The LGBT+ Sector's Response to the consultation on Human Rights Act Reform

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

Interpretation of Convention rights: section 2 of the Human Rights Act

***Question 1:* 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.**

We do not think Section 2 of the Human Rights Act needs to be amended. The options for replacing Section 2 appear specifically designed to sever the connection between the rights in a new 'Bill of Rights' and our rights, as LGBT+ individuals, under the European Convention on Human Rights (ECHR). Section 2 already allows for the UK courts to disregard the rulings of the European Court of Human Rights, whilst enabling the courts to ensure that people in the UK enjoy as high a standard of rights protection as others in Europe. We feel the correct balance has therefore been met. Severing the link between domestic rights and Convention rights will only lead to a fragmentation of rights protection that holds specific concern for the LGBT+ community, which benefits significantly from the protections the ECHR brings.

An amendment to Section 2 will also likely increase the need for individuals to bring an application to the ECtHR because it removes the comfort of Strasbourg at domestic level, but it will only be a viable option for those able to afford to take a case to Strasbourg. Access for trans people is at particular risk therefore as we know trans people are less likely to have a paid job than LGB peers (National LGBT Survey, 2019), at a time of trans individuals specifically requiring the protection of the Convention given the steady increase in anti-trans sentiment in the UK[1].

Question 2: 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.

[1] https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2020-to-2021/hate-crime-england-and-wales-2020-to-2021

How can the Bill of Rights best achieve this with greater certainty and authority than the current position?

Trial by Jury

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

Freedom of Expression

Question 4: 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?

We understand freedom of expression to already have an enhanced protection via Section 12 of the HRA, which was included precisely in recognition of the importance of the right to freedom of expression and in particular the freedom to publish. The proposal possesses a concerning vagueness, which could result in inviting an interference with the very freedom the Government is purporting to protect. We have seen no evidence that supports the need for an amendment to Section 12 in a Bill of Rights, nor how any such amendment would improve the freedom already protected by Section 12. Further, the undermining of privacy rights stands to affect LGBT+ people who have relied upon these rights to resist being outed (BVC v EWF [2019] EWHC 2506 (QB)) which found information regarding BVC's sexuality and sexual behaviour was, together with information about his mental and physical health, finances and private and family life, at the core of the values that Article 8 protects.

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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?

Article 10 protects the right to freedom of expression. The right is – and has always been - a qualified one, insofar that it is able to be restricted for reasons of law and where it is necessary, and proportionate to achieving one of a set of legitimate aims, including protecting national security, preventing disorder or claims, and protecting the rights and reputations of others. The qualified nature is one that holds a significance importance for marginalised communities, including LGBTQIA communities. Freedom of expression has always been one that is

balanced against an individual's right to privacy and it is concerning that this suggests a tipping of that balance in favour, by default, of Article 10.

We are currently living within a climate of anti-trans sentiment in the UK, that has been recognised internationally. It is a rhetoric that has been rooted in misinformation and fear, in the name of 'freedom of expression'. We as a sector would not support the introduction of provisions that would help justify or protect harmful speech towards the trans population, and more broadly LGBTQIA populations.

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

A permission stage for human rights claims

***Question 8:* 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.**

Victims should not be required to prove significant disadvantage before they are able to bring a claim under a new Bill of Rights. To insist on this risks inviting a restriction of the rights of those who do not replicate the status quo and existing power structures, such as LGBTQIA individuals.

The onus on LGBT+ asylum seekers to 'prove' that they are LGBT+ has been a longstanding issue, which is known to obstruct rights; see Rainbow Migration's report called '*Still Falling Short*'[2]. An additional permission stage for other human rights issues risks replicating - and suggesting a credibility - to this obstruction of access to rights.

The test would also pose a particular barrier to accessing justice to LGBTQIA individuals, because we are often presented as having achieved equality and the requirement to prove a disadvantage would be difficult to evidence, which would limit the number of claims able to be brought and would stifle the ability for change and progress.

[2] https://www.rainbowmigration.org.uk/sites/default/files/2021-03/Still-Falling-Short-Jul-18_0.pdf

Further, the emphasis on *significant* disadvantage does not foster a culture of respect and advocacy for our rights and it risks demonstrable and genuine human rights abuses being left unaddressed and reducing the accountability of the state without justification.

***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.**

We do not think a permission stage should be included. See Question 8 response. We would add that the test for an 'overriding public importance' and the reference to exceptionality are also likely to disadvantage LGBTQI+ people seeking to protect their rights, and who are unlikely to be able to meet such high thresholds in most cases.

Judicial Remedies: section 8 of the Human Rights Act

Question 10: How else could the government best ensure that the courts can focus on genuine human rights abuses?

Positive Obligations

Question 11: 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.

Rather than being an imposition, positive obligations require the state to take proactive steps to protect people's human rights. The HRA is used every day by public bodies and frontline workers to provide essential services - positive obligations don't only result in litigation and it is problematic that the question is framed to suggest otherwise. Irrespective, a failure to meet positive obligations must be open to challenge, as with any other human rights violation. Undermining positive obligations risks having a much wider impact, specifically for the LGBTQIA population who can rely on such obligations when accessing public services, as well as having been actively protected by the enforcement of them.

For instance, positive obligations helped protect LGBTIQA Article 11 rights when Strasbourg decided in the case of *Identoba and others v Georgia (no. 73235/12 12 August 2015)* that a lack of police protection during a peaceful march to mark the International Day Against Homophobia constituted a breach of their rights under a number of ECHR provisions.

Further, the ECtHR recently imposed a positive obligation on signatory states to protect individuals from hate speech by other individuals; see, *Beizaras and Levickas* v. *Lithuania no. 41288/15 14 January 2020.* In particular, in this case the ECtHR held that Lithuania was in breach of the foregoing provisions as a result of failing to fulfil its positive obligation to *LGB* individuals to effectively investigate, prosecute and punish homophobic hate speech, which took the form of homophobic comments and threats made on a picture depicting a same-sex couple kissing, which was posted (as a public post) on Facebook by the couple.

The ECtHR also imposed a positive obligation on signatory states to make provision in their legal system for the legal recognition of same-sex relationships in 2013 (see, *Vallianatos* v. *Greece 29381/09 and 32684/09, 7 November 2013).* And in *E.B. v. France (43540/02, 22 January 2008)* the ECtHR made it clear that Article 8 ECHR read in conjunction with Article 14 ECHR requires that if a signatory state grants the right to adopt to single persons, LGB single persons should also enjoy this right and, thus, should not be refused the right to adopt simply on the basis of their sexual orientation.

The above clearly demonstrates the power positive obligations have towards the LGBTQIA populations, and how important they are to ensure our protections. It also acts as a further bolstering of our response to question 1, as it highlights the assistance Strasbourg offers to progress the rights and protections of marginalised populations, such as LGBTQIA communities.

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

Respecting the will of Parliament: section 3 of the Human Rights Act

***Question 12:* 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.

Section 3 of the HRA has been vital in the protection of rights for people with protected characteristics, for example relating to sexual orientation (see for example, Ghaidan v Godin-Mendoza [2004] UKHL 30.)

We do not support Option 1. The purpose of section 3 is to ensure that courts interpret legislation in a way that protects the European Convention rights of individuals. Removing this section would signal to the courts that individuals should no longer be protected by the Convention and reduce the power of the judiciary to provide remedies where human rights breaches have taken place.

With regard to option 2, we also do not think it would be suitable to replace it with the proposed provision. The provision is effectively a caveat which would allow courts to ignore section 3 where the overriding purpose of the legislation is at odds with Convention rights. This would have the same impact as removing section 3 entirely.

We recommend that section 3 remains in place, and that courts should continue to interpret legislation as far as is possible in a way which accords with the rights protected by the European Convention, which includes for LGBTQIA people.

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

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

When legislation is incompatible with the Convention rights: sections 4 and 10 of the Human Rights Act

Declarations of incompatibility

Question 15: Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?

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.

Remedial orders

Question 17: 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.

Statement of Compatibility – Section 19 of the Human Rights Act

Question 18: We would welcome your views on how you consider section 19 is operating in practice, and whether there is a case for change.

Application to Wales, Scotland and Northern Ireland

Question 19: 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?

Public authorities: section 6 of the Human Rights Act

Question 20: 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.

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.

Extraterritorial jurisdiction

Question 22: 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.

Qualified and limited rights

***Question 23:** 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.

We do not support either option. The undermining of Article 8 in particular could deprive many people with protected characteristics of necessary protections, including relating to gender reassignment (Goodwin v United Kingdom (2002) 35 EHRR 18) and sexual orientation (BB v United Kingdom (2004) 39 EHRR 30).

Judges are already experienced in balancing individuals' rights and freedoms with the legitimate aims of public bodies, and they will be less effective at doing so if they cannot exercise their impartiality without Parliament's intervention.

Giving extra weight to Parliament's views also exacerbates the imbalance between those in positions of power and those in vulnerable groups, such as trans and gender diverse people. For example, if the majority party in Parliament does not prioritise the rights of trans and gender diverse people, giving extra weight to their views could give public bodies an unfair advantage when seeking to defend themselves against trans and gender diverse people accusing them of human rights breaches. We believe that an individual's right to seek a remedy where their rights have been breached should be protected and not influenced by the political views of those in power.

Deportations in the public interest

<u>Question 24:</u> 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.
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.
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.
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.

We do not support or recommend any option on the basis that they all contravene fundamental principles of human rights law and the rule of law. To propose "certain rights cannot prevent

deportation of certain categories of individuals" excludes entire groups/classes of people from human rights protection. The growing use of powers to strip individuals of their British citizenship as a precursor to deportation is also likely to be used disproportionately against black and Asian people. Many people entitled to British citizenship are blocked from claiming it by Home Office fees, character requirements and failure to raise awareness of these vital rights. People in this situation are subject to immigration powers of detention and deportation. These proposals, which would further reduce or even remove the human rights protections in such circumstances, would therefore inevitably be racially discriminatory.

These proposals are clearly contrary to the UK's duties under the European Convention on Human Rights, particularly Article 13 which creates a right to an effective remedy for a breach of human rights. They would directly remove rights that people have under the Convention, and leave them with no option but to go to the Strasbourg court to secure the protections they are entitled to. Access to Strasbourg requires financial means that many LGBTQIA individuals will not possess.

Further, all three proposals undermine or remove the role of independent judges from human rights and other legal matters

Illegal and irregular migration

<u>Question 25:</u> 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?

We object to this language. Neither the ECHR nor the Human Rights Act impede anything apart from human rights violations. Further, we note with extreme concern the reference at paragraph 298 of the consultation to the non-refoulement principle as a "challenge to the government's ability to tackle illegal migration, particularly via small boats in the English Channel". The government is conflating refugees with illegal migration, which are separate issues, as seeking asylum is not illegal. The vast majority of people who come to the UK by small boat are subsequently recognised as refugees and granted leave to remain in the UK.[3] The non-refoulement principle prohibits States from returning individuals to a country where there is a real risk of being subjected to persecution, torture, inhuman or degrading treatment

[3] See e.g. https://www.refugeecouncil.org.uk/latest/news/new-refugee-council-analysis-shows-most-people-arriving-by-small-boats-across-the-channel-are-likely-be-fleeing-persecution/ and https://www.gov.uk/government/statistics/immigration-statistics-year-ending-december-2021/how-many-people-do-we-grant-asylum-or-protection-to at 3.1

or any other human rights violation. LGBTQI+ people who have arrived in the UK via the Channel in order to seek asylum due to fear of persecution due to their sexual orientation, gender identity or expression or sex characteristics are no less fearful of persecution than those who are privileged enough to be able to obtain a visa to travel to the UK.

Paragraph 297 of the consultation refers to the removal of failed asylum seekers and people who have overstayed their leave to remain. The implication appears to be that it is the Human Rights Act that is preventing their removal. In fact, the real impediments to removing people without a right to be here appear to be administrative ones, due to delays caused by the inability of an under-resourced Home Office to process cases quickly and remove people with no right to stay in the UK. Another part of this problem is the effect of the cuts to legal aid for immigration cases, brought in by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into force in April 2013. The number of enforced returns has decreased every year since then. We believe there is a correlation, as people being unable to have their case properly prepared and submitted by a lawyer makes it more difficult for the Home Office to resolve cases quickly. These are the issues that the government should be seeking to remedy, rather than proposing as a solution the potential to return people to persecution, torture, inhuman or degrading treatment or any other human rights violation, and these more practical solutions would ensure that our international obligations are complied with.

In response to the proposal that removal decisions made by the Home Office cannot be overturned, unless 'obviously flawed', Home Office decision making is not of sufficient quality to risk removal of the oversight of the Tribunal; 58% of appeals based on human rights refusals are currently allowed.[4]

We do not believe that any person, including those with temporary or irregular status, or those seeking asylum, should be excluded from protection under the Human Rights Act. It would undermine human rights protections to treat people differently based on their immigration status. In particular, LGBTQI+ people with irregular status are vulnerable members of an already marginalised group; we strongly believe that removing their ability to challenge breaches of their human rights would be highly damaging.

Remedies and the wider public interest

Question 26: We think the Bill of Rights could set out a number of factors in considering when damages are awarded and how much. These include:

[4] https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2021/tribunal-statistics-quarterly-july-to-september-2021

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.

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.

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.

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;
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
c. How might any negative impacts be mitigated?

Please give reasons and supply evidence as appropriate.

We, as a LGBTQIA sector, are gravely concerned that a Bill of Rights will create huge difficulties in accessing our rights and our ability to seek justice. For example, (i) the undermining of privacy rights stands to affect LGBT+ people who have relied upon these rights to resist being outed (BVC v EWF [2019] EWHC 2506 (QB)). (ii) LGBTQIA, as a population of civil society that already experiences barriers to accessing justice, are likely to be further ostracised from asserting their rights as a result of further permission stages. Further barriers will only act to entrench problems that already exist. (iii) The removal of positive obligations could have a catastrophic impact on LGBTQIA people who often rely on them when accessing public services. (iv) Section 3 of the HRA has been vital in the protection of rights for people with protected characteristics, for example relating to sexual orientation (see for example,

Ghaidan v Godin-Mendoza [2004] UKHL 30.) and (v) the undermining of Article 8 in particular could deprive many people with protected characteristics of necessary protections, including relating to gender reassignment (Goodwin v United Kingdom (2002) 35 EHRR 18) and sexual orientation (BB v United Kingdom (2004) 39 EHRR 30).

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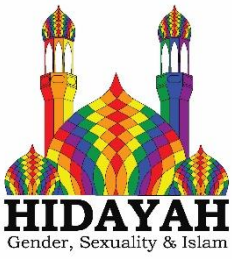
Supporting partners of Transgender/Non Binary people.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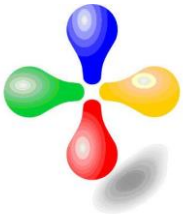


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