

Written evidence from The Relatives & Residents Association (HRA0065)

R&RA

The Relatives & Residents Association (R&RA) champions the rights of older people needing care in England. We provide information, advice and support to empower older people and their families/friends, and use their unique perspective to raise awareness and to influence policy and practice.

Summary

We are concerned that the Government has thought it necessary to establish this review of the Human Rights Act (HRA). The timing is incredibly troubling, taking place during a global pandemic which has seen the rights of older people undermined by the Government's mismanagement of the virus. The technical, legal nature of the review's consultation questions seem designed to limit the responses to those who agree with the Government's position that there is a 'problem' with the HRA. In the context of the Conservative Party's repeated commitment to 'scrap' the HRA, and plans to reform judicial review, we are extremely concerned that the review is part of a wider move to weaken human rights protections and people's ability to hold the Government to account. We welcome the wider scope of the JCHR inquiry, ensuring the review hears about the impact the HRA has had on individuals and service delivery.

1. The need for and timing of the review

We are disappointed by the decision of the Government to establish the Independent Human Rights Act Review. Human rights laws should not be open to review and change at the whim of the government of the day. The HRA, like other bills of rights around the world, should last through the ages as a marker of our values as a society, a bottom line which sets out the kind of treatment we should expect from those with power. The HRA is central to our democracy and how people hold those with power to account when they overstep the mark.

It is particularly concerning that the review is being undertaken during a global pandemic. Rather than our human rights protections being questioned, they should help guide our response to the pandemic and the recovery. Indeed, human rights were themselves born out of crisis in the aftermath of WWII, setting the "foundation of freedom, justice and peace in the world" during our darkest hour.¹

The Government's response to the pandemic has undermined the human rights of older people needing care, from hospital discharge policies which put the right to life at risk to inadequate visiting guidance interfering with the right to family life. The Government have overseen a human rights crisis unfolding in care, with dire and tragic consequences for older people. At this time, the urgent focus should be on ending this crisis and ensuring the rights of some of the most vulnerable members of society are respected and protected. It should not be on questioning the very law which will help older people hold the Government to account for undermining their rights. A public inquiry is on the horizon, where the Government will

¹ Preamble to the Universal Declaration of Human Rights, 1948

have to answer for ‘failing the social care sector’.² The protection afforded by the HRA has never been so vital for older people needing care.

“We have taken the good bits of [residents’] lives away from them. We keep them in isolation. It is a catastrophic failure, against all we believe about our right to family life.”

Care home volunteer, February 2021

2. The remit and context of the review

It is incredibly concerning that an independent review of the HRA begins from the position of the law being problematic. Whilst there is a lack of evidence of the need for a review, if one is to take place, it should be genuinely independent and neutral in its starting position. The questions outlined by the review panel and the tone of their call for evidence suggest that there is a problem with how the Act is operating, without an evidence base for this. We are concerned by the narrow focus and the technical, legal nature of the review questions, which will be unlikely to give the panel a full picture of how the Act is operating on the ground and the difference it is making to people’s lives. We welcome the wider scope of the JCHR inquiry and the broader questions on the impact of the HRA on individuals and services.

It is important to note that the review is taking place in a context of long-running hostility to the HRA from senior politicians and many media outlets. There has been a failure by successive governments (of different colours) to promote the HRA, its purpose, its standing as a key pillar of our constitution or its aim to create a culture of respect for rights. On the contrary, senior politicians – including some in the Government – have sought to denigrate the HRA, perpetuating myths and misinformation. Read against the backdrop of the Conservative Party’s repeated commitments to ‘scrap’ the HRA, and other plans to reform judicial review, we are extremely concerned the review is part of a wider move to weaken human rights protections and people’s ability to hold the Government to account.

3. Impact of the HRA on older people

We know from our work, supporting older people and their families navigating the care system, how vital the protections afforded by the HRA have been over the last 20 years. We hear daily via our helpline the devastating impact poor care can have on older people’s lives. We see the value of a human rights framework in helping to protect people placed in the most vulnerable of situations. To have fundamental rights enshrined in law provides a vital backstop for older people. Sometimes it is the only lever that makes a difference in challenging poor care.

During the pandemic, the protection afforded by the HRA has been crucial for older people. Our helpline has been supporting people at the sharp end of the pandemic, giving us a unique insight into the experiences of those living with coronavirus and measures taken to manage it.

² ‘Interim report’, APPG on Coronavirus, December 2020, available at https://d3n8a8pro7vhmx.cloudfront.net/marchforchange/pages/326/attachments/original/1606989975/APPG_on_Coronavirus_Interim_Report_December_2020_%28%29.pdf?1606989975

Blanket visiting restrictions challenged

The HRA was used to bring about changes to inadequate Government guidance on visiting in care homes, which was encouraging blanket approaches, putting rights at risk. A judicial review of the guidance was instigated,³ leading to revised guidance being published which instead stressed the need for individual assessments and for care providers to meet their obligations under the HRA.

Our helpline supports families to use the rights and the framework of the HRA to negotiate and work with care providers to challenge poor practice. For example, to challenge blanket or disproportionate visiting restrictions. Being able to point to a legal framework, which requires service providers to balance rights, can help take the heat out of conversations.

Sadly, we also hear that too many of our helpline clients are afraid to use their rights and challenge poor practice. This is due to the vulnerable position of care home residents and the fear of reprisals, including threat of eviction or being blocked from contacting their relative. Rather than reviewing the law which provides protection for people placed in such vulnerable positions, the Government should put its energy into fixing the social care system to ensure residents do not live in fear of raising issues due to the power imbalance built into the current system.

During the pandemic, this imbalance has been even more pronounced, as residents in care homes have been restricted from seeing relatives and friends. Government guidance on visiting is not mandatory and continues to place the onus on care providers on how it is implemented. This has left many older people living under restrictive local visiting policies which they and their families feel powerless to challenge. The new law recommended by the JCHR requiring all care homes to facilitate contact with people of significance to residents would have helped to redress this power imbalance and supported care providers to meet their duties under the HRA. We are disappointed that the Government have decided not to take this forward.

4. Impact of the HRA on services

The duty in section 6 of the HRA has helped ensure the law has an impact outside of courtrooms, on the design and delivery of services. Placing a duty on public authorities to respect and protect rights in all they do helps put older people at the heart of decisions. There are many examples of where this has led to better care and treatment for older people.⁴

As most care services are delivered by private providers (either companies, charities or other not-for-profits) many older people are reliant on the clarification in section 73 of the Care Act about when the HRA duty will apply directly to the staff delivering their care. For people arranging and paying entirely for their own care, this makes it more complicated for them to access their rights as they need to involve a core public authority. Had the duty rested with all care providers registered with the regulator – as was suggested at the time – the impact of the HRA in care settings would be much wider.

³ By John's Campaign and supported by R&RA, see <https://www.leighday.co.uk/latest-updates/news/2020-news/johns-campaign-issues-challenge-to-blanket-ban-approach-on-care-home-visits-in-higher-risk-areas/>

⁴ For example, see 'Mental Health, Mental Capacity: My Human Rights' and 'Mental Health, Mental Capacity: Raising a Human Rights Issue', BIHR, 2017.

There is also a widespread lack of training on the HRA, particularly amongst care workers. When the HRA was passed, there was a delay in it coming into force to allow time for the training of judges. A similar mandatory training programme was not rolled out to all the other public officials who would have a duty to implement the law. The impact of the HRA would be much greater in care settings if care staff – often receiving minimum wage for carrying out a job so crucial to society – had mandatory training on the Act and how it applies to their work.

Other mechanisms for enforcing rights in the HRA have led to other positive changes on the ground. The ability for judges to interpret laws compatibly with the rights, or make a declaration of incompatibility, are both vital for ensuring other laws are brought up to the minimum standards set out in the HRA. This has been particularly helpful in care settings in ensuring older laws, like the Mental Health Act, are brought up to date.

Removing the discrimination against ‘nearest relatives’

When a woman in a long-term relationship with another woman was diagnosed with mental health issues, her local authority designated her estranged mother, not her partner, as her ‘nearest relative’ under the Mental Health Act. She challenged this and the court used section 3 HRA to interpret ‘relative’ as including same sex partners.⁵

22/03/2021

⁵ R (SG) v Liverpool City Council, 2002 available at <https://www.bailii.org/ew/cases/EWHC/Admin/2002/4000.html>