Whitehall and the Human Rights Act 1998

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The project relied primarily on interviews and

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Executive Summary

The Human Rights Act, which came into full force on 2 October 2000, is a major development in the legal and constitutional history of the United Kingdom that will reach into every area and activity of Government.

The Act forms an important part of the Government's constitutional reform programme. Its political drive is drawn from that programme and is subject to the ebbs and flows in political commitment to the Government's constitutional agenda.

The Human Rights Act is also intended to serve as the basis for a new 'human rights culture' in the UK. The Government is seeking to establish a culture based on communitarian principles in which the rights of individuals are balanced by their responsibilities to society. Questions are raised, from a human rights perspective, over the Government's apparent intention to build such a culture based on the relatively narrow band of civil and political rights covered by the European Convention on Human Rights (ECHR).

The implementation of the Human Rights Act is being treated as a major undertaking in Whitehall. The intention is to mainstream its requirements in every branch of Government, public authority and private body with public functions.

The Government does not intend to give human rights paramount status above other considerations in policy formulation, decision taking and law making. There will be no single central authority ('Justice Ministry') with powers to oversee the Human Rights Act and to enforce compliance by other branches of Government.

In the absence of a single central authority, implementation of the Act is being handled by the Home Office (as the policy and lead department), Cabinet Office and Lord Chancellor's Department. A range of ad-hoc committees and groups have been set up to steer implementation and ensure consistency in matters concerning the Act. They are doing an effective job but are not permanent in nature. Whitehall will need to consider what structures are required in the longer term to deal with the Human Rights Act and ECHR. Their form will depend largely on what issues remain to be tackled on the Government's human rights agenda.

There is a conflict (not unusual in Whitehall) between the Home Office's role in implementing the Human Rights Act and its portfolio of law enforcement and other issues which may be subject to challenge under the Act. This means that it does not have a strong

incentive to realise the full potential of the Human Rights Act and reasons to try to contain or restrict the effect of the Act.

Signs of such an attitude are evident in the minimalist approach the Home Office has adopted towards the Human Rights Act. Its Human Rights Unit is small in size, under resourced and does not have a high profile in the Home Office. The Unit has focused more on risk management strategies (known in Government as the 'traffic light' system) than the possibilities and potential of the Act to put human rights considerations at the centre of policy and decision making in Government.

Within these limits, the Home Office's Human Rights Unit (with the assistance of the Home Office Human Rights Task Force) has produced some excellent guidance material on the Human Rights Act and ECHR. It has set up an effective framework within which to monitor progress and to provide written guidance to other departments on their preparations for the Act. It has fostered a commendable degree of openness over the preparation process within Government.

The Home Office Human Rights Task Force has provided a very useful forum in which Government and non- Government members can contribute to the implementation process for the Human Rights Act. The Task Force has kept Government departments 'on their toes' and is beginning to produce a steady stream of general publicity material as well as more sharply focused material to counter unfavourable publicity concerning the Act. But it is handicapped by a limited mandate, scant resources and the lack of any meaningful research capacity. The Task Force is not intended to be a permanent body but it fulfils an important promotional function for the Act which should continue. There are diverging views between Government and non- Government members on the Task Force over the latter's call for this function to be taken up by an independent Human Rights Commission.

Most departments received no extra resources to implement the Human Rights Act. It has taken time for them to put in place the management groups, action plans, audits and training programmes required to implement the Act. However, most departments will feel able to face 2 October with a reasonable degree of confidence. The same cannot be said for their public authorities and bodies with public functions. The time taken by departments to put their own houses in order means that only now, late in the day, are they in a position to offer assistance to such organisations. This needs to be addressed as a pressing priority.

Departments offer a microcosm of the problems of mainstreaming human rights within Government. Small ad-hoc 'human rights' teams at the centre of departments are able to guide but do not direct the work of other policy and business units. There is a real need to establish a 'user group' for these departmental officers to allow them to share knowledge, experiences and frustrations concerning the Act. The same question mark needs to be

addressed over the permanence of these departmental teams as with those in central Government. The retention of expertise will be difficult with the posting of staff.

The Government legal services have been quick to see the need to share knowledge and ensure consistency in approaching legal matters concerning the Human Rights Act. Two ad-hoc co-ordinating groups (one for criminal and one for civil issues) have examined the most vulnerable areas disclosed through the 'traffic light' reviews and prepared 'lines to take' for use in the event of a challenge in court. These groups have reviewed the outcome of Convention points raised as devolution issues in Scotland and certain important cases in England and Wales (such as the *Kebilene* judgements) for pointers on the potential use of the Human Rights Act and ECHR after October. They have formulated the Government's response on attempts to make use of the Human Rights Act and Convention points before 2 October.

The different timetables for the introduction of the Human Rights Act and the 'Devolution' Acts have resulted in Scotland becoming the 'test bed' for incorporation of the ECHR. Since July 1999, there have been over 600 cases in Scotland in which Convention points have been raised. Few of these challenges have succeeded (around 3 per cent) but important judgements have ended the employment of temporary sheriffs, focused attention on delays in the criminal justice system and suggested that laws involving self incrimination are not compatible with the Convention. In responding to Convention points, the Scottish Executive has adopted solutions, such as the proposed creation of a Judicial Appointments Commission, which would not be the choice of London. The Scottish Executive has also set in motion steps leading to the establishment of a Scottish Human Rights Commission. Whitehall may have misplaced confidence over its ability to maintain a consistent approach to human rights throughout the UK.

After 2 October, there will be an explosion of cases in which Convention points will be argued. Most of these arguments will fail, but Whitehall accepts that there will be high profile successes. Mechanisms have been put in place to consider important judgements and to fast track appeals. While there will be jolts to the system, Whitehall is sanguine about its ability to cope with the Human Rights Act. There is unease within the Government, however, that the Act will attract a sceptical and, perhaps, a hostile reception in large parts of the media. It is not clear, at this time, whether it will mount a prominent defence and justification of the Human Rights Act or trust t

persons in the UK to the individual complaint mechanisms and broader spread of rights under the UN's human rights treaties. There is no active planning for any of these issues within Whitehall but, for presentational reasons, the door will not be closed. Human Rights NGOs will ratchet up their campaign for a Human Rights Commission particularly should the Human Rights Act be dogged by a poor press and the Joint Parliamentary Committee on Human Rights not be able to scrutinise effectively the Government's human rights record.

The Government's cautious approach is mirrored in the 'no new rights' stance adopted towards proposals for a Charter of Fundamental Rights binding the institutions of the European Union. There is growing disquiet in Whitehall that the Charter may become a harbinger of a European Constitution and that it could give legal effect to new rights and economic and social rights not found in the ECHR. The purpose and form of the Charter will be determined prior to the December 2000 IGC meeting in Nice.

Introduction

The Human Rights Act is an extremely significant development in the legal and constitutional history of the United Kingdom. Not surprisingly, therefore, the Act has already garnered considerable attention in the period before it comes into force in October 2000. Its strengths and weaknesses have been analysed in considerable depth and there has been much speculation on the ramifications of the Act for the future conduct of government and the legal system in the UK.

This paper is not an examination of the Human Rights Act per se or the use to which it will be put before the courts. Instead, it is concerned with that part of the process which lies largely beyond the public gaze, namely the preparations being made within the Government for the coming into force of the Act.

The paper has three purposes:
(a) to examine the Government's human rights policy as developed through the Human Rights Act;
(b) to document Whitehall's preparations for the introduction of the Act; and
(c) to provide timely analysis and advice on issues arising from the implementation of the Act.

The aim is to complete the project in two parts:
(1) an analysis of the preparations and expectations within Government prior to the implementation of the Act in October 2000; and
(2) a subsequent review of how far the first year's experience in implementing the Human Rights Act has validated or altered perceptions and systems within government for dealing with the Act.

This first part of the story is picked up at the passage of the Human Rights Act in November 1998 and is followed through to the end of August 2000 (at the threshold of the Act's commencement). The paper examines:
- the nature of the 'human rights culture' being developed and promoted by the Government,
- how central government is organised to deal with the Act,
- the steps being taken to prepare departments and public authorities for the coming into operation of the Act,
- measures being taken by the Government's legal services,
- preparations in the judiciary,
- the impact of the ECHR and HRA on the devolution process,
- the Government's expectations and preparations for the first months that the Act is in place, and
- the Government's future 'human rights agenda'.

This is not an official history or the Government's version of events. The treatment is, however, sympathetic to the Government's pu

surprising that the new Government would have notions, nurtured during the long years of opposition, that the executive was too powerful in Westminster and that it should be subject to a more rigorous system by which it would be held accountable for its actions. This is not to say that the Human Rights Act came about because there was a new Government still 'thinking like an opposition' but it may be the case that it did not think about all the consequences that would rebound first on the Government which had introduced the Bill. Incorporation of the ECHR would never have been high on the new Government's agenda unless it saw both material and political benefits in doing so. Was this as simple as believing that only the policies and legislative proposals of Conservative governments were likely to have problems under the application of a Human Rights Act? As Luke Clements has commented, "Incorporating the Convention is more likely to disembowel the Adam Smith ship of state than New Labour's flotilla."[2]

Apart from its constitutional significance there was a second important dimension to the Human Rights Act, which was to act as "the cornerstone of the Government's commitment to promoting wider awareness of human rights throughout the United Kingdom"[3] by the

The Government intends that:

> The Act will create and promote a culture of human rights in Britain. It will make citizens more aware of their rights and make it much easier for them to enforce them... Of course with rights come responsibilities and the Act will encourage greater awareness of, and respect for, the rights of others. It will help to create a society in which rights and responsibilities are properly balanced.[5]

Establishing a correct relationship between rights and responsibilities lies at the heart of the human rights culture that the Government wishes to see in the UK. The point is most firmly established in a speech (and the accompanying notes) given by the Home Secretary at the Civil Service College from which it is useful to quote several extracts:

> The culture of rights and responsibilities we need to build is not about giving the citizen a new cudgel with which to beat the State. That's the old-fashioned individualistic libertarian idea that gave the whole rights movement a bad and selfish name. The idea that forgot that rights don't exist in a vacuum, that forgot the relationship between the individual and the group. That's not the culture of rights and responsibilities we want or need.

> The culture we want is not a litigious collection of individuals and interest groups who see rights as a free good and the Human Rights Act simply as a means of enforcing the rights of individuals against public authorities. The culture we need is one which is not always soft when an individual's rights are in play. The true culture of rights and responsibilities may actually sometimes require us to be qui0.0009 Tc0ally so.661S4.-t.235 0 TD0o be qui0.0]TJ19 4hat forgooo1vidualiss are in 5

strengthening of respect for human rights and fundamental freedoms' or 'the full development of the human personality and the sense of dignity'.[9] As Murray Hunt argues:

> It is clear from the Act's own provisions, from its fundamental scheme and from the various government pronouncements surrounding its enactment, as well as from its place in the wider programme of constitutional reform, that it is designed to introduce a culture of rights that is more communitarian than libertarian in its basic orientation. In such a human rights culture, the individual citizen is more than the mere bearer of negative rights against the state, but is a participative individual, taking an active part in the political realm and accepting the responsibility to respect the rights of others in the community with whom he or she is interdependent. The Human Rights Act introduces a distinctly social-democratic model of human rights protection, combining the protection of

The linkage between rights and duties is not unknown in international human rights instruments. Article 29 of the Universal Declaration of Human Rights refers to the fact that 'everyone has duties to the Community in which alone the free and full development of his personality is possible.' The preamble to the ICCPR observes that the 'individual, having duties to other individuals and to the community in which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.' But only Africa has gone so far as to specify in a regional human rights treaty, the African Charter on Human and Peoples' Rights, that an individual has duties and obligations both to other individuals and the state.

The human rights culture that is being built in the UK is apparently to be founded on a single regional human rights instrument, the European Convention on Human Rights, drafted more than fifty years ago to address the circumstances of post- war and Cold War Europe. The ECHR has not stood still in that time. It is a living instrument that has been added to over the years. The Convention has also been given a purposive interpretation by the ECtHR, which means that it retains its relevance in European society. But the Convention has serious limitations as the cornerstone for a human rights culture.

Firstly, the Convention deals almost exclusively with those civil and political rights of individuals that are considered justiciable before the courts. It does not cover the substance of economic, social and cultural rights except in certain procedural aspects. The preamble to the Convention modestly admits that it represents only "the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration of Human Rights". Although a large number of Protocols covering additional civil and political rights have been added to the Convention, several omissions remain even in these areas, most noticeably in the protection of minority rights and the absence of a free-standing non discrimination clause (the latter omission should be corrected by the newly drafted Protocol 12, although the UK is not expected to be among the early signatories). There is also no specific mention of children's rights, a weak provision on personal privacy and gaps in the standards and procedures for detaining people, dealing with asylum seekers and administering justice. Much of the wording of the Convention is outmoded and of more limited scope than that contained in more recent UN human rights treaties (also ratified by the UK). The Convention deals only with individual rights. It does not cover collective rights and, unlike the American Convention on Human Rights, it has no mechanisms for dealing with 'situations' (investigating and handling endemic or repeated violations). The European Court has admittedly, by comparison, rarely had to deal with completely unresponsive governments and domestic systems in which torture, disappearances and extra-judicial executions are almost commonplace. But where there is a systematic flaw, this cannot readily be tackled through the examination of individual cases. In Italy, for example, the length of civil proceedings has been found consistently to breach the right to a fair trial within a reasonable time provided for under Article 6 of the Convention. However, in the absence of major

reforms to the Italian justice system, the European court continues to receive hundreds of these cases each year which either have to be dealt with individually or disposed of en masse through friendly settlements between the applicants and the Italian Government. The root of the problem remains untouched.

In the UK, the Human Rights Act will not deal directly with 'situations' but Section 6 of the Act does make it unlawful for a public authority to act in a way which is incompatible with a Convention right unless it is required to do so by primary legislation which cannot be interpreted compatibly with the Convention. There is, therefore, a strong imperative for the Government to avoid challenges through auditing and correcting procedures and practices where breaches of the Convention might occur.

The ECHR is very much a construct of Western thinking from the middle of the last century that the only real human rights were those that could be specified and acted upon in the courts. In this sense:

> The western conception of human rights…is derived from a view of the human person as possessing inalienable rights anterior to the creation of the state and thus beyond its legitimate reach. No longer absolute, the state is dependent upon the consent of the governed (popular sovereignty) and is itself subject to the law of the land. For the state to act against any individual such action must be taken in the manner provided by law. Thus human rights in the West are an individualistic conception relying on legal-judicial mechanisms for their efficacy and promotion.[12]

But if this is a narrow focus, it is also one the greatest strengths of the Convention in that, uniquely among international human rights instruments, it is overseen by an international court whose judgements are accepted as binding by its states parties. An essential part of the 'human rights culture', therefore, is that the Government is accustomed to having to abide by the rulings of the European Court of Human Rights even to the extent of amending domestic legislation. The dictates of parliamentary sovereignty mean that the rulings of domestic courts will not exert the same force (save in respect of legislation enacted by devolved institutions) under the Human Rights Act. But the right to go to Strasbourg will always remain at the end of the domestic process. This fact together with the long established UK tradition of respect for the 'rule of law' means that there is effectively a 'culture of compliance' within Government to the extent that while it has a discretion not to give full effect to every judgement of the domestic courts under the Human Rights Act, it will never consider this the 'default option' or a decision to be taken lightly. In developing its 'human rights culture', therefore, the Government has been steered by a sense that it should or will need to comply with the end result of a process which it cannot be seen to influence or dictate. But because it is a passive process which will only be triggered by applicants coming

[12] David Wright - 'Human Rights in the West' in Admantia Pollis and Peter Schwab (eds) – 'Human Rights: Cultural and Ideological Perspectives'. Praeger. P 21

forward with grievances and challenges the Home Office does consider, as we have seen, that it can legitimately try to influence their expectations and use of the Act. It has, therefore, fastened on the balance established in certain of

Bill of Rights. It was also part of a vibrant constitutional reform package not only empowering the individual with rights but opening up new avenues of participation in decision-making processes. Much of this emphasis and early drive would seem to have been lost as the complexities of daily government begin to take their toll. The 'human rights culture' that is now being developed would seem to have a much more limited objective. In effect, Convention rights have become synonymous with human rights.

2. Steering implementation of the Human Rights Act

2.1 The Whitehall Machinery

The Human Rights Act was conceived as part of the Government's constitutional reform programme steered by the Ministerial Committee on Constitutional Reform Policy (CRP), chaired by the Prime Minister. Actual development of the Act was in the hands of three parties. Policy responsibility rested with the Home Secretary. However, a good deal of the driving force for the Act came from the Lord Chancellor and, as his interest extended to areas outside the policy remit of his department, the Cabinet Office became drawn into the policy process in its co-ordinating role. The Lord Chancellor chaired the Ministerial Sub-committee on Incorporation of the European Convention on Human Rights (CRP(EC)) which took the key decisions on the form of the Human Rights Act on the basis of proposals formulated by the Home Office.

The active involvement of the Ministerial committees largely ended with the passage of the Human Rights Act. Following from the Ministerial lead, implementation issues are being kept in view by the officials' committee (CRP(EC) (O)) which is chaired by the Head of the Constitution Secretariat in the Cabinet Office. This committee, with some 70 nominal members, conducts most of its business by correspondence or ad-hoc meetings in relation to particular issues. It has met to consider the implications of the more significant devolution cases from Scotland, the form of S.19 statements and the arrangements by which appointments are made to tribunals in England and Wales. The Committee also receives summaries of the returns provided by departments to the Home Office on the steps being taken to implement the Human Rights Act. An ad-hoc sub-committee, chaired by the Legal Adviser of the Constitution Secretariat, provides the main committee with specialist legal advice. It may be counted as an indicator of the special status and significance accorded to the ECHR and Human Rights Act that they are thought sufficiently important to warrant dedicated Cabinet Committees.

No one party has overriding authority within the central structure for dealing with the Human Rights Act. The Home Office holds policy responsibility for the Act and functions as the lead department except in matters relating to the judiciary which fall under the Lord Chancellor's Department. Overlaying these individual responsibilities, the Constitution

Secretariat of the Cabinet Office has a broad policy function and role of providing the means through which collective decisions can be made on issues concerning the Act.

Of the three, prime responsibility for the Human Rights Act rests with the Home Office. The UK does not have a Justice Department to oversee its human rights legislation as is the case in Canada and New Zealand. In Britain, justice functions are divided between the Home Office and the Lord Chancellor's Department. While the Lord Chancellor has been one of the prime movers of the Human Rights Act, his department does not exert the same influence in Whitehall as the Home Office. The Prime Minister has not looked to put his personal stamp on the Act by setting up a dedicated human rights unit within the Cabinet Office, and the Government has consciously and firmly eschewed the possibility of having a dedicated 'Minister of Human Rights' with the authority and means to direct the work of other departments on human rights issues. This is not how matters are structured in Whitehall. In the words of one Permanent Secretary, recorded by Professor Spencer Zifcak:

> We do have a different philosophy. We want to get human rights to run in the bloodstream of each department. If we establish a strong central unit, departments would say, 'Oh well, they're in charge of this, so let's send it on.' Departments would have no real sense of ownership of human rights. So, we have created what I would describe as a disaggregated but still co-operative approach.[14]

No central authority, runs the argument,

this purpose. The responsibility for complying with human rights requirements rests on the Government as a whole.[18]

2.2 The role of the Home Office

Wth these thoughts in mind, it is appropriate to consider the role and 'predicament' of the Home Office in relation to the Human Rights Act. The Home Office has to manage conflicting priorities with regard to the Human Rights Act. It has responsibility for the effective implementation of the Act but, at the same time, must manage a portfolio that covers many of the areas - law enforcement, immigration, prisons - most likely to be subject to challenge under the HRA. Government departments are accustomed to having to juggle competing or contradictory priorities in their work. The Home Office considers that its role in relation to the Human Rights Act is given added credibility in the eyes of other departments because in implementing the Act it is also increasing its own vulnerability to challenge in many of its operational areas. The rest of Government, therefore, can take comfort from the fact that, in the words of one official, the Home Office provides a 'safe pair of hands' and that when it seeks action on the part of other departments what is required is truly necessary and the outcome of careful deliberation. It is tempting to criticise what appears to be a very negative approach, but there can be no question that, given that most departments began with little or no knowledge of what the Human Rights Act entailed, it was important that these departments had confidence in the message bearer who is telling them that they must devote the time and effort to bring their policies, procedures and statutes into conformity with Convention rights.

Within the Home Office, a dedicated Human Rights Unit was established to implement the Human Rights Act. The Unit was to "maintain and develop the UK's position relating to Human Rights issues for the Home Office arising from the work of international organisations including the European Union and the UN" as well as to "implement the Human Rights Act including servicing of the Human Rights Task Force". In November 1998, other departments were advised:

> The Human Rights Unit of the Home Office will be available as a resource on the basis of its experience taking the legislation through. The HRU is not, however, equipped to carry out a comprehensive review of the whole of Departmental activity, nor to give authoritative advice on the compatibility of any proposed legislation or policy with the rights set out in the Act. That can only be a matter for each department, looking at the matter in its policy context and in collaboration with its own legal advisers and with those in the Foreign and Commonwealth Office and the Law Officers' Department where necessary.[19]

The Human Rights Unit is small in size, under resourced, and does not have a high profile within the Home Office. It has not sought to bring in outside human rights experts on

[18] Rights Brought Home: The Human Rights Bill. October 1997. CM3782. P 13-14.

secondment. The learning curve has been steep and there are limits to what the Unit can achieve. Among its first actions was the development of a system which was first to inform other departments of their obligations under the Human Rights Act, and then to monitor and guide the steps taken by those departments to comply with the Act. Departments are expected to provide the Unit with six monthly updates on progress [see pages 58-60 below]. The Unit has also led on the preparation of guidance material on the ECHR and HRA. But the major focus for the Unit has been the development of a consistent approach on risk assessment and the auditing of policies, procedures and legislation across Government. This has resulted in the promotion and widespread use in departments of a ‘traffic light’ system which grades the degree of risk according to the significance or sensitivity of an issue, its vulnerability to challenge and the likelihood of challenge. As interpreted by one department, this system means:

- RED- strong chance of challenge in an operationally significant or very sensitive area. Action must be taken as a priority.
- YELLOW- reasonable chance of challenge, which may be successful. Action should be taken if possible.
- GREEN- little or no risk of challenge, or of damage to an operationally significant area. No amendment required.

It is not certain how far such an interpretation is uniformly applied across Government. However, the traffic light process is clearly well established and would seem to be accepted as a common standard of assessment across Government. The results of ‘traffic light’ audits were used as the basis for the Cabinet Office’s final review and assessment of vulnerable areas (counting the ‘reds’) in April 2000, as well as the starting point for more intensive scrutiny of key issues by two specialist lawyers groups within the Government [see pages 32-34 below].

[illegible]

types of issue that should be taken before the courts under the Act. This is to be expected. It would be remarkable indeed if the Home Office was to encourage challenges under the HRA, and it cannot be faulted for wishing to correct some of the more outlandish views on the potential impact of the Act carried in the media.

2.3 Home Office Human Rights Task Force

Conscious of its own limited resources and the scale of the task involved, in early 1999, the Home Office established a Human Rights Task Force, comprising representatives from key government departments and non- government organisations, in order to facilitate implementation of the Human Rights Act. The Task Force has been widely viewed, both within and outside government, as a concession offered by the Home Office as consolation for not having a Human Rights Commission (something that remains firmly off the political agenda). The terms of reference agreed at the second meeting specified:

> 1. The purpose of the Task Force is to:
> help departments and other public authorities prepare for the implementation of the Human Rights Act 1998; and
> increase general awareness, especially among young people, of the rights and responsibilities flowing from the incorporation of European Convention on Human Rights and thus to help to build a human rights culture in the United Kingdom.
>
> 2. The Task Force will maintain a dialogue between Government and non-governmental organisations on the readiness of public authorities for implementation. It will help identify, promote and support, as appropriate, a

expertise to fulfil the role it has been assigned and the capacity and initiative to extend that role where the need arises. This said, the Task Force means different things to different participants. For the Home Office, there was never any question of throwing open the door to allow direct access by interested parties outside the government to the policy and decision-making processes for the Human Rights Act. Efforts by NGO representatives on the Task Force, for example, to secure some form of outside involvement in the 'process of Departmental risk assessment' were unsuccessful. No attempt was made by the Home Office to bring in outside expertise on a secondment basis as had been done on homelessness and asylum issues. However, there were clear presentational advantages in having the Task Force not least in deflecting pressure for a Human Rights Commission. At the same time, the Task Force has proved to have a real value in refining guidance material for government departments and public authorities and in putting together the promotional materials and launch strategy for introducing the Human Rights Act to a largely unknowing public. The Task Force meetings also allow the Home Office and other Government departments to pick

departments making the presentations freely admit that the process causes them to think more carefully about their state of readiness and none wish to repeat the experience of the one department which revealed several apparent gaps in its preparations under the probing of task force members. Non-government members of the Task Force, when interviewed for this paper, commented that the presentations were very thorough in describing the systems and procedures departments were putting in place to implement the Human Rights Act but were much less forthcoming on the problem areas and changes that were considered necessary to cope with the Act. This is quite deliberate. In fact, the Home Office had some explaining to do to other departments when an early Task Force paper gave an outline of the areas that departments were examining in relation to the Act without obtaining clearance

In April 1999, it was decided to form a Communications Working Group to devise and oversee the publicity arrangements for the Human Rights Act. The Working Group is chaired by Robin Allen QC and comprises representatives from the Home Office Human

In March 2000, the Task Force considered a proposal from the Association of Labour Lawyers that an Advisory Committee on Human Rights should be established to facilitate implementation of the Human Rights Act. This proposal was not taken up by the Task Force but it did prompt the NGO members to consider what organisational structures and resources were required to implement the Act on a long term basis. In May, the NGO members presented a paper to the Task Force that acknowledged how much had been achieved but the main thrust of which was to focus on what were seen to be real weaknesses in the existing arrangements for implementing the Act. It pointed to the lack of monitoring and opinion poll testing of the extent to which the combined efforts of Whitehall, the Task Force and other bodies were "succeeding in the twin objectives of raising public awareness, and of making the necessary preparations for the Act coming into force."[27] Most damagingly, the paper drew on the results of surveys of public authorities and hybrid bodies conducted by the Institute for Public Policy Research which revealed such a lack of knowledge and absence of communication about the Human Rights Act that it seemed "it was apparently never the intention that departments would be highly proactive in raising awareness among public authorities, provide an advice service able to cope with extensive demand, nor monitor the extent to which authorities are actually prepared for the Act coming into force."[28] In this and a following paper discussed in July, the NGO members pressed for additional resources for:

- guidance and training to public authorities and to advice providers,
- authoritative information and advice on the Convention,
- promotion of the Act, especially among young people, and
- an independent monitoring system of the preparations being made to comply with the Act.

It was argued that these functions could not be fulfilled over the long term by a temporary body such as the Task Force. Nor was the Government well placed to perform all of the tasks envisaged because:

> Government (and the Home Office) has a variety of aims and objectives. The promotion of human rights is often in conflict with other messages that it wishes to get across. The government is not always likely to be seen as an objective provider of advice on human rights when its own policies may come under scrutiny.[29]

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[26] The Task Force is presently scheduled to continue to meet until April 2001.
[27] Human Rights Task Force Paper. HRTF (00) 6, para 8.
[28] Ibid, para 10.
[29] Human Rights Task Force Paper. HRTF (00) 12, para 16.

the Cabinet committees, lawyers groups, Task Force and departmental fora now dealing with the Act are permanent in nature.

Against this background, there is no incentive at the centre to become too deeply engaged in matters relating to the future operation of the Act. The Home Office is clearly not going to become a central clearing-house for action in relation to the Human Rights Act. Responsibility has been placed firmly on individual departments to prepare themselves and their public authorities and hybrid bodies for the coming into force of the Act. The Human Rights Unit has chosen not to collate information on the outcome of the 'traffic light' reviews and there will be no omnibus 'ECHR Bill' to sweep up Convention points: each department has to find space in its own legislative programme. Lastly, and perhaps most significantly, the Human Rights Act is 'old news' in the sense that it requires comparatively little policy input to see through implementation. In ter

scrutinise and advise upon policy and legisl

Secretariat in the Cabinet Office in co-ordinating the handling of EU matters has not been mirrored in the Constitution Secretariat's involvement with the ECHR. Legal advice to the European Secretariat is provided by the European Division of the Treasury Solicitor's Department (TSol) which is also responsible for all UK litigation before the European Court of Justice. The litigation lawyers remain part of TSol but the advisory team is part of the Cabinet Office (Cabinet Office Legal Advisers (COLA)) and participate in its policy meetings on EU business. An ad hoc legal group (EQO(L)) in the European Division acts as a forum for the co-ordination of EU legal issues among departments.[35]

We have seen how a similar ad hoc group, chaired by a legal adviser on secondment from TSol, has been established in the Constitution Secretariat to provide legal guidance on devolution issues and human rights matters relating to the ECHR. Outside the Cabinet Office, however, a different path has been followed. With the passage of the Human Rights Act, the Treasury Solicitor's Department debated whether to establish an ECHR Division. It decided not to, because it considered:

- a single unit could not have the in-depth knowledge and grasp of human rights and legal issues in all areas of Government; and
- the existence of such a unit would remove the imperative for other lawyers dealing with departmental matters to become familiar with the HRA and ECHR.

This was in part a reflection of an existing concern that there was a lack of knowledge and interest in EU law among TSol lawyers outside the European Division. Such a unit would also have cut across existing responsibilities in respect of the ECHR, particularly those of the FCO legal advisers. It does mean, however, that there is no single focal point in the legal structure for dealing with the domestic implications of the ECHR. This has put an increased emphasis on ensuring co-operation and co-ordination among the existing elements of the Government's legal services.

3.2 The ECHR before the Human Rights Act

It is easy to forget how radical and novel many of the requirements of the ECHR were at the time it was drafted in the immediate post-war pe

root to the extent that it is accepted by all members of the Council of Europe allowing access to the European Court of Human Rights (ECtHR) by some 800 million people in Europe.

The UK ratified the ECHR in 1951 but did not grant the right of individual petition to Strasbourg until 1966. This did not result in an immediate flood of applications. However, by the end of the nineteen-eighties, a steady increase in the number of cases in which the UK was found to be in violation of the Convention prompted action in Whitehall. Guidance in the form of two Cabinet Office circulars was issued to government departments in July 1987.[36] These promulgated the arrangements that became known colloquially as 'Strasbourg proofing' by which departments were required to assess policies and proposed legislation for conformity with the ECHR. As explained in the later Guide to Legislative Procedures:

> It should be standard practice when preparing a policy initiative for officials in individual departments, in consultation with their legal advisers, to consider the effect of existing (or expected) ECHR jurisprudence on any proposed legislative or administrative measure…. If departments are in any doubt about the likely implications of the Convention in connection with any particular measure, they should seek ad hoc guidance from the Foreign and Commonwealth Office.[37]

Further guidance explained that proposals by Ministers put to Cabinet or a Ministerial Committee should cover where possible the impact of the ECHR.[38] Any memoranda submitted to a Cabinet Committee or accompanying a Bill submitted to Legislation Committee should include an assessment of the impact of the ECHR on the action proposed.[39] This assessment should be built into the policy development process from an early stage.

Central to the 'Strasbourg proofing' process has been the role of the FCO legal advisers as the 'guardians of the Convention'.[40] They are available to offer expert legal advice on the ECHR implications of policy and legislative proposals. In proceedings before the European Court of Human Rights, the FCO legal advisers present the case for the UK Government. They are also responsible for analysing and disseminating the Court's judgements within the Government and for maintaining an ECHR database.

The 'Strasbourg proofing' process did not stem the flow of cases in which the UK was found to be in breach of its Convention obligations. David Kinley has calculated that whereas there

were 13 judgements made against the UK in the period 1975-86, this doubled to 27 in the period 1987-96.[41] Some of this increase may be attributed to the greater awareness and use of the ECHR across Europe. Daintith and Page also

Deputy Legal Secretary in the Legal Secretariat to the Law Officers. Its role is to co-ordinate the handling of ECHR issues that arise in the course of criminal proceedings, and to ensure that any significant developments are made known throughout Government. The Group is also tasked with the development of a database of domestic ECHR case law to complement the FCO's existing Strasbourg database [see terms of reference at Annex B].

The Group comprises some 30-35 senior lawyers drawn from the prosecuting bodies and policy departments across Government. Most of the Group's work has been done through correspondence (circulation of Strasbourg judgements etc). However, it has met to discuss such issues as the ramifications of the *Kebilene* judgements [see pages 36-38 below] and the implications of magistrates being required to give reasons for decisions. A major task taken on by the Group has been the review of some 25 critical criminal issues (such as disclosure of evidence in summary cases) that have been identified through the 'traffic light' process as being vulnerable to challenge under the Convention. Lawyers from the Crown Prosecution Service and the relevant policy departments have examined:

- why these provisions are there
- the need for review
- the likelihood that the provisions could survive a challenge; and
- the arguments that could be employed to defend such provisions if challenged.

It is said that the exercise revealed only one area where a change in the law was warranted. For the other issues, the Group has prepared 'lines to take' with the aim that prosecution lawyers should be equipped to argue these points in whatever court the issue might arise. The lines contain arguments for use in court, reference to relevant case-law and guidance on how to respond should a judge 'read down' sections of the law particularly as the latter, unlike an intention to make a 'declaration of incompatibility', does not require formal notification to the Crown. The Group intends to discuss whether or not to publish these lines to take. The arguments in favour of doing so are considered to be that the lines to take would help set the agenda, might head off points without merit from being raised in court, and that the lines could become a point of reference for judges. Against this is the concern that the 'element of surprise' would be lost and that the lines might not withstand rigorous scrutiny from lawyers and academics outside the Government. If they are not published, the lines will not be given to private lawyers briefed for prosecution work. However, as a matter of policy, it has been decided that only barristers who can demonstrate that they are 'human rights trained' will be briefed for such work. This has been made known to the Bar Council.

The ECHR Civil Litigation Co-ordinating Group is chaired by the Head of Litigation in the Treasury Solicitor's Department. The Group has the same functions as its criminal issues counterpart but in relation to civil litigation [see terms of reference at Annex C]. It comprises

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[43] Departments such as Customs & Excise, Home Office, Inland Revenue, Health, Social Security, and Agriculture, Fisheries and Food have their own legal teams.

- Partnership - means forging new links with other CJS agencies, and with each other within CPS. Building new relationships and strengthening existing ones gives us the best chance of making the Act work.
- Participation - we need to actively engage in the Human Rights debate. Participation means promoting and making rights real.
-

This is a substantial programme of work but how ready will the CPS be for the Human Rights Act in October? The CPS is in the process of a very substantial period of change. Because of this, those tasked with overseeing the introduction of the Human Rights Act expect that the response will be uneven across the CPS ('patchy' from area to area). It is also remarked, however, that unevenness is a two-sided coin and as much a reflection of the different levels of knowledge and expertise concerning the HRA among those law firms who might use the Act.

The CPS anticipates problems in maintaining the flow of information on cases involving the HRA between the centre and the various areas. The CPS intranet only exists in embryonic form and much of the material will need to be distributed in paper form.

3.5 ‘Kebilene’

The *Kebilene* case came as a considerable surprise for lawyers and officials in Whitehall. It is viewed by them as the most important decision in the interim period, to date, before the Human Rights Act comes into force on 2 October. The case concerned the prosecution of three alleged Algerian terrorists for offences under Section 16A of the Prevention of Terrorism (Temporary provisions) Act 1989. At the criminal trial, the Crown Court ruled that Section 16A was incompatible in a “blatant and obvious way”[49] with the presumption of innocence guaranteed by Article 6(2) of the ECHR. The Director of Public Prosecutions (DPP) decided to continue the prosecution but this was challenged in judicial review proceedings where the Divisional Court also held that Section 16A was incompatible with Article 6(2) of the Convention. The DPP appealed to the House of Lords which held in a judgement given on 28 October 1999 that the issue of A wap80n

protected by the courts before 2 October. Again, the views of Lord Steyn are quoted with approbation: "There is a clear case to postpone the coming into effect of central provisions of the Act. A legitimate expectation, which treats inoperative statutory provisions as having immediate effect, is contradicted by the language of the statute."[52]

Lastly, Government lawyers welcomed the views of Lord Hope on the leeway that the courts should allow in examining decisions made by the executive. While the Strasbourg "*margin of appreciation*" doctrine clearly did not lend itself to use by a domestic court, Lord Hope noted that in areas where difficult choices had to be made between the rights of the individual and the broader interests of society, there was an area of judgement where the courts should defer to the considered opinion of the elected body or person whose act or decision was said to be inconsistent with the Convention rights.[53]

Less helpful in the eyes of Government lawyers were the House of Lords' views on the extent to which the Human Rights Act would apply, when brought fully into force, to events which had taken place before 2 October. The Crown had argued that the transitional provisions (Section 22(4) read with Section 7(1)b) were only meant to apply to proceedings which were ongoing as at 2 October 2000. It was not the intention of the Act that after 2 October a person who had previously been convicted of an offence could raise an Article 6 issue on appeal, for example, irrespective of when the original trial took place. Section 22(4), it was argued, only applied to proceedings instigated by a public authority that did not include appeals against conviction.[54] This argument was dismissed by the House of Lords, however, which considered that it was more in keeping with the purpose of the Convention and HRA to treat the trial and appeal as part of the same process.

This posed something of a quandary for the government's legal services. Were prosecuting authorities and public authorities instigating civil proceedings therefore obliged to respond to Convention-based challenges in the period up to 2 October allowing that such issues could be raised in an appeal after that date? After some debate and recourse to outside legal advice, it was decided that the Crown should continue to proceed on the basis that the Human Rights Act did not have any legal effect before 2 October and to contest the relevance of any attempt to argue Convention points in cases before that date. However, given that it was clear that a number of judges were already prepared to entertain such arguments and to apply Convention principles in their judgements, it was also accepted that, if the need arose, the Crown should be prepared to deal with such issues as if the Human Rights Act was already in force. Following from the House of Lords' judgement, it was accepted that, after 2 October, it would be open to a person accused of a crime to raise any breach of his

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[52] Ibid, at p. 982 E-F.
[53] Ibid, at p. 993-4.
[54] A useful analysis of Section 22(4) is given by Francis Bennion - 'A Human Rights Act Provision Now in Force'. Justice of the Peace. Vol 163. 27 February 1999, p 164-165.

Convention rights occurring before that date. This would include issues raised in appeal proceedings where the original trial was concluded before 2 October. Applications for a stay of proceedings until after 2 October, however, were to be resisted.

3.6 Declarations of incompatibility

Given the attachment in Britain to parliamentary sovereignty there was never any question of allowing the courts to use the Human Rights Act to 'trump the outcome of democratic decision-making' by striking down legislation made by Parliament. The Act creates a general requirement that all legislation (past, present and future) be read and implemented in a way which is consistent with the Convention. However, it does not permit the Convention to be used by the courts to strike out inconsistent primary legislation or secondary legislation made under it. The courts are expected to interpret existing and future laws, wherever possible, in ways consistent with the Convention and to take account of Strasbourg case law. If a higher court cannot reconcile a piece of legislation with the Convention rights, under Section 4 of the Act it may make a 'declaration of incompatibility' which will put the onus on the Government and Parliament, but will not compel them, to change the law either through a fast track remedial process or the normal legislative process.

The 'declaration' process represents an unique half-way house between the models and futur20

the Government might act to remedy the deficiency in the law, that this would be done quickly, or even that it would be done at all.[56] One possible option being considered, however, is that the Law Officers might make a statement in Parliament outlining what steps were intended and on this basis announce that other cases would not be taken forward pending this action being completed.

In South Africa, the Constitution requires that its Human Rights Commission measure any proposed legislation against the Bill of Rights or "norms of international human rights law which form part of South African law" or "other norms of international law" and report any conflict to the legislature. In Hong Kong, the Secretary for Justice is expected, as a matter of administrative practice, to certify that proposed new laws are consistent with the ICCPR as applied to Hong Kong.

Section 19 of the HRA: In the UK, Section 19 of the Human Rights Act 1998 ensures that the question of the compatibility of proposed legislation with the ECHR is considered and stated publicly. This provision was brought into effect in November 1998 and was the cause of some initial confusion, especially in regard to what information should be provided to Parliament to support a statement that a proposed law was considered compatible with Convention rights. The experience of the Financial Services and Markets Bill, in particular, convinced the Cabinet Office and Home Office of the need to establish a consistent approach and rationale on the making of Section 19 statements. A Home Office paper was circulated through the CRP(EC)O to agree an uniform approach. Although there were some who maintained that having any valid arguments to advance should be sufficient for a Minister to be able to state that a Bill was compatible with the Convention rights set out in the Human Rights Act, the formula finally adopted was that the proposed legislation was "more likely than not" to withstand a challenge before the Courts. As the Home Secretary explained:

> If a section 19(1) (a) statement is to be made, a Minister must be clear that, as a minimum, the balance of argument supports the view that the provisions are compatible. Lawyers will advise whether the provisions of the Bill are on balance compatible with the Convention rights. In doing so they will consider whether it is more likely than not that the provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and the European Court of Human Rights in Strasbourg. A Minister should not be advised to make a statement of compatibility where legal advice is that on balance the provisions of the Bill would not survive such a challenge. The fact that there are valid arguments to be advanced against an anticipated challenge is not a sufficient basis on which to advise a Minister that he may make a statement of compatibility where it is thought that these arguments would not ultimately succeed before the courts.[59]

The 'more likely than not' formula has been coined the '51 per cent rule' by some outside Government and the term has since entered unofficial usage in parts of the Government. Officials interviewed in a number of departments have remarked that the internal guidance given in relation to Section 19 statements is confusing and not particularly helpful. One Government lawyer considered that the approach adopted put lawyers in the 'firing line' to find arguments to tip the balance and support the case for making a statement of

[59] Hansard. 5 May1999: HC 371

compatibility in respect of a Bill. It is relevant to note that recourse to Section 19 (1) (b)[60] has been made only once (to end July 2000) and then in circumstances where it served the political purpose of signifying the Government

3.8 Conclusion

It is difficult not to be impressed by the scale of the preparations being made by the Government's legal services for the introduction of the Human Rights Act. Government lawyers have been quick to engage with the issues partly through trepidation but mainly because of a fascination with what the future may hold when the Act is in place. Certainly, there are doomsayers among their numbers who liken this to 'moths being drawn to the candle' but the abiding impression is of a legal fraternity which is keen to come to grips with the Act.

The Whitehall structures that these lawyers will work under when the Act is in force are fragmented. There is no prospect of a single authority being established to direct the legal response to the Act. The co-ordinating groups that have been established do not have line authority, are not permanent and are focused on the need to ensure a consistent approach to the risk management aspects of the Act. They have no part to play in the Section 19 process, which seems to be left almost entirely in the hands of the subject department and its lawyers in deciding whether its proposed legislation is compatible with the Convention. Albeit that the system does allow for the most dubious cases to be referred to the Law Officers.

There will be unavoidable communication problems between the centre and lawyers in the field. The legal intranet exists only in embryonic form which will handicap the two-way flow of information on human rights cases. It is unlikely, however, that critical cases will slip through the nets of law reporting and the media and these will be as avidly scrutinised within Government as in Chambers.

Lastly, of one point we can be certain, the Government's legal services are distinctly better prepared for the introduction of the Human Rights Act than the departments and public authorities that they advise.

4. The Lord Chancellor's Department and the Judiciary

In the UK political context, incorporation of the ECHR has always been seen to have far-reaching implications for the respective roles of the executive, parliament and judiciary. There was never any question that the Human Rights Act would be allowed to "trump the outcome of democratic decision-making"[62] by limiting the power of Parliament and putting a large measure of that power in the hands of unelected judges. Given the strength of the attachment in Britain to parliamentary sovereignty, it was unthinkable that judges would be

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[61] Hansard. 10 January 2000 HL 344. Lord Bassam of Brighton.

[62] Dennis Davis, Matthew Chastalson & Johan De Waal – 'Democracy and Constitutionalism: The Role of Constitutional Interpretation' in David Van Wyke, John Dugard, Bertus De Villiers & Dennis Davis – 'Rights and Constitutionalism.' Oxford. [1995] p1.

asked to oversee human rights entrenched in a written constitution binding on the executive and legislature (as done most recently in South Africa).

The Human Rights Act does not, therefore, give the judiciary the power to overrule 'inconsistent' Acts of Parliament but it does give judges new responsibilities to protect and respect Convention rights in the domestic courts. The Act makes it unlawful for the courts, as public bodies, to act incompatibly with Convention rights. It also requires that judges interpret and give effect to primary and secondary legislation, as far as possible, in a way that is compatible with Convention rights. If legislation cannot be read in a manner compatible with the Convention, the higher courts, as we have seen, can make a 'declaration of incompatibility' which may prompt the Government and Parliament to change the law.

4.1 Judicial attitudes towards the Human Rights Act

The Lord Chancellor has stressed how important it is that judges employ a balanced and

> imposes, and which find a deeper resonance in the doctrine of the separation of powers on which the constitution is founded.[63]

Notwithstanding the views of the Lord Chancellor, how judges will execute their functions under the Human Rights Act remains a topic of some speculation within Whitehall. One school of thought is that judges might use the Ac

open to attack on the grounds that it violat

the Convention. In this case, the Court of Appeal concurred with the original ruling of the High Court that the Health Authority's conduct was in breach of Article 8 of the Convention. The Lord Chancellor, however, was reported to have admonished an audience of judges not to continue on the path of the *Coughlan* judgement. In *Nottingham v Amin*[74], the Divisional Court was fully prepared to consider relevant Strasbourg case law in a case where a taxi driver claimed entrapment by plain clothes police officers in persuading him to accept a fare where he was not licensed to operate (although in this case no breach of Article 6 was found). In *Official Receiver v Stern*[75], the Court of Appeal also had no qualms about considering the potential application of Article 6, on the issue of self incrimination, notwithstanding the fact that the Human Rights Act was not in force.

The implications of such cases are being carefully analysed within Whitehall. The guidance given to administrators in the recently amended 'Judge Over Your Shoulder' advises that it is "not safe to assume that because full implementation of the HRA is some months away you can push Convention rights to one side ... In particular, judges are increasingly familiar with the text of the HRA and ECHR, and may have a strong incentive to 'find' 'Convention rights' in existing common law before October 2000." [76]

The guidance concludes:

> Recent case law indicates that the courts' view on the applicability of Convention

In effect, the courts are developing what Murray Hunt terms a "common law human rights jurisdiction"[78] even before the Human Rights Act comes into full force on 2 October.

4.2 The role of the Lord Chancellor's Department

The Lord Chancellor's Department is responsible for the 'fair, efficient and effective administration of justice in England and Wales'. It identifies four main components in this work:

- appointing, or advising on the appointment of, judges;
- the administration of the court system and a number of tribunals;
- the provision of legal aid and legal services; and
- the promotion of reform and revision of English civil law.[79]

Given that the Lord Chancellor was one of the prime movers of the Human Rights Act, it comes as no surprise that special attention has been paid to the needs of preparing the judiciary for the introduction of the Act. The time required to complete the training programme for judges was the single most important factor in setting the commencement date for the Act. An initial estimate that this could be done by Spring 2000 proved optimistic and it was on the advice of the LCD that the commencement date was eased backwards to 2 October 2000.

There can be no question or criticism of the seriousness with which the LCD has approached its part in preparing for the introduction of the Human Rights Act. The LCD was one of the first departments to focus on the Human Rights Act setting up a small team in summer 1998 (prior to the passage of the Act) to identify and co-ordinate action within the department. The project structure was later expanded to incorporate preparations in the department's agencies - the Court Service and the Public Trust Office. Work is overseen by a Project Board, chaired by the Director-General Policy, with two representatives from the judiciary - Lord Justice Brooke and Lord Justice Sedley. The Project Board is supported by working groups covering Criminal Business, Civil and Family Business and Tribunals. Two cross cutting working groups - Training and Information, and Evaluation and Monitoring - are responsible for services and performance in implementing the Act.

The Project Board identified eleven key outcomes to ensure successful implementation of the Act in the courts and tribunals. These included such issues as:

- ensuring that the legislation, policy -

- training for judiciary, magistrates, tribunal members and legal and
- other staff;
- judicial access to case law and textbooks;
- rules, practice directions and procedures for handling cases involving
- Convention rights;
- arrangements for evaluating and monitoring cases involving
- Convention rights;
- provision of information for court users.[80]

In common with the rest of Whitehall, the LCD has audited its policies, practices and procedures to ensure compatibility with Convention rights. It has taken particular note of the implications of Articles 5 and 6 for the operation of the justice system. Two major instances where changes have proved necessary (Magistrat

court considers making a declaration of incompatibility under Section 5; the identification of which courts and tribunals would consider

together with an audio-tape, on the implications of the Human Rights Act for magistrates' courts.

These special training programmes are being offered on a one off basis with the intention that thereafter human rights matters will be subsumed into the induction training for new judges and the 'top up training' offered at three yearly intervals to serving judges. No attempt will be made to evaluate the extent to which judges apply the human rights training that they receive. There will be a follow up survey to check on magistrates.

A series of 'walkthroughs' have also been held for the courts to test the practical aspects of dealing with cases where the HRA and ECHR are invoked. These are run over a whole day and have covered the Court of Appeal (Criminal Division), Crown Court, Magistrates' Court, Youth Court, Immigration Appellate Authority, Civil and Family Courts and the handling of Devolution Issues. The 'walkthroughs' involve between 20-30 participants including judges, court staff, LCD officials, the Police, CPS lawyers as well as private and academic lawyers (including those from organisations such as Liberty and Justice). The format for the 'walkthroughs' normally involves a mock trial in which potential Convention points are argued but without any judgement or decision being given. A number of points of procedure

Human Rights Act because: “Giving reasons for your decisions demonstrates that you have used a structured decision making process rather than reaching an arbitrary decision. This means that the defendant is more likely to accept the decision, and if challenged on appeal, it will be easier for you to state your case.”[84]

set out in Article 6 of the ECHR.[87] The ruling had obvious and immediate implications for part-time judicial appointments in the rest of the UK.

The Cabinet Office co-ordinated feedback from England and Wales on the response to the ruling. When the Lord Advocate decided not to appeal and the Scottish Executive contemplated the formation of a Judicial Appointments Commission, the need arose to quickly devise a separate solution for any similar problems in Northern Ireland, England and Wales (a Judicial Appointments Commission not still being on the political agenda at Westminster). The sensitivity of the issue was heightened because of the question marks being placed over the Lord Chancellor's own position of exercising judicial, executive and legislative functions as a result of the ECtHR's judgement in the case of *McGonnell v UK*. The LCD announced in April 2000 new arrangements for part-time judicial appointments to underscore the judicial independence of persons holding such appointments. These arrangements allowed for the automatic renewal of appointments with a guaranteed minimum number of sitting days and instances of dismissal being decided upon by a judge appointed by the Lord Chief Justice.[an of sitiv co respd, 40 Tsittirecides

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Chancellor continue to exercise executive and judicial functions when the European Court considered: "Any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue."[90]

The *McGonnell* judgement did not mandate a system of strict separation of powers between the executive and the judiciary. The Lord Chancellor, therefore, retains a measure of discretion to consider, on a case by case basis, whether his appearance as a judge might present a conflict with Article 6(1) of the Convention. He has already indicated that he will not sit "in any appeal where the government might reasonably appear to have a stake in a particular outcome".[91] This would include cases under the Human Rights Act. In fact, as Richard Cornes argues:

> In light of *McGonnell* there will now be very few cases where the Lord Chancellor can sit. A Lord Chancellor's connection to the executive… would give rise to an appearance of partiality in any case in which the government might be said to have an interest. Similarly, legislative involvement, whether by presiding, speaking or voting, would also be likely to give rise to an apparent lack of impartiality. The cases where the Lord Chancellors may perhaps still be able to sit may be private controversies … not involving any government interest or application of any statute the passage over which the Lord Chancellor has presided.[92]

4.6 Conclusion

Whitehall is not a monolith and it would be wrong to assume that all parts are equally content and seized of the purpose of preparing the judiciary. The Lord Chancellor and his department have set an example in how to promote a well-informed and effective human rights culture through the training programme for judges, magistrates and tribunals. Other parts of Whitehall, which are more focussed on the avoidance of court cases and adverse judgements, are less enthusiastic about the training of judges which they fear has been given over to those defence lawyers and human rights experts who will make most use of the Act against the Government. There is some unease that judges are being taken along a path where the Government's broad purpose and philosophy of the HRA balancing rights and responsibilities is being lost amid a welter of detail on the meaning of individual Articles and the significance of particular Strasbourg cases. This school of thought does not want to see judges slavishly applying the wisdom of *"A v Z"* as decided in Strasbourg but to see a blending of the common law and the Convention in an uniquely British approach.

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[90] Ibid, para 55.
[91] House of Lords debates, 17 February 1999, Col 736.

It is too much to expect, at this time, that civil servants should welcome successful challenges in the courts. While objectively this means that

difficult for these administrators to share best practice and means that the centre is short of feedback on problems that may be common to a number of departments. Indeed, there is a tendency among officials at the centre to assume that because they have a good grasp of the issues, and have covered these through clear guidance materials, then it stands to follow that the same level of understanding is being achieved in departments. But, from the perspective of many departmental administrators, they are working in isolation, are inadequately supported and resourced, and in need of a support group to share best practice and to vent their frustrations and complaints.

The extent to which departments are approaching the Human Rights Act on an individual basis is noticeable in the attempts to establish their own rationale or culture for the implementation of the Act. In almost all cases this has been done through the prism of a department's existing policies and priorities onto which a human rights dimension is then grafted. This means that for some departments human rights have become closely associated with other initiatives such as open government, data protection and freedom of information. In DETR, local government and the police, there is a strong emphasis combining human rights with best value initiatives on the delivery of services. Other departments have linked human rights with being more customer-orientated (ie. prepared to look at what they do from the 'other end of the telescope') or even as another form of entitlement or benefit for their customers.

It is difficult to know, at this stage, whether to view this somewhat haphazard process:

- as a watering down of the potential of the Human Rights Act to put human rights considerations at the centre of policy and decision-making in Government; or
- as a practical and pragmatic vindication of the Home Office's 'drip, drip' approach to mainstreaming human rights within the Government.

It is an aspect that will bear watching in the months ahead. It would be wrong, however, to try to spin straws into gold in the search for evidence of an emerging human rights culture within the Government. For uppermost in the minds of all departments is the task of avoiding or restricting the likelihood of successful challenges on Convention points. Risk management lies at the heart of every action plan, with the lawyer's hand on the helm to steer the least dangerous course through the iceberg-ridden waters and hazardous weather patterns of the Convention. And, to continue the analogy, only if exceptionally stormy weather is forecast or the largest iceberg seen on the horizon will the ship-owner countenance a change in the ship's course or itinerary or allow a highly valued cargo to be dumped overboard. D2.1366 0 TD-i2helm064 ss0.04 or301[(steer0.[(steerdispts he .0877 Twre Twe .0877 To T

The implementation process initiated through the Permanent Secretary to the Home Office's letter of 27 November 1998 established four main areas on which progress was to be reported at six-monthly intervals by departments:

- management processes,
- review of legislation and procedures,
- staff training, and
- contacts with public authorities. [93]

Progress under these headings is considered below.

5.1 Management processes

The first progress report released in May 1999, recorded that most departments had nominated an official to act as the contact point for the implementation of the Human Rights Act. Some departments, such as the Lord Chancellor's Department, had gone further to establish a management structure at a senior level to oversee the introduction of the Act. Other departments were urged by the Home Office to follow suit:

> Preparing for implementation of the Human Rights Act is a major task with a number of different elements. As such, there is a strong case for Departments to establish a dedicated process at the senior level for managing this programme of work. This could include establishing a clear management structure to direct preparations and review progress, and producing an action plan with a timetable of necessary activities and milestones. Some departments have followed this route. However, several of the responses received by the Home Office did not indicate that a management structure had been put in place, or an action plan produced. Departments that have not set up structures such as these may wish to consider the advantages of adopting them.[94]

The Department of Social Security was cited as one example of good practice for establishing a steering group chaired by the Department Solicitor and comprising representatives from the various DSS business units as well as a representative from the DfEE. The group reported to the DSS Departmental Board and DSS Ministers.

By the second review report in November 1999, most departments had established suitable structures and action plans with only a handful of smaller organisations judging that such arrangements were unnecessary. For example, in the Department of Health, a Human Rights Reference Group had been set up to co-ordinate implementation, a Director's Steering Group had been established in the Home Office and a similar group in the Ministry of Defence.The Home Office concluded with some comfort that "the overall picture is that most Departments are now taking a thorough and systematic approach to preparations co-

[93] Letter from David Omand to Sir Richard Wilson. 26 May 1999.
[94] Ibid, para 4.

ordinated at a senior level."[95] Concern remained, however, over the importance "for Departments to work collectively [original emphasis] when addressing some Convention issues. Flexible management structures can help here - Departments should consider setting up ad hoc groups with stakeholders from other Departments to look at cross-cutting Convention issues."[96]

By the third review report in June 2000, the Home Office was able to record that "Some departments are linking their Human Rights Act implementation plans directly into their overall Departmental planning pr

judicial reviews. Prominent NGO lawyers are invited to speak on this day on the possible challenges and flaws under the Act.

The overall message is intended to be reassuring and to convince participants that the Human Rights Act is an important development but that it is not a monster and that civil servants should not become 'rabbits frozen in the headlights' if confronted with a Convention issue or challenge. Feedback though the courses reveals a high degree of apprehension among civil servants about the consequences of the Act for their work, as well as a degree of cynicism that this is another burden to be borne with no extra resources provided. Many come to courses unaware about the concepts of proportionality and the limitations and balancing allowed in respect of non-absolute rights. Not very surprisingly, younger civil servants and those in the 'fast stream' are found to be more receptive to the operation of a rights based culture than their older and more senior colleagues.

Apart from the two-day course, the Human Rights Act is also covered in more general senior management and law courses offered by the Civil Service College. When the dedicated courses end, the Act will continue to be covered in these general courses. The College also offers half day on-site courses particularly for those heavily involved in the preparations for the Act or for those smaller organisations that do not have their own training units.[103]

The quality of training offered through the Civil Service College is high. But only some 300 civil servants will have attended (is i)]TJ20.gouproJ9e

There have been three fundamental problems for departments in reaching out to their public authorities and hybrid bodies. Firstly, there is no agreed definition of which public authorities and private bodies with public functions will be subject to the Human Rights Act. Secondly, it has taken time for departments to complete their own preparations in order to be in a position to offer assistance. Lastly, not all departments are in the habit of maintaining contacts with such bodies.

The first review report in May 1999, recorded that only 200 subsidiary public authorities had been identified by departments. The Home Office noted: "Some Departmental responses made no reference to Public Authorities, and only a few departments reported that they had communicated with their public authorities about the Act."[105] By November, most departments could claim to be in contact with their public authorities about the Human Rights Act. Core guidance material had also been issued for these authorities. But the identification of private bodies with public functions continued to lag behind and became the subject of increasing concern among the NGOs represented in the Home Office Human Rights Task Force.[106] This concern was conveyed strongly in the next Home Office letter to departments: "These organisations are in the front line of service delivery to the public and it is important they understand the implications of the Human Rights Act for them. Departments should identify those hybrid bodies that operate under their legislation or policy and contact them about the Act."[107]

One positive aspect has been that some hybrid bodies have taken it upon themselves to become acquainted with the purposes and consequences of the Human Rights Act without waiting for guidance from their 'parent' departments. For some there is a strong incentive to demonstrate their human rights credentials if only on the assumption that this may be become a prerequisite for the award of government contracts.

It is not feasible to review in detail the preparations being made for the Human Rights Act in every Government department. Instead, below we consider and compare the approaches in two key disciplined services and conclude with a brief analysis of some of the distinctive features of the preparations in other departments.

5.5 Case study: The Police and Customs and Excise

The Human Rights Act poses major implications for the police service and Customs and Excise Department in the exercise of their law enforcement roles. Both bodies have a myriad of 'sticky' areas, to use the police term, which are liable to attract challenges under the Convention. They also face the considerable task of inculcating the appropriate awareness,

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[105] Omand letter dated 26 May 1999, para12.
[106] Human Rights Task Force. Para5.1 of minutes of meeting held on 30 March 2000.
[107] Omand letter dated June 2000. Annex A, para 12.

> the devastating impact that even isolated acts of wrongdoing can have on our reputation among our stakeholders.[108]

However, police forces are not, by nature, libertarian organisations. Those steering implementation of the Human Rights Act do not disguise their belief that it will take many years to embed a culture of respect for individual human rights within the Police Service. Problems of denial and an unwillingness to embrace human rights are evident at many levels. In particular, it is difficult to prepare police officers for the major shift from a culture where police activities are permissible unless prevented by law to one where there should be a clear legal basis for what is done. Not without some reason, therefore, have the ACPO team characterised human rights as the 'disinfectant of the police service'. At the same time, there is also an underlying confidence that the police service is capable of embracing such change

The police have embarked on what is probably the most systematic and exhaustive exercise in Government to audit compliance with the ECHR and Human Rights Act (see Annex E). This is driven not only by the need to prepare for the onset of the Human Rights Act but also to take on board the proposed freedom of information legislation and to achieve best value in delivering police services. There are three tiers to the process - legislation reviews (conducted by the Home Office), audits of service-wide policies and procedures (in the Human Rights Sub-committee) and Force audits of local policies, procedures and performance.

As a first step, a 'Service Wide Impact Assessment' was completed by the policyholders within ACPO. Subsequently, an 'audit toolkit' was made available to all police forces (see www.cheshire.police.uk/rights). The toolkit consisted of three checklists. The first set out the key questions for Chief Officers to consider in assessing their force's level of preparedness for dealing with the new Act. It covered the need to establish a management structure to deal with human rights issues (Human Rights Strategic Management Board) as well as the need to raise awareness through training and the audit process. The second checklist detailed the core principles underpinning the ECHR and Human Rights Act (non-discrimination, legitimate aims, proportionality etc) which should guide the audit process. The final checklist dealt with the scrutiny of individual business and subject areas to ensure that appropriate mechanisms existed covering record keeping, decision-making and appeal processes etc. Included with the toolkit were templates for completing an Impact Assessment Report, Action and Contingency Plan, Submission sheets and Amendment history. Guidance was also given on the purpose of the Human Rights Act, the Articles of the ECHR and relevant Strasbourg case law (illustrated through a case study).

Information from individual police forces, using the templates, is fed back to the ACPO human rights team on a bi-monthly basis. The need for action in each area audited is graded on a four point scale - Critical, High, Medium, Low. The ACPO team quality assures the results and keeps in view follow up action that may be required particularly in terms of referrals to the Home Office and other policy sections within ACPO.

By comparison, the Customs and Excise Department action plan does not place the same reliance on checklists and templates. The department has followed the traffic light approach employed by most of Government to identify areas that could be vulnerable to challenge after October. This task is vested in the Human Rights Co-ordinators for each business area assisted by the Department's legal advisers. Central guidance is provided through a dedicated human rights intranet site which offers a general guide to the Human Rights Act, an analysis of how Convention Articles might impact on the work of the department together with a feedback page. In addition, each Human Rights Co-ordinator is responsible for posting guidance notes on the site covering the more sensitive aspects of their work

(examples being covert copying of documents, drive pasts and the use of detector dogs). An informal contact network is maintained between the co-ordinators.

The review processes in the two bodies are coming to different conclusions. The Police's 'Service Wide Impact Assessment' identified some 40 potential 'hotspots' (strip searches, hearsay evidence, police negligence etc) where challenges were to be expected. When the first ten of these 'hotspots' were audited, 1,685 compliance issues were identified for referral (558 to the Home Office in relation to legislation, 654 for ACPO committees in relation to policy issues and 473 for legal advice). Of those areas having the potential to infringe Convention rights, the audit's examination of 434 elements revealed an apparent compliance level of 60 per cent, a partial compliance level of 5 per cent and an apparent non-compliance level of 35 per cent. Understandably, the conclusion was reached that the police service "cannot be complacent in addressing human rights issues" and that it would need "actively to address the issue of policy compliance".[109]

5.6 Conclusion

As a first point, it must be said that the openness of the preparation process for departments instigated by the Home Office and the extent to which outside input has been brought into the exercise through the Human Rights Task Force is to be commended. And, even allowing for the natural tendency of departments to portray what they are doing in the best possible light, the latest returns submitted by departments to the Home Office reveal a hive of activity in relation to the Human Rights Act as October approaches.[110] Virtually every department will have completed auditing their policies, procedures and legislation by October and will have in place some form of mechanism to continue to review and update such activities as domestic jurisprudence develops under the ECHR and HRA. While the audits have resulted in changes to conform to the Convention, more commonplace has been the preparation and marshalling of arguments to defend against challenges. To a limited extent, a degree of 'phoney war' complacency has set in amongst departments during the long lead in period to the commencement of the Act as confidence builds in their 'defence plans'. But the detonation of 'buried Convention mines' in Scotland has delivered periodic wake up calls and largely maintained a sense of purpose and urgency for the review exercise.

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relating to the protection of human rights'[112]. In Scotland, Section 29 of the Scotland Act provides that an Act of the Scottish Parliament may not include provisions that are incompatible with Convention rights, as they are defined in the Human Rights Act. Section 57(2) provides that a member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, which would be incompatible with Convention rights. In Wales, Section 102 of the Government of Wales Act details similar restrictions on the more limited law-making powers (to make secondary legislation only) of the Welsh Assembly. However, the Assembly will not have acted *ultra vires* in making incompatible secondary legislation if this is required by UK primary legislation.

Acting incompatibly with Convention rights or EC law will raise a 'devolution issue'. Such issues can be referred to the Judicial Committee of the Privy Council through appeal or by referral from a lower court or the House of Lords. Cases may also be brought directly by the UK Law Officers, the Lord Advocate in Scotland, the First Minister and Deputy First Minister of the Northern Ireland Executive and the National Assembly for Wales (particularly for new legislation).

In fact, the very first Act of the Scottish Parliament, the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, was challenged as being contrary to Article 5 of the Convention. However, the First Division of the Court of Session held, on 16 June 2000, that the arrangements made for the detention and discharge of patients fell within the permitted limitations to Article 5.[113]

For the purposes of the Human Rights Act, the legislative acts of all three devolved bodies are treated as subordinate legislation and can be quashed by a higher court if declared incompatible with Convention rights. The different timeframes for establishing the new devolved bodies[114] and implementing the Human Rights Act have meant that the Convention has been applied in a piecemeal manner through the devolution legislation in advance of the Human Rights Act. The result is that:

> whether by accident or by design, the Celtic fringe has thus become the trial ground for a radically new government policy. The staggered implementation of the Human Rights Act in the United Kingdom effectively allows the effects and implications of direct reliance on human rights considerations to be assessed within the smaller jurisdictions so that proper preparation may be made before the policy becomes law within the territorial jurisdiction of the English courts.[115]

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112 See sections 24(1)(c), 68 and 69(1) of the Northern Ireland Act.
113 *A v The Scottish Ministers*, 2000 GWD 22-864.
114 The Scottish Executive Law Officers became subject to the Convention when joining the executive on 20 May 1999. The Scotland Act came into force on I July 1999.
115 Aidan O'Neill QC- Devolution Issues and Human Rights. Seminar paper delivered on 17 May 2000 at University College London.

There is a degree of resentment, particularly in Scotland (where memories of the poll tax are long lived), at being put in the position of being a guinea pig for full implementation of the Human Rights Act. However, it is difficult to discern any deliberate design on the part of Whitehall behind the setting of different implementation dates for the devolution legislation

legislation is in the context of the matter raising a 'devolution issue' for the purposes of the Convention."[117]

There are other areas of potential confusion. The devolved bodies are bound in equally firm fashion by the Convention and Community law but which is the superior should they conflict? There is also the potential for confusion arising from the existence of a 'double apex' whereby appeals under the Human Rights Act will be directed towards the Appellate Committee of the House of Lords and those under devolution legislation will be taken by the Judicial Committee of the Privy Council. However, given that it will be the same pool of judges considering such cases, the likelihood of a marked deviation in judgements would seem remote. Lastly, while the devolved bodies and their executives may not legislate and act in ways which are incompatible with the ECHR there is no such restriction in England (and to a lesser degree in Wales) because of the non-binding nature of any 'declaration of incompatibility' made by the courts. There is the possibility, therefore, that legal provisions may be introduced or retained in England and Wales that could not be applied in the rest of the UK.

These are issues which apply to any of the devolved administrations. But it is their implications for Scotland that have drawn most attention. With the National Assembly for Wales having fewer legislative powers and having made little use of them and the Northern Ireland Executive starting later and then being suspended for some four months, it has been left to Scotland to set the pace.

6.1 Northern Ireland's experience in applying the ECHR

The ECHR came into effect in Northern Ireland through the Northern Ireland Act on 2 December 1999. Its application was suspended on 11 February and reinstated with the Northern Ireland Executive in May 2000. The political uncertainties over the form and instruments of government in Northern Irel

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group (with representatives from the police, army, courts and probation service) to oversee preparations for the Human Rights Act. Circulars, guidance notes and seminars are being provided, especially for the Northern Ireland Prison Service.

In the Office of the First Minister and Deputy First Minister, the Human Rights Directorate deals with human rights matters concerning the ten Northern Ireland departments and public authorities with devolved responsibilities. It has produced its own versions of the Guidance for Departments and Public Authorities available in London. A human rights website will be launched in the Autumn.

In a departure from Whitehall practice, the Departmental Solicitor's Office in Northern Ireland has prepared a checklist for assessing legislation, policies and procedures and issued this to all Northern Ireland Departments. As in other parts of the UK, however, responsibility for the auditing of legislation, policies and procedures still rests with the subject departments. The roles of the Human Rights Directorate and Departmental Solicitor's Office are to ensure that there is a consistent approach across departments on Convention issues.

The position in Northern Ireland differs from that of the rest of the UK in that it has a new statutory Human Rights Commission responsible for, among other 2.5003 Tm0c-80 Office ar0o r dtmssues

Assembly has not produced its own guidance materials, it has disseminated those produced in Whitehall to public authorities in Wales. It has also initiated its own awareness and training programmes for the Human Rights Act.

6.3 Scotland's experience in applying the ECHR

There are marked similarities and differences in the approaches of London and Edinburgh towards the ECHR and Human Rights Act. The Scottish Executive set up an ECHR working group, chaired by the Head of the Justice Department, at the end of 1998. As in Whitehall, the focus has been on making individual de

The second purpose was to revise the terms of appointment of temporary sheriffs to ensure that these fulfilled the requirements for an independent and impartial tribunal under Article 6(1) of the Convention following the decision of the High Court of Justiciary in *Starrs and Chalmers v P.F. Linlithgow* (see page 63 below). The Bill also changed the arrangements whereby politically appointed Justices of the Peace from local authorities could perform court duties. This was to avoid the possibility of a challenge over their independence and impartiality, given that local authorities benefited from the imposition of certain fines imposed through the district courts as the management authority for those courts. Lastly, again for fear of conflict with Article 6, the Bill removed the power of local authorities to prosecute cases in the district courts because legal advice might be given to the justices sitting in these courts by a legal assessor who was an employee of the same local authority.[121]

Further ECHR Bills are expected in the next session. Consideration of the Regulation of Investigatory Powers (Scotland) Bill will also resume in September 2000. In similar fashion to the legal groups in Whitehall, a core group in the Scottish Executive has examined, in detail, the more -

Excessive delays in bringing prosecutions in such circumstances have been found by the courts in Scotland to be in breach of Article 6 of the Convention. In *HM Advocate v Little*, Article 6 was successfully invoked where the accused person was charged with child abuse offences but no proceedings were initiated for 11 years.[123] Similar arguments also succeeded in *Docherty v H M Advocate*[124] where the accused was charged with crimes of dishonesty after a delay of over 7 years and *R v H M Advocate*[125] where there was a delay of nearly four years, with no reasonable explanation, before the accused was charged with child abuse offences.

Admissibility of Evidence: In *Brown v Stott*, the High Court of Justiciary held that there had been a breach of the right to silence and the right against self incrimination in Article 6 through the use of evidence obtained under S. 172(3) of the Road Traffic Act 1988, under which it is an offence for the owner of a vehicle to fail to give information to the police when required to do so as to the identity of the driver at the time of an alleged offence. The appeal over this case, which has wide implications for the whole of the UK, will be one of the first to go to the Judicial Committee of the Privy Council (in October 2000).[126]

Independence of the judiciary: In a case that continues to cause ructions for the court systems throughout the UK, the High Court of Justiciary upheld, on 11 November 1999, a challenge under Article 6 of the Convention which ended the system of temporary sheriffs in Scotland. Temporary sheriffs were held not to constitute an independent and impartial tribunal having regard to their lack of security of tenure and the manner of their appointment and re-appointment by the Lord Advocate (who was also head of the prosecution service).[127] The impact of this ruling was to considerably increase the delays in cases coming to trial (from 11 to 27 weeks for criminal trials in Stirling), prompt the appointment of more full time sheriffs and, as seen above, require new legislative arrangements to be made to permit the employment of temporary sheriffs. A further challenge to the validity of all appointments (and judgements) of temporary sheriffs dating back to at least 1977 was rejected by the High Court on 25 November 1999. Likewise, a challenge to the use of temporary judges in the Court of Session on the ground that they also did not constitute an independent and impartial tribunal was dismissed, having regard to the differences in the manner of their appointment from that that they

contained in a practice note issued by the Lord President.[128] Article 6 concerns were also raised (unsuccessfully) in the case of *Hoekstra v H M Advocate128*

provide “expert advice and guidance on the impact of the ECHR on public authorities in

Scotland we have seen how two internal reviews still left issues (to be picked up by the courts and through an external audit) that required remedial legislation.

If a non-lawyer dare comment, it is evident that there are marked differences in the perceptions of government and non-government lawyers over what may constitute grounds for a successful challenge under the Act. A catalogue of such challenges ('hot potatoes') said to be waiting in the wings and listed by one prominent human rights lawyer at a seminar in March while carefully noted, sounded no alarms for a senior government lawyer in the audience involved with the ECHR Criminal Issues Co-ordinating Group.[137] The thrust of the Government's litigation strategy after October will reflect the belief that most of the occasions where Convention points are raised will not have merit and that a robust defence should be mounted to prevent ill-conceived arguments gaining unwarranted attention or credence.

There have been sufficient warning signs from Scotland and in the run up to October, however, to give Whitehall some pause for thought. The *Kebilene* judgements, for example, were not anticipated and, as we have seen, have caused Whitehall to re-evaluate the transitional retrospectivity provisions in the HRA and the extent to which the courts might apply the Convention after October to matters and proceedings which occurred before that date. There is also a sense of realism that no audit process is foolproof, and that there will be challenges that have not been anticipated or that will succeed in an area that was thought compatible with the Convention. Further, there are other areas known to be vulnerable but where the risk of challenge is accepted on policy grounds or because there is no clear view on what should be done until or unless a court has ruled.

An elaborate referral system between key departments, such as the Crown Prosecution Service, and the two lawyers' groups has been devised to keep track of the first and then the significant cases under the Act. The ECHR Criminal Issues Co-ordinating Group expects to meet on a weekly basis from October to analyse cases, to decide on the fast tracking of appeals and to prepare and issue guidance on new issues as they arise.

These special arrangements will not be permanent. Whitehall is sanguine in its belief that any storm will pass and, although unpleasant surprises for the Government are expected in the initial flurry of activity when the Act first comes into force, then so will its systems be able to adapt and cope. The application of the ECHR and HRA which seem threatening now in the months before implementation will soon become accepted, it is anticipated, as part of the normal business of government after October.

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[137] Seminar on 'Human Rights: Court Procedures and Remedies' held on 22 March 2000 by the Faculty of Laws, University College London. The issues identified were: reversing the onus of proof, public interest immunity, juvenile trials, drawing inferences from silence and use of evidence obtained in breach of Convention rights.

What happens in the courtrooms, however, is only part of the story. The Government is less confident about creating and maintaining a positive media and public perception of the Human Rights Act. We have seen how the Home Office Human Rights Task Force is developing a publicity strategy for the commencement of the Act and has put in place arrangements for the quick rebuttal of unfavourable media stories. A set of 'core messages' in relation to the Act has been prepared and widely distributed by the Home Office. But the Act is still likely to attract unfavourable publicity irrespective of the outcome of any particular challenge. In the media, if the Government loses a case it will be seen to be at fault. However, if the Government's position is upheld by the courts the views of those unsuccessfully bringing the action are just as likely to make the front pages. Where the Human Rights Act is called into play on difficult social issues, where there is no consensus, or the majority view in society is found to discriminate against the rights of a minority, there will be more than enough people aggrieved at the outcome to criticise the part played by the Act. It is not surprising, therefore, that the Government is content, at present, to give a low profile to the Human Rights Act.

8. Future steps

There is no evidence of the Government looking to take further steps in relation to the protection of human rights in Britain. A long "bedding down" period is envisaged for the Human Rights Act before there could be any question of returning to such issues as the development of a distinctly British Bill of Rights, the creation of a Human Rights Commission and allowing access by persons in the UK to the individual complaint mechanisms and broader spread of rights under the UN's human rights treaties. For presentational reasons, however, the door will not be firmly closed on such issues.

8.1 Amending the Human Rights Act?

Outside Government, several apparent deficiencies have been identified in the Human Rights Act. There are those who would like to see fundamental changes in the Act. Some would like to see the Act entrenched and given special protection against repeal or amendment with enhanced powers for the courts. Conversely, the Shadow Home Secretary has been quoted as considering the Act to be "unacceptable, a step too far" which "if common sense does not prevail then a future Conservative Government would have to decide what to do about it."[138]

Within parts of the legal profession and among human rights NGOs, there is specific unhappiness over particular restrictions in the Act (believed to have been required by the

[138] Shadow Home Secretary, Ann Widdecombe, quoted by the Daily Mail, 30 March 2000.

Treasury) on who may count as a victim and the 'modest' (Strasbourg scale) damages that can be awarded when a Convention right is infringed.

Politically and practically, it is difficult to envisage the circumstances in which early or substantial amendment might be made to the Human Rights Act. The present Labour Government has no reason or purpose to extend the scope of the Act. And even if it might like to revisit particular issues that now, with the benefit of hindsight, may have been thought to have slipped by in the euphoria of its first months in office, it is unlikely to do so as this could reopen debate on a whole host of matters surrounding the Act. In theory, a future Conservative Government could limit the Human Rights Act's effect or even go so far as to repeal it entirely. However, the longer that the Act is in place and the more thoroughly it becomes embedded in the thought processes and practices of the legal and justice system the more difficult and unlikely its removal. The Human Rights Act is, therefore, likely to remain in its present form for some time ahead.

8.2 Additional Convention rights?

However, the Convention rights that the Human Rights Act gives domestic effect to are liable to change as new Protocols are added to the ECHR and the UK accedes to these and existing Protocols that it has yet to ratify. In March 1999, the Government stated that it would ratify Protocol 7 once certain incompatible rules of family law had been amended. However, it indicated that would not ratify Protocol 6 because of concerns that this would extend the right of abode in the UK to all categories of British passport holders. The Government also stated that it would need to retain the existing derogation to Article 5(3) of the Convention until 'a suitable judicial element is introduced into the extension of detention

8.3 A Human Rights Commission?

With the Human Rights Act in place, the debate will intensify over the need for a Human Rights Commission with powers to assist individuals to realise their rights under the Convention. We have noted in earlier sections, how NGO representatives in the Home Office Human Rights Task Force have pressed for such a Commission to fulfil the promotion role for the Human Rights Act. We have also seen how the Scottish Executive has decided to consult publicly on the establishment of a Scottish Human Rights Commission. Officially, the Government has an open mind on the creation of a Human Rights Commission encompassing either the whole of the UK or

March 1999, the Government completed a review of its 'Human Rights Instruments' in which it concluded that:

> it would be wrong to divert the considerable resources needed for the commencement of the Human Rights Act, in order to prepare for the right of individual petition under the Covenant (or indeed, under the conventions against torture or racial discrimination). It undertook, however, to reconsider this question when the Human Rights Act had been fully implemented and was operating satisfactorily.[144]

In fact, the 1999 review came very close to closing the door on the acceptance of individual petition under other human rights treaties. These treaties contain a number of rights either not found in the ECHR or open to different interpretation by their treaty monitoring bodies. There is a deep reluctance within the Government to allow individual access to these bodies. While their decisions are not binding, the Government would inevitably need to conduct similar risk assessment exercises to that undertaken for the ECHR in order to limit the risk of embarrassing adverse decisions. Also, since the UN treaty monitoring bodies are not judicial in nature it has been thought that there is a higher likelihood of the Government being found at fault in individual petitions. The commitment to further review the matter when the Human Rights Act has been 'bedded down' is not likely to be acted on early.

8.5 A Charter of Fundamental Rights for the European Union

This cautious approach would also seem to be mirrored in the 'no new rights' stance adopted by the Government towards proposals for a Charter of Fundamental Rights binding the institutions of the European Union. There is growing disquiet in Whitehall that the Charter may become the harbinger of a European Constitution and that it could give legal effect to new rights and economic and social rights not found in the ECHR.

The UK accepts that certain measures within the competence of European Union law have direct effect or direct applicability in all member states. The European Court of Justice has developed the doctrine of the primacy or supremacy of European Union law, according to which member states have restricted their own legislative powers, and the courts of member states are obliged to give effect to such law even

sovereignty is technically preserved because Parliament retains the ability to amend or repeal the European Communities Act and, through it, superintend the UK's participation in the European Union.

The original EEC Treaty contained no specific reference to human rights. The European Court of Justice has, however, consistently maintained that fundamental rights form an integral part of the European Union legal order and has paid special regard to the ECHR and the case law of the ECtHR a practice which is now reflected in Article 6 of the Treaty on European Union.

Given that all existing and prospective members of the European Union are individually bound by the ECHR, the question of accession to the Convention by the European Union has been hotly debated over recent years. However, the European Court of Justice stated in 1996 that the Union's treaties do not provide any powers to lay down rules or to conclude international agreements on human rights matters. Presently, there is not the political will within the European Union to make the treaty amendments necessary for the Union to accede to the ECHR.

Instead, following the European Council at Cologne in June 1999, work has begun on drafting a Charter of Fundamental Rights for the institutions of the European Union. So far, more questions have been raised than answered over the purpose and effect of the proposed Charter. Will it be purely declaratory or have real legal effect? Is it simply an exercise to consolidate and emphasis existing rights within the European Union or a harbinger of new modern rights (environment, bioethics etc) and a written constitution for a federal European state?

The UK government does not favour a Charter which will contain new and justiciable rights. This is prompted by resistance to the idea of rights suffused with the authority of European Union law and able, unlike the Human Rights Act, to override incompatible domestic law. There is also particular concern that the Charter is part of moves by France and Germany to prepare a written constitution for a federal Europe.

Sentiment in the European Parliament and in a number of other member states is in favour of a legal document. A first draft of the Charter went much further than the ECHR in containing economic and social rights as well as a number of new modern rights. This has raised questions over the possible future relationship between the two instruments and courts. A final draft of the Charter is intended to be ready before the December 2000 meeting in Nice of the intergovernmental conference (IGC) considering voting reforms and EU enlargement.