

Written evidence from the Howard League for Penal Reform (HRA0071)

Key points

1. The Howard League welcomes the opportunity to provide evidence about the operation of the Human Rights Act 1998. This submission focuses on how far the rights of young people in custody are upheld and enforceable in England and Wales.
2. The Human Rights Act is an essential safeguard for children and adults in prison. In particular, Articles 3 and 8 of the Convention of Human Rights help to protect people against abuses of power while they are in police custody or prison.
3. As England (unlike Wales and Scotland) has not incorporated the UN Convention on the Rights of the Child into domestic law, the Human Rights Act has been the main mechanism by which children's rights have been enforced in England. This has had an important and positive impact on all children: the Howard League has used these provisions to benefit vulnerable children in prison.
4. The existing human rights framework is adequate and does not need to be changed. Practice around it needs to improve, especially for vulnerable people. The Howard League knows from its direct legal and participation work with children and young adults in prison the huge difference that access to justice can make. Significant work is required to make sure young people in prison understand the law and can get legal support.
5. The Human Rights Act requires authorities which perform public functions to act in a way which is compatible with Convention rights. However, these rights are only as good as our means of enforcing them. Though the Howard League has had many successes in using rights-based arguments to make sure that young people in or leaving prison are treated fairly, many vulnerable young people in custody continue to experience unnecessary barriers to justice.

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 The Howard League's legal team works directly with children and young adults in prison aged 21 and under and provides legal advice and representation. The legal team runs a free, confidential legal telephone service that is free for young people to call without needing the permission of prison staff. The Howard League has drawn on its legal work and its policy work on the importance of fairness in prison and the value of a rights-based approach in responding to this consultation (Howard League, 2020).¹

1.4 The Howard League's legal team have used human rights legislation to challenge treatment which is inhuman and degrading, and to argue that young people in prison should be able to access medical care and have meaningful contact with their families. The Howard League's view is that the Human Rights Act is adequate and should not be amended, especially as it is the main mechanism through which children's rights are enforced in England. However, practice around the Act needs to improve: at present, it is undermined by a dire shortage of legal aid providers and (as a result) limited access to justice among people in prison.

1.5 The Howard League would welcome the opportunity to provide further information about any of the points below.

2. The Human Rights Act is an essential safeguard for children and adults who are detained

2.1 The Human Rights Act is an essential safeguard ensuring that people in police custody or prison are able to benefit from the protections contained in the European Convention on Human Rights ("the Convention"). Detained children and adults are protected from torture and inhuman or degrading treatment (Article 3 of the Convention), are entitled to a fair trial (Article 6 of the Convention) and should have their private and family life respected as far as is possible (Article 8 of the Convention). These provisions have been especially significant in protecting people in prison from abuses of power. The ability to bring judicial reviews where Convention rights have been interfered enables the courts to set clear guidance and can also improve practice on the ground.

2.2 The Act has enabled the domestic courts to set clear guidance in respect of what is and is not permitted in terms of the treatment of people in prison. For example, in *R(C) v SSJ* [2009] QB 657, the Court of Appeal ruled that an amendment which allowed Secure Training Centre staff to physically restrain children "*for the purposes of ensuring good order and discipline*" breached Articles 3 and 8 of the Convention. The rules had been amended after the deaths of two children who had been restrained even though they posed no risk of harm. Both restraints had been unlawful under the rules in place at the time. One child was a 15-year-old who suffocated while he was being restrained; the other was a 14-year-old

¹ <https://howardleague.org/our-work/transform-prisons/justice-and-fairness-in-prisons/>

who died from suicide shortly after staff had restrained him and struck him on the nose.²

2.3 The Howard League represents AB, who was kept alone in his cell for over 22 hours a day in Feltham Young Offenders Institution for 55 days when he was a 15-year-old boy. The High Court and Court of Appeal found that this treatment was not in accordance with the Young Offenders Institution Rules and so breached the procedural aspect of Article 8 of the Convention. However, both the High Court and the Court of Appeal did not find it amounted to inhuman and degrading treatment. AB has appealed to the Supreme Court on that point and judgment is awaited (Howard League, 2021).³ However, the case has had a significant impact on practice on the ground already. In response to the case, Feltham has dramatically reduced its use of separation. At the time of AB's confinement, a quarter of the children in Feltham were kept in the conditions AB was in. In December 2020, only one child was separated. The legal challenge raised the profile of this issue, as did the interest and scrutiny of a number of other important bodies, including:

- the Royal College of Psychiatrists, the British Medical Association and the Royal College of Paediatrics and Child Health who issued a statement on the solitary confinement of children in prison
- the Joint Committee on Human Rights which conducted an inquiry on the issue
- the Chief Inspector of Prisons who conducted a thematic review on the use of separation

2.4 As the AB case shows, rights-based arguments can improve practice while a case is still ongoing. There are other examples where litigation has resulted in important changes in practice, such as the case of *R(LW & Ors) v Sodexo Ltd & Anor* [2019] EWHC 367 (Admin), where the High Court found that HMP Peterborough (which is operated by the private company Sodexo) had breached Article 8 of the Convention by carrying out unlawful strip searches. Sodexo admitted before the hearing that prison officers had not been trained properly and that the strip searches had breached both Article 8 and the prison rules: as a result, Sodexo reviewed its procedures and the number of full strip searches dropped significantly.⁴

3. The Human Rights Act has been the main mechanism by which children's rights have been enforced in England

3.1 As England (unlike Scotland and Wales) has not incorporated the United Nations Convention on the Rights of the Child into domestic law, the Human Rights Act has been the main mechanism by which children's rights have been enforced. Children's rights have to be interpreted in light of the Convention on the Rights of the Child. In *R (R) v Durham Constabulary* [2005] 1 WLR 1184 Baroness Hale held that "[the UNCRC] is not only binding in international law; it is reflected in the interpretation and application by the [ECtHR] of the rights guaranteed by the

² Available at <https://www.bailii.org/ew/cases/EWCA/Civ/2008/882.html>

³ <https://howardleague.org/news/supreme-court-to-hear-case-of-child-kept-in-solitary-confinement-for-55-days/>

⁴ Available at <https://www.bailii.org/ew/cases/EWHC/Admin/2019/367.html>

European Convention... it must be taken into account in the interpretation and application of those rights in our national law” (§26).⁵

3.2 The Government recognises the crucial importance of children’s rights, as enshrined in the Convention on the Rights of the Child and enforced via the Human Rights Act. In 2018, the then Under-Secretary of State for Education reaffirmed “*the value that this Government places on the UNCRC and our ongoing commitment to give due consideration to the UNCRC when making policy and legislation*” (Hansard HC Deb., 20 November 2018).⁶ Amending the Human Rights Act would threaten this commitment.

3.3 The ability to enforce children’s rights within the UK has had a positive impact on all children. The Human Rights Futures Project at LSE has listed some of the ways in which children’s rights have been protected under the Human Rights Act: for example, it has been established that the state has a positive obligation to protect children from neglect and abuse, that children’s voices must be heard in decisions which affect their family life, and that children cannot be subjected to corporal punishment in private faith schools (LSE Human Rights Futures Project, 2011).⁷ The Government’s introduction of Child Rights Impact Assessments in 2018 is also promising, though they are not yet routinely carried out.

3.4 The Howard League has used the Human Rights Act to make sure that all children in conflict with the law are recognised and supported as children. The Howard League’s lawyers intervened in a case brought by Just for Kids Law, *R(HC(A Child)) v Secretary of State for the Home Department & Anor* [2013] EWHC 982 (Admin), a case which concerned the rights of 17-year-olds to appropriate adults at the police station. At the time, Code C of the Code of Practice under the Police and Criminal Evidence Act 1984 treated 17-year-olds as if they were adults. As a result, they did not have an automatic right to support from an appropriate adult (for example, a parent or carer). Moses LJ concluded that this was incompatible with Article 8, read with the Convention on the Rights of the Child:⁸

“... once it is acknowledged that Article 8 is engaged and that it must be interpreted in harmony with the UNCRC it follows that those who are 17 fall within the definition of children whose best interests must be a primary consideration. To afford a 17 year-old detainee no more than the rights and protections afforded to an adult is not consistent with the principle that Article 8 is to be interpreted in harmony with the UNCRC. It is difficult to imagine a more striking case where the rights of both child and parent under Article 8 are engaged than when a child is in custody on suspicion of committing a serious offence and needs help from someone with whom he is familiar and whom he trusts, in redressing the imbalance between child and authority.” (§84–85)

⁵ Available at <https://www.bailii.org/uk/cases/UKHL/2005/21.html>;

⁶ *Hansard* HC Deb. vol. 649 col. 22WS, 20 November 2018, available at <https://hansard.parliament.uk/Commons/2018-11-20/debates/18112071000005/UniversalChildren%E2%80%99SDay>

⁷ LSE 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-KlugHRACChildren.pdf>

⁸ Available at <https://www.bailii.org/ew/cases/EWHC/Admin/2013/982.html>

4. The existing human rights framework is adequate but practice around it needs to improve

4.1 As set out in the Howard League's response to the Government's call for evidence, the existing human rights framework works well and does not need changing.⁹ However, the lack of availability of legal aid and financial pressures faced by the legal aid sector make it harder for people in prison to access justice and challenge treatment which breaches their human rights.

4.2 The legal team at the Howard League provides advice, representation and participatory legal education to young people in prison. The legal work is all either free or funded by legal aid.

4.3 The Howard League's legal service sees the value and importance of rights-based legal support in both preventing unjust treatment and shifting young people's perceptions of the law. The young people who the Howard League works with often think that the law is only there to punish them. When they learn that the law is not arbitrary and that it applies to the Government and public authorities as well as to them, they become more likely to understand and respect it. In this context, it is concerning that changes to legal aid severely limit access to justice for people in prison.

4.4 The current legal aid scheme fails to remunerate practitioners for the increasingly complicated legal work which they carry out. The fixed-fee system, which financially penalises practitioners for taking the time to fully prepare for hearings, has led to a significant fall in the number of firms which offer prison law legal aid work. Data from the Legal Aid Agency shows that between 2011/12 and 2019/20, the number of providers actively carrying out prison law work dropped from 485 to 146 (Howard League, 2020).¹⁰

4.5 As the Joint Committee on Human Rights noted in 2013, people in prison cannot go to an advice centre in the community for legal advice: they rely on the dwindling number of providers who are able to advise and represent them (Joint Committee on Human Rights, 2013).¹¹

5. The Human Rights Act requires public authorities to uphold human rights, but these rights are only as good as our means of enforcing them

⁹ Howard League (2021), *Response to the Independent Human Rights Act Review*, available at <https://howardleague.org/wp-content/uploads/2021/03/Response-to-the-Independent-Human-Rights-Act-Review.pdf>

¹⁰ Howard League (2020), *Written evidence from the Howard League for Penal Reform*, available at <https://committees.parliament.uk/writtenevidence/13859/pdf/>

¹¹ Joint Committee on Human Rights (2013), *The implications for access to justice of the Government's proposals to reform legal aid*, available at <https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/100/100.pdf>

5.1 The Human Rights Act requires all authorities which exercise public functions, including both public and privately-run prisons, to act in a way which is compliant with human rights.

5.2 The Howard League's legal team often use rights-based arguments to make sure that young people in or leaving prison are treated fairly. For example, to make sure that young people can access appropriate medical care and that they can maintain meaningful contact with their families.

5.3 Howard League lawyers supported one young person who was held in a constant watch cell in a prison segregation unit because of his extremely serious pattern of self-harm. The young person had been admitted to a secure psychiatric unit on two previous occasions and was unable to cope in custody. Though he had been assessed as suitable for transfer to hospital, a bed had not been found for him. Pre-action correspondence was sent to NHS England and the Ministry of Justice, arguing that the young person's continued solitary confinement breached Articles 3 and 8: it placed him at risk of irreversible psychological damage and restricted his personal development. In response to the letter, the young person was transferred to a medium secure unit where he could get the specialist medical treatment he needed from appropriate health services.

5.4 In another case, the Howard League complained to the Prison and Probation Ombudsman on behalf of a young person who was placed on closed visits following a cell search where a mobile phone was found. It had never been formally established that the phone belonged to the young person, who had 'enhanced' status in recognition of his good behaviour. The unnecessary use of closed visits (where there is a pane of glass between the person who is being visited and their visitor) threatened the young person's right to private and family life, as well as breaching the prison rules. The Prison and Probation Ombudsman investigated the complaint and produced a detailed report. The Ombudsman found that the closed visits had been wrongly applied and that the prison had failed to follow prison rules which required them to consider Article 8 of the Convention in making any decision to put a person in prison on closed visits.

5.5 As the Howard League has argued in its work on justice and fairness in prisons, creating a culture in which people in prison know their rights and have those rights respected engenders respect for the law and empowers them to live positive lives.¹² A culture of respect for human rights in prisons would improve the experience of both staff and residents. However, a rights-based approach is not yet embedded in prison culture, and people in prison often do not know that the law can be used to challenge unfair treatment or secure the support which they are entitled to. Even where legal support is available, the Howard League has found that some of the most vulnerable young people do not have the emotional energy to appeal decisions which are made against them: as a result, their challenges to unjust treatment begin and end within the prison.

5.6 Public authorities must be given the resources which they need to comply with human rights and their statutory duties. In our community care work with young

¹² <https://howardleague.org/our-work/transform-prisons/justice-and-fairness-in-prisons/>

people, Howard League lawyers often hear that the shortage of available and appropriate placements makes it hard for local authorities to provide accommodation in a timely way. In cases where accommodation is not found in time, young people find that their release on Home Detention Curfew is pushed back or that they are held on custodial remand for extended periods. These delays affect young person's rights under Article 8 of the Convention (right to a private and family life), by preventing them from being released and enjoying those rights upon release.

6. Conclusion

6.1 The Howard League believes that the Human Rights Act is a valuable piece of legislation and an essential safeguard for people in prison. It does not need amending. However, practice around the Act does need to improve: at present, there are too many barriers to upholding the rights of young people who are in trouble with the law.

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