

REDP Briefing Series

UK Bill of Rights

This paper is part of a series of briefing papers produced by Regional Equality and Diversity Partnership providing an equality analysis of central government policy, emerging or in existence. The central aims of these papers are to assist the community and voluntary sector by providing an overview of government policy and its relationship and impact on equalities, setting out the threats and opportunities for the sector. Much of this briefing has been compiled with the use of resources from the Equality and Diversity Forum and reproduced here with acknowledgement and thanks.

For some time now, cross-party discussion has focussed on considering whether there exists a case to introduce a new UK Bill of Rights. On the 18th of March 2011, the Government established an independent commission, the Commission on a Bill of Rights, to look at this very matter. Their key role is to:

- “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 2012.¹”

It is important to note that the Commission was established to fulfil a commitment made in the Coalition Agreement². The two political parties that form the Coalition disagree about the value and future of the Human Rights act. Both election manifestos had very different views for the future of the act and as such it is clear as to why the Commission has been formed, with its key role to investigate the case for a UK Bill of Rights.

Currently, the Commission has started the process of public consultation by seeking views on a number of questions (see later). It is crucial that the Community and Voluntary sector (CVS) engage in the consultation exercise as the Partnership is particularly concerned that the Commission’s work in considering the introduction of a UK Bill of Rights could result in a serious ‘watering down’ of human rights protection currently in place. Further to this, our concern is that attempts will be made to propose UK withdrawal from the jurisdiction of the European Court of Human Rights. This is especially concerning in respect of the consequences for disadvantaged groups and our concerns are shared with many organisations and individuals.

Placing the Human Rights Act in Context

The European Convention on Human Rights (the ‘ECHR’) was drawn up after the atrocities of the Second World War, with UK lawyers playing a major role in drafting its text. The UK was also one of the first countries to ratify the Convention back in 1950. Since that time, the ECHR has become perhaps the most successful international instrument for protecting human rights in the world.

All 47 member states of the Council of Europe, including the members of the EU as well as states such as Croatia, Russia and Turkey, have now ratified the Convention. Its provisions have

¹ Do we need a UK Bill of Rights Discussion Paper, Commission on a Bill of Rights, August 2011

² The Coalition: Our Programme for Government, p.11.

come to represent common democratic values shared by all European countries.

By ratifying the ECHR, states commit themselves to respecting certain basic human rights, such as the right to freedom from torture and inhuman and degrading treatment (Article 3), the right to fair trial (Article 6), the right to private, home and family life (Article 8) and the right to non-discrimination in the enjoyment of Convention rights (Article 14). To make sure that states live up to their promises, the Convention also establishes the European Court of Human Rights. Individuals can bring cases to the Court alleging that states have failed to respect their rights under the Convention.

The Benefits of the Human Rights Act & European Convention on Human Rights

The HRA and the ECHR has had a considerable impact on UK law. Human rights values have been infused into the British legal system, which previously only recognised a limited set of highly abstract common law rights which could -and sometimes were - overridden by Acts of Parliament that the judges were effectively constitutionally barred from reviewing.

This has dramatically expanded legal protection for the rights of vulnerable groups, and greatly reinforced the remedies that exist against discrimination. In contrast, anti-discrimination legislation such as the Equality Act 2010 is much more limited in scope: it does not apply to Acts of Parliament or to government regulations, and can be overridden by other legislation,

If the HRA had not been part of UK law, few if any of the cases stated in the attached documents (see links at end of the document) could have been brought in the UK courts. The individuals affected by the rights abuses in question would have had to bring a case to the European Court of Human Rights in Strasbourg, which is a long, costly and time-consuming process. These cases demonstrate an ever-deepening engagement on the part of the European Court of

Human Rights with equality issues. As long as the HRA remains in place, the human rights principles that underpin these decisions will continue to be available to UK courts as a tool to infuse, re-energise and transform British law.

The Threat to the HRA

The HRA has been regularly attacked by certain politicians and sections of the media. It has been suggested that the incorporation of Convention rights into UK law has resulted in various undesirable consequences: in particular, that certain groups such as Travellers, illegal immigrants and others have benefited to an unjustified degree from its provisions. Analysis of the impact of the Act produced by the Ministry of Justice and the Joint Committee on Human Rights in 2007 called into question the accuracy of many of these claims, but the HRA continues to be a source of political controversy.

Recently, the focus of criticism has shifted to the European Court of Human Rights, with the HRA sometimes wrongly being presented as having incorporated the case law of the ECHR lock stock and barrel, along with the rights themselves. In *Hirst v UK*, the Court held that the UK's denial of the vote to prisoners constituted an excessive restriction on the right to participate in elections as protected by Article 2 of the First Protocol of the ECHR. This has triggered a media and political backlash, with the *Daily Mail* and some MPs calling for the UK to consider withdrawing from the jurisdiction of the Court. Others, including Lord Hoffmann, a recently retired senior British judge, have criticised the Court for being too activist and interventionist in protecting rights and called for reform.

The Commission on a Bill of Rights

As stated earlier, the Conservative Party In its manifesto for the 2010 general election, suggested that the HRA should be replaced by a British Bill of Rights. Partly in response to the controversy surrounding the issue of votes for prisoners and partially in fulfillment of an undertaking entered into as part of the coalition agreement concluded in May 2010, a Bill of Rights Commission was established in March 2011.

The Commission is widely understood as a mechanism for 'brokering' the conflicting views on the HRA held by the coalition partners. Its terms of reference are to 'investigate the creation of a UK Bill of Rights that incorporates and builds on [the UK's] obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties'.

First analysis of the discussion paper produced by the Commission, highlights that there is no reference to the Human Rights Act in the terms of reference allowing for the possibility of a different, or indeed weaker, approach to incorporating the UK's "obligations" under the ECHR. The Commission will also consider ways of promoting better understanding of rights, and advise on possible reform of the European Court of Human Rights.

Furthermore, the Commission is composed of a mixture of prominent critics and supporters of the HRA. It will consult with the public, interested organisations and the devolved administrations, and report no later than by the end of 2012. The Commission has recently met for the first time, and had preliminary discussions on how it will proceed with its allocated role. It has been reported that due to the differences of perspective by key members of the Bill of Rights Commission, a separate inquiry to address the HRA and the UK relationship with the ECHR has been established by the Conservative Party, chaired by the Home Secretary, Theresa May. This move in itself raises considerable concern about neutrality and objectivity.

How Could the Replacement of the HRA by a Bill of Rights Limit Legal Protection for Human Rights?

Legal protection for human rights could be seriously limited by the repeal, amendment or replacement of the HRA in several different ways, all of which could have a considerable impact on issues related to equality and diversity.

1. Firstly, there appears to be political support in some quarters for the HRA to be replaced by a Bill of Rights

which would be a purely political declaration lacking any legally binding force, or at the very least significantly reducing the current (relatively modest) powers of the courts to adjudicate on human rights. This would return the legal position to something resembling that which applied before 1998. This would return the legal position to the situation that applied before 1998. If this happens, then it will become extremely difficult for individuals to challenge rights abuses in the UK courts. They will have to bring their cases to the European Court of Human Rights in Strasbourg, which will involve considerable delay, travel and costs. Human rights law will be largely uprooted from the UK legal system, with potentially serious consequences for vulnerable groups.

- 2.** Secondly, even if the HRA is replaced with a legally binding Bill of Rights, given that this proposal is largely in response to sustained criticism from sections of the press and opponents of the ECHR, it is probable that at least some of the rights in this new instrument will be more limited than they are currently, or else they may be watered down through wording that narrows the scope of those eligible to be protected by them. This could seriously dilute the protection afforded to vulnerable individuals and groups under the existing provisions of the HRA.
- 3.** Thirdly, if the HRA is replaced by a new British Bill of Rights, UK courts may no longer be required to 'take into account' the case-law of the European Court of Human Rights, as they are currently under s. 2(1) of the HRA. This would sever the link between UK law and the European Court of Human Rights, preventing the progressive jurisprudence of the European Court from enriching UK law and reducing the universal application of current rights protection. The UK would be the first country in Europe to effectively de-incorporate the ECHR from its domestic law setting a precedent to others to follow suit.

4. Finally, repeal or 'reform' of the HRA could even involve an attempt to withdraw the UK from the jurisdiction of the European Court of Human Rights. This would be an extreme step, but it has been supported by the *Daily Mail*, several Conservative MPs and Policy Exchange, a think tank linked to the Conservative Party. If the UK were to withdraw from the jurisdiction of the Court, this would cause irreparable damage to human right protection across Europe. UK withdrawal would in all likelihood be followed by withdrawal by other states such as Russia and Turkey, resulting in the partial collapse of the European Convention on Human Rights.

Could a Bill of Rights Enhance the Legal Protection of Human Rights?

A legally enforceable Bill of Rights could enhance the legal protection of rights in a variety of ways, if the HRA was left intact and additional rights were enshrined in law. It could for example include a free-standing equality clause, similar to the Equal Protection Clause in the US Constitution. Article 14 of the ECHR only guarantees non-discrimination in the enjoyment of Convention rights: so far, successive UK governments have refused to sign and ratify Protocol 12 to the Convention, which would protect individuals against discrimination by public authorities and guarantee equal enjoyment of 'any right set forth by law'. However, a free-standing equality clause in a UK Bill of Rights might achieve a similar result, and give a firmer foundation to UK anti-discrimination law.

A legally binding Bill of Rights could also include enforceable socio-economic rights such as a right to access health care or a right to receive social assistance. It also could contain provisions on children's rights and the rights of persons with disabilities, perhaps drawing upon the UN human rights standards in these fields.

In 2008, the Joint Committee on Human Rights produced a comprehensive report which supported the introduction of

such a legally binding Bill of Rights, which would leave the HRA essentially intact but also reinforce its provisions with additional rights provisions. If the Commission on a Bill of Rights supported the introduction of such a Bill of Rights, it would enhance rights protection in the UK, especially for vulnerable groups. However, at present, there appears little political support for such an expansive Bill of Rights.

Consultation Questions

It is vital that civil society engage with the activity of the Commission and the first step is to respond to the discussion paper (see link below).

The deadline for this **11th November 2011**.

The four questions on which the Commission is seeking our 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?

Please find links to other documents that you may find useful in commenting on the above questions:

Discussion Paper: 'Do we need a UK Bill of Rights?'; Commission on a Bill of Rights.

<http://www.justice.gov.uk/downloads/about/cbr/cbr-discussion-paper.pdf>

Easy Read Version

<http://www.justice.gov.uk/downloads/about/cbr/cbr-easy-read-discussion-paper.pdf>

Commission on a Bill of Rights – interim advice to government letter

<http://www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-interim-advice.pdf>

Equality and Diversity Forum Briefing

<http://www.edf.org.uk/blog/?p=14254>

Equality and Diversity Forum Template Response

<http://www.edf.org.uk/blog/?p=14254>

