

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's written evidence to the Joint Committee on Human Rights' inquiry into 20 years of the Human Rights Act

September 2018

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.libertyhumanrights.org.uk/policy/>

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Introduction

1. This inquiry asks for evidence on whether the Human Rights Act 1998 (HRA) has been effective and whether rights truly have been ‘brought home’.¹
2. This submission will make the following points:
 - The HRA has advanced the protection of individual rights in the UK significantly, with its impact felt across society.
 - The HRA has achieved this by empowering individuals and businesses to enforce their rights through the courts, by entrenching rights considerations in decision-making, and by ensuring that systemic failings are adequately investigated and remedied.
 - Despite facing persistent criticism, the HRA has proven itself a resilient and dynamic mechanism through which rights are protected and enforced, facilitating a constructive dialogue between domestic courts and the European Court of Human Rights (ECtHR).
 - Concerns about redistributions of power caused by the HRA have not been borne out, with the Act instead striking the appropriate balance between branches of government.
 - Cuts to legal aid in recent years threaten the ability of people in the UK to access an effective remedy under Article 13 of the European Convention on Human Rights (ECHR) using the HRA.
 - The loss of the EU Charter of Fundamental Rights means that the integrity of the HRA is all the more essential to the protection and promotion of human rights up and down the UK.

Success of HRA since 1997/8

Bringing rights home

3. Since coming into force in 2000, the HRA has significantly advanced the protection of individual rights in the UK. Its impact is felt across society, with decisions on topics as diverse as: equality in tenancy for same-sex couples, the obligation by the police to effectively investigate sexual violence allegations, equal housing provision for people with disabilities, and the duty of hospitals to protect vulnerable patients at risk of suicide.² The HRA has not only made life fairer for individuals who bring cases but also for the millions of people who benefit from living in a country where rights are directly enforceable and public authorities have a positive obligation to protect and uphold them.
4. Over the years, Liberty has represented dozens of clients who have directly benefited from the HRA. For example, recently, the Coroner delivered his conclusions in a fresh inquest into the 1995 death of Private Sean Benton at Deepcut barracks. Liberty – who represented

¹ Home Office, ‘Rights Brought Home: The Human Rights Bill’ (24 October 1997)

<https://www.gov.uk/government/publications/the-human-rights-bill>.

² *Ghaidan v Godin-Mendoza* (FC) [2004] UKHL 30; *Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents)* [2018] UKSC 11; *R (Bernard) v Enfield London Borough Council* (2003) UKHRR 4 and *R & Anor v Pennine Care NHS Foundation* [2012] UKSC 2.

Sean's family – was able to secure this fresh inquest because of the HRA. The Coroner found significant abuse and failings at the barracks and concluded that the original investigation into Sean's death was "woefully inadequate".³ Relying on the HRA, bereaved families and friends can access information and justice, helping to identify systemic problems that need to be remedied.

5. The enactment of the HRA has also shifted the political discussion around human rights. Every piece of legislation passed through Parliament must – in accordance with s. 19 of the Act – be accompanied by a statement from the Government as to the Bill's compatibility with Convention rights. Parliamentarians benefit from the reports of the Joint Committee on Human Rights scrutinising legislation. The Government responds to declarations of incompatibility made under s. 4 of the Act by taking remedial action or publicly engaging on controversial cases.
6. Importantly, a significant amount of the UK's progress on human rights has been achieved without any need for people to rely on their right of individual petition under Article 34 ECHR. While thousands of individuals and businesses rely on the HRA in domestic courts each year, the number of cases heard against the UK by the ECtHR in Strasbourg is at an all-time low. And the number of violations found is even lower. Of all the substantive decisions made by the ECtHR in 2017, only five related to the UK. Of those five, a violation was found in just two. Even when averaged out, the UK only loses roughly ten cases annually – a lower figure than comparable states including Germany and France.⁴
7. This shows that the overwhelming majority of human rights disputes in the UK are resolved at home by our judges and that the HRA is for the benefit of everyone in the UK. It is deeply regrettable that this has not always been the human rights narrative presented by senior political figures and parts of the media.⁵ It is unfortunate that after 20 years of successfully protecting and promoting our rights, the HRA has been slow to achieve political and cultural entrenchment in our national conscience. However, the Act itself is not to blame. There has been minimal investment in public education on human rights and the Act.⁶ Certain political actors have weaponised the Act for political gain.⁷ Sectors of the media have peddled myths

³ BBC, 'Pte Sean Benton: Deepcut soldier's death was suicide, coroner rules' (18 July 2018)

<https://www.bbc.co.uk/news/uk-england-44860108>.

⁴ Statistics published by the Council of Europe showing violations of the Convention by Article and by State in the period 1959-2017, https://www.echr.coe.int/Documents/Stats_violation_1959_2017_ENG.pdf.

⁵ See for example, J Tapsfield 'PM vows to rip up human rights laws in the war on terror' (7 June 2017) *The Daily Mail* <http://www.dailymail.co.uk/news/article-4576146/PM-says-MI5-does-face-questions-London-Bridge-killer.html> and A Travis, 'Theresa May criticises human rights convention after Abu Qatada affair' (8 July 2018) *The Guardian* <https://www.theguardian.com/world/2013/jul/08/theresa-may-human-rights-abu-qatada>.

⁶ A 2013 Liberty poll on the HRA found that 92% of people had never seen or received any information from the Government explaining the HRA. See, http://www.comresglobal.com/wp-content/themes/comres/poll/Liberty_Human_Rights_Tracker_Data_Tables_November_2013.pdf at 10. See also, J Collins, 'Why aren't human rights part of the essential curriculum at primary school?' (24 May 2018) *Rights Info* <https://rightsinfo.org/human-rights-education/>.

⁷ BBC, 'Theresa May under fire over deportation cat claim' (4 October 2011) <https://www.bbc.co.uk/news/uk-politics-15160326>.

and outright lies about the HRA and the people it benefits.⁸ Advocates of the HRA have not always spoken with a voice that is sufficiently compelling to counter the anti-rights narrative or loud enough to be heard by those who have sometimes felt that human rights are not about them.

8. To truly bring our Convention rights home it is essential that leadership, public education and time are dedicated to ensuring that rights are properly recognised within the UK's constitutional settlement. This has less to do with the HRA and more to do with the cultural and political narratives around human rights in the UK in general. The Act itself as applied by the courts has proved capable of furthering the values it is designed to protect, from human dignity and respect to democracy and the rule of law.

Dialogue between the courts

9. The HRA not only allows UK courts to make decisions that reflect particular traditions, cultures and laws in the UK, but also establishes a constructive dialogue between the UK courts and the ECtHR – allowing the UK to influence the application of the Convention in Strasbourg and for UK court decisions to be followed. For example, as a direct result of the UK Supreme Court explaining in detail its disagreement with the ECtHR in *R v Horncastle*⁹, the ECtHR reversed its approach in *Al-Khawaja*¹⁰, when the Grand Chamber considered the case in 2011, holding that the UK was not in breach of Article 6. They did so relying on the explanation provided by the Supreme Court on the safeguards in UK procedure around the use of hearsay evidence in criminal trials.
10. Another example is the Grand Chamber judgment in *Animal Defenders International v United Kingdom*¹¹, a case about whether a blanket ban on political advertising was a proportionate restriction on freedom of expression. Upholding the UK ban, the ECtHR made an apparent departure from its own earlier case law in the *VGT* case.¹² In doing so, the Court placed considerable weight on the comprehensive nature of the consultation and evidence gathering process undertaken by Parliament when considering the ban. Much of the evidence relied on by the ECtHR in reaching its conclusion came directly from the House of Lords and High Court judgments in the case. As noted by Professor Jeff King:

*“this case ... represent[s] precisely the merits of UK judges scrutinising the State’s arguments in UK courts, in Convention-rights terms and with due consideration of Strasbourg jurisprudence, before the issue travels to Strasbourg for consideration there”.*¹³

⁸ Rights Info, ‘The 14 Worst Human Rights Myths’ <https://rightsinfo.org/infographics/the-14-worst-human-rights-myths/>.

⁹ *R v Horncastle and others* [2009] UKSC 14 (SC).

¹⁰ [2011] ECHR 2127.

¹¹ [2013] ECHR 362.

¹² *Verein gegen Tierfabrik v. Switzerland*, no. 24699/94 ECHR 2001-VI.

¹³ J King, ‘Deference, Dialogue and Animal Defenders International’ (25 April 2013) *UK Constitutional Law Blog* <https://ukconstitutionallaw.org/2013/04/25/jeff-king-deference-dialogue-and-animal-defenders-international/>.

11. This fruitful institutional dialogue is the direct result of the HRA. It is the result of individuals and businesses relying on their Convention rights in domestic courts and of the domestic courts complying with their duty under section 2 of the Act to “take into account” Strasbourg jurisprudence when determining human rights cases. The Government in its recent ‘Brexit White Paper’ made a clear commitment to the UK’s continued membership of the ECHR.¹⁴ For as long as the UK stays a member of the Convention, the HRA will remain the essential mechanism through which the UK courts can influence Strasbourg jurisprudence.

Article 13 and the right to an effective remedy

12. Article 13 and the right to an effective remedy are essential to the success of the human rights project. As articulated by the ECtHR in *Airey v Ireland*: “The Convention is intended to guarantee not rights that are theoretical and illusory but rights that are practical and effective”.¹⁵ In order for rights to be meaningful, if a state breaches human rights there should be a way to pursue a remedy.
13. In the context of the HRA, it is the primary legislation itself which gives effect to Article 13.¹⁶ The Act is designed to make sure that if people’s rights are violated, they are able to access an effective remedy through the courts. Before the passage of the Act, should an individual have wished to enforce their rights under the Convention, the only option available was to bring a case to Strasbourg, with all of the resources – monetary and temporal – that entails. Contrast with today, where each year thousands of individuals and businesses rely on the HRA in local courts. The greater accessibility of our rights has been one of the great victories of the Act.
14. However, in order for a person to access an effective remedy through the courts, those courts themselves must be accessible. In the context of ongoing cuts to legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the accessibility of the courts and therefore the ability of people to enforce their rights and secure an effective remedy under Article 13 face constant threat. The whittling away of access to justice undermines mechanisms put in place to hold the state to account for human rights violations and simultaneously erodes trust in the framework as a whole. As pointed out by former President of the Supreme Court Lord Neuberger:

*“It verges on the hypocritical for governments to bestow rights on citizens while doing very little to ensure that those rights are enforceable”.*¹⁷

¹⁴ Department for Exiting the European Union, ‘The future relationship between the United Kingdom and the European Union’ (July 2018) <https://www.gov.uk/government/publications/the-future-relationship-between-the-united-kingdom-and-the-european-union> at 52.

¹⁵ (1979) EHRR 305, [24].

¹⁶ HRA 1998, Schedule 1.

¹⁷ Lord Neuberger (speech), ‘Access to Justice’, Welcome address to the Australian Bar Association Biennial Conference (3 July 2017) <https://www.supremecourt.uk/docs/speech-170703.pdf>.

The vital link between the enforceability of rights and their practical worth must be taken seriously and the accessibility of our courts not eroded any further.

Reflecting on concerns raised about the HRA

Perceived shift in power from Parliament to the judiciary

15. Concerns over a shift of power away from Parliament as a result of the HRA have been and continue to be misplaced. The HRA expressly retains Parliamentary sovereignty through both the nature of the powers in sections 3 and 4 and the fact that they were bestowed on the judiciary in an Act of Parliament passed by a significant majority. Further, neither power undercuts the political freedom of Parliament to either legislate to reverse a decision under section 3 or to simply ignore or take no action where there has been a declaration of incompatibility under section 4. It must be remembered that when set within a comparative context, judicial review in the UK is relatively weak. Outside the context of EU law, judges have no power whatsoever to strike down primary legislation, even for the most egregious rights violation.¹⁸
16. There is some truth in claims that – despite section 4 declarations of incompatibility being purely advisory – the Government and Parliament tend to treat them as binding. However to suggest that this is the result of a shift in power from Parliament to the judiciary would be a misrepresentation. In the context of human rights litigation, the judiciary exercise significant deference to the legislature. In fact, research has shown a portrait of the judiciary which on the whole is non-activist.¹⁹ This conclusion is evidenced by the fact that in the period between the HRA coming into force and 2015, UK courts issued and upheld only 20 declarations of incompatibility.²⁰
17. The Supreme Court judgment in *R (Nicklinson) v Ministry of Justice* is a helpful example on this point.²¹ Conscious of the contentions around the issue of assisted dying and the fact that Parliament was at that time set to consider the matter, the Supreme Court held that it would not be appropriate for them to make a declaration of incompatibility. This was the case despite clear concerns from the majority of the judges over the Article 8 compatibility of the current law. The generally passive stance adopted by lawmakers with respect to human rights judgments is therefore better understood as:

*“a view of collaboration and divided responsibilities, with courts adjudicating cases and setting out findings on narrow issues, while the Government and Parliament work from these conclusions to refashion policy accordingly”.*²²

¹⁸ Cf the US Supreme Court or the German Bundesgerichtshof.

¹⁹ J King, 'Parliament's Role Following Declarations of Incompatibility under the HRA', in eds. M Hunt, HJ Cooper and P Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015), at 187.

²⁰ *Ibid* at 165.

²¹ [2014] UKSC 38.

²² *Ibid*.

In short, the HRA creates a balanced and constitutionally coherent division of labour based on a model in which each branch of government carries out the role best suited to its expertise.

Balance of power – Parliament and the Executive

18. The HRA successfully balances parliamentary sovereignty with executive power. The power bestowed on ministers under section 10 of the Act – to make a remedial order – is used very rarely. Up to 2015, there had only been three remedial orders under the HRA.²³ In fact, research has shown that there is an “unmistakeable preference” by Government to act through the ordinary legislative procedure when remedying human rights deficiencies in legislation.²⁴
19. It is a concern however that over the lifetime of the HRA we have seen a proliferation of delegated powers and secondary legislation. Critics of this development are easy to find.²⁵ However any shift of power from Parliament to the Executive is not as a consequence of the HRA. The timelines may be similar but that is where the connection ends.
20. In the context of the UK’s withdrawal from the European Union (EU), Liberty has been vocal about our concerns around the use of delegated powers to amend ‘retained’ EU law.²⁶ Primary domestic legislation which protects fundamental rights – such as the Equality Act 2010 and the Modern Slavery Act 2015 – is threatened by such expansive executive powers. It is therefore valuable to consider potential threats posed to human rights by secondary legislation. However, these are threats to our human rights framework, not threats caused by it.

Future of the HRA

21. The ECHR has stood the test of time, adapting and developing as the societies of its members’ progress. The HRA, the domestic vehicle for bringing our Convention rights home, has proven itself a balanced and robust mechanism for protecting and enforcing human rights in the United Kingdom.
22. Nevertheless for almost a decade the HRA has not been the only rights and equality framework through which people in the UK have been able to enforce their rights and secure an effective remedy. The EU Charter of Fundamental Rights (the Charter) has come to

²³ Ibid. at 168.

²⁴ Ibid.

²⁵ For example see, the Rt. Hon Lord Judge, ‘Ceding Power to the Executive; the Resurrection of Henry VIII’ (speech) (12 April 2016), King’s College London.

²⁶ Liberty’s submission to the Joint Committee on Human Rights inquiry into the Human Rights Implications of the EU (Withdrawal) Bill, (November 2017) <https://www.libertyhumanrights.org.uk/sites/default/files/Liberty%20-%20JCHR%20Repeal%20Bill%20submission.pdf>.

occupy an important space within our rights framework, particularly on issues around employment, non-discrimination and data rights. The express failure of Parliament to retain the Charter in the EU (Withdrawal) Act 2018 is therefore a significant loss for human rights protections in the UK. Liberty has no doubt that we will be worse off for the loss of the Charter.

23. However the HRA is not the appropriate forum to try and restore the rights we have lost. Liberty firmly believes that the integrity of the HRA should be protected and that no changes – whether in the form of amendments to the Act itself or the creation of a new composite ‘Bill of Rights’ – should be pursued at this point in time. In both their 2010 and 2015 manifestos, the Conservative Party pledged to ‘scrap’ the HRA.²⁷ The views of the current Prime Minister on the ECHR and the HRA are well known.²⁸ It is reassuring that this Government has committed to membership of the ECHR, however it is not beyond reason that this could change. The HRA has facilitated great progress for human rights in this country over the past 20 years and there is no reason why it should not continue to do so. Any change to the HRA is simply not worth the gamble.

Conclusion

24. Over the past two decades, the HRA has had great success in bringing Convention rights home to the UK. Individuals and businesses are able to enforce their rights in local courts in front of judges who understand the UK-specific context of their cases. The Act has entrenched our rights in public decision-making and ensures that systemic failings are adequately investigated so that they do not happen again. But the work of the HRA is far from done. Human rights will only truly have come home once politicians stop using the Act as a political pawn, until parts of the media stop pushing stories designed to provoke fear at the expense of truth, and until rights education receives the public investment and support it deserves.

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²⁷ Conservative Party, ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Human Rights Laws’ (2015).

²⁸ A Bennet, ‘How Theresa May will take Britain out of the ECHR, eventually’ (27 April 2017) *The Telegraph* <https://www.telegraph.co.uk/news/2017/04/27/theresa-may-will-take-britain-echr-eventually/>.