

Whitehall and the Human Rights Act 1998

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Whitehall and the Human Rights Act 1998

Executive Summary

The Human Rights Act, which came into full force on 2 October 2000, is a major development in the legal and constitutional history of the United Kingdom that will reach into every area and activity of Government.

The Act forms an important part of the Government's constitutional reform programme. Its political drive is drawn from that programme and is subject to the ebbs and flows in political commitment to the Government's constitutional agenda.

The Human Rights Act is also intended to serve as the basis for a new 'human rights culture' in the UK. The Government is seeking to establish a culture based on communitarian principles in which the rights of individuals are balanced by their responsibilities to society. Questions are raised, from a human rights perspective, over the Government's apparent intention to build such a culture based on the relatively narrow band of civil and political rights covered by the European Convention on Human Rights (ECHR).

The implementation of the Human Rights Act is being treated as a major undertaking in Whitehall. The intention is to mainstream its requirements in every branch of Government, public authority and private body with public functions.

The Government does not intend to give human rights paramount status above other considerations in policy formulation, decision taking and law making. There will be no single central authority ('Justice Ministry') with powers to oversee the Human Rights Act and to enforce compliance by other branches of Government.

In the absence of a single central authority, implementation of the Act is being handled by the Home Office (as the policy and lead department), Cabinet Office and Lord Chancellor's Department. A range of ad-hoc committees and groups have been set up to steer implementation and ensure consistency in matters concerning the Act. They are doing an effective job but are not permanent in nature. Whitehall will need to consider what structures are required in the longer term to deal with the Human Rights Act and ECHR. Their form will depend largely on what issues remain to be tackled on the Government's human rights agenda.

There is a conflict (not unusual in Whitehall) between the Home Office's role in implementing the Human Rights Act and its portfolio of law enforcement and other issues which may be subject to challenge under the Act. This means that it does not have a strong

incentive to realise the full potential of the Human Rights Act and reasons to try to contain or restrict the effect of the Act.

Signs of such an attitude are evident in the minimalist approach the Home Office has adopted towards the Human Rights Act. Its Human Rights Unit is small in size, under resourced and does not have a high profile in the Home Office. The Unit has focused more on risk management strategies (known in Government as the 'traffic light' system) than the possibilities and potential of the Act to put human rights considerations at the centre of policy and decision making in Government.

Within these limits, the Home Office's Human Rights Unit (with the assistance of the Home Office Human Rights Task Force) has produced some excellent guidance material on the Human Rights Act and ECHR. It has set up an effective framework within which to monitor progress and to provide written guidance to other departments on their preparations for the Act. It has fostered a commendable degree of openness over the preparation process within Government.

The Home Office Human Rights Task Force has provided a very useful forum in which Government and non- Government members can contribute to the implementation process for the Human Rights Act. The Task Force has kept Government departments 'on their toes' and is beginning to produce a steady stream of general publicity material as well as more sharply focused material to counter unfavourable publicity concerning the Act. But it is handicapped by a limited mandate, scant resources and the lack of any meaningful research capacity. The Task Force is not intended to be a permanent body but it fulfils an important promotional function for the Act which should continue. There are diverging views between Government and non- Government members on the Task Force over the latter's call for this function to be taken up by an independent Human Rights Commission.

Most departments received no extra resources to implement the Human Rights Act. It has taken time for them to put in place the management groups, action plans, audits and training programmes required to implement the Act. However, most departments will feel able to face 2 October with a reasonable degree of confidence. The same cannot be said for their public authorities and bodies with public functions. The time taken by departments to put their own houses in order means that only now, late in the day, are they in a position to offer assistance to such organisations. This needs to be addressed as a pressing priority.

Departments offer a microcosm of the problems of mainstreaming human rights within Government. Small ad-hoc 'human rights' teams at the centre of departments are able to guide but do not direct the work of other policy and business units. There is a real need to establish a 'user group' for these departmental officers to allow them to share knowledge, experiences and frustrations concerning the Act. The same question mark needs to be

addressed over the permanence of these departmental teams as with those in central Government. The retention of expertise will be difficult with the posting of staff.

The Government legal services have been quick to see the need to share knowledge and ensure consistency in approaching legal matters concerning the Human Rights Act. Two ad-hoc co-ordinating groups (one for criminal and one for civil issues) have examined the most vulnerable areas disclosed through the 'traffic light' reviews and prepared 'lines to take' for use in the event of a challenge in court. These groups have reviewed the outcome of Convention points raised as devolution issues in Scotland and certain important cases in England and Wales (such as the *Kebilene* judgements) for pointers on the potential use of the Human Rights Act and ECHR after October. They have formulated the Government's response on attempts to make use of the Human Rights Act and Convention points before 2 October.

The different timetables for the introduction of the Human Rights Act and the 'Devolution' Acts have resulted in Scotland becoming the 'test bed' for incorporation of the ECHR. Since July 1999, there have been over 600 cases in Scotland in which Convention points have been raised. Few of these challenges have succeeded (around 3 per cent) but important judgements have ended the employment of temporary sheriffs, focused attention on delays in the criminal justice system and suggested that laws involving self incrimination are not compatible with the Convention. In responding to Convention points, the Scottish Executive has adopted solutions, such as the proposed creation of a Judicial Appointments Commission, which would not be the choice of London. The Scottish Executive has also set in motion steps leading to the establishment of a Scottish Human Rights Commission. Whitehall may have misplaced confidence over its ability to maintain a consistent approach to human rights throughout the UK.

After 2 October, there will be an explosion of cases in which Convention points will be argued. Most of these arguments will fail, but Whitehall accepts that there will be high profile successes. Mechanisms have been put in place to consider important judgements and to fast track appeals. While there will be jolts to the system, Whitehall is sanguine about its ability to cope with the Human Rights Act. There is unease within the Government, however, that the Act will attract a sceptical and, perhaps, a hostile reception in large parts of the media. It is not clear, at this time, whether it will mount a prominent defence and justification of the Human Rights Act or trust that it will eventually slip quietly off the front pages.

The Human Rights Act was originally put forward as part of a wider human rights agenda. However, a long 'bedding down' period is now envisaged for the Act before there is any question of returning to such issues as the development of a distinctly British Bill of Rights, the creation of a Human Rights Commission (in England and Wales) and allowing access by

persons in the UK to the individual complaint mechanisms and broader spread of rights under the UN's human rights treaties. There is no active planning for any of these issues within Whitehall but, for presentational reasons, the door will not be closed. Human Rights NGOs will ratchet up their campaign for a Human Rights Commission particularly should the Human Rights Act be dogged by a poor press and the Joint Parliamentary Committee on Human Rights not be able to scrutinise effectively the Government's human rights record.

The Government's cautious approach is mirrored in the 'no new rights' stance adopted towards proposals for a Charter of Fundamental Rights binding the institutions of the European Union. There is growing disquiet in Whitehall that the Charter may become a harbinger of a European Constitution and that it could give legal effect to new rights and economic and social rights not found in the ECHR. The purpose and form of the Charter will be determined prior to the December 2000 IGC meeting in Nice.

Introduction

The Human Rights Act is an extremely significant development in the legal and constitutional history of the United Kingdom. Not surprisingly, therefore, the Act has already garnered considerable attention in the period before it comes into force in October 2000. Its strengths and weaknesses have been analysed in considerable depth and there has been much speculation on the ramifications of the Act for the future conduct of government and the legal system in the UK.

This paper is not an examination of the Human Rights Act per se or the use to which it will be put before the courts. Instead, it is concerned with that part of the process which lies largely beyond the public gaze, namely the preparations being made within the Government for the coming into force of the Act.

The paper has three purposes:

- (a) to examine the Government's human rights policy as developed through the Human Rights Act;
- (b) to document Whitehall's preparations for the introduction of the Act; and
- (c) to provide timely analysis and advice on issues arising from the implementation of the Act.

The aim is to complete the project in two parts:

- (1) an analysis of the preparations and expectations within Government prior to the implementation of the Act in October 2000; and
- (2) a subsequent review of how far the first year's experience in implementing the Human Rights Act has validated or altered perceptions and systems within government for dealing with the Act.

This first part of the story is picked up at the passage of the Human Rights Act in November 1998 and is followed through to the end of August 2000 (at the threshold of the Act's commencement). The paper examines:

- the nature of the 'human rights culture' being developed and promoted by the Government,
- how central government is organised to deal with the Act,
- the steps being taken to prepare departments and public authorities for the coming into operation of the Act,
- measures being taken by the Government's legal services,
- preparations in the judiciary,
- the impact of the ECHR and HRA on the devolution process,
- the Government's expectations and preparations for the first months that the Act is in place, and
- the Government's future 'human rights agenda'.

This is not an official history or the Government's version of events. The treatment is, however, sympathetic to the Government's purpose in introducing the Human Rights Act and conscious of the immense task that it has taken on in giving domestic effect to the European Convention on Human Rights. Not all jurisdictions have given the same degree of thought and preparation in introducing domestic human rights legislation. In the end, there is much that is very good about the Government's preparations, some not so good and some that is beyond its realistic control or influence. But the need for effective domestic human rights legislation in the UK is not disputed, and any comments offered are intended to improve and not prompt abandonment of the process now underway.

1. Building a Human Rights Culture

The Government has made a firm commitment to the creation of a new human rights culture in the UK founded on the Human Rights Act and ECHR. In doing so, it has placed a more substantial emphasis on the cultural context than other common law jurisdictions introducing human rights legislation. This section briefly examines the constitutional context surrounding the Human Rights Act. It considers how that context has shaped the Government's concept of a 'human rights culture' and examines the validity of that culture from a human rights perspective.

The Human Rights Act forms part of the Government's constitutional reform package. In introducing the Bill, the Home Secretary explained:

Our manifesto commits us to a comprehensive programme of constitutional reform...The Bill falls squarely within that constitutional programme. It is a key component of our drive to modernise society and refresh our democracy... to bring about a better balance between rights and responsibilities, between the powers of the state and the freedom of the individual.¹

The Human Rights Act should not be viewed as an isolated development, therefore, but as part of the new Labour Government's plans to reinvigorate democracy by providing the means for people to participate and identify more closely with political decisions and institutions through the devolution process, reform of the House of Lords and the opening up of government. As the Home Office's current 'points to make' on the Human Rights Act put it "This legislation was and is a centre-piece of the Government's strategy for modernising our constitution."

Having spent some twenty years in opposition it is scarcely surprising that the incoming Labour Government should have a commitment to constitutional reform and less attachment for the existing systems which had 'kept' it out of office for so many years. Nor is it

¹ 306. H.C. 782-783 (16 February 1998).

surprising that the new Government would have notions, nurtured during the long years of opposition, that the executive was too powerful in Westminster and that it should be subject to a more rigorous system by which it would be held accountable for its actions. This is not to say that the Human Rights Act came about because there was a new Government still 'thinking like an opposition' but it may be the case that it did not think about all the consequences that would rebound first on the Government which had introduced the Bill. Incorporation of the ECHR would never have been high on the new Government's agenda unless it saw both material and political benefits in doing so. Was this as simple as believing that only the policies and legislative proposals of Conservative governments were likely to have problems under the application of a Human Rights Act? As Luke Clements has commented, "Incorporating the Convention is more likely to disembowel the Adam Smith ship of state than New Labour's flotilla."²

Apart from its constitutional significance there was a second important dimension to the Human Rights Act, which was to act as "the cornerstone of the Government's commitment to promoting wider awareness of human rights throughout the United Kingdom"³ by the building of a new human rights culture in the country. What does this mean? The first step is to note the difficulties in discerning what lies behind the political rhetoric and 'spin' selling the notion of a human rights culture during the passage of the Act. Matters are equally opaque when looking at the evidence for the development of such a culture within Government or at the public education programmes being developed as part of the preparations for the Act.

One of the reasons the Government cloaked the Human Rights Act in 'cultural' clothes was because this would make it more easy to sell and more difficult to obstruct passage of the Act (in much the same way that the 'bringing rights home' message was used to counter arguments about incorporating foreign 'European' legal concepts into UK law). This function became redundant with the passage of the Act. A more enduring purpose in seeking to develop a human rights culture is obviously to influence the manner in which the Act will be used. Three aspects are involved. The first, to quote Professor Robert Blackburn, is that "human rights should form part of the 'rules of the game' under which the system of politics and government is conducted."⁴ The second concerns the readiness of lawyers and judges to give proper regard to the Act. The third, and the most problematic for the Government, relates to the expectations that are created among potential users of the Act. The first and second aspects are considered in sections 2, 3 and 4 below. We shall consider the third aspect here.

² Luke Clements, 'The Human Rights Act - A New Equity or a New Opiate: Reinventing Justice or Repackaging State Control?' *Journal of Law and Society*. Vol 26 No 1 (March 1999) p 83.

³ Fifth Periodic Report by the UK under the International Covenant on Civil and Political Rights. Part 1, para 2.

⁴ Professor Robert Blackburn, 'Towards a Constitutional Bill of Rights for the United Kingdom.' Pinter.1999 p xxxii.

The Government intends that:

The Act will create and promote a culture of human rights in Britain. It will make citizens more aware of their rights and make it much easier for them to enforce them... Of course with rights come responsibilities and the Act will encourage greater awareness of, and respect for, the rights of others. It will help to create a society in which rights and responsibilities are properly balanced.⁵

Establishing a correct relationship between rights and responsibilities lies at the heart of the human rights culture that the Government wishes to see in the UK. The point is most firmly established in a speech (and the accompanying notes) given by the Home Secretary at the Civil Service College from which it is useful to quote several extracts:

The culture of rights and responsibilities we need to build is not about giving the citizen a new cudgel with which to beat the State. That's the old-fashioned individualistic libertarian idea that gave the whole rights movement a bad and selfish name. The idea that forgot that rights don't exist in a vacuum, that forgot the relationship between the individual and the group. That's not the culture of rights and responsibilities we want or need.

The culture we want is not a litigious collection of individuals and interest groups who see rights as a free good and the Human Rights Act simply as a means of enforcing the rights of individuals against public authorities. The culture we need is one which is not always soft when an individual's rights are in play. The true culture of rights and responsibilities may actually sometimes require us to be quite robust about an individual's rights to maintain the rights of others.⁶

While allowance may be made for the fact that this is 'fighting talk to rally the troops', Jack Straw's comments add flesh to what Murray Hunt describes as the "communitarian conception of a human rights culture"⁷ which the Home Secretary gave in wrapping up the debate on the Bill where he called for "a much clearer understanding among Britain's people and institutions that rights and responsibilities have properly to be balanced- freedoms by obligations and duties."⁸

The Home Secretary's vision of a 'human rights culture' is very different, therefore, from the libertarian view that such a culture should be about empowering the individual with rights against executive and legislative overreach. The Act is not about, for example, fulfilling the more idealistic liberal aims of the United Nations Decade for Human Rights Education in building an universal culture of human rights based on such worthy ideals as 'the

⁵ Geoff Hoon, Minister of State at the Lord Chancellor's Department. Speech to the Infolog Conference on Human Rights, 16 February 1999.

⁶ Jack Straw, Home Secretary, 'Building a Human Rights Culture'. Address to Civil Service College seminar, 9 December 1999.

⁷ Murray Hunt, 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession'. *Journal of Law and Society*. Vol 26 No 1 March 1999 p 90.

strengthening of respect for human rights and fundamental freedoms' or 'the full development of the human personality and the sense of dignity'.⁹ As Murray Hunt argues:

It is clear from the Act's own provisions, from its fundamental scheme and from the various government pronouncements surrounding its enactment, as well as from its place in the wider programme of constitutional reform, that it is designed to introduce a culture of rights that is more communitarian than libertarian in its basic orientation. In such a human rights culture, the individual citizen is more than the mere bearer of negative rights against the state, but is a participative individual, taking an active part in the political realm and accepting the responsibility to respect the rights of others in the community with whom he or she is interdependent. The Human Rights Act introduces a distinctly social-democratic model of human rights protection, combining the protection of individual rights with a role for participative citizens involved in the democratic decision-making in their community.¹⁰

There is some risk in ascribing philosophical motives in politics. Much of what lies at the root of the Government's outlook goes no further than wishing to deter ill-conceived use of the Human Rights Act or what the Home Secretary has vividly called "wannabe rights". But given that the Human Rights Act was intended to play a motivational part in the Government's reform programme, then we must also seriously consider its potential to create a 'human rights culture'. The Home Office notes to the Home Secretary's Civil Service College speech are instructive in setting out the Government's position. A 'human rights culture' is not:

A litigious collection of individuals and interest groups who see rights as a free good and the Human Rights Act primarily as a means of enforcing the rights of individuals against the state without regard to the interests of other individuals and/or the wider community.

A 'human rights culture' is about:

A modern society enriched by different cultures and faiths, given unity by a shared understanding of what is fundamentally right and wrong. A culture where people understand that rights and duties are two sides of the same coin, recognise the duties citizens owe to each other and the wider community, and are willing to fulfil them. Public authorities that understand that the Human Rights Act defines what the basic rights are and sometimes requires us to be robust about an individual's rights if we are to maintain the rights of others. And a public service underpinned for the first time by a clear, common statement of rights and responsibilities that forms the anchor for all policy making and service delivery.¹¹

⁸ 317 H.C. Col 1359 (21 October 1998).

⁹ Plan of Action of the United Nations Decade for Human Rights Education (1995-2004), para 2.

¹⁰ Murray Hunt op cit p 89.

¹¹ Home Office notes on 'The Human Rights Culture'. See also note 6.

The linkage between rights and duties is not unknown in international human rights instruments. Article 29 of the Universal Declaration of Human Rights refers to the fact that 'everyone has duties to the Community in which alone the free and full development of his personality is possible.' The preamble to the ICCPR observes that the 'individual, having duties to other individuals and to the community in which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.' But only Africa has gone so far as to specify in a regional human rights treaty, the African Charter on Human and Peoples' Rights, that an individual has duties and obligations both to other individuals and the state.

The human rights culture that is being built in the UK is apparently to be founded on a single regional human rights instrument, the European Convention on Human Rights, drafted more than fifty years ago to address the circumstances of post-war and Cold War Europe. The ECHR has not stood still in that time. It is a living instrument that has been added to over the years. The Convention has also been given a purposive interpretation by the ECtHR, which means that it retains its relevance in European society. But the Convention has serious limitations as the cornerstone for a human rights culture.

Firstly, the Convention deals almost exclusively with those civil and political rights of individuals that are considered justiciable before the courts. It does not cover the substance of economic, social and cultural rights except in certain procedural aspects. The preamble to the Convention modestly admits that it represents only "the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration of Human Rights". Although a large number of Protocols covering additional civil and political rights have been added to the Convention, several omissions remain even in these areas, most noticeably in the protection of minority rights and the absence of a free-standing non discrimination clause (the latter omission should be corrected by the newly drafted Protocol 12, although the UK is not expected to be among the early signatories). There is also no specific mention of children's rights, a weak provision on personal privacy and gaps in the standards and procedures for detaining people, dealing with asylum seekers and administering justice. Much of the wording of the Convention is outmoded and of more limited scope than that contained in more recent UN human rights treaties (also ratified by the UK). The Convention deals only with individual rights. It does not cover collective rights and, unlike the American Convention on Human Rights, it has no mechanisms for dealing with 'situations' (investigating and handling endemic or repeated violations). The European Court has admittedly, by comparison, rarely had to deal with completely unresponsive governments and domestic systems in which torture, disappearances and extra-judicial executions are almost commonplace. But where there is a systematic flaw, this cannot readily be tackled through the examination of individual cases. In Italy, for example, the length of civil proceedings has been found consistently to breach the right to a fair trial within a reasonable time provided for under Article 6 of the Convention. However, in the absence of major

reforms to the Italian justice system, the European court continues to receive hundreds of these cases each year which either have to be dealt with individually or disposed of en masse through friendly settlements between the applicants and the Italian Government. The root of the problem remains untouched.

In the UK, the Human Rights Act will not deal directly with 'situations' but Section 6 of the Act does make it unlawful for a public authority to act in a way which is incompatible with a Convention right unless it is required to do so by primary legislation which cannot be interpreted compatibly with the Convention. There is, therefore, a strong imperative for the Government to avoid challenges through auditing and correcting procedures and practices where breaches of the Convention might occur.

The ECHR is very much a construct of Western thinking from the middle of the last century that the only real human rights were those that could be specified and acted upon in the courts. In this sense:

The western conception of human rights...is derived from a view of the human person as possessing inalienable rights anterior to the creation of the state and thus beyond its legitimate reach. No longer absolute, the state is dependent upon the consent of the governed (popular sovereignty) and is itself subject to the law of the land. For the state to act against any individual such action must be taken in the manner provided by law. Thus human rights in the West are an individualistic conception relying on legal-judicial mechanisms for their efficacy and promotion.¹²

But if this is a narrow focus, it is also one the greatest strengths of the Convention in that, uniquely among international human rights instruments, it is overseen by an international court whose judgements are accepted as binding by its states parties. An essential part of the 'human rights culture', therefore, is that the Government is accustomed to having to abide by the rulings of the European Court of Human Rights even to the extent of amending domestic legislation. The dictates of parliamentary sovereignty mean that the rulings of domestic courts will not exert the same force (save in respect of legislation enacted by devolved institutions) under the Human Rights Act. But the right to go to Strasbourg will always remain at the end of the domestic process. This fact together with the long established UK tradition of respect for the 'rule of law' means that there is effectively a 'culture of compliance' within Government to the extent that while it has a discretion not to give full effect to every judgement of the domestic courts under the Human Rights Act, it will never consider this the 'default option' or a decision to be taken lightly. In developing its 'human rights culture', therefore, the Government has been steered by a sense that it should or will need to comply with the end result of a process which it cannot be seen to influence or dictate. But because it is a passive process which will only be triggered by applicants coming

¹² David Wright - 'Human Rights in the West' in Admantia Pollis and Peter Schwab (eds) - 'Human Rights: Cultural and Ideological Perspectives'. Praeger. P 21

forward with grievances and challenges the Home Office does consider, as we have seen, that it can legitimately try to influence their expectations and use of the Act. It has, therefore, fastened on the balance established in certain of the Convention rights between the rights of an individual and the limitations that can be applied on the exercise of those rights in the broader interests of the community. To quote again from the notes to the Home Secretary's speech:

The ECHR accompanies the individual rights with detailed statements of the limitations that can be placed on those rights. These limitations reflect the rights of others and of the wider community. They amount to statements of obligations to respect the rights of others because they flow directly from what we must do to secure the right and to maintain a society based on modern, pluralistic democratic values. So rights and duties go together- and the human rights culture is one of rights *and* [original emphasis] responsibilities.¹³

The Home Office Human Rights Unit has gone on to develop this argument in diagrammatic form (see Annex A).

1.1 Conclusion

Only limited efforts have been made by the Government to sell the concept of a culture of 'rights and responsibilities' to the public. The Home Office probably has little expectation of being able to significantly influence the type and number of cases coming forward especially in the first flush of enthusiasm for the Act. From a human rights perspective, several issues are raised by the 'human rights culture' put forward by the Home Office. It is a strange limitation to try to establish such a culture exclusively on the relatively narrow band of civil and political rights covered by the Convention; and furthermore to focus on a Convention whose enforcement lies primarily through litigation and the courts. If the idea is to promote public awareness of human rights, then the culture cannot ignore the broad spread of economic, social and cultural rights, childrens' rights and other rights that the UK has accepted through an array of international human rights instruments. These rights may never figure in a courtroom under the Human Rights Act but they are often of cardinal importance in specific areas and activities of Government (eg. childrens' rights to the Department of Health). A true human rights culture, therefore, should be about much more than the 'culture of litigation' under the ECHR. But this is effectively the limit of the human rights culture being developed by the Home Office.

Has there been a change of agenda? When the Human Rights Act was conceived it was a first step in a process that could conceivably go on to embrace the setting up of a Human Rights Commission, the acceptance of the right of individual petition under other international human rights instruments and even possibly the drafting of a distinctive British

¹³ See note 6.

Bill of Rights. It was also part of a vibrant constitutional reform package not only empowering the individual with rights but opening up new avenues of participation in decision-making processes. Much of this emphasis and early drive would seem to have been lost as the complexities of daily government begin to take their toll. The 'human rights culture' that is now being developed would seem to have a much more limited objective. In effect, Convention rights have become synonymous with human rights.

2. Steering implementation of the Human Rights Act

2.1 The Whitehall Machinery

The Human Rights Act was conceived as part of the Government's constitutional reform programme steered by the Ministerial Committee on Constitutional Reform Policy (CRP), chaired by the Prime Minister. Actual development of the Act was in the hands of three parties. Policy responsibility rested with the Home Secretary. However, a good deal of the driving force for the Act came from the Lord Chancellor and, as his interest extended to areas outside the policy remit of his department, the Cabinet Office became drawn into the policy process in its co-ordinating role. The Lord Chancellor chaired the Ministerial Sub-committee on Incorporation of the European Convention on Human Rights (CRP(EC)) which took the key decisions on the form of the Human Rights Act on the basis of proposals formulated by the Home Office.

The active involvement of the Ministerial committees largely ended with the passage of the Human Rights Act. Following from the Ministerial lead, implementation issues are being kept in view by the officials' committee (CRP(EC) (O)) which is chaired by the Head of the Constitution Secretariat in the Cabinet Office. This committee, with some 70 nominal members, conducts most of its business by correspondence or ad-hoc meetings in relation to particular issues. It has met to consider the implications of the more significant devolution cases from Scotland, the form of S.19 statements and the arrangements by which appointments are made to tribunals in England and Wales. The Committee also receives summaries of the returns provided by departments to the Home Office on the steps being taken to implement the Human Rights Act. An ad-hoc sub-committee, chaired by the Legal Adviser of the Constitution Secretariat, provides the main committee with specialist legal advice. It may be counted as an indicator of the special status and significance accorded to the ECHR and Human Rights Act that they are thought sufficiently important to warrant dedicated Cabinet Committees.

No one party has overriding authority within the central structure for dealing with the Human Rights Act. The Home Office holds policy responsibility for the Act and functions as the lead department except in matters relating to the judiciary which fall under the Lord Chancellor's Department. Overlaying these individual responsibilities, the Constitution

Secretariat of the Cabinet Office has a broad policy function and role of providing the means through which collective decisions can be made on issues concerning the Act.

Of the three, prime responsibility for the Human Rights Act rests with the Home Office. The UK does not have a Justice Department to oversee its human rights legislation as is the case in Canada and New Zealand. In Britain, justice functions are divided between the Home Office and the Lord Chancellor's Department. While the Lord Chancellor has been one of the prime movers of the Human Rights Act, his department does not exert the same influence in Whitehall as the Home Office. The Prime Minister has not looked to put his personal stamp on the Act by setting up a dedicated human rights unit within the Cabinet Office, and the Government has consciously and firmly eschewed the possibility of having a dedicated 'Minister of Human Rights' with the authority and means to direct the work of other departments on human rights issues. This is not how matters are structured in Whitehall. In the words of one Permanent Secretary, recorded by Professor Spencer Zifcak:

We do have a different philosophy. We want to get human rights to run in the bloodstream of each department. If we establish a strong central unit, departments would say, 'Oh well, they're in charge of this, so let's send it on.' Departments would have no real sense of ownership of human rights. So, we have created what I would describe as a disaggregated but still co-operative approach.¹⁴

No central authority, runs the argument, could possess the knowledge and expertise to gauge, for example, the likelihood or significance of a challenge under the Act for every area of Government. The point is reasonably made that individual departments are best placed to decide how Convention issues will impact on their work, and that if this responsibility is taken away then so will be any sense of ownership of human rights issues in those departments. Experience also dictates that there would be no meeting of minds should a central authority seek to impose solutions for anticipated or actual challenges upon individual departments. Again, Professor Spencer Zifcak cites the remarks of a former Permanent Secretary that:

Whitehall is federal. We don't and can't tell each other what to do. Certainly, Permanent Secretaries discuss whole of government at their regular meetings and work towards a common approach. But essentially it's left to the departments concerned.¹⁵

Outside Government, the case has been put forward for an identified Minister and strong central authority to be responsible for the implementation of the Human Rights Act. The Institute of Public Policy Research has argued that such an arrangement could put "human rights at the heart of government decision-making" through supervising a cross government

¹⁴ Professor Spencer Zifcak- 'Sleepwalking into the Revolution? Pre-legislative Scrutiny in Whitehall under the Human Rights Act 1998.' Unpublished paper.

¹⁵ Ibid.

human rights strategy based on human rights impact assessments for all policy and legislative proposals seeking collective approval with the Government.¹⁶

The fact that there is no such authority steering the Human Rights Act is both a cause and effect of the Government's attitude towards the Act. There appears to be no intention that human rights should have paramount status among the many competing influences on Government policy, decision and law-making. In the Cabinet Office's Policy Makers Checklist¹⁷, for example, the Human Rights Act is ranked as one of the many factors that must be taken into account in preparing policy proposals but it is not the decisive factor or the final word. Instead, Government seems content that human rights and the obligations imposed by the Human Rights Act should be mainstreamed into the activities of every department with a minimum of central direction and control. Hence, most of the organisational arrangements now in place to see through the preparations for the Act are temporary in nature and will not form part of any permanent structure to oversee and direct matters concerning the operation of the Act. Politically, no Minister or department is likely to seek such a role in relation to the Act. The political credit lay in the introduction of the Act not the intricacies of its operation or, worse still, becoming identified with breaches of Convention rights in every branch of Government or public activity.

A strong central authority might also have a critical role in fulfilling any outstanding elements in the Government's human rights agenda. But, for the moment, this is not an active area and the Government seems content to halt at the Human Rights Act which is to be mainstreamed into the mass of government business.

From the outside, a 'three headed cerebus' does not appear to be the most effective means by which to implement the Human Rights Act. Inevitably, tensions have and will continue to arise between the Cabinet Office, Home Office and Lord Chancellor's Department over plans for the Act. There is nothing particularly unusual about this in Whitehall, or any other major organisation for that matter, when dealing with a major policy initiative. In Whitehall, a series of structural adjustments have been made to implement the Act (mainly in the form of new ad hoc committees focused on particular aspects of the Act). However, implementation of the Human Rights Act is not so important to the Government as to act as the catalyst for 'root and branch' reform of the organisational structure of Whitehall. The prospect of establishing a strong central unit with the authority to direct the work of other departments in relation to the Act is, therefore, remote and is viewed as impractical and unnecessary within Whitehall. As the White Paper explained:

We do not see any need to make a particular Minister responsible for promoting human rights across Government, or to set up a separate new Unit for

¹⁶ Ian Bynoe & Sarah Spencer-'Mainstreaming Human Rights in Whitehall and Westminster. (1999) IPPR, p iv-v.

¹⁷ Cabinet Office. Regulatory Impact Unit- Policy Makers Checklist.

this purpose. The responsibility for complying with human rights requirements rests on the Government as a whole.¹⁸

2.2 The role of the Home Office

With these thoughts in mind, it is appropriate to consider the role and 'predicament' of the Home Office in relation to the Human Rights Act. The Home Office has to manage conflicting priorities with regard to the Human Rights Act. It has responsibility for the effective implementation of the Act but, at the same time, must manage a portfolio that covers many of the areas - law enforcement, immigration, prisons - most likely to be subject to challenge under the HRA. Government departments are accustomed to having to juggle competing or contradictory priorities in their work. The Home Office considers that its role in relation to the Human Rights Act is given added credibility in the eyes of other departments because in implementing the Act it is also increasing its own vulnerability to challenge in many of its operational areas. The rest of Government, therefore, can take comfort from the fact that, in the words of one official, the Home Office provides a 'safe pair of hands' and that when it seeks action on the part of other departments what is required is truly necessary and the outcome of careful deliberation. It is tempting to criticise what appears to be a very negative approach, but there can be no question that, given that most departments began with little or no knowledge of what the Human Rights Act entailed, it was important that these departments had confidence in the message bearer who is telling them that they must devote the time and effort to bring their policies, procedures and statutes into conformity with Convention rights.

Within the Home Office, a dedicated Human Rights Unit was established to implement the Human Rights Act. The Unit was to "maintain and develop the UK's position relating to Human Rights issues for the Home Office arising from the work of international organisations including the European Union and the UN" as well as to "implement the Human Rights Act including servicing of the Human Rights Task Force". In November 1998, other departments were advised:

The Human Rights Unit of the Home Office will be available as a resource on the basis of its experience taking the legislation through. The HRU is not, however, equipped to carry out a comprehensive review of the whole of Departmental activity, nor to give authoritative advice on the compatibility of any proposed legislation or policy with the rights set out in the Act. That can only be a matter for each department, looking at the matter in its policy context and in collaboration with its own legal advisers and with those in the Foreign and Commonwealth Office and the Law Officers' Department where necessary.¹⁹

The Human Rights Unit is small in size, under resourced, and does not have a high profile within the Home Office. It has not sought to bring in outside human rights experts on

¹⁸ Rights Brought Home: The Human Rights Bill. October 1997. CM3782. P 13-14.

secondment. The learning curve has been steep and there are limits to what the Unit can achieve. Among its first actions was the development of a system which was first to inform other departments of their obligations under the Human Rights Act, and then to monitor and guide the steps taken by those departments to comply with the Act. Departments are expected to provide the Unit with six monthly updates on progress [see pages 58-60 below]. The Unit has also led on the preparation of guidance material on the ECHR and HRA. But the major focus for the Unit has been the development of a consistent approach on risk assessment and the auditing of policies, procedures and legislation across Government. This has resulted in the promotion and widespread use in departments of a 'traffic light' system which grades the degree of risk according to the significance or sensitivity of an issue, its vulnerability to challenge and the likelihood of challenge. As interpreted by one department, this system means:

- RED- strong chance of challenge in an operationally significant or very sensitive area. Action must be taken as a priority.
- YELLOW- reasonable chance of challenge, which may be successful. Action should be taken if possible.
- GREEN- little or no risk of challenge, or of damage to an operationally significant area. No amendment required.

It is not certain how far such an interpretation is uniformly applied across Government. However, the traffic light process is clearly well established and would seem to be accepted as a common standard of assessment across Government. The results of 'traffic light' audits were used as the basis for the Cabinet Office's final review and assessment of vulnerable areas (counting the 'reds') in April 2000, as well as the starting point for more intensive scrutiny of key issues by two specialist lawyers groups within the Government [see pages 32-34 below].

The Home Office Human Rights Unit has not attempted to hard sell a 'human rights culture' to other departments. It has had less to say on this matter than on how it would like to see the Act used by those outside Government. By focusing on the mechanics of complying with Convention rights, it believes that it has set in motion a 'drip, drip' effect which, in time, will give full expression to the possibilities and potential of the Act as a vehicle for a new human rights culture (ie to put an awareness of human rights considerations at the centre of policy and decision-making in all parts of the Government). In the interim, however, this does mean that departments have been left to provide their own rationale and cultural context for the implementation of the Human Rights Act [see page 56-57 below].

We have already seen in the preceding section, the Unit's authorship in public pronouncements by Home Office Ministers and officials which have played up the linkage between 'responsibilities and rights' and have sought to downplay expectations over the

¹⁹Letter from David Omand to Sir Richard Wilson dated 27 August 1998.

types of issue that should be taken before the courts under the Act. This is to be expected. It would be remarkable indeed if the Home Office was to encourage challenges under the HRA, and it cannot be faulted for wishing to correct some of the more outlandish views on the potential impact of the Act carried in the media.

2.3 Home Office Human Rights Task Force

Conscious of its own limited resources and the scale of the task involved, in early 1999, the Home Office established a Human Rights Task Force, comprising representatives from key government departments and non-government organisations, in order to facilitate implementation of the Human Rights Act. The Task Force has been widely viewed, both within and outside government, as a concession offered by the Home Office as consolation for not having a Human Rights Commission (something that remains firmly off the political agenda). The terms of reference agreed at the second meeting specified:

1. The purpose of the Task Force is to:
help departments and other public authorities prepare for the implementation of the Human Rights Act 1998; and
increase general awareness, especially among young people, of the rights and responsibilities flowing from the incorporation of European Convention on Human Rights and thus to help to build a human rights culture in the United Kingdom.

2. The Task Force will maintain a dialogue between Government and non-governmental organisations on the readiness of public authorities for implementation. It will help identify, promote and support, as appropriate, a range of initiatives and opportunities to assist training and development, including the production and dissemination of appropriate guidance, good practice and publicity material.²⁰

The Task Force would, therefore, fulfil one of the three core functions of a Human Rights Commission, namely promotion of human rights, but it would not take on the other two functions generally envisaged for such a commission - the conduct of inquiries into human rights issues and assisting users of the Human Rights Act in the courts. At its first meeting, the Task Force was also very deliberately steered away from broader policy issues in relation to the Human Rights Act that might overlap with the work of the proposed Joint Parliamentary Committee on Human Rights.²¹

The membership of the Task Force includes core representation from all the key human rights NGOs with a second wider circle of liaison group members offering specialist skills or representing different areas of the UK. The Task Force clearly has the competence and

²⁰ Home Office Human Rights Task Force. Terms of reference.

²¹ Human Rights Task Force. Para 2.1 of Minutes of Meeting held on 28 January 1999.

expertise to fulfil the role it has been assigned and the capacity and initiative to extend that role where the need arises. This said, the Task Force means different things to different participants. For the Home Office, there was never any question of throwing open the door to allow direct access by interested parties outside the government to the policy and decision-making processes for the Human Rights Act. Efforts by NGO representatives on the Task Force, for example, to secure some form of outside involvement in the 'process of Departmental risk assessment' were unsuccessful. No attempt was made by the Home Office to bring in outside expertise on a secondment basis as had been done on homelessness and asylum issues. However, there were clear presentational advantages in having the Task Force not least in deflecting pressure for a Human Rights Commission. At the same time, the Task Force has proved to have a real value in refining guidance material for government departments and public authorities and in putting together the promotional materials and launch strategy for introducing the Human Rights Act to a largely unknowing public. The Task Force meetings also allow the Home Office and other Government departments to pick up what is considered to be useful information from the NGOs on potential challenges and litigation strategies in relation to the Act. But this is a two way street. For the NGOs who pressed for such a body and for it to meet frequently, the Task Force has become an useful means by which to uncover and question the preparations being made by Government departments for the Human Rights Act. It provides a forum in which a degree of concerted pressure may be applied by the NGO caucus and, more importantly, answers obtained on matters related to the Human Rights Act. But it would be wrong to make Task Force meetings appear to be part of an adversarial process. All parties agree that they provide a useful discussion forum and there is fundamental agreement on the point that the implementation process for the Human Rights Act is better served with such a body than without one. Further, both Government and non-Government participants in the Task Force share one abiding concern that the Human Rights Act should not be 'demonised' or allowed to flounder amidst criticism from some sections of the media and community. This latter aspect has a major bearing on the work of the Task Force. Lastly, there are no doubt occasions when Home Office Ministers use NGO views expressed in the Task Force as a means to spur action by their colleagues in other departments.

The initial period of the Task Force's work was hamstrung by the delay in setting a date for the commencement of the Human Rights Act. This made the Task Force a more effective body in the longer term, however, because the Government side came under pressure to put some real substance into its work leading to the arrangements whereby Government departments would be invited to make presentations to the Task Force on the preparations that they were making for the Human Rights Act. The consideration of departmental presentations has become one of the major activities of the Task Force.²² Government

²² Between June 1999 and May 2000, as part of an ongoing programme, presentations were made by the Police, Lord Chancellor's Department, DfEE, Department of Health, DETR/Local Government

departments making the presentations freely admit that the process causes them to think more carefully about their state of readiness and none wish to repeat the experience of the one department which revealed several apparent gaps in its preparations under the probing of task force members. Non-government members of the Task Force, when interviewed for this paper, commented that the presentations were very thorough in describing the systems and procedures departments were putting in place to implement the Human Rights Act but were much less forthcoming on the problem areas and changes that were considered necessary to cope with the Act. This is quite deliberate. In fact, the Home Office had some explaining to do to other departments when an early Task Force paper gave an outline of the areas that departments were examining in relation to the Act without obtaining clearance from those departments. To soothe departmental concerns it was explained to the Task Force by the Chairman that:

it would be necessary to guard against the misunderstanding that the inclusion of an item on the list carried the implication that the department itself regarded the item as raising an ECHR issue, or where it did raise such an issue, that the item was vulnerable to successful challenge. It would be sensible to make clear the context of the exercise if enquiries were made about it from those not directly involved.²³

The initial meetings of the Task Force were taken up by the finalisation of guidance material for government departments and public authorities. Some very impressive material resulted from this collaboration. It was decided at an early stage that the guidance prepared by the Cabinet Office while “suitable for and urgently needed by the specifically Whitehall audience”²⁴ would not meet the needs of all public authorities. As the Chairman summed up:

It was clear that a new approach was needed based on core guidance on the Act, suitable for a broad audience, and accompanied by more specific guidance to meet the particular needs of the various different sectors. The draft guidance considered ... was unsuitable for the former purpose, and fresh draft core guidance would be prepared.²⁵

The minutes do not detail the comments of NGO representatives who had found the initial draft prepared for public authorities by the Home Office to be too defensive in tone and containing several omissions including the absence of any reference being made to the significance of the non discrimination provision contained in Article 14 of the Convention. These points were taken on board by the Home Office Human Rights Unit which, in truth, did most of the work and had the greatest influence on the guidance material.

Association, Northern Ireland Office, Scottish Executive and National Assembly for Wales, Prison Service, Immigration and Nationality Directorate and the Ministry of Defence.

²³ Home Office Human Rights Task Force. Para 5.1 of Minutes of Meeting held on 9 March 1999.

²⁴ Para 3.4 of Minutes of Meeting held on 9 March 1999.

²⁵ Para 3.3 of Minutes of Meeting held on 9 March 1999.

In April 1999, it was decided to form a Communications Working Group to devise and oversee the publicity arrangements for the Human Rights Act. The Working Group is chaired by Robin Allen QC and comprises representatives from the Home Office Human Rights Unit and Communications Directorate together with three NGO Members from the Task Force. The group has developed the October launch strategy for the Act with linked events to take place in four centres (London, Edinburgh, Cardiff and Belfast).

As part of the process of building awareness about the Act and human rights generally, the other main activity the group is organising is a competition for young people in conjunction with the Citizenship Foundation. The Task Force also produces its own newsletter and has successfully encouraged the Home Office to develop and maintain an impressive web-site on matters related to the HRA [www.homeoffice.gov.uk/hract/hramenu.htm].

The provision of information and the creation of media opportunities is only part of the battle. The Task Force is very conscious that large sections of the media and public remain sceptical about the likely effect of the Human Rights Act. Coverage of 'headline' cases from Scotland and particularly fanciful speculation about the consequences of the Human Rights Act for private schools prompted the Task Force in March 2000 to take steps to counter adverse publicity about the Act. This included the preparation of: stock lines explaining the positive aspects of the Act; instant rebuttal material; 'good news' stories; and positive articles for leading newspapers and magazines.

The Task Force also issued its own press release to condemn 'scaremongering' over the implications of the Act. But this will be an uphill struggle as media coverage is inevitably drawn towards the more sensational aspects of the potential use of the Act. It will become even more difficult after October, when 'guilty men' go free as flaws in the criminal process are exposed (and there are bound to be some no matter how exhaustive the vetting process within government). How to cope with negative media coverage will be one of the biggest challenges facing the Home Office and the Task Force in the immediate period after October.

Neither government nor non-government members of the Task Force intend that it should become a permanent substitute for a Human Rights Commission. From a non-government perspective there is concern that the existence of the Task Force makes it more difficult to press the case for a Human Rights Commission. While recognising the Task Force's value, non-government members are frustrated by its limited mandate, restricted resources and absence of any meaningful research capacity. Conversely, from a Government perspective there is concern that the Task Force may act as stepping stone bringing nearer the setting up of such a commission. Both parties are content, therefore, if for different reasons, that the Task Force should not continue to function for too long after the commencement of the Human Rights Act.²⁶

In March 2000, the Task Force considered a proposal from the Association of Labour Lawyers that an Advisory Committee on Human Rights should be established to facilitate implementation of the Human Rights Act. This proposal was not taken up by the Task Force but it did prompt the NGO members to consider what organisational structures and resources were required to implement the Act on a long term basis. In May, the NGO members presented a paper to the Task Force that acknowledged how much had been achieved but the main thrust of which was to focus on what were seen to be real weaknesses in the existing arrangements for implementing the Act. It pointed to the lack of monitoring and opinion poll testing of the extent to which the combined efforts of Whitehall, the Task Force and other bodies were “succeeding in the twin objectives of raising public awareness, and of making the necessary preparations for the Act coming into force.”²⁷ Most damagingly, the paper drew on the results of surveys of public authorities and hybrid bodies conducted by the Institute for Public Policy Research which revealed such a lack of knowledge and absence of communication about the Human Rights Act that it seemed “it was apparently never the intention that departments would be highly proactive in raising awareness among public authorities, provide an advice service able to cope with extensive demand, nor monitor the extent to which authorities are actually prepared for the Act coming into force.”²⁸ In this and a following paper discussed in July, the NGO members pressed for additional resources for:

- guidance and training to public authorities and to advice providers,
- authoritative information and advice on the Convention,
- promotion of the Act, especially among young people, and
- an independent monitoring system of the preparations being made to comply with the Act.

It was argued that these functions could not be fulfilled over the long term by a temporary body such as the Task Force. Nor was the Government well placed to perform all of the tasks envisaged because:

Government (and the Home Office) has a variety of aims and objectives. The promotion of human rights is often in conflict with other messages that it wishes to get across. The government is not always likely to be seen as an objective provider of advice on human rights when its own policies may come under scrutiny.²⁹

²⁶ The Task Force is presently scheduled to continue to meet until April 2001.

²⁷ Human Rights Task Force Paper. HRTF (00) 6, para 8.

²⁸ Ibid, para 10.

²⁹ Human Rights Task Force Paper. HRTF (00) 12, para 16.

Instead, the NGO members argued that only a statutory Human Rights Commission³⁰ could fulfil these functions and that this should be a recommendation of the Task Force. This proposal was not adopted by the Task Force.³¹

2.4 Conclusion

The Human Rights Act bears the hallmark of a proposal conceived in opposition that comes to be viewed differently in the cold harsh light of government. Political enthusiasm for the Human Rights Act has diminished and, as we saw in the previous section, this has taken away from the role of the Act as the linchpin for a new human rights culture inside and outside Government. Professor Spencer Zifcak has commented:

The Human Rights Act was introduced very early in the Blair government's term of office. Probably, it passed before Ministers and officials had the opportunity fully to appreciate its potential impact and reach. Unlike the Freedom of Information Act which was held back deliberately and then constrained, the domestic incorporation of the European Convention, a legislative initiative of far greater consequence, slipped by, justified as a technical exercise designed to take legal authority back from Europe and place it where it belonged, in Britain, its parliament and its courts. It meant not that powerful new legal entitlements would be created but, simply, that Britons' rights would be 'brought home'. From the beginning, therefore, the entire initiative was downplayed.³²

The structures in place for implementing the Human Rights Act reflect that there is no special 'evangelical' role for the Act within Government. In essence, a containment strategy would now appear to be in effect that will realise the objective of avoiding or reducing successful challenges but will not provide the springboard for further steps to be taken as part of a proactive human rights policy.

If the Human Rights Act represents a last step in the Government's human rights agenda, it follows that there is no requirement for a strong central authority to drive forward that agenda within Whitehall. There is no question that considerable and well-directed efforts are being made within Whitehall to prepare for the Human Rights Act. These clearly reflect the importance of the Act, but it is not to be set up on a pedestal. Human rights and the Human Rights Act are to be mainstreamed into the government system where they will become one among many points to consider in the formulation of policy and legislation. On this basis, no special or permanent structures are required at the centre to oversee the operation of the Act. The Act is, therefore, being treated as an extremely important issue which warrants attention at the highest levels during the implementation phase but not necessarily thereafter. None of

³⁰ A thorough exposition of the arguments for a Human Rights Commission and its proposed form is given in Sarah Spencer and Ian Bynoe - 'A Human Rights Commission, the options for Britain and Northern Ireland.' (1998) IPPR.

³¹ See para 6.1 of Task Force Minutes of Meeting held on 27 July 2000.

³² See note 14.

the Cabinet committees, lawyers groups, Task Force and departmental fora now dealing with the Act are permanent in nature.

Against this background, there is no incentive at the centre to become too deeply engaged in matters relating to the future operation of the Act. The Home Office is clearly not going to become a central clearing-house for action in relation to the Human Rights Act. Responsibility has been placed firmly on individual departments to prepare themselves and their public authorities and hybrid bodies for the coming into force of the Act. The Human Rights Unit has chosen not to collate information on the outcome of the 'traffic light' reviews and there will be no omnibus 'ECHR Bill' to sweep up Convention points: each department has to find space in its own legislative programme. Lastly, and perhaps most significantly, the Human Rights Act is 'old news' in the sense that it requires comparatively little policy input to see through implementation. In terms of policy formulation, it is now the EU's proposed European Charter of Fundamental Rights and not the Human Rights Act that is occupying most of the energies and time of the Home Office's Human Rights Unit.

3. The legal services' preparations for the Human Rights Act

Government lawyers have an ambivalent attitude towards the Human Rights Act. There is a keen sense of anticipation over the way in which the Act could invigorate and give new purpose to legal work in the Government. At the same time, there is concern over the potential far-reaching impact of the Act and the capacity of the legal services to rise to the challenge. On both counts, this has meant that the Government's legal services have treated the introduction of the Human Rights Act as an event of cardinal importance.

To understand the legal system that is in place for the Human Rights Act this section will examine:

- how ECHR matters were handled prior to the passage of the HRA;
- the steps taken to prepare for the implementation of the HRA;
- options not pursued for dealing with the HRA; and
- the legal strategies developed in relation to key aspects of the operation of the HRA.

It will also draw on relevant experience overseas to provide a context and, where appropriate, a counterpoint to the approach taken in the UK.

3.1 Is there a case for a central legal authority?

In Canada and New Zealand, the Minister of Justice and Justice Department have a pivotal role in reviewing draft Bills (and the policies that they implement) before these are put to Parliament. This includes the duty to report to Parliament where any draft bill is considered incompatible with that country's human rights legislation. To fulfil these responsibilities, the Canadian and New Zealand Justice Departments created dedicated human rights sections to

scrutinise and advise upon policy and legislative proposals and to provide much of the direction for the government human rights programmes.

We have noted in the previous section, that no single body in Whitehall fulfils all of the functions of a Canadian or New Zealand style 'Justice Ministry'. The organisation of the Government's legal services has evolved in an idiosyncratic and complex manner over many years. As Daintith and Page explain:

The first thing the enquirer notices about the structure of government legal services is how untidy and piecemeal it appears. Some departments have their own legal services; others rely on central services, which themselves are not organised according to the ordinary principles of ministerial responsibility. The second is that it has remained untidy and piecemeal despite frequent attempts at reform, which have been going on for more than a hundred years. Powerful countervailing forces are at work here: on the one side, the desire of departments to control their own legal services; on the other, pressure for a rational, centralised system in which a single corps of lawyers services all the needs of government.³³

Against this background, there was never any question that the Human Rights Act would empower a single Minister and unit with the ability, in effect, to grant or withhold a 'human rights kitemark' applicable to all Government policies and draft legislation. For the Act to be introduced quickly also meant that there should be minimal interference with the existing legal structure in Government. Further, was the Human Rights Act of sufficient import to act as the catalyst for a radical overhaul of the government's legal services early in the new Labour Government's term of office? Evidently not, as we have seen from the White Paper:

Some central co-ordination will be extremely desirable in considering the approach taken to Convention points in civil and criminal proceedings for judicial review to which a Government department is a party. This is likely to require an interdepartmental group of lawyers and administrators meeting on a regular basis to ensure that a consistent approach is taken and to ensure that developments in case law are well understood by all those in Government who are involved in proceeding on Convention points. We do not, however, see any need to make any particular Minister responsible for promoting human rights across Government, or to set up a separate new unit for this purpose. The responsibility for complying with human rights requirements rests on the Government as a whole.³⁴

Those with long memories in Government consider that what is being done now for the incorporation of the ECHR compares favourably with the relative lack of preparation made for Britain's 1972 entry into the European Community. Much was done, however, in subsequent years to remove any weaknesses in the legal machinery for handling legal matters relating to the European Union. The prominent role and authority of the European

³³ Terence Daintith & Alan Page - 'The Executive and the Constitution'. (1999). Oxford. P 214.

³⁴ See note 18.

Secretariat in the Cabinet Office in co-ordinating the handling of EU matters has not been mirrored in the Constitution Secretariat's involvement with the ECHR. Legal advice to the European Secretariat is provided by the European Division of the Treasury Solicitor's Department (TSol) which is also responsible for all UK litigation before the European Court of Justice. The litigation lawyers remain part of TSol but the advisory team is part of the Cabinet Office (Cabinet Office Legal Advisers (COLA)) and participate in its policy meetings on EU business. An ad hoc legal group (EQO(L)) in the European Division acts as a forum for the co-ordination of EU legal issues among departments.³⁵

We have seen how a similar ad hoc group, chaired by a legal adviser on secondment from TSol, has been established in the Constitution Secretariat to provide legal guidance on devolution issues and human rights matters relating to the ECHR. Outside the Cabinet Office, however, a different path has been followed. With the passage of the Human Rights Act, the Treasury Solicitor's Department debated whether to establish an ECHR Division. It decided not to, because it considered:

- a single unit could not have the in-depth knowledge and grasp of human rights and legal issues in all areas of Government; and
- the existence of such a unit would remove the imperative for other lawyers dealing with departmental matters to become familiar with the HRA and ECHR.

This was in part a reflection of an existing concern that there was a lack of knowledge and interest in EU law among TSol lawyers outside the European Division. Such a unit would also have cut across existing responsibilities in respect of the ECHR, particularly those of the FCO legal advisers. It does mean, however, that there is no single focal point in the legal structure for dealing with the domestic implications of the ECHR. This has put an increased emphasis on ensuring co-operation and co-ordination among the existing elements of the Government's legal services.

3.2 The ECHR before the Human Rights Act

It is easy to forget how radical and novel many of the requirements of the ECHR were at the time it was drafted in the immediate post-war period. Allowing a right of individual petition to an international court was a new concept when the ECHR came into force on 3 September 1953. Under Article 24 of the Convention, state parties accepted the compulsory inter-state complaint process but a further voluntary declaration under Article 25 was required to bring the individual petition process into effect. This compromise was considered necessary to allow states to come to terms with the principle if not the reality of their citizens being able to take complaints before an international tribunal. Over the years, even limited use of the inter-state process has withered away, while the right of individual petition has firmly taken

³⁵ Daintith & Page op cit p 316-319.

root to the extent that it is accepted by all members of the Council of Europe allowing access to the European Court of Human Rights (ECtHR) by some 800 million people in Europe.

The UK ratified the ECHR in 1951 but did not grant the right of individual petition to Strasbourg until 1966. This did not result in an immediate flood of applications. However, by the end of the nineteen-eighties, a steady increase in the number of cases in which the UK was found to be in violation of the Convention prompted action in Whitehall. Guidance in the form of two Cabinet Office circulars was issued to government departments in July 1987.³⁶ These promulgated the arrangements that became known colloquially as 'Strasbourg proofing' by which departments were required to assess policies and proposed legislation for conformity with the ECHR. As explained in the later Guide to Legislative Procedures:

It should be standard practice when preparing a policy initiative for officials in individual departments, in consultation with their legal advisers, to consider the effect of existing (or expected) ECHR jurisprudence on any proposed legislative or administrative measure.... If departments are in any doubt about the likely implications of the Convention in connection with any particular measure, they should seek ad hoc guidance from the Foreign and Commonwealth Office.³⁷

Further guidance explained that proposals by Ministers put to Cabinet or a Ministerial Committee should cover where possible the impact of the ECHR.³⁸ Any memoranda submitted to a Cabinet Committee or accompanying a Bill submitted to Legislation Committee should include an assessment of the impact of the ECHR on the action proposed.³⁹ This assessment should be built into the policy development process from an early stage.

Central to the 'Strasbourg proofing' process has been the role of the FCO legal advisers as the 'guardians of the Convention'.⁴⁰ They are available to offer expert legal advice on the ECHR implications of policy and legislative proposals. In proceedings before the European Court of Human Rights, the FCO legal advisers present the case for the UK Government. They are also responsible for analysing and disseminating the Court's judgements within the Government and for maintaining an ECHR database.

The 'Strasbourg proofing' process did not stem the flow of cases in which the UK was found to be in breach of its Convention obligations. David Kinley has calculated that whereas there

³⁶ 'Reducing the Risk of Legal Challenge' (March 1987) and 'The Judge Over Your Shoulder- Judicial Review of Administrative Decisions (7 July 1987). A useful analysis of these documents is contained in Ian Bynoe & Sarah Spencer - 'Mainstreaming Human Rights in Whitehall and Westminster'. IPPR (1999) p 40-44 and Daintith & Page, p 269-270.

³⁷ Guide to Legislative Procedures. Office of Public Service. Cabinet Office (November 1996) Appendix E, para 8.

³⁸ 'Questions of Procedure for Ministers'. Cabinet Office. (1997).

³⁹ Guide to Legislative Procedures op cit, para 9.

⁴⁰ Daintith & Page op cit p 269.

were 13 judgements made against the UK in the period 1975-86, this doubled to 27 in the period 1987-96.⁴¹ Some of this increase may be attributed to the greater awareness and use of the ECHR across Europe. Daintith and Page also note the difficulties faced by Government lawyers:

[...] departmental lawyers argue that the width of the Convention combined with the generality of many of its provisions and the confusion of its jurisprudence make it very difficult to predict whether a particular provision of domestic law is likely to lead to a breach of the Convention, and they point with pride to the many undocumented occasions when they have persuaded Ministers (with difficulty) away from policies 'which sailed too close to the Strasbourg wind'. There is no doubt a great deal in this.⁴²

However, the extensive preparations now being made to prepare for the Human Rights Act suggest strongly that 'Strasbourg proofing' was only of limited effect in ensuring that policies and legislation were compatible with the ECHR. With the passage of the Human Rights Act, it is almost as if the UK had just ratified the Convention and accepted the requirement to comply with its provisions. Evidently, the prospect of an early challenge before the UK courts provides a much sharper and more immediate focus in the minds of government administrators and lawyers than the possibility of a challenge many years in the future before the ECtHR.

3.3 The legal machinery for the Human Rights Act

The FCO legal advisers are one part of the hierarchy for legal advice. The first stop for advice for most departments is the Treasury Solicitor's Department or their own legal team.⁴³ Controversial legal matters, issues where there is a difference of opinion between departments, and those exceptional occasions where a departmental legal adviser has doubts over the legality of a proposal or its ability to withstand challenge in the courts, are normally referred to the Law Officers for advice. The Legal Secretariat to the Law Officers have a FCO legal adviser on secondment to help deal with referrals for Law Officers' advice on devolution and human rights matters. While more use now is being made of the FCO legal advisers their role might be expected to diminish, in the longer term, as attention focuses on satisfying the domestic courts and the Government's legal services become more knowledgeable and familiar with Convention matters.

Co-ordinating Groups: In the absence of a dedicated lead unit, the legal preparations for the Human Rights Act are currently focused in two lawyers groups set up to look at criminal and civil issues respectively. The ECHR Criminal Issues Co-ordinating Group is chaired by a

⁴¹ David Kinley- Parliamentary Scrutiny for Human Rights Compliance: a duty neglected? In Philip Alston (ed)- Promoting Human Rights through Bills of Rights (1999). Oxford, p 111.

⁴² Daintith & Page op cit p 269.

Deputy Legal Secretary in the Legal Secretariat to the Law Officers. Its role is to co-ordinate the handling of ECHR issues that arise in the course of criminal proceedings, and to ensure that any significant developments are made known throughout Government. The Group is also tasked with the development of a database of domestic ECHR case law to complement the FCO's existing Strasbourg database [see terms of reference at Annex B].

The Group comprises some 30-35 senior lawyers drawn from the prosecuting bodies and policy departments across Government. Most of the Group's work has been done through correspondence (circulation of Strasbourg judgements etc). However, it has met to discuss such issues as the ramifications of the *Kebilene* judgements [see pages 36-38 below] and the implications of magistrates being required to give reasons for decisions. A major task taken on by the Group has been the review of some 25 critical criminal issues (such as disclosure of evidence in summary cases) that have been identified through the 'traffic light' process as being vulnerable to challenge under the Convention. Lawyers from the Crown Prosecution Service and the relevant policy departments have examined:

- why these provisions are there
- the need for review
- the likelihood that the provisions could survive a challenge; and
- the arguments that could be employed to defend such provisions if challenged.

It is said that the exercise revealed only one area where a change in the law was warranted. For the other issues, the Group has prepared 'lines to take' with the aim that prosecution lawyers should be equipped to argue these points in whatever court the issue might arise. The lines contain arguments for use in court, reference to relevant case-law and guidance on how to respond should a judge 'read down' sections of the law particularly as the latter, unlike an intention to make a 'declaration of incompatibility', does not require formal notification to the Crown. The Group intends to discuss whether or not to publish these lines to take. The arguments in favour of doing so are considered to be that the lines to take would help set the agenda, might head off points without merit from being raised in court, and that the lines could become a point of reference for judges. Against this is the concern that the 'element of surprise' would be lost and that the lines might not withstand rigorous scrutiny from lawyers and academics outside the Government. If they are not published, the lines will not be given to private lawyers briefed for prosecution work. However, as a matter of policy, it has been decided that only barristers who can demonstrate that they are 'human rights trained' will be briefed for such work. This has been made known to the Bar Council.

The ECHR Civil Litigation Co-ordinating Group is chaired by the Head of Litigation in the Treasury Solicitor's Department. The Group has the same functions as its criminal issues counterpart but in relation to civil litigation [see terms of reference at Annex C]. It comprises

⁴³ Departments such as Customs & Excise, Home Office, Inland Revenue, Health, Social Security, and Agriculture, Fisheries and Food have their own legal teams.

a core of 25-30 senior lawyers with a circulation list of over 80 people for correspondence. There is conscious overlap in membership of the two groups. The Civil Litigation Group is the less active of the two and meets infrequently - preferring to rely instead on 'focus groups' to tackle such issues as the implications of the *Kebilene* judgements (concerning the retrospective effect of the Human Rights Act and the extent to which the courts might draw on Convention principles in advance of 2 October). One other major task overseen by the Group has been the revision of the 'Judge Over Your Shoulder' to highlight the significance and implications of the Human Rights Act. A third edition for administrators was published in March 2000.⁴⁴

The two Groups have not been set up on a permanent basis. Resources have been bid for on the basis that they are likely to have an active lifespan of 2-3 years, which might be taken to be the 'bedding down' period for the Human Rights Act.

3.4 Crown Prosecution Service

The Crown Prosecution Service (CPS) has not had a settled existence since being established in 1986. The introduction of the Human Rights Act coincides with a major reorganisation of the structure and work of the CPS in response to the Narey reforms and the recommendations of the Glidewell report⁴⁵. The cumulative effect of all these changes has been termed 'Year Zero' by some prosecutors.

The CPS has to prepare some 2,000 prosecutors and 1,000 key case workers working in 90 different branches in 42 areas for the introduction of the Act. The HRA will become a potential factor in some 1.4 million prosecutions in the magistrates' courts and some 125,000 cases in the Crown court each year.⁴⁶

Preparations in the CPS began early in anticipation of the passage of the HRA through the setting up of an ECHR Action Group. This group produced a detailed action plan in May 1998 addressing the impact of the Act on the work of the CPS. Five elements were identified in a briefing given to the Home Office Human Rights Task Force in July 1999:

- Perception - it means changing our perceptions about the work we do as a public authority. The Human Rights Act will challenge the way that we approach criminal cases, both in terms of the jurisprudence and the cultural change underpinning it.

⁴⁴ Treasury Solicitor - 'Judge Over Your Shoulder'. Third Edition March 2000. [www.open.gov.uk/tsd/judge.htm].

⁴⁵ The Review of the Crown Prosecution Service- Rt Hon Sir Iain Glidewell. HMSO Cm 3960. June 1998.

⁴⁶ In 1997-98 the CPS dealt with 1,423,000 cases in magistrates' courts and 124,781 cases in the Crown Court. CPS Annual report. 1999.

- Partnership - means forging new links with other CJS agencies, and with each other within CPS. Building new relationships and strengthening existing ones gives us the best chance of making the Act work.
- Participation - we need to actively engage in the Human Rights debate. Participation means promoting and making rights real.
- Processes - it means looking afresh at what we do and why we do it, with the human rights perspective in mind. It gives us an opportunity for a human rights 'health check' on the way we work.
- Performance- by demonstrating our commitment to human rights principles, we improve the quality of criminal justice. Performance is about doing it right.⁴⁷

The CPS is conscious that few prosecutors brought up in the traditions of the English legal system are readily familiar with ECHR concepts and principles. Considerable emphasis has been placed, therefore, on drawing on outside expert advice and assistance not just from within Government but also from NGOs such as Liberty and Justice in order to prepare guidance and training materials. In June 1998, a Guidance Working Group was set up which included representatives from the Customs and Excise Department, the Serious Fraud Office, the Crown Office and the Office of the Director of Public Prosecutions in Northern Ireland. This group identified and studied key aspects of criminal law and practice where guidance would be required or existing guidance for prosecutors would need to be revised to take account of the ECHR and HRA. All these points were consolidated in a single 'ECHR Guidance' internal document completed in December 1999 and distributed to the various CPS areas. The two NGOs, Liberty and Justice, contributed to the preparation of this guidance.

Separately, there has also been a steady stream of guidance given to prosecutors on how to deal with human rights issues if raised in cases before 2 October and, in particular, on the implications of the *Keilene* case. Prosecutors are being armed with the lines to take prepared by the ECHR Criminal Issues Co-ordinating Group for when the Human Rights Act is fully in force. It is also intended to publish a revised version of 'The Code for Crown Prosecutors' in September to take account of the changes in the CPS structure and criminal justice system and the consequences of the HRA.

These steps have been backed up by an extensive training programme being delivered between January and July 2000 by some 25 trainers covering all the CPS areas. These trainers also serve as the first port of call for advice in the areas. Training is provided based on five modules covering two and a half days. Course materials, which were prepared with input from Liberty and Justice, were tested in pilot groups of CPS and Police trainers, and representatives of the Association of Chief Police Officers and the Customs and Excise Department. The CPS has also participated in the 'walkthroughs' organised by the LCD and is represented on the Bar Council's Working Group dealing with training for the HRA.

⁴⁷ CPS Presentation to the Human Rights Task Force. 27 July 1999.

This is a substantial programme of work but how ready will the CPS be for the Human Rights Act in October? The CPS is in the process of a very substantial period of change. Because of this, those tasked with overseeing the introduction of the Human Rights Act expect that the response will be uneven across the CPS ('patchy' from area to area). It is also remarked, however, that unevenness is a two-sided coin and as much a reflection of the different levels of knowledge and expertise concerning the HRA among those law firms who might use the Act.

The CPS anticipates problems in maintaining the flow of information on cases involving the HRA between the centre and the various areas. The CPS intranet only exists in embryonic form and much of the material will need to be distributed in paper form.

A particular concern for the CPS is the potential challenge not, as might be expected, from the alleged perpetrator of a crime but from the victim. Challenges under the HRA by the victim of a crime are anticipated in cases where the CPS has exercised its discretion not to proceed with a prosecution. The Glidewell and Stephen Lawrence reports have already established the importance of the CPS providing information directly to the victims of a crime about decisions to drop or alter charges substantially. The HRA is expected to add the dimension of needing to give reasons for such decisions and also to keep records of those decisions.

The impending introduction of the Human Rights Act has also added a particular piquancy to the debate over whether there should be a prosecution right of appeal. As put by the Attorney General:

My concern is simply this: that there is an imbalance in the system. If a judge decides to stay a prosecution on the ground of abuse of process, or to direct the jury to acquit a defendant, or to make a ruling concerning the admissibility of evidence which has the effect of depriving the prosecution of a crucial plank in its case - ought not the prosecution to be able to test the decision on appeal? If it cannot, are we not allowing in fact a system in which judges are unaccountable to the appeal courts as to a crucial aspect of their responsibilities, at the very time that we are providing them with greater powers through the implementation of the Human Rights Act?⁴⁸

The importance of a right of appeal on ECHR matters can only have been strengthened in the eyes of the Crown by the *Kebilene* judgements of the Crown Court and Divisional Court.

⁴⁸ Attorney General - 'Unfinished Business - Work Still To Be Done' (Tom Sargant Commemorative Lecture), 29 November 1999.

3.5 'Kebilene'

The *Kebilene* case came as a considerable surprise for lawyers and officials in Whitehall. It is viewed by them as the most important decision in the interim period, to date, before the Human Rights Act comes into force on 2 October. The case concerned the prosecution of three alleged Algerian terrorists for offences under Section 16A of the Prevention of Terrorism (Temporary provisions) Act 1989. At the criminal trial, the Crown Court ruled that Section 16A was incompatible in a "blatant and obvious way"⁴⁹ with the presumption of innocence guaranteed by Article 6(2) of the ECHR. The Director of Public Prosecutions (DPP) decided to continue the prosecution but this was challenged in judicial review proceedings where the Divisional Court also held that Section 16A was incompatible with Article 6(2) of the Convention. The DPP appealed to the House of Lords which held in a judgement given on 28 October 1999 that the issue of compliance with Article 6(2) was not so clear-cut, but involved a 'balance between the needs of society and the presumption of innocence' which should be resolved at trial.⁵⁰ As a matter of common law, the decision to prosecute was not open to judicial review in the absence of dishonesty, bad faith or some other exceptional circumstance. Further, once the Human Rights Act entered into force, the requirement in Section 3(1) that 'legislation must be read and given effect in a way which is compatible with the Convention rights' could be used to seek an interpretation of Section 16A's compatibility with Article 6(2) of the ECHR.⁵¹

The *Kebilene* judgements prompted a thorough re-evaluation within the Government of the extent to which ECHR principles might be relied upon by the courts in the run up to 2 October and how the Crown should respond in such situations. There was considerable unease and many meetings over the initial rulings of the Crown Court and Divisional Court. Aspects of the House of Lords ruling, however, were warmly welcomed. In particular, Home Office guidance material and speeches on the Human Rights Act quote frequently from Lord Steyn's comments that: "It is crystal clear that the carefully and subtly drafted Human Rights Act 1998 preserves the principle of Parliamentary sovereignty. In a case of incompatibility, which cannot be avoided by interpretation under section 3(1), the court may not disapply the legislation."

Comfort was also taken from the firm assertion of the House of Lords that the Human Rights Act did not create a *legitimate expectation* that Convention rights would be applied and

⁴⁹ *R v DPP ex parte Kebilene* [1999] 4 All ER 801, Lord Bingham CJ at 815j.

Section 16A reverses the onus of proof in requiring a defendant to prove on the balance of probabilities that any article found in his possession "in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with the commission, preparation or instigation of acts of terrorism" was not in fact in his possession for such a purpose.

⁵⁰ *R v DPP ex parte Kebilene* [1999] 3 WLR 972.

⁵¹ In March 2000, the prosecution for terrorist offences was abandoned to protect the identity of a prosecution witness who was an undercover agent in Algeria. The defendants admitted possessing false documents and were sentenced to prison terms in June 2000.

protected by the courts before 2 October. Again, the views of Lord Steyn are quoted with approbation: "There is a clear case to postpone the coming into effect of central provisions of the Act. A legitimate expectation, which treats inoperative statutory provisions as having immediate effect, is contradicted by the language of the statute."⁵²

Lastly, Government lawyers welcomed the views of Lord Hope on the leeway that the courts should allow in examining decisions made by the executive. While the Strasbourg "*margin of appreciation*" doctrine clearly did not lend itself to use by a domestic court, Lord Hope noted that in areas where difficult choices had to be made between the rights of the individual and the broader interests of society, there was an area of judgement where the courts should defer to the considered opinion of the elected body or person whose act or decision was said to be inconsistent with the Convention rights.⁵³

Less helpful in the eyes of Government lawyers were the House of Lords' views on the extent to which the Human Rights Act would apply, when brought fully into force, to events which had taken place before 2 October. The Crown had argued that the transitional provisions (Section 22(4) read with Section 7(1)b) were only meant to apply to proceedings which were ongoing as at 2 October 2000. It was not the intention of the Act that after 2 October a person who had previously been convicted of an offence could raise an Article 6 issue on appeal, for example, irrespective of when the original trial took place. Section 22(4), it was argued, only applied to proceedings instigated by a public authority that did not include appeals against conviction.⁵⁴ This argument was dismissed by the House of Lords, however, which considered that it was more in keeping with the purpose of the Convention and HRA to treat the trial and appeal as part of the same process.

This posed something of a quandary for the government's legal services. Were prosecuting authorities and public authorities instigating civil proceedings therefore obliged to respond to Convention-based challenges in the period up to 2 October allowing that such issues could be raised in an appeal after that date? After some debate and recourse to outside legal advice, it was decided that the Crown should continue to proceed on the basis that the Human Rights Act did not have any legal effect before 2 October and to contest the relevance of any attempt to argue Convention points in cases before that date. However, given that it was clear that a number of judges were already prepared to entertain such arguments and to apply Convention principles in their judgements, it was also accepted that, if the need arose, the Crown should be prepared to deal with such issues as if the Human Rights Act was already in force. Following from the House of Lords' judgement, it was accepted that, after 2 October, it would be open to a person accused of a crime to raise any breach of his

⁵² Ibid, at p. 982 E-F.

⁵³ Ibid, at p. 993-4.

⁵⁴ A useful analysis of Section 22(4) is given by Francis Bennion - 'A Human Rights Act Provision Now in Force'. Justice of the Peace. Vol 163. 27 February 1999, p 164-165.

Convention rights occurring before that date. This would include issues raised in appeal proceedings where the original trial was concluded before 2 October. Applications for a stay of proceedings until after 2 October, however, were to be resisted.

3.6 Declarations of incompatibility

Given the attachment in Britain to parliamentary sovereignty there was never any question of allowing the courts to use the Human Rights Act to ‘trump the outcome of democratic decision-making’ by striking down legislation made by Parliament. The Act creates a general requirement that all legislation (past, present and future) be read and implemented in a way which is consistent with the Convention. However, it does not permit the Convention to be used by the courts to strike out inconsistent primary legislation or secondary legislation made under it. The courts are expected to interpret existing and future laws, wherever possible, in ways consistent with the Convention and to take account of Strasbourg case law. If a higher court cannot reconcile a piece of legislation with the Convention rights, under Section 4 of the Act it may make a ‘declaration of incompatibility’ which will put the onus on the Government and Parliament, but will not compel them, to change the law either through a fast track remedial process or the normal legislative process.

The ‘declaration’ process represents an unique half-way house between the models advanced in the human rights legislation of other common law jurisdictions. In Canada, Hong Kong and South Africa the courts have the power to strike down inconsistent legislation (exercised 58 times so far in the case of Canada) whereas in New Zealand the courts are prevented from expressing a view on the consistency of legislation with its Bill of Rights.

It is not clear what use the UK courts will make of the ‘declaration’ process or how it will function after 2 October. Geoffrey Marshall has characterised the making of a declaration of incompatibility as “not a legal remedy but a species of booby prize”.⁵⁵ Making a declaration takes matters out of the hands of the court. The Government and Parliament may not act or act quickly. Where action is taken, it is for Parliament to decide whether the change will be retroactive. Thus, making a declaration of incompatibility may have no practical impact on the case before the judge. For these reasons, the Government’s two Legal Groups do not expect judges to make much use of the ‘declaration’ process. More disturbing for them is the prospect of judges ‘reading down’ legislation in an innovative manner especially as this does not require prior notification being given to the Crown. Where a ‘declaration of incompatibility’ is made, however, there is no obvious answer to the question of what happens to other cases in the system relying on that legislation. The ‘staying’ of cases by the CPS is not favoured especially as this may leave it exposed to judicial review by the victims of these cases. Not least because there could be no certainty over the timeframe within which

the Government might act to remedy the deficiency in the law, that this would be done quickly, or even that it would be done at all.⁵⁶ One possible option being considered, however, is that the Law Officers might make a statement in Parliament outlining what steps were intended and on this basis announce that other cases would not be taken forward pending this action being completed.

3.7 Pre-legislative scrutiny of laws

An effective human rights system cannot rely solely on the courts to root out inconsistent legislation. As important, is the obligation on the executive not to retain or introduce inconsistent legislation or, if doing so, to do so in a way which expressly acknowledges the inconsistent nature of the law. Indeed, it could be said that the real benefit of the Human Rights Act rests not in its use in the courts but in its much broader potential to integrate human rights considerations in the policy- making and legislative processes of Whitehall.

Overseas practice: The original Canadian Bill of Rights required that the Federal Minister of Justice scrutinise all proposed federal statutes and regulations in order to ascertain whether any of the provisions were inconsistent with the Bill of Rights and to “report any such inconsistency to the House of Commons at the first convenient opportunity.” Only one such report was made. The subsequent Canadian Charter of Rights and Freedoms contains no such obligation. However, in 1985, the Federal Parliament amended the Department of Justice Act to require similar scrutiny and report for compliance with the Charter.⁵⁷ Section 33 of the Charter does allow for the passage of inconsistent legislation but this has been sparingly used particularly at the federal level.

Since 1991, Section 7 of the New Zealand Bill of Rights Act has required the Attorney General to report to Parliament where a Bill appears to be inconsistent with the Act. He is assisted in this task by the Law Reform Division of the Department of Justice and the Crown Law Office. There have been at least twelve occasions, of which five have involved government bills, where a report has been made to Parliament. In three of these cases, the Bill was still passed by Parliament which fact provoked criticism from the UN Human Rights Committee. In *Mangawaro Enterprises Ltd v Attorney General*, the courts rejected a complaint over the apparent failure of the Attorney General to table a report stating that whether he did so was part of the proceedings of Parliament, which were not covered by the Bill of Rights Act.⁵⁸

⁵⁵ Geoffrey Marshall [1999] Public Law 382

⁵⁶ It is relevant to note that, in Canada and Hong Kong, the Government and Legislature do not always act to fill the gap left by legislation which has been struck down.

⁵⁷ The Canadian Charter of Rights and Freedoms Examination Regulations, PC 1985-2561.

⁵⁸ *Mangawaro Enterprises Ltd v Attorney General* [1994] 2 NZLR 451.

In South Africa, the Constitution requires that its Human Rights Commission measure any proposed legislation against the Bill of Rights or “norms of international human rights law which form part of South African law” or “other norms of international law” and report any conflict to the legislature. In Hong Kong, the Secretary for Justice is expected, as a matter of administrative practice, to certify that proposed new laws are consistent with the ICCPR as applied to Hong Kong.

Section 19 of the HRA: In the UK, Section 19 of the Human Rights Act 1998 ensures that the question of the compatibility of proposed legislation with the ECHR is considered and stated publicly. This provision was brought into effect in November 1998 and was the cause of some initial confusion, especially in regard to what information should be provided to Parliament to support a statement that a proposed law was considered compatible with Convention rights. The experience of the Financial Services and Markets Bill, in particular, convinced the Cabinet Office and Home Office of the need to establish a consistent approach and rationale on the making of Section 19 statements. A Home Office paper was circulated through the CRP(EC)O to agree an uniform approach. Although there were some who maintained that having any valid arguments to advance should be sufficient for a Minister to be able to state that a Bill was compatible with the Convention rights set out in the Human Rights Act, the formula finally adopted was that the proposed legislation was “more likely than not” to withstand a challenge before the Courts. As the Home Secretary explained:

If a section 19(1) (a) statement is to be made, a Minister must be clear that, as a minimum, the balance of argument supports the view that the provisions are compatible. Lawyers will advise whether the provisions of the Bill are on balance compatible with the Convention rights. In doing so they will consider whether it is more likely than not that the provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and the European Court of Human Rights in Strasbourg. A Minister should not be advised to make a statement of compatibility where legal advice is that on balance the provisions of the Bill would not survive such a challenge. The fact that there are valid arguments to be advanced against an anticipated challenge is not a sufficient basis on which to advise a Minister that he may make a statement of compatibility where it is thought that these arguments would not ultimately succeed before the courts.⁵⁹

The ‘more likely than not’ formula has been coined the ‘51 per cent rule’ by some outside Government and the term has since entered unofficial usage in parts of the Government. Officials interviewed in a number of departments have remarked that the internal guidance given in relation to Section 19 statements is confusing and not particularly helpful. One Government lawyer considered that the approach adopted put lawyers in the ‘firing line’ to find arguments to tip the balance and support the case for making a statement of

⁵⁹ Hansard, 5 May 1999: HC 371

compatibility in respect of a Bill. It is relevant to note that recourse to Section 19 (1) (b)⁶⁰ has been made only once (to end July 2000) and then in circumstances where it served the political purpose of signifying the Government's displeasure with amendments made to the Local Government Bill by the House of Lords which were designed to retain the Section 28 ban on the promotion of homosexuality in schools.

There is nothing to say, of course, that the Government's belief that the provisions of a Bill are compatible with Convention rights will be shared by the domestic courts and the European Court of Human Rights. The UK's track record at Strasbourg and the views of some influential judges that legislation passed under Section 19 (1) (a) should be subject to more rigorous scrutiny if brought before the domestic courts, would offer arguments to the contrary.

A particular concern outside Government is the paucity of information made available to support the contention that a Bill is compatible with the Convention. The Government is clearly reluctant to provide hostages to fortune by disclosing the legal advice and arguments influencing Section 19 statements. Much is left to the discretion of individual Ministers who, as a matter of good practice, are encouraged to express their views on compatibility with Convention rights during the Second Reading debate. Attempts to draw out these views through Parliamentary Questions rarely elicit meaningful information. Outside the Government, there is some optimism, however, that the terms of reference for the proposed Joint Parliamentary Committee on Human Rights will allow it to require fuller reasons and supporting arguments for Section 19 statements. One concession already decided by the Government is that:

a Minister inviting Parliament to approve a draft statutory instrument or statutory instrument subject to affirmative resolution should always volunteer his or her view regarding its compatibility with the Convention rights. The Minister's view should also be given regarding the incompatibility of any secondary legislation to the extent that it amends primary legislation; and that the statement should be made in writing where the secondary legislation which amends primary legislation is not subject to affirmative resolution. It is the intention of the policy that these written statements should be publicly available. Their precise format is a matter for the Minister concerned.⁶¹

This is still some way short of the practice in New Zealand. There the Minister of Justice provides Parliament with the legal advice on which he has based his view of the compatibility of a Bill with the New Zealand Bill of Rights Act. The likelihood of such legal advice being released in Britain is remote and would fly in the face of longstanding conventions on the confidentiality of legal advice provided to Ministers.

⁶⁰ A Section 19 (1) (b) statement indicates that although a Minister is unable to make a statement of compatibility the Government wishes to proceed with a Bill.

3.8 Conclusion

It is difficult not to be impressed by the scale of the preparations being made by the Government's legal services for the introduction of the Human Rights Act. Government lawyers have been quick to engage with the issues partly through trepidation but mainly because of a fascination with what the future may hold when the Act is in place. Certainly, there are doomsayers among their numbers who liken this to 'moths being drawn to the candle' but the abiding impression is of a legal fraternity which is keen to come to grips with the Act.

The Whitehall structures that these lawyers will work under when the Act is in force are fragmented. There is no prospect of a single authority being established to direct the legal response to the Act. The co-ordinating groups that have been established do not have line authority, are not permanent and are focused on the need to ensure a consistent approach to the risk management aspects of the Act. They have no part to play in the Section 19 process, which seems to be left almost entirely in the hands of the subject department and its lawyers in deciding whether its proposed legislation is compatible with the Convention. Albeit that the system does allow for the most dubious cases to be referred to the Law Officers.

There will be unavoidable communication problems between the centre and lawyers in the field. The legal intranet exists only in embryonic form which will handicap the two-way flow of information on human rights cases. It is unlikely, however, that critical cases will slip through the nets of law reporting and the media and these will be as avidly scrutinised within Government as in Chambers.

Lastly, of one point we can be certain, the Government's legal services are distinctly better prepared for the introduction of the Human Rights Act than the departments and public authorities that they advise.

4. The Lord Chancellor's Department and the Judiciary

In the UK political context, incorporation of the ECHR has always been seen to have far-reaching implications for the respective roles of the executive, parliament and judiciary. There was never any question that the Human Rights Act would be allowed to "trump the outcome of democratic decision-making"⁶² by limiting the power of Parliament and putting a large measure of that power in the hands of unelected judges. Given the strength of the attachment in Britain to parliamentary sovereignty, it was unthinkable that judges would be

⁶¹ Hansard. 10 January 2000 HL 344. Lord Bassam of Brighton.

⁶² Dennis Davis, Matthew Chastalson & Johan De Waal - 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in David Van Wyke, John Dugard, Bertus De Villiers & Dennis Davis - 'Rights and Constitutionalism.' Oxford. [1995] p1.

asked to oversee human rights entrenched in a written constitution binding on the executive and legislature (as done most recently in South Africa).

The Human Rights Act does not, therefore, give the judiciary the power to overrule 'inconsistent' Acts of Parliament but it does give judges new responsibilities to protect and respect Convention rights in the domestic courts. The Act makes it unlawful for the courts, as public bodies, to act incompatibly with Convention rights. It also requires that judges interpret and give effect to primary and secondary legislation, as far as possible, in a way that is compatible with Convention rights. If legislation cannot be read in a manner compatible with the Convention, the higher courts, as we have seen, can make a 'declaration of incompatibility' which may prompt the Government and Parliament to change the law.

4.1 Judicial attitudes towards the Human Rights Act

The Lord Chancellor has stressed how important it is that judges employ a balanced and 'measured judicial response' when determining the consistency of domestic legislation with the Convention. In his view:

If the courts were to adopt a very narrow view of this duty of consistent construction, their ability interpretatively to guarantee Convention rights would be severely curtailed. Instead of reading municipal law in a way which gave effect to individuals' rights, the courts would tend to discover irreconcilable conflicts between UK law and the Convention which would then require legislative correction. In contrast, a judiciary which took an extremely radical view of its interpretative duty would be likely to stretch legislative language - beyond breaking point, if necessary - in order to effect judicial vindication of Convention rights. Such an approach would yield virtually no declarations of incompatibility: the judges would, in effect, be taking it upon themselves to rewrite legislation in order to render it consistent with the Convention, and so excluding Parliament and the executive from the human rights enterprise.

Both of these approaches would be wrong. The constitutional theory on which the Human Rights Act rests is one of balance. It requires courts to recognise that they have a fundamental contribution to make in this area, while appreciating that the other elements of the constitution also have important roles to play in securing the effective protection of the Convention rights in domestic law. Thus the Act while significantly changing the nature of the interpretative process, does not confer on the courts a licence to construe legislation in a way which is so radical and strained that it arrogates to the judges a power completely to rewrite existing law: that is the task for Parliament and the executive. The interpretative duty which the courts will soon begin to discharge in the human rights arena is therefore a strong one; but it is nevertheless subject to limits which the Act

imposes, and which find a deeper resonance in the doctrine of the separation of powers on which the constitution is founded.⁶³

Notwithstanding the views of the Lord Chancellor, how judges will execute their functions under the Human Rights Act remains a topic of some speculation within Whitehall. One school of thought is that judges might use the Act to 'settle old scores' over some of the laws enacted by previous Conservative governments. We have also already noted how the Government's legal services are making preparations on the assumption that judges will be extremely reluctant to resort to making a 'declaration of incompatibility' but will not be slow to 'read down' legislation in an innovative manner. One knowledgeable commentator, Lord Lester of Herne Hill QC, considers that judges are quite content not to have the power to strike out legislation because they will be able to exert as much impact through their ability to interpret legislation in a manner consistent with the Convention.⁶⁴

It would be wrong to assume that the judiciary is of one mind concerning the Human Rights Act. Undoubtedly, there will be some judges who concur with the forthright views of Lord McCluskey whose perception of the 'disruption' caused in the Scottish courts by the application of the ECHR prompted him to recall his 1986 remarks on the then new Canadian Charter of Rights and Freedoms as providing "a field day for crackpots, a pain in the neck for judges and legislators, and a gold mine for lawyers" with the added postscript "Prophetic or what?".⁶⁵ There are also clearly tensions arising from rulings of the European Court of Human Rights. These are most noticeable over the case of *Osman v the UK*⁶⁶ where the Court held that the blanket immunity granted by the domestic courts to the police (over liability for possible negligence concerning the manner in which a crime was handled) was disproportionate and a breach of Article 6 because an action against the police had not been allowed to proceed to trial. The ruling caused Lord Browne-Wilkinson to reflect in *Barrett v London Borough of Enfield*⁶⁷, where the duty of care issue also arose, that he found the European Court's decision extremely difficult to understand and alien to the conceptual structure of English tort law. More forthright still were the published views of Lord Hoffman who considered that the European Court's ruling meant that the "whole English jurisprudence on the liability of public authorities for failure to deliver public services is

⁶³ Lord Irvine of Lairg - 'Activism and Restraint: Human Rights and the Interpretative Process'. The 1999 Paul Sieghart Lecture, 20 April 1999.

⁶⁴ Lord Lester of Herne Hill- 'The Politics of Human Rights'. Lecture delivered at the University of Essex, 16 March 2000.

⁶⁵ Comments made by Lord McCluskey to 'Scotland on Sunday' reproduced in 'The Times', 8 May 2000. Lord McCluskey's comments, coming soon after his hearing a criminal appeal in which Convention points were raised, resulted in the decision in that case being set aside because his expressing such a view meant that he did not pass the objective test of impartiality required by Article 6 of the Convention.

⁶⁶ *Osman v UK* (1999) 1 FLR 198.

⁶⁷ *Barrett v London Borough of Enfield* [1999] 3 WLR 79 (HL).

open to attack on the grounds that it violates the right to a hearing before a tribunal.”⁶⁸ He lamented:

I am bound to say that this decision fills me with apprehension. Under the cover of an Article which says that everyone is entitled to have his civil rights and obligations determined by a tribunal, the European Court of Human Rights is taking upon itself to decide what the content of those civil rights should be. In so doing, it is challenging the autonomy of the courts and indeed the Parliament of the United Kingdom to deal with what are essentially social welfare questions involving budgetary limits and efficient public administration.⁶⁹

The fact that the Government responded to the Strasbourg court’s ruling by issuing a circular to all civil servants and chief police officers advising them not to claim immunity from negligence claims in future, rubbed salt into the wound in the eyes of judges in Britain. The Law Lords when presented with evidence of the Government’s response considered it “was the most astonishing intervention into the independence of the legal system” because, in their view, the Government was usurping the judiciary’s role in determining the implications of the *Osman* ruling.⁷⁰ Luke Clements considers that “we are likely to see judges making it significantly more difficult for cases to succeed in Strasbourg: beefing up the contra-Convention arguments”.⁷¹ He cites the case of *Camelot Group v Centaur Ltd*⁷² as a foretaste of this attitude where the Court of Appeal, notwithstanding a recent ECHR decision, found in favour of the plaintiff relying on a domestic precedent specifically criticised by the ECtHR.

The existence of judicial indifference and ignorance should also not be discounted in determining what the Human Rights Act and ECHR will mean for the system of justice in the UK but this could be said to be more than offset by the evidence of other judges already applying Convention principles in the period before the Act comes into force. We have referred previously to the application of the Convention in the *Kebilene* case. This may be the most dramatic instance but it is not a solitary example. In *R v North and East Devon Health Authority, ex parte Coughlan*⁷³, the Court of Appeal unanimously found against the health authority over its plans to close a care home for the disabled in view of the legitimate expectation of the residents that they had been offered a home for life. The Court pointed out that in the period between the enactment and the coming into force of the Human Rights Act, it was proper that the courts should pay particular attention to the rights protected by

⁶⁸ Lord Hoffman – ‘Human Rights and the House of Lords’ [1999] 62 MLR 159 at 164.

⁶⁹ Ibid.

⁷⁰ The issue arose in the case of *Hall v Simons* in the House of Lords which considered the rule that clients could not sue their barristers for negligence over the conduct of a case in court. In examining the precedent set by the *Osman* case, the Law Lords were pointed towards the Government’s response to the Committee of Ministers in Strasbourg which referred to the issuing of the circular as one of the steps taken to implement the Strasbourg court’s judgement. See *The Times* 29 June 2000.

⁷¹ Luke Clements- ‘The Human Rights Act- Anew Equity or a New Opiate: Reinventing Justice or Repackaging State Control?’ *Journal of Law and Society*. Vol 26 No 1. March 1999, p 76.

⁷² *Camelot Group v Centaur Ltd* [1998] 1 All E.R. 251.

⁷³ *R v North and East Devon Health Authority, ex parte Coughlan* [1999] C.A.D. 340

the Convention. In this case, the Court of Appeal concurred with the original ruling of the High Court that the Health Authority's conduct was in breach of Article 8 of the Convention. The Lord Chancellor, however, was reported to have admonished an audience of judges not to continue on the path of the *Coughlan* judgement. In *Nottingham v Amin*⁷⁴, the Divisional Court was fully prepared to consider relevant Strasbourg case law in a case where a taxi driver claimed entrapment by plain clothes police officers in persuading him to accept a fare where he was not licensed to operate (although in this case no breach of Article 6 was found). In *Official Receiver v Stern*⁷⁵, the Court of Appeal also had no qualms about considering the potential application of Article 6, on the issue of self incrimination, notwithstanding the fact that the Human Rights Act was not in force.

The implications of such cases are being carefully analysed within Whitehall. The guidance given to administrators in the recently amended 'Judge Over Your Shoulder' advises that it is "not safe to assume that because full implementation of the HRA is some months away you can push Convention rights to one side ... In particular, judges are increasingly familiar with the text of the HRA and ECHR, and may have a strong incentive to 'find' 'Convention rights' in existing common law before October 2000."⁷⁶

The guidance concludes:

Recent case law indicates that the courts' view on the applicability of Convention rights in domestic law before October 2000 will be as follows:

- The courts will presume Parliament's intention was to legislate in keeping with the UK's obligations in international law to act in conformity with the Convention, unless it makes express, in clear statutory words, that this was not its intention.
- Where legislation was enacted specifically to fulfil an ECHR obligation or right, it will be presumed that Parliament's intention was that the statute should meet the obligation.
- On questions of common law the courts will not rule inconsistently with Convention rights.
- If the courts are required to exercise a discretion they will not do so in such a way to violate any Convention rights.
- Where the ECJ has drawn on the ECHR or ECtHR jurisprudence, its approach will bind UK courts as Community law courts.
- In cases which raise Convention rights also recognised in common law, the courts are likely to draw on the ECHR and ECtHR jurisprudence.
- Any acts or measures of the Scottish Parliament, Scottish Executive, Northern Ireland Executive or Assembly or the National Assembly of Wales that are inconsistent with Convention rights will be held *ultra vires*.⁷⁷

⁷⁴ *Nottingham City Council v Amin*. The Times 2 December 1999.

⁷⁵ *Official Receiver v Stern (Re: Westminster Property Management Limited)* (C.A.)- unreported.

⁷⁶ The Judge Over Your Shoulder. Third Edition. March 2000. Para 5.30.

⁷⁷ *Ibid.* Para 5.29.

In effect, the courts are developing what Murray Hunt terms a “common law human rights jurisdiction”⁷⁸ even before the Human Rights Act comes into full force on 2 October.

4.2 The role of the Lord Chancellor’s Department

The Lord Chancellor’s Department is responsible for the ‘fair, efficient and effective administration of justice in England and Wales’. It identifies four main components in this work:

- appointing, or advising on the appointment of, judges;
- the administration of the court system and a number of tribunals;
- the provision of legal aid and legal services; and
- the promotion of reform and revision of English civil law.⁷⁹

Given that the Lord Chancellor was one of the prime movers of the Human Rights Act, it comes as no surprise that special attention has been paid to the needs of preparing the judiciary for the introduction of the Act. The time required to complete the training programme for judges was the single most important factor in setting the commencement date for the Act. An initial estimate that this could be done by Spring 2000 proved optimistic and it was on the advice of the LCD that the commencement date was eased backwards to 2 October 2000.

There can be no question or criticism of the seriousness with which the LCD has approached its part in preparing for the introduction of the Human Rights Act. The LCD was one of the first departments to focus on the Human Rights Act setting up a small team in summer 1998 (prior to the passage of the Act) to identify and co-ordinate action within the department. The project structure was later expanded to incorporate preparations in the department’s agencies - the Court Service and the Public Trust Office. Work is overseen by a Project Board, chaired by the Director-General Policy, with two representatives from the judiciary - Lord Justice Brooke and Lord Justice Sedley. The Project Board is supported by working groups covering Criminal Business, Civil and Family Business and Tribunals. Two cross cutting working groups - Training and Information, and Evaluation and Monitoring - are responsible for services and performance in implementing the Act.

The Project Board identified eleven key outcomes to ensure successful implementation of the Act in the courts and tribunals. These included such issues as:

- ensuring that the legislation, policy and procedure, for which the LCD is responsible, is compliant with Convention rights;
- sufficient numbers of judges, magistrates and their professional advisers and tribunal members;
- sufficient accommodation;

⁷⁸ Murray Hunt - ‘The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession’. *Journal of Law and Society*. Vol 26 No 1. March 1999, p 101.

⁷⁹ LCD website [www.open.gov.uk/lcd/].

- training for judiciary, magistrates, tribunal members and legal and other staff;
- judicial access to case law and textbooks;
- rules, practice directions and procedures for handling cases involving Convention rights;
- arrangements for evaluating and monitoring cases involving Convention rights;
- provision of information for court users.⁸⁰

In common with the rest of Whitehall, the LCD has audited its policies, practices and procedures to ensure compatibility with Convention rights. It has taken particular note of the implications of Articles 5 and 6 for the operation of the justice system. Two major instances where changes have proved necessary (Magistrates giving reasons for decisions and part-time judicial appointments) are examined at [pages 52-55 below]. The LCD has also taken the lead, with the Cabinet Office, to co-ordinate the preparation and distribution of guidance on the implications of Article 6 for Ombudsmen working within Whitehall.

For the judicial system, the LCD expects that while the impact of the HRA will be greatest in terms of numbers in the courts of first instance, the more significant cases will arise in the higher courts. Particular efforts are being made to prepare the higher courts for the implementation of the Act. The Lord Chief Justice is chairing a working group of senior judges and officials to consider how best to employ senior judges to deal with the additional workload arising from the Act. The working group has also overseen the arrangements made within the Royal Courts of Justice to ensure that cases raising important Convention points are identified as quickly as possible, and listed appropriately. The number of Crown Office List courts have been doubled to clear the current backlog of judicial review cases. Recommendations which will make judicial review faster and more efficient are being put in place before October.

To understand what assistance judges would require to identify and make reference to relevant Strasbourg case law, the LCD undertook an information needs analysis that has prompted the creation of an internet portal for judges (www.courtservice.gov.uk/lexicon). The service will include customised e-mail alerts to notify judges of key decisions quickly.

In March 2000, the LCD issued, for public consultation, draft 'Rules and Practice Directions' covering the operation of the Human Rights Act in the courts in England and Wales.⁸¹ The number of new rules required by the Act was not great - the citation of Strasbourg jurisprudence under Section 2: the notice and joining of the Crown to proceedings where the

⁸⁰ Amanda Finlay - 'The Human Rights Act: The Lord Chancellor's Department's Preparations for Implementation.' [1999] EHRLR 5. P 513-514. Amanda Finlay is the Director, Public and Private Rights, in the LCD.

⁸¹ Human Rights Act 1998: Rules and Practice Directions. A Lord Chancellor's Department Consultation Paper. March 2000. See LCD website.

court considers making a declaration of incompatibility under Section 5; the identification of which courts and tribunals would consider free-standing proceedings brought under Sections 7 and 9 of the Act. These new rules should be in place by October.

4.3 Training judges

It is a fundamental aspect of the 'separation of powers' doctrine that the judiciary should remain independent of the executive. The executive cannot instruct the judiciary on how to apply the Human Rights Act but it can ensure that judges are properly prepared for their part in implementing the Act.

The training programme to prepare judges for the Human Rights Act is being conducted on a scale not seen before for the passage of human rights legislation in any other common law jurisdiction. And the resources earmarked for this exercise far exceed anything available for preparing most Government departments and public authorities.

Why train judges? A first thought that can be discounted is that it is in order to imprint the judiciary with the executive's values and perceptions towards the Act. Any such attempt would be easy to identify, fiercely resisted and roundly condemned. The Government, as we have seen, has not been slow on its part to try to limit expectations in relation to the reach or impact of the Act. However, there is also a recognition in Whitehall that for the Act to fulfil its purpose there must be occasions when policies, practices and laws are deservedly and successfully challenged before the courts. Even if this may prove to be a bitter pill to swallow. In the words of the Lord Chancellor: "it is important that the courts are not so timid in their interpretation of a rights instrument that it loses its utility as an effective guarantee of the citizen's fundamental entitlements."⁸²

It would stretch the argument to breaking point to suggest that Whitehall has set up a human rights training programme for the judiciary in order to embolden judges to rule against Government in cases under the Human Rights Act. But there is credibility in the view that the executive, and the LCD in particular, wishes the judiciary to be well-informed about the purposes of the Human Rights Act and the ECHR even if this may increase the chances of successful challenges. This assumes that most judges start from a position of some ignorance on how to apply human rights and Convention points. The reverse side to this coin, therefore, is that a training programme is just as necessary in order to avoid cursory or ill-informed consideration being given to human rights arguments which may result in irrational and damaging judgements in the courts. The fact that human rights arguments may emerge in virtually any court or tribunal makes it doubly important that judges and tribunal chairmen at all levels feel confident that they can handle such arguments.

⁸² Lord Irvine of Lairg - 'Activism and Restraint: Human Rights and the Interpretative Process'. The 1999 Paul Sieghart Lecture, 20 April 1999.

Otherwise, the higher courts will inevitably become inundated with 'human rights' cases, some genuine but most entirely spurious, passed up from the lower courts. And most importantly, if all courts are to handle such cases, a comprehensive training programme for judges will help ensure consistency in the decisions of those courts.

A total of £4.5 million has been earmarked by the Home Office and the LCD for the training of judges, magistrates and tribunal chairmen. Most of this money will be spent through the Judicial Studies Board which has embarked on the biggest single training programme in its history. By October, all 3,000 full and part-time judges (and 200 tribunal chairmen) will have attended a one day basic seminar on the Human Rights Act and ECHR as well as other individual sessions on human rights issues relevant to the criminal, civil or family court in which they sit. Only the most compelling reasons will be accepted for a judge not to attend the designated training sessions. The Board's training programme is directed by a High Court judge, Mr Justice Waller, with the training format and content developed by a working group headed by Lord Justice Sedley. The Board's remit does not extend to Scotland so its first recipients of training, starting in Autumn 1999, were judges sitting in Wales who might be confronted by Convention points as devolution issues. The main programme of training took place over the period January-July 2000. Sessions were held each Friday, led off by an academic speaker on the purpose of the HRA and ECHR but with most of the day devoted to syndicate sessions fronted by judges drawn from a hundred 'syndicate leaders' who had attended an earlier two day course. More emphasis was put on syndicate sessions rather than 'talking heads' following feedback from the first sessions held in Wales. The syndicate exercises covered criminal, civil and family law issues.⁸³ Judges were asked to participate in two sessions. Judges from the European Court of Human Rights have participated in some of these sessions.

Tutor notes on case studies were made available to participants on a confidential basis at the end of these sessions. Participants also received a thick folder of materials. Prominent among the documents provided were summaries prepared by Lord Justice Sedley of current thinking on such important questions as the 'Margin of Appreciation', the 'Horizontal Application of Human Rights', 'Proportionality' and the 'Principle of Legality'.

Upon completion of the training programme for judges, the Judicial Studies Board will commence on-site training for magistrates. Some 30,000 training packs have been issued,

⁸³ The first 'criminal' syndicate session, for example, deals with a hypothetical trial in the Crown Court and covers how the Convention might apply in:

The Preliminary Hearing- separate trials, change of venue, exclusion of evidence, custody time limits, public interest immunity.

The Trial - applications to read a statement, change of counsel, discrimination, adverse inferences, racially biased jury, disclosure of evidence to the defence, sentencing.

together with an audio-tape, on the implications of the Human Rights Act for magistrates' courts.

These special training programmes are being offered on a one off basis with the intention that thereafter human rights matters will be subsumed into the induction training for new judges and the 'top up training' offered at three yearly intervals to serving judges. No attempt will be made to evaluate the extent to which judges apply the human rights training that they receive. There will be a follow up survey to check on magistrates.

A series of 'walkthroughs' have also been held for the courts to test the practical aspects of dealing with cases where the HRA and ECHR are invoked. These are run over a whole day and have covered the Court of Appeal (Criminal Division), Crown Court, Magistrates' Court, Youth Court, Immigration Appellate Authority, Civil and Family Courts and the handling of Devolution Issues. The 'walkthroughs' involve between 20-30 participants including judges, court staff, LCD officials, the Police, CPS lawyers as well as private and academic lawyers (including those from organisations such as Liberty and Justice). The format for the 'walkthroughs' normally involves a mock trial in which potential Convention points are argued but without any judgement or decision being given. A number of points of procedure have been identified through the 'walkthroughs' where corrective steps have been considered necessary to prepare the way for the implementation of the Human Rights Act.

For senior judges in the Court of Appeal, a series of 'teatime' seminars have been held, led by a Court of Appeal Judge and an academic lawyer, which have considered the more significant subject and procedural issues likely to arise from the HRA. Seminars have been held on the making of a Declaration of Incompatibility, Interpretation issues, Articles 6 and 14 of the Convention, Privacy, Immigration matters and who will have Standing to apply for Judicial Review.

4.4 Giving reasons for decisions in Magistrates courts

One area identified by the Lord Chancellor's Department where change was warranted in the judicial system in order to conform with the ECHR was to introduce a new requirement that magistrates should give reasons for decisions in open court. This was necessary to demonstrate that a fair hearing had been conducted by an independent and impartial tribunal as set out under the fair trial provisions of Article 6 of the Convention.

Magistrates have become accustomed to giving reasons for rulings and judgements in the Family Courts and, to a degree, when refusing bail or imposing a custodial sentence. However, in most cases the bench returns to court and announces its decision without explanation. Magistrates have been informed that this arrangement will change under the

Human Rights Act because: “Giving reasons for your decisions demonstrates that you have used a structured decision making process rather than reaching an arbitrary decision. This means that the defendant is more likely to accept the decision, and if challenged on appeal, it will be easier for you to state your case.”⁸⁴

To assist this process, magistrates are being provided with checklists on which to base ‘The Structure of a Decision’ when deciding the guilt or innocence of a defendant or making sentencing decisions. This includes taking into account any Convention issues that may have been raised during the case. At the determination of guilt stage, magistrates are advised to: “Consider whether there are any issues arising in the prosecution of the case or the course of criminal proceedings which engage a Human Right. Refer to the Convention Decision Making Card. Record separately the decisions you reached. These will form part of your reasons later.”⁸⁵ At the sentencing stage, Magistrates are advised to: “Consider whether the offender’s Rights under the European Convention have been adversely affected either in relation to the commission by him of the offence or the procedure leading to the conviction. This is a complex area of law, legal advice should always be sought.”⁸⁶

A separate ‘European Convention Decision Making Guide’ (see Annex D) is being provided to magistrates to tackle Convention points raised by the defendant or by the magistrates clerk whose job it is to ensure that the court, as a public authority, does not breach or fail to act on a breach of a Convention right. The views and advice of the clerk on such issues will be given in open court.

Magistrates’ courts are entitled to ‘read down’ legislation to make it compatible with the Convention but they have no power to make a ‘Declaration of Incompatibility’. When unable to interpret legislation compatibly with the Convention, magistrates must apply primary legislation as it stands and leave the Convention issue unresolved. In which case the issue could then be raised through the existing appeals process.

4.5 Part-time judicial appointments

Not every implication of the Human Rights Act for the justice system has been foreseen well in advance. The judgement in the case of *Starr and Chalmers v Procurator Fiscal*, on 11 November 1999, effectively ended the system of temporary sheriffs in Scotland. The court found that, because the Lord Advocate had a key role in the appointment and dismissal of temporary sheriffs in addition to being the head of the public prosecution system in Scotland, such sheriffs could not meet the requirements of ‘a fair and impartial tribunal’ as

⁸⁴ Human Rights Act 1998. Magistrate’s pre-event pack. Judicial Studies Board. P 21.

⁸⁵ Ibid. Appendix 4(a) para E.

⁸⁶ Ibid. Appendix 4(b) para C.

set out in Article 6 of the ECHR.⁸⁷ The ruling had obvious and immediate implications for part-time judicial appointments in the rest of the UK.

The Cabinet Office co-ordinated feedback from England and Wales on the response to the ruling. When the Lord Advocate decided not to appeal and the Scottish Executive contemplated the formation of a Judicial Appointments Commission, the need arose to quickly devise a separate solution for any similar problems in Northern Ireland, England and Wales (a Judicial Appointments Commission not still being on the political agenda at Westminster). The sensitivity of the issue was heightened because of the question marks being placed over the Lord Chancellor's own position of exercising judicial, executive and legislative functions as a result of the ECtHR's judgement in the case of *McGonnell v UK*. The LCD announced in April 2000 new arrangements for part-time judicial appointments to underscore the judicial independence of persons holding such appointments. These arrangements allowed for the automatic renewal of appointments with a guaranteed minimum number of sitting days and instances of dismissal being decided upon by a judge appointed by the Lord Chief Justice.⁸⁸

The LCD's attempt to speed through these changes, with little internal consultation, provoked complaints from a number of Government departments. The consultation period allowed was considered to be very short and several departments felt that they had been excluded from the process by which the proposals had been drawn up. When the blueprint was circulated, it was quickly pointed out that it was not necessarily applicable or workable for all departments' tribunals. Further, the initial blueprint omitted any mechanism to deal with judicial incompetence. The LCD was only persuaded to include such a mechanism when it was put to them that allowing incompetent part-time judges and tribunal members to remain could also constitute a potential breach of the fair trial requirements of Article 6. In the end, several departments were allowed to reserve the right to make their own arrangements on the understanding that the LCD would not be answerable for the compatibility of any such arrangements with the ECHR. Such infighting is part of the routine for Whitehall but it would not seem to bode well for its ability, from October, to respond swiftly to human rights challenges affecting more than one area of government.

It is ironic that even as the Lord Chancellor played a major part in steering passage of the Human Rights Act, the propriety of his doing so should be brought into question as a consequence of the judgement of the ECtHR in the case of *McGonnell v UK*.⁸⁹ Could the Lord

⁸⁷ See note 127 below.

⁸⁸ Lord Chancellor's Department Press Release. 12 April 2000. See LCD website.

⁸⁹ *McGonnell v UK* (8 February 2000) ECtHR.

The case concerned a decision to refuse planning permission where it was argued successfully that there was a breach of the impartiality requirements of Article 6(1) of the Convention because the Bailiff of Guernsey who presided over the planning appeal had previously presided over the passage of the development plan on which the decision to refuse the original planning application had been based.

Chancellor continue to exercise executive and judicial functions when the European Court considered: "Any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue."⁹⁰

The *McGonnell* judgement did not mandate a system of strict separation of powers between the executive and the judiciary. The Lord Chancellor, therefore, retains a measure of discretion to consider, on a case by case basis, whether his appearance as a judge might present a conflict with Article 6(1) of the Convention. He has already indicated that he will not sit "in any appeal where the government might reasonably appear to have a stake in a particular outcome".⁹¹ This would include cases under the Human Rights Act. In fact, as Richard Cornes argues:

In light of *McGonnell* there will now be very few cases where the Lord Chancellor can sit. A Lord Chancellor's connection to the executive... would give rise to an appearance of partiality in any case in which the government might be said to have an interest. Similarly, legislative involvement, whether by presiding, speaking or voting, would also be likely to give rise to an apparent lack of impartiality. The cases where the Lord Chancellors may perhaps still be able to sit may be private controversies ... not involving any government interest or application of any statute the passage over which the Lord Chancellor has presided.⁹²

4.6 Conclusion

Whitehall is not a monolith and it would be wrong to assume that all parts are equally content and seized of the purpose of preparing the judiciary. The Lord Chancellor and his department have set an example in how to promote a well-informed and effective human rights culture through the training programme for judges, magistrates and tribunals. Other parts of Whitehall, which are more focussed on the avoidance of court cases and adverse judgements, are less enthusiastic about the training of judges which they fear has been given over to those defence lawyers and human rights experts who will make most use of the Act against the Government. There is some unease that judges are being taken along a path where the Government's broad purpose and philosophy of the HRA balancing rights and responsibilities is being lost amid a welter of detail on the meaning of individual Articles and the significance of particular Strasbourg cases. This school of thought does not want to see judges slavishly applying the wisdom of "*A v Z*" as decided in Strasbourg but to see a blending of the common law and the Convention in a uniquely British approach.

⁹⁰ Ibid, para 55.

⁹¹ House of Lords debates, 17 February 1999, Col 736.

It is too much to expect, at this time, that civil servants should welcome successful challenges in the courts. While objectively this means that a 'wrong has been righted', the inevitable tendency is still to view this as a 'defeat' by whichever department and person is dealing with that area of government activity. However, there are also some areas where a successful challenge may be welcomed as the only means to unlock complex social issues where all policy options are equally unappealing in political terms. In such instances, departments will be happy for the courts to 'carry the can'. It remains to be seen, however, how far judges are prepared to delve into such issues or whether they will be left untouched within the 'discretionary area of judgement' that the courts are likely to allow for certain actions of the elected government.

5. Preparations in Government Departments for the Human Rights Act

At the end of 1998, the Home Office asked each department:

- to review its legislation, policies and procedures to ensure compliance with Convention rights.
- to prepare a detailed action plan for the implementation of the Human Rights Act.
- to ensure that new policies and legislative proposals would comply with Convention rights.
- to develop awareness and train staff on the implications of the Act.
- to identify the public authorities and hybrid bodies for which the department was responsible and to advise them on the implications of the Act.

No extra resources were made available to departments for completing these tasks. Most responded by giving responsibility to an existing policy or strategy unit within the department. Virtually all departments established an action plan and most set up cross-departmental groups to steer implementation of the Act. Ministerial involvement has been rare. In many departments, responsibility for co-ordinating action on the tasks identified by the Home Office rests with a single official. It is extremely rare for any of these officials to have prior knowledge of human rights or the workings of the ECHR. This is not an unusual state of affairs when picking up a new initiative within the civil service. The Home Office has attempted to fill this knowledge deficit through the preparation and distribution of well-written guidance material on the import of the ECHR and Human Rights Act. However, the knowledge base that has been created in most departments is narrowly focused and leaches rapidly as you step away from the centre.

Surprisingly, there is no 'user group' to share knowledge and experience among the departmental officials designated to deal with the HRA. Such groups exist at the policy level and among the lawyers but there is no network to support the administrators designated to see through the implementation of the Act in individual departments. This makes it more

⁹² Richard Cornes - 'A Shed in Guernsey and the United Kingdom's Top Judges - *McGonnell v United Kingdom, the Lord Chancellor and the Law Lords*'. Public Law. Summer 2000. P 175.

difficult for these administrators to share best practice and means that the centre is short of feedback on problems that may be common to a number of departments. Indeed, there is a tendency among officials at the centre to assume that because they have a good grasp of the issues, and have covered these through clear guidance materials, then it stands to follow that the same level of understanding is being achieved in departments. But, from the perspective of many departmental administrators, they are working in isolation, are inadequately supported and resourced, and in need of a support group to share best practice and to vent their frustrations and complaints.

The extent to which departments are approaching the Human Rights Act on an individual basis is noticeable in the attempts to establish their own rationale or culture for the implementation of the Act. In almost all cases this has been done through the prism of a department's existing policies and priorities onto which a human rights dimension is then grafted. This means that for some departments human rights have become closely associated with other initiatives such as open government, data protection and freedom of information. In DETR, local government and the police, there is a strong emphasis combining human rights with best value initiatives on the delivery of services. Other departments have linked human rights with being more customer-orientated (ie. prepared to look at what they do from the 'other end of the telescope') or even as another form of entitlement or benefit for their customers.

It is difficult to know, at this stage, whether to view this somewhat haphazard process:

- as a watering down of the potential of the Human Rights Act to put human rights considerations at the centre of policy and decision-making in Government; or
- as a practical and pragmatic vindication of the Home Office's 'drip, drip' approach to mainstreaming human rights within the Government.

It is an aspect that will bear watching in the months ahead. It would be wrong, however, to try to spin straws into gold in the search for evidence of an emerging human rights culture within the Government. For uppermost in the minds of all departments is the task of avoiding or restricting the likelihood of successful challenges on Convention points. Risk management lies at the heart of every action plan, with the lawyer's hand on the helm to steer the least dangerous course through the iceberg-ridden waters and hazardous weather patterns of the Convention. And, to continue the analogy, only if exceptionally stormy weather is forecast or the largest iceberg seen on the horizon will the ship-owner countenance a change in the ship's course or itinerary or allow a highly valued cargo to be dumped overboard. Departments are not disposed, therefore, to make changes on account of the ECHR and Human Rights Act unless there is very good reason or no alternative but to do so. This is because while the department's centre provides human rights advice and guidance, actual decisions are taken by the policy and business managers who will inevitably put a higher priority on their objectives than on the requirements of the HRA.

The implementation process initiated through the Permanent Secretary to the Home Office's letter of 27 November 1998 established four main areas on which progress was to be reported at six-monthly intervals by departments:

- management processes,
- review of legislation and procedures,
- staff training, and
- contacts with public authorities.⁹³

Progress under these headings is considered below.

5.1 Management processes

The first progress report released in May 1999, recorded that most departments had nominated an official to act as the contact point for the implementation of the Human Rights Act. Some departments, such as the Lord Chancellor's Department, had gone further to establish a management structure at a senior level to oversee the introduction of the Act. Other departments were urged by the Home Office to follow suit:

Preparing for implementation of the Human Rights Act is a major task with a number of different elements. As such, there is a strong case for Departments to establish a dedicated process at the senior level for managing this programme of work. This could include establishing a clear management structure to direct preparations and review progress, and producing an action plan with a timetable of necessary activities and milestones. Some departments have followed this route. However, several of the responses received by the Home Office did not indicate that a management structure had been put in place, or an action plan produced. Departments that have not set up structures such as these may wish to consider the advantages of adopting them.⁹⁴

The Department of Social Security was cited as one example of good practice for establishing a steering group chaired by the Department Solicitor and comprising representatives from the various DSS business units as well as a representative from the DfEE. The group reported to the DSS Departmental Board and DSS Ministers.

By the second review report in November 1999, most departments had established suitable structures and action plans with only a handful of smaller organisations judging that such arrangements were unnecessary. For example, in the Department of Health, a Human Rights Reference Group had been set up to co-ordinate implementation, a Director's Steering Group had been established in the Home Office and a similar group in the Ministry of Defence. The Home Office concluded with some comfort that "the overall picture is that most Departments are now taking a thorough and systematic approach to preparations co-

⁹³ Letter from David Omand to Sir Richard Wilson. 26 May 1999.

⁹⁴ Ibid, para 4.

ordinated at a senior level.”⁹⁵ Concern remained, however, over the importance “for Departments to work collectively [original emphasis] when addressing some Convention issues. Flexible management structures can help here - Departments should consider setting up ad hoc groups with stakeholders from other Departments to look at cross-cutting Convention issues.”⁹⁶

By the third review report in June 2000, the Home Office was able to record that “Some departments are linking their Human Rights Act implementation plans directly into their overall Departmental planning process. Plans are also being used to identify linkages with related work underway in other Departments.”⁹⁷ For example, close cooperation was being maintained between the DfEE, DSS and Inland Revenue and the National Insurance Contributions Office in the preparation of those of their front line staff serving the public from the same offices.

5.2 The Review of Legislation and Procedures

By the time of the first review report in May 1999, most departments had completed an initial assessment of their legislation for compatibility with the Convention. Issues identified were said to run across the full range of Government business. Not surprisingly, the Convention rights most frequently cited where issues might arise in respect of department’s policies, procedures and legislation were Article 6 (fair trial), Article 8 (respect for private life) and Article 1 of Protocol 1 (right to peaceful enjoyment of property). The Department of Health and the Department of Culture, Media and Sport were commended for their risk management tools and processes. However, it would seem that, overall, the returns from departments revealed a wide variety of practice in the manner in which the reviews were being conducted in individual departments. In some departments, for example, no input had been sought from legal advisers. In order to ensure consistency, therefore, in a step not documented as part of the review process, the Home Office encouraged adoption of the ‘traffic light’ system described in section one above. Departments were also encouraged not to focus solely on the review of legislation: it was “equally important to ensure that day to day procedures and working practices are compatible.”⁹⁸

The review reports made available in the public domain do not disclose specific areas where departments have identified Convention issues. The Home Office has not attempted to collate all these issues (in part because of the concern that if it held the information it might

⁹⁵Letter from David Omand to Sir Richard Wilson dated 29 November 1999. Annex A, para 6.

⁹⁶ Ibid, para 7.

⁹⁷ Letter from David Omand to Sir Richard Wilson. June 2000. Annex A, para 4.

⁹⁸ Omand letter dated 26 May 1999. Annex A, para 8.

then come under pressure to make it public).⁹⁹ However, 'red light' issues identified through the traffic light process have, as we have seen, been used to shortlist areas for intensive scrutiny by the two lawyers groups and also served as the benchmark by which the Cabinet Office sought reassurance, in April 2000, on departments' readiness for the commencement of the Act.

The traffic light process led departments to the next stage of identifying options for addressing Convention points. In November 1999, departments were advised that:

It is essential that Departments complete their reviews of legislation and procedure as soon as possible. Progress should now be made with assessment of options for addressing any Convention points. This will need a systematic approach with prioritisation of the issues likely to be necessary. Convention issues with implications for more than one public authority should be discussed with those concerned before decisions are made on their resolution.¹⁰⁰

By the third review report in June 2000, the Home Office felt sufficiently encouraged to comment that:

there seems to be growing confidence in Departments about handling implementation.

Considerable progress has been made with reviews of legislation and procedures. The reports show that most initial assessments have now been completed and departments are looking at options for addressing Convention issues. But departments generally recognise that the compatibility of legislation and procedures cannot be resolved in a one-off review. A continuous process of review will be necessary as new issues emerge and the case law develops after 2 October.¹⁰¹

The generally comforting ruling of the House of Lords in the *Kebilene* case and the positive picture emerging from the Cabinet Office's April assessment might also be cited as factors behind the more upbeat note being sounded by the Home Office as October approaches.

5.3 Training

The provision of training has been left largely to departments themselves. Unlike for the judiciary, there is no additional budget for training civil servants and no central training programme relating to the Human Rights Act. Instead, the Home Office advised departments:

⁹⁹ In Hong Kong, laws considered incompatible with the Hong Kong Bill of Rights Ordinance (incorporating the ICCPR) were publicly identified. This proved to be something of a boon to lawyers, legislators and the public and a heavy rod applied to the back of the Government.

¹⁰⁰ Omand letter dated 29 November 1999. Annex A, para 10.

¹⁰¹ Omand letter dated June 2000, paras 3&4.

The centre is offering some basic material and training in the Human Rights Act for administrators and arrangements are well advanced for members of the Government Legal Service. But for the most part, Departments themselves will need to take responsibility for training their own staff... While it will inevitably take some time to gain an understanding of a Department's training needs and develop a programme to meet them, we can hardly overemphasise the need to make progress in this area.¹⁰²

This posed no great handicap for organisations such as the Lord Chancellor's Department and the Crown Prosecution Service who were well aware of the implications of the Human Rights Act and had allocated the necessary resources to prepare themselves for the Act. From other departments' returns, however, it is evident that it has been a difficult and time consuming process to get training programmes up and running. These departments identified two different training needs - general awareness training for all staff and more detailed training for those whose work was most likely to involve Convention issues. However, it took time to develop in-house expertise and to train up the trainers needed to conduct training for every area of a large department. Some departments took the bold step of inviting outside experts from Human Rights NGOs or the Bar to kick start their training programmes, but such avenues were rapidly over-committed and unable to meet the sustained level of demand. As October approaches, departments have tended to turn back on their own resources and begun to implement their own training plans developed over the last 18 months. As familiarity with the Human Rights Act increases in departments, there is also not the same anxiety about the need to establish and maintain special human rights training programmes. The trend, therefore, is to incorporate training on the ECHR and HRA into the standard training courses and induction courses run by departments.

Civil Service College: By October 2000, the Civil Service College will have held some 14 two-day courses on the Human Rights Act. Demand is high and it is considered unusual to offer four sessions a year for a new course. The twenty participants for each session come from all levels of Government but tend to be those tasked with providing in-house training or commissioning such training on the Human Rights Act in their departments. Several departmental administrators have commented that, at £600 a session, the Civil Service College course was too expensive to use as general training on the Act for officials in their departments.

The first day of the course offers a general introduction to human rights, the background to the Convention, its content, and the thought processes behind its interpretation and use in Strasbourg. Much of this day is devoted to group work identifying potential Convention points through case studies. The second day covers the functions of the Human Rights Act, the preparations that need to be made for the Act and its particular impact in the context of

¹⁰² Omand letter dated 26 May 1999, para 10.

judicial reviews. Prominent NGO lawyers are invited to speak on this day on the possible challenges and flaws under the Act.

The overall message is intended to be reassuring and to convince participants that the Human Rights Act is an important development but that it is not a monster and that civil servants should not become 'rabbits frozen in the headlights' if confronted with a Convention issue or challenge. Feedback though the courses reveals a high degree of apprehension among civil servants about the consequences of the Act for their work, as well as a degree of cynicism that this is another burden to be borne with no extra resources provided. Many come to courses unaware about the concepts of proportionality and the limitations and balancing allowed in respect of non-absolute rights. Not very surprisingly, younger civil servants and those in the 'fast stream' are found to be more receptive to the operation of a rights based culture than their older and more senior colleagues.

Apart from the two-day course, the Human Rights Act is also covered in more general senior management and law courses offered by the Civil Service College. When the dedicated courses end, the Act will continue to be covered in these general courses. The College also offers half day on-site courses particularly for those heavily involved in the preparations for the Act or for those smaller organisations that do not have their own training units.¹⁰³

The quality of training offered through the Civil Service College is high. But only some 300 civil servants will have attended its two-day courses: just one-tenth of the number of judges and tribunal chairmen receiving training through the Judicial Studies Board. By October, it seems that most departments should have achieved at least a basic level of awareness among their staff concerning the Human Rights Act and ECHR. This knowledge will not be deeply ingrained and, in most cases, it has not been acquired in time for these people to go on to offer the guidance and assistance which is expected of departments in preparing their public authorities and hybrid bodies for the commencement of the Act.

5.4 Public Authorities

If there is any area in which there is real cause for concern and alarm over departments' preparations for the Human Rights Act, then it is in the limited extent to which they are supporting that same process in their public authorities and hybrid bodies. Research conducted by the Institute for Public Policy Research in early 2000, revealed that: "Most of the organisations with public functions that we have contacted so far are not ready for the Human Rights Act. They either haven't heard of it or think that it does not apply to them."¹⁰⁴

¹⁰³ On-site courses have been held for the Intervention Board (6 times), Department of Health (1), DCMS (4), War Pensions Agency (2), DfEE (1), Cabinet Office (3), Office of the Rail Regulator (6) and DTI (1).

¹⁰⁴ IPPR press release dated 27 March 2000.

There have been three fundamental problems for departments in reaching out to their public authorities and hybrid bodies. Firstly, there is no agreed definition of which public authorities and private bodies with public functions will be subject to the Human Rights Act. Secondly, it has taken time for departments to complete their own preparations in order to be in a position to offer assistance. Lastly, not all departments are in the habit of maintaining contacts with such bodies.

The first review report in May 1999, recorded that only 200 subsidiary public authorities had been identified by departments. The Home Office noted: "Some Departmental responses made no reference to Public Authorities, and only a few departments reported that they had communicated with their public authorities about the Act."¹⁰⁵ By November, most departments could claim to be in contact with their public authorities about the Human Rights Act. Core guidance material had also been issued for these authorities. But the identification of private bodies with public functions continued to lag behind and became the subject of increasing concern among the NGOs represented in the Home Office Human Rights Task Force.¹⁰⁶ This concern was conveyed strongly in the next Home Office letter to departments: "These organisations are in the front line of service delivery to the public and it is important they understand the implications of the Human Rights Act for them. Departments should identify those hybrid bodies that operate under their legislation or policy and contact them about the Act."¹⁰⁷

One positive aspect has been that some hybrid bodies have taken it upon themselves to become acquainted with the purposes and consequences of the Human Rights Act without waiting for guidance from their 'parent' departments. For some there is a strong incentive to demonstrate their human rights credentials if only on the assumption that this may become a prerequisite for the award of government contracts.

It is not feasible to review in detail the preparations being made for the Human Rights Act in every Government department. Instead, below we consider and compare the approaches in two key disciplined services and conclude with a brief analysis of some of the distinctive features of the preparations in other departments.

5.5 Case study: The Police and Customs and Excise

The Human Rights Act poses major implications for the police service and Customs and Excise Department in the exercise of their law enforcement roles. Both bodies have a myriad of 'sticky' areas, to use the police term, which are liable to attract challenges under the Convention. They also face the considerable task of inculcating the appropriate awareness,

¹⁰⁵ Omand letter dated 26 May 1999, para12.

¹⁰⁶ Human Rights Task Force. Para5.1 of minutes of meeting held on 30 March 2000.

¹⁰⁷ Omand letter dated June 2000. Annex A, para 12.

knowledge and response in respect of the Act among some 24,000 Customs and Excise staff and over 154,000 police officers and 55,000 civilian staff spread across the country.

Surprisingly, there has been little or no communication between the two bodies in developing their approaches for implementing the Act. Interesting similarities and differences of approach are apparent. The police response to the Human Rights Act is being steered by the Association of Chief Police Officers (ACPO). The Association provides national policy guidance to some 45 police forces in England, Wales and Northern Ireland but does not have executive or command functions over those forces. Shortly after the enactment of the Human Rights Act, the Association set up a Steering Group supported by a Human Rights Sub-committee (the latter chaired by a Deputy Chief Constable who also sits on the Home Office Human Rights Task Force) to oversee implementation of the Act. Close liaison is maintained between these bodies and the Home Office Cross Departmental Review Team and the Crown Prosecution Service. Four officers (divided between London and a human rights help desk at Crewe) are dedicated to work on implementation of the Act. Exceptionally, among the public authorities under review, the police have been able to draw on one or two officers with previous knowledge and experience of developing rights based approaches to police work (as part of the Council of Europe teams advising the police forces in the new democracies in Eastern Europe).

In the Customs and Excise Department, responsibility for the Human Rights Act rests with the Corporate Development Group (subject to an ongoing restructuring exercise). The department is one of the few to have combined its data protection, human rights and freedom of information functions and to have a clear sense that these areas should not develop in separate policy 'silos'. A side benefit of this approach is that knowledge is retained within a wider group of officials who can be redeployed between the three areas as the need arises. At present, two officials (neither with prior knowledge of human rights issues) deal specifically with implementation of the Human Rights Act.

Knowledge brought to the subject has a clear bearing on the philosophical approach adopted by the police. The police service is one of a handful of public authorities to place a very strong emphasis on establishing a clearly defined human rights culture at the centre of its approach to the Human Rights Act. It is pursuing a multi-faceted culture embracing and locking in human rights, freedom of information and best value with traditional 'policing by consent' methods and strategies. In the words of the Chairman of the ACPO Human Rights Sub-committee:

At the heart of the Human Rights Act lies the challenge of embedding a more defined human rights culture within the police service. The importance of human rights and 'policing by consent' has traditionally influenced British policing methods and strategies. We must be prepared to respond flexibly and effectively to ensure that both the spirit and the letter of the law are met, not least because of

the devastating impact that even isolated acts of wrongdoing can have on our reputation among our stakeholders.¹⁰⁸

However, police forces are not, by nature, libertarian organisations. Those steering implementation of the Human Rights Act do not disguise their belief that it will take many years to embed a culture of respect for individual human rights within the Police Service. Problems of denial and an unwillingness to embrace human rights are evident at many levels. In particular, it is difficult to prepare police officers for the major shift from a culture where police activities are permissible unless prevented by law to one where there should be a clear legal basis for what is done. Not without some reason, therefore, have the ACPO team characterised human rights as the 'disinfectant of the police service'. At the same time, there is also an underlying confidence that the police service is capable of embracing such change (in the same way that it adjusted to the major changes introduced by the Police and Criminal Evidence Act) or, at worst, will be jolted into action by the first successful challenges under the Act.

The Customs and Excise Department has not put the same emphasis as the police on establishing a human rights culture in the department. Human rights are seen as part of the new 'customer focus' that the department is seeking to establish. As part of this organisational culture, there is a broad desire to inculcate an awareness and respect for human rights among all staff. Those promoting the Act are encouraged by the positive response so far, particularly among those working in sensitive investigatory roles who are faced with the greatest changes. However, knowledge of human rights could not be said to run deep within the department and its approach is somewhat narrowly focussed towards meeting the strict letter of the ECHR and Human Rights Act.

Similarities and differences are also evident in the arrangements for implementing the Act. Each body has established an action plan which puts the prime responsibility for coming to terms with the Act on the various policy and subject heads with a degree of support from the centre. In the Customs and Excise Department, it was agreed at Board level that the respective Commissioners and Directors for each business area would be responsible for human rights issues in their areas. At the working level, human rights co-ordinators were appointed for each of the key subject areas. For the police, the central direction comes from the ACPO Steering Group and Human Rights Sub-committee but the practical responsibility, for national policy matters, rests on the various policy sections within the Association. Separately, each police force has also been strongly encouraged to establish a Human Rights Strategic Management Board and dedicated Human Rights Project Managers ('force champions') to deal with issues affecting individual forces.

¹⁰⁸ Foreword to ACPO Briefing paper 'Service Wide Impact Assessment'.

The police have embarked on what is probably the most systematic and exhaustive exercise in Government to audit compliance with the ECHR and Human Rights Act (see Annex E). This is driven not only by the need to prepare for the onset of the Human Rights Act but also to take on board the proposed freedom of information legislation and to achieve best value in delivering police services. There are three tiers to the process - legislation reviews (conducted by the Home Office), audits of service-wide policies and procedures (in the Human Rights Sub-committee) and Force audits of local policies, procedures and performance.

As a first step, a 'Service Wide Impact Assessment' was completed by the policyholders within ACPO. Subsequently, an 'audit toolkit' was made available to all police forces (see www.cheshire.police.uk/rights). The toolkit consisted of three checklists. The first set out the key questions for Chief Officers to consider in assessing their force's level of preparedness for dealing with the new Act. It covered the need to establish a management structure to deal with human rights issues (Human Rights Strategic Management Board) as well as the need to raise awareness through training and the audit process. The second checklist detailed the core principles underpinning the ECHR and Human Rights Act (non-discrimination, legitimate aims, proportionality etc) which should guide the audit process. The final checklist dealt with the scrutiny of individual business and subject areas to ensure that appropriate mechanisms existed covering record keeping, decision-making and appeal processes etc. Included with the toolkit were templates for completing an Impact Assessment Report, Action and Contingency Plan, Submission sheets and Amendment history. Guidance was also given on the purpose of the Human Rights Act, the Articles of the ECHR and relevant Strasbourg case law (illustrated through a case study).

Information from individual police forces, using the templates, is fed back to the ACPO human rights team on a bi-monthly basis. The need for action in each area audited is graded on a four point scale - Critical, High, Medium, Low. The ACPO team quality assures the results and keeps in view follow up action that may be required particularly in terms of referrals to the Home Office and other policy sections within ACPO.

By comparison, the Customs and Excise Department action plan does not place the same reliance on checklists and templates. The department has followed the traffic light approach employed by most of Government to identify areas that could be vulnerable to challenge after October. This task is vested in the Human Rights Co-ordinators for each business area assisted by the Department's legal advisers. Central guidance is provided through a dedicated human rights intranet site which offers a general guide to the Human Rights Act, an analysis of how Convention Articles might impact on the work of the department together with a feedback page. In addition, each Human Rights Co-ordinator is responsible for posting guidance notes on the site covering the more sensitive aspects of their work

(examples being covert copying of documents, drive pasts and the use of detector dogs). An informal contact network is maintained between the co-ordinators.

The review processes in the two bodies are coming to different conclusions. The Police's 'Service Wide Impact Assessment' identified some 40 potential 'hotspots' (strip searches, hearsay evidence, police negligence etc) where challenges were to be expected. When the first ten of these 'hotspots' were audited, 1,685 compliance issues were identified for referral (558 to the Home Office in relation to legislation, 654 for ACPO committees in relation to policy issues and 473 for legal advice). Of those areas having the potential to infringe Convention rights, the audit's examination of 434 elements revealed an apparent compliance level of 60 per cent, a partial compliance level of 5 per cent and an apparent non-compliance level of 35 per cent. Understandably, the conclusion was reached that the police service "cannot be complacent in addressing human rights issues" and that it would need "actively to address the issue of policy compliance".¹⁰⁹ By comparison, in the Customs and Excise Department there is a degree of confidence that while challenges can be expected in such sensitive areas as covert surveillance, anti-smuggling activities and VAT investigations, none of the department's activities remain in the 'red' category (once the passage of the Regulation of Investigatory Powers Bill has put the present codes of practice covering covert surveillance on a statutory basis).

While it may be that the police service have more Convention issues to address (and this may be one of the pointers from Scotland) the different conclusions being drawn would seem to be as much a consequence of the manner in which the reviews have been conducted as an actual reflection of the susceptibility to challenge of the activities of the two bodies. The thoroughness of the review processes would not appear to be an issue, but it is relevant to note that the review process in the Customs and Excise Department has been conducted entirely in-house and that it has not been the subject of 'headline cases' and sustained media and NGO scrutiny. Conversely, the police have already been sensitised to human rights issues by the chastening experience of the Lawrence Inquiry. They have been able to draw on in-house knowledge which goes far beyond a reading of the Convention case law and, significantly, they have readily sought the views and advice of outside organisations including Justice, Liberty and the British Institute of Human Rights. Does this mean that the closed environment in the Customs and Excise Department has resulted in a narrow reading of the ECHR's potential impact? Or has the police's perspective been unduly swayed (as inferred by some officials in Whitehall) by the arguments of the human rights community? This will become more clear after 2 October.

¹⁰⁹ ACPO briefing paper - 'Service Wide Impact Assessment'.

5.6 Conclusion

As a first point, it must be said that the openness of the preparation process for departments instigated by the Home Office and the extent to which outside input has been brought into the exercise through the Human Rights Task Force is to be commended. And, even allowing for the natural tendency of departments to portray what they are doing in the best possible light, the latest returns submitted by departments to the Home Office reveal a hive of activity in relation to the Human Rights Act as October approaches.¹¹⁰ Virtually every department will have completed auditing their policies, procedures and legislation by October and will have in place some form of mechanism to continue to review and update such activities as domestic jurisprudence develops under the ECHR and HRA. While the audits have resulted in changes to conform to the Convention, more commonplace has been the preparation and marshalling of arguments to defend against challenges. To a limited extent, a degree of 'phoney war' complacency has set in amongst departments during the long lead in period to the commencement of the Act as confidence builds in their 'defence plans'. But the detonation of 'buried Convention mines' in Scotland has delivered periodic wake up calls and largely maintained a sense of purpose and urgency for the review exercise.

Not surprisingly, departmental preparations are strongly dictated by the desire to limit the prospects of successful challenges under the ECHR and HRA and, as importantly, to avoid any adverse media coverage. As a result, the Human Rights Act is not viewed as a positive development by departments - the avoidance of challenges or the successful defence of a challenge will not gain the same media coverage as a 'defeat' for the Government. And Whitehall is many miles away from seeing a 'defeat' for the Government as a positive development which advances the protection of human rights in the UK. A single comprehensive 'human rights culture' within Whitehall has not yet made it off the drawing board.

The 'cold start' made by most departments in preparing for the Human Rights Act has meant that only late in the day are they truly coming to grips with all that is entailed in preparing for the Act. This means that while most will have their 'own houses in order' by October, there has been little time or capacity to go on to support preparations in their public authorities and other bodies with public functions. The Department of Health, for example, did not issue its first circular on the Act for its health authorities and NHS trusts until 20 July 2000¹¹¹. If this is truly the starting point for these bodies to prepare for the Act they will have little more than two months in which to achieve what has taken Whitehall departments over eighteen months. Only in Autumn 2000, for example, will HRA issues be reflected in the business planning cycle of the Department of Health's public authorities.

¹¹⁰ Human Rights Task Force. Paper HRTF(00) 11.

¹¹¹ Health Service Circular. HSC 2000/025. 20 July 2000.

Other departments have also had their problems. In 1999, the DfEE was given a rough ride by the Human Rights Task Force over its apparent failure to identify Convention issues which might arise in respect of school exclusion and admission policies etc. But the department responded well to the points made and has since been able to report considerable progress in raising awareness through the distribution of guidance and FAQ on ECHR and HRA matters affecting schools. On a different track, the DSS has established a comprehensive audit trail for decisions that might have implications under the Convention. Senior managers will have to 'sign off' that the implications under the Convention have been considered and their views will be archived. While all departments have been made aware of the need to give and keep reasons for decisions against the possibility of challenge under the Human Rights Act, only the DSS has seen the need to record which official made the decision (for reasons mainly associated with the problems experienced by the department over changes to pension entitlements).

October will reveal the effectiveness of departments' preparations. That there is some unease over this may be judged by the fact that the Home Office took the unusual step of consulting all departments prior to signing, in July 2000, the 'Confirming Order' for the Human Rights Act. This was done to focus minds on the reality of the commencement of the Act in October. That such a step was considered necessary, together with the Cabinet Office's earlier survey of vulnerable areas, would seem to disclose either a degree of nervousness or extreme caution at the centre over the extent to which departments are ready for the Act.

6. Devolution and human rights

This section examines the relationship between the incorporation of the ECHR and the steps taken to establish and operate new devolved systems of government for Scotland, Wales and Northern Ireland. There is a clear intent in Whitehall that Convention rights should help cement the Union. Scotland, Wales and Northern Ireland will not be able to legislate in ways which are incompatible with the Convention and to put the UK in default of its international obligations under the ECHR. The devolved bodies are bound by Convention rights twice - through the Human Rights Act and also through the devolution legislation. In Northern Ireland, Section 6 of the Northern Ireland Act invalidates any provision of the Assembly if it is incompatible with a Convention right. Section 24 of the Act makes it *ultra vires* for the Northern Ireland Assembly, a Minister or department to make subordinate legislation which is incompatible with any Convention right. The Northern Ireland Act is also more far-reaching than the equivalent legislation in the rest of the UK by making it *ultra vires* for devolved bodies in the province to discriminate on the grounds of religious belief or political opinion and by providing for the establishment of a Human Rights Commission to 'keep under review the adequacy and effectiveness in Northern Ireland of law and practice

relating to the protection of human rights¹¹². In Scotland, Section 29 of the Scotland Act provides that an Act of the Scottish Parliament may not include provisions that are incompatible with Convention rights, as they are defined in the Human Rights Act. Section 57(2) provides that a member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, which would be incompatible with Convention rights. In Wales, Section 102 of the Government of Wales Act details similar restrictions on the more limited law-making powers (to make secondary legislation only) of the Welsh Assembly. However, the Assembly will not have acted *ultra vires* in making incompatible secondary legislation if this is required by UK primary legislation.

Acting incompatibly with Convention rights or EC law will raise a 'devolution issue'. Such issues can be referred to the Judicial Committee of the Privy Council through appeal or by referral from a lower court or the House of Lords. Cases may also be brought directly by the UK Law Officers, the Lord Advocate in Scotland, the First Minister and Deputy First Minister of the Northern Ireland Executive and the National Assembly for Wales (particularly for new legislation).

In fact, the very first Act of the Scottish Parliament, the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, was challenged as being contrary to Article 5 of the Convention. However, the First Division of the Court of Session held, on 16 June 2000, that the arrangements made for the detention and discharge of patients fell within the permitted limitations to Article 5.¹¹³

For the purposes of the Human Rights Act, the legislative acts of all three devolved bodies are treated as subordinate legislation and can be quashed by a higher court if declared incompatible with Convention rights. The different timeframes for establishing the new devolved bodies¹¹⁴ and implementing the Human Rights Act have meant that the Convention has been applied in a piecemeal manner through the devolution legislation in advance of the Human Rights Act. The result is that:

whether by accident or by design, the Celtic fringe has thus become the trial ground for a radically new government policy. The staggered implementation of the Human Rights Act in the United Kingdom effectively allows the effects and implications of direct reliance on human rights considerations to be assessed within the smaller jurisdictions so that proper preparation may be made before the policy becomes law within the territorial jurisdiction of the English courts.¹¹⁵

¹¹² See sections 24(1)(c), 68 and 69(1) of the Northern Ireland Act.

¹¹³ *A v The Scottish Ministers*, 2000 GWD 22-864.

¹¹⁴ The Scottish Executive Law Officers became subject to the Convention when joining the executive on 20 May 1999. The Scotland Act came into force on 1 July 1999.

¹¹⁵ Aidan O'Neill QC- Devolution Issues and Human Rights. Seminar paper delivered on 17 May 2000 at University College London.

There is a degree of resentment, particularly in Scotland (where memories of the poll tax are long lived), at being put in the position of being a guinea pig for full implementation of the Human Rights Act. However, it is difficult to discern any deliberate design on the part of Whitehall behind the setting of different implementation dates for the devolution legislation and the Human Rights Act. Rather, it had to cope with two linked initiatives running on different tracks and to different timetables. For political reasons, it would have been unthinkable to hold up the formation of the new devolved bodies until October 2000 in order to fall into line with the preparation period for the Human Rights Act. Equally, the devolved bodies could not be allowed to function free of the Convention without the potential for real problems both in London and Strasbourg should they embark on any course of action that would put the UK in breach of its obligations under the ECHR.

But if there was no design, Whitehall has not been slow to seize on the benefits of being able to watch developments, particularly in Scotland, as a guide and indicator of what the Human Rights Act may bring for all of the UK after October. At the same time, however, there would also seem to be a growing appreciation in Whitehall that there is a downside to having issues that will potentially affect the whole country first addressed in areas outside its immediate control. It is interesting to note, for example, that the temporary sheriffs ruling in Scotland prompted moves to set up a Judicial Appointments Commission in Scotland something which has been taken off the political agenda in London. It was the Lord Advocate in Scotland who ultimately decided not to appeal against the ruling to the Privy Council and the Scottish Executive that decided that the appropriate remedial action was to establish an independent appointments commission. As a consequence, the Lord Chancellor's Department was catapulted into a review of the equivalent arrangements for part-time judicial appointments in England and Wales. The case for a similar appointments commission for England and Wales drew strength from the example of Scotland.

Much about the future operation and working relationship between the Human Rights Act and the devolution legislation remains unclear. For example, after 2 October, it is not automatically clear under which statute a court should be acting in considering a claim that a provision of devolved legislation contravenes a Convention right. The assumption would be that the actions of devolved bodies will continue to be treated as devolution issues. This allows for a more complex system of checks, balances and filtering mechanisms than found in the Human Rights Act. Aidan O'Neill notes, however, that there is nothing to stop this system from being "over-ridden in the case where it is alleged in the course of any legal proceedings that a provision of devolved legislation is incompatible with the rights incorporated by the Human Rights Act."¹⁶ To retain the sanctity and effect of the devolution legislation, he considers, therefore, that it will be necessary for Westminster or the courts to stipulate that "for the purposes of Section 7(1)(b) of the Human Rights Act, the only reliance that can in law be made on Convention rights in relation to provisions of devolved

legislation is in the context of the matter raising a 'devolution issue' for the purposes of the Convention."¹¹⁷

There are other areas of potential confusion. The devolved bodies are bound in equally firm fashion by the Convention and Community law but which is the superior should they conflict? There is also the potential for confusion arising from the existence of a 'double apex' whereby appeals under the Human Rights Act will be directed towards the Appellate Committee of the House of Lords and those under devolution legislation will be taken by the Judicial Committee of the Privy Council. However, given that it will be the same pool of judges considering such cases, the likelihood of a marked deviation in judgements would seem remote. Lastly, while the devolved bodies and their executives may not legislate and act in ways which are incompatible with the ECHR there is no such restriction in England (and to a lesser degree in Wales) because of the non-binding nature of any 'declaration of incompatibility' made by the courts. There is the possibility, therefore, that legal provisions may be introduced or retained in England and Wales that could not be applied in the rest of the UK.

These are issues which apply to any of the devolved administrations. But it is their implications for Scotland that have drawn most attention. With the National Assembly for Wales having fewer legislative powers and having made little use of them and the Northern Ireland Executive starting later and then being suspended for some four months, it has been left to Scotland to set the pace.

6.1 Northern Ireland's experience in applying the ECHR

The ECHR came into effect in Northern Ireland through the Northern Ireland Act on 2 December 1999. Its application was suspended on 11 February and reinstated with the Northern Ireland Executive in May 2000. The political uncertainties over the form and instruments of government in Northern Ireland have complicated preparations for the Human Rights Act.

At one point, it seemed likely that the Act would be given earlier limited application in respect of the work of the Parades Commission but this idea was not well-received and eventually abandoned. The Northern Ireland Human Rights Commission, in particular, objected to the lack of consultation on the proposal.

The Northern Ireland Office has responsibility for non-devolved matters in Northern Ireland, including political development, policing and security, prisons, criminal justice and public expenditure. Its Rights Division is co-ordinating and monitoring human rights developments in the non-devolved areas and has established an inter-departmental working

¹¹⁶ Ibid.

¹¹⁷ Ibid.

group (with representatives from the police, army, courts and probation service) to oversee preparations for the Human Rights Act. Circulars, guidance notes and seminars are being provided, especially for the Northern Ireland Prison Service.

In the Office of the First Minister and Deputy First Minister, the Human Rights Directorate deals with human rights matters concerning the ten Northern Ireland departments and public authorities with devolved responsibilities. It has produced its own versions of the Guidance for Departments and Public Authorities available in London. A human rights website will be launched in the Autumn.

In a departure from Whitehall practice, the Departmental Solicitor's Office in Northern Ireland has prepared a checklist for assessing legislation, policies and procedures and issued this to all Northern Ireland Departments. As in other parts of the UK, however, responsibility for the auditing of legislation, policies and procedures still rests with the subject departments. The roles of the Human Rights Directorate and Departmental Solicitor's Office are to ensure that there is a consistent approach across departments on Convention issues.

The position in Northern Ireland differs from that of the rest of the UK in that it has a new statutory Human Rights Commission responsible for, among other tasks, the promotion of human rights in the province. The Commission has prepared its own guidance material on the Human Rights Act stressing the importance of public authorities drawing up an 'Action Plan' to prepare for the commencement of the Act. There has been little opportunity for the courts in Northern Ireland to come to grips with the ECHR during its short and interrupted period of application in the province. Prior to the suspension of the Executive, Article 6 was invoked successfully in only one case in the High Court where a vesting order was quashed because the NI government department concerned had not properly consulted the persons affected by the order.¹¹⁸ However, the UK's record before the European Court of Human Rights in Strasbourg is a clear indicator that matters relating to Northern Ireland have the potential to be amongst the most controversial and far-reaching in terms of the application of the ECHR and HRA.

6.2 Wales' experience in applying the ECHR

The first year of devolution in Wales has produced no devolution cases relating to the ECHR. Much of what will happen in relation to the Human Rights Act after October will not be distinguishable from the position in England because of the common legal system. Nevertheless, the National Assembly for Wales has not ignored the implications of the ECHR and HRA for Wales. Within the Assembly, the Office of the Counsel General has reviewed legislation and Assembly procedures for compatibility with the ECHR. While the

Assembly has not produced its own guidance materials, it has disseminated those produced in Whitehall to public authorities in Wales. It has also initiated its own awareness and training programmes for the Human Rights Act.

6.3 Scotland's experience in applying the ECHR

There are marked similarities and differences in the approaches of London and Edinburgh towards the ECHR and Human Rights Act. The Scottish Executive set up an ECHR working group, chaired by the Head of the Justice Department, at the end of 1998. As in Whitehall, the focus has been on making individual departments directly responsible for ECHR and HRA matters, with the benefit of some central advice and guidance from the working group. In April 1999, the Scottish Office produced a basic explanatory booklet on the human rights implications of the Scotland Act and the Human Rights Act. The Scottish Executive has completed two reviews to flag up Convention issues using a similar 'traffic light' approach to the Home Office. However, it has also taken a step not seen in London of commissioning an academic lawyer from outside Government to audit and propose solutions for some of the more thorny issues. This final audit report has been considered by the management group and will be considered by the Scottish Cabinet shortly. According to the Deputy First Minister, there are several areas where legislation may be required as a result of the audit or court decisions.¹¹⁹ Details of the audit have been shared with Government lawyers in Whitehall.

Unlike London, the Scottish Executive is prepared to introduce omnibus 'ECHR Bills' to correct any deficiencies in the law. On 25 May 2000, for example, it introduced the Bail, Judicial Appointments Etc. (Scotland) Bill. This had three purposes. The first was to bring the procedures for granting bail in Scotland into line with Article 5(3) of the Convention by:

- placing a new duty on a judge to consider whether to grant accused persons bail when first appearing in court without the need for them to make an application, thus satisfying the requirement for an automatic judicial review of legislation; and
- removing the statutory bar on judges considering bail where a person has been charged or convicted of serious crimes such as murder, attempted murder or rape.¹²⁰

¹¹⁸ *R v Department of Enterprise, Trade and Industry ex parte Cowan*. December 1999. Unreported.

¹¹⁹ Scottish Parliament. Motion SIM-610 'European Convention on Human Rights'. Deputy First Minister, Col 312.

¹²⁰ In England and Wales, Section 25 of the Criminal Justice and Public Order Act 1994 was amended in 1998 to restore the court's discretion to grant bail in certain cases in order to bring it into conformity with the Convention. Whether the amendments went far enough remains under question and is likely to form the basis of an early challenge under the HRA.

The second purpose was to revise the terms of appointment of temporary sheriffs to ensure that these fulfilled the requirements for an independent and impartial tribunal under Article 6(1) of the Convention following the decision of the High Court of Justiciary in *Starrs and Chalmers v P.F. Linlithgow* (see page 63 below). The Bill also changed the arrangements whereby politically appointed Justices of the Peace from local authorities could perform court duties. This was to avoid the possibility of a challenge over their independence and impartiality, given that local authorities benefited from the imposition of certain fines imposed through the district courts as the management authority for those courts. Lastly, again for fear of conflict with Article 6, the Bill removed the power of local authorities to prosecute cases in the district courts because legal advice might be given to the justices sitting in these courts by a legal assessor who was an employee of the same local authority.¹²¹

Further ECHR Bills are expected in the next session. Consideration of the Regulation of Investigatory Powers (Scotland) Bill will also resume in September 2000. In similar fashion to the legal groups in Whitehall, a core group in the Scottish Executive has examined, in detail, the more vulnerable areas that may arise as devolution issues. Guidance notes have been prepared for the Crown Office and 'lines to take' issued to prosecutors who, as in England and Wales, are expected to argue Convention points as they arise in the courts. The main focus of the 'lines to take' so far has been on the subject of delays in the criminal process which have become the most successful grounds for challenge in Scotland under the Convention.

Whitehall is concerned that there should not be a marked divergence in the way that matters relating to the ECHR and HRA are tackled in different parts of the UK. At the end of 1999, a new Joint Ministerial Committee on Human Rights was established under the Cabinet Office. This is intended to act as a forum where UK Ministers and Ministers from the devolved administrations can consider policy and other human rights issues arising from the Human Rights Act, Convention points under devolution issues, and EU legislation.

6.4 Convention points raised as 'devolution issues'

By the end of July 2000, Convention points had been raised in over 600 cases before the Scottish courts. Successful challenges were made in 16 or barely three percent of these cases. Lord Hope of Craighead has identified three main areas where challenges have succeeded - delays, admissibility of evidence and independence of the judiciary.¹²²

Delays: There are strict time limits for bringing a person to trial who is in custody but the same does not apply where a person has been released on bail and in summary procedure.

¹²¹ See 'Bail, Judicial appointments, Etc. (Scotland) Bill. Policy Memorandum'.

¹²² Lord Hope of Craighead- Developments in Scotland. Seminar paper delivered on 17 May 2000 at University College London.

Excessive delays in bringing prosecutions in such circumstances have been found by the courts in Scotland to be in breach of Article 6 of the Convention. In *HM Advocate v Little*, Article 6 was successfully invoked where the accused person was charged with child abuse offences but no proceedings were initiated for 11 years.¹²³ Similar arguments also succeeded in *Docherty v H M Advocate*¹²⁴ where the accused was charged with crimes of dishonesty after a delay of over 7 years and *R v H M Advocate*¹²⁵ where there was a delay of nearly four years, with no reasonable explanation, before the accused was charged with child abuse offences.

Admissibility of Evidence: In *Brown v Stott*, the High Court of Justiciary held that there had been a breach of the right to silence and the right against self incrimination in Article 6 through the use of evidence obtained under S. 172(3) of the Road Traffic Act 1988, under which it is an offence for the owner of a vehicle to fail to give information to the police when required to do so as to the identity of the driver at the time of an alleged offence. The appeal over this case, which has wide implications for the whole of the UK, will be one of the first to go to the Judicial Committee of the Privy Council (in October 2000).¹²⁶

Independence of the judiciary: In a case that continues to cause ructions for the court systems throughout the UK, the High Court of Justiciary upheld, on 11 November 1999, a challenge under Article 6 of the Convention which ended the system of temporary sheriffs in Scotland. Temporary sheriffs were held not to constitute an independent and impartial tribunal having regard to their lack of security of tenure and the manner of their appointment and re-appointment by the Lord Advocate (who was also head of the prosecution service).¹²⁷ The impact of this ruling was to considerably increase the delays in cases coming to trial (from 11 to 27 weeks for criminal trials in Stirling), prompt the appointment of more full time sheriffs and, as seen above, require new legislative arrangements to be made to permit the employment of temporary sheriffs. A further challenge to the validity of all appointments (and judgements) of temporary sheriffs dating back to at least 1977 was rejected by the High Court on 25 November 1999. Likewise, a challenge to the use of temporary judges in the Court of Session on the ground that they also did not constitute an independent and impartial tribunal was dismissed, having regard to the differences in the manner of their appointment from that of temporary sheriffs and restrictions on the use made of them

¹²³ *H M Advocate v Little*, 1999 GWD 28-1320.

¹²⁴ *Docherty v H M Advocate*, 2000 GWD 8-275.

¹²⁵ *R v H M Advocate*, 2000 GWD 8-276.

¹²⁶ *Brown v Stott*, 2000 GWD 6-237, 2000 S.L.T. 379. On 14 July 2000, the Birmingham Crown Court reached the same conclusion in a case concerning the identification of drivers of vehicles caught by speed cameras.

¹²⁷ *Starrs and Chalmers v Ruxton*, 1999 GWD 37-1793, 2000 J.C. 208. For a detailed analysis of this case see Declan O'Callaghan & John McNally- 'Awaiting Chaos? English Courts in the Wake of Starrs v Procurator Fiscal, Linlithgow'. *Justice of the Peace*, Vol 164, p 56-58. Also, Aidan O'Neill- 'The European Convention and the Independence of the Judiciary- The Scottish Experience'. *Modern Law Review*. Vol 63, p 429-441.

contained in a practice note issued by the Lord President.¹²⁸ Article 6 concerns were also raised (unsuccessfully) in the case of *Hoekstra v H M Advocate*.¹²⁹ However, as we have seen, shortly after judgement was given (28 January 2000), the chairman of the bench, Lord McCluskey, referred in the 'Scotland on Sunday' newspaper to comments he had made years earlier on the then new Canadian Charter of Rights and Freedoms that it would provide "a field day for crackpots, a pain in the neck for judges and legislators, and a goldmine for lawyers". Only now he added the rider "Prophetic or what?". A motion that the appeal court bench should disqualify itself and different judges be appointed was granted by the Lord Justice-General on 9 March 2000. He concluded that the comments made by Lord McCluskey meant that he could not meet the test of objective impartiality required by Article 6 of the Convention. In this " the tone of the language used had been particularly important, as had been the impression deliberately given by the author that his hostility to the operation of the Convention had been both long-standing and deep seated".¹³⁰

6.5 Devolution and the future development of human rights in the UK

The devolution process is likely to result in distinctive human rights regimes in different parts of the UK. The ECHR is there to provide a minimum level of human rights protection. However, the Labour/ Liberal Democrat 'partnership' in Scotland already shows signs of wanting to go further and it has always been anticipated, and provided for, that other measures would be required in the particular circumstances of Northern Ireland. The terms of reference for the Northern Ireland Human Rights Commission provide that it should consider the case for introducing additional rights not found in the ECHR, possibly in the form of a Bill of Rights for the province. Initial public consultation has revealed support for the addition of economic and social rights to combat what are seen to be the particular problems of deprivation in the province. There is also support for a more explicit right stipulating that all political views must be represented in the decision-making processes in the province.¹³¹

In Scotland, we have already seen that the Scottish Executive is prepared to adopt its own solutions to Convention challenges such as enacting legislation on judicial appointments and preparing to set up an independent Judicial Appointments Commission. The Executive is considering separating the prosecuting and policy-making functions of the Lord Advocate. North of the border there is also a much more positive attitude taken towards establishing a Human Rights Commission. A debate initiated by the Scottish Conservative Party in the Scottish Parliament in March 2000 revealed that no Scottish party opposed and most positively favoured the establishment of a Scottish Human Rights Commission, which would

¹²⁸ *Clancy v Caird*, 4 April 2000

¹²⁹ *Hoekstra v H M Advocate*, 2000 GWD 12-417.

¹³⁰ The Times, 14 April 2000.

¹³¹ Professor Brice Dickson - Annual Paul Sieghart Lecture, 6 April 2000.

provide “expert advice and guidance on the impact of the ECHR on public authorities in Scotland.”¹³² The Deputy First Minister did not rule out the establishment of such a body and advised that the Executive was waiting on proposals from the Scottish Human Rights Forum.¹³³ In fact, officials from the Justice Department had participated in the forum’s deliberations to ensure that the proposals put forward could be acted upon. On 7 June, the Deputy First Minister announced that the Scottish Executive would be issuing consultation proposals in the Autumn on the case for a Scottish Human Rights Commission. In the same month, a new cross-party group in the Scottish Parliament was launched to promote the establishment of just such a commission.¹³⁴ Decisions on the consultation exercise will be taken in early 2001.

7. What happens when the Human Rights Act comes into force?

The experience in Scotland has been very carefully analysed in Whitehall. Notwithstanding high profile cases (temporary sheriffs, S.172 of the Road Traffic Act and criminal justice delays etc), the main lesson learned is that while a large number of cases can be expected very few of these will result in successful challenges (around 3 per cent if following the pattern in Scotland). Even so, in Scotland, the additional cost to the Crown Office, legal aid fund and Court Service of considering Convention points is put at £6.5m (for 1999), £10.6m (2000) and £8.9m (2001).¹³⁵ The Government’s own estimate for England and Wales is that the Human Rights Act will double, to around 600 a year, the number of applications for judicial review and will add between 2,300 to 2,800 extra sitting days in cases already before the higher courts at an annual cost of £60m (including £39m for legal aid).¹³⁶

While the number of cases is expected to be high, there is a degree of confidence in Whitehall that, come October, there will be relatively few areas of Government business vulnerable to challenge. The Cabinet Office’s assessment in April, based on returns from departments, indicated that comparatively few areas would remain in the ‘red’ category if the legislative programme stayed on track (particularly, the Regulation of Investigatory Powers Bill).

It remains an open question, but one that will be answered quite shortly, as to whether the ‘self-assessment’ of policies, procedures and legislation conducted by most departments provides an accurate gauge of their vulnerability to successful challenge under the Human Rights Act. It is noticeable that confidence over achieving conformity with Convention rights is highest where the audit process has been conducted in-house and is least apparent where the views and advice of outside bodies have been fed into the review exercises. Indeed, in

¹³² See note 119. Col 308. David McLetchie (Con) moving the motion.

¹³³ Note 119. Col 313. Deputy First Minister.

¹³⁴ The Herald, 30 June 2000.

¹³⁵ Note 119. Col 351. Lord James Douglas Hamilton (Con).

¹³⁶ Hansard. HC 10 April 2000. Col 21W.

Scotland we have seen how two internal reviews still left issues (to be picked up by the courts and through an external audit) that required remedial legislation.

If a non-lawyer dare comment, it is evident that there are marked differences in the perceptions of government and non-government lawyers over what may constitute grounds for a successful challenge under the Act. A catalogue of such challenges ('hot potatoes') said to be waiting in the wings and listed by one prominent human rights lawyer at a seminar in March while carefully noted, sounded no alarms for a senior government lawyer in the audience involved with the ECHR Criminal Issues Co-ordinating Group.¹³⁷ The thrust of the Government's litigation strategy after October will reflect the belief that most of the occasions where Convention points are raised will not have merit and that a robust defence should be mounted to prevent ill-conceived arguments gaining unwarranted attention or credence.

There have been sufficient warning signs from Scotland and in the run up to October, however, to give Whitehall some pause for thought. The *Kebilene* judgements, for example, were not anticipated and, as we have seen, have caused Whitehall to re-evaluate the transitional retrospectivity provisions in the HRA and the extent to which the courts might apply the Convention after October to matters and proceedings which occurred before that date. There is also a sense of realism that no audit process is foolproof, and that there will be challenges that have not been anticipated or that will succeed in an area that was thought compatible with the Convention. Further, there are other areas known to be vulnerable but where the risk of challenge is accepted on policy grounds or because there is no clear view on what should be done until or unless a court has ruled.

An elaborate referral system between key departments, such as the Crown Prosecution Service, and the two lawyers' groups has been devised to keep track of the first and then the significant cases under the Act. The ECHR Criminal Issues Co-ordinating Group expects to meet on a weekly basis from October to analyse cases, to decide on the fast tracking of appeals and to prepare and issue guidance on new issues as they arise.

These special arrangements will not be permanent. Whitehall is sanguine in its belief that any storm will pass and, although unpleasant surprises for the Government are expected in the initial flurry of activity when the Act first comes into force, then so will its systems be able to adapt and cope. The application of the ECHR and HRA which seem threatening now in the months before implementation will soon become accepted, it is anticipated, as part of the normal business of government after October.

¹³⁷ Seminar on 'Human Rights: Court Procedures and Remedies' held on 22 March 2000 by the Faculty of Laws, University College London. The issues identified were: reversing the onus of proof, public interest immunity, juvenile trials, drawing inferences from silence and use of evidence obtained in breach of Convention rights.

What happens in the courtrooms, however, is only part of the story. The Government is less confident about creating and maintaining a positive media and public perception of the Human Rights Act. We have seen how the Home Office Human Rights Task Force is developing a publicity strategy for the commencement of the Act and has put in place arrangements for the quick rebuttal of unfavourable media stories. A set of 'core messages' in relation to the Act has been prepared and widely distributed by the Home Office. But the Act is still likely to attract unfavourable publicity irrespective of the outcome of any particular challenge. In the media, if the Government loses a case it will be seen to be at fault. However, if the Government's position is upheld by the courts the views of those unsuccessfully bringing the action are just as likely to make the front pages. Where the Human Rights Act is called into play on difficult social issues, where there is no consensus, or the majority view in society is found to discriminate against the rights of a minority, there will be more than enough people aggrieved at the outcome to criticise the part played by the Act. It is not surprising, therefore, that the Government is content, at present, to give a low profile to the Human Rights Act.

8. Future steps

There is no evidence of the Government looking to take further steps in relation to the protection of human rights in Britain. A long "bedding down" period is envisaged for the Human Rights Act before there could be any question of returning to such issues as the development of a distinctly British Bill of Rights, the creation of a Human Rights Commission and allowing access by persons in the UK to the individual complaint mechanisms and broader spread of rights under the UN's human rights treaties. For presentational reasons, however, the door will not be firmly closed on such issues.

8.1 Amending the Human Rights Act?

Outside Government, several apparent deficiencies have been identified in the Human Rights Act. There are those who would like to see fundamental changes in the Act. Some would like to see the Act entrenched and given special protection against repeal or amendment with enhanced powers for the courts. Conversely, the Shadow Home Secretary has been quoted as considering the Act to be "unacceptable, a step too far" which "if common sense does not prevail then a future Conservative Government would have to decide what to do about it."¹³⁸

Within parts of the legal profession and among human rights NGOs, there is specific unhappiness over particular restrictions in the Act (believed to have been required by the

¹³⁸ Shadow Home Secretary, Ann Widdecombe, quoted by the Daily Mail, 30 March 2000.

Treasury) on who may count as a victim and the 'modest' (Strasbourg scale) damages that can be awarded when a Convention right is infringed.

Politically and practically, it is difficult to envisage the circumstances in which early or substantial amendment might be made to the Human Rights Act. The present Labour Government has no reason or purpose to extend the scope of the Act. And even if it might like to revisit particular issues that now, with the benefit of hindsight, may have been thought to have slipped by in the euphoria of its first months in office, it is unlikely to do so as this could reopen debate on a whole host of matters surrounding the Act. In theory, a future Conservative Government could limit the Human Rights Act's effect or even go so far as to repeal it entirely. However, the longer that the Act is in place and the more thoroughly it becomes embedded in the thought processes and practices of the legal and justice system the more difficult and unlikely its removal. The Human Rights Act is, therefore, likely to remain in its present form for some time ahead.

8.2 Additional Convention rights?

However, the Convention rights that the Human Rights Act gives domestic effect to are liable to change as new Protocols are added to the ECHR and the UK accedes to these and existing Protocols that it has yet to ratify. In March 1999, the Government stated that it would ratify Protocol 7 once certain incompatible rules of family law had been amended. However, it indicated that would not ratify Protocol 6 because of concerns that this would extend the right of abode in the UK to all categories of British passport holders. The Government also stated that it would need to retain the existing derogation to Article 5(3) of the Convention until 'a suitable judicial element is introduced into the extension of detention process' under the Prevention of Terrorism (Temporary Provisions) Act 1989.¹³⁹

Most recently, on 26 June 2000, the Committee of Ministers of the Council of Europe agreed the terms of Protocol 12, which will be open for signature on 4 November 2000. This Protocol will establish a new free-standing prohibition on discrimination which, unlike the existing Article 14, will not need to be exercised in conjunction with another Convention right.¹⁴⁰ The UK Government has no plans for early ratification of the Protocol.

¹³⁹ Home Office Review of Human Rights Instruments. 3 March 1999.

¹⁴⁰ ECHR Protocol 12. "Article 1:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

8.3 A Human Rights Commission?

With the Human Rights Act in place, the debate will intensify over the need for a Human Rights Commission with powers to assist individuals to realise their rights under the Convention. We have noted in earlier sections, how NGO representatives in the Home Office Human Rights Task Force have pressed for such a Commission to fulfil the promotion role for the Human Rights Act. We have also seen how the Scottish Executive has decided to consult publicly on the establishment of a Scottish Human Rights Commission. Officially, the Government has an open mind on the creation of a Human Rights Commission encompassing either the whole of the UK or just England and Wales. At the time of the passage of the Human Rights Act it stated:

The Government do not have a closed mind on a commission – we made our position clear. Different interest groups – the Commission for Racial Equality, the Equal Opportunities Commission and so on – have different views on whether a human rights commission would be a good thing, so the best that we can do for the moment is to ensure that the Convention is accepted as part of our law. After that, the need for a human rights commission may be the subject of future debate – we shall have to see how that develops.¹⁴¹

When the issue was most recently raised in the Human Rights Task Force, the Chairman, Mike O'Brien reiterated that "the Government was not opposed to a UK Human Rights Commission, but had not been persuaded of the case for one."¹⁴² He advised that the Government was interested in the views of the Joint Parliamentary Committee on Human Rights which was likely to consider the case for a Commission as an early task. There is evidently little enthusiasm within the Government for a Commission especially one that would be able to assist individuals to realise their rights under the Convention. And, for the moment, it believes it can ride out any pressure for such a body.

8.4 Rights contained in other human rights treaties

The UK is party to a number of international human rights treaties in addition to the ECHR. Some of these UN treaties include optional arrangements for their respective treaty monitoring bodies to consider individual petitions.¹⁴³ The UK is one of a still sizeable minority of states parties which has not signed up to any of these arrangements (although it is of course bound by the most effective regional regime in the world through the ECHR). In

¹⁴¹ 314 H.C. 1087 (24 June 1998). Mike O'Brien.

¹⁴² Home Office Human Rights Task Force. Para 6.3 of Minutes of Meeting held on 27 July 2000.

¹⁴³ The UN human rights treaties with optional procedures for individual petitions are: the 'International Covenant on Civil and Political Rights' (1966) , the 'Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment' (1984), the 'International Convention on the Elimination of All Forms of Racial Discrimination' (1966) and, as added recently, to the 'International Convention on the Elimination of All Forms of Discrimination against Women' (1979).

March 1999, the Government completed a review of its 'Human Rights Instruments' in which it concluded that:

it would be wrong to divert the considerable resources needed for the commencement of the Human Rights Act, in order to prepare for the right of individual petition under the Covenant (or indeed, under the conventions against torture or racial discrimination). It undertook, however, to reconsider this question when the Human Rights Act had been fully implemented and was operating satisfactorily.¹⁴⁴

In fact, the 1999 review came very close to closing the door on the acceptance of individual petition under other human rights treaties. These treaties contain a number of rights either not found in the ECHR or open to different interpretation by their treaty monitoring bodies. There is a deep reluctance within the Government to allow individual access to these bodies. While their decisions are not binding, the Government would inevitably need to conduct similar risk assessment exercises to that undertaken for the ECHR in order to limit the risk of embarrassing adverse decisions. Also, since the UN treaty monitoring bodies are not judicial in nature it has been thought that there is a higher likelihood of the Government being found at fault in individual petitions. The commitment to further review the matter when the Human Rights Act has been 'bedded down' is not likely to be acted on early.

8.5 A Charter of Fundamental Rights for the European Union

This cautious approach would also seem to be mirrored in the 'no new rights' stance adopted by the Government towards proposals for a Charter of Fundamental Rights binding the institutions of the European Union. There is growing disquiet in Whitehall that the Charter may become the harbinger of a European Constitution and that it could give legal effect to new rights and economic and social rights not found in the ECHR.

The UK accepts that certain measures within the competence of European Union law have direct effect or direct applicability in all member states. The European Court of Justice has developed the doctrine of the primacy or supremacy of European Union law, according to which member states have restricted their own legislative powers, and the courts of member states are obliged to give effect to such law even if it is incompatible with domestic law. The English courts have accepted this requirement with the result that a UK Act of Parliament which is incompatible with European Union law will not be given effect to by the courts. Hence, by virtue of Section 2 of the European Communities Act and Article 5 of the Treaty of Rome "it has always been clear that it was the duty of an United Kingdom court, when delivering a final judgement, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law"¹⁴⁵. But the doctrine of parliamentary

¹⁴⁴ Fifth Periodic Report of the United Kingdom under the International Covenant on Civil and Political Rights. Para 7.

¹⁴⁵ *Factortame Ltd v Secretary of State for Transport*. [1989] All ER 692.

sovereignty is technically preserved because Parliament retains the ability to amend or repeal the European Communities Act and, through it, superintend the UK's participation in the European Union.

The original EEC Treaty contained no specific reference to human rights. The European Court of Justice has, however, consistently maintained that fundamental rights form an integral part of the European Union legal order and has paid special regard to the ECHR and the case law of the ECtHR a practice which is now reflected in Article 6 of the Treaty on European Union.

Given that all existing and prospective members of the European Union are individually bound by the ECHR, the question of accession to the Convention by the European Union has been hotly debated over recent years. However, the European Court of Justice stated in 1996 that the Union's treaties do not provide any powers to lay down rules or to conclude international agreements on human rights matters. Presently, there is not the political will within the European Union to make the treaty amendments necessary for the Union to accede to the ECHR.

Instead, following the European Council at Cologne in June 1999, work has begun on drafting a Charter of Fundamental Rights for the institutions of the European Union. So far, more questions have been raised than answered over the purpose and effect of the proposed Charter. Will it be purely declaratory or have real legal effect? Is it simply an exercise to consolidate and emphasize existing rights within the European Union or a harbinger of new modern rights (environment, bioethics etc) and a written constitution for a federal European state?

The UK government does not favour a Charter which will contain new and justiciable rights. This is prompted by resistance to the idea of rights suffused with the authority of European Union law and able, unlike the Human Rights Act, to override incompatible domestic law. There is also particular concern that the Charter is part of moves by France and Germany to prepare a written constitution for a federal Europe.

Sentiment in the European Parliament and in a number of other member states is in favour of a legal document. A first draft of the Charter went much further than the ECHR in containing economic and social rights as well as a number of new modern rights. This has raised questions over the possible future relationship between the two instruments and courts. A final draft of the Charter is intended to be ready before the December 2000 meeting in Nice of the intergovernmental conference (IGC) considering voting reforms and EU enlargement.

