

Human Rights Lawyers' Association and the Law Society:

Celebrating 10 years of the Human Rights Act 1998

Human Rights – Home to Stay

November 2008

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Human Rights Lawyers' Association please see
www.hrla.org.uk**

A ‘Constitutional Shift’...

The Human Rights Act (HRA) has now been on the statute book for ten years. From the right to life and to free speech, to the right to be free from discrimination – thanks to the HRA we are no longer restricted to what remains of our liberties once the law has finished imposing prohibitions.

Instead, now everyone within this country has a set of positive fundamental and essential rights - and the means of obtaining effective remedies where those basic civil rights and freedoms are violated.

The HRA has fundamentally altered the constitutional framework. Together with the devolution statutes it guarantees our human rights against excessive interference by public authorities and private bodies exercising public functions. It brings us into line with the rest of the democratic Commonwealth and Europe.

This short pamphlet gathers together, and celebrates, the many ways in which the HRA, and the accompanying increase in awareness of the European Court of Human Rights, has changed for the better UK law and government over the past 10 years

An essential tool for improving the administration of justice

The rights guaranteed by the HRA are the birthright of us all – they belong equally to even the most downtrodden and marginalised members of society.

The HRA provides practical and effective remedies in a wide range of situations

- **It provides a new framework for finding solutions to difficult problems**
- **Concepts such as proportionality and necessity provide a straightforward and constructive approach to complex issues**
- **It has brought the guarantees of the Convention into the legal mainstream:**

- giving an opportunity for a remedy in the domestic courts and
 - giving greater awareness of the European Court of Human rights as a to those whose needs are not met by the UK
- **The right to an effective remedy, fundamental in international human rights law protection, has been woven into the fabric of domestic law**
 - **Convention rights provide a prism through which the rest of the law can be seen, and against which it can be tested**
 - **Human rights are a common language across the world – increasing the exchange of knowledge and ideas between jurisdictions**
 - **The HRA has enabled us, as lawyers, to advise our clients in simpler and clearer language, making the law and the process of litigation more accessible, more understandable and more relevant**
 - **The HRA provides a set of standards for practitioners ourselves, but also provides the opportunity to be ‘upholders of rights’ rather than the privileged gatekeepers of confusing laws**

Making a real difference for the vulnerable & marginalised

The most vulnerable members of society are those with the greatest need for the protection offered by the Human Rights Act. Thanks to the standards, and positive obligations, that the Act imposes, they have also seen some of the greatest results over the last 10 years.

- *The elderly and residents of care homes*
 - The HRA assisted residents to challenge a decision to close their care home that had been made without proper consultation
 - Where the intention of the Act has not been fully realised, the protection of the HRA is being extended to those placed in private care homes (s145 of the Health and Social Care Act 2008)
 - Asserting the fundamental right to be treated with dignity has helped put a stop to much casually negligent, even

callous treatment of the elderly, for example, being left to eat their meals whilst on the toilet, or being forced to bathe without privacy

- *The destitute*

- A policy that forced asylum seekers into homelessness and destitution was declared unlawful following a challenge under the HRA

- *People with mental health problems*

- The HRA ensured that a person detained on mental health grounds is given a say in who can make crucial decisions on his/her behalf
- A law that did not require the release of patients when it could no longer be shown that they were suffering from mental illness was successfully challenged under the HRA

- *Children and young people*

The rights guaranteed by the HRA belong to us all – no matter how young

- Articles 3 & 8 were relied upon to end a policy permitting the unnecessary use of force against vulnerable children in Secure Training Centres (*C v SSJ*)
- Greater protection and compassion for unaccompanied minors under asylum & immigration policy has been promoted by the European Court of Human Rights
- Because of the HRA, the UN Convention on the Rights of the Child has been more effectively read into domestic law

- *Minority groups*

- While sex, race and disability discrimination law have been a part of our legal system for several years, Article 14 and the HRA has extended anti-discrimination beyond the traditionally recognised categories - most notably in relation to gay and lesbian people (*Ghaidan v Godin-Mendoza*) and the transgendered (*Bellinger*). While these groups now have specific protection, the recognition of their *human right* to live free of discrimination remains significant.

- The rights of gypsies and travellers to have their unique ethnic and cultural traditions respected has been confirmed by the European Court of Human Rights and absorbed into UK case law through the HRA
- Minority and majority religions are given equal protection under the HRA, which brought protection for freedom of belief into UK law.

Legislation has now provided religion with greater protection as a forbidden ground for discrimination, but it is Article 9 that has allowed religious dress and other forms of observance to be defended in and out of the courts.

Providing a fresh and accessible language for justice

- **The HRA gives legal protection to the human rights which are our birthright.** No longer are our civil rights and liberties confined to a confusing hotchpotch of common law and statute.
- **The HRA creates greater understanding and accessibility of fundamental rights and freedoms for members of the public – taking rights beyond the courtroom.**
- **Simple and comprehensible terms that lie at the heart of human rights values, such as ‘respect’ and ‘dignity’, can be understood by all.**

Re-energising, and constitutionalising, traditional liberties

- ***Habeas corpus*** – recognised since Magna Carta in 1215, this right is given new expression and protection via the right to liberty provided for in Article 5 of the Convention
- **Freedom of the press** – this bulwark of British democracy is not only recognised in Article 10’s guarantee of free speech, but is also given particular emphasis and protection in section 12 of the HRA

- **Universal suffrage** – the right to vote in free elections is protected by the first Protocol to the Convention
- **Fair trial** – one of the basic principles of the rule of law - protecting the right to a fair criminal and civil trial - is guaranteed by Article 6
- **Prohibition of slavery** – the slave trade was abolished throughout the empire in 1807, and now slavery and forced labour are expressly prohibited in Article 4
- **“An Englishman’s home is his castle”** is now formally recognised in Article 8’s right to respect for privacy and the home, which applies to anyone and everyone within the UK’s jurisdiction
- **But the Human Rights Act isn’t limited to these traditional liberties, or even to the standards of 1950 when the Convention was drafted. The rights it contains retain sufficient flexibility to take into account society’s evolving values and ideals.**
- **Nevertheless, section 11 of the HRA explicitly safeguards all the rights and freedoms established in our law prior to the Act coming into force.**

Restating fundamental truths

Article 3 provides that no one shall be subjected to torture or inhuman or degrading treatment.

- Its incorporation through the HRA has given the courts an opportunity to confirm and clarify the proud and long-standing condemnation of torture in UK law (in *A & others (No2)*).
- It has also provided the courts with a power to protect those within the UK from torturous regimes, by preventing people being sent to a country where they face a real risk of torture or inhuman treatment

The incorporation of Article 2, the right to life, led to guidelines on the use of lethal force by the police being made public. The Association of Chief Police Officers’ guidance on lethal force now includes specific reference to the Article 2(2) need for such force to be used only when “absolutely necessary”.

The HRA's incorporation of a prohibition on slavery might appear to have added nothing to our law – but it has led to the introduction of a criminal offence of 'trafficking people for exploitation' in section 4 of the *Asylum & Immigration (Treatment of Claimants etc) Act 2004*

The commitment within the HRA to non-discrimination in the enjoyment of rights has enhanced equality protection.

Habeas corpus has been a guarantor of freedom for centuries, but without the HRA's recognition of the right not to be subjected to arbitrary and discriminatory detention, terrorist suspects would still be held in high security prisons without any prospect of facing trial (*A & others v SSHD*)

Creating a human rights culture

The influence of the HRA can be seen in the growing human rights culture in the UK:

- The establishment of the **Commission for Equality and Human Rights** has provided an independent champion to promote and protect human rights in the UK
- The HRA has been followed and complemented by other legislation that recognises and upholds fundamental rights, such as the **Equality Act**, the **Freedom of Information Act** and the **Regulation of Investigatory Powers Act**
- Human rights have become central to the policy formulation and decision making of public authorities, as well as central and local government – and the positive obligations flowing from Convention rights have shaped their practice
- Parliament's **Joint Committee on Human Rights** ensures that human rights are not neglected in the legislative arm of government
- Through the new curriculum on citizenship, children are taught about the fundamental rights they possess and share, as well as their international and historical context

Giving legal recognition to privacy and family life

The Article 8 guarantee of respect for private life provides a wide range of protections beyond traditional notions of privacy, including physical and moral integrity, personal identity & sexuality and personal autonomy.

- Article 8's protection of physical and moral integrity recognises the right to be treated with dignity, evidenced by the compensation awarded under the HRA to a disabled woman given hopelessly inadequate housing.
- The right not to suffer physical interference is also protected by Article 8 – the European Court has held this right was violated by the unnecessary strip-searching of visitors to prison.
- Personal autonomy – or the right to have control over one's own life has also been recognised. For example, the courts held that a person detained on mental health grounds should be given a say in who can make crucial decisions on her behalf (*M v Secretary of State for Health*).

Article 8 guarantees respect for personal information – which includes access to your own information and its protection from prying eyes.

- An MP used Article 8 to challenge successfully a blanket and arbitrary refusal to disclose whether personal information on him was held by the secret service
- The introduction of the Regulation of Investigatory Powers Act to govern the activities of the secret services was a direct result of the need for any interference with privacy to have a clear basis in law – a manifestation of the principle of legality that underpins the whole Convention.

Whether we are straight, gay, bisexual or choose to abstain, the European Court of Human Rights has recognised that a sexuality is “a most intimate aspect” of our private lives that deserves respect and protection.

The right to privacy also has relevance in the media context:

- Following a number of legal challenges involving celebrities, the right of each of us, even those in the public eye, to have our privacy respected has now been read in to the common law (e.g. *Campbell v MGN*)

Respect for family life is also a crucial part of Article 8:

- A primary care trust's decision to take a severely disabled child from her family and into residential care was ordered to be reconsidered on the basis that the trust had failed to properly consider her right to family life, in *Gunter v S.W. Staffordshire PCT*.

Article 12 confirms that marriage is not a privilege but a right, recognised as extending to transgendered people and those seeking asylum in the UK thanks to challenges brought under the HRA (*Bellinger & Bellinger* – leading to the *Gender Recognition Act* – and *Baiai v SSHD*)

Revitalising the work of the judiciary

- The introduction of new basic rights into domestic law has energised the work of the judiciary by:
 - **Providing an ethical and structured framework, approved by Parliament, that assists the courts to make difficult decisions – where necessary striking a fair & proportionate balance between individual rights and the wider public interest;**
 - **Using and contributing to the jurisprudence of the European Court of Human Rights;**
 - **Giving judges, through declarations of incompatibility, a mechanism to encourage the executive and legislative branches of government to give better effect to Convention rights and obligations;**
 - **Relieving the overburdened Strasbourg Court of cases brought simply because of a lack of effective British legal remedies. Indeed, 'Bringing rights home' has significantly reduced the number of violations found against the UK.**
- **The Convention principles have reshaped common law rules and equitable principles to give greater protection both to freedom of expression and to respect for personal privacy:**

The right to freedom of expression under Article 10 has softened the rigours of English libel law, and the right to respect for privacy, guaranteed under Article 8, has been 'absorbed' into the common law tort of breach of confidence

- **The courts' own duties as public authorities under the HRA have also allowed for a limited extension of human rights principles into non-public arenas:**

The case of X v Y saw the Court of Appeal confirm that the legislation unfair dismissal needs to be read compatibly with human rights – even when considering claims against private employers

- **Through greater consideration and promotion of human rights, our courts have contributed to international jurisprudence:** decisions of the House of Lords and Court of Appeal under the HRA have been cited in senior courts around the world including Canada, India, New Zealand, South Africa and Australia.

Providing smoother and fairer processes

Through Article 2, the right to life, the HRA has produced an enhanced inquest procedure – giving families a greater opportunity to learn the truth about their loved one's death and to play an active role in the investigation – *Amin v SSHD*

Despite the existence of a right to fairness in common law, Article 6 has made a significant impact on the conduct of civil and criminal courts and tribunals.

- Where decisions makers have appeared to lack impartiality, changes have been made:

The Parole Board's close ties with and funding from the Ministry of Justice were found to be incompatible with its role as an impartial decision maker

The Home Secretary's role in setting various prison sentences has successfully been challenged under Article 6 – leaving sentencing decisions to the judiciary

- The right of vulnerable defendants to participate effectively in their trials is recognised explicitly:

For example, section 33A of the Youth Justice & Criminal Evidence Act 1999 now permits certain accused persons to use a live link where their ability to participate effectively in the proceedings is compromised by their level of intellectual ability or social functioning

- The influence of Article 6 has led to more detailed reasons being given for decisions from magistrates:

“it’s the Human Rights Act which has brought greater transparency and accountability into the process. There wasn’t a case about this. We looked ourselves at the long-standing policy in the light of the Act and came to a new conclusion. It was a question not only of giving people a fair trial but also showing them what had happened to them and why.”

Lord Falconer, Lord Chancellor (speaking in 2003)

The ability of judicial review to act as an effective safeguard against unlawful administrative decision-making was confirmed in *Alconbury* to be compatible with the right to a fair trial. However, other significant procedural changes, providing significant substantive benefits, have been made because of the HRA.

Strengthening rights without weakening Parliament

- **The HRA enhances the judiciary’s role as a protector of fundamental rights without undermining the sovereignty of Parliament by:**
 - **requiring the Courts to read primary legislation compatibly with Convention rights, but not permitting them to strike it down**

Section 3 HRA enabled the courts to interpret the Coroners Act 1988 to allow for a wider form of verdict - strengthening a family’s ability to find out the truth of how their loved one came to die

- **introducing the declaration of incompatibility to indicate to Government the laws that need to be amended**

Section 23 of the Anti-terrorism, Crime and Security Act 2001, which provided for the indefinite detention of foreign terrorist suspects, was declared by the House of Lords to be incompatible with Articles 5 and 14 of the Convention

The legislation was later repealed and replaced

Bringing greater legitimacy and accountability to Westminster and Whitehall

- Under the HRA respect for human rights has become an integral part of law making.
 - A memorandum on human rights compatibility is prepared for the Cabinet Committee to consider before it approves a Bill
 - As a result of section 19 of the HRA, now every single Bill that passes through Parliament is first reviewed for compatibility with the human rights of those it will affect
 - The Joint Committee on Human Rights provides another layer of protection for fundamental rights by:
 - Scrutinising all Government Bills, focusing on those that raise significant human rights issues, and pressing Government on whether proposed legislation could do more to guarantee rights
 - Checking to make sure that the Government makes the changes required when courts find breaches of human rights
 - Undertaking inquiries on a myriad of serious issues including the rights of older people in healthcare, human trafficking and policing and protest
 - Human rights provide Parliamentarians with a framework for legislative debate
- Democratic participation, and representative democracy, has been strengthened by human rights judgments:
 - Denial of the right to vote for prisoners has been found to be unlawful under Article 3 of the First Protocol
 - The same right now prevents the Government selling the contents of the electoral roll to private companies without giving any opt out to voters

Defending – and extending – political freedoms

Article 10 of the Convention protects the right to free speech. The European Court of Human Rights has placed particular value on political free speech and freedom of the press. The importance of our free press to British democracy has been emphasised by section 12 of the HRA.

When the right to privacy is invoked, the right to free expression, and to receive and disseminate information, is generally the flip side of the coin. And the right to respect for privacy has often been outweighed (see, for example, *Re S (A Child)* concerning the publication of the identity of a mother who poisoned her son). But when there is no compelling need for publicity, the right to privacy will be protected.

Article 10 has also led to changes in laws that threaten freedom of speech – recognition that legal aid may be necessary for defendants in defamation claims and hastening the abolition of the common law offence of blasphemy.

A right that has traditionally received far less respect in Britain is the right to engage in active political protest. The reluctance of the common law to recognise any right to engage in political protest led Lord Justice Sedley to describe the incorporation of Articles 10 & 11 (peaceful assembly) as a “constitutional shift”.

The role of peaceful protest in a democracy has now been given explicit legal recognition. It has been relied upon by many activists, from those petitioning on the roadside to groups prevented by the police from reaching an anti-war demonstration.

Perhaps more importantly, the role of the police at demonstrations has become more positive and cooperative - as their duty to prevent crime and disorder has been supplemented by a positive duty to facilitate peaceful protest.

Changing the approach of public authorities

- **Human rights training across the public sector has focused institutions and public servants on their human rights obligations.**
- **The positive obligations to promote and facilitate human rights imposed by the HRA have a particular importance**

There is recognition of the benefits that a human rights focused approach can bring for providers and service users, for example:

- The Surrey & Borders Partnership NHS Trust reported to the JCHR that embedding human rights “*will make them better practitioners and drive what they are there to do – deliver better wellbeing, more respect and dignity*”
- **Crucially, the legal duty on public authorities to act compatibly with the rights of the public, coupled with a victim’s ability to bring court proceedings, has ensured that respect for human rights is more than just an aspiration:**
 - A legal challenge asserting human rights led Primary Care Trusts to change their policies on the provision of the breast cancer drug Herceptin
- **As a result, respect for human rights now informs the policy formulation and decision-making of many public authorities, for example:**

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| <ul style="list-style-type: none"> • In accordance with guidance from the DCSF, uniform policies in schools across the country now note the need to respect students’ human rights – including their freedom of religion and belief • The Natural History Museum’s acknowledgement of aboriginal peoples’ right to respect for their cultural and religious beliefs helped to influence the return of aboriginal human remains to Tasmania after more than a century. • A council had revised its policy for adult care services ‘working with asylum seekers’ to ensure that asylum seekers who have special needs are treated fairly and without discrimination by the council • Southwark Council has adopted a comprehensive programme of human rights training, human rights audits and good practice guides for decision-making |
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- Identifying respect for human rights as one its main strategic objectives, Mersey Care NHS Trust recognised that patients and carers should have the right to be involved in the decisions that affect their lives

Extending protection beyond traditional civil and political rights

The right to education in the first Protocol to the Convention is a crucial reminder that the HRA extends beyond traditional civil & political rights and into social and economic rights.

Likewise the right to property, which has a particular relevancy at this time of economic uncertainty:

- It helped the courts to conclude that Customs' seizing a car and its contents would be a disproportionate response to bringing some cigarettes from France for your daughter
- Landowners can no longer lose all rights over their property through nothing more than another's unlawful occupation
- State benefits are now recognised as a form of property, so discrimination in their provision is not permitted

Perhaps the most significant issue to face the world over the coming years will be the deterioration of the environment, and the need to have a human rights compliant response to the growing crisis.

The European Court of Human rights has established that states are under a responsibility to protect and provide information to people who are at risk of serious environmental hazards – showing that the Convention provides tools for dealing with an environmental problem as a matter of human rights protection.