

Review of the Implementation of the Human Rights Act

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Executive Summary

Impact on UK law

- Decisions of the UK courts under the Human Rights Act have had no significant impact on criminal law, or on the Government's ability to fight crime.
- The Human Rights Act has had an impact upon the Government's counter-terrorism legislation. The main difficulties in this area arise not from the Human Rights Act, but from decisions of the European Court of Human Rights.
- In other areas the impact of the Human Rights Act upon UK law has been beneficial, and has led to a positive dialogue between UK judges and those at the European Court of Human Rights.
- The Human Rights Act has not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary.

Impact upon policy formulation

- The Human Rights Act has had a significant, but beneficial, effect upon the development of policy by central Government.
- Formal procedures for ensuring compatibility, together with outside scrutiny by the Parliamentary Joint Committee on Human Rights, had improved transparency and Parliamentary accountability.
- The Human Rights Act leads to better policy outcomes, by ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered. It promotes greater personalisation and therefore better public services.

Myths and misperceptions

- The Human Rights Act has been widely misunderstood by the public, and has sometimes been misapplied in a number of settings.
- Deficiencies in training and guidance have led to an imbalance whereby too much attention has been paid to individual rights at the expense of the interests of the wider community.
- This process has been fuelled by a number of damaging myths about human rights which have taken root in the popular imagination.

The way forward

- The Government remains fully committed to the European Convention on Human Rights, and to the way in which it is given effect in UK law by the Human Rights Act.
- The Government is conducting a thorough review of how police, probation, parole and prison services balance public protection and individual rights and, if necessary, will legislate to ensure that public protection is given priority.

- There will be a major push led by the DCA for the provision of better and more consistent guidance and training on human rights within Departments, with specific reference to areas in which such guidance is currently lacking.
- The DCA will revise and strengthen generic guidance on human rights for public sector managers, placing particular emphasis upon safety arguments.
- The Government must take a proactive, strategic and co-ordinated approach to human rights litigation, so that it has the maximum possible impact on future case law under the Human Rights Act.
- The Government will lead a drive to ensure that the public as well as the wider public sector are better informed about the benefits which the Human Rights Act has given ordinary people, and to debunk many of the myths which have grown up around the Convention rights.

Introduction by the Lord Chancellor

The Prime Minister has asked me to lead a review looking specifically at problems with the implementation of the Human Rights Act. The review was commissioned in the immediate aftermath of the Inquiry Report (by HM Chief Inspector of Probation) into the release of Anthony Rice, which had suggested that human rights arguments, and the Human Rights Act, had been contributory factors in the events leading to the murder of Naomi Bryant.

Impact on UK law

The impact of the Human Rights Act upon the development of UK law has been significantly less, and significantly less negative, than some predictions made for it from 1997 onwards. Arguments based on the Human Rights Act have been raised across a whole range of civil and criminal litigation, and have been explicitly considered in about one third of the cases considered by the House of Lords since the Act came into force. But in many instances the courts would either have reached the same conclusion under common law, or found that the decision being challenged had been properly taken. And, in very many cases, human rights arguments have been rejected by the courts as being either misconceived or irrelevant to the case.

Two cases highlight the impact which human rights have had upon UK law. First, in *A and Others v The Home Secretary* the House of Lords decided that the detention without trial of foreign nationals under the Anti-Terrorism, Crime and Security Act 2001 was incompatible with Article 14 of the European Convention on Human Rights because it discriminated on the grounds of nationality or immigration status. However, all but one of the nine members of the court decided that the Government had been entitled to conclude that there was (in the words of the Convention) a “public emergency threatening the life of the nation” and – since UK courts do not have the power under the Human Rights Act to strike down primary legislation – the applicants remained in detention. The Government therefore had time to identify alternative ways of ensuring that the public continued to be protected, by introducing the regime of Control Orders passed by Parliament in the Prevention of Terrorism Act 2005. That system is currently being considered by the courts.

The other case concerns the UK’s ability, in law, to deport or remove those who threaten us or who have entered illegally or whose claim for asylum has failed. A proportion of those eligible for deportation or removal are not removed because the country to which they would be returned is considered unsafe, and because we are not currently able to balance the threat posed by an individual to national security against the risk of mistreatment if the individual concerned is returned to their own country. We are prevented from making this balance by the judgement in the European Court of Human Rights in 1996 in the case of *Chahal v United Kingdom*. We are seeking to change this through our intervention in a case before the European Court of Human Rights. We want to be able to take account of the threat to national security and also to be able to rely on assurances given by the returnee country. However, the Human Rights Act makes no difference in this instance, not only because the *Chahal* decision predates it, but also because it is an example of the Strasbourg Court directly interpreting Article 3 of the European Convention on Human Rights.

In general, therefore, the Human Rights Act has not seriously impeded the achievement of the Government's objectives on crime, terrorism or immigration, and has not led to the public being exposed to additional or unnecessary risks. In addition, the UK courts have recognised that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the legislature or the executive. Whether and to what extent the courts will recognise a "discretionary area of judgment" depends upon the subject matter of the decision being challenged. But policy decisions made by Parliament on matters of national security, criminal justice and economic policy are accorded particular respect.

There is no doubt that the Human Rights Act has also established a "dialogue" between English judges and the European Court of Human Rights. The close analytical attention paid by the English courts to the European Convention on Human Rights case law is respected in Strasbourg, and has become influential on the way it approaches English cases. This in part accounts for the significant reduction in a number of adverse decisions against the UK Government by the European Court of Human Rights since the Human Rights Act came into effect.

Moreover, there have been only 11 occasions upon which the superior courts have upheld Declarations that Acts of Parliament were incompatible with the Convention rights, and on each occasion Parliament has passed further legislation putting the law back into conformity. Similarly, the courts have used Section 3 of the Act (which requires the courts, if possible, to interpret legislation in a way compatible with the Convention), on only 12 occasions. Arguments that the Human Rights Act has significantly altered the constitutional balance between Parliament, the Executive and the Judiciary have therefore been considerably exaggerated.

Impact upon policy formulation

The Human Rights Act has exerted a more powerful influence upon policy formulation by Government, in three ways:

- through formalisation of the **process** for ensuring compatibility with Convention rights, including the requirement for a positive statement of compatibility for all Bills, a memorandum required for Bills to be approved for introduction and the scrutiny of the Joint Parliamentary Committee on Human Rights;
- in response to **litigation** which may force a change in policy or a change in the method by which a particular policy is delivered; and
- through changes in **behaviour** driven by the greater immediacy of the Act, which makes it unlawful for a public authority to act in a way incompatible with the Convention rights.

Overall, the Human Rights Act can be shown to have had a positive and beneficial impact upon the relationship between the citizen and the State, by providing a framework for policy formulation which leads to better outcomes, and ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered both by those formulating the policy and by those putting it into effect. In particular, the evidence provided to the DCA by Departments shows how the Act has led to a shift away from inflexible or blanket policies towards those which are capable of adjustment to recognise the circumstances and characteristics of individuals.

Myths and misperceptions

But the purpose and effect of the Human Rights Act has been widely misrepresented and misunderstood. Misapprehensions abound not only among the general public, but also among public servants. The events leading to the murder of Naomi Bryant provide a very conspicuous and sobering example of the operational problems which have arisen for key agencies as a result of these misconceptions, and of the failure by Departments across Government consistently to ensure that key decision takers have access to the best possible training, guidance and legal advice. It is not sufficiently appreciated that the State has an overarching duty (deriving from Articles 1 and 2 of the European Convention on Human Rights itself) to maintain the safety and security of its citizens.

So far as the wider public are concerned, there are three different types of myth in play. First, there are those which derive from the reporting (and often partial reporting) of the launch of cases but not their ultimate outcomes. This leaves the impression in the public mind that a wide range of claims are successful when in fact they are not – and have often been effectively laughed out of court. The most notable example in this category is the application made by Denis Nilson in 2001 to challenge a decision of the Prison Governor to deny him access to pornographic material. The case is now often cited as a leading example of a bad decision made as a result of the Human Rights Act. In fact it failed at the very first hurdle.

Secondly, there are pure urban myths: instances of situations in which someone (often it may not even be clear who) is reported to have said that human rights require some outcome or other, and this is subsequently trotted out as established fact. A recent example is the case in which food, drink and cigarettes were supplied to Barry Chambers who, in the course of evading arrest, had taken refuge on a roof of a domestic dwelling. The suspect had, of course, no “human right” to receive food in these circumstances, but instead, as part of a police operational decision aimed at resolving a stand-off quickly and peaceably, his demands for food and other refreshments were met as part of a negotiating strategy aimed (successfully in the event) at coaxing him down from the roof without injury to himself or others.

Finally, there are rumours and impressions which take root through a particular case or decision, and which then provide a backdrop against which all subsequent issues of the type in question are played out. Examples here are false suggestions that the Human Rights Act would prevent the filming of school nativity plays, or prevent teachers from putting plasters on children who have cut themselves. Such stories have undoubtedly had an accumulative and corrosive effect upon public confidence both in the Human Rights Act and in the European Convention on Human Rights itself.

A “UK Bill of Rights”

Before setting out the way forward, it is worth considering briefly an option which has been subject to recent comment. This would be the option of repealing the Human Rights Act and enacting a separate set of fundamental rights which would not, in law, be connected to the European Convention on Human Rights. The suggestion is that these rights could be given some sort of entrenched or superior status in our constitution.

One perceived advantage of this option is that we would have a charter of rights designed and drafted with reference exclusively to British values and priorities. They would be interpreted by UK courts alone, and not in Strasbourg. But there are two major difficulties.

The first is the effect on Parliamentary sovereignty. If the rights were entrenched, so that Parliament cannot amend or violate them, that would remove a central pillar in our constitution. We would lose Parliamentary sovereignty, and the supremacy of the elected House of Commons. On questions of rights and morality, the ultimate arbiter would be the judiciary. Future Parliaments might be unable to act to protect national security. The Human Rights Act avoids that. It allows Acts of Parliament to become law even if they are not compatible with the European Convention on Human Rights.

The second difficulty is the uncertainty and confusion that would result from having two sets of fundamental rights. On the one hand, the Government would remain obliged to comply with all the rights in the European Convention on Human Rights. And the citizen would remain able to take a case to Strasbourg. On the other hand, Government, citizens and courts would be confronted by a separate (but presumably overlapping) set of rights for the purposes of domestic law.

The precise effects of this option must be a matter of speculation. Our courts would certainly be urged to have regard to Strasbourg decisions, even where the domestic rights do not precisely correspond with those in the European Convention on Human Rights. That is likely to lead to a prolonged period of uncertainty in the case law, and to expensive and unnecessary litigation. Decision makers throughout the public sector would have to bear in mind two sets of rights, which might make them more cautious and risk-averse, rather than less. The European Court of Human Rights would probably pay less respect to our case law, which would result in greater scrutiny of UK cases, and more adverse findings. And our citizens would no longer have a single clear catalogue of their rights and freedoms, which the Human Rights Act provides and which is shared by 800 million people across Europe.

The way forward

The Government remains fully committed both to the European Convention on Human Rights, and to the way effect is given to it in the UK by the Human Rights Act 1998. But it is necessary to ensure that agencies (particularly within the criminal justice system) accord appropriate priority to protecting the public when they are balancing rights. The Home Office is conducting a thorough review of how police, probation, parole and prison services balance public protection and individual rights. If necessary, legislation will be introduced to ensure public protection is given priority and the Government will also ensure it is supported by robust and effective administrative processes.

In addition, and to address the way in which the effect and requirements of the European Convention on Human Rights have been misunderstood and misapplied, the DCA will lead a major push on guidance and training within Departments, and within wider public sector agencies. A Ministerial Group will ensure that Departments and Agencies whose work involves decisions affecting the security of the public will urgently analyse and revise the guidance and training they provide for front line staff. In parallel, the DCA will itself revise and strengthen its own generic guidance on human rights for public sector managers, placing particular emphasis on public safety.

The Government will also continue to take a robust and co-ordinated approach to legal advice and litigation. Guidance and training from Government lawyers will contribute to this, as will guidance to lawyers and officials in the wider public sector. The Government will continue to emphasise in its litigation strategy the importance of public safety obligations under the Human Rights Act. The Government will also set up a web-based hot line for front line staff (like the police) to get clear advice on the application of human rights.

Finally, there is an urgent need for the public to be better informed about the benefits which the Human Rights Act has given ordinary people, and to debunk many of the myths which have grown up around the Convention rights and the way they have been applied, both domestically and in Strasbourg. The European Convention and Court of Human Rights occupy a proud place in the new order which followed the Second World War, and the UK played a leading role in their creation. The Government will ensure that the generations of today and the future understand their continuing importance to our democracy.

Charlie
Falconer

LORD FALCONER OF THOROTON

1. Background

The European Convention on Human Rights and the Human Rights Act

The rights set out in the European Convention on Human Rights derive most directly from the aspirational terms of the Universal Declaration of Human Rights issued by the United Nations in 1948; the notion of internationally recognised freedoms having been enunciated in 1941 by Churchill and Roosevelt in the Atlantic Charter. Building upon that base, the International Committee of the Movements of European Unity organised a Congress of Europe in The Hague in 1949 and the European Convention on Human Rights (drafted substantially by Sir David Maxwell-Fyfe) was opened for signature in 1950 and came into force in 1953. The UK was among the first to sign and to ratify the Convention, and allowed individual rights of access to the European Court of Human Rights in 1965.

Although individual access to the European Court of Human Rights had made it possible for human rights cases to be pursued by those alleging breaches of their Convention rights, the time taken and the expense involved meant that only the most serious allegations could be dealt with at Strasbourg. With that in mind the Government undertook, whilst in Opposition, a consultation exercise as a result of which a Manifesto Commitment was made to introduce the Human Rights Act. On taking Office in 1997, the Government published the White Paper *Bringing Rights Home* leading to the Human Rights Act. The Act has made rights from the European Convention on Human Rights enforceable in our own courts, an arrangement which is much quicker and simpler than that which existed before the Act.

The Government has recently reasserted its commitment to the Human Rights Act, and the UK's continued membership of, and participation in, the Council of Europe is accepted by all the main UK political parties. Since the Act came into force in 2000 the UK has reaped the benefits of the greater transparency and immediacy of human rights protection, not only in Strasbourg, but also at the United Nations.

The attached **Annex** lists the Convention rights which are set out in the Human Rights Act, and explains the meaning of the terms “absolute”, “limited” and “qualified” in relation to the Convention rights.

Background to this review

The Prime Minister has asked the Lord Chancellor to lead a review looking specifically at problems with the implementation of the Human Rights Act, covering three areas:

- firstly, the need for clearer cross-Government guidance on the balance that needs to be struck by officials when making decisions with human rights implications, ensuring that public safety is at the forefront of decision making;
- secondly, whether primary legislation is needed either to amend the Human Rights Act 1998 or other legislation; and
- thirdly, how to improve public confidence in the Human Rights Act and its operation.

This report represents the first stage in the response to this commission. It is based on evidence provided to DCA by departments and a comprehensive analysis of case law involving the Human Rights Act.

Structure of this report

This report begins by considering the impact of the Human Rights Act 1998 upon the substantive law of England and Wales through decisions of the courts since the Act came into force in October 2000 (Section 2) and its direct impact on policy formulation and decision making both within central Government and by the wider public sector (Section 3). The report then considers the more indirect effects of the Act, including the way decisions and processes have been influenced either by misconceptions about what the Act requires; or by an over-cautious approach driven by a fear of litigation (Section 4). These effects are evaluated and summarised in Section 5. The report then considers possible solutions to the problems identified (Section 6).

This report mainly considers the law in the courts of England and Wales and the practices and procedures of the UK Government. In Scotland, Wales and Northern Ireland, not only are key areas of responsibility devolved, but there would also be implications for the legislation establishing the devolution settlements if the Human Rights Act were to be significantly amended.

2. Impact on development of substantive law

- Decisions of the UK courts under the Human Rights Act have had no significant impact on criminal law, or on the Government's ability to fight crime.
- The Human Rights Act has had an impact upon the Government's counter-terrorism legislation. The main difficulties in this area arise not from the Human Rights Act, but from decisions of the European Court of Human Rights.
- In other areas the impact of the Human Rights Act upon UK law has been beneficial, and has led to a positive dialogue between UK judges and those at the European Court of Human Rights.
- The Human Rights Act has not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary.

There is no settled consensus as to the impact of the Human Rights Act 1998 ("HRA") on decisions of the courts of England and Wales in the period of five years and eight months since it came into force.¹ There is no doubt that a substantial body of case law has been generated. No overall statistics are available but the comprehensive *Casetrack* database of appellate cases shows 552 cases under the "human rights" classification² over this period, being approximately 2% of the total number of cases determined by these courts. The highest density of HRA cases is in the House of Lords, concentrating as it does on new issues of principle. The HRA has been substantively considered in about one-third of the 354 cases which the House decided in this period and could be said to have substantially affected the result in about one-tenth of those cases. There are a number of reasons why the HRA does not affect the outcome of cases in which it is raised in argument. First, Convention rights may not be relevant on the facts of the particular case. For example, Diane Pretty's attempt to challenge the Director of Public Prosecution's refusal to provide an undertaking not to prosecute her husband if he assisted her to commit suicide failed because the European Convention on Human Rights did not contain an implied right to euthanasia (*R (Pretty) v DPP* [2002] 1 AC 800). The recent unsuccessful HRA challenge to the Hunting Act 2004 (*R (Countrywide Alliance) v Attorney-General* [2006] EWCA Civ 817) failed, in part, because Article 8 was not engaged at all. Second, even if Convention rights are engaged, the court may hold that interference with the right is justified. For example, it has been held that the present statutory regimes relating to matters as disparate as the supply of water (*Marcic v Thames Water* [2004] 2 AC 42), the regulation of the solicitors profession (*Holder v Law Society* [2003] 1 WLR 1059) and the preservation of embryos (*Evans v Amicus Healthcare* [2005] Fam 1) are compatible with the European Convention on Human Rights. In *R (Begum) v Denbigh High School* ([2006] 2 WLR 719) the House of Lords held that, if (contrary to the view of the majority) a school's refusal to allow a pupil to wear a jilbab at school interfered with her Article 9 rights, the interference was justified.

¹ This section does not seek to cover the case law of the courts in Scotland or Northern Ireland. For general studies of the impact of the HRA see F Klug and K Starmer, *Standing Back from the Human Rights Act: how effective is it five years on?* [2005] PL 716; Lord Steyn *2000-2005: Laying the Foundations of Human Rights Law in the United Kingdom* [2005] EHRLR 349. The fullest analysis of the case law is in M Amos, *Human Rights Law* (Hart, 2006).

² A case is given a "human rights" classification if it involves a substantial discussion of issues under the HRA.

Thirdly, arguments based on the HRA may not affect the outcome because the common law recognises similar rights to those found in the European Convention on Human Rights. This was a trend which was already apparent before the HRA came into force (when increasing reference was made to European Convention on Human Rights case law by the courts). The former Lord Chief Justice, Lord Woolf, has suggested that if the HRA had not been enacted, human rights would have been absorbed into the common law in any event as a result of “the changing legal environment and the increased importance attached to the rule of law around the globe”.³ This “development” of the common law in the direction of “fundamental rights” is evident in a number of areas. For example, the law of libel has been profoundly influenced by the increasing recognition of a “constitutional right” of freedom of expression, mirroring Article 10 of the European Convention on Human Rights (see, for example, the pre-HRA case of *Reynolds v Times Newspapers* [2001] 2 AC 127). The common law approach to “procedural rights” has also altered as a result of influences from the European Convention on Human Rights. For example, the common law test for bias has now been adjusted so that it is in line with the approach under the European Convention on Human Rights (see *Lawal v Northern Spirit* [2003] ICR 856). In short, in many cases, HRA arguments “go with the grain” of arguments based on the common law. The courts have increasingly been prepared to recognise “common law constitutional rights” similar in content to those found in the European Convention on Human Rights but independent of it. For example, the House of Lords’ conclusion in *A (No.2) v Home Secretary* ([2005] 3 WLR 1249) that the Special Immigration Appeals Commission in particular and the courts in general could not receive evidence obtained by torture was based not on the HRA, but on the common law, reinforced by international Conventions. It seems highly unlikely that the result of this case would have been any different before the HRA was enacted.

One further introductory point can be made about the HRA case law. There is no doubt that the HRA has established a “dialogue” between English judges and the European Court of Human Rights. The close analytical attention paid by the English courts to the European Convention on Human Rights case law is respected by the European Court of Human Rights and is influential on the way that it approaches English cases. An early example was the European Court of Human Rights’ refusal to follow its own decision in *Osman v UK* ((1998) 29 EHRR 245) in relation to negligence claims against the police (see *Z v UK* (2001) 34 EHRR 97) following consideration of the discussion of *Osman* by the House of Lords in *Barrett v LB Enfield* ([2001] 2 A.C. 550). In *Evans v UK* (Judgment, 6 March 2006) the European Court of Human Rights upheld the English courts’ view that the statutory scheme of the Human Fertilisation and Embryology Act 1990 was compatible with Article 8 and made express reference to the discussion of proportionality in the Court of Appeal. This position can be contrasted with the situation in earlier decades where there was little or no dialogue and provisions of English law which were clearly incompatible with Convention rights were upheld by the English courts, found to be in breach in Strasbourg and were, eventually, remedied by legislation many years later.

The volume of case law is such that even a brief survey would require a very substantial document. What follows is a snapshot of the case law under the HRA. It will be considered in three sections: first, general points about the approach of the courts in HRA cases, second some examples of the cases in specific areas of law and third the “remedies” granted by the courts in HRA cases.

³ See Lord Woolf, *Has the Human Rights Act made Judicial Review Redundant?*, ALBA Annual Lecture, 23 November 2005.

Human Rights Act: general points

Arguments based on the HRA have been raised across the whole range of civil and criminal litigation. The most important cases have been in the field of public law. In *R (Daly) v Home Secretary* ([2003] 1 AC 153, HL) it was held that although the HRA did not require the courts to review the merits of administrative decision, it did have to apply a test of “proportionality”. However, the courts recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the legislature or the executive. The term “discretionary area of judgment” is now preferred to “deference” (see, for example, *R (Pro-Life Alliance) v. British Broadcasting Authority* [2004] 1 AC 185, §§74-77) but the approach is the same – the courts seek to avoid substituting their own views on policy questions for those of the competent authorities.

Whether and to what extent the courts will recognise a “discretionary area of judgment” depends on the subject matter of the decision being challenged. Policy decisions made by Parliament on matters of national security (*Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 195) criminal justice (*R (Marper) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196) and economic policy (*R (Hooper) v Pensions Secretary* [2005] 1 WLR 1681) are accorded particular respect.

Under section 6(3)(a) of the HRA courts are themselves “public authorities” which must act compatibly with the European Convention on Human Rights. This has led to some application of Convention rights in cases between private bodies and some development of the common law. For example the rights under Articles 8 and 10 of the European Convention on Human Rights have been “absorbed” into the tort of breach of confidence creating a new private law claim for “misuse of private information” (*Campbell v MGN* [2004] 2 AC 457). However, the courts have not been persuaded that the HRA requires the development of a new freestanding tort of breach of privacy. The courts are obliged to interpret unfair dismissal legislation in accordance with the European Convention on Human Rights (*X v Y* [2004] ICR 1634). In general, however, the impact of the HRA on private law litigation has been very small.

Cases in specific areas

The specific areas of law in which cases have been decided include the following.

Counter-terrorism

In *A v Home Secretary* ([2005] 2 AC 68) it was held that the detention without trial of foreign nationals under section 23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with Article 14 because it discriminated on the ground of nationality or immigration status. However all but one of the nine members of the House of Lords decided that the Government had been entitled to conclude that there was a public emergency threatening the life of the nation (a view with which the Court of Appeal and the Special Immigration Appeals Commission had unanimously agreed). Moreover the net result under the HRA was that the applicants remained in detention, because the courts did not have power to strike down the primary legislation passed by Parliament, but only to grant a declaration of incompatibility. On both these issues the applicants are now pursuing an application to the European Court of Human Rights, illustrating that, whilst the HRA may have brought forward the moment of decision, ultimately the compatibility of the 2001 Act with the European Convention on Human Rights could in any event have been tested before the Strasbourg court. However, in *R (Gillan) v Home Secretary* ([2006] 2 WLR 537) the House of Lords

rejected the argument that the stop and search provisions of section 44 of the Terrorism Act 2000 were incompatible with the European Convention on Human Rights. It was held that the power to stop and search did not involve a deprivation of liberty under Article 5 and that Article 8 was not engaged. In any event, if Convention rights were engaged the interferences would be justified. In *Re MB* ([2006] EWHC 1000 (Admin)) the judge at first instance held that the procedures for judicial supervision of non-derogating control orders under section 3 of the Prevention of Terrorism Act 2005 were inadequate to comply with Article 6. In *Secretary of State for the Home Department v JJ, KK, GG, HH, NN and LL* [2006] EWHC 1623 (Admin) it was held at first instance that a group of non-derogating controls were unlawfully made because the obligations imposed by them amounted to a deprivation of liberty under Article 5. Both of these decisions are subject to an appeal.

Criminal law

In general the English criminal law has been found to be consistent with the European Convention on Human Rights – both seek to strike a “fair balance” between the demands of the general interests of the community and the requirements of the protection of the individual’s human rights (see *Brown v Stott* [2003] 1 AC 681, PC). The established law on delay (*A-G’s Reference (No.2 of 2001)* ([2004] 2 AC 72) and entrapment (*R v Looseley* [2001] 1 WLR 2060) and the common law offence of public nuisance (*R v Rimmington* [2006] 1 AC 459) have all be held to be compatible with the European Convention on Human Rights. An HRA challenge to the statutory provisions relating to the retention of DNA of cleared suspects was unsuccessful (*R (Marper) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196). The argument that Anti-Social Behaviour Orders constitute a “criminal charge” was rejected (*R (McCann) v Crown Court* [2003] 1 A.C. 787). In *R v Spear* ([2003] 1 AC 734) it was held that the present Court-Martial system is compliant with the European Convention on Human Rights.

Sentencing

In *Stafford v United Kingdom* ((2002) 35 EHRR 1121) the European Court of Human Rights revisited its own earlier case law and decided that the fixing of tariffs for lifers by the Home Secretary was a breach of the European Convention on Human Rights. Following that decision, the House of Lords has determined that statutory provisions relating to the determination of tariffs by the Home Secretary (*R (Anderson) v Home Secretary* [2003] 1 AC 837) and by judges (*R (Hammond) v Home Secretary* [2006] 1 AC 603) are incompatible with the European Convention on Human Rights. In contrast, the regime relating to young offenders held “At Her Majesty’s Pleasure” was compatible (*R (Smith) v Home Secretary* [2006] 1 AC 159).

Prisons

A policy allowing prison staff to search a prisoner’s legally privileged correspondence in his absence was incompatible with Article 8 rights (*R (Daly) v Home Secretary* [2001] 2 AC 532). The rule restricting a prisoner’s rights to publish details of his crimes was not in conflict with the prisoner’s freedom of expression (*Nilsen v HMP Full Sutton* [2005] 1 WLR 1028). The decision of the Prison Service to remove the appellant from a protected witness unit was not in breach of Article 2 (*R (Bloggs 51) v Home Secretary* [2003] 1 WLR 2724).

Immigration, asylum and deportation

It has long been established under the European Convention on Human Rights that Article 3 implies an obligation on a state not to expel someone from its territory (whether by extradition, deportation or any other form of removal and for whatever reasons) where substantial grounds are shown for believing that upon such expulsion he will face a real risk of being subjected to treatment contrary to Article 3 in the receiving country (see *Soering v UK* (1989) 11 EHRR 439). This principle has been considered on a number of occasions under the HRA. It has been held that, when the treatment is likely to derive from non-state agents, to come within the principle the claimant must show that the receiving country does not provide a reasonable level of protection against such harm (*R (Bagdanavicius) v Home Secretary* [2005] 2 AC 668). Furthermore, the principle does not place any “medical care” obligation on the state, so that expulsion of a person to a country where they will not receive proper healthcare for a fatal illness is not a breach of Article 3 (*N v Home Secretary* [2005] 2 AC 296). It has been held that the European Convention on Human Rights does not impose any obligation on the Home Secretary to consider foreign prisoners for parole (*R (Hindawi) v Home Secretary* [2005] 1 WLR 1102). Article 3 requires the Secretary of State to provide support to asylum seekers whose conditions are on the verge of reaching the necessary degree of severity (*R (Limbuella) v Home Secretary* [2006] 1 AC 396). Provisions of the Housing Act 1996 preventing local authorities taking into account the needs of children subject to immigration control was declared incompatible with the European Convention on Human Rights (*Westminster v Morris* [2006] 1 WLR 505). The statutory provisions restricting the rights of those subject to immigration control to enter into a civil marriage was declared to be incompatible with Articles 12 and 14, except in relation to illegal entrants (*R (Baiai) v Home Secretary* [2006] EWHC 823 and 1454 (Admin)). This decision is subject to an appeal. In *R (S) v Home Secretary* ([2006] EWHC 1111), the judge’s finding that the Secretary of State’s decision that it was inappropriate to grant discretionary leave to enter the United Kingdom to individuals responsible for hijacking an Afghan aeroplane was unlawful was not primarily based on HRA considerations. He did, however, also find that the policy on discretionary leave did not meet the requirement of “lawfulness” in Article 8 of the European Convention on Human Rights (that is, it was not a clear and publicly accessible rule of law) because it gave ministers such an open-ended discretion that it could not be foreseen how that discretion would be exercised in any given case.

In other cases involving Article 8 rights, the courts have recognised the need for a fair and effective system of immigration control. For example, in *R (Mahmood) v Home Secretary* [2001] 1 WLR 140, Laws LJ noted that firm immigration control requires consistency of treatment between one aspiring immigrant and another, such that it would be unfair to allow an individual, who has arrived without the required entry clearance, to remain unless he can demonstrate some exceptional circumstance which reasonably justifies his jumping the queue. Similarly, in *Huang v Home Secretary* [2006] QB 1 (which is presently on appeal to the House of Lords), the Court of Appeal held that Article 8 does not require an immigrant to be favoured for leave to remain, in a departure from the normal rules, other than in truly exceptional circumstances.

Family law

The power of the court to restrain publicity in cases relating to children has been clarified and recast in terms of Article 8 (*In Re S* (2005) 1 AC 593). After the HRA, it is no longer necessary to consider the earlier case law as to the existence and scope of the court’s inherent jurisdiction to restrain publicity. This is because the foundation of the court’s power to restrain publicity in order to protect a child’s private and family life is now derived from rights under the European Convention on Human Rights, which provides a simple and more direct approach. But the earlier case law may still be useful in deciding where the balance should lie between privacy and freedom

of expression. Statutory provisions preventing a transsexual from marrying were declared incompatible with Articles 8 and 12 (*Bellinger v Bellinger* [2003] 2 AC 467). However the European Court of Human Rights had already declared in *Goodwin v UK* that UK law in this area was incompatible. The House of Lords in *Bellinger* accepted the Government's arguments that it was not for the courts to recast the relevant law, but that this should be left to Parliament (which has now enacted the Gender Recognition Act 2004 to deal with these issues).

Inquiries and inquests

It has been held that the procedural obligation inherent in Article 2 requires an "effective" independent public investigation into deaths that may have been caused by State intervention or as a result of unlawfulness. Where an inquest was the means by which this is done it had ordinarily to culminate in an expression of the jury's conclusion on the disputed factual issues at the heart of the case – requiring reinterpretation of the Coroners Act 1988 (*R (Middleton) v West Somerset Coroner* [2004] 2 AC 182). The full range of Article 2 obligations extends to life-threatening injuries suffered by persons in custody (*R (D) v Home Secretary* [[2006] EWCA Civ 143) but not to deaths which arguably result from medical negligence (*R Takoushis v Inner North London Coroner* [2006] 1 WLR 461).

Mental health

Certain provisions of the Mental Health Act 1983 were incompatible with Article 5 as they did not require a mental health review tribunal to discharge a patient where it could not be shown that he was suffering from a mental disorder (*R(H) v MHRT, North and East London* [2002] QB 1). However, the statutory regime for reviewing the detention of severely mentally disabled patients is compatible with the European Convention on Human Rights (*R (MH) v Health Secretary* [2006] 1 AC 441) as is the conditional discharge regime under section 73 of the Mental Health Act 1983 (*R (H) v Home Secretary* [2003] 2 AC 253). The automatic appointment of the "nearest relative" for persons detained under the Mental Health Act 1983 and the inability of detainees to challenge that appointment were declared incompatible with the right to respect for private life in Article 8 (*R (M) v Health Secretary* [2003] EWHC 1094 (Admin)).

Travellers' homes and possession proceedings

When granting injunctions to remove travellers from sites occupied in breach of planning permission, the courts must consider whether on the facts, such relief is proportionate, bearing in mind the Article 8 rights of the travellers (*South Bucks Council v Porter* [2003] 2 AC 558). The court in this case emphasised the fact that issues of planning policy and judgment were matters for the local planning authorities and the Secretary of State, not the court. Although Article 8 is engaged in every case where an occupier is evicted there is a strong presumption that a fair balance has been struck by the English law governing possession proceedings (*Kay v Lambeth* [2006] 2 WLR 570).

Administrative decision-making

The courts have rejected the argument that full "fair trial guarantees" under Article 6 should apply to all administrative decisions. Local authority processes that involve internal reviews and judicial review comply with the European Convention on Human Rights (see, eg, *Runa Begum v Tower Hamlets* [2003] 2 AC 430). Similarly, the courts have declined to remove from ministers their role in the planning process: *R (Alconbury Developments) v Environment Secretary* ([2003] 2 AC 295).

Discrimination

In *Ghaidan v Godin-Mendoza* ([2004] 2 AC 557, HL) it was held that the HRA required the Rent Act 1977 to be construed to permit same-sex couples to succeed to statutory tenancies. Most of the other applications based on Article 14 of the European Convention on Human Rights have been unsuccessful. These have included applications relating to Child Support for same-sex couples (*Secretary of State for Work and Pensions v M* [2006] 2 WLR 637), payment of state pension and job seekers allowances (*R (Carson) v Secretary of State* [2006] 1 AC 173). The range of potential Article 14 claims has been limited by the decision of the House of Lords in *R (Marper) v Chief Constable of South Yorkshire* ([2004] 1 WLR 2196) that “other status” in Article 14 is limited to a “personal characteristic” of the claimant.

Education

There have been notable unsuccessful challenges in this area. A challenge to a school uniform policy which prevented the wearing of the jilbab was rejected by the House of Lords (*R (Begum) v Denbigh High School* [2006] 2 WLR 719). A majority considered there was no interference with the claimant’s right to manifest her religious belief, because she could without undue hardship attend another school where she could manifest her beliefs. In any event all their Lordships agreed that any interference was justified to protect the rights and freedoms of others (to avoid divisions between pupils and protect them from external pressure to adopt particular forms of dress). An attempt to claim that a disciplinary expulsion was in breach of the Convention right to education similarly failed before the House of Lords (*Ali v Headteacher and Governors of Lord Grey School* [2006] 2 WLR 690). They held that the European Convention on Human Rights guaranteed only fair and non-discriminatory access to the educational system as a whole, not education at a particular institution, and did not prevent expulsion on disciplinary grounds provided alternative sources of state education were open to the pupil. And Parliament’s decision in the School Standards and Framework Act 1998 to extend to all schools the ban on corporal punishment was held justified in order to protect children (*R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246).

Human Rights Act remedies

The HRA provides for two new remedies to deal with incompatibility between legislation and Convention rights: the “strong interpretation provision” (under section 3) and the declaration of incompatibility (under section 4).

Under section 3 the courts are obliged, so far as possible, to construe legislation in a way which is compatible with Convention rights. The courts have upheld the remarks of both the Lord Chancellor and Home Secretary, at the time the HRA was enacted, that section 3 was intended as the primary remedy under the Act, with a declaration of incompatibility under section 4 (see below) being a remedy of last resort.

In *R v A (No.2)* ([2002] 1 AC 45), the House of Lords applied section 3 to the provisions of section 41 of the Youth Justice and Criminal Evidence Act 1999 which, at the trial of a sexual offence, excluded evidence relating to prior sexual behaviour of the complainant (subject to narrow exceptions). It was held that this was incompatible with the right to a fair trial under Article 6 but that the provision could be construed in a compatible way by “reading in” an implied provision that evidence required to ensure a fair trial should not be excluded. This radical approach has

not, however, been adopted in subsequent cases. Thus in *Re S (Minors)(Care Order: Implementation of Case Plan)* ([2002] AC 291), the House of Lords made clear that the HRA reserved the amendment of primary legislation to Parliament and that any use of section 3 to produce a result departing substantially from the fundamental features of a statute was not acceptable. A line has, therefore, been drawn between legitimate judicial interpretation and an exercise in amendment which must remain the province of Parliament. For example, in *Bellinger v Bellinger* ([2003] 2 AC 467) the House of Lords refused to use section 3 to interpret the word “female” in the Matrimonial Causes Act 1973 to include a person who had changed their gender from male to female.

It appears that section 3 has been applied by the courts on only 12 occasions since 2000. In *R v Offen* ([2001] 1 WLR 253) it was held that the imposition of an automatic life sentence under section 2 of the Crime (Sentences) Act 1997 could be disproportionate but that the phrase “exceptional circumstances” could be interpreted in a less restrictive way to produce compatibility. On three occasions section 3 has been used to interpret references to the “burden of proof” in older statutes as placing an evidential but not a legal burden on the defendant (*R v Lambert* [2002] AC 545, Misuse of Drugs Act 1971, section 28; *R v Carass* [2002] 1 WLR 1714, Insolvency Act 1986, section 206 and *Sheldrake v DPP* [2004] QB 487, Road Traffic Act 1988, section 50. In *R (Middleton) v West Somerset Coroner* ([2004] 2 AC 182) section 3 was used to reinterpret the Coroners Act 1988 to allow for a wider form of verdict to comply with Article 2 of the European Convention on Human Rights.⁴

If the court cannot construe a statutory provision to render it compatible with Convention rights then it may make a declaration of incompatibility under section 4 of the HRA. As indicated above the House of Lords have made clear that this is to be a remedy of last resort. Declarations of incompatibility have been made in 15 cases, two of which are at present subject to appeal.⁵ Declarations have been made and overturned on appeal in a further five cases. The provisions declared to be incompatible include: section 29 of the Crime (Sentences) Act 1997 (*R (Anderson) v Home Secretary* [2003] 1 AC 837 – setting of tariff by Secretary of State); section 23 of the Anti-terrorism, Crime and Security Act 2001 (*A v Home Secretary* [2005] 2 AC 68 – detention without trial of foreign nationals); section 3 of the Prevention of Terrorism Act 2005 (*Re MB* [2006] EWHC 1000 (Admin) – control orders).

Section 10 of the HRA permits a Government minister to amend legislation by a remedial order to remove an incompatibility found by the domestic courts under section 4 or by the European Court of Human Rights, provided there are compelling circumstances to justify proceeding by order (rather than by way of fresh primary legislation). All of the declarations of incompatibility made since the coming into force of the HRA have been remedied (or are still under consideration with a view to being remedied). However in almost all cases this has been done by primary legislation and only in one case using the remedial order power. (The power has also been used once to remedy a defect found by the European Court of Human Rights, and a second such example is planned.)

⁴ For a full list see the Appendix to the opinion of Lord Steyn in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, at 580-582; to this list must be added *Beaulane Properties v Palmer* [2006] Ch 79 (Law of Property Act 1925 – adverse possession); *Culnane v Morris* [2006] 2 All ER 149 (Defamation Act 1952 – qualified privilege during elections).

⁵ DCA lawyers maintain a table of such declarations. The current version can be found on the DCA website.

Section 6 of the HRA makes it unlawful for a public authority to act incompatibly with the Convention rights and this has enabled the courts to strike down as *ultra vires* any such acts. This is not a new remedy as such but a new set of circumstances in which existing judicial review remedies can be used. Decisions and subordinate legislation have been quashed or declared unlawful by the courts under section 6 in a relatively limited number of cases. In addition, it has been held that the question of lawfulness under section 6 should not be taken as imposing complex procedures on public authorities – the question is not whether their decision was the product of a defective decision-making process, but whether, in the specific case, the applicant's Convention rights had been violated (see *R (Begum) v Denbigh High School* [2006] 2 WLR 719, HL).

If a claimant successfully establishes a violation of Convention rights, he has a possible claim for damages under section 8. However section 8(3) expressly limits the circumstances in which damages may be awarded for a breach of Convention rights. This has been interpreted so strictly by the courts that the general view of legal commentators is that it is now very difficult to obtain damages under the HRA. The House of Lords has held that a finding of breach is generally sufficient redress under the HRA. They therefore declined to award damages even where the consequence of the breach was that a prisoner served an additional 21 days in prison (*R (Greenfield) v Home Secretary* [2005] 1 WLR 673). They also held that the level of damages should be commensurate with the levels of compensation available in Strasbourg – which are generally acknowledged to be lower than those available for domestic law torts. Moreover section 8(4) of the HRA requires domestic courts to take into account the principles applied by the European Court of Human Rights in relation to damages. These include, for example, the fact that in deciding whether to award compensation account may be taken of the conduct and character of the claimant (*McCann v UK* (1996) 21 EHRR 97). Perhaps as a result of this narrow approach, it appears that damages have been awarded in only three reported cases: *R (Bernard) v Enfield London Borough Council* ([2003] HRLR 111 – £8,000 was awarded to a disabled claimant who was required to live in unsuitable accommodation for 20 months); *R (KB) v Mental Health Review Tribunal* ([2004] QB 936 – £750 to £4,000 for delays to Mental Health Review Tribunal hearings); *Van Colle v Chief Constable of Hertfordshire* [2006] EWHC 360 (QB) – £50,000 to parents of a witness murdered because of inadequate police protection).

3. Direct impact on policy formulation and decision making

- The Human Rights Act has had a significant, but beneficial, effect upon the development of policy by central Government.
- Formal procedures for ensuring compatibility, together with outside scrutiny by the Parliamentary Joint Committee on Human Rights, has improved transparency and Parliamentary accountability.
- The Human Rights Act leads to better policy outcomes, by ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered. It promotes greater personalisation and therefore better public services.

This section discusses the ways in which the Human Rights Act has affected the development of Government policy and its implementation by public authorities, beyond the impact of the case law surveyed in section 2.

It is extremely difficult to isolate definitively the impact of the Human Rights Act on any given policy. Firstly, the Act does not introduce any new rights but rather gives further effect to the rights set out in the European Convention on Human Rights in UK law. Any policy which breaches the Human Rights Act must be incompatible with one or more of the European Convention on Human Rights articles, and would have been so whether or not the Human Rights Act was in force. Secondly, many of the principles protected under the Act are also embedded into the common law (such as the right to a fair hearing and the rule of law) and EC law, whilst other rights, not covered by the Act, are protected by separate legislation such as UK discrimination legislation, the Data Protection Act 1998 and the Freedom of Information Act 2000. As section 2 explained, the courts have increasingly been prepared to recognise “common law constitutional rights” similar in content to those found in the Human Rights Act. So a single policy may be subject to a number of influences, of which the Human Rights Act is just one, all driving in a common direction. Whether the Human Rights Act has been identified as a critical driver for change, or just part of this wider framework, is therefore not a black-and-white issue and is in some cases a matter of perspective.

That said, there are some clear routes through which the Human Rights Act has influenced the development and implementation of policy since coming into force:

- through formalisation of the **process** for ensuring compatibility with Convention rights: the requirement for a positive statement of compatibility for all Bills, an ECHR memorandum in order for Bills to be approved for introduction and legislative scrutiny by the Joint Committee on Human Rights;
- in response to **litigation** which may force a change in policy or a change in the method by which a particular policy is delivered; and
- through a change in **behaviour** driven by the greater immediacy of the Act, which makes it unlawful for a public authority to act in a way incompatible with a Convention right. This direct effect has changed the weight that public authorities give to human rights considerations, with results that are sometimes positive, sometimes not.

This section first considers what the new human rights framework looks like, by considering the various over-arching administrative changes made since the implementation of the Human Rights Act. It then draws out how the Act works in practice during the policy development and decision-making processes by examining examples identified by Government departments as part of this review.

European Convention on Human Rights compatibility in the policy formulation process

Since the enactment of the Human Rights Act in 1998, all Bills and subordinate legislation coming before either House must be “human rights proofed”. To some extent, that happened before 1998; but there are now a number of formal gateways and statutory requirements, as described below.

Section 19

Section 19 of the Human Rights Act requires a Minister in charge of a Bill in either House of Parliament to make a statement to the effect that either:

- in the Minister’s view the provisions of the Bill are compatible with the Convention rights (a “statement of compatibility”); or
- although the Minister is unable to make a statement of compatibility the Government nevertheless wishes the House to proceed with the Bill.

The statement must be in writing and be published in such manner as the Minister making it considers appropriate. The result is that all Government Bills coming before Parliament since the Act became law must have been through a process of careful scrutiny by officials and lawyers in order to brief the relevant Minister prior to the Minister certifying their view.

Guidance to departments has consistently made it clear that human rights proofing is not simply an exercise to be carried out after legislation has been drafted. Questions of proportionality, and the identification of policy options that produce the least interference with Convention rights, should be embedded in the policy development process.

LP memoranda

It is also necessary, as part of the process leading to Cabinet Committee approval of a Bill for introduction to Parliament, for the relevant Department to compile a memorandum for LP Committee⁶. The memorandum must set out the Convention rights likely to be engaged by the policy embodied in the Bill and explain how the proposed legislative scheme ensures that any interference with the identified right does not result in a breach. It will do this by demonstrating that the interference is legitimate, necessary, proportionate and non-discriminatory.

⁶ LP Committee, or the Ministerial Committee on the Legislative Programme, is the Cabinet Committee responsible for considering legislation and related matters.

As section 6 of the Act makes it unlawful for a public authority to act in a way that is incompatible with a Convention right, the development of policy and practice at a level below that of primary legislation must be compatible with the Convention rights, and similar scrutiny must be given to local instructions produced by public authorities for their staff as is applied to their underpinning legislation.

The Joint Committee on Human Rights

In January 2001, each of the Houses of Parliament nominated members to constitute a Joint Committee of both Houses with, as its first term of reference, the task of considering and reporting on matters relating to human rights in the United Kingdom (but excluding consideration of individual cases). The Committee has, since then, taken upon itself the task of carrying out a rigorous process of legislative scrutiny, regularly reporting to Parliament on matters which it believes requires the Government's attention as the Bill progresses.

The process in practice

The following example illustrates how this process works in practice. The requirement to develop policy within the framework of the Human Rights Act means that approaches must balance the rights of all concerned in complex situations. In developing policy on searches of children, this required consideration of whether searches could only be conducted on an individual basis or whether in some cases mass searches might be justified, as well as safeguards around the conduct of searches. Responses must also be proportionate and a "one size fits all" approach may not be acceptable: the central point is that a solution which is sufficient to tackle the problem is acceptable; those solutions that go beyond what is necessary are not acceptable. Such a tailored approach should not affect the policy outcome, but should have a positive and beneficial impact upon the relationship between the citizen and the State: the Human Rights Act can be seen as part of a framework which promotes greater personalisation and therefore better public services.

In this example and many others in this review, as noted above, the Human Rights Act and the associated human rights framework were only one part of other legal and policy considerations which were driving the decision processes in the same direction.

Powers for Head Teachers and others to search pupils for weapons in schools

Policy on searches for knives or other weapons, developed within the framework of the Human Rights Act, balances the rights of individual pupils with the need to make schools safe from the threat of knife crime. Other drivers include the need to ensure compliance with the common law of assault.

Given concerns in recent years about knife crime, Ministers and officials have formulated a policy which gives Head Teachers and others the power to search pupils for knives and other weapons. The law as it stands allows the police to enter school premises to search pupils (by virtue of the Criminal Justice Act 1988), yet extending the right to conduct searches to others in a way which is compatible with the Human Rights Act throws up a number of considerations, including decisions on whether searches can be made only on an individual basis and/or only when there is reasonable suspicion; or whether searches without individual or reasonable suspicion are proportionate and, if so, in what circumstances.

The result of the application of the human rights framework via the Human Rights Act is not to defeat the policy – indeed many of these same issues might have arisen regardless of the Human Rights Act because of the need to ensure compliance with the common law of assault – but instead to ensure it is delivered in a way which balances the rights of all those concerned in a complex and potentially highly charged situation. The implications are that schools will need to apply a policy which is clear about the triggers for a particular type of search and clear about how the search is going to be conducted with sensitivity to individuals. Schools should also develop a recording system possibly in the form of a log book – including reasons for search, implications for individuals, any notable pupil responses and how they are managed, outcomes and follow up actions. The result will therefore be a more balanced and robust response to the problem.

Policy changes in response to litigation

Section 2 of this review summarised the growing body of case law arising from litigation brought under the Human Rights Act. As well as its direct impact on individual cases, this case law (and cases still making their way through the system) has an influence on the development and implementation of policy, as the following examples illustrate. In the first example, HMRC's policy on seizure and restoration of vehicles used for smuggling was revised to ensure that it reflected the requirement for proportionality. As is shown in the second example, current litigation on the issue of investigating deaths under Article 2 of the European Convention on Human Rights may extend the categories of death subject to a public inquiry and possibly make the requirement retrospective. In these areas, the state of case law surrounding Article 2 inevitably leads to some uncertainty in policy formulation.

Seizure and restoration of vehicles used for smuggling

Her Majesty's Revenue & Customs (HMRC) has a power to seize vehicles used for smuggling. Following the introduction of the Human Rights Act HMRC has faced increased numbers of challenges to the legality of the seizure of vehicles or issues concerning their restoration on the grounds of proportionality.

The Government's policies on the seizure and restoration of smuggled goods and vehicles used to facilitate smuggling have been subject to challenge in the courts. Since the implementation of the Human Rights Act a number of successful challenges have been brought where the argument has been founded on the Human Rights Act. A large proportion of complaints claim that HMRC's actions contravene the individual's human rights, even though established case law suggests those actions are compliant and provided for by law. When smuggled goods are seized, the Customs and Excise Management Act 1979 gave a wide power of discretion to HMRC to consider restoration and impose such conditions as they see fit. The Finance Act 1994 provided for such decisions to be subject to review and appeal to a tribunal.

Various high-profile decisions (such as *Lindsay v Customs and Excise Commissioners* [2002] 1 WLR 1766 and *H & S Handel und Transport GMBH v Customs and Excise Commissions*, VAT and Duties Tribunal, 16 April 2004) have led to HMRC adjusting its policies on when to agree to restoration. These policies had been put in place in 2000 to reverse a significant revenue loss due to smuggling in vehicles. In addition, there are now compensation costs arising from successful appeals (though these are not excessive).

In theory, many of these challenges could be brought regardless of the Human Rights Act, because fundamental rights are recognised by the European Court of Justice as forming part of the general principles of EC law. However, in practice, the Human Rights Act has led to human rights arguments being made much more frequently, and to more litigation in this area.

Requirement for the State to investigate deaths in certain circumstances

Litigation may extend the situations in which investigation of deaths should meet criteria laid down by the European Court of Human Rights (“Jordan criteria”), including to transport accidents. The greater formality of such investigations has implications in terms of cost and potential delay in implementing expert recommendations. In the context of case reviews of death or serious injury where abuse or neglect of a child is suspected, there may be some delay in carrying out the review and the frankness of the review could be undermined. However, the key uncertainty in the law is that which surrounds Article 2 of the European Convention on Human Rights, rather than its scope in UK law under the Human Rights Act.

There is considerable uncertainty over the requirement imposed on the State by Article 2 of the European Convention on Human Rights to investigate deaths in certain circumstances. The case of *Jordan v United Kingdom* (2003) 37 EHRR 2 laid out criteria (the “Jordan criteria”) for the conduct of an Article 2 compliant investigation. These criteria include the need for a prompt and public investigation by an independent body, which must be thorough and rigorous, must involve the next of kin and must be capable of imputing responsibility for the death and (if State agents are responsible) determining whether the death was justified or not. Although they appear relatively straightforward, this is deceptive. In practice, the extent to which the Jordan criteria apply in particular circumstances, and how they apply, remains unclear.

There are a number of areas where the Jordan criteria are currently thought not to apply but where current litigation may result in a different outcome. For example, a judicial review of the Secretary of State’s decision not to hold a public inquiry following the Potters Bar rail crash (*R (on the application of Kuei-Chi-Lin and Chen Far-Lin v Secretary of State for Transport)* ended on 21 July, with extempore judgment likely to be given by the end of July. The claimants argued that the Jordan criteria should also fully apply to investigations into transport accidents necessitating the mounting of a full public inquiry. Although this judicial review relates specifically to fatalities on the railways, there is concern that it may eventually result in the further extension of Article 2 investigative requirements to road, maritime and aviation accidents.

If the courts were to find that full scale inquiries were necessary in a much wider range of fatal accident cases in order to satisfy Article 2 obligations, there would be significant resource implications. In addition, such extended investigatory measures might perversely prevent the timely implementation of appropriate expert recommendations made during the existing transport accident investigations. This is not to suggest however that the influence of Article 2 would be entirely negative: Article 2 compliant inquests by definition do involve greater family representation, which would be welcomed by families, even if it sometimes results in longer inquests. But the current uncertainty over the effect of Article 2 does act as a brake on policy development, since departments have no failsafe way of predicting whether any particular fatal accident should result in an inquest, or in a more extensive public examination of the circumstances and causes.

example continues over

example continued

The second facet of the current uncertainty relates to whether or not certain inquiries, particularly those set up when an individual child dies, or suffers serious injury and where abuse or neglect are suspected, are sufficiently Article 2 compliant on the basis of the Jordan criteria. At present, such serious case reviews are immediate and confidential, and this encourages all to reflect on what has happened and give evidence without fear of repercussion. It is clearly important that such inquiries are conducted quickly to identify lessons learnt as soon as possible. Yet if it were decided that the criteria do apply in a particular case, there may be some delay in carrying out the review and the loss of confidentiality could undermine frankness and lessen the value of the review.

Finally there is uncertainty over the precise circumstances in which the courts might be prepared to make exceptions to the usual rule that the provisions of the Human Rights Act do not apply retrospectively. In the case of *Re McKerr* [2004] 1 WLR 807 the House of Lords established the principle that the Article 2 investigative requirements of the Human Rights Act 1998 do not apply to deaths which took place before the commencement of the Act. However a group of cases seeking to test the limits of this principle is currently awaiting hearing in the House of Lords.

However, the key uncertainty in the law is that which surrounds Article 2 of the European Convention on Human Rights, rather than its scope in UK law under the Human Rights Act.

Greater weight given to human rights considerations because of justiciability of the European Convention on Human Rights before the UK courts

Beyond the direct effect of requirements in relation to legislation and of litigation, the Human Rights Act has changed the way that policy-formers and decision-makers view the Convention rights. Inevitably, making the Convention rights directly enforceable in the UK courts has contributed to this change. As the principles have become more embedded – and in some cases in response to the fear of litigation – policies and practices have been adjusted to ensure compliance with Convention rights and they are a more explicitly recognised part of the decision-making process.

In some cases, the attaching of this greater weight to human rights considerations has been a positive move, as shown by the examples given of decision making in prisons in England and Wales. At this end of the spectrum, it is fair to conclude that this greater weight was necessary and correct. However, at the other end of the spectrum lie examples where this is not the case, and where misinterpretation of the effect of the Convention rights has led to an undue focus upon rights and entitlement of individuals. The result of this can either be simple inefficiency or frustration, as in the question about installing cameras in courts, where a process had to be put on hold whilst advice was sought on human rights considerations, or tragedy, as in the case of Anthony Rice.

Operational decision-making in prisons

The greater immediacy of the Human Rights Act is one of a number of factors that has led to changes in prison policies to ensure that they take account of individual circumstances and risk factors. In Northern Ireland this positive impact has, in a climate of ready litigation, been accompanied by a harnessing of the Act as a means of lending weight to frequent legal challenges.

Within England and Wales a number of operational decisions within prisons have been affected by the Human Rights Act, covering a range of issues including mandatory drug testing, blanket security measures and the searching of visitors. Evidence has shown that an understanding of the Human Rights Act is one of a number of factors that has led to policies being developed in these areas which treat prisoners individually in terms of a number of factors such as privilege levels, categorisation and allocation, rather than via a “one size fits all” approach. The impact is to support a robust approach to decision making which properly reflects individual rights, and is generally supported by the Prison Service.

This experience is broadly shared by the Northern Ireland Prison Service, with the Human Rights Act having a similar impact on operational decisions. An additional issue reported by NIPS is a generally higher level of litigation in Northern Ireland, with frequent legal challenges of prison processes and operating procedures. The Act has been used to lend weight to some such legal challenges.

Cameras in court

Concerns about possible breaches of human rights led a court to seek advice before responding to a request from a magistrate for the installation of a video camera to help overcome his sight difficulties.

Her Majesty’s Courts Service recently raised a concern regarding the use of video cameras in court. The issue revolved around whether or not a magistrate with sight difficulties, who when using a courtroom with a secure dock had difficulty in seeing the defendant behind the glass screen, could use a video link with a monitor on the bench to aid his view of the defendant. The Area Director’s Office sought advice on this issue before they proceeded with the request in order to establish if there would be any human rights issues – for example, a defendant complaining that his rights were being violated by the presence of a camera in the dock.

Although this query was dealt with quickly and efficiently and the “human rights” concerns were dismissed as ill-founded, the end result was delay in making what should have been a routine decision based on a sensible request. Although the Human Rights Act itself is not to blame for the resulting inefficiency, it is clear that the root of this and similar problems is a lack of understanding about the Act which leads to officials being overly hesitant in making routine decisions.

Local Authority services

There is anecdotal evidence to suggest that local authorities have made excessively cautious decisions which have been based on misapprehensions about the Human Rights Act and its consequences.

Anecdotal evidence suggests that it is possible that a local authority may have paid further education tuition fees to a person based on the misunderstanding that Article 3 required it. There is also anecdotal evidence to suggest that local authorities could be more robust about deciding when a breach of Convention rights is “imminent” so as to trigger their obligations to support a person from abroad. Although anecdotal, these examples highlight the misunderstandings about the Human Rights Act that can and do take place.

Release of offenders on licence

A misunderstanding of human rights considerations contributed to the release of a life sentence prisoner who went on to commit murder.

Human rights considerations have perhaps nowhere been more tragically misapplied than in the case of Anthony Rice, who murdered Naomi Bryant in August 2005.

Rice was a discretionary life sentence prisoner with previous convictions for a series of violent and sexual offences. He had been released from HMP Leyhill on 12 November 2004 into a hostel which was not able to provide the necessary degree of security and management in the community. Indeed, the report by HM Chief Inspector of Probation into the case concludes that Rice should never have been released on licence at all. The report paints a picture of wrong decisions within the penal system including failures to connect information, blurred lines of accountability, muddled decision making and lax supervision. Central to the Chief Inspector’s findings is that the operation of the Human Rights Act in the context of release on licence has sometimes caused staff to focus excessively and wrongly on the rights of the individual at the expense of the protection of the public.

The Chief Inspector found that the Human Rights Act is being misapplied in two separate, but complementary ways. First, at key stages in the chain of decision making, a prisoner on licence is sometimes able (whether by himself or through his lawyers) to shift the focus of consideration onto the proportionality of the restrictions to which he is subject, at the expense of assessment of the risk of harm he presents. Secondly, the Inspector identifies a “powerful momentum towards release” (which in Rice’s case developed from the time he was transferred to an open prison in March 2002).

These errors in application of the Act seem to derive from two fundamental mistakes in the application of human rights principles. In the first place, test cases are understood to mean that once the tariff date has passed, the authorities have to justify keeping a prisoner in custody rather than having to justify why he should be released. In fact they should be balancing the prisoner’s rights under the European Convention on Human Rights with restrictions which are proportionate given the risk of harm to the public he presents. Secondly, there seems to be insufficient recognition that the prison, parole and probation services are themselves subject to a positive obligation under the Human Rights Act to take proper steps to protect the public from dangerous criminals such as Rice.

Meaning of “public authority” in section 6 of the Human Rights Act

The Government has intervened in a current court case with the aim of ensuring that people – particularly elderly and vulnerable people – receiving care from a private provider on behalf of a local authority are able to bring Human Rights Act claims against that private provider as well as the local authority. This interpretation of “public authority” carries with it a risk that private landlords might fall within the scope of the Human Rights Act and might be discouraged, by the risk of claims, from providing accommodation to homeless people. However, the intervention has been designed with the intention of minimising this risk.

Section 6 of the Human Rights Act provides that “it is unlawful for a public authority to act in a way which is incompatible with a Convention right”. The case law, in particular the Court of Appeal judgment in *R (on the application of Heather and others) v Leonard Cheshire Foundation* [2002] All ER 936, has had the effect that people receiving care from a private provider on behalf of a local authority may not take action against the private provider under the Human Rights Act if the private provider is claimed to have breached their rights. However, residents in this situation may still be able to take action against the local authority. The Government has intervened in the case of *R (on the application of Johnson and others) v London Borough of Havering* with the aim of ensuring that the meaning of “public authority” is interpreted in such a way that it covers elderly and vulnerable people receiving care in this way.

An intervention on these terms is not without its difficulties. The preferred interpretation of “public authority” carries with it a risk of bringing within the scope of the Human Rights Act registered social landlords and private landlords or bed and breakfast owners providing accommodation to homeless people. There are concerns that if this results in more litigation against such providers, even if unsuccessful, it might be enough to increase burdens on private landlords, divert resources from this sector and deter property owners from entering the market to provide temporary and longer term accommodation to those owed a duty by the local authority under housing legislation.

The Government’s intervention in *Johnson* has been specifically designed to try to minimise these potential risks. However this case illustrates the way in which uncertainties in the Human Rights Act are being explored with consequences for Government policies.

4. Myths and misperceptions

- The Human Rights Act has been widely misunderstood by the public, and has sometimes been misapplied in a number of settings.
- Deficiencies in training and guidance have led to an imbalance whereby too much attention has paid to individual rights at the expense of the interests of the wider community.
- This process has been fuelled by a number of damaging myths about human rights which have taken root in the popular imagination.

This section presents an analysis of areas where the Human Rights Act has been cited as causing a particular problem or being at the root of a particular decision but where the truth lies elsewhere. It considers:

- out-and-out myths which have grown up around the Human Rights Act which are widely reported in the media and which have influenced not only the view the general public has taken of the Act, but also the way public servants may have applied it where appropriate guidance and training have been absent;
- less celebrated and more subtle cases in which the Human Rights Act is cited as part of the problem which leads to a particular decision when in fact it is no such thing; and areas where, despite general perceptions to the contrary, decisions have stood up to challenge under the Human Rights Act.

Inevitably this section has relied on a more anecdotal approach than previous sections. Many myths about the requirements of the Human Rights Act will persist at the level of front-line delivery and it is sometimes only the most outlandish myths that come to wider attention, either through press reports or through their having made a substantive impact on policy or delivery. Similarly, it has only been possible to capture here the few instances of misrepresentation by decision-makers that have been drawn to the attention of this review. Many similar, more minor, misunderstandings undoubtedly take place and yet go unremarked.

Myths

Many myths have grown up around the Human Rights Act since its enactment in 1998. Commentators have blamed human rights for a range of ills, but in particular for giving undeserving people a means of jumping the queue and getting their interests placed ahead of those of decent hardworking folk.

Part of this is attributable to deliberate political campaigns, and to that extent are outside the scope of this study. For example, the reference to the importance of the European Convention on Human Rights in Article 6 of the Maastricht Treaty means the Human Rights Act has become a target for criticism by those who urge withdrawal from the European Union. The forthcoming creation of the Commission for Equality and Human Rights under the Equality Act 2006 prompts from its opponents the allegation that human rights are a symptom of “political correctness gone mad”. The successful use of the Act by members of vulnerable and excluded groups to assert their entitlement to basic standards of treatment means it can be branded by some commentators as a catalyst for a “compensation culture”. To this extent, many of the attacks on the Human Rights Act use it as a proxy for other issues and do not address it on its own terms.

But such myths are nevertheless extremely damaging, for they not only corrode public confidence in the importance of human rights, but could also contribute to the critical mistakes which continue to occur in the misinterpretation and misapplication of the Act which were discussed in the previous section.

There are three different types of myth in play. First, there are those which derive from the reporting (and often partial reporting) of the launch of cases but not their ultimate outcomes. These leave the impression in the public mind that a wide range of claims are successful when in fact they are not – and have often effectively been laughed out of court. Secondly, there are the pure urban myths: instances of situations in which someone (often it may not even be clear who) has said that human rights require some bizarre outcome or other, and this is subsequently trotted out as established fact. Finally, there are rumours and impressions which take root through a particular case or decision, and which then provide the backdrop against which all subsequent issues of the type in question are played out.

Cases never brought

Dennis Nilsen was sentenced to life in prison in 1983 for multiple murders. In an application for judicial review in 2001, he sought *inter alia* to challenge a decision of the Prisoner Governor, under the Prison Rules, to deny him access to a book containing gay artwork and depictions of male nudity, and uncensored access to a mainstream top-shelf gay magazine. He alleged that the decision constituted “inhuman or degrading treatment” contrary to Article 3 of the Convention rights, or in the alternative was discrimination against gay men under Article 14 of the Convention rights when read with Article 3.

Dennis Nilsen’s application was refused by the single judge at the permission stage. He did not establish that there was any arguable case that a breach of his human rights had occurred, nor that the prison’s rules were discriminatory. He also failed to receive any greater access to such materials as a result. The failure of his application at the first hurdle was not widely reported, nor his further failure on renewal. On the contrary, the case is now often cited as the leading example of a bad decision made as a result of the Human Rights Act, with the Shadow Home Secretary himself asserting that Dennis Nilsen had been able to obtain hard-core pornography in prison by citing his “right to information and freedom of expression” under the Act.⁷

⁷ *Daily Telegraph*, 17 August 2004, “Tories target human rights”

There have also been a number of claims for compensation, particularly for various forms of delay, launched by people who have been convicted of serious crimes. The launching of such claims has been widely reported, often with exaggerated exclamations of disgust, but the failure of such claims is rarely reported with any similar profile.

In fact section 8(3) of the Human Rights Act expressly limits the circumstances in which damages may be awarded for a breach of Convention rights. This has been interpreted so strictly by the courts that informed legal commentators regularly complain that it is now very difficult to obtain damages under the Human Rights Act. The House of Lords has held that a finding of breach is generally sufficient redress under the HRA. They therefore declined to award damages even where the consequence of the breach was that a prisoner served an additional 21 days in prison.⁸ They also held that the level of damages should be commensurate with the levels of compensation available in Strasbourg – which are generally acknowledged to be lower than those available for domestic law torts. Moreover section 8(4) of the Act requires domestic courts to take into account the principles applied by the European Court of Human Rights in relation to damages. These include, for example, the fact that in deciding whether to award compensation account may be taken of the conduct and character of the claimant.⁹ Needless to say, none of this is ever reported in the popular press.

Urban myths

On a smaller scale, various rumours have from time to time circulated, sometimes through ill-informed guidance issued by other organisations, about what the Act may require in particular circumstances. For example, it has been (falsely) suggested that the Human Rights Act would prevent the filming of school nativity plays, or prevent teachers from putting plasters on children who had cut themselves.

In the recent case in which food, drink and cigarettes were supplied to Barry Chambers¹⁰ who, in the course of evading arrest had taken refuge on the roof of a domestic dwelling, the spokeswoman for Gloucestershire Police was quoted as saying, “although he’s a nuisance, we still have to look after his well-being and human rights”. This reference to human rights was immediately pounced upon by the media, and the situation has become another supposedly iconic example of the perverse outcomes that the Human Rights Act can bring about.

The suspect, of course, had no “human right” to receive food in these circumstances (let alone food of any particular brand). However, as part of a police operational decision aimed at resolving the stand-off quickly and peacefully, the man’s demands for food and other refreshments were met as part of a negotiating strategy aimed (successfully in the event) of coaxing the suspect down from the roof without injury to himself or others. But when this decision was challenged by the media and local residents, human rights received the blame.

⁸ *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673

⁹ e.g. *McCann v UK* (1996) 21 EHRR 97

¹⁰ *Daily Telegraph*, 7 June 2006 “KFC meal ensures siege man’s rights”, *The Sun*, www.thesun.co.uk/article/0,,2-2006260255,00.html, “A finger nickin’ good farce”

Rumours and impressions

As explained below, local authorities and the local media have tended to blame the Human Rights Act not only when decisions go against them in planning cases involving Gypsies and Travellers, but even when Gypsies and Travellers appear in the locality. The Act here is rarely in issue, since the question is usually one of the local authority's duty to provide adequate sites under general planning law. Similarly, the recent case¹¹ involving the Afghan hijackers was at its heart a judicial review on the basis of abuse of executive power, but was nevertheless cited as being the "fault" of the Human Rights Act.¹²

These sort of cases tend to bring the Act unfairly into disrepute in public perception, and can only properly be countered by swift rebuttal of the false attributions when they appear.

Misrepresentation of the role of the Human Rights Act

As noted above in section 3, a single policy may be subject to a number of influences, of which the Human Rights Act is just one. Whether the Human Rights Act has been identified as a critical driver for change, or just part of this wider framework, is therefore not a black-and-white issue and is in some cases a matter of perspective. Sometimes, on close inspection, the role of the Human Rights Act is found to be minimal or non-existent, yet the perception remains that it is part of the root cause. In fact, in some areas, the policy or decision in question has been found to be compliant with the Human Rights Act to the extent that challenges against it have failed. And as the example on extending custodial sentences shows, the driver for change has sometimes been a challenge under the European Convention on Human Rights rather than under the Human Rights Act.

Extension of custodial sentences for breaches of prison rules

A challenge under the European Convention on Human Rights resulted in a change to the procedure for adding time to a custodial sentence following a breach of prison rules. The change has resulted in cost and administrative implications and is also believed to have resulted in fewer days being added to sentences overall, though the new system is working well.

Until August 2002 Prison Governors had the power to add days to the sentence of a prisoner who had violated the rules of prison discipline. In *Ezeh and Connors* (2004) 39 EHRR 1, it was held to constitute a determination of a prisoner's rights which was not undertaken by a 'fair and impartial tribunal' and was therefore replaced by a system of independent adjudication by visiting District Judges. This is inevitably more expensive and administratively complex, and given the relatively low numbers of adjudications that are referred to independent adjudicators it is fair to conclude that far fewer days are being added than prior to the successful challenge under Article 6. Therefore the European Convention on Human Rights can be seen to have had some impact on the way in which extensions of custodial sentences are used as sanctions for breaks of prison discipline – though this happened before the Human Rights Act came into force and the new system is working satisfactorily.

¹¹ *R (S) v Secretary of State for the Home Department* [2006] EWHC 1111

¹² *The Sunday Times*, 14 May 2006 "Confusion in Court", *The Telegraph*, 11 May 2006 "Hijackers have a right to live in Britain", *The Daily Mail*, 15 May 2006, "A Culture of Legalised Lunacy"

Issues involving Gypsies and Travellers

The Human Rights Act has played a clear role in ensuring equitable outcomes to planning decisions involving Gypsies and Travellers. Nevertheless the misperception remains that the Act contributes to unfair outcomes and in particular favours Gypsies and Travellers over the settled community.

The Department for Communities and Local Government's planning policies have to strike a fair balance between the rights of Gypsies and Travellers and those of the settled community. Following the decision of the Court of Appeal in *Lough and others v First Secretary of State and Bankside Developments Ltd* [2004] 1 WLR 2557, human rights issues and proportionality have been an integral part of the balancing exercise that takes places in all planning decisions.

The Human Rights Act has also led to decisions in favour of the local authority. For example, in *Price v Leeds City Council* (also cited as *Kay v Lambeth London Borough Council*) [2006] 2 WLR 570, the local authority brought possession proceedings to evict Gypsies who had entered onto land owned by the local authority. The Gypsies argued that they were protected by Article 8 because the council was in breach of its statutory duties. The House of Lords held that domestic law generally struck a fair balance between the rights of the individual and the rights of society. Where squatters occupied land belonging to a public authority, where they had no right to do so, it was only in exceptional cases that an Article 8 defence would succeed.

There remains a perception, fuelled by negative coverage in the media, that the rights of Gypsies and Travellers are given priority over those of the settled community. It has been suggested that there is also a tendency for local authorities to blame the Human Rights Act if appeal decisions go against them, rather than accepting that each planning decision is made on the merits of the case.

The Human Rights Act has a clear role in all planning and housing decisions, including those involving Gypsies and Travellers, and is informing robust and equitable policy development exactly as would have been hoped prior to the passing of the Act. Nevertheless the misperception remains that the Act contributes to unfair outcomes.

Prisoners' voting rights

The Government is reviewing its policy of preventing all convicted prisoners from voting following a judgment by the European Court of Human Rights. The current policy had previously been upheld by UK courts under the Human Rights Act.

Following a Strasbourg Grand Chamber judgment in October 2005 (*Hirst v United Kingdom (No. 2) Appl No. 74025/01*) that the policy infringed Article 3 of the First Protocol to the European Convention on Human Rights (the right to free elections), the Government has said that it will consult on the way forward on prisoners' voting rights.

Although the European Court of Human Rights did not say that all convicted prisoners in the UK must be given the right to vote, much of the complexity of the issue arises in determining which prisoners should and should not be entitled to vote. Nevertheless some media reporting has given the impression that the necessary and inevitable conclusion of the judgment would be the extension of voting rights to all convicted prisoners. This was a judgment of the European Court of Human Rights, and indeed had been a case in which the domestic courts had upheld the current policy when considering it under the Human Rights Act, which therefore made no difference to the outcome of the case. Indeed, it is possible that as and when amended policy on this subject is challenged (as it may well be if it does not extend voting rights to all prisoners), the Human Rights Act may increase the margin of appreciation given to the United Kingdom and hence assist the Government in defending its new position.

Courts-Martial

Key aspects of the Courts-Martial system were found to be compliant with the European Convention on Human Rights under a case brought under the Human Rights Act. As a result the European Court of Human Rights subsequently overruled significant parts of an earlier judgement which had found them to be incompatible.

Disciplinary systems within the armed forces, particularly Courts-Martial, have had to develop in a way which is compatible with the Convention rights. In the case of *Morris v UK* (2002) 34 EHRR 52 the European Court of Human Rights in 2002 made potentially far reaching findings about the general structure of the Courts-Martial system, which was held to be incompatible with the right to a fair trial under Article 6. However, in a subsequent case in the same year (*R v Spear and others* [2003] 1 AC 734), the House of Lords had the opportunity to consider the same issues and, in the course of a very detailed judgement, found key aspects of the disciplinary system to be compliant with the European Convention on Human Rights. In 2003, the Grand Chamber of the European Court of Human Rights subsequently reconsidered the issues in the case of *Cooper v UK* (2004) 39 EHRR 8 and, referring to the detailed judgement of the House of Lords in *Spear*, effectively overruled significant parts of its previous judgement in *Morris*.

This is a notable example of the extent to which judgments of the UK courts have been influential not only in domestic UK law but also in the case law of the European Court of Human Rights – making good a defect identified in the Labour Party Policy Document *Bringing Rights Home* of 1996. This outcome is, however, only achievable because of the ability of the UK courts to consider and apply the Convention rights under sections 3 and 6 of the Human Rights Act.

5. Analysis of overall effect

The key and overriding question is whether the Human Rights Act has impeded the achievement of the Government's objectives on crime and terrorism and led to the public being exposed to additional and unnecessary risk. Section 2 of this review shows that the effect of the Act upon domestic UK law has been far from marginal, and has involved the courts in a much more active and intense scrutiny of the Executive than they had been required to do prior to October 2000. The courts have also applied this scrutiny to primary legislation and, in some high profile cases, have declared Acts of Parliament to be incompatible with the Convention rights under section 4 of the Act.

But – and as the Declarations of Incompatibility themselves illustrate – the public policy issues which arise here derive not from the effect of the Human Rights Act in UK law, but from the UK's obligations under the European Convention on Human Rights itself – to which the Government and all the major political parties remain committed. Indeed, the evidence is that, if anything, the UK Government tends to get better outcomes than previously in Strasbourg through having the Act, because these issues are adjudicated by UK judges here in a manner which has gained the approval and respect of the European Court of Human Rights.

The combined view of the security agencies is that, although there are significant resource implications in servicing the structures set up to deal with dangerous terrorist suspects, these result not from the Human Rights Act, but from decisions of the Strasbourg Court in cases such as *Chahal*. Nor do they believe that the courts' approach to Article 8 has caused any particular problem, since interferences with the right to privacy are allowed in the interests of national security where they are necessary and appropriate.

Section 3 of this review also shows that the Human Rights Act can be shown to have had a positive and beneficial impact upon the relationship between the citizen and the State, by providing a framework for policy formulation which leads to better outcomes, and ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered both by those formulating policy and by those putting it into effect. The Act therefore directly contributes to greater personalisation and better public services. The Government has recently reasserted its commitment to the Human Rights Act, and the UK's continued membership of, and participation in, the Council of Europe is accepted by all the main UK political parties. Since the Act came into force in 2000 the UK has reaped the benefits of the greater transparency and immediacy of human rights protection, not only in Strasbourg, but also at the United Nations.

Such difficulties which have arisen, and of which the events leading to the murder of Naomi Bryant provide a very conspicuous and sobering example, lie in the way the Act has been implemented, and in the failure consistently to provide key decision takers with the right training, guidance and legal advice, particularly upon the overriding importance of the State's duty (which can be found in the European Convention on Human Rights itself) to take suitable measures to protect public safety. Section 4 of this review shows that there is an urgent need for action, both by lead policy Departments and by the DCA, in redressing the balance here, and in providing clearer and more timely public communications to undo the damage caused by the myths which have grown up around human rights.

Devolution

Any review of the implementation of the Human Rights Act must necessarily consider the experience of Scotland, Wales and Northern Ireland. This is because of the way that human rights, as defined as Convention rights in the Human Rights Act 1998, are embedded into the Scotland Act 1998, the Government of Wales Act 1998 (and current Government of Wales Bill), the Belfast Agreement and the Northern Ireland Act 1998. The Human Rights Act provides not only the constitutional framework within which devolved powers are exercised, but lies at the foundation of the way devolution has been effected. Any process of amendment to the Human Rights Act would need to pay due regard to this dimension.

The Scotland Act provides that the Scottish Parliament does not have competence to legislate incompatibly with the Convention rights. Therefore, although in respect of Acts of the UK Parliament the courts can only make Declarations of Incompatibility, the courts can invalidate Acts of the Scottish Parliament. Additionally, the Scotland Act states that it is unlawful for a member of the Scottish Executive to make subordinate legislation or to do any other act incompatible with the Convention rights.

The situation in respect of Wales is less marked owing to the fact that the National Assembly does not as yet have primary legislative powers. However, human rights are written in to the Government of Wales Act 1998 in a similar way to that in Scotland: the Assembly is unable to act in any way which is incompatible with the European Convention on Human Rights. The Government of Wales Bill which is currently before Parliament restates this requirement in clause 81 'Human Rights', in respect of the exercise of their functions by the Welsh Ministers, and under clause 94(6)(c) any provision in an Assembly measure is outside the Assembly's legislative competence if it is incompatible with the Convention rights.

A commitment to safeguarding human rights and equality of opportunity was a fundamental part of the Belfast Agreement and has consequently been incorporated into the Northern Ireland Act 1998. As well as ensuring that a devolved administration may not act in a way which is incompatible with the European Convention on Human Rights, the Northern Ireland Act has established the Northern Ireland Human Rights Commission which is tasked, amongst other things, with keeping under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights.

6. Possible solutions

- The Government remains fully committed to the European Convention on Human Rights, and to the way in which it is given effect in UK law by the Human Rights Act.
- The Government is conducting a thorough review of how police, probation, parole and prison services balance public protection and individual rights and, if necessary, will legislate to ensure that public protection is given priority.
- There will be a major push led by the DCA for the provision of better and more consistent guidance and training on human rights within Departments, with specific reference to areas in which such guidance is currently lacking.
- The DCA will revise and strengthen generic guidance on human rights for public sector managers, placing particular emphasis upon safety arguments.
- The Government must take a proactive, strategic and co-ordinated approach to human rights litigation, so that it has the maximum possible impact on future case law under the Human Rights Act.
- The Government will lead a drive to ensure that the public as well as the wider public sector are better informed about the benefits which the Human Rights Act has given ordinary people, and to debunk many of the myths which have grown up around the Convention rights.

The following section sets out a range of possible options for the way ahead.

The first two of the following options have been comprehensively and publicly ruled out by Ministers: the Prime Minister has described repeal of the Human Rights Act as a “false solution”. The Government therefore remains firmly committed to the European Convention on Human Rights and to the Human Rights Act. However, these options are examined in brief detail here in order to provide some further context to the current public debate on the Human Rights Act and the European Convention on Human Rights.

Withdrawal from the European Convention on Human Rights

Withdrawal from the European Convention on Human Rights is permitted on six months’ notice to the Secretary-General of the Council of Europe, though any denunciation could not be retrospective. There would be clear international ramifications: the UK’s rights of representation at the Council of Europe could be suspended, and the Committee of Ministers could request its withdrawal after calling for the opinion of the Parliamentary Assembly. From a broader political perspective, the UK would be fatally undermined in any efforts to encourage better human rights implementation by other members of the Council of Europe and our position in lobbying for human rights implementation by States elsewhere in the world would also be affected.

As regards the European Union, nothing in the European treaties expressly obliges Member States to be a party to the European Convention on Human Rights. But the European Convention on Human Rights is in practice fundamental. The Maastricht Treaty states that the Union is founded upon, *inter alia*, respect for human rights, and that the Union is to respect fundamental rights as guaranteed by the European Convention on Human Rights. Where there is a serious and persistent breach by a Member State, that Member State's voting rights under the treaty can be suspended. Given the high political status of the European Convention on Human Rights, it is theoretically possible that some partners might wish to activate this machinery on the grounds that the UK's denunciation of the European Convention on Human Rights was such a serious breach. Even if the UK could denounce the European Convention on Human Rights and still remain an EU member, Member States must respect fundamental rights when implementing EU measures, so the European Convention on Human Rights would continue to apply to the UK's actions in those areas.

Repeal of the Human Rights Act

An alternative option is to repeal the Human Rights Act, but without withdrawing our membership of the European Convention. This would restore the basic legal framework that existed before the Act was enacted. So individuals would no longer be able to rely directly on their Convention rights before the UK courts. Ministers would no longer have to certify the compatibility of Bills, and courts would no longer formally be able to declare statutes incompatible. Individuals could still petition the European Court of Human Rights in Strasbourg. The Government would also retain its obligation to execute decisions of the European Court, and to provide effective remedies for breaches of the Convention rights.

The precise effect on UK law of repealing the Act is a matter for speculation. On the one hand, repeal could be expected to reduce and to some extent reverse the immediacy of the Convention's impact in UK law. But on the other hand, it is unlikely to restore fully the position immediately before the Act came into force, or to remove European Convention on Human Rights principles from UK law. There are several reasons for this. First, the courts were able to rely on the European Convention on Human Rights even before the Human Rights Act came into force. The European Convention on Human Rights was used as an aid to the interpretation of ambiguous legislation, but also informed the development of the common law. That common law reliance on the European Convention on Human Rights (and of other international rights instruments, such as the various UN treaties) can be expected to continue and possibly intensify on repeal of the Act. Second, the domestic legal landscape has changed since 2000, possibly irreversibly. Since the Act, the courts have assimilated a rights-based approach into the common law. Convention rights, partly because many of them are derived from common law principles, may now be so firmly embedded into the legal culture that repeal of the Act has minimal impact. And in so far as repeal did have an impact in closing off the remedies that are now available in the UK courts, it would only serve to re-introduce the cost and delay of seeking a remedy in Strasbourg. It is also very likely that the European Court would intensify its scrutiny of the application of Convention rights within the UK, following repeal, thereby increasing the number of adverse decisions against the UK.

Straight repeal could be accompanied by legislation that tried to restrict this common law reliance on the European Convention on Human Rights and other international rights instruments. But the attempt is likely at best to be fruitless and at worst to introduce a damaging conflict with a judiciary unwilling to see the common law divorced from the protection of fundamental rights. It would also, probably, increase further the scrutiny received by the UK at Strasbourg.

Amendments to the Human Rights Act

This Report has shown that, in a number of key areas, and particularly when public safety is in issue, key decision makers may be getting the balance wrong by placing undue emphasis upon the entitlements of individuals. Essentially, this means that insufficient regard is being paid to the overarching importance of the State's duty to maintain public security under Article 2 of the European Convention on Human Rights. While it is not possible for the Human Rights Act to seek to amend the Convention rights, nor the way in which the European Court of Human Rights has interpreted them, it might be possible, within the UK's margin of appreciation, to use the Act to effect a rebalancing in the way Article 2 is applied in relation to other Articles.

Sections 12 and 13 of the Human Rights Act require courts to have "particular regard", in certain circumstances, to the importance of freedom of expression; and freedom of thought, conscience and religion, respectively. In theory at least, it might be possible to make similar provision in relation to the importance of public safety, although any provision could not alter significantly the scope of the Convention rights, because it could, like sections 12 and 13, operate only within the margin of appreciation.

Parallel legislation on establishing duties on public safety

There are other possible legislative solutions, which do not involve amending the text of the Human Rights Act itself. Rather than amend the Human Rights Act, legislation could if necessary be enacted to ensure specific agencies give priority to public protection. This might for example be effected in a Bill dealing specifically with the Parole or Probation Services. Such a duty would, of course, have to be fully consistent with the Convention rights as interpreted by Strasbourg and the domestic courts.

The Government would need also to ensure that robust and effective processes were in place to support this. One of the ways of supporting this would be through an advice service for front-line staff, as recommended by the Criminal Justice System Review¹³.

Significant reviews are already underway of administrative procedures across the criminal justice system, which are expected to report in the autumn.

Litigation and co-ordination of legal advice

The Government must take a proactive, strategic and co-ordinated approach to human rights litigation, so that it has the maximum possible impact on future case-law under the Human Rights Act. This approach must include:

- ensuring that Departments are consistent in how they argue human rights points;
- encouraging other public bodies to take similar arguments where they are parties to important cases;
- ensuring that concessions are not made on the basis of an unduly cautious interpretation of the European Convention on Human Rights and of the case law;

¹³ *The Criminal Justice System Review* is available at <http://www.homeoffice.gov.uk/documents/CJS-review.pdf>

- asking the courts to recognise the competing rights and public interests involved in human rights cases; and
- seeking opportunities to intervene in cases where the government is not directly involved.

The Government already has a number of well-established mechanisms to ensure not only compliance but also proper coordination of litigation and legal advice on human rights issues. Some of these are led centrally; but individual departments also have their own arrangements for monitoring important cases and developing arguments in their areas. These mechanisms have had an important and beneficial impact on case law since the coming into force of the Act. They could be used to disseminate the messages emerging from the present review, as well as building on them in various ways.

Existing arrangements will be built on in order to develop a more proactive litigation strategy across central Government. This could include the increased use of targeted interventions in the courts, seeking to exert greater influence over the development of case law in a range of areas, so as to keep the Convention rights within appropriate bounds and emphasise the importance of the rights of the wider public. This robust litigation strategy should be led and periodically reviewed by the Law Officers in conjunction with DCA and other departments.

The Attorney General already plays an active role personally in relation to the Government's litigation strategy. For example, recently the Attorney General successfully intervened in civil proceedings to argue for a narrowing of the privilege against self-incrimination¹⁴. The Attorney General's arguments were based on the government's positive obligations under the Human Rights Act to protect society generally. The result of this judgment (which is being appealed) is that evidence of paedophilic use of a computer could be handed over to prosecuting authorities. Similar strategic interventions by the Government in key cases could assist in keeping Convention rights within reasonable bounds, and emphasising the importance of the rights of the wider public when considering proportionality issues.

Secondly, training provided to Government lawyers will emphasise the weight to be given to public safety considerations when considering European Convention on Human Rights issues, particularly where proportionality is at stake. Such issues could usefully inform the well-developed human rights training programme which already exists for Government lawyers, and could also be the basis for an immediate programme of training, discussion and networking targeted on public safety concerns.

Of course Government lawyers need to continue providing accurate and professional assessments of legal risk, which can form the basis of policy and operational decisions. However there may be scope for them to encourage policy makers to assess more systematically the impact of policy and operational decisions on the wider public, so that these factors are properly weighed in the balance when considering European Convention on Human Rights compatibility. There may also be scope for guidance or training for policy and operational officials on how to approach the task of responding to legal risks, or threats of legal challenge, so that they do not simply respond by taking a decision which avoids legal challenge but which may not sufficiently protect public safety. An analogy may be made with Cabinet Office guidance on the risk-based approach to transposing European directives, which ensures that any risks of under-implementation are properly assessed and analysed, and do not lead to unnecessary "gold-plating".

¹⁴ *C Plc & W v P* [2006] EWHC 1226 (Ch)

As this review has shown many of the difficulties do not lie within Government but in the wider public sector. In this context, it is worth noting the forthcoming establishment of the Commission for Equality and Human Rights, due in October 2007, which will provide a further source of expertise on human rights. The Commission will work to encourage a better understanding of how public authorities should deal with human rights and more generally encourage good practice in relation to human rights.

Meanwhile there is scope to develop greater liaison between central Government and the wider public sector in relation to legal advice and litigation. For example this could involve disseminating information about key cases, the lines which the Government is taking on particular human rights issues, or the approach which Departments would recommend public authorities falling within their area of responsibility to adopt in relation to human rights issues. Whilst DCA might have a central role to play here, such a programme would also involve an important role for other Departments in relation to NDPBs and Agencies which they sponsor. Departments should be accountable for ensuring that the Agencies and NDPBs which they sponsor plan for and ensure suitable human rights training for their staff.

Amendments to guidance within Departments

It is clear that there are a significant number of areas in which departmental guidance is either leading to Convention rights being misapplied (or misinterpreted), or in which the absence of guidance is leaving officials exposed, with insufficient access to advice or guidance which would enable them to balance assertions made by (or on behalf of) individuals against the interests of the wider public where safety is in issue. Operational managers are understandably concerned that those affected by their decisions threaten vigorous legal challenges, and proper support needs to be put in place to ensure that this does not lead to incorrect decision making. There is also a role for better and more consistent training.

This effect can be reversed relatively quickly. The relevant Departments will be invited over the summer to commence a rigorous review of all guidance and training programmes to ensure that public safety is given its proper importance. This will need to extend beyond central Government since it is within Agencies, sponsored bodies and local authorities that many of the problems exist. Coverage of the whole public sector will therefore be achieved through the relevant sponsor Departments. This work could be undertaken under the leadership of a Ministerial Group in order to ensure it is rigorously carried through.

Generic guidance issued from DCA

Departmental-specific guidance will need to be supported and supplemented by overarching central guidance. The DCA already has in hand the preparation of a Human Rights Toolkit which will offer generic guidance to public sector managers in the application and implementation of the Convention rights and the Human Rights Act. The Toolkit has been developed in consultation with expert Non-Governmental Organisations (including the British Institute of Human Rights).

This generic guidance pack will work in parallel with Departmental guidance and training in order to form a body of simple, accessible and comprehensive guidance on what the Human Rights Act does (and does not) require. Dissemination of the Toolkit would be followed up by targeted conferences to publicise and amplify the guidance.

Myth-busting

Negative and damaging myths prevail about the Human Rights Act. These myths undermine the public's confidence not only in the Act but in the very idea of "human rights". There is an urgent need for the public as well as the wider public sector to be better informed about the benefits which the Human Rights Act has given ordinary people, and to debunk many of the myths which have grown up around the Convention rights and the way they have been applied, both domestically and in Strasbourg. The European Convention and Court of Human Rights occupy a proud place in the new order which followed the Second World War, and the UK played a leading role in their creation. The Government will ensure that the generations of today and the future understand their continuing importance to our democracy.

Annex: The Convention rights

These are the Convention rights set out in the Human Rights Act.

Article 2: Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3: Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4: Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service which forms part of normal civic obligations.

Article 5: Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6: Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7: No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8: Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10: Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11: Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.

Article 12: Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 14: Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 16: Restriction on political activities of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17: Prohibition of abuse of rights

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

Article 18: Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

The First Protocol

Article 1: Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2: Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

(The UK has accepted this Article subject to a reservation that it does so only so far as it is compatible with the provision of efficient instruction and training and the avoidance of unreasonable expenditure.)

Article 3: Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

The Thirteenth Protocol

Article 1: Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Explanatory note on terminology: “absolute”, “limited” and “qualified” rights

Not all the Convention rights are formulated in the same way. The different types of Convention rights are sometimes explained as:

- *absolute rights* such as the right to protection from torture, inhuman and degrading treatment and punishment (Article 3), the prohibition on slavery and enforced labour (Article 4) and protection from retrospective criminal penalties (Article 7)
- *limited rights*, such as the right to liberty (Article 5) which are limited under explicit and finite circumstances, set out in the European Convention on Human Rights itself, which provides exceptions to the general right
- *qualified rights*, which include the right to respect for private and family life (Article 8), religion and belief (Article 9), freedom of expression (Article 10), assembly and association (Article 11), the right to peaceful enjoyment of property (Protocol 1, Article 1) and to some extent the right to education (Protocol 1, Article 2). Interference with them is permissible only if what is done:
 - A. has its basis in law; and
 - B. is done to secure a permissible aim set out in the relevant Article, for example for the prevention of crime, or for the protection of public order or health; and
 - C. is necessary in a democratic society, which means it must fulfil a pressing social need, pursue a legitimate aim and be proportionate to the aims being pursued.