



Ministry of  
**JUSTICE**

# Rights and Responsibilities: developing our constitutional framework



# Rights and Responsibilities: developing our constitutional framework

Presented to Parliament  
by the Lord Chancellor and Secretary of State for Justice  
by Command of Her Majesty

March 2009

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## Foreword

- i At all times, but especially in turbulent times of rapid and radical change, people need to feel secure. They need to know that their rights and freedoms will be protected, whatever happens in the world around them, and that others, including governments, will behave responsibly towards them. That is why this Government has placed such emphasis on fair chances, fair rules and a fair say. We believe it is important that people can be confident that opportunities are made available fairly to everyone; that everyone should play by the rules; that every UK citizen should be able to have their say in how their country is run; and that everyone should know the rules of the game – the rights they can expect to enjoy and the responsibilities they owe to one another. That common knowledge helps bind us together as a nation.
- ii While we continue our efforts to bring about change through innovative policies, such as the New Opportunities agenda, the Equality Bill, the Welfare Reform Bill, the move to enshrine in legislation the pledge to eradicate child poverty by 2020, and the National Health Service (NHS) Constitution for England, we seek also to entrench a progressive consensus for the longer term – a common framework of values, rights and responsibilities, which will endure through good times and tougher times.
- iii At the heart of this Green Paper is the key constitutional question of the relationship between the citizen and the state and how this relationship can best be defined to protect fundamental freedoms and foster mutual responsibility as this country is going through profound changes. And, in framing the debate on whether the time is now right for a Bill of Rights and Responsibilities – and, if so, what it should contain – this Green Paper explores the principles which bind all parts of the United Kingdom together and which have the potential to strengthen and enhance them.
- iv The Government is launching this debate on rights and responsibilities at a time of crisis in the world's financial system and, therefore, at a time of great uncertainty and anxiety. The Government has taken unprecedented steps to help solve this international crisis, and to mitigate its effects. This must be our immediate priority. But acting, at the same time, to strengthen communities and individuals' sense of a stake in society – by better articulating the responsibilities we owe and the rights we have – is not an alternative to decisive action on the economic front but an essential complement to it. In the depths of the Second World War, when the United Kingdom's future

as a free and independent nation lay in the balance, Winston Churchill and Clement Attlee had the strength and the vision to plan for better times, laying the foundation for many of the economic and social rights we now take for granted.

- v This Green Paper launches a debate about how best to protect and entrench such fairness in our country for our times. This deep global recession, following extraordinary economic and social and technological and demographic change over the last few decades reinforces the historic importance of these issues.
- vi How individuals should live together, what rights and freedoms we should enjoy in relation to one another and against the state and how they should be balanced by the responsibilities we owe each other are among the most fundamental questions in politics. They are not abstractions, removed from the practical politics of jobs and housing and healthcare and education, because they concern the constitutional arrangements which determine how power is distributed in our country. They determine how every other question in our public life will be answered. They are not just about the historic protections of the individual against the state and balancing liberty and security. They are also about the frustrations that can arise in daily life, especially when using public services, and reflect the key role for town halls in tackling these frustrations by making information easy to access and involving local people in the decisions which affect them. They are about getting support to combat anti-social behaviour and to tackle the discrimination and prejudice many of our people still have to endure. They are about the smoking ban, the hunting ban, and taking action to prevent climate change.
- vii These constitutional questions about rights and responsibilities go to the heart of the most elemental human aspiration – for each of us, as far as is practicable and consistent with the ability of others to do the same, to live our lives fulfilled, peacefully, free from arbitrary interference and control by others.
- viii This always matters – but when times are good it is sometimes easy to forget the importance of the equitable distribution of power and entrenching a common understanding of rights and responsibilities. When most are prospering, concerns about whether people have adequate control over their lives may fade into the background. But when times are tougher, and people feel more vulnerable and threatened, then a sense that they do not have adequate control over their own life, and that others are controlling it for them, creates risks for the peace, stability and cohesion of society. We saw this over and over again in the 19th and 20th centuries.
- ix We should never be complacent about our constitutional arrangements and whether they adequately deliver the fairest possible distribution of power in our society and least of all should we be complacent in the midst of change and upheaval. That is why we launched the *Governance of Britain* programme in July 2007, as the next stage of the Government's constitutional reforms.

- x Constitutions derive from political values and our reforms are being driven by two assumptions. First, that in healthy societies, power is never concentrated in the hands of a few but diffused as widely as possible – and flows freely. Society is diverse and complex – so too must be the distribution of power. And second, that the struggle can never cease – power always clusters, chemically, round the powerful. And it requires rigorous and vigorous activity to reverse this law of nature.
- xi Constitutional reform is never easy – it always runs into opposition from vested interests and it always raises difficult questions about how best to strike the balance between the individual and the community; how best to secure an appropriate relationship between the rule of law and parliamentary democracy; how far executive power should be fettered by the courts and in what ways; how best to balance the scrutiny and accountability of the executive by the legislature with decisive government.
- xii But this Government is committed to this process. The reforms already undertaken by this Government are redistributing and diffusing power away from the centralised state. Devolution has transferred power away from Westminster to the administrations in Scotland, Wales and Northern Ireland, to London, and to local authorities. The Human Rights Act has brought home fundamental rights of the individual against the state, putting them at the heart of our domestic legal culture. The Freedom of Information Act has established transparency as a mechanism for empowering the individual against the state. And the Data Protection Act has provided a valuable tool for safeguarding individuals' privacy.
- xiii And these reforms are working. We believe historians will bracket this Government's reforms with the constitutional transformations of the 17th and 19th centuries as times of profound and invigorating change, when power was redistributed. These last ten years have been years of progress.
- xiv But this is contested territory. Constitutional reform always is. All of our constitutional institutions lay claim to a fundamental role in protecting and securing the freedoms of the citizens from whom authority and legitimacy derive in a democracy, which is the most authoritative and legitimate form of governance we have yet been able to devise. And all of these institutions lay claim to a role in balancing the exercise of power by the others.
- xv Parliamentary sovereignty resides at the heart of our constitutional arrangements. And Parliament, rightly, claims legitimacy to exercise power on behalf of the people who elect it, making laws for the courts to apply, and holding the executive to account – indeed, providing authority for the executive to govern.

- xvi The executive, the state, claims to deliver effective government for the citizen, without which lies anarchy, a condition where the powerful prevail and the vulnerable succumb.
- xvii And the courts, interpreting and applying the law of the land, rightly claim the ability to review actions by the state to ensure that it acts not arbitrarily, abusing power, but according to the rule of law which ensures the equal protection of all.
- xviii Each of these claims is contested once it strays beyond agreed limits. The dangers of government praying executive efficacy in aid of the arbitrary exercise of power are well documented. Government dominance of the House of Commons has created concerns about what Lord Hailsham famously called an 'elective dictatorship', with the reduction of the power of the legislature to restrain the executive challenging the legitimacy of the doctrine of parliamentary sovereignty. Some eminent jurists have even suggested that the doctrine should not apply if Government sought to undermine the democratic principles which confer legitimacy on it and that in what Lord Steyn has called 'such exceptional cases ... the rule of law may trump parliamentary supremacy'.
- xix But, equally the rule of law applies only within accepted political norms. Authoritarian dictatorships might still operate within what, it might be argued, was the rule of law, at least in the formal sense of the phrase. To secure its legitimacy, the law needs to operate according to the underlying values of the society within which it applies. As Lord Bingham has argued 'democracy lies at the heart of the concept of the rule of law' – because the citizen should 'have a say in the laws by which he is bound'.
- xx And the ability of the courts to restrain Parliament is itself fettered by the position of the judiciary in our constitutional system. The very independence of the judiciary which secures its integrity also shapes boundaries to its power. In the resonant words of Lord Bingham:

'The British people have not repelled the extraneous power of the papacy in spiritual matters and the pretensions of royal power in temporal in order to subject themselves to the unchallengeable rulings of unelected judges.'
- xxi Such contest is inevitable – and healthy. Healthy constitutions evolve and they evolve most successfully through debate and deliberation. Only in a world, yet to exist, where governments always governed benignly, where parliaments always legislated wisely and freely on behalf of all citizens and the courts always dispensed justice which was universally accepted, would this not be the case.

- xxii Our constitution is not validated by how far it measures up to an abstract system of ideals. Rather it derives its legitimacy from the way it has evolved over time, tested by event and circumstance, meeting the needs and aspirations of the people it serves, deriving from an organic mix of common law, statute and conventions.
- xxiii Because of its fundamental importance to our society, constitutional change should be approached with caution. Historically, constitutional change in this country has been the work of the physician, healing what needed to be healed, rather than the engineer, drawing up blueprints for new models.
- xxiv But that is not a recommendation for stagnation. Our country is changing and faces new and profound challenges. At such times, people need reassurance that the structures which support them in their daily lives are robust. They need to know that their liberty and freedoms are secure.
- xxv This Green Paper addresses the central constitutional question of the relationship between the citizen and the state. It considers how this relationship might best be defined in the context of the rights, responsibilities and values which unite us across all parts of the UK. Finally, it examines a range of options for drawing up a Bill of Rights and Responsibilities which would be of enduring value.
- xxvi With this Green Paper, we launch a national discussion on a Bill of Rights and Responsibilities.
- xxvii We hope you will join in.



The Rt Hon Jack Straw MP  
Lord Chancellor and  
Secretary of State for Justice



The Rt Hon Michael Wills MP  
Minister of State

# Executive Summary

- Bills of rights all over the world have demonstrated great symbolic and cultural importance, in the face of threats and challenge to a country's stability and system of values.
- From the Magna Carta in 1215 and the Declaration of Arbroath in 1320, the later Bill of Rights and Scottish Claim of Right in 1689, the great Reform Acts of the 19th and early 20th centuries, through to more recent landmarks, such as the foundation of the National Health Service as part of the welfare state, our history illustrates the proud traditions of liberty on which our current framework of democratic rights and responsibilities is built.
- We are living through a period of change – technologically, demographically, economically, socially and culturally. At such times of change, constitutional protections for fundamental rights and freedoms and the articulation of responsibilities can offer security. A new constitutional instrument, reflecting the values that give rise to these rights and responsibilities, could act as an anchor for people in the UK.
- Social and economic change has altered public attitudes. We have a less deferential, more consumerist public and, to an extent, rights have become commoditised.
- Responsibilities have not been given the same prominence as rights in our constitutional architecture. This is despite the fact that many duties and responsibilities already exist in statute, common law and our ethical framework, and despite the fact that the text and case law of the European Convention on Human Rights, given recognition in our law through the Human Rights Act 1998, require a balance to be struck between the two.
- The idea of a link between rights and responsibilities is not new, either in theory or in practice. The challenge is how best to remind people of the importance of individual responsibility and to give this greater prominence.
- The Government is clear that the rights in the European Convention cannot be legally contingent on the exercise of responsibilities. However, it may be that responsibilities can be given greater resonance in a way which does not necessarily link them to the adjudication of particular rights.
- Some existing responsibilities are arguably so central to our functioning as a society that they deserve an elevated constitutional status, over and above their operation as part of the general law or our individual moral codes.

- While the law imposes many duties, it often does so without framing them explicitly in the language of responsibility. If there is a deficit in relation to responsibilities, it is not in relation to their existence, but rather in the expression of them.
- Although not necessarily suitable for expression as a series of new legally enforceable duties, it may be desirable to express succinctly, in one place, the key responsibilities we all owe as members of UK society, ensuring a clearer understanding of them in a new, accessible constitutional document and reinforcing the imperative to observe them. Such responsibilities could include treating National Health Service and other public sector staff with respect; safeguarding and promoting the wellbeing of children in our care; living within our environmental limits; participating in civic society through voting and jury service; assisting the police in reporting crimes and co-operating with the prosecution agencies; as well as general duties such as paying taxes and obeying the law.
- Human rights instruments, containing positive guarantees and balancing mechanisms, protect against the risk that majority or collective interests will be allowed to override the basic rights of individuals. Such instruments also apply a balancing framework, including consideration of the proportionality of Government action, where individual and societal interests collide.
- Living in the UK, we enjoy a range of entitlements which go beyond the civil and political rights in the European Convention and sit – as part of our well-established welfare state – firmly in the sphere of social and economic of rights. Including provisions which point to key aspects of our welfare state, such as the National Health Service and our rights and responsibilities as patients and staff, could help to paint a fuller picture of the rights and responsibilities we share as members of UK society.
- Parliament remains the most appropriate forum for making politically sensitive decisions on resource allocation. But there is much to celebrate across the landscape of our welfare system which could merit greater prominence in a new constitutional instrument. Now is the time to discuss whether a Bill of Rights and Responsibilities should bring together those rights which have developed in parallel with the European Convention, but are not incorporated into it. A new Bill of Rights and Responsibilities could present the opportunity to bring together in one place a range of welfare and other entitlements currently scattered across the UK's legal and political landscape.
- The Government recognises a number of areas in addition to welfare entitlements for potential inclusion in any future Bill of Rights and Responsibilities. In particular, aspects of our criminal justice system such as victims' rights; equality; good administration; children's wellbeing; as well as principles of sustainable development in relation to our environment.

- The possible range of approaches to a Bill of Rights and Responsibilities represents a continuum. At one end, it might take the form of a declaratory and symbolic statement. At the other, it might be a set of rights and responsibilities directly enforceable by the individual in the courts. Along the continuum there are options including a statement of principles which, endorsed by Parliament, might inform legislation, as well as public authority and court decisions, while not necessarily giving rise to enforceable individual rights.
- The Government is proud to have introduced the Human Rights Act and it will not resile from it. Any new Bill of Rights and Responsibilities might subsume the Human Rights Act, or might preserve it as a separate Act.
- The Government does not consider a general model of directly legally enforceable rights or responsibilities to be the most appropriate for a future Bill of Rights and Responsibilities. In terms of economic, social and cultural rights, for example, this may not be the best mechanism for ensuring fair provision for society as a whole. In terms of responsibilities, the imposition of new penalties is unlikely to be the best way to foster a sense of civic responsibility and encourage respect and tolerance for others and participation in the democratic process.
- Any UK-wide discussion of rights and responsibilities raises important questions about the relationship between rights, responsibilities and the UK's governance arrangements in respect of devolution.
- Consideration of a Bill of Rights and Responsibilities for the UK – whatever form it takes – will clearly need to involve Parliament, the devolved legislatures, and the devolved Executive bodies as well as the Human Rights Commissions which operate in the different parts of the UK. Each has its own history, conventions and identity and has different responsibilities and obligations in relation to fundamental rights, how they are safeguarded, and how they are respected in the delivery of key public services. In order to generate the degree of consensus appropriate for a Bill of Rights and Responsibilities, each of these bodies will have an important contribution to make about the way rights and responsibilities should be expressed.
- This Green Paper launches a public consultation across the UK. The Government intends to involve all parts of society in discussions about the fundamental arguments for and against a new Bill of Rights and Responsibilities as well as the advantages and disadvantages of the individual components of any such Bill. The consultation must be extensive. The Government does not intend to bring forward legislation before the next general election.
- The time is right to discuss whether our existing framework is sufficient or whether we need a new constitutional expression of our freedoms and responsibilities and the values which underpin them.

# Chapter 1 Bills of Rights – seeking stability in times of uncertainty

- 1.1 The experience of democracies all over the world has shown that bills of rights can have great symbolic and cultural importance, as well as legal effect, in the face of threats and challenges to a country's stability and system of values. This experience has made a reality of Philip Alston's assertion that bills of rights should be 'a combination of law, symbolism and aspiration'.

## Bills of rights in other countries

- 1.2 Many of the most famous bills of rights around the world were drawn up to anchor societies in the midst of turmoil and change.
- 1.3 In 1776 the American Declaration of Independence pronounced the separation of the thirteen colonies from Great Britain. The Constitution of the United States, drawn up in 1787, established the federal system of government, protecting core civil rights such as freedom of speech, freedom of the press, freedom of religion, freedom to petition the Government, equal protection of the law, due process rights and, famously, the right to bear arms. It retains profound symbolic value for US citizens, helping to define the American identity.
- 1.4 The 1789 French Declaration of the Rights of Man and the Citizen, influenced by contemporary Enlightenment ideas, set out to signal the end of the old regime in the first modern revolution by enshrining ideals of democracy, citizenship and inalienable rights.
- 1.5 Germany's Basic Law of 1949 set out domestic rules of law and fundamental rights as the platform for building a new Germany out of the ruins of Nazi tyranny.
- 1.6 South Africa's Bill of Rights in the 1996 Constitution guarantees not only the traditional civil and political rights, but also social and economic rights and represents the dawn of the new republic after the end of apartheid.
- 1.7 The Canadian Charter of Rights and Freedoms 1982, which built on the International Convention on Civil and Political Rights, has served to provide a common framework for the various provinces in the Canadian federation. Since its inception it has become a symbol of Canadian identity.

- 1.8 In Australia, following the adoption by various states of state-level bills of rights, there is a continuing debate about a national Bill of Rights for Australia.
- 1.9 Internationally, key human rights instruments, such as the Universal Declaration of Human Rights and the European Convention on Human Rights (which finds domestic expression in the Human Rights Act) were drafted in the aftermath of World War II with the aim of preventing a repeat of the horrors of totalitarian and fascist rule in Europe and around the world.
- 1.10 In its recent history, the UK has not had to struggle for self-determination or nationhood, and has not been torn apart by civil strife in the same way as some other countries. But that has not prevented constitutional expressions of rights and responsibilities evolving over the centuries, with historic landmarks along the way. And, as the Joint Committee on Human Rights concluded in its Report on a Bill of Rights for the UK, 'Bills of rights are capable of emerging from deliberative processes conducted in settled democracies in normal times.'<sup>1</sup>
- 1.11 From the Magna Carta in 1215 and the Declaration of Arbroath in 1320, the later Bill of Rights and Scottish Claim of Right in 1689, the great Reform Acts of the 19th and early 20th centuries, through to more recent landmarks, such as the foundation of the National Health Service as part of the welfare state, our history illustrates the proud traditions of liberty on which our current framework of democratic rights and responsibilities is built.
- 1.12 The early great constitutional expressions of liberties emerged out of the turmoil of the times. Some have been superseded by later laws. But they illustrate how the legislative bodies of the time chose to declare certain liberties, as a statement of what was precious in their country at a time of change.
- 1.13 We are now living through a period of significant change. Much of what our parents took for granted is in flux. Never before have so many developments taken place simultaneously in so many different spheres – technologically, demographically, economically, socially and culturally – so quickly, and with such potentially radical consequences, which are likely to be destabilising for many people.
- 1.14 As we are witnessing, globalisation has amplified the effects of the economic cycle, with unpredictable consequences. Populations are ageing; revolutions in biology and medicine are changing conceptions of the nature of life itself; traditional family structures are being transformed; there are new cultural tensions between the quest for individual fulfilment and a desire for social discipline; and climate change is threatening the future of the planet. But there is no consensus on how this should all be tackled and who should pay for it.

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<sup>1</sup> Joint Committee on Human Rights, Twenty-ninth Report of session 2007-08, 'A Bill of Rights for the UK?' p24, para 73.

- 1.15 All these changes will create new forms of vulnerability and many who thought themselves secure will suddenly find they are not. No-one can predict precisely the consequences of such complex transformations. But change always offers new opportunities and trails damage in its wake – and none of it is ever distributed evenly. Power usually accrues to the powerful and the powerless usually lose out.
- 1.16 At such times, constitutional protections for fundamental rights and freedoms and the articulation of responsibilities offer security to those who can feel intensely vulnerable. Expressing these freedoms and duties in a Bill of Rights and Responsibilities and the values which give rise to them (in a Statement of Values potentially serving as a preamble to such a Bill), could act as an anchor for people in the UK as we enter a new age of anxiety and uncertainty.
- 1.17 This is why the Government now believes the time is right to discuss whether our existing protections are sufficient or whether this country needs a new constitutional expression of our fundamental freedoms and responsibilities and the values which underpin them. This Green Paper now considers the possible scope of such a Bill of Rights and Responsibilities.

# Chapter 2 Responsibilities

2.1 Twin threads of rights and responsibilities run through the constitutional heritage of the United Kingdom and help to define it. The Government believes that any new constitutional instrument should encapsulate the responsibilities we owe towards one another. This chapter considers responsibilities from a historical and practical perspective, exploring why they matter to us now and how they might better be reflected in our constitution.

## *Individual responsibility: a time-honoured concept for healthy and vibrant societies*

2.2 Since the time of ancient Greece, philosophers have stressed that individual responsibility is an essential ingredient for the wellbeing and flourishing of a community and its members. Aristotle believed that individuals should take part in 'virtuous actions', which included contributing to community and civic life through the performance of various duties. Natural law theorists in ancient Greece and Rome similarly spoke of duties, alongside rights, as part of the rules and principles originating in human nature. Their code of human conduct included not only inalienable rights which allowed for preservation and prospering as an individual, but also duties to fellow human beings in their efforts to lead a happy and successful life.

2.3 Responsibility also featured in schools of thought that saw the state as the result of a contract: a social contract that citizens entered into to live together on the basis of agreed rules of conduct.<sup>2</sup> Such a contract necessarily involved limitations on freedoms and duties to respect others, such as the duty to respect others' property and rights to security.

2.4 Many leading liberal democratic thinkers, while concerned principally with the curtailment of state power and the safeguarding of individual liberty, also acknowledged the essential quality of individual responsibility. John Stuart Mill noted in his treatise *On Liberty* that 'there are many positive acts for the benefit of others which [anyone] may rightfully be compelled to perform'.<sup>3</sup>

2.5 Philosophers from the time of the American and French revolutions also stressed the critical role which responsibilities play in fostering a peaceful and harmonious society. Thomas Paine, an English political philosopher whose thinking influenced both the American and French revolutions, declared that:<sup>4</sup>

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<sup>2</sup> See for example Thomas Hobbes, *Leviathan* (1651); John Locke, *Two Treatises of Government* (1690); Jean-Jacques Rousseau, *The Social Contract* (1762).

<sup>3</sup> John Stuart Mill, *On Liberty* (1859), p. 24

<sup>4</sup> Thomas Paine, *On the Rights of Man* (1792).

*'A Declaration of Rights is, by reciprocity, a Declaration of Duties, also. Whatever is my right as a man, is also the right of another; and it becomes my duty to guarantee, as well as to possess.'*

- 2.6 Jean-Jacques Rousseau, a theorist whose political philosophy influenced the French Declaration of the Rights of Man and of the Citizen in 1789, said that '[each] individual can...have a private will contrary to or differing from the general will he has as a Citizen. His private interest can speak to him quite differently from the common interest...he might wish to enjoy the rights of the citizen without wanting to fulfil the duties of a subject, an injustice whose spread would cause the ruin of the body politic.'<sup>5</sup>
- 2.7 More recently, communitarian thinkers have advocated greater prominence being given to the place of individual responsibilities in our society.<sup>6</sup> Individual responsibility is considered a civic virtue which has been obscured through the years, but which should be revisited in moral, social, communal and/or legal terms. It is seen to be necessary to foster the character traits on which a productive, but also a rights-respecting and tolerant, society are based. In the communitarians' view, we should attend both to rights and responsibilities, and give responsibilities the status they deserve.
- 2.8 Ideas of duty and responsibility have also been at the forefront of much socialist philosophy. This has emphasised collectivism and co-operative action; and the fulfilment of duties to each other and the wider community sitting side by side with enjoyment of rights, public order and wellbeing.
- 2.9 The importance of duty and responsibility is recognised in free-market philosophy as well. Adam Smith, for example, wrote that, 'subjects of every state ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities.'<sup>7</sup>
- 2.10 Many global cultures and world religions have given prominence to the need to balance individual and community interest and to the essential nature of responsibility. For example, notions of duties to the community are at the forefront of a variety of African societal philosophies. Fulfilment of duties to the community in general and to certain individuals in particular such as family members, is considered a natural part of one's membership of a society, and the avenue to self-realisation and dignity within the community.

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<sup>5</sup> Jean-Jacques Rousseau, *The Social Contract* (1762), Book I, Chapter VII.

<sup>6</sup> See for example, Amitai Etzioni, *The Spirit of Community: Rights, Responsibilities and the Communitarian Agenda* (New York: Crown Publishers, Inc., 1993); Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (The Free Press, 1991).

<sup>7</sup> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Book V, Chapter 2, Part II (I).

*Individual responsibility – how we recognise it in law and in practice*

- 2.11 There are many ways in which our responsibilities as members of a community are impliedly or expressly recognised in our day-to-day lives. We are all subject to criminal and regulatory law, which prohibits or requires certain actions. These laws take account of our fellow members of society and collectively express the way in which we choose to order our society and the conduct we wish either to encourage or prohibit. For example, and most obviously, we prohibit behaviour such as murder, rape and theft; we impose traffic rules that ensure safety on our roads; we also have duties to pay taxes, which contribute to the overall welfare and order of our society.
- 2.12 Many areas of private law require us to bear in mind fellow members of society. For example, we may owe a legal duty of care to others when we interact with them. This ensures that when we cross paths with others or engage in actions which affect others, we are under a duty not to act negligently in a way which harms them. We owe duties to certain individuals by virtue of special relationships or positions – duties as parents; when we contract with others; and when we hold positions of public authority.
- 2.13 The European Convention on Human Rights, given further effect in UK law through the Human Rights Act 1998, recognises that individuals have responsibilities towards one another. For example, our right to freedom of expression set out in Article 10 of the Convention specifically recognises that the exercise of this freedom 'carries with it duties and responsibilities'. In other words, there is a recognition in the Human Rights Act that our rights do not exist in isolation. There are limitations on our conduct which allow us to co-exist harmoniously. Article 10(2) of the Convention provides:
- The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*
- 2.14 Beyond our legal framework, we abide by moral and ethical codes of behaviour derived from various sources – from our religions and beliefs, from our personal principles, from our cultural or ethnic communities, from our professional codes of conduct and from the values that we share as members of society. These moral and ethical codes have informed our collective political decisions over the years to ensure that our society provides a social safety net for the vulnerable and disadvantaged. Increasingly, these codes and value systems include concern for future generations, and the need to live within our environmental limits. Few of these codes are expressed as positive legal obligations which individuals owe,

yet most of us abide by their many common requirements: concern for others and for common welfare and safety; courtesy; assistance and respect for others' privacy.

## The case for change

- 2.15 However, social and economic change has altered public attitudes. It has encouraged the rise of a less deferential, more consumerist public. In this more atomised society people appear more inclined to think of themselves and one another as customers rather than citizens. People are more independent, more empowered. But these developments can pose problems too, especially when viewed in the context of liberal democracy and the way people look upon rights. To an extent, rights have become commoditised. This is demonstrated by those who assert their rights in a selfish way without regard to the rights of others.
- 2.16 Responsibilities have often been a poor cousin to rights in our national discourse, and yet they are deeply woven into our social and moral fabric. Although we have a latent understanding and acceptance of our duties to one another and to the state, they have not been given the same prominence in our constitutional architecture. This is despite the fact that many duties and responsibilities already exist in statute, common law and our ethical framework, and despite the fact that the text and case law of the European Convention require a balance to be struck between the two. 'Liberty means responsibility', wrote George Bernard Shaw, 'that is why most men dread it.'

### *Responsibility – how do we encourage and promote it alongside our protection of individual rights?*

- 2.17 Some commentators have suggested that an over-emphasis on rights, to the exclusion of notions of responsibility, can lead to a 'me' society rather than a 'we' society, in which an unbridled focus on our own individual rights and liberties risks overtaking our collective security and wellbeing, and respect for others.
- 2.18 The Government believes that any Bill of Rights and Responsibilities should seek to articulate what we owe, as much as what we expect. Responsibilities and rights are equally necessary for a healthy democracy. A clearer and more explicit understanding of this should take a central place in our thinking about rights and responsibilities and should help to foster a stronger sense of shared citizenship among all those who live in the UK. When rights are seen through a prism of selfish individualism, this harms both the philosophical basis of inalienable, fundamental human rights and public support for them. Far from undermining rights, a clear statement of the proper relationship between rights and responsibilities could foster a better understanding of those rights.

- 2.19 The idea of a link between rights and responsibilities is not new, either in theory or in practice. In our daily lives we owe responsibilities to the state and to one another. Some of these responsibilities are moral, and are rightly not a matter of legal duty or sanction; many others already exist in our legal system, in statute, in common law and through convention.
- 2.20 The challenge is how better to remind people of the importance of individual responsibility and give this greater prominence. Individual rights must be promoted and protected without losing sight of the essential contribution of responsibilities to collective harmony and prosperity.
- 2.21 Solutions range from the ethical to the political to the legal, and may or may not include prescriptions about the relationship between rights and responsibilities. Some see rights and responsibilities as necessarily linked, such that the scope of an individual's rights may be qualified by certain considerations of his or her responsibilities. Others consider that rights are often more aptly described as free-standing liberties or immunities, shielding individuals from intrusion by others or by the state, but not necessarily implying responsibilities.
- 2.22 The Government is clear that fundamental rights cannot be legally contingent on the exercise of responsibilities. Building on the existing human rights framework, it may be that responsibilities can be given greater resonance in a manner which does not necessarily link them to the adjudication of particular rights.
- 2.23 Notions of individual responsibility can be reflected in many ways in a society's institutions. They underlie many of the moral and ethical codes we follow every day. While no court may be able directly to enforce these codes, they nonetheless play an important role in the decisions that we make and the actions that we take. Statutes can include express duties that carry criminal or regulatory sanction. They can also include express duties toward others that carry the possibility of private compensation where harm is caused. Our human rights instruments, including both the Human Rights Act and the European Convention on Human Rights, contain limitations on rights that help to ensure a peaceful and harmonious co-existence.
- 2.24 While the law imposes many duties, it does so in a patchwork way, and often without framing them explicitly in the language of responsibility. If there is a deficit in relation to responsibilities, it is not in relation to their existence, but rather in the expression of them. This in turn can have an impact on individuals' behaviour, with the selfish and sometimes aggressive assertion of rights, in a way which may damage others' enjoyment of their own rights. If unchallenged, such behaviour damages the cohesion and stability of society.

- 2.25 It is fundamental to human rights theory that human rights cannot be claimed or exercised by individuals without regard to the rights of others, and that most human rights (with exceptions like freedom from torture and slavery) are inherently subject to balance and qualification. The European Court of Human Rights and our judges under the Human Rights Act and the common law all recognise the importance of responsibilities: in particular, that rights are not unlimited and that the irresponsible exercise of rights, for example by causing harm to others or the common good, can be prevented or limited. It would be possible in a future Bill of Rights and Responsibilities to highlight the importance of factors such as an applicant's own behaviour and the importance of public safety and security.
- 2.26 Finally, although not necessarily suitable for expression as a series of new legally enforceable duties, it may be desirable to express succinctly, in one place, the key responsibilities we all owe as members of society, with a view to reinforcing the imperative to observe them. Such responsibilities could include treating National Health Service and other public-sector staff with respect; safeguarding and promoting the wellbeing of children in our care; living within our environmental limits for the sake of future generations; participating in civic society through voting and jury service; reporting crimes and co-operating with the prosecution agencies; as well as more general duties such as paying taxes and obeying the law.
- 2.27 An accessible document which promotes the importance of rights and responsibilities might assist the process of continuing to build a secure and flourishing society. If we are to fulfil our responsibilities we must have a clear understanding of what they are. Further, an appreciation of their relation to the rights that we enjoy and wish to protect should increase our commitment to carrying out these responsibilities.

## Criminal Justice

- 2.28 Responsibilities relating to the criminal justice system extend beyond an implied duty to obey the law. There are a number of duties that may be said also to imply an obligation to uphold the law. In England and Wales, for example, there are a series of duties which fall upon those who receive information in the course of their business about the criminal activities of others, in particular where that activity gives rise to the suspicion of terrorist activity or money laundering.
- 2.29 Anyone may be summoned to give evidence in a criminal trial if able to give relevant testimony, and they are then sworn to tell the truth under oath. In England and Wales, a failure to respond to a witness summons may be treated as a contempt of court and lead to a fine or imprisonment. If called upon to serve on a jury, there is a legal obligation to do so, and failure without

reasonable cause is itself a criminal offence. These duties apply similarly in the other parts of the UK, although there are of course differences of application and detail in each jurisdiction.

- 2.30 These duties to report our knowledge of serious criminal activity and to play our part in the justice system are integral to the maintenance of that system and to the rule of law in our society, but the detail of these obligations tends to be found in a range of legislation dealing with specific offences or procedural matters. This does not mean that in the cases where they come into play, they are not effective, but rather that their underlying, often implied, purpose is not highlighted. The Government sees merit in now highlighting them.

## Education and the family

- 2.31 The Government would not propose to draw on private legal relationships in any Bill of Rights and Responsibilities, which would have as its central theme the relationship between the citizen and the state. However, there are points at which these private responsibilities intersect with the state and with society at large. This is particularly so in relation to the education and care of the family, which although primarily a private matter is recognised as being of such importance, that not only is it the subject of fundamental rights, but it is also the subject of specific duties, both here and abroad.<sup>8</sup>
- 2.32 Several countries afford special constitutional protection to the family. Provisions dealing with family life tend to interweave different rights and duties; the right of parents to raise their family without undue interference by the state; the positive duty upon parents to care for their children; and the right of the state to intervene in the event of parental failure to discharge their duty.
- 2.33 One such example is the German Basic Law, Article 6 of which states:

*Marriage and family enjoy the special protection of the state.*

*Care and upbringing of children are the natural right of the parents and a duty primarily incumbent upon them. The state watches over the performance of this duty.*

*Separation of the children from the family against the will of the persons entitled to bring them up may take place only pursuant to a law or if the children are otherwise threatened with neglect.*

*Every mother is entitled to the protection and care of the community. Illegitimate children shall be provided by legislation with the same opportunities for their physical and spiritual development and their position in society as are enjoyed by legitimate children.*

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<sup>8</sup> Under the Education Act 1996, every parent of a school age child in England and Wales, 'shall cause him to receive efficient full-time education suitable to his age, ability and aptitude and to any special needs he may have, either by regular attendance or otherwise'. In Scotland, the children (Scotland) Act 1995 requires parents to 'safeguard and promote the child's health development and welfare'.

## Child wellbeing

- 2.34 In the UK context, any new Bill of Rights and Responsibilities might set out the contribution that everyone needs to make in order to secure wellbeing for all children, since children cannot achieve wellbeing without parents, government, and wider society recognising their mutual and collective responsibilities, and children and young people being aware of their own responsibilities in our society.
- 2.35 Mothers, fathers and other carers have a responsibility to support the achievement of wellbeing by ensuring that children have access to the opportunities which can help them develop and thrive. For example, parents are already subject to a statutory duty to cause their children to receive efficient and suitable full-time education, either by regular attendance at school or otherwise. Building on this, and reflecting the priority placed on family life by the United Nations Convention on the Rights of the Child, a Bill of Rights and Responsibilities might reflect the aim that all children should be nurtured within a family or other caring setting in order to flourish.
- 2.36 Government and public bodies have a vital role to play, especially in helping the most vulnerable children to succeed and seeking and listening to their views on matters which concern them. In consulting on a new Bill of Rights and Responsibilities, the Government is open to views on how the responsibilities it has to help children achieve wellbeing could be set out.
- 2.37 It will not be possible to achieve wellbeing for all children unless everyone in society takes responsibility to support children's right to achieve wellbeing and to value and protect them as members of society. For example, children will be safer if everyone takes responsibility for keeping them safe and for acting if they believe children to be in danger. Children will have more opportunities to play and enjoy their childhood if society welcomes children's play in public spaces; and schools are more likely to be able to help all children succeed and achieve their potential if they are supported by their local communities. In turn, all members of society should expect their rights to be respected by children and young people.
- 2.38 Children and young people can help themselves to achieve wellbeing, though their right to do so does not depend on them fulfilling these responsibilities. A Bill of Rights and Responsibilities might set out expectations, for example, that children and young people should respect the rights of others, use opportunities to make a positive contribution to society, and take full advantage of the opportunities offered to them including the chance to express their own views.<sup>9</sup>

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<sup>9</sup> Examples of facilitating greater participation from children and young people include the UK Youth Parliament and Funky Dragon (the Youth Parliament in Wales).

## Examples in international and national instruments

2.39 While it would not be appropriate in the UK context for a Bill of Rights and Responsibilities to impose a series of new legally enforceable duties upon individuals, it is nonetheless instructive to see how other countries have chosen to give constitutional expression to such duties. Of course, what works in another country, which may have a codified system of law, a written constitution or a different social and political context, will not necessarily translate into our system. But other countries have dealt with this central issue of responsibilities without compromising their commitment to human rights. Responsibilities in other countries may be expressed as being owed to the community, to the state, to the family, or to the environment. The expression of responsibilities may be declaratory, serving a symbolic purpose rather than giving rise to legal consequences. In other cases, such as with the duty to undertake military service or a duty to vote, the obligation may be legally binding and may be the subject of detailed further legislation setting out the conditions for fulfilment, enforcement and sanction.

### International expressions of responsibility

2.40 A number of the founding international human rights instruments of the last century made explicit the relationship between rights and responsibilities. The framers in each case sought to place the specific rights protected in the context of this relationship. In the years following World War II, against the backdrop of the totalitarian atrocities perpetrated in the name of nations, governments from all over the world resolved to protect the principle of universal and inalienable fundamental rights, and to declare the inherent dignity and equality of every individual.

2.41 Article 1 of the Universal Declaration of Human Rights states that:

*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

2.42 Article 29 of the Universal Declaration develops the theme that full human rights protection involves not only being able to call upon the state to protect individual rights, but also a recognition that all individuals have responsibilities to each other. Further, the enjoyment of the rights and freedoms guaranteed by the declaration is not unconstrained. It may need to be limited to the extent required by the fact that everyone is part of a community and can generally only flourish through living in a community:

*Everyone has duties to the community in which alone the free and full development of his personality is possible.*

*In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing*

*due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*

*These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.*

- 2.43 In other words, the Universal Declaration recognised not only that individuals have inalienable human rights, and that states bear responsibility to protect those rights, but also that individuals have responsibilities to each other and to their society. They have responsibilities to respect others' rights and to foster a society in which every individual and the community as a whole can flourish.
- 2.44 Similar themes were expressed in 1950 when the Council of Europe adopted the European Convention on Human Rights. The European Convention cited the Universal Declaration in its preamble, and reaffirmed the 'profound belief' of the signatory states in fundamental freedoms and in the human rights upon which they depend. It also expressly recognised the interaction of individuals within a community and the need to balance rights and freedoms in the interest of collective order and harmony. For example, Articles 9, 10 and 11 all state that the freedoms set out therein, such as freedoms of thought, religion, expression and assembly, are subject to limits including those prescribed in the interests of public safety, public order and the protection of the rights and freedoms of others in a democratic society.
- 2.45 While these instruments clearly incorporate the concept of individual responsibility to others and the wider community and take account of the interests of societal harmony, this concept has generally had a lower profile in discussions about rights over the years. Nevertheless, the premise that individual responsibility plays an essential and underpinning role in the good order and flourishing of a community does appear throughout the historical discourse on rights and across cultures and religions.
- 2.46 The Universal Declaration does not have legally binding effect, although it is frequently considered to be a part of customary international law. The final part of the preambles to both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the two international instruments to give legally binding effect to the substance of the Universal Declaration, declare:

*Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.*

2.47 In the American human rights tradition, the preamble to the American Declaration of the Rights and Duties of Man, adopted by the Organisation of American States in 1948, is also explicit in its explanation of the interrelationship between rights and duties:

*The fulfilment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.*

2.48 The American Declaration is also notable for being one of the few instruments to set out a comprehensive set of individual duties, to sit alongside human rights. Duties include those to society, to children and parents, to vote, to obey the law, to pay taxes and to serve the community. These duties are not enforceable, but carry symbolic value.

2.49 The American Declaration of the Rights and Duties of Man has now been largely superseded in the inter-American human rights system by the American Convention on Human Rights, which was adopted in 1969 and entered into force in 1978. The Convention did not replicate the detailed list of duties set out in the Declaration, but focused in a single Article on those to whom everyone may be said to owe responsibilities and the matters which serve to limit the exercise of individual rights:

*Every person has responsibilities to his family, community, and mankind. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.*

2.50 The African Charter on Human and Peoples' Rights also covers both rights and duties. For example,

*Article 27*

*1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.  
2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.*

*Article 28*

*Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.*

2.51 The European Convention on Human Rights states, in Article 17, that:

*Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*

- 2.52 This provision has been interpreted by the European Court of Human Rights to prevent certain abuses of the right of freedom of expression, for example extreme forms of hate speech.
- 2.53 The Government wishes to explore whether a future Bill of Rights and Responsibilities ought to have more prominence to principles such as that underpinning Article 17 of the Convention; and to the principles of fair balance and the doctrine of proportionality, both of which are inherent threads running throughout the Convention. Such expression would make these principles more transparent to all citizens, and, if enshrined in legislation, could help guide the courts when they come to balance individual rights against limitations necessary in the wider interests of the community.
- 2.54 Article 41 of the European Convention on Human Rights provides that a person should receive 'just satisfaction' in relation to breach of his or her rights. But in deciding what is 'just' in relation to the level of any damages, the Strasbourg court takes the behaviour of the person claiming the right into account.

*Examples*

In *Eckle v Germany*<sup>9</sup> the applicant complained that his prosecutions for fraud which lasted 17 years breached Articles 5, (right to liberty) and 6, (right to a fair trial), of the Convention. He had been remanded in custody and his expenses had not been reimbursed in one of the proceedings, but the Court stated that: "it cannot be overlooked that they [the applicants] were charged with serious acts of fraud committed to the detriment of, amongst others, persons lacking substantial financial resources and that the Trier Regional Court imposed heavy prison sentences on them". Accordingly even though the Court found that the applicants' rights were breached the finding of the breaches "furnished sufficient just satisfaction" and no compensation was awarded.

In the case of *Johnson*,<sup>10</sup> a psychiatric patient whose own behaviour had contributed to him being held too long in hospital was only entitled to 10% of the damages he asked for.

- 2.55 One way in which to emphasise the importance already given in the European Convention on Human Rights to the fulfilment of responsibilities might be by way of specific provision requiring our domestic courts to consider an individual's behaviour before deciding on the award of any damages.

<sup>10</sup> (Article 50) (App. No 8130/78) [1983].

<sup>11</sup> *Johnson (AP) v Unisys Limited* UKHL [2001] 13.

### *National instruments*

2.56 At national level, and in a modern context, the interrelationship between rights and responsibilities has been set out explicitly in the preambles to two recent Australian human rights statutes. These preambles serve both a symbolic purpose and set the context in which the legislation which follows is to be interpreted.

2.57 The preamble to the Australian Capital Territory's Human Rights Act 2004 states:

*This Act encourages individuals to see themselves, and each other, as the holders of rights, and as responsible for upholding the rights of others.*

2.58 And in the state of Victoria, extensive public consultation led to adoption of the following words in the preamble to its Charter of Rights and Responsibilities:

*Human rights come with responsibilities and must be exercised in a way that respects the human rights of others.*

2.59 Meanwhile, in the Netherlands, the coalition Government of 2007 announced its plan to draw up a Charter for Responsible Citizenship. It has embarked on a programme of public engagement and debate, with the aim of defining and setting out in a new constitutional statement those responsibilities and values which accompany and underpin the rights enshrined in the Constitution of the Netherlands.

2.60 Other countries have expressly set out over-arching responsibilities on all members of society to obey and uphold the law. For example, the Polish Constitution states that:

*Loyalty to the Republic of Poland, as well as concern for the common good, shall be the duty of every Polish citizen.*

*Everyone shall observe the law of the Republic of Poland.*

2.61 Citizenship legislation may set out the rights conferred on new citizens and the obligations they undertake. For example, the preamble to the Australian Citizenship Act 2007 states:

*The Parliament recognises that persons conferred Australian citizenship enjoy these rights and undertake to accept these obligations:*

- *by pledging loyalty to Australia and its people; and*
- *by sharing their democratic beliefs; and*
- *by respecting their rights and liberties; and*
- *by upholding and obeying the laws of Australia.*

2.62 The relationship between British citizenship and rights and responsibilities has been recently explored in the Home Office's February 2008 consultation paper, *The Path to Citizenship: Next Steps in Reforming the Immigration System*.<sup>12</sup> This paper explores the newcomer's path from arrival to citizenship or permanent residence. At the heart of this policy, as the Home Secretary's foreword states, is the idea that:

*There is a deal for citizenship. This is a country of liberty and tolerance, opportunity and diversity – and these values are reinforced by the expectation that all who live here should learn our language, play by the rules, obey the law and contribute to the community.*

### *Economic responsibilities*

2.63 Economic responsibilities which arise both as an aspect of the duty to obey the general law and as essential to the functioning of the state's welfare provision are the duties to pay taxes; a duty not to claim benefits if able to work; and, if earning, to make national insurance contributions. These duties appear in highly complex provisions. It is inevitable, for example, that a benefits system will be detailed in its attempts to cover all the circumstances in which individuals may find themselves. However, other countries do extract the key principles governing this part of the relationship between the citizen and the state, and place them alongside associated rights. For example, the Italian Constitution states:

#### Article 4 (Work)

- (1) *The republic recognises the right of all citizens to work and promotes conditions to fulfil this right.*
- (2) *According to capability and choice, every citizen has the duty to undertake an activity or function that will contribute to the material and moral progress of society.*

#### Article 53 (Taxation)

- (1) *Everyone has to contribute to public expenditure in accordance with their capacity.*
- (2) *The tax system has to conform to the principle of progression.*

### *Civic responsibilities*

2.64 Further responsibilities which are often recognised in national constitutions are those relating to political participation. For example, in many countries voting is not just a fundamental political right, but it is also a duty of the citizen. The UK Government would not favour a duty to vote, backed by legal sanction, but it is interesting to note overseas examples. Again, the Italian Constitution sets out both the right and the duty:

<sup>12</sup> Available at <http://www.ukba.homeoffice.gov.uk>.

Article 48 (Voting rights)

*(1) All citizens, male and female, who have attained their majority, are electors.*

*(2) The vote is personal and equal, free and secret. The exercise thereof is a civic duty.*

- 2.65 Many countries impose a statutory duty to vote, both in Europe and elsewhere. However, it would also be possible – and arguably more desirable – to express any duty to vote as a civic responsibility in order to reinforce the importance of political participation, but without introducing any sanction for non-compliance.
- 2.66 As set out above, some existing responsibilities are arguably so central to our functioning as a society that they might deserve to be given an elevated constitutional status, over and above their operation as part of the general law or our individual moral codes. Such responsibilities may currently be implied or assumed but are not expressed in such a way as to foster our sense of shared values.
- 2.67 The Government welcomes views on whether these, and any of the other responsibilities outlined in this chapter might be afforded a place in a Bill of Rights and Responsibilities for the UK.

# Chapter 3 Rights

- 3.1 Throughout history, philosophers have articulated theories of a society governed by law and of the rights which individuals consequently possess. For all the resonance some of these theories still have today, they are a product of their historical and political context.
- 3.2 It was the Enlightenment period which most prominently gave rise to the concept of individual, fundamental human rights. For example, in revolutionary France and America in the late 18th century writers such as Thomas Paine and Jean-Jacques Rousseau emphasised the inherent rights of individuals and the limitation of state power. Many scholars and statesmen of that era sought to put autocratic rule behind them, openly declaring the right of the people to choose their government.
- 3.3 The notion of natural or immutable rights, enshrined in the American Declaration of Independence and in the French Declaration of the Rights of Man (with precursors in the writings of John Locke) was contested by some legal jurists. Jeremy Bentham famously described such rights as 'nonsense upon stilts'. He argued that rights, far from being inalienable and eternal, could only ever be the product of the laws of the sovereign in power. This view was reflected later by 19th-century jurists such as Dicey, who instead subscribed to the 'absolute legislative sovereignty... of the King in Parliament'. Thus although there were laws which could be called fundamental or constitutional because they dealt with important founding principles (for example the descent of the Crown or the terms of the Union between Scotland and England), there was no such thing as a supreme law, or law which tested the validity of other laws or that could override these other laws. A further prevailing notion among legal writers was that the surest and most effective safeguards of human rights were not rigid legal documents but the exercise of administrative discretion by public officials, acting as guardians of the public interest, accountable to Parliament and the people.
- 3.4 By the 20th century, the discourse on rights had evolved in many countries to incorporate ideas of balancing the rights of individuals and the public interest, and of reasonable and proportionate limitations on rights in the interest of open and democratic society. These were included in many international instruments, including the Universal Declaration of Human Rights and the European Convention on Human Rights (both of which are part of the UK's heritage of rights). In the UK, these ideas of balance evolved as part of the common law. Through the means of individual petition to the European Court of Human Rights,<sup>13</sup> the common law was influenced by, and in turn influenced, their development in the Strasbourg jurisprudence.

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<sup>13</sup> Granted to individuals in the UK in 1966.

- 3.5 Some 20th-century theorists, influenced by the growth of the welfare state in the post-war period, began to take an increasingly comprehensive view of rights. Particularly influential was T H Marshall, a Professor of Sociology at the London School of Economics. Marshall identified three types of rights associated with the concept of full membership in the community: the civil, the political and the social.<sup>14</sup> The civil element was composed of the rights necessary for individual freedom – liberty of the person, freedom of speech, thought and faith; the right to own property and to conclude valid contracts; and the right to justice. The political element consisted of the right to participate in the exercise of political power. The social element consisted of a range of rights, 'from a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society'.<sup>15</sup> Marshall saw this third category as embodied in the institutions of the welfare state, particularly the education and social security systems.

*Freedoms 'from', freedoms 'to', and limitations in the interests of the community*

- 3.6 Guarantees of individual human rights developed not just in the sense of providing freedom from government interference or authority, but also in the sense of freedom to act to fulfil one's potential. Individuals are not only provided with protection from governmental actions such as imprisonment without lawful authority or religious persecution. They are also guaranteed the liberty to do certain things, for example to think and express themselves freely, and to assemble and protest peacefully. In this way, rights theories and instruments focused on individual liberty and self-fulfilment through the absence of government restraint. As the English philosopher Thomas Hobbes said:<sup>16</sup>

'A free man is he that in those things which by his strength and wit he is able to do is not hindered to do what he hath the will to do.'

- 3.7 These individual freedoms are not unlimited, however. On the contrary, they are framed to ensure that the wider community interest and the freedoms of others are taken into account. Freedoms 'from' and freedoms 'to' are constrained as far as necessary to ensure order and harmony amongst members of our society. Historically the starting point for achieving this balance (so far as English law is concerned) has been that individuals are free to do whatever is not expressly prohibited, either by common law or by statute. The balance between individual rights and the rights of others in society has increasingly found expression through positive entitlements and explicit balancing provisions, such as those found in the European Convention on Human Rights and the Human Rights Act.

<sup>14</sup> Marshall defined citizenship as 'the concept of full membership of a community'. T.H Marshall, *Citizenship and Social Class* (1950), p.6.

<sup>15</sup> See fn 16, p.8.

<sup>16</sup> Thomas Hobbes, *Leviathan* (1651), Chapter XXI.

*Democracy: majority, minority and individual rights*

- 3.8 A prominent theme in theories of rights has been that of protecting individual rights against potential 'tyranny of the majority'. Majority rule is a basic principle of democratic government, with legislatures elected by the majority to represent their interests. It has long been recognised, however, that the rights and freedoms of individuals, particularly their human rights, risk being overridden when the interests of the majority prevail and that it is to the benefit of all that the interests of minorities should be protected. We all possess the potential to be part of a minority at some point in our lives.
- 3.9 Rights discourse has developed to protect and promote pluralism and tolerance, and to balance both individual and societal interests even where these may be in tension. Human rights instruments, containing positive guarantees and balancing mechanisms, protect against the risk that majority or collective interests will be allowed to override the basic rights of certain individuals. Such instruments also apply a balancing framework, including consideration of the proportionality of Government action, where individual and societal interests collide.
- 3.10 Today, our constitution is a rich fabric of statute, common law and convention and our fundamental rights and freedoms are embedded throughout it. Inevitably these have been shaped by the beliefs and perspectives of the times in which they were created and new demands continually arise to create new challenges. We are increasingly aware, for example, of the need to live within our environmental limits in order to achieve a sustainable society for future generations; of the pressing need to act to end child poverty; and of the potential rights to which these imperatives give rise.
- 3.11 The Government believes the time is right to explore the case for drawing together and codifying such rights in a new constitutional instrument.

**Painting a fuller picture of rights and responsibilities in the UK**

- 3.12 Living in the UK, we enjoy a range of entitlements which go beyond the civil and political rights in the European Convention and sit – as part of our well-established welfare state – firmly in the sphere of social and economic rights. Including provisions which point to key aspects of our welfare state such as the NHS and our rights and responsibilities as patients and staff, could help to paint a fuller picture of the rights and responsibilities we share as members of UK society. Parliament remains the most appropriate forum for making politically sensitive decisions on resource allocation, but there is much to celebrate across the landscape of our welfare system, which could merit greater prominence in a new constitutional instrument. Now is the time to discuss whether a Bill of Rights and Responsibilities should bring together those rights which have developed in parallel with the European Convention, but are not incorporated

into it. A new Bill of Rights and Responsibilities could present the opportunity to bring together in one place a range of welfare entitlements currently scattered across the UK's legal and political landscape.

- 3.13 It would be possible for a future Bill of Rights and Responsibilities to draw on key principles from current common law or statutory sources. Some are entrenched features of the legal systems of the UK. Others, such as those derived from the UK's complex and well-established welfare system, have not traditionally been framed as rights, but are areas to which Government has been, and remains, firmly committed through its legislative programme. Their importance in the national culture may be such as to merit expression at a constitutional level.
- 3.14 This chapter discusses potential candidates for inclusion in any future Bill of Rights and Responsibilities, exploring first options in relation to the criminal justice system, including victims of crime; equality; and good administration. It then considers options in relation to the welfare state and its goals of protection and collective provision for current and future generations.

## Criminal justice

- 3.15 Everyone has rights and responsibilities in relation to the criminal justice system. These rights flow through the criminal justice process from start to finish in the United Kingdom, though there are significant variances in each part of the UK, most obviously exemplified by the criminal justice system in Scotland being separate from that of the rest of the UK. In the context of a new Bill of Rights and Responsibilities, there are arguments for articulating a distinct set of principles drawn from the existing rights and responsibilities relating to the criminal justice process. The European Convention, to which all major political parties are committed, protects the rights of those accused of crime to liberty and to a fair trial. Much domestic legislation, for example, in England and Wales, the Police and Criminal Evidence Act 1984 (PACE), complements those basic rights and the Human Rights Act gives further expression to those Convention rights within the domestic legal system. The Government does not propose to add to or alter those rights.
- 3.16 There are arguments for gathering together and recognising, in a constitutional document, existing rights in the criminal justice system; not just in relation to accused persons but also victims of crime and ordinary citizens. For example, articulating the rights of victims, and others involved in the criminal justice process such as witnesses, could help to make clear to everyone working in the criminal justice system and the general public that rights are afforded not only to those accused of committing crimes, but to everybody. It might also help to clarify the duties which are already imposed on public authorities and encourage a greater awareness of the needs of victims of crime. As well as

extensive rights, individuals also have a number of responsibilities, discussed more fully in Chapter 2, which help to ensure that an effective system of justice is more likely to be delivered. These responsibilities could merit explicit articulation in a Bill of Rights and Responsibilities.

### Victims in the criminal justice system

- 3.17 The Government is strongly committed to ensuring that victims of criminal activity are treated with dignity and respect and are provided with appropriate recognition and support. In all parts of the UK, the rights of victims are implicitly protected in much of the general law. For example, the law of tort in England and Wales will provide a remedy in negligence for irresponsible behaviour causing injury, and the criminal law will provide punishment of the offender. Injunctions are available to prevent foreseeable harm and damages or compensation may be payable if harm is caused.
- 3.18 Special legislative protection exists in relation to specific areas, for example in domestic violence,<sup>17</sup> and statutory provision is also made for victims of crime more generally, including special support for vulnerable and intimidated witnesses, the creation (in England and Wales) of a national Victims' Advisory Panel, and the provision of compensation from the state for injuries caused by crimes of violence.<sup>18</sup> Further, in England and Wales, there is a Code of Practice for Victims of Crime<sup>19</sup> which sets out victims' rights to certain services from the various criminal justice agencies such as the police, CPS, Probation Service, Youth Offending Teams, HM Prison Service and HM Courts Service. The focus is on procedural and information rights, with special provision being made for particularly vulnerable victims in the criminal justice process.<sup>20</sup> Criminal justice agencies also publish principles on standards of service in relation to victims of crime.<sup>21</sup>

<sup>17</sup> The UK has had specific domestic violence legislation since the Domestic Violence Act 1976 in England and Wales. In addition to existing family law remedies for victims of domestic violence (eg. non-molestation orders under section 42 Family Law Act 1996 and matrimonial homes act interdicts under the Matrimonial Homes Act (Family Protection) (Scotland) Act 1981), recent legislation has increased the availability of injunctions to potential victims to restrain threatened behaviour, for example widening the circumstances in which non-molestation orders are available under the Family Law Act (section 1 Domestic Violence, Crime and Victims Act 2004), and specific provision for potential victims of forced marriage in England and Wales (Forced Marriage (Civil Protection) Act 2007).

<sup>18</sup> In relation to these, see the Domestic Violence Crime and Victims Act 2004, SOCPA section 143, Protocol on Victims Advocate at [http://www.judiciary.gov.uk/docs/victims\\_advocate\\_protocol\\_030506.pdf](http://www.judiciary.gov.uk/docs/victims_advocate_protocol_030506.pdf); and Criminal Injuries Compensation Act 1995, respectively.

<sup>19</sup> Part 3, section 32, Domestic Violence Crime and Victims Act 2004.

<sup>20</sup> Those under 17 years, or whose quality of evidence is likely to be reduced because they have a mental disorder or learning disability or a physical disability or disorder; those who are intimidated because in fear or distress about giving evidence; those who have been victims of domestic violence or sexual assault or have lost a family member through murder or manslaughter.

<sup>21</sup> Eg. the police have a Quality of Service Commitment that includes rights under the Code but also other non-statutory standards, see <https://police.homeoffice.gov.uk/news-and-publications/publication/police-reform/quality-of-service-commitment?view=Binary>.

- 3.19 Non-statutory measures include the introduction of Victim Personal Statements to give victims a voice in their case, and the piloting of a Victims' Advocate scheme allowing the court to hear of the impact of serious crimes on the victim or their family before sentencing. These are in addition to services offered by criminal justice agencies and a wide range of services available from voluntary or community sector bodies.
- 3.20 Broadly parallel provision is made in Scotland. For example, the Criminal Justice (Scotland) Act 2003 implements aspects of the Scottish Strategy for Victims (published by the Scottish Executive in January 2001).
- 3.21 These measures should be set against the backdrop of the wider international context and the provisions which exist at this level by way of declaratory principles. In the international sphere, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Victims Declaration) 1985 is regarded as an important benchmark. Within Europe also, there are a number of legal instruments and decisions to which the UK is committed and which, like the UN Victims Declaration, establish a range of principles on the protection of victims of crime. These include, amongst others, a right to respect and dignity; a right to be heard in any criminal proceedings; a right of access to information about sources of support, protection and legal advice; a right to be informed about the progress of any complaint, criminal proceedings, sentence and release; a right to protection during the proceedings for the victim's safety and privacy; and access to compensation from the offender, where appropriate, or from the state. EU Member states are also required to promote mediation, victim support schemes and provide training for police and lawyers.
- 3.22 Expressing these rights constitutionally in a Bill of Rights and Responsibilities could be an important indication to all involved in the criminal justice system that the interests of victims must be given due importance in the legal process. The Government has recently appointed a Victims' Champion and announced that it will in due course appoint a Victims' Commissioner. The Government sees merit in making provision for victims within the context of a wider articulation of rights and responsibilities related to the criminal justice system, and is open to exploring their inclusion on the basis that a number of potential rights are already implicitly accorded to victims of crime and could thus form the basis of a distinct and separate category.
- 3.23 At the same time, there may be scope for considering inclusion of correlative responsibilities in this area which apply to participants in the criminal justice system such as witnesses, for example in relation to reporting crime and co-operating with prosecution agencies.

### Habeas corpus and the right to be free from arbitrary detention

3.24 The right to be free from arbitrary arrest and detention is one of the key constitutional rights, and the writ of habeas corpus is seen as the historical bedrock of this right. 'Habeas corpus' ('may you produce the body') is a legal writ which allows an individual to seek relief from unlawful detention or that of another. It has, historically, been regarded as a fundamental guarantee of individual freedom against arbitrary state interference and has historical roots in the domestic legal system, although it is unknown to Scots law.<sup>22</sup> The writ of habeas corpus is now seldom used (other than in immigration law) as a means of safeguarding against unlawful detention and has been largely superseded by legislation such as the Police and Criminal Evidence Act 1984, which provides the lawful basis for police detention. In Scotland, sections 13 to 15 of the Criminal Procedure (Scotland) Act 1995 provide the lawful basis for police detention.

3.25 The right to be free from unlawful or arbitrary detention is clearly embodied in the European Convention and incorporated in the Human Rights Act. Article 5(4) of the Convention provides that:

*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

### Right to a fair trial and trial by jury

3.26 The right to a fair trial is regarded as the single most important right in the criminal justice system in the United Kingdom. The right finds detailed expression in Article 6 of the European Convention. Article 6 has both a criminal and a civil limb, and the procedural protections required vary accordingly. The criminal limb includes a number of elements such as the presumption of innocence, being informed of the nature of the accusation and having adequate time and facilities to prepare a defence.

3.27 In the criminal law of England and Wales the right to trial by jury is understandably perceived as being linked to the right to a fair trial. However, over 95% of criminal cases in England and Wales are heard by magistrates without juries. The remainder, usually the more serious cases, are tried by jury in the Crown Court and number about 15,000 per year. Only in cases

<sup>22</sup> The first recorded use of habeas corpus in England dates back to 1305, during the reign of King Edward I. The procedure for the issuing of writs of habeas corpus was codified for the first time by the Habeas Corpus Act 1679. Habeas corpus is unknown to Scots law, nor will it issue from English courts into Scotland. Under a Scots Act of 1701 (c. 6) provision is made for preventing wrongful imprisonment and against undue delay in trials. It was applied to treason felony in 1848. The right to speedy trial is now regulated by s. 43 of the Criminal Procedure Scotland Act 1887. These enactments are the Scottish equivalent to the English Act of 1679.

considered in law to be of moderate seriousness does the defendant have the right to choose to be tried before a jury.<sup>23</sup>

- 3.28 Northern Ireland has had special arrangements since the 1970s for trial without jury for serious cases connected with terrorism and the security situation. These were set up in response to the risks of perverse acquittals resulting from partisan or intimidated jurors. The current system is risk-based, ensuring that only those cases that pose a risk to the administration of justice are tried without a jury. A number of additional safeguards have been put in place in respect of such non-jury trials. These include a requirement for reasoned verdicts from the judge, and the removal of barriers to appeal by a person convicted in a non-jury trial. These arrangements have withstood legal challenge and there is no evidence that these judge-alone trials are less fair than trial by jury. Conviction rates are on a par with jury trials.
- 3.29 Opinion polls show that many are in favour of a 'right to a fair trial by jury' in a Bill of Rights.<sup>24</sup> Some argue that in an adversarial system of justice, trial by jury in serious cases is fundamental to the right to a fair trial. There are other common law jurisdictions which recognise jury trial in certain types of case as a right in constitutional provisions (the United States, Canada, Australia and New Zealand).<sup>25</sup> However, although said to be a right, it should be noted that the proportion of cases going to jury trial in each of these jurisdictions varies.
- 3.30 Much of the argument for enshrining a 'right' to jury trial into a constitutional document may be driven by the deep cultural attachment to jury trial, originally deriving from its inclusion in Magna Carta. Notably, many other countries, including signatory nations to the European Convention do not have jury trials even for the most serious cases – jury trial is not necessary for compliance with Article 6 Convention. Moreover, the arguments in favour of jury trial in some serious cases are open to debate. Some argue that judge-alone trials would deliver better justice because the duty to give reasons in fact means that they are more transparent. There is also a legitimate debate over whether some cases, particularly serious fraud cases, are simply too complex to present properly to a jury and therefore, jury trial is an unreliable way of delivering justice in those cases.<sup>26</sup>

<sup>23</sup> Offences are classified as summary, either-way or indictable, with summary offences being the least serious and indictable covering the most serious such as rape or murder. Summary offences can only be tried in a magistrates court, while in indictable cases there is no choice for the defendant, any trial is in a Crown Court before a judge and jury. While a defendant charged with an either-way offence has the right to choose trial by jury, the court also has the power to decide that the case will be tried by a judge and jury, regardless of the wishes of the defendant.

<sup>24</sup> ICM / State of the Nation poll (89% support in 2006).

<sup>25</sup> See Article 11 F Canadian Charter of Fundamental Rights and Freedoms; 6th Amendment to the US Constitution; s24(e) New Zealand Bill of Rights Act 1990; s80 Commonwealth of Australia Constitution Act.

<sup>26</sup> This was the rationale behind the Government's provision for England and Wales in section 43 Criminal Justice Act 2003 (not yet in force), which would allow non-jury trials in serious and complex fraud cases. This would be where 'the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome' to the jury that 'the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury'.

3.31 Additional protections in relation to liberty of the person or fair trials may not be necessary as the belief in their fundamental nature is already so deeply entrenched, culturally and politically, and there is no fundamental threat to them. At this stage, the Government does not propose the inclusion of the principle of habeas corpus or a right to trial by jury in any new Bill of Rights and Responsibilities, but it remains open to all arguments for and against as part of an informed public debate.

## Equality

3.32 The principle of equality before the law has a long history in the UK. The principles of equality and non-discrimination have long been recognised in the common law and protected through a range of statutes through which the UK also complies with its international obligations. There is the additional protection of Article 14 of the European Convention, which provides a right to non-discrimination in the enjoyment of other Convention rights.

3.33 Discrimination law regulates specific areas of activity (employment and vocational training, provision of goods, facilities and services, performance of public functions, housing and education) and a number of 'strands' (sex, gender reassignment, race, disability, sexual orientation, religion and belief, and age). As well as these statutory requirements covering both the public and private sectors, there are currently three public-sector equality duties, in respect of race, sex and disability. Broadly, these duties require public bodies to have due regard to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity. The forthcoming Equality Bill<sup>27</sup> will build on these public-sector duties by streamlining the existing approach and extending it to the other 'strands'. The Bill will also harmonise and extend the anti-discrimination protections.<sup>28</sup>

3.34 Each of the devolved administrations and legislatures also operates within a similar framework promoting equality. For example, in Wales, under section 77 of the Government of Wales Act 2006, the Welsh Ministers must make appropriate arrangements with a view to securing that their functions are exercised with due regard to the principle that there should be equality of opportunity for all people. In relation to Northern Ireland, section 75 of the Northern Ireland Act requires public authorities to have due regard to the need promote equality of opportunity. Schedule 5 to the Scotland Act 1998 allows for the Scottish Ministers and Scottish Parliament to encourage equal opportunities, in particular the observance of equal opportunity requirements.

<sup>27</sup> The Equality Bill extends only to England, Wales and Scotland. Northern Ireland has a separate body of equality legislation.

<sup>28</sup> See: "Framework for a Fairer Future-The Equality Bill", published by the Government Equalities Office and the detailed proposals for an Equality Bill, following the responses to the Discrimination Law Review, available at <http://www.equalities.gov.uk/>.

3.35 In addition to statutory provision, equality of treatment has consistently been recognised as a principle of administrative law. As Lord Hoffmann said in *Matadeen*:<sup>29</sup>

'Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour.'

3.36 A Bill of Rights and Responsibilities could articulate and emphasise the extensive safeguards provided under the law. This would reflect society's commitment to equality and offer individuals a sense of the protection available to them.

3.37 The Government believes it would be important to avoid opening up new areas of litigation, disrupting the ability of front-line service providers to deliver services effectively and displacing the current balance of power between Parliament, the executive and the judiciary. Moreover, the assessment of when cases are alike or dissimilar, or the extent to which objective justification exists for differential treatment, can involve value judgements. As Lord Hoffman has stated:

'The fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle – that it should always be the judges who have the last word on whether the principle has been observed. In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how that principle is to be applied.'

3.38 The Government's overarching aim in this area would be to set out in any Bill of Rights and Responsibilities an accessible and straightforward statement of equality to embody its central place in UK society. There are justifiable exceptions to the principle that all should be treated alike; for example in accordance with eligibility rules on benefits, rules on immigration and citizenship and exceptions to discrimination law permitted or required by EU law. Generally, these exceptions are already the subject of detailed legislation, which would remain unaffected by any Bill of Rights and Responsibilities. It would also be important to ensure that Parliament could continue to legislate for such exceptions where appropriate. The Government welcomes views on how a statement of equality in the Bill of Rights and Responsibilities might be framed, in order to secure equality's place at the highest levels of political principle.

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<sup>29</sup> *Matadeen v Pointu* [1999] 1 AC 98, 109.

## Good administration

- 3.39 The principles of administrative law have been developed incrementally and flexibly by the courts as part of the common law, and differ in the law of England and Wales, Northern Ireland and Scotland respectively. In all parts of the UK, however, a fundamental aspect of the relationship between citizen and state is the way in which Government, the devolved administrations and other public bodies make decisions affecting individuals. While the detail may differ, the common thread is that the law of judicial review has evolved to require administrative decisions and actions which are lawful, rational and procedurally fair.<sup>30</sup>
- 3.40 The Government considers that to include these core principles in a Bill of Rights and Responsibilities would place the rules governing fair decision-making at the heart of the UK's constitutional arrangements, making them more accessible to the citizen, and helping to enhance confidence in our system of government.
- 3.41 Placing these rules on a constitutional footing is a natural step in the process of the Government's wider commitment to fair rules and good governance, building on that which has already been achieved, from the Freedom of Information Act 2000 and the parallel Freedom of Information (Scotland) Act 2002 (an Act of the Scottish Parliament), to the creation of a unified tribunals service (extending to Scotland in relation to some reserved functions) and the establishment of the Administrative Justice and Tribunals Council.<sup>31</sup> The Council's functions with respect to the administrative justice system include considering ways to make it accessible, fair and efficient; advising the Lord Chancellor, the Scottish ministers, the Welsh ministers and the Senior President of Tribunals on its development and referring proposals for change to them.
- 3.42 Other jurisdictions have taken aspects of administrative law and placed these on a statutory basis. For example, in response to the rapid expansion of the US public sector in consequence of the New Deal and the World War II, in 1946 the United States Congress enacted the Administrative Procedure Act. This statute dealt with a range of federal administrative law matters, setting out rules concerning access to government information, agency rule-making and judicial review. Another example of a similar exercise is the Australian Administrative Decisions (Judicial Review) Act 1977. That Act codifies the law of judicial review for most federal government decisions. For instance, that Act permits challenges to decisions on the ground that 'a breach of the rules of natural justice occurred' or that the 'decision was an improper exercise of the power'.

<sup>30</sup> It should be borne in mind throughout this discussion that the grounds of judicial review in Scotland are analogous but a matter of Scots law. Similar considerations apply in relation to Northern Ireland.

<sup>31</sup> The AJTC was set up in November 2007 under the Tribunals, Courts and Enforcement Act 2007, which also provided a new statutory framework for the tribunals system, designed to improve the access to, and quality of, tribunal decision-making.

- 3.43 The administrative justice landscape today is broad and has distinctive features in each part of the UK, providing a range of different mechanisms through which individuals can seek review of a decision affecting them. As well as judicial review by the courts, it is open to people to take their case to a tribunal or to complain to Ombudsman services. There is strength in this flexibility and in ensuring that not all complaints or decisions are litigated through the courts, when other forms of redress may be more appropriate, less costly and lead to a satisfactory resolution. In the context of a Bill of Rights and Responsibilities, the aim would be to capture some of the key principles across the landscape of administrative justice, although not all would necessarily be suitable for expression as justiciable rights.
- 3.44 For example, the UK Parliamentary Ombudsman, whose remit is maladministration rather than illegality, has set out the principles of 'good administration', which she lists as:
- getting it right (which includes acting in accordance with the law, but also internal rules and guidance)
  - being customer focused
  - being open and accountable
  - acting fairly and proportionately
  - putting things right (acknowledging and remedying mistakes)
  - seeking continuous improvement.
- 3.45 Similarly, in Scotland and Wales, Public Services Ombudsmen provide a route of complaint in respect of a broad range of public services. The Northern Ireland Ombudsman (who is both the Assembly Ombudsman for Northern Ireland and the Northern Ireland Commissioner for Complaints) similarly undertakes investigation of complaints about maladministration. Each of these Ombudsmen defines the principles of maladministration in slightly different ways, but each aims to capture the fair standards of dealing between the citizen and public bodies.
- 3.46 To make all aspects of good administration potentially justiciable might downplay the importance of effective non-legal avenues of redress, or might indirectly encourage an unduly legalistic and defensive approach among administrators. Similarly, the Government would not propose to make principles such as 'being customer focused' which is a central feature of the Ombudsman system, justiciable through the courts. However, there are a number of ways in which the principles of good administration might be framed in a Bill of Rights and Responsibilities, ranging from a general statement of a right of individuals to decision-making which is lawful, rational and procedurally fair, to a more detailed statement of the principles drawn from the existing law and the values which underpin fair decision-making and good

administration. One way might be to express the principles to be applied by the courts in judicial review cases in statutory form so that Parliament and the people it represents had the opportunity to endorse the scope for judicial scrutiny of the actions of the executive.

## Social justice and the welfare state

- 3.47 The UK's welfare state meets needs such as healthcare, education, housing and employment. The principles of the welfare state and its institutions are highly valued by the UK public. They could merit constitutional recognition in a Bill of Rights and Responsibilities to signal their enduring place in the life of our nation.
- 3.48 Although economic, social and cultural rights are not currently incorporated directly into UK law through an equivalent of the Human Rights Act, a range of related entitlements are embedded in UK legislation and reflected in the institutions which oversee their implementation. Many of them are enforceable, either because mechanisms to ensure their delivery (such as tribunals) are explicitly provided for in legislation or because they are susceptible to judicial review by the courts. The Government remains committed to meeting social and economic needs equitably through its policy decisions and legislative programme. It continues to do this on the basis of democratically elected representatives making decisions in Parliament on the allocation of scarce resources.
- 3.49 Legally enforceable entitlements to social and economic provision are not a new concept in the UK. Following the reforms of the 1906 Liberal Government, the 1945-51 Labour Government constructed the modern welfare state, building on the 1942 Beveridge Report and the 1944 Education Act and then setting up the NHS in 1948.
- 3.50 It was fundamental to the creation of the welfare state that rights came with responsibilities. Beveridge wrote<sup>32</sup>:
- 'Social security must be achieved by co-operation between the state and the individual. The state should not stifle incentives, opportunity or responsibility in establishing a national minimum, it should leave room and encouragement for voluntary action by each individual to provide more than the minimum for himself or his family.'
- 3.51 T H Marshall also saw duties as being an implicit aspect of rights. He noted<sup>33</sup>:
- 'If citizenship is invoked in the defence of rights, the corresponding duties of citizenship cannot be ignored. These do not require a man to sacrifice his

<sup>32</sup> Social Insurance and Allied Services CMND 6404, 1942.

<sup>33</sup> T H Marshall, *Citizenship & Social Class* (Cambridge, 1950)

individual liberty or to submit without question to every demand made by government. But they do require that his acts should be inspired by a lively sense of responsibility towards the welfare of the community.'

#### *Welfare Reform Bill*

The measures in the current Welfare Reform Bill are based on the simple idea that support should be matched with responsibility. They seek to renew the partnership between the state and the individual, ensuring that virtually everyone on benefits who can work is preparing for work. State support is crucial for those who find it most difficult to get jobs – disabled people, those lacking skills, single parents. Under the Welfare Reform Bill, parents with younger children, and disabled people who could work with support, will be expected to take part in work related activity, which may include training or other activities to help them move nearer to the job market. The measures are for those people who may not be ready to work immediately, but with the right mix of support and encouragement could get back into employment. For problem drug users, Government proposes to link receipt of benefits with a responsibility to move successfully through treatment and into employment. Those claiming Job Seeker Allowance or Employment Support Allowance and identified as drug users will be referred for an initial assessment with a healthcare professional to decide whether treatment is appropriate. Failure to attend without good cause will result in a benefit sanction. Those who would benefit will be mandated to agree a rehabilitation plan and engage with a personalised programme of support until they are ready to move onto mainstream employment programmes. These reforms will ensure that support is matched with responsibility.

#### **Improving opportunities, tackling disadvantage**

The Government is committed to building on the historic foundations of the welfare state, meeting social and economic needs and enabling everyone to realise their potential by providing appropriate support for them at every stage of their lives.

The recent document, *Working Together: Public Services on your Side*, notes an important role for the state in guaranteeing rights, standards and entitlements in public services. As many services are given greater freedom to manage themselves, some outcomes we want to achieve through public services will be translated into rights, standards, guarantees and entitlements that the public can expect. Ensuring minimum standards in public services are met across the board is a crucial part in tackling disadvantage and extending opportunities. An example of this approach is the Government's pledge that in England, by 2011, no child will go to

a school where fewer than 30 per cent of pupils achieve 5 good GCSEs, including in the key subjects of English and Maths.

The recent *New Opportunities* White Paper also sets proposals to further the objective of providing appropriate support for everyone at every stage of their lives and highlights the need to improve social mobility by tackling key areas such as child poverty. In March 2008, the Government published *Ending Child Poverty: Everybody's Business*, which sets out the causes and consequences of child poverty and the impact of Government action so far. The Government has announced its further intention to enshrine in legislation the pledge to eradicate child poverty by 2020, through a Child Poverty Bill to be introduced in 2009. This will highlight the Government's commitment and ensure a focus across all levels of Government on ending child poverty for the long term.

Taken together, the proposals in the *New Opportunities* White Paper, combined with other continuing Government initiatives, illustrate the scale and extent of the Government's commitment – in the current economic climate – to create jobs, secure economic growth in the future and ensure that everyone, young and old, has the opportunity to develop their talents and realise their potential.

### Welfare rights in a Bill of Rights and Responsibilities

- 3.52 Some argue that economic, social and cultural rights should be guaranteed as 'human rights', carrying the same status in domestic law as the civil and political rights in the European Convention. While many specific welfare entitlements are legally enforceable, the Government believes that such policy matters should generally be developed by democratically accountable elected representatives, rather than by the courts. Decision-making in economic, social and cultural matters usually involves politically sensitive resource allocation and if the courts were to make these decisions, this would be likely to impinge on the principles of democratic accountability as well as the separation of powers between the judiciary, the legislature and the executive which underpins our constitutional arrangements.
- 3.53 In drawing up a Bill of Rights and Responsibilities, the Government would not seek to create new and individually enforceable legal rights in addition to the array of legal protections already available. However, it welcomes discussion on whether there could be advantages in articulating constitutional principles which can be drawn from existing welfare provisions. It might be possible to distil the values which frame our welfare system in order to reflect, in one coherent document, certain social and economic guarantees and the responsibilities and conduct expected of individuals.

- 3.54 The welfare state covers different areas, traditionally categorised as: social security; health; housing; education; welfare and children. The Government welcomes discussion on the opportunities, tensions and challenges which articulating constitutional principles from existing provisions will pose in all areas, some of which are briefly explored below.
- 3.55 In relation to housing, for example, the Government believes that everyone should have access to a decent home at a price they can afford. Housing is largely a devolved area, allowing democratically elected representatives in each administration to take policy decisions according to the different issues they face. Generally, our legal system retains a historic preference for delivery of housing-related aspects of welfare through the imposition of duties on statutory bodies such as local authorities, rather than through grant of rights to individuals.
- 3.56 Housing is part of a wider debate on the relationship between a Bill of Rights and Responsibilities and the Human Rights Act (which includes the right to peaceful enjoyment of possessions)<sup>34</sup>, as well being part of the debate on welfare rights.
- 3.57 Healthcare and child welfare are now considered as further examples of where it might be possible to articulate existing entitlements in a Bill of Rights and Responsibilities.

## Healthcare

- 3.58 The NHS, established by the Labour Government in 1948,<sup>35</sup> was founded on the principle of free healthcare at the point of use for all those ordinarily resident in the UK.
- 3.59 The NHS and the healthcare it provides are regulated by a substantial body of legislation.<sup>36</sup> Many of the entitlements under the NHS and the duties incumbent on public authorities are legally enforceable through the mechanism of judicial review of executive action of Strategic Health Authorities and Primary Care Trusts in England; Health Boards and Special Health Boards in Scotland; local health boards and NHS Trusts in Wales, and organisations in the Health and Personal Social Services Agencies in Northern Ireland.
- 3.60 The NHS is the largest health service in the world and a potent embodiment of values this country holds dear. The Government sees potential advantages in a future Bill of Rights and Responsibilities which would give constitutional

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<sup>34</sup> See para 4.16.

<sup>35</sup> National Health Service Act 1946, brought into effect on 5 July 1948. The National Health Service in Scotland was established by the National Health Service (Scotland) Act 1947.

<sup>36</sup> Recently consolidated in the NHS Act 2006, NHS (Wales) Act 2006 and NHS (Consequential Provisions) Act 2006.

recognition to the principles and values of the NHS. It has already worked closely with the devolved administrations, who have responsibility for the delivery and organisation of healthcare in Scotland, Wales and Northern Ireland, to reaffirm the core principles on which the NHS was founded. Following publication of the draft NHS Constitution on 30 June, Health Ministers from across the UK issued a joint statement of core principles on 3 July 2008, affirming that:

- the NHS provides a comprehensive service, available to all
- access to its services is based on clinical need not an individual's ability to pay
- the NHS aspires to high standards of excellence and professionalism
- NHS services must reflect the needs and preferences of patients, their families and carers
- the NHS works across organisational boundaries with other organisations in the interests of patients, communities and the wider population
- the NHS is committed to providing best value for taxpayers money, making the most effective and fair use of finite resources
- the NHS is accountable to the public, communities and patients that it serves.

3.61 These common principles could provide a starting point for considering how to capture the overarching shared commitments in the NHS across all parts of the UK. A Bill of Rights and Responsibilities could allow for recognition of the distinctive ways in which healthcare is provided in different parts of the UK. These differences in approach are integral to the devolution settlement and there are a number of significant and continuing developments across UK health services which should be borne in mind when considering how this area might be encapsulated in a future Bill of Rights and Responsibilities.

3.62 The Department of Health carried out a consultation during the second half of 2008 on the draft Constitution and published the NHS Constitution on 21 January 2009. This has been well received by both patients and staff alike. The NHS Constitution for England sets out and secures the enduring values and principles of the NHS in England. It also sets out rights to which patients, public and staff are entitled, the pledges which the NHS is committed to and the responsibilities we all have to support the NHS to work effectively. It aims to empower patients, the public and staff alike. The Health Bill, currently going through Parliament, will ensure that all NHS bodies and independent and third-sector providers of NHS services should have regard to the NHS Constitution.

- 3.63 The rights articulated in the NHS Constitution are declaratory of existing legal rights, the majority of which derive from duties imposed on the Secretary of State and NHS bodies through legislation. Areas in which these feature include access to health services; quality of care and environment; informed choice; nationally approved treatments, drugs and programmes; respect, consent and confidentiality; patient involvement in healthcare and the NHS; and complaints and redress. The NHS Constitution also emphasises the role of responsibilities in healthcare, including patient responsibilities to treat NHS staff with respect and to keep medical appointments.
- 3.64 Meanwhile, Scottish Ministers have launched a public consultation on a Patients' Rights Bill for users of the NHS in Scotland. The consultation is seeking views on the development of a legal framework for what individuals can expect from the NHS in Scotland and what can be expected from them. A Patients' Rights bill would reinforce and strengthen the commitment to place patients at the centre of the NHS in Scotland, clarify the standards of the NHS in Scotland and to set out the rights and responsibilities of patients in a clearer way.
- 3.65 Bearing in mind the devolved responsibility of healthcare and the current activity in England and Scotland, the Government would welcome views on what role a future Bill of Rights and Responsibilities might have with respect to healthcare.

## Children

- 3.66 In consulting on a Bill of Rights and Responsibilities, the Government welcomes public debate on how to achieve its vision of making this the best place in the world for children to grow up. It is open to exploring whether and, if so, how a Bill could be used to improve children's wellbeing and their standing and respect for children in UK society and how such a bill could encourage the sense of rights and responsibilities we want from everyone with regard to children in our society. In particular, it seeks views on how the rights of all children, young people and their families might be articulated, along with the responsibilities we all share to secure these.
- 3.67 As Chapter 4 sets out, there is a range of options for the legal effect of rights. By including children's rights in a Bill of Rights and Responsibilities, the Government would not want to create new avenues of redress for individuals in the courts. Rather, it would be seeking to influence the actions of public bodies and to emphasise the importance of children and their wellbeing in UK society.

*Children's rights and the UN Convention on the Rights of the Child*

- 3.68 The UN Convention on the Rights of the Child is the overarching international treaty for children's rights ratified by almost all UN member states.<sup>37</sup> All UK Government and devolved administrations are committed to implementing the Convention and have made improving outcomes for children a top priority. The progress in child wellbeing across the UK builds on the implementation of many of its provisions through common or statute law. For example, rights to education are comprehensively provided for in existing legislation, underpinned by the right to education contained in the Human Rights Act 1998. Legislation confers duties on ministers in relation to education and the courts have recognised that the existing statutory framework provides an effective right for every child of compulsory school age to receive an appropriate education.
- 3.69 Other articles and provisions of the Convention are given effect through a mix of legislation such as the Children Act 1989 and Children Act 2004 and policy initiatives such as Every Child Matters and the Children's Plan in England; Getting it Right for Every Child in Scotland (including key measures such as the Curriculum for Excellence); Seven Core Aims for Children and Young People in Wales, and the 10 Year Strategy for Children and Young People in Northern Ireland.
- 3.70 The UK Government and the devolved administrations share many common aims – such as the goal of eradicating child poverty – but many of the key policy levers which will help achieve this goal, such as improved education and healthcare for children and young people are pursued in distinctive ways. Any Bill of Rights and Responsibilities should allow for recognition that responsibility for many aspects of child wellbeing is devolved and the different ways in which outcomes are achieved for children across the UK.

**A right for children to achieve wellbeing**

- 3.71 Considering the UK's ratification of and commitment to the UNCRC, and drawing on the general principles and articles of the Convention, the Government considers that a future Bill of Rights and Responsibilities could contain a right for children to achieve wellbeing, whatever their background or circumstances. A new Bill of Rights and Responsibilities could help to emphasise that Government and wider society should both play a part in prioritising the needs of children and improving outcomes for them. In England, Every Child Matters aims to make a reality of children's rights by setting an ambition of wellbeing for every child, described in terms of five outcomes, and by setting an expectation that services should work together to promote this.

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<sup>37</sup> The Convention follows on from the 1948 UN Universal Declaration on Human Rights and the 1959 Declaration of the Rights of the Child. The United States and Somalia are the only remaining UN member states yet to ratify the Convention.

- 3.72 The ambition is for every child, whatever their background or circumstances, to be healthy; stay safe; enjoy and achieve; make a positive contribution; and enjoy economic wellbeing. It would be necessary to explore how these aims could be reflected in a Bill of Rights and Responsibilities without placing unrealistic and unsustainable burdens on public bodies and others and without interfering in decisions as to resource allocation which are the preserve of elected bodies including Parliament.
- 3.73 Any provision on a right to achieve wellbeing could be based on broad aspirations such as those captured in the five Every Child Matters outcomes, as set out above, underpinned by the general principles of the Convention and reflected in policy schemes across the UK. These goals could form the basis of provisions in a future Bill of Rights and Responsibilities, articulating principles to guide public authorities and lawmakers when making policy and legislative decisions concerning children, and by the courts when interpreting legislation and reviewing executive and administrative action relating to child wellbeing.

#### *Responsibilities which support outcomes*

- 3.74 A Bill of Rights and Responsibilities might also set out the contribution that everyone needs to make in order to secure wellbeing for all children, since children cannot achieve wellbeing without parents, Government and wider society recognising their mutual and collective responsibilities and children and young people being aware of their own responsibilities in our society. These responsibilities are explored further in Chapter 2.
- 3.75 The Government will be setting out further steps to achieve its aims over the next few months, for example in taking forward action to enshrine in law the commitment to eradicate child poverty by 2020. Through the consultation on this Green Paper it will also explore whether and how a right to achieve wellbeing and its supporting responsibilities could help achieve better outcomes for children and families in a future Bill of Rights and Responsibilities.

### **Living within environmental limits**

- 3.76 New and increasingly complex challenges have arisen since the founding of the British welfare state and the drawing up of the European Convention in the second half of the 20th century. The threat of dangerous climate change, the growing stress human beings place on resources and environmental systems – water, land and air – and the rapid loss of species and habitats all raise issues that reach beyond the rights and welfare of individuals, national boundaries and the current generation alone.

- 3.77 In general, the Government considers environmental policy options in a way that sees the actions of individuals as part of a wider picture, which includes important, politically sensitive decisions. As in other areas, the Government believes such decisions should be the domain of the democratically accountable Parliament and relevant public bodies, such as local authorities, rather than the courts.<sup>38</sup>
- 3.78 In defining what is a clean or suitable environment there is a need to balance a number of factors. For example, the 2006 Stern Review on the Economics of Climate Change<sup>39</sup> proposed a wide-ranging approach to our biggest environmental challenge, involving economic, technological and behavioural change, and based predominantly on collective rather than individual action. The Climate Change Act 2008 sets out innovative actions to give practical effect at the domestic level to many of Stern's recommendations.
- 3.79 The values of action based on collective responsibility that will help meet the challenges faced by our society and our environment are encapsulated in the concept of sustainable development, in which social and economic considerations are integrated with environmental considerations.
- 3.80 Building on the commitments made by governments at the 1992 Rio Earth Summit, sustainable development is a founding principle of the European Union<sup>40</sup> and is underpinned in the UK by the 2005 Sustainable Development Strategy, *Securing the Future*.<sup>41</sup> This sets out a shared vision as a framework for specific actions by the Government, Scottish Government, Welsh Assembly Government and Northern Ireland Administration in their respective areas of competence. In addition, an increasing number of public bodies, such as the Greater London Authority, the Welsh Ministers, the Environment Agency, Natural England, Ofwat and Ofgem, have statutory sustainable development duties.
- 3.81 The UK vision of sustainable development has as its main goal 'to enable all people throughout the world to satisfy their basic needs and enjoy a better quality of life, without compromising the quality of life of future generations'. *Securing the Future* sets out five principles to underpin policy-making in the UK to ensure that it takes us toward the goal of sustainable development. In relation to the environment the key principle is Living Within Environmental Limits:

*Respecting the limits of the planet's environment, resources and biodiversity – to improve our environment and ensure that the natural resources needed for life are unimpaired and remain so for future generations.*

<sup>38</sup> Much environmental policy and regulation is devolved in Scotland, Northern Ireland and Wales.

<sup>39</sup> [http://www.hm-treasury.gov.uk/media/4/3/Executive\\_Summary.pdf](http://www.hm-treasury.gov.uk/media/4/3/Executive_Summary.pdf).

<sup>40</sup> Treaty Establishing the European Community, Article 2.

<sup>41</sup> <http://www.sustainable-development.gov.uk/publications/uk-strategy/index.htm>.

- 3.82 The remaining principles are: 'Ensuring a Strong, Healthy and Just Society, Achieving a Sustainable Economy, Promoting Good Governance and Using Sound Science Responsibly'. For a policy to be sustainable, it must reflect all five of these principles, although it is recognised that some policies, while underpinned by all five, will place more emphasis on certain principles than others. Any trade-offs should be made in an explicit and transparent way.
- 3.83 Sustainable development is promoted in different ways in each part of the UK on the basis of a range of policy schemes and instruments. These include the Sustainable Development Indicators for Wales and a duty on Welsh ministers to promote sustainable development (section 79 Government of Wales Act 2006); the Northern Ireland Sustainable Development Strategy and the Scottish Sustainable Development Strategy. Sustainable development is endorsed across government, by the devolved administrations, and by various other public bodies, and provides a means for responsible collective action and leadership.
- 3.84 For these reasons, the Government considers that if a Bill of Rights and Responsibilities were to include environmental policy, it might refer to agreed UK principles of sustainable development. It might also include reference to the existing statutory provisions for access to information, public participation, and access to justice in environmental matters that enable citizens to engage actively in improving their own and others quality of life whilst respecting environmental limits.
- 3.85 If such an approach were agreed, there might also be arguments for setting out a form of duty on public-sector bodies to promote these principles of sustainable development, for example by exemplifying sustainable behaviour in their own activities; encouraging businesses to adopt sustainable practices; and working to enable citizens to adopt sustainable lifestyles, it might build on the existing commitment to sustainable development across Government and at regional and local level. Any such provision would, however, need to be carefully drafted so as not to cut across the existing specific duties of various bodies. Careful thought would also need to be given to any broader implications it might have, including regulatory impact upon the bodies to whom it might apply.
- 3.86 The Government regards living within environmental limits as an appropriate area for discussion and consultation in the context of a Bill of Rights and Responsibilities. It presents the opportunity to recognise the importance UK society attaches to sustainability and the value of the environment as our common inheritance. Allowing sustainable development principles to feature in some form at the highest political level and on an enduring basis in a new constitutional document should help to foster awareness of our environment and our collective responsibility for it.

# Chapter 4 Legal effect

- 4.1 Fundamental to the consideration of any future Bill of Rights and Responsibilities are what legal effect it should have, and how it should be enforced. This debate provides an opportunity to look again at assumptions about how best to ensure that rights and responsibilities are respected and understood.
- 4.2 The possible range of approaches to a Bill of Rights and Responsibilities represents a continuum. At one end, it might take the form of a declaratory and symbolic statement. At the other lies a set of rights and responsibilities directly enforceable by the individual in the courts. Along the continuum there are options including some form of statement of principles which, endorsed by Parliament, might inform legislation – as well as public authority and court decisions – while not necessarily giving rise to enforceable individual rights. Ultimately, different categories of principles, rights and responsibilities could have different legal effects, so that a Bill of Rights and Responsibilities could encompass a range of legal effects and mechanisms for enforcement.
- 4.3 There are strongly held views on the advantages and disadvantages of positioning any Bill of Rights and Responsibilities at any given point on this spectrum. Judgements will depend on how people believe fundamental rights and freedoms for the individual are best protected and responsibilities most effectively enhanced. The arguments against the need for reform in the end rest on the assumption that the current relationship between Government, Parliament and the courts still provides the best possible protections. The arguments in favour of reform flow from a belief that some change is needed. For advocates of a Bill of Rights and Responsibilities, the further along the spectrum towards directly justiciable rights, the stronger is the likelihood that the courts assume a more important role in protecting individual freedoms. Conversely, creating any Bill of Rights and Responsibilities as a purely declaratory instrument emphasises the cultural: empowering people by making them more aware of their rights and responsibilities.
- 4.4 In addition to the different possibilities for legal effect in the courts, there are a number of options for giving a Bill of Rights and Responsibilities force in the political and social spheres. For example, new procedures could be included, such as a duty placed on ministers to report to Parliament and the devolved legislatures on whether any primary or secondary legislation which they present complies with the principles in a Bill of Rights and Responsibilities. It would remain possible to legislate in a way which diverged from the provisions, but ministers would be politically accountable to Parliament for doing so. Consideration could also be given to a new framework outside the courts for monitoring compliance with the provisions of a Bill of Rights and

Responsibilities. For example, in addition to ministerial accountability to the people through Parliament, scrutiny could take place through Parliamentary committees in relation to primary or secondary legislation; or the Ombudsman in relation to complaints against public authorities.

## **Enforceability – a range of options**

4.5 Any new Bill of Rights and Responsibilities could combine a selection of approaches across a broad spectrum of justiciability, tailoring the legal effect to the right or responsibility at issue and preserving an appropriate balance of power between executive, judiciary and legislature.

### **1) A declaration of rights and responsibilities**

4.6 A declaration or charter of rights and responsibilities expressed as common beliefs might build on the precedent provided by the French Declaration of the Rights of Man or the Universal Declaration of Human Rights, both of which make reference to responsibilities as well as rights. Such a declaration would be intended to have no legal effect in the courts. It would enable Parliament to set out a common and explicit understanding of the values underpinning reciprocal rights and responsibilities, including the rights of individuals, the responsibilities of public authorities to respect rights and the mutual responsibilities we owe each other as members of society. It could reflect the consensus which emerges from the development of the Statement of Values on which the Government will also be consulting. A Bill of Rights and Responsibilities in this form could have the advantage of giving people a clearer idea of what we can expect from the state and from each other, and provide an ethical framework for giving practical effect to our common values. It could provide an expression of what is expected from those who live here in the UK and serve as a code of conduct and reference point for citizenship education. Even if a Bill of Rights and Responsibilities contained some interpretative principles or rights falling further along the scale of justiciability it might also contain an introductory articulation of more symbolic values.

4.7 Such a charter or declaration could be fully debated in Parliament but would not necessarily need the statutory force of an Act of Parliament. A non-statutory declaration could be readily amended and updated over time. Its effect would be intended as primarily political and symbolic rather than legal. The fact that a charter or declaration might not have statutory force or was otherwise not justiciable would not mean that the exercise or the text itself lacked force. It could still carry great legitimacy in the wider sense of that word, by the strength of the consent behind it, and by the way in which it helped to set standards, as yardsticks of the behaviour we expected of others and of ourselves as members of UK society. In so far as a declaration placed new duties on the Government, these would be political commitments for which the main

mechanism for accountability would be Parliament rather than the courts. In so far as a declaration gave expression to new duties on individuals, it could be designed to make explicit the shared values on which our peaceful coexistence depends.

- 4.8 A declaration would have the advantage over other options for legal effect of focusing on cultural change. It would provide an opportunity to express rights and responsibilities in inspiring and motivating language, without the constraints placed by the careful drafting needed in legislative provision.
- 4.9 It would bring together a common set of fundamental beliefs and values in one document and give people better opportunities to respond accordingly. The fact that existing rights and responsibilities are located in a range of different sources means it can be difficult for individuals to understand their rights and responsibilities in relation to society. The absence of a single document means that the development of citizenship in the UK is without the force and focus which constitutional texts and declarations provide in nations like the United States, South Africa and France, for example. There would be value in giving constitutional expression to these principles even if the document as a whole, or discrete parts of it, did not have any separate legal effect.
- 4.10 Moreover, there are some rights, particularly social and economic rights, aspects of which are in practice already embedded in a wide range of legislation in the UK. They may not currently be expressed as legal rights, but many related entitlements are enforceable, either because mechanisms to test their delivery are explicitly provided in legislation or because they are susceptible to judicial review. A Bill of Rights and Responsibilities might bring these together in a single expression of what the citizen can expect from the state.
- 4.11 Finally, a non-justiciable declaration could include broad aspirations (for example, to the resolution of disputes by peaceful means; to tolerance and respect for others; and to safeguarding of the environment for future generations), where traditional legal sanctions would not be appropriate. Some rights, such as the rights of victims of crime to be treated with respect and dignity may also be better achieved by training and education than through legal action. It is also likely that many responsibilities would not give rise to hard-edged legal consequences for particular individuals, such as criminal or financial sanctions. For example, a duty to vote might be set out, but framed as a political and social responsibility of citizens rather than in terms of a legal obligation backed up by a criminal offence.

4.12 A statement of principle of this kind could explicitly be expressed to be non-justiciable, along the lines of the 'Directive principles of social policy' found in the Constitution of the Republic of Ireland.<sup>42</sup> For such a unique constitutional document, new options for scrutiny might be appropriate. Ministers might be required to report to Parliament on the Government's compliance with the declaration. There might equally be a role for the Parliamentary Ombudsman.

#### *Codification of rights and responsibilities*

4.13 A variation on the non-justiciable declaratory option is that a Bill of Rights and Responsibilities could seek to codify and express in one place a range of existing rights and responsibilities. Rights and responsibilities derive from a mixture of written and unwritten sources. In some areas, for example concerning access to official information, data protection, taxation or discrimination, they are found in comprehensive statutory regimes. In other areas, they derive from the common law or from discrete pieces of statute law or a combination of the two.

4.14 In codifying rights and responsibilities, it would be important not to cause confusion by providing alternative expressions of existing rights. This could be avoided either by repeating the wording of established rights and responsibilities in a Bill of Rights and Responsibilities (for example the Convention rights in Schedule 1 to the Human Rights Act); or by cross-referring to or signposting them (for example, the rights to freedom of information as set out in the Freedom of Information Act 2000);<sup>43</sup> alternatively, they might be framed as general principles but the role of the courts could be expressly limited.

4.15 In so far as common law rights are concerned, there may well be a case for codifying these in a new Bill of Rights and Responsibilities so that they can be endorsed by Parliament and more easily understood by the citizen. For example, it might be possible to encapsulate the principles from the case law on fair administrative decision making.

4.16 In rapidly changing economic circumstances, it is also right that the Government keeps reviewing the effectiveness of existing protections and tackles new issues as they emerge. In relation to property rights, for example, an

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<sup>42</sup> Article 45 of the Irish constitution provides for 'Directive principles of Social Policy' which are "intended for the general guidance of Parliament. The application of those principles in the making of laws shall be the care of Parliament exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.". The 1996 report of the All-Party Oireachtas Committee on the Constitution states that while accepting that the principles could not be taken into account in determining whether post-1937 legislation was constitutional, the courts have held that the principles could be looked at for other purposes such as in regard to identification of an unenumerated constitutional right, for examination of the constitutionality of a pre-1937 statute and for the construction of a common law rule. The question has not, however, been fully considered by the Supreme Court.

<sup>43</sup> In Scotland, the Freedom of Information (Scotland) Act 2002.

internal review is currently underway, led by the Ministry of Justice, in relation to the legal protections for homeowners in difficulties with their mortgage payments. Similarly, the Government is also consulting on extending the scope of the Financial Services Authority regulation to cover sale and rent back agreements.

- 4.17 A codified set of rights and responsibilities might enable any such new protections to be located in one place so that people could gain access to them more easily.

## 2) General interpretative provisions

- 4.18 One way of giving a new Bill of Rights and Responsibilities of more legal force than a declaration without encouraging an increase in litigation would be for it to contain guidance from Parliament to the courts or public authorities as to how discretion should be exercised or the law developed and interpreted.
- 4.19 A Bill of Rights and Responsibilities could set out general interpretative principles to be taken into account by courts when considering challenges to decisions by public authorities. It could, for example, expressly refer to the principle of proportionality and the need to balance certain individual rights against the public interest and the rights of others, to the values of dignity and respect or to the fundamental principles underlying the welfare state. A Bill of Rights and Responsibilities might also give guidance as to the factors to be given greatest consideration when a court is considering the grant of discretionary remedies such as injunctions or awards of compensation.
- 4.20 These principles would not override any specific provision in other legislation or be directly enforceable themselves, but they could be taken into account by courts in deciding cases brought under the existing law. They would be relevant when the courts were considering the exercise of discretion by public authorities or were exercising discretion themselves (for example in the development of the common law, interpretation of ambiguous legislation or where a statutory appeal gave the court a degree of discretion). The intention would be not to create new causes of action in the courts but to inform the development of the existing law and the exercise of discretion. A new Bill of Rights and Responsibilities could make it clear that making the rules on eligibility for state services and decisions about competing public policy priorities and spending lie with the elected House of Commons and the Government accountable to it, as well as with local authorities. Such broad principles could also allow full account to be taken of the devolution settlements and the spheres of decision-making that have been delegated to the devolved legislatures and administrations.

### *Duties on public authorities*

- 4.21 One variation on setting out general interpretative principles, would be to place a duty on public authorities to have regard to relevant principles when exercising their functions and in making decisions, thus adding an extra degree of legal effect to the type of provision or principle set out. In this way, Parliament could indicate directly to decision-makers the overarching principles which should inform the exercise of their functions. The advantages of doing so would need to be weighed against the potential disadvantages of placing more legal duties on public authorities.
- 4.22 As an example, a Bill of Rights and Responsibilities might contain a duty on relevant public authorities relating to principles of sustainable development or good decision-making. A set of principles could be taken into account by courts and other public authorities in informing the exercise of discretion in particular cases. The principles could inform the courts' decisions under existing powers without creating new causes of action.
- 4.23 Public authorities comprise a multitude of public bodies, including the important and varied functions of local authorities, as well as central government functions and could cover institutions at grass roots level such as schools and hospitals. The government is considering separately whether the definition of public authority in the Human Rights Act should be clarified following the House of Lords ruling in the case of *YL*.<sup>44</sup> With the possible exception of good administration (where the existing law applies to everyone affected by decisions), it is not proposed that any new rights created should extend to corporations or other private bodies or that responsibilities should be placed on them except to the extent that they carry out public functions.

### **3) Specific provisions enforceable in the courts**

- 4.24 At the far end of the spectrum of justiciability would be an approach whereby any new provisions expressed in legislation would be intended to be legally enforceable. The Human Rights Act places a duty on all public authorities to act compatibly with the Convention rights set out in Schedule 1 and gives those whose rights are infringed a right of legal action directly against the public authority concerned. The Government would not intend to alter or dilute the enforcement mechanism provided by the Act for the fundamental rights it protects. In relation to any new rights in a future Bill of Rights and Responsibilities (going beyond those contained in the Human Rights Act), one option would be to follow the model of the Human Rights Act itself. This would give individuals who considered their rights had been infringed by a public authority a right of legal action directly against the public authority concerned. In relation to responsibilities, it is clear that existing legal duties, such as the duty to pay tax, are already backed up by a system of offences and penalties.

<sup>44</sup> *YL v Birmingham City Council & Ors* [2007] 3 All ER 957.

Similarly, the criminal law imposes sanctions on violent behaviour, reinforcing the implicit responsibility not to behave with unreasonable violence.

- 4.25 The Government does not consider that a generally applicable model of directly legally enforceable rights or responsibilities would be the most appropriate for a future Bill of Rights and Responsibilities. In terms of rights, it may not be the best mechanism for ensuring fair provision for society as a whole in relation to social and economic rights. Similarly, in terms of responsibilities the imposition of new penalties is unlikely to be the best way to foster a sense of civic responsibility and encourage respect and tolerance for others and participation in the democratic process. Many of the areas of responsibility explored in this paper (for example, a civic duty to vote) are of a different nature from, for example, duties already covered by the criminal law and are not necessarily suitable for enforcement through legal sanction.
- 4.26 There are no proposals in this paper which would add to, or modify, the current regime under, for example, the Police and Criminal Evidence Act 1984, anti-terrorism legislation or the common law in respect of the detention or trial of suspects or the removal of deportees. Any new rights would need to be framed so as to make it clear that they did not displace existing rules on citizenship, immigration status, the treatment of criminal (including terrorist) suspects or eligibility, for example in relation to access to benefits or services, as, in the Government's view these should properly remain the subject of political decisions, taken by Parliament. Any new Bill of Rights and Responsibilities should make it clear that Parliament remained free to legislate on such areas in the future and that the courts would have no power to strike down or re-write future legislation in these areas.

## **Decision-making and resource allocation: should there be a role for the courts?**

- 4.27 One of the key questions in relation to the constitutional expression of rights is the extent to which the courts should make decisions which have a direct effect on resource allocation. Different jurisdictions have arrived at different answers depending on their constitutions and their history and social and economic conditions. For the United Kingdom, it is the Government's clear view that Parliamentary sovereignty must remain as the cornerstone of the UK constitution. Ministers are democratically accountable to Parliament for the prioritisation of social needs, and for the way in which resources are targeted towards meeting them. The process of adjudication of individual claims cannot take account of broader public policy arguments in a way which ensures such accountability. Nor do the judiciary have any democratic mandate to take such decisions. The Government is satisfied that there is no case for extending the UK courts' jurisdiction over such areas.

## Relation of a Bill of Rights and Responsibilities to other legislation

- 4.28 Apart from assessing the range of options for any Bill of Rights and Responsibilities, it is important also to consider how it might interact with existing legislation.
- 4.29 The Government is committed to the fundamental rights and freedoms protected by the European Convention on Human Rights and included in Schedule 1 to the Human Rights Act; and to the mechanisms in the Human Rights Act for 'bringing rights home' – a duty on public authorities to act in compliance with the rights; a right to challenge infringements in the UK courts; an obligation on the higher courts to interpret legislation compatibly with the Convention rights; and powers for the courts to make declarations of incompatibility where they cannot do so. The Government is proud that it introduced the Human Rights Act and it will not resile from it nor repeal it.
- 4.30 If a Bill of Rights and Responsibilities took the form of an Act of Parliament, there would be a range of options for dealing with the Human Rights Act and the Convention rights. The Bill might subsume the Human Rights Act as part of the new Bill of Rights and Responsibilities. The Bill of Rights and Responsibilities might preserve the Human Rights Act as a separate Act. It might also be desirable to signpost the Convention rights in some way, for example by cross-reference to make clear that neither they nor the Human Rights Act were affected by the new Bill.
- 4.31 The Government is clear that any attempt to reverse the incorporation of the European Convention on Human Rights would prevent our judges from applying the Convention in a way that is specific to local circumstances in the United Kingdom and from contributing to the development of the interpretation of the Convention in the international arena. Similarly the Government would oppose any attempt to resile from the European Convention on Human Rights as an abdication of moral responsibility. Moreover it would call into question our continuing membership of the European Union.

## A Bill of Rights and Responsibilities and devolution

- 4.32 Devolved legislatures and administrations in Scotland, Wales and Northern Ireland have become an established part of the United Kingdom's political landscape. Any UK-wide discussion of rights and responsibilities raises important questions about the relationship between rights, responsibilities and the UK's governance arrangements in respect of devolution.

- 4.33 Under the devolution settlements, the Scottish Parliament has legislative competence over devolved matters (which include health and social care, education, civil and criminal justice and the environment). The UK Parliament remains responsible for reserved matters in Scotland (including immigration and nationality, social security, foreign affairs, defence, national security and the constitution). The Government of Wales Act 2006 allows the National Assembly for Wales to obtain legislative competence in relation to specified policy areas (or 'matters') with the agreement of the UK Government and Parliament. Legislative competence can be granted either by Acts of Parliament or by Orders in Council under section 95 of the 2006 Act. The Assembly has already acquired extensive legislative competence in relation to education and social welfare, as well as more limited competence in a number of other fields, and several proposals to confer additional competence are currently under consideration.
- 4.34 In both Scotland and Wales, the rights under the European Convention of Human Rights are embedded as part of the devolution settlements. It is outside the competence of both the Scottish Parliament and the National Assembly for Wales to pass any law which is incompatible with the Convention rights or which amends the Human Rights Act. Similarly, the Scottish and Welsh ministers have no power to do anything which is incompatible with Convention rights.
- 4.35 The current devolution arrangements in Northern Ireland were established as a result of the Belfast ('Good Friday') Agreement of 10 April 1998. The Northern Ireland Executive and the Northern Ireland Assembly have full legislative competence over a wide range of 'transferred matters', and the Assembly may legislate on listed 'reserved' matters (such as policing, criminal justice, firearms and explosives regulation, broadcasting, civil aviation, the National Lottery, financial services regulation and the National Minimum Wage scheme) with the Secretary of State's consent.
- 4.36 As with Scotland and Wales, the European Convention rights are a significant part of Northern Ireland's devolution settlement. Under section 24 of the Northern Ireland Act 1998, a minister or Northern Ireland Department has no power to do anything that is incompatible with the Convention rights. Furthermore, section 6 of the Northern Ireland Act 1998 provides that a provision is outside the legislative competence of the Assembly if it is incompatible with the Convention rights.

- 4.37 In 1998, the Belfast Agreement led directly to the establishment of the Northern Ireland Human Rights Commission – an independent statutory body responsible for promoting awareness of the importance of human rights in Northern Ireland, to review existing law and practice and to advise government on what steps need to be taken fully to protect human rights in Northern Ireland. It is able to conduct investigations, and has powers to enter places of detention, and can compel individuals and agencies to give oral testimony or to produce documents. It also has the power to assist individuals when they are bringing court proceedings, to intervene in proceedings and to instigate court proceedings itself.
- 4.38 The Agreement also invited the Commission ‘to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience’. The Commission provided its statutory advice to the Secretary of State on 10 December 2008, which is now under consideration. One issue for examination is the relationship between any Bill of Rights and Responsibilities and a potential Bill of Rights for Northern Ireland. Importantly, the Government does not wish the public debate around a UK instrument to detract from the process relating to a potential Bill relating to the particular circumstances of Northern Ireland.
- 4.39 The creation of the Northern Ireland Human Rights Commission has recently been followed by the creation of other statutory commissions in other parts of the UK. The Equality and Human Rights Commission works in England and Wales (and in Scotland in relation to those matters reserved to the UK Parliament) to promote the understanding and importance of human rights and build good relations, with the aim of ensuring that everyone has a fair chance to participate in society. The Scottish Commission for Human Rights was established by the Scottish Parliament in 2008 with the purpose of promoting human rights and encouraging best practice by Scottish public authorities.
- 4.40 The post of Children’s Commissioner for Wales – the first of its kind in the UK – was established by the Care Standards Act 2000. The Children’s Commissioner for Wales Act 2001 broadened the post’s remit and set out its principal aim, which is to safeguard and promote the rights and welfare of children in Wales. The Commissioner acts as an independent champion for children and young people in Wales. Drawing on this precedent, Children’s Commissioners have subsequently been established in England, Northern Ireland and Scotland and accorded provisions voted by their respective legislatures.
- 4.41 In January 2008, Welsh ministers appointed the first Commissioner for Older People in Wales. Established by the Commissioner for Older People (Wales) Act 2006, the Commissioner’s role is to ensure that the interests of older people in Wales are safeguarded and promoted. The Commissioner, as an ambassador

and authority on older people's issues, speaks up on behalf of older people, in relation to the services they receive and their needs. The Commissioner is a source of information, advocacy and support for older people in Wales and their representatives.

- 4.42 Consideration of a Bill of Rights and Responsibilities for the UK – whatever form it might take – will clearly need to involve Parliament, the devolved legislatures, and the devolved executive bodies as well as the Human Rights Commissions which operate in the different parts of the UK. Each has its own history, conventions and identity and has different responsibilities and obligations in relation to fundamental rights, how they are safeguarded, and how they are respected in the delivery of key public services. In order to generate the degree of consensus appropriate for a Bill of Rights and Responsibilities, each will have an important contribution to make about the way rights and responsibilities should be expressed. This will require further careful consideration.

# Chapter 5 Next steps

- 5.1 The *Governance of Britain* Green Paper stated that any new Bill of Rights and Responsibilities could come into being only 'over an extended period of time, through extensive and wide consultation, and not without broad consensus upon the values on which they were based and the rights and responsibilities which derived from them.'<sup>45</sup>
- 5.2 Our constitutional arrangements, how power is distributed, how our rights and freedoms are protected, how we ensure that our responsibilities to one another are discharged, must be scrutinised and debated, and, if necessary, reformed and renewed. That is the task we set ourselves in the *Governance of Britain* Green Paper. The debate on a Bill of Rights and Responsibilities is the next important stage in meeting that challenge.
- 5.3 It is that process of consultation upon which we now embark. We intend to involve all parts of our country and our society in discussions both about the fundamental arguments for and against such a Bill of Rights and Responsibilities as well as the advantages and disadvantages of the individual components of any such Bill. Full consultation and debate about such a constitutional development will inevitably take some time. It cannot be the property of one Parliament and one Government. All sections of the UK will have a view. As part of the consultation process, we expect that Parliament will want to make a contribution to the debate and we will bring forward proposals for that in due course. The need for such extensive consultation means that, if it were concluded that the time was right for a Bill of Rights and Responsibilities, it would not be possible to bring forward any legislation before the next general election.
- 5.4 If you wish to respond to this consultation or to access further information to allow you or the group you represent to debate the issues, please contact:

## Online

Ministry of Justice

<http://www.justice.gov.uk>

Governance of Britain

<http://governance.justice.gov.uk/>

## Email

[rightsandresponsibilities@justice.gsi.gov.uk](mailto:rightsandresponsibilities@justice.gsi.gov.uk)

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<sup>45</sup> The *Governance of Britain* CM 1770 p.63 para 213  
<http://www.justice.gov.uk/publications/governmentofbritain.htm>

### **Post**

Rights and Responsibilities Consultation  
Human Rights Division  
Ministry of Justice  
102 Petty France  
London  
SW1H 9AJ

### **Telephone**

020 3334 3734

### **Fax**

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### **Gold Fax**

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