Howard League for Penal Reform

Response to the Ministry of Justice's consultation on proposals to reform the Human Rights Act 1998

8 March 2022

Key points

- Positive obligations support effective, fair, and accountable public service delivery and are critical to the realisation of rights
- Human rights must remain universal
- People in the criminal justice system are especially vulnerable to abuses of power and must have access to effective remedies
- The proposals on claimant conduct would reproduce racial inequalities and punish victims of abuse, exploitation and trafficking
- The Ministry of Justice must continue to safeguard against rights abuses in private prisons.

Overview and general comments

In its submission to the Independent Human Rights Act Review (IHRAR), the Howard League found that the existing Human Rights Act framework did not need to change. The Act already maintains the principle of parliamentary sovereignty, including through the current approach to the margin of appreciation and judicial dialogue (Howard League, 2021a).

The government's proposals go far beyond – and largely disregard – the conclusions of the 600-page IHRAR report. The government has not provided an adequate evidence base to support its proposals or demonstrate that there is any need for a Bill of Rights.

The Howard League has seen and endorses the comprehensive responses to this consultation from the Constitutional and Administrative Bar Association (ALBA), JUSTICE, Liberty and Public Lawyers in Non-Governmental Organisations (PLINGO). This submission is narrower in focus, addressing three areas which the Howard League is familiar with from its legal work: positive obligations, the importance of universal human rights, and the definition of public authorities.

The government's proposals threaten to remove the rights of people who have been in trouble with the law, reinforce poor treatment of racially minoritised people and victims of abuse and exploitation, and weaken safeguards against rights abuses in private prisons. These changes would make it harder for people to turn their lives around after contact with the criminal justice system and would erode, not strengthen, the rule of law. They must be rethought.

Question 11: How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons.

Positive obligations support effective, fair, and accountable public service delivery

This question oversimplifies how rights operate, with positive obligations often very difficult to distinguish from negative obligations. Positive, or procedural, obligations have developed as a critical vehicle for the realisation of rights.

The framing of this question suggests that they are 'rights run wild' – ignoring the vast financial and human cost of an alternative where positive obligations are disregarded, where vulnerable people are not protected, and where problems are stored up for the future rather than addressed at an early and preventative stage.

People in prison are particularly vulnerable. It is not enough for the state to desist from violating their rights; it needs to take active steps to protect them, for example from prison violence or from suicide. These positive obligations are consistent with the expectations of anyone concerned about lives at the mercy of the state and any less would amount to a serious abdication of state responsibility.

The consultation refers to uncited cases between 2005 to 2011 to support the idea of an unchecked expansion of positive obligations, noting that these include cases involving the failure of Her Majesty's Prison and Probation Service (HMPPS) to provide drug treatment for people in prison. It notes that HMPPS has settled a range of claims, including for inhuman and degrading treatment, violations of the right to privacy and discrimination, allegedly costing £7 million.

Particularly given that it has chosen to settle, it is unclear how this supports the government's argument against positive obligations. The consultation simply highlights the failure of the HMPPS to act lawfully in respect of people under its care, the answer to which must be that it should abide by the law, rather than be protected from liability.

Our concerns do not solely lie with the positive obligations of HMPPS. Even under current human rights legislation, the Howard League sees the consequences of statutory services' failure to uphold their positive obligations in its legal work. Every day, Howard League lawyers speak to young people who have been repeatedly and tragically failed by public services. These failures can push people into the criminal justice system and make it increasingly difficult for them to get out.

The consultation document assumes that there is a conflict between positive obligations and public service priorities. The Howard League believes that positive obligations instead support effective, fair, and accountable service delivery.

In the context of children's rights, positive obligations encourage public services to recognise and meet children's needs – for example, by taking reasonable action to protect children from abuse and neglect in the community and from treatment which

deliberately humiliates or debases them in custody (Human Rights Futures Project, 2011; Howard League for Penal Reform v Secretary of State for the Home Department, 2002). The *"expansion of positive obligations"* has not introduced outlandish new requirements: it has allowed the law to reflect changed attitudes, such as a societal shift away from corporal punishment.

Question 27: We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons.

The proposal to include 'responsibilities' and/or to take account of 'the conduct of claimants' is disturbing and threatens to undermine the foundation of our human rights system. It appears to be based on a myth that the Human Rights Act protects 'bad' people and suggests that only 'good' people are worthy of rights protection.

Human rights must remain universal

It is a fundamental tenet of human rights that they are universal: they apply to everyone. As set out by Lord Hope:

> *The rights and fundamental freedoms that the Convention guarantees are not just for some people. They are for everyone. No one, however dangerous, however disgusting, however despicable, is excluded. Those who have no respect for the rule of law – even those who would seek to destroy it – are in the same position as everyone else*. RB (Algeria) v Secretary of State for the Home Department [2009] UKHL 10, [2010] 2 AC 110, [210]

The proposals in Question 27 erode that principle and imply that the rights of some people matter less than those of others. This direction of travel is both unethical and deeply counterproductive. The justice system ultimately has to reintegrate people who have committed offences back into society (save for the very small number of people who are sentenced to whole life orders in prison). It can only do this if people are able to move on from their past behaviour, rebuild their lives and develop a positive and law-abiding sense of self. The proposed clauses, particularly the second option, would instead define people by their past conduct.

As the Howard League explained in its submission to the Independent Human Rights Act Review, Howard League lawyers find that rights-based advocacy helps young people to understand and respect the rule of law (Howard League, 2021a). Young people are far more likely to value the law if they can see that it applies to everyone and upholds fair treatment. The proposals would significantly undermine this message by making the law less equitable.

People in the criminal justice system are especially vulnerable to abuses of power and must have access to effective remedies

Troublingly, the question assumes that people who have perpetrated harm do not deserve redress for harms done to them. This fails to acknowledge that many people who have committed offences have experienced and remain vulnerable to mistreatment, including unlawful treatment by statutory agencies. Legal protection is especially important for people in prison, given their position as – in the words of Lord Brown of Eaton-under-Heywood – *"members of a closed community uniquely subject to the exercise of highly coercive powers"* (Hansard HL Deb. 29 January 2014, vol. 751, col. 1279).

There is no reason to believe that rights violations are less damaging for people who have been in trouble with the law. Instead, people in the criminal justice system are both more vulnerable to abuses of power and more likely to have histories and mental health conditions which make these abuses particularly difficult to cope with (Criminal Justice Joint Inspection, 2021).

The proposals would reproduce racial inequalities and punish victims of abuse, exploitation and trafficking

It is not clear how courts are expected to assess past conduct or *"whether the claimant has respected the rights of others"*. However, courts would likely rely on the records of criminal justice agencies and would, in doing so, reproduce the stark racial inequalities found in policing and sentencing (Ministry of Justice, 2021).

The proposals also risk punishing victims of abuse, exploitation and trafficking, who are still unfairly criminalised because of gaps in the defence of duress and in the statutory defence introduced by the Modern Slavery Act 2015 (Howard League, 2021b).

Question 20: Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.

The Ministry of Justice must continue to safeguard against rights abuses in private prisons

The consultation document suggests that the definition of public authorities could be redrafted to offer *"more certainty or clarity"* but does not propose that there should be any change in the scope of what constitutes a public authority. It cites *LW & Ors v Sodexo Ltd*, which found that the Secretary of State ought to have provided safeguards against unlawful strip-searches at a private prison, as an example of cases where it is *"unclear what obligations the government is under"*. Yet the government was not unclear about its obligations in *LW*. The disputed issue was instead whether these obligations had been met.

In *LW*, the Secretary of State accepted that he had a duty to ensure that the relevant Prison Service Instruction was implemented through supervision and monitoring. His Detailed Grounds to the court explained that the issue was whether the framework of supervision and monitoring provided *"adequate and effective safeguards against breaches of Articles 3 and 8 in all the circumstances"* (§6c). Knowles J found that this framework was neither adequate nor effective.

Far from showing that the definition of public authorities needs to change, *LW* underlines the importance of accountability and state oversight over public functions which have been contracted out to the private sector. The government has confirmed that the two newest prisons, and three of the four new prisons to open after that, will be privately operated (Hansard HL Deb., 4 March 2022, col. WS644). In this context, the Ministry of Justice must retain its duty to safeguard against rights abuses in contracted-out prisons.

Cases cited

RB (Algeria) v Secretary of State for the Home Department [2009] UKHL 10, [2010] 2 AC 110, [210]

Howard League for Penal Reform v Secretary of State for the Home Department [2002] EWHC 2497 (Admin)

LW & Ors v Sodexo Ltd [2019] EWHC 367 (Admin)

References

Criminal Justice Joint Inspection (2021), *A joint thematic inspection of the criminal justice journey for individuals with mental health needs and disorders*. Available at https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2021/11/Mental-health-joint-thematic-report.pdf.

Hansard HL Deb, 4 March 2022, col. WS644. Available at https://questions-statements.parliament.uk/written-statements/detail/2022-03-04/hlws644.

Hansard HL Deb. 29 January 2014, vol. 751, col. 1279. Available at https://publications.parliament.uk/pa/ld201314/ldhansrd/text/140129-0002.htm.

Howard League for Penal Reform (2020). *Howard League for Penal Reform's response to the consultation on the Criminal Injuries Compensation Scheme Review 2020*. Available at https://howardleague.org/wp-content/uploads/2020/10/Response-to-Criminal-Injuries-Compensation-Scheme-Review-2020.pdf.

Howard League for Penal Reform (2021). *Howard League for Penal Reform's response to the Law Commission's 14th Programme of Law Reform*. Available at https://howardleague.org/wp-content/uploads/2021/08/2021_07_31_Law-Commission-response.pdf.

Human Rights Futures Project (2011). *Protection of children's rights under the Human Rights Act – some examples*. Available at https://www.lse.ac.uk/sociology/assets/documents/human-rights/HRF16-KlugHRAChildren.pdf.

Ministry of Justice (2021). *Statistics on Ethnicity and the Criminal Justice System 2020*. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1037903/Statistics_on_Ethnicity_and_the_Criminal_Justice_Sysytem_2020.pdf.

Paterson-Young, C. (2021). 'Exploring how children subjected to violence in the home cope with experiences in Secure Training Centres'. *Child Abuse & Neglect* 117, 105076.

Shenton, F. and Smith, R. (2020). 'Behaviour management or institutionalised repression? Children's experiences of physical restraint in custody'. *Children & Society* 35(1), 159–175.