



## Human Rights Act Reform: A Modern Bill of Rights Consultation Discrimination Law Association response

1. The Discrimination Law Association is a registered charity, a membership organisation established to promote community relations by the advancement of education in the field of antidiscrimination law and practice.
2. It is a national association with a wide and diverse membership. The membership currently consists of some 250 members (individuals and organisations). Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, but not exclusively, persons concerned with discrimination law from a complainant perspective.

### Introduction

3. The Discrimination Law Association (DLA) is pleased to have this opportunity to comment on the Government's proposals for the future legal and constitutional framework to promote, embed and enforce European Convention on Human Rights (ECHR) rights and freedoms in the UK.
4. The basic obligation under Article 1 of the ECHR, which a predecessor government signed up to in 1951 when ratifying the ECHR, is that, as a High Contracting Party, the UK “shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.”<sup>1</sup>
5. The DLA has considered and strongly opposes this package of proposals for an amended HRA or a new British Bill of Rights on the ground that taken together they will impede the UK government's ability to comply with its primary Article 1 ECHR duty. Moreover, on its own, the UK is not able to rewrite the ECHR, which is now binding on 47 Council of Europe Member States, to suit its parochial concerns.
6. This consultation on the Government's proposals runs to more than 100 pages. From the Foreword on page 3 to the final question on page 113 what appears is the Government's intention to weaken statutory protections against human rights violations. The proposals seek to do this from both directions – making it more difficult for ordinary people to bring proceedings

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<sup>1</sup> Section 1 of the ECHR contains Articles 2 to 18; Schedule 1 of the HRA contains the same Articles except Articles 13 (remedy for violation of rights) and 15 (derogations).

for breach of their human rights and imposing new constraints on what UK courts are entitled to do when considering such claims. Underpinning these proposals is the Government's clear intention to increase its direct and indirect role in any human rights challenge.

7. While the articles of the ECHR that form Schedule 1 of the HRA define rights and fundamental freedoms as universal – “Everyone” --, various of the Government's proposals would exclude people from using the courts to challenge breach of their human rights, or would impose major barriers that would have the same effect. This could put the UK in breach of ECHR Article 13 which guarantees to “everyone whose ECHR rights are violated, an effective remedy before a national tribunal”. Matters the Government intends the courts to consider would include the significance of the disadvantage, the “importance” of the case, past conduct of the claimant and in human rights challenges to deportation by individuals convicted of a crime in a UK court, the length of sentence of the person threatened with deportation. In our response we raise the prospect of this approach also constituting a breach of Article 14 which prohibits discrimination on any ground in the enjoyment of ECHR rights.
8. What the DLA regrets in this important consultation on the future of the HRA and potentially the future of human rights in the UK, is the absence of any discussion – except in negative sound-bites – of the human rights culture which the HRA has gone some way to establish, making the lives of people most likely to be disadvantaged very much safer and better, with greater respect for their dignity and fairer treatment. It would seem that when proposing changes to the HRA or the need for a “modern Bill of Rights” on which we are now commenting, no thought was given to better ways to secure and maintain human rights for everyone, everywhere across the UK other than through the threat of litigation; hence there are no proposals for any better ways than under the HRA unamended to strengthen the commitment of state bodies to an inclusive human rights culture.
9. As the Discrimination Law Association we have a particular concern, namely that the Government may proceed with some of its proposed changes without taking into account any adverse impact on Equality Act provisions which are often used alongside the HRA in legal challenges to unwarranted discriminatory acts or policies which doubly harm people's lives.

## **Discrimination Law Association Responses to the Consultation Questions**

### **I. Respecting our common law traditions and strengthening the role of the Supreme Court**

**Question 1: Interpretation of Convention rights: section 2 of the Human Rights Act. We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2, as a means of achieving this.**

.. For the Government to suggest that this is a problem requiring new statutory provision is misconceived. Domestic courts can already draw on “a wide range of law” when reaching decisions on human rights issues. Currently the HRA requires domestic courts to take European Court of Human Rights (ECtHR) jurisprudence into account, but they are not bound by it. In any claim brought in any domestic court, the first consideration will always be given to domestic statutes, common law and case law.

If, as proposed in Option 1, rights in the proposed Bill of Rights are decoupled from the rights in the ECHR then, as ECHR Article 13 guarantees a right to a remedy, claimants dissatisfied with the outcome of their case in the domestic courts could apply to the ECtHR. Option 2 would permit but not require domestic courts to have regard to ECtHR jurisprudence. Thus to adopt either of the Government’s options would likely result in an increased number of UK cases in the ECtHR, albeit only for those who are able to afford this route.

The DLA disagrees that there is a need for any amendment to the HRA for this purpose.

**Question 2: The position of the Supreme Court. The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. How can the Bill of Rights best achieve this with greater certainty and authority than the current position?**

The DLA regards this question as misconceived. We disagree that there is any need for any additional provision in this regard. Under the rules of precedence that apply to all UK courts in respect of every type of claim, including a claim under the HRA, decisions of the UK Supreme Court are binding.

**Question 3: Trial by Jury. Should the qualified right to jury trial be recognised in the Bill of Rights? Please provide reasons.**

DLA does not agree that there should be specific reference to a qualified right to jury trial. Sufficient protection is provided by the guarantee to everyone of a fair trial (ECHR Article 6). The right to jury trial does not arise in identical circumstances in each of the countries of the UK; to add this into the HRA or Bill of Rights would be more likely to add confusion rather than greater clarity.

**Question 4: Freedom of Expression. How could the current position under section 12 of the Human Rights Act be amended to limit interference with the press and other publishers through injunctions or other relief?**

**Question 5: The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations above. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?**

**Question 6: What further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources?**

**Question 7: Are there any other steps that the Bill of Rights could take to strengthen the protection for freedom of expression?**

## **II. Restoring a sharper focus on protecting fundamental rights**

**Question 8: A permission stage for human rights claims. Do you consider that a condition that individuals must have suffered a 'significant disadvantage' to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way of making sure that courts focus on genuine human rights matters? Please provide reasons.**

The DLA strongly disagrees with the premise that underpins this proposal. We object to the term 'genuine human rights abuses' and we strongly oppose the proposal for a permission stage for any human rights claim.

There is no evidence that UK courts are failing to focus on "genuine human rights matters" when asked to adjudicate human rights claims. There is no evidence that the courts are struggling with spurious, mischievous or frivolous claims which they are unable to weed out. It is insulting to both claimants and the courts to suggest that without a "significant disadvantage" a claim of breach of human rights is not genuine.

As the Government indicates, a permission stage based on “significant disadvantage” would serve to exclude potential claimants before any consideration could be given to the merits of their claim. Without skilled legal advice, how would people evaluate the gravity of the disadvantage they have suffered? It would be likely to deter potential claimants and create a totally unwanted impression, contrary to the human rights culture that was meant to follow enactment of the HRA, that fighting for your human rights is reserved for the few not the many. Further, a permission stage would introduce an unnecessary delay which would benefit no one.

The DLA is concerned that the Government in developing its proposals appears to have ignored the fact that claims under the HRA are often brought together with claims of discrimination and/or breach of the public sector equality duty (PSED) under the Equality Act 2010. In the Equality Act *disadvantage* is a core element of indirect discrimination (s.19); it is also an element of the duty to advance equality of opportunity within the PSED (s.149(3)). Throughout the history of equality legislation it has never been suggested that before a claim could be brought, the degree of harm suffered or liable to be suffered should be tested. In the view of the DLA this should never occur.

Ironically, it is very likely that the imposition of a permission stage will be indirectly discriminatory against prospective claimants on grounds of race (disadvantaging people less fluent in English), disability (disadvantaging people with communication impairments); and any costs involved could operate as a further disadvantage likely to deter claimants from groups more likely to have limited incomes, including young people, pensioners, workers in precarious employment, asylum seekers, those with no access to public funds, Gypsies and Travellers.

**Question 9: Should the permission stage include an ‘overriding public importance’ second limb for exceptional cases that fail to meet the ‘significant disadvantage’ threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons.**

See our reply to Question 8 (above) rejecting the proposal for a permission stage.

The DLA submits that any case concerning abuse of state power, which is the core of HRA protection for everyone in the UK, will always be of overriding public importance. The DLA therefore also rejects the Government’s alternative ground to exclude HRA claims, namely that, before the claim is considered it could be adjudged not to be of “overriding public importance”.

Our courts are filled at every level, including the Supreme Court, with cases that have little or no public importance (disputes over property, family disputes, contracts etc.) (CD) Yet only in relation to denial of fundamental human rights is the Government proposing a permission stage which would sift out claims that are not of “overriding public importance” in order to protect public authorities from the costs and inconvenience of having to defend their actions or failures to act. This could be in claims under Article 3 (e.g. excessive force in a secure training centre, with Article 14

if boys of different ethnicities are treated differently), Article 5 (indefinite confinement of a disabled person in residential care) or Article 8 and Article 1 First Protocol (a Gypsy family made homeless by the local council's unlawful forced eviction from a designated site) The proposals seem to imply that human rights – ECHR rights – and the right to an effective remedy for violation of such rights (ECHR Article 13) do not apply unconditionally to everyone.

The better way to save public resources is, of course, for the Government to ensure that public authorities carry out their functions in full compliance with ECHR rights, as required by section 6 of the HRA, thereby avoiding any legal challenge.

**Question 10: Judicial Remedies: section 8 of the Human Rights Act. How else could the government best ensure that the courts can focus on genuine human rights abuses?**

This is one of many examples in the Government's Consultation that presents a problem, with little or no supporting evidence, and prescribes a solution; then, as in this case, uses a consultation question to garner support for their solution to what is, in fact, not a problem.

The DLA rejects the underlying premise of this question – the idea that human rights is “misused to provide a fall-back route to compensation on top of other private law remedies” [para. 225]. By “genuine and credible” human rights abuses the government means cases where “a genuine harm or loss has been caused” [consultation document para. 220], cases which “merit the court's attention and resources” [consultation document para. 221] - as opposed to trivial, unmeritorious, frivolous or spurious claims [consultation document paras. 218, 221]. The DLA does not accept that the courts are unable to focus on genuine human rights abuses, or weed out unmeritorious claims, and opposes any change to section 8 HRA.

**Question 11: Positive obligations. How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons.**

The DLA rejects the premise underpinning this question. We read this question as a prime example of the Government's view of the ECHR and the HRA as primarily a burden on all state bodies, which has grown with the recognition that a duty to avoid breach of Convention rights will inevitably entail positive obligations to protect peoples' rights. It is disappointing that the Government appears unwilling to recognise the vital part positive obligations now play in ensuring necessary protections of the human rights of everyone in the UK.

The Government suggests that the positive obligations which have developed through ECtHR and UK Supreme Court decisions have contributed to uncertainty,

confusion and risk-aversion for public authorities. The Consultation uses carefully selected examples of particular measures that public authorities adopted after failure to take positive measures resulted in findings of HRA breach – relating to prisoners, “serious criminals”, convicted offenders – to illustrate costs to public authorities. What the Consultation omits are the positive changes to – for example - protection of women from domestic violence or practices in residential care affecting millions of older and disabled people adopted to meet HRA positive obligations, which, once in place, add no additional costs to the public authority.

At the DLA we have learned the value of positive obligations since the imposition of equality duties on all public authorities under the Race Relations (Amendment) Act 2000, following the Macpherson Report in 1999, and since 2010 the public sector equality duty (PSED) under s.149 of the Equality Act 2010. Those authorities that have taken appropriate steps to comply with their equality duties have not only avoided the costs and reputational damage of defending cases in the courts and tribunals but have provided better, more effective services to members of the public.

The DLA therefore submits that the most effective way public authorities can avoid their “service priorities ...being impacted by costly human rights litigation” is to put in place policies and practices, that fully meet their obligations – including their positive obligations - under the HRA.

### **III. Preventing the incremental expansion of rights without proper democratic oversight**

**Question 12: Respecting the will of Parliament: section 3 of the Human Rights Act. We would welcome your views on the options for section 3. Option 1: Repeal section 3 and do not replace it. Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation. We would welcome comments on the above options, and the illustrative clauses in Appendix 2.**

The DLA notes that a majority of the questions within Part III of this consultation rely on the Government’s real or purported concern regarding diminution of Parliamentary power (which could also be read as concern regarding loss of power of the Government since its majority in Parliament makes the interests of Parliament more or less inseparable from those of the Government). The DLA has found no evidence for such concern, making the proposals within such questions totally unnecessary.

The Government’s concerns in Question 12 regarding “judge-made law”, based on the interpretation of legislation duty in section 3 of the HRA, are expressed in highly emotive terms: “democratic deficit”, “human rights inflation” “lost touch with common

sense”<sup>2</sup> while the reality they describe comprises none of these. In enacting the HRA it was Parliament’s intention that UK legislation should not violate Convention rights, and section 3, accompanied by section 4, is the statutory mechanism to achieve this. No disrespecting of the will of Parliament is involved. Far from taking powers away from Parliament, section 3 enables UK courts to interpret the meaning of legislation to ensure it is compatible with Convention rights but only if it is possible to do so within the full meaning of the legislation as approved by Parliament. This was confirmed by the House of Lords,<sup>3</sup> and recently re-stated clearly by Baroness Hale in evidence to the JCHR: “There are limits to the interpretive obligation. You cannot completely twist the statutory meaning and the statutory purpose in order to produce a compatible interpretation.”<sup>4</sup>

The expert Government-appointed panel that carried out the Independent Human Rights Act Review (IHRAR) concluded with regard to section 3 “notwithstanding the unusual rule of interpretation contained in section 3, there is no substantive case for its repeal or amendment other than by way of clarification”.<sup>5</sup>

The DLA rejects both Option 1 and Option 2 above. Section 3 should remain in force unamended.

The DLA recognises the expertise of UK courts to understand fully the meaning and implications of UK legislation and thereby able to appreciate how a particular law can be read and given effect compatibly with Convention rights. There are no grounds to limit this duty only to laws that are ambiguous or to limit the form or content of a court’s interpretation as in the proposed options. The DLA foresees that if either option is adopted there is strong likelihood that this will give rise to legal challenge as to whether, in a particular case, the specified conditions are met - thereby creating the uncertainty the Government has said it seeks to remove.

Section 3 is important in ensuring that the HRA continues to be a ‘living instrument’ like the ECHR, drafted to be valid while social, political, technological etc. changes may occur. Important for the DLA has been the effective use by the courts having found a law or policy to be incompatible with Article 14 to read it without the unlawful discriminatory provision.<sup>6</sup> DLA has welcomed the use of section 3 to interpret UK laws where this is possible so they are compatible with the Article 14.

### **Question 13: How could Parliament’s role in engaging with, and scrutinising, section 3 judgments be enhanced?**

The DLA understands that this is already a function of the Parliamentary Joint Committee on Human Rights (JCHR). We endorse the IHRAR’s recommendation

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<sup>2</sup> For example see Consultation pages 46 and 54

<sup>3</sup> Ghaidan v Godin-Mendoza [2004] 2 AC 557

<sup>4</sup> Oral evidence 3 February 2021, The Government’s Independent Human Rights Act Review AW to complete footnote

<sup>5</sup> Executive Summary, IHRAR, December 2021, paragraph 45

<sup>6</sup> For example, sexual orientation, in Ghaidan v Godin-Mendoza [2004] UKHL 30 2[2004] AC 557



that the JCHR should be sufficiently resourced to enable it to carry out an increased scrutiny role.

**Question 14: Should a new database be created to record all judgments that rely on section 3 in interpreting legislation?**

The DLA fully supports this proposal, which was a recommendation of the IHRAR. To create this database requires no amendment to the HRA and could be implemented at any time.

The greater transparency which such a database would create should reassure both the Executive and Parliament that UK courts are using section 3 appropriately to ensure UK legislation is compatible with Convention rights, as Parliament intended.

**Question 15: When legislation is incompatible with the Convention rights: sections 4 and 10 of the Human Rights Act. *Declarations of incompatibility*. Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?**

As it is stated here, this question on its own is misleading, since it does not make clear how this would alter the current powers of the courts in relation to incompatible secondary legislation, nor has it accurately stated the question posed by the Government in paragraph 250 of the Consultation, namely whether declarations of incompatibility should be “**the only remedy** available to courts in relation to certain secondary legislation”.

Currently, except where the Act of Parliament requires secondary legislation to be incompatible, section 4 does not apply to secondary legislation. Courts can in HRA cases and in cases under any other primary legislation strike down any unlawful secondary legislation.

Therefore to propose that for all or certain secondary legislation incompatible with Convention rights the courts’ **only** remedy should be a declaration of incompatibility would take away an existing power under the HRA which would continue in relation to unlawful secondary legislation under any other primary legislation. The DLA rejects this proposal.

**Question 16: Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with the Convention rights? Please provide reasons.**

The DLA does not agree that suspended and prospective quashing orders should be available for proceedings under the HRA or any successor legislation eg the proposed Bill of Rights.

At the time of writing the Judicial Review and Courts Bill, which the DLA does not support, has not been passed by Parliament; therefore it is premature to seek to harmonise the HRA with the provisions in that Bill, and it is important to note that the IHRAR agreed with this proposal only to ensure consistency between HRA cases and other judicial review cases.

Should this proposal be adopted for HRA cases, it could mean, for example, that after upholding a claim that a policy of a public authority is incompatible with Convention rights, the court could suspend quashing the policy for a fixed period or make the quashing prospective only. This would deny the claimant a remedy they are entitled to receive and create wholly unnecessary confusion regarding the status of the policy.

**Question 17: Remedial orders. Should the Bill of Rights contain a remedial order power? In particular, should it be: a. similar to that contained in section 10 of the Human Rights Act; b. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself; c. limited only to remedial orders made under the ‘urgent’ procedure; or d. abolished altogether? Please provide reasons.**

Contrary to the presumption in this question that there will be a Bill of Rights, the DLA confirms its full support for retention of the HRA including retention of the remedial order power in its present form, contained in section 10 HRA. No evidence has been put forward to indicate any problem. Section 10 HRA provides a straight-forward procedure, following a declaration of incompatibility by a senior court under section 4, allowing a Minister to amend the legislation in question to make it compatible with Convention Rights and requiring a 60 day period for representations on the draft order and requiring approval of the final order by both Houses of Parliament.

**Question 18: Statement of Compatibility – Section 19 of the Human Rights Act. We would welcome your views on how you consider section 19 is operating in practice, and whether there is a case for change.**

The DLA considers the requirement on the minister introducing a Bill to Parliament to express their view as to the compatibility of the Bill with Convention rights is valuable for both accountability and transparency; it operates as a fixed reminder to the Executive of the UK’s obligation under ECHR Article 1. It should be retained.

Properly carried out, the minister would be expected to consider the content of the Bill against the full list of Convention rights and then, before Second Reading of the Bill, publish a statement either that in their view the Bill is compatible with Convention rights, or that although they are unable to make a statement of compatibility they wish Parliament to proceed with the Bill. We have seen early guidance which advises that a statement of compatibility should only be made,

following consultation with the Law Officers if “at a minimum, the balance of argument supports the view that the provisions are compatible”.<sup>7</sup> If current guidance sets the same minimum level of assurance, this goes some way to explain many recent instances in which the DLA has disagreed with the assessment of the Minister regarding compatibility of new Government legislation. In our view, one undesirable limit to the value of the Section 19 duty is the absence of any further requirement on the Minister to consider compatibility at any later stage, despite issues raised during debate and any major amendments that may have been made during the Bill’s passage through both Houses of Parliament.

**Question 19: Application to Wales, Scotland and Northern Ireland. How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?**

**Question 20: Public authorities: section 6 of the Human Rights Act. Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.**

The DLA recommends that there should be no change to the existing definition in section 6 HRA of a public authority as

- (a) A court or tribunal, and
- (b) Any person certain of whose functions are functions of a public nature.

This definition is sufficiently clear and principles have been identified through case law that assist a body to assess whether it is subject to HRA section 6.

For the DLA, whose members are primarily engaged as lawyers or advisors on rights under the Equality Act, which often also involve Convention rights, it has been valuable to have a definition of public authority in the HRA to which the Equality Act cross-refers in sections 31(4) and 150(5) and reproduces in section 2(2).

**Question 21: The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer? Please explain your reasons. Option 1: provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or Option 2: retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.**

This is one of many examples in the Government’s Consultation that describes a problem, with little or no evidence supporting their concern, and prescribes a

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<sup>7</sup> The Human Rights Guidance for Departments/Home Office 04/02/00 para 36

solution; then, as in this case, uses a consultation question to garner support for their solution to what is, in fact, not a problem.

The DLA does not support any change to the HRA for this purpose. Either option would enable public authorities more often to act incompatibly with Convention rights, which is wholly undesirable, and either option would result in individuals affected by the public authority's acts or omission having to challenge primary legislation to obtain the remedy they are entitled (ECHR Article 13) to receive.

**Question 22: Extraterritorial jurisdiction. Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict.**

**Question 23: Qualified and limited rights. To what extent has the application of the principle of 'proportionality' given rise to problems, in practice, under the Human Rights Act? We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.**

**Option 1: Clarify that when the courts are deciding whether an interference with a qualified right is 'necessary' in a 'democratic society', legislation enacted by Parliament should be given great weight, in determining what is deemed to be 'necessary'.**

**Option 2: Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right. We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.**

The consultation document has not disguised that the government's main, political, concern here is the "evasion of deportation" by individuals whose ECHR Article 5, 6 and 8 rights "are given greater weight than the safety and security of the public" [para.292].

The government has provided no evidence that the courts are not already satisfactorily applying the appropriate test in the case of a qualified Convention right (Articles 8-11 ECHR) to determine whether in the particular case the restriction on the enjoyment of that right is proportionate. The definitions of qualified rights in Schedule 1 of the HRA require that any restriction must be prescribed by law, with a legitimate purpose, necessary in a democratic society and must be proportionate. Both of the proposed options, requiring greater weight to be given to primary legislation will mean, in practice, greater influence by Government as author of the

legislation to be given greater weight, and greater likelihood that claims will not succeed.

**Question 24: Deportations in the public interest. How can we make sure deportations that are in the public interest are not frustrated by human rights claims? Which of the options, below, do you believe would be the best way to achieve this objective? Please provide reasons.**

We reject the premise of this question that deportations in the public interest are frustrated by human rights claims. There is no evidence that the courts are not already satisfactorily applying the appropriate test in the case of qualified Convention rights to determine whether the restriction on the enjoyment of that right (generally Article 8) is proportionate.

**Option 1: Provide that certain rights in the Bill of Rights cannot prevent the deportation of a certain category of individual, for example, based on a certain threshold such as length of imprisonment.**

This option is doubly wrong; what it proposes would conflict with two fundamental principles of the ECHR: (a) the universality of human rights protection – “for everyone” not excluding “a certain category of individual”; and (b) Article 14, the unlimited, unqualified right to enjoy Convention rights without discrimination on any ground; for example, the discrimination could be between non UK citizens who have served a sentence of imprisonment for more than 3 years who would not be able to claim that their deportation would be unlawful under, say, Article 8, and non UK citizens who have not served a sentence of imprisonment for more than 3 years who would be able to bring such a claim. The DLA would urge the Government to go back to their Law Officers before any further consideration of Option 1.

**Option 2: Provide that certain rights can only prevent deportation where provided for in a legislative scheme expressly designed to balance the strong public interest in deportation against such rights.**

Under the ECHR public interest is already a main factor which the courts must consider when assessing the proportionality of the restriction of any of the ECHR qualified rights which are or may be relevant to deportations. There is no need for anything further.

**Option 3: Provide that a deportation decision cannot be overturned, unless it is obviously flawed, preventing the courts from substituting their view for that of the Secretary of State.**

This option would permit the courts to find the decision to deport a particular person a breach of their Convention rights only if that decision “is obviously flawed”. What

greater flaw will there be than breach of the person's Convention rights, but it is unlikely that the Secretary of State or Home Office officials will advise that a decision is flawed; it is unclear how, other than commencing a legal challenge under the HRA and having sight of all relevant documents can the person know what matters were considered by the Secretary of State in deciding to deport them. This is, in effect, a proposal to deny HRA protection to all potential deportees. The DLA strongly opposes this option.

**Question 25: Illegal and irregular migration. While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?**

The DLA rejects the premise that the ECHR and the HRA are "impediments" to tackling "illegal and irregular migration" and further rejects the premise that people identified as such by the state are entitled to lesser human rights than others.

As the Government suggests that the options it has proposed in relation to deportation in Question 24 above could be applied to asylum removals, we refer to the arguments we have put forward in rejecting these options.

**Question 26: Remedies and the wider public interest. We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include: a. the impact on the provision of public services; b. the extent to which the statutory obligation had been discharged; c. the extent of the breach; and d. where the public authority was trying to give effect to the express provisions, or clear purpose, of legislation. Which of the above considerations do you think should be included? Please provide reasons.**

This is one of many examples in the Government's Consultation that describes a problem, with little or no evidence supporting their concern, and prescribes a solution; then, as in this case, uses a consultation question to garner support for their solution to what is, in fact, not a problem.

The consequences of being held to account in law, including the payment of damages, are key drivers for public authorities to ensure that the decisions they make are compliant with Convention rights. The DLA submits there is no case for change.

The DLA rejects the Government proposal to specify in statute matters judges must consider when they are deciding on the damages to award for breach of human rights. Each HRA claim must be considered on its separate merits, and UK judges

have long experience in deciding appropriate remedies in a wide variety of claims. The DLA is concerned that any attempt to place limits on compensation will give public authorities greater sense of freedom to ignore their human rights duty.

#### **IV. Emphasising the role of responsibilities within the human rights framework**

**Question 27: We believe that the Bill of Rights should include some mention of responsibilities and/or the conduct of claimants, and that the remedies system could be used in this respect. Which of the following options could best achieve this? Please provide reasons.**

**Option 1: Provide that damages may be reduced or removed on account of the applicant's conduct specifically confined to the circumstances of the claim; or**

**Option 2: Provide that damages may be reduced in part or in full on account of the applicant's wider conduct, and whether there should be any limits, temporal or otherwise, as to the conduct to be considered.**

The DLA fundamentally disagrees with the suggestion that conduct should dictate one's right to human rights protection or that a claimant's entitlement to human rights protection including remedies should be linked to conduct. Universal human rights are premised on the idea that everyone is entitled equally to human rights regardless of conduct however egregious and whenever it occurred. To move away from this would be totally contrary to the Government's stated aim of wanting to better protect / secure fundamental human rights.

The DLA accepts that a proper concern of government must be to establish across the whole population a strong culture of civic responsibility and positive citizenship, with respect for the rights and the dignity of every person. Some progress toward this could possibly be achieved through education, community engagement, and major steps to reduce social and economic inequality. We do not believe it will be achieved in any way by enshrining in statute that a claimant's conduct should be a determining (Option 1) or a relevant (Option 2) factor in the level of damages to be awarded when the court upholds their HRA claim. Currently, as cases cited by the Government demonstrate, courts are not prevented from considering a claimant's conduct, when, in a particular case, they are satisfied it is a relevant factor to which they will give appropriate weight. The DLA rejects the proposals in both Option 1 and Option 2.

## **V. Facilitating consideration of and dialogue with Strasbourg, while guaranteeing Parliament its proper role**

**Question 28: We would welcome comments on the options, above, for responding to adverse Strasbourg judgments, in light of the illustrative draft clause at paragraph 11 of Appendix 2.**

The DLA is in favour of a transparent process for the timely consideration and implementation of Strasbourg judgments whether favourable or adverse to the UK. The DLA is opposed to a process which enables the UK to ignore Strasbourg judgments.

### **Impacts**

**Question 29: We would like your views and any evidence or data you might hold on any potential impacts that could arise as a result of the proposed Bill of Rights. In particular:**

**a. What do you consider to be the likely costs and benefits of the proposed Bill of Rights? Please give reasons and supply evidence as appropriate;**

The costs of the Government's proposed Bill of Rights with the content as described in this Consultation will fall on everyone in UK because these proposals will result in reduced protections for the enjoyment of their Convention rights together with new, unnecessary barriers to their ability to challenge breaches of these rights. There will also be costs in terms of damage to and undermining of the human rights culture which implementation of the HRA was expected to embed and promote.

The benefits will primarily fall to the Government who, through their position as majority party in Parliament, will have enhanced their ability to limit the scope and rights of individuals to challenge human rights breaches and to keep in check the role of the judiciary in deciding claims and awarding remedies.

**b. What do you consider to be the equalities impacts on individuals with particular protected characteristics of each of the proposed options for reform? Please give reasons and supply evidence as appropriate; and**

In a document proposing major change to the UK's legal structure for the promotion and protection of human rights it was extremely disappointing to find so very little attention given to the equality impact of these significant proposals – a mention on page 88 and a brief statement on pages 104 – 106 is not what the Discrimination Law Association would have expected in relation to proposals which would have been under discussion for many months.



In our view, the undertaking that the Government “will conduct a full impact assessment in due course, once the consultation closes and our policy proposals have been finalised”<sup>8</sup> is evidence of the low priority equality and PSED compliance now have for this Government. The courts have made clear that assessments of equality impact need to be carried out before “policy proposals have been finalised”, when any evidence of adverse impact on any groups can be properly considered. As this package of proposals covers a number of different topics, separate equality impact assessments should be carried out for each topic which involves more than administrative change.

There is no indication that when the Government recognised it lacked relevant statistical data relating to the protected characteristics of HRA claimants<sup>9</sup> it took any steps to collect these data. Nevertheless, the Government feels able in this question to ask individual respondents, even less likely to have these data, to inform the Government about the equality impacts “of each of the nearly 30 proposed options for reform”!

Drawing on our experience of cases of discrimination and breach of the PSED in different areas of activity and related research reports, we can say, without access to any statistical data, that the proposals for reform are likely to have a disproportionate adverse impact on groups with protected characteristics known to have benefited from the HRA in terms of both:

- (i) increased compliance with Convention rights by public authorities (for example recognition of Convention rights in residential care – disability and age), protections against domestic abuse and child trafficking (sex, age, race/ethnicity); and
- (ii) access to the courts to challenge non-compliance and receive appropriate remedies for any breach (cases concerning deportation (race/ethnicity), deaths in custody (race), prisoners’ rights (race, religion or belief, sexual orientation/gender reassignment).

We are concerned that certain proposals, such as a permission stage in all human rights proceedings, will adversely affect people with protected characteristics already disadvantaged under the HRA.

The damage to HRA protection which the Government’s proposals will cause will affect everyone but disproportionately groups with protected characteristics which have in the past particularly benefited from the HRA. Examples include the undermining of positive obligations which will affect women affected by domestic abuse (ECHR Art 3), child trafficking victims (ECHR Article 4), the introduction of a permission stage which will adversely affect people with protected characteristics who are already disadvantaged.

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<sup>8</sup> Page 106

<sup>9</sup> Pages 104-5

**c. How might any negative impacts be mitigated? Please give reasons and supply evidence as appropriate.**

By not enacting the proposals in this Consultation.

The DLA supports retaining the HRA unamended. The negative impacts of the proposed changes will fall primarily on people whose fundamental rights the HRA was enacted, and the ECHR adopted, by the UK to protect.

Discrimination Law Association  
4<sup>th</sup> March 2022