must build on the foundations laid by the ECHR. This progress must be acknowledged in the work of the Commission. The Commission's terms of reference refer to work building on the obligations of the European Convention. Acting as Chair of the Council of Europe Committee of Ministers, the UK piloted through the adoption of the Brighton Declaration on the Future of the European Court of Human Rights. A principle part of the Brighton Declaration is the more effective implementation of national measures to implement the European Convention on Human Rights.⁹ If steps are taken to remove the Convention rights from domestic law; careful measures would need to be adopted to ensure at least the same degree of protection for Convention rights within domestic law. Indeed, we note that the Commission's terms of reference limit its consideration to a bill of rights which "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".

12. We note that, in many European States, although a distinct bill of rights exists, the Convention is also incorporated into domestic law through either constitutional provision for incorporation or the monist recognition of international law standards.

13. The argument is made that a domestic bill of rights which reflected the Convention rights but did not incorporate them directly would allow the UK greater flexibility under the European Court's doctrine of the margin of appreciation. As we explained in our first submission, this argument is not sustainable.¹⁰ The crucial factor remains the substance

⁹ *The Brighton Declaration*, paras 7, 9.

¹⁰ First submission, pages 12 – 13.

of legal protection, not the fact that a mechanism for rights protection is based on direct incorporation or a unique bill of rights model. The UK will remain bound by its obligation to give effect to the Convention and to judgments of the European Court of Human Rights. Any significant departure from the rights contained in the Convention would increase the risk that this international law obligation would be violated in practice, increasing the likelihood of litigation at Strasbourg and adverse judgments of the European Court of Human Rights. One advantage of the HRA 1998 has been that the European Court is increasingly receptive to the case law developed by our domestic courts under the HRA, the quality of which has had a significant impact upon European human rights jurisprudence.¹¹ How this dialogue between the two courts may be affected if the domestic courts are applying language and jurisprudence unfamiliar to the Strasbourg system is unknown, but in our view, the direct impact on the Strasbourg Court's jurisprudence is likely to diminish.

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?

14. In *A British Bill of Rights*, we explored the possibility of redrafting the language of the Convention in order to ensure that the core rights it protected were either updated to make them more accessible to a modern audience or to remove anachronisms, such as the reference to vagrants in Article 5 or the failure to refer directly to sexual orientation in Article 14. While we recognised that this “updating” might have the advantage of increasing accessibility, we also recognised the difficulty of adapting the language in the Convention. Not least, the Convention reflects the broad language of most international and domestic human rights instruments, which although designed to be both aspirational and inspirational are also designed in order to provide a flexible, yet robust legal

¹¹ See Nicholas Bratza, *The Relationship between the UK Courts and Strasbourg*, EHRLRev 5 (2011) 505-512.

framework which will allow for the development of coherent legal remedies. The difficulty in trying to adapt and simplify such language is that it might inadvertently alter the degree of protection intended. Equally, the adoption of different language could spawn litigation on previously settled issues, in order to determine in so far as that language is intended to be interpreted compatibly with our international obligations, including under the ECHR (as the common law would traditionally expect). If the language is seen to diverge from the provisions of the ECHR, unless expressly stated otherwise, the common law would require the Court to interpret it in a manner in accord with our international obligations, including under the ECHR, at least in so far as any ambiguity arose.¹²

15. As we explained in our first submission, we are concerned that the debate over the language adopted in the Convention rights is not so much concerned with updating or removing anachronisms, but ensuring that rights are more narrowly drawn or justification more easily identified in some circumstances. Such a retrogressive step would, in our view, be unique internationally and would lead to increased litigation in Strasbourg, if remedies at home were deliberately circumscribed through re-drafting.¹³

16. See also answer to Question 2, above.

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?

17. In *A Bill of Rights for Britain*, we acknowledged that a benefit of the debate was the opportunity to consider expanding protection of rights beyond the minimum standards in the HRA to include additional rights protected by international law, traditional common

¹² The common law recognises a strong interpretative obligation that Parliament does not intend to legislate contrary to its international obligations, nor does the Government intend to act in a manner inconsistent with its undertakings. This rule was applied in a line of pre-HRA case law to recognise that where ambiguity arose a human rights compatible interpretation was favoured over one that was inconsistent with our Convention obligations. See for example, *R v Secretary of State for Home Department ex parte Simms* [2000] 2 AC 539, 575.

¹³ See First submission, page 12 -13.

law rights and rights designed to particular groups (for example, children's rights) or against particular evils (for example, environmental damage). These included consideration of many of the rights outlined in the Commission's second consultation document, such as the right to trial by jury, the right to good administration, a freestanding right to equality and a host of economic, social and cultural rights. We explored the benefits of protecting these rights, and the models adopted by other countries bills of rights, for example, in South Africa and India and by international instruments such as the EU Charter of Fundamental Rights. However, we also explored the difficulties associated with the degree of protection offered, and historical resistance within Government to the protection of these rights within domestic law (for example, the resistance of Government to the ratification of Protocol 12 ECHR which would incorporate a free-standing equality right into the Convention).¹⁴ We also recognised that agreement, let alone consensus, on the degree of protection offered to these rights within the UK was likely to be extremely difficult. We noted the dangers of creating a constitutional rights document which added little real protection, but which purported to protect against many ills.¹⁵

18. These concerns remain and we consider that changes in the political climate make consensus on expanding the protection of rights yet more unlikely.¹⁶ For example, the decision not to implement the limited provisions on socio-economic equality in the Equality Act 2010 does not suggest that the Governing parties have an appetite for the expansion of either socio-economic rights or equality guarantees.¹⁷

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?

19. The balance to be drawn between qualified rights and the rights of others and between competing Convention rights in individual cases is often an inherently fact sensitive judicial exercise, undertaken in the light not only of any relevant statutory framework,

¹⁴ The JCHR Report on a Bill of Rights made similar observations, noting that adopting different and additional rights and affording them differing degrees of justiciability would be possible. However, the JCHR also recognised the difficulty in reaching consensus on the rights to be included and the model for their protection.

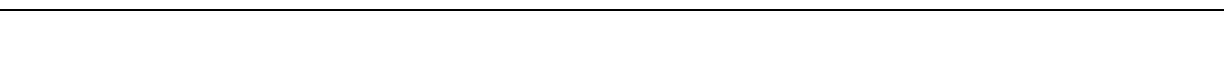
¹⁵ *A British Bill of Rights*, Chapter 2.

¹⁶ First submission, paras 5 – 7.

¹⁷ See for example, Guardian, *Theresa May scraps legal requirement to reduce inequality*, 12 Nov 2010.

20. The key judicial principles which are applied in connection with this balancing exercise are well-known, namely the principles which assist the Court to identify a legitimate aim, necessity for any rights-interfering measure and the overall proportionality of an individual measure. These are principles applied by domestic and international courts alike when applying rights instruments (for example, even before the advent of the HRA 1998, the Privy Council utilised these principles in considering constitutional rights documents across the commonwealth).¹⁸ It is clearly open to Parliament to offer guidance to the Courts on how this balance should be struck in the abstract. Under the HRA 1998, Parliament can bind the Courts' hands by passing primary legislation which strikes a particular balance in connection with an individual exercise, and which clearly places an emphasis on one right over another. In these circumstances, the Court can offer no individual remedy even when it considers that the balance has been struck incorrectly and in violation of an individual's rights. It may only make a declaration of incompatibility under Section 4 HRA 1998. Similarly, should the domestic courts adopt an interpretation which Parliament wishes to reverse, it may do so through the use of clear statutory language.

21. However, we question the value of codifying any wider form of guidance on judicial interpretation. The issue of balance is inherently fact sensitive, and attempting to set rigid rules in the abstract as to the application of the necessity and proportionality tests could adopt either an overly broad or overly restrictive approach with unintended consequences. It could undermine the function and discretion of the Court and the effectiveness of the remedy that they could afford to an individual. This could lead to further unnecessary litigation and increased reliance on the European Court of Human Rights and its jurisprudence.¹⁹



¹⁸ See for example, *De Frietas v Ministry of Agriculture* [1999] AC 69.

¹⁹ We have raised similar concerns in connection with the Statement of Intent issued by the Home Secretary in connection with the application of the right to family and private life in Article 8 ECHR in immigration cases. See here: <http://www.justice.org.uk/resources.php/326/justice-urges-commons-caution-on-immigration-and-human-rights>

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?

22. Maintaining, as a minimum, the procedural protections and enforcement mechanisms in the HRA 1998 would be essential for any change to the status quo to maintain any credibility. At the heart of this system, is the duty in Section 6 HRA 1998 which requires all bodies performing a public function to act compatibly with Convention rights. As we explained in both *A Bill of Rights for Britain* and in our first submission, this duty is designed to integrate human rights into public decision making and to ensure that their protection is not solely understood to be an issue for lawyers and litigation. The definition as drafted was designed by Parliament to ensure that all bodies – public and private – spending public money and providing services as if standing in the shoes of the State would be subject to the obligations in the Act. As, increasingly public services are provided by private providers, it is essential that the duty to comply with our most fundamental rights continue to apply to all bodies deemed to be performing a public function, regardless of whether they are public or private.

23. The litigation around the definition of public function for the purposes of the HRA 1998 has been well dissected. Together with Liberty and BIHR, JUSTICE intervened in the leading case of *YL*, to argue that our courts had taken an overly restrictive approach to the interpretation of Section 6, focusing on the characteristics of the body in question, rather than the function that they performed.²⁰ Subsequently we argued in favour of amendments to the Health and Social Care Act 2008 to ensure that all publicly funded residential care provided by private providers was deemed a public function for the purposes of the HRA 1998. Since *YL*, litigation on the definition of public function has slowed. However, the decision of the court in *Weaver* that some social housing functions would be covered gave more positive guidance, focused more on the function of social housing and the circumstances in which the housing was provided, than on the characteristics of the private provider.²¹

24. There have been many suggestions raised to solve the ambiguity over the scope of Section 6 HRA 1998, including amending the definition to introduce a list of bodies and

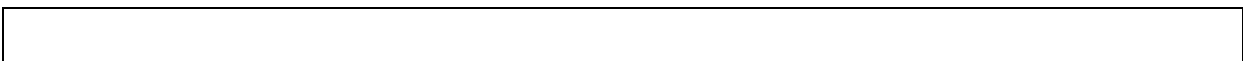
²⁰ [2007] UKHL 27

²¹ *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587

functions clearly covered by the Act, modelled on the Equality Act 2010. Other suggestions have included amending Section 6 to introduce a number of criteria to be applied when considering whether a private body is performing a public function. While such amendment could be utilised to attempt to clarify the precise scope of the Act, we consider that any definition that were to be adopted would need to be adequately flexible to allow courts to react to the shifting market for the provision of public services and the performance of public functions. We consider that an exhaustive list would be impossible and counterproductive. It would also be counterintuitive to set in stone, in a constitutional instrument such as a Bill of Rights, a rigid list of immovable subjects.

25. In light of the shifting jurisprudence of the court – as evidenced in *Weaver* – we consider that the risk posed by any ambiguity in Section 6 insufficient to justify any wholesale change, let alone make the case for a new Bill of Rights.

26. We note that under the HRA 1998, Parliament retains the power to legislate in order to definitively settle the application of the Act to a particular public authority. We note that the Joint Committee on Human Rights has consistently sought to clarify, as Bills proceed through Parliament, which acts are to be determined public functions for the purposes of Section 6 HRA 1998 by Government when the Bill is presented to Parliament. It is unclear whether this correspondence and any subsequent debate on the floor of the House of Commons or the House of Lords will help resolve any ambiguity identified by the courts. In any event, we consider that should the need to revisit the definition in Section 6 be justified, this could be achieved by provisions supplementary to the existing measures in the HRA 1998, without need for repeal.²²



²² We note that the Equality Act 2010, Section 150(5), also adopts the language of the HRA 1998 for the purposes of determining its application to some public authorities. With this in mind, the definition of 'public function' in Section 6 HRA 1998 has a wider impact than the Act itself and would not necessarily be settled by a change in language in any future proposal on a Bill of Rights either to replace or sit alongside the HRA 1998.

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?

27. It is our firm view that the HRA 1998 clearly incorporates both rights and responsibilities. Crucially, it would be unthinkable to produce a bill of rights which explicitly makes rights conditional upon the exercise of specific responsibilities. Already, many rights, such as freedom of expression, are expressly limited by the rights of others, and this is clearly built into the Convention language incorporated by the HRA 1998. While inclusion of defined responsibilities may be attractive in garnering short term popular and political support, they should not be used to appease those who are sceptical about the importance of human rights or those who do not accept that fundamental rights are universal and recognised without pre-conditions. Any substantive statement that placed contingencies on the rights contained in any bill of rights based on conduct or character (for example, by excluding prisoners, asylum seekers and temporary residents from its protection) would most likely fall foul of the UK's international obligations under the ECHR and the UN treaties. Some bills of rights contain declaratory statements on the balancing of competing rights and associated responsibilities in their preamble. These statements are not operative and the substantive guarantees in these documents remain universal and limited only by the substantive provisions which allow for limitations in defined circumstances, for example to protect the rights of others.

28. In our 2007 Report, we considered the viability of such a declaratory statement.²³ The benefits of such a statement are in our view limited to appeasing an unfortunate impression held by some that rights are unbound. While the inclusion of such a statement in a Bill of Rights which could be justified by an evidence-based case for change might be attractive, without any wider case for change, the inclusion of a non-binding statement on responsibilities cannot without more justify the overhaul of the existing system.

²³ *A Bill of Rights for Britain*, Chapter 2, paras 128 – 136,

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?

29. There has been a longstanding debate on whether Section 2 HRA 1998 requires our judges to be bound by the jurisprudence of the European Court of Human Rights. Although there is a clear line of case law which suggests that our judges consider themselves so bound, there is nothing in the HRA 1998 which requires this approach. Indeed, there is some evidence that this is not what Parliament intended when the Act was passed.

30. The judges themselves appear to be moving away from this unduly restrictive approach, recognising that they may go beyond the limits of Strasbourg in providing protection for individual rights, and may indicate where they consider that the jurisprudence of the European Court has failed to engage with the particular safeguards offered by the domestic legal system in identifying a violation.²⁴

31. We are concerned that to wholly detach our courts from the jurisprudence of the Strasbourg court would be to create a fiction, detached from our international obligations under the Convention. However, equally, there is nothing in the Convention itself which requires our domestic courts to apply their reasoning slavishly to domestic law. Rightly, we consider that the language in the HRA 1998 strikes an appropriate balance between respect for the boundaries of the Convention and encouragement of the development of independent domestic rights jurisprudence. The Act has been in force for little over a decade; we recognise the growing dialogue between the Strasbourg Court and our Supreme Court as a positive sign that amendment of the language of the Act is unnecessary at this time.

²⁴ See for example, *Al-Khawaja and Tahery v UK*, Applications nos. 26766/05 and 22228/06, Judgment dated 15 December 2012.

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?

32. The enforcement of any instrument guaranteeing constitutional rights protection goes to the heart of the inevitable tension between the different branches of Government and the role that each legitimately plays both in Government and in the protection of fundamental rights. In our 2007 Report, *A Bill of Rights for Britain*, we considered the range of models in international and comparative rights instruments which govern the enforcement of rights, from models which allow the Courts to strike down legislation promulgated by Parliament, to a purely declaratory model which would give no enforcement role to the judiciary. The declaratory model aside, we concluded that the “parliamentary” model adopted in the HRA 1998 was particularly suited to the British constitutional settlement which had parliamentary sovereignty at its heart.

33. Criticism in the interim has focused on a few limited judgments which the Government and some critics have considered politically unpopular. Any instrument fulfilling the key functions of a bill of rights would by its nature continue to lead to judgments which were politically inconvenient. The function of a rights protecting document is to allow individuals to challenge decisions of the majority Government which allegedly infringe their rights in practice. Depriving the courts of any opportunity to determine that a breach has occurred, the utility of the rights instrument would be seriously undermined. In light of the critique targeted at the current role of the Courts, we consider that agreement enhancing their role is unlikely. With this in mind, we reiterate the analysis in *A Bill of Rights for Britain*. In our view, the parliamentary model embodied in the HRA 1998 presents the best constitutional fit between the need for an effective remedy and recognition of parliamentary sovereignty. That the Act operates to provide a significant role for parliament in the protection of individual rights and liberties is stressed in our earlier remarks.²⁵

²⁵ First Submission, para 30.

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?

34. We reiterate the headline concerns we expressed in our response to the Commission's first consultation:

- The process of agreeing a UK bill of rights, and its content, must reflect the increasingly devolved nature of the United Kingdom;
- The current structures of the devolution statutes are such that they are intimately linked with the HRA 1998 and the ECHR;
- Any bill of rights which covers the devolved jurisdictions will be legally and politically difficult;
- Amendments to the HRA, or the enactment of a bill of rights would likely require amendment to the devolution statutes;
- Any change to the status quo would require consent of the devolved jurisdictions, either from a constitutional perspective, or because of the significant constitutional ramifications of change;
- Any change which would limit the application of Convention rights in Northern Ireland will also engage the international treaty obligations owed by the UK to the Republic of Ireland under the Good Friday Agreement.²⁶

35. Since the first Commission consultation was completed, the impact of the Commission's work in the three devolved jurisdictions has been highlighted by decision makers and others in Northern Ireland, Scotland and Wales. We agree with the assessment of the

²⁶ See JUSTICE Response to the BORC First Consultation, paras 33 – 34. See also, JUSTICE, *Devolution and Human Rights*, February 2010.

Commission in its work that since the Commission was launched, if anything, the significance of the devolution issue has grown.²⁷

- Progress on the debate on independence for Scotland and planning for a referendum has been swift. Agreeing a solid, enduring constitutional rights settlement against a live debate on the wider constitutional settlement and union seems far from ideal and realistically would be politically and legally very difficult. This confirms our view that the current political environment is not conducive to a rational and constructive debate on a constitutional shift of the magnitude proposed by a new bill of rights.
- In Northern Ireland, the consistent response from commentators and institutions within Northern Ireland to the debate on a bill of rights for the UK is that this political debate should not be permitted to derail the Northern Ireland Bill of Rights process.

36. At this stage, we do not provide detailed comment on each of the models proposed by the Commission. While we consider that a politically and legally viable model could be devised which took into account the distinctions between each of the devolved jurisdictions, this would be no simple task.

- The first Commission model envisages a HRA/ECHR + model, to sit alongside the HRA 1998, with additional rights to apply in England only (para 80). Any additional rights for the devolved jurisdictions would be for the respective devolved legislatures to propose and adopt.
- The second Commission model proposes a “UK bill of rights” with substantive content as yet undefined but which might include distinct chapters with individual chapters of specific rights for Northern Ireland, Scotland and Wales where those additional rights would not enter into force without the consent of the respective devolved legislatures (para 81).²⁸

²⁷ See minutes, Commission on a Bill of Rights, January 2012.

²⁸ We have assumed that within this model any additional rights for the England would also be included in a distinct chapter from those rights that apply nationally.

37. While either of these models might be able to work constitutionally within the devolution settlement, the precursor must be to establish whether there is a case for a national bill of rights, and if so, to what degree there is a consensus on how the bill of rights can and should apply in the devolved jurisdictions. In addition, the minimal detail provided in each of these models makes constructive comment difficult. Without a clear understanding of the proposed rights to be covered by either model, making a detailed comment on whether they can operate effectively on an “opt-in” basis is impossible. Equally, additional rights agreed at Westminster, albeit on an opt-in basis, could be politically contentious. It is unclear whether the second model would preserve the current status of the ECHR and whether this would be adequate to satisfy the requirements of the Good Friday Agreement.²⁹ In our view, if there is any question that either model would amount to anything less than HRA 1998 “plus” and ECHR “plus”, neither would be appropriate or acceptable within the existing devolution settlement.

38. JUSTICE reiterates its view that in the current political climate, we can see no positive case for revisiting the current settlement in the HRA 1998. That an ongoing political and constitutional debate is ongoing about the independence of Scotland and separately on a distinct Bill of Rights for Northern Ireland does not preclude debate. However, it does, in our view, make the likelihood of a workable and sustainable political consensus on a bill of rights for the UK extremely unlikely at this time.

Conclusion

39. We urge the Commission to remain conscious of the scope of its terms of reference. We are concerned that the Commission’s second consultation might be seen as preparatory to the drafting of a bill of rights for the UK. The role of the Commission is a far more limited one: to investigate a bill of rights for the UK, which might build on our obligations in the European Convention on Human Rights. The outcome of the Commission’s first consultation appears to reinforce our view that, politically, this is not the right time for a debate about introducing a bill of rights for the UK (with over half of all respondents expressing opposition for such a bill and only around one quarter expressing a desire for change).³⁰ That the Commission’s role is a strictly defined one is reflected in its make-up and its limited resources. Were constitutional change of the magnitude proposed in a bill of rights appropriate, the degree of public education, consultation and engagement

²⁹ JUSTICE, *Devolution and Human Rights*, February 2010.

³⁰ Commission on a Bill of Rights, *A Second Consultation*, July 2012, para 10.

necessary to ensure the public ownership needed to create a truly UK-wide consensus would far outstrip the very limited engagement that the Commission has undertaken during the past year.

40. We urge the Commission to focus on the limited evidence-base for change and the evidenced achievements of the current constitutional settlement. Principally, we urge the Commission to focus primarily on how public engagement with and understanding of human rights principles can be encouraged, as opposed to any detailed recommendations on the structure of any potential bill of rights for the UK. Clearly the investigation of the necessity for change must be a precursor to the design of any future, theoretical model for a bill of rights for the UK. Change for the sake of change cannot provide a solid foundation for the protection of rights and liberties in the UK for centuries to come. Without public understanding and ownership of rights-language, tinkering around the edges of our constitutional settlement for rights protection will bring no clear benefits, but could risk significantly damaging individual's rights to redress against the State in some of the most critical cases of human rights abuse and abuse of power.

JUSTICE

28 September 2012