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## **Rights Brought Home:**

**a briefing on the Human Rights Bill with amendments.**

by Francesca Klug, research fellow at the HRIP, King's College School of Law with  
Rabinder Singh and Murray Hunt, barristers of 4-5 Gray's Inn Square.

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The Human Rights Incorporation Project is an independent research project at King's College London established to provide research, information and policy proposals on human rights legislation in the UK. For further information contact Francesca Klug, School of Law, King's College London, Strand London WC2R 2LS. Tel: 0171 836 5454 ext 1049; Fax: 0171 873 2465.

## ***1. Introduction.***

The European Convention on Human Rights came into force on 3 September 1953. Now the Government has introduced the *Human Rights Bill* to incorporate the Convention into UK law; one of the last of the 40-member states of the Council of Europe to do so. We warmly welcome the Government's decision to incorporate the Convention and believe that the general scheme of the Bill strikes the right balance between effective protection of human rights and respect for our democratic traditions.

Drafted with considerable input from British lawyers, the European Convention reflects the broad values of the United Nation's Universal Declaration of Human Rights drawn up in the aftermath of the second world war. Two UN Covenants adopted in 1966 to reflect these same values have also been ratified by the UK. It is widely recognised that they plug some of the more obvious gaps in the European Convention. General protection against discrimination on a number of grounds is provided by Article 26 of the International Covenant on Civil and Political Rights for example, whilst the equivalent provision in the Convention only applies in relation to the enjoyment of other Convention rights (Article 14). As a result the Convention does not adequately address many current concerns about racism and discrimination, including in Northern Ireland. It is hoped that some of the main provisions in the International Covenants will be incorporated into UK law in the near future.

Currently individuals have to take cases to the European Commission and Court in Strasbourg to enforce their rights under the Convention. This is a lengthy and expensive process. It takes on average five years before a case comes before the European Court of Human Rights at an average cost of £30,000. As a consequence of incorporation, individuals will be able to lay claim to the rights in the Convention in the domestic courts. To the extent that the Convention will act as a 'higher law' to which policy and legislation must conform, the people of this country will have direct access to a bill of rights for the first time in modern history .

In the White Paper *Rights Brought Home*, published to accompany the Bill, the Government states that its intention is to increase accessibility to the rights under the Convention.

“The time has come to enable people to enforce their Convention rights against the state in the British courts...In other words to bring the rights home.” (paras 1.18 & 19).

Whilst reinforcing the significance of this goal, ministers have subsequently emphasised that they intend the effects of incorporation to be wider and deeper than saving time and money through having Convention cases heard directly in domestic courts. Introducing the second reading of the Bill the Lord Chancellor stated that incorporation of the Convention will:

“deliver a modern reconciliation of the inevitable tension between the democratic right of the majority to exercise political power and the democratic need of individuals and minorities to have their human rights secured.”

Section 2 of this briefing summarises the Government's proposals for incorporating the Convention. Section 3 provides a critical analysis of some of the detailed provisions, with proposed amendments and suggestions for ministerial clarification.

## **2. The British Model of Incorporation of the Convention.**

The European Convention on Human Rights is a regional treaty which cannot be amended independently by any single government. As the purpose of the *Human Rights Bill* is to incorporate the treaty, rather than introduce a new bill of rights, it is not possible at this stage to propose amendments to the rights under the Convention to rectify some of its obvious omissions or any other concerns. As a result the debate about the Bill has largely concentrated on the way the treaty is to be enforced rather than the substantive rights it upholds. However the Bill omits to incorporate Articles 1 and 13 which secure to everyone the rights in the Convention and provide an effective remedy for violations of Convention rights. The Government maintains that the *Human Rights Bill* itself fulfils the requirements of these Articles.

The model for incorporation proposed in the Bill, which the Government is calling the British model, has no equivalent elsewhere although it shares a number of provisions in common with other bills of rights. Its main features are described below.

### **2.1. Who can lay claim to the rights in the Bill?**

Anyone living within the jurisdiction of the UK, regardless of citizenship or nationality, can claim the protection of the Convention. If they are a 'victim,' in other words if their rights have been, or would be, violated by a public authority they can bring proceedings in any court or tribunal in the land (clause 7). This means that individuals could cite Convention rights as a legal defence in a criminal or civil trial but they do not have to have been prosecuted before they have standing to bring a case; the threat of prosecution is sufficient. In Strasbourg even those who are indirectly affected have been able to successfully claim to be a 'victim,' e.g. relatives of deportees.

Individuals will be able to go to court to complain that something done to them under an Act of Parliament, subordinate legislation or the common law is a violation of their Convention rights. A gay man could argue that his right not to be discriminated against in his private life has been violated by the unequal age of consent, for example, whether or not he has been charged with a specific offence. Provided individuals can show they are personally affected by the decisions or actions of public bodies they can bring a case for judicial review on Convention grounds alone.

### **2.2 Who is liable to uphold rights under the Bill?**

The Act makes it unlawful for all public authorities "to act in a way which is incompatible with" the rights in the Convention (clause 6(1)). This can include a failure to act but not a failure to legislate (clause 6(6)). The definition of a public authority includes central and local government, the courts, the police, immigration officers and "any person certain of whose functions are functions of a public nature" (clause 6(3)(c)). The White Paper states that this definition is intended to include public functions of private companies such as the privatised utilities. The actions of Parliament, however, are explicitly excluded as are actions to give effect to an Act which cannot be reconciled with the Convention

The unequivocal requirement that all public authorities comply with the Convention means that present restraints on the judicial review of the actions or decisions of officials will no longer apply. Currently these can only be overturned on grounds of illegality, procedural impropriety or what is known as Wednesbury irrationality where a decision is so outrageous in its defiance of logic or accepted moral standards that in the court's view no sensible person could have arrived at it. Now it is the Government's stated intention that this will change:

“Our courts will be required to balance the protection of individual rights against the demands of the general interests of the community” (*Rights Brought Home, para 2.5*).

This means that it is expected that the courts will import the ‘doctrine of proportionality’ in reviewing whether restrictions on fundamental rights are justifiable or not. Even if such restrictions are deemed ‘rational’ (in the *Wednesbury* sense) they will be liable to be overturned if they are not aimed at meeting a pressing social need and are not proportionate to the aim of meeting that need. This is what is meant by the requirement in many articles in the Convention that limitations on rights must be ‘necessary in a democratic society.’ In a case involving a strip search, for example, a defendant would no longer have to rely on arguing that a prison officer had acted unlawfully or irrationally but could argue that the officer had violated their right not to be subject to “inhuman or degrading treatment or punishment” (ECHR, Article 3).

By including “courts” in the definition of public authorities the Bill also ensures that the Convention will have to be complied with by courts when, for example, interpreting the common law or exercising a judicial discretion. The effect of this is that previous decisions of the courts will be overturned to the extent that they are incompatible with the Convention.

### **2.3 What remedies are available?**

Where Convention rights have been breached a court “may grant such relief or remedy as it considers just and appropriate”(clause 8 (1)). This would include all the usual remedies available to the courts, for example, setting aside decisions, issuing an injunction or requiring a public body to take a particular action when they had failed to act to protect fundamental rights. Where the courts or tribunals already have the power to award damages or compensation they may do so. They must, however, take account of the principles applied by the European Court of Human Rights when determining the amount, which tends to award rather lower damages than the domestic courts.

Subordinate legislation such as statutory instruments can be set aside if they breach the Convention unless - and this could turn out to be an important proviso - the terms of the parent Act prevent this. A lot of laws governing Northern Ireland take the form of Orders in Council which are subordinate legislation but they may be protected from being struck down by the courts because of the latter proviso. The Scottish courts and the Judicial Committee of the Privy Council will be empowered to overturn legislation by the new Scottish Parliament which violates the Convention.

No court will have available to it the remedy of striking down full Acts of the Westminster Parliament, or any provision of them, which they consider breach the Convention. This is a power associated with the classical bill of rights model of a Supreme Court and a fully entrenched bill of rights found, for example, in America, South Africa, Germany and Canada (although in the latter case the courts are prevented from overturning statutes which parliament expressly declares are intended to apply “notwithstanding” their Charter of Rights).

### **2.4 What if there is a clash with primary legislation?**

All legislation must be interpreted, “so far as it is possible to do so” in a way which is compatible with the Convention rights (clause 3(1) ). This gives the courts considerable scope for reinterpreting legislation already on the statute book. They are required to take into account the opinions and rulings of the European Commission and Court of Human Rights but are not bound by previous domestic interpretations of legislation where these are considered to be incompatible with the Convention.

A similar, but less strongly worded, interpretation provision under the New Zealand bill of rights has led the courts to “read in” new rights to existing laws. Motorists, for example, have gained the right to consult a lawyer by telephone when breathalysed as a result of the courts’ interpretation of the New Zealand bill of rights (*MOT v Noort* and *Police v Curran*, [1992]). Courts might also protect rights in the Convention by “reading down” apparently broad legislation to narrow its scope. For example legislation which makes it an offence to obstruct the highway will need to be more narrowly interpreted to comply with the right to peaceful assembly.

Where the higher courts take the view that a provision in an Act of Parliament is irreconcilable with the Convention a formal “declaration of incompatibility” can be made (clause 4(2)). Whilst the Government is not required to act in response to such a declaration the White Paper attaches considerable weight to its significance:

“...[ a declaration of incompatibility] will almost certainly prompt the Government and Parliament to change....It will have a profound impact on the way legislation is interpreted and applied and it will have the effect of putting the issues squarely to the Government and Parliament for further consideration” (paras 2.10, 2.17).

A fast track procedure for amending legislation which is the subject of a declaration of incompatibility will mean that the Government is able to remedy the breach rapidly should it choose to do so. A ‘remedial order,’ in the form of a Statutory Instrument, can be made (clause 10(2)). A draft Order amending the affected legislation has to be approved by a resolution of both Houses of Parliament. There are also provisions for emergency orders which lapse if not approved by parliament after 40 days (clause 12 ).

This approach is unique. It is not replicated in any other country with a bill of rights or incorporated human rights treaty. The New Zealand Bill of Rights, for example, whose model many commentators speculated the Government would emulate, does not provide for formal declarations of incompatibility. Where an Act cannot be reconciled with the New Zealand bill of rights the courts are bound to uphold the Act and there is no further consideration of the case.

In many ways the British model most closely mirrors the remedies available at Strasbourg. The European Court of Human Rights is also not able to overturn Acts of Parliament or declare the meaning of national law. Its chief remedy in relation to primary legislation is to declare that an Act is in breach of the Convention, just as the domestic courts will be able to do under the British model. To this extent the Bill succeeds in its goal of ‘bringing rights home.’ There are however some significant gaps which are dealt with below.

If the Government fails to act in response to a declaration of incompatibility then the individual can, of course, still lodge a case with the European Commission of Human Rights. Given that the Strasbourg organs are likely to confirm the findings of the domestic courts where clear breaches are involved, there are few advantages to the Government in refusing to respond to such formal declarations. However there may be controversial issues of social policy like abortion rights or restrictions on tobacco advertising which the European Court of Human Rights considers it is for the domestic authorities to decide (under the so-called doctrine of the margin of appreciation). In those circumstances a declaration of incompatibility under the *Human Rights Bill* would not necessarily lead to a change in the law if the Government or parliament take a different view from the domestic courts.

## **2.5 Parliamentary scrutiny and miscellaneous provisions.**

To reduce the likelihood of incompatible legislation being introduced in the first place new and imaginative scrutiny procedures for Whitehall and Westminster are proposed in the White Paper. This includes a requirement in the *Human Rights Bill* that before the second reading of any bill the responsible minister must make a written statement that the provisions of the Bill are compatible with Convention rights or otherwise (clause 19 (1)). This statement will be provided alongside the Explanatory and Financial Memorandum which accompanies the Act. Where a Minister does not explicitly state that legislation is in breach of the Convention the courts can presume that it is intended to comply, bolstering their obligation under cl. 3(1) to give it an interpretation consistent with the Convention.

There are no provisions to establish a Human Rights Commission to provide the widely recognised need for advice, information and public education on the provisions of the Convention. The White Paper states that the Government has not closed its mind to the idea but wants to give more consideration as to how it would work in practice (para 3.11).

The White Paper also proposes the establishment of a new Parliamentary Committee on Human Rights which could be a joint committee of both Houses or two separate ones. This decision is left to Parliament as is customary but the White Paper gives encouragement to such a development (paras 3.6 & 7). This could provide an important safeguard to ensure that fast-track legislation is properly scrutinised.

There are also proposals under the Bill to allow formal derogations under the Convention to lapse after five years unless both Houses of Parliament agree they should be renewed (clause 16(1)). There are no firm proposals to end the current derogation in relation to the detention provisions of the 1984 *Prevention of Terrorism Act* or to alter the executive prerogative to enter derogations without parliamentary scrutiny in the first place. With regard to formal reservations under the Convention, the Bill merely requires the relevant Minister to review any reservations every five years and to lay a report before Parliament (clause 17(3)). There are no provisions to ratify any of the protocols under the Convention which are not currently ratified, although the intention to ratify Protocol 7 in the future is flagged up in the White Paper.

## **3. Problems and Proposals.**

Taken as a whole the British model appears to provide a novel and effective method for incorporating the European Convention on Human Rights into UK law. There are however a number of gaps in the Bill which could prevent individuals from receiving the same remedies in the British courts as they can at Strasbourg. There are also a number of other steps which could be taken to strengthen the terms of the Bill without disturbing its overall scheme.

### **3.1 Will there be access to justice?**

#### **3.1.1 Standing**

The Bill proposes in cl. 7(3) to adopt the Convention test for “victim” as the standing requirement for parties seeking to rely on the Convention against a public authority in judicial review proceedings. The White Paper explains (para. 2.3) that this means that individuals or organisations will need to show that they have been “directly affected”.

The effect of this would be to introduce a more restrictive standing requirement in cases concerning the Convention than that which applies generally on judicial review. The requirement in s. 31(3)

Supreme Court Act 1981 and RSC Ord. 53, r.5, that an applicant for judicial review must have a "sufficient interest" in the matter to which the application relates, has been interpreted by the courts in a series of cases as entitling organisations representing particular interests to bring applications for judicial review where the court is satisfied that it would be in the public interest to do so, e.g.: in the likely absence of any other responsible challenger.

This approach to the standing requirement in judicial review was recently endorsed by the Law Commission in its 1994 Report, *Administrative Law: Judicial Review and Statutory Appeals* (Law Com No. 226). It recommended placing the approach developed by the courts on a statutory footing.

While a public interest organisation will often be in a position to support a case brought by an individual, the law should permit it to bring a case in its own name when appropriate. Sometimes there may be no single applicant with standing and/or legal aid to bring the case, as in challenges brought by the Child Poverty Action Group. The case of an individual may be premature as occurred with at least part of the challenge of the Joint Council for the Welfare of Immigrants to regulations concerning asylum appeals which had not yet been heard, and the challenge brought by the Immigration Law Practitioners' Association to a revised application procedure for variation of leave to stay in this country. A case brought by a group can clarify the law for many other people, some of whom may not even know of their rights. A well-focused case brought in good time may save public money such as multiple legal aid costs.

One of the Bill's great achievements is the way in which it has grafted the Convention onto the existing legal framework, with the bare minimum of changes to the framework itself. Whilst we welcome the adoption of the Convention's definition of 'victim' (Article 34) there is no reason why this should lead to the modification of any particular features of the law of judicial review in relation to Convention claims. The preferable approach would be to leave untouched the present law concerning what constitutes a sufficient interest for the purposes of judicial review, and allow the courts to continue to develop the jurisprudence as to when it is in the public interest for a challenge to be heard even when there is no 'victim'. Otherwise, in the same case the court will have to refuse to hear a public interest body raising a point about fundamental human rights, when it will hear the same body on less fundamental issues.

**Proposed amendments to clause 7 : (A) Replace sub-section (3) with: "(3) Nothing in sub-section (1) shall prevent an applicant from bringing an application for judicial review provided that the court considers that he has a sufficient interest in the matter to which the application relates." (B) In cl. 7(6), delete "this section" and replace with "sub-section (1) above".**

### 3.1.2 Costs

A related disadvantage of the narrow approach to standing adopted in cl. 7 of the Bill is that, by implicitly ruling out the possibility of a "public interest challenge" in a Convention case, it may preempt the possibility of what are known as protective costs orders being granted in such cases. The Law Commission in its 1994 Report envisaged the possibility of courts using their existing discretion as to costs to make an anticipatory costs order protecting an applicant for judicial review from having to pay costs in public interest challenges where the real value of the litigation is the resolution of a question of public importance. The possibility of such orders in Convention cases would be a casualty of the restrictive approach to standing in cl. 7.

### 3.1.3 Legal aid

One final uncertainty is the relationship of the proposals in the Bill with the proposed legal aid reforms. Whilst legal aid may be available in many Convention cases, the 'no win no fee arrangements' proposed

for cases where damages are available are not appropriate where what is at stake is upholding Convention rights. There will be a huge disincentive to enter into such arrangements for all concerned parties, particularly in the early stage when the outcome of Convention cases is so uncertain. The Lord Chancellor's statement that he is considering establishing a special fund for Convention-type cases is welcome but further ministerial clarification is required.

In cases where the violation of the Convention stems directly from primary legislation, so that the only remedy available from an English court is a declaration of incompatibility, legal aid would not currently be available, because the proceedings would be of no benefit to the individual concerned (but see 3.3.2 below). Ministerial confirmation that legal aid will be available in such cases is desirable.

### **3.2 Is the definition of public authorities adequate?**

#### **3.2.1 The width of the definition of "public authority"**

The provision at the heart of the Bill is cl. 6(1), which makes it unlawful for a "public authority" to act in a way which is incompatible with the rights contained in the Convention. What counts as a "public authority" for this purpose is deliberately defined widely in cl. 6(3) to include courts, tribunals, and "any person certain of whose functions are functions of a public nature" (cl.6(3)(c)). Moreover, this is clearly not meant to be an exhaustive list.

The width of the definition of public authority in the Bill is welcome. As the White Paper makes clear (para. 2.2), it is intended that the requirement to act compatibly with the Convention should bind not only the most obvious public authorities, such as central and local government, executive agencies, the police, immigration officers and prisons, but also private companies responsible for areas of activity which were previously within the private sector. As more and more public services are now delivered to the public by private providers, this is an important step to take to make Convention rights effective.

However, cl. 6(5) of the Bill has the potential to reduce drastically the scope of the legislation's coverage. It provides that, in relation to a particular act, a person is not a public authority by virtue of cl. 6(3)(c) if the nature of the act is private. The clause reflects a quite proper concern that private bodies with some public functions should not be open to challenge under the Bill in respect of their purely private activities.

However, as presently drafted, and bearing in mind that its broad terms will be subject to interpretation by the courts, there is the possibility that certain activities of purely public authorities may be beyond the scope of the Bill. A health authority, for example, might argue that acts done in relation to its employees are "private" acts (see *R v Berkshire Health Authority, ex p. Walsh* (1985)), even though it may be seeking to interfere with, for example, the private lives or freedom of expression of its employees. Similarly, a local authority might argue that acts regulating access to land it owns are done in its private capacity as a landowner. This would seriously weaken the protection afforded by the Bill, and cause domestic protection of Convention rights to fall short of that in Strasbourg, where no distinction is drawn between the public and private acts of what on any view is a public authority.

The Government's concern that the Convention should not apply to all the activities of private bodies with public functions could be met by a simple amendment to cl. 6(5), to relate this clarification solely to hybrid bodies such as Railtrack.

**Proposed amendment to cl. 6(5): insert "private" before "person."**



### 3.2.2. The implications for private bodies of defining courts and tribunals as public authorities

Apart from private parties exercising public functions, such as the privatised utilities, the Bill is not intended to be binding on private individuals or entities. However, that does not mean to say that the Convention will not be relevant in legal proceedings between private parties, for two reasons.

First, the obligation contained in cl. 3(1) to interpret legislation in a way which is compatible with Convention rights, so far as it is possible to do so, is of general application. It applies wherever legislation falls to be interpreted, including in proceedings between purely private parties. Second, the inclusion of courts and tribunals in the definition of public authorities in cl. 6(3) means that they too must act compatibly with Convention rights. This includes cases between private parties where the court or tribunal must exercise a discretion or interpret the common law.

Requiring courts and tribunals, as public authorities, to act compatibly with the Convention in private proceedings is a welcome extension of the current approach. It is already the case that our courts have regard to the Convention when interpreting legislation or the common law, or when exercising a judicial discretion, in private proceedings. For example, in libel and breach of confidence actions brought against newspapers by private individuals the courts have had regard to Article 10 of the Convention guaranteeing freedom of expression.

However it is important to recognise the limits of the effect of the Convention in proceedings between private parties. The press in particular have expressed concern that the inclusion of courts within the definition of “public authority” has the effect of making the Convention enforceable against private entities such as newspapers.

There is nothing in the Bill which allows individuals to sue other private parties for breach of the Convention. After incorporation, individuals such as politicians or members of the royal family will *not* be able to start proceedings directly against newspapers *solely* on the basis that their right to privacy under Article 8 has been infringed although such a claim will be available against a public authority, including the BBC or Press Complaints Commission. However the inclusion of courts in the definition of “public authority” could eventually allow individuals to seek remedies for violations of their Convention rights by private parties, such as employers or the press, by the development of the common law, e.g.: by expanding the law of breach of confidence.

If the courts had been excluded from the definition of “public authority” however, newspapers would have been deprived of the protection of Article 10, guaranteeing the freedom of the press, in the kind of proceedings which are already brought against them by private individuals. These include breach of confidence and defamation cases, or cases where courts seek to punish the press for contempt of court. It is highly desirable, therefore, that the definition of public authority includes courts and tribunals.

## **3.3 Are the remedies sufficient?**

### 3.3.1 The absence of Article 13

Since the overall purpose of the Bill is to 'bring rights home' it should, so far as possible, provide an effective remedy for breaches of the Convention, otherwise cases will still have to be taken to Strasbourg. The right to an effective remedy under Article 13 is a substantive right under the Convention which has been incorporated by every other Contracting State which has incorporated the Convention into their domestic law, including those which have done so by statute.

Preferably there should be an amendment to both Clause 1 and Schedule 1 of the Bill to incorporate Article 13 of the Convention. Otherwise, for the avoidance of doubt, clause 8(1) should be amended to affirm the duty on courts and tribunals to give *full* protection to the rights set out in Schedule 1 and to provide an *effective* remedy for any violations. In so far as the Government may be concerned that this would invite courts and in particular tribunals to fashion new remedies which they cannot currently grant, this has already been met. Clause 8(1) provides that remedies must be within a court's jurisdiction, and clause 8(2) provides that damages may be awarded only by a court or tribunal which already has such powers.

**Proposed amendment: Add to end of cl. 8(1) "to give full and effective protection to Convention rights."**

### 3.3.2 Remedies following a declaration of incompatibility

A declaration of incompatibility under clause 4 will not necessarily affect the parties to the case before the court. Although in some cases such a declaration will provide an effective remedy in others there is the potential for injustice to an individual. In an extreme case, he or she could be left in detention (without bail) or be deported. This could be so even if the fast-track procedure is used to amend the legislation to make it compatible with the Convention. Clearly the Bill envisages that such amending legislation could either be retrospective or prospective (clause 11(1)(b)). If the individual concerned is not given an effective remedy through domestic proceedings there will be a mismatch between the remedies available in Strasbourg and at home.

This could be addressed in one of two ways. The parties could be given a right to go back to court in the light of any remedial order. Alternatively the remedy could be an administrative one: the Minister could be given a statutory power to award compensation on an *ex gratia* basis or whatever other remedy is required. To cater for the possibility that many similar cases may arise, sometimes years after the event, the declaration could be prospective only. This would be consistent with the approach in Strasbourg, where judgements of the Court have to be complied with and legislation to achieve this is not usually retrospective. There is also a precedent in EC law for prospective declarations, coupled with relief to the actual individual who brings the case (e.g. Barber v. Guardian Royal Exchange [1990]).

**Proposed amendment: *Either* add a new clause between cl 10 (1) and 10 (2) " After a declaration of incompatibility has been made the Minister may grant such relief as shall seem just to the person in whose case the declaration was made or to any other person" *or* new clause between cl 10 (2) and 10 (3) " After a remedial order has been made the parties to the case in which the declaration of incompatibility was given may apply to an appropriate court which may award such remedy as it may award under clause 8."**

### 3.3.3. Ministerial response to declaration of incompatibility

To ensure that there is clarity as to the Government's course of action following a Declaration of Incompatibility by the domestic Courts, clause 10 (2) should be amended to require the Minister to make a statement as to his or her intentions with reasons and within a reasonable period. This could be a parallel requirement to that in clause 19 with respect to new legislation.

**Proposed amendment: Add to end of cl 10 (2) " The Minister shall in all cases make a statement of his intentions within a reasonable time following a declaration under section 4."**

### 3.3.4 The absence of a damages remedy in respect of action by courts

Clause 9(3) as drafted may conflict with Article 5(5) of the Convention, which requires there to be an enforceable right to compensation for detention contrary to the Convention (which may have been ordered by a court ; often a magistrates' court). While it may be argued that the Bill should not allow the court itself to be sued for damages, it could provide for a suitable Minister to be liable to pay compensation.

**Proposed amendment: Add to end of clause 9(3) "except in so far as is required by Article 5(5) of the Convention."**

### 3.3.5. The exclusion of a remedy where Government has failed to legislate.

The exemption from the terms of the Bill of an executive failure to legislate under clause 6(6) is potentially inconsistent with the well established duty on states under the Convention to take positive action to protect rights, e.g.: to regulate unregulated behaviour through statute or otherwise. This concern particularly applies where a violation of the Convention is carried out by a third party such as unregulated intrusive surveillance of employees and customers by employers. Whilst protection in such circumstances could be sought through the common law as a result of the inclusion of courts in the definition of public authority ( see 3.2.2) it seems curious that no equivalent protection could be sought from government. There would be no question, of course, of the courts being able to coerce parliament in such circumstances. Parliament's proper sphere is clearly protected by the *Human Rights Bill*. The appropriate remedy would be a declaration by the courts to the effect that the government had positive obligations to protect individuals from third party violations which in the particular circumstances could only adequately be provided by changes to the legal framework (for example through anti-stalking legislation).

**Proposed amendment to cl 6(6): delete all after "failure to act."**

## 3.4 The New Scrutiny Procedures.

### 3.4.1. Ministerial Statements of Compatibility

The White Paper suggests that, with regard to new legislation, where a Minister indicates that he or she cannot provide a positive statement that a bill complies with the Convention "Parliament would expect the Minister to explain his or her reasons" (para 3.3). However there is no requirement to this effect in the Bill. Indeed, to ensure that parliament has the opportunity to fully consider the Ministerial statement, the Minister should be required in all cases to give reasons for the view that has been reached as to compatibility.

**Proposed amendment: Add to cl. 19(2) "with reasons" after "in writing".**

### 3.4.2. Remedial Orders.

A number of commentators have expressed concern about the lack of parliamentary scrutiny of the proposed remedial orders under clause 10. Whilst the orders themselves are not mandatory and involve greater democratic accountability than under the classical American bill of rights model, where a judicial declaration itself determines the law, there is concern over the minimal accountability to the legislature. To redress this there could be an extension of the period for parliamentary consideration to 60 days which should involve consultation with the proposed Parliamentary Committee on Human Rights. A precedent for this general type of approach lies with the role of the Deregulation Committee in reviewing deregulation orders under the Deregulation and Contracting Out Act 1994. The emergency provisions under clause 12(b) could be amended to allow for a speedier negative resolution by parliament.

### 3.4.3. Derogations and Reservations

No future derogations or reservations should be issued without parliamentary approval and, given the seriousness of their nature, derogations, at least, should be subject to annual parliamentary review.

### 3.5. **The Missing Protocols.**

The rationale in the White Paper for excluding the protocols which the UK has not ratified within the *Human Rights Bill* is unconvincing in each case (paras 4.9-4.13). Incorporating the European Convention on Human Rights into UK law provides a welcome opportunity for Parliament to be involved in the process of ratification.

3.5.1. Protocol 4 contains a right of entry to the State of which a person is a national, among other rights. The Government is obviously concerned about the implications of this for the classes of British nationals who do not have full British citizenship. At the very least the Protocol could be ratified with the requisite reservation to cover this issue whilst attempts are made to reconcile our legislation with the Protocol, in line with the stated intention in the White Paper.

3.5.2. Protocol 6 abolishes the death penalty other than in times of war or imminent threat of war. The Government says this is a matter for Parliament not Government. There is no procedural reason why there could not be an amendment to incorporate Protocol 6 on a free vote.

3.5.3. Protocol 7: The Government's stated intention in the White Paper to ratify this Protocol is welcomed (para 4.14) but it is regretted that this is not included in the Bill.

### 3.6 **The Absence of a Human Rights Commission.**

The case for a Human Rights Commission has been well rehearsed in material produced by the Institute for Public Policy Research. Its functions should cover:

- (i) Advice and legal assistance to individuals, particularly crucial in the light of the proposed changes to legal aid.
- (ii) Monitoring legislation and policy; providing independent advice to backbench MPs on the Human Rights Committee, amongst others, on the development of Strasbourg caselaw.
- (iii) Public promotion and education; ensuring that the rights and responsibilities inherent in the Convention are included in any expansion of citizenship education in schools.
- (iv) A watchdog role in relation to other international treaties ratified by the UK to promote compliance with their terms.

The ultimate test of incorporation should be an improvement in the human rights performance of public bodies and a general growth in awareness of the values inherent in the Convention. In time litigation on Convention issues, both here and in Strasbourg, should reduce. It is difficult to see how the necessary shift in public culture to meet these goals can be achieved without the establishment of a statutory body dedicated to the task.

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