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<p>SUGGESTIONS FROM THE 2001 IWG REPORT ?</p> <p>MODELS OF ENFORCEMENT - OPTIONS-</p>	<p>OPTIONS AS REGARDS ENFORCEMENT BODIES</p>	<p>METHODS OF ENFORCEMENT</p>	<p>Potential Problems/Benefits</p>
<p>1. New Bill of Rights for Northern Ireland. Involves repealing HRA. There would be a single document that incorporates both the ECHR and all supplementary rights. The Belfast Agreement explicitly calls for a BOR that includes the ECHR and a set of supplementary rights.</p>	<p>This option could make enforcement more effective. There could be a Human Rights Court with jurisdiction across all rights plus other innovative enforcement mechanisms (see column three)</p>	<p>Unenforceable? It is unclear how a NI BOR would affect UK wide legislation – could legislation be struck down or declared incompatible in relation to NI but remain in force in the rest of the UK?</p>	<p>Requires the repealing¹ or amendment of the HRA – neither option is attractive as would detract from the “particular circumstances” argument of NI? One benefit is that it would allow for alternate ways of drafting so that enforcement mechanisms are spelt out, right by right.</p>
<p>2. New BOR for NI existing as two pieces of legislation – an amended HRA and a “Supplementary Rights for NI Act”</p>	<p>The advantage of this model is that legislation could provide for a range of enforcement mechanisms appropriate to the nature of the rights, e.g. those which would be closest to the rights in the ECHR, such as additional protections in respect of criminal trials, could be enforced in the same way as under the HRA. Different enforcement mechanisms could be provided for rights of a more socio-economic nature.</p>	<p>Judicially enforceable (body for enforcement as per column two choice)</p>	<p>Requires the repealing or amendment of the HRA. Create the appearance of continuity with present legal structures. Could provide for a coherent enforcement of a broad range of rights. Disadvantage – potential complexity and lack of accessibility. With two different pieces of legislation, form might dictate substance, i.e. pre HRA mechanisms would dictate, to some extent, how some new rights (e.g. new fair trial rights) would be enforced.</p>
<p>3. HRA un-amended plus a “Supplementary Rights for NI Act”. Perhaps with a common schedule of all rights. This model is not essentially different from Model Two except in that it does not involve any amendments to</p>	<p>Ordinary Courts for HRA enforcement; plus special courts for “Supplementary Rights Act” enforcement, plus other innovative enforcement mechanisms (see column three)</p>	<p>Innovative “process rights” (e.g. modeled on ‘equality duty’ formulation) again with shape of any judicial element dictated by whether models one or two or model three are</p>	<p>Allows for building on the HRA without changing it. Could also provide for a broad range of supplementary rights with a correspondingly broad range of</p>

¹ In terms of repealing the HRA, there would be legal implications in terms of jurisdiction over ECHR matters, which would have to go back to the ECtHR.

<p>the HRA. It would remain possible to create a schedule restating the ECHR and the supplementary rights and to include formulations suitable for a preamble in a general interpretation clause – e.g. “This Act, when read together with the HRA as it applies to N, shall be known as the BOR for NI”.</p>		<p>chosen.</p> <p>NB. All of these are possible in some form under any of the models in column one, and using either of the options in column two.</p>	<p>enforcement mechanisms. However, enforcement mechanisms other than those in the HRA would only be applicable to “supplementary rights”.</p> <p>Problems – as with Model Two; difference in enforcement mechanisms. However, these difficulties would not be insurmountable and would not be essentially different from those which already exist under the various anti-discrimination statutes.</p>
<p>OTHER ISSUES FOR IWG 2007/8:</p> <p>The relationship with the HRA has the potential to impact on many other areas the IWG has to consider (the group may wish to consider discussing these issues further when discussing other topics).</p>	<p>NOTE: The issues around enforcement remain as commented on by the IWG 2001, detailed above. The wider question is the extent to which enforcement and entrenchment issues impact on other issues. All areas discussed below also impact on any discussion around “implementation”.</p>		
<p>Examples of areas of potential impact:</p>	<p>Examples of possible impact:</p>	<p>Examples of possible solutions :</p>	<p>“A Bill of Rights for Britain?” ‘JUSTICE’ DISCUSSION PAPER FEB ’07</p>
<p>- Entrenchment</p>	<p>Potential for subsequent Parliaments to amend/repeal the BOR;</p> <p>The degree of “entrenchment” of any BOR could impact on any “remedies” which courts may be able to impose; in fact, “entrenchment” is a predominantly cross-cutting theme.</p>	<p>A fundamental principle of Parliamentary sovereignty is that no Parliament can bind successors – therefore ANY bill passed by Westminster can be overruled. Westminster could, however, prevent the NIA from repealing the BOR.</p> <p>At best, at Westminster level, a NI BOR could benefit from the status of a</p>	<p><u>Enforcement/entrenchment</u></p> <p>Discusses 4 models of enforcement</p> <p>1. <i>Judicial entrenchment with Supreme Court strike-down power:</i> courts able to strike down incompatible legislation. This is the model in most Council of Europe countries, including Germany.</p>

		<p>“constitutional statute” so that it could only be overturned by EXPRESS rather than implied language in any subsequent statute.</p> <p>Other possible approach: A NI BOR which is entrenched by both Britain and the Republic of Ireland thereby negating the likelihood of subsequent Westminster Parliaments repealing or amending the NI BOR</p>	<p>Which provides for judicial enforcement in its own constitution. Such a system only allows a subsequent political decision to reverse the outcome of a judicial decision to strike down legislation via changing the constitution through designated procedures. (Works best in the context of written constitution);</p> <p>2. <i>Judicial entrenchment subject to legislative override</i>: involves the use of a “notwithstanding clause” procedure effectively providing for judicial power to declare legislation invalid, but enabling the legislature to override the application of a right to particular legislation in specified circumstances. (as in the Canadian Charter of Rights and Freedoms 1982 which allows the Parliament or any provincial legislature to declare, for renewable five-year periods, that legislation should be given effect by the courts notwithstanding the fact that it infringes certain rights).²</p>
<p>- Remedies</p>	<p>Under the BOR could the courts be given greater powers to “strike down” primary legislation? At present, under the HRA, only secondary legislation can be struck down while “declarations of incompatibility” can be made in relation to primary legislation. If the BOR allowed for primary legislation to be struck down, the possible scenario of Westminster legislation not applying in NI but remaining in the rest of the UK. This may well impact on the</p>	<p>Such an approach would be problematic in constitutional terms as it would interfere with parliamentary sovereignty.</p>	<p>3. <i>Judicial declarations with legislative response</i>: This is the modified system employed in the UK in relation to the HRA. Of 17 declarations of incompatibility made so far, each one has triggered new legislation or been overturned on appeal. However, Parliament could decide to ignore such a declaration and the matter would then face</p>

² In fact, the political stigma attached to the use of the particular section allowing for this has ensured that the Federal Parliament has never employed it.

	<p>beneficial “dialogue”, facilitated by the HRA, which currently exists between the UK and ECtHR (as discussed last week).</p> <p>Alternatively, two other options exist :</p> <ol style="list-style-type: none"> 1. BOR could enable declarations of incompatibility with Westminster legislation to be made while also having the power to declare legislation of the NIA “invalid; 2. BOR could enable the courts to declare both acts of the NIA and acts of the Westminster Parliament “incompatible with any new BOR. 	<p>This option would not create constitutional difficulties. The NIA is a devolved assembly and has limited legislative authority. Its legislation is already required to be compatible with the HRA.</p> <p>This model may better preserve the democratic balance in NI, as it would be the NIA and not the courts which would make the ultimate decision regarding whether to repeal legislation deemed invalid with the BOR. This model would also continue the “dialogue” between the NIA and the NI courts around the BOR (replicating the success of the HRA in this regard).</p>	<p>appeal to the ECtHR. NOTE: In relation to non-ECtHR rights in a BOR, there would be no further appeal to another court.</p> <p>4. <i>Interpretative tool only</i> : some BOR simply share the status of ordinary legislation and operate solely as a tool of interpretation, as in New Zealand. – the disadvantages are that it can be seen as little more than a symbolic gesture. However, the NZ courts have recently stated to imitate the HRA model by issuing “declarations of inconsistency”.</p> <p><u>Rights in relation to UK law</u></p> <p>In “dualist systems like the UK the state is usually bound to comply with ratified international treaties but the courts are not bound to apply them in the absence of incorporating legislation (e.g. HRA). A BOR represents an opportunity to consider some form of judicial duty to take international law into account in decision making. (e.g. SA constitution provides that, in interpreting its BORs, courts “must” consider international law and “may” consider foreign law.)</p> <p><u>Amendability</u></p> <p>The options:</p> <ol style="list-style-type: none"> 1. If the BOR was enacted within a regular Act of Parliament, it would be capable of amendment following a simple majority in the House of
<p>- Application</p>	<p>The issue of application under section 6(3) of the HRA was intended to result in application of the Convention to those performing privatized functions of government and where contractors are performing acts on behalf of the government. As highlighted in discussions last week, the recent House of Lords case of <u>YL</u> did not result in section 6(3) (b) being interpreted in that way.</p> <p>It is also of note that section 75 does not apply to schools.</p>	<p>Examples:</p> <p>USA – very restricted application in the Constitution. Only applies to very clear federal or state actors;</p> <p>Ireland – very generous application, where constitutional rights have very broad “horizontal” application to private actors.</p> <p>One possible solution is to draft a “broad application provision”. The difficulty is that, as demonstrated by the YL case, it may be open for the courts to narrow and exclude parties originally intended to fall within the BOR application provisions.</p>	<p>them in the absence of incorporating legislation (e.g. HRA). A BOR represents an opportunity to consider some form of judicial duty to take international law into account in decision making. (e.g. SA constitution provides that, in interpreting its BORs, courts “must” consider international law and “may” consider foreign law.)</p> <p><u>Amendability</u></p> <p>The options:</p> <ol style="list-style-type: none"> 1. If the BOR was enacted within a regular Act of Parliament, it would be capable of amendment following a simple majority in the House of

		<p>Other alternative:</p> <ul style="list-style-type: none"> - powers could be given to the executive to designate, by Order, those bound by the BOR (as enjoyed by the SS under the FOI Act 2000); - a schedule could detail all entities bound by the BOR. <p>See further South African BOR, section 8 – pg 43 BD.</p>	<p>Commons. Judicial and academic opinion has tended to accord a special (de facto) constitutional “status” to certain Acts, e.g. the European Communities Act 1972 and the HRA. The HRA contains no express provision preventing “implied repeal” by subsequent incompatible legislation, although this may be the effect of its key provisions. (Judges have found that there is a difference between</p>
<p>- Standing</p>	<p>Under section 7 of the HRA, a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful (by section 6(1)) may bring proceedings relying on the Convention only if he is (or would be) a victim of the unlawful act.</p> <p>This requirement of “victimhood” reflects the requirement under the ECHR. The practical effect of this provision has been to substantially negate the opportunities for representative groups/public interest bodies to bring cases under the HRA alleging Convention violations.</p>	<p>A possible solution would be to broaden the standing provisions to enable a wider group to apply to enforce rights under the BOR. Such an approach is apparent in the South African BOR, section 124 – pg 124 BD.</p> <p>The difficulty with this approach is that the BOR may be more widely applicable than the Convention – this could cause confusion as only the rights supplementary to the Convention which are contained within the BOR would have this broad application. It may well be open to argument that, should BOR provisions be relied on, then the door is open legally to argue that the courts should “interpret” these additional rights against the backdrop of appropriate Convention rights – therefore, the courts would be able to consider the applicability of these additional rights through the “prism” of the Convention. (a further advantage of such an approach is that it would not require</p>	<p>ordinary statutes which could be impliedly repealed and constitutional statutes such as the ECA, which could not – see <i>Thoburn</i>.</p> <p>2. A procedurally entrenched BOR would be problematic in the UK system owing to the Principle of Parliamentary sovereignty. There is some doubt about ways in which Parliament might bind its successors in order to restrict subsequent repeal or amendment. The following are mechanisms that might be used, alone or in combination, in order to control direct amendment of the provisions of a BOR:</p> <p><u>Amending the Parliament Acts:</u> The Parliament Act allows the HC, in certain circumstances, to overrule the HL. A requirement of approval by both Houses of Parliament for all proposed amendments to a BOR might represent the closest to constitutional entrenchment possible under British constitutional</p>

		amendment of the HRA).	arrangements. ³
- Justiciability	Should the BOR enable rights relating to, for example, socio-economic rights, to be justiciable, this should not impact on the application of the HRA. It remains open for any BOR to provide a “right by right” enforcement mechanism, thereby limiting any judicial mis/interpretation. As is available in the HRA, the ability to make declarations of incompatibility, as outlined above, could be available under a BOR, as could damages.	(Aoife Nolan’s paper provides examples of justiciability around socio-economic rights – distributed by Aideen previously.)	<u>Requirement of special process for amendment:</u> For example, the provision in the Northern Ireland Constitution Act 1973, stating that “in no event will Northern Ireland... cease to be part of the UK without the consent of the majority of the people of NI voting in a poll held for the purposes of this section.”
- Interpretation	<p>The HRA grants very strong interpretative power to the judiciary. Section 3 HRA reads: “<i>So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights</i>”.</p> <p>The tension in “interpretation” is usually always between the legislature and the judiciary – too free an approach by the judiciary and they could be said to be taking on the legislative power of the democratically elected executive; and yet the judiciary must have the ability to ensure they interpret in a Convention/BOR compliant way.</p>	<p>The case of <i>Ghaidan v Godin-Mendoza</i> [2004] 2 A.C. provides the leading principles: the courts will take a vigorous approach to interpretation to render legislation Convention-compliant but they will not adopt a reading which is directly contrary to the scheme or wording of the legislation.</p> <p>Options in interpretation:</p> <ol style="list-style-type: none">1. EU law – stronger interpretative interpretation;2. ECHR Act 2003 ROI – weaker interpretative obligation, which reads: “...in so far as is possible, subject to the rules of law relating to such interpretation and application...”	<p><u>A simple declaration against amendment:</u> As in the Acts of Union 1707 merging the Scottish parliament with the already conjoined parliaments of England and Wales. ... The issue of how Parliamentary sovereignty could be modified so that the doctrine of implied repeal would no longer apply and the BOR could be amended only by a special majority remains problematic – “Its resolution is a matter for consultation”.</p> <p><u>Derogations</u> A similar voting procedure might be used for derogations as for amendments. “In our view it would be desirable for a BOR to state</p>
- Devolved and Non-devolved issues	This area impacts on the HRA only insofar as	If matters remain un-devolved,	

³ Drafting a provision in a BOR that future amendments will require the consent of both Houses of Parliament should be straightforward, requiring a reference to the 1911 Parliament Act excepting amendments to the British BOR from the terms of its provision.

	<p>within the areas discussed above.</p> <p>Issue - How a BOR can deal with matters that do not fall within the legislative jurisdiction of the NIA? While this issue is pending, it highlights the importance of the HRA in enabling Convention rights to be enforced in relation to non-devolved matters.</p>	<p>provision could be made within a BOR that would enable matters to become “live” should devolution take place.</p>	<p>precisely the duration for each derogation, up to a maximum of one year, with any extension of time requiring agreement of both houses... derogations .. be no less stringent than provided for in the ECHR, i.e. ‘in time of war or other emergency threatening the life of the nation’”.</p>
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