

Sir Leigh Lewis  
Chair  
Commission on a UK Bill of Rights  
Postpoint 9.55  
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Dear Sir Leigh

## **A SECOND CONSULTATION**

In the document "A Second Consultation", the Commission has posed a number of supplementary questions which have a bearing on the potential shape and form of a possible future UK Bill of Rights. As the Minister within the Scottish Government with portfolio responsibility for human rights, I would offer the following observations. As you are aware, I have already made a number of similar points in my response to the Commission's first consultation paper, as well as in the course of my meeting with you and Commission members in December 2011. Many of those points are reiterated here by way of emphasis.

### **A UK Bill of Rights**

As I have said previously, we do not believe a UK Bill of Rights is required. The Human Rights Act already provides for specific elements of the European Convention of Human Rights (ECHR) to have effect as a matter of domestic law. Areas within devolved competence in Scotland are also covered by provisions in the Scotland Act 1998. Our view remains that these existing arrangements are effective, broadly supported and fit for purpose, albeit within the context of the limitations imposed by the existing constitutional settlement. There is a perfectly legitimate debate to be had around ensuring that human rights protections within the UK as a whole are made more effective or more responsive. But it is not helpful to have that discussion in the context of the current exercise, the rationale for which has been unduly determined by a Westminster-centric discourse around human rights, and the UK's relations with the rest of Europe, which is primarily negative in tone and motivation.

On the notion of the Human Rights Act sitting alongside a UK Bill of Rights, we would see no logic in having two separate pieces of UK constitutional legislation in relation to human rights, which would very likely have the effect of causing widespread domestic and international confusion. For the devolved administrations, this would amount to a third statutory mechanism dealing with fundamental rights and freedoms. It is hard to see how such duplication, and triplication, would be helpful to our respective legislatures,

governments, courts or citizens. Moreover, it is important to remember that analogous rights have long been general principles of EU law and therefore, in areas of EU competence, are necessarily already part of the law of the three jurisdictions comprising the UK. For the courts, in particular, the need to reconcile a further layer of overlapping but subtly different legal obligations is unlikely to be conducive to the achievement of legal certainty or the efficient administration of justice.

In our view, it would be considerably more helpful for the UK Government to focus on the existing strengths and features of the Human Rights Act and to examine how these existing mechanisms might be built upon and developed. Of particular importance, in that context, is a recognition of the need to promote a better understanding of these existing mechanisms, within wider society and on the part of individual citizens..

### **Incorporation of the Convention into domestic law**

We believe the ECHR should remain incorporated into domestic law. To do otherwise would be a regressive step, and would damage the UK's standing internationally, as well as Scotland's reputation whilst it remains part of the UK. The Commission has already heard testimony in the course of its inquiries noting the detrimental international impact of political rhetoric which suggests the UK would be prepared to countenance a retreat from existing human rights standards.

As noted above, the Convention in Scotland is given practical effect in Scots law by virtue of both the Human Rights Act and the Scotland Act. In key respects the Scotland Act imposes a more rigorous compliance regime than exists under the Human Rights Act. The Scotland Act has the effect (in relevant circumstances) of providing not only that incompatible actions have no legal effect but that incompatible legislation is *ultra vires* and "not law". In doing so, the Scotland Act comes closer to other modern models of constitutional design, with breaches of fundamental rights being essentially "unconstitutional" in nature. Although not without its practical challenges, we consider this model to be one by which citizens can even more effectively ensure their rights are protected than is the case under the Human Rights Act. In that context we note that the European Court of Human Rights has itself taken the view that the "declaration of incompatibility" mechanism provided by the Human Rights Act does not provide reliable access to an effective remedy. It is certainly our understanding that the distinction between the approach in the Scotland Act and that in the Human Rights Act is one which has been noted by international observers.

### **'Language' of rights**

On language, we note that the language in which the rights within the ECHR are expressed is based in wider international law and in concepts developed by the UN in the context of the International Bill of Rights (the Universal Declaration and accompanying Covenants and protocols). To depart from this international standard would be unhelpful, confusing and unnecessary. Again, it would be a regressive step, and risk damage to both the UK's and Scotland's reputation internationally. Moreover, such a change would in our view cause confusion domestically, as courts sought to interpret different forms of language in relation to human rights.

### **Courts**

On guidance, we would stress the importance of allowing the courts to interpret the Convention in line with developing jurisprudence at the European level and the Convention's status as a 'living instrument'. To restrict the courts in interpreting the Convention would

again be illogical and impractical in the context of the UK's (and Scotland's) continuing membership of both the Council of Europe and the EU. By the same token, we believe it is essential for the courts to take into account Strasbourg case law (and, for that matter, relevant rights-related case law of the Court of Justice of the EU), and we would be strongly opposed to any change to that requirement.

On altering the balance between the UK Parliament and domestic courts with respect to human rights law, we would again point to the direct effect of the Scotland Act in terms of court decisions on compatibility, which allow for both parliamentary legislation and executive actions to be overturned if they are found to be incompatible. We would contrast this with the current UK system, which operates on a model which entrenches the "supremacy" of Parliament, including in relation to its capacity to override the rights of the citizen. The Scotland Act model, by contrast, accords with the general constitutional principle, which has long informed political thinking in Scotland, that sovereignty lies with the people, not with the legislature. It also has the very practical benefit of delivering an effective remedy to victims where their rights have been violated.

### **Definition of 'public authority'**

In considering this point, we note that the most significant effect of entrenching ECHR in the Scotland Act is to place similar constraints and obligations on Scottish Ministers and the Scottish Parliament as those imposed on public authorities in general by section 6 of the Human Rights Act. If changes are to be made to current arrangements in the Human Rights Act, we would suggest that section 6(3) should be extended to include both Houses of the UK Parliament, with a view to ensuring a consistency of principle and of approach across the UK as a whole.

### **Rights and responsibilities**

On the inclusion of responsibilities within human rights legislation, we would take the view that the principal and overriding responsibility already incumbent on every individual is to obey the law, which comprises the rules of conduct society has created for itself. The corollary is that the state (on behalf of society at large) has an obligation to ensure that the human rights of the individual are not violated. That is done, inter alia, through the establishment of a robust legal framework of protections, the provision of effective deterrence (such as a police force) and by ensuring the availability of effective remedy where a person either has their rights violated, or is at risk of having their rights violated. For the same reason, the proposition that the rights of victims are somehow ignored or left unprotected under the regime established by the ECHR is incorrect. There is clearly much which can, and should, be done in practical terms to ensure that victims of crime, in particular, are treated with respect, fairness and dignity, and with a sensitivity to the loss or hurt which they have suffered. Similarly there is an important place for initiatives which promote good citizenship, strong communities and a proper understanding of, and respect for, the rights of others. But these are concepts which are already integral to the idea of protecting and securing fundamental rights, not something which is somehow peripheral or secondary. We comment further on the rights of victims in Scotland below.

Basically, it remains fundamentally erroneous to see rights and responsibilities as being in opposition. The possession of rights by one individual cannot, and does not, confer a right to violate those of others. The Convention itself is explicit on this point. Moreover, just as compliance with the law is not optional, or dependent on merit, so the human rights of individuals are innate. Should they break the law, they can legitimately expect to be subject to sanction by society, but this cannot rationally or ethically include treatment which society

itself has agreed is in breach of, or removes, the fundamental rights possessed by all. Human rights are not contingent in nature.

### **Additional rights**

The Scottish Government believes that active public debate and discussion around the protection and promotion of human rights is both necessary and desirable and we regularly engage with the Scottish Human Rights Commission (SHRC), and with wider civic society, in seeking to promote such informed debate. We are, for example, considering the SHRC's call for a National Action Plan for Human Rights in Scotland, and continue to engage with others in Scotland in discussing a range of matters relevant to the realisation of human rights in this country.

On the right to administrative justice, we would point out there are already a large number of review mechanisms which ensure that individuals have a right to challenge administrative decisions which have not been handled impartially, fairly and within a reasonable time frame in Scotland. In a large number of areas, administrative decisions are subject to statutory reviews before a court or tribunal (for example, planning decisions or decisions under the Mental Health (Care and Treatment) (Scotland) Act 2003) and administrative decisions are more generally subject to the supervisory jurisdiction of the Court of Session which ensures the substantive and procedural legality of those decisions. We would point out that the Human Rights Act and ECHR have underpinned the administrative justice system to good effect upholding the rights of citizens who find themselves in dispute with public bodies and being the basis for pursuing fair and just outcomes.

On judicial rights (including the right to trial by jury), we consider that a UK Bill of Rights with competence in this area would harm Scotland's status as a distinctive legal jurisdiction. Current legal protections within Scotland provide a level of protection which relates directly to the Convention and to the developing jurisprudence of the European Court of Human Rights. We would point out that, irrespective of the position in England and Wales, there has never been a right to trial by jury in Scotland, where the forum has been at the instance of the prosecutor. We would be strongly opposed to the introduction of such a principle, and I would remind the Commission of the importance of ensuring that the different legal traditions within the UK, which are centuries old, continue to be respected and protected.

On socio-economic rights, we note that these are not generally provided for under ECHR, but are nevertheless contained within various international treaties to which the UK is signatory. Given the close correlation between the realisation of such rights and the effective management of public resources, we would suggest that careful consideration would need to be given as to how these rights can best be realised. As we have stated previously, that debate will take place in Scotland within the context of our constitutional future.

On children's rights, we continue to progress this agenda in line with the United Nations Convention on the Rights of the Child (UNCRC) and are committed to enshrining the principles of that Convention into our domestic law and policy where possible. Through our proposed Children and Young People Bill we intend to enhance the role of the Convention in our domestic law and, as a consequence, increase transparency and scrutiny of our overall approach to children's rights. However, we are not of the view that wholesale incorporation of the UNCRC into domestic law represents the best way to progress our approach at this time. Instead, we continue to seek to observe and implement the Convention by legislating where appropriate and through the issuing of guidance and the promotion of good practice where legislation is not the most suitable means to achieve the desired end.

On victims rights, we note that there is a comprehensive EU Directive on victims rights being finalised which is more detailed than the suggestions within the Commission's consultation document. By the end of 2013, Scotland hopes to have in place a Victims and Witnesses Act which will set out various rights for victims in line with the Directive. Again, it is difficult to see what a UK Bill of Rights would achieve in respect of victims over and above the requirements of the Directive and the planned legislation in Scotland.

On environmental rights, we would note that environmental legislation is significantly devolved, and to include such rights in UK legislation would constitute a significant intrusion into an area of devolved competence. As with most of the discussion in the consultation paper around additional rights, such matters are more appropriately addressed and examined against the background of the active and progressive constitutional debate which is already taking place in Scotland.

### **Constitutional matters**

On the extent to which the Commission should seek to factor the current debate around Scotland's constitutional future into its thinking, I would simply state that in an independent Scotland, we would seek to ensure that human rights, as defined by the Convention, are at least as well protected as they are now. Under the existing constitutional settlement, we would express the view that, were the UK Government minded to alter the current regime, the consent of the Scottish Parliament would be required under the Sewel Convention. We would therefore expect to be consulted in the event of any proposed changes. As we have stated throughout, the Scottish Government would oppose repeal of the Human Rights Act and the imposition of a UK Bill of Rights. Our position therefore is and remains that Scotland's views are of critical importance in any decision to vary current arrangements and, to the extent that such changes would affect Scotland directly, the position arrived at by the Scottish Parliament must be respected as being definitive and conclusive.

In relation to options for a UK Bill of Rights under the existing constitutional settlement that make special arrangements for matters within devolved competence, I take the view that these would be fundamentally unworkable. As previously noted, multiple layers of provision would be likely to give rise to widespread confusion domestically and any diminution of effectiveness or commitment would risk reputational damage internationally. That said, if we considered it necessary (most obviously if the Human Rights Act were to be repealed) it would certainly be open to the Scottish Government to introduce Scotland-specific legislation to ensure that the fundamental rights of people in Scotland are properly protected in the context of devolved responsibilities.

I have copied this letter to the UK Secretary of State for Justice and the Secretary of State for Scotland.

Yours  
Roseanna

**ROSEANNA CUNNINGHAM**