

Equality and Diversity Forum response to Commission on a Bill of Rights consultation: 'Do we need a UK Bill of Rights?'

1. The Equality and Diversity Forum (EDF) is the network of national non-governmental organisations committed to equal opportunities, social justice, good community relations, respect for human rights and an end to discrimination based on age, disability, gender, gender identity, race, religion or belief, and sexual orientation.
2. EDF member organisations represent a wide range of experience and specialist knowledge and include many who might not automatically be assumed to have an interest in human rights issues. For example, EDF member organisations include large charities such as Citizens Advice and Age UK – organisations with the interests of many thousands of people at heart who are concerned with a wide range of policy issues and as such bring a fresh perspective to this debate.
3. EDF member organisations place a very high value on human rights in practice and on the specific protections, duties and enforcement mechanisms in the Human Rights Act 1998 (HRA). EDF member organisations support the HRA because we know it has brought many benefits for the beneficiaries of our work. We know from direct experience that the HRA offers vital everyday protections for ordinary people. It protects vulnerable people, some of whom are targets of popular or media hostility. It provides vital safeguards for people detained for compulsory assessment and treatment, for example under the Mental Health Act, to ensure it is proportionate and appropriate. The HRA also offers important guarantees of a fair hearing and treatment for people accused or suspected of offences, which is an important element of a safe and just society.
4. EDF notes the Commission on a Bill of Rights consultation *Do we need a UK Bill of Rights?* We welcome the opportunity to respond to the questions for public consultation posed in the discussion paper. All too often, debate about human rights in the UK takes place against a backdrop of media distortion and unhelpful political rhetoric.
5. This response to the consultation expresses the shared view of EDF member organisations (listed at the end of our response) and of those EDF observer organisations who are also listed at the end of this document. Some EDF member organisations and observers will also make individual responses to the consultation.
6. EDF notes the Terms of Reference of the Commission on a Bill of Rights. We are encouraged to know that any future UK Bill of Rights 'incorporates and builds on all our obligations under the European Convention on Human Rights' and 'ensures that these rights continue to be enshrined in UK law'.¹ The commitment to the ECHR is welcome but it and the HRA are different legal instruments. A

¹ *Do we need a UK Bill of Rights?*, p3, para 1.

commitment to the ECHR is not the same as a commitment to the way in which these rights are made enforceable in the UK under the HRA. Without the HRA there would be no duty on public authorities in the UK to respect the ECHR human rights in everything that they do ('section 6 duty'), nor would it be possible to enforce these rights by taking cases in UK courts. The section 6 duty on public authorities is key to ensuring that the obligations and liberties in the ECHR become part of people's everyday lives. In addition to improvements driven by court cases, the section six duty prompts public bodies to make proactive improvements in public services and to involve service users in helping to design services that better meet their needs. EDF member organisations would be strongly opposed to any dilution of the protections contained within the HRA or the enforcement mechanisms and public duty associated with them.

7. EDF therefore notes, and is troubled by, the absence of the HRA from the Commission's Terms of Reference. EDF member organisations consider unequivocally that the HRA has provided an important legal underpinning for fundamental rights in the UK, reflecting the European Convention on Human Rights, and we are committed to the retention of the HRA. Any UK Bill of Rights must build on the HRA as the minimum standard i.e. be 'HRA plus'.
8. Professor Francesca Klug of the London School of Economics (LSE) has described some minimal indicators to test whether or not a new UK Bill of Rights can be said to constitute 'HRA plus' including the following:²
 - a. Any additional rights should cover new ground, or transparently supplement ECHR rights, not rephrase current rights in the HRA. They should demonstrably enhance rights protection.
 - b. There should be no additional qualifications or limitations attached to specific rights or a new general limitations clause applying to all rights to tie them to 'responsibilities.'
 - c. There should be no new limitations on the scope of the rights in the HRA, which should continue to apply to everyone within the jurisdiction of the UK government.
 - d. Any changes to s12 on the balance between freedom of expression and privacy should be compatible with the provisions of ECHR Articles 8/10.

EDF member organisations are of the view that any new Bill of Rights must meet Professor Klug's minimal indicators: not to do so would constitute a step backwards for human rights protection and enforcement in the UK.

9. EDF member organisations strongly support the rule of law. It is of vital importance that everyone – including people who may be disliked, unpopular or marginalised – is treated equally before the law and has access to due process. EDF member organisations consider this principle to be entirely compatible with long-held values of fair play and decency. Due process must be safeguarded for the good of everybody, not just those that the majority of people may approve of and or empathise with.

² The full set of indicators is included as Appendix 1. 'A Bill of Rights that is Human Rights Act plus: what are the minimal indicators?', Professor Francesca Klug, LSE, January 2010. See <http://www2.lse.ac.uk/humanRights/research/projects/humanRightsFutures.aspx> [Accessed 20.9.11]

10. The HRA provides important protection for minorities, including stigmatised minorities – such as refugees, migrants, Gypsies and Travellers, and people with mental health problems – who may be unlikely to elicit public sympathy, particularly in a climate of media and political hostility. Minorities are still entitled to the protection of the law and EDF member organisations know that the HRA provides valuable protection for them. Indeed one of the core functions of human rights protection is to ensure that minorities are protected against unfair treatment resulting from decisions or views of the majority. It is thus hardly surprising that the practical application of human rights sometimes results in decisions that some people do not like.
11. However unpalatable it may seem to some, human rights are universal and so they apply equally to everyone, including those who some politicians, parts of the media and some members of the British public may dislike. In response to the criticism that ‘bad people should not have rights’, Conservative MP Jesse Norman and journalist Peter Osborne argued:

*This criticism should be rejected out of hand. The rights in question are all or almost all the basic prerequisites of our law. In the words of Horace Rumpole, it is the golden thread of British law that people are innocent until proven guilty in a court of law. Of course the [Human Rights] Act is most invoked on behalf of those at the margins of society – this is only to be expected. But these basic rights protect us all. Abolishing them would give the state free rein to trample on the citizenry.*³

EDF member organisations agree with this statement, including the sentiment that where the fundamental rights of individuals are concerned a check on the overweening power of the state is vital.

12. EDF member organisations consider it of vital importance that the Commission ‘consider ways to promote a better understanding of the true scope of these obligations and liberties’.⁴ EDF sees an urgent need to improve public understanding of, and respect for, human rights in the UK, including those of minorities and of women who are particularly likely to be the focus of popular and media hostility, especially when they seek to assert their human rights.
13. To promote a better understanding of, and respect for, human rights in the UK is in-keeping with the original intention of the HRA, which was to shift the behaviour of individuals towards one another through promoting shared understandings and values:

*Consider the nature of modern society. It’s a society enriched by different cultures and different faiths. It needs a formal, shared understanding of what is fundamentally right and fundamentally wrong if it is to work together in unity and confidence....the Human Rights Act provides that formal shared understanding.*⁵

³ Norman, J. and Osborne, P. (2009), *Churchill’s Legacy: The Conservative Case for the Human Rights Act*. Published by Liberty.

⁴ As 1 above.

⁵ Jack Straw, ‘Building on a Human Rights Culture’, Address to a Civil Service College seminar, 9 December 1999. Cited in *The Future of Multi-Ethnic Britain (The Parekh Report)*, Runnymede Trust/Profile Books, 2000, para 7.15.

14. We recognise that there are many instances in which the rights of one person must be balanced against the rights of one or more others but have found that the HRA provides a framework within which that balance can be struck⁶.

Do we need a UK Bill of Rights?

15. EDF member organisations consider that the HRA is a UK Bill of Rights (even if it is not referred to as such in public discourse) and should be retained. It is important to ensure a mechanism exists to guarantee recourse to the same human rights standards for people in the UK as are available to any other European citizen. The HRA provides such a mechanism and it works well.

16. Therefore EDF member organisations see no reason to create an additional UK Bill of Rights – the HRA is a UK Bill of Rights by another name.

What should a UK Bill of Rights contain?

17. Any additional UK Bill of Rights must build on the HRA, both in terms of its substantive protections and enforcement mechanisms. Voluntary organisations working to tackle inequality and unfairness value the HRA because it helps us to safeguard the dignity and safety of some of the most vulnerable people in society, as case studies elsewhere in this response demonstrate. Any proposals coming from this Commission must protect and build on the rights and enforcement mechanisms in the HRA.

18. There is strong public support for the human rights that are protected by the HRA. Polling data shows that a massive 96% of the general public agree it is important that there is a law that protects rights and freedoms in Britain.⁷

Coverage

19. Human rights by definition apply to all human beings, they are universal and do not depend on a person's immigration or citizenship status. It is essential therefore that everyone in the UK – regardless of their citizenship or immigration status - and UK citizens within the 'jurisdiction' of the UK abroad (such as serving armed forces) continues to enjoy equal protection of their human rights. Enforceability is key – without this, rights have no meaning.

Improving public services

20. The original intention behind the HRA was to change the culture of public services:

A rights and responsibilities culture really is our goal. It's what we want the whole public service in this country to move towards.⁸

EDF member organisations support this intention to shift the culture, with litigation only a last resort. A vital element in changing culture is the section 6 duty on

⁶ *Managing Competing Equality Claims*, EDF 2010 and *From Conflict to Cohesion: Competing Interests in Equality Law and Policy*, EDF 2008

⁷ Human Rights Survey conducted by ComRes for Liberty, September 2010.

⁸ As 5 above.

public authorities, which has helped to improve public services (see case study examples below). It is vitally important to retain this public sector duty.

21. The HRA *has* had a positive impact on the culture and on people's lives, leading to many significant improvements in the way that individuals are treated throughout society. These improvements range from changes in the way that public bodies make policy or deliver services through to opportunities for individuals to challenge poor treatment in domestic courts. Rights-based approaches to public service delivery are often under-pinned by user involvement, which is vital in changing the culture of services. For example, in adult safeguarding there has been a move away from a paternalistic model to working with service users to identify risks of abuse and appropriate courses of action to balance their rights to a private life with their right to safety. Many of these areas of improvement are reflected in the Equality and Human Rights Commission Human Rights Inquiry Report and in reports and publications by EDF member organisations.

Case Study: Mersey Care NHS Trust

Mersey Care provides an example of how the HRA has influenced service delivery. Mersey Care is committed to a human rights-based approach – it has Board level commitment to ensuring service users are involved in all decisions and allocates budget to train and pay users to facilitate this. Over 200 service users have been trained to participate in running the trust, from research, recruitment and induction of staff, investigating serious incidents and evaluation. Over half of Mersey Care's staff, including the Chief Executive, has been recruited with the involvement of users or carers. One service user who said bad practice from staff, including excessive use of control and threats, was once the norm, described 'a totally different ethos' where treatment has moved away from control and towards being sensitive to people's needs. This ensures respect for rights is embedded in the service.⁹

Protecting the rights of particular groups

22. The HRA has protected the rights of a wide range of people including, for example, persons with disabilities, refugees and migrants and lesbian, gay, bisexual and transgender people. It has also helped in cases involving gender equality, family rights, rights of children, rights of older people and the right to religious freedom (see examples below and in appendix 2). Litigation should always be a last resort but these cases below illustrate how vulnerable people do sometimes need the protection offered by the law.

Case Studies: Persons with Disabilities

In *R (Bernard) v London Borough of Enfield* (2002)¹⁰, a woman with severe disabilities was reduced to living in appalling conditions due to delay on the part of a local authority in making necessary adjustments to her accommodation. The High Court held that this constituted a violation of the right to respect for private, home and family life contrary to Article 8 HRA, and awarded her damages.

⁹ Case study courtesy of Mind.

¹⁰ [2002] EWHC Admin 2282.

In *R (B) v DPP* (2009),¹¹ the Crown Prosecution Service (CPS) was found to have breached Article 3 HRA (the right to freedom from inhuman and degrading treatment) by denying access to justice to a victim of a serious assault. The CPS abandoned a prosecution in this case on the grounds that the victim had schizophrenia and thus in their view was an unreliable witness, despite the fact that the victim had identified his assailants and physical evidence existed of the extent of the crime. The High Court held that this decision was both irrational and a violation of Article 3, and awarded £8000 in damages to the aggrieved victim. The HRA was pivotal to this judgment (claims under the Disability Discrimination Act fell). The judgment led to far-reaching improvements in service provision, with the CPS introducing new policies and practices around supporting victims and witnesses with mental health problems as a result of the case.

Case Studies: Refugees and Migrants

In *ZH v Tanzania* (2011),¹² the UK Supreme Court recently held that the right to family life recognized in Article 8 HRA required that the best interests of a child had to be a primary consideration in cases where immigration authorities were seeking to remove or deport families with children possessing UK citizenship. In this particular case, it meant that a non-national mother with young children who had UK nationality could not be removed back to Tanzania, as it would mean massive disruption to the lives of the children. (Their father, a UK national, was separated from the mother, infected with HIV and was unable to take care of the children.) This judgment is now applied in numerous other immigration cases, ensuring that the rights of children are factored into decisions on whether to remove or deport parents.

Outside the courtroom

23. The HRA has also had considerable impact outside the courtroom. Individuals and families have been able to challenge their treatment by public authorities without having to go to court.

Case Study: Fleeing Domestic Violence

A woman and her children were fleeing domestic violence. The woman's husband was attempting to track the family down; each time he discovered their whereabouts the family moved to a different area. The family eventually arrived in London and was referred to the local social services department. Social workers told the mother she was an unfit parent and that by moving she had made the family intentionally homeless. They therefore told her she was not eligible for housing. She was told that her children had to be placed into foster care. An advice worker helped the mother to challenge this claim using the Human Rights Act. They argued that social services were not properly considering the rights of the woman and her children to respect for family life, protected by Article 8. Under this right, social services needed to consider the rights of the woman and her children and to take actions which are necessary and proportionate. As a result, the family

¹¹ [2009] EWHC 106 (Admin).

¹² [2011] UKSC 4.

were told that they could remain together and that the social services department would provide the deposit if they could secure private rented accommodation.¹³

Case Study: Older People

Mr and Mrs Driscoll had lived together for over 65 years. He was unable to walk unaided and relied on his wife to help him move around. She was blind and used her husband as her eyes. They were separated after Mr Driscoll became unwell and was moved into a residential care home. Mrs Driscoll wanted to move to the home with her husband but was told she did not meet the criteria used to by the local authority to allocate places. Human rights experts and older people's organisations pointed out that this was a breach of the couple's right to respect for their private and family life (Article 8), protected by the Human Rights Act. A public campaign launched by the family, supported by various human rights and older people's organisations and the media, used these human rights arguments to convince the local authority to reconsider its decision. As a result Mrs Driscoll's needs were reassessed by social services, and she was offered a place in the same care home as her husband.¹⁴

Additional rights

24. As we have argued earlier, legal protection for human rights could be seriously limited by the repeal, amendment or replacement of the HRA. Any additional Bill of Rights, whatever it is called, must have legally binding force. If the HRA were to be replaced by an additional Bill of Rights, the new legal instrument would, at a minimum, need to include the same enforcement mechanisms as the HRA.
25. A legally enforceable additional Bill of Rights could only enhance the legal protection of rights if the HRA was left intact and additional rights were enshrined in law. It could for example include a free-standing equality clause. It could also include enforceable socio-economic rights e.g. access to healthcare or a right to receive social assistance. It could also include provisions on children's rights and the rights of persons with disabilities.
26. Any additional Bill of Rights should reflect (and where possible give additional force to) the rights contained within the UN Convention on the Rights of Persons with Disabilities. Any move to an additional Bill of Rights should not undermine the rights the UK Government is signed up to under the UN Disability Convention.
27. As discussed elsewhere, the HRA represents a comprehensive package of rights. If there were to be serious consideration of an additional Bill of Rights to add to the rights and enforcement mechanisms already contained in the HRA, these are the kind of rights EDF member organisations think should be considered:
 - Article 14 of the HRA prohibits discrimination with respect to the other rights available under the HRA. EDF member organisations would like any additional Bill of Rights to incorporate Protocol 12 ECHR so that a free-standing right to equality before the law is available to people in the UK
 - The right to receive data and other sources of information from official sources in an accessible format so it can be easily understood by everybody

¹³ Posted on www.ourhumanrightsstories.org.uk by London Irish Women's Centre on 06/02/2010.

¹⁴ Posted on www.ourhumanrightsstories.org.uk by the British Institute for Human Rights on 06/02/2010.

- The right for disabled people to receive accessible information as well as other forms of assistance, support and facilities
- Rights enshrined in the UN Convention on the Rights of the Child should be incorporated into any additional Bill of Rights
- The UN Principles for Older Persons should also be incorporated into any additional Bill of Rights
- The right to healthcare as set out in the International Covenant on Economic, Social and Cultural Rights

How should a UK Bill of Rights apply to the UK as a whole, including its four component countries?

28. Any additional UK Bill of Rights should ensure all people in the UK enjoy equivalent strength, quality and accessibility of rights protection and enforcement whilst respecting the devolution settlements and cultural and legal diversity of each country.
29. According to Roger Smith, Director of JUSTICE, repealing or significantly amending the HRA would be a 'legal and political nightmare' in the context of the Scottish, Welsh and Northern Irish devolution frameworks.¹⁵
30. Alan Miller, Chair of the Scottish Human Rights Commission (SHRC) has stated that 'repeal of the HRA could also create a two-tier system of the level of human rights protection within the UK'.¹⁶ Scottish people would potentially enjoy greater rights protection than the English and Welsh if the HRA was replaced by an additional Bill of Rights.
31. Monica McWilliams, former Chief Commissioner of the Northern Ireland Human Rights Commission (NIHRC) has stated that 'Proposals to amend the Human Rights Act have created a sense of particular unease among those concerned to preserve and maintain the fragile constitutional balances that have been painstakingly put in place'.¹⁷ EDF member organisations agree with Professor McWilliams' statement that the HRA is 'central to the constitutional DNA of the UK. It underpins the devolution settlements while simultaneously elucidating the common values of the constituent nations'.¹⁸
32. The Belfast (Good Friday) Agreement promised a Bill of Rights for Northern Ireland but that promise is as yet unfulfilled. Owen Paterson, Secretary of State for Northern Ireland, has indicated that a parallel process for Northern Ireland should take place alongside discussion about a broader additional UK Bill of Rights. We support the concept of a Bill of Rights for Northern Ireland if it contains rights which are supplementary to those already contained in the HRA and if people in Northern Ireland continue to have recourse to the HRA.

¹⁵ Roger Smith, Director of JUSTICE, quoted in press release, 8 February 2010. Available at <http://www.justice.org.uk/resources.php/58/report-on-devolution-and-human-rights-warns-of-major-difficulties-ahead> [accessed 20.9.11].

¹⁶ Miller, A. (2010), 'The Human Rights Act from a Scottish Perspective' in *Common Sense: Reflections on the Human Rights Act*, published by Liberty.

¹⁷ McWilliams, M. (2010), 'Human Rights Act underpins devolution' in *Common Sense: Reflections on the Human Rights Act*, published by Liberty.

¹⁸ As 15 above.

Human rights are popular when explained and understood

33. Polling data show that human rights are popular when understood – 96% of the public agree it is important that there is a law that protects rights and freedoms in Britain;¹⁹ yet fewer than 1 in 10 people can remember ever receiving or seeing any information from the Government explaining the Human Rights Act.²⁰ EDF member organisations are convinced that if the HRA is accurately and effectively communicated the public will better understand its benefits, removing the need to reinvent the wheel by creating an additional UK Bill of Rights. The HRA works well, as the examples above show, but lacks public support. The key challenge therefore is to promote greater public understanding of human rights and the HRA.
34. We note that human rights and the HRA are frequently misunderstood or wilfully distorted by certain sections of the media and by some politicians. We strongly regret the frequent misreporting of issues concerning the HRA by some media outlets, particularly the tabloid press. In some cases, claims made under the HRA that have been rejected by the Courts are reported in ways that leave the general public with the impression that the claims were met. In other cases, the HRA is wrongly alleged to have required certain actions by public bodies – such as the allegation that the HRA required prisons to provide detainees with pornography.
35. There is a need for Government (and other relevant parties including the Equality and Human Rights Commission) to engage in sustained work to educate the public with a view to clarifying understanding of human rights and the HRA. The public needs access to sources of accurate, unbiased information about the HRA to balance the myth and spin perpetrated by some media outlets and politicians.
36. It is particularly important that public officials have a clear and accurate understanding of what the HRA requires them to do, including the positive obligations that public authorities have to protect human rights.

Rights and responsibilities

37. Recent political and media discourse has claimed that the culture in the UK is one where rights are considered paramount and responsibilities are neglected, and that there is a need to rebalance in favour of encouraging people to take greater personal responsibility:

...the twisting and misrepresenting of human rights that has undermined personal responsibility (Prime Minister David Cameron, 15 August 2011)²¹

38. EDF member organisations consider rights and responsibilities to be intertwined – they cannot be separated. Furthermore, the HRA already embodies a balance of rights and responsibilities. EDF member organisations would be very concerned if an additional UK Bill of Rights made access to rights contingent on responsibilities.
39. EDF considers that responsibilities are implicit within the concept of rights and that this has been clear from the time when the Universal Declaration of Human Rights

¹⁹ Human Rights Survey conducted by ComRes for Liberty, September 2010.

²⁰ As 17 above.

²¹ Speech delivered in response to UK riots. Full transcript available at <http://www.number10.gov.uk/news/pms-speech-on-the-fightback-after-the-riots/> [accessed 2.9.11].

was first formulated in 1948. Indeed, the HRA provides a framework for balancing the rights of the individual against the rights of others and the interests of wider society. Many of the rights in the HRA are 'qualified rights' that may be restricted to the extent necessary to protect the rights and freedoms of others, public safety or health, including the rights to freedom of expression or the right to respect for a private or family life.²² Given this, the EDF is concerned by the implication in stories published by parts of the press and in remarks by some politicians that extra responsibilities need to be included in an additional UK Bill of Rights or that those rights might be made contingent on behaviour. If rights are made contingent on a definition of 'normal' behaviour this could mean, for example, people with certain conditions and/or symptoms that are deemed unusual or irrational (e.g. some people with mental health problems) are left with no protection. In this context, an objective assessment of what is 'normal' or responsible behaviour is not possible, which is one of the reasons why the HRA is an important safeguard for everyone. Human rights are universal and are granted by virtue of one's humanity – there can be no case to exempt some people from access to rights. We note also in this context that many rights can already legitimately be qualified in order to protect the rights and freedoms of others, for example, or for lawful punishment.

40. We agree with the conclusion of the Ministry of Justice commissioned study *The Relationship between Rights and Responsibilities* that 'many duties are already recognised and enforced throughout UK law, and they are also implicit in the exercise of rights under the Human Rights Act'.²³ We therefore have concerns about the incorporation of further duties or responsibilities in an additional UK Bill of Rights and would echo the reservations expressed in the conclusions of the Ministry of Justice study:

... there is little to be gained from incorporating lists of specific duties into any proposed written constitution or Bill of Rights. Instead, this report suggests that the proper place for any statements about responsibilities is in the preamble to any such document. This approach not only ensures that such statements are seen as educative and aspirational but also guards against the risk of misinterpretation and any suggestion that such duties should be regarded as justiciable and directly enforceable against individuals.

Conclusion

41. EDF member organisations have direct experience of the significant benefits that the HRA has brought to a wide range of people. A greater emphasis on effective promotion of the HRA by public bodies in general and central government and the Equality and Human Rights Commission in particular, should increase these benefits and help turn the public's support for human rights into wider public support for the HRA. Effective promotion of the HRA is preferable to an additional UK Bill of Rights but if such a Bill is to be introduced it must build on the HRA and not resile from it.

²² Of course, the right to life and the prohibition of torture are absolute rights that cannot be lawfully violated in any circumstances.

²³ *The Relationship between Rights and Responsibilities*, 2009, Ministry of Justice, p 32, at <http://www.justice.gov.uk/publications/rights-responsibilities-research.htm>.

42. If the HRA is replaced with a legally binding additional UK Bill of Rights the rights contained within it must not be more limited than those that are currently protected and rights must not be watered down through, for example, vague or narrow wording. Any additional Bill of Rights must also be subject to the same enforcement mechanisms and public duty as the HRA. EDF member organisations see no need to replace or repeal the HRA but every reason to educate the public about its contents and how it has and can be used to protect the rights of everybody against human rights abuses by the state.
43. Making changes to the constitution is a serious business and should only be undertaken after careful thought and consideration. It should never be prompted by pressure from ill-informed or partial interests such as media outlets who resent any curb on their conduct. A clear look at the evidence demonstrates that the HRA is doing a good job of protecting the rights of vulnerable people and checking the power of the state. EDF member organisations would caution against making major constitutional changes on the back of hostile but inaccurate media reports.
44. The UK has a proud record of advocating for people's human rights abroad, most recently in Libya. Any additional Bill of Rights that does not include all the rights and enforcement mechanisms of the HRA would undermine human rights at home. The UK needs to lead by example, retaining strong human rights protection for its own people in the form of the HRA.

Equality and Diversity Forum, October 2011

Appendix 1 – Professor Klug’s minimal indicators

A BILL OF RIGHTS THAT IS HUMAN RIGHTS ACT PLUS – WHAT ARE THE MINIMAL INDICATORS?²⁴

1) THE CONTENT OF THE RIGHTS

- Any additional rights should cover new ground, or transparently supplement ECHR rights, not rephrase current rights in the HRA. They should demonstrably enhance rights protection.
- There should be no additional qualifications or limitations attached to specific rights or a new general limitations clause applying to all rights to tie them to ‘responsibilities.’
- There should be no new limitations on the scope of the rights in the HRA which should continue to apply to everyone within the jurisdiction of the UK government.
- Any changes to s12²⁵ on the balance between freedom of expression and privacy should be compatible with the provisions of ECHR Articles 8/10.

2) THE MECHANISMS FOR ENFORCEMENT

- All legislation, *regardless of when it is passed*, should be required to be interpreted by the Courts as compatible with the rights in the Bill of Rights, at least ‘so far as it is possible to do so’ (s3).²⁶
- No substitute for the Courts’ power to issue a ‘Declaration of Incompatibility’ unless this is to strengthen courts’ powers to hold the executive to account (s 4).²⁷
- The common law should not be exempted from the requirement on the courts to interpret all law compatibly with the rights in the Bill of Rights.
- No weakening of the powers of the courts and parliaments under the Devolution settlement.²⁸
- The courts should still be empowered to ‘strike down’ subordinate legislation.²⁹
- Public authorities should still be specifically prohibited from acting incompatibly the Bill of Rights (s6).³⁰
- Any changes to the definition of public authority should be expansive, to address the exemption of some private bodies carrying out public functions, not restrictive (s6).

3) REMEDIES

- Any changes to the definition of a ‘victim’ who can bring proceedings under the Bill of Rights should be expansive, not restrictive (s7).
- No interference with the discretion of the courts to grant such relief or remedies as they considers ‘just and appropriate’ e.g. to limit remedies to those charged with, or convicted of, criminal offences.
- Amendment or repeal of the power to use subordinate legislation to remedy incompatible legislation is possible without materially damaging the protections of

²⁴ The indicators suggested here are not exhaustive but are related to proposals or suggestions that have been made by front bench Conservative spokespeople in support of a bill of rights based on repeal of the HRA.

²⁵ Drafted to ‘safeguard the freedom of the press’.

²⁶ Any new interpretation clause should not be weakened to require the courts merely to ‘take into account’ the rights in the bill of rights or exempt new legislation from its terms.

²⁷ The courts have no strike down powers under the HRA. Any amendment to the mechanism in s4 should not be used to not weaken courts’ powers to ‘rebalance power to parliament’.

²⁸ Scotland Act 1998, Government of Wales Act 1998, Northern Ireland Act 1998.

²⁹ At least under the same terms as provided by HRA s3 (2).

³⁰ This is the root to the development of a ‘culture of rights’ which the Conservative leader has indicated is problematic.

the HRA(s10),³¹ although this could hinder swift remedial action following adverse decisions by the ECHR.

4) DE-INCORPORATION OF THE ECHR (Law And Discourse).

- Any expansion of the sources of authority that the courts can or should 'take into account' when interpreting the Bill of Rights should not exclude the judgements, declarations, decisions or advisory opinions of the European Court of Human Rights.
- A British bill of rights should not be predicated on the denigration of international human rights and the consultation process for introducing it should enhance understanding of the ECHR and other ratified treaties.
- No bill of rights should be aimed at detracting from the universal application of human rights.

³¹ This provision has been used only 3 times.

Appendix 2 – Additional Case Studies

The following is a small selection of further examples of how the Human Rights Act is making a real difference to the lives of people in the UK. There are many more³².

Keeping autistic man in support unit against his and his family's will violates HRA

A 21 year old man with autism and a severe learning disability who lived with his father moved into his local authority's support unit for a couple of weeks when his father was ill, as part of his respite care regime. The local authority then kept him there for nearly a year, against his and his father's wish whilst it considered a long-term residential placement. The Court of Protection³³ ruled that the positive obligation under Article 8 (the right for respect for family life) meant that the removal of vulnerable adults from their relatives or carers could only be justified when the state would provide better quality of care. Keeping this man away from his home for almost a year was a breach of Article 8 HRA, and also Article 5 HRA (the right to liberty and to have a speedy decision by a court of the lawfulness of detention).³⁴

Courtesy of Human Rights Futures Project, LSE.

HRA provides protection against discrimination on grounds of sexual orientation

The courts have used their powers under the HRA to eliminate the discriminatory effect of para 2, Schedule 1 of the Rent Act 1977 which meant that the survivor of a heterosexual couple could become a statutory tenant by succession but the survivor of a homosexual couple could not (in breach of the prohibition on discrimination under Article 14, read in conjunction with the right to respect for private and family life under Article 8).³⁵

Courtesy of Human Rights Futures Project, LSE.

An attack against a religious group which is incompatible with the values of the ECHR will not enjoy the protection of Article 10

A member of the BNP who placed a poster in the window of his house depicting one of the Twin Towers in flames that said 'Islam out of Britain' and 'Protect British people' was convicted of an offence under section 5 of the Public Order Act and of committing the offence in a religiously aggravated way and fined. His appeal to the High Court was rejected³⁶ on the grounds that the restriction upon his right to freedom of expression (Article 10) was proportionate to the legitimate aim of protecting the rights and freedoms of others, given also the fact that the speech arguably fell within Article 17 of the Convention (no right to act with the aim of destroying the rights in the Convention).³⁷ His appeal to the European Court of Human Rights was found inadmissible because the anti-Islam images were a public attack on all Muslims in the UK and fell within Article 17, being incompatible with the values proclaimed in the

³² See the LSE Human Rights Futures Project for more information and examples:

<http://www2.lse.ac.uk/humanRights/research/projects/humanRightsFutures.aspx>

³³ The Court of Protection adjudicates about people who lack mental capacity to make decisions themselves.

³⁴ *Hillingdon London Borough Council v Neary* [2011] EWHC 1377.

³⁵ *Ahmad Raja Ghaidan v Antonio Mendoza* [2004] UKHL 30.

³⁶ *Norwood v DPP* [2003] EWHC 1564 (Admin).

³⁷ Art 17: 'Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

Convention, so did not enjoy the protection of Articles 10 or 14 (prohibition on discrimination).³⁸

Courtesy of Human Rights Futures Project, LSE.

Gender re-assignment requires legal recognition

A challenge was made against the different treatment of transsexual people in obtaining marriage certificates and a declaration was made that the Matrimonial Causes Act 1973 was incompatible with the right to respect for family life (Article 8) and the right to marry (Article 12). The government altered the law and the Gender Recognition Act 2004 now entitles a transsexual person to be treated according to their acquired gender status for all purposes, including marriage.³⁹

Courtesy of Human Rights Futures Project, LSE.

Using human rights to support people with mental health problems

- Article 2 (right to life) – a mental health advocate used this to argue for extra support in the community for a woman at risk of suicide who felt she was discharged from hospital before she was ready. Visits from her support worker were increased from fortnightly to weekly.
- Article 5 (right to liberty) – a mental health advocate used this to successfully challenge nurses who were preventing a voluntary mental health patient from leaving the ward to visit family and friends.
- Article 8 (right to private life) – a social care worker used this to argue for transport assistance from the local authority for an asylum seeker with post-traumatic stress disorder. He had to travel from south to north London to access treatment and support networks, but needed to change buses every 10 minutes due to his anxiety and panic attacks – the local authority eventually granted him a bus pass to facilitate travel.
- Article 12 (right to marry) – hospital staff used this to support a mental health inpatient to marry his partner, balancing their concerns about his capacity to consent against the fact that their refusal could breach articles 8 and 12.

Courtesy of Mind.

³⁸ *Norwood v UK* (2005) 40 EHRR SE11.

³⁹ *Bellinger v Bellinger* [2003] UKHL 21.

Equality and Diversity Forum Members (October 2011)

Action on Hearing Loss
Advice UK
Age UK
British Humanist Association
British Institute of Human Rights
Children's Rights Alliance for England (CRAE)
Citizens Advice
Discrimination Law Association
End Violence Against Women Campaign
Equality Challenge Unit
EREN – The English Regions Equality and Human Rights Network
Friends, Families and Travellers
Fawcett Society
JUSTICE
Law Centres Federation
Mind
National AIDS Trust
Press for Change
Race on the Agenda (ROTA)
RADAR
Refugee Council
RNIB
Runnymede Trust
Scope
Stonewall
The Age and Employment Network (TAEN)
Trades Union Congress (TUC)
UKREN (UK Race in Europe Network)
UNISON
Women's Budget Group
Women's Resource Centre

The following EDF observer organisations support this response:

The Employability Forum
Equality North East
GIRES (Gender Identity Research and Education Society)
René Cassin