

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Equality Bill

Liberty's briefing for Second Reading in the House of Lords

June 2005

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent funded research.

Liberty's policy papers are available at

www.liberty-human-rights.org.uk/resources/policy-papers/index.shtml

Parliamentarians may contact Gareth Crossman, Director of Policy at Liberty.

Direct Line: 020 7378 3654

Email: GarethC@liberty-human-rights.org.uk

Introduction

1. Liberty welcomes the publication of the Equalities Bill and, in particular, the creation of the Commission for Equalities and Human Rights ('the Commission'). Our comments will focus on Part 1 of the Bill. We are not making any specific comments about Part 2 (discrimination on grounds of religion or belief) or Part 3 (Public functions; Sex discrimination) as we support these extensions of discrimination law. In particular we believe that Part 2 offers far more appropriate and effective protection against religious intolerance than the Racial and Religious Hatred Bill which will extend the crime of incitement to racial hatred to cover religious hatred.
2. We are confident that the Commission will help cultivate a culture of respect for human rights in the United Kingdom. When the European Convention on Human Rights (ECHR) was incorporated into domestic law through the Human Rights Act 1998 (HRA) we hoped that human rights would be 'mainstreamed' into the policy and practice of public bodies. In the four years since incorporation this mainstreaming has been limited. The lack of any public body with an educational or informational role has left a gap between human rights litigation in the courts and public awareness. Liberty believes the Commission will help fill this vacuum.
3. Before publication of the Bill some concerns were expressed about the desirability of a joint commission and the compatibility of combining human rights and equalities in one body. Liberty believes that the underlying principles of the equality and human rights agendas are inseparable. The last three years of human rights litigation have demonstrated how common aspects of two agendas outweigh any possible conflict. For example, in *Ghaidan v Mendoza*¹, which concerned the right of same-sex couples to succeed to a tenancy following the death of a partner, the Court of Appeal used the HRA to rewrite legislation so that references to 'living together as husband and wife' had to be read as including Article 14². The use of control orders introduced by the Prevention of Terrorism Act 2005 (PTA) has been used exclusively against Muslims. Control orders raise a

¹ [2003] 2 WLR 478

² Article 14 prohibits discrimination

multitude of human rights issues including rights to liberty, fair trial, family life and association. These are just two of many examples which demonstrate the extent to which the equality and the human rights agendas have become entwined.

The Bill

4. The central power of the Commission relating to human rights is Clause 9. As mentioned above, we acknowledge that the greatest disappointment since incorporation has been the lack of any public information or educational campaign to promote a culture of respect for rights. Since incorporation, ‘human rights’ have been placed in the context of courts and lawyers. There has been a considerable volume of human rights litigation but this has largely remained beyond the reach of the public. Most people rarely come into contact with the courts. Public awareness of the HRA is often be limited to high profile criminal cases where it has been used by defendants to argue fair trial rights, or by convicted offenders to argue against tariffs. Consequently, the HRA is often perceived as a tool for criminals. A wider effect of the HRA is also blunted by the necessity of courts to apply thresholds in order to ascertain whether convention rights have been breached. We are aware of incidents which would not succeed in court because of these thresholds. Whilst elderly people in care homes being made to eat while on the toilet may be degrading, it will not breach Article 3³, so no human rights abuse can be ‘seen’ by the courts.

5. Because of this we believe the powers contained in Clause 9 are crucial to the creation of a culture of respect for rights. Statutory bodies have resources, impact and standing well beyond any non-governmental organisation. In recent years much media comment on human rights has been dismissive or derogatory. Some national papers have editorial policy calling for the repeal of the HRA. However, many of the convention rights are the embodiment of common law traditions reaching back centuries. Rights to fair trial, liberty, privacy, association and so on are rarely considered objectionable in principle. In Liberty’s view, the most

³ Article 3 prohibits torture and cruel, inhuman and degrading treatment

important role of the Commission is in raising awareness that human rights are for all.

6. We are pleased that the definition of ‘human rights’ is not limited solely to Convention rights. The broad range of other human rights instruments, particularly those from the United Nations, allows far greater scope than those contained in the ECHR. For example, the Convention on the Rights of the Child demands respect is paid to children’s rights in terms of care, education, adoption protection and so on. The ECHR makes no specific mention of children and they are currently subject to restrictions (such as curfews and dispersal orders) that would not be tolerated for adults. It is encouraging that the Commission’s role will cover promoting understanding, encouraging good practice and promoting awareness understanding and protection of *all* human rights as well as encouraging public authorities to comply with section 6 HRA. We are particularly pleased that this is a duty of the commission rather than simply an option. Similarly we welcome that fact that this duty extends to the *protection* of human rights. Our slight concern, which is not within the ambit of the bill to resolve, is that the definition of ‘public authority’ has been restrictively interpreted by the courts.⁴

7. Clause 12 requires the Commission to monitor the effectiveness of equality and human rights enactments. This is extremely useful, as it covers not only comments on effectiveness⁵ but also the practical ability to advise central or devolved government about the likely effect of a proposed change in the law⁶. We trust that the meaning of ‘change in the law’ covers relevant judicial interpretations as well as the impact of new legislation. There is a gap in the understanding of human rights in knowledge of jurisprudence. Government departments and large public agencies may be able to interpret and apply complex court precedent, but this will usually be beyond the capability and resource of smaller, local, public bodies. The Commission must explain the implications and applicability of domestic and European decisions.

⁴ *R v. Leonard Cheshire Foundation* [2002] EWCA Civ. 366.

⁵ Clause 12 (2) (a)

⁶ Clause 12 (2) (d)

8. We are broadly supportive of the inquiries powers described in Clause 17. However, Under Clause 17 (1) the Commission is under a duty to comply with a direction of the Secretary of State to conduct an inquiry. This undermines the independence of the Commission which should be in a position to make its own determination about the need for an inquiry. The opinion of the Secretary of State may carry great weight and we do not envisage many situations when he believes there should be an inquiry and the Commission does not agree. It is important the public perceives the Commission as not beholden to the Government. Even if it has independence in other areas, such as deciding when it will be appropriate to provide legal assistance or take on a case, confidence in the Commission might be undermined by any perception that it is answerable to the executive. On a more practical level, the Commission will have finite resources, and should be able to determine for itself how best to use them. A lengthy inquiry could drain funds that might otherwise be promoting good practice in human rights compliance. Ideally the wording of the bill should be altered so that the Commission ‘may’ rather than ‘shall’ comply with a direction. If this does not happen then the Secretary of State should be under a duty to provide appropriate resources. Similarly Schedule 2. 16 provides that the commission shall prepare its own reports on inquiries or investigations unless it has been directed by the secretary of State. In such a case the report is sent to the Secretary of State who will publish it. Even if the power to direct remains, once the Commission has started work it should be responsible for any report. Otherwise its independence will be undermined.
9. In the process of consultation leading up to publication of the bill there was considerable debate over the Commission’s powers to advise, represent and become involved in cases. We are pleased to see that Clause 14 (d) will allow the Commission to give general advice on human rights issues as this will be of considerable benefit for informing people of their rights. However the Commission will not be able to offer legal assistance in human rights cases unless there is also an equality aspect to the case⁷. We do not take issue with this.

⁷ Although the assistance can continue if the equality element falls away if the Lord Chancellor makes an order allowing this (Clause 30 (5))

10. One of the principal reasons why Liberty would not press for legal assistance on human rights issues is that we are concerned about inroads into legal aid eligibility and entitlements. In recent years the Government has proposed capping legal aid asylum work; cited legal aid expense as a justification for curtailing access to higher courts or Judicial Review in asylum cases; and expressed its intent to greatly reduce the criminal legal aid budget. We are concerned that these may represent the vanguard of a series of measures aimed at restricting legal aid eligibility generally. We would not want the existence of a litigation function in the Commission to be used as justification for further inroads into the ability of private practitioners and non-governmental organisations to take cases. The Commission cannot stand in as a national law centre as the range of potential human rights actions is too broad and varied to allow any strategy to successfully replicate the work of existing litigators.

11. The Commission will also not be able to bring judicial review or other legal proceedings. The inability to bring cases is necessary to ensure compliance with Section 7 of the HRA. This prevents legal proceedings being brought by anyone without standing. The Joint Committee on Human Rights has suggested an amendment to the HRA to allow the Commission to bring judicial review cases in its own name. We would support such a future amendment to the HRA although a note of caution should be struck that allowing any sort of litigation could easily allow the Commission to be overwhelmed by the volume of cases.

12. Having said this, we do welcome the power for the Commission to intervene strategically⁸. Its unique role will allow the Commission to determine which cases raise issues of importance meriting intervention. Organisations such as Liberty face resource and other constraints on intervention ability and we think it important that the Commission has this power.

13. Modern notions of equality and fundamental rights are derived from the same political and philosophical traditions of respect for individual dignity, self-determination and freedom. In the United Kingdom the two traditions have

⁸ Clause 32 (2)

developed at different rates, with much of our equality legislation being nearly thirty years old whilst our rights and freedoms have been protected by domestic law for only three years. This temporal separation has created an artificial distinction. Equality is a fundamental human rights that permeates all human rights principles and the modern formulation of anti discrimination stems from the universal declaration of human rights. Liberty believes human rights and equalities are distinct but complementary traditions that can benefit from operating within a single Commission. Suggestions as to how the Commission will be improved by amendment to the Bill should not detract from the support it deserves. We hope that the Government will do all it can ensure speedy passage and that the Commission will receive the support and resources it needs to help create a culture of respect for rights.

Gareth Crossman
Policy Director