

# Developing a Bill of Rights for the UK

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with the assistance of Philip Leach  
and Andrew Puddephatt

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Research Institute,  
London Metropolitan University

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## Abbreviations

ACT	Australian Capital Territory
BCCA	British Columbia Citizens' Assembly
BORA	Bill of Rights Act, New Zealand
ECHR	European Convention on Human Rights
HRA	Human Rights Act
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JCHR	Joint Committee on Human Rights
NHRCC	National Human Rights Consultation Committee (Australia)
NIHRC	Northern Ireland Human Rights Commission
NIO	Northern Ireland Office

## Executive summary

In October 2009, the Equality and Human Rights Commission commissioned Global Partners & Associates and the Human Rights and Social Justice Research Institute at London Metropolitan University to undertake research to identify and explore best practice processes for developing a new Bill of Rights for the UK. The research aimed to analyse evidence drawn from related domestic and international experiences, identify key principles that should underpin the development of a Bill of Rights, and identify policy implications in relation to any future process, regardless of which political party is in power.

All three major parties at Westminster have pledged to initiate a process to create a Bill of Rights – without, in the main, acknowledging that the Human Rights Act (HRA) is, by commonly agreed definition, itself a Bill of Rights. The Labour government is consulting the public on a UK Bill of Rights and Responsibilities, while maintaining its commitment to the HRA, including both the rights enshrined in it and the mechanisms used to implement those rights. The Conservative Party has pledged to repeal the HRA and replace it with a ‘modern British Bill of Rights’. Repealing the HRA would mean that the European Convention on Human Rights (ECHR) would no longer be incorporated into domestic law; the party has not indicated whether, or how, a future Bill of Rights might incorporate the ECHR using a different mechanism. The Liberal Democrats are committed to a written constitution with, at its heart, a Bill of Rights which would strengthen and entrench the rights guaranteed in the HRA.

## Methodology

The research comprised:

- A review of literature on Bills of Rights processes, focusing on Canada, New Zealand, South Africa, Australia and Northern Ireland.
- Forty-three semi-structured interviews with people who have studied and/or been involved in Bills of Rights or analogous processes.
- A seminar on 1 December 2009, held under Chatham House rules, which involved colleagues from human rights commissions in the UK, legal practitioners, academics and non-governmental organisations.

## **Main findings**

### *Comparative analysis of Bills of Rights processes outside Britain*

- Modern Bills of Rights differ in their provenance and the processes used to create them. Some processes were elite-led (Canada and New Zealand); others more participatory (Australia and Northern Ireland); some, over time, became a hybrid of the two (South Africa). Bills of Rights have not emerged in isolation. All have been fundamentally based on, or strongly influenced by, international human rights treaties. They may be viewed as a global collaborative project in which different jurisdictions have incorporated or built upon international human rights standards and adopted legislative models and processes developed elsewhere.
- All Bills of Rights have been designed either to supplement existing human rights protection or to incorporate international human rights into domestic law – to go forwards, not backwards. No Bill of Rights process has permitted even the possibility of regression, either in terms of standards or mechanisms and institutions to protect rights. The way in which governments initiated reform, either through a draft bill and/or through the terms of reference or mandate for the process, expressly excluded this option.
- In jurisdictions where there has been any degree of public participation in developing a Bill of Rights, the effect of that participation has been to give popular weight to the idea of human rights legislation and/or to expand or strengthen the government's proposed legislative model in specific ways.
- Most participants in this research stated that Bills of Rights processes benefit from a clear statement of intent from government about the purpose of a Bill of Rights and the terms of reference of the process for creating it.
- Participants overwhelmingly favoured the establishment of an independent body, usually nominated on a cross-party basis, to lead the consultation. They suggested that the credibility of the process is likely to be enhanced if it is demonstrably non-partisan and has no vested interest in the outcome.
- Most participants said it is imperative to elicit the views and experiences of groups whose human rights are most vulnerable to being breached. Bills of Rights processes in Northern Ireland and Australia have developed methods of working in partnership with community-based networks to achieve this.

- Most Bills of Rights processes have been consultative (the citizen as a ‘sounding board’) rather than deliberative (the citizen as decision-maker). Deliberative forums have been shown to engender public trust if they are: adequately publicised to engage the wider public; are properly constructed to be representative, and if the government gives clear procedural commitments as to how it will act on their recommendations.
- Most participants viewed raising public awareness and understanding of human rights as a primary aim of consultation: however, this has invariably been imperfectly achieved and is hard to measure. The credibility of a process is likely to be enhanced if public debate is as unconstrained as possible, while being informed to the greatest extent it can be about existing human rights protections and options for building on them.
- Participants agreed that it is desirable for processes to have a defined timeframe with a momentum-building phase that aims to generate interest and participation and a clear procedure for what happens at the end of the process.
- Participants concurred that the outcome of consultation should be transparent about the rationale for specific provisions and how these relate to community preferences and experiences. They said that the voices of relatively powerless groups should be given an elevated status in the processing of responses.
- No Bill of Rights process has included notions of individual responsibility in its terms of reference for developing legislation; any decision to do so must be cognisant of the risk that debates about rights, citizenship, values and public policy priorities may act as a lightning rod for social anxieties and prejudices. Participants overwhelmingly agreed that responsibilities should be incorporated in the process solely in the context of education about the duty to respect the rights of others.
- Whether - and how – democratic legitimacy is secured in the process of creating a Bill of Rights is a matter of experimental practice. In the three decades since Canada’s Charter of Rights was enacted, expectations have increased that any process to create a Bill of Rights will be genuinely participatory. This expectation is backed by developing law, theory and practice on the right to participation. It is further fuelled by the development of technology, and methods of consultation and deliberation, which permit ever broader, more inclusive and more sophisticated forms of public engagement.

### *The UK context*

- Our research suggests that current circumstances for any process to create a new UK Bill of Rights are unfavourable. Public understanding of, and enthusiasm for, a Bill of Rights is not assured and there is little discernable popular or civil society momentum behind the idea. The Labour government's consultation on a proposed Bill of Rights and Responsibilities has not reached the wider public sphere. It remains to be seen how far the deliberative events held as part of the consultation might be used to ignite public interest and how far the consultation will engage directly with disadvantaged and disaffected groups.
- Participants overwhelmingly suggested that the political discourse surrounding a Bill of Rights has not been commensurate with the gravity and complexity of the project. Many expressed disquiet about the prevalence of language and stories which have at times distorted the purported effects of human rights and the HRA. Further, they considered that a convincing case for why a new Bill of Rights is needed has not yet been made.
- Many participants noted that, if a future Conservative government were to repeal the HRA and create a 'British Bill of Rights' that did not contain a new mechanism for incorporating the ECHR into domestic law, this would be a process without international precedent and would risk being viewed as illegitimate both at home and abroad.
- Devolution presents considerable legal, constitutional and political obstacles which, while they may not be insuperable, must be negotiated sensitively if UK parties are to progress the Bill of Rights project.
- It appears highly likely that if the HRA were amended or repealed, and/or a Bill of Rights were enacted covering the devolved jurisdictions, this would require amendments to the devolution statutes. Further, such a decision would almost certainly require the consent of the devolved legislatures in Scotland and Northern Ireland. In Northern Ireland, repeal of the HRA or any regression from those provisions of the ECHR already given domestic effect would be likely to breach the Belfast (Good Friday) Agreement.
- The terms of reference for a UK-wide process and the methodologies by which it might be pursued have not been determined, either between the parties at Westminster or between the UK government and the executives in Scotland, Wales and Northern Ireland; this has exacerbated a sense of unease and

disengagement in the devolved nations. In particular, a process to create a Bill of Rights, whether 'British' or for the UK, risks inflaming sectarian divisions in Northern Ireland.

### **Key principles**

These principles are based on the evidence from the processes of creating Bills of Rights in other jurisdictions. They are suggested as both (i) requirements for the conduct of any future process and (ii) a set of criteria to inform the decision about whether that process is worthy of engagement and against which it might be held up to scrutiny.

A process of creating a Bill of Rights should be:

#### *Non-regressive*

Any future UK Bill of Rights should not dilute existing protection provided by the HRA, either in relation to the specific rights protected, or by weakening the existing machinery for the protection of Convention rights. Any process that starts from a premise of going backwards would set a damaging precedent internationally. Any future government must commit unequivocally to retaining the HRA unless and until a new Bill of Rights, protecting human rights to at least the same extent as the HRA, is enacted.

#### *Transparent*

Politicians should be transparent about the purpose of a Bill of Rights and the terms of reference and methods of the process by which they propose to create it. This entails a clear procedural commitment to act on the results of public consultation and deliberation within clearly articulated parameters.

#### *Independent*

The body running the process should be demonstrably non-partisan, independent of government and have no vested interest in the outcome.

#### *Democratic*

For the outcome to be seen as having democratic legitimacy, the process must also be democratic. This principle recognises that Bills of Rights are not only a constraint on the exercise of arbitrary power; they are also a positive instrument to enable relatively powerless groups to have an effective say in the democratic process.

*Inclusive*

The process should place the highest premium on eliciting the views and experiences of groups whose human rights are most vulnerable to being breached, and should give those voices an elevated status in the assessment of responses and in the final outcome.

*Deliberative and participative*

The process should be an exercise in building citizenship, not merely 'market research'. It should provide multiple opportunities for participation and, ideally, properly constructed forum(s) for deliberation which should be used to educate and invigorate the wider consultation.

*Educative*

The public should be informed to the greatest extent possible about existing human rights protections and options for building on them, and about their duty to respect the rights of others. A minimum requirement is the provision of accessible and impartial information and the correction of myths and misperceptions about human rights and the HRA.

*Reciprocal*

The process should be a two-way dialogue in which the government, too, is educated. The imprint of the process must be visible and acknowledged in the final outcome.

*Rooted in human rights*

The process of creating a Bill of Rights must be consistent with human rights principles. These include respect for the dignity and autonomy of individuals and the right to participation. These principles are internationally recognised and not subject to political whim or contingency; nor can they be trumped by considerations such as public safety or security or requirements to exercise individual responsibility.

*Timed*

Any process should have a clear timeframe with, at a suitable juncture, a momentum-building phase. It should not be indeterminate.

*Symbolic*

The process should be suitably ambitious for the undertaking of a constitutional enterprise. A Bill of Rights that aspires to last for generations requires a process that is compelling to the public.

*Designed to do no harm*

The process should be adequately resourced and there should be a political commitment to act on the outcome of consultation. A process is better not done at all than done badly. Disillusionment is contagious and corrosive; trust in the political process is fragile.

*Respectful of the devolution settlements*

Choice should reside with the devolved assemblies and the process should respect their competency and self-determination.

**Policy implications***Pre-conditions for engagement*

The principles stated above are, to a degree, interdependent. However, the principle of non-regression is of a higher order. Without an unequivocal guarantee that the purpose of a Bill of Rights process is to augment international standards and to maintain their incorporation in domestic law, the other principles are likely to appear immaterial. We suggest that any actor concerned with the protection and promotion of human rights would be bound to reject a process predicated on regression in terms of formal endorsement or engagement.

The corollary of this is that any future government must provide (and non-governmental actors should demand) an unambiguous - and public - statement of intent and terms of reference for the consultation process, along with clear procedural commitments to act on the outcome of consultation within the stated parameters.

*Certifying non-regression*

Subject to these assurances, any future government should establish (and actors concerned with the protection and promotion of human rights should advocate for) an independent committee of experts, who might be appointed on a cross-party basis, to provide a 'kitemark' throughout the process that the principle of non-regression is being upheld.

*Designing process to produce an outcome with democratic legitimacy*

Any future government should, drawing from precedents in other jurisdictions, establish an independent body to run the consultation process. Contingent upon the assurances sought above, actors concerned with the protection and promotion of human rights should advocate for a consultative process that is run independently of government and designed to engender public trust.

The process must also be transparent: actors concerned with the protection and promotion of human rights should influence and monitor the process to ensure that any future government does not ‘pick and mix’ from available methodologies in order to manufacture apparent consensus behind measures which would not, in fact, have democratic legitimacy.

*Influencing the terms of debate: a concordat*

Actors concerned with the protection and promotion of human rights should advocate for a concordat that would bind all parties that signed it to certain rules of engagement; principally, an agreement not to use language or bring stories into the public domain that knowingly distort the purported impact of human rights and the HRA. This would help to ensure that all parties commit themselves to a process which is avowedly educative and non-partisan and does not trade in myths or seek to use the Bill of Rights as a proxy for unrelated issues.

*Devolution*

Actors concerned with the protection and promotion of human rights should champion the principle that choice should reside with the devolved assemblies and that the process of creating a UK Bill of Rights should respect their competency and self-determination. It is imperative that those actors with appropriate expertise and authority highlight the legal, constitutional and political implications of devolution for any decision to amend or repeal the HRA and/or to enact a UK or ‘British’ Bill of Rights.

## 1. Introduction

### 1.1 Aims of the report

In October 2009, the Equality and Human Rights Commission commissioned Global Partners & Associates and the Human Rights and Social Justice Research Institute at London Metropolitan University to undertake research to identify and explore best practice processes for developing a new Bill of Rights for the UK.

The Commission has established a number of principles to guide its work relating to a Bill of Rights. These concern four issues: non-regression from the current levels of protection provided by the Human Rights Act (HRA);<sup>1</sup> an appropriate and effective process for developing a Bill of Rights; the need actively to promote understanding of existing international and domestic human rights in any process; and the use by the Commission of the evidence and results from its Human Rights Inquiry<sup>2</sup> to inform the development of any Bill of Rights and overarching human rights framework.

In relation to the process for developing a Bill of Rights, the principles state that:

- This government and any future governments should ensure that the process and result of developing any Bill of Rights involves and includes all sectors of society; creates a feeling of ownership in society as a whole; and allows for the consultation to be adequately resourced and conducted by an independent body.
- In any Bill of Rights process, the government should actively promote understanding of the international treaties and better understanding of existing human rights.

These principles were the starting point for this research, which aimed to:

- analyse evidence drawn from related domestic and international experiences;
- elaborate upon the Commission's principles underpinning the development of a Bill of Rights; and

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<sup>1</sup> Any Bill of Rights should build on the HRA. Any Bill of Rights that replaces the HRA should not be brought into force until and unless it contains at least the same levels of protection of rights and mechanisms as under the Human Rights Act, and complies with obligations under international treaties.

<sup>2</sup> See <http://www.equalityhumanrights.com/human-rights/human-rights-inquiry/>

- identify policy implications in relation to the development of a Bill of Rights, regardless of which political party is in power.

## **1.2 Note on terminology**

### **What is a Bill of Rights?**

There is no fixed definition and the term is applied in practice to a diverse range of instruments, both constitutionally entrenched and non-entrenched, and statutory bills. Klug (2007: 4) describes Bills of Rights as:

Part symbolism, part aspiration and part law ... fundamentally a set of broadly expressed entitlements and values.

Alston (1999: 10) suggests that they have three essential characteristics:

- They provide protection for those human rights which are considered, at a given moment in history, to be of particular importance.
- They are binding upon governments and can only be overridden with significant difficulty.
- They provide some form of redress in the event that violations occur.

Documents with these characteristics are also called a 'charter of rights' or, as in the UK, a 'Human Rights Act'. Unless referring to a named instrument, this report uses the term Bill of Rights to refer to any document adhering to this broad definition.

### **Consultation, deliberation and participation**

Consultation refers to a process intended to elicit the views or preferences of the public on an issue, with the aim of informing decision-makers – the citizen as 'sounding board'. Deliberation refers to a process that brings a random sample of citizens together to deliberate on public policy issues and reach considered judgements on the basis of balanced information – the citizen as decision-maker.

Consultation processes may involve activity to educate or inform those being consulted; in practice, this happens with varying degrees of success. Deliberative techniques involve a more intensive learning phase and the provision of information reflecting competing perspectives.

A process is generally described as ‘participatory’ when it involves a significant proportion of those targeted and includes people who are considered hard to reach because of discrimination or disadvantage. The right to participate in public affairs is enshrined in several international human rights conventions<sup>3</sup> and the United Nations has developed guidelines on what it means to exercise this right beyond voting (Office of the High Commissioner for Human Rights, 2006: 14-16). Key principles are that people must be able directly to influence decisions that affect them and that their participation must be active and informed and must extend throughout the decision-making process, from revealing preferences at the start to ensuring accountability for the impact of decisions.

### 1.3 Context of the report

Debate about a British Bill of Rights goes back some two centuries, but lay dormant until the 1960s when influential figures across the political spectrum endorsed it (Klug, 2007: 2). The idea of a Bill of Rights found a natural home with the Liberal Democrats (formerly the Liberal Party); the Labour and Conservative parties had a ‘less positive and more spasmodic’ approach (Erdos, 2009: 21-22; Blackburn, 1999: Chapter 7).

Nevertheless, in 1993, Labour endorsed *A New Agenda for Democracy*, which envisaged a HRA directly incorporating the European Convention on Human Rights (ECHR) into British law, to be followed by an entrenched, indigenous Bill of Rights (Labour Party, 1993: 29). Erdos (2009: 31-34) attributes the policy to Labour’s long spell in opposition under a Conservative administration widely perceived as illiberal and authoritarian, combined with sustained campaigning by groups such as Charter 88 and the influence of senior Liberal Democrat figures. At this time, the terms ‘Human Rights Act’ and ‘Bill of Rights’ were used almost interchangeably and were viewed as a single project (interview with Francesca Klug, Professorial Research Fellow at the London School of Economics, 13 January 2010). As Labour’s electoral prospects improved, support for the policy waned among the party leadership. The 1998 HRA, which incorporated the ECHR into domestic law, was not entrenched.<sup>4</sup>

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<sup>3</sup> For example, the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of Persons with Disabilities, and the Convention on the Rights of the Child.

<sup>4</sup> Section 4 of the HRA allows judges to signal incompatibility between primary legislation and the rights set out in the Act, while not permitting them to strike down legislation. Under section 3 of the HRA, judges are obliged to read and give effect to legislation in a way which is compatible with the ECHR ‘so far as it possible to do so’.

The HRA is widely referred to as a 'Bill of Rights', including by legal and constitutional commentators, UK government ministers and by actors in other jurisdictions who have sought to adopt the UK legislative model (Alston, 1999: 11; Joint Committee on Human Rights, 2008b: Ev 127; National Human Rights Consultation Committee, 2009: 263). The Act meets Alston's authoritative criteria and was clearly designed as a higher law to which other law and policy should conform. Yet the HRA has failed to fulfil the symbolic requirements of a Bill of Rights: it has not been viewed by the UK population as '**their** bill of rights' (Klug, 2007: 12, emphasis in original). This has been attributed to several factors. These include the lack of public engagement in the HRA's creation, combined with the absence until 2007 of a human rights commission to promote understanding and implementation of it. Other factors are a lack of consistent government leadership (combined with ministerial discomfort at the challenge the HRA has sometimes posed to executive power); hostile and erroneous press reporting; and a political discourse which has at times distorted the purported impact of the Act (Donald et al., 2009: 178-81; Klug, 2007: 12-14; Klug, 2009).

Against this backdrop, in recent years all three major parties at Westminster have pledged to create a new Bill of Rights (while not, in the main, acknowledging that the HRA is widely considered to be one). The Labour government has consulted the public on a Bill of Rights and Responsibilities for the UK; the consultation was launched with the publication of a Green Paper on 23 March 2009 and was due to close on 26 February 2010. The Labour government is committed to the HRA, including both the rights and freedoms enshrined in it and the mechanisms used to implement those rights (Ministry of Justice, 2009a: 58). The Conservatives have pledged to repeal the HRA and replace it with a 'modern British Bill of Rights' (Cameron, 2006). Repealing the HRA would mean that the ECHR would no longer be incorporated into domestic law; the Conservative Party has not indicated whether, or how, a future Bill of Rights might incorporate the ECHR using a different mechanism. The Liberal Democrats are committed to a written constitution with, at its heart, a Bill of Rights which would strengthen and entrench the rights guaranteed in the HRA (Liberal Democrats, 2009). The position of the parties is presented in detail in Chapter 4.

#### **1.4 Methodology**

The research comprised:

- A review of literature on Bills of Rights (and analogous) processes, focusing on five common-law jurisdictions: Canada, New Zealand, South Africa, Australia and Northern Ireland.

- Forty-three semi-structured interviews with people who have studied and/or been involved in either (i) processes to create Bills of Rights in the UK and internationally or (ii) processes undertaken for other purposes that might hold relevant lessons. See Appendix 1 for a list of interviewees.
- A seminar on 1 December 2009, held under Chatham House rules, which involved representatives of the Equality and Human Rights Commission, the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission; legal practitioners; academics from a variety of disciplines; non-governmental organisations (NGOs); and advocacy groups.

### **1.5 Guide to the report**

Chapter 2 gives a narrative account of the processes that created Bills of Rights (or proposed Bills) in common law jurisdictions outside Britain. Chapter 3 provides a comparative analysis of these experiences and identifies the methods and approaches which have been - or might be - used in any future process. Chapter 4 examines the position of the main UK political parties on creating a new Bill of Rights and public attitudes to, and understanding of, human rights legislation. Chapter 5 examines the legal, constitutional and political implications of devolution for any Bill of Rights project. Chapter 6 presents key principles which the author suggests should underpin any UK process to create a Bill of Rights or against which the process might be scrutinised. Chapter 7 outlines the policy implications of these principles and the evidence presented in Chapters 2 to 5.

## 2. Bills of Rights processes

### 2.1 Introduction

This chapter provides an introduction to Bills of Rights in common law jurisdictions outside Britain, the context in which they emerged and the processes that created them. It examines the emergence of the idea of participation as both a right and a necessity to produce a document with democratic legitimacy. This chapter should be read in conjunction with Chapter 3, which offers an analytical and comparative assessment of these experiences.

#### **Bills of Rights outside Britain**

Some of the best-known Bills of Rights (or proposed Bills) were part of a reframed constitutional settlement following conflict, revolution or political upheaval (France, the United States, South Africa, Northern Ireland, and international Bills of Rights such as the Universal Declaration of Human Rights and the European Convention on Human Rights). Elsewhere, national human rights instruments were the product of considered political debate about the value of such legislation in a modern democracy (Canada, New Zealand, Australia and the UK Human Rights Act or HRA).

Bills of Rights form a spectrum of rights protection. At one end is the US model of constitutional supremacy which entrenches fundamental rights as 'supreme law'. At the other is legislative supremacy which gives primacy to parliamentary sovereignty. Each model is vulnerable to criticism - the former for displacing democratic politics in favour of judicial power, the latter for putting human rights at the mercy of transient legislative majorities (Gearty, 2006: 60-98). The Bills of Rights explored in this chapter sit at different points along the spectrum. Most involve some form of constitutional dialogue between judicial and legislative institutions - a 'middle ground' that strikes a balance between parliamentary sovereignty and an elevated status for rights (Leane, 2004: 174).

#### **Participation as a right and a necessity**

A characteristic of the more recent processes to develop Bills of Rights (Australia and Northern Ireland) has been the premium placed on public participation and not solely elite negotiation. Harvey (2001) notes that there are principled and pragmatic reasons for this approach:

The principled reason is that deliberation is always an essential aspect of reflective law and policy formation in a political community ... The pragmatic consideration is that if ... the Bill of Rights is to assume the exalted status of the 'sacred' text in a secular society then its shape (not

simply the choice to accept or reject it) must be determined by a broadly based process of popular participation.

Hart (2003: 12) places Bills of Rights within a broader post-war trend towards 'process-driven constitutionalism'. She suggests that participation has emerged as both a right and a necessity in the formation of constitutional documents. The United Nations treaty body monitoring civil and political rights recognises a specific right to participate in choosing or changing a constitution (Committee on Civil and Political Rights, 1996, para 6). Further, Hart (2003: 12) argues that:

Process has joined outcome as a necessary criterion for legitimating a new constitution: how the constitution is made, as well as what it says, matters.

Similarly, Nedelsky (2008: 162) argues that in order to justify constitutionally entrenched rights as constraints on democratic decision-making 'the processes by which [rights] are defined must themselves be universally recognised as legitimate'.

While the right to participation is becoming established in law and theory, the means of realising that right in the formation of Bills of Rights is a matter of experimental practice. The rest of this chapter gives a narrative account of the processes undertaken in five common-law jurisdictions. These experiences are analysed comparatively in Chapter 3.

## **2.2 Canada**

The 1982 Canadian Charter of Rights and Freedoms was the 'magnificent obsession' of Prime Minister Pierre Trudeau, and the centrepiece of his project to 'patriate' the constitution (that is, to make it amendable by Canada only, with no role for the UK parliament) (interview with Peter Russell, Professor Emeritus of Political Science at the University of Toronto, 9 November 2009). Canada already had a non-entrenched Bill of Rights enacted in 1960, which applied only to federal law as it lacked the requisite provincial consent. Trudeau saw the Charter as a way of forging a source of Canadian values and unity in the face of separatist tendencies in Quebec (JUSTICE, 2007: 99). Quebec rejected the Charter as a centralising mechanism; other provinces were won over by a clause which gave them a way of temporarily overriding certain Charter rights. Leane (2004: 155) notes that the Charter was essentially a top-down process driven by elite negotiation:

... the creature of a highly motivated Prime Minister and often reluctant Premiers of the various provinces, but never 'of the people'.

There was one avenue by which human rights experts and interest groups were able to influence the content of the Charter. A special all-party committee was created, and spent around 90 hours discussing the Charter, all filmed for television. It listened to some 300 presentations from groups representing women, aboriginal people, disabled people, ethnic and cultural minorities and others. The committee also considered 1,200 written submissions. From these, it made 123 recommendations to strengthen the Charter - more than half of which were included in the final document.<sup>5</sup>

Peter Russell, who advised the committee, noted that the purpose of the hearings was not to accept or reject the Charter or to discuss the principles that underlay it:

It was clear we were going to have a Charter of Rights ... the point of the consultation was to influence the detail.  
(interview, 9 November 2009)

Despite the lack of public engagement, the Charter remains popular: a survey in 2007 found that almost six in 10 Canadians believe the Charter 'is moving our society in the right direction' (Nanos, 2007: 51). However, respondents displayed low levels of understanding about the content of the Charter and the mechanisms that make it work.

### **2.3 New Zealand**

The New Zealand Bill of Rights Act 1990 (BORA) was a partisan measure promoted by the Labour government in its pre-election manifesto, promoted without the support of the (then) opposition or most members of the Labour government itself, and with minimal public engagement (Joseph, 1999: 283). BORA followed unsuccessful moves in 1985 to create a constitutionally entrenched Bill of Rights similar to the 1982 Canadian Charter. A Justice and Law Reform Select Committee of Parliament held hearings over two years and analysed more than 400 submissions, the majority of which focused on the controversial issue of abortion rights. Submissions suggested that there was minimal public support for an entrenched Bill (Glazebrook, 2004: 2). Support was also lacking from the ruling Labour Party and from the legal profession; the Law Society described the proposed measure as 'legislating by bumper sticker' in its use of slogans which were vague and open to interpretation (interview with Paul Rishworth, Dean of the University of Auckland Faculty of Law, 9 December 2009). Opposition to the 1985 Bill centred on fears that entrenchment was undemocratic and risked politicising the judiciary. In 1990 - and with little additional public consultation - BORA was enacted as ordinary legislation with subordinate

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<sup>5</sup> See [www.charterofrights.ca](http://www.charterofrights.ca)

status which can be overridden by a simple majority in the unicameral parliament (Leane, 2004: 171).

Sylvia Bell, Principal Legal and Policy Analyst at the New Zealand Human Rights Commission, observed that BORA has been characterised as a 'rogue's charter', a perception she attributed partly to the lack of public engagement in its creation and a paucity of efforts to promote understanding of it (interview, 17 November 2009). Nevertheless, there have been no moves to repeal the legislation and it has not proved to be as weak and inconsequential as many supposed (Joseph, 1999: 283; Paul Rishworth interview, 9 December 2009).

## **2.4 South Africa**

The process of developing South Africa's post-apartheid constitution and Bill of Rights took place in two phases. The first was a partly closed process of negotiation between former adversaries which lasted from 1990-94 and resulted in agreement on an interim constitution including an entrenched Bill of Rights (Chanock, 1999; Hart, 2003: 8; Sarkin, 1999). The agreement included binding requirements that an elected constitutional assembly must, within two years and after wide consultation, draft a final constitution and Bill of Rights according to principles agreed during the negotiations (JUSTICE, 2007: 8).

Hugh Corder, Dean of the Faculty of Law at the University of Cape Town, was one of the four-person technical committee that drafted the interim Bill of Rights; he stated that members were instructed not to talk to the media or the wider public, though they were influenced by informal lobbying (interview, 21 October 2009). This was followed by an 'exaggerated' public consultation process in the second phase from 1994-96.

In this phase, the constitutional assembly - made up of the parliament and the senate - engaged in a massive publicity exercise to encourage the public to submit ideas on the new constitution. This included a media and advertising campaign; an assembly newspaper with a circulation of 160,000; comic books; mass meetings; and an online forum. More than two million submissions were received and estimates suggest that the campaign reached more than two-thirds of the population (Hart, 2003: 8). Debate about economic and social rights percolated up strongly from grassroots discussion, including whether such rights should constitute a minimum core of entitlements or a wider social aspiration (interview with Geoff Budlender, a South African barrister and acting High Court judge, 21 October 2009).

The four biggest petitions, reflecting Afrikaner opinion, were to keep the death penalty; for the right to bear arms; to make Cape Town the capital, and to retain

Afrikaans as a privileged language. None was included in the final Bill of Rights. Hugh Corder noted that the outcome of the process was ‘politically determined and anything not acceptable was simply ignored’. However, he added, public campaigns were successful in resisting efforts by the African National Congress to exclude from the Bill the right of access to information and the right to administrative justice (interview, 21 October 2009).

The South African experience stands apart from the others reviewed here. The Bill of Rights process was part of an exercise in state-building with a transformative purpose and was politically controlled by a party with the mindset of a liberation movement (Geoff Budlender interview, 21 October 2009). South Africa’s story bears some comparison with the transitional context in Northern Ireland. Further, South African jurisprudence has been influential in convincing some UK politicians that it is possible to give legal effect to social and economic rights (Joint Committee on Human Rights (JCHR), 2008a: 48-51). However, the unique circumstances in post-apartheid South Africa make it difficult to draw conclusions about the process that might be applicable in a settled democracy such as the UK.

## **2.5 Australia**

Since 2002, five Australian states and the Australian Capital Territory (ACT) have conducted inquiries into how human rights could be better protected. In Victoria, Tasmania, Western Australia and ACT, the inquiries were conducted by independent committees, all of which recommended the adoption of some kind of Bill of Rights. ACT and Victoria have taken action; ACT passed the Human Rights Act 2004 and Victoria passed the Charter of Human Rights and Responsibilities Act 2006. Tasmania and Western Australia deferred action pending the outcome of a National Human Rights Consultation. This was completed in September 2009 and recommended the adoption of a federal HRA similar to the model in ACT and Victoria. In Queensland and New South Wales, inquiries were conducted by parliamentary committees; both rejected legislation and recommended other measures to protect and promote human rights.

Here, we examine the processes in ACT, Victoria, Tasmania, Western Australia and at the federal level.

### **ACT**

In April 2002, the ACT Labor government appointed a consultative committee to inquire into a possible Bill of Rights for the territory with broad, non-prescriptive terms of reference (Byrnes et al., 2009: 75). Hilary Charlesworth, Professor of Law at the Australian National University, chaired the committee. She noted that, lacking any

models to work from, the committee 'started from first principles' in devising an eight-month programme of community consultation (interview, 2 November 2009).

As outlined in ACT Bill of Rights Consultative Committee (2003), activities included:

- the distribution of a pamphlet to all households;
- the establishment of a web page and dedicated telephone line;
- the distribution of an 'issues paper', leading to consideration of 145 submissions;
- meetings with the public and specific community groups;
- public lectures and seminars; and
- a deliberative poll involving 200 randomly selected residents (see section 3.7)

Hilary Charlesworth (interview, 2 November 2009) reflected that the committee failed adequately to engage with three key audiences: business, the media and public servants. The response of senior bureaucrats to the committee's report 'ranged from indifference to cynicism to outright hostility' (Byrnes et al., 2009: 77).

Hilary Charlesworth added that civic education efforts were limited by a lack of responsiveness from, among others, schools and by a lack of resources. Town hall-style meetings were sometimes sparsely attended. Another lesson learnt was the need to work through community representatives and specialist groups in order to reach individuals and communities who do not normally engage with such processes – a lesson acted on by the Victoria and federal consultation committees.

Some two-thirds of those who responded to the consultation favoured a statutory Bill of Rights. Informed by this, the committee recommended a non-entrenched HRA similar to the UK model (ACT Bill of Rights Consultative Committee, 2003). The primacy of socio-economic rights in community discussions led the committee to include in its draft legislation most of the rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as those in the International Covenant on Civil and Political Rights.

The ACT government rejected the inclusion of socio-economic rights. It also rejected the committee's proposal for an express duty on public authorities to comply with the Act and the provision of a legal remedy for breach of this duty.

### **Victoria**

In April 2005, the Victorian Labor government established an independent Human Rights Consultation Committee to lead a community consultation about whether Victorian law should be changed to protect human rights more effectively (Victorian Human Rights Consultation Committee, 2005a). In contrast to the broad terms of reference of the ACT committee, the Victorian government issued a detailed and prescriptive *Statement of Intent*, setting out its favoured model for a Bill of Rights very similar to the ACT HRA (Department of Justice, Victoria, 2005). Economic and social rights were thus excluded, as were new individual causes of action based on human rights breaches.

The Victorian committee was influenced by the ACT process, but adapted to a larger scale (Byrnes et al., 2009: 112). It was also informed by preparatory meetings with interested parties held before the public consultation was launched (Victorian Human Rights Consultation Committee, 2005a: 141).

Rather than holding drop-in town hall-style meetings, which had mixed success in engaging the public in ACT, the Victorian committee held targeted meetings with 55 small groups and community associations across the state. The committee also pioneered the use of 'devolved consultation', working in partnership with specialist and community groups to speak directly to specific groups within the community who were marginalised from formal methods of consultation or who needed support to take part.

Informed by the hostile response among public servants to the ACT HRA, the committee held a parallel process involving 75 consultations with, among others, the Victorian government and its agencies, parliament, the judiciary and the police.

The Victoria process was structured around 10 key questions (see Appendix 3). The questions formed the basis for a widely circulated community discussion paper (Victorian Human Rights Consultation Committee, 2005b) and a variety of printed and online materials (in 10 languages and accessible formats) which were distributed to more than 600 organisations from culturally and linguistically diverse communities. Specific materials were developed for target audiences, including teaching materials for secondary schools (Victorian Human Rights Consultation Committee, 2005a: 141-43).

In total, the committee received 2,524 formal submissions – most, in the assessment of the committee chair, ‘from people who had never before made a written submission to any public process’ (Williams, 2006: 892). Of these, 84 per cent supported change to better protect human rights in Victoria (rising to 94 per cent when informal petitions were included), with an overwhelming majority favouring a charter (Victorian Human Rights Consultation Committee, 2005a: 145-46). Around 40 per cent supported the inclusion of economic and social rights, compared with 95 per cent support for the inclusion of civil and political rights (Victorian Human Rights Consultation Committee, 2005a: 27).

After a six-month process, the committee recommended a Draft Charter of Human Rights and Responsibilities which was enacted by the state parliament with minor changes. The Charter excludes economic and social rights; only those rights with majority support were included (Williams, 2006: 897). However, the legislation provides for a mandatory review by 2011, during which the Victorian Attorney-General ‘must cause’ a review to examine matters such as whether additional human rights, including rights contained in the ICESCR, should be included.

### **Tasmania**

In February 2006, the Tasmanian Labor government asked the Tasmania Law Reform Institute to investigate options for human rights protection, especially whether Tasmania should have a Bill of Rights. The Institute was assisted by an independent Human Rights Community Consultation Committee (Byrnes et al., 2009: 141).

The Tasmania consultation was on a smaller scale than its predecessors and took only three months. It was focused around an Issues Paper (Tasmania Law Reform Institute, 2006) which was circulated through community, advocacy and professional networks, with a ‘quick response sheet’ for submissions. The committee held 66 community consultation meetings, including with people who might otherwise have been marginalised from the process. It placed particular emphasis on meeting people with learning difficulties face-to-face (Tasmania Law Reform Institute, 2007).

The process generated 407 submissions (a higher per capita response than in either ACT or Victoria); 94 per cent supported a Bill of Rights. The Institute recommended a format similar to the ACT HRA and Victorian Charter, but went further in recommending the inclusion of economic, social and cultural rights. It stated that excluding these rights spoke of ‘timidity rather than rationality’ (Tasmania Law Reform Institute, 2007: 122). The Tasmanian government has indicated that it will await the outcome of the federal consultation before responding to the report (Byrnes et al., 2009: 142).

## **Western Australia**

In May 2007, the Western Australian Labor government announced a community consultation on a HRA for the state, to be led by an independent committee. As in Victoria, the government issued a prescriptive *Statement of Intent*. However, it deviated from earlier models by releasing a draft Human Rights Bill to serve as a focus for the community consultation and to indicate the government's preferred model (Byrnes et al., 2009: 142).

The committee invited responses to a community discussion paper in printed, electronic and audio form, which focused around eight key questions similar to those in Victoria (see Appendix 4). Of 377 submissions, 50 per cent favoured a HRA. A public opinion survey commissioned by the committee to reflect the 'silent majority' showed stronger support, with 89 per cent favouring a law to protect human rights (Byrnes et al., 2009: 142-43).

The committee held 39 public meetings in metropolitan and rural areas around the state – a 'travelling human rights roadshow' (Consultation Committee for a Proposed WA Human Rights Act, 2007). Meetings were also held with, among others, representatives of religious faiths and minority ethnic communities, parliament, the media, the police union, the legal profession, industry, local government and government departments.

As in Victoria, the committee organised devolved consultations. More than 400 people were consulted from groups in the community which could be considered 'marginalised, isolated and at risk' or their advocates.

A former Liberal federal parliamentarian and minister Fred Chaney, who chaired the committee, argued that its priority was to insulate the process from the charge of talking only to the already converted:

The really important thing was to stop the process being dominated by academics and lawyers - I wanted to get down to the bedrock.  
(interview, 23 November 2009)

The committee recommended changes to the Human Rights Bill to reflect community concerns: the most significant was the addition of certain economic and social rights and the establishment of a complaint and conciliation system to deal with human rights breaches by government agencies, in addition to court remedies (Byrnes et al., 2009: 143). The Western Australian Human Rights Bill was put on hold pending the outcome of the federal consultation; the election of a Liberal government in 2008

makes it doubtful that the Human Rights Bill will be revived imminently (Byrnes et al., 2009: 143).

### **National Human Rights Consultation**

Australia is rare among democratic nations in not having a comprehensive form of legal protection for basic rights (Williams, 2006: 883). Debate has proceeded sporadically since Federation. Successive attempts to introduce a Bill of Rights foundered on the twin fears that it would encroach on the legislative powers of the states and that it would be incompatible with Australian parliamentary democracy, or simply unnecessary (Byrnes et al., 2009: 23-43; Williams, 2006: 883-85). In 2005, a civil society-led campaign was initiated with the sponsorship of the online magazine *New Matilda*. Support coalesced around a draft 'New Matilda Bill' which drew explicitly on the human rights conventions and declarations ratified by Australia. From 2008, the campaign was relaunched as the Human Rights Act for Australia Campaign.<sup>6</sup>

That year, the new Labor government fulfilled an election pledge to conduct a nationwide consultation, run by an independent National Human Rights Consultation Committee (NHRCC), with the aim of finding out:

- which human rights and responsibilities should be protected and promoted in Australia;
- whether human rights are sufficiently protected and promoted; and
- how Australia could better protect and promote human rights.

These otherwise open-ended terms of reference were prescriptive in one key regard: constitutional entrenchment of any human rights legislation was ruled out.

As stated in NHRCC (2009: 4-9), throughout its seven months of public consultation the committee:

- invited submissions by email, an online form or post;
- held 66 community roundtables around the country, with attendances of up to 250 people;

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<sup>6</sup> See [www.humanrightsact.com.au](http://www.humanrightsact.com.au)

- held an online forum for discussion of the three primary consultation questions and the question of whether or not Australia needs a HRA, which attracted almost 9,000 users;<sup>7</sup>
- commissioned a national telephone survey and focus group research using qualitative and quantitative methods to gauge the views of a random sample of Australians;
- commissioned focus group research to obtain the views of marginalised groups who might otherwise be excluded;
- commissioned an analysis of the economic and social costs and benefits of various options available;
- held three days of public hearings in Canberra to air competing perspectives;
- hosted Facebook pages; and
- organised an online discussion of human rights on the Australian Youth Forum website.

The question of whether Australia should have a Bill of Rights was not expressly stated in the committee's terms of reference. However, largely as a result of energetic pro-HRA campaigns, the vast majority of submissions addressed this question (NHRCC, 2009: 5-6).

As in the state-level processes, the committee placed a high premium on face-to-face contact with urban and rural communities across Australia and made particular use of local media and local MPs to publicise community meetings. The federal committee also commissioned devolved consultations to obtain the views of groups who would otherwise be excluded from the process.

The committee submitted its report to the federal government in September 2009. The entire process had taken 10 months, after a two-month extension to deal with the volume of submissions. The committee recommended a federal HRA, which was supported by more than 87 per cent of those who made submissions and expressed a view on the issue. It recommended an Act broadly consistent with the Victorian and ACT legislation (NHRCC, 2009: 377-78). It proposed that if economic and social

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<sup>7</sup> See <http://www.openforum.com.au/NHROC>

rights are included, these should not be directly enforceable through the courts (NHRCC, 2009: 365-66). It further recommended a range of measures to strengthen human rights protection in the areas of education, auditing, parliamentary scrutiny and compliance (NHRCC, 2009: 352-61).

At time of writing in February 2010, the Australian government has not responded to the consultation committee's report.

## **2.6 Northern Ireland**

### **Developing advice to the UK government**

The 1998 Belfast (Good Friday) Agreement provided for a Northern Ireland Human Rights Commission (NIHRC) with a mandate 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.  
(NIHRC, 2008: 8)

In December 2008, the NIHRC presented its detailed advice on a Bill of Rights for Northern Ireland to the UK government (NIHRC, 2008). The intervening decade saw an extensive process of public consultation on the Bill of Rights led by the NIHRC and involving a wide range of other actors. According to Catherine Donnelly, the Principal Legal Adviser to the NIHRC on the drafting of a Bill of Rights, this protracted consultation was 'an organic, pragmatic and reactive process rather than one framed at the start' (interview, 30 November 2009).

The consultation was launched in March 2000. There followed a year of activity to canvas views on the Bill of Rights. As noted in NIHRC (2001, 2005), this included:

- Training sessions and the production of a manual and video for some 400 potential facilitators to enable them to spread awareness of the Bill of Rights consultation within their own communities or organisations.
- The establishment of nine advisory Working Groups; these operated independently from the NIHRC and submitted reports to it on: children and young people, criminal justice, culture and identity, education, equality, implementation issues, language, social and economic rights and victims' rights.

- The production and wide distribution of 11 thematic pamphlets.
- Targeted consultations with community-based groups of women and children and young people.
- Numerous public and private meetings with political parties, interest groups and community organisations; conferences and workshops.

Informed by more than 200 submissions, in September 2001, the NIHRC published a consultation document setting out its preliminary views on a draft Bill of Rights (NIHRC, 2001). This was promoted in an advertising campaign on television, radio, billboards and bus-shelters. There was also a second round of the 'training for facilitators' programme, and other educational and promotional work carried out jointly with civil society networks such as the Human Rights Consortium, which was formed in 2000 to promote community engagement. A children's coordinator was appointed to gather the views of 1,350 children and young people. By March 2002, more than 600 formal submissions had been received since the start of the process (NIHRC, 2005: 12-14).

Responses to the consultation document revealed party political fault lines that were to persist throughout the process (NIHRC, 2004a: 8-9). Unionist parties argued that the NIHRC had exceeded its mandate by recommending rights that would not be protected elsewhere in the UK. Nationalist parties stated that the NIHRC's proposals might undermine existing equality guarantees in Northern Ireland as opposed to building on the models that already existed. An associated complaint by nationalist parties was that the NIHRC had not given sufficient focus to guaranteeing parity of esteem for the Catholic and Protestant communities, one of the fundamental principles of the Good Friday Agreement. This concern was shared by two founding Commissioners, who resigned from the NIHRC in 2002; they also expressed frustration about, among other issues, the lack of powers and resources that had been made available to the NIHRC.<sup>8</sup>

In April 2004, the NIHRC responded to the criticisms in a further consultation document (NIHRC, 2004a). This presented the result of an opinion poll in which almost 70 per cent of those expressing an opinion said that a Bill of Rights reflecting the particular circumstances of Northern Ireland was either essential or desirable (NIHRC, 2004a: 145-48; NIHRC, 2004b). Support for a Bill of Rights was indicated by

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<sup>8</sup> See [http://www.nihrc.org/index.php?Itemid=65&category\\_id=2&page=press\\_news\\_details&press\\_id=136](http://www.nihrc.org/index.php?Itemid=65&category_id=2&page=press_news_details&press_id=136)

both main communities (65 per cent of Protestants and 73 per cent of Catholics). There were higher rates of approval among both communities for the inclusion of socio-economic rights. The poll was consistent with two earlier surveys in 1999 and 2001.<sup>9</sup>

Despite this apparent cross-community support, political consensus had still not been achieved, either on the nature of a Bill of Rights or the need for one. At the same time, the NIHRC was experiencing instability as four more Commissioners had resigned, leaving only two. The NIHRC declined to submit final advice in advance of their being replaced (NIHRC, 2005: 5). Instead, in February 2005, the NIHRC stated that a forum comprising political parties and civil society representatives under an international chairperson would be the best means of promoting the eventual adoption of a comprehensive Bill (NIHRC, 2005: 4). The UK government had first committed itself to establishing a forum in 2003. The St Andrews Agreement of October 2006, which restored devolution to Northern Ireland after a four-year suspension, finally provided the necessary cross-party support (Bill of Rights Forum, 2008: 5).

The Bill of Rights Forum was tasked with making recommendations to the NIHRC on the content of a Bill. It consisted of 14 members of civil society and 14 political representatives. It had a part-time independent chair, the Australian human rights lawyer Chris Sidoti (Bill of Rights Forum, 2008: 5-6).

The Forum agreed that its processes would be based on four operational principles: openness, transparency, inclusiveness and accessibility (Bill of Rights Forum, 2008: 7-8). Meetings were open to the public, including the media. The Forum committed itself to proceeding as much as possible through consensus and agreed that all proposals for the Bill of Rights discussed by the Forum would be included in its report, even if they conflicted (Bill of Rights Forum, 2008: 8). Its initial deliberations took place in seven working groups looking at: children and young people; civil and political rights (including equality); criminal justice and victims; culture, identity and language; economic and social rights (including equality); preamble, enforcement and implementation; and women.

The Forum also developed an outreach strategy to, among other aims, consult sectors or groups identified as not having been sufficiently engaged in the earlier consultation process. The Forum seconded four part-time outreach workers, but delays in appointing them and clarifying their role meant the Forum could not

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<sup>9</sup> See <http://www.borini.info/opinion-polls.aspx>

undertake even the limited consultation originally envisaged (Bill of Rights Forum, 2008: 8-9).

The Forum handed its recommendations to the NIHRC in March 2008. The report states alongside each recommendation the level of support or dissent it received from Forum members. The Forum was unable to come to a single view on many issues, including how to interpret its own terms of reference.

In June 2008, the NIHRC published the methodology for preparing its own advice on a Bill of Rights (NIHRC, 2008: 177-80). This comprised a set of guidelines to inform deliberations on the possible contents of its advice. These included whether the proposed right arises out of the particular circumstances of Northern Ireland; whether it is supplementary to, and compatible with, the HRA and ECHR, and not already adequately protected; whether it is in line with international best practice and experience; and whether it reflects the principles of mutual respect and parity of esteem between the two main communities. The Commission held a further round of meetings with political parties and civil society to receive feedback on the methodology (NIHRC, 2008: 13).

Informed by the Forum's recommendations, its own extensive consultations and this methodology, the NIHRC submitted its advice to the UK government in December 2008. The NIHRC did not draft a Bill of Rights but rather a series of recommendations specific enough to provide clear direction. Each of the proposed rights is explained and justified with reference to the methodology. Among the rights recommended for inclusion are economic, social and cultural rights, children's rights, victims' rights and environmental rights.

### **The Northern Ireland Office consultation**

In November 2009, the Northern Ireland Office (NIO) published its consultation paper, *A Bill of Rights for Northern Ireland: Next Steps* (NIO, 2009); the consultation was due to close on 1 March 2010. The NIO consultation document focuses on rights which, in the government's view, 'can be argued to reflect the particular circumstances of Northern Ireland and the principles of mutual respect for the identity and ethos of both communities' (NIO, 2009: 21). Only two of the rights recommended by the NIHRC were accepted by the government for inclusion: the right to vote/be elected and the right to identify oneself and be accepted as British or Irish or both. The NIO stated that social and economic rights are common across the UK and should be addressed as part of the consultation on a UK Bill of Rights and Responsibilities, rather than solely in relation to Northern Ireland (NIO, 2009: 19-20).

Other rights and enforcement issues are either discarded or left open for consultation.

The Human Rights Consortium has described the document as 'pitifully limited' and 'disrespectful' (*Irish Independent*, 2009). Some interviewees expressed concern that the three-month NIO consultation risks failing to engender a sense of public ownership of the process in Northern Ireland and is not adequate for a constitutional enterprise of such significance. Further, they suggested that the year-long delay in launching the NIO consultation had dissipated momentum. A senior official at the NIO stated that it would be difficult to extend the process beyond the standard duration for government consultations given the proximity of a general election (interview, 19 January 2010). The official added that the time taken to issue the document reflects the breadth and complexity of the advice document.

The UK parties' positions on a Northern Ireland Bill of Rights and the relationship between the processes at the UK level and in Northern Ireland are considered in Chapter 5.

## **2.7 Conclusion**

Bills of Rights in the modern era differ from each other in their provenance and the processes used to create them. All have been fundamentally based on, or strongly influenced by, international human rights treaties. They have not emerged in isolation from each other: the South African and New Zealand drafters looked to Canada; the Northern Ireland drafters looked to South Africa, Canada and Australia; the Australian drafters looked to all of these and to the UK HRA. In this sense, Bills of Rights may be viewed as a global collaborative project in which different jurisdictions have incorporated or built upon international human rights standards and adopted, or adapted, legislative models and processes developed elsewhere.

As JUSTICE (2007: 98) notes, consultation processes have steadily grown 'in their breadth, inclusiveness, sophistication and general effectiveness'. Yet whether - and how - democratic legitimacy is secured in the process of creating a Bill of Rights is a matter of experimental practice. The case studies available to us are too few and too recent to permit definitive conclusions about which methods are most likely to generate a sense of public ownership for the final outcome; some offer negative rather than positive examples of how to create a Bill of Rights. Further, methods of achieving participation may legitimately vary according to the context. Chapter 3 analyses the experiences narrated above to provide some comparative insights that span the different jurisdictions.

### **3. Securing democratic legitimacy**

#### **3.1 Introduction**

This chapter examines some common themes emerging from the diverse experience of post-war Bills of Rights processes. A good starting point is provided by the reflections of George Williams, who chaired the Victorian consultation committee, about the challenge of designing a Bill of Rights process:

I felt strongly the real danger of introducing a major democratic reform that had not been preceded by a significant period of consultation and engagement ... that led me to believe that one of the key principles had to be that an instrument of this type had to come with a high level of popular ownership; it had to be generated by a very inclusive process to give the outcome legitimacy and the process also really had to ground itself in everyday concerns so that the law would reflect – and be seen to reflect – community concerns.

(interview, 27 October 2009)

What constitutes ‘significant’ engagement? What makes a process ‘inclusive’? How might process ensure the ‘legitimacy’ of the outcome? Here, we analyse how different processes have responded to these questions and whether their approaches are context-specific or offer more general insights.

#### **3.2 Going forwards, not backwards**

Some of the processes we examined in Chapter 2 were elite-led (Canada and New Zealand); others were more participatory (Australia and Northern Ireland) or, over time, a hybrid of the two (South Africa). However, they share a common characteristic: all have been designed to supplement existing human rights protection, and/or to incorporate international human rights into domestic law, and/or to strengthen mechanisms and institutions for protecting human rights.

The Canadian Charter of 1982 built upon the 1960 Bill of Rights, itself largely based on the International Covenant on Civil and Political Rights (ICCPR). The New Zealand Bill of Rights Act 1990 expressly affirmed New Zealand’s commitment to the ICCPR. The South African Bill built upon the Canadian Charter, the ICCPR and the International Covenant on Economic and Social Rights (ICESCR). Bills of Rights which have been enacted or recommended in Australia have drawn explicitly on the ICCPR and in some cases the ICESCR and on models of enforcement from jurisdictions including the UK.

Most interviewees suggested that national Bills of Rights derive an essential element of their legitimacy from their explicit or implicit foundation in international human rights treaties. The ACT consultation committee recognised this in their strategy to ensure that the federal government, which was then strongly opposed to Bills of Rights, would not exercise its constitutional power to override the ACT HRA:

We made sure the proposal stuck very closely to the ICCPR, so the [federal] government would find it harder to override it.  
(Hilary Charlesworth interview, 2 November 2009)

None of the processes under review permitted even the possibility of regression either in terms of standards or mechanisms and institutions for protecting human rights. The way in which governments initiated reform, either through a draft bill and/or through the terms of reference or mandate established for a participatory process of consultation, expressly excluded this option (even if, in some cases, maintenance of the status quo was at least a theoretical option).

For example, the mandate behind the creation of a Northern Ireland Bill of Rights was to identify rights '**supplementary to the European Convention**' (NIHRC, 2008: 8, my emphasis). The Chair of the Bill of Rights Forum in Northern Ireland, Chris Sidoti, stated that it was a 'bottom line' of the Forum's process that it should not weaken or be inconsistent with international human rights obligations or their existing means of domestic enforcement in the Human Rights Act (HRA) – and that this should be clearly explained to the public:

It was necessary to articulate this clearly right at the start because international law is remote and people don't always have a sense of ownership over it.  
(interview, 26 November 2009)

In South Africa, one of the constitutional principles specified in the Interim Constitution (to which the final constitution had to conform) required that '[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties' (Constitution of the Republic of South Africa Act 200 of 1993, Schedule 4, Principle 2).

The terms of reference of the Australian National Human Rights Consultation Committee were to:

... report to the Australian Government ... on the issues raised and the options identified for the Government to consider **to enhance the protection and promotion of human rights.**

(Attorney-General's Department (Australia), 2008, my emphasis)

For its part, the Victorian government stated that the primary purpose of community consultation was to:

... identify those mechanisms that will **strengthen Victorians' enjoyment of their democratic rights and the institutions that protect those rights.** (Department of Justice, Victoria, 2005, my emphasis)

Defining certain areas as non-negotiable might be seen as conflicting with the principle of democracy. George Williams noted that in recommending significant reform such as a Bill of Rights, the question always needs to be asked

How will that reform be assisted - or not - by the openness of the terms of reference and will there be any lingering questions of illegitimacy?

(interview, 27 October 2009)

However, interviewees overwhelmingly understood the democratic imperative as requiring not a 'blank sheet' in which all possible options are given equal consideration - including that of going backwards - but rather transparent terms of reference. These should state clearly the parameters of the discussion in relation to existing human rights protections and international obligations.

In all Bills of Rights processes, building on existing standards and mechanisms rather than going backwards has been one of those parameters. This trend in the way that governments have initiated reform is consistent with the principle of non-regression – a principle established by, among others, United Nations bodies that monitor states' compliance with their international human rights obligations. This requires that standards for the protection of the individual that have already been adopted should not be undone at a later date (Committee on Economic, Social and Cultural Rights, 1990: para 9). This principle has gained cumulative force as successive jurisdictions have, building on each other's experience and on the international human rights treaties, enacted national Bills to strengthen human rights protection.

Moreover, the principle of non-regression goes to the heart of the relationship between human rights and democracy. Ian O'Flynn, Lecturer in Political Theory at the University of Newcastle, argued that human rights are constitutive of democracy:

Bills of Rights are not merely negative instruments to constrain authoritarian governments and the suppression of minorities. They are also:

... positive instruments to enable minorities to have a more effective say in the democratic process and hence to play their part in shaping the polity as a whole.

(interview, 27 October 2009)

There is no trade-off, then, which might justify the weakening of human rights protection on the grounds that it expresses the majority will. Rather, the democratic imperative is to construct a process which provides ample opportunities for groups whose rights are most likely to be abused to participate; mechanisms for achieving this are considered in section 3.6.

### **3.3 Statements of intent**

Section 3.2 established that no Bill of Rights process has been entirely open-ended in the options it was prepared to consider. However, some were more open-ended than others. In this section, we analyse how governments have constrained the options put forward for public consultation and the implications that this might have for the legitimacy of the resulting document.

Interviewees recognised that all Bills of Rights processes are necessarily constrained by what is considered legally and politically feasible in terms of the possible substantive outcome(s). However, there were differences of emphasis about how these constraints should be managed. Some favoured a clear statement of intent from government about what options it favours, since it is disempowering and distracting for people to be consulted about outcomes which are politically unattainable. Others favoured casting the net more widely to encompass options that do not necessarily have elite support, with the only 'non-negotiable' being non-regression from existing standards and mechanisms for protection.

A comparative analysis shows how these differences of emphasis have played out in different contexts.

The national process in Australia excluded the option of constitutionally entrenching a Bill of Rights. Frank Brennan, who chaired the process, argued that it was a reasonable decision:

Interfering with federal-state relations wouldn't have got past first base politically. So the prior question is, 'what are the immovable political

parameters?', and for those to be stated upfront and for the committee to consider only options in accordance with those parameters.  
(interview, 20 November 2009)

However, other interviewees criticised the decision to foreclose this option. Chris Sidoti considered that the case for constitutional entrenchment should have been considered as part of the process:

Desirably, possibilities should not be closed off, even though pragmatically there is a need to recognise that every possibility may not be realistic or attainable in the short term.  
(interview, 26 November 2009)

Conversely, the Australian process has also been criticised for posing questions that were **too** open-ended. This resulted, according to Edward Santow, the Director of the Charter of Human Rights Project at the University of New South Wales, in 'a conversation with the community that lacked structure' (interview, 26 October 2009).

Edward Santow suggested that another benefit of asking more structured questions and proposing draft models for reform:

The merit of this process is that it gives the community a clearer idea of what they're giving their opinions about and it can also reduce political game-playing that might happen if no one knows where the [process] is headed.  
(interview, 26 October 2009)

The Australian Capital Territory (ACT) process was entirely open-ended in the questions it asked the public, though the clear political context was the government's willingness to enact some form of Bill of Rights. Hilary Charlesworth considered that the unconstrained nature of the public debate influenced the resulting recommendations and ensured they reflected the flavour of discussions at community level. Specifically, it was 'very good to be able actively to consider a more constitutional route' even though, on balance, the committee was swayed by arguments for a statutory model. Further, although the government rejected the committee's recommendation to include socio-economic rights, Hilary Charlesworth stated that:

... being allowed to consider economic, social and cultural rights ... was really important ... Almost everything people said was very much tied to [these] rights ... I was really glad not to have to rule them out.

(interview, 2 November 2009)

In Victoria, the government's *Statement of Intent* ruled out the possibility of including economic and social rights. Some people, especially in the community sector, argued that the statement was too prescriptive and could be seen as prejudging the consultative process (Williams, 2006: 887). However, the chair of the committee, George Williams, notes that the government's prescriptions did not constrain community discussions in practice:

While the Consultation Committee asked members of the community open-ended questions that sought responses far broader than the preferences in the *Statement of Intent*, it was useful when people asked where the Government stood to be able to provide a specific response. (Williams, 2006: 887)

In the event, the government provided for a review of the Victorian Charter by 2011 to determine, among other things, whether it should be expanded to include economic and social rights; this gives proponents of such rights a four-year period in which to make the case for their inclusion (Williams, 2006: 897). Phil Lynch of the Human Rights Law Resource Centre argued that the Victorian consultation committee's willingness to listen to community deliberations, despite its prescriptive terms of reference, shows the value of a more open-ended approach:

The government was initially interested only in [civil and political] rights. They were pushed further than that by the weight of community engagement ... This was a direct impact of the process – it effected a real shift in the debate. (interview, 16 November 2009)

At the same time, George Williams (2006: 887) emphasises that the *Statement of Intent* was valuable in signifying the government's endorsement of a Bill of Rights and the political will to implement its favoured model if the committee found it had popular support. The Victorian process, then, combined relatively unconstrained community discussion with an unambiguous commitment from the government to act within certain parameters.

Northern Ireland presents a contrasting experience. Reflecting on the decade-long process, interviewees concurred that it had been protracted and indeterminate. This was partly due, some interviewees suggested, to the lack of clarity at the outset on the timeframe, procedure, mandate and terms of reference of both the Bill of Rights

Forum and the Northern Ireland Human Rights Commission (NIHRC); these were contested throughout, preventing progress on substantive issues (Catherine Donnelly interview, 30 November 2009; Chris Sidoti interview, 26 November 2009). Also lacking was a clear procedural commitment from the UK government about what action would be taken after the NIHRC presented its advice. Brice Dickson, Professor of International and Comparative Law at Queen's University, Belfast, suggested that the UK government's delay in taking almost a year to respond to the NIHRC's advice had caused the process to 'fall into disrepute' (interview, 9 November 2009). Another interviewee noted:

Before you even step into this arena you need to tie down more carefully a clear line about what happens afterwards because there's a real danger of creating expectations among communities that are vulnerable and marginalised - and in Northern Ireland some of those communities are already disillusioned with the rhetoric of the peace process.

This observation goes to the heart of the integrity of participatory processes to create Bills of Rights. Pulling together the strands of debate considered in this section, human rights lawyer Phil Lynch argued that:

It is disempowering for people to be asked questions in which their answers will have no influence ... So, do one thing or the other: if there is a limited number of possible outcomes, there's no point debating outcomes that fall outside those parameters. If there's a genuine desire to obtain the community's views, then ask open-ended questions that do not presume any particular outcome.  
(interview, 16 November 2009)

Graham Smith, Professor of Politics at the Centre for Citizenship, Globalization and Governance at the University of Southampton, added that meaningful engagement tends to come around contested areas such as socio-economic rights. A key aspect of process, then, is to identify areas where interest groups and the political elite do not agree and put these at the heart of the process:

A general approach of 'fill in the blank, what should a bill of rights be?' would be an enormous mistake. It is better to engage people on the areas of greatest controversy - the things that actually make a difference.  
(interview, 9 November 2009)

Most interviewees suggested that transparency about the political purpose of a Bill of Rights ‘project’ and the options that a government considers feasible is paramount. Chris Sidoti added that a body independent of government ‘is in a good position to be open and honest about these realities’ (interview, 26 November 2009). It is to this question of who runs the consultation process that we turn next.

### **3.4 Running the consultation**

In Australia, most Bills of Rights processes were run by independent committees. The Northern Ireland process was run by a human rights commission, with a significant role for the separate Bill of Rights Forum. The more limited public participation in Canada and New Zealand took place in parliamentary hearings. In this section, we compare these approaches in terms of their success in building trust and engagement and insulating the process from being undermined or manipulated by political interests.

#### **The independent committee model**

Most of the Australian committees comprised four people, nominated on a cross-party basis. Most were not human rights experts, with the exception of the committee chairs in Victoria and ACT. The chair of the Western Australia consultation committee, Fred Chaney, was a former Liberal politician whose party has consistently opposed Bills of Rights. The federal committee included a prominent broadcaster, a former police officer specialising in counter-terrorism and an indigenous barrister, with a Jesuit priest and lawyer, Frank Brennan, as chair. None publicly held a position about the desirability of a Bill of Rights; the committee was ‘genuinely agnostic’ (Chris Sidoti interview, 26 November 2009). The Victoria committee included a basketball player; the ACT committee, a poet. Some interviewees were uncomfortable about the idea of appointing committee members primarily for their public profile. Most also said that it was important for the committee to include at least one member with human rights expertise so that it was not wholly reliant on external legal advice.

Interviewees familiar with the Australian experience were unanimous in endorsing the independent committee model and considered the principle of independence to be transferable to other contexts. Previous inquiries into a Bill of Rights for Australia were run by parliamentary committees with a clear government majority, which were seen as having a vested interest in the outcome and failed to convince the public or sceptical politicians. Spencer Zifcak, Director of the Institute of Legal Studies at the Australian Catholic University, noted that:

There is no point giving [the process] to a body that is not independent, that has a pre-determined agenda.  
(interview, 14 December 2009)

Chris Sidoti added that the perception of independence increases the prospect of the resulting recommendations being seen as legitimate:

The credibility of the process has to be designed right up front ... human rights are a highly emotive issue [and] attract a high level of irrational responses ... so it's far better for such a consultation to be undertaken by a group of 'clean skins'.  
(interview, 26 November 2009)

Throughout the federal process, the committee was attacked by the anti-HRA Murdoch-owned press for being, as Frank Brennan put it, 'like-minded people with pre-conceived notions'. He added:

This was nonsense. We were four people with quite different and disparate experiences and views but who shared a genuine commitment to improving the rights of people who 'fall through the cracks' in the Australian context ... and over time we developed a credibility of connectedness to local communities.  
(interview, 20 November 2009)

Further, he added, the independence and diversity of the committee bolstered the credibility of its final report:

It was precisely because the committee did not have unanimity ... that guaranteed the integrity of the processes we followed including the report writing ... It could have been a more focused report with clearer lines if there had been a clearer position earlier on; but in terms of the long-term validity of the exercise it was a very good thing that the committee was divided until the very end of the process.

One challenge faced by the national committee was the difficulty in establishing dialogue with senior officers of federal government departments (other than the Attorney-General's Department which hosted the committee's secretariat). Occasional meetings with an inter-departmental committee made up of middle-ranking officials were no substitute for 'being able to eyeball senior bureaucrats', and Frank Brennan suggested that:

We were talking about getting ideas off the ground that would impact primarily on Commonwealth public servants in terms of delivery of services so it was a very significant shortcoming ... This will make things problematic in terms of implementation [because] if it's not practical it doesn't matter how firmly based we think it is in principle.

(interview, 20 November 2009)

However, interviewees did not consider this an inherent weakness of the independent committee model: such obstruction had not been experienced in other processes. For example, in Victoria, an inter-departmental committee was established to shadow the community-level process and to have input before the committee drafted its report. George Williams argued that this ensured an outcome 'that not only had broad community support but which could be implemented effectively and at the lowest cost' and that enjoyed a greater sense of ownership among public servants (Williams, 2006: 890).

### **Human rights commissions**

A review of the Northern Ireland process reveals the particular difficulties facing a human rights commission charged with leading a consultation process on a Bill of Rights. One interviewee noted that the NIHRC's role had created suspicion among some communities that a 'maximalist approach was intended from the start'. Smith (2006: 918) sees the experience of the NIHRC as a 'stellar illustration' of the challenges facing **all** national human rights institutions, which must carve out a space between government and civil society and remain independent of government while being reliant on state funding.

The Australian Human Rights Commission (AHRC) saw its primary role in the federal consultation as providing information about human rights and appropriate tools to support public engagement. The AHRC took no formal role in the consultation and, like the consultation committee, was 'conscious of the need to keep a healthy separation' (interview with Kate Temby, Acting Director Human Rights Unit, AHRC, 26 November 2009). The AHRC had also played a role in brokering competing viewpoints, for example by organising a roundtable of constitutional lawyers to consider the implications of a national HRA.

Interviewees overwhelmingly agreed that human rights commissions are not the right institutions to run a consultative process on a Bill of Rights since they will inevitably be seen as having a vested interest in the outcome. Rather, interviewees suggested that the role of a human rights commission was to influence the design of the process and monitor its implementation; advocate for key principles, including non-regression;

promote a participatory approach; coordinate responses and generate community engagement; take a leading educational role; and speak authoritatively about human rights with particular attention to 'myth-busting'.

### **Government or parliament**

No interviewee favoured public consultations on a Bill of Rights being run by a government department or solely by a parliamentary committee. As Phil Lynch noted, a government-run exercise:

... presents problems of accountability to political masters and can easily be seen as compromised.

(interview, 16 November 2009)

Some interviewees noted that both governmental and parliamentary processes tend to be more conventional and static in their methods than an independently run process and significantly less able to generate community engagement and enthusiasm. Such processes are also more vulnerable to becoming a proxy for other political battles than in the relative 'safe haven' of an independent exercise.

In New Zealand, the government-sponsored process engaged the public only minimally and, partly as a result of this, the Bill of Rights Act remained 'abstract and remote' to the public (Sylvia Bell interview, 17 November 2009).

Peter Russell, who advised the Canadian parliamentary committee during the Charter of Rights process, said that submissions by interest groups experts did much to strengthen the Charter (interview, 9 November 2009). However, it was an elite-led process in which only national organisations with 'political clout and good legal counsel' were able to get a hearing; community-based groups and individuals were effectively excluded. He added that a better process would have been to have a 'real political conversation about the Charter of Rights, with the public much more involved than it was in Trudeau's package'.

### **3.5 Political consensus**

The premium placed on achieving political consensus around a Bill of Rights varies with the political context. Constitutional reform of any kind is generally perceived as requiring substantial political consensus, since partisan initiatives are unlikely to achieve legitimacy or longevity. In South Africa and Canada, Bills of Rights were emblematic documents developed in the context of significant constitutional moments and gained acceptance in part by being firmly rooted in international human rights treaties.

Statutory Bills of Rights developed in settled times have rarely achieved cross-party consensus: the New Zealand Bill of Rights Act was a controversial and partisan measure. In Australia, the conservative Liberal Party has consistently opposed Bills of Rights processes initiated by Labor administrations at federal and state/territory level.

In Australia, the consultation committee expended considerable effort in meeting politicians from all sides and saw it as a success that the Shadow Attorney-General made a formal submission to the committee on behalf of the opposition parties rather than standing aloof from the process (Frank Brennan interview, 20 November 2009).

A further question arises in relation to process: **how** should it seek to build political consensus if this is lacking at the outset?

Northern Ireland is a salient example, given the conflicted context in which the Bill of Rights process took place. Interviewees suggested that it was unrealistic to expect the NIHRC to achieve cross-party consensus. One argued that:

There was no express requirement in the mandate to achieve consensus around the proposals ... Ultimately if you ask a human rights commission to do this, all you can really expect ... is that it will provide you with good, solid human rights advice. If your dominant concern is party political consensus, then give it to a body that is set up to do that.

The Bill of Rights Forum in Northern Ireland was set up primarily as a space for political negotiation and not as a body for public consultation, though it came under pressure from some quarters to fulfil both roles (Chris Sidoti interview, 26 November 2009). Some interviewees acknowledged that the Forum learned some difficult lessons. It had been set up too late in the process; it was inadequately resourced (requiring a full-time chair and a bigger secretariat) and it had too little time for preparation and educational groundwork with those attending.

Most interviewees agreed that the Forum could not have achieved political consensus whatever its methods: politicians knew that the 'endgame' when final deals would be struck had not yet been reached. Despite this, the Forum's chair, Chris Sidoti, stated that it played a 'very valuable role' (interview, 26 November 2009). Other interviewees also praised the Forum as a model: it had increased the knowledge and understanding of key decision-makers, overcome some political obstructions and established precisely where agreement and disagreement lay. It had also provided an arena for politicians to be challenged by community groups to

defend their position, educating all players in the process. Moreover, the structure of the Forum 'demanded participation' of its members since parties were inevitably reluctant to surrender the seats they had been allocated; skilful chairing had also 'kept people in the room' despite the political fissures.

Chris Sidoti suggested that the Forum could provide a useful model for a Bill of Rights process outside the Northern Ireland context:

There is value in having, parallel to a broad public consultation or subsequent to it, this kind of political process, on neutral ground, to thrash out areas of agreement and perhaps overcome political blockages.  
(interview, 26 November 2009)

Some interviewees pointed to other models for seeking consensus. The European Charter of Fundamental Rights was formed of heads of state and national and European parliamentarians, with civil society groups able to monitor and shape proposals. It used an 'iterative consensus-seeking' approach in which successive drafts were debated at periodic intervals until little or no opposition remained (Deloche-Gaudez, 2001: 23).

Another model is that of the constitutional convention. One precedent is the Scottish constitutional convention which helped design the framework for devolution.<sup>10</sup> It was initiated by civil society groups and consisted of some political parties, churches, trade unions and other sectoral groups. The convention established a Constitutional Commission; its purpose was to develop proposals for, among other issues, the electoral system and how a Scottish Parliament might operate. Convention members spent several months debating the Commission's recommendations within their own organisations, before negotiating a consensus on the key issues. Another precedent is the Australian Constitutional Convention of 1998 which debated the best model for a republic; this was formed of 152 delegates, half popularly elected and half government appointees.

In terms of UK precedents for considering broader constitutional reform, JUSTICE (2007: 95-96) notes that a convention of citizens, interest groups and parliamentarians offers an alternative to either a royal commission, a specially appointed select committee or a constitutional assembly of both Houses of Parliament. A constitutional convention has not been a feature of any Bill of Rights process outside the UK and it is beyond the scope of this report to evaluate this

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<sup>10</sup> See [http://www.almac.co.uk/business\\_park/scc/scc-rep.htm#The\\_Scottish\\_Constitutional\\_Convention](http://www.almac.co.uk/business_park/scc/scc-rep.htm#The_Scottish_Constitutional_Convention)

model in detail. Some interviewees noted that specially convened assemblies involving political parties and civil society are not assured of achieving cross-party or social consensus. An interviewee in Australia suggested that the convention on a republic was justifiably criticised for being dominated by the ‘usual suspects’ and failing sufficiently to engage or educate the wider public. An interviewee in Scotland observed that the convention on devolution had been useful for generating ‘social buy-in’, though it did not escape partisan controversy as the Conservative and Scottish National Parties boycotted it.

In summary, the achievement of political consensus is not reducible to this or that model of consultation. It is dependent also upon the nature of the constitutional ‘moment’ and on having champions in the legislature and (as in Canada) on sustained political leadership. Nor is cross-party consensus, desirable as it may be, necessarily synonymous with public legitimacy. Forums for negotiation must co-exist with consultative bodies that engender trust by being demonstrably non-partisan and by employing participatory methods of engaging the public.

### **3.6 Consultation**

As noted in Chapter 1, there is a distinction between ‘consultation’, an exercise in finding out the views or preferences of citizens, and ‘deliberation’, a process by which, typically, a random sample of citizens conducts informed discussion of a policy question and reaches a considered judgement. Both require an educative component since there is no value – and potential harm - in people expressing views on matters they do not understand.

All Bills of Rights processes have been primarily consultative rather than deliberative.

In this section, we analyse who is consulted and how, including the role of civil society. In section 3.7, we examine the (potential) value and impact of deliberative techniques. The main focus is on methods used in Bills of Rights processes; however, we refer also to consultative and deliberative methods used for other purposes that might yield relevant insights.

#### **Who to consult**

A hallmark of the Australian and Northern Ireland experiences was the imperative to ‘engage the unengaged’ rather than elite groups and those already motivated and equipped to make submissions. This involved eliciting opinions and experiences from specific groups identified as socially excluded or disadvantaged – and, more broadly, from disaffected communities alienated from the political and legal system. George Williams, who chaired the Victorian process, recalled that:

I said upfront that I didn't want to talk to the human rights groups – they're well educated and can look after themselves. I wanted to speak to victims' rights groups, farmers, people who feel disconnected from the issue.  
(interview, 27 October 2009)

In a comparable process in 2004, the New Zealand Human Rights Commission consulted broadly on its strategic Action Plan which established priorities for protecting and promoting human rights. The Commission adopted a deliberate strategy of recruiting people from communities identified as marginalised to help run the consultation; this included street children, asylum seekers and refugees, and people with mental illness. Joanna Collinge, the Executive Director of the Commission, stated that:

We were aware of the need to reach the silent majority who normally wouldn't contribute to a public submissions process ... We also wanted to get at the marginalised voices **within** the marginalised communities, such as the women in migrant groups.  
(interview, 7 November 2009)

Some interviewees stated that outreach should also target powerful interests who might assume the process is irrelevant to them, such as corporations. Success was patchy with this audience in Australia (Hilary Charlesworth interview, 2 November 2009). However, the early endorsement of a human rights charter by telecommunications firm Telstra was influential in the national debate (Telstra, 2009; Edward Santow interview, 26 October 2009).

### **How to consult: the relationship with civil society**

We have seen that the Australian processes sought to ensure that interest groups did not monopolise debate about a Bill of Rights. Yet in Australia and elsewhere civil society organisations have greatly influenced consultation processes. This has happened in two distinct ways: civil society groups have been subcontracted as direct partners by bodies running consultations to engage 'hard-to-reach' groups; they have also played a broader lobbying and mobilising role.

### **Devolved consultation**

Processes in Victoria, Western Australia and at the federal level in Australia used 'devolved consultations' – described by one interviewee as a 'spectacularly successful' way of reaching individuals who would otherwise have been unlikely to participate (Edward Santow interview, 26 October 2009). This involved working in partnership with non-governmental organisations (NGOs), community groups and

specialist networks such as community law centres, youth councils and frontline service providers systematically to facilitate hundreds of conversations with such individuals.

At the national level, the devolved consultations were run by a research company. In Western Australia, they were carried out by a consultant, guided by a reference group from the community sector. In Victoria, the consultative committee directly subcontracted community-based groups to promote discussion in their sector. In each case, community and advocacy groups that had relationships of trust with the targeted groups were involved in the conversations.

Target groups for devolved consultation included: prisoners or ex-prisoners; people with drug or alcohol dependency; homeless people; single mothers; people living with AIDS; people on low incomes; people with mental health problems; people with physical and/or learning disabilities; indigenous people; people from culturally and linguistically diverse backgrounds; recently arrived refugees, immigrants and people recently released from immigration detention; and older people (Consultation Committee for a Proposed WA Human Rights Act, 2007: Appendix F; National Human Rights Consultation Committee (NHRCC), 2009: 13; Victorian Human Rights Consultation Committee, 2005a: 165-67).

Phil Lynch ran some devolved consultations with homeless people in Victoria as the then Coordinator of the Public Interest Law Clearing House (PILCH) Homeless Persons' Legal Clinic in Melbourne. He explained that each workshop involved 10-15 people and was facilitated by a lawyer and someone who was homeless or formerly homeless who had received training in human rights and facilitation. Discussion was pitched in terms meaningful for that group, such as the rights to housing and health and to be treated with dignity and respect. Each workshop had an open-ended session which recorded people's views and experiences and a session which supported people to make individual submissions: a questionnaire with 'tick box' options and sections where people could tell their story. The end result, Phil Lynch noted, was around 100 individual submissions and an organisational submission from the legal clinic bolstered by 'real, human content' (interview, 16 November 2009).

The devolved consultations influenced both the tone and content of the committees' final reports and, according to Spencer Zifcak, made them more persuasive to government:

Individual experiences of disadvantage are a basis for sounder recommendations and to indicate to government that there are real problems.

(interview, 14 December 2009)

Frank Brennan also identified this aspect of process as having been indispensable:

People have got to see the human face, they've got to be able to paint the picture of the lived experience, where people are falling through the cracks and what are the issues of significance to them.

(interview, 20 November 2009)

Frank Brennan suggested that one lesson learnt from the federal experience was that consulting groups considered vulnerable is time-consuming, especially where ethical clearance is required by academic researchers. This might require devolved consultations to start before the wider public consultation.

Some interviewees in Northern Ireland said that the programme of training facilitators had been an important part of the process. Another initiative was the Bill of Rights mentoring project run by the Community Foundation for Northern Ireland (CFNI). This supported mentors and related training for community groups in order to extend their knowledge of, and interest in, the Bill of Rights process (CFNI, 2007).

These initiatives to leverage community networks in order to invigorate Bills of Rights processes show the importance of engagement with civil society by those running the consultation process. Some interviewees stated that this needed to start well before the public consultation in order that NGOs could influence the design of the process and prepare to involve their own constituencies.

### **Lobbying and mobilising**

In Australia and Northern Ireland, NGO networks have been vibrant and influential throughout the process.

In Australia, around 25,000 of the more than 35,000 submissions sent to the committee were generated through campaigns by Amnesty and a coalition called Get Up! (NHRCC, 2009: 5-6).<sup>11</sup> Amnesty circulated a simple tick-box postcard in universities and schools. It also developed an online submission form which gave drop-down options relating to particular rights and space for people to narrate their

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<sup>11</sup> See <http://www.amnesty.org.au/> and <http://www.getup.org.au/campaign/rights/407>

experiences. Jenny Leong of Amnesty Australia argued that new media campaigns were especially important in engaging a young audience: Amnesty used Twitter, Facebook and blogs to keep supporters updated. She stated that:

Many people think they are not expert enough to participate in such a consultation so we gave people the tools to do that.  
(interview, 11 November 2009)

Also influential were the Charter Group in Victoria and the Australian Human Rights Group at (AHRG) at federal level.<sup>12</sup> The AHRG was formed several months before the consultation – partly to ensure that the process happened. It subsequently provided advice to the consultation committee and assisted individuals and organisations to make submissions.

In Northern Ireland, an ad hoc Human Rights Consortium was established in 2000 to encourage community involvement. It grew into a coalition of more than 100 community groups, NGOs and trade unions campaigning for a ‘strong and inclusive’ Bill of Rights. Its activities have included research, education, lobbying, roundtables between civil society groups and politicians, and, in 2008, a publicity campaign to raise awareness about the Bill.<sup>13</sup> During 2006-08, other independent organisations consulted on a Bill of Rights: these included the CFNI and the Northern Ireland Council for Ethnic Minorities.<sup>14</sup>

Civil society networks have played a significant role in energising and informing debate on Bills of Rights, both as campaigners and as direct partners in the consultation. It is too early to make a final assessment of their impact as they are still instrumental in lobbying for implementation of recommendations for Bills of Rights: their role both precedes and outlasts that of the ‘official’ consultation.

### **How to consult: the choice of methodology**

Methods used in Bills of Rights processes have included consultation documents inviting submissions on paper or online; online discussion forums; opinion surveys; focus groups; public hearings; ‘town hall’ meetings; and more targeted conversations with community groups.

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<sup>12</sup> See [www.humanrightsact.com.au/ahrg/](http://www.humanrightsact.com.au/ahrg/)

<sup>13</sup> See <http://www3.billofrightsnri.org/>

<sup>14</sup> See <http://www.communityfoundationni.org/news/default.asp?ID=9&itemId=75&va=1> and <http://www.nicem.org.uk/bill-of-rights>

Interviewees emphasised the need for the process to offer multiple opportunities and spaces to participate. It was also 'exceptionally important to mix qualitative with quantitative methods' to insulate the process from allegations of being confined to a self-selecting audience (Chris Sidoti interview, 26 November 2009). Frank Brennan suggested that the multi-stranded nature of the Australian process increased its credibility:

We were always aware that those who came to community meetings were likely to have a grievance or personal agenda, so it was also important to have rigorous independent research to capture general opinion and significant resources were put into this.  
(interview, 20 November 2009)

The more recent processes in Australia have used social networking and other online forums, email and text messaging to energise debate and generate submissions. Each consultation committee had a website and most developed online submission forms. At the federal level, the committee and its chair each had a Facebook page, while an online forum facilitated by legal experts responded to questions about the consultation. In Victoria, information on how to access the community discussion paper was distributed by email to tens of thousands of people using community and NGO networks. In Western Australia, an online discussion forum, email and text messaging were used to consult with hard-to-reach groups to supplement meetings in person. Future Bills of Rights processes may wish to consider other innovations which use information technology to engage citizens, including those with little or no knowledge of the internet (Smith, 2005: 90-104). Examples in the UK include anonymous and secure discussion forums, 'Womenspeak' (for survivors of domestic violence) and 'HeadsUp'<sup>15</sup> (for young people). Smith (2005: 104) notes that these were an effective means of garnering the views and experiences of groups that would be highly unlikely to engage effectively with public officials via conventional means.

Several interviewees in Australia pointed to the impact of the three days of public hearings in Canberra, which attracted significant national media attention. These were televised and webcast and were 'very valuable for public accountability and transparency' (Phil Lynch interview, 16 November 2009). The hearings involved more

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<sup>15</sup> See <http://www.headsup.org.uk/content/>

than 60 pro- and anti-HRA speakers and tackled, among other themes, the 'hot button' issues of same-sex marriage, euthanasia, abortion and religious freedom.<sup>16</sup>

Interviewees gave mixed views on the value of opinion polls. Some considered them a valuable supplement to qualitative methods. Others highlighted the risk of relying on polls to provide a gauge of public opinion. For example, opponents of a Bill of Rights in Northern Ireland had 'been able to shoot holes' in this aspect of the process because of the necessarily simplistic nature of the questions asked (Brice Dickson interview, 9 November 2009). By contrast, deliberative techniques are less vulnerable to the charge of superficiality.

### **3.7 Deliberation**

Although as noted above, all Bills of Rights processes have been primarily consultative rather than deliberative, there is a growing body of theory and practice in deliberative methods that focus on the quality and form of the engagement between citizens in participatory forums (Involve and the National Consumer Council, 2008; Runswick, 2007; Smith, 2005). Of particular interest are 'micro-forums' that select participants by forms of statistical or random sampling to ensure their representativeness and design a safe environment where they can deliberate on the basis of balanced information (Smith, 2005: 40). These vary in their format and scale, from citizens' juries of a dozen people to the 'America Speaks' initiative where 5,000 citizens are linked via networked computers (Smith, 2005: 48-52). In this section, we focus on deliberative polling, which has been used in one Bill of Rights process, and citizens' assemblies which some interviewees suggest offer a useful model to consider for future processes.

#### **Deliberative polling**

Deliberative methods were not used in any Bill of Rights process except in ACT, where a deliberative poll aimed to 'facilitate the informed voice of ACT citizens' (Issues Deliberation Australia, 2002: 6). Some 200 randomly chosen ACT residents were polled on their initial views on issues relating to a Bill of Rights. They later held two days of deliberation, during which they were exposed to competing views and were able to question speakers. They were polled again to measure changes in their opinions. The independent organisers also measured the gains in the knowledge base of those taking part. In common with most deliberative polls, the results reported by Issues Deliberation Australia (2002: 2-3) showed statistically significant changes in views:

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<sup>16</sup> See

[http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/CalendarofEvents\\_PublicHearings](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/CalendarofEvents_PublicHearings)

- Prior to the deliberation, 47 per cent of participants favoured a Bill of Rights; this grew to 59 per cent afterwards. Those opposed also grew, from 29 per cent to 39 per cent, with fewer undecided.
- Initially, 72 per cent favoured an entrenched Bill; after deliberation, this fell to around 40 per cent.
- Following their deliberations, participants' knowledge base increased by between five and 50 per cent.

The event was broadcast in edited form on television and attracted news media attention. The consultative committee's recommendations reflected the final view of the deliberative poll in proposing a statutory HRA. Committee chair Hilary Charlesworth argued that the deliberative poll was the most successful aspect of the ACT process:

It was quite remarkable that there was quite a strong swing [towards a Bill of Rights] once people had been educated ... I learnt a great deal and it made me really focus on the big questions in people's minds.  
(interview, 2 November 2009)

The drop in support for an entrenched HRA is a reminder that the constitutional model, viewed by its proponents as the pinnacle of human rights protection (Gearty, 2006: 69) is not necessarily assured of popular support – a trend that was repeated in other Australian processes.

### **Citizens' assemblies**

The pre-eminent example of a citizens' assembly is that established by the government of British Columbia in 2004 to review the province's voting system.<sup>17</sup> The assembly was empowered to propose a new voting system to be put to referendum should it conclude that change was needed. Warren and Pearse (2008: 1) note that the assembly:

... represented the first time in history that ordinary citizens have been empowered to propose fundamental changes to political institutions to their fellow citizens.

The assembly was carefully designed to be 'insulated from the distortions and bias of political debate in mass democracies' and from direct manipulation by politicians

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<sup>17</sup> See <http://www.citizensassembly.bc.ca/public>

(Warren and Pearse, 2008: 17). It consisted of 160 randomly selected citizens (a man and a woman from each district), with an independent chair and a secretariat. Two aboriginal representatives from the larger random sample were added because the final selection had resulted in insufficient representation from that group. The assembly met regularly over a period of 11 months to learn about different electoral systems and discuss their relative merits. Warren and Pearse (2008: 11-12) show that the process involved three phases:

- The learning phase: intensive education of assembly members about electoral processes, including questioning of expert witnesses.
- The public hearing phase: members held public hearings, attended community events and received more than 1,400 public submissions.
- The deliberative phase: members designed an electoral system that maximised the values they rated most highly.

The assembly recommended the single-transferable vote system (British Columbia Citizens' Assembly on Electoral Reform, 2003). This voting system received 57 per cent support in the referendum, just short of the required 60 per cent majority.

Despite this narrow rejection, perceptions about the citizens' assembly - its representativeness, competence and independence - were important to voters that knew about it (around 60 per cent of the electorate); the more they knew about the assembly, the more they trusted it (Warren and Pearse, 2008: 17-18). Mark Warren, Professor of Political Science at the University of British Columbia, stated that:

It was remarkable to construct a body doing political work in such a way that people trusted it.  
(interview, 23 November 2009)

A citizens' assembly on electoral reform, modelled on the British Columbia experiment, took place in Ontario in 2006-07.<sup>18</sup> Again, the assembly's recommendation failed to pass the referendum.

A lesson that emerges from both these experiences is the importance of connecting the 'mini-public' of the assembly (or other deliberative forum) to the broader public sphere by using both the process and outcome of deliberation as a vehicle for debate

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<sup>18</sup> See <http://www.citizensassembly.gov.on.ca/>

and education (Mark Warren interview, 23 November 2009). Many deliberative polls have been run in concert with media organisations (Smith, 2005: 43).

Professor John Gastil of the Department of Communication at the University of Washington advocated a hybrid approach in which citizens' juries of 20-24 people would identify areas of agreement and disagreement in order to frame the key issues for deliberation, followed by a larger citizens' assembly which would produce recommendations (interview, 6 November 2009).

### **Impact of deliberation**

Practitioners of deliberative methods argue that they offer advantages over the use of consultative methods alone. Smith (2005: 55) suggests that:

- Deliberations reflect on a variety of experiences and competing viewpoints.
- Selection methods mean that all citizens have an equal opportunity to participate and no social group is systematically excluded.
- Events are run by independent organisations to ensure transparency and fairness.
- Outcomes reflect citizens' considered judgements as opposed to the 'top of the head' preferences expressed in opinion polls.

Deliberative methods may also be especially suitable for issues where the public is ill-informed or misinformed or where it has failed to confront the trade-offs and complexities inherent in public policy.<sup>19</sup>

In this sense, the outcomes of a deliberative process can be promoted as a legitimate proxy for the conclusions the public would reach, if people had opportunity to become fully informed and engaged. Properly constructed deliberative methodologies are thus relatively immune to the charges of being skewed or unrepresentative (Ian O'Flynn interview, 27 October 2009).

Deliberative approaches are relatively expensive compared with consultative methods: participants are generally paid an honorarium and much effort is required to select participants and sustain their involvement. The national consultation committee in Australia opted against a deliberative poll, judging that it wouldn't 'deliver bang for the buck politically' (Frank Brennan interview, 20 November 2009).

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<sup>19</sup> See also <http://cdd.stanford.edu/polls/docs/summary/>

Our review suggests that this concern is mitigated if the process is designed to communicate the deliberative event in order to build trust and interest in the broader consultation.

Deliberative forums should not be seen as a method in isolation from wider consultative approaches. Their impact comes in part from being communicated to the wider public sphere. Moreover, targeted consultative methods may be required to ensure that the views of relatively powerless groups are given privileged status in the process (see section 3.6).

### **3.8 Public education**

We have seen that education is an integral feature of deliberative methods. Interviewees say raising public knowledge and understanding is also an essential ingredient of consultation: however, these objectives are invariably imperfectly achieved and hard to measure.

Some interviewees suggested that the lengthy process in Northern Ireland succeeded in raising overall ‘human rights literacy’ through initiatives such as training facilitators and mentoring of community projects by those with human rights expertise. Civil society actors – especially those who had contact with the Bill of Rights Forum - now use human rights language and concepts with greater confidence and sophistication than before (Catherine Donnelly interview, 30 November 2009). Awareness is also perceived to have increased among Unionist parties previously unengaged with human rights (interview with Mike Ritchie, Director of the Committee on the Administration of Justice, 9 December 2009).

Frank Brennan offered the impressionistic assessment that the Australian process raised the knowledge base of Australians about human rights:

Education wasn't a primary aim of the government but it was one of the primary aims of the committee.  
(interview, 20 November 2009)

Also key, Frank Brennan added, was avoiding technical or legalistic terms and embracing human rights-compatible language that resonates among communities in Australia, such as ‘the fair go’ and ‘not falling through the cracks’. Edward Santow stated that those running the federal consultation were ‘plain talking’ and treated ill-informed questions or mendacious reporting as an opportunity to educate and dispel myths (interview, 26 October 2009).

However, educational opportunities were lost in Australia: the government's discussion paper for the consultation process (Attorney-General's Department (Australia), 2008), written before the committee was formed, was 'not user-friendly' and large press advertisements announcing community meetings could have contained more educational content (Frank Brennan interview, 20 November 2009). Some interviewees agreed that accessible and tailored materials should be circulated before the consultation proper. George Williams noted that:

My philosophy is: get people involved very early and then build upon that with the law, but don't pretend you can start it once the law is in place because it's very hard at that point if perceptions are set against it.  
(interview, 27 October 2009)

Civil society organisations put considerable resources into education. A notable example in Australia is the Human Rights Law Resource Centre in Melbourne.<sup>20</sup> It produced *Engaging in the Debate* (Lynch and Knowles, 2009), which sought to present arguments for and against human rights legislation 'in the most informed, evidence-based, rational way possible' (Phil Lynch interview, 16 November 2009).

The media might be considered an essential conduit for information about human rights. In practice, most of the Australian committees used community discussions deliberately to bypass the media. George Williams suggested that in Victoria:

We quickly found that media tended to polarise people and sensationalise issues – it's not a place to get reasoned and nuanced debate.  
(interview, 27 October 2009)

Some interviewees said that this strategy of staying 'under the radar' of the media had limited the potential for wider awareness-raising. Hilary Charlesworth in ACT noted that, with hindsight, her committee would have forged a positive media strategy to engage the local and national media (interview, 2 November 2009). Frank Brennan stated that the three-day public hearings in Canberra and the way they were disseminated and reported were a successful aspect of the process, indicating the value of set-piece events as a focal point for national media coverage. The Australian processes made more proactive use of local and community-based radio to announce community meetings, though these were more to inform people about events than to educate.

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<sup>20</sup> See <http://www.hrlrc.org.au/>

Overall, most interviewees were dubious about how far a time-limited consultation aimed at gauging public preferences could fulfil a serious educational function in relation to human rights; this was a more deep-rooted challenge for the education system. A minimum requirement of a consultation process was the provision of impartial and accessible information (in appropriate formats and languages) and a concerted strategy to correct misperceptions.

This review has not found any studies which objectively compare public knowledge and awareness before and after consultation processes. By contrast, this is an inherent feature of most deliberative methodologies. This again suggests the advantage of educating a sub-section of the population and using the results of their deliberation as a vehicle to inform and engage the media and the wider public.

### **3.9 Translating process into content**

Some interviewees suggested that ‘traceability’ – being able to see the imprint of the process on the final outcome and the rationale for including one provision over another – is necessary for the outcome to be seen as legitimate. Yet the success of consultations in the volume and diversity of views and experiences they generate presents challenges of its own. In this section, we examine how different processes have synthesised the (sometimes conflicting) results of consultation or deliberation in their final outcomes.

It is notable that, in jurisdictions where there has been any degree of public participation in developing a Bill of Rights, the effect of that participation has been to give popular weight to legislative options for change and/or to expand or strengthen the government’s proposed legislative model in specific ways.

This has partly been a ‘numbers game’. The recommendations of committees in Australia and of the NIHRC in Northern Ireland were wholly or partly justified in terms of the volume of submissions received, the results of opinion surveys and, in ACT, the majority preference in the deliberative poll.

However, interviewees emphasise that consultation processes should not be majoritarian exercises: indeed, Bills of Rights derive from the imperative to protect individuals and minorities from the consequences of majority rule (Kavanagh, 2004: 964-68). To counter this danger, consultative bodies like the Australian committees and the NIHRC have tended to elevate the voices and priorities of less powerful groups in society (such as those engaged through the devolved consultations described in section 3.6). Consultative committee reports in Australia are suffused with personal stories of abuse or neglect. George Williams noted that:

That was the powerful message – what people had to say to us – and it was our job to translate that into legal outcomes.  
(interview, 27 October 2009)

These narratives add authenticity and urgency to the recommendations. Yet synthesising thousands of diverse stories along with submissions from expert bodies is challenging, as Frank Brennan acknowledged:

Trying to balance the contributions that reflect lived experience and those of a more theoretical or abstract nature was problematic ... was an ongoing and irresolvable tension in drafting our report.  
(interview, 20 November 2009)

George Williams considered that one way of mitigating this problem is to channel the submissions more effectively by asking carefully structured questions designed to make the responses easier to analyse and present in the final outcome, as happened in Victoria and Western Australia (interview, 27 October 2009). Edward Santow argued for submissions to be assessed qualitatively as well as quantitatively; he suggested that detailed submissions and those from organisations with large memberships should be given greater weight than tick-box responses from individuals (interview, 26 October 2009).

### **Examples of impact**

The impact of consultation and deliberation is visible in specific provisions of (proposed) Bills of Rights.

In Canada, NGO submissions to the parliamentary hearings secured more expansive definitions of some rights, stronger equality measures and a more narrowly defined limitation clause which placed a greater onus on the government to prove its case if it wanted to limit rights (Peter Russell interview, 9 November 2009).

In Western Australia, as in ACT, the independent committee was convinced by the consultation to recommend a HRA including socio-economic rights. Its chair, Fred Chaney, said that:

I wouldn't have foreseen before the inquiry that we could be quite so settled in our minds that this could be a useful instrument and I wouldn't have foreseen that we would go beyond civil and political rights.  
(interview, 23 November 2009)

Spencer Zifcak argued that the national consultation report in Australia highlights areas of disadvantage that would not have been as prominent had consultation not taken place (interview, 14 December 2009). These include the position of people with mental illness, older people, people in remote rural areas and children in need of protection. These issues are not necessarily traceable to specific provisions in the proposed HRA but add ballast to the case for having one.

Also prominent in the report are the 'hot button issues' - abortion, euthanasia, religious freedom and same-sex marriage – that surfaced repeatedly in community meetings. Frank Brennan stated that the committee confronted these issues (in its recommendations on the respective roles of parliament and the courts) 'because they would be thrown in the face of any government proposing a HRA' (interview, 20 November 2009).

A key requirement here is transparency. The NIHRC's advice on the content of a Bill of Rights was developed according to a methodology which was transparent and had itself been consulted on (see section 2.6). As one interviewee put it, the Commission decided 'it was important to be able to justify rigorously the inclusion of any supplementary right'.

The Australian federal consultation committee set out the case for and against legislative and other options for strengthening human rights protection and specified how many submissions supported or opposed each option. When an option attracted strong support and the committee considered that its advantages outweighed any disadvantages, it was generally recommended (NHRCC, 2009: 343). Frank Brennan noted that the committee was scrupulous in presenting the weight of opinion for each option and the origins of submissions, including those generated by campaigns:

No one could say we were putting too glowing a picture on the pro-HRA case. We gave the negative case all the weight it could possibly enjoy ... We did everything possible to faithfully reflect the views and opinions we heard throughout the Consultation process, regardless of our personal perspectives or preference. The report reflects what we heard and were told.

(interview, 20 November 2009)

The federal process differed from the process in ACT and Victoria, then, in that it did not draft a Human Rights Act but put forward recommendations as to its content and enforcement mechanisms. Spencer Zifcak suggested that, in the Australian context,

this approach could leave the recommendations vulnerable to being undermined by the vocal lobby against a federal HRA, notably from evangelical Christian groups:

Recommendations about content are not enough to fend off misinformation and scaremongering ... you need to be able to show exactly what you are or are not proposing [in the legislation].  
(interview, 14 December 2009)

In the case of either a draft Bill or a set of recommendations, interviewees concurred that consultative bodies should be transparent about the rationale for the outcome, where possible relating specific provisions to expressed community preferences. They should balance qualitative and quantitative methods in processing submissions, and should give elevated status in the outcome to the views and priorities of people most likely to suffer breaches of their human rights, as in the consultation process itself.

Further, 'traceability' requires that governments respond to and act upon the outcomes of consultation. If these are seen to be disregarded, there is a risk that the process and any resulting legislation will not be seen as legitimate. This underlines again the importance of a clear statement of intent that commits the government to act on the outcomes of a consultative process and states clearly the parameters within which it is prepared to act (see section 3.3).

### **3.10 Timescale**

The processes under review involved hugely varying timescales: from three months in Tasmania to a decade in Northern Ireland. It is perilous to suggest an optimum timeframe as this factor is context-specific. Yet interviewees in different jurisdictions overlapped in their view of how timeframes should be designed once political conditions are considered propitious to invite public engagement.

Most recommended a defined period of outward-facing consultation:

It's better to build excitement and interest ... in a concentrated and sustained way or you run the risk of losing momentum and people losing interest.  
(George Williams interview, 27 October 2009)

Suggestions for this ranged from six months to one year, depending partly on whether there was any pre-existing momentum from civil society. A consultation

shorter than six months would be unlikely adequately to engage hard-to-reach groups.

Some interviewees argued that, from the point at which the government agrees to hold a consultation, several months of preparation are required to: appoint an independent body if that is the model chosen; assemble a secretariat; prepare educational materials, and harness the expertise and engagement of civil society. Delegating consultation to specialist and community groups permits broader coverage over a shorter period of time. The pre-consultation phase may also include negotiations with political parties and/or devolved authorities to secure their engagement with the process.

Some interviewees argued that the federal process in Australia had been too short; the intensity of the process might have hindered its capacity to break down bureaucratic obstruction and necessitated a 'rough and ready' approach to processing submissions. Interviewees in New Zealand cautioned against truncating the synthesising and drafting period too drastically:

You need to do justice to a range of evidence ... A human rights approach demands that this be done with consideration and reflection because you are dealing with vulnerable groups whose voice needs to be listened to particularly carefully. It isn't just a matter of adding up the number of mentions of an issue.

(Joanna Collinge interview, 17 November 2009)

In practice, drafting periods have varied. The federal committee in Australia took only three months to process more than 30,000 submissions and draft its recommendations. The NIHRC delivered its advice around eight months after the Bill of Rights Forum made its recommendations (meeting the deadline it had publicly set itself).

Overall, most interviewees favoured arrangements which provide for a clear beginning, middle and end to a process; it must not be unduly protracted as it was in Northern Ireland because this can breed disillusionment and dissipate momentum. In settled democracies, this concentrated period of consultation and deliberation has invariably been preceded by a period of civil society activism which has generated impetus behind the process, as in Australia. Where this demand is lacking, and the impetus is largely top-down (as in New Zealand), the chances of achieving meaningful engagement within a limited timeframe are likely to be reduced.

### 3.11 Resources

As with timescale, the issue of what constitutes adequate resources for a consultation process is specific both to the political context and factors such as the size of the jurisdiction.

The Australian federal consultation had a budget of 2.8 million Australian dollars (around £1.54 million) and a secretariat of around 20 people based in the Attorney-General's Department (Frank Brennan interview, 20 November 2009). The federal consultation was proportionately better resourced than those at state and territory level. Chair Frank Brennan worked full time on the consultation, allowing for a more intensive and fast-moving process. Some interviewees recommended 'front-loading' resources in order that consultative or deliberative activities can 'hit the ground running', combined with more sophisticated use of new technology than previous processes have achieved. They added that if an independent committee is established, it must include at least one member with human rights expertise and be supported by a secretariat with legal, policy and public relations competence.

Deliberative methods are relatively expensive: the British Columbia Citizens' Assembly cost 5.5 million Canadian dollars (around £3.2 million).<sup>21</sup> The cost of deliberative polls varies greatly but they are inherently resource-intensive. Experiments in online deliberative polling suggest that this may become a cost-effective alternative to conventional polling (Fishkin et al., 2003).

Resource issues surfaced in Northern Ireland where, in 2002, two commissioners resigned because, among other concerns, the Bill of Rights process 'had not received the internal allocation of resources (in time, thought or money) it requires' (Joint Committee on Human Rights, 2003; Northern Ireland Human Rights Commission, 2004a: 8).

Yet where public involvement has been minimal, as in New Zealand and Canada, interviewees did not attribute this to a shortage of resources as such. Rather, they suggested, it is the political intent behind a Bill of Rights process that determines its scale and ambition. A key lesson to emerge from these precedents is that the process of creating a Bill of Rights is, as one seminar participant noted, 'better not done at all than done badly': the risk of a process that lacks serious political commitment and momentum is disillusionment and a lack of legitimacy for the outcome.

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<sup>21</sup> See <http://www.citizensassembly.bc.ca/>

### 3.12 Responsibilities

Debates about the merits, or dangers, of connecting rights and responsibilities are well-rehearsed (Lazarus et al., 2009). In the UK, the responsibilities of citizens to the state and to each other feature prominently in the political discourse of the two main parties at Westminster (see Chapter 4). By contrast, no Bill of Rights process outside the UK has included questions about individual responsibility in its terms of reference.

In Victoria, the insertion of 'responsibilities' in the title and preamble of the Charter (though not its substantive content) was a response to community-level discussions. George Williams argued that including responsibilities had 'tactical value' in heading off opposition from those who perceive human rights as individualistic; responsibilities were a 'key part of the rhetoric' and should be 'reclaimed strongly as part of the human rights debate' (interview, 27 October 2009). Responsibilities were not a prominent feature of the national debate in Australia (Spencer Zifcak interview, 14 December 2009). The national consultation report proposes a list of civic responsibilities 'as a matter of education and culture' but these are not recommended for inclusion in legislation (Frank Brennan interview, 20 November 2009).

The national committee was 'troubled' to learn that more than 40 per cent of Australians surveyed agreed that if some members of a group abused the wider community's rights then it was reasonable to restrict the rights of the entire group; 57 per cent agreed that it was reasonable to reduce or take away an individual's rights if s/he did not respect the community's rights (NHRCC, 2009: 347). In ACT, critics of the HRA proposed a Charter of Responsibilities Bill which prescribed, among other things, that a person 'must not harass, annoy or interfere with anyone else in their community, for example by not upholding the proper values of the community'.<sup>22</sup> The ACT parliament rejected it.

These examples illustrate how social anxieties and prejudices can surface during processes which invite debate about citizenship, rights, values and public policy priorities. Interviewees suggested that giving prominence to responsibilities in a Bill of Rights process can be volatile in the context of low public understanding about (or antipathy towards) human rights; it can generate ill-informed notions of rights being contingent on the exercise of responsibilities, particularly in relation to unpopular or marginalised groups. For this reason, without exception, interviewees said responsibilities should be incorporated in the consultation process in the context of education about human rights and the duty to respect the rights of others, rather than as the basis for substantive legislative provisions.

<sup>22</sup> See [http://www.legislation.act.gov.au/b/db\\_12795/20040623-14574/pdf/db\\_12795.pdf](http://www.legislation.act.gov.au/b/db_12795/20040623-14574/pdf/db_12795.pdf)

### 3.13 Referendum

It is beyond our scope to do justice to the arguments for and against legislative referenda or other types of popular vote such as the multi-choice ballot or 'preferendum' (JUSTICE, 2007: 97-98; Smith, 2005: 80-81). No Bill of Rights process we have reviewed has used a referendum either to initiate the legislative stage of a Bill of Rights or after its enactment as a means of democratic entrenchment.

The federal consultation in Australia excluded the option of constitutional entrenchment partly to avoid the need for a referendum; constitutional reform which would have extended certain rights to states was overwhelmingly rejected in a referendum in 1988 (Byrnes et al., 2009: 32-33). The issue has reverberated in debate about a federal HRA. Opponents argue that a referendum is a prerequisite for an Act to be considered legitimate, while pro-HRA voices say the consultation process was a quicker and more cost-effective alternative to gauge popular preferences (*The Age*, 2009).

If a referendum is held, one lesson noted by the New Zealand Constitutional Arrangements Committee in 2005 is for it to take place as soon as possible after the consultation process, while public consensus still holds (JUSTICE, 2007: 98).

JUSTICE (2007: 97) argues that a referendum 'would be of great benefit in ensuring popular support for rights protection'. Some interviewees agreed that a constitutional Bill of Rights requires a legitimating referendum like that which preceded Scottish devolution. If announced early in the process, this might also generate momentum behind the process (Graham Smith interview, 9 November 2009).

Even supporters of a referendum, however, say the legitimacy of the result depends in turn on the quality of deliberation that precedes it (Ian O'Flynn interview, 27 October 2009). Whether a consultative process is an adjunct to, or replacement for, a referendum, there is a considerable onus on the process to be rigorous and transparent in its popular engagement.

### 3.14 Conclusion

The experience analysed here raises two questions crucial to our inquiry. How far can we reach definitive conclusions about what methods and approaches will confer popular legitimacy on a Bill of Rights? And how far can experience in one jurisdiction inform practice in another?

Leane (2004: 156) argues that it is a moot point whether widespread participation is a prerequisite for achieving legitimacy, or whether elite support and an absence of

widespread resistance will suffice: after all, the Canadian Charter involved minimal public engagement yet has achieved iconic status. Leane's observation illustrates the specificity of each national experience (for example, no comparable jurisdiction had Trudeau's charismatic leadership). However, our review suggests that Canada's experience does not necessarily provide insights that can be generalised to other (or future) Bills of Rights processes. In the almost three decades since Canada's Charter was enacted, expectations have increased that any process to create a new human rights instrument - especially one that is constitutionally entrenched - will be genuinely participatory. This expectation is backed by developing law, theory and practice on the right to participation. It is fuelled further by the development of consultative and deliberative approaches and new technology which permits ever broader, more inclusive and more sophisticated forms of public engagement.

No single method of consultation or deliberation is a 'magic bullet' for achieving popular ownership and methods may legitimately vary. Colm O'Connell, Reader in Laws at University College London, noted that even processes designed to be genuinely participatory:

... rarely satisfy those who are opposed to ... a measure or highly sceptical about state action in the area in general.  
(interview, 18 December 2009)

Yet the inevitability of political opposition is itself an imperative to design the process so that it can be defended from the accusation that it is anti-democratic, partisan or the project of a self-selecting clique. The form of consultation and the institutions used have a profound effect on what it is possible to achieve in terms of popular ownership and understanding. Here, we extract some general insights which, in the view of those who have designed or studied such processes, constitute best practice and may be transferable between national contexts.

- In all Bills of Rights processes, one 'non-negotiable' has been a commitment to go forwards, not backwards in terms of human rights standards and enforcement, invariably by incorporating and building on international human rights treaties. We may conclude that any process which does the opposite will be viewed as setting a dangerous precedent internationally. This is likely to affect the legitimacy of the outcome both at home and abroad.
- It is desirable to have a clear statement of intent from the government of the day about the purpose of a Bill of Rights and the terms of reference of the process for creating it. This entails a clear procedural commitment to act on the results

of public consultation and deliberation within certain parameters which must be transparently stated and justified.

- The ensuing process must be matched to that purpose. Its credibility is likely to be enhanced if it is seen to be independent of government and to have no vested interest in the outcome and if its methods are open to scrutiny and combine both qualitative and quantitative approaches.
- The body running the process should be capable of facilitating community-level discussions as well as expert opinion. Community discussion should be as unconstrained as possible whilst being informed to the greatest extent it can be about existing human rights protections and options for building on them, and the boundaries of what is considered politically feasible.
- Further, the process should ideally contain forums for deliberation as well as broader consultation, and should be skilfully designed to connect the two.
- The process should also place the highest premium on eliciting the views and experiences of groups whose human rights are most vulnerable to being breached, and should give those voices an elevated status in the processing of responses.
- It is desirable for processes to have a clear timeframe with, at some point, a momentum-building phase that generates interest even among those previously unengaged.
- Processes should be adequately resourced so as to be appropriately ambitious for the stated purpose. Human rights expertise should be 'hard-wired' into the process both in the body running the consultation and, where appropriate, in the form of a separate advisory committee.
- The outcome of consultation should be transparent about the rationale for specific provisions and how these relate to community preferences and experiences.
- No Bill of Rights process has included notions of individual responsibility in its terms of reference for developing legislation; any decision to do so must be cognisant of the risk that debates about rights, citizenship, values and public policy priorities may act as a lightning rod for social anxieties and prejudices.

Interviewees strongly suggested that responsibilities are properly a matter of education about the duty to protect the rights of others.

It is premature to assess objectively how far the participatory processes in Australia and Northern Ireland might secure democratic legitimacy for final outcomes. Where Bills of Rights have been enacted, the real test of popular ownership may come from emerging case law and success in using legislation as a vehicle for human rights education and a driver of public policy.

## 4. The UK context: Westminster

### 4.1 Introduction

This chapter examines (i) the position of the main UK political parties at Westminster on the process of creating a new Bill of Rights, including consultation to date on the Labour government's proposed Bill of Rights and Responsibilities, and (ii) public attitudes to and understanding of human rights legislation.

### 4.2 The UK government's position

In July 2007, in its Green Paper *The Governance of Britain*, the Labour government announced that it would consult the public on creating a Bill of Rights and Duties as a 'framework for giving practical effect to our common values' and to 'make explicit the way in which a democratic society's rights have to be balanced by obligations' (HM Government, 2007: 61). Consultation on the proposed Bill was viewed as part of a broader process of constitutional renewal. The Green Paper presented options for reinvigorating democracy and for making the executive and parliament more accountable. It also invited debate about citizenship and a 'British statement of values' (HM Government, 2007: 11).

This was followed in 2009 by a Green Paper aimed at launching a national debate on how the relationship between the citizen and the state 'might best be defined in the context of rights, responsibilities and values which unite us across all parts of the UK' and proposing the creation of a Bill of Rights and Responsibilities (Ministry of Justice, 2009a: 7). The 2009 Green Paper presents a continuum of possibilities for the legal effect of such a Bill. At one end is a declaratory and symbolic statement; at the other is a set of rights and responsibilities directly enforceable by the individual in the courts. Along the continuum are options including a statement of interpretative principles which might inform legislation as well as public authority and court decisions (Ministry of Justice, 2009a: 51). The Green Paper (Ministry of Justice, 2009a: 57) indicates that the UK government's position is that it:

... does not consider that a generally applicable model of directly legally enforceable rights or responsibilities would be the most appropriate.

The Green Paper states that, under a new Bill of Rights and Responsibilities, parliament would remain free to legislate on policy areas such as eligibility for access to benefits or services and the treatment of criminal (including terrorist) suspects: 'the courts would have no power to strike down or re-write future legislation in these areas' (Ministry of Justice, 2009a: 57).

The Green Paper notes that in relation to economic, social and cultural rights, the government ‘would not seek to create new and individually enforceable legal rights’; however, existing welfare rights might be expressed in the form of constitutional principles or a set of social and economic guarantees (Ministry of Justice, 2009a: 43). The parliamentary Joint Committee on Human Rights (JCHR) has recommended that any UK Bill of Rights should include the rights to health, education, housing and an adequate standard of living. It suggests the imposition of a duty on the government to achieve the progressive realisation of the relevant rights, by legislative or other means, and to report to parliament on its progress. Addressing the government’s objection that legally enforceable economic and social rights would usurp democratic functions, the JCHR proposes that these rights would not be enforceable by individuals; rather, the courts would have a tightly circumscribed role in reviewing government actions to ensure that commitments were not being ignored (JCHR, 2008a: 53-56).

In relation to responsibilities, the Green Paper notes that ‘fundamental rights cannot be made legally contingent on the exercise of responsibilities’ (Ministry of Justice, 2009a: 18). However, some responsibilities ‘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’ (Ministry of Justice, 2009a: 28).

The Labour government has said it will not repeal or resile from the Human Rights Act (HRA): it remains committed to the rights and freedoms enshrined in the HRA and the mechanisms used to implement those rights (Ministry of Justice, 2009a: 58). Any new Bill of Rights and Responsibilities might either subsume the HRA or preserve it as a separate Act. The Green Paper adds that it might also be desirable to ‘signpost’ the Convention rights, for example by cross-referencing to make clear that neither they nor the HRA were affected by the new Bill (Ministry of Justice, 2009a: 58).

#### **4.3 Consultation process on the Green Paper<sup>23</sup>**

This section focuses on the consultation on the 2009 Green Paper on a Bill of Rights and Responsibilities.

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<sup>23</sup> Unless sourced otherwise, this section is based on an interview with Edward Adams, Head of the Human Rights Division at the Ministry of Justice, and Glenn Preston, Head of Projects and Communications at the Ministry of Justice on 18 November 2009; the People, Power and Politics consultation page at <http://governance.justice.gov.uk/>; and documentation relating to the recruitment and research methodology of the deliberative events supplied by the Ministry of Justice. The author is grateful to the Ministry of Justice for supplying this documentation and for the opportunity to observe the deliberative event in Birmingham on 28 November 2009.

We note that consultation on the 2007 *Governance of Britain* Green Paper also included some activity relating to a Bill of Rights and Responsibilities. The proposed Bill was one of the topics for discussion at a series of town hall-style events held in England in 2008; other topics were a statement of values, community engagement and the electoral system.<sup>24</sup> The plan announced in 2007<sup>25</sup> and reiterated in 2008 (Ministry of Justice, 2008a: 22) for a ‘Citizens’ Summit’ to formulate a ‘British statement of values’ which might form the preamble to a Bill of Rights did not take place.

The consultation on the 2009 Green Paper has been styled ‘People, Power and Politics’ and has consisted of:

### **A series of deliberative events**

The aim of these was ‘to involve all parts of the country and society’ in a discussion about:

- the values that people in the UK subscribe to;
- how power is distributed in our society;
- how our rights and freedoms are protected; and
- how we ensure that our responsibilities to one another are fulfilled.

Initially, five regional events were held around Britain (but not in Northern Ireland) and focused primarily on issues of ‘identity, belonging and values’ as factors that might underpin people’s understanding of constitutional change and a Bill of Rights. Each event had around 100 people, randomly sampled to reflect the UK population. Participants viewed filmed contributions by expert commentators with competing perspectives, heard presentations by a minister or senior representative of the

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<sup>24</sup> See for example <http://governance.justice.gov.uk/wp-content/uploads/2008/08/brighton-note-of-table-discussions.pdf>; <http://governance.justice.gov.uk/wp-content/uploads/2008/08/newcastle-note-of-table-discussions.pdf>; <http://governance.justice.gov.uk/wp-content/uploads/2008/07/bristol-30-june-table-discussions.pdf>; <http://governance.justice.gov.uk/wp-content/uploads/2008/08/london-note-of-table-discussions.pdf>. Another event in Leicester invited members of the public and representatives of the local community to debate broader issues of democratic and constitutional renewal with ministers and MPs; see <http://governance.justice.gov.uk/2008/01/30/leicester-event-response-from-michael-wills-mp/> and <http://governance.justice.gov.uk/wp-content/uploads/2008/01/leicester-event-key-themes-from-the-feedback-session1.pdf>

<sup>25</sup> See <http://www.number10.gov.uk/Page13008>

Ministry of Justice and were given written stimulus material and exercises to provoke discussion. They were polled on key questions at the beginning and end of the event to give a snapshot of how views had changed, with several hours of mainly group-based, facilitated discussion in between. The polling was not representative of wider views; the events were primarily qualitative, with substance drawn from recordings of the group deliberations. Following the event, participants were encouraged to record personal thoughts and experiences relating to rights and responsibilities in a 'scrapbook' and submit it as part of the consultation.

The principles underpinning the process were drawn from the UK government's *Code of Practice on Consultation* (Better Regulation Executive, 2008) and guidance on effective public engagement (Central Office of Information, 2009), and the *National Framework for Greater Citizen Engagement* (Ministry of Justice, 2008b), which sets out a proposed constitutional framework for the use of a number of engagement mechanisms, including deliberative methods. The methodology used in the deliberative events has been used in consultations on other policy areas, but this is the first time it has been used in relation to constitutional change.

Two further national deliberative events were held, following a similar format and consisting of around 120 participants who had each attended one of the previous events. Those attending were again sampled to be broadly reflective of the UK population. At these, deliberations focused on:

- views about existing rights and responsibilities;
- views about a Bill of Rights, including whether it should include socio-economic rights and/or responsibilities, and if so how they should be enforced on a spectrum from 'declaratory' to 'fully justiciable';
- views about a written constitution, including which institution people trust most to protect their rights; and
- reactions to the findings at the regional deliberative events about a statement of values.

Edward Adams, Head of the Human Rights Division of the Ministry of Justice, commented that only two options were ruled out as subjects for deliberation: repealing or resiling from the HRA and making rights legally contingent on responsibilities. This decision arose directly from the exclusion of these options from the Green Paper. Participants were made aware of the government's reluctance, as

stated in the Green Paper, to create new and individually enforceable socio-economic rights, but were encouraged to debate the merits of including these and other rights and to consider what the trade-offs might be:

We're not putting boundaries around it ... If people come out with the view that what they want are hard-edged, legally justiciable rights to healthcare ... that will be a conclusion we'll report to ministers.  
(Edward Adams interview, 18 November 2009)

At time of writing, a final national event was planned for 20 February 2010, involving people drawn from the two earlier national events and focusing on a written constitution. The results of the earlier events are not yet available for review. Human Rights Minister Michael Wills told the JCHR that:

The headline is that there is a real popular appetite, judged by these events at least, to discuss these issues and a very significant majority in favour of having a new Bill of Rights and Responsibilities.  
(oral evidence, 2 December 2009)<sup>26</sup>

### **Online consultation**

An online forum invites debate on the content and enforcement mechanisms of a Bill of Rights and Responsibilities and on 'values in the UK today'.<sup>27</sup> It has received very few responses. Glenn Preston, Head of Projects and Communications at the Ministry of Justice, said the Ministry hoped to use the outcome of the deliberative events to stimulate engagement online (interview, 18 November 2009). At time of writing in February 2010, there is no record of the events online.

### **In-house consultation**

Alongside formal submissions to the Green Paper, the Ministry of Justice is conducting bilateral consultations, transcripts of which will be put on the website. As of November 2009, among the groups consulted were:

- faith groups;
- children and young people: this involved the preparation of a *Young People's Guide*, produced jointly with the Office of Children's Rights Director; this office

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<sup>26</sup> See <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/uc112-i/uc11202.htm>

<sup>27</sup> See <http://governance.justice.gov.uk/join-the-debate/>

also organised a national event on rights and responsibilities and polling of around 1,800 young people who are ‘away from home’ (including in care or at a boarding school) – activities which will inform the office’s formal response to the consultation;

- UNICEF and the Children’s Rights Alliance for England: this included a half day workshop with young people; and
- the Community Sector Coalition: this involved exploring how civil society might participate in the debate.

### **Essay-writing competition**

The competition, for young people aged between 11 and 18, invites essays on rights, responsibilities and options for enforcement.<sup>28</sup>

### **Future plans**

Glenn Preston indicated that the Ministry of Justice is likely to commission a quantitative poll of at least 2,000 people before the conclusion of the consultation in the first quarter of 2010; the content will be informed by the outcome of the deliberative events and the findings are intended to be published along with the outcome of the deliberative events. He added that:

We are at the earliest stages of gauging how people feel ... I think this process is exciting exactly because we were able to talk to members of the public who have never talked about these issues before ... The government is clear that this is a debate that has to take a considerable period of time.

(interview, 18 November 2009)

The Office for Public Management is conducting an independent evaluation of the deliberative events; this is not publicly available at time of writing. Formal responses to the Green Paper will be considered after the closing date of 26 February 2010.

### **Assessment of the consultation process**

Aside from the content of the Green Paper, interviewees were mostly unfamiliar with the consultation process. Graham Smith observed that the process so far had been:

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<sup>28</sup> <http://governance.justice.gov.uk/2009/12/10/rights-and-responsibilities-essay-writing-competition/>

... underwhelming – in essence it hasn't begun yet because it has registered so low in public interest that most people haven't noticed.  
(interview, 9 November 2009)

Andrew Dismore MP, who chairs the JCHR, described the whole endeavour as a 'missed opportunity ... done on the cheap' and too long delayed (interview, 7 January 2010). Another interviewee noted that the Green Paper was a 'reasonable starting point' but had little momentum or support behind it from the public, interest groups or Labour Party activists.

Some seminar participants were uneasy about the prominence in the consultation process of the idea of a statement of values that might form part of a preamble to a Bill of Rights and Responsibilities. One noted that the process of articulating a set of common beliefs or characteristics might have the effect of making minorities 'feel they don't belong', adding that:

Trying to impose such an identity on devolved nations – or on the multi-national and multi-cultural communities in the various parts of the UK - poses great risks.

Without exception, interviewees in the UK were concerned about the way notions of responsibility have been constructed in the consultation process. One said that the connection between rights and responsibilities was, as constructed, 'worrying and muddled'. Another commented:

[Responsibility] can be addressed as part of civic education, but has no jurisprudential meaning. It's just a buzzword that politicians like ... it's perilous and it confuses people.

Qudsi Rasheed of JUSTICE noted that codes of responsibilities are part of the communitarian and authoritarian rather than the liberal tradition (see also Lazarus et al., 2009):

At best, responsibilities would be superfluous and at worst they'd be dangerous – we can't see any benefit in having them in the discussion ... Our approach would be to reject them and give very clear reasons why they are rejected: they're already inherent in rights and normal laws that impose duties or responsibilities can be passed as part of the normal democratic process.  
(interview, 23 November 2009)

At the time of the writing in February 2010, the consultation has not concluded. It is therefore premature to offer any definitive assessment of the process. However, almost a year on from the publication of the Green Paper, we offer some preliminary observations informed by our analysis of Bills of Rights processes elsewhere.

One lesson from other jurisdictions is the imperative, over the lifetime of a consultation process, to publicise deliberative events and to use them as a vehicle to educate and engage the wider public (see section 3.7). To date, this has not been attempted in the consultation on a Bill of Rights and Responsibilities; the deliberative events are not publicised on the consultation website and have taken place largely unnoticed by the media or the wider public. It remains to be seen how far the deliberative events, once concluded, might be used to frame public debate or to ignite broader interest in the process.

The Ministry has produced an Easy Read guide to the Green Paper (Ministry of Justice, 2009c). As noted above, the consultation has also included activity to engage children and young people and faith groups. At time of writing, it is unclear how far the consultation has engaged directly with other groups or individuals who might face discrimination or disadvantage or who might need particular support to participate in the process. As noted in section 3.6, interviewees from other jurisdictions considered direct engagement with people who are disadvantaged and/or disaffected to be an essential component of the process of creating a Bill of Rights if it is to reflect the views and experiences of those whose human rights are most vulnerable to being breached.

As noted in section 3.4, the principle of independence has been established by consultative processes in Australia. Most interviewees in the UK stated a preference for the consultation to be run by a body independent of government. One noted that the fact that the present consultation was being run by the government had made it harder to win public trust in the process and had made a Bill of Rights appear to be 'just another piece of legislation'. Another noted that an independent body would be of particular value in a context in which political debate about a Bill of Rights has become unduly politicised.

#### **4.4 The Conservative Party's position**

The Conservative Party's position has shifted over the past decade and appears still not to be firmly fixed.

In 2001, the party pledged to repeal the HRA; by 2005, the commitment was to 'reform or repeal' it (Erdos, 2009: 38). In 2006, David Cameron announced his

intention to scrap the HRA (but not the UK's ratification of the European Convention on Human Rights, or ECHR) and introduce 'a modern British Bill of Rights to define the core values which give us our identity as a free nation' and to 'balance rights and responsibilities' (Cameron, 2006). The Conservative Party has not indicated whether, or how, a future Bill of Rights might incorporate the ECHR using a different mechanism. Unless it did so, the repeal of the HRA would mean that individuals in the UK would be in the same position as they were before the Act came into force, when they could only enforce their specific Convention rights by going to Strasbourg. It is not clear how a future Conservative government would then resolve the apparent paradox that, although the UK state would be legally bound to comply with the ECHR (and with Strasbourg decisions against the UK) there would be no mechanism, as such, to require domestic courts to apply the Convention.

David Cameron (2006) stated that the creation of a Bill of Rights would involve a process to 'promote public debate as the drafting proceeds, in order to achieve a lasting consensus'. The nature of this process has not been elaborated, though Shadow Justice Secretary Dominic Grieve (2009a: 7) has stated that he expects it to take the form of a Green Paper. For now, the party has established a commission of jurists and other legal experts to provide advice. It has been meeting since 2007 but at the time of writing in February 2010 it has not yet published any proposals.

Pending this advice, Dominic Grieve (2009a: 9) has indicated that a Conservative-designed Bill of Rights, while it would be compatible with the ECHR, would effectively be decoupled from the jurisprudence of the European Court of Human Rights at Strasbourg by emphasising 'the leeway of domestic courts to have regard to national jurisprudence and traditions and to other common law precedents'. He has stated (Grieve, 2009b) that:

There is no reason why our courts should be bound by Strasbourg Court jurisprudence, if their own interpretation is different, particularly where rights should be balanced by responsibilities.

It should be noted that section 2 of the HRA requires only that domestic courts 'take account of' Strasbourg decisions: in practice, domestic courts do apply their own interpretation and have sometimes made decisions that expressly divert from Strasbourg judgements in comparable cases.<sup>29</sup> This discrepancy highlights the danger that political discourse about the HRA can, wittingly or unwittingly,

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<sup>29</sup> A recent example is *R v Horncastle and others (Appellants)* [2009] UKSC 14, in which the Supreme Court expressly diverts from Strasbourg case law relating to the right to a fair trial.

misrepresent the way the Act works and the impact it has had. This underlines the imperative for any future Bill of Rights process to start with the provision of accurate and impartial information about existing mechanisms to protect human rights.

Dominic Grieve (2009b) has indicated that a Conservative government would, as he put it, ‘look at restoring a better balance between Parliament and the courts’ by weakening the mechanisms that the HRA contains (in section 10 and schedule 2) to allow courts to quash or disapply subordinate legislation (such as Regulations or Orders and Acts of the Scottish Parliament and Northern Ireland Assembly) that is judged to be incompatible with a Convention right. It should be noted that the HRA does not permit courts to strike down primary legislation, precisely in order to preserve parliamentary sovereignty. It is possible for higher courts to make declarations that primary legislation is incompatible with Convention rights; it is then at the discretion of the government and parliament to legislate to amend or repeal that legislation.<sup>30</sup> Some seminar participants expressed concern that one effect of reforms aimed at ‘rebalancing’ power away from the courts might, in practice, be to increase the power of the executive rather than that of parliament.

There are two other consistent themes in Conservative discourse around a Bill of Rights. The first is individual responsibilities. Grieve was quoted in the Northern Ireland *News Letter* as saying that his party intended to create a Bill of Rights that would have in-built safeguards to prevent those ‘whose own behaviour is lacking’ from abusing its powers (*News Letter*, 2009). He has stated (Grieve, 2009: 8) that, while aspirational responsibilities (such as being a good neighbour) ‘cannot be enforced through statute’, his party sees scope for:

... interpretation clauses to provide for the better balancing of rights where the assertion of a right undermines the rights of others.

The second theme is the purported impact of the HRA on the government’s ability to tackle terrorism and crime. In several well-documented instances, stories cited by Conservative politicians have been refuted by, among others, the government, the JCHR and the Director of Public Prosecutions (Department for Constitutional Affairs (DCA), 2006; JCHR, 2006: 5; Starmer, 2009). One example was the erroneous claim

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<sup>30</sup> The procedure under section 10 and schedule 2 of the Human Rights Act permits a Minister by remedial order to bring legislation into line with the ECHR following a declaration of incompatibility or a finding of the European Court of Human Rights. This procedure contains certain restrictions: it can only be used where there are ‘compelling reasons’, a draft of the order is laid before parliament with the reasons for proceeding under that procedure, and the draft order is approved by both Houses of Parliament.

that the HRA bars publication of photographs of wanted criminals, which was refuted by the Derbyshire Constabulary.<sup>31</sup> Yet as recently as January 2010, David Cameron stated that:<sup>32</sup>

We've said we'll scrap the Human Rights Act, which has put our police in the ridiculous position of trying to tackle the most serious crimes without putting the faces of the most wanted criminals on posters ... Instead, what we need is a modern British Bill of Rights which clearly sets out people's rights and responsibilities, and strengthens our hand in the fight against terrorism and crime.

Some interviewees and seminar participants noted that the knowing dissemination of misleading stories about the HRA creates a perilous context in which to initiate debate about a new Bill of Rights. They suggested further that the political priority the Conservatives have placed on the repeal of the HRA raises the possibility that the Act might be repealed without immediately being replaced by a new Bill of Rights if, as David Cameron acknowledges, a Bill would require a period of debate to build consensus.

If a future Conservative government were to seek to create a British Bill of Rights as part of a project to weaken existing human rights protection, this would be a process without international precedent. As explained in section 3.2, no Bill of Rights process has involved the possibility of repealing or weakening existing human rights protections or reversing the incorporation of international human rights law into domestic law.

#### **4.5 The Liberal Democrats' position**

The Liberal Democrats are committed to a written constitution for Britain that defines and limits the power of government. At the centre of the policy is a Bill of Rights which would 'strengthen and entrench the rights guaranteed in the Human Rights Act' (Liberal Democrats, 2009). The party has also published a Freedom Bill which seeks to reinstate civil liberties that the Liberal Democrats say successive Labour and Conservative governments have eroded.<sup>33</sup> In terms of the process, the party has proposed a constitutional convention, with at least half the members being randomly

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<sup>31</sup> See <http://www.thisisderbyshire.co.uk/news/Tories-slammed-attack-Derbyshire-police/article-1402488-detail/article.html>

<sup>32</sup> See <http://www.thisisgloucestershire.co.uk/gloucestershireheadlines/David-Cameron-answers-questions/article-1728873-detail/article.html>

<sup>33</sup> See <http://freedom.libdems.org.uk/>

selected from the electorate, to draw up a written constitution to be endorsed in a national referendum.<sup>34</sup> The Liberal Democrats have expressed strong reservations about the way the debate about a Bill of Rights is being framed. Nick Clegg (2008) called for:

... a clear and responsible stand on the Human Rights Act ... Either Government should stand by the Human Rights Act and make it work or they should work across all political parties ... to produce a Bill of Rights that adds value to existing protections.

#### **4.6 Public attitudes and understanding**

Informed consultation on a Bill of Rights requires an understanding of existing legislation to protect and promote human rights; it is pertinent, then, to examine public attitudes to, and understanding of, both the HRA and the idea of a Bill of Rights.

##### **Human Rights Act**

Polling covering Britain suggests that more than 80 per cent of people think it is important to have a law that protects human rights (Kaur-Ballagan et al., 2009: 22; Ministry of Justice, 2008c: 27). Opinion surveys and qualitative research suggest that a majority of people respond positively to human rights values such as dignity, respect and fairness (Donald et al., 2009: 161-62; Kaur-Ballagan et al., 2009: 9; Ministry of Justice, 2008c: 42). However, there is a lack of detailed public understanding of human rights and the legislation that surrounds them (Kaur-Ballagan et al., 2009: 8). Moreover, polling indicates that more than half the people in Britain consider that certain social groups take unfair advantage of the HRA, among them asylum seekers and refugees, immigrants, lawyers and criminals (Donald et al., 2009: 174; Ministry of Justice, 2008c: 44).

The UK government (DCA, 2006: 5) has lamented the 'accumulative and corrosive' impact of negative or misconceived media reporting upon public confidence both in the HRA and in the ECHR. The JCHR (2006: 16) has further blamed ministers for failing systematically to dispel myths about the HRA and for sometimes using the Act as a scapegoat for unrelated administrative failings. These observations suggest that any process to create a new Bill of Rights must start with the provision of balanced information about the HRA and the way it is implemented; as one seminar participant noted: 'we cannot have a debate in a context where human rights are fundamentally misunderstood'.

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<sup>34</sup> See [www.libdems.org.uk](http://www.libdems.org.uk)

## Bill of Rights

Opinion surveys on a Bill of Rights are inconsistent. ICM polls over 15 years suggested high support for a Bill of Rights. In 1991, 79 per cent thought their rights would be better protected if written in a single document (Klug, 2007: 12). In 2006, an ICM *State of the Nation* survey (based on more than 2,000 face-to-face interviews conducted in 2006) reported that 77 per cent of those polled agreed that Britain needs a Bill of Rights to protect the liberty of the individual; 51 per cent agreed strongly (Joseph Rowntree Reform Trust, 2006). As Klug (2007: 12) notes, we may infer that even though the HRA can fairly be described as a 'Bill of Rights', most people in the UK do not see it as such.

The Hansard Society's 2008 *Audit of Political Engagement* (based on more than 1,000 face-to-face interviews in 2007) found significantly lower levels of enthusiasm. The issue of 'whether Britain needs a new Bill of Rights' scored third lowest out of 11 constitutional issues for public understanding at 28 per cent (Hansard Society, 2008: 5). A quarter of respondents were dissatisfied that Britain does not have a Bill of Rights, while 63 per cent were 'effectively neutral' (Hansard Society, 2008: 28-29). Only 14 per cent identified the lack of a Bill of Rights as being among their top three priorities for change (Hansard Society, 2008: 31). In Wales, understanding fell to 12 per cent, with correspondingly lower levels of dissatisfaction at the lack of a Bill.

Vizard (forthcoming) finds high levels of overall public support for the inclusion of a range of social and economic rights in a Bill of Rights (such as the right to healthcare and the right to education) and civil and political rights (such as the right to freedom of expression, the right to elections and the right to freedom of conscience, religion and belief). Although variations in support between population subgroups – such as by ethnicity, and religion and belief – are important in some instances, highest level of educational qualification and social class appear to be the most consistent and influential drivers of public attitudes towards a range of rights. Vizard suggests that survey methodology – for example, whether the term 'human rights' is specifically referenced and whether survey questions are 'prompted' or 'unprompted' – was also found to be an important factor in explaining variations in the findings of the various polling and survey exercises on public attitudes in this area.

Vizard's observation may help to explain the apparent discrepancy between the other survey results. The 2006 ICM *State of the Nation* poll gauged support for a Bill in the context of specific rights it might contain, including the right to a fair trial by jury and the right to hospital treatment on the National Health Service within a reasonable time, each supported by almost 90 per cent of those polled. The Hansard survey did not discuss specific rights; it concludes that, compared with other constitutional

issues, the question of whether Britain needs a new Bill of Rights is ‘among the most technical and the vaguest’ and has no ‘real resonance, at least when stated in these terms’ (Hansard Society, 2008: 39).

Overall, these findings suggest the need for caution when assessing polling data about human rights. People may be quick to approve certain rights, but reluctant for them to be universal and unaware of the trade-offs they might require in public policy. We may infer from these polls that public understanding about human rights is generally low and that popular enthusiasm for a Bill of Rights in the abstract is not proven. The JCHR (2008a: 79) notes that any government will have an ‘uphill task to stimulate and inspire public debate’.

#### **4.7 Conclusion**

Overall, this review suggests that current circumstances for any process to create a new UK Bill of Rights are unfavourable. Public understanding of – or enthusiasm for – a new Bill of Rights is not assured and there is little discernible popular or civil society momentum behind the idea. To date, the consultation on the government’s 2009 Green Paper has not reached the wider public sphere. It remains to be seen how far the deliberative events organised by the Ministry of Justice might be used to frame debate or ignite public interest, and how far the consultation will engage directly with disadvantaged and disaffected groups. Most interviewees in the UK argued that a body independent of government would be better placed than a government department to win public trust in the consultation process and to raise awareness of the idea of a new Bill of Rights as a constitutional enterprise and not ‘just another piece of legislation’.

Many interviewees and seminar participants suggested that the political discourse surrounding a Bill of Rights has not been commensurate with the gravity and complexity of the project. One interviewee argued that the process had become unduly politicised; while politicians should not be sidelined, their influence should be ‘appropriately counterbalanced’. Some interviewees expressed disquiet about the prevalence of language and stories which in some instances have distorted the purported effects of human rights and the HRA. Colm O’Cinneide spoke of a ‘staggering level of assertion’, adding that:

Political positioning has replaced serious consideration ... [A Bill of Rights] is a fundamental piece of the constitutional architecture: it can’t be made subject to the day-to-day need for political rhetoric ... This is deadly serious stuff and it should be treated as such.  
(interview, 18 December 2009)

A striking feature of this debate is the lack of acknowledgement that the HRA is viewed by authoritative commentators to be a Bill of Rights (see section 1.3). While Labour has pledged to protect the HRA, the origin of the Act as part of a wider constitutional project to protect and promote human rights is rarely articulated. Conservative discourse about the need for a British Bill of Rights is predicated on the assertion that Britain does not already have one. Some interviewees in the UK argued that any process to create a new Bill of Rights must entail a convincing case as to **why** it might be needed. Qudsi Rasheed of JUSTICE noted that:

At the moment the reasons advanced are to varying degrees illegitimate – populist or cosmetic – and not sufficient grounds on which to base a Bill of Rights ... The UK is not starting with a blank canvas – we have the HRA, the ECHR and the EU Charter [of Fundamental Rights]. We need to look at what we've got, what works, what doesn't work and why.  
(interview, 23 November 2009)

This observation underscores the importance in any future process to provide impartial information and promote measured debate about existing human rights protections.

## 5. The UK context: devolution

### 5.1 Introduction

This section examines (i) the legal and constitutional implications and (ii) the political implications of devolution for any decision to amend or repeal the Human Rights Act (HRA) and/or to enact a new Bill of Rights.

### 5.2 The legal and constitutional dimension<sup>35</sup>

The HRA applies throughout the UK, including in the devolved jurisdictions. The devolved authorities and institutions have no competence to act in any manner that is contrary to the rights in the European Convention on Human Rights (ECHR).<sup>36</sup> Further, specific provision is made in both the Scotland Act 1998 and the Northern Ireland Act 1998 to prevent the devolved Parliament and Assembly from modifying the HRA.<sup>37</sup>

The HRA and the ECHR are ‘tied and embedded’ into the complex devolution statutes (JUSTICE, 2010: 11). The HRA incorporates most of the rights contained in the ECHR and the devolution statutes incorporate the HRA directly into their own frameworks; thus, the substantive rights protected under both the HRA and the devolution statutes are the same (JUSTICE, 2010: 17).<sup>38</sup>

Further, the procedural mechanisms in sections 2, 3, 7 and 8 of the HRA are, in different ways, adopted explicitly or implicitly in the devolution statutes (JUSTICE, 2010: 14-17). The duty of the courts to take into account Strasbourg case law found in the HRA has been implied by the courts as being a requirement under the devolution statutes (JUSTICE, 2010: 15). Analogous provisions to the interpretive obligation to construe legislation compatibly with Convention rights found in the HRA are found in the devolution statutes (JUSTICE, 2010: 15-16). In summary, JUSTICE (2010: 3) notes that:

The devolution statutes and the HRA are tied together in order to provide mutually supporting and complementary rights protection, both in terms of substantive rights and procedural mechanisms.

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<sup>35</sup> See JUSTICE (2010) for a recent and authoritative discussion of devolution and human rights.

<sup>36</sup> s29 and s54 Scotland Act 1998 (SA); s6 and s24 Northern Ireland Act 1998 (NIA); s81 and s94 Government of Wales Act 2006 (GWA 2006)

<sup>37</sup> s29 and Schedule 4 SA; ss6(2f) and 7(1) NIA

<sup>38</sup> s126, SA; s98 NIA; s158 GWA 2006

It adds that, as a consequence:

From a legal perspective, if the HRA was amended or repealed, and/or a bill of rights was enacted covering the devolved jurisdictions, there would almost certainly be a need for amendments to the devolution statutes.

Further, JUSTICE (2010: 3) argues, any such decision is likely, from a constitutional perspective, to require the consent of the Scottish Parliament and the Northern Ireland Assembly. This is given through a so-called Sewel Motion which is required when the Westminster Parliament seeks to legislate on areas which have been devolved (or, in the case of Northern Ireland, 'transferred').

Underlying this analysis is a legal debate about whether 'human rights' are, under the devolution statutes, a devolved matter or one reserved to Westminster – or, rather, a set of overarching provisions that apply to all categories of legislation, wherever it is made (JUSTICE, 2010: 17-18). JUSTICE suggests that a strong argument can be made that 'human rights' have been devolved to the Scottish Parliament and the Northern Ireland Assembly, or at least that the 'observation and implementation' of the ECHR, has been devolved.<sup>39</sup> It argues that (JUSTICE, 2010: 3):

As such, because any amendment to, or repeal of, the HRA and/or legislation enacting a bill of rights covering the devolved jurisdictions would touch upon 'human rights' or the 'observation and implementation' of the ECHR, from a constitutional perspective, the consent of the Scottish Parliament and the Northern Irish Assembly would be needed.

Even if this argument is rejected, and 'human rights' are seen as a reserved matter, JUSTICE (2010: 20) suggests consent would still be required for any legislation in the field of human rights (including any amendment to the HRA or passing of new legislation) which touched upon areas of devolved competence. These include housing, education and local government and, in Scotland (and, subject to approval in the Assembly, in Northern Ireland from April 2010), policing and criminal justice.

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<sup>39</sup> This argument is based on the practice of the devolved jurisdictions in Scotland and Northern Ireland and the creation and respective remits of the human rights commissions in different parts of the UK (JUSTICE, 2010: 19-20). Note that these arguments do not apply to Wales; the GWA 2006 specifies exactly what powers have been devolved. Further, there is no requirement for consent from the Welsh Assembly.

David Russell, Head of Communication and Education at the Northern Ireland Human Rights Commission (NIHRC)<sup>40</sup>, argued that the operating procedures of the Northern Ireland Assembly may, in addition, require concurrent majorities from both main communities (British unionist and Irish nationalist) represented in the Assembly for the motion of consent to pass:

There is a risk therefore that a UK Bill would be vetoed by the Northern Ireland Assembly, due to its operating procedures, thus forcing the Westminster government to take the unpalatable decision of trying to force legislation through in accordance with the doctrine of parliamentary sovereignty.

(seminar, 1 December 2009)

Northern Ireland presents further constitutional complexities. The 1998 Belfast (Good Friday) Agreement stated that:<sup>41</sup>

The British government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.

Thus, a decision to repeal the HRA, or to amend the HRA and/or enact a UK Bill of Rights covering Northern Ireland in a way which diminished existing human rights protection, would be likely to breach the Good Friday Agreement. Further, it may put the UK in breach of its international treaty obligations owed to the Republic of Ireland as one of the guarantors of the Agreement (JUSTICE, 2010: 23; David Russell, seminar, 1 December 2009).

Russell stated that:

It is clear that in order to ensure there is no breach of the Belfast [Good Friday] Agreement the starting point for any debate on a UK Bill must guarantee that the HRA will remain and that there will be no regression from those provisions of the ECHR already given domestic effect.

(seminar, 1 December 2009)

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<sup>40</sup> We are grateful to David Russell for allowing us to cite his presentation to the seminar on 1 December 2009.

<sup>41</sup> See <http://www.nio.gov.uk/agreement.pdf>

There is no settled view on the seriousness of these legal and constitutional implications. Ministers have spoken of ‘tricky’ drafting issues, rather than matters of principle, arising from the devolution settlements (Joint Committee on Human Rights (JCHR), 2008a: 29). The JCHR (2008a: 95-96) argues that it would be desirable to have Bills of Rights at both the UK and devolved levels:

The devolution settlement creates certain difficulties for a UK Bill of Rights, but we do not accept that it creates an insuperable obstacle to such a Bill.

By contrast, JUSTICE (2010: 27) concludes that:

Amendments to the HRA or legislating for a bill of rights would be dangerous and risky – to the protection of rights, to the constitution of the UK, and to the Union itself.

Some interviewees were, like the JCHR, persuaded in principle of the case for an overarching Bill with either additional chapters or separate Bills covering the devolved nations. None supported the idea of an ‘English’ Bill of Rights. Several interviewees suggested that retaining the HRA as a minimum floor would allow the devolved nations to develop their own Bills or to opt into a more expansive UK Bill of Rights covering England and the powers reserved to Westminster. Colm O’Cinneide argued that:

As a matter of constitutional principle, an instrument to guarantee fundamental rights such as the HRA should ideally apply to the whole territory ... However, additional rights guarantees could be introduced in different parts of the country, or the devolved assemblies could choose to opt into a framework established by Westminster. This could get messy but would be technically possible as long as choice resides with devolved assemblies and the process of drawing up such an instrument respects their competency and self-determination.

(interview, 18 December 2009)

The legal and constitutional implications of devolution are the subject of continuing debate which it is beyond our scope to resolve. What is clear is that the process of creating either a UK or British Bill of Rights presents political challenges that the UK parties are only starting to confront.

### 5.3 The political dimension

#### The view from Westminster

The UK government's 2007 *Governance of Britain* Green Paper did not mention devolution and spoke of a 'British' Bill of Rights. Its 2009 Green Paper, by contrast, said that consideration of a UK Bill of Rights and Responsibilities would need to involve the devolved legislatures and executive bodies and the human rights commissions around the UK 'in order to generate the degree of consensus appropriate' to such legislation (Ministry of Justice, 2009a: 61). The JCHR stated in 2008 that the required dialogue between central government and the devolved administrations did not yet seem to have begun (JCHR, 2008a: 31), an impression borne out by this review.

For its part, the Conservative Party (Grieve, 2009a) has stated that in creating a 'British' Bill of Rights, it would wish to:

... respect the devolution settlements and so does not want to impose change against the will of devolved administrations in devolved matters. We want therefore to proceed by agreement with the principle very much in mind, particularly for Scotland, that its own national tradition of rights and liberties is different from that of England and Wales.

The Conservatives have not specified what proceeding 'by agreement' might mean in terms of the consultation process.

In relation to a Northern Ireland Bill of Rights (see section 2.6), the UK government has said it does not wish debate around a UK instrument to detract from the process relating to a potential bill reflecting the particular circumstances of Northern Ireland (Ministry of Justice, 2009a: 60). The two processes have, in practice, become connected. The Northern Ireland office (NIO, 2009: 15) has said it is important that:

... decisions reached in respect of Northern Ireland are taken with full awareness of the developing national debate about the best way of protecting our rights and discharging our mutual responsibilities.

For his part, David Cameron has said that he considers that the commitment to legislate on additional rights protections for Northern Ireland contained within the Good Friday Agreement could be adequately provided for by drafting a sub-section for inclusion in a future 'British' Bill (Committee on the Administration of Justice, 2009). David Russell suggested that if a future Conservative government

implemented this approach, it would mean that the debate on a UK Bill of Rights would become 'bound up in the intricacies of the peace process':

Moreover, one must presume that if a sub-section in a UK Bill is proposed in order to reflect the particular circumstance of Northern Ireland, then Scotland and Wales may seek a similar opportunity.  
(seminar, 1 December 2009)

### **The view from the devolved nations**

Some interviewees and seminar participants reported scepticism and unease in the devolved nations about the competing political agendas underpinning the UK Bill of Rights project. They pointed to the absence of clear terms of reference for a UK-wide debate about a Bill of Rights (such as that contained in the NIHRC's mandate) and the lack of an agreed methodology for conducting consultation or deliberation. The fact that negotiations between the parties responsible for legislating at Westminster and between the UK government and the Scottish, Welsh and Northern Ireland executives have not started in earnest, or in public, appears to have exacerbated this uncertainty.

Further, some seminar participants suggested that any UK-wide process, if insensitively handled, risks being seen as a move to centralise power, values and identity - at odds with devolution processes which are rooted in recognition of the multi-national character of the UK and the principle of self-determination.

A process to create a Bill of Rights, whether described as 'British' or as covering the UK, risks inflaming sectarian divisions in Northern Ireland. Members of the British unionist community will not wish Northern Ireland to be excluded from any process that helps reinforce 'Britishness', while Irish (and Scottish) nationalists will not want to be included (JUSTICE, 2010: 24-25). David Russell noted that:

For many people in Scotland, Northern Ireland and Wales, the idea of a British or UK Bill of Rights suggests a centralisation programme that runs counter to their understanding of the devolution settlements ... In Northern Ireland, which is part of the island of Ireland, not Great Britain, but which remains constitutionally part of the UK, the very notion that any UK Bill should reinforce a sense of Britishness is geographically nonsense and politically loaded, if not dangerous.  
(seminar, 1 December 2009)

Some interviewees and seminar participants expressed concern about how any UK process might impact upon the protracted process of creating a Bill of Rights for Northern Ireland. One noted that the NIHRC has recently begun discussions with Dublin on an all-Ireland Charter of Rights, as mandated by the Good Friday Agreement:

These discussions were long-delayed so as not to complicate or confuse the separate process relating to a Northern Ireland Bill of Rights. Westminster parties have displayed no such sensitivity about timing. (seminar, 1 December 2009)

Some interviewees in Scotland suggested that the politically contested nature of devolution creates a difficult environment in which to pursue a UK or British Bill, which could become a proxy for other issues relating to the Union. The Scottish Justice Minister, Kenny MacAskill, told the JCHR (2008b: Ev 59) that the Scottish government had not been significantly involved in discussions on a Bill of Rights; nor would it countenance regression from current mechanisms for protecting human rights:

We have the Human Rights Act and ECHR incorporated into our founding principles ... We are happy with that and as a Government party [the Scottish National Party] we seek to expand upon that if and when the constitutional settlement changes.

Some seminar participants, too, suggested that any process which had the stated or implicit purpose of regression would be politically volatile in Scotland. The Scottish Parliament has built on the protections in the HRA - outwards (internationally) and upwards beyond the UK floor, for example in the fields of mental health, adult social care and housing. As one participant noted:

To repeal the Human Rights Act now would be confusing for public authorities, undermining progress that has been made so far ... The HRA has much unfulfilled potential – the current debate about weakening protection is untimely and unfortunate. (seminar, 1 December 2009)

Some seminar participants noted the risk of a disconnection between the political discourse at Westminster and that in the devolved nations. As one of them commented:

... the Magna Carta resonates less strongly in Scotland than, say, the Declaration of Arbroath [for independence] or the UN Convention on the Rights of the Child.

(seminar, 1 December 2009)

Similar concerns were expressed in Wales. Jane Williams, Lecturer in Law at Swansea University, noted that human rights (and especially children's rights) have featured prominently in political debate and public policy development in Wales and the priority now is to ensure implementation and achieve impact 'on the ground' (interview, 21 January 2010). A distinctly Welsh notion of citizenship has emerged which is rooted in rights and the notions of universality and community rather than (as in England) notions of individual choice and responsibility. Williams suggested that repealing the HRA would be 'politically very difficult' in Wales. Further:

A Bill of Rights for Wales would look different from a Bill of Rights written in England. ... If there's a move to do this at UK or British level, I'm sure there would be a keen appetite for separate consideration for Wales and for a separate public debate with the ability to produce a separate set of ideas about what would go into a Bill.

#### **5.4 A UK-wide consultation process?**

There was a strong consensus among interviewees and seminar participants that how the process is designed in relation to the devolved nations is of paramount importance. Aileen McHarg, Senior Lecturer in Public Law at the University of Glasgow, argued that even if a Sewel Motion was passed (see section 5.2):

I would question whether that would be anywhere near sufficient to say that the Scottish Parliament and the Scottish people have consented to this process.

(interview, 10 December 2009)

Francesca Klug added that any process must engage Scotland, Wales and Northern Ireland in their own right and would need separate processes in all three (interview, 13 January 2010). Graham Smith noted that the process would need to be integrated to legitimate the outcome as a UK Bill of Rights (interview, 9 November 2009). This could take the form of a UK citizens' assembly or comparable body (see also Runswick, 2007). Smith suggested there would also need to be tailored consultations to 'burrow down' to particular communities in each devolved nation.

## **5.5 Conclusion**

Devolution presents considerable legal, constitutional and political obstacles that, while they may not be insuperable, must be negotiated sensitively if UK parties are to progress the Bill of Rights project. It appears highly likely that if the HRA were amended or repealed, and/or a Bill of Rights were enacted covering the devolved jurisdictions, there would be a need for amendments to the devolution statutes. Further, such a decision would almost certainly require the consent of the devolved legislatures in Scotland and Northern Ireland.

The terms of reference for a UK-wide process and the methodologies by which it might be pursued have not been determined, either between the parties responsible for legislating at Westminster or between the UK government and the Scottish, Welsh and Northern Ireland executives; this has exacerbated a sense of unease and disengagement in the devolved nations.

## 6. Key principles

### 6.1 Introduction

In this chapter, we propose key principles which should underpin the creation of a Bill of Rights based upon the evidence from experience in other jurisdictions. These principles are consistent with, and build upon, those established by the Equality and Human Rights Commission (section 1.1) and with the ‘non-negotiables’ advocated by the parliamentary Joint Committee on Human Rights (JCHR) in its inquiry into a UK Bill of Rights (JCHR, 2008a: 91-92).

We note that a significant proportion of interviewees in the UK, viewing current political conditions as unfavourable, are concerned about such a process happening at all. They advocate greater efforts to promote understanding and implementation of the Human Rights Act (HRA) and a more considered process of reflection on the broader issue of a written constitution. Therefore, these principles are suggested as both (i) requirements for the conduct of any future process and (ii) a set of criteria to inform the decision about whether that process is worth engaging in and against which it might be held up to scrutiny.

### 6.2 The principles

A process of creating a Bill of Rights should be:

#### **Non-regressive**

Any process to create a new Bill of Rights must go forwards, not backwards. In the UK, the government (Ministry of Justice, 2009a: 58), the JCHR (2008a: 91) and the Equality and Human Rights Commission<sup>42</sup> have each stated unequivocally that any future UK Bill of Rights should not dilute existing protection provided by the HRA. This is either in relation to the specific rights protected, or by weakening the existing machinery for the protection of Convention rights. Interviewees and seminar participants overwhelmingly endorsed this view. Some suggested that there is an important ethical dimension to the process of creating a Bill of Rights which recognises that human rights are rooted in human struggles against oppression and injustice. As one put it: ‘they are not ours to throw away’. Moreover, any process that starts from a premise of going backwards would disturb norms established across the democratic world and set a damaging precedent internationally.

A subsidiary principle here is: no repeal without replacement. Any future government must commit unequivocally to retaining the HRA unless and until a Bill of Rights, protecting human rights to at least the same extent as the HRA, is enacted.

<sup>42</sup> See [www.equalityhumanrights.com/legislative-framework/bill-of-rights/](http://www.equalityhumanrights.com/legislative-framework/bill-of-rights/)

### **Transparent**

Politicians must be transparent about the purpose of a Bill of Rights and the terms of reference for the process by which they propose to create it. This entails a clear procedural commitment to act on the results of public consultation and deliberation within certain parameters which must be clearly stated and justified. The methods employed to consult the public must also be transparent and open to scrutiny and those designing the process should explain the advantages and disadvantages of the chosen approach. Transparency must extend to the final outcome, with a clear rationale for the inclusion of specific provisions and how these relate to community preferences and experiences and to international standards.

### **Independent**

The consultative body must be independent of government. A Bill of Rights would affect the relationship between parliament, the government and the courts, and between the individual and the government. Public trust is likely to be enhanced if the body running the process is seen to be independent and to have no vested interest in the outcome. While the government will set the framework and provide resources, the process must not be owned by ministers or be manipulated for partisan ends.

### **Democratic**

For the outcome to be seen as having democratic legitimacy, the process must also be democratic. Bills of Rights are not only a constraint on repressive government; they are also a positive instrument to enable relatively powerless groups to have a more effective say in the democratic process. People must be encouraged to see that they have a stake in the process and understand what that stake is. As Ian O'Flynn noted:

If [a Bill of Rights] is to have meaning for people and become part of British constitutional tradition, people have to have a real say in its creation ... It must be **their** Bill of Rights, not be superimposed by an intellectual or political elite.

(interview, 27 October 2009)

### **Inclusive**

The process should place the highest premium on eliciting the views and experiences of groups whose human rights are most vulnerable to being breached, and should give those voices an elevated status in the processing of responses. Any process should also include meaningful efforts to elicit the views of disaffected groups who are most alienated from the legal and political system. This will generally

require combining qualitative and quantitative methods and providing multiple opportunities for people to participate.

### **Deliberative and participative**

The process must be participatory and, as one seminar participant put it, ‘an exercise in building citizenship rather than just market research’. Deliberative forums have been shown to engender public trust if they are adequately publicised, properly constructed to be representative and independent from government and if government gives clear procedural commitments to act on their recommendations. Deliberative forums should not be used in isolation, but rather as a vehicle to inform and engage the wider public.

### **Educative**

Consultation and deliberation should be as unconstrained as possible whilst being informed to the greatest extent that it can be about existing human rights protections and obligations. The UK does not start with a blank sheet in terms of human rights protection. A minimum requirement of a consultation process is the provision of impartial and accessible information (in appropriate formats and languages) and a concerted strategy, adhered to by all parties, to correct prevalent myths and misperceptions about human rights and the HRA. The public must also be informed about the duty to respect the rights of others.

### **Reciprocal**

Consultation and deliberation should be a two-way process in which the government, and not just those being consulted, is educated. The imprint of the process must be visible and acknowledged in the final outcome both of the consultation and consequent government action.

### **Rooted in human rights**

The process of creating a Bill of Rights must be consistent with human rights principles. These principles include respect for the dignity and autonomy of individuals and the right to participate. These principles are internationally recognised and not subject to political whim or contingency; nor can they be trumped by considerations such as public safety or security or requirements to exercise individual responsibility.

### **Timed**

Any process must have a clear timeframe with, at a suitable juncture, a momentum-building phase. It must not be indeterminate: the government must give a clear

procedural commitment to act at the end of the process within clearly stated parameters.

### **Symbolic**

A process should be designed that is suitably ambitious for its stated purpose and for the undertaking of a constitutional enterprise. The government must have a clear answer to the question posed by Andrew Dismore MP, who chairs the JCHR:

What are we trying to achieve here? Do we want a Bill of Rights that's going to last for 200 years or 10 years? Are we trying to create a written constitution or are we simply tinkering with the HRA?  
(interview, 7 January 2010)

If the outcome aspires to endure, then, as one seminar participant noted, it must be 'myth-making':

People should have a sense that they did, or at least **could have**, participated in the process, creating a compelling story ... This creates buy-in in a way that experts and elites cannot.

### **Designed to do no harm**

The process should be adequately resourced for the stated purpose and there should be a political commitment to act on the outcome of consultation. A process is better not done at all than done badly. Disillusionment is contagious and corrosive; trust in the political process is fragile.

### **Respectful of the devolution settlements**

All these principles apply to the design of a process which seeks to include the devolved nations. Specifically, choice should reside with the devolved assemblies and the process should respect their competency and self-determination.

## 7. Policy implications

### 7.1 Introduction

In this chapter, we analyse the policy implications of the evidence presented in Chapters 2 to 5 and the principles listed in Chapter 6. We address these observations to a range of actors who are concerned with the protection and promotion of human rights and/or who might be involved in designing - or seeking to influence - a future consultation process. These include: the UK government and the devolved executive bodies; the Westminster Parliament and the devolved legislatures; the Equality and Human Rights Commission, the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission; non-governmental organisations and other civil society actors, and academics and practitioners.

### 7.2 Pre-conditions for engagement

The principles in Chapter 6 are fundamental and, to a degree, interdependent. The question arises, are they a pre-condition for engagement in any future process? We suggest that the principle of non-regression is of a higher order: without an unequivocal guarantee that the purpose of a Bill of Rights process is to augment international standards and to maintain their incorporation into domestic law, the other principles relating to process are likely to seem immaterial. We suggest that any actor concerned with the protection and promotion of human rights would, if a consultation were predicated on regression, be bound to reject the process in terms of formal endorsement or engagement.

This is consistent with the position of the parliamentary Joint Committee on Human Rights (JCHR) which states that the principle of non-regression is 'non-negotiable'; it suggests specific guiding principles for a Bill of Rights process including that it must 'build on the HRA without weakening its mechanisms in any way' and 'supplement the protections in the [European Convention on Human Rights]' (JCHR, 2008a: 91).

The corollary of this position is that any future government must provide (and non-governmental actors should demand) an unambiguous and public statement of intent and terms of reference for the consultation process, along with clear procedural commitments to act within the stated parameters.

Actors concerned with the protection and promotion of human rights should also highlight the implications of a process predicated on regression for the UK's existing international human rights obligations and its role and position in the Council of Europe and European Union. They should advocate for the importance of the UK as

a prime carrier of human rights values internationally and highlight the damaging precedent that a process predicated on regression would set.

### **7.3 Certifying non-regression**

Subject to the assurances sought above, any future government should establish (and actors concerned with the protection and promotion of human rights should advocate for) an independent committee of experts, who might be appointed on a cross-party basis, to provide a 'kitemark' throughout the process that the principle of non-regression is being upheld.

### **7.4 Designing the process to produce an outcome with democratic legitimacy**

Any future government should, drawing from precedents in other jurisdictions, establish an independent body to run the consultation process. Contingent upon the assurances sought in sections 7.2 and 7.3, actors concerned with the protection and promotion of human rights should advocate for a consultative process that is run independently of government and designed to engender public trust.

Another key principle is transparency: actors concerned with the protection and promotion of human rights should influence and monitor the design of process to ensure that any future government does not 'pick and mix' from available methodologies in order to manufacture apparent consensus behind measures which would not, in fact, have democratic legitimacy. Experience from other jurisdictions, while it cannot be transplanted uncritically to the UK, provides a bedrock of knowledge that can be drawn upon – for example, the imperative to link deliberative forums to the broader public sphere and to pursue meaningful engagement with disaffected and marginalised groups in society.

### **7.5 Influencing the terms of debate: a concordat**

As Francesca Klug noted in stark terms: 'It would be unprecedented to have a Bill of Rights based on the trashing of a human rights treaty' (interview, 13 January 2010). This observation is relevant to both content and process. Actors concerned with the protection and promotion of human rights should advocate for a concordat that would bind all parties that signed it to certain rules of engagement; principally, an agreement not to use language or bring stories into the public domain that knowingly distort the purported impact of human rights and the HRA. This would help to ensure that all parties buy into a process which is avowedly educative and non-partisan and does not trade in myths or seek to use the Bill of Rights debate as a proxy for unrelated issues. Parties which declined to sign the concordat would be answerable to the public for their conduct.

## **7.6 Devolution**

Actors concerned with the protection and promotion of human rights should champion the principle that choice should reside with the devolved assemblies and that the process of creating a UK Bill of Rights should respect their competency and self-determination. It is imperative that those actors with appropriate expertise and authority highlight the legal, constitutional and political implications of devolution for any decision to amend or repeal the HRA and/or to enact a UK or 'British' Bill of Rights.

## Appendix 1 List of interviewees

Name		Title	Institution/role	Country
Sylvia	Bell	Principal Legal and Policy Analyst	New Zealand Human Rights Commission	New Zealand
Robert	Blackburn	Professor of Constitutional Law	King's College, London	UK
Frank	Brennan	Professor of Law Public Policy Institute	Australian Catholic University; former Chair, National Human Rights Consultation Committee	Australia
Geoff	Budlender		Barrister and acting High Court judge; founder of Legal Resources Centre; Trustee, Sigrid Rausing Trust	South Africa
Simon	Burall	Director	Involve: the participation organisation	UK
Fred	Chaney		Former federal minister for Aboriginal Affairs; former Chair, Consultation Committee for a Proposed WA Human Rights Act	Australia
Hilary	Charlesworth	Director, Centre for International Governance and Justice	The Australian National University; former Chair, Australian Capital Territory inquiry into an ACT bill of rights	Australia
Joanna	Collinge	Executive Director	New Zealand Human Rights Commission	New Zealand
Hugh	Corder	Dean, Faculty of Law	University of Cape Town	South Africa
Brice	Dickson	Professor of International and Comparative Law	Queen's University, Belfast	UK
Andrew	Dismore MP	Chair	Joint Committee on Human Rights	UK
Catherine	Donnelly	Barrister	Blackstone Chambers; Principal Legal Adviser to the Northern Ireland Human Rights Commission on the drafting of a Bill of Rights for Northern Ireland	UK

Name		Title	Institution/role	Country
Ruth	Fox	Head of Parliament and Government programme	Hansard Society	UK
John	Gastil	Professor, Department of Communication	University of Washington	USA
Colin	Harvey	Professor of Human Rights Law	Queen's University Belfast	UK
Paul	Kildea	Director, Federalism Project, Gilbert and Tobin Centre of Public Law	University of New South Wales	Australia
Francesca	Klug	Professorial Research Fellow	London School of Economics	UK
Jenny	Leong	Human Rights Act Campaign Coordinator	Amnesty Australia	Australia
Phil	Lynch	Director and Principal Solicitor	Human Rights Law Resource Centre	Australia
Aileen	McHarg	Senior Lecturer in Public Law	University of Glasgow	UK
Tom	Mullen	Head of School of Law	University of Glasgow	UK
Colm	O'Kinneide	Reader in Laws	University College London	UK
Ian	O'Flynn	Lecturer in Political Theory	University of Newcastle	UK
Jason	Pobjoy	PhD candidate, Faculty of Law	University of Cambridge	UK
Glenn	Preston	Head of Projects and Communications	Ministry of Justice	UK
Michael	Raftery	Head of Citizenship Education	Hansard Society	UK
Qudsi	Rasheed	Legal Officer (Human Rights)	JUSTICE	UK
Paul	Rishworth	Auckland School of Law	University of Auckland	New Zealand
Michael	Ritchie	Director	Committee on the Administration of Justice	UK
David	Russell	Head of Communication and Education	Northern Ireland Human Rights Commission	UK

Name		Title	Institution/role	Country
Peter	Russell	Professor Emeritus, Political Science	University of Toronto	Canada
Edward	Santow	Director, Charter of Human Rights Project, Gilbert and Tobin Centre of Public Law	University of New South Wales	Australia
Chris	Sidoti	International human rights consultant	Former Australian Human Rights Commissioner; Australian Law Reform Commissioner; independent chair of the Northern Ireland Bill of Rights Forum	Australia
Graham	Smith	Professor of Politics, Centre for Citizenship, Globalization and Governance	University of Southampton	UK
Kate	Temby	Acting Director, Human Rights Unit	Australian Human Rights Commission	Australia
Angela	Ward	Barrister	Bar Council, Law Library of Ireland	Ireland
Mark	Warren	Harold and Dorrie Merilees Chair for the Study of Democracy, Department of Political Science	University of British Columbia	Canada
George	Williams	Anthony Mason Professor, Faculty of Law	University of New South Wales; former Chair, Human Rights Consultation Committee, Victoria	Australia
Jane	Williams	Lecturer in Law	Swansea University	UK
Andy	Williamson	Head of eDemocracy programme	Hansard Society	UK
Jane	Winter	Director	British Irish Rights Watch	UK
Spencer	Zifcak	Director, Institute of Legal Studies	Australian Catholic University	Australia
Senior official	(anonymous)		Northern Ireland Office	UK

## Appendix 2 Question guide for interviewees

### Questions for respondents involved in, or familiar with, processes outside Britain

1. What do you consider to be the most important principles that should underpin the process of creating a Bill of Rights (or similar document)? In the process/es you know about, were these principles derived from international human rights standards and principles (for example the right to participation in public affairs)? What else informed them?
2. What were the most – and least – successful aspects of the process/es you were involved in or familiar with? Were any unexpected challenges encountered?
3. How open-ended was the process: which matters of substance were pre-determined and which were open to deliberation (for example the principle of non-regression; the rights to be enshrined; the status and enforceability of those rights)? How significant was this factor in terms of public ownership of the resulting document?
4. Which institution/s carried out the process? What was (and what should be) the role of a national human rights institution in the process?
5. What lessons were learnt about how to conduct successful civic education, information or media campaigns? Was civic education about human rights a primary aim of the process and can you draw lessons about how this was achieved?
6. What channels were created to facilitate public debate? How was technology used to broaden participation?
7. What lessons were learnt about how best to engage specific population groups in the process of deliberation, in particular groups or communities that face discrimination, disadvantage or exclusion or who are considered 'hard to reach'? Can you give examples of how the views of specific groups or communities were incorporated in the drafting process?
8. What lessons were learnt about the use of particular consultation methodologies, for example opinion polling, deliberative polling, referendums?

9. How were diverse public contributions synthesised in the drafting process? How were minority views balanced against those of the majority?
10. How were notions of responsibility constructed in the process, if at all?
11. How were statements of values constructed in the process, if at all?
12. Can you draw lessons about the optimum timescale for the process of creating a Bill of Rights?
13. What lessons were learnt about how to ensure extensive input into the legislative process? How was cross-party consensus around the Bill of Rights sought or achieved?
14. If you were working within a devolved or federal context, how were the issues raised by this context dealt with? How were the views and particular experiences of those in different nations (or states) captured and reflected? How was cross nation (or state) consensus achieved? If relevant, how were different legislative frameworks and legal traditions reflected?
15. In relation to all these questions: how did the process of public participation influence the final shape of bills of rights in particular instances?
16. To what extent do you consider experience drawn from outside the UK to be relevant to, or replicable in, the UK?
17. Is there anything else that we have not discussed that you consider is important in the process of developing a Bill of Rights?

### **Questions for respondents in Britain**

1. What do you consider to be the most important principles that should underpin the process of creating a Bill of Rights? Should these principles be derived from international human rights standards and principles (for example the right to participation in public affairs)? What else should inform them?
2. What lessons can be drawn at this early stage from the way in which reform proposals have been initiated (for example the UK government's Green Paper on *Rights and Responsibilities: developing our constitutional framework*)?

3. How open-ended should the consultation process be? Which matters of substance should, in your view, be pre-determined and which should be up for deliberation (for example the principle of non-regression; the rights to be enshrined; the status and enforceability of those rights; the inclusion of responsibilities; the inclusion of a statement of values)?
4. Which bodies should carry out the process? What role do you think the Equality and Human Rights Commission or Scottish Human Rights Commission should play?
5. Should raising public awareness, knowledge and understanding about human rights principles and standards (the Human Rights Act and the UK's international human rights obligations) be a primary aim of the consultation process? How might this be achieved?
6. Are there lessons you can share from your own work about the type of consultation methodologies that might best be used in a Bill of Rights process, for example opinion polling, deliberative polling, use of information and communications technology? You may wish to draw upon knowledge and experience of approaches to deliberative democracy that do not relate to a Bill of Rights as such but which might offer useful lessons with regard to process (for example citizens' juries, participatory budgeting).
7. Are there lessons you can share from your own work about how best to engage specific population groups in the process of deliberation, in particular groups or communities who face discrimination, disadvantage or exclusion or who are considered 'hard to reach'?
8. Are there lessons you can share about the potential role of third-sector organisations, including the voluntary and community sector, in a consultation process?
9. Do you have a view on whether a referendum should be held, either to initiate the legislative stage of a Bill of Rights or after its enactment as a means of democratic entrenchment?
10. What do you consider to be the implications of devolution for the process by which a UK Bill of Rights should be created? In particular, what are the legal, political or social issues relevant to Scotland England and Wales that should be taken into account in developing a Bill of Rights?

11. What do you consider to be key factors to ensuring that the engagement with the devolved administrations and civil society in each of the nations is effective?
12. Do you have any other suggestions about how a Bill of Rights process might be carried out so as to achieve genuine and inclusive public deliberation and a sense of common ownership?
13. Is there anything else that we have not discussed that you consider is important in the process of developing a Bill of Rights?

## **Appendix 3      Victoria human rights consultation**

The Human Rights Consultation Committee in Victoria released a community discussion paper entitled *Have your say about human rights in Victoria*.

The paper asked 10 key questions to encourage debate. These were drafted 'to be as open-ended as possible so that people responded to us without feeling constrained by the preferences expressed in the *Statement of Intent* which had been issued by the Victorian government. The 10 questions were:

1. Is change needed in Victoria to better protect human rights?
2. If change is needed, how should the law be changed to achieve this?
3. If Victoria had a Charter of Human Rights, what rights should it protect?
4. What should be the role of our institutions of government in protecting human rights?
5. What should happen if a person's rights are breached?
6. What wider changes would be needed if Victoria brought about a Charter of Human Rights?
7. What role could the wider community play in protecting and promoting human rights?
8. What other strategies are needed to better protect human rights?
9. If Victoria introduced a Charter of Human Rights, what should happen next?
10. Is there anything else you would like to tell us about how human rights should be protected in Victoria?

## Appendix 4 Western Australia human rights consultation

The Consultation Committee for a Proposed WA (Western Australia) Human Rights Act released a community discussion paper entitled *Human Rights for WA* and invited people to make submissions. It also released a shorter summary document, *Talking Human Rights in Western Australia*, and a pamphlet, *We Want Your Views*.

Each listed eight key questions relevant to the Committee's brief, which the Committee asked the community to answer. These were:

1. Should WA have a Human Rights Act?
2. What rights should be protected in a WA Human Rights Act?
3. What form should a WA Human Rights Act take?
4. How should a WA Human Rights Act require human rights to be protected?
5. Who should be required to comply with the human rights recognised in a WA Human Rights Act?
6. What should happen if a person's human rights are breached?
7. If WA introduced a Human Rights Act what wider changes would be needed?
8. What else can the government and the community do to encourage a culture of respect for human rights in WA?

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## Useful websites

**(All websites accessed on 24 January 2010)**

Australia - national human rights consultation

<http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf>

Australian Capital Territory human rights consultation

<http://www.jcs.act.gov.au/prd/rights/index.html>

Australian Human Rights Group

<http://www.humanrightsact.com.au/ahrg/>

Australian Human Rights Group

<http://www.humanrightsact.com.au/2008/>

Canadian Charter of Rights

[http://www.charterofrights.ca/en/26\\_00\\_01](http://www.charterofrights.ca/en/26_00_01)

Canadian Human Rights Commission

<http://www.chrc-ccdp.ca/default-en.ASP>

Center for Deliberative Democracy

<http://cdd.stanford.edu/>

Democratic Audit

<http://www.democraticaudit.com/>

Get Up!, Australia

<http://www.getup.org.au/campaign/rights/407>

Ministry of Justice, UK: People, Power and Politics

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

New Zealand Bill of Rights Act

<http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

New Zealand Human Rights Commission

<http://www.hrc.co.nz>

Northern Ireland Bill of Rights Forum

<http://www.billofrightsforum.org/>

Northern Ireland Human Rights Commission

<http://www.nihrc.org/>

Northern Ireland Human Rights Commission, Bill of Rights consultation documents

[http://www.nihrc.org/index.php?option=com\\_content&task=view&id=54&Itemid=71](http://www.nihrc.org/index.php?option=com_content&task=view&id=54&Itemid=71)

Northern Ireland Human Rights Consortium

<http://www.billofrightsni.org/>

South African Bill of Rights

<http://www.info.gov.za/documents/constitution/1996/96cons2.htm>

South African Human Rights Commission

[http://www.sahrc.org.za/sahrc\\_cms/publish/cat\\_index\\_26.shtml](http://www.sahrc.org.za/sahrc_cms/publish/cat_index_26.shtml)

Unlock Democracy

<http://www.unlockdemocracy.org.uk/>

Victoria, Australia: human rights consultation

<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Human+Rights/Consultation+Process/>

Western Australia human rights consultation

[http://www.department.dotag.wa.gov.au/H/human\\_rights\\_report\\_2007.aspx?uid=0053-1186-4534-3685](http://www.department.dotag.wa.gov.au/H/human_rights_report_2007.aspx?uid=0053-1186-4534-3685)

# Contacts

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Equality and Human Rights Commission Helpline

FREEPOST RRLG-GHUX-CTR

Arndale House, Arndale Centre, Manchester M4 3AQ

Main number 0845 604 6610

Textphone 0845 604 6620

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## Scotland

Equality and Human Rights Commission Helpline

FREEPOST RSAB-YJEJ-EXUJ

The Optima Building, 58 Robertson Street, Glasgow G2 8DU

Main number 0845 604 5510

Textphone 0845 604 5520

Fax 0845 604 5530

## Wales

Equality and Human Rights Commission Helpline

FREEPOST RRLR-UEYB-UYZL

3rd Floor, 3 Callaghan Square, Cardiff CF10 5BT

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## Helpline opening times:

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This research identifies and explores best practice processes for developing a new Bill of Rights for the UK. Drawing on interviews with 43 key individuals and other secondary evidence, it analyses the position of the main UK parties and the legal, constitutional and political implications of devolution; assesses the processes pursued to create Bills of Rights in Canada, New Zealand, South Africa, Australia and Northern Ireland; identifies key principles that should underpin the development of a Bill of Rights, and outlines policy implications in relation to any future process.