



LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

# **Liberty's response to the Second Consultation of the Commission on a Bill of Rights**

**September 2012**

## **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>

## **Contact**

Isabella Sankey

Director of Policy

Direct Line 020 7378 5254

Email: [bellas@liberty-human-rights.org.uk](mailto:bellas@liberty-human-rights.org.uk)

Rachel Robinson

Policy Officer

Direct Line: 020 7378 3659

Email: [rachelr@liberty-human-rights.org.uk](mailto:rachelr@liberty-human-rights.org.uk)

Sophie Farthing

Policy Officer

Direct Line 020 7378 3654

Email: [sophief@liberty-human-rights.org.uk](mailto:sophief@liberty-human-rights.org.uk)

## Introduction

1. In August 2011 the Bill of Rights Commission<sup>1</sup> published a discussion paper “*Do we need a UK Bill of Rights?*” which sought views on whether the UK needs a new Bill of Rights.<sup>2</sup> Liberty provided a detailed and lengthy response to this consultation – *Human Rights or Citizens’ Privileges?*<sup>3</sup> - addressing not only the four fleeting questions presented but several other questions and issues raised by the document. In July 2012 the Commission published a second consultation paper which asks more detailed questions about the Human Rights Act (HRA) and what a UK Bill of Rights could look like. Liberty predicted and addressed the vast majority of the issues raised in this secondary document in our response to the first consultation. We therefore refer the Commission to our earlier response. Below we add anything further that we think may be relevant to the new questions posed. Some questions are answered individually and some – with overlapping ideas – are grouped answered collectively.

2. Before embarking on our second substantive response to the Commission we think there are useful observations to make about the results of the Commission’s first consultation and the response to the second. We note that the Commission had only 900 responses to its first consultation. Of those, only a quarter advocated a UK Bill of Rights. While it is impossible to use such a small sample to extrapolate statistically the views of the wider population, it is clear from the number and the substance of the responses received that the reconfiguration of our constitutional rights framework is not a popular or pressing issue of concern in the UK. This conclusion is made starker by the much higher number of responses received in relation to other issues, such as the recent Scottish Government consultation on gay marriage which received 77,508 responses.<sup>4</sup> We also note that of the relatively small number of responses in favour of a UK Bill of Rights, some of these envisaged a new Bill building on the protections under the HRA. Those responses in support of a UK

---

<sup>1</sup> The Commission on a Bill of Rights was established by Government in March 2011 in fulfilment of a Coalition Agreement pledge.

<sup>2</sup> Commission on a Bill of Rights Discussion Paper, *Do we need a UK Bill of Rights?* published August 2011, available at - <http://www.justice.gov.uk/downloads/about/cbr/cbr-discussion-paper.pdf>

<sup>3</sup> *Human Rights or Citizens’ Privileges?* Liberty’s response to the Commission on a Bill of Rights Discussion Paper: *Do we need a UK Bill of Rights*, published November 2011, available at <http://www.liberty-human-rights.org.uk/pdfs/policy11/human-rights-or-citizens-privileges-nov-2011-.pdf>

<sup>4</sup> See Press Release from the Scottish Government, *Same Sex Marriage to be Legalised*, 25<sup>th</sup> July 2012 available at <http://www.scotland.gov.uk/News/Releases/2012/07/same-sex25072012>

Bill of Rights should not therefore be perceived as opponents of the present system under the HRA. Liberty was also interested (but not surprised) to learn that some respondents, in particular in Northern Ireland, Scotland and Wales

*“were concerned that any attempt to introduce a UK Bill of Rights at this time could have adverse constitutional and political consequences for the UK, particularly if it were undertaken to the exclusion of a Bill of Rights for Northern Ireland or if it were undertaken without regard to the implications of the independence debate in Scotland. It was also argued by many of these respondents that there was little or no call for a UK Bill of Rights from people in Northern Ireland, Scotland or Wales”.*

At paragraphs 91 – 97 of our first response we examined the legal, constitutional, political and cultural implications - for the Union and the devolved nations –of unpicking the HRA. We urge the Commission to give serious consideration to these complexities.

Finally, we observed in our earlier submission, that the Commission has been given an almost impossible challenge. Triggered and established in order to paper over a fundamental fault line in the Coalition consensus, there are diametrically opposed and raised expectations on either side. We hardly think evidence of this political reality is required but in case it is, we draw attention to some of the media coverage of the Commission’s second consultation exercise. The editorial in *The Sun* ran under the banner “Right idiots” railed against the extension of substantive rights in any new document

*“JUST when we thought the tide was about to turn on Britain’s human rights madness, it gets worse. The Government’s Bill of Rights Commission, charged with clearing up the mess, instead suggests adding to it by enshrining in law the “human right” to claim benefits....Welfare handouts were designed as a safety net against dire poverty. Not as a freebie to which everyone has a birthright.”<sup>5</sup>*

The *Daily Mail* took a similar view and in an article entitled “*The human right to claim benefits: jobless could sue for better payments under controversial plan*” observed:

---

<sup>5</sup> *The Sun*, Right Idiots, 13<sup>th</sup> July 2012 available at [http://www.thesun.co.uk/sol/homepage/news/sun\\_says/4427294/The-Sun-says-Horrific-error.html](http://www.thesun.co.uk/sol/homepage/news/sun_says/4427294/The-Sun-says-Horrific-error.html).

*“The ‘Commission on a Bill of Rights’ was set up by David Cameron to end the rampant abuse of human rights laws. Originally, the Prime Minister had pledged to scrap Labour’s Act and replace it with a UK Bill of Rights, which would stop the system being abused by criminals and those who refuse to work. But, after being forced into a coalition with the Liberal Democrats he had to downgrade his pledge. Instead, he established the commission to decide the best way forward”.*<sup>6</sup>

We further refer the Commission to paragraphs 103 – 132 of our earlier submission which examines the politics of the contemporary Bill of Rights debate.

**Question 1: What do you think would be the advantages or disadvantages of a UK Bill of Rights? Do you think that there are alternatives to either our existing arrangements or to a UK Bill of Rights that would achieve the same benefits? If you think that there are disadvantages to a UK Bill of Rights, do you think that the benefits outweigh them? Whether or not you favour a UK Bill of Rights, do you think that the Human Rights Act ought to be retained or repealed?**

3. Comparing the HRA with a document that doesn’t yet exist is a largely futile exercise. That said, Liberty believes that any perceived advantages of replacing the HRA with a theoretical UK Bill of Rights are negligible compared with the disadvantages. The latter includes matters as serious as – diminished human rights protection for everyone in the UK; diminished human rights protection for certain groups in the UK; opening the door for extensive and expensive satellite litigation around the interpretation of a new document and (if worded differently) its relationship with the European Convention on Human Rights (ECHR); becoming the first country at the Council of Europe to repeal legislation that domestically incorporates the ECHR (and the consequent diplomatic and political implications); becoming the first liberal democracy to repeal a modern-day Bill of Rights (with corresponding implications for the international struggle for human rights); and destabilising the delicate devolution settlement that currently exists in the UK. These grave implications and more are discussed extensively throughout our earlier submission to the Commission.

4. In the abstract, the only potential advantage would be if a new “UK Bill of Rights” enshrined greater substantive rights or enforcement mechanisms than in the HRA. Recent history (discussed in more detail below) reveals that it is politically

---

<sup>6</sup> Daily Mail, *The human right to claim benefits: jobless could sue for better payments under controversial plan*, 12<sup>th</sup> July 2012 available at <http://www.dailymail.co.uk/news/article-2172260/The-human-right-claim-benefits-Jobless-sue-better-payments-controversial-plan.html?ito=feeds-newsxml>.

naïve in the extreme to expect a UK Bill of Rights to emerge from the present Parliament having genuinely enhanced the protections that are already available under the HRA. In making this observation, we want to be clear that this view is not fuelled by cynicism or an “anti-politics” political view. Liberty is a cross party, non party campaign that has throughout our 78 year history worked incredibly closely with politicians from across the spectrum to protect rights and uphold civil liberties. We believe that Parliament, politicians and the democratic process has a crucial role to play in safeguarding, promoting and extending fundamental rights and freedoms. Indeed, many important human rights victories of recent years have been won in Parliament including the enactment of *Civil Partnerships Act 2004*, the defeat of 90 and then 42 days pre-charge detention; and the repeal of ID cards legislation.<sup>7</sup> At the time of writing the Liberal Democrat conference has recently voted overwhelmingly in favour of abandoning Part 2 of the deeply illiberal Justice and Security Bill and a parliamentary campaign in favour of gay marriage is building. However, as the ongoing prisoner voting debacle best evidences, the rights of unpopular minorities – especially those who are disenfranchised - remain vulnerable to political opportunism. In recent times also, the Executive and Parliament have become increasingly cowed by the demands of the Security Services.<sup>8</sup> This combined with the clamour for rights dilution in certain quarters of the press and the avowed opposition to the HRA at the very highest levels of Government makes it unrealistic to imagine that a repeal and replacement Bill would proceed calmly and intact on its Parliamentary journey.

5. Apart from this entirely theoretical “advantage” then, the only other conceivable advantage is what others have described as the “symbolic” or “emotional” appeal that a new Bill could inspire in the population. Liberty does not dismiss this perceived problem out of hand. We are well aware that, having come into force less than a year before the tragic events of the 9/11 during an era of national security challenges and tightening immigration rules, the Act has become associated with disproportionately benefitting suspected terrorists and those with no perceived right to remain in the UK. The fact that the Act provided the first domestic recourse to privacy protection in an era of legal aid cuts has also meant that wealthy

---

<sup>7</sup> See Protection of Freedoms Act 2012.

<sup>8</sup> See for example provision for effective house arrest without charge or trial through control orders under the Prevention of Terrorism Act 2005 (replaced by an almost identical regime under the Terrorism Prevention and Investigation Measures Act 2011); the Justice and Security Bill and the Draft Communications Data Bill both before Parliament at the time of writing.

public figures have appeared unfairly and disproportionately advantaged by its protections in contrast to average and low earners. So, with this in mind and in the absence of any public education about the HRA it is understandable that the protections it affords to all weren't and aren't yet widely apparent. That said it is difficult to understand the argument that a straightforward name change could suddenly create cultural ownership and understanding. If, theoretically, the substance remained the same and only the name altered, the cases that undermine "kiss and tell" revenue would remain. So too, would judgments perceived by some to benefit the undeserving and any new document would continue to be used as a scape-goat by officials unwilling to admit to administrative blunder. Not only would the media criticisms be maintained, therefore, but the political act of repealing the HRA would badly weaken the idea that the values contained therein are constitutional and non-negotiable democratic values. The symbolism of repeal would arguably undermine the idea of an enduring "higher law" – potentially leading to less long - term cultural ownership not more.

6. It is also the case that a simple name-change would likely be met with media ridicule. Rather than building increased cultural attachment, it may well – and perhaps rightly - be perceived as a misconceived attempt to placate and patronise those dissatisfied with the operation of the HRA. In Liberty's experience greater attachment to the Act is generally achieved when its history and function is calmly and accessibly explained. Personal attachment is also increased when its benefits are felt. Jon Gaunt, the former TALKsport "shock jock" and *Sun* columnist was a long time critic of the HRA until he sought the protection of Article 10. He used the HRA to judicially review complaints upheld by Ofcom following his sacking by TALKsport for comments made on air during a heated exchange on fostering policy. After the High Court hearing he said, "*Some people say I'm a hypocrite, but it's only when your freedom is being curtailed that you realise how important it is*". His story neatly captures how daily distortions of the Act create mistrust and misunderstanding which can be reversed once the Act's real, important and tangible protections are more widely felt.

**Question 2: In considering the arguments for and against a UK Bill of Rights, to what extent do you believe that the European Convention on Human Rights should or should not remain incorporated into our domestic law?**

7. We refer the Commission to paragraphs 77 - 90 of our earlier response which explains in detail the very good reasons for retaining domestic incorporation of the

ECHR. In short the HRA has allowed for greater appreciation in Strasbourg of British judgments, while encouraging dialogue, disagreement and the development of domestic human rights jurisprudence. British sovereignty has been strengthened and the margin of appreciation made easier to apply. It is legal nonsense to suggest that either of these aims would be accomplished by repealing and/or replacing the HRA.

8. The main development in this area since the Commission's last consultation was the High Level Conference on the future of the European Court of Human Rights (ECtHR) organised by the UK Government in Brighton in April 2012. The Brighton Declaration<sup>9</sup> adopted by all Council of Europe member states placed huge emphasis on the importance of domestic implementation of the Convention. Over the course of the conference domestic implementation of the Convention was identified as a key mechanism by which the backlog of cases at the ECtHR can be reduced. Interestingly, in this forum, the UK Government was particularly keen to highlight to its fellow member states that it has incorporated the Convention into domestic law through the HRA.

**Question 3: If there were to be a UK Bill of Rights, should it replace or sit alongside the Human Rights Act 1998?**

9. Liberty believes that if proposals are going to be made for a new UK Bill of Rights, at a very minimum this must be a Bill which would supplement the HRA. Paragraphs 6 – 76 of our earlier response details the effect and importance of each of the substantive rights contained in the HRA as well as the crucial enforcement mechanisms that ensure the rights have meaning and afford protection in practice. The substantive protections and mechanisms contained in the Act are too important to risk dilution in a “replacement” statute. And as we have frequently stressed, if replacement and addition is what is intended, there is no reason why the HRA would need to be repealed. The international repercussions of repealing the HRA cannot be underestimated.

**Q4: Should the rights and freedoms in any UK Bill of Rights be expressed in the same or different language from that currently used in the HRA and ECHR? If different, in what ways should the rights and freedoms be differently expressed?**

---

<sup>9</sup> The final Brighton Declaration is available at <http://www.coe.int/en/20120419-brighton-declaration>



**Q5: What advantages or disadvantages do you think there would be, if any, if the rights and freedoms in any UK Bill of Rights were expressed in different language from that used in the ECHR and the HRA?**

10. A great practical benefit of incorporating the rights and freedoms set out in the ECHR in our domestic human rights legislation is the avoidance of unnecessary litigation. A decision to change the language in which rights and freedoms are expressed could either be carried out with the aim of altering the level and nature of extant protections or alternatively with the aim of framing the same protections in a way which would render them somehow more palatable. Either route would inevitably lead to litigation as our domestic Courts grapple with the interaction between this country's international obligations and our domestic laws. If our objective is to encourage understanding and ownership of our human rights framework, a step which will lead to lengthy adversarial proceedings on the nuanced divergence between two human rights instruments is liable to prove counter-productive in the extreme.

11. In paragraphs 6 - 58 of our earlier submission, we set out our detailed views on the operation of the substantive rights protected by the HRA and in particular the delicate balance frequently struck between the protection of individual rights and wider social interests.<sup>10</sup> Liberty firmly believes that the substantive rights protected by the HRA are a core of fundamental protections intrinsically linked to human dignity and essential to sustaining meaningful democracy.<sup>11</sup> To the extent that questions 4 and 5 of this consultation are designed to explore a shift in the range or nature of rights protected by our domestic human rights framework, our view is that this carries the very real risk of reducing the extent or effectiveness of essential existing protections.

12. If, alternatively, the objective is to retain the scope of human rights protections but somehow to link individual rights explicitly to contemporary political or social debates, Liberty is concerned both that a problem has been misdiagnosed and that the proposed remedy would prove sorely inadequate. Whilst it is undeniable that there is a lack of public understanding and 'ownership' of the HRA, we refute the

---

<sup>10</sup> *'Human Rights or Citizens' Privileges: Liberty's response to the Commission on a Bill of Rights Discussion Paper: Do we need a UK Bill of Rights?'* Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy11/human-rights-or-citizens-privileges-nov-2011-.pdf>.

<sup>11</sup> See in particular our discussion of the practical operation of the Convention rights at Chapter 2 of *'Human Rights or Citizens' Privileges'*.

implication that this is linked to the way in which the rights and freedoms it protects are expressed. Liberty has long criticized the almost complete lack of Government led public information around the Act and unfortunately the void created by this deafening silence has been filled by hostile media reporting riddled with myth and misinformation and perhaps more disturbingly still, by wildly inaccurate claims about the operation or impact of the Act by those in the upper echelons of Government.<sup>12</sup> The answer to concerns around feelings of suspicion towards the HRA is to better explain the protections it provides for some of the most vulnerable people in our society, the limited nature of most of the rights it enshrines and the nuanced balancing exercise frequently carried out by our Courts. If we resort to tinkering with the wording of the Act, those whose real concerns are with the inclusivity or universality of protection will not be appeased for long and our core legislative protection for rights and freedoms will come to be viewed not as an enduring document enshrining principles fundamental to human dignity and democratic Government, but a transient statement of popular preoccupations, susceptible to change and lacking the enduring quality which sets statements of constitutional intent apart.

13. Further and in more practical terms, one of the defining features of constitutional documents throughout the course of history has been the framing of broad, fundamental principles capable of remaining relevant and meaningful even as technology and social norms develop. Those who drafted the Articles of the ECHR could have had no conception of the technological leaps which would bring us to a point where a Government could propose to force communications companies to fit hardware capable of intercepting the content of every online communication, nor could they have known that social attitudes would develop to the extent that in this country we are now ready to afford equal status and respect to the unions between gay and straight couples. Yet Article 8 has been used to challenge unjustified incursions into our personal privacy in a digital age and to recognise the right to respect for family life of those in a same-sex relationship. Pinning our fundamental human rights instruments explicitly and specifically to the exigencies of a particular time will inevitably prove limiting, undermining attempts to enshrine meaningful,

---

<sup>12</sup> Most notably the Home Secretary's seriously inaccurate assertion at last year's Conservative Party conference that Article 8 of the HRA facilitated the ongoing residence of an 'illegal immigrant' in this country because he had a pet cat. For more discussion of recent political misrepresentations of the operation of the Act see '*Human Rights or Citizens' Privileges*', pg 72-79.

enduring protections well understood and respected by those they are designed to serve.

14. Of course our human rights framework has a genesis, but it was born at a time of global resolve following the horrors of the Second World War. History tells us that meaningful commitments to fundamental rights and freedoms are set down after revolution, civil strife or international armed conflict, not as part of a PR exercise designed to increase popular appeal.

15. The fact that the rights protected by the HRA are broadly framed means they are not overly prescriptive allowing for a dialogue between our judicial and legislative authorities. Parliament can legislate to create more focused prescription in areas of law which raise human rights issues as a matter of course, for example in the context of immigration, state surveillance or proceedings in defamation, or it can leave a space within which our courts can develop a body of jurisprudence as our human rights protections come to life in individual cases.

16. To the extent that the aim is to make the rights set out in the HRA appear somehow more 'British', we must not forget the very British origins of the rights enshrined in the HRA, inspired by Churchill and drafted by British politicians – Britain also led the way as the first country to ratify the Convention. In the words of the late Lord Bingham "*which of these rights...would we wish to discard? Are any of them superfluous, unnecessary? Are any of them un-British?*"<sup>13</sup> As the world's oldest, unbroken democracy, which one of the rights we currently protect sits ill with our national character? The right to respect for privacy and family life? The freedom of expression? The freedom from inhuman and degrading treatment which acts as a bulwark against tyranny and arbitrary violence? The fair trial rights which have their roots in the Magna Carta? Perhaps, as Lord Bingham also observed, it is easier for some to attack the HRA than try to understand what it means.<sup>14</sup> The answer to this is not to pick apart our human rights framework making cosmetic changes, but to help the public to understand the nature and extent of the protection it offers to every one of us, but most especially to those vulnerable to neglect or ill-treatment.

---

<sup>13</sup> The full transcript of Lord Bingham's keynote address to Liberty's 75<sup>th</sup> Anniversary Conference is available on Liberty's website at: <http://www.liberty-human-rights.org.uk/media/articles/pdfs/lord-bingham-speech-final.pdf>.

<sup>14</sup> See Lord Bingham's keynote address at Liberty's 75<sup>th</sup> Anniversary conference.

**Q 6: Do you think any UK Bill of Rights should include additional rights and, if so, which? Do you have views on the possible wording of such additional rights as you believe should be included in any Bill of Rights?**

**Q 7: What in your view would be the advantages, disadvantages or challenges of the inclusion of such additional rights?**

17. Any human rights lawyer or campaigner could provide potentially endless examples of other rights that could be included in a new Bill of Rights. As an academic exercise this sort of exploration of potential additional areas of protection is very interesting, but the Commission's mandate is one rooted in an uncomfortable political reality. Even the briefest analysis of recent parliamentary debate around potential new areas of rights protection lays bare the truth: if we open up our legislative protection for fundamental rights and freedoms we will not find ourselves with 'HRA plus', we will find our fundamental rights and freedoms substantially diminished.

18. The unreal quality to an exploration of additional rights protections in the current climate is best illustrated by recent examples. Many of those who seek to extend the scope of our human rights protections use the example of the right to trial by jury as the paradigmatic example of an additional right which reflects British traditions and would attract widespread support. Liberty would be the first to sign up to additional protection for the right to trial by jury if we felt that such an innovation was a realistic possibility. The reality, however, is that the last Government introduced provision which sought to diminish the role of the jury in criminal trials, by creating exceptions to the requirement of trial by jury in a number of areas, including serious fraud trials. Whilst the present Government has reversed that decision, provisions remain on the statute book, notwithstanding the opportunity offered by the parliamentary passage of what is now the *Protection of Freedoms Act 2012*, obviating the right to trial by jury in broadly defined circumstances, such as where there is a danger of jury tampering or an indictment contains multiple charges.<sup>15</sup>

---

<sup>15</sup> Section 44 of the *Criminal Justice Act* allows for a non-jury trial where there is a danger of jury tampering. This provision has been enacted and a number of applications under this section have already been made. At least one application has been successful with the subsequent trial taking place without a jury. This notwithstanding opposition from Liberty and others that the removal of juries on this basis of possible tampering sends an extremely disturbing message to future or existing witnesses about the ability of those working within the criminal justice system to protect them. Similarly section 17 of the *Domestic Violence, Crime and Victims Act 2004* provides for the prosecution to apply for certain counts on an indictment to be heard without a jury if certain conditions are met. These include (a) where the number of counts on the indictment will make a jury trial impractical; (b) where the counts to be tried with

19. Further, the Government's Defamation Bill which recently completed its passage through the House of Commons, contains a clause reversing the presumption in favour of trial by jury in defamation proceedings. We cannot ignore clear evidence of a lack of political will to strengthen or even retain fair trial protections in this and other areas. In the Government's Justice and Security Bill we see an attempt to undermine centuries of civil fair-trial protections, with basic tenets of the rule of law – open justice and equality before the law - facing attack on a quite unprecedented scale. These developments must be taken together with the exclusion of huge areas of our civil law from the scope of civil legal aid, creating real practical bars to justice for some of the most vulnerable people in our society. Against this backdrop the prospects of Parliament voting through thoroughgoing new protections for jury trial or enshrining commitment to judicial due process must be very low indeed. Do we really expect the Government to support measures which would seriously undermine the legislative agenda of the recent past and present?

20. Another area commonly mooted for the extension of rights and freedoms is in terms of rights framed explicitly and specifically for victims of crime. Liberty has successfully used the HRA to challenge the violation of victims' human rights on numerous occasions, for example to secure inquests for victim's families and ensure that those who perpetrate modern day slavery face prosecution. We would be only too pleased to see more specific duties placed on the state when it comes to vulnerable victims of crime. However, recent legislative moves give us little confidence about the prospect of securing additional specific protection. In a recent consultation document, the Government announced its intention to reduce the compensation available to victims of crime in a variety of circumstances, this is in addition to removing legal aid from victims seeking to challenge decisions of the criminal injuries compensation authority. More disturbing still the Justice and Security Bill will mean closed courts and an unfair litigation advantage for Government in civil cases brought to hold the state to account for serious - sometimes life destroying – abuses or mistakes. Recent history does not support the ambitions of those who would seek to see specific victims' rights enshrined in a Bill of Rights.

---

a jury are a sample of what counts will be tried without a jury; and (c) where it is in the interests of justice to do so.

21. Another suggestion is the incorporation of rights which recognise the particular vulnerability of children. Any such addition would make Liberty's work in defending the rights of this vulnerable group easier. In recent years we been vocal in our opposition to the detention of asylum seeking children, opposed ASBOs and other criminal justice measures that have disproportionate punitive impacts on the young, campaigned against the Mosquito (a high-pitched noise devise designed to exclude children – regardless of their behaviour - from public spaces).<sup>16</sup> We have also and supported calls to facilitate the greater engagement of young people in British politics by allowing 16 and 17 year olds to vote. But we see no discernable political inclination to increase legal protections for children in this country. In fact earlier this year we saw the introduction of measures which provide for young offenders to be sentenced to curfews of 12 hours a day for a period of 12 months regardless of the impact this might have on their educational or social development.

22. The reality is that we have no reason to believe the political will exists to maintain the core of central and established civil and political rights protected by the HRA never mind go further. Yet by opening up the HRA and exposing its protections to contemporary political machinations we face a very real risk of diminishing what we already have.

**Q 8: Should any UK Bill of Rights seek to give guidance to our courts on the balance to be struck between qualified and competing Convention rights? If so, in what way?**

23. The HRA already gives guidance about the operation of some of the freedoms it incorporates in prescribed circumstances. Section 12 of the Act, provides guidance on the operation of Article 10, the protection of freedom of expression, in the context of applications to restrain a publication. This section of the HRA clearly looks to the potential conflicts which can arise between the right to respect for personal privacy protected by Article 8 and a free press. Section 12 also draws attention to the compelling freedom of expression issues which arise in cases where a publication relates to documents of a journalistic, artistic or literary nature. Similarly section 13 acknowledges the unique place of the right to freedom of thought, conscience and religion in British society, instructing judges to have particular regard to the demands of that aspect of this country's tradition of liberty.

---

<sup>16</sup> For more information see Liberty's website: <https://www.liberty-human-rights.org.uk/human-rights/discrimination/young-people/the-mosquito/index.php>.

24. Each qualified or limited Convention right carries within it guidance about its practical operation its interaction with other rights or wider social interests. The right to respect for private and family life is explicitly subject to interference in so far as “*is necessary in a democratic society in the interests of 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 protection of the rights and freedoms of others.*”<sup>17</sup> In protecting freedom of thought, conscience and belief, Article 9 still maintains that the freedom to manifest beliefs is subject to the protection of the rights and freedoms of others in addition to wider social objectives. The text of Article 10 makes explicit reference to considerations of reputation, echoing the conflict between freedom of expression and respect for personal privacy, including reputation, which lies at the heart of domestic defamation law.

25. Our legislature could of course provide more specific guidance for the Courts on the delicate balance which falls to be struck under the HRA’s qualified rights, including cases involving conflicts of rights. This is exactly the approach taken in the Defamation Bill, which has recently completed its passage through the House of Commons. The Bill is explicitly designed to redress a balance widely perceived as skewed in favour of reputational concerns at the expense of freedom of expression.<sup>18</sup> The Bill, for example, carves out particularly strong protections for certain sorts of publications such as scientific or academic writing and gives greater instruction around the adjudication of conflicts between respect for reputation and respect for freedom of expression. Similarly the Government has been very clear that recently implemented changes to the Immigration Rules reflect its views about the correct way to strike the Article 8 balance in cases involving family migration. Whilst Liberty opposes the substantive changes made to the Rules we accept the legitimacy of a process firmly rooted in a dialogue between the Courts and Parliament.<sup>19</sup>

26. Liberty firmly believes that a constitutional document expressing a small number of core fundamental freedoms of universal application is not the place to provide detailed prescription about the application of individual rights in specific areas of law or policy. Statements of constitutional import make sense as a framework

---

<sup>17</sup> Article 8 of the European Convention on Human Rights.

<sup>18</sup> See Liberty’s Second Reading Briefing on the Defamation Bill in the House of Commons, available at <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-second-reading-briefing-on-lord-lester-s-defamation-bill.july-2010.pdf>.

<sup>19</sup> See Liberty’s Briefing on the Statement of Changes to the Immigration Rules 2012, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy12/liberty-s-briefing-on-the-statement-of-changes-in-immigration-rules-june-2011.pdf>.

expressing the values and aspirations of a people, not as a detailed, code designed to deal with the complex operation of rights and freedoms within a modern democratic state.

**Q9: Presuming any UK Bill of Rights contained a duty on public authorities similar to that in section 6 of the Human Rights Act 1998, is there a need to amend the definition of ‘public authority’? If so, how?**

27. Liberty does not believe that the definition of ‘public authority’ in section 6 of the HRA requires amendment. Section 6(3)(b) contains a broad definition which determines the scope of the HRA, stating it applies to any person “*whose functions are functions of a public nature*”. As the Act allows for judicial adjudication of alleged breach of the rights contained therein, it is appropriate that judges are able to determine not only the scope of those rights but also to what public service acts they apply. Tightly prescribing a definition of ‘public authority’ would be unhelpful. Over time, the nature of public service delivery and the mode of delivery have changed and will likely continue to change. Attempting to create an exhaustive definition for the current climate would risk excluding future modes service delivery. We believe taking such a risk is unnecessary. It is always open to Government to legislate to correct a judgment which has determined that a particular service does not fall within the definition of ‘public authority’, or provide guidance to public service providers undertaking Government contracts. This was the course the Government chose to take following *YL v Birmingham City Council and Ors*<sup>20</sup>, in which the House of Lords determined that a private care home provider contracted to provide services by the local council was not exercising “functions of a public nature” under the HRA. In an era where many services are being contracted to private companies such clarification is obviously important for coherent and comprehensive human rights protection.

**Question 10: Should there be a role for responsibilities in any UK Bill of Rights? If so, in which of the ways set out above might it be included?**

28. A frequent riposte to the Human Rights Act and the ECHR is that it has robbed individuals in our society of their sense of social and civic responsibilities. As Liberty outlined in our first submission to the Commission,<sup>21</sup> we believe this accusation is illogical and without basis. We do not believe that the HRA is

---

<sup>20</sup> [2007] UKHL 27.

<sup>21</sup> *Ibid*, at para’s 108 to 111.



responsible for undermining the public's sense of what it means to be socially responsible and, consequently, that a UK Bill of Rights is needed to expressly impose responsibilities on individuals. Indeed, the HRA has actually set up a helpful framework to assist the resolution of disputes between different groups asserting different rights. Adopting one of the models proposed in paragraph 68 of the consultation document would respond only to political posturing rather than a civic deficit. Indeed, in the past, blaming social disorder or criminal behaviour on the perceived destruction of individual responsibility by human rights has allowed government to take a lazy and simplified view of arguably nuanced and complex causes. Blaming the HRA as a root cause of the London riots in August 2011, for example,<sup>22</sup> was an easy way to provide a bruised and frightened public with an explanation and knee jerk plan of action, while deflecting attention from flaws in the policing response,<sup>23</sup> the impact of broad policing powers such as stop and search without suspicion and socio-economic problems, such as record youth unemployment.<sup>24</sup>

29. We also believe that responsibilities are already expressly provided for in the text of many of the rights under the HRA. For example, exercising your Article 10 right to freedom of expression "*carries with it duties and responsibilities*"<sup>25</sup>. Similarly Article 8 states that the right to respect for private and family life can be interfered with to prevent disorder and crime, to protect health or morals and to protect the rights and freedoms of others.<sup>26</sup> To extend this type of reference to the other, absolute, rights would be a dangerous path indeed, undermining the content of those important rights and putting us in breach of international obligations. The strength of human rights, which sets them above partisan politics, is that they are universal and attach to us as humans – regardless not only of race, age and gender, but also regardless of behaviour.

30. We also believe that the ethical duties we owe to others are woven into our democratic and social fabric. Introducing positive stand alone responsibilities, and

---

<sup>22</sup> See the speech of the Prime Minister, 15<sup>th</sup> August 2011, available at <http://www.number10.gov.uk/news/pms-speech-on-the-fightback-after-the-riots/>.

<sup>23</sup> As outlined, for example, the report of the HMIC *The Rules of Engagement, A review of the August 2011 disorders* (2011), available at <http://www.hmic.gov.uk/media/a-review-of-the-august-2011-disorders-20111220.pdf>.

<sup>24</sup> As outlined in the final report of the Riots Communities and Victims Panel *After the Riots* (March 2012), available at <http://riotspanel.independent.gov.uk/wp-content/uploads/2012/03/Riots-Panel-Final-Report1.pdf>.

<sup>25</sup> Art 10(2).

<sup>26</sup> Art 8(2).

making rights contingent on good behaviour would be entirely out of place with our traditions and democracy. This was the conclusion of in-depth research carried out on behalf of the Ministry of Justice in relation to the relationship between rights and responsibilities,<sup>27</sup> which found that, in contrast to the ECHR, “*it is more common to find extensive lists of directly enforceable individual duties in constitutions with a strong authoritarian... element (for example, the People’s Republic of China)*”.<sup>28</sup> Changing the content of our rights in this way would only serve to undermine our rights protection and introduce a dangerous and alien concept to British constitutional democracy.

**Question 11: Should the duty on courts to take relevant Strasbourg case law ‘into account’ be maintained or modified? If modified, how and with what aim?**

31. We outlined our views on section 2 of the HRA in our initial submission to the Commission.<sup>29</sup> We believe that section 2 should be maintained and that any tinkering or modification is unnecessary. The meaning of section 2 is unambiguous. It is an incorporation mechanism which requires domestic courts to take account of – and not be bound by – Strasbourg jurisprudence. Any change to the section would be to respond to the popularly perpetuated misconception that the HRA means “*importing the Strasbourg case law wholesale*”<sup>30</sup>. Quite the contrary. There is an increasing number of UK judgments which have declined to follow ECtHR precedent, as well as an increasing number of ECtHR judgments adopting a wide margin of appreciation and allowing decisions of the British Supreme Court to stand. The deliberate and delicate balance adopted by the HRA has ensured adjudication of alleged breaches of human rights by the UK Government to be undertaken by British courts in the first instance, allowing for the development of human rights principles rooted in British common law. It has encouraged dialogue, disagreements and the development of British human rights principles and influenced the jurisprudence of the ECtHR.

**Question 12: Should any UK Bill of Rights seek to change the balance currently set out under the Human Rights Act between the courts and Parliament?**

---

<sup>27</sup> Liora Lazarus, Benjamin Goold, Rajendra Desai and Qudsi Rasheed, University of Oxford, *The relationship between rights and responsibilities*, Ministry of Justice Research Series 18/09, December 2009, available at:

<http://www.justice.gov.uk/publications/docs/research-rights-responsibilities.pdf>

<sup>28</sup> *Ibid.*, at page 24.

<sup>29</sup> *Ibid.*, at para’s 78 to 89.

<sup>30</sup> As asserted by Conservative MP Dominic Raab, as reported in “Britain can ignore Europe on human rights: top judge” *The Times*, 20 October 2011.

32. We provided detailed views on this issue in our initial submission to the Commission.<sup>31</sup> We believe that the HRA is carefully and cautiously drafted to ensure that it preserves our constitutional democracy whereby the powers of the legislature and the judiciary are balanced. Unlike other bills and charters of rights – such as those in the United States, Canada and South Africa - the UK Supreme Court does not have the power to strike down primary legislation. The HRA only permits a declaration that the law in question breaches the applicant’s human rights.<sup>32</sup> It then remains the task of Parliament to legislate to remedy the breach. This mechanism ensures that the elected representatives decide government policy and legislation, and the judiciary keeps an independent check on government to ensure it is complying with its human rights obligations.

33. It is difficult to see how this could be improved in a way which would comply with our constitutional democracy, nor our human rights obligations. A stronger enforcement mechanism such as a strike out procedure would usurp parliamentary sovereignty and could lead to knee jerk legislation being rushed through parliament in response to a court judgment, curtailing and diminishing the scrutiny function of Parliament. A weaker mechanism, such as a declaratory bill of rights, would be insufficient to fulfil the United Kingdom’s obligations under the ECHR, leaving vulnerable members of our community with limited protection against acts of the State. Weaker human rights protections would also serve to lessen the UK’s moral authority as we seek to promote the importance of adherence to human rights principles in fledgling democracies across the world.<sup>33</sup>

**Question 13: To what extent should current constitutional and political circumstances in Northern Ireland, Scotland, Wales and/or the UK as a whole be a factor in deciding whether (i) to maintain existing arrangements on the protection of human rights in the UK, or (ii) to introduce a UK Bill of Rights in some form?**

**Q14: What are your views on the possible models outlined in paragraphs 80-81 above for a UK Bill of Rights?**

---

<sup>31</sup> Ibid, at para’s 61 to 70.

<sup>32</sup> Section 4 HRA.

<sup>33</sup> See Liberty’s first submission to the Commission, at para’s 98 to 102.

**Q15: Do you have any other views on whether, and if so, how any UK Bill of Rights should be formulated to take account of the position in Northern Ireland, Scotland or Wales?**

34. We set out our views on the complications for the devolved nations which would arise should the HRA be repealed in our first submission to the Commission.<sup>34</sup> Liberty does not believe that the HRA could be repealed without significant implications for the devolution settlements in Scotland and Northern Ireland. Even if these legal and constitutional hurdles could be overcome, we believe that in the context of the current political relationship between the nations any adopted model would only inflame the delicate devolution arrangements. Adding layers of rights protection – as proposed in one of the Commission’s models - would also provide an incongruous patchwork of protection across the Kingdom, with potentially stronger protection for human rights in Northern Ireland and Scotland than the framework adopted in England and Wales.

**Rachel Robinson**  
**Sophie Farthing**  
**Isabella Sankey**

---

<sup>34</sup> Ibid, at para’s 91 to 97.