

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS



JUSTICE

**Liberty and JUSTICE submission to the
United Nations Human Rights Council's
Universal Periodic Review of the United
Kingdom**

November 2007

About JUSTICE

JUSTICE is an all-party, human rights and law reform organisation founded in 1957. Its purpose is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists.

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.

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Introduction

1. Liberty and Justice welcome the opportunity to comment on the Universal Periodic Review of the United Kingdom's record on human rights compliance. Submissions are requested not to exceed five pages. As a consequence this submission will provide a general overview. However both organisations have published detailed analysis of the specific issues addressed in this submission which can be provided on request.

2. Liberty and Justice's principal concerns arise from the measures taken by the British Government in response to heightened security risks. We would emphasise that both organisations fully support appropriate and proportionate anti terrorism measures. These tend to be targeted measures taken to address specific gaps in the existing legislative framework. Examples in the Terrorism Act 2006 includes new offences of attendance at terrorist training camps overseas, offences involving the possession of radioactive materials and the offence of preparation of terrorist acts. Unfortunately much anti terrorism legislation has gone further. Examples include the extension of pre charge detention limits to 28 days¹, the use of control orders, the creation of new speech offences such as encouragement of terrorism and the extension of grounds for proscribing organisations to include those that 'glorify' terrorism.

3. As well as security a significant proportion of the Government's legislative programme in recent years has related to a perceived need to 'rebalance' the criminal justice system and combat 'anti social behaviour'. Coupled with this has been a trend to blur the boundaries of the criminal law through the use of civil orders the breach of which amounts to a criminal offence. Since first introduced with the Anti Social Behaviour Order (ASBO) in the Crime and Disorder Act 1998 this model has been frequently used to address issues from serious crime (the Serious Crime Prevention Order) to domestic violence (the Violent Offender Order). In the limited space available we will offer a brief oversight of some of the issues raised

4. Before doing this we would draw attention to more general concern, namely the repeated assaults on the human rights framework itself as embodied in the Human Rights Act 1998 (HRA). The HRA incorporated the European Convention on Human Rights (ECHR) into domestic law. These attacks have tended to focus on the absolute prohibition on torture contained in Article 3 HRA preventing, for example, deportation of foreign nationals to places where they are likely to face torture or death. Anti HRA sentiments have been picked up in sections of the media which openly campaign for the HRA to be abolished. This has been accompanied by a tendency in the press to blame the HRA (usually inaccurately) for incidents such as a murder committed by a prisoner released early on parole, to the failure of police to publish photographs of escaped prisoners. Political reaction to assaults on the HRA have

¹ Likely to be further extended in a new terrorism bill to be published in late 2007

varied. The Government's response under Tony Blair implied that the government were considering amending the HRA. The new administration has been more measured, consulting on a possible bill of rights and responsibilities. They have also offered reassurance that any such bill would only expand upon and not restrict levels of rights protections available. Meanwhile the main opposition Conservative party is also undertaking a review of the HRA

Anti terrorism policy

5. Anti terrorism policy has had significant impact upon the UK human rights framework. Of particular concern is the manner in which the use of criminal law to bring alleged terrorists to trial has been undermined by a reliance on quasi-judicial processes. Departures from the normal standards of criminal law create a culture of exceptionalism that heightens both real and perceived injustice in the eyes of millions and the "wartime" heroics of the dangerous minority. The Special Immigration Appeal Commission (SIAC) was introduced in 1997 to provide judicial oversight for asylum and immigration appeals. SIAC differs from normal criminal court processes in its use of Special Advocates. These are security cleared lawyers who do not act for terrorism suspects but instead are used to represent their interests. The Special Advocate will often do this in closed hearings where the 'client' is not present. After the September 2001 bombings the government rushed through legislation allowing for the potentially indefinite internment of foreign nationals. SIAC was delegated as the court overseeing detention.

6. The fundamental problem with the use of SIAC in this way is that people who are accused of involvement in terrorist activity are not allowed to know what it is they have done, their lawyers are not told what they were supposed to have done and the Special Advocates who do know are not allowed to tell them. This Kafkaesque system meant that it was impossible for a detainee to rebut evidence against him as (s)he did not know what it was. This cornerstone of the Government's anti terrorism policy was thrown into disarray in December 2004 when the House of Lords Appellate Committee determined by a majority of 8 to 1 that these detentions were discriminatory, disproportionate and breached the right to liberty.

7. The Government response to the House of Lords decision was to introduce the 'control order' regime in the Prevention of Terrorism Act 2005. This made detention of British citizens possible as well as non-nationals and replaced detention in high security prisons such as Belmarsh with other restrictions such as house detention, curfew and reporting to the police. However, it retained a virtually identical oversight process through the use of special advocates. On 31 October 2007 the House of Lords Appellate Committee stopped short of determining control orders incompatible with human rights standards. However they did rule

that restrictions in individual cases breached the right to liberty (Article 5 HRA) while aspects of the special advocate regime were in breach of the right to a fair trial (Article 6 HRA) .

8. Concerns over detention have also arisen in the context of pre charge detention. In recent years the detention time permitted has increased from 7 days, to 14 days to the current period of 28 days². The Government has indicated its intention to further increase this period, possibly to 56 days. This is despite a recent admission by the Home Secretary Jacqui Smith that there is no evidence that a period in excess of 28 days is needed. Liberty and Justice are concerned that any attempt to further extend what is already the longest period of pre charge detention in a comparative democracy would be an unacceptable assault on longstanding protections against excessive detention without due cause. We are also concerned it will prove to be counterproductive in that the divisive message sent out to communities will far outweigh any possible benefit that might arise from possible application to, at the most, a handful of cases.

9. Attacks on free speech and expression have also been characteristic of government Anti terrorism policy. The offence of encouragement of terrorism contained in the Terrorism Act 2006 has criminalised speech that 'glorifies' terrorism whether or not the person speaking intends for anyone else to commit a crime or act of terrorism. The 2006 Act also broadened the grounds for banning or 'proscribing' organisations first introduced in Terrorism Act 2000. The 2000 Act allowed violent terrorist organisations to be outlawed. In 2006 the definition was extended to cover non violent political groups.

Criminal justice, policing and anti social behaviour

10. Recent years have seen constant legislation in the areas of criminal justice, police powers and anti social behaviour legislation. The fact that 'anti social behaviour' (which is not a concept defined in criminal law) is frequently categorised with crime and police powers is a consequence of the government's approach to the criminal law generally. Historically criminal and civil processes and sanctions have been separate branches of the British legal system. The main rationale behind this being that the a crime is an offence against society as a whole carrying far more practical and reputational censure than a civil wrong. However, the passing of the Crime and Disorder Act 1998 signified a shift in approach from the (then) new Government. The introduction of the ASBO, a civil order breach of which was a crime, was the first instance of this blurring of traditional distinctions. Since then legislative developments have also seen a shift in the role of the police. Police powers have been extended to allow criminal sanction and the ability to impose restrictions to be added to the exercise of policing

² Terrorism Act 2006

powers. Examples include the use of dispersal powers where a failure to comply is a crime³ and the imposition of punitive conditions on conditional cautions⁴.

11. The blurring of boundaries between criminal and civil and between the role of the police and the courts have, in Liberty and Justice's view, undermined the integrity of the criminal justice system. It is now possible to end up with a criminal conviction without having acted in a way that is in breach of the criminal law. A person who enters an area from which they have been excluded by an ASBO, or who returns to an area before the term of dispersal imposed by a police officer has ended, will commit a crime even though their actions are not by themselves criminal. The use of ASBOs in particular has raised further concerns. They are often extremely broadly drafted and consequently will frequently be breached. A study on ASBOs carried out by the Youth Justice Board published in November 2006 found that *'nearly half of the young people whose case files were reviewed, and the vast majority of young people who were the subjects of in-depth interviews, had been returned to court for failure to comply with their order. The majority had 'breached' their ASBO on more than one occasion.'*⁵ Furthermore, the efficacy of ASBOs is increasingly being questioned as evidence emerges that they are increasingly being seen as a 'badge of honour'.

12. There have been 37 Acts of parliament passed since 1997 containing the words 'crime' 'justice' or 'police'⁶. As a consequence an estimated 3000 new criminal offences have been created. This constant lawmaking occurred in a political environment where the government consistently spoke of the need to 'rebalance' the criminal justice system towards the victim and away from the defendant. The unfortunate implication of this rebalancing exercise was that one had to either be on the 'side' of the criminal or of the victim. Liberty and Justice frequently expressed concerns that much of the legislation passed was unnecessary. The policy driver for many new laws seemed to be a need to show that 'something was being done' whether or not there was a genuine gap in the law that needed addressing. As well as creating a myriad of new offences this approach can prove problematic for enforcement agencies who have to devote time, energy and resource to ensuring that they are up to date with new laws powers and procedures.

13. This concept of legislation as a tool of political message rather than necessity is substantiated by the fact that approximately one third of the Criminal Justice Act 2003, heralded as the flagship of criminal justice reform, remains un-enacted. Unfortunately, law once passed tends to remain in statute for a long period. The new administration has

³ Created in the Anti Social Behaviour Act 2003 and the Violent Crime Reduction Act 2005

⁴ Introduced in the Police and Justice Act 2006 with extension planned in the Criminal Justice and Immigration Bill currently before Parliament.

⁵ <http://www.yjb.gov.uk/publications/Resources/Downloads/ASBO%20Summary.pdf>

⁶ Soon to be added to by a further bill currently before Parliament, the 'Criminal Justice and Immigration Bill'

indicated an intention to seek consensus on policy where possible. Even if this proves to be true, the last ten years have produced a vast quantity of unnecessary law.

Privacy and Surveillance

14. In November 2006 the Information Commissioner Richard Thomas said *“Two years ago I warned that we were in danger of sleepwalking into a surveillance society. Today I fear that we are in fact waking up to a surveillance society that is already all around us.”* His words came at the time *‘A Report on the Surveillance Society’*⁷ was published. Liberty and Justice agree with the Information Commissioner’s assessment. We also accept that surveillance is an unavoidable, and often justified, aspect of life in the early 21st century. However, the extent to which every person in the UK is subjected to surveillance, has increased disproportionately to any justifying social need or benefit.

15. In the late 90s and early years of this decade, public interest in privacy was limited. Acceptance of mass surveillance through the use of CCTV for example, was a UK phenomenon not experienced in other jurisdictions. Arguably this was a consequence of the huge societal impact of CCTV in helping secure the convictions of the killers of the toddler Jamie Bulger in the mid 1990s. Coupled with this was the heightened awareness of security issues following the attacks of September 11 2001. The essence of the public mood was those who had ‘nothing to hide’ had ‘nothing to fear’, that it was necessary to sacrifice individual privacy for greater security, it was a price worth paying.

16. In recent years this attitude seems to have shifted. This can be attributed to a variety of reasons. Increasing public awareness that it is over-simplistic to conflate privacy and criminality has meant people are more conscious of privacy intrusions. The Government’s flagship ID card programme has been frequently criticised and Ministers have publicly admitted that ID cards would have done nothing to prevent the July 7 2005 London bombings. Concerns have also been growing over the massive expansion of the National DNA Database. Samples of DNA can be permanently retained from anyone arrested for a recordable offence⁸ even if they are subsequently released without charge. As a consequence the UK’s database is proportionately five times the size of any other country.

17. Public attitudes might be slowly shifting. However, data retention and dissemination in the UK is still increasing apace. There has also been a change in the way some crime detection is initiated, supported through legislative change allowing the profiling and matching of otherwise innocuous data sets to indicate potential criminality. In order to provide a

⁷http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/surveillance_society_full_report_2006.pdf

⁸ Generally those which carry a custodial sentence but also including offences such as begging.

counterbalance to these trends Liberty and Justice believe it is necessary to bolster privacy protection. This would include providing stronger statutory protection covering data protection and the use of CCTV, increasing the powers and resources of the Information Commissioner's Office and introducing greater transparency and accountability to privacy invasive practices. This is not intended to increase levels of privacy protection to new levels, but to ensure the existing legal framework is suited to the technologies and capabilities of 2007.

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