HUMAN RIGHTS ACT REFORM: CONSULTATION

Response 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: victims of the Windrush scandal; the families of persons killed in custody; trafficking victims; and disabled persons denied access to public services, to name but a few. In many of those cases our clients rely on the Human Rights Act 1998 ("HRA"). Our response to the consultation is ordered as follows:

   (A) Brief details of DPG's work;

   (B) General observations; and

   (C) Responses to the Review Questions

2. In summary, our experience borne of many years helping vulnerable people to vindicate their rights under the HRA is that it is an essential and unique means of obtaining redress for very vulnerable individuals. Without it, they would be denied access justice. They do not need a new Bill of Rights, and the proposals do not advance a sufficient justification for removing or restricting rights for these persons. Enabling access to justice for these persons is an important aspect of the rule of law. The HRA in its current form also strikes an importance important constitutional balance: it enables access to remedy while at the same time preserving parliamentary supremacy and according appropriate latitude to public authorities. There is no basis for altering this. There is no need for a Bill of Rights.

3. Several of the changes proposed in the consultation would upset this careful constitutional balance at the cost of victims, who would be disenfranchised from access to justice as a result. This would disproportionately affect minority ethnic groups at a time when much remains to be done for the law to advance equality and remedy discrimination, as can be seen from the Windrush scandal. Other vulnerable groups: the disabled, trafficking victims and others, would also disproportionately suffer. Therefore, save where noted below, we oppose the proposals.

(A) About Deighton Pierce Glynn

4. 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.

5. 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.

6. To give examples of some of our clients who have benefitted from the operation of 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; Afghan interpreters incorrectly refused protection in the UK; and others.

7. 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.

8. We are recognised in leading directories for our work, for which we are consistently top-ranked[2]. Please see our website for further details of our work: www.dpglaw.co.uk.

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

(B) General Observations

9. After a series of reviews in relation to the HRA in recent years, and having established the comprehensive Independent Human Rights Act Review that reported only last year, strong public policy reasons are required for departing from the recommendations of that Review. The Government's Proposal does not discharge that burden. In the main, the evidence base is selective and reliant on headline grabbing, but non-representative, outliers. The existence of cases the government find objectionable is not a justification for altering the system. You will find that there are an equal or greater number of cases that claimant representatives would wish to change. The way to do so is through litigation, not by redrawing rights protections in the UK.

10. Any 'tinkering' with the HRA needs to have an extremely strong public policy justification because the mere fact of amendment tends to undermine its constitutional importance. The stated aim of the proposals – of strengthening and improving rights protections – is therefore set back before the government gets started.

11. We believe the "judge over your shoulder"[3] to be a useful influence on public authority decision makers. Because of the proposal's focus on what it perceives to be 'problem cases' it gives inadequate weight to where the HRA drives better and rights-consistent decision making. In most cases, the HRA's impact is felt in the original decision, and no litigation therefore follows. There has been no adequate attempt to quantify the impact of the HRA having regard to these less visible (but more sizeable) impacts of the HRA.

12. 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 last year's HRA 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*."

13. As regards parliamentary supremacy, the HRA already preserves this principle. Any retreat from the "declaration of compatibility" mechanism in section 4 HRA would

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

result in a large increase in 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.

(C) Response to Questions

We respond below to the questions on which we have direct experience and particular contributions to make. In relation to other questions we endorse the responses of the Law Society and the Police Action Lawyers Group, of which we had advanced sight.

Q1: s2 HRA

14. In our experience, domestic courts do not prefer ECtHR precedents over domestic precedents, nor do they apply ECtHR judgments in a literal fashion. They take these cases into account in an appropriate manner. Practice has continued to develop in this regard over the last decade and the senior courts have provided guidance on when Strasbourg judgments may be departed from (see e.g. *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2). 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.

15. The proposed changes to s.2 HRA would introduce additional uncertainty and would abandon the existing judicial dialogue between Strasbourg and the domestic courts in favour of unplanned 'off piste' judicial decision making on a case-by-case basis. That would lead to legal uncertainty for Claimants and Defendants alike; an increase in applications to the Strasbourg court; significant delays in accessing justice; the need for additional resourcing of that court and a delay in securing judicial certainty and certainty of redress for victims. It would amplify rather than mitigate the perception of judicial policy making that appears to have prompted many of the consultation proposals. This would in turn undermine the rule of law and the international rules based order, at a time when the government needs to be seen to be restoring trust in the same.

Q8-Q10: A 'permission stage' for HRA/Bill of Rights Claims

16. Introducing a severity threshold for HRA/Bill of Rights claims is not desirable: there is no evidence that this is necessary and no clear evidence is relied upon for it. In judicial review claims there already exists a permission stage and that includes having regard to the viability of any human rights arguments that form part of the claim. In private law claims, the incentive to settle in order preserve costs i.e. the cost-benefit calculus for privately and publicly funded litigants alike already serves to filter-out unmeritorious claims. There is therefore no need for such a test.

17. Q10 advocates increasing the focus on "genuine" human rights claims, but there is no evidence provided of the resources being wasted on "non-genuine" claims. These are heavily value-laden judgments that risk entrenching inequality. They illustrate the problems any judge would have in operating a permission stage (which would itself lead to more appeals and more delay). There is also a danger that low value claims, which may be of particular importance to vulnerable litigants, would be ruled-out by such a test. This would have an unfair and disproportionate impact on access to justice to no real gain.

Positive Obligations (Q11)

18. The premise of this question is misleading. Positive obligations on the state ensure that there are systems in place and operational measures to protect people's human rights; these are proactive steps which ensure that individuals are protected from the loss of life and/or ill-treatment in a democratic society. We thereby reject the proposition that positive obligations are an 'imposition', but rather that they are instrumental to the provision of public services.

19. We do not endeavour to repeat the evidence-based analysis of relevant case law concerning positive obligations aptly provided by Police Action Lawyers Group in their response to this consultation. Instead, we provide an example of a DPG case that illustrates the importance of positive obligations on the state through the failure to have adequate systems in place, which led to the breach of an individual's right to life under Article 2 of the European Convention on Human Rights:

    Tarek Chowdhury

    Article 2 imposes on a state an 'investigative duty' to investigate the circumstances of any death that occurs at the hands of the state, whether that is in state custody or if there is state involvement, via a coroner's inquest.

    On 1 December 2016 a 64-year-old Bangladeshi national was killed by Zana Yusuf Ahmed. The inquest into the death of Mr Chowdhury in March 2019 found a catalogue of systemic failings by various agencies, but in particular in the immigration detention estate, that contributed to the killing.

    On 21 September 2016, the Home Office risked assessed Mr Ahmed as inappropriate for

transfer to an immigration removal centre ('IRC') due to his violent behaviour. He therefore remained in the prison estate. Mr Ahmed was not due to be assessed for potential transfer for another four months, but approximately three weeks later, on 10 October 2016, his transfer to an IRC was considered suitable. The Home Office disclosed evidence during the inquest that this was to assist with the reduction of foreign national offenders within the prison estate. It was accepted by the Home Office that Mr Ahmed should never have been transferred on consideration of his violent custodial behaviour – particularly as the day before he was transferred, he had attacked another prisoner with a table leg.

Alongside the failure to properly assess Mr Ahmed's mental health and risk of violence, the jury found that there was an absence of an appropriate system to share information about his risk of violence, which caused and contributed to Mr Chowdhury's death. They also found that there were failures to share information about his mental health, and inappropriate staffing and handover arrangements between the night and morning of the killing, which may have contributed to Mr Chowdhury's death. Moreover, the jury heard evidence that Mr Chowdhury was suitable for an interview for administrative removal without being detained, but that he was held in an IRC due to error by the Home Office.

20. This is a case in which there were clear breaches of the state's positive obligations, and lessons-learned from the inquest are important to ensure that systems are put in place so as to prevent future deaths.

'Reading down' (Q12-14)

21. This section appears to be based on a false premise that the HRA has undermined parliamentary law making when it has in fact been careful to respect parliamentary sovereignty. Section 3 was enacted by Parliament and made clear that "so far as it is possible to do so"[4] legislation must be read in a way that is compatible with Convention Rights. Courts have therefore been interpreting legislation in line with the express wishes of Parliament. With the current pace of legislation, we have seen how this provision acts as an important safeguarding mechanism and also has the benefit o avoiding unnecessary and costly appeals to Strasbourg. It is an important mechanism in ensuring rights are given their full effect within the domestic context.

22. The Command Paper cites *Ghaidan v Godin-Mendoza* [2004][5], the judicial authority on section 3, only in passing and ignores that this is the authority on section 3 interpretation which is clear, considered, has been in place for seventeen years and achieves the aims the Committee is seeking to address through its proposed reforms. There is little evidence of section 3 being misused by courts and indeed JUSTICE found only 24 cases in which section 3 was used to interpret 24 cases between 2013 and 2021.[6] Further it is worth noting that in within these already rare instances in which section 3 has been used, for example in *Secretary of State for the Home Department v AF (No 3)* [2009][7] or indeed in the above-mentioned case of *Ghaidan,* use of section 3 was not resisted by counsel for the government, which according to

[4] Human Rights Act 1998, s 3(1)
[5] *Ghaidan v Godin-Mendoza* [2004] UKHL 30
[6] JUSTICE, 'A consultation to reform the Human Rights Act 1998 – Consultation Response' (March 2022), para 171
[7] *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, paras 67 and 95

the Independent Review "*is a not unusual feature where section 3 and 4 of the HRA are concerned*."[8]

23. We object to both proposals for reforms to section 3. There is little-to-no evidence to suggest section 3 is in need of reform and that is the basis on which the options are proposed. To repeal section 3 would effectively prohibit the Court from performing this domestic safeguarding function. To dilute section 3 would have a similar effect. The objectives and interests this Command Paper seeks to balance are better balanced by section 3, and for that matter, by sections 2, 3, and 4 in their current form then they are by these proposed reforms.

Q15-Q16: Approach to secondary legislation

24. DPG have represented claimants in judicial reviews challenging both primary and secondary legislation. This proposal appears to contemplate restricting or removing the ability to obtain a quashing order in relation to secondary legislation. The availability of such a remedy in relation to secondary legislation is not the exclusive preserve of the HRA and is a recognised remedy in public law. The HRA is therefore reflective of a broader public law distinction and there is no basis to alter this. Secondary legislation receives little to no parliamentary scrutiny and in many instances can become a *de-facto* means of executive law making. It is right that it should be subject to judicial review including on HRA grounds. No evidence basis is provided for departing from the status quo. Further any quashing remedy is only in play where the 'reading down' the provision under s.3 is not possible. The number of cases affected are therefore limited, and are justified for these policy reasons.

25. In relation to prospective quashing orders we adopt the consultation response of the Law Society.

Q21: Changing the approach to s6(2)

26. The proposal to alter s.6(2) HRA to exempt public authorities from liability where they are "clearly giving effect" to primary legislation would drive a coach and horses through the coherency of HRA protections. We are seriously concerned that many of our clients would not have been able to obtain access to justice were these proposals to be enacted. This is because much of the activities of public authorities of the most serious kind: detaining, deporting, policing, surveilling etc. can be said to be giving effect to relevant primary legislation. It cannot be right that this insulates wrongful actions in carrying out those functions from liability and accountability.

27. These proposals would remove the 'judge over the shoulder' from potentially large swathes of public decision making to no good effect. Any changes to s.6(2) HRA

[8] Ministry of Justice, 'The Independent Human Rights Act Review' (December 2021), para 60

threaten to create a serious gap in ECHR protections and a lack of effective domestic remedy. Applications to the European Court of Human Rights would proliferate and victims would face substantial delays and would be prevented from obtaining access to justice.

Q22: Military Claims and Extra-Territorial Jurisdiction

28. 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[9]. 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[10] and the Iraq Fatality Investigations[11]. It should also not be forgotten that the UK Government interned well over a thousand Iraqi civilians[12] 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.

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

Excluding extraterritorial jurisdiction or military claims 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, at a particularly important time for preserving the international legal order.

Q23, Q24 & Q25: Deportations and Immigration

29. The framing of Q24 is misleading, in that it suggests wrongly that the Human Rights Act is an impediment that 'frustrates' deportations that are in the public interest. It is important to emphasise a very basic concept, which is that Article 8 does not contain an absolute right for any category of people not to be deported. It simply provides for circumstances where deportation will give rise to a violation of Article 8, which is why the concept of proportionality, bearing in mind the context of each case, provided by the Courts is vital. (and what option 3 is trying to curtail).

30. It is disturbing therefore to see that the options provided seem to suggest an inclination to adopt a deportation regime which will redefine rights under Articles 5, 6 and 8 in a way that would not mean the same as the European Court and would place people subject to deportation in an 'unpopular group' which is undeserving of human rights.

31. Foreign offenders are already subject to onerous statutory presumptions providing for deportation. For example, section 117C of the Nationality and Immigration Act 2002 creates a presumption that deportations of foreign national offenders are in the public interest. There is no basis for excluding such persons from human rights protections altogether. The Windrush scandal is a salutary reminder of how already marginalised communities were excluded from the protections that citizenship afforded them by increasingly hostile immigration policy. In many cases persons with the right to remain the UK were subject to unjustified deportations. There is no justification for the changes proposed in this question, which are prompted by the minority of deportation challenges. The law already provides a sufficient basis for implementing deportations. To exclude the affected persons from availing themselves of core human rights protections (e.g. Art 8 ECHR) undermines the completeness of human rights protections and sets a dangerous precedent for pick and mix rights based on arbitrary criteria set by the executive. For every isolated example of a case lost by the government in this area, there are examples of Windrush citizens or persons who have lived in the UK for decades, with children who are British citizens being deported for relatively minor offences. It is right that the law has regard to the impact on the family of a deportation in such circumstances and the law already circumscribes that review without the need to remove huma rights protections altogether.

32. The first proposed option seems to suggest that an imprisonment of a certain number of years would always determine deportation without having regard to the nature of

the offence. This would be arbitrary and would fail to ensure all rights and liberties are protected domestically while also adhering to the ECHR.

33. The third option to suggest that the Secretary of State should be given unfettered power to make proportionality and ultimately deportation decisions, which should almost never be challenged by the courts, limiting the possibility of legal challenges such as judicial reviews. It seeks to take away from the courts the ability given by the Human Rights Act 1998, to look at a provision's ordinary meaning informed by its context, which would ultimately result in a 'one size fits all' approach.

34. In relation to Q25: we reject the premise that human rights law is an impediment to the effective implementation of immigration law. Adequate resourcing and timely decision making would far more easily, and less damagingly, remove any perceived impediment.

Q26: Just satisfaction damages

35. We draw your attention to the PALG's response to this question, which we support. In particular, we wish to emphasise our rejection of the premise that damages could be limited by the factors listed in the question; rather than focusing on how the modest damages awarded in these claims negatively impact the resources of public authorities, which we state is overstated, the focus should instead be on how the HRA endeavours to improve systems, training and procedures, so as to reduce unlawful actions by the state, and thereby litigation.

Q29: Impacts

36. We have sought to emphasise above the disproportionate impact on vulnerable groups on weakening human rights protections. Those vulnerable groups are disproportionately comprised of persons with protected characteristics under equality law: minority ethnic persons; the disabled; women; and others. We anticipate increased costs to litigation for these groups, as well as exclusion from remedy altogether in relation to some of the proposals. The proposals have been drawn up without adequate involvement of these affected communities. This needs to be remedied in any future proposals or decisions.

Deighton Pierce Glynn
8 March 2022