

Birthrights response to the open consultation - Human Rights Act Reform: A Modern Bill of Rights

Overview

Birthrights is the UK charity that champions respectful care during pregnancy and childbirth by protecting human rights.

We are choosing to respond to this consultation via a statement as many of the questions are technical in nature and extend beyond the scope of our work. We nonetheless welcome the opportunity to explain the potential for these proposals to seriously undermine our mission to ensure everyone receives the respect and dignity they deserve in pregnancy and childbirth.

We note that the Panel of the Independent Human Rights Act Review (IHRAR) did not recommend that the Human Rights Act should be replaced by a Bill of Rights and yet the consultation does not ask for opinions on this most basic of questions. Furthermore the majority of submissions received by the IHRAR were supportive of the Human Rights Act. We also note that the idea of a Bill of Rights was investigated in 2010 by an independent Commission, and that it was concluded that “the UK already has a bill of rights in the shape of the 1998 Human Rights Act.”¹ Very little evidence is given to justify the proposals set out, which a range of experts have described as “incoherent”². We therefore question the very basis for this consultation.

Our specific areas of concern are as follows:

II. Restoring a sharper focus on protecting fundamental rights (Q8-11)

The proposal to introduce a separate permission stage for human rights claims where claimants would need to demonstrate that they have suffered a significant disadvantage is entirely unnecessary and indeed significantly detrimental in our view. An “overriding public importance” limb would still add to the hurdles that charities like ours and the families we help would have to meet.

Our experience is that it is already extraordinarily difficult for a claimant to bring a human rights claim due to the lack of availability of legal aid, the one year limitation on claims and the low levels of damages available. In addition judicial review claims already have a permission stage. We note that the Government has provided very scant evidence of unmeritorious damages actions and therefore it is unclear what problem this additional permission stage would solve.

During the pandemic, we were contacted by thousands of women/birthing people and families affected by changes to maternity services and visiting restrictions put in place. This included women giving birth on their own because they were COVID positive, parents being separated from their babies for days even when neither the parents nor the

¹ <https://webarchive.nationalarchives.gov.uk/ukgwa/20130206021312/http://www.justice.gov.uk/about/cbr/>

² See for example <https://committees.parliament.uk/oralevidence/3436/pdf/>

baby were COVID positive, and individuals struggling to recover from a traumatic birth whilst being in sole charge of their newborn baby due to partners being banned from inpatient wards. It meant women/birthing people being given the devastating news that their baby had died without any support, or going through a miscarriage on their own. Choices to give birth at home or in community settings were withdrawn or restricted despite women's reluctance to go to hospital. There has been an overwhelming focus on infection control at the expense of human rights and psychological safety³.

These measures had had a devastating impact of the mental health of all those affected. Health economist Rachael Hunter estimated the mental health impact on women and birthing people to be £17.5bn, with maternity services having the ability to reduce this by up to 50% depending on their visiting restrictions⁴.

The Human Rights Act is one of the only effective mechanisms for holding NHS Trusts/Boards to account and forcing them to demonstrate that their restrictions are proportionate. We have engaged lawyers to write a number of pre-action letters to Trusts during the pandemic. Sometimes this in itself has had the effect of making a Trust consider the adverse impacts its actions were having. However the reality of taking a claim forward has been extremely difficult. Firstly it requires one or more families who have just been through an incredibly traumatic experience and also have a new baby to be prepared to consider taking a claim within twelve months. Secondly if claimants are not eligible for legal aid, charities such as ourselves have to raise an unknown amount of money running into many thousands of pounds. This is a risky process for small charities such as Birthrights and often relies on substantial amounts of work by lawyers pro bono or at significantly discounted rates to make it possible. Judicial review claims in particular, take place in the context of a rapidly changing environment, which may mean that we incur significant costs only for the facts of the case to change, or for a judge to dismiss the claim as being academic. No charity or NGO would bring such a case unless they felt there was a wider public interest that justified the risk involved.

The proposed measures would reduce further the ability of individuals, and of organisations such as Birthrights, and other charities/NGOS to hold public bodies to account. Birthrights would like to see the hurdles to bringing these claims being lowered, not raised, and/or alternative mechanisms introduced such as giving increased powers to the Equalities and Human Rights Commission to investigate claims.

III. Preventing the incremental expansion of rights without proper democratic oversight (Q23-24)

We are concerned that these proposals (specify) may reduce the importance of proportionality. The concept of proportionality ensures that the individual facts of a case can be taken into account which is in fact a key advantage of Article 8.

³ <https://bmjopen.bmj.com/content/bmjopen/12/1/e051965.full.pdf>

⁴ <https://medwinpublishers.com/JQHE/the-role-of-maternity-services-in-reducing-the-prevalence-and-cost-of-perinatal-depression-and-anxiety-during-covid-19-in-england.pdf>

Changing rights in order to tackle deportation as an issue, may have unforeseen and adverse consequences for the rights of a family to be together during labour and birth for example.

Creating a human rights culture – a missed opportunity

The IHRAR report recommended more education about the Human Rights Act and the need to increase public ownership of it. We are disappointed that the consultation paper proposes nothing of substance on this issue.

Last year, Birthrights reached over 4,000 thousand of healthcare professionals with our training and information on how the Human Rights Act affects maternity care. Our training is extremely well received and an impact study we carried out last year demonstrated that healthcare professionals find the human rights framework a really powerful tool to be able to prioritise the pregnant women they care for, whilst also fulfilling other professional obligations:

“After the training I know that no I don’t have to impose what I think is right on my lady...now I just ask them (Midwife)”

“I’d like to think that my own personal changes have just improved the experience that I offer women in terms of the care that they’ve received from me (Midwife)”

“...was a good stop moment for myself and my colleagues...I never thought that you know everything we do, really, from continuous monitoring to abdominal palpation, not just the obvious ones around you know induction or caesarean section or vaginal examinations, but absolutely everything is choice, it has to be choice, which then has to be respected. (Midwife)”

Our training empowers healthcare professionals to give the respectful care which they came into the professional to give and gives them the confidence to challenge colleagues as well:

“I did have that argument once with an obstetrician [about] somebody who was following their own path and he said ‘well can we get her sectioned?’ I went no, we can’t get her sectioned because she has capacity, and if you’re going to go down that route, I’m going to have to be really clear that I support her right. (Midwife)”

In addition through our advice service we educate over 1000 individuals each year about their rights in their specific situation, and reach thousands more through the media and social media. Again the recent impact study of our advice service showed that this had had a real impact on care:

“It made me feel 100% confident in challenging care decisions with the knowledge I had been given. “

“They gave me the confidence, they made me feel heard and seen.”

“Gave me the confidence to stand my ground.”

“Was very helpful advice and made me feel confident in taking it further if needs be.”

We can therefore see the incredible potential of starting education about human rights in school and in other education settings so that all individuals are aware of their rights, feel ownership of them and feel confident in their right to exercise them. In addition, all those working in all public bodies, whether in health, education, policing, housing or any other area, would be aware of their obligations to uphold those rights. This sort of public education is an essential foundation for a positive human rights culture. The pandemic has sadly shown how easily the state can harm individuals when human rights are not at the heart of public decision making.

We all want to live in a country where we can be confident we will be treated with dignity and respect in maternity care and every other area of public sector provision. We urge the Government to take this opportunity to commit to rolling out an ambitious education programme to explain the positive benefits of human rights, and to rebuild and enhance our reputation as a fair, tolerant and rights respecting country.

END