



# The Equal Rights Trust

126 North End Road  
London W14 9PP  
United Kingdom

Tel.: +44 (0) 20 7610 2786  
Fax: +44 (0) 20 3441 7436  
info@equalrightstrust.org  
www.equalrightstrust.org

## Board of Directors

Bob Hepple (Chair)  
Sue Ashtiany  
Tapan Kumar Bose  
Hywel Ceri-Jones  
Sonia Correa  
Asma Khader  
Claire L'Heureux-Dubé  
Gay McDougall  
Bob Niven  
Kate O'Regan  
Michael Rubenstein  
Stephen Sedley  
Theodore Shaw  
Sylvia Tamale

The Equal Rights Trust is a company limited by guarantee incorporated in England and a registered charity. Company number 5559173. Charity number 1113288.

Dimitrina Petrova  
Executive Director

## Secretariat for the Commission on a Bill of Rights

Postpoint 9.55  
102 Petty France  
London  
SW1H 9AJ

By email: [responses@commissiononabillofrights.gsi.gov.uk](mailto:responses@commissiononabillofrights.gsi.gov.uk)

11 November 2011

Dear Sir

### **RE: Response to Discussion Paper: Do we need a UK Bill of Rights?**

I write on behalf of The Equal Rights Trust (ERT) in response to the Commission on a Bill of Rights (the Commission) consultation entitled *Do we need a UK Bill of Rights?* ERT is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. In the exercise of this mission, we undertake research on emerging issues related to equality, make submissions to governments concerning the implementation and enforcement of the rights to non-discrimination and equality, work to develop the capacity of civil society actors to advocate for improved protection of these rights, and collect and disseminate information on developments related to equality.

### **Question 1: Do you think we need a Bill of Rights?**

In response to the first question posed in the Commission's consultation paper, ERT does not believe that the UK needs a Bill of Rights, as the UK already has one: the Human Rights Act 1998 (HRA), an Act which provides an important set of minimum standards for the protection of human rights of persons within UK jurisdiction, which allows them to challenge violations of their rights in UK courts and which requires the UK government to act in a way which is compatible with the rights guaranteed therein. We share the view expressed by Liberty<sup>1</sup>, the Equality and Diversity Forum (EDF)<sup>2</sup>, and the British Institute

<sup>1</sup> Liberty, *Bill of Rights Commission: Defend Our Common Values*, 2011, available at: <http://www.liberty-human-rights.org.uk/campaigns/common-values/bill-of-rights-commission.php>.

<sup>2</sup> Equality and Diversity Forum, *Equality and Diversity Forum response to Commission on a Bill of Rights consultation: 'Do we need a UK Bill of Rights?'*, November 2011, available at: <http://www.edf.org.uk/blog/?p=14349>.

Of Human Rights (BIHR)<sup>3</sup>, among others, that the UK already has a Bill of Rights, in the form of the HRA itself. ERT notes and endorses the informative and authoritative statements and submissions from these organisations and others arguing that the HRA should be retained and that it should not be “diluted” or weakened. **ERT opposes any proposal to repeal, regressively amend or weaken the HRA, moves which we believe would seriously undermine the protection of human rights in the United Kingdom.**

*ERT urges the Commission to recommend that the Human Rights Act is retained.*

The rights guaranteed under the European Convention on Human Rights (ECHR) and incorporated into UK law by the HRA are fundamental human rights which merit robust protection in domestic law. Rights such as the right to life, the rights to freedom from torture and freedom from slavery, the rights to freedom of opinion and expression and the right to be free from discrimination in the exercise of these rights are essential parts of any functioning democracy and a just society. Protection of these rights in law is consistent with the UK’s tradition of respect for civil liberties and human rights and reflective of the UK’s current commitment to the promotion of human rights abroad. Moreover, the protection of these rights in law is widely supported by the British public, as evidenced by Liberty in research for its *Common Values* campaign.<sup>4</sup> As the Rt Hon Lord Bingham of Cornhill, former Master of the Rolls and Lord Chief Justice has stated: “which of these rights, I ask, would we wish to discard?”<sup>5</sup>

The rights provided by the HRA – and the mechanisms for making these rights effective through the courts as well as the duty on state actors to act compatibly with these rights – have been used by individuals in the UK to challenge the treatment which they have received and thereby to secure tangible improvements in their lives. Testimonies provided on the “Our Human Rights Stories” website indicate the importance of the HRA in safeguarding the human rights of individual persons in the UK.<sup>6</sup>

As an organisation focussed on the promotion of equality and non-discrimination, ERT is keen to stress that the HRA provides particularly important protections for those vulnerable to discrimination and for “minorities, including stigmatised minorities – such as refugees, migrants, Gypsies and Travellers, and people with mental health problems – who may be unlikely to elicit public sympathy, particularly in a climate of media and political hostility.”<sup>7</sup>

The HRA is also an essential means for the UK to comply with its international obligations to protect civil and political rights, arising both under the ECHR and under the International Covenant on Civil and Political Rights (ICCPR). The HRA, together with the devolution legislation governing Scotland, Wales and Northern Ireland, is the principal means by which the UK gives effect to its obligations under the ECHR, in particular under Article 1, which requires states to “secure to everyone within their jurisdiction” the rights in the ECHR, and Article 13 which obliges states to provide effective remedy for rights violations. This Commission’s own terms of reference require that any proposed Bill of Rights “incorporates and

---

<sup>3</sup> British Institute of Human Rights, *Briefing on the Commission on a UK Bill of Rights and the current consultation on its Discussion Paper*, October 2011, available at: <http://www.bihhr.org.uk/documents/policy/bihhrs-briefing-on-the-commission-on-a-uk-bill-of-rights-and-responding-to-its-discussion-paper>.

<sup>4</sup> “Britain Agrees: What’s Not to Love About the Human Rights Act”, Liberty, 2 October 2011, available at: <http://www.liberty-human-rights.org.uk/media/press/2010/britain-agrees-what-s-not-to-love-about-the-human-rights.php>.

<sup>5</sup> Rt Hon Lord Bingham of Cornhill, *Keynote Speech to Liberty 75<sup>th</sup> Anniversary Conference*, June 2009, available at: <http://www.liberty-human-rights.org.uk/about/history/75-years-of-liberty/our-75th-anniversary.php>.

<sup>6</sup> British Institute of Human Rights, *Our Human Rights Stories*, available at: <http://www.ourhumanrightsstories.org.uk/>.

<sup>7</sup> See above, Note 2, Para 10.

builds on all our obligations under the European Convention on Human Rights”<sup>8</sup>. As the rights guaranteed by the HRA are those which the UK is obliged to protect under the ECHR and as such, the HRA as it stands meets this first essential requirement of the Commission’s terms of reference.

In addition to these reasons for retention of the HRA, ERT would like to stress that retention of the HRA is also entirely compatible with the introduction of new legislation related to human rights, including the right to equality. As the BIHR has pointed out, the introduction of any new legislation which is envisaged or proposed by the Commission or the Government would not require the repeal of the HRA.<sup>9</sup>

*ERT urges the Commission to recommend that the Human Rights Act is not weakened or redefined.*

In accordance with our view that the HRA should not be repealed, ERT believes that the HRA should not be weakened, either by re-defining the rights themselves or restructuring the mechanisms for the implementation of the rights. In this respect, we endorse the position of the Joint Committee on Human Rights in its 2008 report *A Bill of Rights for the UK*:

*In our view it is imperative that the HRA not be diluted in any way in the process of adopting a Bill of Rights. Not only must there be no attempt to redefine the rights themselves, for example by attempting to make public safety or security the foundational value which trumps all others, but there must be no question of weakening the existing machinery in the HRA for the protection of Convention rights.<sup>10</sup>*

Thus, ERT opposes any proposals to re-define the Convention Rights which are guaranteed under the Act by virtue of section 1(1). ERT opposes any proposal to “balance” any of these rights with responsibilities, as has been suggested in public statements by the Prime Minister and others.<sup>11</sup> We also oppose any proposals which would involve the introduction of new interpretative clauses, the re-defining of Convention rights more narrowly than they are at present or the introduction of new derogations or reservations to these rights under sections 14 and 15 of the Act.

Similarly, we oppose any proposals to weaken the mechanisms which make the Convention Rights effective and operational. ERT believes that the powers granted to the UK courts under sections 2, 3 and 4 of the Act are critical to ensuring that the UK effectively meets its obligations under Article 13 of the Convention. Moreover, these sections of the Act ensure that individuals have a right to a remedy before a UK court should their Convention rights be violated. This means that these individuals are able to access justice without incurring the delay and costs of taking claims to the European Court of Human Rights.

ERT also opposes any proposals which would alter the obligation on public authorities to act in conformity with Convention Rights, under section 6 of the HRA and the obligation on the government to make a statement of compatibility when introducing new legislation under section 19 of the HRA. These measures are of critical importance in ensuring that Convention rights are effective in the UK. Furthermore, we believe that the mechanisms available under sections 6 and 19, together with those provided under sections 2, 3 and 4, strike an appropriate balance between the need to give individuals a

---

<sup>8</sup> Commission on a Bill of Rights, *Do We Need a Bill of Rights?*, August 2011, p. 3, available at: <http://www.justice.gov.uk/about/cbr/index.htm>.

<sup>9</sup> See above, Note 3, p. 5.

<sup>10</sup> Joint Committee on Human Rights, *A Bill of Rights for the UK? (Twenty-ninth Report of Session 2007-08)*, HL 165-I/ HC 150-I, August 2008, Para 53, available at: <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/jtrights.htm>.

<sup>11</sup> See, for example: Cameron, D., “Balancing freedom and security – A modern British Bill of Rights”, Speech to the Centre for Policy Studies, June 2006, available at: <http://www.guardian.co.uk/politics/2006/jun/26/conservatives.constitution>.

right to a remedy and the UK's tradition of parliamentary sovereignty, a point which the Commission's own consultation document acknowledges:

*The Human Rights Act provides legal remedies for violations of Convention rights while adhering to the doctrine of Parliamentary sovereignty by withholding from our courts the power to strike down Acts of Parliament that are held to be incompatible with Convention rights.<sup>12</sup>*

Fundamentally, ERT believes that any proposal to weaken the mechanisms provided under sections 2, 3, 4, 6 and 19 will undermine the effective protection of human rights in the UK and would be inconsistent with the Commission's mandate to ensure that its proposals "incorporate and build upon" the UK's obligations under the ECHR. In this regard, ERT supports the view put forward by Professor Francesca Klug of the *Human Rights Futures Project* at the London School of Economics, that the following minimum standards must be maintained:

- *All legislation, regardless of when it is passed, should be required to be interpreted by the Courts as compatible with the rights in the Bill of Rights, at least 'so far as it is possible to do so' (s3).*
- *No substitute for the Courts' power to issue a 'Declaration of Incompatibility' unless this is to strengthen courts' powers to hold the executive to account (s 4).*
- *The common law should not be exempted from the requirement on the courts to interpret all law compatibly with the rights in the Bill of Rights.*
- *No weakening of the powers of the courts and parliaments under the Devolution settlement.<sup>13</sup>*
- *The courts should still be empowered to 'strike down' subordinate legislation.*
- *Public authorities should still be specifically prohibited from acting incompatibly with the Bill of Rights (s6).*
- *Any changes to the definition of public authority should be expansive, to address the exemption of some private bodies carrying out public functions, not restrictive (s6).<sup>14</sup>*

ERT agrees that this set of obligations is essential to the effective protection of human rights in the United Kingdom and believes that they are well provided for in the present Human Rights Act.

### **Question 2: What do you think a UK Bill of Rights should contain?**

As stated above, ERT is of the view that the Human Rights Act 1998 is a UK Bill of Rights within the meaning envisaged by the Commission's terms of reference, though it may not be widely perceived as such. However, as an organisation concerned with the promotion of comprehensive protection of the rights to equality and non-discrimination, ERT believes that the UK should take further steps to provide an autonomous, comprehensive right to equality under UK law. In respect of enhancing protection of the rights to equality and non-discrimination, we make a recommendation below in answer to question 4.

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

---

<sup>12</sup> See above, Note 8, Para 28.

<sup>13</sup> See answer to Question 4 below.

<sup>14</sup> Klug, F., "A Bill of Rights that is Human Rights Act plus: what are the minimal indicators?", London School of Economics, January 2010, available at:

<http://www2.lse.ac.uk/humanRights/research/projects/humanRightsFutures.aspx>.

ERT believes it is essential that there should be a consistent level of human rights protection across the United Kingdom. We note, as the Commission itself recognises, that at present this consistency is ensured by virtue of the consistency between the protections and obligations provided in the HRA and the provisions of the various devolution Acts. We note that a number of commentators, including for example Roger Smith, Director of Justice, who described changes as a “legal and political nightmare” in the context of the Scottish and Welsh devolution frameworks<sup>15</sup>, have expressed concern that repealing or amending the HRA would create inconsistency between the different component countries. **ERT believes that consistency across the United Kingdom and the devolved jurisdictions is another strong reason in favour of retention of the HRA and non-regression from the provisions therein.**

**Question 4: Are there any other views which you would like to put forward at this stage?**

As stated above, ERT’s position is that the UK government should not repeal, amend or weaken the Human Rights Act. This said, as an organisation concerned with improving protection from discrimination and promoting the right to equality, ERT believes that the UK government could and should take this opportunity to improve its participation in international human rights instruments related to the protection of the right to non-discrimination and the incorporation of such instruments into UK law. In particular, **ERT recommends that the UK sign and ratify Protocol 12 to the European Convention on Human Rights (Protocol 12) and once this happens, consider a future amendment to HRA under section 1(4) to incorporate Protocol 12 into UK domestic law.**

At present, under the HRA individuals in the UK can only claim that they have been discriminated against in relation to the exercise of another Convention right. This limited application of the right to non-discrimination arises because of the limitation in Article 14 of the ECHR, which prohibits discrimination only with regard to the “enjoyment of the rights and freedoms” set forth in the Convention. Thus, Article 14 of the Convention and, by extension, the HRA, does not give rise to an independent right to non-discrimination and instead only provides an “accessory” right to those other rights guaranteed therein. As Professor Sandra Fredman has stated, Article 14 has “proved woefully inadequate as a constitutional equality guarantee”.<sup>16</sup>

Protocol 12 to the ECHR was developed in order to address this deficiency in the ECHR, providing that “any right set forth by law shall be secured without any discrimination on any ground” and thus providing a non-subsidiary, independent right to non-discrimination.<sup>17</sup> ERT believes that ratification of Protocol 12 is both consistent with the UK’s obligations under other international legal instruments and with the developments in the protection of the right to non-discrimination which have taken place in the UK since the Protocol was opened for signature.

**Ratification of Protocol 12 is warranted by the UK’s already existing obligations under international human rights law.**

The non-ratification by the UK of Protocol 12 ECHR is at odds with the UK’s existing obligations under other international treaties to which it is a party. As a party to the International Covenant on Civil and Political Rights (ICCPR) and to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UK is required to ensure the enjoyment of the civil, political, economic, social and cultural

---

<sup>15</sup> Smith, R., “‘A legal and political nightmare’: Report on devolution and human rights warns of major difficulties ahead”, JUSTICE, 8 February 2010, available at <http://www.justice.org.uk/resources.php/58/report-on-devolution-and-human-rights-warns-of-major-difficulties-ahead>.

<sup>16</sup> Fredman, S., “Why the UK Government Should Sign and Ratify Protocol 12”, *Equal Opportunities Review*, Vol. 105, May 2002, available at:

<http://www.eortrial.co.uk/default.aspx?id=http://www.eortrial.co.uk/default.aspx?id=1062225>.

<sup>17</sup> Article 1(1), Protocol 12 to the European Convention on Human Rights.

rights guaranteed in those Covenants “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Apart from this obligation, and even more relevant to the issue of ratification of Protocol 12, is the fact that, under Article 26 of ICCPR, the UK has an obligation equivalent to that provided in Protocol 12:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

As the UN Human Rights Committee has stated, Article 26 enshrines an autonomous, stand-alone right to non-discrimination in all fields:

*In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.<sup>18</sup>*

As the Explanatory Notes to Protocol 12 make clear, Article 14 ECHR is “limited in comparison with those provisions of other international instruments”, including in particular Article 26 of ICCPR. Moreover, the Explanatory Notes specify the additional scope of protection provided under Article 1 of the Protocol in a way which closely parallels the description of the obligations arising under Article 26 provided by the HRC. The Explanatory Notes state:

*In particular, the additional scope of protection under Article 1 concerns cases where a person is discriminated against:*

- i. in the enjoyment of any right specifically granted to an individual under national law;*
- ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;*
- iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);*
- iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).<sup>19</sup>*

In addition to its general obligation to respect, protect and fulfil the right to non-discrimination under Article 26 of ICCPR, the UK has obligations under Article 2 of ICESCR to guarantee the enjoyment of economic, social and cultural rights without discrimination. The scope of Article 14 ECHR is insufficient to meet the obligation to prohibit discrimination in respect of these rights which arises under ICESCR.

---

<sup>18</sup> UN Human Rights Committee, *General Comment 18: Non-Discrimination*, 1989, Para 12.

<sup>19</sup> Protocol 12 to the Convention on Human Rights, *Explanatory Report*, Para 22, available at: <http://www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm>.

Thus, ratification of Protocol 12 would not add new substantive commitments to UK's existing obligations under international instruments. Additionally, the ratification and incorporation of Protocol 12 would be consistent with the UK's obligations under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination Against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD) which contain specific provisions to ensure that persons enjoy equality irrespective of race, sex or disability.

*Ratification of Protocol 12 is consistent with recent developments in UK equality law*

Since Protocol 12 was opened for signatures in 2000, there have been significant developments in the UK's domestic law on equality and non-discrimination, culminating in the adoption of the Equality Act 2010 (the Equality Act). ERT supports the Equality Act and the unified approach to equality it seeks to secure. The Act is a step forward to combating discrimination and reducing inequality in Great Britain, and is an important measure to ensure the UK complies with its international legal obligations. Under the Equality Act, individuals have a right to non-discrimination on the basis of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation in employment, access to services and public functions, housing and education.

The ratification of Protocol 12 and its incorporation into UK law through the HRA would be a significant step in aligning the HRA with the new level of protection provided under the Equality Act, and in ensuring consistency of protection for individual victims of discrimination. The Equality Act provides expansive protection from discrimination in a number of important areas of life. However, one of its weaknesses is that it allows significant exceptions for public sector actors, in respect of parliament, legislation, judicial functions and areas of education, health services and immigration.<sup>20</sup> Without a more expansive right to non-discrimination in the HRA, there is a gap in the legal protection from discrimination in the UK with respect to actions undertaken by the state and an inconsistency between the level of protection which individuals have from discrimination by private and state actors. Ratification and incorporation of Protocol 12 would be an important step towards resolving this inconsistency, by ensuring that the levels of protection afforded in these two sets of circumstances are consistent. Professor Sandra Fredman, writing before the Equality Act was adopted, indicated how the ratification of Protocol 12 would be consistent with the efforts to harmonise equality law in the UK through enactment of a single equality Act:

*Protocol 12 is not a substitute for such harmonisation, since it only applies directly to public authorities. Nevertheless, it would provide a welcome unifying theme, akin to the constitutional guarantee of equality, which we have so far been lacking.<sup>21</sup>*

Finally, ERT considers that in addition to ensuring consistency between the UK's international and domestic obligations in this area, and ensuring greater consistency between the protection from discrimination by individuals and by the state, the ratification of Protocol 12 would be a natural evolution of the law related to equality. Such a move would fill some of the remaining gaps in the domestic legal protection from discrimination which is available under UK law and would underpin the protections provided in the Equality Act.

## **Conclusions**

As stated above, ERT endorses the view that the UK does not need a new Bill of Rights. The Human Rights Act 1998 is a Bill of Rights. Moreover, ERT believes that both the rights specified and the mechanisms provided to make these rights effective through establishing judicial oversight and requiring public bodies to act in conformity with the rights are an essential, non-negotiable minimum standard for the protection

---

<sup>20</sup> *Ibid.*, Schedule 3.

<sup>21</sup> See above, Note 17.

of human rights in the UK. As such, ERT opposes any proposal to repeal, regressively amend or weaken the Human Rights Act.

However, as an organisation concerned to ensure the highest standard of protection for the rights to non-discrimination and equality, ERT urges the government to consider signing and ratifying Protocol 12 of ECHR which provides an autonomous right to non-discrimination, and take steps, in due course, to give effect to Protocol 12 in the domestic legal order, using the power provided under section 1(4) of the HRA.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'D Petrova', written in a cursive style.

**Dimitrina Petrova**  
Executive Director  
Equal Rights Trust