Children's Rights Alliance for England

Part of Just for Kids Law

Briefing for the children's sector – Government plans to replace the Human Rights Act with a Bill of Rights: Implications for children

May 2022

Our human rights are about the values we hold dear and the way we treat one another – such as dignity, fairness, equality, tolerance, and respect. They are the hidden foundations that help us live together freely and fairly - a safety net to protect us all, including our children. We are therefore very concerned about the UK Government's far-ranging proposals to replace the Human Rights Act (HRA) with a British Bill of Rights. We believe the proposed reforms will significantly weaken children's human rights and the ability of children to hold the UK Government and public bodies to account where their rights have been infringed.

As charities working in the children's sector, we work with some of the most vulnerable children in society and it is crucial that their rights, as protected under the HRA, are not diluted in any way. We will be urging the UK Government to abandon its proposals for a British Bill of Rights and to redirect its efforts towards the retention and strengthening of the HRA, alongside a programme of awareness raising so everyone, including children, better understand its protections and freedoms. We are more likely to succeed in convincing the Government to protect these important rights for children if a broad range of children's charities work with us to speak out in support of the Human Rights Act.

The role of the HRA in relation to the CRC

The HRA is the primary law which protects fundamental human rights in the UK, including those of children, by enshrining the rights contained in the European Convention on Human Rights into domestic law. As the UN Convention on the Rights on the Child (CRC) has not yet been incorporated into UK law, the HRA also plays a crucial role in the protection and promotion of the rights of children; enabling them to claim and enforce some of the rights contained in the CRC. These include children's right to life, to be free of slavery and forced labour and not to be treated in inhuman or degrading ways, their right to freedom of expression, to private and family life and their right to education. Case law has also made clear that when a case under the HRA involves a child, the rights in the HRA must be interpreted through the lens of the CRC.[1]

The HRA is working effectively for children and there is no evidenced-based case to amend or replace it. Evidence from across civil society, including the conclusions of the Government's Independent Human Rights Act Review, shows that existing human rights law is working well, and that if changes are needed they are to attitudes and understanding of human rights and not the fundamentals of our legal and constitutional framework. While we recognise the HRA does not protect all the rights in the CRC and there is still a need to incorporate the CRC into domestic law, now is not the time to do this.

Why is the HRA important for children?

[1] R (P & Q) v The Secretary of State for the Home Department, 2001, EWCA Civ 1151

Since the HRA came into force it has provided important protections for some of our most vulnerable children such as children in care, child witnesses, children in custody, and refugee children as the following examples illustrate.

- Ensuring that 17-year-olds were given the right to an appropriate adult at the police station, and to have their parents notified of their whereabouts where previously they were treated the same as adults. [2] This previous lack of protection for 17 year-olds in police custody led to the tragic case of a child taking her own life.

- Confirming equal financial support for family and non-family members who foster children, when the High Court ruled that payments by a local authority should not discriminate against foster families on the grounds of family status.[3]

- Ensured that children in prison were entitled to the same protection and care as all other children. This landmark case found that the Children Act 1989 applies to children in custody and led to a raft of child protection policies and procedures being introduced to prisons. [4]

- Curtailed police powers to remove children under 16 years old from designated areas, when a court ruled that the power in the Anti-Social Behaviour Act 2003 to disperse children under 16 from certain areas after 9pm should only be used in cases where children are involved in, or at risk of, anti-social behaviour.[5]

- Preventing a woman living in poverty, who had to leave her partner after discovering he had been abusing their children, from being separated from her children. The woman and her children were placed in temporary bed and breakfast accommodation and were housed in three different places in a 6-month period. Social workers claimed she was not a 'fit' parent as she was unable to provide stability for her children and was having problems getting them to school. With assistance from a local group, the woman invoked her children's right to respect for private and family life and their right to education under the HRA, and challenged their decision. The local authority then decided not to remove the children, but to keep them on the 'children at risk' register, and within three weeks the family was able to be placed in stable accommodation.[6]

- Preventing a mother and her new-born baby from being made homeless. A single mother who had been refused asylum was threatened with eviction by the National Asylum Support Service (NASS), while having her second child. NASS issued a 'termination of support' notice to her while she was giving birth in hospital. The voluntary organisation supporting the woman suggested to NASS that evicting the family in these circumstances could amount to inhuman and degrading treatment under Art. 3 of the HRA and suggested the NASS reconsider the decision. The notice was amended and the woman and her children were able to receive support and alternative accommodation under the Immigration and Asylum Act 1999.[7]

Duty on public bodies

Importantly for children, who depend heavily on public services, section 6 of the HRA also places a duty on public bodies to comply with the human rights obligations contained within it, including the

[2] R(HC) v The Secretary of State for the Home Department, and the Commissioner of the Police of the Metropolis [2013] EWHC 982 (Admin)

[3] R (L and others) v Manchester City Council, High Court, 26 September 2001

[4] R (on the application of Howard League) v Secretary of State for the Home Department and the Department of Health 2002

[5] R (W) v Commissioner of Police for the Metropolis and others, 2006, EWCA Civ 458

[6] *The Human Rights Act Changing Lives*, 2nd edition, British Institute of Human Rights, https://www.bihr.org.uk/Handlers/Download.ashx?IDMF=3c184cd7-847f-41b0-b1d1-aac57d1eacc4

[7] British Institute of Human Rights (2008) *The Human Rights Act Changing Lives,* 2nd edition

police and the youth secure estate, care institutions, courts, publicly funded schools, and local authorities. This also requires all public officials to think about human rights in their day-to-day decisions and policy making so that all laws, policies, and guidance are compatible with the HRA. Section 6, when fully implemented, helps to ensure that public authorities comply with the European Convention on Human Rights (ECHR) and that there are positive changes to children's rights protection without the need to go to court. As the Parliamentary Joint Committee on Human Rights concluded, Section 6 means *"there is more respect for rights and less need for litigation"*[8] but where public bodies fail to respect and protect rights, children and their families can take action in the courts, if necessary.

What do the proposed reforms say?

Choice of rights to target for reform

We are extremely concerned that much of the Government narrative around the Bill implies that some people, including some children, could be excluded from the full protection of human rights laws. Such a proposal undermines the fundamental principle behind human rights, which is that they are universal and must be applied to everyone equally and would be inherently discriminatory if this exclusion was based on their immigration status or any other characteristic.

When the Government consulted on its plans for the Human Rights Act, it included examples of where it believes that rights have been interpreted too widely, or that the issues should not be decided by the courts. These included obligations on local authorities in respect of child safety and the duty on the police to protect the right to life. These engage the right to respect for private and family life, home and correspondence (Article 8 ECHR), the right to life (Article 2 ECHR) and the right to be free from freedom, torture and inhuman or degrading treatment (Article 3 ECHR).

This aim misrepresents the nature of human rights. We all want to live in an equal, just and fair society, where governments and public bodies respect, protect and fulfil our human rights. The Human Rights Act, along with other legal processes, gives people the ability to hold governments and public bodies to account when they fail to uphold our rights and/or cause other types of harm. It allows ordinary people to stand up to those in power and expect that their rights are respected. The rights targeted for reform are also the rights that are often of most use to minority or other disadvantaged groups and are fundamental to our humanity.

One of the examples is the obligation on local authorities to safeguard children from abuse, while balancing this against the child's right to family life. This often difficult and nuanced situation is mischaracterised as 'judicial extensions' of human rights, rather than as applying the human rights framework to ensure that difficult decisions are taken properly and in a way that respects the rights of all concerned.

Harder to hold the Government and public bodies to account

The proposed reforms also include introducing a permission stage. We are extremely concerned about the effect introducing a conditionality would have on a child's right to bring a claim under the HRA and do not believe that these new measures are needed. There are already the necessary checks in place to ensure that spurious claims cannot proceed. Section 7 of the HRA already requires a child, or anyone else, who wants to bring a claim under the HRA to show that they are a victim of a human rights breach and there are admissibility stages for legal cases in the UK which prevent frivolous, academic or unmeritorious cases from proceedings.

[8] House of Commons House of Lords Joint Committee on Human Rights (2021) *The Government's Independent Review of the Human Rights Act. Third Report of Session 2021–22* HC 89 HL Paper 31

This proposal would make it much harder for children to access justice if they also had to prove that they had experienced 'significant disadvantage', an extra test that is likely to complicate, delay and add cost to proceedings We know from our work, that children already struggle to access justice in a number of areas, are already disadvantaged by the lengthy time taken in court proceedings, and can be far less willing to litigate breaches of their Human Rights as they are more reliant on their parents or carers to assist them in making such decisions. This proposal would have a chilling effect which will be particularly detrimental to children who already struggle to access expert legal advice and representation due to lack of legal aid and expert representation. Again, these proposals could also make it more likely that children would need to go to the ECtHR under Article 13 (the right to an effective remedy) which is not a suitable route for children given the time it takes for cases to be heard and the costs likely to be involved.

Greater focus on 'genuine human rights abuses'

The Government's consultation which proceeded the Bill implied that some people may make a claim under the HRA in order to receive financial damages. In our experience of working with children, being awarded damages is not the priority motivation for taking a case. In the cases that Just for Kids Law have taken representing children who allege breaches of the rights under the HRA, they have rarely sought damages as a remedy. Instead, the cases were taken in order to rectify their rights being infringed.

For example, in the case taken by our strategic litigation team the High Court overturned the youth court's decision denying a 15-year-old child with special educational needs additional support from an intermediary - a specialist speech and language expert. The court stated that a defendant must have a fair trial (Article 6), which includes the ability to participate effectively in their case as well as confirming that child defendants are entitled to additional protections in law in criminal proceedings. [9] No damages were awarded.

Children, like adults, want to see justice being done and any infringements of their rights to be recognised as such. What type of remedy is awarded, depends on the facts of each case and a decision on what is 'just and appropriate' so a child would not necessarily be awarded damages in every case.

Change to the definition of public authorities

We are also concerned about suggestions to change the definition of public authorities. It is extremely important that even if public functions are contracted out to a charity or company the HRA still applies to them. This is particularly crucial for the protection and safeguarding of children who live in institutions which are run by private providers, for example, Secure Training Centres and children's homes. Any changes to the definition of public authorities could therefore put children at risk. The Howard League for Penal Reform, for example, successfully challenged the privately run prison of Ashfield, in the High Court, who unlawfully punished children, and acted in breach of their rights under Article 6 (the right to a fair trial)[10]. It would be unthinkable if such establishments would escape such scrutiny.

Courts are already incredibly reluctant to put positive obligations on public bodies as they recognise that the bodies themselves will have competing priorities. The courts exercise institutional deference by quashing an unlawful policy or declaring a situation to be in breach of the HRA. It is rare for a court to impose a positive obligation on a public authority as a remedy.

Changes to the principle of 'positive obligations'

[9] For more information, see: https://justforkidslaw.org/news/high-court-ruling-support-vulnerable-young-people-complex-needs
[10] https://howardleague.org/news/ashfield-prison-punished-children-unlawfully-high-court-rules-after-howard-league-legal-challenge/

The European Court of Human Rights has established the principle of 'positive obligations' to refer to situations where securing rights requires actions from the Government e.g. it might mean passing a law to make certain behaviours criminal, such as physical violence against a child when punishing them or requiring social housing landlords to make sure their housing is in a fit state for children and families to live in. The Government argues that its' aim is to "address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation."

The concept of 'positive obligations' has been most effective at protecting minority groups, or those with protected characteristics whose needs are not always met by generic government policy made for the majority. Positive obligations have been used to support public services priorities by ensuring they are delivered well and for all. There are rare cases where it is necessary for the court to impose positive obligations, and these powers are extremely important for children who frequently access and use such services, particularly those from the most vulnerable groups, as we have illustrated above.

We would be very concerned if any steps were taken to dilute positive human rights obligations on public bodies, which provide the foundation for safeguarding children and protecting them from abuse and neglect. This safety net is particularly important for children in institutions, for example, mental health units, children's homes, Secure Training Centres or Young Offender Institutions. Positive obligations ensure that public bodies take proactive steps to safeguard children's rights and enable redress when a public body has not fulfilled its human rights obligations towards children.

This is demonstrated by the Deep Cut Barracks case[11] where the families used the HRA to get justice for their children who had died at the barracks because steps had not been taken to properly safeguard and protect them. Using Article 2 (right to life) and Article 6 (right to a fair and public hearing) of the ECHR they successfully argued that the court should quash the findings of the previous coroners and ordered fresh inquests. It was clearly necessary for the High Court to have this power. It is therefore imperative that these obligations are not weakened in any way.

Proposals to make a declaration of incompatibility rather than overturn secondary legislation

We also strongly disagree with the proposal to enable courts to make a declaration of incompatibility with the HRA rather than overturning secondary legislation given that such legislation has wide-ranging impact on many aspects of children's lives. Such a change will weaken UK Government accountability, which is an important protection for ensuring that secondary legislation respects children's human rights given that it only has very limited parliamentary scrutiny. We are also concerned that a change to the status quo will mean long delays before a breach of children's rights is rectified, meaning that children could continue to have their rights breached for long periods of time. Currently, if a court rules that a piece of secondary legislation is unlawful the Government is still able to redraft it so that policy aims are met while also safeguarding human rights - we believe this is the right balance.

Plans to favour freedom of expression over privacy

While we recognise that freedom of expression (Article 10) is an important right in any democracy, we have serious concerns about proposals to introduce a presumption in favour of upholding Article 10 rights, and thus tipping the balance in its favour, against privacy rights set out in Article 8. These plans have the potential to be extremely damaging to the children we work with. Children in contact with the criminal justice system are some of the most vulnerable in society.[12] It is crucial,

[11] https://centreformilitaryjustice.org.uk/human-rights-stories-no-4-deepcut-how-the-families-used-the-human-rights-act-to-get-access-to-the-states-evidence-about-their-children-and-to-get-fresh-inquests-exposing-abuse-ill-treat/

[12] National Association for Youth Justice (2020) *The state of youth justice 2020: An overview of trends and developments*

therefore, that their identities are not revealed in the media, which can be extremely damaging, detrimental to their mental health, and also hinders rehabilitation and the ability for them to move on with their lives and to contribute positively to society.[13] We are concerned that any reforms to Article 10 could make case law, which sets out the balance which must be struck between Article 8 and 10, redundant and therefore reduce protection for this group of children. The right of a child to have his or her privacy fully respected during all stages of criminal proceedings is set out in article 40(2) of the CRC and in the UN Committee on the Rights of the Child's General Comment Number 24.[14]

Deportation and the public interest

We are particularly alarmed at the suggestion that any individual would be barred from arguing that their rights had been breached. Such a suggestion runs entirely contrary to the nature and purpose of Human Rights.

We are very concerned about cases we have seen where the Secretary of State has attempted to deport young adults who have lived in this country most of their lives, based on crimes they have committed when they were children.

We are currently assisting one young person subject to deportation who has lived here since he was 12 and another young person who has lived here since he was two years old. We are also aware of cases where the Home Office has attempted to deport young adults who were born in this country.

We believe that where deportations are based on crimes that were committed as children, that the courts have a vital role in ensuring all relevant information is taken into account in deciding whether or not deportation is necessary. We believe that the time spent in this country as a child and growing up here will always be relevant in deciding whether to deport someone, and therefore allowing such people to bring Article 8 (right to private and family life) claims is necessary and just.

Devolution

Our sister organisations in the other parts of the UK have told us that the Government's proposals for reform are out of step with political and public opinion in the devolved regions and nations and, in particular, are incompatible with the Good Friday Agreement and devolution settlement in Northern Ireland. The proposals in the consultation, if enacted, will detrimentally alter the way in which these protections are experienced by children in the devolved regions and nations. The cumulative impact of the proposals will be to limit access to the Convention rights as currently experienced.

Find out more about why the Human Rights Act is important and the proposals:

British Institute of Human Rights: https://www.bihr.org.uk/human-rights-act-reform
Equally Ours: https://www.equallyours.org.uk/human-rights-our-rights/
Liberty: https://www.libertyhumanrights.org.uk/your-rights/the-human-rights-act/

Contact: Natalie Williams, Head of Policy and Public Affairs (Child Rights) NWilliams@crae.org.uk; 020 3174 2279

[13] Standing committee for Youth Justice (2014) *What's in a name? The identification of children in trouble with the law*

[14] UN Committee on the Rights of the Child (2019) *General comment No. 24 on children's rights in the child justice system: "In the Committee's view, there should be lifelong protection from publication regarding crimes committed by children. The rationale for the non-publication rule, and for its continuation after the child reaches the age of 18, is that publication causes ongoing stigmatization, which is likely to have a negative impact on access to education, work, housing or safety. This impedes the child's reintegration and assumption of a constructive role in society. States parties should thus ensure that the general rule is lifelong privacy."*