

# Why didn't prisoner rights come home?

David Scott considers the continued marginalisation of prisoner rights.

*The Human Rights Act 1998 (HRA) received royal assent on 9 November 1998 and came into force ten years ago on 2 October 2000. The government rhetoric surrounding the introduction of the HRA included a commitment to 'bring rights home' and develop a 'rights culture' for the benefit of all people, including prisoners. Yet in terms of providing an impetus for a culture of rights in state institutions such as the prison, the HRA has proved to be somewhat of a damp squib. When we ask the question 'why didn't prisoner rights come home' at least part of the answer can be found through the recognition that from the start the HRA was shackled within a wider context of responsabilisation and minimalism. Evidence of its historically restrictive interpretation by the Prison Service can be identified in two main ways: (1) assessment of existing policies and the level of training available prior to implementation and (2) the reassuring messages sent to staff via official discourse.*

Prior to the implementation of the HRA an extensive review was undertaken of Prison Service policies and operational practices. The main outcome of the review was the decision that strip-searching and the use of strip cells should be discontinued for prisoners identified as being at risk of 'suicide and self-injury' (HM Prison Service, 2000b). In addition there was a commitment to provide clearer lines of reasoning for decision making and policy documents and a number of references to 'proportionality' were carefully inserted into the prison

rules. Beyond this very few other policies were altered or introduced as the Prison Service felt it was now broadly compliant with the HRA (HM Prison Service, 2000c). Pro-active training on human rights for staff prior to October 2000 was largely directed towards governors and senior managers. Whilst *The Human Rights Act: HM Prison Service Information Pack* was given to all personnel, and an edition of the *Prison Service Journal* in 2000 included a copy of HRA there was no specific training, for example, initiated for existing prison officers.

In official discourse five calm and reassuring messages were sent to staff.

## Don't panic

The implementation of the HRA was greeted with great confidence, summed up in the belief that 'we have no doubt that the Prison Service will master the act' (Sanderson, 2000). The heavy use of the European Convention by UK prisoners since the 1970s had led to the assumption that virtually all those aspects of policy that could be successfully challenged through the principles of the ECHR had been exhausted. Correctly anticipating the framework of judicial reasoning post HRA, the then Director General stated:

*In developing our policies we already take account of human rights and will continue to do so; and if the courts find that practices are unlawful under the Act we shall respond. But we are not going to panic ... We have been carrying out an audit of our practices. So far we have found*

*none which need to be changed. If we find policies which need to be changed we will issue new guidance.*

(Martin Narey, *The Guardian*, 12 May 2000)

Arising from this were public reassurances that there was nothing to fear from the HRA for it was not asking for a new commitment to care for prisoners (HM Prison Service, 2000a).

## Familiarity is the best form of protection

It was considered catastrophic if staff had their authority undermined by the 'jail house lawyer'. In an attempt to protect themselves, prison officers were expected to 'know enough not to be ambushed by a prisoner who has been mugging up on the Convention' (Sanderson, 2000). However, it was the policy makers who had the key responsibility for compliance, as they shaped other staff's decision making through the prison rules, PSIs (Prison Service Instructions) and PSOs (Prison Service orders). It was they who must be prepared to use the 'new vocabulary' of proportionality; be able to apply its test to appropriately justify decision making processes; and thus be able to successfully demonstrate compliance to convention principles.

## Staff will be vigorously defended

In October 2000 the prevailing attitude was one that all existing policies and practices meet HRA requirements (Sanderson, 2000) and the Prison Service planned to 'defend current practices and policy unless there are clear and good reasons to the contrary' (Pickering, 2000). Indeed policies 'have been devised to be ECHR proof and will be defended rigorously in the event of any challenge' (ibid, emphasis added). Whilst legal changes must be adopted, the spirit of a human rights culture certainly did not. The Prison Service was not to be a lamb and lie down and wait for its slaughter; rather it would offer full support to any staff operating in accordance

with instructions (HM Prison Service, 2000a). The approach of the Prison Service was to emphasise how prison staff would be defended against trouble making prison litigants who might turn the HRA into a weapon.

### It is all about responsibilities

In a number of key statements the introduction of the HRA was contextualised as being involved in a balancing act with the responsibility of the Prison Service to protect the general public. The HRA was to make prisoners 'more aware of the rights they already have but also balance these with responsibilities to others' (HM Prison Service, 2000a). In a mutated interpretation of the HRA, the new act was not to be perceived as a means of creating *new* rights for prisoners, but rather as a means of educating them by highlighting what rights and *responsibilities* they already possessed. Remarkably the HRA was construed as validating existing strategies of responsabilisation.

### Creates penal legitimacy

The HRA was constructed in official discourse as Prison Service-friendly and a means of adding greater legitimacy to its already existing penal realities. The HRA provided a means for prisoners to challenge the state. Whether such challenges had much chance of success was not the point.

Despite the widespread hype surrounding the HRA in the late 1990s, its implementation was either radically rearticulated to reflect existing prison policies or ignored by the Prison Service. The latter is especially true in the *Annual Report & Accounts* where the HRA only merits nine lines of text in the 2000-2001 report. Consequently when today we consider the continued marginalisation of prisoner human rights and look for reasons 'why prisoner rights didn't come home' ten years after the implementation of the much proclaimed HRA, we should perhaps start with the acknowledgement that

as a means of transforming prison culture and promoting prisoners legal rights the HRA never really got the chance to get started. ■

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