

# Human Rights Act 1998 - the business implications

## PFI



The Human Rights Act (HRA) came into force on 2 October 2000. The most significant requirement of the HRA for PFI projects is the provision which makes it unlawful for public authorities to act in a way which is incompatible with Convention Rights.

It is not only local authorities, government departments, the police and other “obvious” public authorities that are included within this requirement. It also extends to operations of private companies where those companies are performing a public function. An example is Railtrack where its safety operations are part of a public function but its property development activities are not caught by the Act since they do not perform a public function.

This has particular significance for PFI. A PFI contractor, in providing services to government, say, in relation to the operation of a prison or hospital, is performing a public function. The contractor will, therefore, be under a duty to act compatibly with the Convention in the operation of those public services.

The Rights which may be relevant to PFI contractors include:

### **First Protocol, Article 1 - protection of property**

This provides that everyone is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law.

Possessions have been interpreted widely and can include land, shares, an interest under a contract and

anything of economic value. This means that interference by a public authority with property rights, where they are not in the public interest, may be a breach of this Convention right.

### **Article 2 - the right to life**

This amounts to a positive duty to safeguard lives.

### **Article 3 - prohibition of slavery and forced labour**

Freedom from torture or inhumane or degrading treatment or punishment - this might be relevant to prison overcrowding which could be regarded as inhuman or degrading.

### **Article 6 - the right to a fair trial and public hearing**

This gives a right to a fair hearing in any matter which involves “a determination of civil rights and obligations”. Therefore any decision which is determinative of someone’s rights, particularly financial matters, must comply with the requirements of a fair hearing before an independent and impartial tribunal.

Article 6 also has benefits for the consortium bidding for a PFI project. The tendering process must comply with the requirements of Article 6. Therefore the process must be fair in all respects, allow parties a reasonable opportunity to be heard and the decision making process itself must be by a fair and impartial tribunal.

## Article 8 - the right to respect for private and family life

Everyone has the right to respect for his private and family life, his home and his correspondence.

This is the right to privacy and could be relied on, together with Article 1 Protocol 1, where property rights are interfered with.

### The contractual position

It is clear that PFI contractors will need to take account of these key HRA rights in the way they plan and run their day to day activities. However, it is entirely possible that contractors will have contractual obligations to the relevant government authority which effectively require performance in such a way as to infringe the HRA.

Of course, PFI contractors who have existing contractual obligations are in a different position from bidders for PFI contracts yet to be awarded. The former have to work within the existing contracts while the latter are in a position to negotiate for protection.

Existing PFI contractors on the receiving end of an HRA challenge may not have a sufficiently wide indemnity from the relevant government authority to hold it harmless from compensation claims. It is also possible that successful challenges under the HRA against government authorities may result in the need for contractors to incur significant capital expenditure in order to put themselves in a position to be able to carry out their duties in a way which is compatible with the HRA. PFI contractors will need to look carefully at the "Change of Law" and "Changes to Service" provisions in their contracts to ascertain whether or not they can require an increase in unitary charges to offset additional costs incurred.

Bidders for new contracts are in a position to address these issues before ironing out their contracts. Bidders might well feel that the risk of being on the receiving end of HRA claims or incurring the costs of changing services to comply with the HRA are risks that they should not be required to bear to the extent that these arise as a result of their performing services in accordance with their contractual obligations and that the relevant government authority should provide a full indemnity against these potential liabilities.

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