Prison Reform Trust response to the Commission on a Bill of Rights' discussion paper, Do we need a UK Bill of Rights?

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform.

The Prison Reform Trust's main objectives are:

1. reducing unnecessary imprisonment and promoting community solutions to crime
2. improving treatment and conditions for prisoners and their families
3. promoting equality and human rights in the justice system.

Introduction

The Prison Reform Trust welcomes the opportunity to respond to the Commission on a Bill of Rights discussion paper, Do We Need a UK Bill of Rights?

In the past two decades the prison population in England and Wales has almost doubled from around 45,000 in the early 1990s to just under 88,000 today. Prisoners are among the most marginalised groups in society with high levels of school exclusion, illiteracy, mental disorder, substance misuse and complex needs. A disproportionate number of people in prison come from black and minority ethnic backgrounds. Former prisoners face difficulties in securing jobs, homes, access to health treatment and fractured family and community ties.[1]

Anne Owers, the former HM Chief Inspector of Prisons, said: "It is the marginalised in society who most need the protection of the law as by definition they may not be able to look for that protection from the democratic process or common consensus."[2]

As the most invisible of our public services, it is important that prisons can be held accountable for the treatment of the people in their care. Prison in the UK is the punishment of last resort and is the highest form of legally sanctioned coercive intrusion into an individual's liberty. A prisoner is virtually dependent on the prison for every aspect of his or her existence. Prison determines a prisoner's confinement, movement, association, work, level of contact with the outside world, accommodation, education, recreation, healthcare and even the food the prisoner eats.

[1] Prison Reform Trust (2011), Bromley Briefings Prison Factfile (June 2011), London: Prison Reform Trust

[2] Owers, A. (2003), Prison Inspection and the Protection of Human Rights, BIHR Human Rights Lecture, 22 October 2003

The Human Rights Act (HRA), which brings the European Convention on Human Rights into British law, is an important legal framework for helping to ensure that people in prison are treated according to basic principles of dignity and respect. The Act places an obligation on public bodies, including prisons, to ensure they respect human rights in everything they do (section 6 duty). This obligation is intended to make litigation through the courts a last resort.

When the HRA was introduced the Prison Reform Trust welcomed action taken by the Prison Service to call a halt to holding vulnerable prisoners indentified as at risk of suicide, in strip cell conditions. This action anticipated HRA compliance and was the humane and decent thing to do. The HRA does not prevent the state from placing limits on prisoners' rights if it is considered necessary for the prevention of crime, for prison security or to protect the safety of the prisoner or others. Any limitations placed upon such rights must be proportionate to the aim that the authorities are seeking to achieve. There are a large number of cases that have been heard by the European Court of Human Rights (ECtHR) which help clarify the extent to which limitations can be imposed.

We note that the Commission has been established against the backdrop of disagreement among the two parties in government over their position on the HRA. We share the concern of the British Institute of Human Rights that the Commission's Terms of Reference do not refer to the HRA, instead only referring to the European Convention on Human Rights (ECHR).

The commitment to the ECHR is welcome, but the ECHR and the HRA are different legal instruments. The ECHR sets out the rights which the UK has agreed to since 1951, it is the HRA which makes these rights enforceable and accessible in the UK. Without the HRA there is no duty on public authorities in the UK to respect the ECHR human rights in everything that they do, nor is it possible to enforce these rights by taking cases in UK courts. Therefore, the absence of the HRA in the Commission's terms of reference is a serious cause for concern.

The Ministry of Justice has been clear that it is for the Commission to interpret and apply its terms of reference. The Commission needs to clarify its position on where the HRA fits within its work. We believe that the HRA must be crucial part of the Commission's work, and should be seen as the absolute minimum for the legal protection of human rights in the UK.

(1) Do you think we need a UK Bill of Rights?

We believe that even though the HRA is not called a Bill of Rights it performs the same function. In many ways the HRA provides additional protections than some other Bills of Rights. For example the duty in section 6 of the HRA means that people can use the law to hold public bodies to account outside of the courtrooms; no similar duty exists in the US's Bill of Rights, which focuses on enforcement of rights through the courts. The rights, duties and enforcement mechanisms in the HRA provide vital basic protections for all people, including some of the most vulnerable and marginalised groups in our society who are disproportionately represented in our prisons. The Commission's focus on exploring a new UK Bill of Rights should be used to strengthen existing arrangements and not muddy the waters about how rights are protected in UK law.

(2) What do you think a UK Bill of Rights should contain?

If the Commission does decide to recommend a future Bill of Rights it must be made clear that the Human Rights Act is the foundation for the legal protection of human rights and this means safeguarding rights, duties and enforcement mechanisms in the Act. This means:

- **No scrapping of the HRA**

There is no need to repeal the HRA in order to improve human rights protection. New laws, such as a Bill of Rights, can be enacted and live alongside the HRA. This is how other countries like Canada have approached the issue. It would be questionable to scrap a human rights law in the name of protecting and developing human rights.

- **Maintaining the enforcement mechanisms: the importance of the section 6 duty**

It is important that the duty in section 6 of the HRA remains in force. This section places a duty on public authorities in the UK to respect the ECHR human rights in everything that they do. This duty provides individuals with an important framework for holding public bodies to account when things go wrong and helps services to do their job better. In this way the Act was intended to develop a culture of respect for human rights within our public services, making litigation in the courts a last resort. Through this section 6 duty the HRA can influence the way public services are developed and delivered, ensuring that people are treated with dignity and respect.

The duty has helped to support the work of agencies such as Her Majesty's Inspectorate of Prisons (HMIP) and the Prisons Ombudsman in enabling prisons to achieve and maintain safe and healthy regimes. The HRA has provided an important framework for the HMIP in its duties under the UN's Optional Protocol to the Convention against Torture (OPCAT) to monitor the conditions and treatment of prisoners and to make recommendations regarding the prevention of ill treatment. The HMIP has earned international respect as a model of best practice in implementing its duties under the Protocol. The Ministry of Justice has highlighted the importance of the HRA as a framework for the work of the prisons inspectorate in its publication, The Human Rights Framework as a Tool for Regulators and Inspectors. It states:

> **"**Her Majesty's Inspectorate of Prisons has developed and published criteria for inspecting prisons, referenced to international human rights standards and aimed at achieving best practice. These criteria, called Expectations, go behind processes and output measures to examine the quality and outcomes for prisoners of the application of Prison Service standards and policies. For example, they explicitly require that 'all prisoners are treated with humanity and with respect for the inherent dignity of the person.' Sometimes, they go beyond what an overcrowded prison system can currently achieve: for example, criticising the practice of holding two men in a cell meant for one, with a shared toilet, and where they eat all their meals; or sanitary arrangements which mean in

practice that prisoners have to use buckets. It is important to set out these deficiencies; otherwise what is becoming normal may become normative."[3]

- **Maintaining the other enforcement mechanisms: access to the UK courts**

By placing an obligation on public bodies to respect human rights the HRA was intended to make litigation through the courts a last resort. Nonetheless it is important that, where issues cannot be resolved outside the courtrooms, people can take legal action where they think a public body has breached or is at risk of abusing their human rights. The HRA has provided people in prison with an important avenue of legal redress when the prison authorities fail to meet their duties under the Act. Cases taken under the HRA have helped to highlight significant concerns about prison conditions and regimes that may not otherwise have come to light. These include the existence of "slopping out" (Napier v Scottish Ministers [2004] SLT 555), the inadequate investigation of deaths in custody (R (on the application of Amin) v Secretary of State for the Home Department [2004] 1 AC 653) and the rights of prisoners' children and dependents (R (on the application of P and Q v Secretary of State for the Home Department).

Before the HRA it was virtually impossible for individuals to raise issues about their human rights in the courts. It is the HRA which makes it possible to bring legal cases in the UK courts not the ECHR. With the exception of cases brought under the Corporate Manslaughter Act, without the HRA we would be in exactly the same position as before its enactment where the only remedy people could seek would be in the European Court of Human Rights (ECtHR).

- **"Human" rights not citizenship rights**

Human rights are universal and apply to all people regardless of immigration status or citizenship. You simply need to be human and in the UK to be protected by the HRA and this must continue. (We note that being in the UK includes being within the UK's jurisdiction when abroad, such as those serving in the armed forces.)

A model of entitlement based on citizenship could potentially exclude people in custody since in law the citizenship status of prisoners is ambiguous. For instance, sentenced prisoners in the UK are currently denied the right to vote, despite an ECtHR ruling in 2004 which declared the blanket ban unlawful (see question 4 below). However, remand prisoners, people imprisoned for contempt of court and fine defaulters held in prison are eligible to vote. A human rights framework is vital to ensure that absolute rights – such as the right to life and the protection from torture – are universal and afforded necessary powers of legal protection and enforcement.

- **Adding new rights not attempting to re-state the rights in the HRA**

Paragraph 13 of the consultation document sets out the means by which international legal obligations which have not been incorporated into UK law are currently monitored and enforced through reporting mechanisms and the UK courts. The HRA – not mentioned in paragraph 13 – has provided an important mechanism for the UK courts to

[3] Ministry of Justice (2009), The Human Rights Framework as a Tool for Regulators and Inspectors, London: Ministry of Justice

consider international legal obligations, including under the UN Convention on the Rights of the Child in cases such as C v Secretary of State for Justice [2008] in which the UK Court of Appeal identified the unlawful restraint of children in secure training centres to ensure good order and discipline. However, the extent to which the UK's international legal obligations can be enforced by individuals in the UK remains limited.

The Prison Reform Trust would welcome consideration by the Commission of how existing rights accessible in the UK courts could be built on through the incorporation of international obligations, for the benefit of vulnerable and marginalised groups such as prisoners – and particularly children. Any additional rights should cover new ground, or transparently supplement ECHR rights, not re-phrase current rights in the HRA. New rights should not seek to add qualifications or limitations to the rights in the HRA.

(3) How do you think it should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?

It is important that any additional Bill of Rights continues to apply equally to all people in the UK.

(4) Having regard to our terms of reference, are there any other views which you would like to put forward at this stage?

The Prison Reform Trust would like to highlight the continued failure of the UK authorities to comply with the ECtHR judgment to overturn the blanket ban on sentenced prisoners voting.[4] We note that the Commission is required in its terms of reference: "To investigate the creation of a UK Bill of Rights that *incorporates and builds on all our obligations under the European Convention on Human Rights [and] ensures that these rights continue to be enshrined in UK law*."

In March 2004 the ECtHR considered the case of John Hirst. It found unanimously that the UK government was in violation of Article 3 Protocol 1 of the European Convention on Human Rights. The panel of judges that considered the case included Sir Nicolas Bratza, a British judge. The ECtHR concluded that: "The fact that a convicted prisoner is deprived of his liberty does not mean that he loses the protection of other fundamental rights in the Convention" and argued that "the right to vote must be acknowledged as: ...the indispensable foundation of a democratic system."

The blanket ban is in clear breach of the UK's international obligations and undermines the principle that, in a democracy, everybody counts. It has resulted, as the Committee of Ministers at the Council of Europe highlighted at its meeting in December 2010, in the risk of repetitive applications to the European Court materialising, with over 2,500 applications received at the time of the meeting.

The UK is out of step with all but a handful of Council of Europe countries, as well as many developed states around the world, when it comes to prisoners voting. Around 40% of the countries in the Council of Europe have no restrictions on prisoners voting. Many others only ban some sentenced prisoners from voting. In France and Germany,

[4] For further information see Prison Reform Trust (2011), Barred From Voting: The Right to Vote for Sentenced Prisoners, London: Prison Reform Trust. Available at http://www.prisonreformtrust.org.uk/Portals/0/Documents/Votesbriefingfeb2011_Layout%201.pdf

courts have the power to impose loss of voting rights as an additional punishment. The UK is only one of a handful of European countries that automatically disenfranchise all sentenced prisoners, the others including Armenia, Bulgaria, Estonia, Hungary and Romania.

In South Africa, all prisoners have the right to vote. Handing down a landmark ruling in April 1999, the constitutional court of South Africa declared: "The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts."

The process of compliance with the ECtHR judgment has been characterised by continuous delay. The Government has yet to publish the results of its second consultation despite the fact the consultation received only 100 responses, an analysis that should have taken the skilled Ministry of Justice and Human Rights team a short time had they been authorised to proceed. In correspondence with the Prison Reform Trust and others the Ministry of Justice has repeatedly said it is in the process of considering the responses with no indication of when the results will be published.

Repeated reminders to the Government to comply with the Convention have been issued by a number of official bodies including the UK Parliament's Joint Committee on Human Rights, the UN Human Rights Committee, and civic society groups including the Prison Reform Trust, UNLOCK, the association of reformed offenders, Liberty, Penal Reform International and the Aire Centre.

Through its audit procedures the Ministry of Justice has been systematically seeking prisoners' level of interest in voting and in general is thought to have received positive responses. The Prison Service does not envisage practical problems in enfranchising prisoners and already has arrangements in place for remand prisoners to exercise their right to vote. The Public and Commercial Services (PCS) Union, National Offender Management Services (NOMS) group, confirmed that it supports the enfranchisement of all sentenced prisoners. The Electoral Commission has set out in its response to the Ministry of Justice's second consultation on prisoners voting in 2009 a mechanism by which prisoners could be enfranchised though a system of postal or proxy voting, involving a modification to the existing declaration of local connection in electoral law.

The question of the UK's compliance is currently awaiting the outcome of an ECtHR judgment in the case of Scoppolla. According to the timetable set by the Court the UK will have 6 months from the date of the judgment in that case to comply. We urge the Commission to use its authority under its terms of reference to advise the government to comply with the judgment and timetable set by the European Court. The blanket ban on sentenced prisoners voting, a punishment that dates back to the Forfeiture Act (1870), is neither humane or legal.

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Prison Reform Trust