Written evidence from the Open Rights Group (HRA0067)

Open Rights Group are grateful for the opportunity to provide our input to the Joint Committee on Human Rights inquiry into Government's review of the Human Rights Act. Open Rights Group are a digital rights campaigning organisation. We seek to help build a society where rights to privacy and freedom of speech online are respected, protected and fulfilled. We have over 20,000 engaged supporters across the United Kingdom. We operate an evidence-based policy, guided by respect for fundamental human rights.

ORG has been a party in cases at the Court of Justice of the European Union (CJEU) and European Court of Human Righs (ECtHR). At the CJEU, we intervened in the Secretary of State for the Home Department v. Tom Watson C-203/15 (http://curia.europa.eu/juris/liste.jsf?num=C-203/15) regarding the conformity of data retention law in the Unted Kingdom with EU law. At the ECtHR, we are a party in the litigation against the UK's pre-Investigatory Powers Act 2016 surveillance regime (Big Brother Watch and Others v. the United Kingdom (nos. 58170/13, 62322/14 and 24960/150 - http://hudoc.echr.coe.int/fre?i=001-140713) .

The Act and digital rights

Following the UK's withdrawal from the European Union, the human rights constraints which defined and safeguarded our digital rights have been greatly diminished, as much of UK law fell under the supervision of the CJEU. This supervision included the ability to strike down laws ruled incompatible with European law, including violations of the Charter of Fundamental Rights, and declare them null and void.

Prominent rulings were able to happen regarding the UK's data retention practices because the state interferences, and incompatibilities with EU law, were so severe. Corrective action to restore and enforce citizens' rights, therefore, was swift. Even though further litigation has been necessary due to member states disregarding judgments on data retention, such as the need for notification of persons who have been subjected to surveillance in ordinary circumstances, the European Commission has been cautious in its further proposals on data retention to ensure that they are more justifiable, and less likely to be challenged, as incompatible with the Charter of Fundamental Rights.

The incentives for compliance with future human rights judgments in the UK, however, are weak. The UK courts may declare domestic data retention practices or aspects of its surveillance legislation incompatible with the HRA, but government sets its own timetable for compliance. This raises the possibility that legislation is changed, but remains incompatible with the HRA, so that a new decision has to be sought for further changes to be made, which - again - would be done according the government's own timetable. This provides no incentive for the administration to comply fully with the UK courts' decisions; after all, the worst that can happen is a further challenge to request further changes. Indeed, it even creates an incentive to implement legislative changes slowly, in order to ensure that any new legal challenges are not swift.

In contrast, the threat that legislation can be struck down and declared null and void, as was possible under the CJEU, would matter to a domestic UK Government, as it will wish its policy to be implemented rather than abandoned or halted. The lack of such a threat when human rights challenges rely on the ECtHR or the HRA relieves the Government of substantive risk to its policies, and thus diminishes the need to comply and avoid litigation.

Regardless of whether a ruling would have fallen under the auspices of the CJEU, HRA or the ECtHR, the fact is that after the UK's withdrawal from the EU, the previous high level of close

judicial oversight of European law no longer applies, and thus nor do the incentives for healthy public policymaking they attempted to encourage. This weakens restraints on the Executive in key areas such as the uses of personal data, including state, police and surveillance capabilities as well as uses of data by the private sector.

Whatever the merits of Brexit, the ability of the courts to protect privacy and free expression in these controversial areas, where the executive has a particularly clear interest in lowering privacy protections, has been weakened considerably. This raises questions for the committee, and for government, about how digital rights will be protected by law when the safeguards, constraints, and judicial oversight mechanisms are weaker in their oversight and enforcement.

We are therefore supportive of the strengthening of declarations of incompatibility within the Human Rights Act. Adding a similar ability to impose a timetable for reforms, or striking laws down, would create an incentive to bring legislation before Parliament in a timely manner, allowing for full public and legal scrutiny to bring the draft law into healthy compliance, or risk the Government losing its policy agenda through a declaration of incompatibility.

The Act and executive power

In addition to our concerns about the ability to safeguard and enforce digital rights, we are concerned about any prospect of weakening the ability of the courts to use the Human Rights Act to constrain executive power. Human rights exist precisely as a means by which to place limits on Government and the executive; this is their function. Within a functioning legal regime, nobody can be above the law, and limits must be placed on the exercise of power.

In the UK system, the potential for unrestrained executive power is great. The executive is frequently able to write laws in any shape or form they choose, as absolute majorities are common in our Parliament. Lords are under-resourced but tasked with revision, and they lack an independent, democratic political mandate. This means that even when scrutiny applies, revision of laws is not always possible, and can be limited to the starkest errors. This makes it especially important to have proportionate judicial oversight, underpinned by human rights, as a form of check-and-balance on laws which might be passed through Parliament, where those laws turn out in practice to have adverse impacts on the right to free expression, the right to privacy, and the right to freedom from government surveillance.

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