



The Law Society
of England and Wales

Law Society Response
Commission on a Bill of Rights
"Do we need a Bill of Rights?"
November 2011

SUPPORTING
solicitors

Introduction

The Law Society is the representative body for over 145,000 solicitors in England and Wales. It negotiates on behalf of the profession, and lobbies regulators, Government and others. Its concerns include upholding the independence of the legal profession, the rule of law and human rights around the world. This response has been prepared by the Law Society through its Human Rights Committee.

The Human Rights Committee is a specialist body of the Law Society and is comprised of practitioners and experts in domestic and international human rights law. The Human Rights Committee is networked with a broad spectrum of international professional legal bodies, intergovernmental organisations, and non-governmental and civil society organisations.

This submission is divided into 4 sections reflecting the 4 questions posed by the Commission on a Bill of Rights (the "**Commission**").

Executive Summary

Question 1: Do you think we need a UK Bill of Rights (**BoR**)?

The Law Society recommends that:

- The Human Rights Act 1998 (**HRA**) should be retained and should be accompanied by a programme of public education, outreach and debate to enhance understanding and legitimacy.
- Additional rights can be added by amendment to the HRA, but no rights should be diluted or taken away.
- Any enhancement or alteration of the HRA will require public participation, consultation and education, possibly cemented or entrenched by a final referendum.
- There should be a single consolidated document which enshrines our domestically enforceable rights. The HRA already fulfils this function, and to create an additional BoR would be unnecessary duplication or complication.

Question 2: What do you think a UK Bill of Rights should contain?

Possible additional rights might include:

- Trial by jury
- Habeas Corpus
- Common law saving provision
- Economic, social, and cultural rights (**ESCRs**) should be included in any public consultation. The proposal by the Parliamentary Joint Committee on Human Rights (**JCHR**) should be given further consideration
- Rights protected by the EU Charter of Fundamental Rights (*the "EU Charter"*)
- Rights contained in the unincorporated and un-ratified Protocols to the Convention
- A freestanding right to equality

- Article 13 of the European Convention on Human Rights (the “**Convention**”) (right to an effective remedy)
- Administrative justice

HRA provisions that should be retained include:

- Section 19 – the minister responsible for laying the draft legislation before Parliament must certify that it is human rights compliant
- Section 4 – declarations of incompatibility
- Section 3 – legislation to be interpreted in a human rights compatible way “*so far as it is possible to do so*”
- Section 12 – the balance between Article 10 (freedom of expression) and Article 8 (privacy)
- Section 2(1) - courts must “*take into account*”, but not necessarily follow, Strasbourg jurisprudence

Issues which should not be included:

- The Law Society is opposed to the inclusion of responsibilities in a BoR.

Question Three: 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?

The current devolution statutes which limit the powers of the devolved governments by reference to Convention rights in combination with the HRA should be retained as the most practical solution. The current system already supports cultural variation while providing the required protections. A UK-wide BoR might cut across local processes and sensitivities and so might be too political to enact. Separate bills for each of the constituent nations might be culturally appropriate, but too complicated.

Question Four: Having regard to our terms of reference, are there any other views which you would like to put forward at this stage?

No BoR will be accepted into the public consciousness without grassroots participation in its creation in order to achieve public buy-in and legitimacy. To this end, we propose the following:

- A proper programme of public consultation
- A programme of education and information
- A concordat pledging not to use language or promote stories that knowingly distort the purported impact of human rights and the HRA.

In relation to the Commission's interim advice to the UK Government on proposed reform of the European Court of Human Rights (**ECtHR**) and the parallel letter dated 28 July 2011:

- Subsidiarity and screening: In order for reform of the ECtHR to be effective there should be a common understanding on the fundamental role of the ECtHR. Before subsidiarity can be strengthened, concrete proposals should be put forward to ensure that states will provide effective domestic remedies.
- Relief and ‘just satisfaction’: The Law Society proposes the alternative solution of setting up a specialist unit at the ECtHR to decide monetary compensation, which might free the judges from having to spend time on these technical issues.

However, this would only work if there was sufficient funding. Another alternative would be to enhance the friendly settlement procedure, perhaps by means of court-directed mediation.

- Enhancing the nomination and appointment of judges: It is essential that adequate funding is provided so that the Advisory Panel can interview nominees before giving its advice to the Parliamentary Assembly of the Council of Europe (**PACE**). In the meantime, the Law Society recommends a programme of education would be helpful to correct some of the recent media misreporting about how ECtHR judges are appointed.
- Democratic override: The Law Society strongly opposes allowing an ECtHR decision to be overridden by PACE and or Committee of Ministers (**CoM**). Such override would undermine the rule of law, and the whole point of the Convention system if member states can be let off the hook.

Question 1: Do you think we need a UK Bill of Rights?

Retaining the Human Rights Act 1998 with a programme of education

The Law Society considers that the Human Rights Act 1998 (**HRA**) already acts as a Bill of Rights (**BoR**) which, carefully, strikes the balance between safeguarding fundamental rights and preserving parliamentary sovereignty. The HRA does so in combination with the devolution statutes which limit the powers of the devolved governments by reference to Convention rights. Thus, retaining the HRA in its current form would be a simple solution.

Although recent polling suggests that there is public support for a law that protects human rights,¹ other research suggests that the public is much less knowledgeable,² and less interested,³ in the detail of such rights. Some studies also suggest that the public does not consider the creation of a new BoR a high priority for government.⁴ In one poll in 2010, 75% thought that the HRA should be retained.⁵

We recommend a comprehensive programme of public education and debate to assist in correcting myths and promoting understanding of how the HRA works. Some commentators suggest that this would be enough to reverse any negative impressions and foster acceptance of the HRA as a legitimate BoR for the UK. Such an initiative could highlight the role played by British politicians, including Winston Churchill, in the creation of the Convention. It would also emphasise that the drafting was guided by a British MP and lawyer, Sir David Maxwell-Fyfe, so that the Convention's principles reflect long-established British values, e.g. "*prohibition of torture, right to liberty and right to a fair trial...from Magna Carta, habeas corpus [and] the Bill of Rights [1688/9]*".⁶

The Law Society also proposes that a Standing Commission on Human Rights could be set up with the specific purpose of investigating and addressing unbalanced or incorrect perceptions. For example, such a Commission could provide clarity over the nomenclature which often seems to obscure and confuse. Some people react negatively to the term "human rights" while at the same time supporting "civil liberties" even though the two expressions may be referring to the same right. Such clarity might equalise the language so that reasoned debate can take place more readily.

Therefore, the Law Society recommends that the HRA should be retained and should be accompanied by a programme of public education, outreach and debate to enhance understanding and legitimacy.

¹ 84%, see Ministry of Justice (2008) Human Rights Insight Project. London: Ministry of Justice at 29

² Ministry of Justice (2008) *Human Rights Insight Project*. London: Ministry of Justice at 27; see Kaur-Ballagan, K., Castell, S., Brough, K. and Friemert, H. (2009) *Public Perceptions of Human Rights*. Manchester: Equality and Human Rights Commission at 8, referred to in Equality And Human Rights Commission (Donald) (2010) *Developing a Bill of Rights for the UK* at 69

³ Hansard Society (2008) *Audit of Political Engagement 5: the 2008 Report with a special focus on the constitution*. London: Hansard Society at 5, 28-29

⁴ *Ibid.* at 31

⁵ Ministry of Justice (2010) *Human Rights Tracker Survey*. London, Ministry of Justice at 4 referred to by Polly Vizard (2010) *What do the public think about economic and social rights?* Centre for Analysis of Social Exclusion London School of Economics at 53

⁶ Attorney General, Dominic Grieve QC MP, *European Convention on Human Rights - current challenges*, speaking at Lincoln's Inn, London on 24 October 2011

Additional rights can be added to the HRA, but no rights should be diluted or taken away

The Terms of Reference (**ToRs**) of the Commission suggest that any future BoR should protect the same rights as the HRA and might be augmented by the inclusion of some additional rights. The ToRs state that a UK BoR would "*incorporate[...] and build[...] on all our obligations under the European Convention on Human Rights*".

The need to incorporate the Convention rights is embedded in the very structure of the Convention: the duty to secure the rights, the requirement to provide effective remedies, the requirement to exhaust such remedies before applying to the European Court of Human Rights (**ECtHR**) and the subsidiary nature of the just satisfaction power. The Commission's terms of reference acknowledge the need to incorporate the Convention rights and its interim advice on reform of the ECtHR also recognises the importance of domestic remedies as a way of ensuring subsidiarity and cutting down the ECtHR's workload.

It seems, therefore, that it is generally accepted not only that we need to retain effective domestic enforcement of Convention rights but also that this is more pressing if the aim is to repatriate cases to our domestic courts, thereby minimising recourse to Strasbourg. It follows that there can be no objection to the substance of the Convention rights, and indeed surveys suggest that there is popular support for them. Similarly, the Commission appears to recognise that effective domestic remedies are both necessary to comply with the convention and desirable to ensure subsidiarity. The HRA currently fulfils these needs, so there should be no question of its repeal or dilution, since either course would detract from the acknowledged goals set out above. Therefore, the key question is how to build on the HRA.

Rather than scrap the HRA and replace it with an enlarged BoR (which would be a fairly similar document), it might be simpler and less duplicative to retain the HRA and add any additional rights by amendment.

In order for any enhancement or alteration of the HRA to be effective, the Law Society notes the paramount importance of public participation, consultation and education, possibly cemented or entrenched by a final referendum. These have been common features of previously successful Bills of Rights around the world. Without such processes, there may be a lack of public ownership and buy-in into the BoR solution, which will perpetuate one of the original problems from which the HRA already suffers (further detail of such processes are set out in response to Question Four below).

The Law Society recommends that additional rights can be added by amendment to the HRA (see Question Two below for proposals for such rights), but that no rights should be diluted or taken away. Any enhancement or alteration of the HRA will require public participation, consultation and education, possibly cemented or entrenched by a final referendum.

A single consolidated document

If the HRA is retained, and possibly enhanced, it is recommended that it be the sole human rights instrument in the UK. A single, consolidated document would avoid the problems of a new BoR subsisting alongside or on top of the HRA by:

- Avoiding a decision as to whether the new BoR would be fully enforceable or purely aspirational - and, if enforceable, whether the new BoR or the HRA would have priority. If purely aspirational, its worth might be questioned.
- Minimising the creation of yet more BoR-like documents, where there may be overlapping, conflicting and or confusing rights and jurisdictions (e.g. a new BoR, the old HRA, the Convention, and EU Charter of Fundamental Rights)

The Law Society recommends that there should be a single consolidated document which enshrines our domestically enforceable rights. The HRA already fulfils this function, and to create an additional BoR would be unnecessary duplication or complication.

Question 2: What do you think a UK Bill of Rights should contain?

As recognised in the ToRs, a BoR would have to protect the same rights as the HRA, plus some possible additional ones.

Such additional rights might include:

- **Trial by jury:** The lawful judgment of one's peers is a concept enshrined as long ago as 1215 in the Magna Carta. It is a practice that allows for civic participation and representation in the criminal justice system and ensures that one class of person does not sit in judgment over another. Therefore, it should be included in a BoR. Care will have to be taken to respect any variations in Scotland, which does not have the same tradition of jury trials as other parts of the UK.
- **Habeas Corpus:** is another time-honoured safeguard first codified in the Habeas Corpus Acts of 1640 and 1679. It is a fundamental procedural mechanism that protects individual liberty, and is apt to be enshrined in a BoR.
- **Common law saving provision:** This would make clear that nothing in the BoR denies the existence or restricts the scope of rights or freedoms already recognised at common law.
- **Economic, social, and cultural rights (ESCRs):** The Law Society hosted a 2-day symposium to discuss this subject in October 2011. Approximately 60 experts attended and contributed, including UK parliamentarians, leading NGOs, Justice Juan Carlos Henao Pérez, President of the Colombian Constitutional Court, and Justice Albie Sachs, formerly of the South African Constitutional Court.

Rights to adequate housing, employment, health and education have been cited in surveys by the public as highly important.⁷ Such rights seem to resonate with

⁷ The ICM "State of the Nation" poll of 2010 prepared for The Joseph Rowntree Reform Trust by ICM Research states shows that 87% were in favour of the right to hospital treatment on the NHS within a reasonable time (1% less than the right to a fair jury trial). 75% of those surveyed supported the right to strike without losing your job. 60% supported protection of the right of the homeless to be housed; The poll for the Bill of Rights for Northern Ireland (2004) (see <http://www.borini.info/opinion-polls.aspx>) found that over 70% approval on average for both communities for the inclusion of socio-economic rights, which is a higher score than for the civil and political rights. In Polly Vizard (2010) *What do the public think about economic and social rights?* Centre for Analysis of Social Exclusion London School of Economics at 107 and 126, the right to free health-care if you need it, and the right to access to free education for children achieved the threshold set for "near universal support" (90%+). The right to be looked after by the State if you can not look after yourself achieved the "very high support" threshold (80%+). The right to a job achieved the threshold for "high support" (70%+).

the every day experience of people's lives. Consideration of such rights should be included in any public consultation on the BoR as they are likely to feature highly, especially during this period of economic austerity.

The UK has agreed to be bound by ESCR principles by ratifying the International Covenant on Economic Social and Cultural Rights but has not yet adopted the optional protocol which would provide a mechanism for individual petition or implemented these rights directly in domestic law. ESCRs are currently not directly protected in the HRA. Therefore, ESCRs are binding on the UK but not directly enforceable by its citizens.

However, there is understandable resistance to the incorporation of ESCRs, because respect for them may require the state to take positive action and expend limited resources. It is said that decisions of resource allocation should not be justiciable in the courts because they are properly the domain of the elected branches of government, who also may have more expertise in this area than the judiciary. These and other objections are fully addressed and countered in the response to the Commission from Just Fair, an NGO working for increased recognition of economic, social and cultural rights in the UK.

Some commentators have suggested that an alternative is to incorporate ESCRs as aspirations in a non-binding part of the BoR. However, if ESCRs are given no binding effect at all, in stark contrast to civil and political rights, this might undermine the core principle that all human rights are universal, interdependent and indivisible.

The Law Society points to the South African example of the incorporation of ESCRs in a BoR without the courts overreaching. South African jurisprudence has developed a restrained approach to the scope of permissible review, confined to consideration of whether the government has taken "reasonable" steps to protect the right (i.e. within narrow parameters, only for very serious or large-scale violations).

The Law Society also notes that its counterpart in Zimbabwe (the Law Society of Zimbabwe) included key ESCRs in its proposed draft constitution in 2010.

The Parliamentary Joint Committee on Human Rights (**JCHR**) has put forward an ESCR proposal that aims to be suitable for the UK context, and which:

*"draws inspiration from the South African approach to economic and social rights, but [...] contains additional wording designed to ensure that the role of the courts in relation to social and economic rights is appropriately limited. The broad scheme of these provisions is to impose a duty on the Government to achieve the progressive realisation of the relevant rights, by legislative or other measures, within available resources, and to report to Parliament on the progress made; and to provide that the rights are not enforceable by individuals, but rather..."*⁸

ESCRs would be justiciable to assess the reasonableness of Government measures to achieve progressive realisation. The role of the courts would not be to decide how best to allocate scarce resources but to ensure that the commitments are not being ignored.

⁸ Para 192, Joint Committee on Human Rights - Twenty-Ninth Report, 21 July 2008

The Law Society therefore recommends that consideration of ESCRs should be included in any public consultation and the proposal by the JCHR should be given further consideration.

- **Rights protected by the EU Charter of Fundamental Rights (*the "EU Charter"*):** In 2009, the EU Charter became legally binding with the same legal status as the EU treaties. It contains rights that are enforceable in UK by virtue of Section 2(1) of the European Communities Act 1972. Such rights are enforceable against EU institutions and the UK (in relation to the latter only when the UK is implementing EU law). The EU Charter protects various rights that are not covered by the HRA, for example, ESCRs including the right to education, healthcare, work and working conditions, and social security. It also includes protection for the rights of children and disabled people which reflect the obligations that the UK has already assumed by ratifying the CRC and CRPD treaties,⁹ but has not yet implemented in UK law. Other additional protections include the right to property, elections, environmental and consumer rights. Since these rights already have a degree of protection in UK courts, and some mirror the UK's other treaty obligations, it may be sensible to consolidate and clarify them in a BoR.
- **Rights contained in the unincorporated and un-ratified Protocols to the Convention:** There are a number of Protocols to the Convention, some of which the UK has ratified, signed or neither.

The UK has signed but not ratified Protocol 4 (freedom from imprisonment for debt, prohibitions on the expulsion of nationals and collective expulsion of aliens and freedom of movement). Although the UK is not legally bound until it has ratified the Protocol, signature creates a good faith obligation in international law not to defeat the object and purpose of a Protocol.¹⁰ Rights similar to the last two mentioned above are included in the EU Charter and therefore enforceable to a limited degree, but it means that UK citizens are better protected in relation to EU matters than they are when purely domestic rights are in issue. It is undesirable that rights should attract a different level of protection based not on the substantive content of the subject-matter in issue but on the source of the legal regulation of those rights. To include these rights in a BoR would remove or clarify these anomalies.

The UK has neither signed nor ratified Protocol 7. However, by virtue of its ratification of the ICCPR,¹¹ the UK has already bound itself to equivalents of two of the rights found in Protocol 7: the rights to compensation for wrongful conviction and not to be tried twice for the same crime. Thus, inclusion in a BoR would make these UK obligations accessible to its citizens in the domestic courts.

Protocol 12 is dealt with in the next paragraph.

- **A freestanding right to equality:** Article 14 of the Convention is not a freestanding right because it guarantees non-discrimination only if one of the other Convention rights is engaged. A freestanding equality right is included in Protocol 12 of the Convention. The UK has not signed or ratified Protocol 12 because the wording is said to be too wide in that it might apply to international

⁹ respectively, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

¹⁰ Article 18, Vienna Convention on the Law of Treaties, 1969

¹¹ The International Covenant on Civil and Political Rights

conventions to which the UK is not a party. The Law Society recommends that a BoR should include an equivalent to the equality rights which already bind the UK internationally, under the ICCPR, CERD, and the ICESCR treaties.¹² The rights enshrined in Protocol 12 are rights which the Government has accepted through its international commitments to human rights treaties. These commitments should be given effect in national law through a free standing right of non-discrimination. The EU Charter also contains a right to non-discrimination which again creates the anomaly that UK citizens are better protected in relation to EU matters than purely domestic ones. Inclusion in a BoR would clarify or resolve the position.

- **Article 13 of the Convention (right to an effective remedy):** The UK is bound by this Convention right but has not incorporated it into the HRA. Article 13 is a corollary to subsidiarity. In other words, for a state to be trusted to comply with the Convention with minimal interference from Strasbourg, the state must ensure it provides its citizens with adequate recourse and remedy. Article 13, if enshrined in UK law, would be a further safeguard against any erosion of these principles.
- **Administrative justice.** The right to fair and just administrative action is an innovation of the common law. The Law Society would recommend the express inclusion of the right to administrative action that is lawful, reasonable and procedurally fair, and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. The right to good administration is also included in the EU Charter and so it is already enforceable to a limited degree. Inclusion in a BoR would promote full protection for this common law principle.

The HRA also includes some provisions not derived from the Convention. The Law Society's view is that the following such HRA innovations should be preserved in any BoR:

- **Section 19 – the minister responsible for laying the draft legislation before Parliament must certify that it is human rights compliant:** Similar provisions are found in comparable BoRs around the world. It signals that human rights principles are primarily the responsibility of legislators, and apply practically to the law-making process beyond the realm of lawyers and the courtroom.
- **Section 4 – declarations of incompatibility (Dols):** The Law Society's position is that Dols are the best way to adjudicate human rights while still preserving the tradition of parliamentary sovereignty. If the courts were to be given power to strike down or suspend incompatible legislation, this would unsettle the UK's constitutional balance. The Dol provision could be enhanced in a BoR by including procedural steps and deadlines which the government would have to follow in response to a Dol.
- **Section 3 – legislation to be interpreted in a human rights compatible way "so far as it is possible to do so":** The Policy Exchange advocates the repeal of section 3.1 on the grounds that it leads to judicial activism and allows judges to stretch the meaning of legislation beyond what is reasonable. However, the Law Society's view is that section 3 is the corollary of Dols. Dols should be the last resort so that the courts and Parliament only rarely come into direct conflict. It is

¹² respectively, the International Covenant on Civil and Political Rights, the Convention on the Elimination of Racial Discrimination, and the International Covenant on Economic Social and Cultural Rights.

the mechanism which avoids unnecessary constitutional confrontation. Section 3 is, in effect, a codification of the principle that the UK government ratified the Convention with the intention of complying. Section 3 provides the UK with the ability to comply with Convention rights without having to amend every law individually and laboriously. The provision could be clarified in a BoR so that it expressly applies to the common law (not just to statutes). Section 3 is also a reflection of section 19, which creates a very strong presumption (in the absence of contrary intention) that Parliament intended its legislation to comply with Convention rights.

- **Section 12 – the balance between Article 10 (freedom of expression) and Article 8 (privacy):** The Policy Exchange advocates that Article 10 should have express priority over Article 8. However, the Law Society notes that Section 12 of the HRA adequately protects freedom of expression from ex parte applications to restrain publication. Thus, the Law Society prefers to retain the current balancing test as the relationship between the two rights, rather than lay down a fixed order of priority.
- **Section 2(1) - courts must "take into account", but not necessarily follow, Strasbourg jurisprudence:** The wording of this section indicates that the courts must consider Strasbourg decisions - they cannot ignore them - but they do not in all cases have to follow them. This allows the UK courts to develop their own case law better suited to the social context and local traditions of the UK rather than slavishly following or having to rely on Strasbourg. The Law Society considers that this is the correct approach.

The Law Society considers that the following, which has been proposed by various commentators, should not be included in a BoR:

- **Responsibilities:** There is no need to include express provision for responsibilities as they are already implicit in the text of the Convention. There are already important exceptions which can legitimately restrict some rights. In certain circumstances, the rights can be interpreted so that duties are imposed. Article 17 ensures that people do not have the right to do anything that would destroy or unduly limit the rights of others. Further, express inclusion of responsibilities might be detrimental. It might give rise to the false notion that rights are not universal but conditional and not available for everyone but only those who are "deserving". People enjoy human rights by virtue of being human, not by discharging any precondition or having to "earn" them. If a public consultation finds support for "responsibilities" (e.g. to promote a "we" culture over the perceived "me" culture or to minimise a repeat of the recent press intrusion into privacy) then general responsibilities could be included in a non-binding preamble as an aspirational statement of values. However, a BoR is not the best place to educate the public on their responsibilities or to remind them to obey the laws defined in other statutes or rules. **Therefore, the Law Society is opposed to the inclusion of responsibilities in a BoR.**

Question Three: 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?

The Law Society hosted a roundtable of experts on this subject in July 2008. The roundtable noted significant difficulties in developing a UK-wide BoR because of the current devolution settlements.

More recent commentators suggest that the difficulties are not insuperable, but do add a new and complex dimension to any discussion of a UK BoR. This is an issue to be handled with a great deal of sensitivity to the cultural background of the devolved nations.

The HRA and the Convention are tied to and embedded in the devolution settlements. The devolution statutes incorporate the Convention directly into their own frameworks. The devolution statutes also contain procedural mechanisms analogous to the HRA. Therefore, any amendments or repeal of the HRA would require amendment of the devolution settlements.

It is also arguable that human rights observation and implementation has been devolved. In any event, Westminster legislation on a BoR is likely to touch on areas of devolved competence, e.g. housing, education and local government. Thus, the Westminster parliament would most likely require the consent of the devolved parliaments in order to enact a new UK BoR.

In relation to Northern Ireland, the Good Friday Agreement (**GFA**) requires the Convention be incorporated into Northern Irish law, with direct remedies. There has been a process of consultation regarding a BoR for Northern Ireland, ongoing for over a decade, which has had to contend with the intricacies of the competing cultural traditions. Thus, any UK-wide BoR which diminished the rights already included in the HRA might be a breach of the GFA. In addition, care will have to be taken to be sensitive to the local culture and not to be seen as overriding a long established local process with an initiative imposed from outside.

Devolution is currently high on the agenda in the other devolved nations. In Scotland, recent public debate has revolved around a possible referendum on independence or increased autonomy. It has also been reinvigorated in Wales since the referendum in March 2011 which led to increased legislative competence for the Welsh Assembly.

Thus, attempts to amend the devolution settlements or secure consent from devolved parliaments could be characterised as attempts to centralise power and/or might be an opportunity for the devolved nations to bargain for increased autonomy. As JUSTICE reported in 2010, this might be “*dangerous and risky...to the constitution of the UK itself*”.¹³

Various experts have suggested a possible solution: a UK-wide BoR with separate Bills or chapters in which each devolved nation can add further protections. This would facilitate culturally appropriate variations as well as local consultations. However, such solution could lead to different levels and types of rights protection in the UK depending on geographical location – a quasi-federal model incompatible with the current UK system which is a unitary state.

¹³ Justice. *Devolution and human rights*. February 2010, page 27

Although it would theoretically be possible for each jurisdiction to have its own bill, thereby transforming the proposal to four bills of rights – English, Scottish, Welsh and Northern Irish – it would undermine the coherence of the project.¹⁴

The Law Society recommends that the current devolution statutes which limit the powers of the devolved government by reference to Convention rights in combination with the HRA should be retained as the most practical solution. The current system already supports cultural variation while providing the required protections. A UK-wide BoR might cut across local processes and sensitivities and so might be too political to enact. Separate bills for each of the constituent nations might be culturally appropriate, but too complicated.

Question Four: Having regard to our terms of reference, are there any other views which you would like to put forward at this stage?

Public buy-in and legitimacy

The Law Society is very aware that the HRA sometimes receives public criticism. Several reports suggest that one of the major problems at the HRA's inception was that the public debate and consultation was not effective, resulting in a perception that the HRA was "imposed" and the HRA failing to acquire popular legitimacy or common ownership.

Thus, the Law Society's position is that no BoR will be accepted into the public consciousness without grassroots participation in its creation. Research suggests that the public overwhelmingly accepts that our law should continue to protect the rights in the Convention and the common law and accordingly there should be a genuine attempt to involve the public through outreach. To this end, we propose the following:

- **Consultation:** A proper programme of public consultation will be required to give the BoR grassroots credibility. Deliberative participation is recommended, culminating in a referendum to secure democratic legitimacy.
- **Education:** As part of any consultation, there should be a programme of education and information to create an environment of informed debate. This would help demystify the subject and correct any lingering myths which have arisen through inaccurate reporting.
- **Concordat:** Various commentators have recommended that all parties involved in the BoR process should sign a concordat pledging not to use language or promote stories that knowingly distort the purported impact of human rights and the HRA. This would enable the consultation to be truly deliberate and educative. It would prevent the process from being used as a proxy to advance other agendas.

Proposed reform of the European Court of Human Rights (ECtHR)

The Law Society recognises that the backlog of cases at the ECtHR undermines the effectiveness of the system. It also diminishes the credibility of the ECtHR which eventually can have an adverse influence on respect, in the public imagination, for its judgments and for Convention principles. Thus, reform to deal with the backlog is an

¹⁴ Justice. *Minimum conditions for a Bill of Rights*. April 2010. Page 1.

urgent consideration. The UK now has the Chairmanship of the Council of Europe and the Government has signalled its intention to pursue reform of the European Court of Human Rights.

In relation to the Commission's interim advice to the UK Government, the Law Society endorses the recommendations proposed by the group of eminent NGOs¹⁵ in a letter to the Commission dated 26 October 2011. The Law Society also notes the following:

- Subsidiarity and screening: The Law Society is slightly puzzled to note that the Commission recommends an improvement to the screening process (rejecting applications of minor importance) which, it seems, is already being implemented under Protocol 14 as interpreted by *Korolev v Russia*.¹⁶

The Commission's repeated concern with subsidiarity, without making concrete proposals as to how to achieve a situation where member states take more or primary responsibility for enforcement of rights, is also curious.

It may be that what is required is a debate on the fundamental question of what is the proper role of the ECtHR. Should it move away from being a beacon of hope for victims seeking individual justice, and instead become a European constitutional court, with more discretion to control its own docket, and focusing more on addressing structural failures in the exercise of power?¹⁷ Or would a constitutional court be too intrusive on national sovereignty and domestic legal systems, in which case the ECtHR should act as an "*international court*"¹⁸ accepting limits to its authority? In any event, the fundamental principle remains that no one who is the victim of a human rights violation should be left without an effective remedy.

Some commentators have suggested that the Commission's concern for subsidiarity actually reflects the current political climate where there is a desire for an increased 'margin of appreciation' (i.e. the leeway that member states are allowed to diverge and follow their own interpretation of rights that best fits their national context). The Commission's invocation of the Interlaken declaration which "*invite[s] the Court to take fully into account its subsidiary role in the interpretation and application of the Convention*" does appear to hint at the margin of appreciation. The margin of appreciation is an important (though perhaps thorny) issue which the Commission might wish to address directly in future advice to the UK Government.

This was corroborated by the Attorney-General on 24 October 2011 when he suggested that subsidiarity could be strengthened through a wide margin of appreciation in cases where the national parliament has implemented the Convention and the national courts have properly assessed the compatibility of that implementation. He maintains that on issues of social policy there can be a range of reasonable views, and subsidiarity requires the ECtHR not to interfere if Parliament has fully debated the issue.

¹⁵ AIRE Centre, Amnesty International, European Human Rights Advocacy Centre, INTERIGHTS, International Commission of Jurists, Human Rights Watch, JUSTICE, Open Society Justice Initiative

¹⁶ Application no. 25551/05, Admissibility, 1 July 2010 ("*the new criterion hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a minimum level of severity to warrant consideration by an international court.*")

¹⁷ See e.g. Greer, Stephen, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006), pages 174 to 192

¹⁸ See e.g. Bates, *Why have a European Court of Human Rights?*, 13 October 2011, UK Human Rights Blog.

*Emre v. Switzerland (No. 2)*¹⁹ perhaps suggests (in relation to assessing whether a state has complied with a previous ECtHR judgment under Article 46) that national authorities may be given more leeway the more closely their procedures follow and address the specific concerns identified by the ECtHR (not simply that the matter is "fully" debated). The Attorney-General appeared to recognise this concept in a House of Commons debate in February 2011.²⁰

In any event, the corollary of subsidiarity is the proper implementation of Convention rights by national authorities. Subsidiarity is dependent upon state parties actually providing effective domestic remedies. Some countries do not. An increase in the level of subsidiarity, which reduces access to the ECtHR, may leave individuals in those countries with no remedy at all.

The Law Society recommends that in order for reform of the ECtHR to be effective there should be a common understanding on the fundamental role of the ECtHR. Before subsidiarity can be strengthened, the issue of the margin of appreciation should be addressed and concrete proposals put forward to ensure that states provide effective domestic remedies.

- **Relief and 'just satisfaction'**: The Law Society is not convinced that the motivation for many cases at the ECtHR is monetary. Our discussions with practitioners and reading of the academic literature suggest that most victims are not primarily seeking compensation but vindication. They seek revelation and acknowledgement of the truth.²¹ They want their allegation to be taken seriously²² and investigated.²³ Therefore, remitting decisions about monetary awards back to member states may free the judges from having to decide the level of compensation but overall is unlikely to reduce the number of new applications.

In fact, the Commission's proposal might require additional supervision over the member states to ensure that they are providing an effective remedy. It would put victims at risk of having to conduct another round of domestic legal proceedings and suffering further delay before receiving their compensation. This would be unfortunate because the prompt payment of just satisfaction has been one of the success stories of the ECtHR. "*Compliance with the ECtHR's just satisfaction orders continues to be quite high and, with few exceptions, states continue to pay the ordered sums on time and without controversy.*"²⁴ This contrasts sharply from the situation in relation to orders for individual or general measures where compliance is much lower.

The Law Society suggests the alternative solution of setting up a specialist unit at the ECtHR to decide monetary compensation, which might free the

¹⁹ Application no. 5056/10, 11 October 2011, para 75

²⁰ Hansard, Volume No. 523, Part No. 116, Column 511, 10 February 2011 ("*In order for the views of this House to be helpful, we need to demonstrate that we are engaging with the concerns of the Court and that we are not just expressing our frustrations...*")

²¹ Shelton, Dinah *Remedies in International Human Rights Law*, Second Edition (Oxford: Oxford University Press, 2005), p. 276

²² Dembour, Marie-Bénédicte *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge: Cambridge University Press, 2006), p. 135

²³ Leach, Philip, "The Chechen conflict: analysing the oversight of the European Court of Human Rights" (2008) 6 E.H.R.L.R. 732, at 759 (Sometimes "*the closest one could get to 'restoration' would be a resolution of what had actually happened*")

²⁴ Open Society Foundation, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*, November 2010, p.52

judges from having to spend time on these technical issues. However, this would only work if there was sufficient funding.²⁵ Another alternative would be to enhance the friendly settlement procedure, perhaps by means of court-directed mediation.

- **Enhancing the nomination and appointment of judges:** Proper selection of judges is very important in ensuring the quality of judgments from the ECtHR. **It is essential that adequate funding is provided so that the Advisory Panel can interview nominees before giving its advice to the Parliamentary Assembly of the Council of Europe (PACE).**

In the meantime, the Law Society recommends a programme of education would be helpful to correct some of the recent media misreporting about how ECtHR judges are appointed. It is not entirely correct to say that they are unelected, as reported by various UK newspapers.

The PACE votes on the selection of judges. All members of the assembly are MPs from domestic parliaments. The UK has 18 seats on the PACE, and as such UK MPs vote on which judges to appoint. This is more power than they have to elect domestic judges.

In relation to the Commission's parallel letter on reform of the ECtHR, the Law Society wishes to comment on only one issue as follows:

- **Democratic override:** **The Law Society strongly opposes allowing an ECtHR decision to be overridden by the PACE and or the Committee of Ministers (CoM). Such override would undermine the rule of law, and the whole point of the Convention system if member states can be let off the hook.**

The CoM currently suffers from a lack of transparency and is composed of politicians or diplomats from member states. Thus, there would be a great temptation for the member states at the CoM to carry out political negotiations behind closed doors and strike deals on what to enforce and who to let off. This runs contrary to the rule of law and the proper administration of justice.

Similarly, the PACE is made up of politicians and so would not a proper forum to make (quasi-)judicial decisions.

It is noted that the CoM is the body officially charged with supervising the implementation of judgments. Thus, the CoM already has the power to release a member state from further compliance with a judgment. The CoM does so by issuing a Final Resolution when it is satisfied that the member state has satisfactorily implemented the judgment.

**The Law Society
November 2011**

²⁵ Lord Woolf, *Review of the Working Methods of the European Court of Human Rights*, 2005.