

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty's response to the Joint Committee on Human Rights:**

### **“A British Bill of Rights”**

**August 2007**

## About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organizations. 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 for a, and undertake independent funded research.

Liberties policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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## Introduction

1. The Joint Committee of Human Rights (the “**JCHR**”) has asked for evidence on recent calls for a British Bill of Rights. Sadly, these calls have not, in general, arisen out of a progressive desire to increase human rights protection in the UK. In fact, the opposite is true. A “Modern British Bill of Rights” is most often proposed as an alternative to the existing protection provided by the Human Rights Act 1998 (the “**HRA**” or “**1998 Act**”).

2. The 1998 Act has been the target of a concerted media campaign which has unfairly portrayed it and the rights it contains as a charter for criminals and terrorists and as a threat to public safety. Prominent politicians have attacked judicial decisions to protect even the most fundamental human right, the absolute prohibition against torture. The official opposition has called for the 1998 Act to be scrapped. This was most recently demonstrated in David Cameron’s outburst in response to the judgment not to allow Learco Chindamo (killer of the head teacher Philip Lawrence) to be deported to Italy:

“It has to go. Abolish the Human Rights Act and replace it with a British Bill of Rights, which sets out rights and responsibilities. The fact that the murderer of Philip Lawrence cannot be deported flies in the face of common sense ... It is a glaring example of what is going wrong in our country. What about the rights of Mrs Lawrence?”<sup>1</sup>

3. Liberty has long supported the idea of a British Bill of Rights that goes beyond the incorporation into domestic law of the key rights contained in the European Convention on Human Rights.<sup>2</sup> We would be keen to engage in constructive public conversations about ways of enhancing and building upon the rights protection that is currently

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<sup>1</sup> *Telegraph*, “David Cameron: Scrap the Human Rights Act”, 24<sup>th</sup> August 2007. In reality, the case had little to do with the HRA and was more about the right to free movement of people under EU law.

<sup>2</sup> In 1991, for example, we published a draft Bill of Rights for consultation which differed in a number of significant respects from the protection accorded by the HRA and from the range of rights it protects. For example the Bill contained: a stand-alone right against discrimination; clearer and more restrictive limitations on rights; more extensive protection for personal liberty, fair trial rights, privacy and democratic participation; express rights for children and those seeking asylum in the UK.

provided in the HRA. We are not, however, convinced that this is politically realistic in the current climate and do not consider it to be the first priority.

4. Liberty is concerned that moves towards a new Bill of Rights for Britain would, in the current climate, be dominated by public, media and political pressure to weaken the protection currently provided by the HRA. In this short response we consider how criticisms of the 1998 Act have fed the calls for a “Modern British Bill of Rights” and have distorted discussions about what such a Bill should contain. We explain why we consider most of these criticisms to be unfounded. Liberty believes that the existing 1998 Act, and the basic rights it contains, must form the minimum level, or floor, for human rights protection in the UK.<sup>3</sup>

### **Is a British Bill of Rights needed?**

5. In this section we do not attempt to contribute to the fascinating debate about whether the current 1998 Act can fairly be described as a “Bill of Rights”.<sup>4</sup> Instead, we identify and respond to two of the key arguments most frequently used to support calls for a British Bill of Rights:

#### ***Britishness***

6. The Bill of Rights called for is frequently described as “British”. In part, this seems to be in response to the common misperception that the existing HRA was imposed on us by Europe and is in some way tied-up with the European Union and Brussels. The Act is, of course, nothing to do with Brussels or the EU. It was debated and passed by the UK Parliament and is based on the European Convention on Human Rights, drawn up by the Council of Europe.<sup>5</sup> The British also played a major role in drafting the Convention and included in it many of the rights and freedoms enjoyed for centuries in this country. We

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<sup>3</sup> Not only because any less would put us in breach of our obligations under the European Convention on Human Rights

<sup>4</sup> Cf Professor Francesca Klug, Irvine Human Rights Lecture 2007, University of Durham, Human Rights Centre, 2 March 2007, “A Bill of Rights: Do we need one or do we already have one?” and Philip Alston, ed., *Promoting Human Rights Through Bills of Rights* (Oxford: Oxford University Press, 1999)

<sup>5</sup> An institution set up after the Second World War in response to the twin horrors of Nazism and Stalinism whose founding father was Winston Churchill.

are delighted that the “Britishness” of the existing HRA and the rights it contains has been emphasised in the Green Paper, “The Governance of Britain”.<sup>6</sup>

7. Most worrying is the suggestion that the Bill of Rights would be “British” because it would only protect the rights of British people. Calls for a British Bill of Rights are often made in response to criticisms of the HRA for protecting the rights of foreign citizens to the perceived detriment of British citizens (David Cameron’s response to the Chindamo judgment, cited above, is a perfect example). The “Governance of Britain” paper itself describes a Bill of Rights as “the articulation of the rights of each *citizen*” [emphasis added].<sup>7</sup> It also suggests that basic rights might be something that one “earns” as a result of becoming a British citizen or permanent resident.<sup>8</sup> A Bill of Rights which reserves basic rights and freedoms to British citizens would be unacceptable, flying in the face of the principle of universality which is a fundamental feature of the post-war human rights framework. After the horrors of the Holocaust the international community recognised “the inherent dignity ... and inalienable rights of *all* members of the human family”.<sup>9</sup> People have basic rights by virtue of being human. They are not earned by paying taxes to a particular government and do not come with possession of a particular passport. As the Belmarsh internment policy and treatment of asylum-seekers have demonstrated, it is indeed non-citizens that are most often in need of human rights protection.

### ***Greater Public Understanding and Ownership of Human Rights?***

8. Another argument often used in favour of a new Bill of Rights for Britain is the need to encourage public buy-in and ownership of the legal instrument itself as well as the rights and freedoms it protects. It is, in our view, undeniable that a failure to get the public to understand, appreciate and own the HRA is to some extent responsible for the recent hostility to the Act. As Professor Klug has argued:

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<sup>6</sup> July 2007, CM 7170, paras 206-207

<sup>7</sup> July 2007, CM 7170, para 211

<sup>8</sup> Para 186 states: “The Government believes that everyone in the UK should be offered an easily understood set of rights and responsibilities when they receive citizenship. This might serve to make citizenship more attractive but also to make it clearer to potential citizens what it is to be a member of Britain’s democratic society. There might also be a case for extending this to those who have the right to permanent residence in the UK.”

<sup>9</sup> Preamble to the Universal Declaration on Human Rights

“the HRA appeared like a bolt out of the blue to most people...there was no prior consultation in the UK. Very little was done to prepare for the introduction of the HRA beyond the publication of *Bringing Rights Home*, the discussion document Labour issued before it came to power, and a large-scale training programme for the judiciary prior to the Act coming into force ... This has been compounded, *until recently*, by an absence of consistent political leadership and no statutory Human Rights Commission to explain the role and purpose of the HRA.”<sup>10</sup>

It is disappointing that more was not done to explain human right principles and to sell the HRA to the British public. This might well have encouraged greater buy-in to the legislation and made the recent attacks on the HRA less likely.

9. It is, however, far from clear that tearing up the HRA and starting afresh with a new Bill of Rights would rectify this failure. As long ago as 1976, a Committee of the Society of Conservative Lawyers acknowledged:

“A Bill of Rights can only operate as an effective safeguard if it commands the respect and confidence of those whom it seeks to protect. This it cannot do unless the public can reasonably expect it to be a permanent feature of our constitution, at least for the foreseeable future”.<sup>11</sup>

Basic human rights and civil liberties must be given a chance to ‘bed down’ if they are to stand any chance of being understood, appreciated and owned by the public. If we don’t defend the 1998 Act and the rights it contains, any new Bill of Rights would inevitably be damaged, no matter how well it is crafted or how great the public participation prior to its creation.

10. Liberty is not convinced that it is too late to encourage the British public to better understand and appreciate the existing HRA and the rights it contains. Indeed, we hope that this will be a priority for the new Commission for Equality and Human Rights. Concerted efforts must be made, not only to explode the myths and misunderstandings

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<sup>10</sup> Professor Francesca Klug, Irvine Human Rights Lecture 2007, University of Durham, Human Rights Centre, 2 March 2007, “A Bill of Rights: Do we need one or do we already have one?”

<sup>11</sup> “Another Bill of Rights for Britain?”, A Report by a Committee of the Society of Conservative Lawyers, 1976, page 10

about the 1998 Act, but also to communicate the constitutional value of the post-war human rights framework - its ability to provide a unifying set of values in a diverse society, to hold an increasingly powerful and overbearing Executive to account, and to protect and empower some of the most vulnerable people in society.

## **What should be in a British Bill of Rights?**

11. The range of rights protected by the 1998 Act (15 well-established fundamental rights and freedoms) is far more limited than those contained in rights instruments in many other democracies and in many regional and international human rights treaties. Liberty would welcome a public conversation about ways of extending the rights that are protected under the 1998 Act. We would also welcome proposals to make more explicit the ways in which the British legal system has historically protected rights like the right to a fair trial, i.e. by highlighting the right to trial by jury for more serious offences and the right to legal aid. Sadly, however, calls for a British Bill of Rights are usually justified on the basis that the rights protected in the HRA are too extensive and need to be limited or restricted. In the following paragraphs we look at three of the most common ways those calling for a British Bill of Rights have argued that the rights protected by the HRA should be restricted.<sup>12</sup>

### ***Rights and Responsibilities***

12. A frequent criticism of the HRA is that it has helped to create a culture of rights without responsibilities. David Cameron has argued that we need “a modern British Bill of Rights that ... balances rights with responsibilities” and which “spell[s] out the fundamental duties and responsibilities of people living in this country”.<sup>13</sup> The “Governance of Britain” green paper also states that a “Bill of Rights and Duties could

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<sup>12</sup> We do not consider criticisms of the 1998 Act arising from obvious misunderstandings about what rights are actually covered (i.e. media reports that the 1998 Act gave a person evading justice a right to Kentucky Fried Chicken and fizzy drinks - Cf “KFC meal ‘ensures siege man’s rights’”, *Daily Telegraph*, 8<sup>th</sup> June 2006)

<sup>13</sup> David Cameron, “Balancing freedom and security – A modern British Bill of Rights”, Speech to the Centre for Policy Studies, June 26, 2006

provide explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others.”<sup>14</sup>

13. Liberty does not dispute that individuals owe moral and legal obligations to the society they live in. We are not, however, convinced that the HRA is responsible for undermining the public’s sense of social responsibility or that a British Bill of Rights is needed to make individual responsibilities explicit:

- As the “Governance of Britain” paper acknowledges, in some respects the 1998 Act itself enunciates the “balance of rights and responsibilities that are now common to most of the democratic world.”<sup>15</sup> With few exceptions the rights in the HRA are not absolute. This means that the rights to privacy and freedom of expression can, for example, be restricted for a number of legitimate reasons, i.e. to protect public safety or national security. It is therefore permissible to make laws which restrict a person’s rights in order to ensure compliance with individual responsibilities to society. Furthermore, one cannot use a human right as a justification for violating the rights of another person.<sup>16</sup>
- A mass of criminal and civil laws have existed for centuries to ensure that people act in accordance with their responsibilities to the state and other individuals. These laws already operate to punish those who breach the criminal law and to provide redress where a person violates its civil law responsibilities to others, i.e. by acting negligently. There has been a huge growth in the body of our criminal law, in particular, over recent years and we are far from convinced that additional obligations are needed.
- As a constitutional instrument one would expect a British Bill of Rights to express rights in relatively broad terms, to enable the Bill to stand the test of time and to be applied in a wide variety of contexts. We would, however, have serious concerns about framing new legal duties or responsibilities on individuals in such broad terms. It is a central feature of the rule of law and of the post-War human rights framework

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<sup>14</sup> July 2007, CM 7170, para 210

<sup>15</sup> Ibid, para 106

<sup>16</sup> Article 17 of the European Convention

that legal obligations placed on individuals are expressed with sufficient clarity to enable people to predict the likely consequences of their actions.

- Calls for a British Bill of Rights *and Responsibilities* are often accompanied by the suggestion that individual rights should in some way be contingent upon compliance with one's responsibilities. This would clearly undermine the principle of universality referred to above. Self-evidently a person could not, for example, be denied a right to a fair trial because they are suspected of having committed a crime. A failure to afford rights protection to everyone within a state's jurisdiction would violate the UK's obligations under international law and would also undermine the state's moral standing in the international community and with its own citizens.

### ***National Security***

14. Another perceived weakness with the HRA is the idea that it does not have sufficient regard to public safety and national security. The "Governance of Britain" paper, for example, states:

"The Government itself recognised, in its review last year of the implementation of the Human Rights Act, the importance which must attach to public safety and ensuring that Government Agencies accord appropriate priority to protection of the public when balancing rights. A Bill of Rights and Duties might provide a means of giving greater clarity and legislative force to this commitment."<sup>17</sup>

This is also a common feature of David Cameron's criticisms of the 1998 Act. He has argued, for example, that "the time has now come for a new solution that protects liberties in this country ... and ... at the same time enables a British Home Secretary to strike a common-sense balance between civil liberties and the protection of public security". He has argued that a modern British Bill of Rights "should guide the judiciary and the Government in applying human rights law when the lack of responsibility of some individuals threatens the rights of others".<sup>18</sup>

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<sup>17</sup> Ibid, para 210

<sup>18</sup> David Cameron, "Balancing freedom and security – A modern British Bill of Rights", Speech to the Centre for Policy Studies, June 26, 2006

15. Liberty does not accept these criticisms of the HRA. Public protection is at the core of the human rights framework.<sup>19</sup> Not only do rights instruments like the 1998 Act play a vital role in protecting individuals against abuses by the state; they also require the state to take positive steps to protect the rights of those within their jurisdiction, including from the actions of other private individuals. The HRA requires criminal laws to be put in place to deter people from committing serious offences like murder, terrorism and rape. It also requires allegations of such offences to be investigated by the police and requires people who commit serious, violent offences to be prosecuted. The HRA does not give convicted criminals the right to enjoy the same freedoms as the rest of us. For example, the 1998 Act provides that people convicted of crimes can, and in some cases must, be deprived of their liberty and that they should not be released early if they present a serious danger to others.<sup>20</sup> It is also worth reiterating in this context that most of the rights in the HRA are not absolute. One of the legitimate reasons for placing proportionate legal restrictions on the rights protected is public safety. This means, for example, that the rights to privacy, freedom of expression and free speech can be restricted where necessary to protect the public.

### ***Deportation to Torture***

16. The one absolute in the post-war human rights framework is the prohibition on torture. While few critics of the HRA have argued publicly that a new British Bill of Rights should allow torture, there is one aspect of the right against torture that has faced severe criticism. Article 3 prohibits states from removing a person to a country where there are substantial grounds to believe that s/he will face a real risk of torture.<sup>21</sup> The former Prime Minister referred to this as “an abuse of common sense”.<sup>22</sup> David Cameron has described it as “an invitation for terrorists and would-be terrorists to come to Britain,

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<sup>19</sup> Indeed, this is inherent in the talk of human rights in the context of other countries like Zimbabwe – we speak of “human rights protection”.

<sup>20</sup> This is why Liberty has sought to challenge, on human rights grounds, the early-release decision for Anthony Rice, a convicted sex offender serving a life sentence, enabling him to commit the murder of Naomi Bryant.

<sup>21</sup> Most famously enounced by the Grand Chamber of the European Court of Human Rights in *Chahal*. The protection against deportation to torture has, for example, been criticised in the context of stories about the inability of the state to return a number of men to Afghanistan who hijacked a plane to get to the UK (cf “Afghan hijackers win right to remain”, *Telegraph*, 11<sup>th</sup> June 2006)

<sup>22</sup> “Blair dismay over hijack Afghans”, BBC, 10<sup>th</sup> May 2006

safe in the knowledge that whatever crime they may have committed in their home country and whatever suspicion there may be that they might be planning a terrorist attack in the UK or elsewhere they won't be sent back to their country of origin and may not even be detained.”<sup>23</sup> For some, the removal of this protection would be reason enough to tear up the 1998 Act and start afresh with a new Bill of Rights.

17. Liberty does not accept these criticisms of the rule against deportation to torture. We believe it to be an inevitable and important aspect of the absolute prohibition on torture in Article 3 which must form part of any new Bill of Rights for Britain. Like the prohibition on using evidence obtained by torture in British courts, this principle is vital if we are to ensure that the UK is not complicit in torture elsewhere in the world. If we do not comply with it we would not only breach international law, but would also undermine our claims to civility, could be seen as condoning torture or could actually encourage its practice in other countries. The practice of ‘extraordinary rendition’ clearly demonstrates why these wider aspects of the prohibition on torture are needed.<sup>24</sup> Without them, human rights law would not prevent countries getting other states to do their dirty work by effectively ‘contracting out’ torture.

## **Jago Russell, Liberty**

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<sup>23</sup> David Cameron, “Balancing freedom and security – A modern British Bill of Rights”, Speech to the Centre for Policy Studies, June 26, 2006

<sup>24</sup> Refers to allegations that western democratic states have kidnapped terror suspects and flown them to states that practice torture with the aim of gaining intelligence