

Discussion Paper

# Do we need a UK Bill of Rights?

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## Introduction

1. The Commission on a Bill of Rights is an independent Commission set up by the Government<sup>1</sup> and required by our Terms of Reference<sup>2</sup>

“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 extends 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.”
2. The Commission has decided to begin to consult by seeking views from the public on the four questions set out in paragraph 5.
3. As regards the need to reform the European Court of Human Rights, on which we are also asked to give advice to the Government, we are not asking detailed questions at this stage. The Government has asked for our preliminary views on this within a limited timeframe, and our further views will be given at a later stage, when we may consult further. Any views on this aspect of our work which you would like to give us at this stage would, however, be welcome. As background we include the text of the Interlaken Declaration and a subsequent Declaration agreed by the forty seven Member States of the Council of Europe at Izmir.
4. The purpose of this Discussion Paper is to begin the process of public consultation.

## Questions for Public Consultation

5. The four questions on which we seek your views are:

(1) do you think we need a UK Bill of Rights?

If so,

(2) what do you think a UK Bill of Rights should contain?

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

(4) having regard to our terms of reference, are there any other views which you would like to put forward at this stage?

6. The remainder of this paper sets out background to these questions, and is put forward as an aid to understanding. It aims to describe the current position in purely factual terms.

## Background

### The UK Constitution

7. The United Kingdom is unlike most other democratic countries in Europe and the Commonwealth (apart from New Zealand) in having neither a comprehensive written constitution nor a constitutional charter of fundamental rights which is supreme over ordinary law and able to be amended only by a special prescribed procedure. We have no comprehensive constitutional charter which establishes and gives limited powers to the institutions of government, or which confers and protects the civil and political rights of citizens, or which restricts Parliamentary sovereignty.
8. There are thus no British rights that are 'fundamental' in the sense that they enjoy special constitutional protection against Parliament. The liberties of the subject are implications derived from two principles. The first principle is that we may say or do as we please, provided that we do not transgress the substantive law or the legal rights of others. The second principle is that the Crown and public authorities may only act if they have the power to do so. These powers can derive from legislation, common law and – as far as the Crown is concerned – the royal prerogative. Our laws are a combination of statute law and the principles of the common law and equity developed by our courts. Our system is based upon the constitutional principles of Parliamentary sovereignty and the Rule of Law.

### Parliamentary sovereignty

9. The principle of Parliamentary sovereignty means that the power to legislate may be exercised only by Parliament. The principle of Parliamentary sovereignty also means that Parliament cannot limit the power of a future Parliament to amend or repeal legislation.

### The Rule of Law

10. The Rule of Law means, among other things, that it is the responsibility of the independent judiciary to interpret and apply the law impartially and fairly, free from government influence or interference.
11. Our constitutional system is also different from that of some other countries in that international treaties do not automatically become part of our law. Parliamentary legislation, such as the European Communities Act 1972, is passed to bring international obligations into domestic law.

### International Human Rights Conventions

12. In December 1948, the UN General Assembly adopted the Universal Declaration of Human Rights, recognising the universality of human rights. In 1976, two UN International Covenants – a Covenant on Civil and Political Rights, and a Covenant on Economic, Social and Cultural Rights – came into force. They are reinforced by several UN human rights conventions, for example, against torture, race and sex discrimination, and protecting the rights of the child and of the disabled.

13. These international treaties are binding in international law on the UK, but they have not been directly incorporated by legislation into UK law. However, their reporting mechanisms and comments influence UK policy and practice and are taken into account by our courts and lawmakers where relevant. Our courts operate a presumption that where a treaty has been accepted by the Government on behalf of the UK and its citizens, Parliament is presumed to legislate to give effect to the terms of the treaty when introducing legislation in that area.

## The Origins of the European Convention on Human Rights

14. The Convention was created in the aftermath of the Second World War which convinced many European politicians and jurists of the need to guard against the rise of dictatorships and to reduce the risk of relapse into another European war. This led to the creation, in 1949, of the Council of Europe. Members of the Council are obliged to accept the principles of the rule of law and the enjoyment by all peoples within their jurisdiction of human rights and fundamental freedoms.
15. One of the Council of Europe's first acts was to draft a human rights Convention for Europe, conferring enforceable rights upon individuals against sovereign states, intended to provide a European mechanism for the enforcement of certain rights.
16. On 23 January 1951,<sup>3</sup> in accordance with standard UK practice for the ratification of treaties, the text of the Convention was laid before both Houses of Parliament for 21 sitting days in accordance with the 'Ponsonby Rule'.<sup>4</sup> No member of either House of Parliament prayed against it, thus there was no Parliamentary debate. However, the Convention was discussed during a House of Commons debate on the Council of Europe on 13 November 1950, one week after the UK's signature of the Convention.<sup>5</sup> The UK was the first state to ratify the Convention, on 8 March 1951.
17. The Convention came into force on 23 September 1953. The Convention has now been ratified by the forty-seven Member States of the Council of Europe, with a population of over 800 million people, including Russia and the majority of former countries of the Soviet bloc.
18. Subsequent to its introduction, the Convention has been amended or supplemented by several Protocols. Additional rights to protection of property, education and free elections were added by Protocol No.1 to the Convention, ratified by the UK on 3 November 1952. The UK has since ratified Protocol No. 6 on abolishing the death penalty<sup>6</sup> and Protocols Nos. 11 and 14 which have amended the Convention enforcement machinery.<sup>7</sup> It has not ratified Protocols Nos. 4, 7 nor 12 which contain further rights.<sup>8</sup>
19. At its inception, only countries, and not individuals, could bring complaints under the Convention. However, the right of individual complaint or petition to the European Commission of Human Rights (as it then was) was accepted by the UK in January 1966 without Parliamentary debate.

## Convention rights and freedoms

20. The Convention identifies the following human rights and freedoms:

- Right to life (Article 2);
- Prohibition of torture or inhuman or degrading treatment or punishment (Article 3);
- Prohibition of slavery or servitude, or forced or compulsory labour (Article 4);
- Right to liberty and security (Article 5);
- Right to a fair trial (Article 6);
- No punishment without law (Article 7);
- Right to respect for private and family life, home and correspondence (Article 8);
- Freedom of thought, conscience and religion (Article 9);
- Freedom of expression (Article 10);
- Freedom of peaceful assembly and association (Article 11);
- Right to marry (Article 12);
- Right to an effective remedy (Article 13);
- Prohibition of discrimination (Article 14).

21. Protocol No. 1 includes the following:

- Protection of property (Article 1);
- Right to education (Article 2);
- Right to free elections (Article 3).

## Giving effect to the Convention

22. Article 1 of the Convention provides that contracting states must “secure to everyone within their jurisdiction” the Convention rights. States and their public authorities – legislative, executive, and judicial – are required to respect these Convention rights and freedoms and have positive obligations to secure them within their national legal systems. Article 13 of the Convention obliges States and their public authorities to provide effective remedies for violations of the Convention rights.

23. At the same time, Article 35(1) of the Convention provides that (unless they are ineffective) domestic remedies must have been exhausted before an application may be made to the Strasbourg Court. This is to provide the State with the opportunity to remedy the matter itself. The Strasbourg Court is thus intended mainly to be a supervisory Court of last resort, and the main responsibility for enforcing human rights is meant to be that of the domestic authorities, who are in the best position to do so.

24. Article 46 of the Convention also imposes a duty on contracting states to abide by final judgments of the European Court of Human Rights where the Court decides that there has been a violation of the Convention. The supervision of the execution of final judgments of the Strasbourg Court is carried out by the Committee of Ministers of the Council of Europe, which decides whether the State has adopted sufficient individual and general measures to enable the case to be closed.<sup>9</sup> If a state were unwilling or unable to abide by a final judgment, it would have the option of withdrawing from the Convention system. Article 58 of the Convention provides that a state has to give six months' notice in order to denounce the Convention.

### How the Convention rights are given effect in UK law<sup>10</sup>

25. The obligation to provide effective remedies under Article 13 of the Convention is met in the UK by a combination of common law and statute law.
26. Statutes and other documents such as Magna Carta in 1215 and the Declaration of Arbroath in 1320, the later Bill of Rights and Scottish Claim of Right in 1689, and the Reform Acts of the 19th and early 20th centuries, hand in hand with developments of the common law reflect the traditions of liberty on which our current framework of rights and responsibilities is built. The Convention sought to reflect that tradition. Our courts have recognised constitutional rights inherent in the common law as matching some Convention rights, including a right of access to justice, a right to freedom of expression, a right to respect for private life, and a right to equal treatment without discrimination.
27. Apart from specific legislation giving direct or indirect effect to particular Convention rights, the main legislative ways in which the Convention rights have been given effect is by means of the Human Rights Act 1998 and the devolution legislation for Northern Ireland, Scotland and Wales.

### The Human Rights Act 1998

28. The Human Rights Act provides legal remedies for violations of Convention rights while adhering to the doctrine of Parliamentary sovereignty by withholding from our courts the power to strike down Acts of Parliament that are held to be incompatible with Convention rights.
29. The Act requires our courts and tribunals to take into account judgments of the European Court of Human Rights where they are relevant. So far as possible, it also requires legislation to be read and given effect in a way which is compatible with the Convention rights. Where a specified higher court considers that a provision in an Act of Parliament is not compatible with a Convention right, the Human Rights Act empowers the court to make a declaration of incompatibility.
30. A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given. So the relevant legislative provision continues to have force and effect, despite its incompatibility with Convention rights, until such time as it is amended. It is for the Government to decide whether to seek to amend the law. If it decides not to do so, the alleged victim of a violation may have recourse to the European Court of Human Rights, but has no further remedy under UK law.

31. The Human Rights Act also makes it unlawful for any public authority (which includes courts and tribunals but excludes Parliament) to act in a way which is incompatible with a Convention right (apart from where they are required by primary legislation to act in that way).
32. A person who claims that a public authority has acted or proposes to act in a manner made unlawful by the Act may bring proceedings provided that the claimant is a victim within the meaning of the Convention. The Act empowers a court or tribunal to grant appropriate remedies when it finds that a public authority has acted or proposes to act in a way which is incompatible with Convention rights and has therefore acted unlawfully. However, no award of damages may be made unless it is necessary, having regard to any other remedy, to afford 'just satisfaction' to the claimant. When deciding whether to award damages, or the amount of an award, the court or tribunal must take into account the principles applied by the Strasbourg Court in awarding compensation under Article 41 of the Convention.
33. The Act provides that a person's reliance on a Convention right does not restrict any other right or freedom conferred on him by or under any law having effect in any part of the UK. The purpose of this is to safeguard more generous rights which may be enjoyed apart from the Human Rights Act, whether at common law or under other legislation.
34. Section 19 of the Act requires a Minister in charge of a Bill to make a statement before the second reading of the Bill that in his or her view its provisions are compatible with Convention rights, or, if unable to make such a statement of compatibility, that the Government nevertheless wishes the House to proceed with the Bill. The purpose is to ensure that in the preparation of a Bill and its passage through Parliament, consideration is given to any implications the Bill may have in relation to Convention rights, and to ensure that any relevant issues are identified at an early stage so that they can be the subject of informed debate in Parliament.

### The Joint Parliamentary Human Rights Committee

35. So far as the work of Parliament is concerned, an independent cross-party Joint Parliamentary Committee of both Houses of Parliament (the JCHR) enables systematic Parliamentary scrutiny of government measures for their compatibility with the Convention rights and the other human rights conventions to which the UK is party.<sup>11</sup> The JCHR scrutinises proposed legislation for compatibility with the UK's obligations under the Convention and other human rights treaties by which the UK is bound. Where necessary it questions Ministers. The JCHR also monitors the Government's response to judgments on human rights from the European and UK courts, and conducts thematic inquiries into particular human rights issues (for example, deaths in custody, care for the elderly, business and human rights, human trafficking, extradition and deportation procedures, the operation of anti-terrorist legislation, and the right of disabled people to independent living).

### The Equality and Human Rights Commission

36. The Equality and Human Rights Commission (EHRC) was set up by the Equality Act 2006 with duties not only as regards equality and diversity, but also as regards Convention and other human rights.<sup>12</sup> It has monitoring and advisory powers. The EHRC may institute or intervene in legal proceedings, and may rely in judicial review on alleged breaches of the Convention rights, even though it is not a victim or potential victim.<sup>13</sup>

## Scotland

37. Scotland is a separate jurisdiction from England and Wales and from Northern Ireland, with its own distinctive legal history and traditions, its own body of common law and statute law, its own system of courts and its own legal profession. However, the Human Rights Act applies to Scottish public authorities in the same way as it applies to public authorities elsewhere in the UK.
38. The Convention has been given further effect in Scotland by virtue of the devolution settlement. Under the Scotland Act 1998, actions by members of the Scottish Government<sup>14</sup> and legislation enacted by the Scottish Parliament<sup>15</sup> must be compatible with the Convention. Legislation or actions which are found to be incompatible by the courts are liable to be declared to be beyond the powers conferred and to be held invalid.
39. A Scottish Commission for Human Rights was set up by Act of the Scottish Parliament in 2006<sup>16</sup> with a general duty to promote human rights and to encourage best practice in relation to human rights, including not only the Convention rights but those in other human rights treaties ratified by the UK.<sup>17</sup>

## Northern Ireland

40. Under the terms of the Northern Ireland Act 1998, Ministers and Northern Ireland departments are not permitted to act in a way which is incompatible with the Convention.<sup>18</sup> Similarly the Northern Ireland Assembly does not have competence to legislate in a manner incompatible with the Convention.<sup>19</sup>
41. The Northern Ireland Human Rights Commission (NIHRC) is an independent statutory body set up in 1999 with wide functions, including giving assistance to individuals in court proceedings, and bringing proceedings itself. It is required by statute to advise the Secretary of State for Northern Ireland on the scope for defining, in a Bill of Rights for Northern Ireland to be enacted by the Westminster Parliament, rights supplementary to those in the Convention. The Belfast (Good Friday) Agreement of 1998 states that the Bill should reflect the particular circumstances of Northern Ireland, drawing as appropriate on international law and experience.
42. On 10 December 2008, the NIHRC presented its Advice on a Bill of Rights for Northern Ireland to the Government. It made a number of recommendations for inclusion in a Bill of Rights.<sup>20</sup>
43. The Government published its paper "A Bill of Rights for Northern Ireland: Next Steps" for consultation, and the NIHRC made a written response to that paper on 17 February 2010.<sup>21</sup>

## Wales

44. The Laws in Wales Act 1535 provided that England and Wales were united and the Welsh and the English were to be subject to the same laws and have the same privileges. Since that time, there has been one legal system for England and Wales. However, the Government of Wales Act 1998, which has since been modified by the Government of Wales Act 2006, provides an additional route for the application of the Convention to Wales.
45. The devolution arrangements set out in the Government of Wales Act 2006 place a requirement upon the National Assembly for Wales<sup>22</sup> and the Welsh Ministers<sup>23</sup> to act compatibly with the Convention. Following a referendum, the legislative competence of the Assembly was extended in May 2011 to enable the Assembly to enact primary legislation on its own initiative within the subject areas listed in Schedule 7 to the Government of Wales Act 2006.<sup>24</sup> Legislation that is incompatible with Convention rights is outside of the legislative competence of the Assembly and is liable to be held invalid.<sup>25</sup>

## European Union rights

46. In 2007 the institutions of the European Union proclaimed the EU Charter of Fundamental Rights.<sup>26</sup> This includes a number of social, economic and political rights and principles that do not appear in the Convention. The Charter applies to the institutions of the European Union, and to the Member States “only when they are implementing Union law”.<sup>27</sup> The Charter, where it applies, has the same legal force as the Treaties.<sup>28</sup> Under Protocol 30 to the Lisbon Treaty, the Charter does not contain any new justiciable rights applicable to the United Kingdom or Poland. The Treaties also provide that fundamental rights guaranteed by the Convention and the common constitutional traditions of the Member States are general principles of EU law.<sup>29</sup>

## We hope to hear from you soon.

47. We hope to begin hearing your views on a Bill of Rights for the UK and the related issues raised by our Terms of Reference. We would like to receive your views by 11 November 2011. Unless you specifically request otherwise, all responses will be made public.
48. All responses should be sent to the inbox or address below:

[responses@commissiononabillofrights.gsi.gov.uk](mailto:responses@commissiononabillofrights.gsi.gov.uk)

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## Endnotes

<sup>1</sup> The Commission's creation was announced by Mr Mark Harper MP (Parliamentary Secretary, Cabinet Office) on 18 March 2011 in a written Ministerial Statement (HC Deb 18 March 2011 c 32WS) as follows:

"The Government have established an independent Commission to investigate the creation of a UK Bill of Rights, fulfilling a commitment we made in our Programme for Government. The Commission will explore a range of issues surrounding human rights law in the UK and will also play an advisory role in our continuing work to press for reform of the European Court of Human Rights in Strasbourg.

"The UK will be pressing for significant reform of the European Court of Human Rights, building on the reform process underway in the lead up to our Chairmanship of the Council of Europe later this year. We will be pressing in particular to reinforce the principle that states rather than the European Court of Human Rights have the primary responsibility for protecting Convention rights.

"The Commission will be chaired by Sir Leigh Lewis KCB, a former permanent secretary at the Department for Work and Pensions with a long career in public service. He will be joined on the Commission by Jonathan Fisher QC, Martin Howe QC, Baroness Kennedy of The Shaws QC, Lord Lester of Herne Hill QC, Philippe Sands QC, Anthony Speaight QC, Professor Sir David Edward QC and Dr Michael Pinto-Duschinsky.

"The Commission members have, between them, extensive legal expertise and experience, and we expect the Commission to take into account a broad range of views as it fulfils its remit. In addition, an advisory panel will be established to provide advice and expertise to the Commission on issues arising in relation to Scotland, Wales and Northern Ireland. The Commission will report jointly to the Deputy Prime Minister and the Secretary of State for Justice. The Commission will be supported by a small secretariat of civil servants."

<sup>2</sup> The Coalition's Programme for Government said: "We will establish a Commission to investigate the creation of a British 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 British law, and protects and extends British liberties. We will seek to promote a better understanding of the true scope of these rights and obligations." See Cabinet Office: [http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition-programme\\_for\\_government.pdf](http://www.cabinetoffice.gov.uk/sites/default/files/resources/coalition-programme_for_government.pdf)

<sup>3</sup> See HC Deb 5 February 1951 vol 483 cc 159-60W.

<sup>4</sup> The power to make treaties is a Prerogative power vested in the Crown, but under the Ponsonby Rule, the Government lays all treaties subject to ratification (with limited exceptions) before both Houses of Parliament for 21 sitting days before ratification (or its equivalent) is effected: Foreign Office, "Ponsonby Rule", [http://www.fco.gov.uk/resources/en/pdf/pdf4/fco\\_pdf\\_ponsonbyrule](http://www.fco.gov.uk/resources/en/pdf/pdf4/fco_pdf_ponsonbyrule). See also Gardiner, Richard K., *International Law* (Edinburgh: Pearson Education Limited, 2003), pp. 148-9.

<sup>5</sup> See HC Deb 13 November 1950 vol 480 cc 1392-504.

<sup>6</sup> The UK signed Protocol No. 4 on 16 June 1963 but has yet to ratify. Protocol No. 4 entered into force for the other signatories from 2 May 1968. The UK signed Protocol No. 6 on 27 January 1999 and ratified it on 20 May 1999. Protocol No. 6 entered into force for the UK on 1 June 1999.

<sup>7</sup> The UK signed Protocol No. 11 on 11 May 1994 and ratified it on 9 December 1994. Protocol No. 11 entered into force on 1 November 1998. The UK signed Protocol No. 14 on 13 July 2004 and ratified it on 28 January 2005. Protocol No. 14 entered into force on 1 June 2010.

<sup>8</sup> The full text of the Convention and its Protocols can be found at: <http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>

<sup>9</sup> See generally, Supervision of the execution of judgments of the European Court of Human Rights, 4th Annual Report (2010), Council of Europe, Committee of Ministers, April 2011.

<sup>10</sup> We refer to “UK law” for convenience, while recognising that there are different laws and courts of England, Northern Ireland, Scotland and Wales.

<sup>11</sup> See <http://www.parliament.uk/commons/selcom/hrhome.htm>

<sup>12</sup> Sections 8 and 9.

<sup>13</sup> Section 30.

<sup>14</sup> Section 57(2).

<sup>15</sup> Section 29.

<sup>16</sup> The Scottish Commission for Human Rights Act 2006 (2006 asp 16).

<sup>17</sup> See <http://www.scottishhumanrights.com>

<sup>18</sup> Section 24(1)(a).

<sup>19</sup> Section 6.

<sup>20</sup> These included:

- right to equality and prohibition of discrimination;
- right to health;
- education rights;
- freedom from violence, exploitation and harassment;
- right to identity and culture;
- right to civil and administrative justice;
- rights to liberty and fair trial;
- language rights;
- rights of victims;

- democratic rights;
- right to an adequate standard of living;
- right to accommodation;
- right to work;
- environmental rights;
- children's rights.

<sup>21</sup> See <http://www.nihrc.org/bor>

<sup>22</sup> Section 94.

<sup>23</sup> Section 81(1).

<sup>24</sup> The Government of Wales Act 2006 (Commencement of Assembly Act Provisions, Transitional and Saving Provisions and Modifications) Order 2011 (SI2011/1011).

<sup>25</sup> Section 108, Government of Wales Act 2006 (c. 32).

<sup>26</sup> The text of the Charter can be found at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:303:SOM:en:HTML>

<sup>27</sup> Article 51.1.

<sup>28</sup> Treaty on European Union, article 6(1), 2010/C 83/01.

<sup>29</sup> Treaty on European Union, article 6(3), 2010/C 83/01.





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