

Response to Commission on a Bill of Rights: 'A Second Consultation'

About the Children's Rights Alliance for England

The Children's Rights Alliance for England (CRAE)¹ protects and promotes the human rights of children by lobbying government and others who hold power, by bringing or supporting test cases and by using regional and international human rights mechanisms. We provide legal information, raise awareness of children's human rights, and undertake research about children's access to their rights. We mobilise others, including children and young people, to take action to promote and protect children's human rights. Each year we publish a review of the *State of Children's Rights in England*, using the framework of the UN Committee on the Rights of the Child's latest concluding observations on the UK.

Q1: What do you think would be the advantages or disadvantages of a UK Bill of Rights? If you think that there are disadvantages to a UK Bill of Rights, do you think that the benefits outweigh them? Whether or not you favour a UK Bill of Rights, do you think that the Human Rights Act ought to be retained or repealed?

The Children's Rights Alliance for England (CRAE) is committed to promoting the full implementation of the United Nations Convention on the Rights of the Child (CRC). In our view, the most effective way of giving domestic effect to the CRC rights, and ensuring they are realised in practice, would be to incorporate the full range of rights in a constitutional Bill of Rights.

¹ This submission is made by the Secretariat of the Children's Rights Alliance for England. Not all of our member organisations will necessarily agree with the analysis and recommendations contained here.

However, in answering this question, it is important to acknowledge the context in which the Bill of Rights debate is taking place. Misunderstanding and misrepresentation of the Human Rights Act 1998 (the “Human Rights Act” or “the Act”) have helped create negative perceptions of, and a toxic debate around, the very idea of rights. In this context, there is a very serious risk that, rather than ensuring additional protection of children’s rights, any change to our existing human rights framework would instead result in the repeal or weakening of the Human Rights Act. If a Bill of Rights repealed or weakened the Human Rights Act, in terms of the rights it contains (“the Convention Rights”) or the mechanisms via which they are protected, the disadvantages would significantly outweigh the advantages.

The Human Rights Act, which is itself a Bill of Rights, has been pivotal in protecting children against human rights abuses. It has, for example, been used to challenge public authorities where they have failed to protect children against abuse, ensured that children are not inappropriately denied contact with their parents, and protected children against physical punishment. It is essential that the Human Rights Act continues to serve this purpose.

Our comments below should be read subject to our overriding position that we would not support any Bill of Rights which in any way weakens the Human Rights Act.

Q2: In considering the arguments for and against a UK Bill of Rights, to what extent do you believe that the European Convention on Human Rights should or should not remain incorporated into our domestic law?

As indicated in our response to Question 1, the European Convention on Human Rights (ECHR) should continue to be incorporated into domestic law via the Human Rights Act. The ECHR, via the Act, has ensured crucial protection for children.

Q3: If there were to be a UK Bill of Rights, should it replace or sit alongside the Human Rights Act 1998?

As explained above, the Human Rights Act has been pivotal in protecting children, and it is vital for children that the Act should continue to fulfil this role. On this basis, a Bill of Rights should sit alongside the Human Rights Act.

Q4: Should the rights and freedoms in any UK Bill of Rights be expressed in the same or different language from that currently used in the Human Rights Act and the European Convention on Human Rights? If different, in what ways should the rights and freedoms be differently expressed?

The Human Rights Act should be retained, and the Convention Rights should continue to be drafted as currently.

To the extent that any future Bill of Rights also contains the rights currently in the Human Rights Act, they should be expressed in the same language as currently used in that Act and the ECHR.

As stated above, the Bill of Rights should also protect the rights contained in the CRC. These rights should be expressed in the same terms as those in the CRC.

Q5: What advantages or disadvantages do you think there would be, if any, if the rights and freedoms in any UK Bill of Rights were expressed in different language from that used in the European Convention on Human Rights and the Human Rights Act 1998?

There is a huge amount of jurisprudence from both our domestic courts and the European Court of Human Rights interpreting the rights contained in the European Convention on Human Rights. This jurisprudence is an important source of guidance for public authorities, and others, as to their obligations under the ECHR and the Human Rights Act. The jurisprudence has, for example, been crucial in explaining how the Convention Rights protect children. Rights in a Bill of Rights should be expressed in the same terms as

the corresponding rights in the ECHR and the Human Rights Act, so that the existing jurisprudence is applicable to their interpretation. This will be advantageous not only in providing legal certainty for those obliged to comply with the Bill of Rights, it will also assist children and those working to protect their rights.

Q6: Do you think any UK Bill of Rights should include additional rights and, if so, which?

As we have said in our response to Question 1, we would only support a Bill of Rights incorporating additional rights if it in no way undermined the Human Rights Act. Subject to this caveat, we believe that a Bill of Rights should contain those rights found in the CRC. There are compelling arguments supporting the constitutional protection of children's rights:

- Children have additional needs and rights, not shared by adults, which are not found in other human rights treaties, and are not protected in the Human Rights Act.
- Children are particularly vulnerable to human rights abuses, and to the impact of such violations;
- Research confirms that children in the UK do not currently enjoy their rights, indicating that their rights need additional protection.
- Children are particularly reliant on legal protection of their rights because they lack political power.

Each of these points is dealt with below.

Children have additional needs and entitlements which adults do not share and which are not, therefore, reflected in more general human rights treaties, and are not protected by the Human Rights Act and the ECHR. The additional rights found in the CRC, reflecting the particular needs and circumstances of children include, for example:

- a. The four general principles of the Convention: the right to enjoy all rights without discrimination on the basis of the child's or parents' or other family members' status or actions (Article 2); the best interests of the child (Article 3); the right to life and maximum development; (Article 6); and the right to be heard and taken seriously (Article 12)
- b. The positive role of parents, parental responsibilities and the child's evolving capacities (Articles 5, 18(1) and 14(2))
- c. The right to family support and to maintain regular contact with both parents when separated from them (Article 18(2) and (3))
- d. The right to protection from all forms of violence and to positive rehabilitation (Articles 19 and 39)
- e. The aims of education (Article 29)
- f. The right to information (Article 17) and education about children's rights (Article 42)
- g. The right to play, rest and leisure (Article 31)
- h. The right to an adequate standard of living (Article 27)
- i. The right to health and health care (Article 24)
- j. The right to special care and protection when separated from parents (Article 20)
- k. The right to protection from contact with the criminal justice system, including institutionalisation (Article 37(b))
- l. The right of children in conflict with the law to be treated in a way which promotes dignity and self worth, and consistent with the child's age (Article 40(1))
- m. The right to privacy throughout all stages of criminal proceedings (Article 40(2) (vii))
- n. The right to be separated from adults in detention (Article 37(c)).

These additional rights recognise that childhood is a time of evolving capabilities, and unrivalled human potential and vulnerability. Children are economically dependent on adults, they lack physical, social and political power, and childhood is a critical time for survival and development. Children are, therefore, particularly vulnerable to human rights violations and are particularly susceptible to the impact of any human rights abuses.

There is clear evidence that children in the UK do not currently enjoy their rights. The 2007 UNICEF report card placed the UK as overall worst for children's well being among the world's 21 richest countries.² In 2008, the UN Committee on the Rights of the Child made over 150 recommendations for changes to law, policy and practice affecting children.³ In 2009, the OECD's assessment of child well-being across 30 OECD states placed the UK 28th for risky behaviours, 22nd for educational well-being and 20th for health and safety.⁴ The evidence indicates that the UK's current approach to the implementation of children's rights has not been successful in ensuring that children enjoy their rights in practice.

Because children cannot rely on democratic processes to bring about the change necessary to protect their rights, they are particularly reliant on legal protection of their rights.

A Bill of Rights should also incorporate the rights found in other human rights treaties ratified by the UK. The Convention on the Rights of People with Disabilities, for example, contains many rights which may offer disabled children additional and greater protections than that afforded by the CRC.

Do you have views on the possible wording of such additional rights as you believe should be included in any UK Bill of Rights?

Children's rights in a Bill of Rights should be drafted to reflect the wording in the CRC. This would have the advantage of making the General Comments of the Committee on the Rights of the Child highly relevant in interpreting the children's rights in a Bill of Rights, and would reflect the UK's obligations under international law most closely. The wording could be amended to the extent necessary to reflect the modern understanding of the rights contained

² UNICEF, *Child Poverty in Perspective: An overview of child well-being in rich countries*, 2007.

³ United Nations Committee on the Rights of the Child, *Concluding observations on the UK*, 2008.

⁴ OECD, *Doing Better for Children: Comparative child well-being across the OECD*, 2009.

therein, in recognition of the fact that human rights treaties are living instruments. The right to be free from discrimination should, for example, include protection against discrimination on grounds of sexual orientation and gender identity.

Q7: What in your view would be the advantages, disadvantages or challenges of the inclusion of such additional rights?

So long as the Bill of Rights does not weaken or repeal the Human Rights Act, incorporation of children's rights in a Bill of Rights would have the advantage of affording much needed additional protection to children's rights. Our response to Question 6 explains why such additional protection of children's rights is necessary.

The primary advantage of incorporating children's rights would be to change the behaviour of those who influence children's lives, by requiring them to put children's rights and interests at the heart of what they do and emphasising the need to bring about positive change in individual children's lives. In addition, incorporation of the CRC rights would increase access to justice for children, where their rights are breached.

When examining the UK in 2008, the Committee on the Rights of the Child took the unprecedented step of drawing attention to the "general climate of intolerance and negative public attitudes towards children, especially adolescents, which appears to exist in the State party, including in the media".

⁵ Incorporation of the CRC rights has the potential to promote a shift in the way people think about children and children's rights. This potential will only be realised if there is an appropriate process of public consultation, dissemination and sensitisation surrounding the enactment of a Bill of Rights.

One particular advantage of incorporating the CRC and other treaties such as the International Covenant on Economic, Social and Cultural Rights, would be

⁵ United Nations Committee on the Rights of the Child, *Concluding observations on the UK*, 2008, para 24.

to give domestic effect to economic and social rights. Children are particularly vulnerable to the affects of socio-economic deprivation because of their unique and crucial stage of development. We are not persuaded by concerns that the incorporation of economic and social rights will involve judges in inappropriate decision-making. Judges are used to making decisions concerning the distribution of resources in other contexts, and are careful not to usurp the power of parliament in doing so. Bills of Rights in other jurisdictions provide models for incorporation of economic and social rights in a way which maintains an appropriate balance between the branches of power.

Incorporation will also help the UK meet its international obligations. The Committee on the Rights of the Child has urged the UK to incorporate the Convention, expressing concern that “the principles of the Convention are not duly taken into account in all pieces of legislation throughout the country and that the State party has not incorporated the Convention into domestic law nor has ensured the compliance of all legislation affecting children with it.” It concluded:

The Committee recommends that the State party continue to take measures to bring its legislation into line with the Convention. To this aim, the State party could take the opportunity given in this regard by the development of a Bill of Rights in Northern Ireland and a British Bill of Rights, and incorporate into them the principles and provisions of the Convention, e.g. by having a special section in these bills devoted to child rights.⁶

Q8: Should any UK Bill of Rights seek to give guidance to our courts on the balance to be struck between qualified and competing Convention rights? If so, in what way?

⁶ United Nations Committee on the Rights of the Child, *Concluding observations on the UK*, 2008, paras 10-11.

No additional guidance is necessary. The drafting of the rights, and jurisprudence, provides the courts with the necessary guidance.

Q9: Presuming any UK Bill of Rights contained a duty on public authorities similar to that in section 6 of the Human Rights Act 1998, is there a need to amend the definition of 'public authority'? If so, how?

The definition of a public authority should be such that all those carrying out public functions are subject to its provisions.

Q10: Should there be a role for responsibilities in any UK Bill of Rights? If so, in which of the ways set out above might it be included?

It is vital that any Bill of Rights is drafted in such a way that the enjoyment of rights is not contingent on responsibilities. Those who argue otherwise fundamentally misunderstand the concept of human rights.

Q11: Should the duty on courts to take relevant Strasbourg case law 'into account' be maintained or modified? If modified, how and with what aim?

The courts should be required to take into account Strasbourg case law, and other sources of international human rights law.

Q12: Should any UK Bill of Rights seek to change the balance currently set out under the Human Rights Act between the courts and Parliament?

The provisions protecting the rights in a Bill of Rights should be at least as strong as those found in the Human Rights Act.