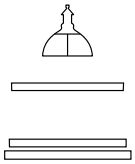

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Introduction

The Human Rights Act 1998 is a crucial development in the legal and constitutional history of the United Kingdom. It reaches into and has to be taken into account in every area and activity of government.

This is the second of two reports examining the steps taken by the Government to implement the Human Rights Act 1998. The first report, published in September 2000, documented Whitehall's preparations for the introduction of the Act. It concluded that considerable and well-directed efforts had been made but that a question mark remained over Whitehall's long-term commitment to secure the position of the Human Rights Act and respect for human rights within Government.[1] This report picks up the story with the coming into force of the Act on 2 October 2000. It focuses on:

- the nature of the "human rights culture" being developed and promoted by the Government;
- the Government's human rights policy and machinery steering implementation of the Human Rights Act;
- what has been done (and needs to be done) by Government departments and public bodies to implement the HRA and ECHR;
- the Government's legal machinery and litigation strategy for considering, prioritising and responding to human rights challenges in the courts; and
- the differences and similarities in the experiences of Whitehall and the Scottish Executive in implementing the new human rights legislation.

The first year following the introduction of the Human Rights Act has gone well for the Government. It has mainly focused on the compliance aspects of the Act. The thoroughness of its preparations and risk management approach, in this regard, markedly reduced the prospect of successful human rights challenges being made in the courts. These have been comparatively few in number during the first year and where they have occurred the Government's legal services have been quick to respond in a usually successful manner in the higher courts. The Government has been less active and successful in developing a "human rights culture" and in inculcating a sense of respect for human rights across its departments and public bodies. Whitehall has undergone significant organisational change in its handling of human rights matters and seen a marked falling off in enthusiasm for human rights following the events of 11 September 2001. The structures, systems and procedures remain in place but the sense of purpose is missing. Recommendations on how this might be rekindled are made in this report.

[1] J. Croft—'Whitehall and the Human Rights Act 1998'. The Constitution Unit. 2000.

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done as part of its “human rights culture”. These other instruments do not have the same domestic status as the ECHR. Through the HRA, the ECHR has acquired constitutional status in the UK: the others have not. This tension was evident in the evidence given by the Home Secretary to the Joint Parliamentary Committee on Human Rights in March 2001 where he accepted that “the generation of a culture of rights and responsibilities in the widest sense should certainly take account of the obligations to which we have signed up internationally” but “if you are asking … whether … every single one of the obligations to which we have signed up internationally should be incorporated into our domestic law … the answer is no”.[3] A particular concern, at that time, was the new Charter of Fundamental Rights and Freedoms of the European Union where the Government had battled hard to resist moves to give legal effect to an array of rights not found in the ECHR. Instead, in the eyes of the Government, Convention rights appear to remain synonymous with human rights and the “human rights culture” effectively a question of building a ‘culture of compliance’ with the ECHR. It means that many departments and public officials believe that complying with the requirements of the HRA and ECHR fulfils all the human rights responsibilities of the Government.

1.2 A "human rights culture" within Government

Inculcating a sense of respect for human rights among government officials is vital. Arguably, the greatest value of the Human Rights Act lies in what does not happen—the court challenges which do not occur because human rights considerations are central to the thought processes of those involved in formulating and executing policies and legislation.

Among officials, the Human Rights Act has been described as a ‘constitutional giant’ capable of shifting the ‘tectonic plates’ of government. Prior to the Act coming into force, this saw attention focused on compliance issues and the need to remedy potential breaches of the ECHR. However, as the Act becomes fully embedded in the processes of government, this emphasis is expected to change with a greater focus on prevention rather than cure. In

Addressing a government audience, the Permanent Secretary to the Home Office used his last progress report to stress the importance of the Human Rights Act as:

> "a constitutional measure, legislating for basic values which can be shared by all people throughout the United Kingdom. It offers a framework for policy-making, for the resolution of problems across all branches of government and for improving the quality of public services. From this point of view it is not right to present the Human Rights Act as a matter for legal specialists. The culture of rights and responsibilities needs to be mainstreamed."[5]

Among the ways in which this could be done, he noted requirements for:

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forward by the Human Rights Unit and none had received any communication from the Unit in this regard since it became part of LCD in July 2001. Without reinforcement from the centre, in too many departments and public authorities progress has stalled: the phrase “human rights culture” has been imbued with little real meaning and its use invites cynicism or blank looks among officials.

It is difficult to see how a "human rights culture" will be established and maintained throughout Government without the political will to keep the issue alive. The Government is faced with the problem of building a culture out of litigation or the fear of litigation. There is no political kudos in being associated with challenges and breaches under the Convention. This is not a culture to be embraced enthusiastically by Government departments. As matters stand, therefore, building a "human rights culture" within Government exists mainly as a policy on paper but not in practice.

1.3 A ‘human right culture’ for the UK

The Human Rights Unit has worked to influence public perceptions about the Human Rights Act. Its main aims appear to have been:

— to win public support for the Human Rights Act and to counter criticism that the Act might cause ‘damage’ to the legal system and traditional values in society; and

— to reduce the expectations of potential users and deter ill-conceived use of the Act.

During the run up to October 2000, the Home Office Human Rights Task Force actively promoted the positive benefits of the Act and tried to correct some of the more outlandish media reports concerning the use to which the Act might be put. These efforts enjoyed some success—aided by the careful manner in which the courts have since used the Act which greatly limited the scope for ‘scare stories’.

Ironically, in the latter part of 2001 it was a Government department, the Home Office, which launched the most trenchant attacks on the new human rights regime. Beset by the twin ills of terrorism and mounting asylum claims, the Home Office posited the need to substantially amend or override the Human Rights Act with a

In any political climate, selling a “human rights culture” to the public is an extraordinarily difficult task. The Human Rights Unit is quick to point out that building a horizontal culture where individuals embrace Convention rights in their business and social relationships is going to be a long-term process. In a rare statement of purpose, Baroness Scotland, junior

1.4 Conclusions

The Human Rights Act has given human rights teeth and legitimacy but also had the unfortunate consequence of narrowing the focus of the human rights debate in the UK. There is a tendency to assume that the only 'real rights' are those 'constitutional rights' found in the ECHR which can now be enforced in the domestic courts. A senior health official could deny the existence of a 'right to health', for example, because there is no such right included in the Convention. This is symptomatic of a widespread attitude among public servants who have been 'taught' to see the Government's human rights obligations in terms of compliance with the ECHR. This misconception is exacerbated by the espousal of a "human rights culture" that excludes rights not found in the ECHR and which are not justiciable before domestic courts. Any attempt to seek a more broadly based culture is rejected because the Government interprets such moves as an attempt to obtain some form of domestic legal status for these other rights. They are not to bask in the sunlight of the HRA. The Government's does not conceive that there could be a "human rights culture" encompassing both civil and political rights (enforceable in the courts) and economic, social and cultural rights (which are achieved through social programmes). In the Government's eyes, such a culture would advance the possibility of other Protocols in the ECHR, rights contained in UN human rights instruments and, most menacingly, the EU Charter of Fundamental Rights

2. Implementation of the Human Rights Act

2.1 Purpose

This chapter examines:

- the Government machinery for steering implementation of the Human Rights Act;
- the Government's human rights policy;
- the role of the centre in securing and supporting the implementation of the HRA and ECHR in departments and public bodies; and
- what has been done (and needs to be done) by departments and public bodies to implement the HRA and ECHR.

2.2 A brief overview

The smooth introduction of the Human Rights Act and the small number of human rights cases presenting significant implications has allowed the Act to drift to the political and policy backwaters of Government.

Having successfully steered the preparation process and mainstreaming policy for the Human Rights Act, the Home Office was quick to assume a back seat for its implementation—winding up the Human Rights Task Force in March 2001 and allowing most co-ordination and monitoring tasks to quickly revert to the Cabinet Office. In June, for reasons largely unconnected to human rights, policy responsibility for the subject was transferred to the Lord Chancellor's Department. In July, the LCD also assumed the Cabinet Office's co-ordination responsibilities following the dismantling of the Constitution Secretariat (again for reasons not connected to human rights). Any plans that the LCD might have had in the area of human rights policy were eclipsed by the events of 11 September. Instead, as the year closed, the protection of individual human rights afforded by the HRA and ECHR was more likely to be criticised as an 'obstacle' in the war against terrorism.

2.3 Government machinery and human rights policy

During the preparation phase, it was an indicator of the special status and significance

human rights issues. After October 2000, the most important of these paper exercises required all departments to furnish the Cabinet Office with returns on significant human rights challenges ('hot cases') and a consolidated list of these, as approved for issue by the Lord Chancellor, was circulated to committee members.

When the Human Rights Act came into force on 2 October 2000, no one body within the central structure had overriding authority for dealing with the Act. The Home Office held policy responsibility for the HRA and functioned as the lead department except in matters relating to the judiciary which came under the Lord Chancellor's Department. Overlaying these individual responsibilities, the Constitution Secretariat of the Cabinet Office had a broad policy function and role of providing the means through which collective decisions could be made on issues concerning the Act.

Of the three, prime responsibility for the implementation of the Human Rights Act rested with the Human Rights Unit of the Home Office. During the preparation phase, the Home Office's purpose had been to see human rights and the obligations imposed by the HRA mainstreamed into the activities of every department with a minimum of central direction and control. Hence, most of the organisational arrangements put in place to see through the preparations for the Act were of a temporary nature and were not to form part of a permanent structure to oversee and direct matters concerning the operation of the Act.

After October 2000, the Home Office showed no inclination to remain deeply engaged in matters relating to the future operation of the Human Rights Act. Its mainstreaming approach firmly placed the responsibility on individual departments to implement the requirements of the HRA in their policy, decision and law making. The Home Office was quick to distance itself from this process. In December 2000, departments were advised that the Cabinet Office would take over the role of requesting information on the impact of the Act and would act "as a 'ginger group' around Whitehall to ensure that matters of importance across Departments are recognised and dealt with in a suitable manner".[11] The Home Secretary acknowledged that the Home Office retained "over-arching responsibility"[12] for the HRA, but his department's interest extended little beyond the Act's impact upon its own subject areas. It was inevitable that the Home Office's responsibility for the effective implementation of the HRA (even with the best efforts of the Human Rights Unit) should start to count for less than its day to day concerns of managing a portfolio covering areas—law enforcement, immigration, prisons—now subject to challenge under the Act.

During the preparation phase, conscious of the need for consensus and the scale of the task involved, the Home Office had established a Human Rights Task Force, comprising representatives from key government departments and non-government organisations in order to facilitate implementation of the HRA. The Task Force had played an important role

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[11] HRTF Paper (00) 22, para 3(f).

[12] Joint Committee on Human Rights. Minutes of Evidence, 14 March 2001, paras 23-24.

in contributing to the preparation of guidance and publicity materials. It had also acquired and performed a valuable inquisitorial role in examining the effectiveness of the preparations being made in individual departments.

Neither Government nor non-government members of the Task Force had envisaged that it should become a permanent body. The Home Office had always considered that the Task Force should not continue to function for more than a few months after the introduction of the HRA. In October 2000, it proposed that the Task Force should continue to meet until around April 2001 and that in this remaining period it should switch its focus from departmental presentations to maintaining a more general overview of the immediate impact of the HRA.[13] However, at the insistence of non-government members, while the cycle of departmental presentations was ended, two new sub groups were formed (covering legal and home affairs and health, social services and education matters) to address the general level of preparedness in key sectors. In the end, the two sub-groups had little time to make an impact. The Task Force's sense of purpose and momentum was rapidly

have the committee in place by the time the HRA came into force. The membership of the committee was finally agreed in January 2001 with Jean Corston MP in the chair.

In March, the new committee instituted an inquiry into the initial impact of the HRA and the degree to which the associated human rights culture had been established within and outside Government. The committee's brief initial report (curtailed by the impending general election) did not comment on the extent to which acceptance of human rights has been cemented within Government departments or conveyed by them to the host of public

indicate that this exercise will result in a 'Ministry of Justice' with the means and authority to secure respect for human rights within the Government. To have a lead organisation steering the preparations for the Human Rights Act had been unusual given the federal nature of Whitehall and a reflection of the seriousness with which the Act was viewed within the Government. With no serious alarms over the manner in which the Human Rights Act was functioning during its first months, the need for a 'directing' body to oversee implementation of the Act was a non-starting issue within the Government.

Since acquiring its new responsibilities, the LCD has been slow to disclose how it will pick up the 'human rights' baton. However, information provided to the Joint Committee on Human Rights in January 2002 indicates that a radical shift in policy or approach is not immediately on the cards. The department considers:

> "Ensuring the Human Rights Act is embedded in our law and administration and developing a culture of rights and responsibilities are long-term projects. Our current priorities are to achieve a high level of awareness throughout public authorities of the balance that needs to be struck between rights and responsibilities, and how that balance could be achieved. Public authorities should know about the Human Rights Act, and treat it yet as an instrument for achieving good, open and accountable government, and for measuring and improving their standards of service delivery."[17]

Some specific measures are being proposed to achieve these goals. Guidance for Whitehall

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An announcement is also in the offing that the Government will now review its commitments under the ECHR and other international human rights instruments following the successful bedding down of the Human Rights Act. This will entail examination of whether to accede to a number of additional protocols under the Convention (most importantly, the new Protocol 12 creating a free-standing prohibition on discrimination). The exercise will also involve looking at the arrangements whereby individual complaints may be taken to the treaty monitoring bodies for a number of the UN human rights treaties. It is possible that the Government may be prepared to now test the waters in this regard. These treaties contain a number of rights not found in the ECHR or open to different interpretation by their monitoring bodies. While they are not judicial in nature, decisions of these bodies are potentially influential upon the Government. Acceptance of such requirements and scrutiny will require consultation within the Government and might well entail a further risk assessment exercise on similar lines to that conducted for the ECHR. After a quiet beginning, therefore, the LCD may be entering a more active period and on the way to becoming the Government's 'rights department'.

2.4 11 September

Part of the reason for the LCD's inaction hitherto lies in the events of 11 September. The LCD was left on the sidelines as the Home Office became increasingly outspoken in its criticism of the Human Rights Act and ECHR.

The latter part of 2001 became a difficult time for any Government department to choose to extol or promote the virtues of individual human rights. No official acknowledgement was made, good or bad, concerning the impact of the Human Rights Act in its first year. Instead, the first anniversary coincided with an 'open season' during which a number of grievances and concerns with the human rights legislation (particularly in the areas of asylum and immigration) were able to 'hitchhike' on the theme of combating terrorism. It was the starkest possible evidence concerning the ease with which human rights considerations could be set aside by the Government for political and policy purposes. In this sense, the Human Rights Act failed its first major political test since coming into force.

However, the HRA, if not a roadblock, proved to be a major factor in determining the path and means that the Government would employ in the war against terrorism. Initially, the gravity of the threat prompted calls to amend the HRA and override the ECHR. However, on 12 November, the Home Office introduced the Anti-terrorism, Crime and Security Bill seeking to work within the framework allowed by the ECHR for responding to national emergencies. The Bill was accompanied by an Order paving the way for the Government to derogate from the right to liberty and security of the person under Article 5 of the ECHR. Such a step is permitted under the ECHR where there is an emergency threatening the life of the nation. The Government argued that this situation had arisen in respect of the need to be able to detain terrorist suspects who could not be deported (and against whom there was insufficient evidence for a prosecution in this country).

— introduce, disseminate and observe the new human rights culture throughout their organisation;
— review their policies, procedures and legislation for compliance with the ECHR;
— ensure that public authorities and other bodies likely to be subject to the HRA were aware of its requirements and made similar preparations; and
— report back to the centre on their state of readiness particularly in regard to removing potential breaches of Convention rights.

2.7 Maintaining a centre of knowledge

Following the disbanding of the Human Rights Task Force, however, few visible efforts have been made to monitor progress or to maintain communication between the centre and departments on matters of human rights policy or practice. This reflects, in part, the fact that no 'crisis' has arisen during the HRA's first year requiring further policy guidance from the centre, but also that there are no other policy initiatives planned to follow the Act which need to be communicated to departments. Instead, the Home Office was quick to end the system of periodic progress reports required during the preparation phase. It did not have the intention and hence the means to offer permanent support to departments regarding human rights matters. This situation has not obviously changed with the transfer of responsibility for human rights from the Home Office to the Lord Chancellor's Department. The LCD has still to demonstrate a clear sense of purpose in this area.

There appears to be a reluctance at the centre to having any long-term involvement in the implementation of the HRA and ECHR across Government. There are a number of possible reasons. Human rights are not now marked out for special treatment as a political priority of the Government. There is no political kudos to be gained for any Minister by being associated with breaches of Convention rights. Indeed, since the events of 11 September, there is a sense of ambivalence within Government over the need for effective human rights protection. On a more practical level, it has also to be recognised that under the federal Whitehall system, no one Minister or organisation at the centre would have/ seek/ be accepted as having the authority to direct the human rights efforts of other departments. And no central unit (of whatever size) would have the means (knowledge and resources) to provide effective support to every department. Last, and not least important, it is increasingly possible to sense a belief among Go

much higher premium is clearly set on dealing with the direct legal consequences (compliance aspects) of the HRA and ECHR than on their use as a means of delivering a human rights policy in Government. This is not to say that litigation and policy function in watertight compartments with no interaction between the two—this has become more likely, in fact, with the clustering of responsibilities and functions within LCD. The structural means are there to achieve further progress.

2.8 What have departments and public authorities achieved?

The lack of active political championing of human rights at the centre has meant that departments have been left very much to their own devices in implementing the HRA. By October 2000, all departments had reviewed their policies, procedures and legislation for compliance with the Convention. The majority had taken steps to mainstream awareness of the requirements of the HRA and ECHR within their own organisational structure. Most had alerted public bodies within their work areas to the coming into force of the new rights regime. A handful had taken meaningful steps to assist their public bodies to prepare.

Since October 2000, the majority of departments have handled fewer cases citing HRA and ECHR arguments than had been anticipated. Few departments have had to make changes (or contemplate making changes) as a result of a court ruling. And in the absence of court challenges, most departments have substantially reduced the time and resources that they are prepared to devote to human rights matters.

2.9 Best and worst practice

A composite picture drawn from a number of departments reveals a number of strengths and weaknesses concerning the manner in which departments have set about implementing the requirements of the HRA and ECHR.

Best practice sees human rights mainstreamed into the work and goals of an organisation. The presence of an identified Minister and officials charged with responsibility for human rights issues and exercising ownership over the subject. An active and knowledgeable human rights co-ordinator maintaining an extensive network of contacts within the organisation sharing information on human rights matters. Business units maintaining communication with public authorities and public bodies on human rights matters. The creation of local networks among departments to share information, best practice and for problem solving purposes. The promotion of a “human rights culture” as an intrinsic part of the organisational culture and its goals. Systems in place to continue to monitor and review compliance with the HRA and ECHR. Systems in place to ensure that human rights considerations are taken fully into account during the formulation of policy and proposals. Arrangements made to assess and audit the effectiveness of the steps taken to implement the requirements of the HRA and ECHR. A proactive approach to the identification and resolution of potential Convention issues which does not shy away from the cross-cutting

implications. And a positive attitude and readiness to communicate with NGOs, individuals

ECHR monitoring group for sharing information within the Directorate. Awareness, although not necessarily an enthusiasm for human rights, is firmly established across the Home Office and a permanent feature of policy and decision making. Other departments or parts thereof have become sensitised to human rights matters by single high profile challenges in the courts (for example, challenges on planning and mental health—see sections 3.4 and 3.5 below). But for the majority of departments, HRA challenges have only had a marginal impact on their work. Even so, some continue to maintain sophisticated structures and mechanisms to oversee human issues. The Department of Work and Pensions maintains a 'risk register' numb

This convinced District Audit that it should develop comprehensive audit arrangements with the objective of assessing whether the bodies it audits have:

- "effective management arrangements in place for complying with the Act
- identified their key risk areas, which could be subject to challenge under the Act and, as such, have introduced changes to minimise legal, financial and reputational risks
- taken steps to build a rights based culture
- established management arrangements to ensure its contractors / partners are compliant with the Act
- on-going monitoring and review arrangements."[24]

These audit arrangements are likely to take effect in 2002. It will be interesting to see what impact they have in instilling awareness and compliance with the requirements of the HRA within local government and the health sector.

And not all human rights co-ordinators have a firm grasp of how such matters are being tackled within their own departments or, another step on, between individual business units and public authorities.

attention paid to human rights will legitimately vary from business unit to business unit/ department to department/ public body to public body. And officials will always respond to the challenge of a court case (albeit that 'fire fighting' is a far less effective use of resources than fire prevention). However, does this mean that human rights values do not in fact need to be inculcated and routinely reinforced in every part of every department and public body? Or is there a point at which human rights no longer warrant being flagged as a distinctive topic and should instead be treated as just another 'ingredient' of Government? If there is, that point does not appear to have been reached with the present level of understanding and respect for human rights within the Government.

Conclusions

3. Legal Services

3.1 Introduction

The Government has expended immense time and effort to try to eliminate the risk of challenge under the Human Rights Act or, where it does occur, to be able to respond in a prompt, effective and convincing manner to whatever Convention issues are raised.

This chapter examines:

— the Government's legal machinery for handling the implementation of the Human Rights Act;

— the Government's 'human rights' litigation strategy for considering, prioritising and responding to human rights challenges in the courts; and

— how the human rights legal machinery and strategy have responded to the first year of challenges under the new legislation as illustrated through actions taken for the first declaration of incompatibility made by the courts, the first remedial order introduced by the Government, and in the course of litigation in the courts.

This chapter is not a definitive guide to the case law arising under the Human Rights Act during its first year. It draws primarily on those cases that have had particular significance for the Government or the way in which its legal services have addressed human rights matters.

3.2 Criminal and Civil co-ordinating groups

The legal arrangements for the HRA have been focused in two lawyers groups set up to look at criminal and civil issues respectively.

Criminal issues

The ECHR Criminal Issues Co-ordinating Group is chaired by a 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 comprises some 30-35 senior lawyers drawn from some 20 prosecuting bodies as well as policy departments across government. During the preparation phase, the major task taken on by the Group was the review of some 25 critical criminal issues that were identified through the 'traffic light' process as being vulnerable to challenge under the Convention.

This review exercise is said to have revealed only one area where a change in the law was warranted. For the other issues, the Group 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 contained 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', would not require formal notification to the Crown. In September 2000, the 'lines to take' relating to specific Convention points were published as 'Points for Prosecutors' and posted on the Legal Secretariat to the Law Officers website.[25]

the ‘coal face’ rounding up significant developments and cases in England and Wales, Scotland and Strasbourg. On this occasion, the discussion over the *Lambert* ruling was also to prompt the Group to go on to examine reverse onus provisions across Government.

One crucial lesson learned by Government lawyers during the preparation phase, stemming from the *Kebilene* case[28], was that there was no mechanism by which the Government could expedite the court process, especially appeals, in cases of overriding importance or significance. It was also evident that the Criminal Issues Group itself would not be able to take quick decisions needed on the handling of individual cases. In September 2000, therefore, a new ‘fast tracking’ sub-group was formed under the Criminal Issues Group.

Until recently the ECHR Fast Track Group met first thing every Wednesday. This has now moved to every alternate week (while the courts are in session). It is headed by a lawyer seconded to the Legal Secretariat from the Treasury Solicitor’s Department. This small group, of prosecutors from the CPS, DTI and lopEx3.2not ge.000 witheaded bsThis smalld

The first of these cases (*R v Havering Magistrates Court*[30]) was brought to the fast tracking group on 4 October (two days after the HRA ca

the ECHR Civil Litigation Co-ordinating Group in capturing and disseminating information about major civil cases and growing confusion outside the two groups about their respective roles, prompted a review of their functions by the Cabinet Office. It had always been accepted that arrangements for dealing with human rights issues might need to be altered as experience was gained in handling cases. There was no hesitation, therefore, in taking the decision, in July 2001, to combine the two groups into one new group under the Cabinet Office. What was not planned, however, was to see this decision quickly overtaken by other events which dismantled the Constitution Secretariat and saw its human rights functions transferred to the Lord Chancellor's Department.

The new committee in its new home in LCD first met in September 2001. Unusually, it retained two chairmen—the former chairman of the Civil Litigation Group chairing that part of the meeting relating to litigation matters and the former Legal Adviser to the Cabinet Office (now LCD) chairing the part relating to policy matters. The new committee remained a lawyers' forum. The intent was to be better able to capture cases, disseminate information, make the 'read acrosses', deal with cross-cutting issues and, most importantly, 'add value' and thus influence the decision making processes on cases and issues (ie. to be more than a debating and recording forum). Among the policy issues considered at the first meeting were the manner in which judges were applying the interpretation powers in Section 3 of the HRA, the call by the Joint Parliamentary Committee on Human Rights for more information to be provided on the supporting reasoning behind Section 19 statements, progress with the first remedial order being introduced by the Department of Health and the application of Article 6 in the decision-making processes involving Conservation Areas and Sites of Special Scientific Interest.

It is not the intention that the two Co-ordinating Groups should exist on a permanent basis. Resources had been bid for on the basis that they were likely to have an active life span of 2-3 years. At the end of 2001, there were no plans to retained

unduly simplistic assessment although there is reason to conclude that the first instinct of the Government's legal machinery is to contest human rights challenges using all possible means of appeal and that the machinery works most effectively when used in this manner. This is not being done blindly, however, and if it is difficult to find occasions where the Government has accepted and acted on rulings of lower courts this possibility is not precluded if justified in the particular circumstances of a case. Albeit, the dice appear loaded against such a possibility.

The successful completion of the 'traffic light' audit prior to October 2000 would seem to mean that in the eyes of the Government all indisputable breaches of the ECHR have been identified and remedied. There are, admittedly, a large number of 'amber' issues that remain on which no action would be taken until challenged in the courts but these are matters where the Government believes it has at least a 'good arguable case' to put forward. It is very difficult, therefore, to envisage circumstances in which the Government would concede a human rights argument before entering the courtroom (unless it was already minded to make changes in that area as a matter of policy). This has only really happened in Scotland

however, seems to be the practical issue that there is no avenue whereby the Government's legal machinery can readily accept a lower court ruling in consultation with all those who might be affected by the judgement. This is not a function of the fast track group. The Government's legal machinery is geared towards the fast tracking of appeals rather than consideration of the merits of a successful challenge. It would be a bold call indeed on the part of any department or lawyer to accept the ruling of a lower court with implications for other departments and difficult in the extreme to obtain the agreement of all other parties who might be affected within a short timeframe. It is much easier to appeal. It is also a route, judging from the first year of operation of the HRA, which will be likely to obtain a favourable outcome for the Government.

There have only been a handful of cases, therefore, where the Government has not exhausted all the available legal processes before accepting a judgement with implications under the ECHR. They include:

— the declaration of incompatibility made in respect of the Mental Health Act 1983 (see 3.7 below) where the Government had already identified that there was a potential Convention issue which was being addressed in the context of a major review of mental health policy;

— the acceptance in the cases of *King v Walden* and *Han and Yau* that tax and VAT evasion penalties should be treated as criminal and not civil penalties thereby attracting the more rigorous procedural guarantees under Article 6(1) of the ECHR; and

— *R on the application of Nigel Smith v Lincoln Crown Court, R on the application of Chief Constable of Lancashire v Preston Crown Court*[40] where it was accepted that the arrangements for considering licensing appeals by the same magistrates' bench involved in the original decision constituted a clear breach of Article 6. An issue that had been completely overlooked during the audit exercises.

More commonplace, however, is the situation whereby a lower court establishes that there has been a violation of a Convention right only for that decision to be overturned when the Attorney General, or parties, take the case to the Court of Appeal or House of Lords.

3.4 The first 'Declaration of Incompatibility' ("Alconbury")

A major challenge to the planning system came as no surprise to the Government. Even a quick glance at overseas experience indicated that planning matters attracted challenges under human rights legislation. From a private sector perspective, such a challenge represents a reasonable investment/gamble when the rewards of winning more than outweigh the costs involved.

[40] *R on the application of Nigel Smith v Lincoln Crown Court, R on the application of Chief Constable of Lancashire v Preston Crown Court*, 12 November 2001, QBD,AC.[2001] EWHC Admin 928.

> Judicial Review is not sufficient to remedy the defects in the secretary of State for the Environment, Transport and regions' decision-making role—the scope of judicial review is not sufficiently wide and the court is not prepared to enlarge its power of review."[44]

In a flurry of internal meetings, steps were taken for an appeal to be fast tracked, with the consent of all parties, to the House of Lords. The decision to appeal rested with DETR but reports were made to both the Cabinet Secretary and Prime Minister. As the court had stressed that the Secretary of State had acted in accordance with the law, which remained in force, as provided for under Section 4 (6) of the Human Rights Act, he would continue to exercise his powers under the Town and Country Planning Act. This meant:

> "the existing primary legislation continues to apply and the Secretary of State has a duty to continue determining cases which have been called–in and appeals that have been recovered, and to fulfil his statutory functions in relation to orders made... He will continue to exercise his discretion—for example, as to whether to call-in planning applications—as before. In all cases, he will proceed in accordance with his usual practice. Pending final decisions on the appeals, in deciding whether to call-in or recover cases for his own decision, he will take account of the fact that call-in and recovery, although lawful, have been declared incompatible with the Convention by the Divisional Court."[45]

The appeal was heard by the House of Lords over 26 February to 1 March 2001 with the Lord Advocate also participating because of its potential implications for Scotland.

Pending judgement, some contingency planning was done within Government (informally described as "contingency planning to have a contingency plan") to cover different possible outcomes and impacts on the planning system. However, on May 9, 2001, the House of Lords ruled that the processes by which the Secretary of State made decisions and orders under the Town and Country Planning Act 1990, the Transport and Works Act 1992, the Highways Act 1980 and the Acquisition of Land Act 1981 were not incompatible with Article 6(1) of the ECHR.[46] The Law Lords gave a clear signal that Article 6 was not to become a conduit for judicial intervention in questions of policy. They were uneasy that the Strasbourg court had included public policy making in planning matters within the ambit of "civil rights and obligations" under Article 6. And they were not prepared to substitute the wisdom of judges for what should be a democratic process. It was appropriate, therefore, that the determination of planning policy and its application in particular cases should be in the hands of the Secretary of State who was answerable to Parliament for his policy decisions and to courts as regards the lawfulness and fairness of his decision making. As Lord Nolan remarked:

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[44] HC, 19 December 2000, col 120W.

[45] Ibid.

[46] *R v Secretary of State for the Environment ex p. Holding and Barnes plc and others*

> "To substitute for the Secretary of State an independent and impartial body with no central electoral accountability would not only be a recipe for chaos: it would be profoundly undemocratic."[47]

However, although the declaration of incompatibility was overturned on this occasion, other challenges to the planning system are still expected. Waiting in the wings, for example, was another procedural challenge under Article 6 to the lack of any statutory basis for the inquiry process whereby the Home Office might convert a prison into a detention centre for asylum seekers.[48] Not surprisingly, planning officials and lawyers are to be counted amongst the most sensitised to Convention issues within the Government.

3.5 The first Remedial Order

In March 2001, the Court of Appeal found Sections 72(1) and 73(1) of the Mental Health Act 1983 to be incompatible with Article 5 of the ECHR.[49] This was because of the manner in which the provisions placed the burden of proof on a patient to show that he was no longer suffering from a mental disorder warranting detention in order to be able to satisfy the Mental Health Review Tribunal that he was entitled to discharge. The Court of Appeal ruled that the shifting of the burden of proof to the patient did not allow the legislation to be construed in a manner that would guarantee his right to liberty under Article 5 and a declaration of incompatibility was made. The essential question was the nature of the test to be applied when determining a patient's entitlement for release. Lawyers for the Department of Health conceded that the same approach had to be applied when considering whether to admit a patient and when considering whether the patient's continued detention was lawful. The test was, therefore, whether it could be reliably shown that the patient suffered from a mental disorder sufficiently serious to warrant detention. Because Sections 72(1) and 73(1) of the Mental Health Act did not require the mental health review tribunal to discharge a patient if that could not be shown, they were incompatible with Articles 5.1 and 5.4 of the Convention.

The challenge to Sections 72 and 73 was initially raised as a secondary point to what the Department of Health believed was going to be a different challenge to the Mental Health Review Tribunal constitution. However, by the time that the department was given notice that a declaration of incompatibility was being considered this latter issue had been dropped. The department had considered the risk of challenge to Sections 72 and 73 during its audit of legislation preparing for the introduction of the Human Rights Act. The issue had

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[47] Ibid. Para 60 of judgement.

[48] *S R Foster v Secretary of State for the Environment, Transport and Regions*. [Unreported]. The case concerned the proposed conversion of a prison in the village of Aldington, Kent into a detention centre for asylum seekers.

[49] *R v (1) Mental Health Review Tribunal, North and East London Region (2) Secretary of State for Health, ex parte H* . (4 April 2001) CA. [2001] 3 WLR 512.

been judged to be an ‘amber’ risk—one where there was a reasonable chance of challenge which might be successful and where action should be taken if possible. In this case, no immediate action was proposed but it was marked down as an issue to be addressed in the

The DoH responded in detail to the Committee's questions on 15 October. It explained that it had been advised that an appeal would have "no realistic prospect of success. We understand that there was no discernible error of law in the judgement of the Court of Appeal and an application for leave to appeal to the House of Lords had been refused by the Court of Appeal. In addition the judgement was not out of line with the direction of Government policy intentions for new mental health legislation as set out in the White Paper *Reforming the Mental Health Act 1983*"[52]. No other restricted patients were considered to be detained in contravention of the Convention and in the case of 'H' the Mental Health Review Tribunal had made a positive finding in August that there was a mental disorder of a nature and degree warranting detention in hospital. The department did not envisage the need for a statutory compensation scheme: the small number of people likely to be affected by the court's ruling could be catered for through ex gratia payments. It had adopted the non-urgent procedure because no patient was currently

resolution for approval to be moved at any time once the Committee had reported[54]. The guidance for departments recommended timeframes within which departments should notify the Committee of rulings finding violations of Convention rights made by the Strasbourg court, and declarations of incompatibility made by domestic courts, and what action they proposed to take[55]. One consequence of this would be to give the Committee broader insight into the manner in which Government was responding to successful challenges at Strasbourg and in the domestic courts. The Committee also offered criteria to guide departments in their choice of the urgent or non-urgent procedure for which "the decisive factor should be the current and foreseeable impact of the incompatibility on anyone who might be affected by it"[56].

What will Government make of these suggested procedures? It would already appear that the occasions on which a Remedial Order might be employed will be small in number because very few declarations of incompatibility are being made by the courts and on most such occasions departments' first instinct will be to appeal the judgement (with a high probability of success). For any declaration that has broad implications for several departments within the Government, it is also difficult to imagine that a consensus will be reached quickly on the use of such an Order (even within the six-month timeframe suggested by the Committee). The Committee allows for no other path than that the Government will respond to a declaration of incompatibility, whether by way of a Remedial Order or bringing forward amending legislation to correct the incompatibility. The political test will come should the Government choose to stand its ground notwithstanding the making of a declaration of incompatibility. Such circumstances are difficult to envisage. More likely, given the careful manner in which the courts are addressing Convention issues and the problems of coming to a consensus on use of the Remedial Order procedure within Government, is that the Remedial Order is already destined to become a museum piece.

3.6 'Reading down'

Section 3 of the Human Rights Act requires the courts to interpret legislation as far as possible in a way which is compatible with the Convention and only where this is not possible to consider use of a 'declaration of incompatibility'. How judges might apply their power to interpret legislation was a source of unease, during the preparation phase, for those Government lawyers trying to gauge the potential impact of the Human Rights Act. This concern arose out of the fact that whereas the Government could appeal against a 'declaration of incompatibility', there was no obvious avenue whereby this could be done

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[54] See 'Making Remedial Orders'. Seventh report of the Joint Committee on Human Rights. Annex B. published on 19 December 2001.

[55] Ibid. Annex C.

[56] Ibid. Para 36.

should a judge choose to reinterpret or 'read down' legislation to ensure its compatibility with the Convention. Such an interpretation would also have immediate effect unlike a 'declaration of incompatibility'. Before the Act came into force, therefore, the Lord Chancellor spoke of the need for judges not to adopt 'strained interpretations' when considering the compatibility of legislation with the Convention.

Nonetheless, the manner in which judges have applied Section 3 has presented particular challenges for the Government. In a prominent early judgement in the criminal courts (*Offen and others*)[57], the Court of Appeal interpreted (read down) Section 2 of the Crime (Sentences) Act 1997 so as not to be bound by the mandatory sentencing provisions for defendants who had committed two serious offences but, in the opinion of the trial judge, did not pose a significant risk to the public. In a second 'reading down' case (*R v A*)[58], the court reinterpreted Section 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999 (the 'rape shield' law) to remove the blanket bar on a defendant being able to use a defence of consent in sexual offence trials and to present evidence of a prior sexual relationship with the 'victim', and instead left the admission of such evidence to the discretion of the trial judge. This was a difficult judgement for the Government to accept because of its determination to spare rape victims humiliating cross-examination and its wish to boost the level of rape convictions which had fallen to an all time low. It did not welcome the new balance drawn between the rights of the victim and the defendant by the courts but saw no means to challenge the new interpretation. A third 'reading down' case, however, was to prove a step too far for the Government. In *(1) W & B (Children), (2) B (Children)* [59], the Court of Appeal 'read in' new powers of action by the courts under the Children Act 1989 in order to eliminate the potential for breaches of articles 6 and 8 of the ECHR in the course of care proceedings. The powers would give judges greater flexibility in the making of interim care orders and to intervene should important aspects of a care plan not be achieved, for example, because of changes in circumstances. Lady Justice Hale stated:

> "Where elements of the care plan are so fundamental that there is a real risk of a breach of Convention rights if they are not fulfilled, and where there is some reason to fear that they may not be fulfilled, it must be justifiable to read into the Children Act a power in the court to require a report on progress. In effect, such vital areas in the care plan would be 'starred' and the court would require a report, either to the court or to the guardian ad litem … who could then decide whether it was appropriate to return the case to the court … This would only be appropriate if there was good reason to believe that Convention rights had been or were at real risk of being breached.

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[57] *R v Offen; R v McGilliard; R v Mc Keown; R v Okwuegbunam; R v Saunders*, 9 November 2000, CA. [2001] 2 All ER 154.

[58] *R v A*, 17 May 2001, HL. T.L.R. 24 May 2001.

[59] *(1) W & B, (2) B*, 23 May 2001, CA. T.L.R. 7 June 2001.

> There is nothing in the Children Act 1989 to prohibit this. Simply, there is nothing to allow it. The courts have so far been true to the division of responsibility underlying the 1989 Act and declined to introduce it. But when making a care order, the court is being asked to interfere in family life. If it perceives that the consequence of doing so will be to put at risks the Convention rights of either the parents or the child, the court should be able to impose this very limited requirement as a condition of its own interference."[60]

That the courts might 'write in' new powers into existing legislation had considerable implications for the Government and Parliament. It was by no means clear, however, that there was an avenue by which the Government could seek to amend or overturn the

under compulsion (but did not contain statements made by the bankrupt under compulsion) violate the bankrupt's rights under Article 6 of the Convention? The court, having considered the jurisprudence of the ECtHR, which it did not find wholly consistent, concluded:

> "In our judgement, the answer to the question posed by the Attorney General is 'No'. We say that for a number of reasons. First, there is no doubt and indeed it is not disputed before this court that the privilege against self-incrimination is not absolute and, in English law, Parliament has, for a variety of reasons, in a whole range of different statutory contexts, made inroads upon that privilege."

In a second example, in January 2001, a High Court judge in the north of England stayed indictments against seven defendants on the grounds that there had been an unreasonable delay in bringing the proceedings to trial in breach of Article 6(1) of the Convention. The proceedings related to a prison disturbance. The judge concluded that the time taken between the defendants (inmates of the prison) being interviewed (July 1998) and summonsed (11 February 2000) was a period of unreasonable delay within the meaning of the Convention. The Attorney General sought to clarify the relevant sections of the Criminal Justice Act 1972 (*Attorney General's Reference No.iewed 2wpsTT4 1 Tf85.2796 0 TD0.9913 TwJ. Should cCrimi*

w( )Tj70.08 0 070.083340.984544.2403 Tm0.0403 Tc(62)Tj10.98 0 0 10.983422.46 52.30403 Tm0.0008 Tc013723 TwJeacceptde

of the game' through its developing and maintaining the systems and networks that ensure that prompt attention is given to Convention issues as they emerge in the courts.

As part of this project, Government lawyers dealing with Convention challenges in the two litigators groups were asked to nominate what they saw as the more significant cases since the Human Rights Act came into force. The resulting list (at Annex D) is an eclectic mix of victories for the 'little man', landmark decisions in favour of the Government, rulings that impact directly on the operation of the HRA and matters (such as retrospective effect) which have yet to be fully resolved by the courts. The latter categories tie in closely with the issues that have occupied much of the time and deliberations of the legal networks. However, the

4. A Scottish perspective

4.1 Introduction

Scotland's experience in implementing human rights legislation, important in its own right, also offers a useful counterpoint to the manner in which matters have been handled in Whitehall. In structure and attitude, there are both marked similarities and differences to be found in the approaches of London and Edinburgh towards the HRA and ECHR. This chapter examines:

— the Scottish Executive's human rights machinery and policy,
— the debate leading to the important decision to establish a Scottish Human Rights Commission, and
— the relationship between the Scotland Act and Human Rights Act.

It concludes with an analysis and comparison of the approaches being taken in Edinburgh and London to human rights matters.

4.2 Human rights machinery and policy

Scotland is bound by the ECHR through both the HRA and the Scotland Act. During the preparation phase, Scotland had its own ECHR Working Group set up within the Justice Department of the Scottish Executive to dispense advice and prepare guidance on the human rights implications of the Scotland Act and Human Rights Act. It had to prepare within a shorter timeframe than London because the Scotland Act came into force on 1 July 1999 and the Law Officers of the Scottish Executive became subject to the Convention on first joining the Executive on 20 May 1999.

The Justice Department remains the lead and co-ordinating department for human rights matters in Scotland. The role of its small human rights section is very similar to that of its counterpart, the Human Rights Unit, in Whitehall. Scotland has also chosen to mainstream human rights requirements with a small central operation to guide but not direct the efforts of other departments (ie. the Justice Department is not a 'Ministry of Justice').

There is a greater apparent sense of commitment among Ministers and officials in Scotland for the introduction of a human rights culture than found in England and Wales. Hitherto, the means of delivery have been equally weak but the political commitment was evident in the debates leading to the decision to establish a Scottish Human Rights Commission (see section 4.3 below). Promotion of a human rights culture in Scotland will be one of the functions of the proposed new commission. The latter issue dominated the work of the Justice Department in 2001 to the virtual exclusion of other matters. In this period, the department fared more poorly than its Whitehall counterpart in addressing the human rights agenda. It did not maintain an active network of contacts within the Scottish Executive and its HRA/ECHR guidance (as available on the web)

form. Towards the end of 2001, however, new life was being breathed into the subject with the resurrection, in November, of the Scottish Executive Human Rights Co-ordination Group and discussion about the creation of a working group to provide a forum for public authorities to discuss human rights matters and the need to update guidance materials. The department has also now decided to adopt its own version of the 'hot cases' list used in Whitehall in order to maintain a central record of key cases which should also help to

matters. However, Scotland's willingness to be seen to act in a proactive manner does not mean that it will sweep up every abuse identified by the courts or suspected to exist by those outside the Executive. The Compliance Act did not address, for example, the issue of 'slopping out' as regards which practice a case is pending before the Court of Session alleging a breach of Article 3 of the Convention. Nevertheless, having introduced the two omnibus pieces of legislation, the Scottish Executive would appear to consider that it has removed the last clearcut breaches of the Convention in Scottish law.

Scotland does not have or require the same extensive networking arrangements for Government lawyers as found in Whitehall. Prosecutions are handled centrally by the Crown Office (rather than through regional offices). Civil matters are co-ordinated through a litigators' group established in 2000 and chaired by the Solicitor General. The group functions as a reviewing body and meets every two months with representatives from the

case of *Millar*[69]

rights institutions.[75] They had been much encouraged by the presence at the forum of observers from the Justice Department of the Scottish Executive who they believed had 'green lighted' their submission in its final form. [76]The consultation document issued in March, however, was a different beast reflecting Cabinet instructions that the treatment should be 'balanced and neutral' thereby demonstrating the 'open mind' of the Executive on the issue. It sought views on four main areas:

> "Is a new body needed?
>
> Should this body be specifically Scottish?
>
> Possible role and status of a new body
>
> Relationship with other existing bodies."[77]

The possible roles outlined for such a body included:

> "To scrutinise for ECHR compliance proposals for legislation in the Scottish Parliament and perhaps UK legislation, which might impact on human rights in Scotland, and to advise the Executive and / or Parliament
>
> To monitor implementation of legislation and compliance by public authorities
>
> To provide guidance to public authorities on how to ensure compliance and effective protection of human rights
>
> To promote awareness of human rights issues, rights and responsibilities

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undertake investigations into allegations of human rights abuses (either situations or individual cases) and to be able to take action if such abuses were identified.[79]

The Executive was uneasy about the small number of public authorities who had responded during the consultation exercise given the very substantial impact that a Human Rights Commission might have on the way in which they conducted their business. A separate exercise, targeted at public bodies, was commissioned by the central research unit of the Executive to obtain their views. Responses bore out the need for advice and guidance to be made available to public authorities in Scotland.

A Cabinet decision was taken at the end of 2001. Political support for the principle of establishing a Human Rights Commission remained strong but it was maintained that the practicalities of developing a working model would prevent action to set up a statutory body being taken before the 2003 elections to the Scottish Parliament. When interviews were being conducted in Scotland for this project, in September 2001, no work was in hand within the Justice Department or OffDepars tak Tc0iE7

Commission and whether interim arrangements might be introduced prior to the creation of the statutory body have still to be worked out. Detailed proposals will be the subject of consultation in 2002.

4.4 Relationship between the Scotland Act and Human Rights Act

Scotland is bound by the Convention in two ways. First through:

- Section 29 of the Scotland Act which provides that an Act of the Scottish Parliament may not include provisions that are incompatible with Convention rights as defined in the HRA; and
- Section 57(2) which provides that a member of the Scottish Executive has no power to make any subordinate legislation or do any other act which would be incompatible with Convention rights.

Second, after 2 October 2000, Scotland is bound by the HRA in the same manner as the rest of the UK.

The Human Rights Act and the three devolution statutes of 1998 were the responsibility of and were instructed by different Government departments. This clouded and has caused confusion over the manner in which these consti

— a final appeal to the House of Lords or, for criminal proceedings in Scotland, the High Court of Justiciary acting as the final court of criminal appeal.

A devolution issue under the Scotland Act:

— was not subject to a specific time limit,
— notice had to be given to the relevant Law officers,
— allowed the courts to consider whether and to what extent any decision on incompatibility should be made retrospective, and
— provided for a final decision by the Judicial Committee of the Privy Council.83

It is also relevant to recall that provision made in the devolution statutes asserting the binding nature of rulings of the Judicial Committee of the Privy Council had altered the general rule that the Appellate Committee of the House of Lords was not bound by Privy Council decisions. This meant that " on questions of the effect and scope of Convention rights (which have been duly raised under the Devolution Statutes) the House of Lords has been superseded as the final court of appeal in the United Kingdom".[84]

Some lawyers within the Scottish Executive were uneasy that human rights matters could now be raised under the HRA without notification even where the issue at stake might relate to the powers of the Lord Advocate (although this was no different than the situation in England and Wales). Iain Jamieson, a former se

that the Judicial Committee should be the final court on such questions so as to obtain a consistent and coherent view upon them throughout the UK".[85]

Other lawyers within the Executive commented during interviews for this project, that that there was more than a whiff of administrative convenience in the desire that all human rights matters should be the subject of prior notification which had proved to be a comfortable arrangement in the period before the HRA came into force. In the Crown Office, in particular, it was not thought that the legislative intent had been that it should be procedurally more difficult to process human rights cases in Scotland than England and Wales by insisting on a prior notification requirement. It was a matter of more real concern for the Advocate General for Scotland, the UK Government's Law Officer in Scotland, who was effectively shut out of matters if cases could be brought purely under the HRA. The

having modified the requirement to intimate to the Advocate General."[89] The court did not expect this to be the final word. It noted—"Given that issues can arise at any stage of the prosecution we would not be surprised to see arguments designed to limit the scope of the issues which must be classed as devolution issues being presented in future cases."[90] And this is not to mean that the Human Rights Act now ceases to have any practical effect in Scotland.

It would still be possible, for example, to brin

> It is this message, and taking positive steps to reinforce it, which will help us to develop a culture of respect for human rights in Scotland."[91]

In 2001, the Scottish Executive did not have the means to implement such a culture. Its human rights arm had exactly the same problems as its counterpart in London of not being able to reach into every part of government, never mind wider society, to influence matters. However, in Scotland, there is the promise of things to come. The decision to establish a Scottish Human Rights Commission will ensure that there is a focal point for human rights matters in Scotland. A body that will be able to directly assist and encourage public bodies (resources permitting) to engage with human rights.

Scottish human rights cases have become less influential as the courts in England and Wales develop their own jurisprudence especially in relation to civil matters. The important exception exists in relation to Scottish cases brought before the Judicial Committee of the Privy Council, whose rulings have precedence over decisions of the Appellate Committee of the House of Lords. The existence of the 'd

The Government's mainstreaming strategy has yet to succeed in establishing its proposed "human rights culture" in developing a sense of respect for human rights within its departments, public authorities and society as a whole.

The Government's "human rights culture" is focused on compliance with the requirements of the ECHR. There is no meeting of minds on the argument advanced in this report that the culture should embrace the broader spectrum of human rights obligations accepted by the UK. The constitutional status accorded to Convention rights through the Human Rights Act suggests that these other rights simply do not carry the same legitimacy in the eyes of the Government. The Government is not wrong to pursue a 'Convention culture' but this does not absolve it from the need to pay heed to other human rights. And it should correct the impression, now endemic throughout public bodies, that compliance with the Convention is the same as being 'human rights compliant'.

There are no short cuts to establishing any form of "human rights culture". Within the public sector, the Government is faced with the problem of trying to build a culture out of litigation or the fear of litigation. This is not a culture to be embraced enthusiastically by Government departments. There can be no warming to human rights in such a context—they will all too readily be seen as an obstacle or threat to the policy objectives of an organisation.

A more positive take—the equation of human rights with good practice—is not something that will emerge overnight. A start has been made through the Section 19 procedure under

If the momentum is to be recaptured, there is still a need for an active centre of knowledge which can act as champion and

commissions. There is also a potential conflict in the investigative functions of a prospective UK Human Rights Commission and the Joint Parliamentary Committee on Human Rights.

A Human Rights Commission could also be given the ability to assist applicants or bring its own cases under the HRA and ECHR (as given to the Northern Ireland Human Rights Commission). The Scottish Executive, which has experienced similar problems to Whitehall in its handling of human rights issues, has decided to establish a Scottish Human Rights Commission. But it will not have the ability to bring individual cases before the courts. The experience of the first year of implementation of the HRA does not appear to reveal particular problems for individuals to be able to raise Convention points before the courts. In fact, it is almost always the case that this takes place within the context of existing court proceedings (criminal trial, judicial review etc) where legal representation and advice are available. There does not appear to be a strong requirement, therefore, for an additional body with powers to bring 'free standing' Convention issues before the courts. A Human Rights Commission might be better employed as a forum for 'alternative dispute resolution' on human rights complaints operating outside the judicial process.

Annex C

Cases recommended for fast tracking by the Government ECHR fast track group.[92]

1. *R v Havering Magistrates Court* (breaches of bail conditions)[2001] 3 All ER 997;
2. *R v Christopher St John* (HL) (extradition);
3. *R v Benjafield, R v Leal, R v Rezvi, R v Milford*, 21 December 2000, CA (confiscation in criminal proceedings);
4. *R v Muhammed* (incompatibility of offence);
5. *R v A*, 17 May 2001, HL (rape shield law)[2001] UKHL 25;
6. *R v Redbridge Justices ex parte DPP* (TV links for child witnesses) [2001] 2 Cr App R 25
7. *R v Lambert, Ali and Jordan*, 5 July 2001, HL (reverse burden of proof, retrospective effect of the HRA)[2001] UKHL 37;
8. *R v Thames JJs ex parte Sammons* (severance)
9. *R v Westlake* (use of cannabis for religious reasons)
10. *R on application of Nigel Smith v Lincoln Crown Court and R on application of Chief Constable of Lancashire v Preston Crown Court*, 12 November 2001, QBD,AC (impartiality of magistrates bench hearing licensing appeals)[2001] EWHC Admin 928;
11. *R v Manchester CC ex parte McCann*, 1 March 2001, CA (Anti Social Behaviour Orders)[2001] 1 WLR 1085;
12. *R v Kansal*, 29 November 2001, HL (retrospective effect of the HRA)[2001] UKHL 62;
13. *R v Seggers* (self incrimination)
14. *R v Wilson* (road traffic legislation) [2001] 98(18) LSG 45;
15. *R v Goldsmith and Lyons v HM Customs and Excise* (civil or criminal penalties)
16. *R(DPP) v Acton Youth Court*, 22 May 2001, QBD,DC (was a District Judge correct to disqualify himself from hearing a trial because he earlier ruled in favour of the prosecution's ex parte application for non disclosure of material on the ground it attracted Public Interest Immunity)[2001] EWHC Admin 402;
17. *Attorney General's Reference No. 2 of 2001*, R v J, 2 July 2001, CA (unreasonable delay in bringing to trial) [2001] EWCA Crim 1015;

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[92] Information supplied by the Legal Secretariat to the Law Officers.

18. *Wildman v CPS* (whether evidence is required for pre trial applications) [2001] EWHC Admin 14;

19. *Attorney General's Reference No. 7 of 2000*, 29 March 2001, CA (self-incrimination) [2001] EWCA Crim 888;

20. *Margaret Anderson Brown v (1) Procurator Fiscal (Dunfermline) (2) Advocate General for Scotland*, 5 December 2000, PC (self-incrimination in road traffic offences)[2001] 2 All ER 97.

Annex D

Human rights cases

Government lawyers involved with the two litigators groups were invited to nominate the most significant cases since the Human Rights Act came into force (to December 2001). A composite list (in no particular order of priority) is given below:

Civil

1. *Alconbury*[93](see Section 3.4 above).
2. *Wilson v First County Trust*[94]- the Court of Appeal found that the provisions of Section

the local parish church. The Parochial Church Council tried to recover £95,000 from the Wallbanks for the cost of repairs. The Court of Appeal found that the liability for chancel repairs was a tax that operates arbitrarily and violated the Wallbanks' right to the peaceful enjoyment of their property (Article 1 of the First Protocol). It was also found to be unlawful discrimination in breach of Article 14. The case was an indicator of how broadly the definition of public bodies subject to the HRA could be drawn.

5. *R v Crawley Green Road Cemetery, Luton*—The ashes of the petitioner's husband had been interred in a consecrated plot in error following a humanist funeral but she was denied permission to move them. The court held that the freedom of thought, conscience and religion, guaranteed by Article 9, meant the petitioner should be allowed to remove her husband's ashes from a place where their burial was contrary to her humanist beliefs.

6. *R (McCann) v Manchester Crown Court and Chief Constable of Manchester* [97]- the Court of Appeal upheld the decision of the Administrative Court that the making of anti social

Section 9(1) of the 1968 Act in a way which was compatible with Convention rights. The court went on to dismiss the appeals on merits finding that a mandatory life sentence of imprisonment was not incompatible with Articles 3 and 5 of the Convention. An appeal will go to the House of Lords. Of interest

10. *R v A (the rape shield law)* [100]- the House of Lords ruled that preventing a defendant charged with a sexual offence from introducing evidence of a prior consensual sexual relationship with the complainant could infringe the right to a fair trial under Article 6 of the Convention. The aspect that caused particular concern within Government was the Lords' use of their interpretative obligations under Section 3 of the Human Rights Act to 'read down' the existing prohibition on such evidence or questioning in Section 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999, in order to enable a trial judge to allow its admissibility where exclusion would endanger the fairness of the trial in breach of Article 6 of the ECHR.

11. *Margaret Anderson Brown v (1) Procurator Fiscal (Dunfermline) (2) Advocate General for Scotland* [101]- the Privy Council ruled that the admission in criminal proceedings of a suspect's identification that they were the registered keeper of a vehicle under Section 172 of the Road Traffic Act 1988 did not violate Article 6 of the Convention. The Privy Council considered that Section 172 was not a disproportionate response to the problem faced by the community of death or injury caused by the misuse of motor vehicles.

12. *R v Lambert* [102] *R vKansal* [103]- these two cases, ruled on by the House of Lords, considered the crucial question for the Government of whether the Human Rights Act had retrospective effect over events before the Act came into force. In the course of 2001, concern arose within the Government that proceedings involving the Criminal Case Review Commission could lead to the HRA being applied to proceedings completed many years before the Act came into force (the 'Guy Fawkes' argument). However, in *Lambert*, five law lords, Lord Steyn dissenting in part, ruled that the presumption of innocence in Article 6(2) of the Convention, as scheduled to the Human Rights Act, did not apply retrospectively to a summing up made before the Act came into force. The Act was deemed retrospective for actions brought by or at the instigation of a public authority but was not retrospective in respect of appeals in those proceedings. This good news for the Government was tempered by the apparent unease among the law lords at this interpretation. In *Kansal*, five law lords (including four associated with the earlier decision) concluded that the decision in *Lambert* may have been mistaken but that as a bench of five they could not so quickly overturn or reinterpret the earlier decision (had they met as a bench of seven this decision might have been different). The question of

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[99] R v Attorney General Reference No. 7 of 2000 CA, 29 March [2001] H.R.L.R. 41.

[100] R v A, 17 May 2001, HL.

[101] Margaret Anderson Brown v (1) Procurator Fiscal (Dunfermline (2) Advocate General for Scotland, 5 December 2000, PC.

[102] R v Lambert, 5 July 2001, HL.

[103] R v Kansal (No2), 29 November 2001, HL.

whether and in what circumstances the HRA would have retrospective effect is a matter that remains unresolved at this time.

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