Minister for Community Safety and Legal Affairs
Roseanna Cunningham MSP

T: 0845 774 1741
E: scottish.ministers@scotland.gsi.gov.uk

The Scottish Government

Sir Leigh Lewis
Chair
Commission on a UK Bill of Rights
Postpoint 9.55
102 Petty France
London
SW1H 9AL

Dear Sir Leigh

DISCUSSION PAPER: "DO WE NEED A UK BILL OF RIGHTS?"

Your letter of 5 August invited views on the Commission's discussion paper "Do we need a UK Bill of Rights?". As the lead portfolio Minister for human rights, I am responding on the Scottish Government's behalf.

On the broad principles of human rights, the Scottish Government is committed to creating a modern, inclusive Scotland which protects, respects and realises human rights. We strongly believe in the principles and provisions laid out in the European Convention on Human Rights ("The Convention"), and welcome debate and discussion around human rights in the context of any proposals which seek to build on and extend those. It should be noted that this response is submitted within the context of the current constitutional settlement. In an independent Scotland, we would seek to ensure that human rights as defined by the Convention were encapsulated within a codified Scottish constitution.

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

No. In terms of existing provision, we note that the Human Rights Act 1998 already provides for specified elements of the Convention to have effect as a matter of domestic law. The Act makes provision requiring public authorities to act compatibly with the Convention, except in defined circumstances. It also provides for the judgments, decisions, declarations and advisory opinions of the European Court of Human Rights, as well as opinions and decisions of the Commission and Committee of Ministers, to be taken into account by the domestic courts. Taken as a whole, the Act as it currently stands constitutes a detailed and comprehensive statutory framework within which citizens of the United Kingdom have been able, since October 2000, to vindicate their rights under the Convention through domestic legal channels.

I would also note that Convention rights are independently given effect in the context of devolved matters in Scotland by virtue of the Scotland Act 1998. In some respects this imposes a more rigorous compliance regime and has the effect (in relevant circumstances) of providing that incompatible actions have no legal effect. In doing so, the Scotland Act arguably comes closer to a continental model under which breaches of Convention rights can be considered to be inherently "unconstitutional" in nature.

The Scottish Government has, as you will be aware, argued consistently for adjustments to the current Scotland Act regime, for example in order to allow for a measure of additional flexibility in responding to situations in which the courts have determined that breaches of the Convention have occurred. For that reason, we have welcomed the UK Government amendment to the current Scotland Bill which would extend judicial discretion in dealing with the retrospective effect of decisions relating to actions which are found to be *ultra vires*.

The Scottish Government is not, in consequence, inherently opposed to developments which would improve and refine existing arrangements. Indeed we would be strongly in favour of enhancements which take into account the considerable practical experience gained over more than a decade of domestic implementation of the Convention. We do not, however, consider there to be a convincing case for any wholesale replacement of the existing legislative framework. In particular, we note that it remains unclear precisely what benefits a UK Bill of Rights would bring in delivering a more effective translation of human rights undertakings into domestic law. Furthermore, the drivers for the current debate at the UK level seem to us to be informed to an unfortunate degree by a negative and frequently misleading political discourse around the nature and importance of human rights are, and who they are for, rather than any more fundamental concerns about the effectiveness of existing legislative provisions.

Against that background, I note that the Commission's terms of reference explain the requirement to "build on.... obligations" and "extend... our liberties". Such building and extension would presumably best be carried out through the modification of existing legislation, rather than its repeal or radical reformulation. As we have said, the latter course of action seems to us to be entirely unnecessary. Indeed, we would argue strongly against any proposal for a UK Bill of Rights which sought to undermine or detract from the ability of citizens to vindicate their rights as a matter of domestic law, or sought to inhibit access to the court in Strasbourg.

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

As I have indicated, we do not believe that a UK Bill of Rights is necessary. I note the Human Rights Act requires all legislation to be interpreted and given effect as far as possible to be compatible with the Convention. This should continue to be the case. I also note the Human Rights Act makes it unlawful for a public authority to act incompatibly with the Convention, and allows for a case to be brought in the domestic courts against public authorities if they are alleged to have acted in such a way. This should continue to be the case. In the event of any decision made by the UK Parliament to repeal the Human Rights Act, the Scottish Government would need to consider carefully how the ability of Scottish citizens to obtain domestic recourse to rights under the Convention should best be protected.

I note the various articles and protocols of the Human Rights Act, which I will not repeat. I would expect these provisions to remain within domestic law. In relation to the question of including a greater number of rights that are not currently defined under statute (in particular, those falling within the category of economic, social and cultural rights) I believe that to be a matter which, whilst not without its practical challenges, is worthy of further consideration and public debate.

Question 3: how do you think it should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?

The Scottish Government's position is that Scotland should be an independent nation, and that human rights would be secured under a Scottish constitution. Within the UK, under current devolution arrangements, the Scottish Parliament already has competence for "observing and implementing ...obligations under the European Convention on Human Rights". Were the Human Rights Act to be repealed by the UK Government, it would be open to the Scottish Parliament to pass its own legislation implementing relevant Convention Rights, within the constraints set by the current constitutional settlement.

It therefore follows that differential implementation within the existing UK would be a theoretical possibility, at least in circumstances in which the UK Parliament were to limit or restrict the manner in which Convention rights are given effect in a manner that the Scottish Parliament found unacceptable. That would in my view be an unfortunate development, not least because it would raise self-evident difficulties for the UK as signatory to the Convention and would communicate an undesirable message internationally.

I would also note in passing that one aspect of the wider debate around human rights in a Westminster context is its tendency to reference history, principles and concepts which are often uniquely or primarily English in character (such as Magna Carta) or which are predicated on the Westminster-centric doctrine of unassailable parliamentary sovereignty. The consequence has, at least on occasion, been to lend the overall debate an unhelpfully narrow perspective, and one which all too often gives the impression of being out of touch with the broader European and international context within which efforts to secure the effective implementation of human rights require to be debated.

Question 4: having regard to our terms of reference, are there any other views you would like to put forward at this stage?

I trust the above sets out a view on the first part of your terms of reference.

On the second part ("To examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties"), I believe that work needs to be done to influence and to deepen existing public discourse around human rights issues, and raise awareness of their importance both within UK society and in terms of the role of the UK and devolved administrations in setting international standards of good practice.

It is worth remarking that the present debate has not been assisted by a tendency in some quarters to draw an inaccurate link between human rights and complex social issues or to draw a false distinction between those who are thought to be "deserving" of rights and those who are somehow deemed to have a lesser claim to fundamental rights. An attitude which leads the public to form the view that human rights are somehow harmful or dangerous or contingent in nature is unacceptable and conversely, puts these very rights - which are fundamental to a healthy democratic society - at risk.

Furthermore, it is both dangerous and detrimental to risk allowing the perception to arise that the UK in some sense considers human rights to be "inconvenient", too challenging or discretionary. That sends an extremely undesirable message to other members of the international community and potentially damages the reputation and standing of all administrations in the UK.

On the third part ("To provide advice to the Government on the ongoing Interlaken process to reform the Strasbourg court ahead of and following the UK's Chairmanship of the Council of Europe"), the Cabinet Secretary for Justice has written to the UK Secretary of State for Justice setting out his views on your interim advice and the process of reforming the European Court of Human Rights, a matter on which we expect to be consulted on going forward. In doing so, we have specifically noted the congruence between your conclusions on the desirability of reform of the Strasburg court and the parallel debate within Scotland around the respective roles and functions of the Scottish courts and the UK Supreme Court.

It is certainly the view of the Scottish Government that national institutions – legislative, executive and judicial – should have principal responsibility for securing the rights of the citizen. In the context of a distinctive legal jurisdiction, of the kind Scotland possesses, that function should rest primarily with the Scottish courts, with the role of external institutions, whether the Supreme Court or the European Court of Human Rights, remaining focussed on those cases in which disputed points of law arise or the proper interpretation of the Convention requires to be determined.

On the fourth part ("To consult, including with the public, judiciary and devolved administrations and legislatures, and aim to report no later than by the end of 2012."), I welcome your commitment to consulting, and look forward to further communications as your proposals develop. Along with the Cabinet Secretary for Justice, I look forward to discussing these matters further with you and the Commission when we meet in December.

I have copied this letter to the Cabinet Secretary for Justice here, the Deputy Prime Minister, the Secretary of State for Justice, the Secretary of State for Scotland, the Welsh First Minister and the Northern Irish First and Deputy First Ministers.

Yours

R. Cunningham

ROSEANNA CUNNINGHAM