RESPONSE ON BEHALF OF THE SOCIETY OF CONSERVATIVE LAWYERS TO THE COMMISSION ON A BILL OF RIGHTS DISCUSSION PAPER.

Do we need a Bill of Rights?

1. Our view is a qualified ñyesò.

2. Historically the two principles identified in paragraph 8 of the Commissionôs Discussion Paper, namely the principle that we may say or do as we please so long as we do not transgress the substantive law or the legal rights of others and the principle that the Crown and public authorities may only act if they have the power to do so, have served our freedom well. It is doubtful that those British jurists involved in drafting the European Convention on Human Rights and Fundamental Freedoms thought that they were framing rights which were either new or needed to be legislated for in the United Kingdom. A position where freedom for the citizen is presumed to exist in all space unoccupied by positive prohibition remains an attractive one.

3. However, we recognise that the Human Rights Act 1998 (ñHRAò), now in force for some 11 years, has changed the legal landscape. Lord Hoffmann[1] has suggested that the implementation of the HRA has damaged our self-esteem as a nation in relation to the concept of human rights. Whether that is so, it is the case that the notion that positive rights must be identified is now part of our legal culture. A new generation of lawyers has been trained to approach legal questions and argument on that premise. Our courts have become accustomed to grappling with the application of broadly stated principles to specific factual situations. A Bill of Rights which demarcates the boundaries between judicial and Parliamentary law making may be necessary.

[1] Writing in the Times on 8 February 2011,

4. The HRA itself is not working. A convention which was intended to protect ñhuman rights and fundamental freedomsò has become associated instead in the public mind, not without some justification, with dubious compensation claims, complaints about the trivial, the protection of lawbreakers rather than the law abiding majority, a transfer of decision making on economic and social policy to judges and the enrichment of lawyers. ñHuman rightsò claims feature significantly in compensation claims brought by prisoners, often for minor grievances.

5. A further disadvantage with the HRA is its express reliance on the European Convention on Human Rights and Strasbourg jurisprudence. When enacted, it was intended that this should ñbring rights homeò, resulting in fewer cases where UK litigants had to petition the Strasbourg Court. In practice, what has happened is that the HRA has simply introduced a domestic tier of litigation, with individuals who are disappointed with the decisions of our own Court of Appeal or Supreme Court petitioning Strasbourg as though it were an appellate court. (Conversely, when the government or public authority loses in the domestic courts it has no further right of appeal). As the Commission has advised in its interim report to the government, this is not a function which it was originally intended the Strasbourg Court should have.

6. It is for these reasons that with some reluctance we conclude that a fresh ñrights and responsibilitiesò based enactment may be inevitable. We consider that this should replace the HRA and provide a recalibration of human rights jurisprudence in this country. We consider that the new Bill of Rights should be independent of the European Court of Human Rights and its jurisprudence.

7. We do not consider it would be satisfactory to have both a ñBill of Rightsò enactment and the current HRA. Having two statutes cover the territory would, we believe, lead to further legal uncertainty and litigation as to which took priority in any given case where there was a difference of emphasis.

Further, leaving the HRA in place would not solve the problem of our courts having to follow Strasbourg jurisprudence which is often inconsistent and uncertain in its scope.

8. We do not believe that any new Act should be ñentrenchedò (if that is even constitutionally possible). We consider it important that the principle of Parliamentary sovereignty should be preserved and that future generations should have the ability to make changes to human rights legislation to reflect the circumstances of their time. We are also concerned that entrenchment of statements of broad principle should not occur without a simultaneous and full consideration of how the emergence of a democratic deficit could be avoided, given that it would fall to our currently unelected judiciary to work out the specifics.

9. Finally, we consider it will be important that the enactment of any new Bill of Rights takes place in tandem with reform of the processes of the European Court of Human Rights as foreshadowed in the Commissionôs Interim Advice to the Government on that issue. There needs to be a new emphasis on the margin of appreciation given to States in addressing the complex issues which face modern democratic societies. There will be little point in having a new British Bill of Rights if disappointed litigants are able to routinely have a second bite of the cherry under the European Convention of Human Rights in Strasbourg.

What do you think a UK Bill of Rights should contain?

10. We would not quarrel with the core rights identified in the European Convention on Human Rights as scheduled to the HRA. Few would argue with the desirability of the right to life, the right to a fair trial, the right to respect for family life, or the right not to be tortured, for example. It may be,

however, that some of these rights should be reworded or defined to emphasise their fundamental nature or matters which reflect our own circumstances. For instance, article 8 might be reworded to emphasise the need to balance press freedom with the right to respect for private life, or alternatively to permit interferences in family or private life so long as they are in accordance with law, without the additional proportionality requirements which have tended to introduce uncertainty as to how the article will be applied in any particular case.

11. The source of the current dissatisfaction with the HRA, lies, as we see it, in the way in which courts ï particularly the European Court of Human Rights ï have applied the statements of principle in the text of the Convention to areas far beyond those which the framers of the Convention, living in a continent emerging from the terror of totalitarian regimes, can have had in mind. We do not believe that ñfundamentalò human rights and freedoms should extend to the following:

(1) The creation of new torts. The Strasbourg courtôs decisions have led to the fashioning of a number of new types of claim previously unknown to the common law. These typically involve claims for compensation against the State not for its own wrongdoing, but for failings on the part of its employees to act with sufficient skill and care to prevent or protect from the wrongdoing of others. Thus new causes of action have been created against the police for failing to prevent crime (*Osman v United Kingdom*[2]; *Rantsev v Cyprus*[3]) and against social services for failing to remove children from their parents (*Z v United Kingdom* [2001] 2 FLR 612). Whilst there are arguments for and against the imposition of a tort liability for operational negligence on public authorities in such areas, we do not believe that they belong in a discourse concerning fundamental human rights. Indeed, we consider

[2] [1999] 1 FLR 193
[3] [2010] 51 E.H.R.R. 1

that the fact that the HRA can be used as a ñtort statuteò has played a significant part in the creation of the Actôs poor image. For example a rash of compensation claims and awards for prisoners who did not receive heroin substitutes timeously has not improved the public perception of human rights. We would propose that the new Bill of Rights should not give rise to private law causes of action for damages for its breach, but should be concerned with pre-empting apprehended infringements of human rights, bringing existing infringements to an end, or vindicating infringements of those rights in the recent past by appropriate declaratory relief.

(2) The creation of socio-economic rights. Elected representatives, assisted by their professional advisers, not judges, are best placed to make decisions on social welfare and the like. Electorates should have the ultimate say on such issues through the ballot box. All of the European Convention rights were framed to protect political, civil and economic freedoms rather than confer socio-economic rights. Even the right to education is expressed not as a positive right, but a right not to be ñdeniedò education and our own courts have interpreted this right as giving no more than a ñright of fair accessò to such facilities as exist in a state (*Ali v Lord Grey School*[4]). However, attempts have been made to argue that some of the European Convention rights contain minimum welfare rights e.g. in *R (Holub) v Secretary of State for Education*[5] the Court of Appeal considered that the right to education included a right to an ñeffective educationò although it is unclear how a court would be able to set this standard. In *Anufrijeva v London Borough Southwark*[6] Lord Woolf pointed out that the Strasbourg Court had recognised the possibility that articles 8 and 3 of the Convention might require a state to provide positive welfare support, such as

[4] [2006] 2 AC 363
[5] [2001] 1 WLR 1359
[6] [2004] 1 QB 1124

housing, but that it was impossible to deduce from the Courtôs decision when the duty might arise. This is not a satisfactory state of affairs;

(3) Exempting individuals or sections of society from compliance with national laws. National laws in themselves invariably represent a balancing of competing public and private interests by the legislature. Public confidence in the legal system requires that such laws should be applied equally to all except where the legislation itself makes specific provision to the contrary. However, this year the Supreme Court, following Strasbourg jurisprudence, has held that even where domestic law entitles a local authority landlord to a possession order against a tenant who is in breach of his tenancy, a possession order cannot be made if this would be ñdisproportionateò to the tenantôs right to respect for his family and private life under article 8 of the Convention[7]. Law abiding citizens are mystified by such glosses and additions to unambiguous domestic legislation. Such judicially created exemptions, involving as they do vague notions of ñproportionalityò, also undermine legal certainty and tarnish the reputation of human rights;

(4) Micro-managing or second guessing the acts of public authorities and officials. The legislation ought to make clear that the courts must respect the judgments of public officials or ministers in areas where decision making has been entrusted to them by Parliament. The Courtôs role ought to be one of genuine review, rather than substitution of its own decision. In our view the courts should be obliged to have regard to the margin of appreciation in the formulation and execution of government policy and to interpret the rights guaranteed by the Bill without being bound by the inconsistent interpretations found in the Strasbourg Court;

(5) Closely connected to (3) and (4) above, restrictions on the use of the concept of ñproportionalityò. We consider that many of the difficulties

[7] Manchester City Council v Pinnock [2010] UKSC 45,

which have arisen with the HRA can be traced to this concept. For instance, as article 8 is applied it is not enough for a public authority to establish that an interference in a personôs family life was in accordance with a law democratically enacted, but a judge must additionally be satisfied that the interference was ñproportionateò. This vague requirement, dependent upon what particular judges in a particular case consider to be appropriate, undermines legal certainty, itself an intrinsic component of the rule of law. It encourages expensive litigation. It is the principle of ñproportionalityò which has led to court decisions allowing foreigners convicted of criminal offences and illegal immigrants to be granted permission to stay in the UK, despite a detailed, democratically mandated, legal code governing this area. The *Pinnock* case mentioned above is another example of the reach of the doctrine.

12. Additionally, we consider that it remains an important principle that the Courts should not, in the final analysis, be able to overrule an Act of Parliament. We would therefore suggest that a new Bill of Rights should make this plain.

13. In summary, we believe that the Bill of Rights should contain the following:

(1) Core rights, which may be based on those set out in the European Convention to Human Rights as scheduled to the HRA;

(2) A provision that damages should not be awarded for a breach of the Bill. This would be a departure from existing practice under the Human Rights Act and from the approach of the Strasbourg Court, although the case law of the latter as to when damages will be awarded for a breach of a convention right and as to how any such damages should be measured is particularly incoherent and has attracted criticism in this country[8]. It has

[8] See *Anufrijeva v Southwark* [2004] Q.B. 1124 per Lord Woolf, referencing also the Law Commission Report (Law Comm No 266) (Cm 4853).

been said that the primary focus of the European Convention on Human Rights is the bringing of a violation to the end and the prevention of a repetition, with damages playing a secondary if any role[9]. However, in practice compensation awards are all too often a primary objective of those bringing human rights claims. Our proposed restriction on the remedy of damages being available under the Bill of Rights would not preclude a litigant seeking damages if a separate, freestanding cause of action recognised by the common law or statute has been infringed;

(3) Elimination, or substantial curtailment, of the concept of proportionality;

(4) Provision ensuring that the Courts cannot overrule an Act of Parliament.

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

14. We believe that if rights are truly fundamental, they should apply across the whole of the United Kingdom. Further, given that it is the UK state as a whole which is a signatory to international treaties on human rights and hence answerable at an international level, we consider it appropriate that any legislation should be national in its reach.

Having regard to our terms of reference, are there any other views which you would like to put forward at this stage?

15. We consider that the interpretation of article 8 has been particularly unsatisfactory. It is complicating an already difficult balancing exercise in, for example, asylum cases. The jurisprudence from Strasbourg is particularly inconsistent. Judges here trying to reach decisions which respect the right to family life have tended to treat article 8 as some sort of trump card despite both its vagueness and its qualified nature. Of the convention rights this is the

[9] See *Anufrijeva* above, and also *R (Greenfield) v Secretary of State for Home Department* [2005] 1 WLR 673 per Lord Bingham.

one which has, rightly in our view, given rise to the most public disquiet. It is of note that the hitherto broad interpretation of Article 8 has had the deepest impact on the delivery of policy objectives particularly in the sphere of immigration. We are of the view that a new Bill of Rights should ensure that the remit of article 8 or any similar right is very tightly drawn.

16. The law of tort in relation to public authorities has always been a difficult area involving many judgments of the higher courts and much legislation. The convention does not in any way illuminate the policy issues involved. As much has been acknowledged by some judges[10] who have concluded that the law of negligence and right to compensation under the HRA should not overlap. There are shades of the old distinction between law and equity here.

17. The margin of appreciation has been insufficiently reflected in the Strasbourg Courtôs decision making and the courts here have been remarkably supine in their acceptance of some of the Courtôs second guessing of national issues. The debate in Parliament at the time of the HRA going through both houses shows that legislation did not foresee the extent of the deference to Strasbourg which the judiciary has in fact shown.

18. The HRA has given unelected judges powers to frustrate the will of Parliament. The very recent case of *R(on the application of Quila) v Secretary of State for the Home Department*[11] illustrates this. The case concerned the raising of the minimum age under the *Immigration Rules* of either the sponsor or the spouse or partner to 21. The relevant rule was brought in to help combat forced marriages.

19. The majority of the Supreme Court concluded that the rule change was unlawful as it was in breach of the coupleôs article 8 rights . We consider that

[10] See Smith v Chief Constable of Sussex [2009] 1 AC 225, per Lord Brown
[11] 2011 UKSC45

Lord Brown, in his dissenting judgment, was right when he said these questions were ñ*questions of policy and should be for government rather than us".* He also said: ñ*it is the Secretary of State who has the responsibility for combating forced marriages in the context of immigration and who should be recognised as having access to special sources of knowledge and advice in that regard."* He said that rule change in this context was a matter ñ*for elected politicians not us*ñ

20. This case (and others) illustrates the enormous change that the HRA has brought about in the relationship between Parliament, the Executive and the Judiciary. It reinforces the need for a fresh start.

21. It seems to us that the only real alternative (apart from simply reverting to the pre-1998 position) is for there to be *ad hoc* legislation on ,say, privacy or the scope of article 8 so that Parliament can reassert its supremacy in areas where the HRA and its interpretation by the courts has resulted in so many unsatisfactory decisions.

22. A further aspect of the HRA causes us concern. As with Health and Safety the HRA has caused public bodies to go to elaborate lengths and incur enormous costs in order to try and ensure that all activities and policies are ñHRA compliantñ- a goal which is particularly elusive since it is often difficult to predict how the courts will interpret the Act. A written parliamentary question was addressed to the Ministry of Justice by Lord Faulks as to whether the Commission would be investigating the cost to public authorities of complying with the HRA. The answer given was that this was a matter for the Commission. We consider it of considerable importance that the public should be aware of the practical costs of the HRA are and exactly how money is spent.

23. At the outset of this paper we gave a qualified ñyesò to the question whether the country needs a Bill of Rights. Our hesitation stems from the view that before the HRA we did not consider such a Bill was desirable. The experience of the HRA has not been a happy one and one which we consider to have undermined the concept of human rights and to have blurred the demarcation between the role of elected representatives and the judiciary. The content of any Bill of Rights and its inter-relationship between the European Convention is likely to prove problematic and a fertile source of litigation. Although it may be strictly outside the terms of reference of this Commission, we consider that a simple repeal of the Human Rights Act 1998, without a replacement Bill of Rights, ought to be seriously considered.

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On behalf of the Executive Committee of the Society for Conservative Lawyers.

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