



House of Commons

House of Lords

Joint Committee on Human  
Rights

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# The Government's Independent Review of the Human Rights Act

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Third Report of Session 2021–22

*Report, together with formal minutes relating  
to the report*

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## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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## Summary

The Government has set up an Independent Review into the Human Rights Act 1998. This report contains our views on the topics which are the focus of that Review. The evidence we heard has led us to conclude that there is no case for changing the Human Rights Act.

The Human Rights Act incorporated the European Convention on Human Rights into UK law. It has had a positive impact on the enforcement and accessibility of rights in the UK. Cases are now heard by UK judges in UK courts rather than applicants having to take cases to Strasbourg. This means that cases are heard sooner, court action is less prohibitively expensive, and UK judges are able to take better account of our national context when reaching decisions than judges in Strasbourg. Whilst courts can find legislation incompatible with our ECHR obligations, the courts cannot overturn primary legislation, keeping parliamentary sovereignty intact. The requirement for public authorities to act compatibly with ECHR rights has embedded human rights in the delivery of public services. The Act is a central part of the devolution settlement in the UK. To amend the Human Rights Act would be a huge risk, to our constitutional settlement and to the enforcement of our rights.

The Government's Review looks closely at the relationship between the UK courts and the European Court of Human Rights. We found that the Human Rights Act does not unduly constrain the domestic courts. The requirement in section 2 of the Act that UK courts take into account relevant factors, including ECtHR judgments, is entirely sensible. Without it, UK courts could not engage properly with factors relevant to the matters before them and would risk more successful appeals to Strasbourg. It would also risk the ECtHR having less confidence in UK judgement and thus according the UK less of a margin of appreciation. Any change to section 2 HRA could only serve to damage the rights of UK citizens—with the associated increases in time and cost of cases going to Strasbourg.

The Human Rights Act was designed to maintain parliamentary sovereignty. It does this successfully by the mechanisms in section 3 and 4 of the Act which ensure that legislation is read compatibly with Convention rights where possible. Courts cannot strike down primary legislation; the Government propose amendments to laws where incompatibilities are found (either through primary legislation or remedial Orders) which are then subject to scrutiny by Parliament. Where secondary legislation is found to be incompatible with ECHR rights the Courts can strike it down but this is an appropriate check on the power of the executive rather than a challenge to parliamentary sovereignty. Whilst the Courts may challenge the Government, they do so in a way which is consistent with the wishes of Parliament. As former Attorney General Dominic Grieve QC PC told us, "Did I ever feel that government was being rendered ineffective by Human Rights Act claims? No, I did not." There is no case for changing the Human Rights Act on the basis of the impact on the separation of powers in the UK.

Article 13 of the European Convention on Human Rights provides a right to an effective remedy for a breach of Convention rights. The Government must be cautious about any changes to the Act that would limit the way in which individuals can access effective remedies. In particular, if some categories of people were unable to seek to enforce their

rights in UK courts or if the extra territorial effect of the Act were limited this would mean claimants would need to go to Strasbourg. This would damage enforcement of rights in the UK and would risk placing the UK in breach of its duties under Article 13 of the ECHR.

Our report also makes the following conclusions on other elements of the Government's Independent Review's Terms of Reference:

- There are limits set in the ECHR on when and to what extent a State can derogate from basic human rights protections. It is only right that there are parliamentary and judicial controls to ensure human rights are not violated beyond those limits. More could be done to increase the parliamentary involvement in assessing derogations from the ECHR. Since the Human Rights Act came into force there has only been one designated derogation Order made. There is therefore not enough evidence or need to change the current arrangements for remedies for judicial review or such Orders.
- Remedial Orders are a mechanism to remove incompatibilities found by the courts between Acts of Parliament and human rights obligations. They are subject to enhanced scrutiny by this Committee - we examine Remedial Orders for both procedural propriety as well as substance and our reports inform the subsequent debates and votes by both Houses. Given pressures on parliamentary time there is very little appetite for requiring stricter procedures and processes for non-controversial matters and therefore no argument in favour of change.

The Independent Human Rights Act Review (IHRAR) has not taken place in isolation. It followed the Independent Review of Administrative Law (IRAL), which considered potential reforms to judicial review, which has itself been followed by a Government consultation. Since judicial review applications in the Administrative Court play a key role in enforcing human rights through the HRA, any reforms that would affect access to judicial review or the remedies available would have implications for the efficacy of the HRA and for compliance with Article 13 ECHR. We will scrutinise any forthcoming legislation on Judicial Review with its impact on the enforcement of human rights in mind.

The Human Rights Act has had a wide impact outside the courtroom, Whitehall, and Westminster. The Act requires public authorities to act in a way that is compatible with Convention rights. This duty, contained in section 6 of the Act, has embedded human rights amongst public authorities and has reduced the need for litigation to enforce people's rights. However, where rights do need enforcement through the courts, this must be accessible to all. The Government should take the opportunity of the review of means testing for legal aid support to look at how best to support those who might be least able to defend their rights in court. The Equality and Human Rights Commission must be given the same enforcement powers for human rights as for equality laws.

# 1 Introduction

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1. The Human Rights Act 1998 (HRA) incorporated the European Convention on Human Rights (ECHR) into UK law. It came fully into force two years later, in 2000. Since its introduction the HRA has been subject to four reviews by incumbent Governments, including one which is currently underway. The Conservative Party's manifesto for the 2019 general election, on which the Government was elected, included a commitment to "update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government". The Government's Independent Human Rights Act Review Panel was appointed in January 2021 and is expected to publish its report later this year.

2. We launched our own inquiry into the Government's Independent Human Rights Act Review in January 2021. We wanted to know more about how the Act was operating for those who rely on it when they deliver public services and make decisions about how we are governed. We therefore asked the following questions in our call for evidence:

- Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their Human Rights?
- How has the operation of the Human Rights Act made a difference in practice for public authorities? Has this change been for better or worse?
- What has been the impact of the Human Rights Act on the relationship between the Courts, Government and Parliament?
- Has the correct balance been struck in the Human Rights Act in the relationship between the domestic Courts and the European Court of Human Rights? Are there any advantages or disadvantages in altering that relationship?
- Are there any advantages or disadvantages in seeking to alter the extent to which the Human Rights Act applies to the actions of the UK (or its agents) overseas?

3. We wrote to the Independent Human Rights Act Review on 4 March 2021 in response to their consultation.<sup>1</sup> We used the evidence we had heard and received to that point along with our experience of conducting thematic inquiries, legislative scrutiny, and holding the Government to account on Human Rights matters, to form our view that we did not see that "any compelling case for reform or amendment of the HRA in response to the Review's consultation questions has been made".<sup>2</sup> We continued with our own inquiry. This report is the result of that inquiry.

4. The Independent Review has undertaken its work at a time of profound distress and difficulty for many as the covid-19 pandemic has affected us all. The human rights and the protections afforded by the Human Rights Act have become particularly relevant. Our right to a family life, our right to privacy, and our freedom to associate with others have become increasingly pertinent as has, sadly, the right to life, and the duty of the

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1 Letter to Sir Peter Gross, Chair, Independent Review of the Human Rights Act, [regarding the Committee's submission](#), dated 4 March 2021

2 Letter to Sir Peter Gross, Chair, Independent Review of the Human Rights Act, [regarding the Committee's submission](#), dated 4 March 2021

state to protect lives. During this time, the Human Rights Act has provided a mechanism for decision makers in Government and on the front-line delivering services to balance rights. It has provided recourse to the courts when things have gone wrong. This has shown us the strengths and weaknesses of the Human Rights Act and its implementation.

5. Our findings are based on the evidence we have heard, and this Committee's experience of holding the government to account on human rights issues. We received 82 written submissions in response to our call for evidence, and took oral evidence from 16 witnesses. We are grateful to all those who took part in our inquiry.

## 2 The Human Rights Act 1998

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6. The Human Rights Act 1998 (“HRA”) incorporated the European Convention on Human Rights (ECHR) into UK law. The aim was to “bring rights home”, enabling people to enforce their rights in the domestic courts. The Act, in the words of Lord Irvine, the then Lord Chancellor, at second reading of the Human Rights Bill in the House of Lords, “does not create new human rights or take any existing human rights away. It provides better and easier access to rights which already exist”.<sup>3</sup>

### The European Convention on Human Rights

7. The ECHR came into force on 3 September 1953. The adoption of the Convention by the Council of Europe was the first step in implementing the UN’s Universal Declaration of Human Rights of 1948. By ratifying the Convention, member states accept international legal obligations to guarantee certain civil and political rights to individuals within their jurisdiction. These rights are contained in a series of Articles of (and Protocols to) the Convention.

8. The European Court of Human Rights (ECtHR) is an international court, based in Strasbourg. It rules on individual or State applications alleging violations of the civil and political rights set out in the ECHR. The ECtHR was established in 1959 by the Council of Europe Member States themselves to ensure the observance of the obligations that they had undertaken. It seeks to ensure compliance with the Convention for 800 million people in the 47 member States that have ratified the Convention. The ECtHR is separate from the European Court of Justice which adjudicates on EU law.

9. The United Kingdom ratified the Convention in 1951 and in 1965 declared that it would accept the jurisdiction of the ECtHR in relation to individual complaints.

### The provisions of the Human Rights Act

10. The HRA effectively incorporated the ECHR into domestic law. The HRA was intended to ‘bring rights home’ and does so in part by allowing human rights claims to be brought in domestic courts, as well as, for example, through a culture shift in the approach taken by public authorities to embedding human rights into their policy-making and operational actions. The central provisions of the Act, which came fully into force on 1 October 2000, are as follows:

- Section 2 ensures that the courts “must take into account” the judgments and decisions of the European Court of Human Rights that are relevant to the proceedings before the court in question.
- Sections 3 and 4 require legislation to be interpreted compatibly with Convention rights “so far as it is possible to do so” and provides for the courts to make declarations of incompatibility when such an interpretation is impossible in relation to primary legislation.
- Section 6 requires public authorities to act compatibly with Convention rights. This obligation applies to all bodies carrying out “functions of a public nature”,

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3 HL Deb, 5 February 1998, [col 755](#)

including central Government and the courts. However, in recognition of the constitutional primacy of Parliament, section 6 expressly does not apply to “either House of Parliament or a person exercising functions in connection with proceedings in Parliament.”

- Sections 7 and 8 give individuals whose rights have been violated the right to bring proceedings and obtain remedies in domestic courts rather than having to go to Strasbourg to have their rights enforced.

## Enforcing human rights in the UK prior to the Human Rights Act

11. Before the HRA's entry into force, the UK was already bound by the ECHR as a matter of international law, which meant the Convention had the following effects in UK domestic law:

- a) The ECHR served as an aid to construction of domestic legislation, but only where there was ambiguity (it being assumed in cases of ambiguity that Parliament intended to legislate compatibly with the UK's international human rights obligations).<sup>4</sup>
- b) It informed the exercise of judicial discretion.
- c) It assisted in establishing the scope of the common law (i.e. law made by judicial interpretation and precedent) where it was developing and uncertain or incomplete.<sup>5</sup>

12. An individual in the UK could enforce their ECHR rights, but only by petitioning the European Court of Human Rights directly. Taking a case to Strasbourg was both time-consuming and expensive. The White Paper that preceded the Human Rights Bill said that, “For individuals and for those advising them, the road to Strasbourg is long and hard. Even when they get there, the Convention enforcement machinery is subject to long delays”.<sup>6</sup> It added that, at that time, it took an average of five years to exhaust all domestic remedies and cost an average of £30,000.

13. An example of the excessive delay involved in the pre-HRA enforcement of ECHR rights is provided by the *Sunday Times* ‘thalidomide’ case.<sup>7</sup> The domestic claim was initially decided by the High Court in 1972, and the final appeal was decided by the House of Lords in 1973. The European Court of Human Rights did not give its ruling until 1979, and Parliament responded to the judgment against the UK by enacting the Contempt of Court Act in 1981. Almost 10 years passed between the violation of rights and the law being changed to resolve the incompatibility.<sup>8</sup>

4 R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696

5 See for example Lord Bingham in R v Lyons [2003] AC 976 [13]. See also Dr Jacques Hartmann (Reader in Law at University of Dundee); Mr Samuel White (Postdoctoral Research Assistant at University of Dundee) ([HRA0016](#)) at paragraph 3.

6 Home Office, *Rights brought home: the Human Rights Bill*, Cm 3782, October 1997, para 1.14

7 Attorney-General v Times Newspapers [1974] AC 273; *Sunday Times v United Kingdom*, App. No. 6538/74, 26 April 1979. The case concerned whether the publication by the Sunday Times of articles concerning children affected by the drug ‘thalidomide’ amounted to contempt of court, and whether the finding that it did infringed Article 10 ECHR.

8 As noted by Professor Richard Stone in *Textbook on Civil Liberties*, Blackstone Press Limited, 1994

14. Moreover, before incorporation cases before Strasbourg would result in judges unfamiliar with the careful balances struck within the UK's domestic legal systems deciding a case usually without the benefit of seeing the analysis of UK judges applying human rights standards to those domestic laws. Domestic courts were very rarely considering the extent of ECHR rights and so would only very rarely have regard to the case-law of the ECtHR (in line with the limited role played by the ECHR summarised in paragraph 12 above). As such, the ECtHR was often the first court to apply the Convention standards to the facts of a UK case. The White Paper argued for the improvements that the HRA could bring to this situation:

“Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts - without this inordinate delay and cost. It will also mean that the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom, and their interpretation will thus be far more subtly and powerfully woven into our law. And there will be another distinct benefit. British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe”.<sup>9</sup>

15. The White paper further suggested that the number of findings against the UK by the Commission and the ECtHR was proof that the approach taken by the UK until that point did not sufficiently reflect the importance of the Convention and had not stood the test of time.

16. As many of our witnesses pointed out, data on UK cases at the ECtHR illustrate the success of the HRA in bringing rights home. The ECtHR told us in their evidence that the number of applications against the UK was low: since 2017 the figure per 100,000 inhabitants was just 0.06 - the lowest of all the 47 Member States over the last four years. Moreover, the vast majority of cases lodged against the United Kingdom were found to be clearly inadmissible and were decided in a summary procedure by a single judge. The Court gave us the most recent statistics:

“In 2020, the Court decided 284 cases lodged against the United Kingdom. It declared inadmissible or struck out 280 applications. It found a violation of the Convention in two cases. It found no violation in one case and it further struck one case out of the list in a judgment following the acceptance of the friendly settlement declaration. In 2019, the Court decided 359 cases lodged against the United Kingdom. It declared inadmissible or struck out 347 applications. It found violation of the Convention in five judgments concerning 12 applications.”<sup>10</sup>

**17. The HRA enables us to argue for our rights in British courts. Relative to population size, the UK has the lowest number of claims brought against it of all Member States at the European Court of Human Rights. Of those claims that are brought, only a tiny fraction lead to an adverse finding against the UK.**

<sup>9</sup> Home Office, *Rights brought home: the Human Rights Bill*, Cm 3782, October 1997, para 1.14

<sup>10</sup> European Court of Human Rights ([HRA0011](#))

## Positive impact of the Act

18. The HRA has brought the rights guaranteed under the ECHR to the foreground for UK public authorities, influencing decision and policy making to improve respect for human rights. Those representing marginalised groups have emphasised the importance of the HRA in enabling those groups to enforce their rights, from children's rights,<sup>11</sup> to those preparing for the end of life.<sup>12</sup>

19. Where public authorities fail to act compatibly with Convention rights, the HRA provides a remedy via the courts. The Equality and Human Rights Commission (EHRC) told us that this has improved practice among public authorities, and provided "a common framework of legal principles, which can promote high-quality, user-focused services, and guide decisions about competing priorities".<sup>13</sup> This also means that many more issues can be resolved without the need to resort to litigation.

20. As we will set out in this report, the duty imposed on public authorities to act compatibly with the Convention, combined with the ability to have human rights claims heard in UK courts, means fewer cases need to go to court, and when they do, the cost and time of finding a resolution are radically reduced.

21. The HRA also reduces the likelihood of the UK Government being found in breach of the Convention by the ECtHR by enabling the UK courts to rule on Convention rights, which they do in a way which is respected by and helpful to the ECtHR. Further, it helps the ECtHR by providing valued UK judicial input into ECHR jurisprudence.

## No case for change

22. The Government asked the Review to consider:

- "The relationship between the domestic courts and the European Court of Human Rights (ECtHR) ...
- The impact of the HRA on the relationship between the judiciary, executive and Parliament, and whether domestic courts are being unduly drawn into areas of policy.
- The implications of the way in which the Human Rights Act applies outside the territory of the UK and whether there is a case for change."<sup>14</sup>

23. The evidence we have received, as we will set out in the chapters that follow, overwhelmingly finds that these are not problematic.

24. By concentrating on these narrow issues, the opportunity has been lost to consider the positive impact of the Human Rights Act, and what can be done to maximise this. As Southall Black Sisters wrote in their submission, the terms of reference "fails to give

11 Article 39 told us: "One of the key benefits of the HRA for children has been the ability to bring cases to national courts, rather than having to go to Strasbourg, and to access remedies more swiftly as a result. Timescales are especially critical for children and young people". Source: Article 39 ([HRA0017](#))

12 Compassion in dying, highlighted the importance of being able to die with dignity and respect: "The HRA has led to individuals being more able to enforce their rights in relation to end-of-life care." Compassion in Dying ([HRA0018](#))

13 Equality and Human Rights Commission ([HRA0025](#))

14 Ministry of Justice, [Government launches independent review of the Human Rights Act](#), 7 December 2020

any consideration to the positive impact that the HRA has had for the most vulnerable in our society".<sup>15</sup> The National Aids Trust told us that "None of the questions seek to assess the success of the HRA's original aim around supporting a culture of respect for human rights or indeed of making Convention rights enforceable in the UK legal system".<sup>16</sup> The legal language of the review was raised by the British Association of Social Workers who told us that "Conversations about the future of human rights should be accessible to all, and not reduced simply to a legal discourse".<sup>17</sup> We will consider these issues ourselves in chapter 11 below.

**25. The HRA has had an enormously positive impact on the enforcement of human rights in the UK. Whilst it is sensible that the Review's terms of reference focused on specific issues, concentrating only on narrow legal and constitutional questions means there is a risk that proposals are made that are divorced from their wider context and will harm the enforcement of human rights.**

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15 Southall Black Sisters ([HRA0062](#))

16 National AIDS Trust ([HRA0060](#))

17 British Association of Social Workers ([HRA0035](#))

### 3 The relationship between the European Court of Human Rights and the Domestic Courts: Section 2 Human Rights Act

#### Introduction

26. This chapter of the Report focusses on the relationship between the domestic courts and the ECtHR, and specifically on section 2 HRA, the concept of margin of appreciation and the practice of judicial dialogue. In order to fully understand the context and operation of section 2, it is necessary to consider:

- a) How Convention rights were enforced in the UK prior to the HRA;
- b) The operation of section 2 HRA, its interpretation, and the extent to which domestic Courts feel free to depart from Strasbourg case-law;
- c) The relationship between the HRA and the margin of appreciation; and
- d) How judicial dialogue has been working in practice.

#### Box 1: IHRAR's Terms of Reference relating to the relationship between the courts<sup>18</sup>

##### **The relationship between domestic courts and the European Court of Human Rights (ECtHR)**

Under the HRA, domestic courts and tribunals are not bound by the jurisprudence of the ECtHR, but are required by section 2 to “take into account” that jurisprudence (in so far as it is relevant) when determining a question that has arisen in connection with a Convention right.

The Review should consider the following questions in relation to this theme:

- 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?
- 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?
- 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?

Source: Independent Human Rights Act Review: [Terms of Reference](#)

<sup>18</sup> These questions were also replicated in IHRAR's own call for evidence - Independent Human Rights Act Review: [Call for Evidence](#). Which additionally noted, “We would welcome any views on how the relationship is currently working, including any strengths and weaknesses of the current approach and any recommendations for change”.

## Section 2 Human Rights Act

### Box 2: Section 2(1) HRA: Interpretation of Convention rights

The HRA provides:

A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

- a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

[ ... ]

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

Source: Human Rights Act 1998, [Section 2](#)

27. Section 2 governs the relationship between the judgments of the ECtHR in Strasbourg and the domestic courts of the UK. It strikes a careful balance between respect for the ECHR, and the institutions that uphold it, and respect for one of the pillars of the UK constitution—the judiciary.

28. Within the domestic legal systems of the UK, courts are strictly required to follow the judgments of more senior courts even if they disagree with them. Those judgments set a binding precedent. The HRA specifically provides that the same system of binding precedent does not apply to the judgments of the ECtHR. The key element of section 2 is that any court or tribunal considering a question that has arisen in connection with a Convention right “must take into account” judgments, decisions or opinions of the ECtHR but only “so far as... relevant to the proceedings in which that question has arisen”.<sup>19</sup> This phrase determines that domestic courts are bound to consider relevant Strasbourg case law when making any decision that relates to Convention rights, but they are expressly not bound to follow it.

29. Such a requirement to have regard to relevant jurisprudence is an essential part of properly assessing the application of Convention rights to a given case. As Lady Hale told us, it is “an integral part of the [HRA]”.<sup>20</sup>

30. The ECtHR President Robert Spano, and Judge Tim Eicke, told us that this relationship is mutually beneficial. Should a claim reach the ECtHR, our domestic courts’ consideration of the legal issues in its judgment helps Strasbourg to understand the UK context, reducing the likelihood of adverse findings. They told us that:

“Domestic judgments frequently set out crucial aspects of the case including the detail of the applicable domestic law, the competing interests at play as well as any potential domestic sensitivities which may be relevant to the

<sup>19</sup> The same obligation applies in respect of (a) opinions and decisions of “the Commission”, a body that ceased to exist in 1998 but which used to form the first part of a two-tier structure, filtering cases before they reached the Court; and (b) decisions of the Committee of Ministers (the Council of Europe’s decision-making body, made up of the ministers of foreign affairs of each member State or their permanent diplomatic representatives in Strasbourg) relating to the execution of final judgments from the Court.

<sup>20</sup> [Q18](#)

margin of appreciation. When the domestic decision-making is undertaken by reference to Strasbourg case-law and principles this is extremely helpful for the Court. As a matter of principle, we can probably say that having the benefit of a careful and detailed domestic engagement with the Convention principles at the national level is likely to reduce the likelihood of finding a violation against the respondent State in question”.<sup>21</sup>

**31. The requirement in section 2 HRA that the court must take into account judgments relevant to the proceedings before it is eminently sensible. It would be bizarre for a court to take into account any factor that is irrelevant to the proceedings in question—equally it would seem irresponsible for a court not to take into account a judgment that was relevant to the proceedings before it.**

### *Courts' interpretation of section 2*

32. Since the HRA came into effect in October 2000 the courts have interpreted section 2 HRA and its effect. In a 2003 judgment of the House of Lords, Lord Slynn stated that while section 2 “does not provide that a national court is bound by” the decisions of the ECtHR, “[i]n 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.”<sup>22</sup> This was followed by the case of *Ullah* in which Lord Bingham said “a national court subject to ... section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law.”<sup>23</sup> However, this has not prevented the domestic courts from departing from Strasbourg case law when they have seen fit—as President Robert Spano and Judge Tim Eicke said, “the UK superior courts can and do take an independent view on specific case-law issues where they consider it necessary to do so”.<sup>24</sup>

33. Overwhelmingly, respondents to our call for evidence, considered that the operation of section 2 HRA struck the right balance. As *Equally Ours* told us:

“ ... the duty to take into account the [ECtHR] jurisprudence has been used in an appropriate and effective way, that finds the right balance between keeping up to date with developments in the case law and applying Convention rights with sensitivity to the UK context. This has allowed for legal certainty while keeping our rights up to date.”<sup>25</sup>

### *Departure from Strasbourg case law*

34. Despite their recognition of the need to follow ‘clear and consistent’ Strasbourg case law, the courts have rejected any suggestion that section 2 HRA prevents them departing from ECtHR jurisprudence where appropriate. Indeed, as Professors Helen Fenwick and

21 European Court of Human Rights ([HRA0011](#))

22 [R \(Alconbury Developments Ltd\) v Secretary of State for the Environment, Transport and the Regions \[2003\] 2 AC 295](#)

23 *R (on the application of Ullah) v Special Adjudicator* [2004] 2 AC 323, at paragraph 20.

24 European Court of Human Rights ([HRA0011](#))

25 *Equally Ours* ([HRA0029](#))

Roger Masterman of Durham University set out in their evidence there are many examples where “domestic courts have chosen not to follow, or apply, European Court of Human Rights decisions in a range of circumstances”.<sup>26</sup>

35. By way of example, in *R v Horncastle*, the Supreme Court chose not to follow a decision of the ECtHR concerning the use of hearsay evidence in criminal proceedings, on the basis that the ECtHR had not fully appreciated the protections in place in the UK system, and therefore had “resulted in a jurisprudence that lacks clarity.”<sup>27</sup> Lord Phillips (giving the judgment of the full seven member Supreme Court) said:

“The requirement to “take into account” the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court. This is such a case.”

36. As Professors Masterman and Fenwick said in their evidence to the Committee, the current judicial approach to the interpretation of s.2(1) has “clear benefits”:

“It respects the position of the European Court of Human Rights as the authoritative interpreter of the Convention’s requirements while allowing some flexibility in the translation of those requirements into domestic law. It encourages critical, rather than mechanical, engagement with the Convention jurisprudence, and as a result promotes dialogues between domestic courts and the European Court of Human Rights.”<sup>28</sup>

**37. The requirements of section 2 HRA strike the correct balance in that the UK courts take into account relevant considerations, but are not bound by them. The domestic courts are not unduly constrained by section 2 HRA as cases where the domestic courts have departed from Strasbourg case-law illustrate. Importantly, even in these cases the domestic courts do have regard to relevant ECHR case-law, so as to best consider how the applicable human rights standards should be applied in the UK context. It is only by UK courts having appropriate regard to the relevant case-law that they can engage with it appropriately, reach the correct results and engage in fruitful judicial dialogue with the Strasbourg Court.**

**38. If domestic courts did not have to take due account of Strasbourg jurisprudence that was relevant to the case before them this would risk domestic cases being decided without due regard to the relevant human rights standards and case law. This in turn**

26 Professor Roger Masterman (Professor of Constitutional Law at Durham Law School, Durham University); Professor Helen Fenwick (Professor of Law at Durham Law School, Durham University) ([HRA0007](#)). See also the examples they provide at paragraph 7 of their evidence.

27 *R v Horncastle* [2009] UKSC 14

28 Professor Roger Masterman (Professor of Constitutional Law at Durham Law School, Durham University); Professor Helen Fenwick (Professor of Law at Durham Law School, Durham University) ([HRA0007](#)), paragraph 10.

would simply mean more successful cases against the UK in Strasbourg. Therefore, any attempt to reduce the extent to which domestic courts are required to 'take into account' caselaw of the ECtHR relevant to the case before them—for example were section 2 to say that a judge “may” take ECtHR case law into account rather than “must”—would inevitably lead to greater numbers of successful appeals to the ECtHR in Strasbourg, as well as poorer enforcement of human rights for victims in the UK.

### *Taking into account ECtHR judgments concerning other States*

39. Even in the domestic legal systems, where lower courts are required to follow the rulings of more senior courts, binding precedent will only apply where the facts of the original case are sufficiently similar to those that appear in new cases. While a legal principle may be binding, it still needs to be applied to the distinct circumstances of an individual case. The courts are very much alert to this and recognise that one set of circumstances are not the same as another—“In law, context is everything.”<sup>29</sup>

40. Domestic courts are thus familiar with this approach of distinguishing between cases and apply the same approach to Strasbourg judgments. Where the circumstances of an individual case, and the national context in which that case arose, are markedly different to the circumstances pertaining in the case before the domestic court, the value of the Strasbourg judgment will be limited. The most a UK court would normally extract from such a judgment would be a statement of principle which it is then able to apply to the facts before it. As Lady Hale told us:

“Where the context is so different from the context in the United Kingdom... they are of less assistance than ones that come from countries where the context is comparatively similar.”<sup>30</sup>

### ***Does section 2 limit our courts?***

41. UK courts have also considered whether section 2 HRA permits them to interpret the protections of the Convention as requiring a higher or more far-reaching standard of protection than has been established in the Strasbourg Court. In doing so, the courts are conscious that a defendant public authority cannot appeal to Strasbourg if it considers that the domestic courts have applied too generous an interpretation of ECHR rights.

42. However, it is unreasonable for the UK courts to be restricted to protecting rights only in circumstances where similar facts have happened to arise in a previous case before the ECtHR. Such a restrictive interpretative approach would run counter to normal interpretative techniques and could lead to perverse results.

43. The traditional approach is for domestic courts to avoid going further than the ECtHR. Lord Bingham, in the case of *R (Ullah) v SSHD*, said:

“It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since

29 Lord Steyn in *R v SSHD*, ex p. Daly [2001] UKHL 26

30 [Q24](#)

the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”

44. In the case of *Al-Skeini*, Lord Bingham’s cautionary words were emphasised by Lord Brown, who suggested that the “last sentence could as well have ended ‘no less, but certainly no more.’” This caution has been reflected in many subsequent judgments.

45. Nevertheless, there have been some instances in which the UK courts have felt able to apply the Convention rights in situations where it was not yet clear how the Strasbourg Court would rule. Lady Hale gave us the example of *Rabone v Pennine Care NHS Trust* in which the Supreme Court considered whether Article 2 ECHR (the right to life) should impose an operational duty to protect informal psychiatric patients who were at a real and immediate risk of suicide.<sup>31</sup> The ECtHR had recognised that such an obligation existed in respect of persons held under state control, but had not yet considered whether this extended to those who were not detained. The Supreme Court concluded that Article 2 ECHR did impose such an obligation. In his speech, Lord Brown sought to clarify, or qualify, the meaning of Lord Bingham’s phrase in the case of *Ullah*:

“What the *Ullah* principle importantly establishes is that the domestic court should not feel driven on Convention grounds unwillingly to decide a case against a public authority (which could not then seek a corrective judgment in Strasbourg) unless the existing Strasbourg case law clearly compels this ... If, however, a domestic court is content ... to decide a Convention challenge against a public authority and believes that such a conclusion flows naturally from existing Strasbourg case-law (albeit that it could be regarded as carrying the case-law a step further), then in my judgment it should take that further step. And that, indeed, is to my mind precisely the position in this very case”.

46. As Lady Hale told us, in a similar case, a few weeks later, the ECtHR reached the same conclusion as the Supreme Court’s interpretation, thus confirming that the Supreme Court “had correctly anticipated what Strasbourg would do in that situation.”<sup>32</sup>

**47. In considering the extent to which the domestic courts should be restricted to merely keeping pace with the Strasbourg case-law, the current balance that has been struck by the case law is sensible. It enables domestic courts to apply the Convention to the domestic context, with their greater understanding of the domestic system, whilst also ensuring that cases that would be a significant step forward in interpreting a Convention right would need to go to Strasbourg. It would seem unhelpful to seek to reopen this careful balance.**

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31 [2012] 2 AC 72

32 [Q22](#)

## Impact of domestic court's consideration of human rights compatibility on the margin of appreciation afforded to the UK

### *Margin of appreciation*

48. The margin of appreciation is a doctrine developed by the ECtHR in its case-law, which forms an important element of the relationship between the Strasbourg court and the courts of the State Parties to the ECHR. It is a recognition that in certain contexts national authorities have available to them a degree of discretion in their choice of policy when regulating the exercise of a Convention right. Where the Strasbourg court accepts that a state is acting within its margin of appreciation it will not further scrutinise the merits of the particular decision in question. Underlying this concept is a recognition of the difficulties in applying a single set of rights to a broad and diverse group of nations and legal regimes, and an acknowledgement that certain factors can be particularly important in a particular domestic or national setting and therefore are best determined by national institutions, such as parliaments or courts, who best understand local sensitivities.<sup>33</sup>

49. There are many examples of the margin of appreciation being applied by the ECtHR in respect of the United Kingdom. For example:

- a) In *Tamiz v UK*<sup>34</sup> the ECtHR rejected an applicant's claim that his Article 8 ECHR right to respect for his private life had been violated by the English court's refusal to allow him to bring a libel claim against Google. The ECtHR accepted that when balancing a claimant's Article 8 ECHR right to private and family life against the Article 10 ECHR rights (freedom of expression) of a defendant, the UK's margin of appreciation was a wide one and there were no strong reasons to justify the ECtHR substituting its views for those of the domestic court.
- b) In *McDonald v United Kingdom*<sup>35</sup> the ECtHR found that the Article 8 ECHR rights of a disabled elderly woman were not violated by a local authority requiring her to use incontinence pads rather than providing her with night-time care, recognising that "states are afforded a wide margin of appreciation in issues of general policy, and that margin is particularly wide when the issues involve an assessment of the priorities in the context of the allocation of limited state resources."

### *Impact of domestic courts' consideration of human rights compatibility on the margin of appreciation*

50. The doctrine of the margin of appreciation is derived from the principle of the 'subsidiarity' of the Convention machinery—i.e. that "the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the Court [ECtHR]. The Court can and should intervene only where the domestic authorities fail in that task."<sup>36</sup>

33 The margin of appreciation may also play a significant role at the admissibility stage, when the ECtHR screens out cases that are 'manifestly ill-founded'. This serves to massively reduce the numbers of cases that ever reach a full hearing. In 2019 the ECtHR decided 359 applications from the UK, 347 of which (approximately 97%) were declared inadmissible.

34 *Tamiz v UK*, ECHR, 2017, Application No. 3877/14.

35 *McDonald v UK*, ECHR, 2014, Application No. 4241/12.

36 As defined by in the European Court of Human Rights, [Interlaken Follow Up, Principle of Subsidiarity](#), June 2010

51. Since the entry into force of the HRA, the ECtHR has been slow to adopt a different conclusion to that taken by the UK domestic Courts. This is because it has recognised that those UK Courts, which are best placed to understand the local particularities, have properly considered the application of Convention rights in the domestic context. As President Robert Spano and Judge Tim Eicke said in their evidence to us:

“... the [ECtHR] has been able to rely on the UK courts’ specific reasoning as to compliance with the Strasbourg principles and case-law; this is because the UK domestic courts and the Court are systematically applying the same set of principles and Strasbourg case-law by reference to the same text. Domestic judgments frequently set out crucial aspects of the case including the detail of the applicable domestic law, the competing interests at play as well as any potential domestic sensitivities, which may be relevant to the margin of appreciation ... .As a matter of principle, we can probably say that having the benefit of a careful and detailed domestic engagement with the Convention principles at the national level is likely to reduce the likelihood of finding a violation against the respondent State”.<sup>37</sup>

**Box 3: Subsidiarity & judicial dialogue: Austin v UK**

The case *Austin v UK* [2012] related to the use of kettling in police cordons around Oxford Street during the 2001 May Day riots and whether this was covered by the right to liberty in Article 5 ECHR. The Supreme Court looked extensively at the (limited) ECtHR caselaw on the topic, thus showing that it had carefully considered the relevant case law. The ECtHR judgment contained a very extensive analysis of the UK domestic courts’ consideration of the case and made clear the weight given to the domestic courts findings:

“... the Court observes that within the scheme of the Convention it is intended to be subsidiary to the national systems safeguarding human rights (see *A & Ors v UK*). Subsidiarity is at the very basis of the Convention, stemming as it does from a joint reading of Articles 1 and 19. ... As a general rule, where domestic proceedings have taken place, it is not the Court’s task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them. Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts ... .”<sup>38</sup>

52. The ECtHR is more likely to grant a wide margin of appreciation to the State where the ECtHR has confidence in the way in which the national courts address human rights issues arising before them.<sup>39</sup> As President Robert Spano and Judge Tim Eicke told us:

37 European Court of Human Rights ([HRA0011](#))

38 *Austin v UK* [2012], ECHR, paragraph 61

39 Paul Mahoney, when Judge at the ECtHR, noted that: “There will be less temptation for the Strasbourg Court to engage in micro-management of individual situations or even in reviewing the preceding policy-making and, thus, less inclination to disturb the rulings of the national courts if the national courts are visibly operating domestic remedies with an eye to compliance with Convention standards and case-law.” The relationship between the Strasbourg court and the national courts, Paul Mahoney *Law Quarterly Review* L.Q.R. 2014, 130 (Oct), 568–586

“Analysis of Strasbourg case-law by UK domestic courts and in particular its superior courts shows an in-depth understanding of the Court’s case-law... When the national authorities have demonstrated in cases before the Court that they have taken their obligations to secure Convention rights seriously the Court may apply the concept of subsidiarity more robustly...”

“The fact that there are so few violations found against the UK would also argue in favour of the fact that the UK courts are successfully applying the Convention at the domestic level... the number of applications brought to Strasbourg against the UK is exceptionally low (for the last four years the lowest per head of all of the 47 Member States).”<sup>40</sup>

53. Paul Mahoney, when the UK Judge at the ECtHR, noted the implications for admissibility of proper and careful consideration by the domestic courts:

“Some Strasbourg judges—and up till now they would seem to be the majority—take the view that if the independent and impartial national courts, who are better acquainted with the democratic society of their country, have properly and fully considered the contested legal measure on the basis of the relevant human rights standards, there will need to be strong reasons for them to substitute their own, different assessment for that of the national judges.”<sup>41</sup>

**Box 4: Subsidiarity: *Ndidi v UK***

President Robert Spano and Judge Tim Eicke provided us with the example to *Ndidi v UK* (2017) relating to the right to private and family life under Article 8 ECHR. This case:

“established the principle that where domestic courts have carefully examined the facts, applied the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant’s personal interest against the more general public interest in the case, the Strasbourg Court would not substitute its own assessment of the factual details and/or the balance struck for that of the competent national authorities, unless there were strong reasons to do so.”<sup>42</sup>

54. In the vast majority of cases that reach Strasbourg where there might be a question as to the extent of the margin of appreciation to be accorded to the UK, the UK Courts play a core role in setting out, to the ECtHR, how the domestic system works and how rights are protected within it.<sup>43</sup> As such, the domestic courts often playing a crucial role in ensuring that the UK is accorded the full extent of the margin of appreciation available to it, through their efforts to set out the national context and how rights are protected within it.

40 European Court of Human Rights ([HRA0011](#))

41 Paul Mahoney, *The relationship between the Strasbourg court and the national Courts*, *Law Quarterly Review*, L.Q.R. 2014. He went on to provide the example of the ECHR case *Countryside Alliance v UK* [2009] relating to the challenge to the statutory ban on fox-hunting which stated: “[T]he domestic courts have given the greatest possible scrutiny to the applicants’ complaints under the Convention ... Serious reasons would be required for this Court to depart from the clear findings of those courts.”

42 European Court of Human Rights ([HRA0011](#))

43 See, for example, [Q21](#), [Lady Hale]

**Box 5: Margin of appreciation & judicial dialogue: R v Horncastle and Al-Khawaja v the United Kingdom - hearsay evidence**

*R v Horncastle*<sup>44</sup> is one example where the domestic Courts went to considerable effort to set out the particularities of the law relating to hearsay and how the necessary protections could be found in that law, so that the UK could be accorded the full margin of appreciation in how it ensured the right to a fair trial through its law of criminal evidence.

We heard how the Supreme Court went to considerable effort to help the ECtHR understand the relevant surrounding context in the criminal law of England and Wales in relation to hearsay, in order to avoid a finding that our rules on the admissibility of hearsay evidence were incompatible with fair trial rights.<sup>45</sup> As Lady Hale set out:

“In the case of Horncastle, it looked as if our rules of the admissibility of hearsay evidence, which was basically previous witness statements in criminal cases, might be declared incompatible in Strasbourg. We went to a huge amount of trouble to explain why criminal trials in the UK had enough safeguards in them to mean that somebody was not at risk of being wrongfully convicted if, for example, the written statements of people who had died were admitted in the criminal case... it has enabled Strasbourg to understand more about the surrounding context in UK law”.<sup>46</sup>

President Robert Spano and Judge Tim Eicke told us that as a result “... the Grand Chamber adjusted its position on a specific aspect of the right to a fair trial (rules on the evidence of witnesses who are absent from trial) in direct response to the UK Supreme Court’s judgment in Horncastle (2009)”.<sup>47</sup>

55. The role of the UK domestic courts is crucial to ensure that the right result is reached in an individual case, as well as to ensure that Convention rights are applied to the UK in a way that best fits the legal systems of the UK. Their judgments show a detailed understanding of how human rights are protected in the balances struck within the UK’s legal systems.

44 *R v Horncastle and others* [2009] UKSC 14

45 [Q20](#). See also Cambridge Centre for Public Law ([HRA0014](#)) at paragraph 13

46 [Q20](#)

47 European Court of Human Rights ([HRA0011](#))

**Box 6: Margin of appreciation & judicial dialogue: Animal Defenders International v UK - political advertising**

The question at issue in *Animal Defenders International v UK* [2013],<sup>48</sup> was whether the prohibition on paid political advertising in UK law was a disproportionate interference with the freedom of expression guaranteed by Article 10 ECHR. Political advertising restrictions had previously been found by the ECtHR to interfere with the right to free speech in other Council of Europe States. As Lady Hale told us, this was a case where the domestic courts played a crucial role in ensuring that the particularities of the UK system on political funding and political advertising were fully understood and that the full extent of the margin of appreciation could be enjoyed by the UK on this sensitive matter. Following the domestic court's efforts to explain the peculiarities of the UK system, the Strasbourg court was convinced by the reasoning of the House of Lords (as it then was) to find that the legislation in question was compatible with the Convention, despite the existing case law that suggested it might not be.<sup>49</sup>

The ECtHR considered the domestic examination of the issues and stated that it “attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process”.

What was even more remarkable is that this is a case where the Minister did not certify (under s. 19 HRA) that the legislation was compatible with ECHR rights, due to the existing case-law. It was therefore up to the UK Courts to set out why they thought it was compatible (and within the UK margin of appreciation)—reasoning that was then accepted by the ECtHR.

This shows how, having been assisted by the careful consideration of the relevant issues and case law by the UK's domestic courts, the ECtHR was able to take into consideration the specific nature of the political advertising ban in the UK context, accord the UK a specific margin of appreciation in respect of that issue, and was therefore able to depart from case-law that had been applied in other national contexts.

**56. The UK courts play a crucial role in ensuring that the UK is accorded the full extent of the margin of appreciation available to it, through their efforts to set out how rights are protected within the national legal context.**

**57. Any steps taken to minimise the ability of the UK domestic courts to properly consider the application of the Convention rights in the UK context would risk the ECtHR having less confidence in the UK's systems and therefore according it less margin of appreciation. We therefore cannot see how it would be advantageous to the UK to weaken the role of the judiciary in upholding human rights—either from the perspective of individual citizens or the system overall.**

48 Application no. 48876/08

49 [Q19](#)

### *How domestic courts apply the margin of appreciation*

58. The concept of margin of appreciation relates principally to the relationship between the UK (whether judiciary, legislature or executive) and the organs of the Council of Europe—embodying an understanding that national bodies should have some latitude/discretion in how best to find the best way of protecting rights in national or local situations.

59. The domestic courts need to have due regard to the margin of appreciation when taking into account relevant ECtHR case-law. They will need to assess the extent to which that case-law could be relevant to the situation before them—or whether it can be distinguished for some reason, for example because of the peculiarities or particular balances inherent in the national system.

60. However, the UK courts are already familiar with a similar concept, that of ‘judicial deference’, which broadly means that they will defer to the executive and the legislature for matters of policy and will be reluctant to interfere except to the extent of illegality or irrational behaviour. Thus, the UK courts are not new to the issues involved in margin of appreciation assessments as they employ similar concepts when according the executive and the legislature a certain latitude in making policy decisions that they are uniquely or better placed to determine.

61. There are other cases, where the domestic courts have to apply the law to the facts before them, but where the situation might be on the cusp of what could fall within a permitted margin of appreciation. Sometimes this puts the courts in an uncomfortable situation—especially in cases where it might be more proper for Parliament to have acted on an issue, but, for whatever reason, it has not done so. The courts, in contrast, have to apply the law and determine a case that is properly brought before them and, unlike Parliament, do not have the flexibility of determining whether or not to consider an issue. We heard how, in cases that are on the cusp of what could fall within a permitted margin of appreciation, the courts are generally cautious.

62. Lady Hale provided us with two examples that the Supreme Court had to grapple with where Convention rights were engaged, but where the State would likely be accorded a very significant margin of appreciation: (1) The Northern Ireland abortion case<sup>50</sup> in which the Supreme Court had to consider whether the ECtHR would regard the matter as being within the UK’s margin of appreciation, and if it did, what then was the role for the Supreme Court; and (2) the Nicklinson<sup>51</sup> case on assisted dying:

“The majority of us decided that we would be abdicating the responsibility that the Human Rights Act gave us if we did not try to make up our own minds about the situation, because the Human Rights Act says that public authorities must act compatibly with the Convention rights. If the legislation obliges them to act incompatibly, we make a declaration of incompatibility. Are we not ducking our responsibility if we do not make up our own minds about what the correct situation is?”

50 [In the matter of an application by the NI Human Rights Commission for JR \(NI\) and Reference by the Court of Appeal in NI pursuant to Paragraph 33 of Schedule 10 to the NI Act 1998 \(Abortion\) \(NI\) \(supremecourt.uk\) \[2018\] UKSC 27](#)

51 [R \(on the application of Nicklinson and another\) \(Appellants\) v Ministry of Justice \(Respondent\), R \(on the application of AM\) \(AP\) \(Respondent\) v The Director of Public Prosecutions \(Appellant\) \(supremecourt.uk\) \[2014\] UKSC 38](#)

“The other case was the Nicklinson assisted suicide case... Clearly there were some Strasbourg principles that were developing, but again it would probably have regarded it as within the margin of appreciation for the United Kingdom. Of course, the assisted suicide case was one we all would have wanted Parliament to debate thoroughly and to decide, and basically Parliament kept on ducking the issue. Some of us felt that we had to try to supply an answer, but others felt differently. This is the benefit of a collegiate court where differences of opinion can be voiced and argued through.”<sup>52</sup>

63. It is notable that in these two cases, the Court was reluctant to reach too forceful a conclusion, indicating, in both, that a political solution could be preferable. We discuss matters relating to the proper respective roles for Parliament, the courts and the executive, in protecting human rights, in more detail in chapter 4.

64. **The UK courts are used to applying the doctrine of judicial deference to accord the executive and the legislature a certain latitude in making policy decisions that they are uniquely or better placed to determine. The UK courts are therefore very well placed to apply the margin of appreciation and they perform a central role in ensuring that the UK is accorded the full extent of the margin of appreciation available to it.**

65. **Moreover, in the rare cases where a political (rather than a legal) solution would be preferable, and where a wide margin of appreciation would likely be accorded to the State, the Courts have been cautious and have sought primarily, to encourage the other organs of State to fulfil their roles in the protection of human rights within the UK system. We welcome this cautious approach by the courts.**

## Judicial dialogue

66. Judicial dialogue is a term often used to refer to two different forms of dialogue:

- a) Informal judicial dialogue through informal contact such as discussions between judges; and
- b) Formal judicial dialogue through judgments—whereby courts set out their views on the law and the way that the law should be applied, often taking into account and testing the views of other courts.<sup>53</sup>

### *Informal judicial dialogue: discussions between judges*

67. As President Robert Spano and Judge Tim Eicke told us, there is extensive informal dialogue between the UK and ECtHR judges, which takes place through various means:

- a) Regular bilateral meetings between small groups of UK judges (from the three domestic UK jurisdictions and the Supreme Court) and judges from the ECtHR.
- b) The UK Judge on the ECtHR, Tim Eicke, frequently visits the UK and engages in informal dialogue with the judiciary in the three UK jurisdictions.

52 [Q23](#)

53 European Court of Human Rights ([HRA0011](#)). As President Robert Spano and Judge Tim Eicke said “Formal dialogue is constructive as it leads to a conversation through judgments usually resulting in the issue being resolved over time.”. They provided the example of the Charlie Gard case to highlight how judges can at times communicate with each-other quite directly through judgments/orders.

- c) The Superior Courts Network (“SCN”), including through its annual meeting of national focal points in Strasbourg.
- d) A delegation of senior UK judges (frequently including the heads of the respective jurisdictions) go to Strasbourg each year to participate in the ECtHR’s formal Opening of the Judicial Year (which includes informal meetings with members of the ECtHR and its registry).
- e) The national judge (as well as the President or his representative) of the ECtHR attending the Opening of the Legal Year at Westminster Abbey, as well as the Lord Chancellor’s breakfast.<sup>54</sup>

68. As Lady Hale told us she thought there was “plenty of dialogue and opportunity for informal dialogue at present”.<sup>55</sup> It is clear that there are many opportunities for informal exchanges for UK and ECtHR judges to discuss issues of mutual interest to better understand each-others legal systems, legal developments and to improve judicial mutual understanding. Informal judicial dialogue seems to be working very well at present.

### ***Formal Judicial dialogue: judgments***

69. The most well-known form of judicial dialogue is in the form of judgments—and this has also received the most attention from academics and commentators. The UK (and UK lawyers) have brought some of the leading cases before the ECtHR to clarify the boundaries of Convention rights. Since the entry into force of the HRA in 2000 judicial dialogue has increased as UK judges, through their judgments, are better able to take due note of, and analyse, ECHR case-law.

#### **Box 7: The role of judicial dialogue: *Vinter v UK & Hutchinson v UK - Whole Life Orders for Prisoners***

President Robert Spano and Judge Tim Eicke gave us the example of how judicial dialogue worked in the cases considering whether whole life orders for prisoners were compatible with human rights:

“Another example of this type of judicial dialogue may be seen in the cases on whole life orders for prisoners. Firstly there was the Strasbourg Court’s judgment in the case of *Vinter and Others v. the United Kingdom* [GC] ... 2013 where the [ECtHR] also found inter alia that the domestic law concerning the prospect of release for life prisoners in England and Wales was unclear. A specially constituted Court of Appeal which considered this judgment in *R v McLoughlin* examined the Court’s conclusions. It set out how domestic law would treat applications for release and declared that it did provide offenders with a clear hope or possibility of release in exceptional circumstances (a power which, under the relevant legislation, is the Secretary of State’s to exercise). In *Hutchinson v. the United Kingdom* [GC]. No 57592/08, 17 January 2017 the Court found that the imposition of a ‘whole life order’ for murder did not violate Article 3 of the Convention”.<sup>56</sup>

54 European Court of Human Rights ([HRA0011](#))

55 [Q25](#)

56 European Court of Human Rights ([HRA0011](#))

**Box 8: UK judicial reasoning relied on in cases relating to other States: S., V. and A. v. Denmark**

As President Robert Spano and Judge Tim Eicke told us “the sophisticated analysis by the UK domestic courts of the case-law of the [ECtHR] is indeed relied upon in its judgments against other countries. Sometimes the reasoning is discussed by the judicial formation even if that is not expressly reflected or recorded in the final judgment. Sometimes, however, there is direct and express reliance on judgments of the higher courts of the UK in the judgment itself.”

They provided us with the example of a Danish case, *S., V. and A. v. Denmark*,<sup>57</sup> concerning the detention of football supporters with a view to preventing violence. In that case the Grand Chamber departed from the approach that the ECtHR had taken in the previous case of *Osterdorf v Germany*, having considered the reasoning of the UK Supreme Court in the separate case of *R v The Commissioner of Police for the Metropolis*.

“The Grand Chamber relied upon the judgment of the UK Supreme Court in *R v The Commissioner of Police for the Metropolis*... in which the [ECtHR’s] case-law on Article 5(1)(b) was found to be inconclusive ... The UK Supreme Court, having analysed the [ECtHR’s] case-law... concluded that the detention was lawful under Article 5(1)(c). The Grand Chamber of the Court, having considered in detail its own case law as well as the reasoning of the UK courts, consequently changed its own approach also to consider the issues raised under Article 5(1)(c) (rather than under Article 5(1)(b) as the Court had done in *Ostendorf*)”.<sup>58</sup>

70. **It is clear that there is a very healthy state of judicial dialogue as between the ECtHR and the UK judiciary. We agree with President Robert Spano and Judge Tim Eicke when they said, “our view is that both the formal and the informal judicial dialogue is going extremely well and it is rather difficult to identify any particular area for improvement”. Such a sentiment was also echoed by Lady Hale in her evidence to the Committee. Both informal and formal judicial dialogue is clearly working well. In particular, the operation of section 2 HRA clearly allows for very healthy state of judicial dialogue in the form of judgments. *It would therefore seem prudent not to change these successful practices; in our opinion too much risks being lost by any amendments to section 2 HRA.***

## Conclusion

71. **As a result of the HRA, a human rights case is first determined by UK judges, who:**
- a) **understand the complex and subtle balances at work within the relevant UK legal systems;**
  - b) **understand how human rights are given effect in those legal systems;**
  - c) **apply a considered analysis of how the relevant fundamental protections, including ECHR rights and relevant case-law apply to the case;**

57 [S., V. and A. v. Denmark \[GC\], nos. 35553/12 and 2 others, 22 October 2018.](#)

58 [European Court of Human Rights \(HRA0011\)](#)

- d) **apply that understanding to the facts of the case, explaining their reasoning and how the balances are met within those legal systems in their judgment; and**
- e) **are able to dispose of obvious human rights breaches without wasting time and money and extending suffering by needing to litigate in Strasbourg.**

**72. As a result of the above and because UK judgments show the detailed judicial reasoning in the judgments:**

- a) **Fewer cases from the UK are litigated before the ECtHR than was the case before the HRA;**
- b) **ECtHR judges have been able to rely on the reasoning in UK judgments to better understand how the national UK legal systems protect human rights;**
- c) **If a case reaches the ECtHR, there is less of a risk of adverse ECtHR judgments arising due to any misunderstanding as to how the domestic legal system protects human rights;**
- d) **The margin of appreciation accorded to the UK is significant as there is confidence in the national processes established by the HRA, including the national courts' role in applying human rights, following careful consideration of any case-law relevant to the case before it;**
- e) **Where there are differences of opinion, there are clear and constructive mechanisms (through 'judicial dialogue') to resolve any differences of opinion based on misunderstandings.**

***73. Any change to the current operation of section 2 would be unnecessary, unhelpful and counterproductive.***

## 4 The separation of powers: sections 3 and 4 Human Rights Act

### Introduction

74. This chapter focusses on the impact of the HRA on the relationship between the courts, Government and Parliament, and in particular on sections 3 and 4 HRA. These provisions most clearly reflect the way in which the HRA was designed to achieve a balance between the protection of individual rights and respect for the constitutional principle of the sovereignty of Parliament. Before considering the operation of sections 3 and 4 HRA and their impact, however, it is necessary to recognise the constitutional context for the HRA.

**Box 5: IHRAR terms of reference: The impact of the HRA on the relationship between the judiciary, the executive and the legislature**

The judiciary, the executive and the legislature each have important roles in protecting human rights in the UK. The Review should consider the way the HRA balances those roles, including whether the current approach risks “over-judicialising” public administration and draws domestic courts unduly into questions of policy.

The Review should consider the following questions in relation to this theme:

- b) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:
  - Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?
  - 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?
  - 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?
- ...
- 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?

75. The IHRAR call for evidence also invited “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.”

## Constitutional context

76. An examination of the relationship between the courts, Government and Parliament touches upon three core elements of the unwritten constitution of the United Kingdom: the separation of powers, the sovereignty of Parliament and the rule of law.

### *The separation of powers*

77. The concept of the separation of powers refers to the division of the functions of government into different branches, with each branch operating separately from and respecting the others. The most widely recognised model of the separation of powers is based on there being three functions of government, each of which is exercised by a distinct branch of government, which exercises checks on the other branches to ensure balance and that none of them has too great a power. The three functions are:

- The legislative function, i.e. making the law, which is carried out by the legislature (Parliament);
- The executive function, i.e. executing and enforcing the law, which is carried out by the executive (Government);
- The judicial function, i.e. interpreting and applying the law, which is carried out by the judiciary (the courts).

78. In the UK constitution there is not such a clear tripartite distinction between these branches, with equal checks and balances, as exists under some other constitutions.<sup>59</sup> In particular, the Westminster model, whereby the Government is made up of members of Parliament, involves a mixing of the executive and the legislature.<sup>60</sup> As a consequence, the government of the day has a significant ability to control the legislative function.

### *Parliamentary sovereignty*

79. Parliamentary sovereignty is often seen as the cornerstone of the UK constitution. It was defined by Lord Bingham, in his seminal book ‘The Rule of Law’, as meaning “that Parliament has, in the United Kingdom, no legislative superior”.<sup>61</sup> A more traditional view of Parliamentary sovereignty is that expressed by the Victorian jurist A.V. Dicey:

“The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and further that no person or body is recognised by the law of England as having a right to override or set aside the law of Parliament”.<sup>62</sup>

59 Most obviously, the constitution of the United States of America.

60 Until 2009, the presence of active Law Lords in the House of Lords also mixed the Judiciary into the Legislature.

61 Tom Bingham, ‘The Rule of Law’, Allen Lane, 2010

62 A V Dicey, *An Introduction to the Study of the Law of the Constitution* (first published 1885), 10th edn, 1959, London: Macmillan, pp 39–40

### ***The rule of law***

80. The rule of law is a further fundamental principle of the UK constitution and is recognised as such in the Constitutional Reform Act 2005. Margaret Thatcher described it as “the very bedrock of our civilization.”<sup>63</sup> The preamble to the Universal Declaration of Human Rights describes it as essential to the protection of human rights.

81. The importance of the rule of law to any functioning democracy is uncontroversial, but its precise meaning is less easy to define. Lord Bingham, in his book on the subject, explained that:

“The core of the existing principle is ... that all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”<sup>64</sup>

82. But can the rule of law be restricted to requiring the courts to administer whatever laws are passed by a properly elected Parliament—no matter what impact they might have on the rights of individuals? Does the rule of law require that “laws publicly made” must have any particular quality or content? Lord Bingham believed so, considering that a further principle embraced within the rule of law is that “the law must afford adequate protection of fundamental human rights.”<sup>65</sup>

83. This conception of the rule of law recognises that the law and the courts that apply it have a vital role in protecting human rights and avoiding the tyranny of the majority. However, it comes into conflict with a belief in unfettered Parliamentary sovereignty, as it proposes that there are some limits on what Parliament can do.

84. Despite the limit it places on the power of the judiciary, and its potential to conflict with the rule of law, the higher courts have frequently upheld a traditional notion of Parliamentary sovereignty and the related separation of powers between them and the legislature. For example, Lord Diplock in *Duport Steels v Sirs* noted that:

“the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them ... [T]he role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it ... Under our constitution it is Parliament’s opinion on these matters that is paramount”.<sup>66</sup>

### ***Constitutional context for the introduction of the Human Rights Act***

85. The UK became one of the first signatories to the ECHR in 1951. In the decades following the signing of the Convention there was much debate over the introduction of a Bill of Rights into domestic law, whether based upon incorporation of the Convention or otherwise. In particular, there was concern over the impact such an instrument would have on the traditional view of the separation of powers and Parliamentary sovereignty

63 Hudson Institute, [Margaret Thatcher - Follow the Leader](#), American Outlook, Spring 2000

64 Tom Bingham, ‘The Rule of Law’, Allen Lane, 2010

65 Tom Bingham, ‘The Rule of Law’, Allen Lane, 2010

66 [1980] 1 All ER 529 at 541

expressed by Lord Diplock. For many who opposed the formal recognition of fundamental rights the concern was the prospect of granting the courts the ability to deny the will of Parliament where fundamental rights were in play.

86. For those on the other side of the debate, it was questioned whether there could truly be any guarantee of fundamental rights if Parliament retained the ability to overrule any law protecting them at will. For some, proper respect for the rule of law required human rights to be given a particular, protected status within the constitution.

87. The HRA represented the result of Parliament's efforts to achieve a compromise position between these two opposing views. As then Home Secretary Jack Straw put it during the passage of the Human Rights Bill through Parliament:

“One of the [Act's] many strengths is that it promotes human rights while maintaining the sovereignty of Parliament and the separation of powers which underpins our constitutional arrangements.”<sup>67</sup>

88. Nevertheless, each of the central provisions of the Act has some impact on the balance of power between the different branches of government. For example, by requiring public authorities to act compatibly with Convention rights (section 6 HRA - see Chapter 11 below) and granting individuals the right to bring human rights claims in domestic courts (section 7 HRA), the HRA increased the role of the judiciary in reviewing the actions of the executive for compliance with accepted human rights standards. The judiciary was itself subject to new requirements as it was not immune from the obligation to act compatibly with the Convention under section 6 HRA.

89. Sections 3 and 4 of the HRA most directly affect the balance of power between the judiciary and the legislature. As Lady Hale put it in her oral evidence to us, “those are the two crucial sections that define the relationship between the courts and Parliament.”<sup>68</sup> However, given the powerful role played by the Government of the day within Parliament, sections 3 and 4 inevitably also have implications for the power of the Executive.

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67 Third Reading, HC Deb, 21 October 1998, [col 1358](#)

68 [Q17](#)

## Section 3 Human Rights Act—statutory interpretation

### Box 6: Section 3 HRA: Interpretation of legislation

#### Interpretation of legislation.

- 1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
- 2) This section—
  - a) applies to primary legislation and subordinate legislation whenever enacted;
  - b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Source: Human Rights Act 1998, [Section 3](#)

90. Section 3 HRA concerns the interpretation of legislation. This includes both primary legislation, i.e. statutes/Acts of Parliament, and subordinate or secondary legislation, i.e. statutory instruments.<sup>69</sup>

91. As discussed in Chapter 2, prior to the HRA coming into force the ECHR was treated by the courts like any other treaty which the UK had ratified. Thus, the courts were permitted (but not bound) to refer to the ECHR to assist in their interpretation of legislation where the meaning of the statutory words was ambiguous. Where there was no ambiguity, however, statutes and statutory instruments had to be read and given effect even if they were in conflict with the ECHR.<sup>70</sup> Section 3 HRA alters this position somewhat, requiring all primary and secondary legislation to be read and given effect in a way which is compatible with the Convention rights—so far as it is possible to do so. But where that is not possible, Acts of Parliament have to be followed even if they conflict with the ECHR.

### *The new interpretative obligation*

92. The nature of the new interpretative obligation under section 3 HRA was described by Lord Steyn in 2002:

“... the interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature ... Parliament specifically rejected the

69 [Secondary legislation](#) is also known as ‘subordinate’ or ‘delegated’ legislation. As well as statutory instruments, the term secondary legislation also includes statutory rules and orders and church instruments

70 As Lord Brandon put it in *In re M. and H. (Minors) (Local Authority: Parental Rights)* [1990] 1 A.C. 686, 721: “while English courts will strive when they can to interpret statutes as conforming with the obligations of the United Kingdom under the Convention, they are nevertheless bound to give effect to statutes which are free from ambiguity in accordance with their terms, even if those statutes may be in conflict with the Convention.”

legislative model of requiring a reasonable interpretation. Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights.”<sup>71</sup>

93. However, while the obligation to interpret legislation compatibly with the Convention requires the court to go further than resolving ambiguity, it is not unlimited. It is confined to those situations where “it is possible to do so.” The precise boundaries of where it is and is not possible to read legislation compatibly with the Convention rights have been explored in caselaw.

**Box 7: The limits of the interpretive obligation under s3 HRA: Ghaidan v Godin-Mendoza**

In the judgment of the House of Lords in *Ghaidan v Godin-Mendoza* Lord Steyn explained that:

“ ... In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation ... It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is “possible”, a court can modify the meaning, and hence the effect, of primary and secondary legislation.”<sup>72</sup>

94. It is this potential for the courts to ‘modify’ the meaning of legislation, identified in *Godin-Mendoza*, that has implications for the balance of power between the courts and Parliament, and that some see as a threat to Parliamentary sovereignty. However, since the HRA was introduced the courts have demonstrated their awareness of and respect for the separation of powers and the fact that their role remains one of interpretation and not legislative amendment. The House of Lords (in its judicial form) concluded that in passing section 3 HRA, Parliament could not have intended the courts to “adopt a meaning inconsistent with a fundamental feature of legislation”<sup>73</sup> or “inconsistent with the scheme of the legislation or with its essential principles”.<sup>74</sup> Only readings that “go with the grain of the legislation” are permitted under section 3 HRA.<sup>75</sup> As Lady Hale confirmed: “There are limits to the interpretive obligation. You cannot completely twist the statutory meaning and the statutory purpose in order to produce a compatible interpretation.”<sup>76</sup>

***Has section 3 undermined the separation of powers?***

95. In respect of the impact of section 3 HRA on the balance of power between the judiciary and legislature, some of the witnesses before us suggested that little had changed as a result of its introduction. Dominic Grieve QC PC, former Attorney General, commented that: “the courts have been reading down legislation and reinterpreting it outside the ambit of the Human Rights Act and through common law principles for many decades, so I do not

71 *R v A (No2)* [2002] 1 AC 45

72 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557

73 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 33

74 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 121

75 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 33 and 121

76 [Q28](#)

see that as some kind of constitutional novelty";<sup>77</sup> Lord Neuberger expressed agreement.<sup>78</sup> Helen Mountfield QC also considered section 3 to be largely a continuation of previous practice rather than a seismic change:

“Courts have always applied the principle of legality. Parliament is presumed to expect the Executive to act in compliance with fundamental rights. It is only if Parliament says in express terms that you can do something that is against human rights that the courts will say that that is what Parliament wants to happen. That has always been the case. The Human Rights Act put that on the statute book ...”<sup>79</sup>

96. Other witnesses considered that section 3 HRA had made a substantial change to the court's interpretative role. The Cambridge Centre for Public Law described section 3 as “quite radical” and stated that the HRA had “significantly altered the approach of the courts to the interpretation of the legislation of the UK Parliament and subordinate and secondary legislation”. Notably, however, their submission concluded that “this has not resulted in a radical transfer of power from the legislature to the judiciary”.<sup>80</sup>

97. This is not a universal view. The breadth of the power of the courts to interpret legislation, particularly in disputes concerning the balancing of individual rights against other societal interests and concerns, has given rise to concerns of ‘judicial activism’ and illegitimate ‘judicial overreach’ by individuals and groups including the Judicial Power Project. Professor Graham Gee of the University of Sheffield voiced these concerns in his evidence to us, suggesting that section 3 HRA could be said to be “warping the separation of powers ... by obscuring the distinction between the judicial and the legislative function”.<sup>81</sup>

98. Lady Hale accepted that the incorporation of the ECHR into domestic law has resulted in the courts having to make decisions about controversial issues that would be better addressed by Parliament. However, she did not consider that this was a result of judicial activism but rather because “if the courts are presented with a case that has been properly brought by somebody with a proper interest in the case, the courts have no choice but to resolve it according to law.”<sup>82</sup>

99. Insofar as there is a concern that the courts might be using section 3 HRA to go beyond what Parliament intended when legislating, it is not one that we share.

100. Firstly, the strong interpretive obligation contained in this section is imposed by Parliament itself. This was emphasised by Richard Hermer QC in his oral evidence to us: “All the courts have been doing is that which Parliament has told them to do, which is to apply the Act”.<sup>83</sup> In the same vein, Helen Mountfield QC commented that “I just do not understand how it can be said that the Human Rights Act is a constraint on parliamentary sovereignty, because it is a vindication of it”.<sup>84</sup> JUSTICE elaborated on this point further in their written submissions to us, stating that, “in our view the will of Parliament includes an intention that legislation should not be incompatible with Convention rights”.<sup>85</sup> We

77 [Q5](#) [Dominic Grieve QC]

78 [Q5](#) [Lord Neuberger]

79 [Q55](#) [Helen Mountfield QC]

80 Cambridge Centre for Public Law ([HRA0012](#))

81 [Q55](#) [Professor Gee]

82 [Q29](#)

83 [Q55](#) [Richard Hermer QC]

84 [Q55](#) [Helen Mountfield QC]

85 JUSTICE ([HRA0069](#))

agree with this view, and note that the intention of the Government that new Bills brought before Parliament should not be incompatible with human rights is made clear on their face. This is because section 19 HRA requires the Minister in charge of any Bill, before second reading, to publish a statement either confirming that the provisions of the Bill are compatible with Convention rights or making it clear that even though they cannot say the Bill is compatible, the Government nevertheless wishes Parliament to proceed with it. The Government has only made a s.19(1)(b) HRA statement that they are unable to say a Bill is compatible with Convention rights on very few occasions.

101. Secondly, the overwhelming majority of the evidence provided to us was positive about the use of section 3 HRA and did not consider it to raise any constitutional concerns. As the Law Society of England and Wales noted, “there are few notable examples of courts using broad section 3 interpretations”.<sup>86</sup> Indeed, recent research found only 25 cases in the past 8 years in which section 3 had been used to interpret legislation compatibly with Convention rights.<sup>87</sup> The only notable example provided to us of a relatively recent judgment raising concerns about the use of the HRA taking judges “outside their lane” (rather than one taken from the first few years after the HRA was introduced) was the case of *Nicklinson* from 2014—which concerned a challenge to the continued criminalisation of assisted suicide.<sup>88</sup> And yet in *Nicklinson*, the Supreme Court concluded that an issue as sensitive as this was one for Parliament to resolve and firmly rejected the use of section 3 HRA to reinterpret section 2 of the Suicide Act 1961 so as to provide a defence of necessity. As the legal commentator Joshua Rozenberg QC summarised in his evidence to us: “[t]he most that the five judges in the majority felt they could do was to make a declaration of incompatibility, and three of the five decided they should not even do that. They left this up to Parliament”.<sup>89</sup>

102. Generally, the courts have shown themselves to be conscious of their role within the separation of powers. Helen Mountfield QC commented:

“I just do not agree that judges think they can or do in fact use Section 3 of the Human Rights Act as an instrument of practical law reform ... I think the judges are incredibly—in fact sometimes overly—conscious of their constitutional role”.<sup>90</sup>

103. Thirdly, for those that remain concerned that the section 3 interpretative obligation may distort or undermine the intentions of Parliament, there remains the obvious backstop that there is nothing stopping Parliament legislating to resolve any such distortion. As Lady Hale put it:

“... if Parliament does not like something that the courts have done in pursuance of the interpretation obligation in Section 3 of the Act, Parliament can always put it right, It can always say, “No, this is what the law is”, and you cannot interpret your way out of it, basically.”<sup>91</sup>

86 The Law Society ([HRA0063](#))

87 Based on research conducted by two lawyers from the organisation Justice. Putting these results into some context, in 2019 alone the Administrative Court received 3,400 applications for judicial review and the Queen's Bench Division of the High Court saw 4,600 proceedings started. These are the types of claims most likely to give rise to human rights arguments, but the precise number that do raise human rights issues is not available.

88 *R (Nicklinson) and another v Ministry of Justice and others* [2015] A.C. 657

89 [Q56](#) [Joshua Rozenberg QC]

90 [Q56](#) [Helen Mountfield QC]

91 [Q26](#)

104. The Government has repeatedly confirmed its commitment to the ECHR, and the call for evidence issued by the IHRAR confirms that “the Review proceeds on the footing that the UK will remain a signatory to the Convention”. This means that any deficiency in the protection of human rights within the UK, including any deficiency resulting from amendment of the HRA, can be raised by an individual bringing a case before the European Court of Human Rights in Strasbourg. A diminution in the protection provided by the HRA could re-establish the position prior to the Human Rights Act, when people in the UK had to turn to an international court to defend their rights.

**105. Section 3 HRA allows the judiciary to ensure that legislation is read compatibly with the Convention where possible. This supports the overarching intention of Parliament that legislation should not violate Convention rights. We have not been provided with any evidence to suggest that the courts are wrongly applying this power or that its use undermines or usurps the role of Parliament. The fact that it is hard to identify any cases in which Parliament has felt the need to correct a court's interpretation of legislation under section 3 HRA strongly indicates that the courts are not using section 3 to trespass on to the territory of the legislature. There is no case for amending or repealing this provision.**

### *When a Human Rights Act compatible interpretation is not possible*

106. The limit on the section 3 interpretative obligation means that there will be occasions when the courts will identify a provision of legislation that cannot be read compatibly with the Convention. Where this is primary legislation, an Act of Parliament, the court has the option to turn to the HRA remedy that most plainly acknowledges the sovereignty of Parliament: the Declaration of Incompatibility. Before turning to that part of the HRA, however, we must consider the powers of the courts to deal with incompatible subordinate legislation—itsself the subject of a question within the IHRAR terms of reference.

### *Incompatible legislation—secondary legislation*

107. Statutory instruments (SIs), of which approximately 3,500 are made each year, are made by ministers (or other bodies) under powers delegated to them by Parliament.<sup>92</sup> They receive less Parliamentary scrutiny than primary legislation; they cannot be amended by either House but either accepted or rejected. SIs subject to the affirmative procedure must be approved by both Houses of Parliament. The majority of SIs are made under the negative procedure, by which they come into effect as law unless either House rejects them within a fixed period after they have been laid. It is extremely rare for an SI to be rejected by either House of Parliament - whether laid under the affirmative or negative procedures.<sup>93</sup>

108. If a court is unable to use section 3 HRA to find a Convention compliant interpretation of a statutory instrument, the court has the power to strike down that secondary legislation. As noted by Dominic Grieve QC PC in his evidence to us, this is not a new power granted by the HRA.<sup>94</sup> The High Court's power to make orders quashing unlawful administrative

92 For more detail, see the [House of Commons Background Paper: Statutory Instruments](#), Number 06509, 15 December 2016

93 The [Strathclyde Review of December 2015 \(Cm 9177\)](#) reported that the last affirmative SI not to receive Commons approval was in 1978 and that the House of Lords had rejected SIs on only 5 occasions since 1968.

94 “As for secondary legislation, the courts have already always had the power of scrutiny of secondary legislation and the power in certain circumstances to override it.” [Q5](#) (Dominic Grieve QC)

decisions, which extends to quashing unlawful statutory instruments, is longstanding. What the HRA provides is an additional basis upon which the actions of the executive, including the making of secondary legislation, can be found to be unlawful—inconsistency with Convention rights.

109. The power to strike down secondary legislation that does not comply with Convention rights, and cannot be read compatibly, is consistent with the courts' role of ensuring that secondary legislation made by ministers is not made outside the powers granted by Parliament. This is not a challenge to the role of Parliament or to the separation of powers but an example of the separation of powers in action. As Helen Mountfield QC explained:

“When Parliament gives the Executive power to put forward subordinate legislation with the idea of saving parliamentary time ... and the subsequent rule of having a lesser degree of scrutiny, it does that on the assumption—the express assumption, again in the Human Rights Act—that those rules will comply with Convention rights and that, if they do not, they are not within the authority that Parliament gave the rule-maker to put the rules forward.”<sup>95</sup>

110. Richard Hermer QC added: “the idea that subordinate legislation will be reviewed to see if it does that which Parliament intended that it does is utterly unremarkable”.<sup>96</sup> We agree. The scrutiny given to secondary or subordinate legislation as it passes through Parliament is limited, not least due to the volume of secondary legislation being passed and the limits of the Parliamentary timetable. A review of that legislation by the courts to make sure it complies with the general intention of Parliament that legislation be human rights compliant should be something to be welcomed not resented. While it might at times be inconvenient for the Government, that is an inevitable consequence of the rule of law. In that regard, Dominic Grieve QC PC commented that in his four years as Attorney General:

“Did I ever feel that government was being rendered ineffective by Human Rights Act claims? No, I did not ...”<sup>97</sup>

He continued that whilst ministerial colleagues were sometimes “understandably irritated by some of the consequences of judgments, or, indeed, by the litigation surrounding them”, the question that had to be asked was “is this a price worth paying for trying to maintain the standards contained in the convention?” We believe that it is.

111. In any event, secondary legislation actually being quashed by the courts on the basis that it is not human rights compliant happens only very infrequently. In respect of a seven-year period between 2014 and 2020, recent research identified only 14 pieces of delegated legislation that were quashed on human rights grounds.<sup>98</sup> As Professor Graham Gee noted to us: “This is obviously low in absolute numbers, and especially when you take into account the thousands of statutory instruments made each year.”<sup>99</sup> These numbers

95 [Q58](#) [Helen Mountfield QC]

96 [Q58](#) [Richard Hermer QC]

97 [Q4](#) [Dominic Grieve QC]

98 UK Constitutional Law Association, 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?](#), February 22, 2021

99 [Q58](#) [Professor Gee]

suggest to us that even if the quashing of secondary legislation on human rights grounds were considered problematic rather than helpful, it does not amount to a significant impediment to the Executive.

**112. The court's power to quash secondary legislation that cannot be read compatibly with Convention rights respects Parliamentary sovereignty rather than challenging it. It is also an appropriate check on the power of the Executive, in accordance with the separation of powers and the rule of law.**

## Section 4 Human Rights Act—declarations of incompatibility

113. Section 3 HRA explicitly provides that the obligation to interpret legislation compatibly with the Convention “does not affect the validity, continuing operation or enforcement of any incompatible primary legislation”. The same limit on the effect of the interpretive obligation also applies, consequentially, to any incompatible secondary legislation “if primary legislation prevents removal of the incompatibility”.

114. The effect of this crucial provision was summarised by the then Lord Chancellor during Second Reading of the Human Rights Bill in the House of Lords: “This ensures that the courts are not empowered to strike down Acts of Parliament which they find to be incompatible with Convention rights.”<sup>100</sup> When a Convention compatible interpretation of primary legislation is not possible, the courts must turn instead to section 4 HRA.

### Box 8: Section 4 HRA: Declarations of incompatibility

- 1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
- 2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.
- 3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.
- 4) If the court is satisfied—
  - a) that the provision is incompatible with a Convention right, and
  - b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,
 it may make a declaration of that incompatibility.
 

...
- 6) A declaration under this section (“a declaration of incompatibility”)—
  - a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
  - b) is not binding on the parties to the proceedings in which it is made.

Source: Human Rights Act 1998

100 Second Reading, HL Deb, 3 November 1997, [col 1294](#)

### ***Respecting Parliamentary sovereignty***

115. Under section 4 HRA, where in the course of any legal proceedings a senior court determines that a provision of primary legislation is incompatible with the Convention (even after considering the s3 obligation to interpret legislation compatibly) the court may, not must, make a 'declaration of incompatibility'.

116. Section 4(6) HRA embodies respect for the sovereignty of Parliament, making clear that a declaration of incompatibility has no legal effect on the statute in respect of which it is made. The legislation continues to operate as before.<sup>101</sup> The declaration simply draws attention to the incompatibility in the legislation, alerting the public and Parliament (and this Committee in particular), and putting political pressure on the government of the day to change the law.<sup>102</sup>

117. In recognition of the constitutional significance of such a declaration, and fundamentally respecting Parliament, the power to make declarations of incompatibility is reserved to the senior courts - essentially the High Court and above.<sup>103</sup> In addition, section 5 expressly requires the government to be notified whenever a court is considering whether to make a declaration of incompatibility, and grants them the right to be joined as a party to the proceedings.<sup>104</sup>

118. The sovereignty of Parliament and the separation of powers are also acknowledged in the fact that the HRA does not place any duty on the Government to remedy the incompatibility and nor is there any obligation on Parliament to accept any remedial action the Government proposes. Largely for this reason, the ECtHR held in 2006 that a declaration of incompatibility did not amount to a domestic "effective remedy"<sup>105</sup> that needed to be exhausted before a claim could be brought to the Strasbourg Court.<sup>106</sup> The ECtHR has not, however, found that a declaration of incompatibility violates the Article 13 ECHR obligation to provide a victim with an "effective remedy" because Article 13 does not require a contracting states to put in place measures by which individuals can challenge the validity of primary legislation.<sup>107</sup>

119. We heard evidence recognising section 4 as the key provision by which the HRA maintains respect for the sovereignty of Parliament. Lord Neuberger described it as "a

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101 Jack Straw at Second Reading in the House of Commons: "What the Act makes clear is that Parliament is supreme, and that if Parliament wishes to maintain the position enshrined in an Act which it has passed, but which is incompatible with the Convention in the eyes of a British court, it is that Act which will remain in force." Hansard HC 16 February 1998, col. 773

102 Lord Irvine during the Second Reading in the House of Lords: "A declaration of incompatibility will not itself change the law. The statute will continue to apply despite its incompatibility. But the declaration is very likely to prompt the Government and Parliament to respond." Hansard HL, 3 November 1997, col. 1231

103 While the section 3 interpretative obligation applies to all courts, declarations of incompatibility may only be made by: the High Court and Court of Appeal in England and Wales or Northern Ireland; the High Court and Court of Session in Scotland; the Supreme Court; the Privy Council; the Court Martial Appeal Court and, in certain cases, the Court of Protection (see section 4(5) HRA)

104 Human Rights Act 1998, [section 5](#)

105 Under Article 35(1) ECHR, an applicant may only bring a claim to the ECtHR if they have exhausted all the effective remedies that are available to them in their own country

106 See *Burden v UK*, Application No 13378/05, Judgment, 12 December 2006. While the Court indicated at the time that it was possible the Court's position might change if there was "at some future date evidence of a long-standing and established practice of ministers giving effect to the courts' declarations of incompatibility", and this possibility was repeated in a 2016 judgment, at the moment the position remain unchanged.

107 *Greens and MT v United Kingdom* (2011) 53 EHRR 21 at [90]-[92]

very elegant way of getting the courts to be free to do their job of deciding whether a statute is inconsistent with human rights, but then paying proper regard to parliamentary sovereignty by saying that it is over to Parliament to decide what to do about it".<sup>108</sup>

120. No matter how egregiously a court may consider an Act of Parliament to violate Convention rights, it cannot strike it down, declare it invalid or otherwise prevent it having ongoing effect. The court can only refer the matter back to Parliament. In so doing, however, it indicates to Parliament the likely result should the matter remain unresolved and the case go to Strasbourg. As Lady Hale explained:

“the declaration is a discretionary matter. We do not have to make one, but it is a useful tool to send a warning shot, basically, over the bows of Government and Parliament as to what we think would happen when the case got to Strasbourg, if it did.”<sup>109</sup>

**121. The declaration of incompatibility under section 4 HRA provides an elegant solution to the potential conflict between the protection of fundamental rights and the sovereignty of Parliament. Where a human rights compatible interpretation is not possible, the courts are able to identify primary legislation that is incompatible with human rights, drawing it to the attention of government and Parliament, but they cannot go further.**

122. Where declarations of incompatibility have been made, the government and Parliament have in every case ultimately legislated to remedy the incompatibility. From a human rights perspective, and from the perspective of respecting the parliamentary intent behind the Human Rights Act, this is laudable. Yet even for those who are sceptical about the role of the courts in decisions concerning human rights, or even about human rights generally, the key point is that the HRA has not compelled the government and Parliament to remedy the incompatibility. Parliament has chosen to take the steps it has. Its sovereignty remains intact.

### ***A measure of last resort***

123. As noted in the IHRAR terms of reference, the courts have identified the declaration of incompatibility as an option of “last resort”, emphasising the importance of the section 3 obligation to interpret legislation compatibly with the Convention where possible. Lord Steyn observed in the case of *Ghaidan v Godin-Mendoza* that “resort to section 4 must always be an exceptional course”, due to the fact that there is “a strong rebuttable presumption in favour of an interpretation consistent with Convention Rights”.<sup>110</sup>

124. The courts treating the declaration of incompatibility as an option of “last resort” is consistent with the approach taken by the Government of the day during the passage of the Human Rights Bill.<sup>111</sup> It is also consistent with what we consider to be the simple overarching intention of the HRA and the ECHR - to prevent violations of human rights wherever possible. Consistent with this ‘last resort’ approach, despite the many thousands

108 [Q9](#) [Lord Neuberger]

109 [Q28](#)

110 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 50

111 See the Secretary of State for the Home Department during the Commons Second Reading debate: “We expect that, in almost all cases, the courts will be able to interpret legislation compatibly with the Convention. However, we need to provide for the rare cases where that cannot be done.” HC Deb, 16 Feb 1998, [col 780](#)

of cases that have come before the courts over the past two decades, there have been only 43 declarations of incompatibility since the HRA came into force in October 2000.<sup>112</sup> Courts have generally felt themselves able to interpret legislation compatibly with Convention rights where deficiencies have been identified.

125. The IHRAR terms of reference suggest that the rarity of declarations of incompatibility may be seen as a problem and asks whether declarations of incompatibility “should 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”. By taking the resolution of human rights incompatibilities away from the judiciary and into Parliament, increasing the number of declarations of incompatibility made by the courts could be seen as a method for rebalancing the separation of powers in favour of the legislative branch. However, we have concluded that this is a solution looking for a problem.

126. Firstly, we received no evidence suggesting that there are cases in which declarations of incompatibility should have been made by the courts but were not. Indeed, Lady Hale suggested that in her experience the Government would get its way when the court came to consider whether a section 3 HRA interpretation was possible or whether a section 4 declaration of incompatibility would be made:

“Usually the Government argues first for compatibility, but if we decide that it is incompatible, there is then a choice between the interpretive obligation, if we can, to try to cure it or simply to make a declaration of incompatibility. I cannot remember a case that I was involved in where we did not do whichever of those two the Government asked us to do. The Government’s first line was always, “It’s compatible” but if they lost on that they would then argue either for using the interpretive obligation or for a declaration, and we would usually do what the Government asked for in that respect”.<sup>113</sup>

127. Secondly, we did not receive any evidence suggesting there is an appetite from Parliamentarians for greater involvement in resolving human rights incompatibilities identified by the courts. The pressure on the Parliamentary timetable is already great. Requiring the legislature to grapple with every instance of legislative incompatibility with the Convention, whether in a recent statute or one passed many years before the HRA came into force, would put a significant additional burden on the Government and Parliament (and the Parliamentary timetable). Were the role that Parliament plays in the remedial order process to be ‘enhanced’ in some way, this would occupy even more time that Parliamentarians may not feel they have available.

128. Thirdly, while the declaration of incompatibility serves an important purpose in preserving Parliamentary sovereignty and the separation of powers, its use has the inevitable consequence of leaving in operation legislation assessed by the Higher Courts as being incompatible with human rights. So greater use of section 4 would mean more instances of the UK remaining in breach of its international human rights obligations and

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112 And 9 of these were overturned on appeal. See Ministry of Justice, *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2019–2020*, [CP 347](#), Dec 2020

113 [Q27](#)

likely leaving more individuals continuing to suffer violations of their rights. This in turn would be in breach of the UK's obligations under Article 13 ECHR to provide an "effective remedy" for a breach of a Convention right.

129. Even if the Government and Parliament do choose to remedy an incompatibility identified by the court, it can take years for this to be completed. The timeframe for legislative responses to declarations of incompatibility is likely to be even greater if the numbers of declarations made were to increase significantly. In the meantime, the victims who brought the case to court, and others affected, are left without redress for the violations of their rights.

130. Given that the current position of the ECtHR is that a declaration of incompatibility is not an effective remedy, there would likely be an increase in applications to Strasbourg from those claimants who would no longer obtain a Convention compliant read-down of legislation in a domestic court. Any applications to the European Court of Human Rights that were successful would place an obligation on the UK to implement the Court's judgment—potentially including an obligation to legislate to remedy the incompatibility. This would again place an additional burden on the Parliamentary timetable.

**131. The use of section 3 HRA interpretation wherever "possible" and reserving section 4 declarations of incompatibility as a remedy of last resort creates a sensible and respectful balance between the roles of the Judiciary and Parliament. An increase in the use of declarations of incompatibility at the expense of section 3 interpretations would have significant ramifications: leaving victims without effective redress for human rights violations and placing a considerable additional legislative burden on Government and Parliament. There is again no case for reform.**

## Conclusions

132. The IHRAR terms of reference question whether there is any need for change to the framework established by sections 3 and 4 HRA. The evidence provided to us was overwhelmingly against any change and very positive about the existing legal framework.

133. While one witness who gave oral evidence to us suggested that the HRA "had contributed to the unbalancing of [the] relationships" between judges, Ministers and parliamentarians,<sup>114</sup> the overwhelming majority of the evidence we received praised the balance that the HRA, and in particular the framework established by sections 3 and 4, strikes between the different branches of the state and between the rights of the individual and the sovereignty of Parliament. For example, the framework was described in written evidence to us as "carefully crafted";<sup>115</sup> "well crafted [and] delicately balanced";<sup>116</sup> "carefully constructed"<sup>117</sup> and as "striking a sensible and elegant balance between providing effective legal remedies and respecting Parliament's sovereignty."<sup>118</sup>

134. In oral evidence, Lord Neuberger described the HRA as "a very cleverly drafted piece of legislation", while Dominic Grieve QC PC added that it was "a masterpiece of respect

114 [Q60](#) [Professor Graham Gee]

115 The Baring Foundation ([HRA0015](#))

116 JUSTICE ([HRA0069](#))

117 Child Poverty Action Group ([HRA0075](#))

118 Humanists UK ([HRA0023](#))

for parliamentary sovereignty.”<sup>119</sup> Even Professor Graham Gee, who raised concerns about the operation of the Human Rights Act, acknowledged that “Some of the saving grace for those who are critics of the Human Rights Act is that its structure was designed to minimise the political role of domestic courts.”<sup>120</sup>

135. While the IHRAR does not raise the possibility of wholesale change to sections 3 or 4 HRA, as Les Allamby, Chief Commissioner, Northern Ireland Human Rights Commission, told us: “I would not underestimate the ability [of] to change the machinery—that sounds a rather benign phrase—to make a very significant difference.”<sup>121</sup> In respect of sections 3 and 4 we are inclined to agree with Lady Hale’s comment to us about the HRA in general that “I cannot myself think of a fix that would make things better as opposed to potentially making things worse.”<sup>122</sup>

**136. While the changes to the HRA mooted by the IHRAR terms of reference, including in respect of sections 3 and 4, look to be relatively minor, minor changes could have a major impact on the protection of human rights in the UK.**

**137. Sections 3 and 4 HRA work together to balance protection for fundamental rights, an aspect of the rule of law, with the separation of powers and respect for Parliamentary sovereignty. We have not been provided with evidence justifying any change to the careful balance struck by these provisions, and consider that the changes mooted by the IHRAR terms of reference would be damaging for this balance rather than beneficial.**

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119 [Q5](#)

120 [Q56](#) [Professor Gee]

121 [Q38](#) [Les Allamby]

122 [Q17](#)

## 5 The right to an effective remedy: Article 13 ECHR

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### Introduction

#### **Article 13 ECHR: Right to an effective remedy**

**Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.**

138. Article 13 ECHR requires the UK to provide an “effective remedy” before a “national authority” for any person whose rights under the ECHR have been violated. Whilst that doesn’t necessarily require that the ECHR is incorporated into domestic law, it is worth noting that all ECHR signatory States have, now, done so.

139. Since the entry into force of the HRA, which incorporated the ECHR into the UK’s domestic law, anyone can access an effective remedy for a breach of ECHR rights in the UK.<sup>123</sup> This has been done principally through the operation of section 7 HRA which entitles “a person who claims that a public authority has acted (or proposes to act) in a way which” is incompatible with an ECHR right to bring proceedings in the appropriate court or tribunal, or to rely on the ECHR rights in any other legal proceedings.

140. Prior to the HRA, enforcement of human rights in the UK was more piece-meal and relied on discreet subject-specific mechanisms for those seeking to have an effective remedy. For example, one might rely on civil damages in a defamation case; police investigations for compliance with Article 2 ECHR procedural obligations; or perhaps reviews by ad hoc or administrative review boards with varying degrees of independence and powers in order to determine many other rights.

141. Some of these pre-1998 mechanisms met the requirements of Article 13 ECHR that people whose human rights had been violated should have an effective remedy. Other mechanisms were either not available or were insufficient—for example if they were not sufficiently independent or if they could not make legally binding decisions. Therefore, prior to the HRA the right to an effective remedy under Article 13 ECHR was not comprehensively given effect in the UK and compliance was variable depending on the underlying subject-matter.

### **The right to an effective remedy as a core part of the principle of subsidiarity**

142. Under Article 1 ECHR, the UK accepted a legally binding obligation to “secure to everyone within [its] jurisdiction the rights and freedoms defined in Section I of [the] Convention”.

143. Under the ECHR system, national authorities have the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the ECHR. Recourse

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<sup>123</sup> There are a few, very limited, exceptions to this rule, for example, judicial immunity precludes the award of damages for a judicial act done in good faith – which is reflected in section 9(3)HRA, as amended.

to the ECtHR in Strasbourg is thus subsidiary to national systems safeguarding human rights. This system—whereby the State has primary responsibility to protect and enforce human rights domestically—is reflected in Article 13 ECHR, under which the UK has undertaken to provide anyone whose rights have been violated with “an effective remedy” for a breach of a Convention right.<sup>124</sup>

144. Article 13 ECHR thus reflects the States’ obligation to protect human rights first and foremost within their own legal system, and establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. If Article 13 ECHR is not properly given effect to in a State, as was arguably the case for some matters in the UK prior to the HRA, individuals will be forced to refer complaints to the ECtHR in Strasbourg in the absence of any adequate means of enforcing their human rights in the UK.

### What does Article 13 ECHR require of a State’s domestic legal system?

145. Article 13 ECHR requires a domestic “effective remedy” before a competent “national authority” affording the possibility of dealing with the substance of an arguable complaint under the ECHR and of granting appropriate relief. However, States have a margin of appreciation in conforming with their obligations under this provision.<sup>125</sup>

146. It is clear from the ECtHR’s case law that there are many ways in which a State can provide an ‘effective remedy’. Moreover, Article 13 ECHR does not require any particular form of remedy, given the margin of appreciation afforded to Contracting States. Nor does Article 13 ECHR go so far as to require the incorporation of the Convention in domestic law.<sup>126</sup> That said, all States bound by the ECHR have now incorporated the Convention into their domestic legal order. It is therefore arguable that state practice has developed such that some form of incorporation sufficient to ensure the effectiveness of the right to an effective remedy is now expected. It is also noteworthy that much of the caselaw relating to Article 13 ECHR concerns cases coming from the UK prior to the entry into force of the HRA, in part because of the variable compliance with Article 13 ECHR in the absence of the HRA.

147. Article 13 ECHR requires that where an individual plausibly considers themselves to have been prejudiced by a measure allegedly in breach of the ECHR, he should have a remedy before a “national authority” in order both to have his claim decided and, if appropriate, to obtain redress.<sup>127</sup> The “national authority” need not always be a judicial body, but in general judicial remedies provide strong guarantees of independence and enforceability in line with the requirements of Article 13 ECHR.<sup>128</sup> In certain circumstances, however, the national authority could be a quasi-judicial body such as an ombudsman,<sup>129</sup> an

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124 This subsidiary character of the ECHR is shown most clearly in Articles 13 and 35(1) ECHR, – Article 35 ECHR provides that a person may only bring a case to the ECtHR if they have exhausted all available domestic remedies.

125 *Vilvarajah and Others v. the United Kingdom*, 1991, § 122; *Chahal v. the United Kingdom*, 1996, § 145; *Smith and Grady v. the United Kingdom*, 1999, § 135.

126 *Smith and Grady v. the United Kingdom*, 1999, § 135

127 *Klass and Others v. Germany*, 1978, § 64; *Silver and Others v. the United Kingdom*, 1983, § 113; *Leander v. Sweden*, 1987, § 77 (a).

128 Collected edition of the “Travaux préparatoires” of the European Convention on Human Rights, vol. II, pp. 485 and 490, and vol. III, p. 651; *Ramirez Sanchez v France* [GC], 2006.

129 *Leander v. Sweden*, 1987

administrative authority such as a government minister,<sup>130</sup> or a political authority such as a parliamentary commission.<sup>131</sup> Whatever the form of the body, it must still be effective and must normally have the power to hand down a legally-binding (not merely advisory) decision. This was the subject of a number of cases against the UK prior to the HRA.

### What remedy is “effective”?

148. To be effective, the remedy must be sufficient, accessible, and adequate, as well as being capable of directly remedying the impugned situation. The process must also be fair, which encompasses the equality of arms (granting the different parties involved an equal opportunity to make their case), as a constitutive element of an effective remedy. Moreover, the obligation on States under Article 13 ECHR includes a duty to ensure that the competent authorities enforce and implement remedies when granted, in line with the principle of the rule of law.

149. Judicial review is capable of providing an effective remedy, particularly where the domestic courts have been able to review the “reasonableness” of a decision, applying the same tests and law that the ECtHR would apply.<sup>132</sup> However, judicial review will not always provide an effective remedy, for example if the court’s powers of judicial review are insufficient (e.g. if they do not consider the relevant ECHR standards in assessing compliance with human rights, or if their remedial powers are so limited that they are incapable of providing an effective remedy to a breach of human rights).<sup>133</sup>

### Conclusions

**150. The ability to enforce Convention rights is crucial to the protection of human rights. The HRA is the principal way in which the UK both secures to everyone within its jurisdiction the Convention rights (Article 1 ECHR)—and how it enables them to be enforced so that there is an “effective remedy” in case of a breach of Convention rights (Article 13 ECHR).**

**151. Any change to the HRA, particularly any change that makes it more difficult for domestic courts to remedy human rights violations brought before them—or even effectively prevents courts from hearing certain cases—risks weakening the UK’s ability to comply with its obligations under Articles 1 and 13 ECHR (as well as any related substantive rights).**

**152. Any efforts to exclude or limit certain subject-matters or categories of people from the scope of the HRA would risk putting the UK in breach of its obligations under Article 13 ECHR, as well as being a retrograde step for compliance with human rights and the rule of law in the UK. Moreover, any effort to limit the way that individuals can access effective remedies or enforce their rights under the HRA would risk creating gaps in individuals’ ability to enforce their human rights and to obtain an effective**

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130 Boyle and Rice v. the United Kingdom, 1988

131 Klass and Others v. Germany, 1978

132 See Soering v. the United Kingdom, 1989 (§§ 121–124), and Vilvarajah and Others v. the United Kingdom, 1991 (§§ 123–127).

133 Smith and Grady v. the United Kingdom, 1999, §§ 136–139; Hatton and Others v. the United Kingdom [GC], 2003, §§ 141–142

**remedy, which again would risk placing the UK in breach of its duty under Article 13 ECHR to provide any person whose rights have been violated with an effective remedy at the national level.**

**153. Moreover, if some categories of people cannot seek to enforce their human rights before UK courts, we would not have the benefit of the UK Courts having first carefully considered the application of the relevant domestic laws and practices to the given case—and analysing the human rights compatibility of those laws in light of their in-depth understanding of how those laws work. As a result, we would likely see an increase in the numbers of cases needing to be litigated in Strasbourg, and an increase (as was seen prior to the HRA) in the number of UK cases raising issues around the UK's non-compliance with the right to an effective remedy for a breach of human rights.**

154. The right to an effective remedy under Article 13 ECHR is a theme that keeps recurring in this work, because any amendments to the HRA risk affecting—or even undermining—the right of people in the UK to an effective remedy for violations of human rights. We therefore come back to this theme in the following chapters.

## 6 Extra-territorial effect of the Human Rights Act

155. Within the second theme of the IHRAR (“The impact of the HRA on the relationship between the judiciary, the executive and the legislature”) appears a specific question relating to the application of the HRA to acts of public authorities taking place outside the territory of the UK. This is often referred to as the ‘extra-territorial effect’ of the Human Rights Act.<sup>134</sup>

156. The extra-territorial effect of the rights protected under the HRA has proved to be contentious. It has come into particular focus in the context of military conduct overseas. Judicial interventions in this area have been controversial, as they have highlighted political and legal tensions between human rights law and international humanitarian law (i.e. the legal framework applicable to situations of armed conflict and occupation). The Overseas Operations Bill 2019–2021, which focused on narrowing the legal responsibility of the UK and/or UK personnel for wrongful acts committed overseas and which included changes affecting time limits in HRA claims, received royal assent only after compromises were made in the face of significant objections to the Bill.<sup>135</sup> The question posed by IHRAR is whether the current law on ‘extra territoriality’ means there is a case for change to the HRA?

157. To consider this question, it is important to first review:

- a) Territorial jurisdiction under the HRA; and
- b) Territorial jurisdiction under the ECHR.

### ***Territorial jurisdiction under the HRA***

158. It is a general principle of statutory interpretation that “Unless the contrary intention appears, Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom”.<sup>136</sup>

159. However, in the case of *R (Al-Skeini) v Secretary of State for Defence* the House of Lords confirmed that the territorial effect of the Human Rights Act 1998 should be interpreted as being consistent with the territorial effect of the ECHR.<sup>137</sup> Since the HRA was intended “to provide a remedial structure in domestic law for the rights guaranteed by the Convention”—i.e. to allow claimants to obtain remedies in domestic courts rather than having to go to Strasbourg—then the UK’s jurisdiction under the Act must be consistent with the UK’s jurisdiction under the Convention. To interpret otherwise would leave a

134 This is to be distinguished from the ‘Soering’ principle, or non-refoulement, which prevents contracting states removing an individual from their territory to another territory where there is a real risk they will face torture or inhuman or degrading treatment or punishment in breach of Article 3 ECHR as a result. Such cases are not true examples of extra-territorial jurisdiction, because they concern actions by the State in respect of “a person while he or she is on its territory”. (*Bankovic v Belgium and others* App.No. 52207/99, 12 December 2001)

135 Including by the Committee: see Joint Committee on Human Rights, Ninth Report of Session 2019–21, [Legislative Scrutiny: Overseas Operations \(Service Personnel and Veterans\) Bill](#), HL Paper 155 / HC 665

136 Bennion, *Statutory Interpretation*, 4th ed, p282

137 [2008] 1 AC 153

category of victim under the Convention unable to obtain a remedy in the UK and would put the UK in breach of its obligation to provide an effective remedy under Article 13 ECHR.<sup>138</sup>

160. This decision confirmed that the section 6 HRA obligation on all public authorities to act compatibly with Convention rights applied not only within the physical territory of the UK, but also when the public authority was taking action outside the physical territory of the UK but still deemed to be legally responsible for the purposes of the ECHR. While Parliament could theoretically legislate to detach the HRA from the ECHR in terms of jurisdiction this would not affect the responsibility of the UK under the Convention. The UK would remain responsible in international law and any victim would still be able to seek redress in the ECtHR.

161. This means that to determine jurisdiction under the HRA the key question is whether the UK would bear legal responsibility under the ECHR.

### ***Territorial jurisdiction under the ECHR***

162. The geographic extent of the ECHR's application is governed by Article 1 ECHR, which states:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined ... this Convention.”

163. The precise meaning of “within their jurisdiction” has been explored by the ECtHR and has developed over the past 20 years. Inconsistencies in earlier case law were resolved by the Grand Chamber of the ECtHR in the case of *Al-Skeini v United Kingdom*.<sup>139</sup>

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138 See the speech of Lord Rodger at paras 56–57.

139 (2011) 53 EHRR 18

**Box 9: Extra-territorial effect of the ECHR: Al-Skeini v United Kingdom**

This case concerned allegations that the deaths of six Iraqi civilians, caused by British troops, had not been properly investigated as required by Article 2 ECHR (the right to life). The claim reached the House of Lords, where the Law Lords followed the leading ECtHR case of *Bankovic v Belgium* and ultimately held that only the claim brought in relation to the death of Baha Mousa in British Military custody in Iraq was valid. They found that all the other claims, which related to deaths occurring during patrols and encounters outside custody, fell outside the jurisdiction of the UK for the purposes of the ECHR (and thus the HRA)—meaning that no obligations were owed by the UK to those claimants.

However, the Grand Chamber of the ECtHR concluded that all of the deaths had occurred within the jurisdiction of the UK for the purposes of the ECHR. The Grand Chamber recognised two exceptions to the essentially territorial nature of the ECHR's jurisdiction:

- Firstly, where a contracting state has “effective control of an area” outside its borders, it must secure the full range of rights guaranteed under the Convention for the people within that area.
- Secondly, where agents of a contracting state exercise “control and authority over an individual” outside their territory they must secure the Convention rights of that individual—although only those that are relevant to the individual's situation.<sup>140</sup>

It was under this second exception that the jurisdiction of the UK was recognised in Al-Skeini.

164. Al-Skeini v UK clarified the limited basis for obligations under the ECHR to extend beyond the borders of the states that had ratified the Convention. The UK Supreme Court subsequently confirmed the Strasbourg approach and applied the extra-territorial effect of the HRA in the case of *Smith v Ministry of Justice*, a case relating to the adequacy of equipment provided to members of the UK Armed Forces when serving overseas.<sup>141</sup> The extra-territorial effect recognised in Al-Skeini is now relatively settled law. As the Law Society commented in their written evidence to us: “The exceptions to the general principle of territorial application are rightly restricted and their limits have been clarified. The position that has been established upholds human rights protections without stretching the reach of the HRA beyond its limits.”<sup>142</sup> In her oral evidence, Helen Mountfield QC emphasised that this extra-territorial effect remains exceptional:

“The point is that it is exceptional for there to be extraterritorial jurisdiction. It only happens where British forces or agents or officers are exercising jurisdiction beyond the territory of the UK, which is unusual”.<sup>143</sup>

140 I.e. if a potential enemy combatant is captured overseas, he must not be subjected to inhuman or degrading treatment in breach of Article 3 ECHR but the troops who have captured him are not obliged to secure his right to marry under Article 12 ECHR.

141 [2014] AC 52

142 The Law Society ([HRA0063](#))

143 [Q66](#) [Helen Mountfield QC]

165. She added that “if state power is exercised by agents of the British executive, it seems to me that it ought to be supervised by agents of the British legislature, because where there is an action there should be a legal remedy. It makes sense for that remedy to be the same wherever state power is exercised.” We agree. We were also impressed by Richard Hermer QC’s evidence that the extension of the protections of the HRA beyond the borders of the UK was a vindication of the rule of law:

“Watching the experience of people come to court, be listened to, tell their version to a judge who was listening, seeing witnesses from the other side have to come and give evidence and be cross-examined, and to receive reasoned judgments, which, as it happens, vindicated their right, and seeing the reaction of Iraqis to that—Iraqis who had suffered at the hands of the British—I found a deeply patriotic moment, because it vindicated the rule of law in this country. They came out of this experience with an immensely positive view of this country, despite everything that they had been put through. I just felt exceptionally proud to have been part of that. It is a human element as to what the Human Rights Act is capable of bringing and what the rule of law does through it”.<sup>144</sup>

### *Hassan v United Kingdom*

166. Professor Graham Gee referred us to arguments “that the law of armed conflict is a better suited legal regime for providing the rule of law over our overseas operations.”<sup>145</sup>

167. An argument of this type was made by the UK in the case of *Hassan v UK*, where it was submitted that ECHR jurisdiction based on taking a person into physical custody should not apply during the active hostilities phase of an international armed conflict, when the conduct of the State will be subject to the different requirements of international humanitarian law.<sup>146</sup> This submission was rejected by the ECtHR, but the Court did accept that the requirements of the right to liberty (Article 5 ECHR) had to be construed against the background of the provisions of IHL. This meant that Article 5 should be read so as to allow for the detention of prisoners of war and the detention of civilians who posed a risk to security under the Third and Fourth Geneva Conventions, subject to the need to avoid arbitrariness and to reviews appropriate for the context of international armed conflict.

168. This case is of particular relevance to those who believe that the application of human rights law in armed conflict situations is unrealistic and/or problematic. In *Hassan*, while it was not accepted that human rights law had no place in conflict situations, the ECtHR demonstrated that it was not blind to arguments that the full requirements of international human rights law may not be appropriate for situations of armed conflict where international humanitarian law applies.<sup>147</sup>

144 [Q67](#) [Richard Hermer QC]

145 [Q66](#) [Professor Gee]

146 *Hassan v United Kingdom* [2014] 9 WLUK 388

147 In *Hassan* the ECtHR did not resolve the question of whether the UK had also had jurisdiction because it had had ‘effective control over the area’ of Iraq where the detention had taken place. The Court did, however, indicate that even on the facts in *Al-Skeini*, when active hostilities had been declared finished, the evidence before the court had “tended to demonstrate that the United Kingdom was far from being in effective control” of the area it occupied. Thus, it seems highly unlikely the Court would have concluded that the UK was in effective control of the area during active hostilities.

### *Human rights protection for UK soldiers*

169. One significant consequence of *Al-Skeini* and the recognition that public authorities can owe duties under the HRA outside the territory of the UK is that these duties are owed to British soldiers as well as those over whom they exercise control.

170. In *Smith v Ministry of Justice*, the Supreme Court followed *Al-Skeini v UK* and concluded that the UK owed duties under Article 2 ECHR (the right to life) to its own armed forces serving outside its territory (although as JUSTICE noted to us in their written evidence, the Supreme Court recognised that “the actual application of the HRA to UK forces must take account of the difficult and dynamic conditions on the battlefield”).<sup>148</sup>

171. The Law Society of England and Wales commented that:

“The HRA not only provides protections for those resident in a foreign territory and subject to actions of the UK, but also for UK state agents who are deployed or stationed there, often armed services personnel. Limiting extraterritorial application of the HRA therefore risks removing protections from our own citizens, should their rights be infringed.”<sup>149</sup>

**172. The extra-territorial effect of the HRA is now relatively settled. It essentially ensures protection for those under the control of UK public authorities, even when those public authorities are operating overseas. It is important that UK Armed Forces personnel overseas - as well as other victims of human rights violations - can also benefit from the protections in the HRA.**

### *Implications of reform*

173. The IHRAR terms of reference ask whether there is a case for change to the circumstances in which the HRA applies to acts of public authorities taking place outside the territory of the UK. Since IHRAR began its work, and despite concerns raised by this Committee and others, some limited changes to the HRA have already been made in the Overseas Operations (Service Personnel and Veterans) Act 2021. In addition to changes relating to criminal responsibility for human rights violations overseas, and limitations for bringing civil claims, this Act has created specific additional considerations that a court must take into account when deciding whether to allow an HRA claim arising from overseas operations to proceed when it was brought outside the primary time limit of 12 months from the alleged violation. It also imposes an absolute (non-extendable) time limit on HRA claims arising from overseas operations of six years from the date of incident, or one year from the date of knowledge of the incident (whichever is later).<sup>150</sup> The question posed by IHRAR thus becomes whether there is a case for any *further* change? Given the approach already taken in the Overseas Operations Act, it seems highly likely that any further changes envisaged by the Government would be intended to limit the extra-territorial reach of the HRA rather than to extend it.

148 JUSTICE ([HRA0069](#))

149 The Law Society ([HRA0063](#))

150 This Committee raised concerns about these amendments, and the risk they pose of breaching the UK's human rights obligations, in the course of its scrutiny of the Bill - see Joint Committee on Human Rights, Ninth Report of Session 2019–21, [Legislative Scrutiny: Overseas Operations \(Service Personnel and Veterans\) Bill](#), HL Paper 155 / HC 665, para 107

174. The evidence we received was unanimously against any such change. The Law Society of England & Wales expressed the general sentiment of that evidence in saying that:

“Amendment of the HRA to limit extraterritorial application would have further perverse consequences for the advancement of human rights and for the rule of law overall. It would create a situation whereby public authorities are bound by human rights obligations at home, but free to violate them elsewhere.”<sup>151</sup>

175. The most obvious consequence of a change of this type would be that recognised by the House of Lords in *Al-Skeini* - it would leave a category of victim under the Convention unable to obtain a remedy in the UK and would put the UK in breach of its obligation to provide an effective remedy under Article 13 ECHR.<sup>152</sup> This would be because public authorities acting overseas would no longer be bound under section 6 HRA to comply with Convention rights, and human rights victims of their actions would no longer be able to seek redress in domestic courts under section 7 HRA.

176. We have previously voiced our concern about difference in treatment of human rights victims just because they are not within the UK.<sup>153</sup> The Scottish Human Rights Commission noted that this difference in treatment would affect British victims too:

“If the UK Government seeks to limit the reach of Convention rights so that they do not apply to UK activity abroad, this would remove protection for UK personnel abroad, as well as for non-UK citizens under our control. The extra-territorial effect of Convention rights means British troops and their families can ask our national courts to determine if the Ministry of Defence took reasonable steps to protect their lives from foreseeable risks such as through the procurement and deployment of appropriately armoured vehicles. It also requires the state to conduct an effective investigation into deaths abroad. Our military and their families may lose these protections if the extra-territorial reach of the Act is curtailed.”<sup>154</sup>

177. We also agree with evidence received from Rights and Security International, that reducing human rights protections for extraterritorial actions “carries institutional risks for the UK internationally”:

“The implications of the change would be twofold: firstly, there would be a risk of a ‘race to the bottom’, in which other States and non-State actors likewise failed to carry out their overseas actions in a manner compliant with human rights law. In times of conflict, this could place British soldiers in danger. Second, the UK’s international standing and engagement could be impacted by such a policy: as General Sir Nick Parker has recently noted, international coalition partners may be less likely to engage with the UK if it does not uphold its human rights obligations during conflict.”<sup>155</sup>

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151 The Law Society ([HRA0063](#))

152 per Lord Rodger at para 56.

153 Joint Committee on Human Rights, Ninth Report of Session 2019–21, [Legislative Scrutiny: Overseas Operations \(Service Personnel and Veterans\) Bill](#), HL Paper 155 / HC 665, para 54 and para 90

154 Scottish Human Rights Commission ([HRA0037](#))

155 Rights and Security International ([HRA0059](#))

178. Of course, any such amendments to the HRA would have no effect on the ECHR itself, so the UK's obligations under the Convention would not change. This would mean that public authorities operating overseas would still be bound by the same human rights obligations (under the ECHR) and that victims of human rights violations (including British victims) would still be able to bring a claim against the UK, but would be forced to take that claim to the Strasbourg Court. Richard Hermer QC noted this issue, but also the potential for cases to be brought before the International Criminal Court:

“ ... the other really troubling consequence, if we were to tinker with the extent of the territorial jurisdiction, is that this would just go to Strasbourg rather than be dealt with by our own courts. Even more troubling, not least I think as perceived by many senior military personnel, is that this, taken in tandem with the overseas operation Act, will mean not simply scrutiny of our cases before the Strasbourg court but British soldiers at risk of being dragged to the International Criminal Court in The Hague.

The Human Rights Act would provide the mechanism for this country to show that we have properly investigated, which would mean that the ICC does not have jurisdiction, absent that our troops are going to be placed at risk of being dragged to The Hague. That is a cause of grave concern to all of us, but I know it is a concern for senior military personnel.”<sup>156</sup>

179. One particular aspect of the ECHR which has had a significant extraterritorial effect is the obligation under Article 2 ECHR to carry out an effective investigation into a death where there are reasons to believe it may have been unlawful. Richard Hermer QC noted that investigations of this type perform a public service, both in revealing human rights violations and in clearing suspicions surrounding lawful deaths. He added that “in those senses it performs an enormous public service. There have also been ongoing investigations under a judge into fatalities, which I am sad to say have produced some shocking findings but which again have been an opportunity not only for victims to have redress but for the armed services to learn lessons.”<sup>157</sup>

**180. As we concluded in our Report on the Overseas Operations Bill, effective investigations into allegations of human rights violations by troops overseas are valuable and important and allow lessons to be learned. Changes to the HRA that would threaten the conduct and quality of such investigations would be of significant concern.**

**181. Ultimately, the Human Rights Act binds public authorities acting overseas only to a limited extent. It does so because the ECHR applies to all signatory states in respect of extra-territorial actions in certain, limited circumstances. Any attempt to amend the HRA to limit the extent to which public authorities acting overseas are bound by it could leave a category of victim under the Convention unable to obtain a remedy in the UK. This would put the UK in breach of its Article 13 ECHR obligation to provide those victims with an effective remedy. It would also leave the actions of UK public authorities, including the armed forces, open to challenge in the European Court**

156 [Q66](#) [Richard Hermer QC]

157 [Q66](#) [Richard Hermer QC]

**of Human Rights rather than in the domestic courts. It may even expose our armed forces to the jurisdiction of the International Criminal Court. There is no justification for making any such amendments to the HRA.**

## 7 Administrative Law

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### Inter-relationship between IHRAR and IRAL

182. The launch of the IHRAR came just over four months after the government's separate Independent Review of Administrative Law (IRAL) was established. The IRAL moved swiftly and published its report into judicial review in March 2021.<sup>158</sup> The two reviews, while separate, are interrelated;<sup>159</sup> both forming part of the government's realisation of the 2019 Conservative party manifesto commitment to "update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government".

183. The two reviews are also interrelated substantively, as judicial review is the key method by which the acts and decisions of public authorities, including government, can be challenged on human rights grounds under the HRA.<sup>160</sup> Any reform affecting judicial review will be likely to have an effect on human rights claimants. In particular, if access to, or the impact of, judicial review is restricted so as to undermine the ability of victims to enforce their human rights and secure an effective remedy, then the UK will additionally be in breach of its obligation to provide an effective remedy under Article 13 ECHR.

184. However, the IRAL report ultimately recommended very limited changes to the current system of judicial review. The substantive changes were (a) removing from the scope of judicial review decisions of the Upper Tribunal to refuse permission to appeal; and (b) granting judges in judicial review claims the power to make suspended quashing orders. The current intention of Government is to include both of these proposals in the forthcoming Judicial Review Bill. While we have not yet scrutinised these proposals, the first of them would not appear to undermine human rights protections. In respect of the second, the availability of a suspended quashing order would allow the courts to suspend, for a specified time, the effect of an order quashing a decision or action or statutory instrument. This would give the Defendant public authority an opportunity to rectify the errors identified, with the quashing order coming into effect if the errors were not remedied within the timeframe.

185. While suspended quashing orders in judicial review applications may well provide more flexibility in the remedies available, in applications concerning human rights they must not be used in such a way as to deny an effective remedy. We intend to take evidence on these proposals and report in due course.

### Government consultation on Judicial Review Reform

186. Despite the limited recommendations of the IRAL, the Government subsequently launched a six-week consultation on further potential changes to judicial review that would have a significant impact on access to justice, the rule of law and the balance of power between the courts and the other branches of government.

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158 *Report of the Independent Review of Administrative Law*, [CP 407](#), March 2021

159 The Human Rights Act fell outside the IRAL terms of reference, but the IRAL report acknowledged that there "is clearly a degree of overlap between" the IHRAR and the IRAL (Conclusions, para 5).

160 Civil claims for human rights breaches can also be brought in the county court (or high court) but they offer more limited remedies, usually damages (essentially compensation).

### *Ouster clauses*

187. Ouster clauses are clauses in primary legislation which seek to preclude the court's jurisdiction on specific issues, placing certain powers and decisions beyond the reach of judicial review. One of the additional proposals for reform put forward in the Government's consultation was "legislating to clarify the effect of statutory ouster clauses", on the basis of a "core principle ... that ouster clauses legislated for by Parliament should not be rendered as of no effect".<sup>161</sup>

188. This reflects the fact, acknowledged in the consultation, that the courts have tended not to give effect to ouster clauses which purport to oust their jurisdiction entirely. Instead they have found that decisions based on errors of law are still capable of being reviewed, on the basis that they involve the exercise of powers that Parliament did not intend to give to the decision maker.<sup>162</sup>

189. The consultation notes that IRAL made no such recommendation on ouster clauses, but explains the Government's position that the doctrine followed by the courts is

"... detrimental to the effective conduct of public affairs as it makes the law as set out by Parliament far less predictable, especially when the courts have not been reluctant to use some stretching logic and hypothetical scenarios to reduce or eliminate the effect of ouster clauses ... .The danger of an approach to interpreting clauses in a way that does not respect Parliamentary sovereignty is, we believe, a real one."<sup>163</sup>

190. Whilst it acknowledges that it is not unreasonable to presume that Parliament would not usually intend a body to operate with "unlimited restriction, and with no regards to any form of accountability", the paper concludes that further clarity is needed as to how the courts should interpret ouster clauses.<sup>164</sup>

191. The Government further claims that ouster clauses are not a way of avoiding scrutiny, but rather "are a reassertion of Parliamentary Sovereignty, acting as a tool for Parliament to determine areas which are better for political rather than legal accountability".<sup>165</sup>

192. We are concerned at the implication that the use of ouster clauses might become more widespread in areas where "conciliatory political means" are considered to be a more appropriate form of accountability. Legal accountability is crucial when dealing with human rights violations as political accountability will not always be sufficient.

193. In evidence to IHRAR, Policy Exchange's Judicial Power Project (JPP) suggested that Parliament could enact an ouster clause specifying that no court would have authority to question a designated derogation order. This would be "highly controversial", it was acknowledged, but they argued that it would be consistent with the role that Government plays in deciding on derogations from the ECHR.<sup>166</sup> However, we note that in a constitutional system that respects the rule of law, whilst derogation decisions are indeed for the Government to make, citizens should be protected from unlawful decisions by

161 Ministry of Justice, *Judicial Review Reform - consultation*, [CP 408](#), March 2021, para 90

162 See *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22

163 Ministry of Justice, *Judicial Review Reform - consultation*, [CP 408](#), March 2021, para 39

164 Ministry of Justice, *Judicial Review Reform - consultation*, [CP 408](#), March 2021, para 39

165 Ministry of Justice, *Judicial Review Reform - consultation*, [CP 408](#), March 2021, para 86

166 Judicial Power Project submission to IHRAR, para 65

Government that breach their human rights. This protection is provided by the ability of the Courts to hear challenges to such unlawful decisions and to provide appropriate and effective remedies where people's human rights are violated as a result. We discuss this in further detail in the next chapter.

### *Prospective-only remedies*

194. The Government consultation also proposes 'prospective-only remedies'. This is essentially a proposal that in certain circumstances the courts would either have the option, or even be required, to make quashing orders that only affect statutory instruments for future purposes. Instead of being found to have been unlawful from the point at which it was first made, the SI would instead be treated as having been lawful until the order was made. Claimants who had already suffered as a result of the statutory instruments found to be unlawful would not receive any remedy, other than, as Joshua Rozenberg QC described it to us, "the warm feeling that they had persuaded the Government to change the law".<sup>167</sup>

195. Joshua Rozenberg QC summed up the effect of any such change in his oral evidence:

"The advantage of that from the Government's point of view is that secondary legislation that people have previously relied on would not be overturned. The disadvantage from the claimant's view is, as the Government seem to accept, that the successful claimant would not get any benefit from winning the case."<sup>168</sup>

196. Plainly the use of prospective-only remedies in judicial reviews brought on human rights grounds, particularly if they were made mandatory, raises serious concerns about the ability of the courts to provide an effective remedy as required under Article 13 ECHR. It also raises the likelihood of those claimants who receive no effective remedy in the UK courts successfully pursuing their claims to the ECtHR.

**197. The IHRAR has not taken place in isolation. It followed the Independent Review of Administrative Law (IRAL), which considered potential reforms to judicial review, which has itself been followed by a Government consultation. Since judicial review applications in the Administrative Court play a key role in enforcing human rights through the HRA, any reforms that would affect access to judicial review or the remedies available would have implications for the efficacy of the HRA and for compliance with the right to an effective remedy for a breach of an ECHR right (Article 13 ECHR).**

**198. Limited changes such as those recommended in the IRAL report could potentially be accommodated within a system that provides effective human rights protection. However, some of the proposals in the Government's consultation paper, concerning ouster clauses and changes to judicial review remedies, could harm the ability of the HRA to be used to enforce rights and provide an effective remedy in accordance with Article 13 ECHR. The JCHR will carefully scrutinise the forthcoming Judicial Review Bill.**

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167 [Q59](#)

168 [Q58](#) [Joshua Rozenberg QC]

## 8 Derogating from the ECHR: Designated Derogation Orders and Remedies

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### Introduction

199. There are limits on a State's ability to derogate from basic human rights protections. Article 15 ECHR sets clear limits as to when—and to what extent—a State may derogate from its ECHR obligations. Any attempt to derogate from the protections in the ECHR outside of those limits would be an unlawful violation of human rights. It is therefore very important that derogations are properly scrutinised and are only used lawfully.

200. Under the HRA the principal role is for the Government to make a derogation and a designated derogation order; for Parliament to consider and approve that designated derogation order; and for the Courts to hear any challenges as to the legality of any derogations from basic human rights protections.

201. If the Government attempts to derogate from the ECHR in a way that is not lawful, any executive acts such as deciding to derogate in those terms, making a designated derogation order, or acting pursuant to such an attempt to derogate, would be unlawful and can be challenged before the courts under the usual grounds of challenging the lawfulness of executive actions.

202. As is well established, the Government and other public authorities can only act within the limits of their powers. It is therefore crucial that there are checks and balances in place for situations where the Government acts unlawfully and especially where such unlawful acts lead to a violation of an individual's human rights.

203. The terms of reference for IHRAR<sup>169</sup> include the question “What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?”

204. In order to consider whether there is a case for reviewing the remedies available to domestic courts when considering challenges to designated derogation Orders, it is first important to recall the legal framework (both national and international) for derogating from the ECHR, before considering recent case studies and the case for change.

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169 Independent Human Rights Act Review: [Terms of Reference](#). This question was also replicated in IHRAR's own [call for evidence](#).

## The legal framework for derogating from the ECHR

### Article 15 ECHR

#### Box 10: Article 15 ECHR

Article 15 ECHR provides:

“1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligation under [the] Convention to the extent strictly required by the exigences of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2 [the right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [torture], 4(1) [slavery] and 7 [retrospective criminal penalties] shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

Source: European Convention on Human Rights

205. The UK has an international legal obligation to comply with the provisions and protections contained in the ECHR Articles, subject to any valid derogation made. Derogation from certain Convention rights is possible, but only if and to the extent that the situation meets the threshold required by Article 15 ECHR. The validity of any derogation may be tested before the ECtHR, which has developed its caselaw on Article 15.<sup>170</sup>

### Political Context

206. In the course of the debates on the Overseas Operations (Service Personnel and Veterans) Bill 2019–21, the Government has recently explored, and then withdrew, a proposal to require Ministers systematically to consider whether the criteria of Article 15 ECHR are met in order to derogate from certain ECHR rights during overseas military operations.<sup>171</sup> As we said, in relation to that proposal:

“The UK cannot lawfully make a derogation unless the Article 15 ECHR conditions for derogation are met ... It is therefore highly questionable as to whether this provision adds much to what the Minister would or indeed should do in any event ...”<sup>172</sup>

170 See for example, the ECHR's helpful guide on Article 15 – [Derogation in time of emergency](#)

171 HL Deb, 13 April, [c 1234](#) [B Goldie]

172 Joint Committee on Human Rights, Ninth Report of Session 2019–21, [Legislative Scrutiny: The Overseas Operations \(Service Personnel and Veterans\) Bill](#), HL Paper 155 / HC 665

207. As was made clear during the debates on that Bill, there are clear limits on a State's ability to derogate from its obligation to protect the human rights of those within its control—and this is for good reason. In any event, the proposal was withdrawn, perhaps making this element of the IHRAR's term of reference less pertinent.

### ***HRA Framework for derogating from the ECHR***

208. In order to derogate from the Convention rights, not only would the Government need to comply with the criteria for derogation, but it would also need to notify the Secretary General of the Council of Europe in writing, and, under the terms of the HRA, it would also need to make a designated derogation Order in order for the derogation to have effect in UK law.

209. Section 1(2) HRA provides that Convention rights have effect “subject to any designated derogation”. Therefore, for UK law purposes, a derogation would only have the effect of limiting the application of Convention rights where a designated derogation is in place. These are made through designated derogation Orders, the mechanism for which is set out in sections 14 and 16 HRA.

210. The HRA provides for designated derogation Orders to be made under the ‘made affirmative’ procedure—i.e. to be made by the Minister, but to cease to have effect unless approved by a resolution of both Houses of Parliament within 40 days.<sup>173</sup> Whilst this procedure therefore purports to involve Parliament actively in the approval of a designated derogation Order, we have noted in the Committee's previous work that the requirement for parliamentary approval does not necessarily translate into Parliament being informed, consulted or allowed to debate derogations in good time.<sup>174</sup>

### ***The lack of adequate parliamentary scrutiny of designated derogation Orders***

211. The opportunity for both parliamentary and judicial scrutiny of derogation from Convention rights is both limited and uncertain. As the Joint Committee on Human Rights noted in its 2007–2008 Report on the Counter-Terrorism Bill:

“As far as parliamentary scrutiny is concerned, the HRA itself provides for some but it is of limited scope. There is no obligation on the Government to consult Parliament before it decides to derogate from a Convention right. A derogation order, making the derogation effective in domestic law, is made by order-in-Council and can be made without being laid first in draft, but once made it must be laid before parliament and it will cease to have effect after 40 days unless approved by a resolution of each House. Parliament's ability to scrutinise a derogation is therefore fairly limited.”<sup>175</sup>

173 Human Rights Act 1998, [section 16\(3\)](#)

174 See for example, Joint Committee on Human Rights, Ninth Report of Session 2019–21, [Legislative Scrutiny: The Overseas Operations \(Service Personnel and Veterans\) Bill](#), HL Paper 155 / HC 665, and Thirtieth Report of Session 2007–08, [Counter-Terrorism Policy and Human Rights \(Thirteenth Report\): Counter-Terrorism Bill](#), HL Paper 172 / HC 1077

175 Joint Committee on Human Rights, Thirtieth Report of Session 2007–08, [Counter-Terrorism Policy and Human Rights \(Thirteenth Report\): Counter-Terrorism Bill](#), HL Paper 172 / HC 1077, para 96

212. That Report went on to conclude that there is a strong case for greater clarity as to the parliamentary procedure to be followed in advance of a derogation, to ensure that there is an opportunity for both houses to satisfy themselves that the conditions for derogating are met, that the extent of the derogation is no greater than is required by the exigencies of the situation, and that any necessary safeguards against any disproportionate exercise of the derogating power are in place in advance of the power being used.<sup>176</sup>

213. Despite further such requests by the JCHR in 2020, such a move to improve parliamentary scrutiny of designated derogation Orders has not been made. Moreover, there has only been one designated derogation Order made since the HRA entered into force and concerns were expressed then at the lack of adequate information and time for parliamentary scrutiny.<sup>177</sup>

## UK derogations from the ECHR

214. The UK has only very rarely derogated from the ECHR. We are only aware of eight derogations.<sup>178</sup> All of the UK's derogations related to powers to detain suspected terrorists and required a derogation from the right to liberty (Article 5 ECHR). All but one of these related to the threat of terrorism in Northern Ireland and all but the latest of these derogations pre-date the HRA. The eight derogations are:

- a) Six derogations from 1957, 1969, 1971, 1973, and 1975 concerning extra-judicial detention relating to the Troubles in Northern Ireland.<sup>179</sup>
- b) A 1988 derogation relating to powers to detain suspected terrorists in relation to Northern Ireland.<sup>180</sup>
- c) A 2001 derogation to detain non-nationals suspected of international terrorism but who couldn't be deported. This is the only derogation made since the entry into force of the HRA and therefore the only derogation to have required a designated derogation Order. The derogation was considered by SIAC, the Court of Appeal, the House of Lords (as it then was) and the ECtHR in the case *A and others v UK* [2009] and was found to be unlawful.

176 Joint Committee on Human Rights, Thirtieth Report of Session 2007–08, [Counter-Terrorism Policy and Human Rights \(Thirteenth Report\): Counter-Terrorism Bill](#), HL Paper 172 / HC 1077, paras 99 and 100.

177 In 2001, the lack of a statement to Parliament on the derogation and the public emergency situation in relation to the controversial (and ultimately unlawful) derogation to detain foreign terrorist suspects for unlimited periods of time when they could not be deported led to Points of Order critical of the Home Secretary in the Commons Chamber – 131. HC Deb, 12 November 2001, [cols 572–573](#)

178 This excludes historical derogations in relation to former British colonies, such as those in relation to Cyprus in 1955.

179 These derogations included (i) detention relating to initial arrest for interrogation; (ii) detention for further interrogation; and (iii) preventive detention. These were considered by the ECtHR in the case *Ireland v United Kingdom* [1978] and found to be comply with the conditions of Article 15 ECHR and to be within the UK's margin of appreciation in the use of Article 15 ECHR.

180 The derogation arose from the ECtHR case *Brogan and Others v UK* in 1988 in which the ECtHR held that the detention of the applicants under the Prevention of Terrorism (Temporary Provisions) Act 1984 for more than four days was a breach of Article 5(3) ECHR, because they had not been brought promptly before a judicial authority. Consequently, the Government entered a derogation to extend the period of detention of persons suspected of Northern Ireland - related terrorism for up to seven days. That derogation was upheld by the ECtHR in *Brannigan and McBride v UK* [1993] where it was found to be within the UK's margin of appreciation in the use of Article 15 ECHR. The derogation was further upheld in *Marshall v UK* [2001] where it was found to still be valid notwithstanding the somewhat improved security situation in Northern Ireland.

***The case of A v UK [2009]***

215. This case concerned measures introduced to detain foreign nationals who were suspected of being international terrorists but who could not be deported due to a real risk of their being subjected to torture or inhuman or degrading treatment or punishment contrary to Article 3 ECHR on their return to their country of origin. The UK Government had made a derogation in respect of the right to liberty under Article 5 ECHR and a corresponding designated derogation Order. This is because the UK Government considered that the power to detain these individuals under the Anti-Terrorism Crime and Security Act 2001 (ATCSA) may be inconsistent with the right to liberty under Article 5(1) ECHR.

216. The UK courts judicially reviewed the derogation and the designated derogation Order:

- a) The Special Immigration Appeals Commission (SIAC) was satisfied that the criteria under Article 15 ECHR were met—i.e. that there was a “public emergency threatening the life of the nation”. However, it held that the measures constituted unlawful discrimination as the measures were only taken against non-British nationals, whereas British nationals who posed a similar threat to the UK were not detained. SIAC consequently quashed the designated derogation Order and issued a section 4 HRA declaration of incompatibility in respect of section 23 ATCSA 2001.
- b) The Court of Appeal agreed that there was a public emergency threatening the life of the nation, but found that the measures were objectively justified as ATCSA only applied to individuals that the Secretary of State wanted to deport but could not and so did not consider that the derogation was unlawful.
- c) The House of Lords also agreed that there was a public emergency threatening the life of the nation, but that the detention scheme did not rationally address the threat to security and was therefore disproportionate. It found, in particular, that there was evidence that United Kingdom nationals were also involved in terrorist networks linked to al-Qaeda and that the detention scheme in question discriminated unjustifiably against foreign nationals. It therefore made a declaration of incompatibility under section 4 HRA and made a quashing order in respect of the designated derogation Order.<sup>181</sup>
- d) The ECtHR accepted that there had been a public emergency threatening the life of the nation, noting that significant attention also had to be paid to the views of the national courts, which were better placed to assess the evidence relating to the existence of an emergency. On substance, it found in particular that the choice by the Government and Parliament of an immigration measure to address what had essentially been a security issue had resulted in a failure adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists.<sup>182</sup> The threat came from both British nationals and foreign nationals and there was

181 Part 4 of the impugned ATCSA remained in force, however, until it was repealed by Parliament in March 2005. As soon as the applicants still in detention were released, they were made subject to control orders under the Prevention of Terrorism Act 2005.

182 [A. AND OTHERS v. THE UNITED KINGDOM](#)

no significant difference in the potential adverse impact of detention without charge on a national or on a non-national. The Court thus found that there had been a violation of Article 5 § 1 (right to liberty and security) of the Convention because the derogating measures had been disproportionate in that they had discriminated unjustifiably between nationals and non-nationals.

## Arguments for a change

217. Notwithstanding the judicial review of the designated derogation Order at issue in *A v UK*, concerns have been expressed at the lack of clarity as to the judicial scrutiny opportunities for designated derogation Orders. As the Joint Committee on Human Rights previously said in its 2007–2008 Report on the Counter-Terrorism Bill:

“As for judicial scrutiny, the HRA itself does not make any express provision for judicial control of derogations. Article 15 ECHR, which is the source of the power to derogate from Convention rights and contains the preconditions which must be satisfied for a derogation to be lawful, is not one of the Articles of the ECHR expressly incorporated by the HRA.”<sup>183</sup>

218. Further, in evidence to IHRAR, Policy Exchange's Judicial Power Project (JPP) suggested that Parliament could enact an ouster clause specifying that no court would have authority to question a designated derogation order. It acknowledged that this would be “highly controversial”, but they argued that it would be consistent with the role that Government plays in deciding on derogations from the ECHR.<sup>184</sup> However, in a constitutional system that respects the rule of law, citizens should be protected from unlawful decisions of the Government that breach their human rights. This is done through the Courts hearing challenges to such unlawful decisions and providing appropriate and effective remedies where human rights have been violated by as a result of such unlawful actions.

## Conclusion

219. It is only right that there should be clear substantive and procedural limits on a State's ability to derogate from basic human rights protections. Article 15 ECHR sets clear limits as to when—and to what extent—a State may derogate from its ECHR obligations. It is crucial that there are adequate parliamentary and judicial controls on any decision to derogate from human rights safeguards.

220. The HRA sets out the roles for national actors in any derogation decision. Under the HRA the principal role for the Government is to make a derogation and a designated derogation order and to keep it under review; for Parliament to consider and approve that designated derogation order and to hold the Government to account; and for the Courts to hear any challenges as to the legality of any derogations from basic human rights protections.

**221. It is important that both the parliamentary and judicial controls on the legality and necessity of derogations are retained. Moreover, as we have seen in our previous**

183 Joint Committee on Human Rights, Thirtieth Report of Session 2007–08, [Counter-Terrorism Policy and Human Rights \(Thirteenth Report\): Counter-Terrorism Bill](#), HL Paper 172 / HC 1077, paras 97 and 98.

184 See [paragraph 65](#) of that submission.

work, it is clear that parliamentary scrutiny of derogations should be improved. Given the absence of improved parliamentary scrutiny of derogations, judicial scrutiny is all the more crucial.

222. The UK has only rarely derogated from the ECHR. Since the entry into force of the HRA only one designated derogation Order has been made. There is a very limited evidence base on which to assess whether there is any need for improved or bespoke remedies for challenges to designated derogation Orders. As such, we think there is a limited need and a limited case for reviewing the current arrangements for remedies for challenges to designated derogation Orders.

223. Judicial scrutiny of UK derogations from the ECHR and designated derogation Orders is essential to ensure that human rights are not violated. Impeding the courts from delivering an effective remedy to a person whose human rights were violated would be deeply problematic.

224. The national courts are also best placed to assess the evidence relating to the existence of an emergency threatening the life of the nation—and this has been recognised by the ECtHR who will pay significant attention to the views of the national courts on such matters. The national courts can therefore play a key role in setting out the context of an emergency and the extent of the margin of appreciation to be accorded to the State.

225. The current arrangement whereby the domestic courts have powers to issue quashing orders in respect of a designated derogation Order, but only to make a declaration of incompatibility in respect of a provision of an Act of Parliament reflects the status quo for the powers of the courts in relation to statutory instruments as compared to Acts of Parliament. Moreover, it seems to us to strike the right balance in ensuring respect for Parliamentary sovereignty, whilst also ensuring that acts of the executive that unlawfully violate a person's human rights are quashed.

## 9 Parliamentary scrutiny of remedial Orders

226. The terms of reference for IHRAR<sup>185</sup> includes a question on the remedial Order process, which was also replicated in IHRAR's own call for evidence.<sup>186</sup>

### Box 11: IHRAR call for evidence: Remedial Orders

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?

Source: IHRAR, Independent Human Rights Act Review: Call for evidence

### The remedial process

227. The Government may take action to remedy an incompatibility in the law identified in a declaration of incompatibility or following a judgment of the ECHR. They do this usually either by introducing a Bill to Parliament or by way of the remedial order process provided under section 10 HRA.

228. Section 10 HRA provides a specific procedure for remedying legislation that has been declared incompatible with Convention rights. It permits a Minister to make a statutory instrument called a remedial order amending the legislation in a way considered necessary to remove the incompatibility. Such remedial orders are subject to much greater scrutiny than many other forms of secondary legislation, including statutory instruments that may have a wide-ranging impact on human rights as we have seen during the pandemic.

### Use of the remedial power

229. The remedial power can only be used where “there are compelling reasons for proceeding under this section” rather than taking a normal legislative route. This requirement for “compelling reasons” means that remedial orders cannot be used when scrutiny by parliament of primary legislation in the form of a Bill is what is required.

230. Where there are “compelling reasons”, schedule 2 of the HRA provides that remedial orders can be made either by way of the standard procedure or an emergency procedure:

- a) Under the standard procedure, a draft of the proposed order (complete with some background information) is laid for a period of 60 days, during which period the JCHR undertakes an inquiry and produces a Report. After this period of 60 days, a draft of the order (including any amendments that were considered appropriate e.g. following the JCHR Report) can be laid before Parliament, together with a summary setting out any representations made and whether any changes were made following those representations. The JCHR then produces a second Report on this draft Order and then, using the JCHR's Report to help to inform debate, the Order is subject to approval by a resolution of each House of Parliament before coming into force.

185 Independent Human Rights Act Review: [Terms of Reference](#)

186 Independent Human Rights Act Review: [Call for Evidence](#)

- b) Under the emergency procedure, the order is made without approval by Parliament. But the 'made order' is then laid before Parliament (complete with background information), similarly to the standard procedure. The JCHR then produces a Report in the same way as for a standard procedure remedial order. The "made order" (or a "replacement order" if changes have been made to the original made order following representations) must then be approved by both Houses of Parliament within 120 days or it will cease to have effect. Again, the debates in both Houses are informed by the JCHR's Report(s) on the Order.

231. Practice over the last 20 years has shown that the remedial power has been used only rarely and where a topic is not considered controversial. Of the 43 declarations of incompatibility made since 2000, only 8 have been amended by way of remedial order.<sup>187</sup>

### Scrutiny by the JCHR

232. The Government department taking a lead on an issue is expected to bring a declaration of incompatibility to the JCHR's attention. The Ministry of Justice states that it encourages departments to update us regularly on their plans for responding to declarations of incompatibility.

233. Under Commons Standing Order No. 152B and Lords Standing Order No. 72(c) Parliament has given the JCHR a role in scrutinising and reporting on remedial Orders. As set out above, we generally produce two Reports in respect of a remedial Order. For non-urgent remedial Orders—the first Report is produced when the remedial order is laid as a proposal and the second when it is laid in draft. For urgent remedial Orders, the first Report is produced in the 60 day period after it is laid before Parliament and a second Report is normally only produced if necessary (e.g. if changes have been made and there is a replacement order).

234. When undertaking this scrutiny work, we analyse each remedial Order (and draft remedial Order) as against a set of criteria to determine if it meets the procedural requirements as well as carefully considering the substantive changes being introduced.<sup>188</sup> This includes considering whether it is a topic that would be better suited for consideration

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187 A further 3 remedial Orders were made following judgments of the ECtHR. So the total number of remedial Orders is 11. The MoJ state that of the other declarations of incompatibility, 15 have been addressed by primary or secondary legislation (other than remedial orders) and the rest were either overturned on appeal, resolved prior to judgment, addressed by other measures or are still under consideration. See ["Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019–2020"](#) Dec 2020, CP 347

188 These criteria are set out by the JCHR when reporting on remedial Orders. See, for example, the Joint Committee on Human Rights, Fifteenth Report of Session 2017–19, [Proposal for a draft Human Rights Act 1998 \(Remedial\) Order 2019](#), HL Paper 228 / HC 1547: which explains that the Committee generally asks: (i) Have the conditions for using the Remedial Order process (section 10 and Schedule 2 HRA) been met? (ii) Are there "compelling" reasons for the Government to remedy the incompatibility by Remedial Order? (iii) Is the procedure adopted...appropriate? (iv) Has the Government produced the required information and effectively responded to other requests for information from the Committee? (v) Does the proposed order remedy the incompatibility with Convention rights and is it appropriate? For example, is any additional provision contained in the proposed order appropriate and intra vires—and does the proposed order omit additional provisions which it should have contained? (vi) Are the criteria of technical propriety applied by the JCSI satisfied?"

by Parliament in a Bill.<sup>189</sup> The level of scrutiny given to the provisions of a remedial Order—including the substance of the proposals, as well as their procedural propriety—is therefore very significant. Our Reports then inform the subsequent debates and votes by both Houses on the remedial Order in question.

**235. Remedial Orders are subject to enhanced scrutiny by the JCHR—which carefully examines remedial Orders for both procedural propriety as well as substance. The ensuing JCHR Reports then inform the subsequent debates and votes by both Houses on the remedial Order in question. Remedial Orders therefore already receive a significant level of scrutiny.**

**236. In practice, the remedial power is not used for politically sensitive issues and therefore its use has not been seen as controversial. Given pressures on parliamentary time there is very little appetite for requiring stricter procedures and processes for non-controversial matters. There is therefore little need or appetite for a more stringent parliamentary process in respect of remedial Orders.**

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189 The 2001–2002 JCHR addressed what might amount to “compelling reasons” in its report on the [“Making of Remedial Orders”](#). Noting expressly that this was not an exhaustive list they suggested: (i) Where the amendment relates to a body of legislation which is under review with a view to major legislative reform in the next few years; (ii) Where the legislative timetable is already fully occupied by other important, or even emergency, legislation; (iii) Where waiting for a slot in the legislative timetable might cause significant delay and the Remedial Order procedure would be likely to cause less delay; (iv) When the incompatibility affects the life, liberty, safety, or physical or mental integrity of the individual - in such cases, there would be ‘compelling reasons’ even if a Remedial Order would achieve only a small acceleration in the process.

## 10 The nations of the UK and the devolution statutes

237. The role played by the ECHR in the devolution statutes has helped to embed respect for human rights in executive and administrative action in Scotland, Northern Ireland and Wales. Indeed, there has been an appetite for enhancing human rights protections in these three nations of the United Kingdom.

238. Any change to the HRA would impact on the people and governance of Wales, Scotland and Northern Ireland. The role of the HRA in the Northern Ireland peace process and the implications of reform for the Belfast/ Good Friday Agreement (the “1998 Agreement”) give rise to particular sensitivities.

### Northern Ireland

239. In the 1998 Agreement between the UK and Ireland, the UK Government “undertook the complete incorporation into Northern Ireland law of the ECHR with direct access to the court and remedies for breach of the Convention, including the power for the courts to overrule Assembly legislation on the grounds of inconsistency”.<sup>190</sup> The HRA currently fulfils this part of the Agreement in Northern Ireland.

240. The 1998 Agreement further envisaged the creation of a Bill of Rights for Northern Ireland to provide for rights supplementary to the Convention rights, “to reflect the particular circumstances of Northern Ireland”.<sup>191</sup>

241. It also requires certain safeguards to be in place to ensure that all sections of the community can participate in the operation of the Democratic Institutions in Northern Ireland, including:

...

- 5(b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission;
- 5(c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland;<sup>192</sup>

242. The Northern Ireland Act 1998 (NIA), which provides for the devolution arrangements in Northern Ireland, also makes direct reference to the ECHR, by limiting the powers of the Northern Ireland Assembly and Executive by reference to Convention rights. Section 6 of the NIA provides that an Act is outside the competence of the Assembly if it is incompatible with Convention rights. Section 24 provides that a Minister or department has no power to act, including making subordinate legislation, in a way that is incompatible with Convention rights.

190 [The Belfast/ Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity](#), para 2

191 [The Belfast/ Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity](#), para 4

192 [The Belfast/ Good Friday Agreement 1998, Rights, Safeguards and Equality of Opportunity](#). Strand One: Democratic Institutions in Northern Ireland, para 5

243. Les Allamby told us the 1998 Agreement “has human rights at its heart”. He also told us that it was clear that the 1998 Agreement did not just commit to incorporating the Convention into domestic law, which was already happening at the time the Agreement was signed, but was about having access to meaningful remedies. However, he warned that:

“It feels like the Belfast/Good Friday agreement is being kicked about like a political football at the moment. On the particular evidence that I have seen and read, I think you interfere at your peril with the core human rights and equality provisions that are central to the Belfast/Good Friday agreement.”<sup>193</sup>

244. Policy Exchange’s Judicial Power Project argued in evidence to IHRAR that the claim that the 1998 Agreement required the retention of the HRA could be “dismissed swiftly” on the basis that there was no such requirement in the text, and that the requirement to incorporate the ECHR had been discharged by sections 6 and 24 of the NIA.<sup>194</sup> This is at odds with the legal position, whereby in the absence of the HRA there would be no duty on public authorities to act compatibly with Convention rights, nor access to an effective remedy for breach of Convention rights, as required by Article 13. Furthermore, the limitations on the powers of the Assembly and the Executive imposed by the NIA only apply in relation to areas of devolved competence. It is also at odds with the evidence we received to our inquiry which noted the importance of the HRA in the context of what Mr Allamby referred to as “the rather febrile circumstances of Northern Ireland”. He suggested any dilution of the machinery of the HRA would be “counterintuitive to the clear aim of the Belfast/ Good Friday agreement”.<sup>195</sup>

245. The Bar of Northern Ireland agree that the HRA “has a distinctive constitutional function in Northern Ireland” as the mechanism that delivered on the human rights and equality guarantees contained in the 1998 Agreement via the effective delivery of ECHR rights in domestic law. Thus “any efforts to alter this under the terms of this Review risks unsettling a delicate balance”.<sup>196</sup>

246. The Bar of Northern Ireland also told IHRAR that the proposals under consideration by the Review could potentially lead to a divergence between domestic jurisprudence and that of the ECtHR which would “threaten the basis of the constitutional settlement here, insofar as the divergence could dilute the protections guaranteed by the Convention”.<sup>197</sup>

247. These concerns were shared by our witnesses. The Human Rights Centre at Queen’s University School of Law told us that the Review “presents significant risks to stability and peace in Northern Ireland”.<sup>198</sup> And “the HRA has been, and should remain, absolutely integral to the sustainability of the Northern Ireland peace process”.<sup>199</sup>

**248. We find the evidence of witnesses with direct experience and understanding of the particular circumstances of Northern Ireland persuasive. The commitment to the incorporation of the ECHR is a key feature of the Good Friday Agreement. Even the**

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193 [Q33](#) [Les Allamby]

194 Judicial Power Project submission to IHRAR, para 13

195 [Q33](#) [Les Allamby]

196 The Bar of Northern Ireland submission to IHRAR, para 11

197 The Bar of Northern Ireland evidence to IHRAR, para 7

198 Human Rights Centre, School of Law, Queen’s University Belfast ([HRA0005](#)), para 1

199 Human Rights Centre, School of Law, Queen’s University Belfast ([HRA0005](#)) para 5

**relatively technical changes under consideration could have unintended consequences. We are very concerned about the possible implications of upsetting the delicate framework that currently exists.**

## Scotland

249. As in Northern Ireland, the powers of the Scottish Parliament and the Executive are limited by the requirement to act compatibly with human rights obligations under the Scotland Act 1998 (“SA”). Under section 29, legislation that is incompatible with Convention rights, defined by reference to the HRA, is outside the competence of the Scottish Parliament. Section 57 provides that Scottish Ministers have no power to act incompatibly with Convention rights. The Scottish Law Society have noted that consequently, questions about the compatibility of legislation passed by the Scottish Parliament with Convention rights are usually dealt with under the SA rather than the HRA.<sup>200</sup>

250. Judith Robertson, Chair of the Scottish Human Rights Commission, told us that, as a result of the embedding of the HRA within the SA “Convention rights have become a very strong part of the fabric of Scotland’s laws or judicial analysis and, crucially, the legislative competence of the Scottish Parliament”. The result, she said, had been the development of a rights-based culture in Scotland. She suggested that the HRA is entwined with the SA and the whole establishment of devolution, and that weakening or changing the framework may have complex implications that are not yet fully understood.<sup>201</sup>

251. The Scottish Government describe the position as a “sophisticated constitutional framework ... comprised of two constitutional statutes—the Scotland Act and the HRA”.<sup>202</sup> They argue that it is essential for the Review to recognise that the HRA applies in Scotland and the devolved nations as “an integral part of a larger and more complex legal and constitutional framework”.<sup>203</sup>

252. The Faculty of Advocates also noted the risk of unintended consequences in any piecemeal reform of the HRA, which was designed to work as a whole, “not just in the application of the HRA, but also in other legislation that refers to Convention rights (i.e. the legislation creating the devolved administrations in Scotland and Wales)”.<sup>204</sup>

253. It has also been argued that amending the HRA would require the consent of the Scottish Parliament.<sup>205</sup> Section 28 of the SA states that “it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament”. This is the statutory expression of what is known as the Sewel Convention. Although in *Miller 1*<sup>206</sup> the Supreme Court found that the convention was not legally enforceable despite its statutory entrenchment they emphasised that the convention has an important role in facilitating harmonious relationship between the UK Parliament and the devolved legislatures.

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200 Law Society of Scotland submission to IHRAR

201 [Q38](#) [Judith Robertson]

202 Scottish Government evidence to IHRAR

203 Scottish Government evidence to IHRAR, para 38

204 Faculty of Advocates evidence to IHRAR, para 32

205 For example, [Human Rights and Devolution - The Independent Review of the Human Rights Act: Implications for Scotland](#), Professor Nicole Busby

206 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at para 151.

254. There is no clear consensus as to the extent to which human rights are a devolved matter. The SA specifically prohibits the Scottish Parliament from amending the HRA. However, whilst the conduct of international relations is reserved, “observing and implementing ... obligations under the Human Rights Convention” is specifically excluded from this.<sup>207</sup> Thus it is argued that responsibility for the observation and implementation of human rights is at least to some extent devolved to the Scottish Parliament.<sup>208</sup>

## Wales

255. The Government of Wales Act 2006 incorporates Convention rights in a similar way to the SA and NIA. Section 81 provides that Welsh Ministers cannot make subordinate legislation or act in way which is incompatible with Convention rights. Section 108A (2) (e) provides that a provision of an Act of the Senedd is not law if it is not compatible with Convention rights.

256. As in Scotland and Northern Ireland, these provisions provide a strong incentive for the Welsh Government and the Senedd to act in accordance with Convention rights. The Public Service Ombudsman in Wales is able to consider complaints about public bodies on the basis that they have failed to adequately consider the HRA, and if this amounts to maladministration. In the case of an adverse finding, the Ombudsman can ask the public authority to reconsider its decision and make recommendations as to action to be taken to put things right.

## Conclusions

**257. The incorporation of the HRA into the devolution settlements and the limits it places on the power of ministers and institutions have made human rights compliance central to policy making in the nations of the UK. This appears to have fostered a positive attitude towards human rights.**

**258. It is essential that proposals to amend the HRA take account of its unique role in the constitutional arrangements of the devolved nations and the implications for the future of the union. The Government should not pursue reform of the HRA without the consent of the Scottish Parliament, the Welsh Senedd and the Northern Ireland Assembly.**

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207 Scotland 1998, Schedule 5, para 7

208 [Human Rights and Devolution - The Independent Review of the Human Rights Act: Implications for Scotland](#), Professor Nicole Busby

# 11 Enforcing and embedding rights

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## The 'section 6' duty

259. Section 6 HRA obliges public authorities to act in conformity with Convention rights unless primary legislation requires them to do otherwise. This part of the Act places human rights front and centre of public authorities' approach to providing services, helping to create a human rights culture. In such a culture, human rights breaches are less likely to occur. There is more respect for rights and less need for litigation. It is therefore disappointing that the Government's own review has not sought to consider the impact or effectiveness of section 6. As the National Aids Trust told us:

“Crucially, the Review does not consider the success of Section 6 of the HRA which states that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The HRA has an important part to play outside of the courtroom, including in developing good public policy, and it is shame that this was not considered by the Review.”<sup>209</sup>

260. Migrant Voice noted that the Home Office might benefit from further embedding human rights in some areas of its work and expressed regret that the Government's review had not included terms of reference that sought to improve the effect of the Act in this regard:

“We are profoundly discouraged and concerned, therefore, at the Government's decision to commission this review with terms of reference that include no positive inquiry as to how a culture of respect for human rights might be secured and sustained; nor any specific inquiry into the current will or capacity of public authorities, including the Home Office, to manifest and promote such a culture.”<sup>210</sup>

261. In its 2018 report on Enforcing Human Rights the Joint Committee on Human Rights commented on the operation of section 6, stating that the degree to which it was acting as a driver of a human rights culture was “patchy” as “it depends on awareness and training of public officials, which can vary according to the public authority”.<sup>211</sup>

262. Section 6 can be highly effective in protecting rights without recourse to the Courts:

- Sarah Dallal, Equality and Diversity lead, Tees, Esk and Wear Valleys, NHS Foundation Trust, told us that the legislation had given her trust “an objective legal framework that we can use when we are making complex clinical decisions”. She had recently spoken to a colleague who said that “she did not think that they could have got through the difficult decisions that they have had to make during this Covid period without the human rights framework”.<sup>212</sup>
- Chief Constable Carl Foulkes of the National Police Chief's Council told us that the HRA “fundamentally underpins what we do now”:

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209 National AIDS Trust ([HRA0060](#))

210 Amnesty International UK, Migrant Voice ([HRA0052](#))

211 Joint Committee on Human Rights, Tenth Report of Session 2017–19, [Enforcing Rights](#), HL Paper 171 / HC 669, 19 July 2018, paras 155

212 [Q43](#), [Q48](#) [[Sarah Dallal](#)]

It affects everything we do on a daily basis, from our use of force to our covert policing, to public order events to firearms operations. It has fundamentally changed the training of our officers when they join the service, to our command training and specialist training when people progress into specialist disciplines. In policing we are now constantly balancing the human rights of individuals, the human rights of society and the requirements of the law in the UK. We do that as a matter of course. That was not the same pre-1998, prior to the Human Rights Act coming in.<sup>213</sup>

- Judith Robertson, the Chair of the Scottish Human Rights Commission, told us that Her Majesty's Inspectorate of Prisons for Scotland had reframed its inspection standards from a human rights perspective.<sup>214</sup>
- The British Association of Social Workers told us that "Human rights are the foundation of social work practice and at the very heart of the profession, seen in the values, code of ethics, education, training, and professional standards. The act underpins the role of all social workers and there are specialist accredited roles such as Best Interest Assessors and AMHP's developed specifically to safeguard people's Human Rights, promote social justice, and ensure people's voices are heard".<sup>215</sup>

263. However, the "patchiness" sadly continues. The EHRC told us "[ ... ] recent experience demonstrates that some public authorities are not doing enough to fulfil their human rights obligations. For example, during the covid-19 pandemic, the HRA has offered a framework for local authorities to balance the right of care home residents to private and family life in the form of visits with the requirement to take steps to protect their right to life; however, we have seen repeated blanket bans on visits throughout the pandemic."<sup>216</sup> Sanchita Hosali, of the British Institute of Human Rights told us, "There is a widescale issue around Section 6 not being fully understood across the gamut of public authorities and the public sector. That is an issue because it is the implementation that makes a difference to people's lives every day".<sup>217</sup>

264. Whether the lack of consistency in adherence to section 6 duties is due to oversight as Lord Neuberger believed,<sup>218</sup> or other causes, it needs to be overcome. When the Act was first introduced, a great deal of training and awareness raising was carried out across the public sector. For example, Helen Mountfield QC told us that "The Judicial Studies Board trained every immigration adjudicator and every employment tribunal chair. It was an enormous mass exercise, and that was really helpful".<sup>219</sup> There is a strong case for better inclusion of human rights in the initial training, qualification and professional development of those working in public services. The Lord Chancellor's 2018 vision for Public Legal Education (PLE) included a goal to embed public legal education "into public services and government departments".<sup>220</sup> We support this goal.

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213 [Q43 \[CC Faulkes\]](#)

214 [Q31 \[Judith Robertson\]](#)

215 [British Association of Social Workers \(HRA0035\)](#)

216 [Equality and Human Rights Commission \(HRA0025\)](#)

217 [Q44 \[Sanchita Hosali\]](#)

218 [Q3 \[Lord Neuberger\]](#)

219 [Q68](#)

220 [Attorney General's Office and The Rt Hon Robert Buckland QC MP, "Our vision for legal education", 31 October 2018](#)

265. **Concentrating on certain narrow constitutional and legal questions, as important as they may be, fails to acknowledge the difficulties that many ordinary people have in enforcing their rights. Section 6 of the Human Rights Act makes human rights real and accessible to service users without recourse to the courts by requiring public authorities to act compatibly with the Act. Where public authorities are complying with this duty, it means that human rights are respected and embedded in service delivery. The Government must look at ways to spread best practice in human rights compliance across the public sector including through training and information programmes.**

### Enforcing rights through the courts

266. There are times, however, when the state does not fulfil its obligations and litigation is needed to enforce rights. This option, however, is increasingly difficult to access due to the limited availability of legal aid. Liberty told us that “In 2009 more than 135,000 people received legal aid for welfare benefits issues; by 2017 this had fallen to fewer than 500”.<sup>221</sup> The EHRC’s evidence pointed to the disproportionate impact of legal aid reforms on those with protected characteristics, stating that “For example, the removal of certain areas of law from the scope of legal aid has disproportionately affected disabled people, women, children and people from ethnic minorities”.<sup>222</sup>

267. The Ministry of Justice is conducting a review of the means test for legal aid with the aim of publishing a consultation paper later this Spring. In evidence to the Justice Select Committee, the Justice Minister Lord Wolfson noted that “a system which means that people cannot vindicate their legal rights is a legal aid system that is not working”.<sup>223</sup> We agree. **We hope the Government takes the opportunity of the review of means testing for legal aid support to consider how best to ensure that people are able to vindicate their human rights in court.**

### The Human Rights role of the Equality and Human Rights Commission

268. There are three National Human Rights Institutions (NHRIs) operating across the UK; the Equality and Human Rights Commission (Great Britain) (EHRC), the Scottish Human Rights Commission (SHRC) and the Northern Ireland Human Rights Commission (NIHRC). They are publicly funded bodies with a legislative mandate to protect and promote human rights and they have a central role to play in their enforcement. It is vital that the UK’s NHRIs have the powers necessary to do their jobs, in accordance with the different roles assigned to them.

269. This Committee has long argued that the powers of the EHRC should be harmonised across equality and human rights. Under its current powers, the EHRC cannot provide legal assistance to individuals in a human rights case unless there is also an equality element in the case. Similarly, the Commission has the power to undertake investigations into named bodies in relation to possible breaches of the Equality Act 2010, but this does not extend to human rights breaches. In 2018 the Committee wrote:

221 Liberty ([HRA0027](#))

222 Equality and Human Rights Commission ([HRA0025](#))

223 Oral evidence taken before the Justice Committee on 24 March 2021, HC [2021–22] 289, [Q525](#) [Lord Wolfson]

“It is difficult to understand why the EHRC should have weaker enforcement powers as concerns human rights violations than equality matters. The EHRC’s inability to bring cases on purely human rights grounds severely restricts its effectiveness”.<sup>224</sup>

270. We once again drew attention to this deficit in our report on Black People, Racism and Human Rights in 2020 which recommended that, “Government must harmonise the Commission’s human rights enforcement powers in line with its powers in relation to equality, so that it can undertake investigations where it is suspected that an organisation has breached the Human Rights Act and provide legal assistance to individuals in Human Rights Act cases”.<sup>225</sup>

271. In its response to that report, the Government rejected this recommendation stating that as the ECHR had been accredited at the United Nations with “A” status by the Global Alliance of National Human Rights Institutions, it fully met the requirements to protect human rights in Great Britain including carrying out inquiries, where appropriate. The response further argued that the 2018 Tailored Review did not recommend that human rights enforcement powers were necessary for the EHRC. The Government’s Tailored Review, which was one of a series of reviews of arms length bodies, noted that the EHRC had asked for these increased powers but did not find strong views in favour or against extended powers amongst its stakeholders.<sup>226</sup> To us, this neglects consideration of the importance of these powers to enforcing rights.

**272. It is greatly disappointing to us that the Government’s review into the Human Rights Act has not engaged with the role and powers of the EHRC and its role in enforcing rights. *The role of the EHRC in enforcing rights must be strengthened by allowing them to undertake investigations into named bodies for possible breaches of the Human Rights Act and to provide legal assistance in Human Rights cases.***

### **A step short of legal action?**

273. Legal action is rightly the last resort. The time legal action can take, along with the cost of legal representation, can mean our rights feel at times unenforceable. When a relative is being denied meaningful visits to a loved one in a care home, or a parent is trying to challenge the use of restraint on a child or young person held in an Assessment and Treatment Unit, decisions on rights are crucial and it is crucial they are provided in a fast and accessible manner. Legal action can by its nature be oppositional whereas in many settings what will matter is the ongoing relationship between service providers and those that receive them.

274. Lord Wolfson, in his evidence to the Justice Committee, emphasised that we do not live in a world, and will increasingly not live in a world, where the only way to vindicate your legal rights is to go to Court.<sup>227</sup> A step short of legal action which is faster, less costly, and less combative, is worth exploring. Judith Robertson explained:

224 Joint Committee on Human Rights, Tenth Report of Session 2017–19, [Enforcing Human Rights](#), HL Paper 171 / HC 669, para 127

225 Joint Committee on Human Rights, Eleventh Report of Session 2019–2, [Black People, Racism and Human Rights](#), HL Paper 165 / HC 559, para 101

226 HM Government, [Tailored Review of The Equality and Human Rights Commission](#), November 2018

227 Oral evidence taken before the Justice Committee on 24 March 2021, HC [2021–22] 289, [Q525](#) [Lord Wolfson]

“We need better processes in our public authorities, whether they are complaint mechanisms or means by which people can raise human rights issues quickly and achieve some kind of adjudication, and for that to happen in a context that does not necessarily require there to be large amounts of money or legal support. I think there is scope for a much more accessible process of route to remedy and access to justice within the Scottish, English and Welsh legal frameworks, and potentially in Northern Ireland, than we currently envision”.<sup>228</sup>

275. In November 2019 the Lord Chancellor Robert Buckland noted that Article 13 ECHR was not prescriptive about effective remedy. He explained:

“It leaves it to the member state, the signatory, to determine what that process might be. I am not going to sit here and say that a court process is not the right way to deal with this—far from it—but it is the job of all of us to consider whether there are other avenues and other means by which the citizen can obtain redress of grievance. We know that litigation can be long and expensive, for example. It is not always the best answer here for the wronged citizen.”<sup>229</sup>

***276. The Government should consider whether there is the need for additional mechanisms to make the enforcement of rights more accessible. Any such mechanism should not impede access to justice through the courts when necessary, and must deliver on the enforcement of human rights.***

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228 [Q32](#) [Judith Robertson]

229 Oral evidence taken on 18 November 2020, HC (2019–21) 978, [Q11](#) [Rt Hon Robert Buckland QC MP]

## Conclusions and recommendations

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### The Human Rights Act 1998

1. The HRA enables us to argue for our rights in British courts. Relative to population size, the UK has the lowest number of claims brought against it of all Member States at the European Court of Human Rights. Of those claims that are brought, only a tiny fraction lead to an adverse finding against the UK. (Paragraph 17)
2. The HRA has had an enormously positive impact on the enforcement of human rights in the UK. Whilst it is sensible that the Review's terms of reference focused on specific issues, concentrating only on narrow legal and constitutional questions means there is a risk that proposals are made that are divorced from their wider context and will harm the enforcement of human rights. (Paragraph 25)

### The relationship between the European Court of Human Rights and the Domestic Courts: Section 2 Human Rights Act

3. The requirement in section 2 HRA that the court must take into account judgments relevant to the proceedings before it is eminently sensible. It would be bizarre for a court to take into account any factor that is irrelevant to the proceedings in question—equally it would seem irresponsible for a court not to take into account a judgment that was relevant to the proceedings before it. (Paragraph 31)
4. The requirements of section 2 HRA strike the correct balance in that the UK courts take into account relevant considerations, but are not bound by them. The domestic courts are not unduly constrained by section 2 HRA as cases where the domestic courts have departed from Strasbourg case-law illustrate. Importantly, even in these cases the domestic courts do have regard to relevant ECHR case-law, so as to best consider how the applicable human rights standards should be applied in the UK context. It is only by UK courts having appropriate regard to the relevant case-law that they can engage with it appropriately, reach the correct results and engage in fruitful judicial dialogue with the Strasbourg Court. (Paragraph 37)
5. If domestic courts did not have to take due account of Strasbourg jurisprudence that was relevant to the case before them this would risk domestic cases being decided without due regard to the relevant human rights standards and case law. This in turn would simply mean more successful cases against the UK in Strasbourg. Therefore, any attempt to reduce the extent to which domestic courts are required to 'take into account' caselaw of the ECtHR relevant to the case before them—for example were section 2 to say that a judge "may" take ECtHR case law into account rather than "must"—would inevitably lead to greater numbers of successful appeals to the ECtHR in Strasbourg, as well as poorer enforcement of human rights for victims in the UK. (Paragraph 38)
6. In considering the extent to which the domestic courts should be restricted to merely keeping pace with the Strasbourg case-law, the current balance that has been struck by the case law is sensible. It enables domestic courts to apply the Convention to the domestic context, with their greater understanding of the domestic system, whilst

also ensuring that cases that would be a significant step forward in interpreting a Convention right would need to go to Strasbourg. It would seem unhelpful to seek to reopen this careful balance. (Paragraph 47)

7. The UK courts play a crucial role in ensuring that the UK is accorded the full extent of the margin of appreciation available to it, through their efforts to set out how rights are protected within the national legal context. (Paragraph 56)
8. Any steps taken to minimise the ability of the UK domestic courts to properly consider the application of the Convention rights in the UK context would risk the ECtHR having less confidence in the UK's systems and therefore according it less margin of appreciation. We therefore cannot see how it would be advantageous to the UK to weaken the role of the judiciary in upholding human rights—either from the perspective of individual citizens or the system overall. (Paragraph 57)
9. The UK courts are used to applying the doctrine of judicial deference to accord the executive and the legislature a certain latitude in making policy decisions that they are uniquely or better placed to determine. The UK courts are therefore very well placed to apply the margin of appreciation and they perform a central role in ensuring that the UK is accorded the full extent of the margin of appreciation available to it. (Paragraph 64)
10. Moreover, in the rare cases where a political (rather than a legal) solution would be preferable, and where a wide margin of appreciation would likely be accorded to the State, the Courts have been cautious and have sought primarily, to encourage the other organs of State to fulfil their roles in the protection of human rights within the UK system. We welcome this cautious approach by the courts. (Paragraph 65)
11. It is clear that there is a very healthy state of judicial dialogue as between the ECtHR and the UK judiciary. We agree with President Robert Spano and Judge Tim Eicke when they said, “our view is that both the formal and the informal judicial dialogue is going extremely well and it is rather difficult to identify any particular area for improvement”. Such a sentiment was also echoed by Lady Hale in her evidence to the Committee. Both informal and formal judicial dialogue is clearly working well. In particular, the operation of section 2 HRA clearly allows for very healthy state of judicial dialogue in the form of judgments. *It would therefore seem prudent not to change these successful practices; in our opinion too much risks being lost by any amendments to section 2 HRA.* (Paragraph 70)
12. As a result of the HRA, a human rights case is first determined by UK judges, who:
  - a) understand the complex and subtle balances at work within the relevant UK legal systems;
  - b) understand how human rights are given effect in those legal systems;
  - c) apply a considered analysis of how the relevant fundamental protections, including ECHR rights and relevant case-law apply to the case;
  - d) apply that understanding to the facts of the case, explaining their reasoning and how the balances are met within those legal systems in their judgment; and

- e) are able to dispose of obvious human rights breaches without wasting time and money and extending suffering by needing to litigate in Strasbourg. (Paragraph 71)
13. As a result of the above and because UK judgments show the detailed judicial reasoning in the judgments:
- a) Fewer cases from the UK are litigated before the ECtHR than was the case before the HRA;
  - b) ECtHR judges have been able to rely on the reasoning in UK judgments to better understand how the national UK legal systems protect human rights;
  - c) If a case reaches the ECtHR, there is less of a risk of adverse ECtHR judgments arising due to any misunderstanding as to how the domestic legal system protects human rights;
  - d) The margin of appreciation accorded to the UK is significant as there is confidence in the national processes established by the HRA, including the national courts' role in applying human rights, following careful consideration of any case-law relevant to the case before it;
  - e) Where there are differences of opinion, there are clear and constructive mechanisms (through 'judicial dialogue') to resolve any differences of opinion based on misunderstandings. (Paragraph 72)
14. *Any change to the current operation of section 2 would be unnecessary, unhelpful and counterproductive.* (Paragraph 73)

### The separation of powers: sections 3 and 4 Human Rights Act

15. Section 3 HRA allows the judiciary to ensure that legislation is read compatibly with the Convention where possible. This supports the overarching intention of Parliament that legislation should not violate Convention rights. We have not been provided with any evidence to suggest that the courts are wrongly applying this power or that its use undermines or usurps the role of Parliament. The fact that it is hard to identify any cases in which Parliament has felt the need to correct a court's interpretation of legislation under section 3 HRA strongly indicates that the courts are not using section 3 to trespass on to the territory of the legislature. There is no case for amending or repealing this provision. (Paragraph 105)
16. The court's power to quash secondary legislation that cannot be read compatibly with Convention rights respects Parliamentary sovereignty rather than challenging it. It is also an appropriate check on the power of the Executive, in accordance with the separation of powers and the rule of law. (Paragraph 112)
17. The declaration of incompatibility under section 4 HRA provides an elegant solution to the potential conflict between the protection of fundamental rights and the sovereignty of Parliament. Where a human rights compatible interpretation is

not possible, the courts are able to identify primary legislation that is incompatible with human rights, drawing it to the attention of government and Parliament, but they cannot go further. (Paragraph 121)

18. The use of section 3 HRA interpretation wherever “possible” and reserving section 4 declarations of incompatibility as a remedy of last resort creates a sensible and respectful balance between the roles of the Judiciary and Parliament. An increase in the use of declarations of incompatibility at the expense of section 3 interpretations would have significant ramifications: leaving victims without effective redress for human rights violations and placing a considerable additional legislative burden on Government and Parliament. There is again no case for reform. (Paragraph 131)
19. While the changes to the HRA mooted by the IHRAR terms of reference, including in respect of sections 3 and 4, look to be relatively minor, minor changes could have a major impact on the protection of human rights in the UK. (Paragraph 136)
20. Sections 3 and 4 HRA work together to balance protection for fundamental rights, an aspect of the rule of law, with the separation of powers and respect for Parliamentary sovereignty. We have not been provided with evidence justifying any change to the careful balance struck by these provisions, and consider that the changes mooted by the IHRAR terms of reference would be damaging for this balance rather than beneficial. (Paragraph 137)

### The right to an effective remedy: Article 13 ECHR

21. The ability to enforce Convention rights is crucial to the protection of human rights. The HRA is the principal way in which the UK both secures to everyone within its jurisdiction the Convention rights (Article 1 ECHR)—and how it enables them to be enforced so that there is an “effective remedy” in case of a breach of Convention rights (Article 13 ECHR). (Paragraph 150)
22. Any change to the HRA, particularly any change that makes it more difficult for domestic courts to remedy human rights violations brought before them—or even effectively prevents courts from hearing certain cases—risks weakening the UK’s ability to comply with its obligations under Articles 1 and 13 ECHR (as well as any related substantive rights). (Paragraph 151)
23. Any efforts to exclude or limit certain subject-matters or categories of people from the scope of the HRA would risk putting the UK in breach of its obligations under Article 13 ECHR, as well as being a retrograde step for compliance with human rights and the rule of law in the UK. Moreover, any effort to limit the way that individuals can access effective remedies or enforce their rights under the HRA would risk creating gaps in individuals’ ability to enforce their human rights and to obtain an effective remedy, which again would risk placing the UK in breach of its duty under Article 13 ECHR to provide any person whose rights have been violated with an effective remedy at the national level. (Paragraph 152)
24. Moreover, if some categories of people cannot seek to enforce their human rights before UK courts, we would not have the benefit of the UK Courts having first carefully considered the application of the relevant domestic laws and practices to

the given case—and analysing the human rights compatibility of those laws in light of their in-depth understanding of how those laws work. As a result, we would likely see an increase in the numbers of cases needing to be litigated in Strasbourg, and an increase (as was seen prior to the HRA) in the number of UK cases raising issues around the UK's non-compliance with the right to an effective remedy for a breach of human rights. (Paragraph 153)

### Extra-territorial effect of the Human Rights Act

25. The extra-territorial effect of the HRA is now relatively settled. It essentially ensures protection for those under the control of UK public authorities, even when those public authorities are operating overseas. It is important that UK Armed Forces personnel overseas - as well as other victims of human rights violations - can also benefit from the protections in the HRA. (Paragraph 172)
26. As we concluded in our Report on the Overseas Operations Bill, effective investigations into allegations of human rights violations by troops overseas are valuable and important and allow lessons to be learned. Changes to the HRA that would threaten the conduct and quality of such investigations would be of significant concern. (Paragraph 180)
27. Ultimately, the Human Rights Act binds public authorities acting overseas only to a limited extent. It does so because the ECHR applies to all signatory states in respect of extra-territorial actions in certain, limited circumstances. Any attempt to amend the HRA to limit the extent to which public authorities acting overseas are bound by it could leave a category of victim under the Convention unable to obtain a remedy in the UK. This would put the UK in breach of its Article 13 ECHR obligation to provide those victims with an effective remedy. It would also leave the actions of UK public authorities, including the armed forces, open to challenge in the European Court of Human Rights rather than in the domestic courts. It may even expose our armed forces to the jurisdiction of the International Criminal Court. There is no justification for making any such amendments to the HRA. (Paragraph 181)

### Administrative Law

28. The IHRAR has not taken place in isolation. It followed the Independent Review of Administrative Law (IRAL), which considered potential reforms to judicial review, which has itself been followed by a Government consultation. Since judicial review applications in the Administrative Court play a key role in enforcing human rights through the HRA, any reforms that would affect access to judicial review or the remedies available would have implications for the efficacy of the HRA and for compliance with the right to an effective remedy for a breach of an ECHR right (Article 13 ECHR). (Paragraph 197)
29. Limited changes such as those recommended in the IRAL report could potentially be accommodated within a system that provides effective human rights protection. However, some of the proposals in the Government's consultation paper, concerning ouster clauses and changes to judicial review remedies, could harm the ability of the

HRA to be used to enforce rights and provide an effective remedy in accordance with Article 13 ECHR. The JCHR will carefully scrutinise the forthcoming Judicial Review Bill. (Paragraph 198)

### Derogating from the ECHR: Designated Derogation Orders and Remedies

30. It is important that both the parliamentary and judicial controls on the legality and necessity of derogations are retained. Moreover, as we have seen in our previous work, it is clear that parliamentary scrutiny of derogations should be improved. Given the absence of improved parliamentary scrutiny of derogations, judicial scrutiny is all the more crucial. (Paragraph 221)
31. The UK has only rarely derogated from the ECHR. Since the entry into force of the HRA only one designated derogation Order has been made. There is a very limited evidence base on which to assess whether there is any need for improved or bespoke remedies for challenges to designated derogation Orders. As such, we think there is a limited need and a limited case for reviewing the current arrangements for remedies for challenges to designated derogation Orders. (Paragraph 222)
32. Judicial scrutiny of UK derogations from the ECHR and designated derogation Orders is essential to ensure that human rights are not violated. Impeding the courts from delivering an effective remedy to a person whose human rights were violated would be deeply problematic. (Paragraph 223)
33. The national courts are also best placed to assess the evidence relating to the existence of an emergency threatening the life of the nation—and this has been recognised by the ECtHR who will pay significant attention to the views of the national courts on such matters. The national courts can therefore play a key role in setting out the context of an emergency and the extent of the margin of appreciation to be accorded to the State. (Paragraph 224)
34. The current arrangement whereby the domestic courts have powers to issue quashing orders in respect of a designated derogation Order, but only to make a declaration of incompatibility in respect of a provision of an Act of Parliament reflects the status quo for the powers of the courts in relation to statutory instruments as compared to Acts of Parliament. Moreover, it seems to us to strike the right balance in ensuring respect for Parliamentary sovereignty, whilst also ensuring that acts of the executive that unlawfully violate a person's human rights are quashed. (Paragraph 225)

### Parliamentary scrutiny of remedial Orders

35. Remedial Orders are subject to enhanced scrutiny by the JCHR - which carefully examines remedial Orders for both procedural propriety as well as substance. The ensuing JCHR Reports then inform the subsequent debates and votes by both Houses on the remedial Order in question. Remedial Orders therefore already receive a significant level of scrutiny. (Paragraph 235)
36. In practice, the remedial power is not used for politically sensitive issues and therefore its use has not been seen as controversial. Given pressures on parliamentary time

there is very little appetite for requiring stricter procedures and processes for non-controversial matters. There is therefore little need or appetite for a more stringent parliamentary process in respect of remedial Orders. (Paragraph 236)

### The nations of the UK and the devolution statues

37. We find the evidence of witnesses with direct experience and understanding of the particular circumstances of Northern Ireland persuasive. The commitment to the incorporation of the ECHR is a key feature of the Good Friday Agreement. Even the relatively technical changes under consideration could have unintended consequences. We are very concerned about the possible implications of upsetting the delicate framework that currently exists. (Paragraph 248)
38. The incorporation of the HRA into the devolution settlements and the limits it places on the power of ministers and institutions have made human rights compliance central to policy making in the nations of the UK. This appears to have fostered a positive attitude towards human rights. (Paragraph 257)
39. It is essential that proposals to amend the HRA take account of its unique role in the constitutional arrangements of the devolved nations and the implications for the future of the union. The Government should not pursue reform of the HRA without the consent of the Scottish Parliament, the Welsh Senedd and the Northern Ireland Assembly. (Paragraph 258)

### Enforcing and embedding rights

40. Concentrating on certain narrow constitutional and legal questions, as important as they may be, fails to acknowledge the difficulties that many ordinary people have in enforcing their rights. Section 6 of the Human Rights Act makes human rights real and accessible to service users without recourse to the courts by requiring public authorities to act compatibly with the Act. Where public authorities are complying with this duty, it means that human rights are respected and embedded in service delivery. The Government must look at ways to spread best practice in human rights compliance across the public sector including through training and information programmes. (Paragraph 265)
41. We hope the Government takes the opportunity of the review of means testing for legal aid support to consider how best to ensure that people are able to vindicate their human rights in court. (Paragraph 267)
42. It is greatly disappointing to us that the Government's review into the Human Rights Act has not engaged with the role and powers of the EHRC and its role in enforcing rights. *The role of the EHRC in enforcing rights must be strengthened by allowing them to undertake investigations into named bodies for possible breaches of the Human Rights Act and to provide legal assistance in Human Rights cases.* (Paragraph 272)

43. *The Government should consider whether there is the need for additional mechanisms to make the enforcement of rights more accessible. Any such mechanism should not impede access to justice through the courts when necessary, and must deliver on the enforcement of human rights. (Paragraph 276)*

## Declaration of interests<sup>1</sup>

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### *Lord Brabazon of Tara*

- No relevant interests to declare

### *Lord Dubs*

- No relevant interests to declare

### *Lord Henley*

- No relevant interests to declare

### *Baroness Ludford*

- No relevant interests to declare

### *Baroness Massey of Darwen*

- No relevant interests to declare

### *Lord Singh of Wimbledon*

- No relevant interests to declare

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<sup>1</sup> A full list of Members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mpslords-and-offices/standards-and-interests/register-of-lords-interests/>

# Formal minutes

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**Wednesday 23 June 2021**

Virtual Meeting

Members present:

Ms Harriet Harman MP, in the Chair

Lord Brabazon of Tara	Baroness Massey of Darwen
Joanna Cherry MP	Angela Richardson MP
Lord Dubs	Dean Russell MP
Baroness Ludford	David Simmonds MP
	Lord Singh of Wimbledon

Draft Report (*The Government's Independent Review of the Human Rights Act*), proposed by the Chair, brought up and read.

*Ordered*, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 276 read and agreed to.

Summary agreed to.

*Resolved*, That the Report be the Third Report of the Committee to both Houses.

*Ordered*, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till 30 June at 2.40pm.]

## Witnesses

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The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee’s website.

### Wednesday 27 January 2021

**Lord Neuberger of Abbotsbury**, former President of the Supreme Court of the United Kingdom; **Dominic Grieve QC PC**, former Attorney-General for England and Wales

[Q1–9](#)

**Saira Salimi**, Speaker’s Counsel, House of Commons; **Eve Samson**, Clerk of the Journals, House of Commons

[Q10–16](#)

### Wednesday 3 February 2021

**Baroness Hale of Richmond**, former President of the Supreme Court of the United Kingdom

[Q17–29](#)

### Wednesday 10 March 2021

**Baroness Falkner of Margravine**, Chair, Equality and Human Rights Commission; **Judith Robertson**, Chair, Scottish Human Rights Commission; **Les Allamby**, Chief Commissioner, Northern Ireland Human Rights Commission

[Q30–42](#)

### Wednesday 17 March 2021

**Sanchita Hosali**, Director, British Institute of Human Rights; **Carl Foulkes**, Chief Constable, National Police Chiefs’ Council; **Gregor McGill**, Director, Legal Services, Crown Prosecution Service; **Sarah Dallal**, Equality and Diversity Lead, Tees, Esk and Wear Valleys NHS Foundation Trust

[Q43–53](#)

### Wednesday 24 March 2021

**Joshua Rozenberg QC**; **Helen Mountfield QC**, Matrix Chambers; **Richard Hermer QC**, Matrix Chambers; **Professor Graham Gee**, Professor of Public Law, University of Sheffield

[Q54–68](#)

## Published written evidence

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The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

HRA numbers are generated by the evidence processing system and so may not be complete.

- 1 Access to Care Records Campaign Group ([HRA0038](#))
- 2 Amnesty International UK ([HRA0052](#))
- 3 Angelou Centre ([HRA0079](#))
- 4 Article 39 ([HRA0017](#))
- 5 Bannister, Annie ([HRA0008](#))
- 6 Baring Foundation ([HRA0015](#))
- 7 Barker, Professor Nicola (Professor of Law, University of Liverpool) ([HRA0020](#))
- 8 British Association of Social Workers ([HRA0035](#))
- 9 British Institute of Human Rights ([HRA0030](#))
- 10 Brophy, Mr Thomas ([HRA0001](#))
- 11 Cambridge Centre for Public Law ([HRA0012](#))
- 12 Cambridge Centre for Public Law ([HRA0013](#))
- 13 Cambridge Centre for Public Law ([HRA0014](#))
- 14 Challenging Behaviour Foundation ([HRA0021](#))
- 15 Child Poverty Action Group ([HRA0075](#))
- 16 Committee on the Administration of Justice (CAJ) ([HRA0066](#))
- 17 Compassion in Dying ([HRA0018](#))
- 18 Dignity in Dying ([HRA0026](#))
- 19 End Violence Against Women ([HRA0080](#))
- 20 Equality and Human Rights Commission ([HRA0025](#))
- 21 Equally Ours ([HRA0029](#))
- 22 Greater Manchester Equality Alliance ([HRA0061](#))
- 23 Hartmann, Dr Jacques (Reader in Law, University of Dundee); and White, Mr Samuel (Postdoctoral Research Assistant, University of Dundee) ([HRA0016](#))
- 24 Howard League for Penal Reform ([HRA0071](#))
- 25 Human Rights Centre, School of Law, Queen's University Belfast ([HRA0005](#))
- 26 Human Rights Consortium Scotland ([HRA0051](#))
- 27 Human Rights Lawyers Association ([HRA0032](#))
- 28 Spano, Judge Robert (President of the European Court of Human Rights) and Judge Tim Eicke ([HRA0011](#))
- 29 Humanists UK ([HRA0039](#))
- 30 Humanists UK ([HRA0023](#))
- 31 INQUEST ([HRA0082](#))
- 32 Inclusion Gloucestershire ([HRA0049](#))

- 33 International Observatory of Human Rights ([HRA0028](#))
- 34 Johnson, Professor Paul (Professor and Head of the Department of Sociology, University of York); Professor Kanstantsin Dzehtsiarou (Professor of Human Rights Law, University of Liverpool); Professor Dimitrios Giannouloupoulos (Professor and Head of the Department of Law, Goldsmiths, University of London); and Dr Silvia Falcetta (Research Associate, University of York) ([HRA0070](#))
- 35 JUSTICE ([HRA0069](#))
- 36 Just Fair ([HRA0019](#))
- 37 Law Society ([HRA0063](#))
- 38 Law Society of Scotland ([HRA0081](#))
- 39 Liberation ([HRA0024](#))
- 40 Liberty ([HRA0027](#))
- 41 Lived Experience Leadership Group ([HRA0064](#))
- 42 Lowrie, Mr John ([HRA0002](#))
- 43 Masterman, Professor Roger (Professor of Constitutional Law, Durham Law School, Durham University); and Professor Helen Fenwick (Professor of Law, Durham Law School, Durham University) ([HRA0007](#))
- 44 McGarry, Dr John (Senior Lecturer in Law, Department of Law and Centre for Crime Justice and Security at Staffordshire University); and Dr Samantha Spence (Lecturer in Law, Department of Law and Centre for Crime Justice and Security at Staffordshire University) ([HRA0056](#))
- 45 Mencap ([HRA0073](#))
- 46 Mental Capacity Act Team / Deprivation of Liberty Safeguards Team, Bradford Council ([HRA0042](#))
- 47 Migrant Voice ([HRA0052](#))
- 48 Moss, Derek ([HRA0072](#))
- 49 MSI Reproductive Choices UK ([HRA0076](#))
- 50 Muslim Engagement and Development (MEND) ([HRA0074](#))
- 51 National AIDS Trust ([HRA0060](#))
- 52 Northern Ireland Human Rights Commission ([HRA0044](#))
- 53 Open Rights Group ([HRA0067](#))
- 54 Persaud, Albert (Co-Founder, The Centre for Applied Research and Evaluation-International Foundation. London .UK (CAREIF)); and Professor Dinesh Bhugra (Professor, Professor Emeritus Mental Health and Cultural Diversity, King's College London) ([HRA0048](#))
- 55 POhWER ([HRA0033](#))
- 56 Prison Reform Trust ([HRA0036](#))
- 57 The Public Interest Litigation Support (PILS) Project ([HRA0047](#))
- 58 Pupils 2 Parliament ([HRA0054](#))
- 59 Redress, Hogan Lovells International LLP ([HRA0053](#))
- 60 The Relatives & Residents Association ([HRA0065](#))
- 61 Rene Cassin ([HRA0022](#))

- 62 Reunite Families UK ([HRA0041](#))
- 63 Rights and Security International ([HRA0059](#))
- 64 Salimi, Saira ([HRA0010](#))
- 65 Samson, Eve ([HRA0009](#))
- 66 Scottish Human Rights Commission ([HRA0037](#))
- 67 Southall Black Sisters ([HRA0062](#))
- 68 Stonewall ([HRA0050](#))
- 69 Taylor Vinters LLP ([HRA0003](#))
- 70 West Yorkshire Network of the British Association of Social Workers ([HRA0057](#))

## List of Reports from the Committee during the current Parliament

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All publications from the Committee are available on the [publications page](#) of the Committee's website.

### Session 2021–22

Number	Title	Reference
1st	Children of mothers in prison and the right to family life: The Police, Crime, Sentencing and Courts Bill	HC 90
2nd	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill, Part 3 (Public Order)	HC 331
4th	Legislative Scrutiny: Police, Crime, Sentencing and Courts Bill	HC 478

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Number	Title	Reference
1st	Draft Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019: Second Report	HC 146
2nd	Draft Human Rights Act 1998 (Remedial) Order: Judicial Immunity: Second Report	HC 148
3rd	Human Rights and the Government's Response to Covid-19: Digital Contact Tracing	HC 343
4th	Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report	HC 256
5th	Human Rights and the Government's response to COVID-19: the detention of young people who are autistic and/or have learning disabilities	HC 395 (CP 309)
6th	Human Rights and the Government's response to COVID-19: children whose mothers are in prison	HC 518 (HC 518)
7th	The Government's response to COVID-19: human rights implications	HC 265 (CP 335)
8th	Legislative Scrutiny: The United Kingdom Internal Market Bill	HC 901 (HC 901)
9th	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill	HC 665 (HC 1120)
10th	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill	HC 847 (HC 1127)
11th	Black people, racism and human rights	HC 559 (HC 1210)
12th	Appointment of the Chair of the Equality and Human Rights Commission	HC 1022

<b>Number</b>	<b>Title</b>	<b>Reference</b>
13th	The Government response to covid-19: freedom of assembly and the right to protest	HC 1328
14th	The Government response to covid-19: fixed penalty notices	HC 1364
15th	Care homes: Visiting restrictions during the covid-19 pandemic	HC 1375
1st Special Report	The Right to Privacy (Article 8) and the Digital Revolution: Government Response to the Committee's Third Report of Session 2019	HC 313
2nd Special Report	Legislative Scrutiny: Covert Human Intelligence Sources (Criminal Conduct) Bill: Government Response to the Committee's Tenth Report of Session 2019–21	HC 1127
3rd Special Report	Legislative Scrutiny: Overseas Operations (Service Personnel and Veterans) Bill: Government Response to the Committee's Ninth Report of Session 2019–21	HC 1120
4th Special Report	Black people, racism and human rights: Government Response to the Committee's Eleventh Report of Session 2019–21	HC 1210
5th Special Report	Democracy, freedom of expression and freedom of association: Threats to MPs: Government Response to the Committee's Third Report of Session 2019	HC 1317