

**A. Specifically, we would welcome views on the detailed questions in our ToR:**

a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

- i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?
- ii. If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?
- iii. Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

d) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

**B. Response to Review.**

There are three problem areas in the Schedule 1 of the HRA:

1. Part I Article 8 – Right for private and family life. Within the Rights of Way legislation there is no respect for individuals or families.
2. Part I Article 14 – Prohibition of discrimination. The Rights of Way legislation allows discrimination of a minority group of individuals and families denying it the fundamental right to liberty and security.

3. Part II Article 1 – Protection of property. This removes any human rights by the condition ‘except in the public interests’.

### **Questions in the ToR**

#### **ToR a)i -**

There have been cases where the legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it. The issue of public footpaths that pass through family homes (down drive, between parts of same house, into gardens) is recognised by parliament as not acceptable on the grounds of privacy, security, safety. The topic has been discussed on a number of occasions in the House of Lords and House of Commons and the views expressed by Ministers representing Government are recorded in Hansard giving a commitment to reform the RoW to ensure paths do not pass through family homes. A list of the occasions and the commitments of government ministers are given in attachment 1. As an example,

(Extract from Hansard 23rd March 2016)

Speaking for the government Baroness Williams of Trafford made the following statements:

*“The right to apply will be supplemented by guidance that will effectively act as a presumption to divert or extinguish public rights of way that pass through the gardens of family homes, working farmyards or commercial premises where privacy, safety or security are a problem.*

*The guidance will give authorities more scope to confirm orders made in the interests of the landowner in circumstances where a right of way may cause hardship because it goes through the garden of a family home, a working farmyard or other commercial premises.*

*I am happy to reaffirm the commitment made by the previous Government that we will review, within two years of implementation of the reforms package, how effective the right-to-apply provisions and the accompanying guidance have proved to be. The review will send a message to authorities that the Government are determined that the new policy should work and that if guidance does not bring about sufficient changes, we will consider the introduction of further measures.”*

Also given in Appendix 1 are letters from Government ministers explaining the Government commitment on this. These commitments are as yet undelivered although there is no backtracking and this commitment has repeated many times so the spirit and intention is clearly established and the HRA as currently drafted conflicts with what is agreed is right and fair by Government.

This all shows that there is conflict between the Government position and the Human Rights Act and the need for the Act to be changed.

The Right to Apply referred to relates to the Deregulation Act and supplemented by guidance to be drafted by Defra. The Schedule 1 Part II Article 1 in the HRA stating ‘except in the public interest’ is used by LA’s to promote a public footpath that passes through a family home. The only guidance given by Defra to Local Authorities on how to interpret the Human Rights Act when considering RoW issues

is given in Attachment 2. This indicates that the Part 1 Article 8 of the Human Rights Act can be ignored.

This shows that legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it. The section 3 should be amended to say applies absolute to an individual and family so there is no condition of (Schedule I Part II Article I) 'except in public interests'.

**ToR a)ii** – the change proposed should be applied retrospectively.

**ToR a)iii** - declarations of incompatibility (under section 4) be considered as part of the initial process.

## **Attachment 1. Ministers statements in the HoL's and HoC's**

### **Extract from Hansard**

Tom Brake speaking on behalf of the government said

#### **23 Jun 2014 : Column 77**

The Government acknowledge that for householders, farmers and others, an intrusive footpath can have a substantial impact on their quality of life or on their ability to run a business. We understand that while this is not a widespread problem, where it occurs it can cause severe difficulties, and in a significant number of cases people have been put through years of considerable inconvenience and stress,.....

It is clear, however, that there has to be a change in the way in which both legislation and policy operate if people are to get a satisfactory hearing, and that is what the Government are doing in the Bill.

#### **23 Jun 2014 : Column 78**

We very much sympathise with people's genuine concerns about the problems that can arise from footpaths running through private gardens and farmyards and recognise that we need to find an acceptable solution, but we do not believe that these new clauses are the best way to go about this. Measures are already being developed that will make a significant difference to the way in which requests for diversions and extinguishments of rights of way will be dealt with by local authorities. We are working towards making effective the "right to apply" provisions in the Bill. That will enable a landowner to make a formal application for the diversion or extinguishment of a public right of way; with that will come the right to appeal to the Secretary of State if the authority rejects the application or fails to act on it, so local authorities will not be able simply to rebuff or ignore representations from a landowner, as they can at present. I hope that my hon. Friends will see that as a positive development.

Moreover, the right to apply will be supplemented by guidance that will effectively act as a presumption to divert or extinguish public rights of way that pass through the gardens of

family homes, working farmyards or commercial premises where privacy, safety or security are a problem. That guidance has been developed in agreement with the rights of way stakeholder working group.

## **Grand Committee House of Lords 28<sup>th</sup> October 2014**

### **Re the Deregulation Act**

**Lord De Mauley for the government states**

The Government acknowledge my noble friend's point that for householders and farmers an intrusive footpath can have a substantial impact on their quality of life or on their ability to run a business, and several noble Lords have spoken about that. It can cause severe difficulties and there are a significant number of cases where people have been through years of considerable inconvenience and stress. We recognise that there is a need to find an acceptable

**28 Oct 2014 : Column GC412**

solution. That is why the Government have worked with the stakeholder working group to include measures in the rights of way reforms package that will make a significant difference to the way that requests for diversions and extinguishments of rights of way will be dealt with by local authorities. I am confident that they will help to alleviate the difficulties experienced by those affected.

.....The right to apply provisions will be supplemented by guidance that will effectively act as a presumption to divert or extinguish public rights of way that pass through the curtilage of family homes where privacy, safety or security are a problem.

## **Hansard 23<sup>rd</sup> March 2016 circa 6.45pm**

**Speaking on behalf of the government in relation to the Housing and Planning bill**  
**Baroness Williams of Trafford stated:**

The provisions in the Deregulation Act allow the right to apply to be extended to land-use types other than agriculture, forestry and the keeping of horses— for example, private residential gardens. The right to apply will be supplemented by guidance that will effectively act as a presumption to divert or extinguish public rights of way that pass through the gardens of family homes, working farmyards or commercial premises where privacy, safety or security are a problem.

**23 Mar 2016 : Column 2496**

..... The guidance will give authorities more scope to confirm orders made in the interests of the landowner in circumstances where a right of way may cause hardship because it goes through the garden of a family home, a working farmyard or other commercial premises.....

.....I am happy to reaffirm the commitment made by the previous Government that we will review, within two years of implementation of the reforms package, how effective the right-to-apply provisions and the accompanying guidance have proved to be. The review will send a message to authorities that the Government are determined that the new policy should work and that if guidance does not bring about sufficient changes, we will consider the introduction of further measures.

**NB. It should be noted that the guidance promised in 2014 has not yet been delivered, nor indeed has the Right to Apply (for a diversion or extinguishment) included as part of the 2000 CROW Act and whilst there have been a number of intended dates for implementation none has come to pass and currently there is no firm date for implementation. And therefore the promised two year review seems a very, very long way away.**

**Despite years of promises, those with a PROW through their garden are denied the basic rights included in Schedule 1 of the HRA Part 1 Articles 8 and 14 and Part 2 Article 1 which is why these articles need revision.**

Below are attached just two of many letters received from successive DEFRA ministers reaffirming the commitments that would confer some protection to those affected by a PROW through their home consistent with the intentions of the HRA.



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## **Attachment 2. Defra Guidance to Local Authorities**