

COMMISSION ON A BILL OF RIGHTS CONSULTATION 2: A BILL OF RIGHTS ONLY IF RIGHTS STANDARDS ARE MAINTAINED

Response from University of Derby School of Law and Criminology and Amnesty International Local Groups in Derbyshire, 4 10 2012

In response to the Commission's first consultation, we expressed our strong support for the Human Rights Act (HRA), and were among respondents to whom the Commission refers as suspicious that the move to establish a British Bill of Rights (BBR) could be cover for reducing the standards of rights protection from those under the HRA. We thank the Commissioners for this opportunity to consider any possible advantages of a BBR, but remain strongly in support of the HRA and of its effects.

Standards of rights protection under the HRA:

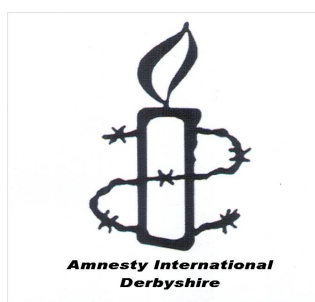
By 'standards of rights protection as under the HRA' we mean standards such as those reflected in:

- (i) the systematic reach of human rights legislation, e.g. to the definition of a 'public authority' as any organisation carrying out public work, as in the Health and Social Care Act (2008) S.145;
- (ii) careful attention to particular circumstances, e.g. that required against blanket prohibition of protest on MOD land (ECHR Art. 10, Right to free expression)¹; see also adversarial use of Art. 2 Right to Life against the widespread use of non-resuscitation orders on geriatric wards²;
- (iii) an 'operational' (proactive) interpretation of the state's duty to protect rights, which reduces the possibility of state officials turning a blind eye to avoidable death,³ degradation etc;
- (iv) a broad interpretation of Convention Article 14's ban on discrimination in rights access, to include all minority⁴ and oppressed groups, discrimination in the 1951 post-Holocaust Convention being mainly focussed towards religious and racial minorities;
- (v) the requirement for special attention to the needs of children and other vulnerable groups, in respect of torture, inhumane and degrading treatment, and by implication death⁵;
- (vi) strict requirements for state accountability, as reflected in the standards of independence in the investigation of possible wrongdoing by state officials, including, in specific circumstances, when we are an occupying power abroad⁶.

The following responses are consistent with these and other HRA standards.

Q1: *What do you think would be the advantages or disadvantages of a UK Bill of Rights?*

We see the advantages of a Bill of Rights as (a) putting the included rights beyond the whim of individual parliaments, possibly through an increased BBR majority for amendments; (b) extending human rights throughout public life via, as HRA Section 3, the Bill of Rights characteristic overarching function vis à vis other legislation; and as HRA Section 6, the requirement for public authorities to work consistently with the Convention rights; (c) increasing citizens' (i) geographical (Q2 below) and (ii) linguistic (QQ 4 & 5 below) access to their rights; and (d) the legally cosmetic yet possibly real advantage of quietening some of the Eurosceptic anger against high grade human rights. It will be noted that (b) and c(i) are already provided by the HRA; and that regarding (d), rights standards as in (i) – (vi) above are already extending protection to huge numbers of vulnerable people. These advances must not be compromised for what could be simply a cosmetic name-change.



Q2: 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?

We strongly support continuing the HRA's incorporation of the ECHR into UK domestic law, so that UK citizens can take their grievances to a British court rather than to Strasbourg.

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

Provided that any BBR matched the rights standards of the HRA, and that it carried the same powers of enforcement, **we do not see how repealing the latter could be more than a political gesture.** We believe the HRA and the BBR could sit together, the HRA falling into disuse under the well-established rule that more recent legislation takes precedence.

Q9: Presuming any UK Bill of Rights contained a duty on public authorities similar to that in Section 6 of the HRA, is there a need to amend the definition of 'public authority'? If so, how?

As above p1(i), we would welcome a broad definition of 'public authorities' that required all organisations carrying out public functions to comply with the HRA, as the Health and Social Care Act (2008).

Q11: Should the duty on courts to take relevant Strasbourg case law 'into account' be maintained or modified?

Consistent with our points above (p1), **we support the duty under the HRA for UK courts to take Strasbourg case law into account.** We do not consider this duty to be burdensome, indeed it means fewer lost UK cases at Strasbourg.

Q 4: 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 HRA and the ECHR? 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 ECHR and the HRA 1998?

For us, a key issue is ordinary people's access to and ownership of their rights. The fifteen basic ECHR rights (including the three Protocol 1 rights to property, education and the vote) are intuitively easy to understand. However:

- (a) the Convention's terminology is frequently outdated and / or legalistic;
- (b) owing to later amendments (protocols), the ECHR itself can easily be misunderstood, e.g. the first clause of the first right (Right to Life, Article 2) reads as though the Convention still allows capital punishment, which in fact it prohibited in Protocol 6, 1985.
- (c) many of the assumptions implied in the Convention's expression of the rights are out-dated. For example, because the Convention was motivated by the Holocaust, Article 2 (Right to Life) is heavily focussed on murder by states, while the modern concept of the state's operational (proactive) duty is applied to death in various circumstances including in NHS care (above p1(ii)) and even, when we are an occupying power, abroad (above p1(vi)).

These problems of terminology, structure and assumptions affect the HRA as well, since it draws its rights verbatim from the Convention. A Bill of Rights would provide the opportunity:

- (a) to rewrite the Convention articles in plain English;
- (b) to bring the results of later protocols into their meaningful places;
- (c) to drop outmoded assumptions, or at least to make their relevance explicit.

However, an absolutely critical caveat for us is the marked potential for this rewriting of the ECHR / HRA to result in weaker standards of rights protection than such as our examples above. This weakening could have at least three sources:

- (a) the complexity of the linguistic task itself, which would necessitate very close scrutiny by skilled persons sensitive to modern rights standards;
- (b) language changes occurring in the rewriting process could facilitate changes in judges' interpretation of the rights, even though the linguistic task per se had been scrupulously and sensitively performed;
- (c) changes during the Parliamentary process could also reduce the standards of rights guaranteed compared with those in even a sensitively drafted Bill.

Q 6: 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?

Regarding specific additional rights, we strongly support, indeed could not object to, any right, such as the suggested Rights to Administrative Justice and in Civil and Criminal Justice, that would raise a Convention right to English common law standards: for us, the Convention is a floor, not a ceiling.

Further, we strongly support the following additional rights:

- **to Equality** that prohibits discrimination in state services and employment, as Equality Act (2010);
- **to Trial by Jury**, qualified in that some modern fraud trials are too complex for a jury off the street;
- **a basic Social and Economic Right** to a job or welfare; access to health care; and shelter;
- **a Children's Right** to emotional, cognitive and physical protection and provision;
- **an Environmental Right** that simplified the complex EU environmental law, e.g. the law supporting the key Aarhus Declaration;
- **a Victims' Right**, consolidating the HRA rights to life; freedom from torture etc; privacy and family life; to be heard in trials where they are victim; and to rights access without discrimination. HRA case law provides the right to independent investigation of police response to crimes (above p1(vi)).

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?

In some cases, judges must balance the rights of one party to the case against those of the other, e.g. the claimant's right to privacy (ECHR Art. 8) against the respondent's right to free expression (ECHR Art. 10). Here the courts have a degree of 'wriggle room'. Regarding advice to the courts about the use of this wriggle room, we recall the UK House of Lords case law (above p1(v)), that **courts must pay special attention to the needs of children and the vulnerable**, in respect of their rights to life; freedom from torture etc. We urge a broadening of this principle, i.e. that when balancing any rights, the courts should pay particular attention to the rights of the young and the vulnerable.

Q9: see p2 above

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?

We hold that rights are universal and inalienable, so not contingent on the individual's behaviour.

Further, consistent with preserving the standards of rights protection as under the HRA (p1 above), we are deeply anxious about the general introduction of Responsibilities into a BBR (or amended HRA), and particularly about the introduction of conditional rights (loss of rights for irresponsibilities) because:

- (a) from the values point of view, we feel conditionality of rights would be a step back towards a revenge society, which, at its best, British tolerance takes us beyond;
- (b) from the practical point of view, we simply cannot envisage a settled outcome from the enormous legal minefield of deciding which rights should be lost for which irresponsibilities, let alone taking degrees of irresponsibility into account. Apart from this legal minefield, we believe that the maintenance of the HRA level of rights standards would be lost in the mist of arranging reciprocity between rights and responsibilities;
- (c) we also believe that this exercise could lead to considerable state repression, especially in a society with Britain's degree and range of diversities..

Q11: see p2 above

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

The contribution of the courts to British tolerance and fairness outlined in our opening paragraph (p1 above) is partly due to judges' HRA Section 3 'reading down' obligation, i.e. to interpret existing laws so that they are ECHR compatible. We therefore strongly support the HRA's dynamic balance between the legislature and the courts. However in spite of our belief that the courts use these reading down powers well, regarding the more general relationship between the judges and Parliament, we believe that our present division of powers serves our country well, and would not want our judges to have strike down powers⁷ with respect to laws that Parliament has passed. Between October 2000 when the HRA came

into force and August 2011, the courts had issued only nineteen final Declarations of Incompatibility (where the older law is so far from the ECHR rights that judges cannot make a compromise)⁸, and even this slow rate should taper with the on-going vetting of new laws for ECHR compliance. For eighteen out of these nineteen declarations, Parliament has adjusted the legislation for ECHR compatibility. For others in the future, Parliament may decline to meet standards that the courts recommend, but when legislation is very old, it is at least right that Parliament take a careful look at whether the old laws meet the standards of wisdom and fairness of a modern society.

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¹ *Tabernacle v MOD*, EWCA 2009, Civ 23

¹ British Institute of Human Rights at Nursing Conference 2009:

<http://www.bihhr.org.uk/news/bihr-royal-college-of-nursing-human-rights-conference>

¹ *Rabone v Pennine NHS Trust*: UKSC 2010/0140

¹ *Ahmad Raja Ghaidan v Antonio Mendoza* [2004] UKHL 30; see also, e.g., *HJ (Iran) and HT (Cameroon) v SSHD*; UKSC 31 & 32, 2010, judgments that makes clear that their landmark interpretation of 'persecution' relies on international human rights law.

¹ *R.(Williamson) v SSES*; 2005 UKHL 15; based on *Z v United Kingdom* (2001) 34 EHRR 97, 131, para 73.

¹ *Mousa*, EWCA Civ, 2011, 1334 (Ali Zaki Mousa); *R(Smith) v Oxfordshire Deputy Coroner & SSD*. 2010. UKSC 29

¹ Please note that with their international perspective, Amnesty International supports strike down powers for judges as more rights resilient than a parliamentary last word. However, it seems likely that the matter is academic vis à vis the British system of parliamentary government.

¹ Colm O'Conneide: Human Rights and the UK Constitution. British Academy, 09 2012

BBR COMMISSIONERS' CONSULTATION 2 QUESTIONS:

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?

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?

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?

¹ *Tabernacle v MOD*, EWCA 2009, Civ 23

² British Institute of Human Rights at Nursing Conference 2009:
<http://www.bihhr.org.uk/news/bihr-royal-college-of-nursing-human-rights-conference>

³ *Rabone v Pennine NHS Trust*: UKSC 2010/0140

⁴ *Ahmad Raja Ghaidan v Antonio Mendoza* [2004] UKHL 30; see also, e.g., *HJ (Iran) and HT (Cameroon) v SSHD*; UKSC 31 & 32, 2010, judgments that makes clear that their landmark interpretation of 'persecution' relies on international human rights law.

⁵ *R.(Williamson) v SSES*; 2005 UKHL 15; based on *Z v United Kingdom* (2001) 34 EHRR 97, 131, para 73.

⁶ *Mousa*, EWCA Civ, 2011, 1334 (Ali Zaki Mousa); *R(Smith) v Oxfordshire Deputy Coroner & SSD*. 2010. UKSC 29

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⁸ Colm O'Coinneide: Human Rights and the UK Constitution. British Academy, 09 2012