



HOUSE OF LORDS

# Library Note

## **Human Rights and Civil Liberties in the United Kingdom 2 July 2015**

This Library Note draws on recent political developments to provide a concise background to ongoing discussions about human rights and civil liberties in the UK. It has been written to support the debate in the House of Lords on this subject on 2 July 2015. The scope of the discussion can be very widely drawn and so this Library Note focuses on the Government's plans for the repeal of the Human Rights Act 1998, and its subsequent replacement with a new British Bill of Rights, alongside issues raised by other legislative proposals such as the Investigatory Powers Bill. Other recently passed Acts of Parliament are also briefly discussed, including the Protection of Freedoms Act 2012 and the Modern Slavery Act 2015.

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26 June 2015  
LLN 2015/016

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## 1. Introduction

The scope of the discussion on human rights and civil liberties in the UK can be very widely drawn. The UK has a strong history in the development of international standards on both of these issues, having been part of the drafting process for the Universal Declaration of Human Rights (UDHR) and for the European Convention on Human Rights (ECHR).

The Note looks at human rights and civil liberties in the UK, focusing on recent political developments in these areas. It therefore provides context for the public and political discourse in the UK regarding the reconciling of the legislative agenda with the need to uphold certain conventions and principles of human rights, alongside the concerns of crime prevention and national security.

## 2. Universal Declaration of Human Rights and the European Convention on Human Rights

The UDHR was the first international expression of universal standards on human rights. It was created in order to provide a framework through which the aims of the United Nations (UN) Charter could be realised and protected. After a drafting process which began at the first session of the UN General Assembly in 1946, the UDHR was adopted by the UN General Assembly on 10 December 1948—General Assembly resolution 217 A (III).<sup>1</sup> The UDHR consists of 30 articles that outline basic rights and freedoms to which all people are entitled. Charles Dukes—later Lord Dukeston, a Labour Party Peer—represented the United Kingdom as one of the 9 members of the Drafting Committee.<sup>2</sup>

The Convention for the Protection of Human Rights and Fundamental Freedoms, which is better known as the European Convention on Human Rights, was opened for signature in Rome, on 4 November 1950. It came into force in 1953. The Convention was the first international instrument designed to bring into effect certain of the rights described in the UDHR and make them binding to the signatories through the European Court of Human Rights. The Convention has been subsequently amended with the addition of further rights.<sup>3</sup> Sir David Maxwell-Fyfe (Conservative MP and later Lord Chancellor, Viscount Kilmuir) was chair of the European Council's Committee on Legal and Administrative Questions on the Establishment of a Collective Guarantee of Essential Freedoms and Fundamental Rights,<sup>4</sup> and the ECHR was “drafted largely under [his] supervision”.<sup>5</sup> Additionally, the UK was the first country to ratify the Convention in 1951; and Lord McNair, a British legal scholar, became the first President of the European Court of Human Rights in 1959.<sup>6</sup>

Under the Human Rights Act 1998, the rights enshrined in the ECHR became directly enforceable in the domestic courts for the first time. The Act requires that UK courts and tribunals take account of judgments of the European Court of Human Rights where they are relevant, and that legislation must be read and given effect in a way that is compatible with the

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<sup>1</sup> UN, ‘[UDHR—History of the Document](#)’, accessed 19 June 2015.

<sup>2</sup> UN, ‘[Drafting the Universal Declaration of Human Rights](#)’, accessed 19 June 2015.

<sup>3</sup> European Court of Human Rights, ‘[European Convention on Human Rights](#)’, accessed 19 June 2015.

<sup>4</sup> Consultative Assembly of the Council of Europe, *Measures for the Fulfilment of the Declared Aim of the Council of Europe, in Accordance with Article 1 of the Statute in Regard to the Safeguarding and further Realisation of Human Rights and Fundamental Freedoms*, 5 September 1949.

<sup>5</sup> UCL, *Human Rights and British Values: The Role of the European Convention on Human Rights in the UK Today*, December 2013.

<sup>6</sup> *ibid.*

Convention rights, so far as it is possible to do so. If a higher court in the UK is satisfied that a provision of primary legislation is incompatible with a Convention right, the Act empowers the court to make a declaration of incompatibility, although this does not affect the continuing operation or enforcement of that provision; Parliament is not obligated to amend the law.<sup>7</sup> The Act makes it unlawful for a public authority (including courts and tribunals, but excluding both Houses of Parliament) to act in a way that is incompatible with a Convention right. However, it should be noted that “courts can strike down incompatible secondary legislation”.<sup>8</sup>

Within its articles, the ECHR recognises the conflict between human rights, personal liberty and national security. For example, Article 6, ‘Right to a Fair Trial’, states that:

Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society [...]<sup>9</sup>

And, Article 8, ‘Right to Respect for Private and Family Life’, similarly states that:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing 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>10</sup>

Writing in 1997, Steven Greer, Reader in Law at the University of Bristol, argued that:

Some of the most significant cases in which the national security defence has been pleaded have involved infringements of the right to respect for private and family life, home and correspondence occasioned by secret surveillance. The Strasbourg [where the European Court of Human Rights sits] organs accept that secret surveillance constitutes an interference with Article 8. But they have also acknowledged that such practices can be justified provided they are “strictly necessary for safe-guarding the democratic institutions”. In 1978 the Court observed in *Klass* that two then comparatively recent developments, technical advances in espionage and the development of European terrorism, had made secret surveillance particularly necessary. Therefore, in order for any given system, or specific instance, of secret surveillance to be judged compatible with the Convention the Strasbourg organs must be convinced that it is subject to satisfactory safeguards against arbitrary abuse.<sup>11</sup>

However, it should be noted that some rights are absolute, such as Article 3, ‘Prohibition of torture’. Such rights cannot be taken away or otherwise modified by the State.<sup>12</sup>

<sup>7</sup> Ministry of Justice, [Making Sense of Human Rights: An Introduction](#), October 2006. p 13.

<sup>8</sup> *ibid*, p 12.

<sup>9</sup> European Convention on Human Rights, [European Convention on Human Rights](#), Article 6, p 8.

<sup>10</sup> *ibid*, Article 8, p 10.

<sup>11</sup> Steven Greer, Council of Europe Publishing, [Human Rights Files No. 15: The Exceptions to Articles 8 to 11 of the European Convention of Human Rights](#), 1997, p 19.

<sup>12</sup> Ministry of Justice, [Making Sense of Human Rights: An Introduction](#), October 2006.

### 3. Recent Political Developments in the UK

Much of the recent debate on human rights and civil liberties in the UK has arguably been informed by the unauthorised release of sensitive data such as the release of US diplomatic cables by Wikileaks in November 2010 and the use of communications data by the security services following the leaking of classified information by the former CIA contractor Edward Snowden in June 2013.<sup>13</sup> The previous Government stated that:

[...] Edward Snowden's actions have damaged the national security of the UK. Since the theft of the National Security Agency and the Government Communications Headquarters documents, and since the allegations about secret capabilities contained in those documents were made public, this country is at greater risk.<sup>14</sup>

The murder of Fusilier Lee Rigby near Woolwich Barracks in May 2013 and more recently, the attacks on the offices of the satirical magazine, *Charlie Hebdo*, in Paris in January 2015, have also focussed political and public attention on the issue of access to communications data in the prevention of terrorism. In an oral statement to the House of Commons during the previous Parliament, Theresa May, the Home Secretary, stated that:

[...] the police and the security agencies must have the capabilities and powers they need to do their job, and following the attacks in Paris the Prime Minister has reiterated that commitment. Unfortunately, when it comes to communications data and the intercept of communications, there is no cross-party consensus and therefore no Parliamentary majority to pass the legislation to give the police and security services the capabilities they need. Let me be absolutely clear: every day that passes without the proposals in the draft Communications Data Bill, the capabilities of the people who keep us safe diminish; and as those capabilities diminish, more people find themselves in danger and—yes—crimes will go unpunished and innocent lives will be put at risk.<sup>15</sup>

The draft Communications Data Bill is discussed in Section 3.3 below.

#### 3.1 Data Retention and Investigatory Powers Act 2014 and the Counter-Terrorism and Security Act 2015

The EU Data Retention Directive (2006/24/EC) set out rules regarding “the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks”.<sup>16</sup> This was implemented in UK law under the Data Retention (EC Directive) Regulations 2009. On 8 April 2014, the European Courts of Justice (ECJ) passed judgment on the joined cases C-293/12 *Digital Rights Ireland* [2014] and C-594/12 *Seitlinger* [2014], which declared the Data Retention Directive (2006/24/EC) invalid.<sup>17</sup> The ECJ held that the retention of data in order to allow access by the competent national authorities constitutes processing of data and therefore affects two basic rights of the EU's Charter of Fundamental Rights: (a) the right to private life guaranteed by

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<sup>13</sup> *Guardian*, ‘[Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations](#)’, 11 June 2013.

<sup>14</sup> House of Commons, Written Question: Espionage: Disclosure of Information, 15 June 2015, [C2542](#).

<sup>15</sup> HC *Hansard*, 14 January 2015, [cols 870–1](#).

<sup>16</sup> [Directive 2006/24/EC of the European Parliament and of the Council](#), 15 March 2006.

<sup>17</sup> InfoCuria—Case-law of the Court of Justice, ‘[Judgment of the Court \(Grand Chamber\) of 8 April 2014, Joined Cases C-293/12 and C-594/12](#)’, 8 April 2014.

article 7, and (b) the protection of personal data guaranteed by article 8.<sup>18</sup> The EU's Charter of Fundamental Rights brings together in a single document the fundamental rights protected within the EU, and is enforced through the Court of Justice of the EU.<sup>19</sup>

The Data Retention and Investigatory Powers Bill was expedited legislation in the last session (2014–15), passed in order to replace the 2009 Regulations. Amongst other provisions, the resulting Act also clarified the nature and extent of obligations that can be imposed on telecommunications service providers based outside the United Kingdom under Part I of the Regulation of Investigatory Powers Act 2000.<sup>20</sup>

The Data Retention and Investigatory Powers Act (DRIPA) 2014 has attracted criticism from civil liberties groups. For example, Liberty argue that:

The Data Retention and Investigatory Powers Act 2014 allows the Home Secretary to order communications companies to retain all communications data for 12 months—no link with the prevention or detection of serious crime is required. It catches the communications of everyone in the UK including the emails, calls, texts and web activity of MPs, journalists, lawyers, doctors and other communications that may be confidential or privileged.

Data retained under DRIPA is then subject to an extremely lax access regime, allowing it to be acquired by hundreds of public authorities who can sign off on their own access for a broad range of reasons that have nothing to do with the investigation of serious crime.<sup>21</sup>

On 4 and 5 of June 2015, a case was brought to the High Court by Liberty, challenging the Act on behalf of Tom Watson (Labour MP for West Bromwich East) and David Davis (Conservative MP for Haltemprice and Howden). The premise of the case is Liberty's assertion that the Data Retention and Investigatory Powers Act 2014 is incompatible with the Human Rights Act, in particular Article 8 of the European Convention on Human Rights, the right to respect for private and family life, as well as Articles 7 and 8 of the EU Charter of Fundamental Rights—respect for private and family life, and the protection of personal data.<sup>22</sup>

The BBC has reported that “the verdict is not expected for some months”.<sup>23</sup>

During the passage of the Data Retention and Investigatory Powers Act 2014 through Parliament, the then Government made a commitment:

[...] to provide further assurance to the public about the current counter-terrorism arrangements, including ensuring that legislation and policies have due regard for civil liberty and privacy concerns in the face of the threat to the UK.<sup>24</sup>

<sup>18</sup> For further details of the judgment and for a full explanation of the ECJ's reasoning see the Law Library of Congress, [European Union: ECJ Invalidates Data Retention Directive](#), June 2014.

<sup>19</sup> European Commission, [EU Charter of Fundamental Rights](#), accessed 26 June 2015.

<sup>20</sup> [Explanatory Notes](#) to the Data Retention and Investigatory Powers Act 2014.

<sup>21</sup> Liberty, [High Court to Hear Liberty's Legal Challenge to Government's "Emergency" Surveillance Law](#), 3 June 2015.

<sup>22</sup> *ibid.*

<sup>23</sup> BBC News, [Emergency Surveillance Law Faces Legal Challenge by MPs](#), 4 June 2015.

<sup>24</sup> Home Office, [Consultation on Establishing a UK Privacy and Civil Liberties Board](#), December 2014, p 3.



As a result, Clause 36 of the Counter-Terrorism and Security Bill, introduced later in the 2014–15 session, made provision for the establishment of a body called the Privacy and Civil Liberties Board, through the laying of regulations. The Coalition Government ran a consultation on the formation of the Board between 17 December 2014 and 30 January 2015.<sup>25</sup> The Counter-Terrorism and Security Bill received Royal Assent on 12 February 2015, after the consultation closed.<sup>26</sup> The consultation document explained that the Privacy and Civil Liberties Board will seek to:

[...] support the role of the Independent Reviewer of Terrorism Legislation, by providing him with extra capability to carry out his role. It will offer a breadth of experience and be able to provide assistance, advice and undertake particular duties on behalf of the Independent Reviewer to support him in reviewing UK counter-terrorism legislation. It will further assist him in delivering a number of core objectives which include providing evidence to Parliamentary committees, and carrying out particular inquiries into the impact of certain issues or legislation relating to the prevention of terrorism. The Independent Reviewer will chair the Board.<sup>27</sup>

The Independent Reviewer of Terrorism Legislation has expressed concern regarding the naming of the new board:

It is not clear why privacy is singled out: other important civil liberties (or as they are often known, human rights) are potentially infringed by counter-terrorism law including the right to liberty, the right to a fair trial and the freedom of expression.

I have suggested that “*Counter-Terrorism Oversight Panel*” (or “*Independent Counter-Terrorism Oversight Panel*”—(ICTOP)) would be more appropriate.<sup>28</sup>

At the time of writing the Home Office are still analysing the feedback to the consultation.<sup>29</sup>

In addition to providing for the establishment of a Privacy and Civil Liberties Board, the Counter-Terrorism and Security Act 2015 also provided—amongst other things—for

- The strengthening of powers to place temporary travel restrictions on terror suspects;
- The enhancement of Terrorism Prevention and Investigation Measures;
- The extension of the retention of communications data to include data in who has sent a particular communication or has accessed a particular internet communications service.<sup>30</sup>

The issue of human rights and civil liberties were raised during the passage of the legislation. Lord Paddick (Liberal Democrat) argued that:

This country has a liberal tradition that citizens should be allowed to do what they will, provided it does not harm others, free from interference from the state. This freedom

<sup>25</sup> Home Office, ‘[Privacy and Civil Liberties Board](#)’, accessed 23 June 2015.

<sup>26</sup> Parliament.uk, [Bills Before Parliament: Counter-Terrorism and Security Act 2015](#), accessed 25 June 2015.

<sup>27</sup> Home Office, [Consultation on Establishing a UK Privacy and Civil Liberties Board](#), December 2014, p 3.

<sup>28</sup> Independent Reviewer of Terrorism Legislation, ‘[Independent Review and the PCLB](#)’, 31 January 2015.

<sup>29</sup> Home Office, ‘[Privacy and Civil Liberties Board](#)’, accessed 23 June 2015.

<sup>30</sup> [Explanatory Notes](#) to the Counter-Terrorism and Security Act 2015.

is anathema to the Islamist extremists who carry out terrorist attacks against the West. They want a society where every aspect of people's lives is controlled. If we curtail people's liberties, we are taking society in exactly the direction the terrorists want us to go.

Of course the police and security services will always ask for more draconian powers in order to carry out surveillance of those suspected of criminality. The Liberal Democrats have been criticised for scuppering the Communications Data Bill—the so-called snoopers' charter—but we must always seek to find the right balance between security and civil liberties.<sup>31</sup>

In his maiden speech, Lord Evans of Weardale (Crossbench), former Director General of MI5, argued that an increase in security powers does not necessarily lead to a decrease in liberty:

It is sometimes suggested that there is a zero-sum game between security on the one hand, and civil liberties and human rights on the other—that this is some kind of see-saw and that if one end goes up the other will inevitably go down. That seems to me to be fundamentally mistaken. I believe that a country that has a strong basis of civil liberties and human rights is likely then to be able to draw on that as a form of resilience in the face of extremism and violence; in that sense our civil liberties and human rights are a very important moral component in the struggle against extremism. Conversely, inadequate security will breed vulnerability and fear, and that in turn will tend to limit people's ability to contribute to civil society, will provoke vigilantism and will diminish people's ability to exercise the very civil liberties and human rights that we wish to sustain. It is true to state that, when rightly created, appropriate security and civil liberties and human rights are mutually supportive.<sup>32</sup>

Opening the second reading of the Counter-Terrorism and Security Bill, the Parliamentary Under-Secretary of State for the Home Office, Lord Bates (Conservative), described the international context in which the legislation was being passed and spoke to the threat of Islamic State saying that:

[...] the emergence of ISIL and its territorial gains in Syria and Iraq present a clear and present threat to our national security. Noble Lords will be aware that nearly 600 people from the UK who are of interest to the security services are thought to have travelled to the region since the start of the conflict. It is estimated that almost half of them have since returned to the UK. On 29 August 2014, the independent Joint Terrorism Analysis Centre raised the terrorism threat level from substantial to severe, meaning that an attack is highly likely.<sup>33</sup>

In his closing statement Lord Bates also made reference to the need to balance civil liberties with security, saying that:

The first duty of any Government is to ensure that their citizens are safe. That means not only the wider elements of how we talk about and tackle the culture that is giving

<sup>31</sup> HL *Hansard*, 13 January 2015, [col 682](#).

<sup>32</sup> *ibid*, [col 691](#).

<sup>33</sup> HL *Hansard*, 13 January 2015, [col 661](#).

rise to this problem but also effective policing [...] I agree with noble Lords that we must protect our civil liberties alongside our rights to safety and security.<sup>34</sup>

Responding to Lord Bates, Baroness Smith of Basildon (then Labour Spokesperson for Home Affairs) stated that Labour:

[...] support the Bill. However, there are a number of areas in which we continue to seek improvements and greater clarity. We have to ensure that we achieve that balance between protecting our security and our liberty and that the measures are proportionate. The measures must be workable and feasible in their practical application, not only in theory. Your Lordships' House will want to seek assurances and evidence that the measures have the effect intended, can achieve the stated objective and are not open to abuse.<sup>35</sup>

### 3.2 British Bill of Rights / Repeal of the Human Rights Act

The Conservative and Liberal Democrat parties had differing policies towards the Human Rights Act (HRA) in their 2010 manifestos. The 2010 Conservative manifesto contained a commitment to replace the HRA with a UK Bill of Rights,<sup>36</sup> while the 2010 Liberal Democrat manifesto promised to protect the Human Rights Act.<sup>37</sup> However, in *The Coalition: Our Programme for Government*, the two parties agreed to:

[...] establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties.<sup>38</sup>

An independent Commission on a Bill of Rights was established in March 2011. It submitted its final report, *A UK Bill of Rights? The Choice Before Us*, in December 2012, but its members were unable to reach a shared view.<sup>39</sup> Seven of them concluded that there was:

[...] a strong argument in favour of a UK Bill of Rights on the basis that such a Bill would incorporate and build on all of the UK's obligations under the European Convention on Human Rights, and that it would provide no less protection than is contained in the current Human Rights Act and the devolution settlements.<sup>40</sup>

The remaining two members believed that the time was “not ripe for the conclusion that a future process should be focussed on a new UK Bill of Rights”,<sup>41</sup> and that the other members of the Commission had “failed to identify or declare any shortcomings in the Human Rights Act or its application by our courts”.<sup>42</sup>

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<sup>34</sup> *ibid.*, [col 772](#).

<sup>35</sup> *ibid.*, [col 664](#).

<sup>36</sup> Conservative Party, *Invitation to Join the Government of Britain: The Conservative Manifesto 2010*, p 79.

<sup>37</sup> Liberal Democrats, *Liberal Democrat Manifesto 2010*, p 94.

<sup>38</sup> HM Government, [The Coalition: Our Programme for Government](#), May 2010, p 11.

<sup>39</sup> Commission on a Bill of Rights, [A UK Bill of Rights?—The Choice Before Us](#), December 2012.

<sup>40</sup> Ministry of Justice Press Release, [‘The Commission on a Bill of Rights’ Report](#), 18 December 2012.

<sup>41</sup> *ibid.*

<sup>42</sup> *ibid.*

The Conservatives' criticisms of the HRA were set out in a policy paper published in October 2014, entitled *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Law*.<sup>43</sup> This argued that change was necessary owing to "mission creep" on the part of the European Court of Human Rights and because the Human Rights Act "undermines the role of UK courts in deciding on human rights issues in this country"; "undermines the sovereignty of Parliament, and democratic accountability to the public"; and "goes far beyond the UK's obligations under the Convention".<sup>44</sup> The paper stated that "we will shortly publish a draft British Bill of Rights and Responsibilities for consultation",<sup>45</sup> although this did not happen at the time.

The 2015 Conservative manifesto restated this policy, containing a commitment to abolish the Human Rights Act, and introduce a British Bill of Rights to "break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK".<sup>46</sup> It promised that a British Bill of Rights would "remain faithful to the basic principles of human rights, which we signed up to in the original European Convention on Human Rights",<sup>47</sup> such as the right to a fair trial and the right to life. However, it would also "reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society", and would "stop terrorists and other serious foreign criminals who pose a threat to our society from using spurious human rights arguments to prevent deportation".<sup>48</sup>

The 2015 Queen's Speech provided few further details of the Government's intentions in this area, save that it "will bring forward proposals for a British Bill of Rights",<sup>49</sup> and that:

This would reform and modernise our human rights legal framework and restore common sense to the application of human rights laws. It would also protect existing rights, which are an essential part of a modern, democratic society, and better protect against abuse of the system and misuse of human rights laws.<sup>50</sup>

On 3 June 2015, in response to a question at Prime Minister's Questions on whether the UK might withdraw from the ECHR itself, the Prime Minister stated that:

We are very clear about what we want: British judges making decisions in British courts, and the British Parliament being accountable to the British people. The plans that were set out in our manifesto do not involve us leaving the European convention on human rights, but let us be absolutely clear about our position if we cannot achieve what we need—I am very clear about that. When we have these foreign criminals committing offence after offence, and we cannot send them home because of their "right to a family life", that needs to change. I rule out absolutely nothing in getting that done.<sup>51</sup>

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<sup>43</sup> Conservative Party, [Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws](#), October 2014.

<sup>44</sup> *ibid.*, pp 3–4.

<sup>45</sup> Commission on a Bill of Rights, [A UK Bill of Rights?—The Choice Before Us](#), December 2012, p 2.

<sup>46</sup> Conservative Party, [Conservative Party Manifesto 2015](#), April 2015, p 60.

<sup>47</sup> *ibid.*, p 73.

<sup>48</sup> *ibid.*

<sup>49</sup> HM Government, [The Queen's Speech 2015](#), 27 May 2015, p 8.

<sup>50</sup> *ibid.*, p 75.

<sup>51</sup> HC *Hansard*, 3 June 2015, [cols 582–3](#).

Liberty has criticised this position, however, arguing that:

Under the Human Rights Act, British judges make human rights decisions in British courts and parliamentary sovereignty is perfectly preserved—scrapping it would make Strasbourg a first instance court once again.<sup>52</sup>

The policy has proved controversial amongst Parliamentarians as well as campaign groups. Dominic Grieve, the former Conservative Attorney-General, wrote in October 2014 that “these proposals threaten to create domestic constitutional difficulties and to undermine our international reputation and influence for entirely illusory benefits”.<sup>53</sup> Keir Starmer, former Director of Public Prosecutions and now Labour MP for Holborn and St Pancras, argued against the abolition of the Human Rights Act in a recent *Guardian* article, arguing that “there has been no fundamental shift in defendants’ rights under the HRA”, but that repealing it would “silence the vulnerable and leave great swaths of executive action unchecked and unaccountable”.<sup>54</sup> He noted that the Human Rights Act “only obliges our courts to ‘take into account’ judgments of the European Court; they are not bound by them”.<sup>55</sup> He also observed that repealing the Human Rights Act would not remove the UK’s obligation to respond to the European Court of Human Rights’ judgments in cases in which the UK is a party.<sup>56</sup> The UK would have to withdraw from the Convention altogether to achieve this, which, wrote Mr Starmer, would “leave the UK outside the family of nations upholding universal human rights and would hugely diminish our reputation abroad”.<sup>57</sup>

The other major UK political parties have all stated that they would seek to retain the HRA. Labour’s 2015 Manifesto stated that a:

Labour Government will stand up for citizens’ individual rights, protecting the Human Rights Act and reforming, rather than walking away from, the European Court of Human Rights.<sup>58</sup>

The SNP also opposes the repeal of the HRA. Its 2015 Manifesto stated that:

Given the central place of human rights in Scotland’s constitutional settlement, and their importance at the heart of our politics, we will oppose scrapping the Human Rights Act or withdrawal from the European Convention on Human Rights.<sup>59</sup>

The Liberal Democrats 2015 Manifesto stated that they would:

Protect the Human Rights Act and enshrine the UN Convention on the Rights of the Child in UK law. We will take appropriate action to comply with decisions of UK courts and the European Court of Human Rights.<sup>60</sup>

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<sup>52</sup> Liberty, [‘Liberty Responds to David Cameron’s PMOs Comments on the Human Rights Act’](#), 3 June 2015.

<sup>53</sup> Dominic Grieve, [‘Human Rights Act: Why the Conservatives are Wrong’](#), *Prospect*, 10 October 2014.

<sup>54</sup> Keir Starmer, [‘The Arguments against the Human Rights Act are Coming. They will be False’](#), *Guardian*, 13 May 2015.

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid.*

<sup>57</sup> *ibid.*

<sup>58</sup> Labour Party, [‘Britain Can be Better: The Labour Party Manifesto 2015’](#), p 67.

<sup>59</sup> SNP, [‘Stronger for Scotland: SNP Manifesto 2015’](#), p 23.

<sup>60</sup> Liberal Democrats, [‘Manifesto 2015: Strong Economy, Fairer Society, Opportunity for Everyone’](#), p 114.

### 3.3 Proposed Investigatory Powers Bill and Communications Data Retention

A draft Communications Data Bill was included in the Queen’s Speech in 2012, with the aim of “ensuring that communications data is available to the police and security and intelligence agencies in future as it has been in the past”.<sup>61</sup> The Bill was widely referred to in the media, and by campaign groups, as the ‘snooper’s charter’.<sup>62</sup>

Whilst the draft Bill received pre-legislative scrutiny by a Joint Committee of both Houses of Parliament—and was considered by the Joint Committee on Human Rights<sup>63</sup> and the Intelligence and Security Committee<sup>64</sup>—it still proved controversial. At the beginning of their summary, the Joint Committee wrote:

It is the duty of Government to maintain the safety and security of citizens. This is not only in the public interest; it is in the interest of law-abiding members of the public. For this the law enforcement agencies must be given the tools they need. Reasonable access to some communications data is undoubtedly one of those tools. But the Government also have a duty to respect the right of citizens to go about their lawful activities, including their communications, without avoidable intrusions on their privacy. These duties have the potential to conflict.<sup>65</sup>

However, it should be noted that the Home Secretary, Theresa May, spoke to this issue when she wrote in the foreword to the draft Bill that “this Government is committed to ensuring that here, as elsewhere, we strike the right balance between protecting the public and safeguarding civil liberties”.<sup>66</sup> The Joint Committee made a number of recommendations for changing the draft Bill and were critical of certain aspects stating that the scope of the draft Bill “must be significantly narrowed”.<sup>67</sup> However, the Bill was never formally introduced into Parliament due to disagreement within the Coalition Government.<sup>68</sup>

The 2015 Conservative Party Manifesto raised the issue again, pledging to introduce “communications data legislation”, which would:

Strengthen our ability to disrupt terrorist plots, criminal networks and organised child grooming gangs, even as technology develops. We will maintain the ability of the authorities to intercept the content of suspects’ communications, while continuing to strengthen oversight of the use of these powers.<sup>69</sup>

<sup>61</sup> HM Government, [The Draft Communications Data Bill](#), June 2012, Cm 8359, p i.

<sup>62</sup> See for example, Liberty, [‘Campaigning for No Snoopers’ Charter](#)’, accessed 22 June 2015.

<sup>63</sup> Joint Committee on Human Rights, [‘Draft Communications Data Bill: Memoranda and Correspondence](#)’, accessed 20 May 2015.

<sup>64</sup> Intelligence and Security Committee, [Access to Communications Data by the Intelligence and Security Agencies](#), February 2013, Cm 8514.

<sup>65</sup> The Joint Committee on the Draft Communications Data Bill, [Draft Communications Data Bill](#), 11 December 2012, HL Paper 79 of session 2012–13.

<sup>66</sup> HM Government, [The Draft Communications Data Bill](#), June 2012, Cm 8359, p i.

<sup>67</sup> Joint Committee on the Draft Communications Data Bill, [‘Report on the Draft Communications Data Bill Published](#)’, 11 December 2012.

<sup>68</sup> The House of Commons Library’s Standard Note [Communications Data: The 2012 Draft Bill and Recent Developments](#) (12 June 2015, SN06373), provides substantial background information on the Draft Bill.

<sup>69</sup> The Conservative Party, [Conservative Party Manifesto 2015](#), April 2015, p 63.

The Queen's Speech 2015 saw the announcement of an Investigatory Powers Bill which would cover:

[...] all investigatory powers including communications data, where the Government has long maintained that the gap in capabilities are putting lives at risk.

And,

[...] will enable the continuation of the targeting of terrorist communications and other capabilities.<sup>70</sup>

The Government's plans for legislation in the area of communications data have been criticised by several sources. In April 2013, Nick Clegg stated that the Liberal Democrats were opposed to the draft Bill, saying that "what people have dubbed the snooper's charter—I have to be clear with you, that's not going to happen".<sup>71</sup> Mr Clegg reiterated this view on BBC Radio's 4 Today Programme in January 2015, with the *New Statesman* reporting that:

He told the BBC's *Today* programme this morning that while he supports plans to, "strengthen our defences to make ourselves physically safe", he sees a law closing in on our privacy as a "slippery slope [...] if we start to censor or self-censor ourselves as a society."

His argument is that the Bill is an "unworkable proposition", because much of our communication, and industries that we rely on, are based outside of the UK's jurisdiction anyway. He also questions the efficiency and necessity of monitoring everyone's messages: "Scooping up vast amounts of information on everyone, children, grandmas, who go on garden centre websites [...] Every single individual in this country, people who would never dream of doing us harm."<sup>72</sup>

Alison Powell, lecturer in the Department of Media and Communications at the LSE, makes the point that we "don't know what a new Investigatory Powers Bill might include".<sup>73</sup> The civil liberties campaign group, Big Brother Watch, responded to the announcement of the Investigatory Powers Bill, writing that:

Whilst the title may have changed from a Communications Data Bill to an Investigatory Powers Bill it will be interesting to see whether the content has radically changed. We have yet to see real evidence that there is a gap in the capability of law enforcement or the agencies' ability to gain access to our communications data. We are also yet to see any concrete evidence that access to communications data has and indeed will, make the country safer. The only evidence we have is of numerous failures to make effective use of the data already available. Any new draft legislation must acknowledge that the bigger the haystacks the harder it will be to find the needles.<sup>74</sup>

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<sup>70</sup> HM Government, [The Queen's Speech 2015](#), 27 May 2015, pp 64–5.

<sup>71</sup> BBC News, ['Nick Clegg: No 'Web Snooping' Bill While Lib Dems in Government'](#), 25 April 2013.

<sup>72</sup> *New Statesman*, ['Nick Clegg Clashes with David Cameron Over Privacy Laws Post-Charlie Hebdo Terrorist Attack'](#), 13 January 2015.

<sup>73</sup> LSE, ['The Government's Investigatory Powers Bill May Mean Digital Innovators Say Bye to Britain'](#), 17 June 2015.

<sup>74</sup> Big Brother Watch, ['Reaction to the Queen's Speech—Investigatory Powers Bill'](#), 27 May 2015.

However, the Director General of the Security Service, Andrew Parker, has stated that the security services need to be able to intercept communications data:

Changes in the technology that people are using to communicate are making it harder for the Agencies to maintain the capability to intercept the communications of terrorists. Wherever we lose visibility of what they are saying to each other, so our ability to understand and mitigate the threat that they pose is reduced [...]

[...] the capability to intercept these communications is so important to MI5—the ability to monitor the terrorists’ communications as they plan is central to our chances of knowing their intentions and stopping them. So, if we lose that ability, if parts of the radar go dark and terrorists are confident that they are beyond the reach of MI5 and GCHQ, acting with proper legal warrant, then our ability to keep the country safe is also reduced.<sup>75</sup>

Responding to an oral statement by the Home Secretary on 14 January 2015—following the attacks on *Charlie Hebdo* in Paris—Yvette Cooper (Labour Shadow Home Secretary) said that:

The Home Secretary referred to the draft Communications Data Bill. That was rejected three years ago by the Joint Committee that the Government established to scrutinise it because, the Committee said, it was too vague, too widely drawn, and put too much power directly in the hands of the Home Secretary. The Committee recommended that the new legislation needed should be drawn up in a far more limited way, and that the Government should provide more evidence and clarity about what they wanted to achieve [...]<sup>76</sup>

She went on to say that:

This is an extremely important issue, and the detail—about the powers and capabilities that our intelligence agencies need, as well as about the safeguards and oversight that are also needed—matters. We agree that the police and the agencies need to get the intelligence to keep us safe and that they need updated legislation, and we also need safeguards and stronger oversight to make sure that powers are effectively and appropriately used.<sup>77</sup>

### **3.4 Anderson Report, A Question of Trust—Report of the Investigatory Powers Review**

The Data Retention and Investigatory Powers Act 2014 required the Independent Reviewer of Terrorism Legislation—David Anderson QC—to examine:

A. the threats to the United Kingdom; B. the capabilities required to combat those threats; C. the safeguards to protect privacy; D. the challenges of changing technologies, and E. issues relating to transparency and oversight, before reporting to the Prime

<sup>75</sup> MI5, ‘[Terrorism, Technology and Accountability](#)’, 8 January 2015.

<sup>76</sup> HC *Hansard*, 14 January 2015, [col 872](#).

<sup>77</sup> *ibid*, [col 873](#).



Minister on the effectiveness of existing legislation relating to investigatory powers, and to examine the case for a new or amending law.<sup>78</sup>

The report was published on 11 June 2015.<sup>79</sup> It made a large number of recommendations, including:

- A comprehensive and comprehensible new law should be drafted from scratch, replacing the multitude of current powers and providing for clear limits and safeguards on any intrusive power that it may be necessary for public authorities to use.<sup>80</sup>
- Designated persons (DPs) (including in the security and intelligence agencies) should be required by statute to be independent from the operations and investigations in relation to which they consider whether to grant an authorisation [for the acquisition of communications data].<sup>81</sup>
- Whilst the operation of covert powers is and must remain secret, public authorities, ISIC and the IPT should all be as open as possible in their work. Intrusive capabilities should be avowed. Public authorities should consider how they can better inform Parliament and the public about why they need their powers, how they interpret those powers, the broad way in which those powers are used and why additional capabilities may be required.<sup>82</sup>

In a statement to the House of Commons the Home Secretary said:

[...] The report makes 124 recommendations, covering sensitive intelligence capabilities, and it extends to more than 300 pages. Following careful consideration by the Government and the security and intelligence agencies, I can confirm that no redactions have been made to the report prior to publication [...]

[...] The Anderson review was undertaken with cross-party support and I believe that it provides a sound basis for taking this issue forward in the same manner. To ensure that that is the case, the Government will publish a draft Bill in the autumn for pre-legislative scrutiny by a Joint Committee of Parliament, with the intention of introducing a Bill early in the new year. Given the sunset clause in the Data Retention and Investigatory Powers Act 2014, the new legislation will need to be in place by the end of December 2016.<sup>83</sup>

In relation specifically to communications data, Yvette Cooper responded for Labour, said that:

[...] the report confirms some of the problems with the original draft Communications Data Bill, which the Joint Committee that scrutinised it at the time stated was too widely drawn—we agreed. David Anderson says:

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<sup>78</sup> David Anderson QC, Independent Reviewer of Terrorism Legislation, [A Question of Trust—Report of the Investigatory Powers Review](#), 11 June 2015, p 1.

<sup>79</sup> The House of Lords Library will be producing a Library Note to support the forthcoming debate, 8 July 2015, on the Anderson Report.

<sup>80</sup> David Anderson QC, Independent Reviewer of Terrorism Legislation, [A Question of Trust—Report of the Investigatory Powers Review](#), 11 June 2015, p 4.

<sup>81</sup> *ibid*, p 6.

<sup>82</sup> *ibid*, p 8.

<sup>83</sup> HC *Hansard*, 11 June 2015, [col 1353](#).

“There should be no question of progressing proposals for the compulsory retention of third party data before a compelling operational case for it has been made out (as it has not been to date)”.

I agree with David Anderson and, again, I urge the Home Secretary to accept that recommendation.<sup>84</sup>

In reply, Theresa May replied said that:

The right hon. Lady mentioned two particular issues, one of which was access to third party data. David Anderson does not say that this should not be permissible or possible; he says that he would like to see a better case made for it than has been made in the past, but he does not reject the use of access to third party data.<sup>85</sup>

Speaking for the SNP, Joanna Cherry (MP for Edinburgh South West) said:

The Scottish National party also welcomes the publication of this report, but we will oppose any plans to introduce what is sometimes referred to as a snoopers charter, that being a charter that would sanction the mass collection of data and mass spying on people’s private communications. Although the SNP is supportive of law enforcement and security services having appropriate access to the information they require, the appropriate checks and safeguards must be in place to ensure that the requirement to keep our community safe is balanced against the civil liberties to which we are all entitled.

This report seems to urge much stronger oversight of the activities of the police and the security services, which we welcome and, like others, I wish to single out the recommendation that warrants be authorised by senior judges. However, the new legislation is required to be more than just a change of name. There must be substantial changes in substance from the previous draft Bill, which threatened to impinge on civil liberties.<sup>86</sup>

### 3.5 Other Relevant Legislation

There have been several other pieces of legislation passed in the 2010–15 Parliament that have had an impact on human rights and civil liberties in the UK, a selection of which are discussed briefly below.

#### Identity Documents Act 2010

The Identity Documents Act 2010 made provision for the repeal of the Identity Cards Act 2006. The Home Office explains that:

In the Queen’s Speech of May 2010, the government announced the introduction of legislation that would ‘restore freedoms and civil liberties through the abolition of identity cards and unnecessary laws’. Following this commitment, the Home Office

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<sup>84</sup> *ibid*, col 1355.

<sup>85</sup> *ibid*, col 1356.

<sup>86</sup> *ibid*, col 1357.

introduced the Identity Documents Bill, which received Royal Assent in December 2010. Identity cards and the National Identity Register have now been abolished.<sup>87</sup>

Identity cards had been criticised by some groups from a personal privacy standpoint as the data was recorded on a central register.<sup>88</sup>

### **Protection of Freedoms Act 2012**

The Protection of Freedoms Act 2012, which received Royal Assent on 1 May 2012, made provisions in a wide range of areas related to civil liberties, including the regulation of biometric data; the regulation of closed-circuit television (CCTV); and the reduction of the maximum pre-charge detention period for terrorism suspects to 14 days.<sup>89</sup>

### **Modern Slavery Act 2015**

The Modern Slavery Act 2015, which received Royal Assent on 26 March 2015, included provisions to:

- Consolidate and clarify the existing offences of slavery and human trafficking whilst increasing the maximum penalty for such offences.
- Provide for two new civil preventative orders, the Slavery and Trafficking Prevention Order and the Slavery and Trafficking Risk Order.
- Introduce a number of measures focussed on supporting and protecting victims, including a statutory defence for slavery or trafficking victims and special measures for witnesses in criminal proceedings.<sup>90</sup>

The Act's explanatory notes also make the point that "Article 4 of the European Convention on Human Rights prohibits holding a person in slavery or servitude, or requiring a person to perform forced or compulsory labour".<sup>91</sup>

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<sup>87</sup> Gov.uk, '[Protection of Freedoms Bill](#)', accessed 25 June 2015.

<sup>88</sup> *Guardian*, '[ID Cards Scheme to be Scrapped Within 100 Days](#)', 27 May 2010.

<sup>89</sup> Parliament.uk, '[Bills Before Parliament: Protection of Freedoms Act 2012](#)', accessed 25 June 2015.

<sup>90</sup> [Explanatory Notes](#) to the Modern Slavery Act 2015.

<sup>91</sup> *ibid*, p 2.

## Appendix: Selected Further Reading

- David Anderson QC, Independent Reviewer of Terrorism Legislation, [A Question of Trust—Report of the Investigatory Powers Review](#), 11 June 2015
- House of Commons Library, [UK Cases at the European Court of Human Rights since 1975](#), 26 May 2015, SN05611
- House of Commons Library, [A British Bill of Rights?](#), 19 May 2015, CBP-7193
- House of Commons Library, [Interception of Communications](#), 13 March 2015, SN06332
- House of Commons Library, [Prisoners' Voting Rights](#), 11 February 2015, SN01764
- House of Commons Library, [Forced Marriage](#), 21 January 2015, SN01003
- House of Commons Library, [Communications Data: The 2012 Draft Bill and Recent Developments](#), 5 February 2015, SN06373
- House of Lords Library, [Debate on 24 July 2014: International Compliance with Article 18 of the Universal Declaration of Human Rights Concerning Freedom of Belief](#), 21 July 2014, LLN 2014/026
- House of Lords Library, [Debate on 19 May: European Convention on Human Rights](#), 13 May 2011, LLN 2011/017
- Intelligence and Security Committee of Parliament, [Privacy and Security: A Modern and Transparent Legal Framework](#), 12 March 2015
- Joint Committee on Human Rights, [The UK's Compliance with the UN Convention on the Rights of the Child](#), 24 March 2015, HL Paper 144 of session 2014–15
- Joint Committee on Human Rights, [Human Rights Judgments](#), 11 March 2015, HL Paper 130 of session 2014–15
- Joint Committee on Human Rights, [Legislative Scrutiny: Counter-Terrorism and Security Bill](#), 12 January 2015, HL Paper 86 of session 2014–15
- Liberty, [Blanket Surveillance—Everything You Need to Know](#), 22 June 2015
- Ministry of Justice, [Making Sense of Human Rights: An Introduction](#), October 2006
- Parliamentary Office of Science and Technology, [Big Data, Crime and Security](#), 10 July 2014
- Steven Greer, Council of Europe Publishing, [Human Rights Files No. 15: The Exceptions to Articles 8 to 11 of the European Convention of Human Rights](#), 1997

- UCL, [\*Human Rights and British Values: The Role of the European Convention on Human Rights in the UK Today\*](#), December 2013