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# Some suggested text for the Joint Committee on Human Rights report on the Case for the Human Rights Act:

# Why the Human Rights Act must be scrapped

Summary

## Summary

**The Joint Committee on Human Rights calls for the repeal of the Human Rights Act and recommends to the Government that the UK withdraw from the European Convention on Human Rights**.

The Human Rights Act was passed with some degree of cross-party support. Such support can no longer credibly be regarded as cross-party, and there is in no sense an effective consensus.

Thanks to the Human Rights Act, UK courts have adjudicated with growing frequency on the basis of the ECHR to the point where they are beginning to actively prevent our democratically elected government from responding effectively to serious challenges that threaten our county.

However, **it is not enough to simply repeal the Human Rights Act and un-incorporate the ECHR from UK law. Rather, the UK must curtail the ability of the unelected and unaccountable Courts to adjudicate on the basis of the ECHR, which will necessarily mean withdrawing from the ECHR, not merely un-incorporating the ECHR from UK law.**

**We have assessed three recent cases of public policy failure:**

- **failure to deport nine Afghan hijackers**
- **granting Anthony Rice freedom to commit murder**
- **failure to failure to deport foreign criminals**

**Having considered the charge that it is the Human Rights Act that accounts for these instances of public policy failure, we conclude that it is not simple the Act that is at fault, but the ECHR and the courts' willingness to adjudicate on the basis of it. Not only should the Act be repealed, but the UK should withdraw from the ECHR.**

It would, therefore, be largely meaningless to repeal the Human Rights Act without also withdrawing from the ECHR. Repealing the Act without withdrawing from the ECHR would limit the scope for the courts to refer to the ECHR but would not eliminate it as witnessed by the process of "creeping incorporation" which was taking place prior to the Act coming into force.

The Human Rights Act should be regarded not as a measure that empowers individuals against the State, but rather one that hands powers to judges that should rightfully rest with accountable parliamentarians through the ballot box. Moreover, we note with concern that the Human Rights Act, while specifically not giving judges *de jure* powers to strike down Acts of Parliament, creates the scope for this to happen *de facto*.

There is a growing public perception that the Human Rights Act protects only the undeserving, such as criminals and terrorists, at the expense of the law abiding. We believe that this view is largely justified.

We would welcome a more detailed inquiry that would assess the extent to which individual liberty could better be protected by a second Bill of Rights than is currently the case with the Human Rights Act and the ECHR.

We believe that the Human Rights Act and the ECHR are creating the conditions for increased tension between Parliament and the judiciary. As a consequence of this, the Human Rights Act - far from guaranteeing the independence of the judiciary - in fact threatens an independence that has been in effect since the Act of Settlement. This concerns us greatly, and we believe makes a review of the process of making judicial appointments both inevitiable and desirable.

Apologists for current Human Rights legislation have argued that in many cases it is not the law as it stands that is to blame for public policy failure, but misunderstandings and the law's misapplication. While such misunderstandings have undoubtedly arisen, this is not a valid excuse. Any law must be assessed on the basis of how it operates in practice. When it comes to our deeply flawed Human Rights legislation, even highly trained lawyers have got it seriously wrong, as the House of Lords indicated the Court of Appeal had done in the Begum Moslem school uniform case.

## Introduction

### Background

1. Public misgivings about the Human Rights Act have grown, and there have been calls for the Act's repeal. Even the political establishment in Westminster has started to acknowledge the mood of public hostility towards what is often now regarded as a "Criminal Rights Act", and both the Government and HM Opposition have begun to consider radically amending or repealing the Act. It is not enough to dismiss growing public misgivings on the basis that they are merely the consequence of misinformation and media inaccuracies. Rather than initiating a public relations programme of "Myth Busting", the government needs to prepare to dismantle the Human Rights Act.

2. **The Joint Committee on Human Rights recognises this mood of justifiable cynicism about so-called human rights legislation, and now calls for the repeal of the Human Rights Act**.

3. The catalyst for our inquiry is the fact that the Prime Minster has asked the Home Secretary to "consider whether primary legislation should be introduced to address the issue of court rulings which overrule the Government in a way that is inconsistent with other EU countries' interpretation of the European Convention on Human Rights".[1]

4. In light of this need to consider such primary legislation, rather than confine ourselves to merely calling for the repeal of the Human Rights Act, **we also recommend to the Government that the UK go further and withdraw from the European Convention on Human Rights**.

5. As parliamentarians committed to defending the rights of the individual against the State, we believe that human rights can best be protected through a second domestic Bill of Rights. Moreover, we would like to see the rights of individuals protected through a system which reverses the present trends of growing political activism by

[1] Letter dated May 2006 from the Prime Minister to the Home Secretary

some of the judiciary and increasing conflict between the courts and elected politicians.

**The break down of consensus**

6. The Human Rights Act was passed with some degree of cross-party support. Such support can no longer credibly be regarded as cross-party, and there is in no sense an effective consensus. This committee has failed to establish a sufficiently overlapping consensus on the importance and meaning of human rights, and about the institutional machinery necessary for their effective protection. We, therefore, recognise that as a committee we are not best placed, and perhaps lack the direct incentives, to consider the really radical alternatives to the existing Human Rights legislation that a disenfranchised and alienated public increasingly demands.

7. Indeed, there are those on this committee who were surprised that the committee has undertaken this inquiry in the way that it has. While reassessing the case for the Human Rights Act is overdue, we are surprised by the sudden announcement of such a short inquiry that lacked either comprehensive terms of reference, or an array of witnesses that might give us sufficient perspective.

## 2. The case for repealing the Human Rights Act and withdrawing from the ECHR

8. The Human Rights Act gave the UK courts the ability to adjudicate directly on the basis of the ECHR. Prior to the incorporation of the ECHR into UK law,[2] the domestic courts only referred to the ECHR in limited contexts. Before the Act, the Strasbourg Court alone could directly adjudicate on the basis of the ECHR, normally when dealing with individual petitions. This was the only route by which an individual could directly seek to enforce the ECHR.

9. Since then, UK courts have adjudicated with growing frequency on the basis of the ECHR. In doing so, they have begun to actively prevent our democratically elected government from responding effectively to serious challenges that threaten our county. We believe that any responsible government, of whatever political persuasion, would need to be able to respond effectively to such challenges.

10. In order to enable our elected government to get on with the business of governing, it is not enough to simply repeal the Human Rights Act and un-incorporate the ECHR from UK law. Rather, the UK must curtail the ability of the unelected and unaccountable Courts to adjudicate on the basis of the ECHR. This must necessarily mean withdrawing from the ECHR, not merely un-incorporating the ECHR from UK law.

11. Indeed, it would be largely meaningless to repeal the Human Rights Act without also withdrawing from the ECHR. By incorporating the ECHR into UK law, the Act merely eases the ability of the Courts to cite the ECHR and refer to it in their rulings[3].

[2] We use the term "incorporation" in this report for purposes of simplicity though we recognize that there is a debate over the extent to which the Human Rights Act can be said to have incorporated Convention rights rather than having given further effect to them in the UK context.

[3] In the 21 years between 1975 and 1996, the ECHR had been considered in 316 cases and affected the outcome, reasoning or procedure in 16 of them. In the 18 months between October 2000 (when the Act came into force), and April 2002, the ECHR was substantively considered in 431 cases in the higher courts, and affected the outcome, reasoning and procedure in 318.

12. Repealing the Act without withdrawing from the ECHR would limit the scope for the courts to refer to the ECHR but would not eliminate it as witnessed by the process of "creeping incorporation" which was taking place prior to the Act coming into force. More importantly, remaining in the ECHR would leave the UK exposed to rulings of the Strasbourg Court. Some of the most serious problems with the ECHR arise from the judicial activism of the Strasbourg Court which has devised doctrines which are not present in the wording of the Convention itself and which would have surprised the signatory states of the Convention at the time when it was drafted in the 1950s.

13. The Human Rights Act has conferred on UK judges powers to take what are in effect political decisions. Using the Act, the judiciary has acted not merely undemocratically, but anti-democratically, in effect imposing public policies that have been specifically rejected through the democratic process at the ballot box.

14. There are three recent cases where the Human Rights Act and the ECHR on which it is built account for public policy failure. As we shall see, however, it is not merely the Act that is at fault, so much as the ECHR itself:

i. Failure to deport nine Afghan hijackers: the High Court decided that nine people from Afghanistan who arrived in the UK after hijacking an aeroplane could not be deported.

ii. Granting Anthony Rice freedom to commit murder: Human rights aspects of managing offenders undermines public protection, according to a report by HM chief Inspector of Probation into the case of Anthony Rice who murdered Naomi Bryant following his release from prison.

iii. Failure to deport foreign criminals: Human Rights and the judiciary's tendency to adjudicate on the basis of the European Human Rights charter, rather than primary legislation (which pre-dates the Act), has prevented the government from deporting foreign prisoners.

15. Apologists for the Human Rights Act would undoubtedly try to make the case – somewhat disingenuously - that the Act itself is not *per se* at fault. This is only correct in that it is the ECHR, with or without its incorporation into UK law, that explains why the nine Afghan hijackers were not removed, and why foreign prisoners were never deported.

**i. Failure to deport nine Afghan hijackers**

16. On May 10 2006, the High Court overturned the Home Secretary's decision that it was not appropriate to grant discretionary leave to enter the UK to nine Afghan nationals who arrived in the UK on 7th February 2000, having supposedly hijacked an aircraft that was apparently on an internal flight in Afghanistan. The High Court ordered the Home Secretary to grant them discretionary leave to enter for a period of six months.

17. The Prime Minister responded to the judgement on the same day, saying "We can't have a situation in which people who hijack a place, we're not able to deport back to their country. It's not an abuse of justice for us to order their deportation, it's an abuse of common sense frankly to be in a position where we can't do this".[4]

18. The Government's reaction to the High Court judgement suggests that the High Court had somehow incorrectly interpreted human rights law. The implication seemed to be that the Human Rights Act was at fault, or at least being misapplied. This was not the case; it was the ECHR, as much as the Act that actually incorporated the ECHR into UK law that was responsible for the failure to remove the nine supposed hijackers.

19. The decision that the Afghan nationals could not be returned to Afghanistan was a decision taken, not by the High Court on 10th May 2006, but by a panel of three Immigration Adjudicators on 8th June 2004. The Adjudicators ruled that the Afghanis be allowed to remain in the UK under Article 3 of the ECHR[5].

[4] Ref

[5] On May 10 2006, the High Court was in fact deciding that the Home Secretary had acted unlawfully by deliberately delaying giving effect to the Adjudicators' decision.

20. The Adjudicators' decision was not in fact made on the basis of any disputed interpretation of the Human Rights Act itself. Rather it was the interpretation of the ECHR by the Strasbourg Court which was responsible, since the hijackers were correctly refused asylum by the Adjudicators under the Geneva Refugee Convention, but were given what is in effect a backdoor asylum right under the ECHR.

21. The Human Rights Act does not itself directly account for why the nine hijackers were not removed from the UK; in fact it was the ECHR that the Act incorporates into UK law that is to blame. The decision not to deport the hijackers was made because such deportation would have breached Article 3 of the ECHR. The decision was made by a quasi-judicial body – the Immigration Adjudicators.

22. The case of the nine Afghan hijackers shows that it is not merely necessary to repeal the Human Rights Act, but to withdraw from the ECHR as well.

**ii. Granting Anthony Rice freedom to commit murder:**

23. On 10 May 2006, HM Inspector of Probation published a report of his review of the case of Anthony Rice, a life sentence prisoner who on 17 August 2005 murdered Naomi Bryant following his release from prison on licence.[6]

24. The report found that one of the reasons why the Parole Board underestimated the risk of harm to others when it decided that he was safe to release was that from the time of his transfer to open conditions in 2001, "the people managing his case started to allow public protection considerations to be undermined by its human rights considerations, as these required increasing attention from all involved, especially as the prisoner was legally represented".[7]

25. In place of shame, some apologists for the Human Rights Act might instead argue that the report failed to produce any concrete evidence that decisions concerning the release or management of Anthony Rice were affected in any way by human rights

[6] HM Inspectorate of Probation, *An Independent Review of a Further Serious Offence case: Anthony Rice* (May 2006)
[7] Ref

considerations being given precedence over public protection. We would find any such arguments put forward to be deeply offensive.

26. Public bodies, such as the Parole Board, are specifically covered by section 6(1) of the Human Rights Act, which makes it unlawful for a public authority to act in a way which is incompatible with the ECHR.

27. Moreover, at the time the Act was introduced, it was the stated aspiration of the Government that the Act would be more that a merely technical instrument to enable Courts to adjudicate on the basis of the ECHR. It was also hoped that the Act would bring about a fundamental transformation towards a "human rights culture". The case of Anthony Rice suggests that the government has been all too successful in creating precisely such a culture.

28. While there is little specific evidence in HM Inspector of Probation's report to show that detailed technical considerations of the Act were made, the report shows all too clearly how a vague "human rights culture" ensured that this public body, covered by the Act, set a convicted criminal free to commit rape and murder.

29. Granting Anthony Rice freedom to commit rape and murder did not come about because of any erroneous understanding of the Human Rights Act on the part of the Parole Board. Mr Rice was set free because the Parole Board feared that human rights legislation meant if it did not let him out under licence, the Courts would step in and do so anyway.

**iii) Failure to deport foreign prisoners**

30. On 3rd May 2006, the Home Secretary made a statement to the House of Commons setting out various proposals to change the system governing deportation of foreign prisoners. This statement followed the revelation that substantial numbers of foreign prisoners who would have been considered for deportation on their release had not in fact been so considered but instead had been released into the community – where some had committed more crime.

31. As with the nine Afghan hijackers and the case of Anthony Rice, the Government has once again cited this failure of public policy as a reason to amend the Human Rights Act. The Prime Minister told the House of Commons that "in the vast bulk of cases … there will be an automatic presumption to deport, and the vast bulk of those people will, indeed, be deported, irrespective of any claim that they have that the country to which they are returning may not be safe. That is why it is important that we consider legislating, if necessary, to ensure that such an automatic presumption applies … Yes; we will make sure that our human rights legislation does not get in the way of commonsense legislation to protect our country".[8]

32. Apologists for the Human Rights Act will no doubt claim that it is not the Act itself, nor the decisions made by judges under it, that account for the failure to consider these foreign prisoners for deportation.

33. Again, it is deeply invidious to imply that human rights legislation is not at fault. Article 3 of the ECHR places the UK under an obligation not to deport a foreign national to torture[9]. Article 8 prevents deportation where there would be a disproportionate interference with their family life. The Courts have chosen to interpret these Articles of the ECHR – regardless of whether or not the ECHR is in fact incorporated into UK law – in such a way as to effectively prevent deportation to many third countries – including indeed, fellow signatories of the ECHR.

34. The fact that the ECHR is incorporated into UK law as a result of the Act means that would-be deportees are able to challenge their deportation on those grounds in a

[8] HC Deb 17 May 2006 col. 990

[9] It is important to note that Article 3 ECHR does not as worded have anything to do with deportation. It prevents contracting states from engaging in torture or inhuman or degrading treatment or punishment, and the ECHR applies to the European territories of the contracting states. The Strasbourg Court extended the Convention by holding that it applied when someone is deported to a state where there is a risk of Article 3 mistreatment (not just torture, a wider category including e.g. inadequate medical services for AIDS patients as in *D v. United Kingdom*).

It is historically and politically important to distinguish between the Convention itself which we signed in the 1950s and the overlay of judicial "interpretation" which has changed it greatly from its original meaning and intent.

UK court[10]. As a result of this, the Courts can and do frequently present an obstacle to the deportation of foreign nationals.

35. The Human Rights Act might not of itself provide any greater obstacles to the deportation of foreign nationals than the limitations on such deportation which already exist under the ECHR. That, however, is a reason to withdraw from the ECHR in its entirety, rather than a reason to retain the Human Rights Act.

36. As with the case of Anthony Rice, there is also evidence that the Human Rights Act, in making it easier for courts to refer to the ECHR, is creating a "human rights culture". There is some evidence that as with the Parole Board, this less tangible, but pervasive "human rights culture" is undermining the effectiveness of the Home Office.

37. The Prime Minister's announcement of an automatic presumption of deportation for foreign prisoners would mean not only amending the Human Rights Act, but withdrawal from the ECHR. Unless the UK were to exempt herself from Articles 3 and 8 of the ECHR, judges would continue to rule that such an automatic presumption of deportation contravened the ECHR. Judges will continue to prevent the deportation of foreign nationals unless the UK withdraws from the ECHR, as opposed to merely repealing the Human Rights Act.

**Conclusion**

38. **Having considered the charge that it is the Human Rights Act that accounts for the massive failures of public policy with regard to the three cases above, we conclude that it is not simply the Act that is at fault, but rather the ECHR and the courts' willingness to adjudicate on the basis of it. Not only should the Act be repealed, but the UK should withdraw from the ECHR**.

[10] It is interesting to note that the judiciary have yet to ever cite the ECHR as a basis on which to challenge the government so as to enforce a deportation that the government would not otherwise have carried out. The judges rulings only seem to apply one way.

**3. Alternative ways of defending individual liberty: a second Bill of Rights?**

39. The Human Rights Act should be regarded not as a measure that empowers individuals against the State, but rather one that hands powers to judges that should rightfully rest with accountable parliamentarians through the ballot box.

40. It is often claimed by supporters of the Act that the Act gives easier and more direct access to those rights which people in the UK have enjoyed under the ECHR for the past half century. It would be more accurate to say that the Act in fact makes it easier for judges to directly cite the ECHR in order to overturn decisions made by Parliament.

41. Moreover, we note with concern that the Human Rights Act, while specifically not giving judges *de jure* powers to strike down Acts of Parliament, creates the scope for this to happen *de facto*. The Act enables courts to declare statutes incompatible with Convention rights, leaving it to Parliament to decide whether and how to legislate in response. On the face of it, this does not challenge the primacy of Parliament.

42. However, we note that the process for assessing whether a Bill conforms with human rights, as defined by judges, means that any legislation that is likely to be deemed incompatible is highly unlikely to even be authored, let alone debated in Parliament.

43. Moreover, that any offending law can be amended by Remedial Orders, meaning in practice that an Act judged incompatible can be amended with the most cursory scrutiny in Parliament, further suggests that the Human Rights Act can and will further diminish the role of our Parliament. To adopt Bagehot's phrase, under the Act Parliament will become more the "dignified" rather than the "efficient" part of our constitution.

Thanks to our Human Rights laws, the role of Parliament as our chief law-making institution is also being usurped by the judiciary's recently acquired habit of judicial law-making. Media freedom in Britain is now threatened by new judge-made law of privacy. This comes in place of any legislation from our elected Parliament, and its

consequences on press freedom are far less predicatable than those that would arise on the basis on a primary law made in Parliament.

Human Rights legislation has poisoned relations between the executive and the judiciary. As the unelected and unaccountable judges have acquired power without responsibility, they have exercised it in a way that has exercised democratically accountable Ministers. Scrapping the Human Rights Act and the ECHR would allow fresh legislation that prevented further unhealthy tensions between the executive and the judiciary.

44. There is a growing public perception that the Human Rights Act protects only the undeserving, such as criminals and terrorists, at the expense of the law abiding. We believe that this view is largely justified.

45. When not protecting the undeserving and making unreasonable and burdensome demands on the law-abiding, the Human Rights Act is resulting in some extraordinary judicial involvement in matters that ought to be of no concern to them. For example, local authority monopsonies as procurers of beds in residential care homes mean that old and frail residents all too often are forced out of the home of their choice. By any criteria, this is undesirable. Yet in pronouncing against it, courts have merely decreed that it should not happen, rather than tackle the underlying causes of the problem. Legal experts in wigs have shown extraordinary economic illiteracy in seeking to decree away a problem caused by an unfair market monopsonies.

46. By using the Human Rights Act to pronounce upon the running of public services, judges have made public services even more upwardly accountable – rather than downwardly accountable. It is a matter of great concern that unelected judges should be interfering in the running of public services in this way.

47. As a result of democratic deliberation and competition, all three political parties are beginning to look towards “new localism” solutions to enhance public services. Top down, judicial involvement in the delivery of public services should rightly be seen as an unwarranted and illegitimate interference in the political process.

48. Had our committee established comprehensive terms of reference for this inquiry, and had we had the opportunity to hear from a range of witnesses, we would like to have considered if there were better ways of safeguarding the rights of individuals and personal liberties.

49. *A new Bill of Rights*: In particular, we would like to have debated if our individual freedoms would be better protected by a new, domestic UK Bill of Rights. We would like to have had the opportunity to consider what such a Bill of Rights might entail, and how such a Bill of Rights could safeguard individual liberty, without enabling some judges to resort to political activism.

At the time that the Human Rights Act was passed, the debate focused on whether we should incorporate a statement of fundamental rights into our law. There was no real debate on whether if we were to do so the European Convention on Human Rights was the most appropriate text for the task. Creating a new Bill of Rights outside the ECHR would enable us to better protect the freedoms of the individual vis-à-vis the State:

- The ECHR was drafted to set minimum standards across European countries with widely different legal traditions. It therefore did not include, for instance, a right to jury trial. A new British Bill of Rights based on a text other than the ECHR could ensure such rights were guaranteed.
- The ECHR was drafted nearly half a century ago. A new British Bill of Rights free from the constraints of the ECHR would enable better safeguards against the ability of the State to collect and control vast amounts of data about individuals.
- The ECHR is extremely vague and under its wording almost anything is argueable. This is not surprising given that its original purpose was to safeguard a set of basic rights in an era after the Second World War to prevent a return to totalitarianism. It never was drafted in order the serve the purpose it now does. After quitting the ECHR, it would be possible to draft a text that guaranteed freedoms more effectively, using a text written with that role in mind.

The new British Bill of Rights could follow the same soft entrenchment mechanism followed by the New Zealand Bill of Rights Act in 1990. It would not bind any future Parliament that consciously choose to depart from it, but it would avoid the muddle and scope for future judicial activism implicit in the current Act.

50. *A new system of judicial appointments?*: We would also like to have considered if there might be a better system for senior judicial appointments than the system created by the Constitutional Reform Act 2005. Some might argue that this enabled a remote, unrepresentative and unaccountable body – the Judicial Appointments Commission – to make judicial appointments at a time when those so appointed are increasingly wielding political power and making political decisions. This has, and will continue to, create controversy between the democratically elected executive and the judiciary. Indeed, we believe that the growing scope for conflict between judges and government Ministers has come about as a direct consequence of the Human Rights Act.

51. This growing tension created by the Human Rights Act posses a threat to the cherished judicial independence enjoyed since, and underpinned by, the Act of Settlement. This concerns us greatly. Until the Judical Appointments Commission is abolished and the process for appointing judges is subjected to greater democratic scrutiny, we believe that judicial activists will clash with democratically elected representatives with growing frequency. Moreover, we fear that there judicial activism will further corrode public faith in the political process, at a time when voter turnout is already in decline.

52. We would welcome one day having the opportunity to have a proper inquiry that could assess both the case for repealing the Human Rights Act, withdrawing from the ECHR and bringing about real reforms in order to guaranetee the rights of the individual against the State.

**53. It is a moot point whether or not withdrawing from the ECHR is incompatible with our European Union treaty obligations. Certainly, being part of the EU does oblige the UK to follow the principles of the ECHR. How we do**

**so, is an open question, and it is conceivable that the UK could adhere to the principles found within the ECHR, without being a signatory. Not withstanding, any suggestion that the UK withdraw from the ECHR will raise questions in some quarters about our continued membership of the EU. It is a debate that we would welcome.**