

Howard League for Penal Reform's response to the Independent Human Rights Act Review call for evidence

March 2021

Summary

1. The Howard League welcomes the opportunity to contribute to the Independent Human Rights Act Review. This short response considers the review from the perspective of the need to promote fairness in prisons.
2. The UK is rightly proud of its role in drafting the European Convention of Human Rights, which built on both English common law and domestic laws passed by Parliament. The UK ratified the Convention before any other nation.
3. The Human Rights Act requires courts to take the judgments, declarations and opinions of the European Court into account while maintaining the principle of parliamentary sovereignty. The Howard League believes the current framework is sensible and does not need changing.
4. The current approach to the margin of appreciation and judicial dialogue ensures that sovereignty of parliament is sufficiently respected.
5. Though the framework of the Human Rights Act should not change, its application in practice could be improved. For example, declarations of incompatibility do not always lead to prompt corrective action.
6. As members of a closed community subject to the exercise of highly coercive powers, people in prison need to be able to ensure their rights are respected and protected through our domestic laws.
7. The Human Rights Act helps to uphold standards of fairness in prisons, to the benefit of both staff and prisoners. People in prison are more likely to respect the law if they know that their rights cannot be breached arbitrarily: this improves behaviour and makes it more likely that children and adult prisoners will be successfully rehabilitated. The Howard League's work with children and young adults in prison often reveals how rights-based advocacy can engender respect for the rule of law.

- 1. About the Howard League for Penal Reform and summary of response**
 - 1.1 Founded in 1866, the Howard League is the oldest penal reform charity in the world. The Howard League has some 13,000 members, including prisoners and their families, lawyers, criminal justice professionals and academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.
 - 1.2 The Howard League works for less crime, safer communities and fewer people in prison. We achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's parliamentary work, research, legal and participation work as well as its projects.
 - 1.3 Our legal team works directly with children and young adults in prison. We have drawn on our legal work in responding to this consultation. We have also drawn on our policy work on the importance of fairness in prison and the value of a rights-based approach (Howard League, 2020).¹ As the most absolute expression of the criminal justice system, we believe prisons should uphold the highest standards of justice and fairness. Fair treatment encourages prisoners to take personal responsibility and improves behaviour in custody.
 - 1.4 The UK has a proud history of promoting human rights, including through its contributions to and early adoption of the European Convention on Human Rights. The Human Rights Act 1998, which incorporates the Convention rights into domestic law, is a continuation of that valuable history. The Human Rights Act upholds the principle of parliamentary sovereignty by ensuring that Parliament decides how any incompatibility with Convention rights should be resolved. In the Howard League's view, this framework works well and does not need changing. If anything, the Act should be more closely adhered to.
 - 1.6 The Howard League would welcome the opportunity to provide further information about any of the points below.
- 2. The UK was pivotal in drafting the European Convention on Human Rights, and was the first nation to ratify it**
 - 2.1 British politicians and lawyers played a key role in drafting the European Convention on Human Rights. As legal scholars have noted, the Convention reflects and builds upon English common law and legislation passed by Parliament (Frantzou et al, 2013).² The UK is deservedly proud of its work towards, and early adoption of, the Convention.
 - 2.2 The Human Rights Act 1998 was an important development in this valuable work. In 2019, the then-Parliamentary Under Secretary of State for Justice noted that Human Rights Act was "a huge step forward in putting those [i.e., the Convention] rights on a

¹ Howard League (2020) *Justice does not stop at the prison gate: Justice and fairness in prisons* <https://howardleague.org/wp-content/uploads/2020/11/Justice-Fairness-briefing-2-FINAL-2.pdf>

² Frantzou, Eleni, Staiger, Uta and Chaytor, Sarah (2013), *Human Rights and British Values: The Role of the European Convention on Human Rights in the UK Today*, available at https://www.ucl.ac.uk/public-policy/sites/public-policy/files/migrated-files/European_Convention_on_Human_Rights.pdf

footing whereby they could be enforced in the UK's domestic courts" (Hansard HC Deb., 13 February 2019).³ It is often described as the Act which "brought rights home".

3. The current framework is sensible and does not need changing

- 3.1 Sections two, three, four and ten of the Human Rights Act uphold the principle of parliamentary sovereignty, and sensibly reflect the balance between the executive, the legislature, and the judiciary. The Howard League sees no reason to repeal or amend any of these provisions.
- 3.2 Until the Human Rights Act, breaches of Convention rights could only be remedied in Strasbourg. Since then, UK public authorities have been required to act in a way which is compatible with the Convention, and domestic courts have been required to take the judgments, declarations and opinions of the European Court of Human Rights into account.
- 3.3 The Convention and the Human Rights Act help to ensure that public authorities in the UK treat everyone fairly. Where this does not happen, people can seek legal remedy without the delays and complications of bringing a case in the European Court. As a result, the Human Rights Act upholds standards of justice and fairness which would be less secure in law without it.
- 3.4 The current framework set out in the Human Rights Act carefully balances the value of Convention rights with the principle of parliamentary sovereignty. The courts cannot themselves change primary legislation: once a declaration of incompatibility is made, Parliament decides how it will be remedied. Remedial orders do not become law unless they are approved by both Houses of Parliament. This framework works well and should not be changed.

4. The courts recognise the intentions of parliament and the executive

- 4.1 In light of the legal, cultural, and political diversity of member states, the European Court partially defers to national authorities' interpretation of Convention rights. The Open Justice Society Initiative has produced a helpful summary of the case law on this "margin of appreciation". States are given a wide margin in matters concerning national security, the interpretation of social and economic policies, the protection of morals, and public emergencies (Open Justice Society Initiative, 2012).⁴
- 4.2 Similarly, in cases which would fall within the margin of appreciation if they were heard before the European Court, the UK courts allow a "margin of discretion, or deference" to public decision-makers. In *R (S and KF) v Secretary of State for Justice* [2012] EWHC 1810 (Admin), a case concerning deductions from prisoners' earnings, Mr Justice Sales (as he then was) concluded that the margin of discretion for decision-makers in domestic courts is equivalent to the margin of appreciation in the European Court:⁵

³ Hansard HC Deb. vol. 651 col. 348WH, 13 February 2019, available at <https://hansard.parliament.uk/Commons/2019-02-13/debates/D3018F3E-4DAB-4D0C-B9D7-CF1B84DBD204/details#contribution-250BE7B3-F5BF-4D5B-864C-E00AF2B6A6B0>

⁴ Open Justice Society Initiative (2012), *Margin of Appreciation*, available at <https://www.justiceinitiative.org/uploads/918a3997-3d40-4936-884b-bf8562b9512b/echr-reform-margin-of-appreciation.pdf>

⁵ [2012] EWHC 1810 (Admin), available at <https://www.bailii.org/ew/cases/EWHC/Admin/2012/1810.html>

"As is well known, the concept of the margin of appreciation is deeply embedded in the case law of the ECtHR, featuring in hundreds of judgments. By requiring that this case law must be taken into account when the domestic courts determine questions arising in connection with a "Convention right", as that term is employed in the HRA, Parliament has indicated that an equivalent to the margin of appreciation should be applied by the domestic courts." (§55)

- 4.3 The judicial dialogue between the UK and Strasbourg ensures that domestic courts can – and do – challenge decisions of the European Court. In interviews carried out for a doctoral thesis on judicial dialogue, Justices of the UK Supreme Court explained that a national court will challenge a decision if it feels that Strasbourg has failed to understand the domestic law, or if it views the reasoning as inadequate (Davies, 2017).⁶
- 4.4 The margin of appreciation and judicial dialogue ensure that the European Court recognises the intentions of public decision-makers. Domestic courts similarly defer to the intentions of Parliament and other decision-makers. No change is required.

5. The application of the Human Rights Act could be improved

- 5.1 Though the framework set out in the Human Rights Act works well and does not need changing, its application in practice could be improved. For example, there have been long delays between declarations of incompatibility and remedial action by the Government and Parliament. Between 2000 and 2012, the legal scholar Jeff King has pointed out, the average time between declaration and remedy was 25 months. This is significantly longer than the time taken by other states (King, 2015).⁷

6. People in prison are members of a closed community subject to coercive powers

- 6.1 As Lord Brown noted in a debate on criminal legal aid, people in prison are "members of a closed community uniquely subject to the exercise of highly coercive powers" and must be protected against abuses of power (Hansard HL Deb., 29 January 2014).⁸ As Philippa Kaufmann QC and Tim Owen QC, citing Stephen Sedley QC (as he then was), state in their article in the European Human Rights Law Review, people in prison experience a sense of impotence and isolation that is the antithesis of the rule of law when informed by prison officials of an unpleasant truth—"I'm the law here" (Kaufmann and Owen, 2013).⁹
- 6.2 It is crucial that the rights of people in custody remain protected in our domestic laws, and that they are understood by both people in prison and staff. If Convention rights ceased to be enforceable in the UK, there is a risk that the rule of law would be undermined.

⁶ Davies, Gregory (2017), 'The Legitimising Role of Judicial Dialogue between the United Kingdom Courts and the European Court of Human Rights', Cardiff University DPhil Thesis, available at <http://orca.cf.ac.uk/107657/1/Gregory%20James%20Davies%20The%20Legitimising%20Role%20of%20Judicial%20Dialogue%20between%20the%20United%20Kingdom%20Courts%20and%20the%20European%20Court%20of%20Human%20Rights%20%28FINAL%29.pdf>

⁷ King, Jeff, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act' in Hooper, Hayley et al (2015), *Parliaments and Human Rights*, available at <https://discovery.ucl.ac.uk/id/eprint/10072227/>

⁸ Hansard HL Deb. vol. 751, col. 1279, 29 January 2014, available at

<https://publications.parliament.uk/pa/ld201314/lhdhsrd/text/140129-0002.htm>

⁹ Kaufmann, Philippa and Owen, Tim (2013), 'The price of dignity: legal aid for prisoners', *European Human Rights Law Review*, vol. 5, 482–493

- 6.3 The Howard League runs a free and confidential legal advice line for children and young adults in custody. Young people in custody are particularly vulnerable to rights violations, as shown by the abuse and coercion which BBC Panorama uncovered at Medway Secure Training Centre in 2016. As the then-Secretary of State for Justice put it, “those running Medway conceived of it as a place of coercion, where the culture and the incentives—as they were designed in the contracts—were centred around the corralling and control of children, rather than their full rehabilitation” (Hansard HC Deb., 12 May 2016).¹⁰
- 6.4 The Howard League had previously assisted children to complain about excessive use of force, physical and verbal abuse at Medway, as we explained in a blog post at the time. These complaints had not been upheld, due to a lack of CCTV footage. The Panorama investigation included footage of violent incidents which took place away from the view of CCTV cameras (Howard League, 2016).¹¹ This underlines the extreme vulnerability of children in prison.

7. The Human Rights Act helps to uphold standards of justice and fairness, to the benefit of both prison staff and people in custody

- 7.1 The Human Rights Act keeps the state accountable and upholds standards of fairness throughout public life, including in custodial settings. In turn, this engenders respect for the rule of law.
- 7.2 Young people often call the Howard League when they have been treated unfairly, including in circumstances which breach their human rights. Where appropriate, we raise these issues with prison safeguarding teams and governors and support young people to make complaints. In our legal work, the Howard League has found that rights-based advocacy helps young people to understand and respect the rule of law. If young people can see that the law applies to everyone and upholds fair treatment, this allows them to understand its value. Weakening the provisions of the Human Rights Act would undermine this message.
- 7.3 The young people supported by the Howard League’s legal team often initially see the law is only there to punish them. The legal work of the Howard League helps them to understand that the law is also there to protect them against abuses of power, and to ensure that they receive the support which they are entitled to and which will help them to rebuild their lives (for example, educational provision in custody or social care support upon release). In 2017, we published *Justice for Young People: 15 years of successful legal work* (Howard League, 2017). This summarises our legal work and achievements, all of which have focused on improving fairness for young people in prison and the community.¹²
- 7.4 Children and adults in custody have had their fundamental right to liberty removed as a punishment. However, as we have set out in our briefings on justice and fairness, inmates remain legally entitled to their other rights – and a failure to respect this is bad

¹⁰ Hansard HC Deb. vol. 609, col. 18WS, 12 May 2016, available at <https://hansard.parliament.uk/Commons/2016-05-12/debates/16051233000021>YouthJustice?contribution=859FAAFC-0F07-4515-8BBB-E15F4881C925>.

¹¹ ‘Howard League responds to BBC Panorama investigation into G4S-run Medway Secure Training Centre’, 12 January 2016, available at <https://howardleague.org/news/medwaystc/>

¹² Howard League for Penal Reform (2017), *Justice for Young People: 15 Years of Successful Legal Work*, available at <https://howardleague.org/wp-content/uploads/2017/11/Justice-for-Young-People.-15-years-of-successful-legal-work.pdf>

for everyone (Howard League, 2020).¹³ If people in custody perceive their treatment as arbitrary, they have little incentive to behave well or reflect on mistakes which they have made. This creates an environment which is worse for both people in prison and staff.

- 7.5 In contrast, if people in prison perceive their treatment as fair, they are more likely to respect and obey both the rules which they are subject to in prison and the law. Research shows that when decisions and processes in prison are procedurally just (i.e., transparent and fair), there is a reduction in rule-breaking and reconvictions and an improvement in prisoners' mental health (Howard League, 2020).¹⁴ For example, a American study shows that a failure to respond promptly to complaints – a measure of procedural justice – is a predictor of increased prison violence (Berie, 2013).¹⁵

8. Conclusion

- 8.1 The Human Rights Act 1998 is a valuable piece of legislation which balances the value of Convention rights with the principle of parliamentary sovereignty. The Howard League strongly believes that there is no need to amend the Human Rights Act: if anything, it should be more closely adhered to. We are concerned that any weakening of the Act could undermine justice and fairness in prisons, with detrimental effects for both staff and people in prison.

Howard League for Penal Reform
3 March 2021

¹³ Howard League for Penal Reform (2020), *Justice does not stop at the prison gate: Justice and fairness in prisons*, available at <https://howardleague.org/wp-content/uploads/2020/02/Justice-and-Fairness-in-Prison-briefing-one.pdf>

¹⁴ Ibid.

¹⁵ Berie, D. M. (2013), 'Procedural justice and prison violence: Examining complaints among federal inmates (2000–2007)', *Psychology, Public Policy, and Law*, 19(1), 15–29, available at <https://doi.org/10.1037/a0028427>