



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

**“Implementation of Judgments of the  
European Court of Human Rights and  
Declarations of Incompatibility”**

**September 2009**

## **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

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

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## Introduction

1. On 30<sup>th</sup> July 2009, the Joint Committee on Human Rights (JCHR) called for evidence on: (i) the implementation of judgments in the European Court of Human Rights (ECtHR) finding the UK to be in breach of the European Convention on Human Rights (the 'ECHR'); and (ii) the adequacy of the Government's response to declarations of incompatibility made under the *Human Rights Act 1998* (HRA). In this response we draw out some general observations about the Executive's and Parliament's responses to such decisions.

2. We welcome the JCHR's role in considering the UK's response to ECtHR judgments and declarations of incompatibility. Rather than giving the courts the final say, the HRA retains an important role for the Executive and Parliament in determining how rights are protected. The JCHR helps to ensure that this role is properly performed by, for example (i) bringing adverse decisions of the Strasbourg and UK's courts to Parliament's attention; (ii) pressuring the Executive to respond to such judgments in an appropriate and timely manner; and (iii) scrutinising proposed new laws to limit the risk of future adverse decisions.

## Implementation of ECtHR judgments

3. All the Strasbourg decisions identified in the JCHR's call for evidence raise important human rights issues. We are pleased that the JCHR has written to the relevant Government departments about these decisions, seeking information about their proposed courses of action, and that it is now seeking evidence from interested parties. In this response we do not comment on every decision mentioned, but focus instead on those decisions in which Liberty has been involved, by way of interventions or lobbying Parliament, and those we regard as raising broader issues requiring government action.

### ***S and Marper v United Kingdom***<sup>1</sup>

4. *S and Marper* related to the UK's policy of indefinite retention of DNA profiles and samples of all persons arrested for a recordable offence. S was 11 years old

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<sup>1</sup> Application Nos. 30562/04 and 30566/04, 4 December 2008.

when he was arrested and charged with armed robbery. Despite being acquitted after trial, his fingerprints and DNA were retained by the police. Mr Marper was arrested in 2001 and charged with harassment of his partner. Charges against him were discontinued, and yet the police retained his DNA and fingerprints. All samples were retained on a national database pursuant to section 64(1A) of the *Police and Criminal Evidence Act 1984*. S and Marper submitted that the retention of the samples interfered with their right to a private life pursuant to Article 8 of the ECHR.

5. The ECtHR found a violation of Article 8, holding that the protection of personal data was of fundamental importance to a person's right to respect for private life. Especially in the case of minors, the retention of an unconvicted person's data was held to be harmful, given the importance of that person's future development and integration in society. In particular, the ECtHR, held that the 'blanket and indiscriminate nature' of powers of retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences failed to strike a fair balance between competing public and private interests. The State had overstepped any acceptable margin of appreciation and the retention of such information constituted a disproportionate interference with the applicants' right to respect to private life.

6. The Government's response to the *S and Marper* decision has been to introduce provisions in the Policing and Crime Bill<sup>2</sup> enabling it to make secondary legislation setting out details about the retention, use and destruction of fingerprints and DNA. It has also rushed through a Home Office consultation on the matter.<sup>3</sup>

7. Liberty regards this response as inadequate and disappointing. At the very least, an issue as important as the retention of intimate DNA profiles on a centralised database, must be properly debated and considered by Parliament and not left to secondary legislation. Liberty is currently lobbying for changes to the Policing and Crime Bill<sup>4</sup> to try and ensure that the substantive requirements regarding retention, use and destruction of DNA samples and profiles are set out in primary legislation.<sup>5</sup>

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<sup>2</sup> Clauses 96-98.

<sup>3</sup> *Keeping the Right People on the Database: Science and Public Protection, May 2009*. See Liberty's response to the consultation, August 2009, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-response-to-dna-database-consultation.pdf>

<sup>4</sup> Due to be brought back to Committee Stage in the House of Lords on 13<sup>th</sup> October 2009.

<sup>5</sup> Liberty's most recent briefing on the Policing & Crime Bill is available at: <http://www.liberty-human-rights.org.uk/pdfs/policy-09/policing-and-crime-committee-stage-lords.pdf>

8. Liberty's concerns about the growth of the National DNA Database are well documented and available in our response to the recent consultation.<sup>6</sup> Our concerns about the Government's current proposals can be summarised as follows:

- Most problematically, the Government's proposal to remove the profiles of those who have not been convicted of any offence, either because they have been acquitted or no charges were laid or were later dropped, is limited to six and twelve years according to the offence for which they were arrested. These figures are based on flimsy research, compare unfavorably with the position in other European countries and fail to have due regard for the presumption of innocence.
- The approach taken towards children fails to fully appreciate the harmful effect on minors of being on the National DNA Database.
- Further, the Government has given no consideration to deleting the DNA profiles of adults, and many children, convicted of minor offences.
- The consultation paper makes no mention of the disproportionate over-representation of people from BME backgrounds on the DNA database, and the proposals do nothing to address this imbalance.

9. Liberty believes that DNA evidence can be a highly effective crime detection and prosecution tool. We take no issue with the collection of DNA from suspects for the purposes of a criminal investigation. Our concerns relate to the regime of permanent retention of DNA of people arrested for any recordable offence, even if no charge or conviction follows. Public protection is incredibly important, but so is respect for a person's private life. The significant value of DNA retention as an intelligence and evidence tool must be balanced against the incredibly intimate nature of material that reveals much more than the identity of the person profiled. We hope that the Government will recognise the importance of the right to a private life and ensure the National DNA Database is set on a statutory footing in primary legislation and retains only that data that is necessary and proportionate.

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<sup>6</sup> See above note 3.

## ***Al-Saadoon & Mufdhi v United Kingdom***<sup>7</sup>

10. Liberty has intervened in the case of *Al-Saadoon & Mufdhi v UK* which is currently before the ECtHR. The ECtHR's interim judgment issued on 30 June 2009 was the first decision of the ECtHR on the application of the ECHR to UK forces in Iraq. The applicants were Iraqi nationals and officials of the Ba'ath Party, accused of murdering two members of the UK armed forces. They were held by UK forces in Basra until 31 December 2008 when they were transferred to the custody of the Iraqi High Tribunal ('the IHT'), which intended they would be held in Rusafa Prison prior to their trial. They complained about the transfer, relying on Articles 2 (right to life), 3 (prohibition against torture) and 6 (right to a fair trial) and Article 1 of Protocol No. 13 (abolition of death penalty). They also complained about the fact that they were transferred to the Iraqi authorities despite the Court's indication under Rule 39 of its Rules of Court, in breach of Articles 13 (right to an effective remedy) and 34 (right of individual petition).

11. The applicants brought judicial review proceedings in the UK challenging, among other things, the legality of their transfer to the IHT. This was unsuccessful, as was their appeal to the Court of Appeal which was dismissed on 30 December 2008. The Court accepted that there was a real risk that the applicants would be executed but, as they were being held within another sovereign State, they did not fall within the UK's jurisdiction and the UK therefore had no discretionary power of its own to hold, release or return the applicants. It held that the UK was in essence detaining the applicants only at the request and order of the IHT and was obliged to return them to the IHT in accordance with UK-Iraq arrangements. Even if the applicants did fall within the UK's jurisdiction, the Court held that the death penalty was not contrary to international law and there was no evidence that a crime against humanity would be committed or the applicants tortured if they were transferred. In those circumstances the Court held that the UK's obligation to respect Iraqi sovereignty and transfer the applicants had to take precedence.

12. Immediately after that decision, the applicants applied to the ECtHR for an interim measure to prevent the British authorities making the transfer. The ECtHR indicated to the UK Government that the applicants should not be removed or transferred from their custody until further notice. The following day the UK

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<sup>7</sup> ECtHR, Application No: 61498/08, 30 June 2009.

Government informed the ECtHR that, principally because the UN Mandate, which authorised the role of British forces in arrest, detention and imprisonment tasks in Iraq, was due to expire at midnight on 31 December 2008, they could not comply with the interim measure and had transferred the applicants to Iraqi custody earlier that day. On 16 February 2009 the applicants were refused leave to appeal by the House of Lords. The applicants' trial before the IHT commenced on 11 May 2009. The charges against them have now been dismissed for lack of evidence. The Iraqi Government has appealed and may seek a retrial.

13. In its interim judgment, the ECtHR held that the United Kingdom had jurisdiction over the applicants, since the UK authorities had total and exclusive control, first through the exercise of military force and then by law, over the detention facilities in which the applicants were held. The ECtHR further held that the applicants' complaints that, at the moment they were transferred, there were substantial grounds for believing that they were at real risk of being subjected to an unfair trial before the IHT followed by execution, raised serious questions of fact and law which were of such complexity that they had to be determined on an examination of the merits. Those complaints under Articles 2, 3 and 6 and Article 1 of Protocol No. 13 were therefore declared admissible. The issue of the admissibility of the complaints under Articles 13 and 34, closely connected to those complaints, were joined to the merits of the case. The complaints under Article 2 and 3 concerning the conditions of detention and the risk of ill treatment in Rusafa Prison were held inadmissible, as the applicants had not exhausted all available domestic remedies before the British courts.

14. On the issue of jurisdiction, Liberty believes that the ECHR applies extra-territorially where a Convention state exercises effective authority and control, whether factual or legal, over a person. The ECtHR's judgment on this issue is significant, since it places more emphasis on *de facto* control than is to be found in the previous case law. It is indicative of a wider application of extra-territorial jurisdiction than that applied by, for example, the House of Lords in *Al-Skeini*.<sup>8</sup>

15. In respect of international obligations, Liberty believes that international treaties do not displace the UK's obligations under the ECHR. However, if a state is acting pursuant to another international treaty which provides for equivalent, if not

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<sup>8</sup> *Al Skeini and others v Secretary of State for Defence* [2007] UKHL 26

identical, protections to those within the ECHR, the state is presumed to comply with the ECHR. If there is any conflict which cannot be resolved by interpretation of the conflicting instruments, then a state must incur international responsibility for breaching one of the obligations. Further, in the context of *Al-Saadoon*, Convention states are obliged to ensure by diplomatic means that any agreements relating to the transfer of detainees to non-Convention states provide for equivalent protections to those under the ECHR.

16. Liberty has grave concerns about the Government's failure to comply with the ECtHR's interim measure, notwithstanding its stated reasons for doing so. Interim measures are binding on contracting states and failure to comply with them dangerously undermines the whole system of protection of Convention rights.

### ***Liberty v United Kingdom***<sup>9</sup>

17. This case concerned communications interception by the Ministry of Defence (MoD) of Liberty's telephone, fax and email communications between 1990 and 1997. Liberty made complaints to the Interception of Communications Tribunal, the DPP and the Investigatory Powers Tribunal about what we alleged were unlawful interceptions of our communications. The complaints were dismissed on the basis that there had been no contravention of the *Interception of Communications Act 1985* (IOCA). Liberty brought the case before the ECtHR complaining of a breach of Article 8 (right to respect for private life).

18. The ECtHR found there had been a violation of Article 8, holding that the IOCA at the time had not indicated with sufficient clarity, so as to provide adequate protection against abuse of power, the scope or manner of exercise of the very wide discretion conferred on the State to intercept and examine external communications. In particular, it had not set out in a form accessible to the public any indication of the procedure to be followed for examining, sharing, storing and destroying intercepted material.

19. The IOCA has since been replaced by the *Regulation of Investigatory Powers Act 2000* (RIPA). RIPA, enacted soon after the HRA, was intended to introduce a more human-rights friendly framework for targeted surveillance. Although it was a

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<sup>9</sup> *Application No: 0058243/00*; 1 July 2008

step forward, the Act attempted to remain faithful to those that had passed before it<sup>10</sup> and the result is a byzantine piece of legislation that is as confusing as it is insidious. Earlier this year, prompted by some negative media coverage of local authorities' use of RIPA powers the Government published a narrowly framed consultation on the Act. Liberty responded to this consultation<sup>11</sup> urging the Government to consider a much more comprehensive review. In summary our key concerns include; the lack of judicial oversight (particularly for the more intrusive forms of surveillance); the circumstances in which RIPA powers can be granted (which are broad and ill-defined); and the number of bodies that have access to targeted surveillance powers (over 800 public bodies).

### ***A and others v United Kingdom***<sup>12</sup>

20. *A and others* was the culmination at Strasbourg of litigation concerning foreign nationals detained pursuant to anti-terrorism legislation. The applicants were foreign nationals living in the UK whom the government suspected of being international terrorists following 9/11. The Government issued a derogation order on the basis of a public emergency threatening the life of the nation pursuant to Article 15(1) and detained the applicants without trial pursuant to the *Anti-Terrorism, Crime and Security Act 2001*. They complained of breaches of Articles 3, 5(1), 5(4), 13 and 14. The applicants appealed to the Special Immigration Appeals Commission (SIAC) which examined both open and closed material disclosing a case against them. Following a House of Lords decision in which quashed the derogation order and declared the relevant provision of the 2001 Act to be incompatible with Articles 5(1) and 14, the applicants remained in detention until they elected either to leave the UK or were released and made subject to control orders pursuant to the *Prevention of Terrorism Act 2005*. The ECtHR held that although there was no breach of Article 3, there had been a breach of Article 5(4). The Court held that the procedural requirements of Article 5(4) were not satisfied as, before SIAC, the open material consisted purely of general assertions yet SIAC's decision was based solely or to a decisive degree on closed material.

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<sup>10</sup> See for example Mr Straw's comments in introducing the Bill: "We start from the regime established by the *Interception of Communications Act 1985*, and we have been faithful to many of its key tenets". Hansard HC Debs. Vol 345, col 769, 6 March 2000.

<sup>11</sup> Liberty's response is available at: <http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-response-to-the-ripa-consultation.pdf>

<sup>12</sup> *Application No: 00003455/05*; 19 February 2009

21. The indefinite detention of foreign nationals without charge or trial was the sinister high-water mark of the legal innovations adopted by this Government in the wake of the tragic events of 9/11. The House of Lords rejection of this approach, now confirmed by Strasbourg, was a critical moment for rights and freedoms in the UK. Also critical is the subsequent and recent decision in *Secretary of State for the Home Department v AF and others*,<sup>13</sup> which concerned the Government's control order policy – the direct legislative response to the Law Lords earlier declaration of incompatibility in the Belmarsh litigation. In *AF* the House of Lords found a breach of Article 6 in the case of the three control orders before it, on the basis of the ECtHR judgment in *A and others*. The House of Lords regarded the judgment in *A and others* to have provided a 'definitive' resolution to the issue of closed material and Article 6 in control order cases. Their Lordships determined that unless an irreducible minimum of information was provided to 'controlees' their control orders could not stand.

22. We believe that this development is significant in that it marks the beginning of the end for the unfair and unsafe control order regime. Control orders were always meant to be a temporary measure. We have however watched with dismay as successive Home Secretaries seem to increasingly lose sight of their intended interim nature. Unfortunately, as with much 'emergency' legislation the longer the measures remain on the statute book the more likely it is that they become part of our permanent legal landscape. What is more, since the creation of control orders in 2005 there have been significant innovations in criminal law and practice (including threshold charging, obligations to hand over encryption keys, etc) which render unsustainable the Government's claim that control orders remain necessary. We have urged the Government to begin work on dismantling what is now an increasingly unworkable system<sup>14</sup> and to allow the case files for all those currently on control orders to be re-examined by prosecutors to determine whether or not individuals can be dealt with within the rule of law.

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<sup>13</sup> [2009] UKHL 28.

<sup>14</sup> Six control orders were revoked between 11<sup>th</sup> June – 24<sup>th</sup> September 2009  
<http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/6226749/Terrorist-suspect-released-from-control-order.html>

### ***Hirst v United Kingdom (No 2)***<sup>15</sup>

23. The case of *Hirst* related to the blanket ban on convicted prisoners voting in elections. The applicant argued that the ban breached his right to free elections under Article 3 of Protocol No. 1 of the ECHR, both on its own terms and in conjunction with Articles 10 (freedom of expression) and 14 (prohibition on discrimination). The ECtHR found a violation of Article 3 of Protocol No. 1, holding that although the ban had the legitimate aim of preventing crime by sanctioning the conduct of convicted prisoners, enhancing civic responsibility and respect for the rule of law, it was not a proportionate measure to achieve that aim.

24. In reaching its decision, the Court had regard to the fact that the ban (i) applied to a significant number of individuals and encompassed a wider range of offenders and sentences; and (ii) applied to all convicts with custodial sentences, regardless of the nature or gravity of the crime that had been committed. The ban was therefore general, automatic and indiscriminate, and fell outside the UK's margin of appreciation.

25. Liberty responded to the Government's December 2006 consultation on prisoners' voting rights<sup>16</sup> and again<sup>17</sup> to the second consultation<sup>18</sup> launched earlier this year and only recently closed. We have expressed our disappointment with the Government's response to the ECtHR's judgment. It has now been more than four years since the ECtHR ruled that UK law was unlawful yet no changes have yet been made. The first consultation paper rejected outright before receiving any responses the enfranchisement of all prisoners. It only proposed more minor reforms, saying explicitly that full enfranchisement was not an option. This position has been maintained in the second stage consultation which merely proposes allowing prisoners sentenced to between one and four years to continue to hold the right to vote. Liberty believes that all prisoners should retain the right to vote and the

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<sup>15</sup> Application No: 74025/01, 6 October 2005.

<sup>16</sup> *Voting Rights of Convicted Prisoners Detained within the United Kingdom*; CP 29/06, December 2006. Liberty's response can be found at: <http://www.liberty-human-rights.org.uk/pdfs/policy07/prisoners-voting-rights.pdf>

<sup>17</sup> Liberty's consultation response is available at: <http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-response-to-the-prisoner-voting-consultation-2.pdf>

<sup>18</sup> *Voting Rights of Convicted Prisoners Detained within the United Kingdom*, April 2009, Consultation Paper CP06/09

Government's failure to implement the ECtHR's decision reflects a lack of political will manifested in a series of delaying tactics, including a flawed and protracted consultation exercise.<sup>19</sup> We are particularly concerned that prisoners will remain disenfranchised by the time of the next (imminent) General Election.

### **Declarations of Incompatibility**

26. Section 4 of the HRA empowers a court to make a declaration of incompatibility where it believes legislation is incompatible with the rights contained in the HRA. A declaration of incompatibility has no legal effect and does not bind Parliament, contrary to popular belief. This is a peculiar feature of human rights protection in the UK, an innovative compromise between human rights protection by the courts and the maintenance of parliamentary sovereignty. It recognises that it is not only the courts, but also the other two limbs of state that have a responsibility for protecting human rights. If the scheme for human rights protection envisaged by the HRA is to be effective, Parliament and the executive must also respect and protect our rights and freedoms. Section 4 declarations are very important in this regard. They represent a clear indication that the existing law is incompatible with ECHR rights and a clear signal that Parliament must take steps to remove that incompatibility. Below we consider the declaration of incompatibility in *R (Wright) v Secretary of State for Health*<sup>20</sup> and the wider issues raised by the judgment in this case.

### ***R (Wright) v Secretary of State for Health*<sup>21</sup>**

27. *R (Wright)* involved registered nurses who were placed on a list that prevented them from working with vulnerable adults, without being given the opportunity to first make representations before a decision was taken to include them on the list. The effect of being on the list was to deprive a care worker of employment as a care worker and further to prevent him or her from undertaking any other such employment. The procedure involved an initial reference, a provisional

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<sup>19</sup> We note that the Government's stated reason for responding to the decision in *S and Marper* by way of secondary rather than primary legislation is because it needs to respond quickly to Strasbourg judgments. Its slow response to the judgment in *Hirst* completely undermines this argument.

<sup>20</sup> [2009] UKHL 3, 21 January 2009

<sup>21</sup> *Ibid*

listing and a determination as to whether the worker should be confirmed on the list. In the four cases in the appeal, it took between four and six months from the referral to the provisional listing and eight or nine months from the provisional listing to the determination. The appellant argued that Articles 6 (fair trial) and 8 (privacy) were engaged and breached by the lack of a right to an oral hearing before the provisional listing and the low threshold applied to the listing.

28. The House of Lords held that section 82(4)(b) of the *Care Standards Act 2000* was incompatible with Articles 6 and 8. The provisional listing amounted to the determination of a civil right within the meaning of Article 6, even though the listed person had the opportunity eventually to bring the case before the Care Standards Tribunal. Since the listed person was deprived of employment, the case represented an exception to the general rule that Article 6 did not apply to provisional measures. The relevant scheme was held to breach Article 6(1) as it was unfair not to allow a care worker the opportunity to answer allegations made against them before imposing possibly irreparable damage to their employment or employment prospects.

29. Liberty welcomes this judgment. We have, for several years, expressed concern at a host of provisions around employment vetting which give insufficient regard to procedural fairness. We accept that vetting is critical for certain sensitive employments. We believe however that this should not be at the expense of fairness to the individual. In particular Liberty has had longstanding concerns about the statutory provisions relating to enhanced criminal record certificates (ECRCs).<sup>22</sup> As hitherto interpreted, the scope and effect of these provisions is extraordinary. In specified circumstances they allow the police to disclose to prospective employers – via the Criminal Records Bureau (“CRB”) - information about prospective employees. There is presently no limit on the type of information that may be disclosed. The information may include allegations of criminal conduct, and where this is so, it does not matter whether the allegations have been tested at trial or have led to a conviction. It does not matter, moreover, whether the information disclosed can be shown to be true, or is believed by the police to be true. The question is whether in the opinion of the police the information might be true, and might be relevant for the employer’s purposes in assessing the employee’s suitability. If information satisfies these minimal conditions then police are not merely permitted to disclose it; save

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<sup>22</sup> The relevant provisions are in Part V of the *Police Act 1997*.

(possibly) in rare circumstances, they are required to do so. There is no right for the employee to make representations before disclosure takes place. Nor is there any right of appeal against the decision to disclose.

30. We believe that the current framework for ECRCs disproportionately interferes with Article 8 of the HRA (right to private life).<sup>23</sup> As with many rights protected under the HRA, Article 8 can be limited where it is shown to be in accordance with law, necessary and proportionate: “*in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the rights and freedoms of others*”. Although Article 8 contains no explicit procedural requirements it is well established that there are implicit procedural safeguards.<sup>24</sup> While we accept that vetting in sensitive employments is necessary we do not believe that the current framework for vetting gives necessary regard to the implicit procedural standards required by Article 8.

31. The Independent Safeguarding Authority (ISA)<sup>25</sup> will soon establish another system of vetting. The ISA's creation was recommended by Sir Michael Bichard in his Inquiry into the murders of Jessica Chapman and Holly Wells by Soham school caretaker Ian Huntley. The ISA is due to come into operation in October 2009, and from July 2010 all people who work with or volunteer with children and vulnerable adults will need to be registered with the ISA.<sup>26</sup> While employers are always likely to err on the side of caution (potentially refusing employment to anyone against whom there is any sort of unsubstantiated allegation) a third party body such as the ISA is able to make a more objective assessment of suitability and allows a person to make representations to the ISA about such allegations before a decision on barring is made.. However, bizarrely, despite setting up the ISA, the Government intends to continue to allow employers to obtain ECRC's directly from the Criminal Record Bureau (CRB). Liberty can see no sense in this duplication. The Bichard Report clearly envisaged the current system of sending ECRCs to employers continuing until

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<sup>23</sup> Liberty has recently intervened in *L v Commissioner of Police for the Metropolis* in the House of Lords on the issue of ECRCs and Article 8 of the HRA. Judgment has been reserved.

<sup>24</sup> *Tysiac v Poland* (2007) 45 EHRR 42.

<sup>25</sup> The ISA was established under the *Safeguarding Vulnerable Groups Act 2006*.

<sup>26</sup> The ISA will eventually replace the impugned *Care Standards Act* system of vetting.

the ISA came into operation. We agreed that this was the logical short term approach. However, the presumption from Bichard was that once the ISA began work ECRCs need no longer be sent to employers. Certainly the language used indicated that the new system would replace the passing of ECRCs to employers. In the introduction to the Report, Bichard stated that this new system “*would also avoid information about past convictions being released to prospective employers without reference first to the individual concerned*”. Later, when setting out plans for the ISA model Bichard identified the problem of unfairness stating:

*At present Enhanced Disclosure results are normally provided at the same time to the individual applicant and to the employer or voluntary body (Police Act 1997). Any objections by the job applicant to the provision of certain information could not, therefore, undo any damage done to his/ her prospects with that particular employer... This raises important issues about the fair treatment of individuals. There is a risk that careers may be blighted and job prospects lost.*<sup>27</sup>

32. We believe that an effective vetting system should ensure that those not suitable to work with children or the vulnerable are barred, while ensuring that potential employers remain unaware of unfair, malicious or spurious allegations. It is undeniable that details of allegations (as well as convictions) might be relevant in determining suitability to work with children and the vulnerable. However, it is also an unfortunate truth that many careers have been blighted by unfounded accusations of impropriety. In light of the decision in *R(Wright)* and the recent creation of the ISA Liberty is calling for an end to the unfair ECRC scheme. We have suggested amendments to the *Policing and Crime Bill*<sup>28</sup> to remove the overlap between the operation of the ISA and Enhanced Disclosure.<sup>29</sup>

## **Conclusion**

33. We welcome the fact that the Government has not, at least to date, simply disregarded any declarations of incompatibility. Disregard for a declaration of

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<sup>27</sup> See paragraphs 4.107 and 4.109 of *The Bichard Inquiry Report*.

<sup>28</sup> Due to be brought back to Committee Stage in the House of Lords on 13<sup>th</sup> October 2009.

<sup>29</sup> Liberty’s proposed amendments are included in our Committee Stage briefing on the Policing and Crime Bill in the House of Lords available at: <http://www.liberty-human-rights.org.uk/pdfs/policy-09/policing-and-crime-committee-stage-lords.pdf>

incompatibility would have serious consequences for our domestic human rights framework. It would demonstrate not only an unacceptable disregard for rights and freedoms but a similar disregard for the British courts and for the scheme of rights protection that Parliament envisaged in the HRA. In many cases the nature of the response by the elected limbs of the state has been constructive and appropriate, removing the incompatibility.<sup>30</sup> The nature of the response to declarations of incompatibility has not, however, been universally effective with the creation and implementation of the control order regime being the most notorious example. Having been told that the indefinite detention of foreign nationals was discriminatory the Government chose instead to apply control orders to all – nationals as well as non nationals. The replacement regime was notable for its ‘levelling down’ approach to rights protection. In responding to both domestic declarations of incompatibility and findings against the UK at Strasbourg we urge the Government to reassess policy in the round and not opt for the minimum believed necessary for compliance. The later approach inevitably leads to further litigation and embarrassment for the executive while leaving dangerous gaps in the level of rights protection in the UK.

**Helen Foot**

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<sup>30</sup> For example the *Gender Recognition Act 2004* which remedied the declaration of incompatibility in *Bellinger v Bellinger* [2003] 2 A C 467.