dpg
deighton pierce glynn

INDEPENDENT HUMAN RIGHTS ACT REVIEW
Call for Evidence

Evidence of Deighton Pierce Glynn Solicitors

Summary

1. Deighton Pierce Glynn ("DPG") is a leading public law and civil liberties firm. We represent claimants in a broad range of cases and in many of those cases our clients rely on the Human Rights Act 1998 ("HRA"). Our response to the Review is ordered as follows:

   (A) Brief details of DPG's work;

   (B) General observations; and

   (C) Responses to the Review Questions

2. In summary, we support the careful constitutional balance struck by sections 2 (interpretation of convention rights); 3 (interpretation of legislation); and 4 (declarations of incompatibility) of the HRA and caution against changes to these provisions. In our view any change along the lines contemplated would limit access to justice for our clients.

(A) About Deighton Pierce Glynn

3. Deighton Pierce Glynn[1] is a firm of solicitors specialising in civil liberties, human rights and public law, with offices in London and Bristol. We employ 40 solicitors and paralegals . We have specialisms in community care and mental capacity; actions against the police; detention and prison claims; equality and discrimination matters; environmental and planning law; healthcare; housing, destitution and migrant rights; international human rights; inquests; and assisting victims of crime.

4. The firm has a particular reputation for its representation of disabled people; persons in detention and vulnerable individuals such as victims of torture, human trafficking and sexual exploitation; unaccompanied child immigrants; and those with serious mental health needs, including people who lack mental capacity (where we are instructed by the Official Solicitor). A significant proportion of our clients have English as a second language or limited literacy skills.

5. To give examples of some of our clients who have benefitted from the operation of

[1] http://www.dpglaw.co.uk/litigation-and-public-law-solicitors/reputation/

the HRA: families whose relatives have died in police custody or prison and who used the HRA to ensure that the inquest considered the wider circumstances of their relative's death (and were vindicated by those findings); survivors of the Hillsborough and Grenfell Tower tragedies; survivors of torture and human rights defenders detained in fast-track immigration detention; trafficking victims who have been overlooked by the public authorities responsible for helping them; members of the Windrush generation denied immigration status in the UK; a victim of unlawful rendition, detained by British forces; people wrongfully refused emergency lifesaving healthcare treatment; families who were destitute and homeless; disabled people in wholly unsuitable accommodation; and others. Please see our website for further details of our work: www.dpglaw.co.uk.

6. Most of DPG's clients are individuals, although we also act for and with charities and non-governmental organisations such as Southall Black Sisters, Amnesty International, Privacy International, Medical Justice, Inclusion London and the Red Cross. The vast majority of our work is funded through legal aid, although we also have significant experience of crowdfunded litigation.

7. Our clients litigate not for commercial reasons, but to obtain access to critical services unlawfully denied to them, to eliminate discrimination, to prevent or to seek redress for interferences in fundamental rights or to bring public bodies to account in relation to issues of wider public importance. We have a long track-record of helping people who are not wealthy secure access to justice.

(B) General Observations

8. This is not the first review of the HRA and/or European Convention on Human Rights ("ECHR"). Previous reviews have often been accompanied by media misunderstanding/misrepresentation of the ECHR/HRA's operation. We welcome the Review Chair's affirmation that:

   "*The Review's Terms of Reference (ToR) focus on the operation of the HRA. They are not concerned with either the substantive rights contained within the Convention or with the question whether the UK should remain a signatory to it; the Review proceeds on the basis that the UK will remain a signatory to the Convention*."

9. The Review is not being asked to comment on the value of individually enforceable convention rights, but only on certain aspects of their domestic incorporation. For this reason it has not sought evidence going to the importance and value of enforceable ECHR rights. This has important consequences for the Review, as follows:

   a. In terms of process, the absence of this kind of evidence means that the Review is unable to conduct its work with reference to the broad range of people who benefit from the HRA and the impact on their lives. It is important to note that this

is a far larger cohort than the small proportion of cases that lead to reported judgments (and the even smaller proportion that lead to reported judgments of particular note). There is a danger therefore that the Review focuses on those cases while ignoring the true substance of the HRA. The HRA's impact is more often felt in the absence of lawyers and - even when legal proceedings are commenced - in pre-action and pre-judicial review permission work. For example, the majority of our litigation concludes at these stages.

b. In terms of conclusions, the Review must be mindful of these limitations and therefore similarly limit its recommendations, since it cannot confine the effects of its recommendations to issued litigation. Any change to the HRA will have knock-on effects for the policy positions taken by public authorities, their approach to their day-to-day operations, and in their conduct of litigation (pre-action and beyond).

c. Also, experience shows that engaging with the facts of individual cases is relevant to assessing the questions of legal balance that the Review is focused on, and it should be mindful of this too.

10. Finally, the Review should avoiding straying, or being seen to have strayed, into undermining the importance of the ECHR. The conduct of any review in this area carries this danger. This would be a poor signal to send internationally while the European Court of Human Rights ("ECtHR") grapples with securing enforceability throughout the Council of Europe area.

(C) Response to Questions

Theme One (Relationship between domestic courts & ECtHR)

11. In relation to the relationship between domestic courts and the case law of the ECtHR: in our view section 2 HRA strikes a careful constitutional balance between the primacy of domestic law making and the need to keep in step with wider ECtHR jurisprudence that flows from the UK's commitment to the ECHR. Any change would risk unduly diminishing the relevance of ECtHR jurisprudence. This would in turn result in more time consuming and costly applications to the ECtHR for UK litigants, an increase in negative ECtHR judgments against the UK and distort the dialogue which currently takes place between domestic courts and the ECtHR.

12. In our experience, domestic courts do not prefer ECtHR precedents over domestic precedents, nor do they apply ECtHR judgments in a literal fashion, but they do take these cases into account in an appropriate manner. Practice has continued to develop in this regard over the last decade. In our experience, domestic judges are able to identify particularly significant ECtHR judgments (usually those of the Grand Chamber) from other more routine Chamber judgments.

13. If the Panel feels that dialogue needs strengthening, then this could be achieved by practical measures such as a centralised collation of domestic and ECtHR case law on key issues or increased judicial training and exchanges with the ECtHR judiciary.

14. We have had the opportunity of reading the submissions of the Public Law Project ("PLP") to the IHRA Review on Theme One and we agree with and adopt those submissions. We agree that the domestic courts have in recent years shown greater flexibility in applying Strasbourg caselaw and there is no need to interfere externally in this continuing development.

15. We also have read and adopt the submissions of the Police Action Lawyers Group ("PALG"), of which many of our solicitors are members.

Theme Two (Relationship between judiciary, executive & legislature)

16. Again, we support the careful constitutional balance struck by sections 3 and 4 HRA. In relation to section 4 HRA, as part of an Act of Parliament, it cannot properly be said to have curtailed the powers of parliament. It was passed by parliament, and it does not disapply domestic legislation. Section 4 HRA is in essence a human rights compatibility legislative review function. Not all human rights impacts are going to be identified in the HRA-compliance statement at the time of a bill's passing and it is sensible to have a means to revisit compliance where the courts find a clear incompatibility in practice. Data collated by the Public Law Project shows that in practice, reliance on section 4 is relatively rare (see e.g. para 54 of their submission to the Review).

17. The position in relation to the executive is of course different. The HRA does limit acts of the executive, but this is nothing new: this is in the nature of judicial review and is within constitutionally appropriate limits. We do not accept the premise that this leads to the "over-judicialisation" of public policy making. HRA adjudication will inevitably take place in a public policy arena since it provides a means of redress for individual citizens against the actions/inactions of public authorities. But this is in the nature of judicial review, as we have noted. And the courts accord due deference and a margin of appreciation in carrying out any such review. Complaints may be made about where the balance is struck in individual cases, but this too is an age-old complaint, and one made by claimants and defendants alike.

18. Further, we believe the "judge over your shoulder"[2] to be a useful influence on public authority decision makers. In most cases, the HRA's impact is felt in the original decision, and no litigation results. This is often overlooked by those who complain of "over-judicialisation". There has been no attempt to quantify the impact of the HRA having regard to these less visible (but more sizeable) impacts of the HRA.

[2] https://www.gov.uk/government/publications/judge-over-your-shoulder

19. Finally, while we accept that "over-judicialisation" is a perception in some quarters, changing the HRA will not alter this perception, nor will it stop victims from applying to the courts to protect themselves from the unlawful acts of public authorities. Changes to the HRA will not meet the concerns of those who maintain this point of view.

20. In our experience much of the debate under this heading is conducted using the language of parliamentary supremacy but disingenuously. The complaints of 'judicial policy making' are often on closer examination a complaint about a lack of executive supremacy. The latter is not a principle of our constitution nor should it be. We agree with PLP's submission to the Review that:

    "*In the UK constitutional framework, it is the function of the judiciary to scrutinise the lawfulness of government action, whether through secondary legislation or the implementation of policy. The courts' function includes being the final arbiter of the interpretation and application of legislation, both primary and secondary. This necessarily involves consideration at times of questions of policy; but the courts' role is not to decide whether the policy choice made by the democratically elected branch is the right one: its role is to scrutinise its lawfulness. So too with the HRA: the courts' rule is to scrutinise the compatibility of policy choices with the rights protected by the HRA, not to decide whether the policy is desirable or the 'right' one. This function of the courts in ensuring that government acts within the law is an essential element of the rule of law in a functioning democracy*."

21. As regards parliamentary supremacy, as we have noted, the HRA already preserves this principle. Any retreat from the "declaration of compatibility" mechanism in section 4 HRA would result in a large increase of applications to ECtHR in cases concerning the human rights compatibility of legislation, which would impose an unreasonable burden on that court and needlessly subject UK applicants to years of delay. It would lead to an increase in negative Strasbourg judgments against the UK and an inefficiency in domestic law making. It would also undermine the efficacy of the domestic legal order: there is an obvious need for a domestic mechanism to consider human rights compatibility of legislation, particularly given the pace of legislation in the current post-Brexit, Covid-19 era. Finally, it would place the UK in breach of its obligations under the ECHR. The compatibility of s.4 itself has been in question (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 43, ECHR 2008) and removing this mechanism would deny UK citizens an effective remedy under ECHR Article 13.

22. Again, we also agree with and adopt the submissions of PLP and PALG in relation to Theme Two.

Extra-Territorial Jurisdiction

23. Question (d) poses a question about extra-territorial jurisdiction. This does not fit comfortably under the heading of this theme. Any change in this area would warrant its own consultation. It is also the subject of the Overseas Operations (Service

Personnel and Veterans) Bill. However, we make the following observations:

a. The tests for extra-territorial jurisdiction of the HRA have been developed carefully, and in dialogue with the ECtHR. There is a significant body of caselaw on these questions which represents a careful working out of the relevant principles (see e.g. *Al-Skeini v UK* [GC] Application No. 55721/07; *Al-Jedda v UK* [GC] Application No. 27021/08; *Al-Saadoon v UK* Application no. 61498/08; *Hassan v UK* [GC] Application no. 29750/09; *Smith v Ministry of Defence* [2013] UKSC 41; and others).

b. Much of the caselaw in this area concerns the activities of armed forces overseas[3]. Debate about this litigation in the UK often generates more heat than light. The facts of the relevant cases show that they were not imposing human rights standards "on the battlefield". They concerned the actions of British forces away from heat of battle, in its own detention centres and/or during the UK's post-hostilities military occupation of Iraq (as classified under international humanitarian law).

c. The importance of the HRA in this context is underlined, not undermined, by the Baha Mousa Inquiry[4] and the Iraq Fatality Investigations[5]. It should also not be forgotten that the UK Government interned well over a thousand Iraqi civilians[6] without criminal charge, holding them often for years at a time, on unchallenged evidence, in Iraq. It is unsurprising that judicial remedies were sought given that Iraqi judicial remedies were unavailable.

d. The HRA did not require repeated investigations of individual soldiers. These were borne of the inadequacy of the military justice system to meet the demands of an occupation (itself borne of a lack of planning) and the Ministry of Defence's refusal to accept the responsibility of the chain of command for what happened to the victims. Rather than concede these issues in the relevant litigation, the Ministry of Defence initiated repeated investigations of the soldiers concerned.

e. We agree with PALG that:

"*96…The proposed law in its current format would amend the HRA in ways that impact on its human rights obligations. The Bill has been met with strong criticism and resistance from several institutions concerned with the protection of human rights and upholding the rule of law.*

[3] See ECtHR Fact Sheet on Extra-territorial Jurisdiction: https://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf
[4] https://www.gov.uk/government/publications/the-baha-mousa-public-inquiry-report
[5] https://www.gov.uk/government/collections/iraq-fatality-investigations
[6] https://hansard.parliament.uk/Lords/2007-03-12/debates/07031234000022/IraqDetainees

97. Should the Bill be passed in its current form, it is our view that it would damage the standing of the armed forces, and by proxy the UK's position as a leader in the protection of human rights, by acting contrary to both established domestic and international legal norms."

We therefore do not support the Review recommending any changes in this area, nor are the Review's processes adequate to bring about such changes.

Deighton Pierce Glynn
3 March 2021