Medical Justice
working for health rights for detainees

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Sent by email to: HRAreform@justice.gov.uk

Medical Justice Comments on the Human Rights Act Consultation

Medical Justice is the only charity in the UK to send independent volunteer clinicians to visit people in immigration detention in the UK, including Immigration Removal Centres and prisons. The doctors document scars of torture and challenge instances of medical mistreatment. We receive around 600 referrals from people in immigration detention each year and have gathered a sizeable, unique and growing medical evidence base. We help them access competent lawyers who properly harness the strength of the medical evidence we generate. Evidence from our casework is the platform for our research into systemic failures in healthcare provision, the harm caused by these shortcomings, as well as the toxic effect of immigration detention itself on the health of people in detention. Evidence from our casework guides our research, policy work and strategic litigation to secure lasting change.

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.

We reject the premise that there are 'frivolous or spurious' claims which 'devalue the concept of human rights', and take away the focus from 'genuine human rights matters'.[1] The framing of this is problematic. No evidence has been provided to demonstrate that there is a genuine problem with a significant number of 'frivolous or spurious' human rights claims, instead the consultation document provides incomplete and selective summaries of a small number of individual cases, including some that had been struck out at an early stage. This does not provide any justification for restricting access to justice in the context of fundamental rights. We reject the need to introduce a permission stage and argue that the reasoning to do so is unsubstantiated.

Introducing a permission stage and requiring individuals to prove that they have 'suffered a significant disadvantage' would increase the burden on claimants and reduce the accountability of the state.

The requirement of proving a 'significant disadvantage' introduces a high threshold that is not reflected in any other area of law. There is a lack of clarity over what would qualify as a 'significant disadvantage' and therefore increases complexity and uncertainty. Many of our clients are disabled within the Equality Act due to their health needs. The proposed "significant disadvantage" threshold will create confusion, e.g. section 212(2) of the Equality Act 2010 imposes a "substantial disadvantage" threshold, which is defined as meaning merely more than minor or trivial.

The permission stage would create an additional barrier to accessing justice. For those who already face significant obstacles, this will only make it harder for their rights to be protected, thus

1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf para 219.

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undermining protection for those who have experienced human rights breaches which may have adversely affected their physical and/or mental health and in turn the universality of human rights.

We question the need for a permission stage given that Judicial Reviews already have a permission test to determine whether there is an arguable ground and the claimant has standing to bring the claim. There is no evidence of spurious human rights claims being brought. There are case management stages in the County Court where damages for former detainees are considered and this usually results in agreed settlement. A permission stage would mean more costs, delay and potential distress for already vulnerable clients who have experienced trauma. There are case management stages in the asylum and immigration appeal process and already long delays. Another stage would put more pressure on public resources and lead to more delays in reaching a final decision. Moreover, a 'victim test' for standing already exists in Section 7 of the Human Rights Act, for the purpose of Article 34 of the Convention. Defendants can also apply to 'strike out' a claim if the claimant has not shown reasonable grounds for bringing it. This is a far more appropriate threshold than 'significant disadvantage', consistent with other areas of law, and was applied in some of the small number of case examples cited in the consultation document.

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 reject the proposal to introduce a permission stage entirely, as explained in our response to Question 8. We consider that introducing additional barriers to access to a remedy could result in denying the right to a fair trial or adequate remedy even with these qualifications and so give rise to applications to the European Court of Human Rights on the basis the UK is not meeting its European Convention of Human Rights (ECHR) obligations.

There are already a number of restrictions in access to legal aid for human rights related claims which should be taken into account. The Legal Aid Agency applies the Lords Chancellor's guidance, which includes a proportionality and a wider public interest criteria where a claim does not meet the costs benefit criteria so this would be duplication in many cases. The suggestion that the permission stage would include an 'overriding public importance' limb for exceptional cases is insufficient in mitigating the concerns outlined about the permission stage. Even with this second limb, a permission stage would undermine the universality of human rights, increase complexity in the legal process, and risk denying protection who are already marginalised.

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

We reject the premise that there is a need for measures to 'ensure that the courts can focus on genuine human rights abuses'. As outlined above, this is based on a flawed argument that there are many 'frivolous or spurious' human rights claims. Access to justice should not be restricted and additional barriers, such as those suggested in Questions 8 and 9, should not be introduced.

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The suggestion that applicants should be required to pursue 'any other claims they may have first' before their 'human rights-based claims' could be made, is inappropriate.[2] We reject both proposals that people would be required to first 'pursue any other claims they made first, either so that rights-based claims would not generally be available where other claims can be made, or in advance of any rights argument being considered'.[3] Such suggestions would inappropriately exclude human rights claims and reduce the accountability of public authorities. It would also potentially add further unnecessary complexity, time and cost to the process.

There is a risk that people who have experienced violations will not be able to access justice and secondly that public bodies which do not comply with their obligations will not be corrected and have a chance to remedy the situation, as in the Brook House Inquiry where there is an investigation of breaches of Article 3 ECHR.

If timely competent advice and representation were available, especially in immigration and asylum cases, this would enable those affected by human rights violations to put their cases in the most efficient way and to understand what falls within the ECHR and what does not, taking into account lawyers' duties to the court.

We have seen repeated examples of unlawful breaches of human rights over more than a decade in the context of immigration detention. Where such breaches repeatedly occur we would suggest that there be a duty to review and investigate the systems to prevent recurrences and further breaches and further court cases, and even, sadly, deaths of those in detention.

We maintain that there is not sufficient evidence to substantiate this proposal and it will damage the fundamental concept of the universality of human rights.

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.

We disagree with the framing of positive obligations as being 'imposed'. Positive obligations are inherent to international human rights protection frameworks including being instrumental to the ECHR, which the UK signed in 1951. The claim that positive obligations are a costly burden and that they have created 'considerable legal uncertainty, with incrementally expanding interpretations of the scope of certain rights and judicial amendment of legislation', is unsubstantiated.[4]

Positive obligations are essential as they ensure that public authorities have a responsibility to actively take reasonable measures to prevent human rights breaches. For example, Article 2 of the

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2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf para 226

3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf para 226

4 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf para 133

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ECHR, which protects the right to life, creates a positive obligation for states to investigate circumstances of deaths that occurred under the authority of the state. This includes the duty to investigate deaths in custody through inquests.

Investigative duties are another crucial framework to ensure human rights are not breached. For example, Article 3 of the ECHR prohibits torture and inhuman or degrading treatment or punishment. In addition to the primary duty not to breach Article 3, investigative duties arise where the Article has been breached. The establishment of the current Brook House Public Inquiry followed legal action and the recognition of the need for an Article 3-compliant investigation into the mistreatment of people detained at Brook House IRC. Such a positive obligation is crucial to ensuring that breaches of human rights are appropriately investigated and action taken to prevent further, similar breaches.

Moreover, positive obligations have the positive effect of improving public administration and ensuring a level playing field among public bodies and also private bodies that are increasingly taking over public obligations. With private contractors moving into the immigration detention field, it is important that good standards of governance are maintained to avoid harm, which would ultimately be the responsibility of central government. There are already limits that exist to positive obligations.

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?

We are concerned that making a declaration of incompatibility for all secondary legislation would replace, and thereby remove, the courts' ability to strike down or quash secondary legislation in human rights claims. Although this is not explicitly stated in the question, the Consultation document outlines that the government wants 'to explore whether there is a case for providing that declarations of incompatibility are also the only remedy available to courts in relation to certain secondary legislation'.[5]

We argue that it is important that courts retain the power to quash secondary legislation that breaches human rights. Underlying this is the clear distinction between primary and secondary legislation and the constitutional principle that secondary legislation has a subordinate status to primary legislation. Whilst primary legislation is enacted by Parliament and undergoes full parliamentary scrutiny and debate, secondary legislation does not go through the same processes, removing the ability of the legislature to examine human rights implications.

Accordingly, the Human Rights Act maintains this differentiation. The courts are able to declare an Act of Parliament as incompatible with human rights, a mechanism which balances protecting human rights and preserving the principle of parliamentary sovereignty. However, the courts are able to quash secondary legislation or set aside particular parts. This does not challenge parliamentary sovereignty because secondary legislation, by virtue of its subordinate status, will not

5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf para 250

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have been subject to the same degree of parliamentary scrutiny. Therefore, the same compromising mechanism is not necessary for secondary legislation.

Removing the courts' ability to quash secondary legislation would remove a crucial check on the executive, resulting in the executive powers being expanded, and raise the status of secondary legislation to be in line with that of primary legislation. The IHRAR have warned that "[t]reating subordinate legislation, generally, on a par with Acts of Parliament would be contrary to our constitutional tradition" and "could act as a potential incentive to Government to use the breadth of subordinate legislation (as defined in section 21 of the HRA) as a means to side-step the detailed scrutiny of Parliament".[6]

Moreover, the power of the courts to quash or disapply secondary legislation comes from the common law, not the Human Rights Act and is a power that already exists in administrative law, through judicial review. It also applies in other circumstances, for example, if secondary legislation is found to be ultra vires of powers given by primary legislation.

This proposal to remove courts' ability to quash secondary legislation would create inconsistency in the law as the status of human rights would be reduced and secondary legislation may be quashed due to incompatibility with common law, but contradictorily, not due to incompatibility with the Human Rights Act.

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.

We reject the proposal regarding prospective quashing orders and argue that courts should not have the discretion to decide that unlawful secondary legislation can remain in force. Prospective quashing orders could deny redress to those who were adversely affected by the human rights breach prior to it being found to be unlawful, which is an important part of access to justice.

It is not acceptable for human rights to continue to be breached by secondary legislation until some further action is taken or undertaking fulfilled. Where a quashing order is the appropriate remedy this should be immediately effective to avoid further breaches of fundamental 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'.**

6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf Chapter 7 para 61

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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 principle of proportionality, which is used when considering if qualified rights (for example Article 8 right to private and family life) can be legitimately interfered with and restricted, does not require further guidance. Any further guidance may interfere with the independence of judges to apply the law to the individual circumstances of the case before them.

The two options set out could limit human rights protection afforded to particular groups who are unpopular or marginalised, and be potentially discriminatory in operation. The options feed the narrative that there are deserving and underserving groups of people. This rhetoric is being used to justify the attack on human rights protections.

Question 24: 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.

The consultation document specifically states that the right to liberty and security (Article5), the right to a fair trial (Article 6), and the right to respect for private and family life (Article 8) as fuelling "new and expanding human rights claims" that "systematically frustrate" deportations (para 292).

The premise that human rights claims frustrate deportations is unfounded and misleading. It reflects and is part of the government's wider rhetoric that manipulates the facts to erode public confidence and justify its attacks on migrants' rights. It also suggests a lack of understanding of the present regime; those with convictions can already be removed from the UK in the public interest even where there are arguments against this from qualified rights. Section 117C of the Nationality and Immigration Act 2002 creates a presumption that deportations of foreign national offenders are in the public interest, which is difficult to displace. Added to this, the test for rebutting the presumption states that even where the person has a partner or child (thus creating a ground for a claim under the article 8

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right to family life), they must prove that the effect of the removal on that partner or child would be "unduly harsh". This "unduly harsh" threshold is already a very stringent one.

Option 1 creates an arbitrary threshold according to the length of imprisonment. It serves to undermine the concept of the universality of human rights by specifically targeting a particular group of people. This proposal would essentially exclude a whole group of people from the protection of rights without any consideration of individual circumstances and would therefore lead to injustice.

Option 2 creates a separate set of human rights for those with deportation claims, distinct from the wider public. Again, this contradicts the fundamental principle that human rights are universal.

Option 3: This option would potentially exclude deportation claims from access to justice in relation to their fundamental rights.

We reject all three options presented as we disagree with the fundamental arguments of the question. Based on our experience of those in detention awaiting deportation despite having serious physical and mental health needs, close ties in the UK and often limited access to representation, we are very concerned by these proposals and the direction it would represent towards removing human rights. The effect would be to strip individual rights on a blanket basis (Option 1 and 2) or to prevent any appeal except in narrow circumstances (Option 3). Denying fundamental rights to a specific group of people or otherwise removing the ability to challenge decisions affecting their rights, undermines core principles such as the universality of human rights, equality before the law and access to justice. Such a discriminatory reduction in human rights protections would almost certainly result in increased cases being taken to the European Court of Human Rights and is likely to be incompatible with the ECHR.

The denial of access to justice inherent in these options would also deny individuals an effective remedy for breach of their rights as required by Article 13 and may also result in more cases being pursued in the European Court of Human Rights, due to the lack of a domestic remedy. This would undermine one of the primary reasons for the Human Rights Act, acknowledged in the IHRAR report – that Convention rights could be asserted in UK courts, rather than requiring individuals seeking to assert their right to do so through individual petition to the European Court of Human Rights.[7]

All three options are inherently discriminatory and have a disproportionate impact on grounds of race.[8]

Question 25: While respecting our international obligations, how could we more effectively address, at both the domestic and international levels, the impediments arising from the

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7 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf, para 22

8 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874022/6.5577_HO_Windrush_Lessons_Learned_Review_WEB_v2.pdf

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Convention and the Human Rights Act to tackling the challenges posed by illegal and irregular migration?

We reject the premise of this question that the Refugee Convention and the Human Rights Act have created 'impediments' and take issue with the language around 'illegal' migration. This question implies that particular groups would be excluded from full human rights protections. It is inherently discriminatory as it limits human rights protections according to immigration status.

It feeds into a dehumanising and hostile narrative that is currently reflected in the Nationality and Borders Bill. It is not appropriate for fundamental rights such as those contained within the Human Rights Act and the principle of non-refoulement mentioned in the Consultation document[9] to be described as 'impediments'. Research from the Refugee Council has demonstrated that the majority of those crossing the channel in small boats (a route particularly highlighted in the consultation) are seeking asylum.[10] Many are granted asylum. The UK should be ensuring that it complies with the 1951 Refugee Convention and Convention rights, and increases safe routes to the UK, rather than seeking to undermine long-established and fundamental principles of international law.

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.

Neither of these options are necessary or appropriate. The courts are already able to take into account factors relevant to the claim, such as causation, in determining the appropriate award of damages in an individual case.

It is entirely inappropriate for judgments on the wider conduct of an applicant to be taken into consideration when determining the damages payable for an established breach of human rights. Where a breach is established, an individual's wider conduct should not undermine their appropriate remedy.

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.**

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9 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf para 298

10 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/

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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.

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

We reject the premise of this consultation. We do not consider that there is a need for the proposed Bill of Rights or the proposed changes to the Human Rights Act. However, if the ECHR is to be incorporated into a Bill of Rights, it should be done so in a way that ensures it is complaint with the UK's responsibilities under the Convention. The current proposal would seem to put the UK in conflict with the approach of the European Court of Human Rights.

The proposals would have a substantial negative impact on those with protected characteristics, with whom Medical Justice works, such as those with mental health needs, cognitive impairments and physical disabilities, as well as those with English as a second language. The Consultation document suggests that 'since the proposals relate mainly to constitutional reform' monetised impacts for main affected groups are expected to be small. We dispute this suggestion and the implication that the proposals will not have significant impact on people's lives. Many of the proposals will add further complexity or restrictions to the legal process (such as the suggested permission stage, requiring other claims to be pursued first, etc.). These are likely to significantly increase the costs to individuals seeking to secure their rights, particularly for marginalised groups such as people with disabilities.

The proposals fail to have due regard to the Public Sector Equality Duty and are inherently discriminatory in their impact on BAME populations and people with protected characteristics. In particular, proposals in questions 24 and 25 are discriminatory on grounds of race.

It would not be possible to adequately mitigate the negative impacts in continuing with the proposed reforms. For these reasons, as well as those outlined in our responses above, these proposals should be scrapped.