



**The Independent Human Rights Act Review**

**Call for Evidence – Response**

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## Introduction

1. Established in 1957, JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil, and criminal – in the United Kingdom. It is the UK branch of the International Commission of Jurists. JUSTICE’s vision is of fair, accessible, and efficient legal processes, in which the individual’s rights are protected, and which reflect the country’s international reputation for upholding and promoting the rule of law.
2. JUSTICE has a long history of work relating to the Human Rights Act 1998 (the “**HRA**” or the “**Act**”). We were involved in the process of drafting the HRA, and in subsequent training of judges on its operation. We have contributed to various public debates and consultations relating to a British Bill of Rights<sup>1</sup> and have intervened in numerous cases involving the HRA.<sup>2</sup> Through all our work, through working parties of our members and responding to consultations and proposed legislation, we assess the impact of justice system processes on the rights of those using them.
3. JUSTICE has convened an advisory group of experts to inform its response to the Independent Human Rights Act Review’s (the “**Review**”) Call for Evidence. The group comprises the following members:
  - Sir Michael Tugendhat (Chair);
  - Professor Brice Dickson, Queen’s University Belfast;
  - Tessa Gregory, Partner, Leigh Day LLP;
  - Dominic Grieve QC, Temple Garden Chambers;
  - Raza Husain QC, Matrix Chambers;
  - Jennifer McDermott, former head of Media and Public Law at Withers LLP, Addleshaw Goddard LLP and Hogan Lovells LLP;
  - Jonathan Moffett QC, 11KBW;
  - Christine O’Neill QC, Partner and Chairman of Brodies LLP; and

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<sup>1</sup> JUSTICE, ‘A British Bill of Rights: Informing the Debate’ (2007), available at <<https://justice.org.uk/wp-content/uploads/2015/07/A-British-Bill-of-Rights.pdf>>; JUSTICE, ‘Commission on a Bill of Rights: Do we need a bill of rights?: JUSTICE’s Response’ (2011), available at <<https://justice.org.uk/wp-content/uploads/2015/01/JUSTICE-BORC-Response-November-2011-FINAL.pdf>>; JUSTICE ‘Commission on a Bill of Rights: Response to Second Consultation’ (2012), available at <<https://justice.org.uk/wp-content/uploads/2015/12/BORC-Second-Consultation-JUSTICE-Response-FINAL-2012.pdf>>.

<sup>2</sup> Including *R (Ullah) v Special Adjudicator* [2004] UKHL 26; *Jones v R (Al Jedda) v Secretary of State for Defence* [2007] UKHL 58; *Cadder v HM Advocate* [2010] UKSC 43; *Home Office v Tariq* [2011] UKSC 35; *Smith & others v Ministry of Defence* [2013] UKSC 41; and *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2.

- Alison Young, Sir David Williams Professor of Public Law, University of Cambridge.
4. The group members are experts in the field of human rights, and have a wide range of experience, including a former High Court judge, legal representatives who act for both claimants and public authorities, academics, a former Attorney General and representatives from Scotland and Northern Ireland.
  5. Despite the diverse experience of our advisory group members, there is a strong consensus that the HRA in its current form functions very well. The HRA is a well-crafted delicately balanced piece of legislation. It enables the courts to give effect to and protect the rights of individuals whilst at the same time maintaining Parliamentary sovereignty and the balance between the different branches of Government.
  6. We recognise that there exists a body of criticism of the way in which the HRA currently operates, produced largely, if not exclusively, by the Judicial Power Project (the “**JPP**”), part of the Policy Exchange think tank.<sup>3</sup> The views of this small but prolific group do not appear to be reflective of the experiences of those who use the HRA on a regular basis. We are concerned that the JPP / Policy Exchange’s critiques often appear to conflate the ‘will of Parliament’ with the ‘will of the Executive’ and their suggested amendments would upset the careful constitutional balance currently struck by the HRA.
  7. Our advisory group includes those working, or who have worked, at the coalface of litigation under the HRA mechanisms that are the subject of this review. They have acted both for and against the government, been a member of the government and a member of the judiciary. Yet still they are unanimous in their view that there is no need for amendment of the HRA (bar some minor amendments relating to the use of remedial orders). This is particularly so, given the Government’s welcome commitment to remaining a party to the European Convention on Human Rights (the “**ECHR**” or the “**Convention**”). Conversely, as highlighted throughout our response we are concerned that amending the current HRA mechanisms could give rise to a number of risks or adverse impacts. These include:
    - a. a reduction in dialogue between Strasbourg and the domestic courts, limiting the UK’s ability to influence Strasbourg’s approach and enhance its understanding of UK domestic law;

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<sup>3</sup> <https://judicialpowerproject.org.uk/>.

- b. limiting the ability for individuals to remedy rights breaches domestically;
- c. a lack of legal certainty and clarity as to the operation of any proposed changes to the HRA and the impact those would have on the position and development of the common law;
- d. placing the UK in breach of its international legal obligations;
- e. potential effects on the devolution settlements and the peace process in Northern Ireland; and
- f. exposing British troops to investigation and prosecution at the International Criminal Court.

## **Devolution**

8. We note that this Review is limited to a consideration of the domestic HRA framework and that it acknowledges that the Act is a protected enactment under the devolution settlements. However, given the intertwined relationship between the HRA and the devolution statutes, consideration must be given to the impact that amendments to the HRA would have on the devolution settlements and rights protection in the devolved nations.
9. The devolution statutes contain a number of provisions which help ensure broad congruence with the HRA. The procedural mechanisms in sections 2 and 3 are mirrored by equivalent mechanisms contained within the devolution statutes. Although the devolution statutes do not establish a duty to take into account Strasbourg case law when deciding a devolution issue, this duty has been implied by the Scottish courts and House of Lords when considering the Scotland Act 1998 (the “**SA**”).<sup>4</sup> It can be assumed that the same approach would be taken under the Northern Ireland Act 1998 (the “**NIA**”) and the Government of Wales Act 2006 (the “**GoWA**”). The devolution statutes all contain an interpretive obligation to construe Acts, bills and subordinate legislation as within the legislative competence of the Assembly / Parliament where it is possible to do so. Since legislation will exceed the competence of the Assembly / Parliament if it is incompatible

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<sup>4</sup> *Clancy v Caird* 2000 SLT 546, at [549]; *HM Advocate v R* [2004] 1 AC 462, at [54].

with Convention rights these interpretative provisions have a similar effect to section 3 HRA. Although there are differences between these interpretative provisions and section 3, where the question of competence concerns Convention rights ‘the proper starting point is to construe the legislation as directed by section 3(1) of the HRA’.<sup>5</sup> As a result any changes to the HRA are likely to have consequences for the operation of the devolution statutes. In particular, a weaker section 3 will likely result in courts being able to interpret Acts of the devolved legislatures as compatible with Convention rights less frequently. A weaker section 3 may therefore result in a greater likelihood that legislation will be struck down as outside the legislative competence of the Assembly / Parliament. Alternatively, where the courts are dealing with devolution issues that involve Convention rights issues and are faced with what may have become conflicting interpretive obligations (under section 3 HRA on the one hand and under the devolution statutes on the other) the consequence may be inconsistencies in the approach to interpretation depending on whether the legislation being interpreted is the product of the Westminster or devolved legislatures.

10. Further, there is an argument that ‘human rights’, or at least the ‘observation and implementation’ of the ECHR, has been devolved to the Scottish Parliament, Northern Irish Assembly and Senedd Cymru.<sup>6</sup> If this is the case, although from a legal perspective the Westminster Parliament could still legislate in this area, constitutionally, because amendment of the HRA would touch upon ‘human rights’ or the ‘observation and implementation’ of the ECHR, the consent of the devolved legislatures may be needed.

11. In addition, it is important for the Review to bear in mind that the HRA has been hugely significant in the rolling out of the peace process in Northern Ireland, as provided for in the Belfast (Good Friday) Agreement of 1998 and in subsequent legislation. More particularly, it has been fundamental to the success of the Police Service of Northern Ireland (the “**PSNI**”), which enjoys widespread public confidence in Northern Ireland largely because it is fully committed to operating in accordance with the HRA. The HRA is central to the PSNI’s Code of Ethics and to the oversight of the PSNI conducted by the Northern Ireland Policing Board, which has a statutory duty to publish an annual report on the PSNI’s compliance with the Act. The HRA has also been central to the challenges of dealing with the past in Northern Ireland, leading to the re-investigation of many unsolved killings, to

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<sup>5</sup> *DS v Her Majesty’s Advocate* 2007 SC (PC) 1.

<sup>6</sup> JUSTICE, ‘Devolution and Human Rights’ (2010), available at <<https://justice.org.uk/wp-content/uploads/2015/01/Devolution-and-Human-Rights.pdf>>.

several inquests which have brought comfort to loved ones of the deceased and to the identification of some miscarriages of justice. In addition, the HRA has played a very helpful role in the regulation of parades in Northern Ireland, which are now much less contentious than they used to be. Given the undoubted benefits which the HRA has brought to Northern Ireland during the past 20 years, we would strongly caution against any interference even with the domestic HRA framework lest it renders the Belfast (Good Friday) Agreement less effective, especially in this post-Brexit era.

## Theme 1

**We would welcome any general views on how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change.**

**a) How has the duty to “take into account” ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?**

12. Section 2 of the HRA imposes a duty on the domestic courts and tribunals to ‘take into account’ any judgment, decision or opinion of the Strasbourg institutions, but only so far as the domestic court considers it relevant to the proceedings. This requires the domestic courts to take account of all the relevant case law of the European Court of Human Rights (the “ECtHR” or the “Strasbourg court”), regardless of whether the UK was a party to the case. In our view, the courts apply this duty in accordance with the ordinary meaning of those words. To the extent there was, in the early days of the HRA, a stricter adherence to Strasbourg jurisprudence than the words of the statute provide for, that approach has long been left behind.

### The mirror approach

13. The early judicial consideration of section 2 was dominated by the ‘mirror’ approach which was typified by a stricter adherence to ECtHR decisions. In *R (Alconbury Developments Ltd et al) v Secretary of State for the Environment, Transport and the Regions* Lord Slynn expounded the rule:

*In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that*

*court which is likely in the ordinary case to follow its own constant jurisprudence.*<sup>7</sup>  
(emphasis added)

14. The most famous expression of the 'mirror' principle, is Lord Bingham's statement in *Ullah* that 'The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'<sup>8</sup>
15. It is this principle of 'no more, but certainly no less', which was closely followed for a number of years, even where the domestic courts clearly disagreed with the Strasbourg jurisprudence. The apex of this is Lord Rodger's statement in *Secretary of State for the Home Department v AF* '*Argentoratum locutum: iudicium finitum* – Strasbourg has spoken, the case is closed.'<sup>9</sup> Lord Hoffmann expressed dissatisfaction with the reasoning of the ECtHR, believing Strasbourg to have been wrong, but nevertheless he accepted the House of Lords had to follow the Strasbourg jurisprudence, lest the UK be put in breach of their Convention obligations.<sup>10</sup>
16. However, even under the mirror principle the courts still recognised there would be circumstances in which they could depart from Strasbourg: where there was no 'clear and constant' line of ECtHR decisions, or where Strasbourg had misunderstood the domestic position. For example, in *Spear*<sup>11</sup> the House of Lords disapplied the Strasbourg court's ruling in *Morris v UK*,<sup>12</sup> on the basis that Strasbourg had misunderstood the nature of the safeguards of independence in a court martial in the earlier case.
17. The early entrenchment of the mirror principle was the subject of widespread criticism, including from Lord Irvine, the Lord Chancellor responsible for introducing the HRA into the House of Lords,<sup>13</sup> as well as then President of the Supreme Court, Lord Phillips, and

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<sup>7</sup> [2001] UKHL 23, [2003] 2 AC 295 [26] (emphasis added).

<sup>8</sup> *R v Special Adjudicator ex parte Ullah* [2004] UKHL 26, [20].

<sup>9</sup> [2009] UKHL 28, [98].

<sup>10</sup> *ibid*, [70]. Baroness Hale has suggested that Lord Rodger did not approve of his own conclusion (Baroness Hale, '*Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?*' (2012) 1 Human Rights Law Review 65, 67). However, it is also important to contextualise this case. It came after a series of cases going backward and forward between the domestic courts and Strasbourg on closed material proceedings, and some judges in the case expressed views that earlier opinions of the House of Lords on the same issue were 'enigmatic' (*Secretary of State for the Home Department v AF* [2009] UKHL 28, [17], [18]).

<sup>11</sup> *R v Spear* [2002] UKHL 31.

<sup>12</sup> *Morris v UK* (2002) 34 EHRR 52.

<sup>13</sup> Lord Irvine, 'A British interpretation of Convention rights' [2012] Public Law 237, 241.



Lord Chief Justice, Lord Judge.<sup>14</sup> Indeed, in 2014, both the Conservative and Labour parties expressed the view that the domestic courts followed the jurisprudence of the ECtHR too prescriptively, treating the Strasbourg court as if creating legal precedent for the UK.<sup>15</sup> However, by then the use of section 2 had moved far beyond the mirror principle and the House of Lords' ruling in *AF*.

### Departure from the mirror principle

18. From around 2009 onwards, there has been a clear shift away from strict adherence to the mirror principle. First, in the absence of a 'clear and consistent' line of Strasbourg jurisprudence to follow the courts have been increasingly willing to undertake their own interpretation of the Convention rights.<sup>16</sup> Second, the domestic courts have been more willing to find the ECtHR has fallen into error, misunderstanding the domestic law or misapplying the facts. This has led to circumstances in which the domestic courts have done both 'more' and 'less' than Strasbourg.

19. Where there is no established Strasbourg jurisprudence on a particular factual matter the courts have applied established principles to that situation. For example, in *EM* the House of Lords held that a removal of a mother and son to Lebanon would amount to a flagrant breach of their Article 8 rights, in circumstances where Strasbourg had not previously decided a case on that basis (but had established the flagrancy principle in other cases).<sup>17</sup> In *Rabone v Pennine Care NHS Foundation Trust* the court held that, despite the absence of Strasbourg authority, there was a positive obligation to protect the life of a patient who

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<sup>14</sup> Owen Bowcott, 'UK courts following European human rights rulings too strictly, warn judges' *The Guardian* (London, 15 November 2011) available at <<https://www.theguardian.com/law/2011/nov/15/uk-courts-european-human-rights-rulings>>.

<sup>15</sup> In 2014 the Conservative Party produced a series of proposals for reforming the UK's relationship with the ECtHR which argued the Strasbourg court had engaged in 'mission creep, providing expansive interpretations of rights which are then incorporated into domestic law as the UK courts apply these rulings under section 2'. The suggested solution was to make the decisions of the ECtHR advisory only, although no proposal on amending section 2 was set out. Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws' (2014) available at <<https://s3.amazonaws.com/s3.documentcloud.org/documents/1308198/protecting-human-rights-in-the-uk.pdf>>. Also in 2014, Labour's then Shadow Justice Secretary, Sadiq Khan, wrote an article suggesting the courts had erred in their interpretation of section 2, transforming the requirement to consider Strasbourg jurisprudence into a prescriptive precedent they are required to follow. Labour's proposed solution was to issue guidance to the judiciary on the correct interpretation of section 2, reiterating that the domestic courts must take Strasbourg rulings into account and then find 'their own way'. Sadiq Khan, 'Labour will shift power back to British Courts' *The Daily Telegraph*, (3 June 2014) available at <[www.telegraph.co.uk/news/uknews/law-and-order/10870113/Labour-will-shift-power-back-to-British-courts.html](http://www.telegraph.co.uk/news/uknews/law-and-order/10870113/Labour-will-shift-power-back-to-British-courts.html)>.

<sup>16</sup> Francesca Klug and Helen Wildbore, 'Follow or lead The Human Rights Act and the European Court of Human Rights' [2010] 6 *European Human Rights Law Review* 621, 626-627.

<sup>17</sup> *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64.

had been informally admitted to hospital due to serious attempts to take their own life.<sup>18</sup>

20. It is logical that the courts do this. The HRA provides for direct access to Convention rights through their enforcement by domestic courts. It is therefore the courts' duty to resolve the question before them as to whether a right has been violated, even where Strasbourg has yet to supply an answer, and they are required to do so by virtue of section 6.<sup>19</sup> Further, a reluctance to express a view on an issue and an effective handing over of the issues to Strasbourg would diminish the valuable dialogue that takes place between the domestic courts and the ECtHR (see paragraphs 31-34 below).<sup>20</sup> Moreover, the 'living instrument' doctrine of the ECtHR, means that a previous statement of law may have been overtaken by societal changes. In such circumstances it would be peculiar if the domestic courts were restricted by the original jurisprudence and could not take into account these changes, particularly as the Strasbourg court itself is not bound by a system of precedent.

21. The domestic courts have also declined to follow the Strasbourg court where they believe Strasbourg has misunderstood UK law. For example, in *R v McLoughlin* the Court of Appeal was asked to consider the legality of whole-life tariffs in light of the judgment of the Grand Chamber of the ECtHR in *Vinter v UK*.<sup>21</sup> Lord Thomas CJ declined to follow the ECtHR decision because he considered the Grand Chamber to have based their judgment on an erroneous understanding of domestic law.<sup>22</sup>

22. However, more recently the courts have also declined to follow Strasbourg where they disagree with Strasbourg's reasoning. In *Poshteh v Royal Borough of Kensington and Chelsea* the Supreme Court declined to follow *Ali v UK*,<sup>23</sup> and it criticised the Strasbourg court for failing to address the concerns raised by the Supreme Court in an earlier case and for concentrating on obiter statements in two other cases instead, which were taken out of context.<sup>24</sup> In *Kaiyam* the Supreme Court declined to follow part of *James v UK*<sup>25</sup> as

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<sup>18</sup> [2012] UKSC 2. JUSTICE, together with INQUEST, Liberty and Mind submitted a joint intervention in this case, available at <<https://justice.org.uk/rabone-v-pennine-care-nhs-trust/>>.

<sup>19</sup> Lord Kerr, 'The UK Supreme Court: The Modest Underworker of Strasbourg?' (Clifford Chance Lecture, 25 January 2012) 8-9. Available at <[https://www.supremecourt.uk/docs/speech\\_120125.pdf](https://www.supremecourt.uk/docs/speech_120125.pdf)>.

<sup>20</sup> Nicolas Bratza, 'The relationship between the UK courts and Strasbourg' [2011] 5 European Human Rights Law Review 505.

<sup>21</sup> (2016) 63 EHRR 1.

<sup>22</sup> Attorney General's Reference (No.69 of 2013) [2014] EWCA Crim 188 [28]-[29].

<sup>23</sup> (2015) 63 EHRR 20.

<sup>24</sup> [2017] UKSC [33].

<sup>25</sup> [2012] ECHR 340.

the reasoning was based 'on an over expanded and inappropriate reading of the word "unlawful" in article 5(1)(a).'<sup>26</sup> In *R (Hicks) v Commissioner of Police for the Metropolis* although the Supreme Court agreed with the outcome of the Strasbourg decision in *Ostendorf v Germany*<sup>27</sup> it believed it erred in reasoning.<sup>28</sup> In *Re McLaughlin* the majority held that the reasoning of *Shackell v UK*<sup>29</sup> was wrong and should not be followed as it failed to address the clear purpose of the widow's benefit.<sup>30</sup>

23. Whilst these cases all involved decisions of one of the sections of the ECtHR, in *R v Abdurahman* the Court of Appeal held that the appellant's conviction was not unsafe, despite a Grand Chamber decision which had held that the appellant's Article 6 rights had been violated.<sup>31</sup> As well as identifying areas where domestic procedures had been misunderstood, the Court of Appeal disagreed with a number of elements of the Grand Chamber's reasoning and the way in which it had applied the law and facts.<sup>32</sup> In *Hallam v Secretary of State for Justice* the Supreme Court had to decide whether the basis on which compensation was payable for miscarriages of justice was compatible with the Article 6(2) presumption of innocence.<sup>33</sup> There was a previous Supreme Court authority on the interpretation of 'miscarriage of justice' as well as a Grand Chamber judgment, *Allen v UK*.<sup>34</sup> A majority held that *Allen* was directly applicable, but declined to follow it. Lord Mance who gave the leading judgment said he did not find the current state of Strasbourg caselaw as 'coherent or settled'.<sup>35</sup> In a concurring judgment Lord Wilson stated that he thought the domestic legislation was incompatible with Article 6(2) on the basis of the meaning given to Article 6(2) by the ECtHR. Despite this, he dismissed the appeals. He recognised the likelihood that the appellants would be successful in Strasbourg but was 'conscientiously unable to subscribe to the ECtHR's analysis of the extent of the operation of article 6(2).' His view was not based on the fact that the Strasbourg court had misunderstood the operation of domestic law, but because the relevant line of ECtHR

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<sup>26</sup> [2014] UKSC 66 [35].

<sup>27</sup> [2013] ECHR 197.

<sup>28</sup> [2017] UKSC 9 [32].

<sup>29</sup> *Shackell v UK* App no 45851/99 (ECtHR, 27 April 2000).

<sup>30</sup> [2018] UKSC 48 [49].

<sup>31</sup> *R v Abdurahman* [2019] EWCA Crim 2239; *Ibrahim v UK* [2016] ECHR 750.

<sup>32</sup> *R v Abdurahman* (ibid) [111(c)].

<sup>33</sup> [2019] UKSC 2.

<sup>34</sup> *Allen v UK* (2013) 63 EHRR 10.

<sup>35</sup> *Hallam v Secretary of State for Justice* [2019] UKSC 2 [73].

jurisprudence was wrong and incoherent.<sup>36</sup>

24. Despite a clear and increased willingness to depart from decisions of Strasbourg, in the majority of their decisions the courts still do follow the clear jurisprudence of Strasbourg even though they are not bound to do so. The position was summarised by Lord Wilson in *AM (Zimbabwe) v Secretary of State for the Home Department*:

*Our refusal to follow a decision of the ECtHR, particularly of its Grand Chamber, is no longer regarded as, in effect, always inappropriate. But it remains, for well-rehearsed reasons, inappropriate save in highly unusual circumstances such as were considered in R (Hallam) and R (Nealon) v Secretary of State for Justice [2019] UKSC 2, [2020] AC 279.<sup>37</sup>*

25. This makes sense; if the domestic courts were to frequently depart from clear Strasbourg jurisprudence, declining to find a breach of a Convention right in circumstances where Strasbourg has, or would, this would result in the UK being consistently non-compliant with its international treaty obligations. Doing so would undermine the purpose of the HRA to give individuals whose rights have been breached a remedy in domestic law, without resorting to Strasbourg.<sup>38</sup> It is also in line with the Brighton Declaration, which was initiated under the UK's chairmanship of the Council of Ministers.<sup>39</sup> However, in enacting section 2 Parliament clearly contemplated that domestic courts would not follow Strasbourg in all cases.<sup>40</sup> Indeed, the case law demonstrates that where there is good reason not to follow Strasbourg, the courts are very willing not to do so. We therefore do not believe that section 2 requires amendment as it already allows sufficient leeway to the domestic courts to diverge from Strasbourg where warranted.

**b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?**

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<sup>36</sup> *ibid*, [87] – [94]. The case is currently before the ECtHR.

<sup>37</sup> [2020] UKSC 17, [340].

<sup>38</sup> Home Office, *Rights Brought Home: The Human Rights Bill* (CM 3782, 1997) para 1.18. Available at <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/263526/rights.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/263526/rights.pdf)>.

<sup>39</sup> ECHR, 'High Level Conference on the Future of the European Court of Human Rights: Brighton Declaration' (2012), para 9 a) iv), available at <[https://www.echr.coe.int/Documents/2012\\_Brighton\\_FinalDeclaration\\_ENG.pdf](https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf)>.

<sup>40</sup> A proposed amendment suggested that section 2 should read 'A court... determining a question which has arisen in connection with a Convention right shall be bound by a judgment etc of ECtHR', however this was rejected. HL Deb 18 November 1997, vol 583, cols 511 – 516.

26. The margin of appreciation is an area of discretion afforded to states which is taken into account when considering the proportionality of an interference with a qualified Convention right (Articles 8 -11), the balancing of competing rights or the scope of a positive obligation to ensure achievement of a Convention right. It is largely accorded where there is a lack of consensus among Contracting Parties around an issue, particularly involving morally or politically controversial subjects. In *Handyside* the ECtHR acknowledged in principle that national authorities are better placed to assess the necessity of an infringement 'By reason of their direct and continuous contact with the vital forces of their countries.'<sup>41</sup> Nevertheless, the contracting state does not have an unlimited power of appreciation and the margin of appreciation is subject to ECtHR supervision.<sup>42</sup>

27. In areas of social and economic policy Strasbourg allows national authorities a wide margin of appreciation and will respect that judgment unless it is 'manifestly without reasonable foundation'. The domestic courts have been similarly circumspect in relation to matters of social and economic policy and will also respect the judgment of the legislature unless it is manifestly without reasonable foundation.<sup>43</sup> For example, in *AXA* (challenging an infringement of the claimant's rights under Article 1 of Protocol 1) Lord Reed accepted that while the margin of appreciation was not strictly engaged under the HRA, the courts would consider the issue of proportionality while giving due weight to the decisions of public authorities within the discretionary area of judgement accorded to those bodies.<sup>44</sup> The Court of Appeal adopted similar reasoning in *Dolan*, holding that a wide margin of judgement must be afforded to the Government, the executive and Parliament in matters concerning Article 1 of Protocol 1.<sup>45</sup> In *R (Z) v Hackney London Borough Council*, Lord Sales emphasised the wide margin of appreciation to be afforded to Parliament in the area of social welfare benefits and that a court 'should accord weight to the judgment made by the democratic legislature on a subject where different views regarding what constitutes a fair balance can reasonably be entertained'.<sup>46</sup> The courts have also emphasised that in issues of controversial social policy, such as the permissible forms of registration of a

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<sup>41</sup> *Handyside v UK* [1976] ECHR 5 [48].

<sup>42</sup> *ibid*, [49].

<sup>43</sup> See for example *R (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16 [268]; *Humphreys v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKSC 15 [22].

<sup>44</sup> *AXA General Insurance Limited v The Lord Advocate* [2011] UKSC 46 [131].

<sup>45</sup> *R (on the application of Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1650 [97], [110]. See also *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21.

<sup>46</sup> [2010] UKSC 40, [107], [108].

transgendered person on a birth certificate, Parliament enjoys a special democratic legitimacy which, while not immune from judicial scrutiny, is owed due respect when considered by the courts.<sup>47</sup>

28. Where Strasbourg has held that a matter falls within states' margin of appreciation, the UK courts have taken the approach that it is for the national courts to determine the question of whether there has been a breach of Convention rights.<sup>48</sup> The fact that a matter falls within a state's margin of appreciation at the international level will not necessarily mean that the courts will be unwilling or unable to find a breach of Convention rights at a domestic level.<sup>49</sup>

29. This approach has been criticised by some who would like to see the HRA amended so that in cases where, by application of the margin of appreciation, the ECtHR would not find a policy or enactment in breach of the ECtHR, it should likewise not be possible for domestic courts to find that policy or enactment incompatible with the ECHR.<sup>50</sup>

30. We disagree with this proposal. When a matter falls within states' margin of appreciation, Strasbourg has specifically left it up to individual states to decide how to deal with an issue. This does not necessarily mean it is up to the legislature; it will depend on the constitutional settlement of each state. As Lord Hoffmann stated in *Re G* 'the margin of appreciation is there for division between the three branches of government according to our principles of the separation of powers. There is no principle by which it is automatically appropriated by the legislative branch.' It is for the court to apply the division in the way which is appropriate for the United Kingdom.<sup>51</sup> The court has jurisdiction to do so because that is part of the court's function pursuant to the HRA as determined by Parliament.<sup>52</sup> As explained above,

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<sup>47</sup> See *R (on the application of McConnell) v The Registrar General for England and Wales* [2020] EWCA Civ 559 [80]-[82].

<sup>48</sup> See *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38 [36] (Lord Hoffmann); [50] (Lord Hope); [116]-[120] (Lady Hale); and [130] Lord Mance. Relying on *Re G* Lord Neuberger held in *Nicklinson v Ministry of Justice* [2014] UKSC 38, that since the ECtHR had concluded that member states enjoy a wide margin of appreciation on the issue of assisted dying, it was for the national courts to decide how to accommodate the article 8 rights of those who wish and need assistance to kill themselves and the competing interests of the prevention of crime and the protection of others (at [70]. See also Lord Mance at [162]).

<sup>49</sup> *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 [54]. See also *Re an application by the NIHR for Judicial Review (NI)* [2018] UKSC 27 [192].

<sup>50</sup> Richard Ekins, *Protecting the Constitution: How and why Parliament should Limit Judicial Power*, (Policy Exchange, 2019) 24. Available at <<https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf>>.

<sup>51</sup> *Re G* (n48) [37].

<sup>52</sup> *Nicklinson* (n48) at [73].

in exercising that function the courts already are conscious of, and give significant consideration to, the relative institutional competence of the three branches of government,<sup>53</sup> and are conscious of the need to ‘attach appropriate weight to informed legislative choices at each stage in the Convention analysis.’<sup>54</sup> This is why in *Nicklinson* a majority declined to make a declaration of incompatibility, Lord Neuberger stating that it ‘would be institutionally inappropriate’ for the court to do so at that time.<sup>55</sup>

**c) Does the current approach to ‘judicial dialogue’ between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?**

31. In our view judicial dialogue between the domestic courts and Strasbourg does satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence in the UK, as evidenced by the following examples:

- a. In *Cooper v UK*<sup>56</sup> Strasbourg found that RAF and Army Courts Martial were compliant with Article 6. It accepted the view of the House of Lords in *Spear*<sup>57</sup> that it had previously misunderstood the nature of the safeguards that existed to ensure the independence of a court-martial in *Morris v UK*.<sup>58</sup>
- b. In *Al Khawaja v UK* the ECtHR had determined that a breach of Article 6 occurred when a conviction was based ‘solely or decisively’ on the evidence of a witness that the defendant had not had the chance to cross-examine.<sup>59</sup> Lord Phillips held that the Strasbourg judgment failed to distinguish situations where cross-examination was not possible and similarly failed to take account of the safeguards against unsafe convictions firmly established in the domestic common law. Following the Supreme Court judgment in *Horncastle*,<sup>60</sup> the case of *Al-Khawaja* was appealed to the Grand Chamber. The Grand Chamber accepted the reasoning

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<sup>53</sup> *Re G* (n48) at [130]; *Nicklinson* (n48) at [75].

<sup>54</sup> *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 [54].

<sup>55</sup> *Nicklinson* (n48) [116] per Lord Neuberger and [166] per Lord Mance.

<sup>56</sup> *Cooper v UK* (2004) 39 EHRR 8.

<sup>57</sup> *R v Spear* [2002] UKHL 31.

<sup>58</sup> *Morris v UK* (2002) 34 EHRR 52.

<sup>59</sup> *Al-Khawaja and Tahery v UK* (2009) 49 EHRR 1.

<sup>60</sup> *R v Horncastle* [2009] UKSC 14.

of the Supreme Court in *Horncastle* that not all circumstances when a defendant was denied the chance to cross-examine a witness would give rise to a breach of Article 6.<sup>61</sup>

- c. *Hutchinson v UK* marked the successful conclusion of a developed dialogue between the domestic courts and the ECtHR on the issue of whole-life sentences for prisoners.<sup>62</sup> In *Vintner* the ECtHR had concluded that the lack of clarity over the review of whole-life sentences amounted to an infringement of Article 3.<sup>63</sup> The Court of Appeal responded to these criticisms, offering clarification over the circumstances which would be considered when reviewing a whole-life sentence.<sup>64</sup> The Grand Chamber accepted that in light of the Court of Appeal's clarification the UK's treatment of whole-life prisoners did not amount to a breach of Article 3.
- d. In *Animal Defenders International v UK*,<sup>65</sup> Strasbourg followed the reasoning of the House of Lords which upheld a ban on political advertising despite a ECtHR case that held a Swiss ban on political advertising as it applied to an animal rights group violated Article 10.<sup>66</sup>
- e. The *Osman* case is a further example where the Strasbourg court was subsequently shown to have misunderstood the law of negligence,<sup>67</sup> an error which was corrected by the Court in the case of *Z*.<sup>68</sup>

32. Dialogue does not necessarily involve a back and forth between the UK and Strasbourg courts. In many cases, the UK has spoken first and Strasbourg has listened. As former UK Judge on the Strasbourg court Sir Nicholas Bratza has pointed out 'the compelling reasoning and analysis of the relevant case-law by the national courts has formed the basis of the Strasbourg court's own judgment in many cases.'<sup>69</sup> Bratza cites the examples

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<sup>61</sup> *Al-Khawaja and Tahery v UK* (2012) 54 EHRR 23.

<sup>62</sup> *Hutchinson v UK* [2017] 1 WLUK 173.

<sup>63</sup> *Vintner v UK* (2013) 63 EHRR 1.

<sup>64</sup> *Attorney General's Reference (No.69 of 2013)* [2014] EWCA Crim 188.

<sup>65</sup> *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

<sup>66</sup> *VgT Verein gegen Tierfabriekn v Switzerland* (2001) 34 EHRR 159.

<sup>67</sup> *Osman v UK* [1999] 29 EHRR 245.

<sup>68</sup> *Z v UK* [2001] ECHR 333.

<sup>69</sup> Bratza, (n20) 507.



of *Pretty*<sup>70</sup> and *Stafford*.<sup>71</sup> He notes that in *Christine Goodwin*,<sup>72</sup> the Strasbourg court was emboldened by the decision and reasoning of the Court of Appeal to go further than it might otherwise have done in the protection of human rights, and in *N v United Kingdom* the Grand Chamber substantially adopted the reasoning employed by the House of Lords.<sup>73</sup>

33. We acknowledge that there are limits to the dialogue between the UK courts and Strasbourg, as pointed out by Lord Mance in *R (Chester) v Secretary of State for Justice*:

*In relation to authority consisting of one or more simple Chamber decisions, dialogue with Strasbourg by national courts, including the Supreme Court, has proved valuable in recent years. The process enables national courts to express their concerns and, in an appropriate case such as R v Horncastle [2010] 2 AC 373, to refuse to follow Strasbourg case law in the confidence that the reasoned expression of a diverging national viewpoint will lead to a serious review of the position in Strasbourg. But there are limits to this process, particularly where the matter has been already to a Grand Chamber once or, even more so, as in this case, twice.*<sup>74</sup>

34. However, it is inevitable there are limits to the process, and Strasbourg does not always follow the domestic court's reasoning, but nor is it required to do so. The best way to ensure a successful dialogue is to maintain the current wording and interpretation of the Section 2 duty 'to take into account' Strasbourg jurisprudence. This allows the domestic courts the flexibility to identify issues with ECtHR jurisprudence in relation to the specific circumstances of the UK and offer alternative solutions. In addition, it is crucial that the domestic courts maintain the ability to grant a declaration of incompatibility where Strasbourg has applied the margin of appreciation. To prevent them from doing so would cut off another possible means of dialogue between the domestic and Strasbourg courts.

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<sup>70</sup> *Pretty v UK* [2002] 35 EHRR 1.

<sup>71</sup> *Stafford v UK* [2002] 35 EHRR 32.

<sup>72</sup> *Christine Goodwin v UK* [2002] 34 EHRR 18.

<sup>73</sup> *N v UK* (2008) 47 EHRR 39; *N v Secretary of State for the Home Department* [2005] UKHL 31.

<sup>74</sup> [2013] UKSC 63.

## Theme 2

We would welcome any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change.

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

- 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?

35. Section 3 HRA requires the courts to 'read and give effect' to legislation 'in a way which is compatible' with Convention rights, 'so far as it is possible to do so'. Ambiguous legislation is resolved in a Convention-compliant way under ordinary principles of statutory construction: the UK is a signatory to the ECHR, and ordinary principles of statutory construction include a presumption that Parliament does not intend to legislate in a way that would put the United Kingdom in breach of its international obligations.<sup>75</sup> Section 3 therefore only becomes truly significant where the ordinary, unambiguous meaning of a statute would result in a Convention breach.<sup>76</sup> In these circumstances, the courts may use section 3 to adopt a Convention-compliant interpretation.<sup>77</sup>

36. The degree of departure from the ordinary meaning of the words in the legislation is constrained by reference to what is 'possible'. The leading case on the application of section 3 is *Ghaidan*,<sup>78</sup> from which the following general principles can be identified:

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<sup>75</sup> See *Donoghue v Poplar Housing and Regeneration Community Association* [2001] EWCA Civ 595; *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [60]; *S v L* [2012] UKSC 30, 2012 SLT 961[16]; *R (SG) v Secretary of State for Work and Pensions (SSWP)* [2015] UKSC 16, [2015] 1 WLR 1449 [83]–[84].

<sup>76</sup> Lord Millett in *Ghaidan* suggested that 'the [section 3] obligation arises (or at least has significance) only where the legislation in its natural and ordinary meaning, that is to say as construed in accordance with normal principles, is incompatible with the Convention.' *Ghaidan* (n75) [60]. See also *S v L* (n75) [15] per Lord Reed: 'the special interpretative duty imposed by sec 3 arises only where the legislation, if read and given effect according to ordinary principles, would result in a breach of the Convention rights'.

<sup>77</sup> *Ghaidan* (n75) [29]; *R v A (No 2)* [2001] UKHL 25, [2001] 1 AC 45, [108] (Lord Hope: ('There is no need to identify an ambiguity or absurdity'); *Re S (Children) (Care Order: Implementation of Care Plan)*, *Re W ((Children) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10, [2003] 2 AC 291 [37] (Lord Nicholls: ('Nor is its use dependent on the existence of ambiguity.'))

<sup>78</sup> *Ghaidan* (n75).

- a. Section 3 is the primary means of ensuring that domestic legislation is compatible with Convention rights. A court will only issue a declaration of incompatibility as a last resort.<sup>79</sup>
- b. When determining whether a Convention-compliant interpretation is possible, the courts will focus on the thrust of the legislation, not its detailed language. Strained construction may be possible.<sup>80</sup>
- c. The courts may depart from the intention of the enacting Parliament in seeking to give effect to the intention of the Parliament of 1998, which passed the HRA. The original legislative intent in relation to the legislation being interpreted has a constraining effect on section 3 interpretation but is not determinative.<sup>81</sup>
- d. The interpretation must not undermine a 'fundamental feature' of the legislation.<sup>82</sup>
- e. The courts should not make decisions for which they are not equipped; in other words, institutional competence is a consideration when determining what is 'possible'.<sup>83</sup>

37. Professor Ekins has suggested that section 3 enables 'judicial activism', and that it 'should be amended to specify that it does not authorise courts... to read and give effect to legislation in ways that depart from the intention of the enacting Parliament.'<sup>84</sup> However, there is no evidence that the application of these principles has resulted in interpretations

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<sup>79</sup> *ibid* [39], [46] (Lord Steyn).

<sup>80</sup> *ibid* [64] (Lord Millett), [123] (Lord Rodger). This will depend on context, see [70]-[71] (Lord Millett): 'section 3... could not be used to read "black" as meaning "white". ... Words cannot mean their opposite... But they may include their opposite. In some contexts it may be possible to read "black" as meaning "black or white"; in other contexts it may be impossible to do so. It all depends on whether "blackness" is the essential feature of the statutory scheme; and while the court may look behind the words of the statute they cannot be disregarded or given no weight, for they are the medium by which Parliament expresses its intention. Again, "red, blue or green" cannot be read as meaning "red, blue, green or yellow"; the specification of three only of the four primary colours indicates a deliberate omission of the fourth...'

<sup>81</sup> *ibid* [30] (Lord Nicholls).

<sup>82</sup> *ibid* [19], [33] (Lord Nicholls); [67]-[68], [101] (Lord Millett, dissenting on the basis that 'these questions are essentially question of social policy which should be left to Parliament.'). See also *Re S* [(n77)] at [40] (Lord Nicholls): 'a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment.'

<sup>83</sup> *ibid* [33] (Lord Nicholls); [115] (Lord Rodger). See also *Re S* (n77) [40] (Lord Nicholls).

<sup>84</sup> Richard Ekins *Protecting the Constitution* (n50) 24. See also Conservative Party, *Protecting Human Rights in the UK* (n15) 6.

which are inconsistent with Parliament's intention.

38. Although section 3 enables courts to go beyond the unambiguous words of a statute, the courts have, in most cases, been careful not to go beyond the enacting Parliament's overarching intention.<sup>85</sup> It may be that the approach of the courts in some specific case and older cases can be criticised,<sup>86</sup> however, our review of the case law from 2013 onwards has shown that: (i) there have been very few cases in which the courts have used section 3 - we have found only 24 cases in which section 3 was used to interpret legislation that would otherwise have been incompatible with Convention rights; and (ii) when it has been used this has not been done in a radical way.<sup>87</sup> In addition, the Government sometimes accepts that section 3 is the appropriate remedy if a breach is found.<sup>88</sup>
39. In cases where the proposed interpretation would undermine a fundamental feature of the legislation – in other words, where the interpretation would conflict with the enacting Parliament's fundamental intention – the proposed interpretation is rejected.<sup>89</sup> The courts

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<sup>85</sup> See, for example, *R (on the application of Aviva Insurance Ltd) v Secretary of State for Work and Pensions* [2021] EWHC 30 (Admin) [35]-[36]; *Re A (Surrogacy: s.54 Criteria)* [2020] EWHC 1426 (Fam) [26]-[28], [31], [35], [54]; *Re X (Parental Order: Death of Intended Parent Prior to Birth)* [2020] EWFC 39 [24]-[29], [85]-[86], [93]; *O'Donnell v Department for Communities* [2020] NICA 36 [77]; *C v Governing Body of a School* [2018] UKUT 269 (AAC) [95]; *Wandsworth LBC v Vining* [2017] EWCA Civ 1092 [75]; *Fessal v Revenue and Customs Commissioners* [2016] UKFTT 285 (TC) [28]-[29].

<sup>86</sup> Ekins and Gee identify the case of *R v A (No. 2)* [2001] UKHL 25 as the 'highpoint of [section 3's] misuse', *Submission to the Joint Committee on Human Rights* (2018) para 18, available at <<https://policyexchange.org.uk/wp-content/uploads/2018/10/JPP-submission-to-the-JCHR-inquiry-18-September-2018.pdf>>. That case was decided in 2001, shortly after the HRA came into effect and before *Ghaidan* was decided.

<sup>87</sup> We analysed 593 cases where judgment was given between 1 January 2013 and 31 December 2020, which Westlaw identified as mentioning section 3 of the HRA. In addition to the 24 cases in which section 3 was used to interpret legislation that would otherwise have been incompatible with Convention rights, there were 30 cases where section 3 was used to support, or as an alternative to, an interpretation that was reached using normal principles of statutory interpretation. We also identified a handful of cases where there was no question of a prima facie breach of the HRA as a result of the statute, but section 3 was used to interpret the terms used in a statute in line with the Convention and to justify the application of ECtHR jurisprudence when applying the statute to the facts of the case. The majority of these cases related to the interpretation of the Equality Act 2010.

<sup>88</sup> See for example *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, per Lord Phillips, [67] 'It is perhaps open to question whether the House would have been prepared to read down the statute had this been anticipated. No party has suggested, however, that the reading down should be replaced with a declaration of incompatibility and I believe that there is good reason to let the reading down stand.' and per Lord Scott, [95] 'I am not sure that, if the point had been taken on these appeals, I would have agreed with my noble and learned friend's reading-down of the statutory power to make control orders... But the Secretary of State has accepted that the relevant statutory provisions should be construed with the words proposed by my noble and learned friend read into paragraph 4(3)(d) of the Schedule... So be it.' See also Lord Phillips, First Lord Alexander of Weedon Lecture (2010), available at <[https://www.supremecourt.uk/docs/speech\\_100419.pdf](https://www.supremecourt.uk/docs/speech_100419.pdf)>.

<sup>89</sup> See, for example, *AR v Secretary of State for Work and Pensions* [2020] UKUT 165 (AAC); *Steer v Stormsure Ltd* [2020] 12 WLUK 427; *FS v RS* [2020] EWFC 63; *WB (a protected party through her litigation friend the Official Solicitor) v W District Council v Equality & Human Rights Commission* [2018] EWCA Civ 928; *R. (on the application of K (A Child)) v Secretary of State for the Home Department* [2018] EWHC 1834 (Admin); *Re K (Children) (Unrepresented Father: Cross-Examination of Child)* [2015] EWCA Civ 543; *Re Z (A Child) (Surrogate Father:*

are particularly conscious of principle (e) above and decline to make use of section 3 in circumstances where to do so would go beyond their institutional competence. For example, in *Bellinger v Bellinger*,<sup>90</sup> the House of Lords did not find it 'possible' under section 3 to interpret 'male' and 'female' to include transgender persons who identified as the sex opposite to that which they were assigned at birth.<sup>91</sup> Lord Nicholls explained that:

*This would represent a major change in the law, having far reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament...*<sup>92</sup>

40. More recently the Upper Tribunal held that the Social Security Contributions and Benefits Act 1992 could not be interpreted so as to grant widowed parent's allowance to an unmarried parent whose partner had died. Such a benefit could only be paid to a 'spouse' married under English law. The UT held that the different democratic functions of Parliament and the courts had to be respected and that it was not possible to read the legislation any other way without crossing the divide between the interpretative function of the courts and matters of policy that were democratically entrusted to Parliament.<sup>93</sup> In *Mathieson v Secretary of State for Work and Pensions*, the Supreme Court declined to use its section 3 powers in order to afford the Secretary of State the opportunity to consider what adjustments could be made to regulations which suspended disability living allowance after 84 days in hospital in order to avoid the violation of the rights of disabled children.<sup>94</sup> In *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* the Court of Appeal found that the Fatal Accidents Act 1976 was incompatible with Article 14 read with Article 8 to the extent that it excluded cohabitants of over two years from its scheme for

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*Parental Order* [2015] EWFC 73; *R (on the application of Boots Management Services Ltd) v Central Arbitration Committee* [2014] EWHC 65 (Admin).

<sup>90</sup> *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467.

<sup>91</sup> *ibid*. A transgender woman argued that she should be recognised as female, and as such that her marriage to her husband should be deemed valid in law. Marriages between persons of the same sex were not valid at that time the Matrimonial Causes Act 1973 s 11(c) was passed.

<sup>92</sup> *ibid* [37]. See also [45]: 'the recognition of gender reassignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion. There should be a clear, coherent policy. The decision regarding recognition of gender reassignment for the purpose of marriage cannot sensibly be made in isolation from a decision on the like problem in other areas where a distinction is drawn between people on the basis of gender'; and [18] discussing the Court of Appeal judgment: 'At what point would it be consistent with public policy to recognise that a person should be treated for all purposes, including marriage, as a person of the opposite sex to that which he or she was correctly assigned at birth? This is a question for Parliament, not the courts'.

<sup>93</sup> *AR v Secretary of State for Work and Pensions* [2020] UKUT 165 (AAC).

<sup>94</sup> [2015] UKSC 47.

bereavement damages. However, it could not use section 3 to interpret the relevant provision so as to apply to cohabitants of two years plus as this would 'give rise to policy decisions which the court cannot make.'<sup>95</sup>

41. We recognise that the use of section 3 does sometimes enable Convention-compliant interpretations to be adopted in situations that the enacting Parliament did not consider or foresee,<sup>96</sup> however this is not the same as interpreting statutes in a manner inconsistent with Parliament's intention and can in fact ensure that Parliament's overarching intention is realised. The facts of *Warren v Care Fertility* serve by way of example. A woman sought a declaration that it was lawful for the sperm of her late husband to be stored beyond a certain date.<sup>97</sup> Regulations adopted under the Human Embryo and Fertilisation Act 1990 permitted an extension of the storage period, but only if certain forms were completed.<sup>98</sup> The clinic had failed to provide the proper documentation,<sup>99</sup> but the tribunal was satisfied that it would have been completed had it been provided.<sup>100</sup> A restrictive interpretation of the legislation would have interfered with the couple's Article 8 rights.<sup>101</sup> In deciding whether it was 'possible' to use section 3 HRA to reach a Convention-compatible interpretation, the tribunal noted that Parliament had 'intended to enable a [consenting] deceased man's sperm to be used by [his widow]', but that 'neither the Regulations nor statute' had made any provision about what should happen if the clinic failed to provide the correct documents.<sup>102</sup> The application of section 3 facilitated a declaration that the man's sperm could be stored beyond the normal expiry date, despite the fact that the correct paperwork had not been completed.<sup>103</sup>
42. Crucially, in our view the will of Parliament includes an intention that legislation should not be incompatible with Convention rights. Legislation interpreted under section 3 has to be read in light of both the enacting Parliament's intention *and* the intention of Parliament

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<sup>95</sup> [2017] EWCA Civ 1916, [98].

<sup>96</sup> See, for example, *Gilham v Ministry of Justice* [2019] UKSC 44 [42]-[43]; *Re X* (n85) [93]; *Wandsworth* (n85) [75]; *Re A (Surrogacy: s.54 Criteria)* (n85) [31]-[32].

<sup>97</sup> [2014] EWHC 602 (Fam).

<sup>98</sup> Human Fertilisation and Embryology (Statutory Storage Period for Embryos and Gametes) Regulations 2009.

<sup>99</sup> *Warren* (n97) [76].

<sup>100</sup> *ibid* [97], [98].

<sup>101</sup> *ibid* [117]-[127].

<sup>102</sup> *ibid* [136]; [103].

<sup>103</sup> *ibid* [139].

in 1998.<sup>104</sup> At the time of the HRA's passage, it was understood that Convention-compliant interpretation would be 'possible' in almost all cases – in other words, that section 3 would be strong, in order to maximise the potential for rights enforcement at a domestic level.<sup>105</sup> Parliament was also aware when it enacted the HRA that the ECHR is a living instrument,<sup>106</sup> and that domestic courts would also need to be able to interpret legislation in light of present day conditions in order to keep pace with Strasbourg. As Lord Nicholls has explained:

*It may have come as a surprise to the members of the Parliament which in 1988 enacted the statute construed in the Ghaidan case that the relationship to which they were referring could include homosexual relationships. In that sense the construction may have been contrary to the "intention of Parliament". But that is not normally what one means by the intention of Parliament. One means the interpretation which the reasonable reader would give to the statute read against its background, including, now, an assumption that it was not intended to be incompatible with Convention rights.<sup>107</sup>*

43. For the vast majority of post-HRA primary legislation this assumption is made explicit by a statement issued by the Minister in charge of the Bill to the effect that the provisions of the Bill are compatible with Convention rights.<sup>108</sup> In the rare case where the Minister has declined to make a statement of compatibility in relation to a piece of legislation, the courts have been deferential in their use of section 3.<sup>109</sup> In respect of pre-HRA legislation, the intention of Parliament in enacting section 3 of the HRA was that such legislation should, as far as possible, be read in a way that renders it compatible with Convention rights. It is, of course, always open to Parliament to legislate to reverse or modify a section 3 interpretation. Parliament has from time to time legislated to reverse interpretations by courts which applied conventional common law principles of statutory interpretation.

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<sup>104</sup> *Ghaidan* (n75) [40] (Lord Steyn): 'there is the constant refrain that a judicial reading down, or reading in, under section 3 would flout the will of Parliament as expressed in the statute under examination. This question cannot sensibly be considered without giving full weight to the countervailing will of Parliament as expressed in the 1998 Act.'

<sup>105</sup> See HL Deb 5 February 1998, vol 585, col 840, in which the Lord Chancellor said that 'in 99 per cent. of the cases that will arise, there will be no need for judicial declarations of incompatibility. See also HL Deb 18 November 1997, vol 583, col 535; Tom Sargent Memorial Lecture, 16 December 1997; Lord Irvine of Lairg, *Human Rights, Constitutional Law and the Development of the English Legal System: Selected Essays* (Hart Publishing 2003) 25. Richard Bellamy, 'Political constitutionalism and the Human Rights Act' (2011) 9(1) *ICON* 86, 96. Section 3 was modelled on the strong interpretative duty which applied with respect to European Union law, as set out in *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135, 4159.

<sup>106</sup> *Tyrer v the United Kingdom* (Application no. 5856/72) para 31. Ekins' view is that 'Parliament in 1998 chose to tolerate [the living instrument doctrine] and to give it effect in our domestic law', Richard Ekins, 'Human Rights and the Morality of Law' (5 June 2019, UK Constitutional Law Association). Available at <<https://ukconstitutionallaw.org/2019/06/05/richard-ekins-human-rights-and-the-morality-of-law/>>.

<sup>107</sup> *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30 [18].

<sup>108</sup> HRA s 19(1)(a).

<sup>109</sup> See, for example, *Animal Defenders International*(n65). See HRA s 19(1)(b).

44. We are concerned that criticisms of section 3 misconstrue the ‘will of Parliament’ as the clear words of the statute alone. Under long-established common law rules for interpreting statutes, the ‘will of Parliament’ is not to be viewed as the actual subjective intention of a particular group of politicians. It is the intention that must be imputed to the legislature by reference to the words used and the context in which they are used.<sup>110</sup> The ‘will of Parliament’ is the legal meaning of an enactment. The legal meaning may or may not correspond to the grammatical or literal meaning. The function of determining the legal meaning of legislation is exclusively the function of the court. The object in construing an enactment is to ascertain the intention of the legislature as expressed in the enactment, considering it as a whole and in its context, and acting on behalf of the public. For this purpose, the court applies to the enactment an established set of rules, principles, presumptions and canons which govern statutory interpretation.<sup>111</sup> The purpose of the law governing statutory interpretation is to give effect to the rule of law generally, and in particular, to the constitutional function of the courts to define the powers of the other arms of the state. It is an inevitable consequence of these rules on the interpretation of statutes that the legal meaning as found by the court will, on some occasions, be different from the will of Parliament as ascertained by those who do not apply the same principles. Parliament is not misled: it is taken to know the laws on statutory interpretation.<sup>112</sup>

**If yes, should section 3 be amended (or repealed)?**

45. Our view is that section 3 should not be weakened or repealed. It is almost inevitable that the practical effect of doing so would be to leave individuals whose rights have been breached without access to a domestic remedy.

46. Ekins and Gee have suggested that section 3 is:

*similar to the equivalent provision, section 6, of the New Zealand Bill of Rights Act 1990, on which the HRA is partly modelled. However, whereas section 6 has been interpreted only to permit reasonable interpretations, section 3 has been interpreted*

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<sup>110</sup> See *R (Black) v Secretary of State for Justice* [2017] UKSC 81 per Lady Hale ‘the goal of all statutory interpretation is to discover the intention of the legislation... That intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose’, [36].

<sup>111</sup> Halsbury's Laws vol 96(2018) paras 694 697-8, 708 and ff.

<sup>112</sup> These are well-known to the Office of the Parliamentary Council who draft legislation.



*and developed to be a much more radical instrument.*<sup>113</sup>

47. The two provisions *have* been interpreted differently, but this is because the purpose of the HRA is fundamentally different from that of the New Zealand Bill of Rights Act (“NZBORA”). The HRA was enacted in order to ‘bring rights home’, i.e., to make rights domestically enforceable, and reduce the number of individuals who take their cases to Strasbourg.<sup>98</sup> On the other hand, no supranational court supervises New Zealand’s compliance with its human rights obligations.<sup>114</sup> In addition, the narrower scope of the NZBORA’s interpretative provision partly influenced the New Zealand court to become more ‘active’ elsewhere, developing their own remedy of a declaration of inconsistency when NZBORA did not include a DOI equivalent.
48. Where rights are not enforceable domestically, individuals will likely seek to enforce them supranationally. During a debate on a proposal to weaken section 3, the Home Secretary made the following comment:

*I cannot see what could be gained by that... apart from the prospect of more cases ending up in Strasbourg because fewer people would be satisfied with the interpretation of the United Kingdom courts.*<sup>115</sup>

49. On a domestic level, the alternative to a compatible interpretation is a declaration of incompatibility. As such, if section 3 were repealed or weakened by amendment, it is highly likely that declarations of incompatibility would be issued more frequently. During a debate on the merits of replacing the word ‘possible’ in section 3 with the word ‘reasonable’, the Lord Chancellor stated that ‘the only intention that I could divine behind [this proposal] would be to maximise rather than minimise declarations of incompatibility which would tend to bring the statute book into unnecessary disrepute.’<sup>116</sup> As discussed at paragraphs 58-62 below, we believe that there are a number of issues with increasing the use of declarations of incompatibility, not least that they do not secure the rights of

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<sup>113</sup> Ekins and Gee, *Submission to the Joint Committee on Human Rights* (n86) para 18.

<sup>114</sup> See Benedict Coxon, ‘The Prospective (Ir)Relevance of Section 3 of the Human Rights Act: A Comparative Perspective’ (2020) 20 *Statute Law Review* 1; *R v Hansen* [2007] NZSC 7 [246]. The NZBORA does seek to give effect to the International Covenant on Civil and Political Rights (ICCPR) (*R v Hansen* [2007] NZSC 7 [246]), however, whilst failures to comply with the ICCPR can be submitted to the Human Rights Committee for a judgment, they do not have any binding effect. Coxon explains how the legislative histories and judicial treatment of the two Acts have consequently differed and see also the New Zealand Supreme Court’s discussion in *Hansen*.

<sup>115</sup> HC Deb 3 June 1998, vol 313, cols 421–2.

<sup>116</sup> HL Deb 18 November 1997, vol 583, col 536.

the applicant or provide them with effective redress.<sup>117</sup>

### The common law principle of legality

50. If section 3 were to be repealed or substantially weakened, the courts would still be able to use the common law principle of legality as an interpretive tool. It is therefore worth considering what the position under common law would be. The principle of legality provides that rights and constitutional principles recognised by the common law will not be treated as overridden by statute unless by express language or clear and necessary implication.<sup>118</sup>
51. There are a number of risks associated with greater reliance on the legality principle. In its current form it would result in a weaker form of rights protection. Indeed it was the failure of the common law to sufficiently protect Convention rights that led to the HRA being enacted in the first place.<sup>119</sup> Whilst general or unambiguous words will not be interpreted to override fundamental rights, under the orthodox approach to the principle of legality rights-compatible interpretation will not be possible in the face of clear unambiguous language.<sup>120</sup> In addition, under section 3 courts may ‘read in’ language to a statute and are not limited to ‘reading down’ legislation.<sup>121</sup>
52. It is possible that the repeal or amendment of section 3 would lead the courts to develop the principle of legality further, and there have already been suggestions that it can be applied to unambiguous wording.<sup>122</sup> It is also possible that the courts might even go

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<sup>117</sup> A declaration under section 4 has been held not to constitute an effective remedy for the purposes of the ECHR, *Burden v UK* (2008) 47 EHRR 38 [40]–[44].

<sup>118</sup> See *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1. It might be that the common law approach in New Zealand differs somewhat from that in the UK. Claudia Geiringer, ‘The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*’ (2014) 4 (22) Victoria University of Wellington Legal Research Papers 59, 77.

<sup>119</sup> For example, *Golder v. United Kingdom* - 4451/70 [1975] ECHR 1 (21 February 1975) in which a UK court’s literal interpretation of the Prison Rules resulted in the infringement of a prisoner’s rights under Articles 6 and 8. As with many of the pre-HRA cases which the UK lost in Strasbourg, the UK court probably should have decided this case differently at the time, applying the principle of legality (i.e., in this case, the common law right of access to justice). A UK court probably would decide such a case differently now, absent the HRA, in particular, due to developments in the principle of legality (see para 52 and footnote 122 below).

<sup>120</sup> *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 157 (Lord Diplock).

<sup>121</sup> Sir Phillip Sales, ‘A comparison of the principle of legality and section 3 of the Human Rights Act 1998’, Statute Law Society Conference (Belfast, October 2008), p.12, available at <[http://www.statutelawsociety.co.uk/wp-content/uploads/2014/01/A\\_comparison\\_of\\_the\\_principle\\_of\\_legality\\_and\\_section\\_3\\_of\\_the\\_Human\\_Rights\\_Act\\_1998\\_Mr\\_Justice\\_Sales.pdf](http://www.statutelawsociety.co.uk/wp-content/uploads/2014/01/A_comparison_of_the_principle_of_legality_and_section_3_of_the_Human_Rights_Act_1998_Mr_Justice_Sales.pdf)>

<sup>122</sup> See *R v Secretary of State for the Home Department ex parte Simms* [1999] UKHL 33 at 340F-H (Lord Steyn): ‘...even in the absence of an ambiguity there comes into play a presumption of general application operating as a constitutional principle... This is called “the principle of legality”’. See also 341F–H (Lord Hoffmann), suggesting that ‘the principle of legality will be expressly enacted as a rule of construction in section 3’, and Michael Fordham and Thomas de la Mare, ‘Anxious Scrutiny, the Principle of Legality and the Human Rights Act’ (2000) 5(2) Judicial

further than the current section 3. Under the common law, courts are not constrained by declarations of incompatibility and could develop the principle of legality to enable them to disapply primary legislation that was incompatible with fundamental rights, risking a constitutional crisis or clash between the judiciary on the one hand and the Government and Parliament on the other.<sup>123</sup>

53. The scope of rights protected by the principle of legality is also uncertain. Unlike with section 3 and the rights set out in the HRA, there is no fixed and determinate statement of rights to which the principle of legality applies. The ECHR has been identified as relevant to identification of these rights,<sup>124</sup> but is not an ‘exhaustive statement’ of them.<sup>125</sup> Lady Hale has noted that any list of common law rights is ‘inherently contestable’.<sup>126</sup>
54. The repeal or weakening of section 3 would therefore replace a settled, well understood interpretive tool that is, in general, used with restraint and deference to the institutional competence of the other branches of Government, with the principle of legality the development and use of which would be uncertain. This uncertainty would be compounded by any changes made to the availability and effectiveness of judicial review following the IRAL and their impact on, and interaction with, both the development of the common law and the HRA.

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Review 40, 48, suggesting that ‘if Lord Hoffmann is right that the 1998 Act does not make any such change, this is *not* because the 1998 Act is weak, but because under *Simms* (properly understood and applied) it can finally be said that *the common law is strong*.’

<sup>123</sup> See for example, *R (Jackson) v Attorney General* [2005] UKHL 56, [102], per Lord Steyn ‘The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.’ See also *id.* [104] – [107] per Lord Hope and *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [120] – [123].

<sup>124</sup> *R v Lord Chancellor ex parte Lightfoot* [1999] 4 All ER 583; quotation from first instance judgment [1999] 2 WLR 1126 [1136F–G]; *R v Secretary of State for the Home Department ex parte McQuillan* [1995] 4 All ER 400 p. 422f–j.

<sup>125</sup> *R v Secretary of State for the Home Department ex parte Anufrijeva* [2003] UKHL 36 [27] (Lord Steyn): ‘The principle [of legality] may find its primary application in respect of cases under the European Convention on Human Rights. But the Convention is not an exhaustive statement of fundamental rights under our system of law. Lord Hoffmann’s dictum [on the principle of legality in *ex p Simms*] applies to fundamental rights beyond the four corners of the Convention.’

<sup>126</sup> Lady Hale gives keynote address to the Constitutional and Administrative Law Bar Association Conference 2014: UK Constitutionalism on the March? (12 July 2014) 9. Available at <<https://www.supremecourt.uk/docs/speech-140712.pdf>>.

- 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?**
55. If an amended version of section 3 had unlimited temporal scope, then its application, at least initially, would be unclear.<sup>127</sup> Ekins suggests the enactment of a ‘detailed transitional scheme’,<sup>128</sup> but it is hard to imagine a scheme sufficiently detailed to address every section 3 interpretation that has ever come before the courts.<sup>129</sup> On the other hand, if an amended section 3 were limited in temporal scope, this would give rise to obvious practical difficulties, since two different interpretative regimes would apply to legislation enacted at different times.
56. Ekins suggests that wholesale repeal of section 3 would be a ‘relatively clear change’ but goes on to accept that there would have to be ‘careful [Parliamentary] deliberation about the substance of the relevant changes’, since some post-2000 interpretations might be preferable.<sup>130</sup> Every instance of section 3 interpretation would have to be combed through, to ensure that judgments which rendered legislation rights-compliant are not accidentally overturned. Moreover, there may be cases which were decided using section 3, but in which the same conclusion could have been reached by applying the principle of legality.<sup>131</sup> Ultimately, Ekins recognises that repealing section 3, like amending it, ‘would be no simple legislative act: the rule of law would call for careful, extended thought and then precise, comprehensive action.’<sup>132</sup>

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<sup>127</sup> See, for example, the difficulty in assessing the differences between the HRA s 3, the New Zealand Bill of Rights Act s 6, and the common law principle of legality. Ekins notes that ‘[a]mending s 3 to introduce some new formulation... might have the same effect as outright repeal (it would depend on the terms of the new formulation) or it might substitute for s 3 some intermediary, alternative rule. In the latter case, the amendment would change the existing statute book in ways that would be difficult to predict.’ R. Ekins ‘Rights-consistent interpretation and (reckless) amendment’ UK Const. L. Blog (24th January 2013) available at <<https://ukconstitutionallaw.org/2013/01/24/richard-ekins-rights-consistent-interpretation-and-reckless-amendment/>>.

<sup>128</sup> Ekins, *ibid*.

<sup>129</sup> It is likely this would take the form either of the European Union (Withdrawal Agreement) Act 2020 s 29, or a strong Henry VIII clause. The latter solution in particular runs the risk of undermining Parliamentary sovereignty.

<sup>130</sup> Ekins (n127).

<sup>131</sup> Section 3 is frequently used to support a conclusion reached using the ordinary principles of statutory construction, see *Scottow v Crown Prosecution Service* [2020] EWHC 3421 (Admin); *Re A (A Child) (Adoption Time Limits s.44(3))* [2020] EWHC 3296 (Fam); *Reeves v Revenue and Customs Commissioners* [2018] UKUT 293 (TCC); *England and Wales Cricket Board Ltd v Tixdaq Ltd* [2016] EWHC 575 (Ch); *Re Z (Children) (Application for Release of DNA Profiles)* [2015] EWCA Civ 34; *Pallet Route Solutions Ltd v Morris* [2013] 10 WLUK 324. Section 3 is invoked in the alternative in these cases.

<sup>132</sup> Ekins (n127).

57. In our view, these practical complexities and uncertainties add further force to the argument against repealing or amending section 3.

**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?**

58. From a practical perspective, it is difficult to see how declarations of incompatibility could be considered prior to the question of whether courts are able to interpret the legislation in a Convention-compliant way. An enhanced use of declarations of incompatibility would therefore necessitate an amendment or removal of section 3, and the arguments against this are set out above.

59. More frequent use of declarations of incompatibility would raise concerns about the availability of remedies. As outlined above the purpose of the HRA was to 'bring rights home', so that individuals would have a domestic remedy for human rights breaches. Whilst a declaration of incompatibility has, in all cases so far, ultimately led to a change in the law, in most cases this will not provide a meaningful remedy for the individual claimant in the case whose rights are currently being infringed. A declaration of incompatibility has been found not to constitute an effective remedy for the purposes of the ECHR.<sup>133</sup> Its increased usage may result in more individuals taking cases to Strasbourg, undermining the whole purpose of the HRA to 'bring rights home'. Furthermore, where a declaration of incompatibility is made damages will not be available.<sup>134</sup>

60. The availability of a remedy is a particular concern given that the delays in responding to declarations of incompatibility are significant.<sup>135</sup> While the average time lag for all declarations of incompatibility in the UK is 25 months, the equivalent figures in Canada,

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<sup>133</sup> *Burden v UK* (2008) 47 EHRR 38 [40]–[44].

<sup>134</sup> Under s.8(1) the courts can award damages where they find that an act (or proposed act) of a public authority is (or would be) unlawful. However, by virtue of s.6(2) it will not be unlawful for a public authority to act in a way which is incompatible with a Convention right if it could not have acted differently as a result of primary legislation (or subordinate legislation which could not have been made differently).

<sup>135</sup> Jeff King, 'Parliament's Role following Declarations of Incompatibility under the Human Rights Act' in Murray Hunt, Hayley Hooper, and Paul Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015).

France and Germany are four, one, and nine months, respectively.<sup>136</sup> This is despite the relatively low number of incompatibility declarations issued in the UK.<sup>137</sup>

61. A greater use of declarations of incompatibility may not necessarily result in an enhanced role for Parliament. As outlined in paragraphs 39 and 40 above, the *Ghaidan* principles already mean that courts already issue declarations of incompatibility where Convention-compliance requires policy choices to be made.<sup>138</sup> In cases where it is 'possible' to read legislation in a Convention-compliant way without effecting any great policy change, it is unclear what the benefit of a section 4 declaration would be, as there would be limited scope for Parliamentary debate on 'how best' to address the incompatibility.<sup>139</sup> In addition, more frequent declarations of incompatibility would put increased pressure on Parliamentary time and may merely result in a higher volume of executive made remedial orders, rather than any significant Parliamentary debate.<sup>140</sup>
62. Moreover, the suggestion that declarations of incompatibility should be made more frequently implies that access to Convention rights are subject to Parliamentary approval. On the contrary, as Lady Hale has noted, '[t]he whole point about human rights is their universal character. The rights set out in the European Convention are to be guaranteed to "everyone" (Article 1).'<sup>141</sup> From the 1970s onwards Dworkin argued that rights are 'trumps' on utility- and efficacy-based political decision-making, and that rights are necessary to protect disenfranchised minorities.<sup>142</sup> Sir Rabinder Singh has also noted that the rights of minorities 'are not something which the majority can simply trade away because that is how the calculations come out.'<sup>143</sup> A greater reliance on declarations of incompatibility would undermine this understanding of human rights, and instead imply

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<sup>136</sup> *ibid* Figure 8.3. King does note that this figure may be skewed by the cases of *R(M) v Secretary of State for Health* [2003] EWHC 1094 and *Smith v Scott* [2007] CSIH 9 (*Scotland*); if these two cases are excluded the average lag time for the UK is approximately 17 months.

<sup>137</sup> *ibid*.

<sup>138</sup> See, for example, *AR v Secretary of State for Work and Pensions* [2020] UKUT 165 (AAC); *Office for Gas and Electricity Markets v Pytel* [2018] 12 WLUK 105; *Banks v Revenue and Customs Commissioners* [2018] UKFTT 617 (TC) [128]. See also *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 [37], setting out and applying the same principle.

<sup>139</sup> See *Ghaidan* (n75) for example. The only way to interpret or amend the legislation in a Convention-compliant way would be to extend the protection enjoyed by heterosexual couples to homosexual couples.

<sup>140</sup> Absence of Parliamentary time has been accepted as a 'compelling reason' for the use of such orders. See paragraphs 101.

<sup>141</sup> *P v Cheshire West and Chester Council* [2014] UKSC 19 [36].

<sup>142</sup> Ronald Dworkin, *Taking Rights Seriously* (1977, Harvard University Press), Ronald Dworkin, *Is democracy possible here? Principles for a new political debate* (2006, Princeton University Press).

<sup>143</sup> Rabinder Singh, *Human Rights in the United Kingdom: Essays on Law and Practice* (Hart 1997) 48. See also *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 WLR 581 [186].

that Parliament determines whether individual rights are guaranteed to 'everyone'.

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

63. Article 15 of the Convention allows state parties to derogate from the convention in a 'time of war or other public emergency threatening the life of the nation...to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'<sup>144</sup>

64. The HRA does not incorporate Article 15, but a mechanism is provided in section 14 of the HRA for the Secretary of State to make an order incorporating any derogation made or planned to be made into the Act so that any derogation notified to the Secretary General of the Council of Europe would have affect in domestic law. Section 14(1) states 'In this Act "designated derogation" means any derogation by the United Kingdom from an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State.'

65. Section 1(2) of the HRA provides that Convention rights are to have effect subject to any designated derogation order.

66. There has been only one designated derogation order made since the HRA came on to the statute books.<sup>145</sup> This related to the provisions contained in section 23 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) which allowed for the indefinite detention of non-nationals suspected of terrorism.<sup>146</sup> The Home Secretary notified the Council of Europe of the Government's intention to derogate from Article 5 and made the Human Rights Act 1998 (Designated Derogation) Order 2001, which designated the proposed derogation under section 14 of the HRA. That order was the subject of a judicial review in *A v Secretary of State for the Home Department*.<sup>147</sup> The House of Lords found that the

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<sup>144</sup> Although no derogation is allowed from Article 2 (right to life), except in respect of death resulting from lawful acts of war, or from Articles 3 (torture), 4 para 1 (slavery) and 7 (no punishment without law).

<sup>145</sup> Prior to the enactment of the HRA the UK had two outstanding derogation notifications relation to Article 5 in respect of executive detention in Northern Ireland. Following the enactment of the Terrorism Act 2000 these were withdrawn in February 2001.

<sup>146</sup> In circumstances where deportation was prevented either for a practical reason or because to do so would risk the individuals being subject to torture in breach of Article 3.

<sup>147</sup> UKHL [2004] 56. Section 30 of the ATCSA provided for a 'derogation matter' to be questioned exclusively in legal proceedings before the Special Immigration Appeals Commission and on appeal from the Commission.

requirements of Article 15 had not been met,<sup>148</sup> quashed the designated derogation order and made a declaration of incompatibility in respect of section 23 of ATCSA.

67. The courts generally have the power to quash subordinate legislation. As a piece of subordinate legislation, designated derogation orders are therefore no different. In theory the courts could also use section 3 to read down a derogation order,<sup>149</sup> however, given the nature of the order it is unlikely that this would be possible. In addition, as discussed below, courts often make a declaration disapplying the incompatible subordinate legislation in the particular claimant's case. Again, this is unlikely; if the requirements of Article 15 are not met they will not be met for anyone.

68. The question therefore appears to be asking whether courts should have the power to quash designated derogation orders, or whether designated derogation orders should be given a special status akin to that of primary legislation, so that courts may issue a declaration of incompatibility that does not impact the legal effect of the order.

69. We strongly disagree with this proposition. The effect of a designated derogation order is to disable the courts from invoking sections 3, 4 or 6 of the HRA in relation to the right that has been derogated from. Therefore, when the court quashes the order the rights take effect as normal, meaning that the relevant statutory provision will be in breach of the Convention rights and a declaration of incompatibility will have to be issued, in relation to the relevant primary legislation, as was the case in *A v Secretary of State for the Home Department*. If the courts were unable to quash a designated derogation order, it would remain in force. This would enable the executive to proceed with whatever action it was that required the designated derogation order (for example the indefinite detention), without breaching domestic law. Given the need for a derogation order in the first place, this would result in a serious breach of Convention rights but leave those whose rights have been breached without recourse to the domestic courts.

70. However, we do believe that there is further scope for Parliamentary involvement in any proposed derogations from the Convention and the making of any future designated derogation orders. Currently a designated derogation order can be made without being

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<sup>148</sup> The majority upheld the existence of an emergency threatening the life of the nation but found that the measures weren't 'strictly required by the exigencies of the situation' as required by Article 15. Further, the detention scheme discriminated unjustifiably against foreign nationals and there had been no derogation from Article 14 of the Convention.

<sup>149</sup> HRA 1998 s.3.



laid in draft. Once made it must be laid before Parliament and will cease to have effect after 40 days unless approved by a resolution of each House.<sup>150</sup> We agree with the suggestions of the Joint Committee on Human Rights (“JCHR”) that the Government should undertake to consult the JCHR in advance of any proposed derogation, including providing a detailed memorandum explaining how the Article 15 criteria are met as well as providing Parliament with sufficient time to consider any proposed derogation.<sup>151</sup>

**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?**

71. Courts and tribunals must, so far as possible, interpret subordinate legislation in a Convention compliant manner, under section 3 HRA, unless the primary legislation prevents this. If a section 3 interpretation is not possible then, section 6 of the HRA requires that courts and tribunals disapply the provision of subordinate legislation which results in a breach of a Convention right, so long as the primary legislation allows it to do so.<sup>152</sup> This may take the form of a formal declaration (where the court or tribunal has the power to make a declaration) or the disapplication of the incompatible legislation in the claimant’s case. Where a HRA claim is brought by way of judicial review, the courts and Upper Tribunal, also have the power to quash (or in Scotland reduce) the subordinate legislation. The effect of a quashing order will be to impugn the subordinate legislation, whereas the effect of the declaration or disapplication is that the application of the subordinate legislation to a person in the claimant’s situation would be unlawful, but the legislation continues to have legal effect.

72. There have been relatively few successful challenges to subordinate legislation under the HRA. In a review of HRA cases heard in the period 2014 to 2020 in the High Court and Court of Appeal of England and Wales, and the Supreme Court, the Public Law Project

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<sup>150</sup> HRA 1998 s.16(3) and (5).

<sup>151</sup> Joint Committee on Human Rights, Ninth Report of Session 2019-21. ‘The Overseas Operations (Service Personnel and Veterans) Bill, (HL Paper 155, HC 665) para 152, available at <<https://committees.parliament.uk/work/488/legislative-scrutiny-the-overseas-operations-service-personnel-and-veterans-bill/publications/>>.

<sup>152</sup> Section 6(1) HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. By virtue of section 6(3) courts and tribunals are public authorities for the purpose of section 6(1). It is therefore unlawful for courts or tribunals to make or uphold a decision that is incompatible with an individual’s Convention rights. See *RR v Secretary of State for Work and Pensions* [2019] UKSC 52.

found only 14 successful challenges to subordinate legislation.<sup>153</sup> This is a tiny fraction of the thousands of statutory instruments that are laid each year.<sup>154</sup>

73. Furthermore, the facts of the cases show that there is little evidence of courts being unduly drawn into matters of policy. The courts have been very careful to confine their judgment to the specific elements of the scheme in question that are incompatible, or the specific circumstances of the claimant. For example, in *R (TP, AR & SXC) v Secretary of State for Work and Pensions*, the Court of Appeal stressed that in ‘these appeals we are concerned only with the position of the Respondents and those in a similar position to them. These appeals do not concern the validity of the [Universal Credit] scheme as a whole.’<sup>155</sup> In *Carmichael v Secretary of State for Work and Pensions*, the claimants sought to argue that the lower courts were wrong to apply the ‘manifestly without reasonable foundation’ test when deciding whether the discriminatory effect of the cap on housing benefit on the claimants was justified. The Supreme Court rejected the claimants’ argument that the challenge was not to the policy but to the detail of its implementation.<sup>156</sup> It stated that the question about the impact of the cap on housing benefit on those with disabilities was:

*a clear example of a question of economic and social policy, integral to the structure of the welfare benefit scheme, and it would not be appropriate to depart from the court’s normal approach. Otherwise, it would be too easy for a skilled lawyer to circumvent the general rule by couching the discrimination complaint in terms of an attack on matters of detail.*<sup>157</sup>

74. This is also evident in the courts’ infrequent use of their power to quash subordinate legislation. They recognise that there can be subordinate legislation which does not generally infringe Convention rights but does so in its specific application to a certain individual. In these circumstances the courts recognise it would be inappropriate to quash the subordinate legislation due to the broader policy impacts on an otherwise lawful

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<sup>153</sup> Joe Tomlinson, Lewis Graham and Alexandra Sinclair, ‘Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive law-making?’, U.K. Const. L. Blog (22nd Feb. 2021) available at <<https://ukconstitutionallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/>>.

<sup>154</sup> An average of 3,000 Statutory Instruments a year were issued between 2010 and 2019, House of Commons Library Briefing Paper ‘Acts and Statutory Instruments: the volume of UK legislation 1850 to 2019’ CBP 7438, 4 November 2019 available at <<http://researchbriefings.files.parliament.uk/documents/CBP-7438/CBP-7438.pdf>>.

<sup>155</sup> [2020] EWCA Civ 37 at [198].

<sup>156</sup> [2016] UKSC 58.

<sup>157</sup> *ibid*, [36].

scheme that a quashing order may have.<sup>158</sup> Instead they make a formal or informal declaration that the application of the legislation to the claimant is unlawful. For example, in *Tigere v Secretary of State for Business, Innovation and Skills* Lady Hale stated:

*The problem with quashing the settlement criterion in its entirety is that there must be cases in which it is not incompatible with the Convention rights.... But the appellant is clearly entitled to a declaration that the application of the settlement criterion to her is a breach of her rights under article 14, read with article A2P1, of the Convention.*<sup>159</sup>

Whilst in *Re Gallagher's Application for Judicial Review* Lord Sumption declined to quash a provision of subordinate legislation that breached Article 8 rights because it would introduce a discrepancy between the disclosure required of the Disclosure and Barring Service under the Police Act 1997 and the disclosure required under the Rehabilitation of Offenders Act 1974, he therefore made a declaration instead.<sup>160</sup>

75. Further, the courts have set a very high threshold for quashing subordinate legislation on the ground that it is, in principle, incompatible with Convention rights (as opposed declaring that it operates incompatibly in a particular individual case or that it will operate incompatibly in an identified category of cases). In general, the courts will only find that legislation, including subordinate legislation, is disproportionate if the measure is 'incapable' of being operated in a proportionate way, such that it is 'inherently unjustified in all or nearly all cases'.<sup>161</sup>

76. In the context of the HRA, Ekins has argued that the risk that secondary legislation will be quashed, because a court concludes it is unjustified, undermines legal certainty. He proposes that the HRA should 'be amended to protect subordinate legislation, as well as primary legislation, from invalidation on the grounds of incompatibility with convention

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<sup>158</sup> The courts quashed or otherwise disapplied the incompatible subordinate legislation in only 4 out of the 14 successful HRA challenges to subordinate legislation since 2014 (Tomlinson, Lewis and Sinclair (n153)).

<sup>159</sup> [2015] UKSC 57 at [49]. The case challenged a regulation which required persons to be settled in the UK on the day the academic year begins in order to qualify for a student loan. The effect was that all students with limited or discretionary leave to remain in the UK were ineligible for student loans. The regulation was found to be discriminatory on the basis of the appellants' immigration status and therefore breached the appellant's rights under Article 14, read with Article 2 of Protocol 1 of the Convention.

<sup>160</sup> [2019] UKSC 3. See also *R (TD) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618, where Singh LJ stated that 'it will be a matter for the Secretary of State to decide how to respond to a declaration by this Court that there has been a violation of these Appellants' rights... that may or may not lead to a scheme being designed which benefits other people, who are not before this Court, but the design of any such scheme will in the first instance be for the Secretary of State' [94].

<sup>161</sup> *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68, [69]. See also, *R (MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10, [56] (both cases related to the Immigration Rules, which are subordinate legislation for the purposes of the HRA).

rights. This would discourage political litigation retrospectively to impugn the lawmaking [sic] choices of responsible authorities, helping uphold settled law and protecting the rule of law.<sup>162</sup>

77. However, the ability of courts to quash subordinate legislation is not unique to the HRA. Outside of the HRA context, courts may quash subordinate legislation if it is *ultra vires*. There is a common law power to quash subordinate legislation which is ‘discriminatory; manifestly unjust; made in bad faith or if it “involved such oppressive or gratuitous interference with the right of those subject to them as could find no justification in the minds of reasonable men.”<sup>163</sup> It has not been suggested that this undermines legal certainty. In fact, it is constitutionally proper to distinguish between primary and secondary legislation as the HRA currently does; they are fundamentally different parts of the legislative hierarchy. The latter is made by the executive, not Parliament. It is subject to much less, if any, scrutiny by Parliament and cannot be amended by Parliament.<sup>164</sup> It cannot therefore be considered the ‘will of Parliament’ in the same way as primary legislation.<sup>165</sup>

78. Subject to the possible application of the common law power, removing the ability of the courts and tribunals to quash or disapply incompatible subordinate legislation would have adverse consequences, both for the rule of law in general, and for individual claimants in particular. It would shift the balance of power significantly from the courts and tribunals to the executive. This would be at odds with the division of responsibilities across the branches of government in respect of other areas of law; it has long been the constitutional role of the courts to ensure that the executive only exercises its powers to make secondary legislation in the way in which Parliament intended it to do so.<sup>166</sup> Furthermore, it would

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<sup>162</sup> Ekins, *Protecting the Constitution* (n50), 24.

<sup>163</sup> *R (MM) v Home Secretary* [2014] EWCA Civ 985, [95].

<sup>164</sup> Parliament rejects statutory instruments extremely rarely. As of 2016, only 17 SIs had been rejected in the preceding 65 years (House of Lords Select Committee on the Constitution, ‘Delegated Legislation and Parliament: A response to the Strathclyde Review’ (2016), para 40, available at <<https://publications.parliament.uk/pa/ld201516/ldselect/ldconst/116/116.pdf>>). Subordinate legislation made under the negative resolution procedure in particular receives minimal scrutiny. Six out of the 14 successful challenges to subordinate legislation identified by PLP were to statutory instruments made via the negative resolution procedure (see Tomlinson, Graham and Sinclair (n153)).

<sup>165</sup> Whilst Acts of the devolved legislatures are subordinate legislation for the purposes of the HRA (section 15(1)), the devolution statutes provide that the devolved institutions have no competence to act in any manner contrary to the Convention rights (sections 29 and 543 of the SA, sections 6 and 24 of the NIA and section 94 of the GoWA). The devolution statutes provide that an Act of the devolved legislatures are not law so far as any provision is outside the legislative competence of the legislatures (section 29(1) SA, section 6(1) NIA and section 94(2) GoWA), therefore Acts of the devolved legislature that are incompatible with Convention rights are “not law”.

<sup>166</sup> The Government recently attempted to adopt this approach in the United Kingdom Internal Market Bill which, following amendments at committee stage, contained clause 47(3) which provided for regulations made under certain clauses of the bill to be treated for the purposes of the HRA as if they fell within the definition of ‘primary

undermine the purpose of the HRA by significantly increasing the use of section 4 declarations of incompatibility. Individuals whose rights have been breached would have no effective domestic remedy. They would have to wait for a minister to decide what, if any, remedial action to take.<sup>167</sup>

79. Consideration must also be given to how such a proposal would interact with section 6 of the HRA. Currently section 6(1), which makes it unlawful for public authorities to act in a way which is incompatible with a Convention right, does not apply where the public authority was required to act in such a way due to primary legislation.<sup>168</sup> If subordinate legislation was treated the same as primary legislation for the purposes of the HRA, it would not be unlawful for public authorities to act contrary to Convention rights so long as they were required to do so by subordinate legislation (which the courts could not disapply or quash). This creates an incentive for the executive to channel government decision-making into subordinate legislation to circumvent the effect of section 6. This would not be difficult to do given the broad definition of subordinate legislation currently contained in the HRA.<sup>169</sup>

**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?<sup>170</sup>**

#### Article 2 and 3 investigations

80. The current position is that the HRA applies to acts of public authorities outside of UK territory where the UK exercises 'authority and control' over individuals. In *Al-Skeini v UK* the UK was found to exercise authority and control over Iraqis who had been shot by British troops in the course of operations in Southern Iraq because the UK had assumed

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legislation'. The clause was heavily criticised by the Joint Committee on Human Rights for undermining human rights protections and stated that it did 'not consider that it is constitutionally acceptable for ordinary delegated legislation to be treated for the purposes of the Human Rights Act as if it were primary legislation passed by Parliament', Joint Committee on Human Rights, 'Legislative Scrutiny: The United Kingdom Internal Market Bill. Eighth Report of Session 2019-21, available at <<https://committees.parliament.uk/publications/3151/documents/29299/default/>>'. The clause was not eventually included in the United Kingdom Internal Market Act 2000.

<sup>167</sup> See footnotes 117 and 133.

<sup>168</sup> However, Scottish, Welsh and Northern Irish ministers have no power to do any act that is incompatible with Convention rights (s.57(2) SA, s.24(1) NIA and s.81(1) GoWA).

<sup>169</sup> HRA 1998 s.21(1), 'subordinate legislation' includes, in addition to regulations, orders, rules, schemes, warrants and bylaws.

<sup>170</sup> Sir Michael Tugendhat has not contributed to this section of the response.

responsibility for the maintenance of security there.<sup>171</sup> In *Al-Saadoon v Secretary of State for Defence* the Court of Appeal considered this test in the context of claims by Iraqi civilians killed or injured by British soldiers in Southern Iraq when the UK was not responsible for the maintenance of security there. In the High Court, Leggatt J, as he then was, had concluded that the effect of *Al-Skeini* was that any use of physical force amounted to the exercise of authority and control, and therefore must be done in a way that does not violate Convention rights. The Court of Appeal disagreed holding that the use of lethal force alone was not sufficient and the intention of Strasbourg in *Al-Skeini* was to require that there be an element of control of the individual prior to the use of lethal force.<sup>172</sup> In the recent case of *Hanan v Germany*, the ECtHR held that Germany was under an obligation to investigate a death caused by an airstrike ordered by a German Colonel of the International Security Assistance Force (the “ISAF”). There were special features which triggered the existence of a jurisdictional link: Germany retained exclusive criminal jurisdiction over its troops under the ISAF Forces agreement, and it was obliged under both domestic law and customary international humanitarian law (“IHL”) to conduct an investigation.<sup>173</sup> However, this jurisdictional basis has yet to be tested in the UK courts.

81. As a result of this extraterritorial application of the HRA, there will be circumstances where the deaths and treatment of individuals in the course of overseas operations will be subject to the requirements of Articles 2 and 3 of the Convention, including the procedural obligations to conduct effective investigations.
82. The JPP argues that Article 2 investigations into deaths during armed conflicts, expose service personnel ‘to judicial scrutiny of their service, with consequences for reputation and career and the possibility of subsequent prosecution’ and impact ‘morale, recruitment and operational effectiveness’.<sup>174</sup>
83. The rights in question in these cases are the most fundamental rights to life and freedom from torture and inhuman and degrading treatment; we believe that our armed forces

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<sup>171</sup> (2011) 53 EHRR 18 [149]. In addition, the House of Lords in *Al-Skeini* [2007] UKHL 26 had already found that another Iraqi who had died in detention at a British military base was within the jurisdiction of the UK for the purposes of the HRA as military bases were analogous to embassies, where it was accepted that states exercise jurisdiction.

<sup>172</sup> [2016] EWCA Civ 811.

<sup>173</sup> [2021] ECHR 131.

<sup>174</sup> Ekins, Hennessey and Marionneau, ‘Protecting Those Who Serve’, Policy Exchange 2019, 22, available at <<https://policyexchange.org.uk/publication/protecting-those-who-serve/>>.

should respect these rights. There is no suggestion that British armed forces should be above the law or should not be subject to obligations under the Geneva Conventions, Convention Against Torture and domestic criminal law. As Lord Goldsmith and former Ministry of Defence legal adviser Martin Hemming have both pointed out, there is no mistreatment that would be permissible under the Geneva Convention and UK criminal law but is prohibited by the ECHR.<sup>175</sup>

84. That being the case, we see no issue in principle with holding Convention compliant investigations into the deaths and treatment of individuals during armed conflict. To the extent that these investigations uncover instances of mistreatment or unlawful killing, they may indeed result in 'consequences for the reputation and career and the possibility of subsequent prosecution' for those involved. However, these consequences would exist regardless of the extraterritorial application of the HRA - if members of the armed forces commit offences under English law during operations they can be prosecuted, as was the case for those involved in the death of Baha Mousa.<sup>176</sup> It should also be noted that to the extent the allegations of mistreatment are not found to be substantiated, those allegedly involved will be exonerated by the investigations.
85. In terms of the practicalities of an investigation, in *Al-Skeini v UK* the Strasbourg court acknowledged that the form of investigation that will achieve the purposes of Article 2 may vary depending on the circumstances and authorities are only required to 'take the reasonable steps available to them to secure evidence concerning the incident'.<sup>177</sup> The court also recognised that there 'may be obstacles or difficulties which prevent progress in an investigation in a particular situation'.<sup>178</sup>
86. Clearly there have been problems with the investigation of allegations of mistreatment of Iraqis by the British armed forces. The majority of the allegations investigated by the Al-Sweady inquiry were found to be 'wholly and entirely without merit and justification'.<sup>179</sup>

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<sup>175</sup>Defence Committee, *UK Armed Forces Personnel and the Legal Framework for Future Operations* (HC 2013-14, 931) EV94-95, available at <https://publications.parliament.uk/pa/cm201314/cmselect/cmdfence/931/931.pdf>.

<sup>176</sup> *R v Payne* (CM, 30 April 2007); see also: Sir William Gage, *The Report of the Baha Mousa Inquiry* (HC 2011, 1452-I) paras 1.2 – 1.3. available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/279190/1452\\_i.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/279190/1452_i.pdf).

<sup>177</sup> (2011) 53 EHRR 18 [165], [166].

<sup>178</sup> *ibid* [167].

<sup>179</sup> Sir Thayne Forbes, *The Report of the Al Sweady Inquiry* (HC 2014, 818-II) para 5.198. available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/388295/Volume\\_2\\_Al\\_Sweady\\_Inquiry.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/388295/Volume_2_Al_Sweady_Inquiry.pdf).

The House of Commons Defence Committee found serious failings in the conduct of the Iraq Historic Allegation Team's investigations and noted that none of its investigations had resulted in a prosecution.<sup>180</sup> However, these problems do not reflect on the principle of the extra-territorial application of the HRA. Further, investigations into allegations of abuse have found instances of human rights violations, including the Al-Sweady inquiry<sup>181</sup> and the Baha Mousa Inquiry. The Baha Mousa Inquiry highlights the importance of such investigations. It found a number of serious failings of policies and training governing the interrogation and treatment of detainees by UK armed forces.<sup>182</sup> The government accepted 72 out of the 73 recommendations made in the report<sup>183</sup> and acknowledged that there were serious defects and deficiencies in the way in which the Ministry of Defence prepared military personnel for the Iraq campaign.<sup>184</sup> The inquiry enabled these to be remedied.<sup>185</sup>

87. Limiting the extraterritorial effect of the HRA and removing the investigative duties also runs the risk of exposing British troops (including military leaders who can be held accountable for the actions of their subordinates) to prosecution in the International Criminal Court (the "ICC"). The ICC only investigates when the state in question is unable or unwilling to examine war crimes domestically. The ICC prosecutor recently found that there was 'a reasonable basis to believe' that UK soldiers had committed war crimes against detainees during the conflict in Iraq, however she closed the case due to the existence of inquiries by UK authorities.<sup>186</sup>

### Application of the HRA to British soldiers

88. The Supreme Court has applied the same 'authority and control' test to the question of

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<sup>180</sup> See: House of Commons Defence Committee, 'Who guards the guardians? MoD support for former and serving personnel' (10 February 2017) (HC 109), 3, available at <<https://www.publications.parliament.uk/pa/cm201617/cmselect/cmdfence/109/109.pdf>>.

<sup>181</sup> *The Report of the Al Sweady Inquiry*, Volume 2, (n179) para 5.196.

<sup>182</sup> *The Report of the Baha Mousa Inquiry* (n176).

<sup>183</sup> See Oral Statement to Parliament by Dr Liam Fox, 'Statement on the report into the death of Mr Baha Mousa in Iraq in 2003' (8 September 2011) available at <<https://www.gov.uk/government/speeches/2011-09-08-statement-on-the-report-into-the-death-of-mr-bahamousa-in-iraq-in-2003>>.

<sup>184</sup> 'Who guards the guardians?' (n180) para 84.

<sup>185</sup> The government later reported that it had decided not to make changes in respect of one of the 72 recommendations but that all the other 71 recommendations had been implemented: House of Commons Defence Committee, 'UK Armed Forces Personnel and the Legal Framework for Future Operations: Government Response to the Committee's Twelfth Report of Session 2013–14' (Third Special Report of Session 2014–15) (11 July 2014) (HC 548), 7, available at <<https://www.publications.parliament.uk/pa/cm201415/cmselect/cmdfence/548/548.pdf>>.

<sup>186</sup> The Office of the Prosecutor of the International Criminal Court, *Situation in Iraq/UK: Final Report* (2020) available at <<https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>>.



whether British soldiers carrying out operations in Iraq were within the jurisdiction of the HRA. In *Smith v Ministry of Defence* it held that a state's extra-territorial jurisdiction over local inhabitants exists because of the authority and control exercised over them as a result of the authority and control that the state has over its own armed forces. They are all brought within the state's jurisdiction by the application of the same general principle.<sup>187</sup> Article 2 claims arising from the deaths of British servicemen in Iraq, caused by the detonation of improvised explosive devices whilst they were patrolling in Snatch Land Rovers, could therefore proceed.<sup>188</sup>

89. The JPP has argued that claims made by families of deceased soldiers 'in effect expose actions of personnel to second-guessing in a court of law' and again this has an adverse impact on the operational effectiveness of the armed forces.<sup>189</sup> It proposes that the HRA should be amended to prevent military personnel relying on Article 2 of the ECHR against the Ministry of Defence in respect of injuries sustained on active operations.

90. As we argued in our intervention in *Smith*, British military personnel are required to give complete allegiance and obedience to the UK and are subject to the control and authority of the UK (including UK criminal law) wherever they are. In exchange, they should also be entitled to the protection of UK law at all times, including the protection of the HRA. It would be illogical for UK forces to extend the reach of the UK courts but remain outside of their protection themselves.

91. It should also be noted that the recognition in *Smith* that service personnel are within the UK's jurisdiction affords Article 2 protection in principle, however the actual application of Article 2 will depend on the individual circumstances of claims. The judgment in *Smith* was cautious, recognising the difficulty of decision making in the battlefield and the dynamic conditions there. Lord Hope was conscious that 'the court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate' and that policy decision about training and procurement taken at a high level of command would be outside the scope of Article 2, as would actions taken on the battlefield.<sup>190</sup> He went on

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<sup>187</sup> [2013] UKSC 41, [42]-[52].

<sup>188</sup> *ibid*, [55].

<sup>189</sup> Richard Ekins, Jonathan Morgan and Tom Tugendhat, 'Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat', Policy Exchange, 2015, 7. Available at <<https://policyexchange.org.uk/wp-content/uploads/2017/12/clearing-the-fog-of-law.pdf>>.

<sup>190</sup> *Smith v The Ministry of Defence* [2013] UKSC 41, [76].

to put the claimants on notice that the trial judge will be expected to follow the Court's guidance as to the 'very wide measure of discretion which must be accorded to those who were responsible on the ground for the planning and conduct of the operations during which these soldiers lost their lives and also to the way issues as to procurement too should be approached.'<sup>191</sup>

92. Similar concerns about the impact of the Article 2 claims against the police were raised around the time of *Osman v UK*, in which the Strasbourg court held that the police have a positive duty to protect a person's life under Article 2<sup>192</sup> and in *Commissioner of Police of the Metropolis v DSD*, in which the Supreme Court held that police can be liable for a breach of Article 3 as a result of failure to conduct an effective investigation.<sup>193</sup> The police, like the armed forces operate in a complicated decision-making environment informed by dynamic risks and sensitive resource constraints. However, these concerns have not materialised in practice and effective police operations do not appear to have been unduly hampered by these decisions.<sup>194</sup>

#### Application of the Convention to armed conflict and its interaction with IHL

93. Another line of cases deals with questions relating to the interaction between IHL and the ECHR. In *Al-Jedda v UK*, Strasbourg held that a UN Security Council Resolution did not displace the Government's obligations to protect the right to liberty under Article 5 of the ECHR.<sup>195</sup>

94. However, more recently in *Hassan v UK* the ECtHR held that the nine-day detention of a combatant was compatible with Article 5.<sup>196</sup> Whilst the Court rejected the Government's argument that IHL excluded jurisdiction arising under Article 1 of the Convention, it interpreted Article 5 in light of IHL. It effectively read into Article 5(1) an extra permissible ground for detention where consistent with the Geneva Conventions and read down the requirements of Article 5(4) to allow for the administrative forms of review under the Fourth

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<sup>191</sup> *ibid*, [81].

<sup>192</sup> [1999] 1 F.L.R. 193 (ECtHR)

<sup>193</sup> [2018] UKSC 11.

<sup>194</sup> Miles Jackson, 'The Fog of Law', EJIL: Talk!, 2015, available at <<https://www.ejiltalk.org/the-fog-of-law/>>.

<sup>195</sup> [2011] ECHR 1092. The House of Lords had previously held in *Al-Jedda v Secretary of State for Defence* [2007] UHL 58 that the indefinite detention without charge of a dual British/Iraqi national in a Basra facility was lawful because the UK had been authorised to act by a UN Security Council Resolution, which took precedence over any ECHR obligation.

<sup>196</sup> [2014] ECHR 936.

Geneva Convention. It was expressly confined to international armed conflicts, however in *Serdar Mohammed v Secretary of State for Defence*<sup>197</sup> Lord Sumption expanded the ruling in *Hassan*, to cover non-international armed conflicts as well. He held that detention would be lawful where a positive authority for it existed under some other part of international law.<sup>198</sup>

95. One of the key criticisms of the extraterritorial application of the HRA is that the ECHR was designed for conditions of peace and never intended to apply to combat,<sup>199</sup> but is now supplanting the more practical laws of war – the IHL regime – resulting in ‘a highly confusing variable legal geometry for British commanders.’<sup>200</sup> Furthermore, when the HRA was going through Parliament it was never anticipated that it would operate in a way as to affect the activities of UK forces abroad.<sup>201</sup> The JPP would therefore like to see the HRA amended to provide either that the Act only applies within the territory of the UK or that the Act only applies outside the UK in carefully limited circumstances.<sup>202</sup>

96. It seems unlikely that the ECHR was intended to apply only in peacetime given that Article 15 provides for derogation of certain rights ‘in time of war or other public emergency threatening the life of the nation.’<sup>203</sup> Further, extraterritorial application was not unheard of or novel at the time the Human Rights Act was going through Parliament, as there were already a number of well-known cases which had held that the Convention could apply extraterritorially.<sup>204</sup> The International Court of Justice has also supported the position that human rights treaties continue to apply during armed conflict.<sup>205</sup> Further, in light of *Hassan v UK* this concern seems unfounded given the ECtHR’s finding that although Convention rights do apply in international armed conflict, they have to be read in light of IHL.<sup>206</sup>

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<sup>197</sup> [2017] UKSC 2.

<sup>198</sup> It was therefore possible for the UK to detain combatants captured in Afghanistan for longer than the 96 hours provided for in the International Security Assistance Force regulations and Afghan law, if this was needed for imperative reasons of security.

<sup>199</sup> Ekins, Morgan and Tugendhat, ‘Clearing the Fog of Law’ (n189) 8, 9, 27, 28 and 31.

<sup>200</sup> *ibid* 8.

<sup>201</sup> *ibid* 13 and 29.

<sup>202</sup> Ekins, Hennessey and Marionneau, (n174) 10-11.

<sup>203</sup> C Greenwood, ‘Rights at the Frontier’ in *Law at the Centre* (Kluwer 1999) 279 cited in Eirik Bjorge, ‘The Fogmachine of War: A Comment on the Report “Clearing the Fog of Law”’, EJIL:Talk!, 13 April 2015, available at <<https://www.ejiltalk.org/the-fogmachine-of-war-a-comment-on-the-report-clearing-the-fog-of-law/>>.

<sup>204</sup> For example, *Cyprus v Turkey* (1977) 62 ILR 4, 74 [19]; *Loizidou v Turkey* (Merits) (1996) 108 ILR 443 [56].

<sup>205</sup> In *Nuclear Weapons and Wall*, the ICJ held that ‘the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation’, ICJ Rep 2004 p 136, 178 at [106]; ICJ Rep 1996 225, 240 [25].

<sup>206</sup> Ekins, Morgan and Tugendhat, (n189) 29.

97. Even if such an amendment to the HRA were made, it would not alter the extraterritorial effect of the Convention and the UK's obligations in international law. This would leave individuals whose rights have been breached within the extraterritorial reach of Article 1 with no domestic remedy and increase claims against the UK at Strasbourg. It would also send a message that the UK is prepared to disregard fundamental rights such as the protection from torture and inhuman and degrading treatment.<sup>207</sup>

### Derogation

98. Alternatively, the JPP would like the Government to derogate from the European Convention on Human Rights in respect of future overseas armed conflicts – using the mechanism of Article 15 of the ECHR.<sup>208</sup> In 2016, the Government announced that it would introduce a presumption to derogate from the ECHR in future conflicts in order to 'protect' the armed forces from 'persistent legal claims'.<sup>209</sup> Clause 12 of the Overseas Operations (Service Personnel and Veterans) Bill, which had its second reading in the House of Lords on 20 January, would introduce into the HRA a new section 14A requiring the Secretary of State to 'keep under consideration whether it would be appropriate' for the UK to derogate in relation to any "significant" overseas operations.<sup>210</sup>

99. There are a number of potential issues with derogating under Article 15. First, Article 15 allows state parties to derogate in a 'time of war or other public emergency threatening the life of the nation'. To date no state has derogated from the ECHR in respect of an overseas military operation. It is therefore unclear whether 'war' would cover non-traditional forms of conflict such as non-international armed conflicts, peacekeeping operations and counter-terrorism operations,<sup>211</sup> particularly as it is unclear whether the references to 'war' and 'public emergency which threatens the life of the nation' are to be read disjunctively. The UK courts have expressed doubt that certain overseas operations would be able to

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<sup>207</sup> *Delia Saldias de Lopez v. Uruguay*, CCPR/C/13/D/52/1979, UN Human Rights Committee (HRC), 29 July 1981, para 12.3.

<sup>208</sup> Ekins, Hennessey and Marionneau, (n174.) 11 and Ekins, Morgan and Tugendhat, (n189) 8.

<sup>209</sup> Ministry of Defence, 'Government to Protect Armed Forces from Persistent Legal Claims in Future Overseas Operations', 4 October 2016, available at <<https://www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations>>.

<sup>210</sup> Overseas Operations (Service Personnel and Veterans) HL Bill (2019-21) [147]. Available at <<https://publications.parliament.uk/pa/bills/lbill/58-01/147/5801147.pdf>>.

<sup>211</sup> JCHR, 'Overseas Operations (Service Personnel and Veterans) Bill', (n151) paras 133 – 134.

satisfy the conditions for derogation.<sup>212</sup>

100. Second, the rights from which states are able to derogate are limited. No derogation is permitted from Article 2 (right to life) other than in respect to lawful acts of war, Article 3 (freedom from torture and inhuman or degrading treatment and punishment), Article 4(1) (freedom from slavery) and Article 7 (no punishment without law). A derogation would therefore most likely be made in respect of Article 5. However, in light of *Hassan* it is arguable whether there would be any need for the UK to derogate from this article. If the Government decided to derogate from Article 2 in respect of lawful acts of war, then this would be unlikely to have the intended effect of insulating the actions of the armed forces from judicial scrutiny; instead the courts would be called upon to determine whether the deaths resulted from 'lawful acts of war'.<sup>213</sup>

101. Third, derogation from the ECHR could risk weakening the UK's reputation as an upholder of international law and undermine the legitimacy of the operation itself, given that our reasons for conducting overseas operations often centre on the need to prevent human rights abuses.<sup>214</sup>

**e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?**

102. Section 10 enables legislation to be amended by executive order where (i) a court has issued a declaration of incompatibility about it under section 4 HRA; or (ii) the ECtHR has held that the legislation is incompatible with the Convention. If a minister considers that there are 'compelling reasons' for fixing the incompatibility by executive order, they may lay a draft remedial order before Parliament. Parliament then has 60 days in which to scrutinise the proposal, during which period the Joint Committee on Human Rights (JCHR) also considers it. At the end of this period, the minister can lay a draft remedial order. The minister must report details of any representations made during the scrutiny period, and any changes made to the original proposal. Another 60-day period follows,

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<sup>212</sup> In *Al-Jedda v Secretary of State for Defence* [2007] UKHL 58, Lord Bingham expressed doubts that an overseas peacekeeping operation, from which it could withdraw, would ever satisfy the conditions for derogation at [38]. In *Smith v Ministry of Defence* [2013] UKSC 41, Lord Hope expressed similar views in respect of operations undertaken overseas with a view to eliminating or controlling threats to the nation's security ([59-60]).

<sup>213</sup> Aurel Sari, 'The Duty to Derogate: Suspending Human Rights in a Very Limited and Specific Way?', EJIL:Talk!, 18 September 2020, available at <<https://www.ejiltalk.org/the-duty-to-derogate-suspending-human-rights-in-a-very-limited-and-specific-way/>>.

<sup>214</sup> See Overseas Operations (Service Personnel and Veterans) Bill Debate, 20 January 2021, Hansard, vol 809, Lord Dannatt, column 1180 and Baroness Warsi, column 1211.

during which the JCHR issues a report on whether the draft order should be approved. If both Houses approve the order, the minister may make it. If the order is not approved within 120 days after it is laid, then it will lapse.

103. There is also an urgent remedial order process, which permits a minister to make the order *before* laying it before Parliament. The minister must declare in the order that, 'because of the urgency of the matter, it is necessary to make the order with a draft being... approved.'<sup>215</sup> After an urgent order is made, there are 60 days for representations to be made, and the JCHR may also report on it.<sup>216</sup> A replacement remedial order can be laid as a result of such representations.<sup>217</sup> If an urgent remedial order is not approved by Parliament within 120 days, it ceases to have effect.<sup>218</sup> Urgent remedial orders have generally been used where there is a genuine pressing need to remedy the rights breach.<sup>219</sup>

104. The grounds on which the JCHR might draw the attention of each House to a draft order are: (i) that it imposes a charge on public revenues or requires payments to be made to a public authority; (ii) that there is doubt as to whether it is *intra vires*; (iii) that it appears to make unusual or unexpected use of the power under which it is made; (iv) that for any special reason its form or purport calls for elucidation; or (v) that its drafting appears to be defective.<sup>220</sup>

105. We agree with the JCHR that 'As a matter of general constitutional principle, it is desirable for amendments to primary legislation to be made by way of a Bill.', as this allows for greater Parliamentary scrutiny.<sup>221</sup> We also note that in practice Acts of Parliament are

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<sup>215</sup> HRA sched 2 para 2(b).

<sup>216</sup> UK Parliament, *MPs' Guide to Procedure* available at <<https://guidetoprocedure.parliament.uk/articles/Htt2atZR/remedial-orders>>.

<sup>217</sup> *ibid.*

<sup>218</sup> HRA 1998 sched 2 para 4 (4).

<sup>219</sup> See, for example, the Mental Health Act 1983 (Remedial) Order 2001/3712 and the Naval Discipline Act 1957 (Remedial) Order 2004/66. There have been instances of arguable misuse, see the Terrorism Act 2000 (Remedial) Order 2011/631 and Joint Committee on Human Rights, *The Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion (second Report)*, Seventeenth Report of Session 2010-12, HL Paper 192, HC 1483, paras 11-18.

<sup>220</sup> Joint Committee on Human Rights, *Making of Remedial Orders*, Seventh Report of 2001-02 Session, para 17. Available at <<https://publications.parliament.uk/pa/jt200102/jtselect/jtrights/58/5803.htm>>. See House of Commons, Standing Orders, Public Business 2017, HC 4, 152(B), and The Standing Orders of The House of Lords relating to Public Business 2016, HL Paper 3, 72(c).

<sup>221</sup> *ibid* para 32.

more frequently used to address declarations of incompatibility than remedial orders.<sup>222</sup> However, we would not support the abolition of the remedial order process as we appreciate that there are practical reasons why it might be necessary to use a remedial order rather than a Bill. In particular, there may be insufficient space in the legislative timetable and in the absence of a remedial order the remedy of the incompatibility would be significantly delayed. As outlined above, even with the availability of remedial orders, there are already significant delays in responding to declarations of incompatibility.<sup>223</sup> The JCHR also accepts that insufficient Parliamentary time for considering the incompatibility and the absence of a suitable Bill in the legislative timetable for remedying it are ‘compelling reasons’ for use of the remedial order procedure.<sup>224</sup>

106. We do however support the JCHR’s recommendations for minor amendments to the non-urgent remedial order process. These are aimed at ensuring proper scrutiny of remedial orders by Parliament and that the remedial order process does not take longer than necessary. They are:

- a. an amendment to the HRA to stop the 60-day statutory period in which proposed remedial orders lie before Parliament in draft from running when either House is adjourned for more than four days,<sup>225</sup> and
- b. amendment of paragraph 2(a) of Schedule 2 to the HRA to allow a draft remedial order to be approved at any time after being laid before Parliament, at the same time amending the Standing Orders of the House of Commons to ensure that no resolution for approval could be moved in that House until the JCHR had reported. The current second 60-day period creates delays in remedying breaches of

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<sup>222</sup> Ministry of Justice, *Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2019-2020* (December 2020 CP 347) 30.

<sup>223</sup> See para 60 above.

<sup>224</sup> See for example, the JCHR’s scrutiny of the Human Fertilisation and Embryology Act 2008 (Remedial Order). Joint Committee on Human Rights (*Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018, Second Report of Session 2017–19*, HC 645, HL Paper 68, para 26) and the British Nationality Act 1981 (Remedial) Order. Despite raising concerns about the use of a remedial order when a topical Bill was imminent, given the pressing need to address Convention incompatibility was satisfied that there were compelling reasons to proceed by remedial order (Joint Committee on Human Rights, *Proposal for a draft British Nationality Act (Remedial) Order 2018, Fifth Report of the 2017-19 Session* (HC 926, HL paper 146) paras 27-33).

<sup>225</sup> Currently paragraph 6 of Schedule to the HRA provides that no account shall be taken of any time during which Parliament is dissolved or prorogued, or both Houses are adjourned for more than four days, when calculating the 60 day period.

convention rights and is unnecessary if the JCHR has reported that it would be appropriate to approve the draft Order.<sup>226</sup>

107. We are also concerned about the use of remedial orders to amend the HRA itself. This occurred following the decision in *Hammerton v UK* that the HRA's bar on damages for judicial acts 'done in good faith'<sup>227</sup> was a violation of the right to an effective remedy under Article 13 ECHR.<sup>228</sup> The use of Henry VIII powers shifts the balance of power towards the executive and should therefore be narrowly construed so as not to permit amendment of the parent statute.<sup>229</sup> To allow remedial orders to be used to amend the HRA risks the executive upsetting the carefully crafted balance that has been struck by Parliament in its enactment of the HRA. In our view it is preferable that changes to the HRA are subject to debate and authorisation by Parliament. We therefore recommend that section 10 is amended to expressly exclude the possibility of ministers using remedial orders to amend the HRA itself. There is precedent for this in other Acts, for example the European Union (Future Relationship) Act 2020 provides that the Henry VIII powers contained in section 31 may not 'amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it'.<sup>230</sup>

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<sup>226</sup> Joint Committee on Human Rights, Making of Remedial Orders, Seventh Report of 2001-02 Session (n 220), paras 39-44.

<sup>227</sup> Under section 9 HRA.

<sup>228</sup> [2016] ECHR 272. The Human Rights Act 1998 (Remedial) Order 2020 amended section 9 of the HRA.

<sup>229</sup> See, for example, *McKiernon v Secretary of State for Social Security* [1989] 2 Admin LR 133, approved by the House of Lords in *R v Secretary of State for Social Security, Ex parte Britnell* [1991] 1 WLR 198, 204F: 'a delegation to the Executive of power to modify primary legislation must be an exceptional course and... if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach.' JUSTICE has also been cautious about the overuse of Henry VIII clauses in other contexts: see, for example, JUSTICE, *EU Withdrawal Bill: Second Reading Briefing* (September 2017) para 12; JUSTICE, *Public Bodies Bill: Briefing on the Second Reading House of Lords* (November 2010).

<sup>230</sup> The European Union (Future Relationship) Act 2020, s.31(4)(d)