



The Independent Human Rights Act Review

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The Independent Human Rights Act Review

Presented to Parliament
by the Secretary of State for Justice
by Command of Her Majesty

December 2021



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Foreword

The Independent Human Rights Act Review (IHRAR) was established in December 2020 to examine the operation of the Human Rights Act 1998 (the HRA), in two main areas: first, the relationship between domestic courts and the European Court of Human Rights (the ECtHR); secondly, the impact that the HRA has had on the relationship between the Judiciary, the Government and Parliament. To do so IHRAR received a wealth of information from the public and other interested parties through a written call for evidence, virtual Roundtables (meetings with interested parties) and virtual Roadshows (open public meetings) kindly facilitated by a number of universities across the UK. IHRAR is grateful to all who assisted with its work. The material published on IHRAR's webpage demonstrates the scale of that contribution and the width of the spectrum of opinion covered.

I would personally like to thank every member of the IHRAR Panel for their hard, dedicated, work and collegiality in considering the issues. It has been both a privilege and a pleasure to Chair IHRAR and now to deliver its Report. My thanks too for the excellent support from IHRAR's independent legal advisers, principally Dr John Sorabji, and assisted by Mr Gethin Thomas and Ms Rachel Jones. So too, I thank IHRAR's Secretariat, provided by the Ministry of Justice – at time of writing, Mr Andrew Waldren, Mr Joe Rice, Mr Noah Thorold, Ms Kate Stevenson, Mr Iain Miller and Ms Millie Rae, together with other members of the Secretariat who assisted at earlier times. Their work has been much appreciated.

Sir Peter Gross
Chair
IHRAR
October 2021

Summary of Recommendations

We make the following recommendations, the aim of which is to improve the operation of the Human Rights Act 1998. The full recommendations, and the rationale behind them, are set out in each chapter of this report. We also indicate in the report whether recommendations were supported by the whole or by a majority of the Panel. Each chapter also sets out those reform options the Panel considered and rejected and those it considered but did not recommend.

Recommendations

Chapter One: Introduction

- Serious consideration should be given by Government to developing an effective programme of civic and constitutional education in schools, universities and adult education. Such a programme should, particularly, focus on questions about human rights, the balance to be struck between such rights, and individual responsibilities.

Chapter Two: Section 2 of the HRA

- Amend section 2 to clarify the priority of rights protection by giving statutory effect to the position developed in *Osborn v Parole Board* [2013] UKSC 61; [2014] AC 1115 and *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455, therefore applying UK domestic statute and common/case law first before, if proceeding to interpret a Convention right, taking into account ECtHR case law.

Chapter Three: The Margin of Appreciation

- Other than the amendment recommended in Chapter Two, no change to section 2 in respect of the margin of appreciation. The UK Courts have, over the first twenty years of the HRA, developed and applied an approach that is principled and demonstrates proper consideration of their role and those of Parliament and the Government.

Chapter Four: Judicial Dialogue

- To continue to enable judicial dialogue, both formal and informal, to develop organically.

Chapter Five: Sections 3 and 4 of the HRA

- Amend section 3 to clarify the order of priority of interpretation, coupled with increased transparency in the use of section 3, an enhanced role for Parliament in particular through the JCHR, and the introduction of a discretion to make ex gratia payments where a declaration of incompatibility is made. Otherwise no changes to sections 3 and 4.

Chapter Six: Designated Derogation Orders under section 14 of the HRA

- Amend the HRA to enable UK Courts to make suspended quashing orders where a challenge to a designated derogation order succeeds. Otherwise no change to section 14.

Chapter Seven: Subordinate Legislation

- The introduction of an additional power to suspend quashing orders or make them prospective only, in this sphere as with judicial review generally, and the introduction of a judgments database for judgments where subordinate legislation has been disapplied or quashed.

Chapter Eight: Extra-Territorial and Temporal Scope of the HRA

- The current position of the HRA's extra-territorial application is unsatisfactory, reflecting the troubling expansion of the Convention's application. The territorial scope of the Convention ought to be addressed by a national conversation advocated to IHRAR during the Armed Forces Roundtable, together with Governmental discussions in the Council of Europe, augmented by judicial dialogue between UK Courts and the ECtHR.
- Equally, the temporal application of the HRA is now uncertain and unsatisfactory. Clarity is needed. The temporal scope of the Convention ought to be addressed at a political level by the UK and the other Convention states.
- Future domestic developments, both legislative and judicial, will be informed by the progress and outcome of the national conversation and the inter-Governmental dialogue.

Chapter Nine: Remedial Orders under section 10 of the HRA

- Amend section 10 of the HRA to clarify that remedial orders cannot be used to amend the HRA itself and improve parliamentary scrutiny of remedial orders.

Chapter One – Introduction

(1) IHRAR

1. *By a Written Ministerial Statement, dated 7 December 2020 (the WMS), the full terms of which are set out in **Annex II**, the then Lord Chancellor and Secretary of State for Justice, the Rt. Hon. Robert Buckland QC MP announced the creation of the Independent Human Rights Act Review (IHRAR). As expressed by the Lord Chancellor in the WMS:*

‘This review extends from our Manifesto commitment and will take the form of an independent advisory panel which will provide the Government with options for updating the Human Rights Act (HRA). As Lord Chancellor, I am committed to upholding the UK’s stature on human rights. The UK contribution to human rights law is immense and founded in the common law tradition. We will continue to champion human rights both at home and abroad, and we remain committed to the European Convention on Human Rights.

The HRA has been in force for 20 years, and therefore it is timely to undertake a review into its operation. The UK’s constitutional framework has always evolved incrementally over time, and it will continue evolving. We need to make sure that our human rights framework, as with the rest of our legal framework, develops and is refined to ensure it continues to meet the needs of the society it serves.’

2. The WMS then referred to the key areas outlined in detail in IHRAR’s Terms of Reference (the ToR)¹, before saying this:

‘It is my intention that the panel shall consider these questions independently, thoroughly, and put forward options for reform to be considered by myself. The panel will report back in Summer 2021 and their report will be published, as will the Government’s response.’

Finally, the WMS set out the membership of the IHRAR Panel (the Panel).

¹ Deposited in the libraries of each of the Houses of Parliament.

3. The ToR are set out in full in **Annex III**. At this stage it is convenient to note that IHRAR has explored two key themes, outlined in detail in the ToR. The first, *Theme I*, concerns the relationship between domestic courts and the *European Court of Human Rights* (the ECtHR). The second, *Theme II*, concerns the impact of the Human Rights Act 1998 (the HRA) on the relationship between the three Branches of the State: the Judiciary, the Executive and the Legislature. The late Sir John Laws might have termed Theme II as examining the impact on the '*constitutional balance*'².

4. IHRAR has three features of paramount importance. First, it is an independent review. It is independent of Government, Parliament and the Judiciary. The 'I' in IHRAR was deliberately included. Secondly, the Panel is also independent. Each member was selected, as set out in the WMS, based on:

'...their wealth of experience, coming from senior legal and academic backgrounds. They have the breadth and depth of expertise required to consider the issues highlighted within the Terms of Reference effectively.'

Thirdly, the ToR were expressed in neutral terms. They did not beg the question or suggest preconceived or predetermined answers. There were none.

5. As to the scope of IHRAR, it is necessary to underline both what is and what is not within its scope:

First, and most significantly, it was a fixed premise of IHRAR that the UK is committed to remaining a party to the European Convention on Human Rights (the Convention). IHRAR was thus informed by that commitment.

Secondly, an examination of substantive Convention rights fell outside IHRAR's scope. Its review was, with one exception, solely focused on the operation of the HRA, the domestic statute. The exception was the question raised in the ToR concerning the *extra-territorial application or jurisdiction* (ETJ) of the HRA, which required consideration of the ECtHR's approach to the territorial application of the Convention.

Thirdly, IHRAR is UK-wide. It is therefore concerned with England and Wales, Scotland and Northern Ireland. The Panel was, throughout its work, very much alive to devolution issues and determined to take proper account of all parts of the UK, including the circumstances prevailing in Northern Ireland, together with the importance attached to rights protections in that context.

2 Sir John Laws, *The Constitutional Balance* (Hart, 2021).

6. From the outset, openness and transparency have been hallmarks of IHRAR. Its Chair made this clear in 38 conversations with interested parties (peers, MPs, academics, legal experts and heads of public bodies) at the time of IHRAR's launch. Its *Call for Evidence* (CfE) was open-ended. IHRAR encouraged responses from individuals and organisations, wherever they might be on the spectrum of opinion, and received upwards of 150 responses. While the Panel reserved the right not to publish responses that, for instance, were irrelevant to the ToR, defamatory, or where, exceptionally, a respondent requested anonymity or non-publication, it made clear that it would endeavour to publish all consultation responses on the IHRAR website³. IHRAR is most grateful to everyone who responded. Its webpage now contains an exceptional store of knowledge and learning on the HRA⁴.
7. IHRAR's work would plainly have lent itself to face-to-face meetings around the UK. However, faced with COVID-19 restrictions, IHRAR held thirteen online *Roundtables*⁵, by way of smaller meetings involving targeted engagement with interested parties. A further online *Roundtable* was held with members of the public who provided the Panel with an invaluable, moving insight into how their lives had been affected by reliance upon the Convention rights contained within the HRA⁶. The Panel thanks them for their willingness to share their personal experience and their candour.
8. Moreover, with the warm support of the then Lord Chancellor, the Panel was determined not to approach the Review in a parochial manner. The Panel's meetings therefore extended to conversations with judges of the ECtHR, the German Federal Constitutional Court and the Supreme Court of Ireland. The minutes of the Roundtables and meetings are set out in **Annex VIII**. Furthermore, in lieu of town-hall-style meetings, the Panel held seven online *Roadshows*, generously facilitated by universities around the UK⁷. Recordings of those Roadshows were also published online; the link is available on the IHRAR webpage and in Annex VIII. The Panel listened carefully to the views expressed at all the Roadshows and Roundtables. It is very grateful to all concerned who helped facilitate those meetings and all those who gave their time to engage with the Review.

3 See the IHRAR Call for Evidence <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962423/Call-for-Evidence.pdf>; *Treatment of Responses* at page 8. No requests were made for non-publication. One submission was published anonymously at the respondent's request. A small number of responses were not published due to their content falling outside the ToR.

4 See <https://www.gov.uk/guidance/independent-human-rights-act-review>.

5 Roundtables were held with: The Bar Council of England and Wales; Equalities Groups; The Irish Judiciary and academics; the Ministry of Defence/Armed Forces; The Equalities and Human Rights Commission and Human Rights Groups; JUSTICE and the Independent Anti-Slavery Commissioner; the Police; the Security Services; The Law Society of England & Wales (Human Rights firms); The Law Society of England & Wales (City firms); The Law Society of Northern Ireland; The Law Society of Scotland; and; The Scottish Judiciary.

6 Organised by Liberty and the British Institute of Human Rights.

7 Durham University; The University of Nottingham; Swansea University; Queen's University, Belfast; The University of Glasgow; University College London; Oxford University and Cambridge University.

9. In parallel, the Panel met regularly online, working its way through the issues raised in the ToR. It did so without preconceptions and subject, of course, to further thought, reflection and revision of any preliminary impressions, once it had absorbed the evidence, Roundtables and Roadshows. The Panel was excellently supported throughout by independent legal advisers: Dr John Sorabji; Mr Gethin Thomas⁸; and Ms Rachel Jones⁹, together with a Secretariat provided by the Ministry of Justice¹⁰.
10. As presaged in the WMS, this report provides options for reform for consideration by Government and Parliament to consider. They are presented as a practical, coherent and sensible package of reforms to improve the operation of the HRA. To assist in the consideration of the report, the Panel is clear on which are its *recommended options* and which are not, categorised as set out in the box below.

The Panel's approach to reform options

The Panel categorises reform options as follows:

Rejected. These options the Panel explicitly rejects.

Not recommended. These options the Panel neither rejects nor recommends. They warrant further consideration.

Recommended. These options the Panel recommends Government and/or Parliament consider on the basis that they form the optimum approach to reform in relation to the HRA.

11. Before turning to the questions raised for IHRAR's consideration in the ToR, it is first necessary to say something of the *Background* and to flag a number of more *General Considerations*.

⁸ From 14 December 2020.

⁹ From 10 June 2021.

¹⁰ See **Annex XI**.

(2) Background

- 12.** The UK did not come cold to the Convention or the HRA. Instead, it has played an immense role in the development of human rights law, founded in the common law tradition of which the UK can be proud.
- 13.** The UK has made a long and significant contribution in the sphere of civil liberties, including residual and negative rights that existed in the absence of limits being imposed by statute or the common law¹¹. Avoiding overstatement, *Magna Carta* 1215¹², for instance, affirmed the existence of limits on the power of the Crown and, specifically, what is now understood to be the right of access to justice; a right further developed by the common law principles of natural justice¹³, which continue to be developed today¹⁴. *Entick v Carrington* (1765)¹⁵ established the common law rights to liberty (that an individual is free to act unless specifically prohibited by law from so doing) and to security and property¹⁶. Perhaps most significantly, it established the principle that the Executive is required to have a legal basis for exercising power. Other such developments were various protections for freedom of speech both for individuals¹⁷ and the media¹⁸.
- 14.** Running in tandem with the development of common law rights, Parliament has also historically taken a lead role in the development of positive rights. By way of example, protection from unlawful detention was provided by the *Habeas Corpus Act 1215*; the *Bill of Rights 1688/69* provided protection from cruel and unusual punishment; and, the contemporaneous *Claim of Right 1689* passed as a pre-union Act by the Parliament of Scotland, restricted the use of torture and provided protection from arbitrary detention and delay in trial. Protection of employees was developed starting from the *Cotton Mills and Factories Act 1819*, through the *Factories Acts 1844 to 1961*, and then the *Health and Safety at Work etc Act 1974*; protection from discrimination via the *Sex Discrimination Act 1975*, the *Race Relations Act 1976*, and most recently the *Equality Act 2010*. The extension of the franchise to secure the right to vote was the product of, for instance, the *Representation of the People Act 1832*, the *Reform Act 1867* and the *Representation of the People Acts 1918, 1928 and 1969*. Both the common law and statute continue to develop UK human rights.

11 Developed classically by Dicey, see A.V. Dicey, *Introduction to the Study of the Constitution*, (Macmillan & Co) (1902) (6th edn.); C. O’Cinneide, *Human Rights and the UK Constitution*, in J. Jowell & C. O’Cinneide, *The Changing Constitution*, (OUP, 2019) at 63.

12 Chapter 39 and 40. See generally, A. Arlidge and I. Judge, *Magna Carta Uncovered* (Bloomsbury, 2014).

13 E.g., the right to be heard; the duty to hear the other side.

14 *Osborn v Parole Board* [2013] UKSC 61; [2014] AC 1115; *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869.

15 (1765) 19 Howell’s State Trials 1030.

16 A similar result was achieved in Scots law by *Bell v Black & Morrison* 5 Irv 57; [1866] SLR 1 169.

17 *Bonnard v Perryman* [1891] 2 Ch 269; *Verrall v Great Yarmouth BC* [1981] QB 202 at 205.

18 Such as the right to report legal proceedings, see *Scott v Scott* [1913] AC 414. For a broader discussion, see: M. Elliott & K. Hughes, *Common Law Constitutional Rights*, (Hart, 2020).

15. The UK's contribution to the development of human rights was historically focused on common law jurisdictions, as is apparent in the development of the *US Bill of Rights*. However, its influence on the creation and development of the Convention (and the Council of Europe) should not be underestimated. As the UK and the states of Western Europe emerged from the horrors of World War II, the Convention formed a part of the post-war architecture. At the time of its genesis, ideas for such a Convention 'were dominated by the need to prevent the rise of another Hitler and the fear that Europe was in danger of being overrun by the communists.'¹⁹ As is often noted and in keeping with the UK's traditions already described, Sir David Maxwell Fyfe QC, later Viscount Kilmuir LC, was instrumental in the drafting process of the Convention and Sir Winston Churchill played a key role in promoting its development²⁰.
16. On 4 November 1950, the Convention was signed in Rome, by the UK and 12 other member states of the Council of Europe²¹. On 8 March 1951, the UK ratified the Convention. The ECtHR was founded on 21 January 1959, becoming a permanent Court on 3 November 1998. In the meantime, on and from 14 January 1966, the UK accepted both the right of individual petition and the jurisdiction of the ECtHR.
17. The UK's accession to the Convention in 1951 meant that, as a matter of public international law, from that date it was, like all other Council of Europe states, bound to comply with its provisions. This obligation has remained in place since 1951 and does so now in respect of judgments of the ECtHR through article 46.1 of the Convention²². The UK's obligation to comply with such judgments continues while the UK remains a party to the Convention. It is, for the avoidance of doubt, unaffected by the UK's withdrawal from the European Union. Moreover, both the Council of Europe and Convention predate the EU, and its predecessors – the Convention contains freestanding obligations entered into more than 20 years before the *European Communities Act 1972* (ECA) – which are and have always been separate from it.

¹⁹ E. Bates, *The Evolution of the European Convention on Human Rights* (Oxford, 2010), at 44; also at 5-6 and following.

²⁰ M. Duranti, *The Conservative Human Rights Revolution*, (OUP, 2017), at 4, and 96 and following.

²¹ The dates are taken from E. Bates, *op cit*, Appendix 7, at 531 and following.

²² It provides that 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'.

The Council of Europe and Convention states

The Council of Europe was founded on 5 May 1949 by the Treaty of London. The original Convention states, that is parties to the Treaty and members of the Council, were: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the UK. There are currently 47 Convention states²³.

The Council of Europe is separate from, and predates the founding of what would become, the European Union.

- 18.** Accession to the Convention did not, however, render the rights guaranteed in it directly applicable in UK domestic law. In this respect the UK differed from the majority of Council of Europe states. Most of those states, following their accession to the Convention, incorporated the Convention directly into their domestic legal system, and did so against a background that contained a codified constitution and an entrenched Bill of Rights. Direct incorporation either occurred because international treaties automatically formed part of the state's domestic law, as in France or the Netherlands; because it was given the effect of domestic legislation, as in Germany²⁴; or incorporated via legislation, as in Norway²⁵. While the UK's starting point was similar to that of Norway (or Ireland²⁶), where legislation was needed to give domestic effect to the Convention, it was markedly different from all other Convention states in three respects. Accession and domestic effect to the Convention via the HRA (when enacted) was carried out against a background of the UK, unlike the other Convention states, having no codified constitution; no Bill of Rights; and, as a fundamental element of its constitution, the principle of Parliamentary Sovereignty.
- 19.** Accordingly, until the HRA was introduced, the Convention's effect was indirect through judgments of the ECtHR on issues raised against the UK by individual petitions brought by UK citizens. The UK was obliged to comply with the ECtHR judgments in relation to the UK. There are numerous examples of such judgments²⁷. Crucially, in this situation UK citizens or residents could not enforce claims in UK Courts in respect of Convention rights; they had no option but to go to the ECtHR in Strasbourg. As it was said:

23 A full list of Convention states is available at: <<https://www.coe.int/en/web/yerevan/the-coe/about-coe/map-member-states>>.

24 Under art. 59(2) of the *German Basic Law*.

25 See Act (No. 30 of 1999) to strengthen the position of human rights in *Norwegian law (Human Rights Act)*.

26 The European Convention on *Human Rights Act 2003 (Ireland)*.

27 For instance, *Golder v UK* (1975) 1 E.H.R.R. 524, *Sunday Times v UK* (No. 1) (1979) 2 EHRR 245, the latter of which led to the enactment of the Contempt of Court Act 1981.

*'Prior to the HRA the ECHR was an instrument to which the UK was a state party, but the rights protected within the ECHR were not justiciable in a UK courtroom. Some of these rights were protected in other parts of UK law, and it was possible if all else failed to take a case to the European Court of Human Rights in Strasbourg. The HRA did not 'invent' or 'create' rights, but it did make their protection a lot easier.'*²⁸

- 20.** To a limited extent, the Convention at this stage also had an effect in the development of law within the UK. Judgments of the ECtHR, in a similar way to judgments of other non-UK Courts could be relied upon in four distinct ways by UK Courts: as aids to the construction of legislation; to develop the common law; to inform the exercise of judicial discretion; and, to assist the court in determining matters of European Union law²⁹.
- 21.** From the 1960s, there was significant debate about whether and how the Convention or, in some way, the rights contained within it ought to be given effect in UK domestic law³⁰. In the event, the HRA ultimately gave effect to Convention rights in UK law, although the Convention was itself neither incorporated directly into, nor given direct effect in UK law, by the Labour Government following the 1997 general election. In this, a different approach was taken to that carried out in respect of EU law³¹, which was incorporated directly into, and given direct effect in, UK law by section 2 of the ECA.
- 22.** It appears that the HRA's enactment was effected for both **practical** and **principled** reasons. In respect of the former, it accepted that requiring individuals to seek to assert their Convention rights through the right of individual petition to the ECtHR was both excessively time-consuming and expensive for UK citizens. In *Rights Brought Home: The Human Rights Bill*, which foreshadowed the publication of the then Human Rights Bill in 1997, the Labour Government noted that the average cost of such an action was £30,000, with the average time to resolve it before the ECtHR being five years³². As it stated, *'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.'*³³

²⁸ F. Cowell (ed), *Critically Examining The Case Against The Human Rights Act*, (Routledge, 2018), at 3.

²⁹ J. Wadham et al, *Blackstone's Guide to the Human Rights Act 1998*, (7th edn) (OUP, 2015) at 5-6, citing for each of the propositions respectively: *R v Secretary of State for the Home Department, ex p. Brind* [1991] 1 AC 696; *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770; *R v Khan* [1996] 3 WLR 162; *Johnston v Chief Constable of the Royal Ulster Constabulary* [1987] QB 129.

³⁰ The first proposal to introduce a Bill of Rights, which would incorporate the Convention into UK law was made in 1968 by Quentin Hogg MP (later Lord Hailsham LC). Also see, for instance, Lord Scarman, *English Law - The New Dimension* (Hamlyn Lecture) (Stevens, 1974); C. Campbell (ed), *Do We Need a Bill of Rights*, (Maurice Temple Smith, 1980).

³¹ 'EU law' is taken to refer to the law of the European Economic Community and then the European Union.

³² Home Office, *Rights Brought Home: The Human Rights Bill*, at 1.14 (CM 3782) (HMSO, October 1997); J. Straw MP, Hansard, HoC, 16 February 1998, Vol. 307, col. 769, in J. Cooper & A. Marshall-Williams, *Legislating for Human Rights - The Parliamentary Debates on the Human Rights Bill* (Hart, 2000) at 4.

³³ Home Office, *ibid*.

- 23.** A further practical consequence of giving effect to Convention rights in UK law was anticipated to be the creation, and then further development of, a ‘rights culture’ within the UK (and particularly the Executive³⁴); one which was explicitly based on the introduction of positive rights that went beyond the traditional negative rights/civil liberties³⁵. This was to be achieved through the Government and Parliament scrutinising legislation more closely than perhaps had been the case in the past to ensure it was consistent with Convention rights³⁶. It could also be said that it, implicitly at least³⁷, called for effective civic education, both in schools and generally, to raise awareness among the public of the Convention rights, the role of the ECtHR (including that it is distinct from the European Court of Justice), the Council of Europe (and the difference between it and the European Union) and the nature and role of the HRA.
- 24.** In respect of the latter, there was a principled recognition that giving effect to Convention rights in UK law would ‘*change the relationship between the state and the citizen, and ...redress the dilution of individual rights by an over-centralising Government that [had] taken place over the [previous] two decades*’³⁸; a point reiterated by Jack Straw MP in the debate on the Second Reading of the Human Rights Bill.

Jack Straw MP – Second Reading of the Human Rights Bill

*‘The power of the Executive will be reduced by the Bill because the state will be made far more accountable for its acts and omissions to its citizens.’*³⁹

*It would do so by making ‘more directly accessible the rights which the British people already enjoy under the Convention.’*⁴⁰

Making Convention rights effective in UK law was also expected to produce three further effects⁴¹.

34 Lord Williams of Mostyn, Hansard, HL, 3 November 1997, vol. 582, col. 1307 in J. Cooper & A. Marshall-Williams LC in J. Cooper & A. Marshall-Williams at 8-9.

35 J. Straw MP, Hansard, HoC, 16 February 1998, vol. 307, col. 769 in J. Cooper & A. Marshall-Williams at 3, ‘*Nothing in this Bill will take away the freedoms that our citizens already enjoy. However, those freedoms alone are not enough: they need to be complemented by positive rights that individuals can assert when they believe that they have been treated unfairly by the state, or that the state and its institutions have failed to properly protect them.*’

36 Home Office, *ibid* at 1.18, 3.2ff; Section 19 of the HRA.

37 Lord Irvine LC, Hansard, HL, 3 November 1997, vol. 582, col. 1227 in J. Cooper & A. Marshall-Williams in J. Cooper & A. Marshall-Williams at 1, makes the point that individuals would be able to argue about their rights in domestic courts, which would be able to develop a human rights culture in society. It would seem either implicit in this or a necessary corollary of it that a better understanding of those rights was needed

38 J. Straw & P. Boateng, *Bringing Rights Home: Labour’s Plans to Incorporate the ECHR into UK Law: A Consultation paper*, (December 1996).

39 J. Straw MP, Hansard, HoC, 16 February 1998, Vol. 307, col. 769, reprinted in J. Cooper & A. Marshall-Williams, *ibid* at 7.

40 Home Office, Home Office, *ibid* at 1.19.

41 Lord Irvine LC, Hansard, HL, 3 November 1997 Vol. 582, col. 1227, reprinted in J. Cooper & A. Marshall-Williams, at 1; and see J. Straw MP *ibid* at 4.

25. First, it would enable the courts to ‘develop human rights throughout society’. It was not, however, intended to affect the constitutional principle of Parliamentary Sovereignty. The Judiciary would not, therefore, be provided with the power to disapply or set aside Acts of Parliament on the basis that they were incompatible with Convention rights⁴². Again, this drew a distinction between Convention rights and EU law. Under EU law, Parliament had authorised the courts, through section 2 of the ECA to disapply Acts of Parliament that were incompatible with EU law⁴³.
26. Secondly, it would enable the UK Courts to contribute directly through their judgments on human rights issues under the Convention to the development of the jurisprudence of the ECtHR. It would thus enable UK judges to help shape the development of the very Convention rights that the UK had in 1948-1950 played an instrumental role in introducing.
27. Thirdly, it would enable the UK Courts, as recognised by the ECtHR, to play their proper and ‘primary role in protecting individuals’ rights⁴⁴.
28. The Human Rights Bill became law, for some purposes, on 9 and 24 November 1998. It generally came into force on 2 October 2000⁴⁵. It did so not by incorporating the Convention and Convention rights directly into UK domestic law, but by creating domestic rights, as would later be made clear by Lord Hoffmann in *Re McKerr (Northern Ireland)*⁴⁶:

‘It should no longer be necessary to cite authority for the proposition that the Convention, as an international treaty, is not part of English domestic law. R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696 and R v Lyons [2003] 1 AC 976 are two instances of its affirmation in your Lordships’ House. That proposition has been in no way altered or amended by the 1998 Act. Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg.’

⁴² Lord Irvine LC *ibid* at 2; J. Straw MP, *ibid* at 5.

⁴³ See *R v Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1991] 1 A.C. 603.

⁴⁴ M. O’Brien MP in J. Cooper & A. Marshall-Williams at 10; *Handyside v United Kingdom* – 5493/72 [1976] ECHR 5, (1976) 1 EHRR 737 at [48].

⁴⁵ Sections 18, 20, and 21(5) came into effect on 9 November 1998. Section 19 came into force on 24 November 1998.

Section 19 requires a Minister to make a statement either that, in their view, the Bill is compatible with Convention rights or that, although they are unable to make such a statement, the government nevertheless wishes the House to proceed with the Bill

⁴⁶ [2004] UKHL 12; [2004] 1 WLR 807 at [65].

- 29.** The Convention rights were given effect by the HRA providing that UK Courts, where issues before them concerned those Convention rights, take account of, amongst other things, judgments of the ECtHR and that UK Courts must, so far as possible, give effect to legislation in a way compatible with Convention rights, as those rights were and are set out in Schedule 1 to the HRA⁴⁷. Further domestic effect to the Convention rights was later provided by the Northern Ireland Peace Agreement (the Good Friday Agreement or Belfast Agreement), which set out that compliance with the Convention was a ‘safeguard’⁴⁸ for the peace process in Northern Ireland and also that a separate Bill of Rights for Northern Ireland would be considered for introduction into the law of Northern Ireland⁴⁹. Convention rights were further given effect within the legislation that established devolution throughout the UK⁵⁰, importantly, amongst other things, by making compatibility with Convention rights part of the test of legislative competence for the devolved legislatures.

(3) General Considerations

- 30.** We introduce here a number of recurring considerations, encountered in the course of our work, bearing on our later and more detailed exploration of the questions in the ToR.

(i) The UK’s commitment to remaining a party to the Convention

- 31.** The commitment to the UK remaining a party to the Convention is clearly stated in the WMS⁵¹. A necessary consequence is that the UK will, as it has for the last 60 years, remain committed to comply with its international obligations as they arise under the Convention. This commitment has formed a fixed premise for IHRAR. The Panel was also mindful that it is a commitment, that forms an important assumption of the UK-EU Withdrawal Agreement and Trade and Co-operation Agreement⁵².

47 Sections 1(1), 2, 3, 4 and 6 of the HRA.

48 Northern Ireland Peace Agreement (Good Friday or Belfast Agreement) (10 April 1998), Democratic Institutions In Northern Ireland, at para.5, ‘There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including:

(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;*

(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;* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf>.

49 Northern Ireland Peace Agreement, Rights, Safeguards And Equality Of Opportunity, para.2, ‘*The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency*’.

50 Sections 6 and 24(1)(a) of the Northern Ireland Act 1998; section 29 of the Scotland Act 1998; and section 108A(2)(e) of the Government of Wales Act 2006.

51 See **Annex II**.

52 See, for instance, Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Protocol on Ireland/Northern Ireland, article 2(2); Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, articles 692, 763, 771 – 773.

32. The UK's continuing commitment to the Convention has an important ramification for the Panel's consideration of the HRA. That is the interest in *consistency* between the decisions of domestic courts and those of the ECtHR, not least to reduce the prospect that UK Court decisions do not place the UK in breach of its international obligations. This interest may of, course, be outweighed by other considerations, including but by no means limited to where the UK Courts consider that the ECtHR's case law has taken the wrong approach or has misunderstood the UK context, or where Parliament chooses to enact legislation in breach of its obligations, which the UK Courts are thus required to apply. In this last instance, such matters may ultimately then be the subject of applications, whether successful or not, before the ECtHR.

(ii) The UK as the primary forum for rights protection

33. The system of rights protection established by the Convention properly accepts that the primary forum for rights protection is each Convention state; a point recently emphasised by the introduction of Protocol 15 to the Convention, which was a result of the Brighton Conference and Declaration⁵³. The UK and not the ECtHR is thus the primary forum for protecting rights within the UK. The ECtHR is a longstop. In other Convention states this delineation of responsibility is more readily visible than in the UK, due to the existence of constitutional rights protection and Bills of Rights. In the UK, due to its uncodified constitution and absence of an explicit Bill of Rights, the existence of rights protection, through discrete statutes and the common law, is less visible. The HRA has, however, brought into sharper focus this delineation of responsibility.

(iii) Bringing rights home

34. As already noted, one of the objectives clearly articulated when the HRA was enacted was to 'bring rights home': to save UK citizens and residents the need to go to the ECtHR in Strasbourg to enforce their claims. This is an important consideration as, to the extent that there is a significant gap between rights protection in the UK and that available before the ECtHR, it will run counter to the HRA's original objective of bringing rights home. Moreover, it will be inconsistent with the UK's commitment to the Convention (already highlighted above).

35. In carrying out this Review, the Panel has kept well in mind this original objective underpinning the HRA's enactment, as well as the other original objectives, such as enabling the UK Courts to more effectively contribute to the development of ECtHR jurisprudence. That said, the remit of the Review did not preclude re-examining those objectives if a case for doing so was made out. The Panel was not *bound* by Parliament's views in 1998. However, the vast majority of those who responded to the CfE appeared to be content with its original objectives. We did not, therefore, think it appropriate to re-examine the original objectives of the HRA.

53 Article 9 of the Brighton Declaration <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf>; Article 1 of Protocol 15 to the Convention <https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf>. See further Chapter Three.

- 36.** We have considered the case for reform of the HRA in the light of its original objectives, as well as other factors we considered to be relevant. When considering its recommendations, the Panel developed certain guiding principles, based on the work done further to the ToR:
- Respect for the common law tradition of human rights protection;
 - Respect for the separation of powers and Parliamentary Sovereignty;
 - Respect for the Convention as a subsidiary system of rights protection;
 - Acknowledgment of the importance of certainty and predictability in the law;
 - Openness to comparative approaches to incorporating the Convention;
 - Realism in the recommendations proposed, in keeping with the common law tradition, together with an evidence-focused consideration of issues;
 - Subjecting recommendations to a risk/benefit analysis;
 - Consistency within the report: we seek to present a coherent package of reforms.

(iv) The common law and the Judiciary

- 37.** While the primary responsibility for protecting human rights lies with the UK Parliament and the devolved legislatures, the centrality of the common law, one of the oldest and most successful of the world’s legal systems, and of the UK Judiciary to the development of law in the UK need to be highlighted and grasped at the outset. Together they are distinctive strengths of our law⁵⁴. They enable the law to evolve in the light of developments in society, so retaining its relevance and strength. They do so in a way that properly balances the flexibility that such developments require with the likewise important interest in legal certainty for individuals, businesses and public authorities. A number of points arise.
- 38.** First, is the singular contribution the common law, Scots law, and the UK Judiciary make to ensure the attraction of the UK’s laws, including rights protection, to international business and to the UK as a world-leading centre for international dispute resolution⁵⁵. This consideration represents an important feature of Global Britain⁵⁶ and soft power. In purely monetary terms, the legal sector generates £22 billion to the UK economy⁵⁷.

54 This is of course not to overlook the importance of statute law but, as observed in *The Constitutional Balance* (op cit), at 51, it is the common law which gives statutes life and comprises ‘*the unifying principle of our constitution*’. Nor is it to overlook other strengths of law in the UK, such as the Rule of Law, the legal profession and the mutually supportive relationship between the courts and arbitration.

55 Sir Peter Gross, *A good forum to shop in: London and English law post-Brexit* [2018] LMCLQ 222.

56 See <<https://www.gov.uk/government/collections/global-britain-delivering-on-our-international-ambition>>.

57 CityUK, *UK Legal Services Report 2020* at 6 <<https://www.thecityuk.com/assets/2020/Reports/1e13ba3d56/Legal-excellence-internationally-renowned-UK-Legal-Services-2020.pdf>>.

- 39.** In a competitive international legal market, the combination of predictability and flexibility in the common law, shaped and developed by the Judiciary as the independent third Branch of the State (the other two, political, Branches being the Legislature (i.e., Parliament) and the Executive (i.e., Government)), forms a most important part of the attraction of our law. It is important not to lose sight of the importance of these points when reviewing the HRA, not least given the relevance of rights protection to international businesses. It should be underlined, in this regard, that rights protection and the HRA are topics of serious interest to those concerned with the reputation and standing of London as a world leading international commercial centre. It would be a misconception to think otherwise, a point forcefully made to the Panel in the Roundtable with the Law Society City firms.
- 40.** Secondly, an equally important point arises in respect of the common law and the UK Judiciary. That is whether a sufficiently robust approach has been taken to using and developing the common law since the enactment of the HRA. The common law has protected individual rights for centuries. It was thus important for the Panel to consider further whether the common law's role in this area had received proper attention and emphasis. Despite it being more focused on negative protections⁵⁸, the common law, and this focus on it, is of the first importance on a variety of levels. To begin with, it is a matter of real significance with regard to public acceptance and ownership of the HRA, as discussed further below. A pertinent question is: to what extent could a greater emphasis on the approach of the common law⁵⁹ help facilitate, as Parliament intended when enacting the HRA, a distinctive UK contribution to human rights law? Plainly, the common law has a central role to play in any such contribution. Meshing this objective with that of bringing rights home is, self-evidently, not straightforward but must be pursued.
- 41.** Thirdly, in considering the role of the common law and the UK Judiciary, proper consideration had to be given to another central feature of the UK's constitution: the need for mutual respect between the three Branches of the State. Historically, each has respected the lawful province of the others⁶⁰. This is not to say that there have not been, and cannot be, tensions between them. In a democracy, such tensions are inevitable and healthy. A necessary and proper complement to such tensions is that each Branch must seek to avoid overreaching into the others' legitimate spheres of action⁶¹. Such considerations feature in IHRAR's second principal theme: namely, whether the HRA has adversely affected mutual respect between the Branches of the State by unbalancing their relationship.

58 Professor Colm Ó Cinnéide, *Human Rights and the UK Constitution*, in J. Jowell & C. O'Cinneide, *The Changing Constitution*, (OUP, 2019). This issue is discussed further in Chapter Two.

59 Including the role played by UK Statute law, already outlined.

60 *M v The Home Office* [1992] QB 270 at 314; *R (Jackson & Ors) v Her Majesty's Attorney General* [2005] UKHL 56; [2006] 1 AC 262 at [125].

61 *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46; [2012] 1 AC 868 at [148].

(v) Parliament's role

- 42.** Implicit in the final point concerning the common law and UK Judiciary is that there is an important safety valve built into the UK constitution where development of the common law is concerned: any such development is subject to the possibility of revision by Parliament through statute. The matter is straightforward: Parliament may legislate to overrule common law developments by the courts or, indeed, set a different legislative direction⁶². The position is not the same with regard to decisions of the ECtHR. As has been pointed out, critically, the Convention through the HRA:
- '...ties the United Kingdom to a dynamic system of law whose development is the task of a court standing entirely outside its own political institutions...The Convention and the case law of the Strasbourg court create a body of law which cannot be repealed or amended by Parliament short of withdrawing from the treaty altogether.'*⁶³
- 43.** That said, Parliament may choose to legislate inconsistently with its international obligations under the Convention. It needs, of course, to be borne in mind that, given the UK's continued commitment to the Convention, should the UK Parliament enact legislation incompatible with Convention rights, as it has the power to do, it may place the UK in breach of its international obligations.
- 44.** A further important theme for consideration by the Panel was therefore Parliament's role in rights protection. This encompassed its role in determining and refining the scope and application of positive rights through legislation – its traditional pre-HRA role. It also encompassed its role in respect of considering common law developments and UK Court decisions further to section 3 of the HRA, where the court interprets legislation consistently with Convention rights, and declarations of incompatibility made under section 4 of the HRA.
- 45.** In all these situations, an important question for the Review was the extent to which effective political ownership and responsibility for rights protection could be and was taken by Parliament, and how this might be enhanced. Enhancing the common law does not and need not result in any diminution in Parliament's, the Government's, and hence the public's political ownership of rights and rights protection.

⁶² See, for instance, the Race Relations Act 1976.

⁶³ Lord Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books, 2019), Reith Lecture III, Human Rights and Wrongs, at 55.

(vi) Perception and the HRA

46. The vast majority of submissions received by IHRAR spoke strongly in support of the HRA. They pointed to its impact in improving public administration for individuals, through developing a human rights culture. Thus, the HRA was not, or not just, to be viewed through the prism of a few high-profile cases or indeed with a focus on litigation at all⁶⁴. What happened outside the courtroom was every bit as important as the cases decided by the courts. Some telling examples included the impact that the development of a human rights culture had had on the provision of care in care homes⁶⁵.

47. Strong support for the HRA in some submissions translated into support for the proposition that no changes were needed to the HRA. It did not exclusively do so, however. Both those submissions supporting the HRA, as well as those strongly critical of it, set out reform proposals. What the Panel thus saw was that after 20 years the HRA remains, to a degree at least, controversial. Granted that some issues concerning its operation, heavily contested in its first decade, are not as contentious now as they were then⁶⁶. The HRA does not, in some quarters, enjoy the level of settled public acceptance that it should command to be secure as an enduring feature of the UK's constitutional landscape. As has been observed:

*'Since its passage, the HRA has faced a steadily escalating series of attacks, designed not just to undermine the Act but, at times, the very concept of human rights. A genuine case can be made that the HRA has faced a series of attacks without precedent for a piece of legislation in modern British history.'*⁶⁷

48. The fact and persistence of hostility to the HRA is noteworthy. It may be that these views are less widespread than might first appear but are disproportionately fuelled and ventilated by negative media and political coverage. However, even if such is the case, it seems clear to the Panel that much work needs to be done to understand the basis of and challenge this negative perception of the HRA, and also to increase the sense of public ownership of the HRA, so serving to reduce what was described as a sense of 'disempowerment'⁶⁸. We return to the issue of ownership below. Two strands of thought merit introduction at this stage.

64 A point which was reinforced by the evidence from participants in the Liberty/BIHR Roundtable.

65 See for example, the following responses to the CfE: Human Rights in Action; Law Works; and Law Centres Network.

66 See Chapter Five and consideration of sections 3 and 4 HRA and the issue concerning prisoners' votes.

67 F. Cowell, *op cit*, at 16 and following.

68 Durham Law School's Submission to the IHRAR (Feb 2021, para 17) spoke of '*political disquiet surrounding the disempowerment of national institutions*'. In the Roadshow with Durham University on 4 May 2021, Professor Masterman noted that 'disempowerment' is in part a problem of public understanding, and in part a problem of political narratives surrounding the Act. He further noted that, in the early days of the case law under the HRA, courts were 'disempowered' from putting their own stamp on human rights decision-making, and thinking about protections of human rights at the domestic level may be one way to offset some of the disempowerment narrative: the Supreme Court has begun to remind us of the domestic nature of human rights law.

- 49.** The first, articulated by a Panel member at the UCL Roadshow, is that human rights belong to everybody⁶⁹. There has been a perception that human rights did not apply to everyone, and that abuses of those rights happen to other people. This perception needs to be challenged and dispelled, perhaps with a focus on work on the ground, far-removed from high profile litigation⁷⁰. Though it is accurate to say that much, although not all, human rights litigation is concerned with people with particular circumstances that do not pertain to the majority, developing the necessary level of settled acceptance requires majority ownership of the HRA and its concepts⁷¹. It requires the development of a perception, reflecting the reality, that human rights issues concern, apply to and protect everyone in society. In working our way through the ToR, this feature will recur in the discussion to follow. A not unrelated consideration goes to the question of access to justice, without which the reality of rights protection is (at the least) impaired⁷².
- 50.** Secondly, devolution considerations⁷³ form part of the mainstream of IHRAR’s work. Such considerations are important due to the role that the HRA and Convention rights play in the legislative devolution arrangements in Scotland, Wales and Northern Ireland. Devolution concerns were raised, as illustrated in the box below:

Law Society of Scotland – Roundtable minutes

‘Amendment [to the HRA] raises complicated devolution questions, particularly in terms of how to handle interactions between the reserved powers and devolved competences. The position raised (by Policy Exchange) in respect of devolution re Northern Ireland and the HRA was straightforwardly wrong.’⁷⁴

Law Society and Bar of Northern Ireland – Roundtable minutes

‘... a significant dilution of human rights protections will impact on the delicate ecology of the Agreement. There is a need to benchmark any proposals in the review alongside the GFA [Good Friday Agreement] and the ‘no diminution commitment’.’

69 Simon Davis, 27 May 2021.

70 A point emphasised by Sir Nicolas Bratza in his supplementary submission to the CfE, where he noted the work of the British Institute of Human Rights in disseminating information to counteract ‘unfair and inaccurate criticisms of the working of the [HRA]’ and that the focus of its work in so doing is ‘not on litigation under the HRA but on how the HRA continues to make improvements in the everyday lives of UK citizens’.

71 See, Lord Sumption, *op cit*, at 49, on rights as claims against society calling for ‘a measure of social consent’.

72 Questions of legal aid are plainly outside IHRAR’s ToR but the point was raised with the Panel – especially though not only in the Liberty/BHR Roundtable – and is noted here.

73 Using the term ‘devolution’ broadly.

74 Also see, for instance, Together (Scotland Alliance for Children’s Rights), *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at 1.

Professor Jeff King⁷⁵

'My conclusions are ... that weakening the overall scheme of the Act risks upsetting devolution arrangements at an already delicate time.'

51. In considering potential reform recommendations, the Panel has taken account of such devolution issues. In respect of the benefits and risks of any recommendations to reform of sections 3 and 4 in particular (See Chapter Five) such considerations loom large in the balance, while not of course being determinative of the Panel's conclusions.

(vii) Public ownership of rights – public or civil education

52. The final general consideration was public ownership of rights, together with disquiet as to the apparent shortfall of such ownership and of support for the HRA. This topic follows directly from the question of perception just discussed. A matter repeatedly and cogently emphasised in submissions and presentations to the Panel was the need for greater public or civil education concerning the HRA and rights more generally, both in terms of their content and in terms of the role they played in society⁷⁶. Public attendance at IHRAR's Roadshows was strongly suggestive of public interest in human rights and an appetite to discuss and engage with the issues.

Examples of evidence on the need for increasing public and civic education

The President of the Law Society of England and Wales

'The IHRAR provides an opportunity to address the often negative narrative that surrounds the HRA and encourage civic education about the protections it provides, the ways in which it operates and the place it holds in our democratic constitution. A survey conducted by the Law Society, the Bar Council and CILEx has shown that the public value[s] legal protections for rights, with 70% saying the role the law plays in protecting people's freedoms is important or very important. It indicates that the COVID-19 pandemic has increased awareness of rights, presenting an opportunity for renewing efforts to improve appreciation of the HRA. Public engagement and education are vital for ensuring long-lasting consensus and the Law Society would welcome recommendations being made on this point.'

⁷⁵ Professor Jeff King, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [26]-[27]. Also see the specific concerns regarding amendment to sections 3 and 4, e.g., Queen's University Belfast, Human Rights Centre, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [28], where it concluded that no amendment to section 3 should be made. Also see Scottish Government, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at 21.

⁷⁶ The issue and the importance of such education was raised, for instance, at IHRAR's Durham University, Glasgow University, Nottingham University, Swansea University and Queen's University, Belfast Roadshows.

The Law Society of England and Wales – City firms Roundtable minutes

‘There needs to be more education around what the Human Rights Act (HRA) actually does and how it operates to challenge misconceptions. Media representations of human rights are unhelpful, as is the Government’s rhetoric.

The more sensationalist cases skew public opinion and detract from the wider benefits of the HRA.’

Equalities groups – Roundtable

‘Many people in the UK do not know their rights or how to go about claiming them. There are also examples where public bodies are not aware of their own duties and responsibilities. Greater education and communication of the UK’s rights protections would be a useful outcome from IHRAR. There was a need to convey to the public that the rights in the HRA were their rights and not just the rights of those who were unpopular or vilified in the media.’

The Legal Education Foundation

‘There is a strong case for Government to provide more support and training to public authorities to fulfil their duties under the HRA: to take a more active and central role in providing public legal education about human rights; and to reframe the discussion and debate about human rights to help address misunderstandings and misperceptions.’

- 53.** In principle, the Panel had no hesitation in agreeing with and endorsing these calls. We are in little doubt that there is much room for increasing understanding of the UK’s constitution, and particularly, of the HRA, of the Convention and the ECtHR (not least, as noted above, that they originate from international obligations that pre-date and are entirely distinct from the UK’s former membership of the European Union), and the role of the Judiciary more generally. A greater role for the common law has obvious attractions in countering a lack of ownership of rights, just as it could equally counter the notion that the HRA is some alien imposition on UK law. Moreover, increased emphasis on the common law is not in any way inconsistent with the practice of other Convention states⁷⁷ and is readily intelligible and acceptable to the ECtHR in terms of the doctrine of subsidiarity⁷⁸. Matters do not, however, end with an increased role for the common law.

⁷⁷ Which approach the Convention through the prism of their own constitutions.

⁷⁸ See Chapter Two at [110].

- 54.** Thinking, as we do, that public ownership of the HRA and civic education relevant thereto are within the ToR, or alternatively inseparably ancillary to the ToR, the Panel **strongly recommends** to Government, for its consideration, a focus on civic, constitutional education as integral to ensuring that, as expressed in the WMS ‘... *our human rights framework, as with the rest of our framework develops and is refined to ensure it continues to meet the needs of the society it serves...*’. Refining such a programme would require consideration of education at school, university and adult education levels, together with the scope for its delivery by way of online learning. It might also, usefully, consider questions about the difficult balances human rights questions often require, and of individual *responsibilities*, though those are well outside the scope of IHRAR.
- 55.** A further consideration is whether increasing public or civic education will itself be sufficient to enhance public ownership of the HRA. Notably, in this regard, it has been said to the Panel that an important part of public ownership of rights in the Republic of Ireland has been *public participation*⁷⁹ in the endorsement or ratification of legal developments relating to human rights – as a means of increasing public ownership of rights. In the Panel’s view, the question of such public participation in some suitable form is a matter falling properly to be considered by the political Branches of the State in the context of enhancing public ownership of the HRA.
- 56.** We leave this chapter with two concluding observations. First, increasing public ownership of the HRA and human rights generally is not a matter for the UK Courts, whose primary role is of course the independent and impartial determination of disputes brought before them⁸⁰. Instead, addressing concerns as to public ownership of the HRA and related civic education is a matter calling for the active involvement of all three Branches of the State. The political Branches of the State, Parliament and Government, have an essential part to play in this regard in this shared endeavour, not least through considering the implementation of mandatory human rights training for public officials. So political ownership of human rights is also needed.

79 Albeit, in part at least, by way of not infrequent Referendums on issues of controversy, a feature of Irish political life manifestly not capable of transplanting to the UK.

80 The Judiciary can and do, notably, play an important role in raising awareness of the justice system and its operation.

- 57.** Secondly, we do not underestimate the challenges with regard to civic education and a sense of increased public ownership of the HRA. We are not educationalists; nor does the Panel have a budget at its disposal; furthermore, while we heard many attractive pleas for civic education at the Review’s Roundtables and Roadshows⁸¹, practical suggestions for implementation were lacking⁸². Nonetheless, we are in no doubt that, in the interests of civil society, public education and public ownership in the HRA context are issues which cannot sensibly be overlooked.

Recommendation

Given the importance of the issue, the Panel recommends that serious consideration is given by Government to developing an effective programme of civic and constitutional education in schools, universities and adult education. Such a programme should, particularly, focus on questions about human rights, the balance to be struck between such rights, and individual responsibilities.

81 See, for example, the Equalities Groups Roundtable and the Human Rights Organisations Roundtable. Similarly, Professor Jim Murdoch’s introductory remarks at the Glasgow Roadshow on 18 May 2021 spoke of a failure to promote an understanding of the HRA 1998 and successive political parties questioning it, undermining the acceptance of the HRA.

82 A number of practical suggestions are, however, set out, in S. Hoffman, S. Nason, R. Beacock, E. Hicks (with contribution by R. Croke), *Strengthening and advancing equality and human rights in Wales*, (Welsh Government, GSR report number 54/2021) (2021).

Chapter Two – Section 2 of the HRA

(1) Introduction

1. Theme I of the ToR focuses on the relationship between UK Courts and the ECtHR. The first specific issue it raises concerns section 2 of the HRA. That section requires UK Courts, when they interpret Convention rights contained in the HRA, to take into account, amongst other things¹, ECtHR jurisprudence or, as referred to in the report, ‘ECtHR case law’.

Section 2(1) of the HRA

‘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,*
- (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,*
- (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or*
- (d) decision of the Committee of Ministers taken under Article 46 of the Convention,*

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.’

2. The specific question posed, as Question 1(a) in the ToR, asks IHRAR to consider:

‘How has the duty to ‘take into account’ ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2 [of the HRA]?’

¹ See section 2(1)(b)-(d).

3. This chapter brings into stark relief the tensions to be addressed and accommodated between the objectives originally underlying the HRA. So, significant gaps between rights protection before UK Courts and the ECtHR are best avoided, while the development of a distinctively UK contribution to the Convention in accordance with the principle of subsidiarity is nevertheless desirable, not least (as is now clear) for strengthening a more settled public and political acceptance of the HRA. Such a distinctive ‘British’ (i.e., United Kingdom) contribution will facilitate proper judicial development of UK law, giving greater prominence to the common law, while taking care to avoid judicial overreach. As will become apparent, the approach taken by UK Courts, and particularly the House of Lords and UK Supreme Court, to section 2, has evolved since the HRA came into force. It will also become apparent that there is, in our view, scope for section 2 to be amended in order to clarify its meaning and application, and that such an amendment would be beneficial domestically without disturbing the existing equilibrium between UK Courts and the ECtHR, to the benefit of both.
4. There are a number of ways in which this ToR question could be answered. The Panel has considered recommendations to abolish, weaken, or enhance the duty set out in section 2. It recommends the following reform option to improve its operation.

Recommended Reform Option²

Amend section 2 to clarify the priority of rights protection by giving statutory effect to the position developed in *Osborn v Parole Board* [2013] UKSC 61; [2014] AC 1115 and *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455, therefore applying UK domestic statute and common/case law first, and before – if proceeding to interpret a Convention right – taking into account ECtHR case law.

5. This option is simply implemented by way of an amendment to section 2. It would place on a statutory footing the approach developed by the Supreme Court that UK statute and common law/case law is the first port of call before, if proceeding to interpret a Convention right, ECtHR case law is taken into account. By giving prior consideration to national law but continuing to take proper account of ECtHR case law, it is designed to promote greater consistency in the application of section 2 by UK Courts and greater domestic political and public ownership of human rights, while giving full effect to the principle of subsidiarity and maintaining the beneficial equilibrium reached between UK Courts and the ECtHR.

² See Option Five: the Recommended Reform Option, below.

6. Full details of the recommendations and other reform options that the Panel has considered are set out in Parts 16-18 of this chapter.

(2) Context – Section 1 of, and Schedule 1 to, the HRA

7. As outlined in Chapter One, the UK became a party to the Convention in 1951³, but did not immediately incorporate the Convention into UK domestic law⁴. One consequence was that from 1951 until the HRA was enacted, securing compliance with the UK's international treaty obligations under the Convention was a task primarily for the UK Government⁵. Its role was to keep UK law and administrative practice and proposals for legislation under review to ascertain if they were consistent with Convention rights, and if not to take steps to bring them into line. The UK Courts' role during this period was, broadly, to apply UK domestic law without reference to the Convention, except where domestic legislation was capable of more than one interpretation. In the latter case, they were to interpret such legislation according to '*a presumption that Parliament has legislated in a manner consistent, rather than inconsistent, with the United Kingdom's treaty obligations.*'⁶ Furthermore, UK Courts would seek to develop the common law, in so far as possible, consistently with the Convention⁷.
8. In 1998, the HRA could have given effect to the UK's international treaty obligations by incorporating the Convention directly into UK domestic law⁸. As noted in Chapter One, this is a typical approach amongst parties to the Convention⁹. It was also the approach taken by the UK to the law of the European Economic Community, later European Union, given effect domestically by the ECA. The HRA did not take this approach. It did not incorporate the Convention, or Convention rights, directly into UK domestic law. It thus did not, nor was it intended to, make the Convention rights enforceable directly in the UK Courts¹⁰.

3 Chapter One at [16].

4 *Re McKerr (Northern Ireland)* [2004] UKHL 12, [2004] 1 WLR 807 at [65].

5 *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 at 718, *per Lord Donaldson MR*.

6 *Ibid.* For a detailed discussion on the approach taken by the courts to the application of the Convention prior to the HRA's enactment, see: M. Hunt, *Using Human Rights Law in English Courts*, (Hart, 1998).

7 A point stressed by Lord Irvine LC during the Parliamentary debates concerning the HRA. See Hansard, HL, 18 November 1997, vol. 583, col. 478, reprinted in J. Cooper & A. Marshall-Williams, *Legislating for Human Rights – The Parliamentary Debates on the Human Rights Bill* (Hart, 2000) at 19.

8 As had been proposed by Lord Wade in 1979, see clause 1 of his proposed Bill of Rights Act. See, further C. Campbell (ed), *Do we need a Bill of Rights?*, (Temple Smith, 1980) at 21.

9 Chapter One at [18].

10 Again see Lord Irvine LC, Hansard, HL, 29 January 1998, vol. 585, col. 422, reprinted in J. Cooper & A. Marshall-Williams, at 21, '*The short point is that if the Convention rights were incorporated into our law, they would be directly justiciable and would be enforced by our courts. That is not the scheme of this Bill.*'

9. The HRA assumed that the Convention already had practical effect in the UK, as outlined above. The Act was intended to give further legal effect to Convention rights in UK domestic law. This was achieved through section 1 of, and Schedule 1 to, the HRA. Section 1 provided that rights set out in the Convention were to be given effect in UK domestic law. Schedule 1 specified the Convention rights that were to be given effect in this way. It did so by annexing the relevant text of the Convention itself¹¹.

Section 1 of the HRA

'(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—

- (a) Articles 2 to 12 and 14 of the Convention,*
- (b) Articles 1 to 3 of the First Protocol, and*
- (c) Article 1 of the Thirteenth Protocol,*

as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

(4) The Secretary of State may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.

(5) In subsection (4) "protocol" means a protocol to the Convention—

- (a) which the United Kingdom has ratified; or*
- (b) which the United Kingdom has signed with a view to ratification.*

(6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.'

Article 13 of the Convention was not included in section 1 of the HRA. It requires parties to the Convention to provide an effective domestic remedy for breaches of Convention rights. Its incorporation into the HRA was unnecessary, as the HRA is itself the means by which the UK intended to provide an effective domestic remedy for such breaches¹².

¹¹ See **Annex IV** for the text of the HRA.

¹² That article 13 of the Convention was not included was not uncontroversial at the time: see Hansard, HL, 3 November 1997, vol. 582, col. 1243, 1284, 1308; 18 November 1997, vol. 583, col. 475, 480; 19 January 1998, vol. 584, col. 1266; HC, 20 May 1998, vol. 312, col. 975 and following reprinted in J. Cooper & A. Marshall-Williams, at 231-247.

- 10.** By giving effect to the Convention rights listed in section 1 of the HRA the Government of the day sought, as it put it, to ‘*bring rights home*’ in order for remedies for breaches of those rights to be available in the UK¹³. They were ‘*brought home*’ by the HRA recreating the Convention rights contained in it as domestic law rights. As Professor Guglielmo Verdirame QC submitted in his response to the CfE, in taking this approach:

*‘[the] UK chose to proceed in a manner that made it an exception among major democracies: the constitutional protection of liberty for modern times was entrusted to a list of rights that was not an original composition but a reprint.’*¹⁴

- 11.** In doing so it created a set of domestic rights in UK domestic law (a domestic rights regime), equivalent to those set out in the Convention, a point emphasised by Lord Hoffmann in *Re McKerr (Northern Ireland)*¹⁵ and most recently by Lord Reed PSC in the case of *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* (2021), when he concluded that:

*‘The only treaty to which the Human Rights Act gives domestic legal effect is ...the Convention.’*¹⁶

- 12.** The plain intention of the phrase to ‘*bring rights home*’ was to encapsulate the effect of the HRA in facilitating the enforcement of Convention rights by UK citizens and residents before UK Courts, rather than requiring them to proceed before the ECtHR in Strasbourg. It was indeed so understood at the time. We cannot, however, avoid noting the comment made to us that the approach taken to give effect to the Convention into UK law was unfortunate in so far as it implied that the HRA was in some way introducing something new, and foreign, into UK domestic law¹⁷.

13 As noted in Chapter One at [20] and [23].

14 Professor Guglielmo Verdirame QC, *Submission to the Independent Human Rights Act Review Panel*, at [16].

15 *Re McKerr (Northern Ireland)* [2004] UKHL 12, [2004] 1 WLR 807 at [65], as set out in Chapter One at [28] and see Lord Irvine LC, *Hansard*, HL, 19 January 1998, vol. 584, col. 1261 in J. Cooper & A. Marshall-Williams at 23.

16 *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26 at [79].

17 Also see [167] below.

Professor Guglielmo Verdirame QC

*'Given the approach that was chosen [to give effect to the Convention], and with the HRA itself describing the rights it protected as "Convention rights", it is hardly surprising that the HRA came to be viewed by the wider public as a foreign import. Indeed, one of its architects [Lord Lester] remarked over a decade later that "although the scheme works well for judges and lawyers and civil society, and for the devolved institutions, it does not command widespread public confidence" – a comment which raises the question whether there could be any sense in which a constitutional charter of fundamental rights can be said to work well even though it fails to command public confidence. What is bewildering is not that the British public failed to enthuse over "Convention rights" – but, rather, that anyone ever thought they would.'*¹⁸

13. IHRAR received a number of comments noting the lack of public ownership of the HRA and the rights it provides¹⁹. Viewing the Convention rights as a 'foreign import', rather than as a step in the evolutionary development of domestic rights protection has, in the Panel's view, been one factor that has underpinned a lack of public ownership of the HRA.
14. In annexing the Convention to the HRA the Government of the day made it clear that the rights set out in the HRA were the Convention rights. It did not gloss the wording. Nor did it paraphrase it. In that way it ensured that there could be no gap between the text of the rights set out in the HRA and those set out in the Convention, such as to raise the possibility that arguments could be made that the rights in the two documents differed or were intended to differ. Presentationally, however, this choice does – and could be said to – suggest that the Convention rights annexed as schedule 1 to the HRA are not domestic rights but are and were, as pointed out to IHRAR, perceived to be 'foreign' rights being introduced into UK law.

18 Professor Guglielmo Verdirame QC, *Submission to the Independent Human Rights Act Review Panel*, at [18]. The critical view can be contrasted with support for rights protection in Northern Ireland, Scotland, and Wales, noted in Chapter One at [48].

19 E.g. Roadshows at the universities of Durham, Nottingham and Glasgow; Roundtable meetings with the Law Society for England and Wales, the Equality and Human Rights Commission, and Equalities Groups. See also Chapter One at [49]. We note, too, that some respondents described popular support for the HRA: e.g., Queen's University Belfast Roadshow; F. Cowell, *Submission to the Independent Review of the Human Rights Act Call for Evidence* at [2.5]; Amnesty International, *Submission to the Call for Evidence* at [3]. See also Chapter One at [49]. Nonetheless, the Panel's view is that there is a need to foster a more settled public and political acceptance of the HRA, in all parts of the UK.

- 15.** A different and more considered approach could have been taken in 1998. While the form the HRA took may have been a necessary political compromise at the time, it elided the distinction between a national bill of rights and an international bill of rights. This is not the position adopted in other Convention States²⁰. In other States, the Convention, like other international rights instruments, is given a certain status in national law. Its status is that of a supplementary and complementary human rights instrument, additional to existing, well-established and entrenched human rights protections.
- 16.** In principle, steps could be taken to draw a clearer distinction between the HRA as setting out domestic human rights, and the Convention as an international human rights instrument. Section 1 of the HRA could, for instance, be amended so that reference to ‘Convention rights’ was replaced by reference to ‘domestic human rights’²¹, ‘domestic rights’ or ‘United Kingdom rights’. The rights set out in schedule 1 could, equally, be moved into section 1 without reference being made to the Convention. Taking such an approach now, however, may not produce any substantive, practical improvement as the human rights regime set out in the HRA is deeply embedded in the UK legal system. Equally, it may give rise to unintended and adverse consequences, not least due to the possibility that it may create legal uncertainty concerning whether the content of the rights is the same. In turn that might create an unwarranted opportunity for judicial creativity rather than restraint. It may also be perceived as signalling to other Convention states that the UK intends to distance itself from the Convention.
- 17.** Given this, the Panel take the view that amending section 1 of, and Schedule 1 to, the HRA is not prudent (although we say nothing about the possibility or merit of varying the Convention rights to provide for specific domestic rights, such as a right to trial by jury). That said, the Panel acknowledges that section 1 is the foundation stone on which the HRA is built. As such, the Panel acknowledges that it is also the source of some of the issues and concerns considered throughout this report. By way of example, there is a substantive difference between ‘taking into account’ ECtHR case law, as required by section 2, when you have a significant body of case law on a domestic Bill of Rights and doing so when you do not.

20 While Ireland adopts a similar approach to the UK through its European Convention of Human Rights Act 2003, that Act supplements and complements its pre-existing constitutional and common law rights.

21 A point noted by Professor Tom Hickman QC during the UCL Roadshow. He noted that if the intention is to encourage domestic courts to develop domestic rights in a more domestic way, being less tied to the ECtHR, then the solution is to amend section 1 of the HRA: to change the definition of ‘Convention’ rights to ‘human’ rights (but keeping the rights in the Schedule the same). Rather than framing the Act as giving effect to an international treaty (on which the ECtHR is the authoritative source of meaning), this would frame the HRA as more clearly being about domestic human rights, albeit ones that would still be interpreted consistently with section 2 of the HRA.

- 18.** In order to remedy any issues that arise from section 1, the report sets out a coherent package of recommendations, the aim of which is to: facilitate the development of a position that occurs in other jurisdictions, the prioritisation of domestic human rights caselaw, alongside engagement with the Convention; and, assert with confidence the strength of the national approach where necessary. As such we provide for appropriate priority for domestic statutory and common law (including Scots case law) human rights, while maintaining the current statutory architecture. We also provide, in this way, to give the Convention principle of subsidiarity greater effect²². In this way we intend to provide a surer basis for the development of domestic human rights.
- 19.** Before moving on a consideration of section 2 itself, the Panel also notes that, while not within its ToR, a limited number of submissions were made to IHRAR concerning repeal of the HRA. The submissions' proposals ranged from repeal in order to replace the HRA with a British Bill of Rights with content going wider than the HRA²³, to repeal so that the UK would return to the pre-HRA common law tradition. IHRAR was provided with no evidence to show any depth of support for either proposal. On the contrary, there was an overwhelming body of support for retaining the HRA. Furthermore, detailed arguments in favour of repeal and replacement of the HRA with a British Bill of Rights were not provided, nor could we have properly considered the issue given IHRAR's ToR. We do, however, note, that it is an issue that has, in any event, been considered before inconclusively²⁴.
- 20.** In respect of the argument in favour of repeal of the HRA and return to the common law tradition, we were unable to accept it. The argument was that the change made by the HRA generally, and its sections 3 and 4 specifically, fell outside the historic approach taken by the common law constitutional tradition²⁵. Repeal would therefore, it was suggested, place the UK once more within that, its, historic tradition.

22 We consider this principle substantively in Chapter Three.

23 Professor Robert Blackburn, *Submission to the Independent Review of the Human Rights Act Call for Evidence*.

24 Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, Vol. 1 and 2 (December 2012).

25 Policy Exchange, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [3] and following.

- 21.** The difficulty with this approach is that it relies upon reference to three commonwealth jurisdictions: Canada before 1982, when it introduced its Charter of Rights; New Zealand, although detailed consideration of the movement it had made away from the historic common law tradition though its Bill of Rights Act 1990 was not set out; and Australia, which while remaining closest to the historic tradition has seen some movement away from it²⁶. The basis of the argument is that the UK should return to a common law tradition that, to a significant extent, no longer exists. On the contrary, each of the jurisdictions, and the UK, have over the last forty years seen their approaches to rights protection develop into what has been described as the '*new commonwealth model of constitutionalism*'²⁷.
- 22.** A better way to understanding the common law tradition is that set out by the Bonavero Institute of Human Rights, which makes clear in its response to the *CfE* that the UK's current approach, and the HRA, stands fairly in comparison with the best developing global practices in human rights protection and has, in fact, served as a model for development, particularly in Australia²⁸.

26 See, for instance, the Human Rights Act 2019 (Queensland, Australia) <<https://www.legislation.qld.gov.au/view/pdf/asmade/act-2019-005>>.

27 S. Gardbaum, *The New Commonwealth Model of Constitutionalism*, (2001) 49 *American Journal of Comparative Law* 707 at 707

28 Bonavero Institute of Human Rights, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [19] and following. To some degree, as noted by Professor Jason Varuhas, Australia and New Zealand have not gone as far as the UK in terms of powers provided to the courts to interpret legislation compatibly with human rights. However, it needs to be borne in mind that unlike the UK, neither Australia nor New Zealand are signatories to the Convention and thus do not enact legislation against the backdrop of the international law obligations that apply to the UK: see J. Varuhas, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [72].

Bonavero Institute of Human Rights – the HRA a model for global developments²⁹

‘There can be no exact transplant of constitutional frameworks or provisions because of differences in constitutional context and culture ... Nevertheless since its adoption, the HRA has become an extremely successful legal export. The HRA has become a leading model and influence on global constitutionalism, especially the “new Commonwealth” constitutional model.

To date, the HRA has directly informed the design, application and/or interpretation of:

- (a) *the Australian Capital Territory’s (“ACT”) Human Rights Act 2004 (“ACT HRA”);*
- (b) *Victoria’s Charter of Human Rights and Responsibilities Act 2006 (“Victorian Charter”);*
- (c) *Queensland’s Human Rights Act 2019 (“QHRA”); and*
- (d) *the New Zealand Bill of Rights Act 1990 (“NZBORA”).*

Each of these rights charters have also been widely seen as successful innovations in the protection of rights in their respective jurisdictions, and particularly in the case of the Australian legislation, which followed the enactment of the HRA, as reflecting a positive British influence on the development of a new model of constitutionalism.’

A return to the approach taken by common law jurisdictions over forty years ago would seem to be simply regressive.

- 23.** It must also be acknowledged that both proposals³⁰, in the Panel’s view, could have a significant impact on devolution and the Northern Ireland Peace Agreement (the Good Friday or Belfast Agreement)³¹, clearly so in the case of straightforward repeal. It might be said that, depending on how a British Bill of Rights was framed, it might pose less of a risk of such an impact in the devolution context *if* it substantially replicated the HRA.

29 Bonavero Institute of Human Rights, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [22]-[24].

30 I.e., the British Bill of Rights and repeal of the HRA.

31 See Professor Jeff King, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [26]-[27], and, generally, Queen’s University Belfast, Human Rights Centre, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [4]-[5].

(3) Section 2 of the HRA – The Parliamentary Debates

- 24.** Creating a domestic rights regime rather than making the Convention directly effective in UK domestic law had an important implication: it meant that ECtHR case law did not, itself, become part of UK law. Accordingly, provision needed to be made as to how UK Courts were to approach ECtHR case law³². Section 2 was intended to answer that question.
- 25.** The starting point from the Parliamentary debates was that section 2 was not intended to make ECtHR case law binding on UK Courts. It was not intended to create a '*uniform jurisprudence*'³³ between the ECtHR and the UK Courts. In other words, UK Courts were not required to apply ECtHR case law in the same way that they were required under the ECA and the various EU Treaties to apply decisions of the Court of Justice of the European Union. That this was the position is particularly clear as a proposed amendment to section 2, which would have made ECtHR case law binding on UK Courts, was rejected. The proposed amendment would have replaced the requirement in section to that UK Courts '*must take into account*' ECtHR case law with one that specified that they '*shall be bound by*'³⁴ it.
- 26.** The amendment was rejected on the basis that it was: the '*language of precedent*'; inconsistent with the Convention as it, and not the ECtHR's case law was, '*the ultimate source of the relevant law*'; and, that it was inconsistent with the fact that the Convention did not itself bind the UK in international law to follow ECtHR judgments, except where the UK is a party to proceedings before the ECtHR³⁵. It is of course of note that the ECtHR does not regard itself as bound by its own previous decisions.

32 References to ECtHR case law include reference to the other sources specified in section 2 of the HRA.

33 Geoff Hoon MP, Hansard, HoC, 3 June 1998, vol. 313, col. 390 in J. Cooper & A. Marshall-Williams at 43.

34 Lord Kingsland, Hansard, HL, 18 November 1997, vol. 583, col. 511, in J. Cooper & A. Marshall-Williams at 36.

35 Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 511 in J. Cooper & A. Marshall-Williams at 37 & 39. Also see Lord Browne-Wilkinson, with whom Lord Irvine LC agreed, *ibid* at 38-39, who noted if the courts were bound by ECtHR case law it would stifle the development of human rights law.

The ECtHR's approach to its own previous decisions

The Convention does not provide any guidance on the approach the ECtHR should take to its previous decisions. The approach taken by the ECtHR is that it is not bound by its previous decisions, will generally follow them, but may depart from them where there is good reason for it to do so. This was clearly set out in *Beard v the United Kingdom - 24882/94* [2001] ECHR 42, (2001) 33 EHRR 32 at [81]. It explained it this way,

'The Court considers that, while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see, amongst other authorities, the Cossey v. the United Kingdom judgment of 27 September 1990, Series A no. 184, p. 14, § 35).'

- 27.** Parliament may not have intended UK Courts to be bound by ECtHR case law, but it did expect ECtHR case law to play an important role in the interpretation of the domestic rights regime introduced by the HRA. This expectation was consistent with the intention underpinning section 1 of, and schedule 1 to, the HRA; namely, to enable Convention rights to be given effect in UK law, as noted above. Section 2 required the UK Courts to take into account that case law. A proposed amendment that would have weakened that requirement, and given the UK Courts a choice in effect over whether or not to take into account ECtHR case law, was rejected on the basis that such a discretion would produce inconsistent decisions in the UK Courts, when the intention was to '*promote consistency in the decision making of [UK] courts.*'³⁶

36 Geoff Hoon MP, Hansard, HoC, 3 June 1998, vol. 313, col. 390 in J. Cooper & A. Marshall-Williams at 43.

- 28.** By taking ECtHR case law into account under section 2, UK Courts were expected to ‘draw on the wealth of existing jurisprudence on the Convention.’³⁷ This approach was intended ‘to point [them] towards an interpretation of Convention rights [i.e., the domestic rights in the HRA] that [was] consistent with the interpretation in Strasbourg’³⁸; for ‘the law of the UK, as applied by the UK courts, is broadly consistent with the jurisprudence of the Strasbourg court’³⁹. Such broad, not invariable, consistency was **a** necessary aim – essential to give effect to bringing rights home, and thus enable them to secure what was said to be the ‘purpose of the [HRA] ...’ ... to enable Convention rights to be asserted directly in our domestic courts’⁴⁰. The UK Courts were not, however, expected to consider only ECtHR case law when developing their interpretation. As Lord Irvine LC explained, ECtHR case law was ‘a source of jurisprudence’⁴¹. It was not the only source of jurisprudence that the UK Courts were to consider. That it was not, was itself consistent with *another* necessary aim of the HRA. It was an essential underpinning of the development of a distinct UK contribution to the development of ECtHR case law, for UK Courts ‘to give a successful lead to Strasbourg’, to ‘give a lead to Europe as well as to be led’.⁴²
- 29.** A necessary consequence of the intention underpinning section 2 was that UK Courts were to be entitled to ‘depart from existing Strasbourg decisions.’⁴³ That follows both from the fact that section 2 did not make ECtHR case law binding on UK Courts and from the fact that the UK Courts were to make a positive contribution to the development of ECtHR case law through their own judgments. Such departures were not to be typical occurrences given the expectation that UK Courts would broadly adopt an approach consistent with the ECtHR⁴⁴. It was, however, to be for the Courts, exercising their independent judgment⁴⁵, to determine their approach to ECtHR case law.

37 Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 514 in J. Cooper & A. Marshall-Williams at 36.

38 Geoff Hoon MP, Hansard, HoC, 3 June 1998, vol. 313, col. 402 in J. Cooper & A. Marshall-Williams at 43.

39 Geoff Hoon MP, Hansard, HoC, 3 June 1998, vol. 313, col. 403.

40 Lord Irvine LC, Hansard, HL, 19 January 1998, vol. 584, col. 1257 in J. Cooper & A. Marshall-Williams at 23.

41 Lord Irvine LC went on to reiterate here that ECtHR decisions were ‘not binding precedents which we necessarily should follow or even necessarily desire to follow.’; Hansard, HL, 18 November 1997, vol. 583, col. 511 in J. Cooper & A. Marshall-Williams at 38.

42 Lord Irvine LC, Hansard, HL, 19 January 1998, vol. 584, col. 1271 in J. Cooper & A. Marshall-Williams at 38.

43 Lord Irvine LC, Hansard, HL, 19 January 1998, vol. 584, col. 1268 in J. Cooper & A. Marshall-Williams at 38-39.

44 Lord Irvine LC provides limited examples of when the UK courts could depart from ECtHR case law, Hansard, HL, 18 November 1997, vol. 583, col. 514 in J. Cooper & A. Marshall-Williams at 38.

45 Geoff Hoon MP Hansard, HoC, 3 June 1998, vol. 313, col. 402 in J. Cooper & A. Marshall-Williams at 42.

30. There was one final, important consequence of the fact that Parliament anticipated that the UK Courts applying section 2 could depart from ECtHR case law. In some situations, the UK Courts could when departing from ECtHR case law put the UK in breach of its international law obligations to comply with the Convention. This possibility was, as Lord Irvine LC explained after the HRA came into force, anticipated and authorised by Parliament⁴⁶. As he explained it,

'Parliament contemplated that the domestic courts would not follow Strasbourg in all cases. In doing so it implicitly approved the domestic courts reaching an outcome which might result in non-compliance with the UK's Treaty obligations. The judges should not abstain from deciding the case for themselves simply because it may cause difficulties for the United Kingdom on the international law plane.'

Where UK Courts did depart from ECtHR case law and place the UK in breach of its international law obligations, the resolution of such breaches was a matter for the political domain, to be resolved by Government and Parliament, whether by statutory reform or by engagement with the ECtHR or the Council of Europe.

Summary of the intended effect of section 2 of the HRA

The Parliamentary debates demonstrate that section 2 was intended:

- to ensure that UK Courts **had to take into account** ECtHR case law when interpreting the domestic rights contained in the HRA. It did not, however, stop them considering other rights case law, such as common law case law.
- to ensure UK Courts were **not bound to follow or apply** ECtHR case law. They could refuse to apply it and could do so even if that would put the UK in breach of its international law obligations as a party to the Convention.
- to enable UK Courts to **exercise their independent judgement** on when to apply ECtHR case law and when not to do so. But in doing so, they were to ensure that UK case law was broadly consistent with the approach taken in ECtHR case law.

By adopting this approach rights were to be *'brought home'* by the UK Courts developing the UK domestic rights regime in a way that was broadly consistent with ECtHR case law. Remedies for breaches of Convention rights would, consequently, be available in UK Courts. That approach would also enable the UK Courts to refuse to be led by the ECtHR where that was justified. Equally, it would enable them to lead in developing rights protection where that too was justified.

⁴⁶ Lord Irvine, *A British interpretation of Convention rights*, Public Law (2012) 237 at 245. That Parliament authorised this approach can properly be understood to have qualified the general rule of construction that the courts will generally try to construe legislation so as not to place the UK in breach of its international obligations: see *Re G* [2008] UKHL 38; [2009] 1 AC 173 at [35] on the nature of that obligation.

(4) Section 2 of the HRA – The Courts’ initial approach – *Alconbury* and *Ullah*

- 31.** The HRA contained no statutory guidance on the question of how to apply section 2 of the HRA. The initial approach to its interpretation section was cautious. In *R v Davis* [2000] EWCA Crim 109, [2001] 1 Cr App Rep 8⁴⁷, the Court held that Courts were not obliged to adopt ECtHR case law, although it did not need to decide the exact nature of the obligation imposed by section 2. The Court, however, emphasised that if too divergent an approach was taken, the HRA’s objective of giving greater effect to Convention rights in domestic law⁴⁸ would be undermined.
- 32.** This initial approach was superseded by authoritative statements as to section 2’s interpretation by the House of Lords in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* (2001)⁴⁹ (**Alconbury**) and *R (Ullah) v Special Adjudicator* (2004)⁵⁰ (**Ullah**). These two decisions formed the basis of the UK Courts’ initial, evolutionary, phase of development. They provided an anchor in uncharted waters.

Alconbury

The House of Lords heard three cases that raised the question whether planning decisions taken by the Secretary of State for the Environment, Transport and the Regions, after he had been involved in developing planning policy, were compatible with article 6(1) of the Convention as set out in the HRA. It held that because the Secretary of State’s planning decisions were capable of being challenged by judicial review, his involvement in developing planning policy did not result in a breach of article 6(1) of the Convention when he went on to take planning decisions.

47 See too, in Scotland, *Clancy v Caird* [2000] Scot CS 96.

48 *R v Davis*, *ibid.* For further comment, see F. Cowell, *Submission to the Independent Human Rights Act Review Panel*.

49 *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295.

50 *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 3 WLR 23.

- 33.** The starting point in **Alconbury** was that section 2 of the HRA did not require UK Courts to follow ECtHR case law. It confirmed that they were not bound to follow such decisions⁵¹. However, Lord Slynn, who gave the leading speech, went on to explain that, absent special circumstances, UK Courts ‘*should follow any clear and constant jurisprudence of the European Court of Human Rights.*’⁵² They should do so because if they did not the possibility arose that the issue would end up in proceedings before the ECtHR which was ‘*likely to follow its own constant jurisprudence.*’⁵³ It would, as a consequence, frustrate the HRA’s aim of ‘bringing rights home’. That the UK Courts could in special circumstances not follow ECtHR decisions was illustrated by Lord Hoffmann. In his speech, he explained that if ECtHR case law was ‘*fundamentally at odds with the distribution of powers under the British constitution, [he] would have considerable doubt as to whether [it] should be followed.*’⁵⁴
- 34.** Lord Slynn’s approach was further explained by Lord Bingham in **Ullah** in a passage that has become the principal basis of the UK Courts’ approach to section 2’s interpretation.

Ullah

The House of Lords heard two appeals brought by individuals whose claims for asylum in the UK had been rejected. The issue on the appeals was whether any Convention right, apart from article 3 of the Convention (the prohibition on torture and inhuman or degrading treatment or punishment), could be engaged when considering the removal of an individual from the UK in circumstances where it was anticipated that their treatment in the country to which they were to be returned would breach Convention rights such as, in this case, article 9 (freedom of religion). The House of Lords held that, in principle, Convention rights could be engaged in such circumstances.

- 35.** Lord Bingham reiterated that section 2(1) of the HRA required UK Courts to take into account relevant ECtHR case law. However, while this meant they were not ‘*strictly bound*’ to follow that case law, they should do so where there was a clear and constant line of ECtHR case law and special circumstances to justify departure from it did not arise⁵⁵. As noted in the submission to the CfE by Durham Law School, this interpretation of section 2 has been both ‘*hugely influential*’, not just in terms of understanding that section, but as a ‘*pervasive indicator of the purpose and function of the Act as a whole.*’⁵⁶

51 *R (Alconbury Developments Ltd) v Environment Secretary* [2001] UKHL 23, [2003] 2 AC 295 at [26] (Lord Slynn), at [76] (Lord Hoffmann).

52 *R (Alconbury Developments Ltd)* at [26].

53 *Ibid.*

54 *Ibid* at [76].

55 *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 3 WLR 23, at [20].

56 Human Rights Centre, Durham Law School, Durham University, *Submission to the Independent Human Rights Act Review Panel* at [7].

- 36.** Lord Bingham explained why his interpretation of section 2 was appropriate as follows:

*'[It] reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. 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 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.'*⁵⁷

It is important to highlight a number of points from this passage.

- 37.** First, that the Convention is an international instrument, a treaty to which the UK amongst the other Council of Europe countries is a party, suggests that it ought, where possible, to be interpreted consistently by its parties. This point has recently been reiterated by Sir Geoffrey Vos MR, in *Tunein Inc v Warner Music UK Ltd* (2021). In that case he considered the UK Courts' power to diverge from established case law of the Court of Justice of the European Union. As he explained, the approach to be taken to international treaties was that the

*'... courts of the states that accede to such treaties should, wherever possible, be striving to achieve harmonious interpretation of them, not individualistic disharmony.'*⁵⁸

This was the approach taken by the UK Courts to the Convention prior to the HRA's introduction, as is apparent from Lord Bingham's decision in *Kay v Lambeth BC* (2006)⁵⁹ (**Kay**). In that case, he explained that the Convention's effectiveness depended upon parties to it adopting such an approach as a general principle applicable to international treaties.

⁵⁷ The view that UK Courts should keep pace with ECtHR case law in this way is generally known as '*the mirror principle*'.

⁵⁸ *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441 at [198].

⁵⁹ *Kay v Lambeth BC* [2006] UKHL 10, [2006] 2 AC 465.

Lord Bingham's explanation of the need for a harmonious interpretation of the Convention in *Kay*

*'[28] The mandatory duty imposed on domestic courts by section 2 of the 1998 Act is to take into account any judgment of the Strasbourg Court and any opinion of the Commission. Thus they are not strictly required to follow Strasbourg rulings, as they are bound by section 3(1) of the European Communities Act 1972 and as they are bound by the rulings of superior courts in the domestic curial hierarchy. But by section 6 of the 1998 Act it is unlawful for domestic courts, as public authorities, to act in a way which is incompatible with a Convention right such as a right arising under article 8. There are isolated occasions (of which *R v Spear* [2002] UKHL 31, [2003] 1 AC 734, paras 12 and 92, is an example) when a domestic court may challenge the application by the Strasbourg Court of the principles it has expounded to the detailed facts of a particular class of case peculiarly within the knowledge of national authorities. The 1998 Act gives it scope to do so. But it is ordinarily the clear duty of our domestic courts, save where and so far as constrained by primary domestic legislation, to give practical recognition to the principles laid down by the Strasbourg Court as governing the Convention rights specified in section 1(1) of the 1998 Act. That Court is the highest judicial authority on the interpretation of those rights, and the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down...'*

38. If the UK Courts, applying section 2, were to unnecessarily weaken or strengthen the application of Convention rights they would be acting inconsistently with this general approach. In such a situation, they would also not promote a broadly consistent approach to Convention rights, nor would they enable individuals to seek effective remedies for breaches of those rights in the UK.
39. This approach is also consistent with Lord Bingham's comment in the passage that it ought not to be for UK Courts to develop greater rights than those provided by the Convention through their own interpretation of it.
40. Secondly, and consistently with Parliament's intentions, the passage endorses the view that the UK Courts could choose not to accept and apply ECtHR decisions. That strong reasons were needed to do so is consistent with the aims underpinning the HRA's introduction.

- 41.** Thirdly, it creates a presumption that in interpreting and applying Convention rights, the UK Courts will look to the ECtHR case law as their primary guide. The interpretative lens focuses first, and exclusively, on that case law. Again, this is consistent with two of the HRA's original aims: securing broad consistency with ECtHR case law; and providing effective domestic remedies for breaches of the Convention. The interpretative presumption does, however, leave little room for UK Courts to consider other material, such as (pre-eminently) the common law, in interpreting and applying Convention rights as domestic rights. It ties that interpretation very strongly to the Convention, which might weaken the UK Courts' ability to develop a domestic rights regime that properly takes account of matters relevant to the UK. It is, moreover, difficult to reconcile with the principle of subsidiarity, discussed further below. This leads to a final and related point.
- 42.** The presumption that the UK Courts will primarily look to ECtHR case law as their guide, linked to section 6 of the HRA (which requires courts as public authorities not to act incompatibly with Convention rights) leads to the duty to keep pace with the ECtHR – *'no more, but certainly no less'*. This is consistent with the aim of ensuring that the UK will be led by the ECtHR, as Parliament intended, although it is more definitive than the intention that the UK Courts would take a broadly consistent approach. It is also not entirely consistent with the aim of ensuring the UK Courts make a distinctive contribution to ECtHR case law.

(5) Section 2 of the HRA – Developments following *Ullah*

43. In some cases, during the first evolutionary phase of section 2's interpretation, the UK Courts went further than the position set out in *Ullah*⁶⁰ and treated ECtHR case law as, effectively, binding on them. The highpoint of that approach was the House of Lords' decision in *Secretary of State for the Home Department v AF* (2009) (**AF**)⁶¹.

AF

The House of Lords considered whether the procedure for making control orders that did not derogate from Convention rights (non-derogating control orders) under the Prevention of Terrorism Act 2005 breached article 6(1) of the Convention on disclosure grounds. The matter had already been considered by the Grand Chamber of the ECtHR in *A v United Kingdom* (3455/05) (2009) 49 EHRR 29.

The House of Lords concluded that the 2005 Act had to be interpreted consistently with article 6 of the Convention. It did so on the basis that the issue of its compatibility with the Convention had been determined by the ECtHR itself and notwithstanding the particular provision made in domestic law for the appointment of special advocates.

44. The approach adopted by the House of Lords in **AF** saw the Law Lords accept that UK Courts were required to apply – were bound by – the Grand Chamber of the ECtHR's decision. Lord Hoffmann expressed 'very considerable regret' in reaching this conclusion, as he thought the ECtHR decision in question was 'wrong ... and may well destroy the system of control orders which is a significant part of this country's defences against terrorism.'⁶² Notwithstanding these immensely cogent concerns, together with the terms of section 2, the rationale for Lord Hoffmann's decision was that if the UK Courts did not follow such case law, they would likely put the UK in breach of its international treaty obligations, and there was no merit in the Courts doing so. Lord Carswell also accepted that the UK Courts were 'obliged to accept and apply' 'a considered statement of the Grand Chamber' notwithstanding what scope they would otherwise have to depart from ECtHR case law⁶³. Lord Rodger simply stated that UK Courts had no choice but to follow such case law. As he put it, '*Argentoratum locutum, iudicium finitum – Strasbourg has spoken, the case is closed.*'⁶⁴ The House of Lords thus accepted it was bound *in fact* even if not *in law*.

60 A helpful summary of the post-*Ullah* case law on section 2 of the HRA is set out in Lord Wilson's judgment in *Moochan v Lord Advocate* [2014] UKSC 67; [2015] AC 901 at [104]-[105].

61 *Secretary of State for the Home Department v AF* [2009] UKHL 28; [2010] 2 AC 269.

62 *Secretary of State for the Home Department v AF* [2009] at [70].

63 *Ibid* at [108].

64 *Ibid* at [98].

45. It is difficult to reconcile the approach in **AF** with the intentions lying behind section 2 if it is taken as setting out a general approach to the application of that section. **AF** is perhaps best seen as the high-water mark of a particular approach, albeit an outlier, going further than warranted by the **Ullah** principle, and effectively superseded by later decisions.
46. In other cases, the Courts have treated the principle articulated in **Ullah** as limiting their approach in another way. Lord Bingham stated that applying section 2 meant that UK Courts should keep pace with ECtHR case law, ‘no more, but certainly no less.’ This approach set ECtHR case law as a baseline for compliance with Convention rights; consistency was to be achieved by the UK Courts keeping pace with ECtHR case law.
47. Tying the domestic rights introduced by section 1 of the HRA to ECtHR case law in this way led to the approach articulated by Lady Hale in *R (Marper) v Chief Constable of South Yorkshire* (2004) (**Marper**)⁶⁵. There she accepted, as was already apparent in **Ullah**, that in interpreting those rights, the courts were to do so in ways that did not leap ahead of ECtHR case law⁶⁶. The UK Courts could not, therefore, as intended by Parliament, ‘lead’ the development of rights case law. It limited the effectiveness of ‘judicial dialogue’ with the ECtHR⁶⁷.
48. The corollary of the approach from **Ullah**, **AF**, and **Marper** was that the UK Courts were to mirror ECtHR case law as it explained the scope of the Convention. It was thus not for UK Courts to go further than that case law in their interpretation of those rights, just as they were not to go below the standards set by it. They were thus bound to give effect to that case law and no more than that, notwithstanding the wording of section 2 of the HRA. As Lord Brown noted in *R (Al-Skeini) v Secretary of State for Defence* (2007)⁶⁸ (**Al-Skeini**), Lord Bingham’s statement in **Ullah**, instead of stating the UK Courts should keep pace with ECtHR case law, ‘no more, but certainly no less’ could properly have been expressed as ‘no less, but certainly no more’⁶⁹.

65 *R (Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39, [2004] 1 WLR 2196 at [70].

66 Lady Hale reiterated the point in *R (Animal Defenders International) v Secretary of State For Culture, Media and Sport* [2008] UKHL 15, [2008] AC 1312 at [53], ‘Our task is to keep pace with the Strasbourg jurisprudence as it develops over time, no more and no less: *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, para 106.’ Also see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2006] AC 529 at [25], [33]-[34] and [88]-[92] (the HRA was not intended to enlarge rights but simply enable the Convention to be enforced in the UK); and, *Ambrose v Harris* [2011] UKSC 43; [2011] 1 WLR 2435 at [18]-[19].

67 We return to judicial dialogue in Chapter Four.

68 *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 AC 153 at [106].

69 Also see to similar effect, *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2010] UKSC 29; [2011] 1 AC 1.

(6) Section 2 of the HRA – Summary of the Initial Evolutionary phase

49. The UK Courts' initial approach can therefore be summarised as follows.

Section 2 – the initial phase of development

- The Convention rights set out in the HRA are to be interpreted primarily by looking to ECtHR case law.
- ECtHR decisions are 'not strictly binding', a characterisation repeated in the authorities⁷⁰. Where the ECtHR's Grand Chamber has decided an issue, however, UK Courts are, in practice, bound to apply that case law.
- ECtHR decisions are to be presumptively followed. UK Courts are to keep pace with ECtHR case law, which provides a baseline for interpreting Convention rights.
- UK Courts are not to develop their own interpretation of Convention rights in ways that go further than ECtHR case law.

50. As an initial evolutionary phase, the ***Ullah*** approach is readily understandable, while the UK Courts were coming to grips with the Convention and developing the human rights framework. It is also an approach that commands great respect, framed as it was by jurists of the greatest eminence, Lord Slynn and Lord Bingham. It had a number of particular benefits.

⁷⁰ *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 3 WLR 23 at [20]; *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673 at [6]; *N v Secretary of State for the Home Department* [2005] UKHL 1124, [2005] 2 AC 296 at [24] (endorsing *Ullah* at [20]); *Kay v Lambeth BC* [2006] UKHL 10, [2006] 2 AC 465 at [28].

- 51.** It helped the UK achieve two specific aims that were part of the original justification for the HRA's enactment. One specific objective, as noted in Chapter One⁷¹, was to reduce the number of applications brought before the ECtHR against the UK. A further specific objective was to reduce the number of adverse findings made by the ECtHR against the UK. It was implicit in the aim of 'bringing rights home', to enable individuals to vindicate those rights in UK Courts rather than before the ECtHR. As Cowell notes in his submission to the *CfE*, during the 1990s, i.e., prior to the enactment of the HRA, adverse findings against the UK were increasing before the ECtHR⁷². Following the HRA coming into force, the number of adverse findings has been in decline, as have the number of ongoing cases against the UK before the ECtHR⁷³.
- 52.** One reason why the number of applications to, and adverse findings by, the ECtHR has decreased over the last twenty years would appear to be the UK Courts' approach to section 2. By adopting an approach where ECtHR case law is presumptively binding, they have minimised the scope for inconsistency between their interpretation and application of Convention rights and the approach taken by the ECtHR. As ***Ullah*** intended and as was anticipated in the Parliamentary debates, they have ensured that UK rights kept pace with the ECtHR, or as it has also been said, that ECtHR judgments should provide a baseline below which domestic rights protection ought not to go⁷⁴.
- 53.** In this way it helped to build confidence in UK Court decisions in the ECtHR, giving the UK Courts an anchor in the form of the framework developed by the ECtHR while navigating new and (then) uncharted waters. It helped to minimise gaps in rights protection between UK Courts and the ECtHR, helping to ensure that remedies for rights breaches were available in the UK as the HRA intended.

71 Chapter One at [22].

72 F. Cowell, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at 4 citing, for instance, A. Donald, J. Gordon & P. Leach, *The UK and the European Court of Human Rights*, Equality and Human Rights Commission Research Report 83 (2012) <https://www.equalityhumanrights.com/sites/default/files/83_european_court_of_human_rights.pdf>.

73 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*, at 9 – 10 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf>. Also see Mischon de Reya, *Submission to the Independent Human Rights Act Review Panel and Methodology*, Chart A and Chart B.

74 F. Klug & H. Wildbore, *Follow or lead? The Human Rights Act and the European Court of Human Rights*, E.H.R.L.R. 2010, 6, 621 at 624.

54. The initial phase of development did, however, pose problems. The extent to which **Ullah** and the decisions that followed it gave primacy to ECtHR case law and appeared to render UK Courts subservient to the ECtHR⁷⁵, implying a single correct interpretation of the Convention, makes its approach difficult to reconcile with the wording of, or the intention lying behind, section 2 of the HRA⁷⁶. It is particularly difficult to reconcile with the intention that courts could reach decisions inconsistent with ECtHR case law and thus contribute to ECtHR case law by developing an approach that differed from the standard set by the ECtHR. It is an approach that goes beyond ‘*broad consistency*’ and points towards uniformity, not least where **AF** was concerned. Moreover, it may have contributed to fears and resentment of the HRA and may have undermined ‘*the autonomous development of human rights by the common law courts*’, leading to what Sir John Laws described as a ‘*wrong turning*’ in the law⁷⁷.

(7) Section 2 of the HRA – The UK Courts’ later approach

55. Following what we have described as the court’s initial phase of development, the UK Courts took a more nuanced approach, albeit one still rooted in the interpretation of section 2 given in **Ullah**. They became more confident in departing from ECtHR case law, although that confidence was premised upon the continuing presumption that while not strictly bound, UK Courts should generally follow that case law. The more nuanced approach has three elements.

(i) The domestic doctrine of precedent

56. First, it affirmed the domestic doctrine of precedent. In **Kay**⁷⁸ the House of Lords confirmed that UK Courts were bound to apply the domestic doctrine of precedent notwithstanding any inconsistent ECtHR case law. It did so, recognising that if the system of rights protection the Convention creates is to work effectively, national Governments, Parliaments and Courts must apply the principles articulated by ECtHR case law in the State’s national context, particularly where issues fell within the margin of appreciation⁷⁹. Rights protection was a shared endeavour between the ECtHR and national authorities.

75 Sir John Laws, *The Common Law Constitution* (2013, CUP), in Lecture III, *The Common Law and Europe*, at 72 & 75 and following.

76 It is also difficult to reconcile with the feature that the HRA did not incorporate the Convention directly into UK law but, instead, introduced, via section 1, equivalent domestic human rights.

77 Sir John Laws, *The Common Law Constitution* (2013, CUP) at 75. See too, Sir John Laws, *The Constitutional Balance* (2021, Hart Publishing), at 126-128.

78 *Kay v Lambeth BC* [2006] UKHL 10, [2006] 2 AC 465 at [40] – [45].

79 On which see Chapter Three.

Lord Bingham’s approach to domestic precedent in *Kay*

‘[44] There is a more fundamental reason for adhering to our domestic rule. The effective implementation of the Convention depends on constructive collaboration between the Strasbourg court and the national courts of member states. The Strasbourg court authoritatively expounds the interpretation of the rights embodied in the Convention and its protocols, as it must if the Convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply.’

57. In taking this approach the House of Lords rightly acknowledged that, as a fundamental feature of the system of rights protection created by the Convention, it is primarily the responsibility of national authorities, including courts, to give effect to Convention rights.
- (ii) A greater willingness to depart from ECtHR case law**
58. The second area where there was a move away from *Ullah* was a greater willingness to depart from ECtHR case law. There was a move towards a greater emphasis on ‘*broad consistency*’ and less emphasis on uniformity, on the idea that if Strasbourg has spoken that was the end of the matter.
59. This more confident approach by the Courts is most clearly seen by the Supreme Court’s judgment in *Manchester City Council v Pinnock* (2011)⁸⁰ (***Pinnock***).

Pinnock

In ***Pinnock*** the question arose whether a housing tenant’s right to family life under article 8 of the Convention had to be considered by a court on an application for a possession order by a local authority, in this instance in the context of anti-social behaviour.

The Supreme Court held that when considering such an application a court had to consider the proportionality of the order for possession in respect of the article 8 Convention right. Having done so, the appeal was substantively dismissed.

80 *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104 at [48].

60. Lord Neuberger MR, with whom the other Justices agreed unanimously, gave the leading judgment. He restated the approach taken in **Ullah**. First, he made clear that the UK Supreme Court was not bound to apply every ECtHR decision, albeit in doing so he implied that the Courts would be bound to apply *some* decisions. We return to the rationale for this part of his judgment below.
61. Secondly, he confirmed that the UK Supreme Court was '*not actually bound*' by decisions of the ECtHR's Grand Chamber, albeit that was said to be a matter of '*theory, at least*'. Thus, at least to a degree, the high-water mark position reached by Lords Carswell and Rodger in **AF** was significantly qualified.
62. Finally, Lord Neuberger MR set out criteria to determine when it would be inappropriate for UK Courts to depart from ECtHR case law. As he put it, '*Where, ... , there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.*'
63. The upshot of Lord Neuberger MR's restatement of **Ullah** was that, while in general and in practice, the UK Courts were to continue to approach ECtHR case law as to be followed where it formed a clear and constant line of authority, specific criteria were highlighted justifying a refusal to treat it in that way. His restatement provides a more balanced approach to the tension between the UK Courts giving effect to the duty of parties to the Convention to secure a harmonious approach to it, and the HRA's aim of producing an approach that was '*broadly consistent*' with ECtHR case law rather than one that was uniform with it.
64. There are a number of examples where, consistently with Lord Neuberger MR's restatement, the Courts have (both before and after the restatement) declined to follow ECtHR case law. Those are:

Where there is no clear and constant line of ECtHR case law⁸¹

UK Courts have decided not to follow the approach of the ECtHR to Convention rights where its approach does not form part of a clear and constant line of ECtHR case law.

They have done so, for instance, where there is only one ECtHR decision or there are a limited number of decisions.

They have also done so where an ECtHR decision stems from an early period of its development and where a decision was criticised at the time it was made.

They have further done so where later cases are inconsistent with a specific decision, or where, they have concluded that the ECtHR was likely to depart from its own decision today.

Where an ECtHR decision is based on a misunderstanding of UK law⁸²

UK Courts have decided not to follow the approach of the ECtHR to Convention rights where its approach has, for instance, failed to understand properly UK domestic criminal procedure or the operation of the law relating to sentencing for criminal offences.

Where there is a fundamental principle of UK law or a failure to properly consider UK law⁸³

UK Courts have decided not to follow the approach of the ECtHR to Convention rights where its case law, including that of its Grand Chamber, involves a failure to take proper account of a fundamental principle of UK law or its case law is based on significant oversight.

⁸¹ *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621 at [43]; *R (Chester) v Secretary of State for Justice (Rev 1)* [2013] UKSC 63; [2014] 1 AC 271 at [27].

⁸² *R v Horncastle* [2009] UKSC 14; [2010] 2 WLR 47, where the court refused to follow a decision of the ECtHR on the basis that it failed to understand domestic criminal process. This decision resulted in the ECtHR altering its approach in *Al-Khawaja v UK* 26766/05 [2011] ECHR 2127, (2012) 54 EHRR 23 and thus also illustrates the importance of judicial dialogue between UK courts and the ECtHR. Also see *Attorney-General Ref No. 69 of 2013* [2014] EWCA Crim 188, [2014] 1 W.L.R. 396; *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2; [2020] AC 279.

⁸³ *R (Chester) v Secretary of State for Justice (Rev 1)* [2013] UKSC 63; [2014] 1 AC 271 at [27]; also see *R (Alconbury Developments Ltd)* at [26]; *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 at [48]. Also see *Ali v Birmingham City Council* [2010] UKSC 8; [2010] 2 AC 39 and *Poshteh v Kensington and Chelsea Royal London Borough Council* [2017] UKSC 36, [2017] AC 624, esp. at [32]-[37].

(iii) The UK Courts suggest a greater willingness to make a positive contribution

65. Finally, there has been a cautious move away from the idea that the UK Courts cannot develop rights beyond the position reached by the ECtHR.
66. This movement can be traced to the House of Lords' decision in *Re G* (sometimes referred to as *Re P*) (2008)⁸⁴ (**Re G**). In that case, Lord Hope and Lady Hale accepted that the UK Courts could develop rights beyond the ECtHR's limits where an issue fell within, or what would be expected to be, the UK's margin of appreciation⁸⁵ and there was, as would be expected in such a case, no existing ECtHR case law on the point⁸⁶. As Lord Hope put it, '*The Strasbourg jurisprudence is not to be treated as a straightjacket from which there is no escape.*' Consistently with *Ullah* the House of Lords in **Re G** did, however, maintain the position there set out that the Courts should keep in step with ECtHR case law as a minimum; that UK Courts while not strictly bound by that case law would ordinarily be expected to follow it⁸⁷.
67. The approach in **Re G** was endorsed in *R (Nicklinson) v Ministry of Justice* (2014)⁸⁸ (**R (Nicklinson)**). In that decision, the Supreme Court also took the view that the Courts could develop rights protection where an issue is within the UK's margin of appreciation⁸⁹. It is fair to note, however, that UK Courts have been cautious in taking such steps. As Lord Reed PSC observed in his submission to the *CfE*⁹⁰, while cases like **Re G** and **R (Nicklinson)**⁹¹ have taken a more robust approach, others such as *Ambrose v Harris* (2011)⁹² (**Ambrose**), *Smith v Ministry of Defence* (2013)⁹³, and *Kennedy v Charity Commission* (2014)⁹⁴ have not, on the basis that they should not develop rights law beyond the point that the ECtHR has developed it.

84 *Re G* [2008] UKHL 38; [2009] 1 AC 173 at [31].

85 The margin of appreciation is considered in Chapter Three. In essence, it refers to the space within which a signatory to the Convention is able to develop its own approach to rights protection.

86 **Re G** at [5] (Lord Hope), at [84] and [120] (Lady Hale).

87 See **Re G** at [50] (Lord Hope), [79] (Lord Rodger), [120] (Lady Hale), [126]-[130] (Lord Mance). Lord Hoffmann reiterated the view at [33]-[34] that the HRA did not require UK courts to apply ECtHR case law.

88 *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] AC 657.

89 *Ibid.* at [70-71] (Lord Neuberger PSC), at [162-163] (Lord Mance), at [197] and [202]-[204] (Lord Wilson), at [299] (Lady Hale), at [339]-[342] (Lord Kerr). Also see, *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27; [2018] HRLR 14; *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32; [2020] AC 1.

90 Lord Reed PSC, *Response to a Call for Evidence produced by the Independent Human Rights Act Review*, at 5-6.

91 For example, *Surrey County Council v P* [2014] UKSC 19; [2014] AC 896; *Moohan v Lord Advocate* [2014] UKSC 67; [2015] AC 901; *Re McLaughlin* [2018] UKSC 48.

92 *Ambrose v Harris* [2011] UKSC 43; [2011] 1 WLR 2435.

93 *Smith v Ministry of Defence* [2013] UKSC 41; [2014] AC 52.

94 *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455.

- 68. *Ambrose***, in particular, reflects the tension between the restrictive approach⁹⁵ and the more expansive approach of ***Re G***. The majority view, articulated by Lord Hope⁹⁶, was that Parliament had not intended the court to have the power under the HRA to go beyond the ECtHR's interpretation of the scope of the Convention as that would turn Convention rights into free-standing domestic rights, which the court would be creating. Lord Kerr, dissenting, rejected this view. Consistently with ***Re G***, Lord Kerr, expressed the view that UK Courts needed to determine the scope of rights. On one level the majority view is difficult to reconcile with intention underpinning section 2 of the HRA that the UK Courts should make a distinctive contribution to developing ECtHR case law when appropriate. On another, it is correct to say the HRA was not intended to usher in free-standing domestic rights.
- 69.** A broader, but also cautious, approach to a positive contribution on the part of UK Courts, was articulated in ***Pinnock***⁹⁷. As noted earlier, in his restatement of ***Ullah***, Lord Neuberger MR explained that the UK Supreme Court was not bound to apply every ECtHR decision. The reason for this was that if the UK Courts simply applied every ECtHR decision that would undermine their ability to influence the development of ECtHR case law and engage in a meaningful dialogue with that court.
- 70.** Implicit in this is the idea that the UK Supreme Court by considering the application of ECtHR case law domestically could depart from it by setting a lower standard of rights protection than the ECtHR, or by setting a higher standard. The former could, through effective dialogue, suggest that the ECtHR had developed rights beyond where they ought properly to go; the latter could point to the development of increasing rights protection standards throughout the parties to the Convention. In either way, as was intended, the UK Courts, by departing from the ECtHR in an appropriate case, could seek to lead.

95 On which also see *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153.

96 *Ambrose v Harris* [2011] UKSC 43; [2011] 1 WLR 2435 at [18]-[19].

97 *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 at [48].

- 71.** Examples where the UK Courts have led the development of Convention case law by departing from the ECtHR were highlighted to IHRAR by, for instance, the evidence submitted to the CfE by the Centre for Public Law at Cambridge University. Its submission highlighted how in *Animal Defenders International v Secretary of State for Culture, Media and Sport* (2008)⁹⁸ and *Hicks v Commissioner of the Police of the Metropolis* (2014)⁹⁹, the House of Lords and the Supreme Court departed from ECtHR case law. Its submission went on to conclude that, '[in] both cases the ECtHR subsequently followed the reasoning of the House of Lords/Supreme Court.'¹⁰⁰ It is of note that in respect of the former example, Parliament had indicated its willingness to legislate in circumstances where a declaration of incompatibility could not be made.
- 72.** Following *Pinnock*, the more expansive approach from *Re G* and Lord Kerr's dissent in *Ambrose* gained traction. It is reflected in Lord Brown's judgment in *Rabone v Pennine Care NHS Foundation* (2012) (*Rabone*)¹⁰¹ where, against the background that the question in issue had not been specifically resolved by ECtHR case law, he explained that the UK Courts could develop Convention rights where that was a natural development of ECtHR authority. The UK Courts could therefore develop their interpretation of Convention rights consistently with their cautious approach to developing the common law.
- 73.** Separately, he acknowledged that Courts could develop the common law to provide more expansive rights protection than that set out in the Convention. We return to this in **Section 11**, below.
- 74.** As highlighted by the Centre for Public Law at Cambridge University, *Rabone* is a particular example where the UK Courts correctly anticipated, and applied, the approach the ECtHR would later take to a category of case it had not previously considered.

98 *Animal Defenders International v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312.

99 *Hicks v Commissioner of the Police of the Metropolis* [2014] EWCA Civ 3; [2014] 1 WLR 2152.

100 Cambridge University, Centre for Public Law, *Submission to the Independent Human Rights Act Review Panel*, at 5 - 6; and see *Animal Defenders v United Kingdom* (App. No. 48876/08) [2013] ECHR 362; (2013) 57 EHRR 21; and, *Eiseman-Renyard v United Kingdom* (App. No. 57884/17) [2019] ECHR 237.

101 *Rabone v Pennine Care NHS Foundation* [2012] UKSC 2; [2012] 2 AC 72 at [112]-[114].

Centre for Public Law at Cambridge University – Submission on the effect of *Rabone*¹⁰²

*'...[in] Rabone, ... the domestic courts concluded that the State's positive obligation to protect the right to life under Article 2 ECHR can, in appropriate cases, extend to patients who have been voluntarily admitted to hospital for treatment. This obligation clearly "flow[ed] naturally from Strasbourg's existing case law" regarding positive obligations with respect to involuntary patients. In reaching that conclusion, Lord Dyson noted that "Strasbourg proceeds on a case by case basis" and in this particular context, "the jurisprudence [was] young. [The] boundaries [of the positive obligation to protect under article 2 were] being explored by the ECtHR as new circumstances [were] presented to it for consideration." Indeed, the ECtHR has since confirmed [in *Fernandes de Oliveira v Portugal*, Grand Chamber (App No 78103/14) [2019] ECHR 106] that the operational obligation does, in fact, extend to patients who have been hospitalised on a voluntary basis. Here, the Supreme Court has done precisely that which Lord Irvine foreshadowed when the Human Rights Bill was being debated in the House of Lords, namely, it gave "a successful lead to Strasbourg."*

102 Centre for Public Law at Cambridge University, *Submission to the Independent Human Rights Act Review Panel* at 7; Also see *Reynolds v United Kingdom* (2012) 55 EHRR 55.

(8) Section 2 of the HRA – Summary of the second phase of development

75. The UK Courts' second phase of section 2's development can be summarised as follows.

Section 2 – the second phase of development

- UK Courts were bound to apply the domestic doctrine of precedent even where ECtHR case law was inconsistent with it.
- A more confident approach to departing from ECtHR case law developed. **Ullah** was restated and specific examples of situations where UK Courts could depart were identified.
- A cautious approach to a distinctive leading contribution to ECtHR case law was developed.
- Cautious support was given to developing rights protection beyond the ECtHR's position where doing so was a natural development from the ECtHR's case law but strong caution was sounded about developing 'free-standing' human rights case law.
- Support was given to developing common law rights protection separately from the approach the UK Courts took to interpreting Convention rights in the HRA.

76. The second phase saw the UK Courts start to develop a careful and nuanced approach to the interpretation and application of Convention rights, approaching the question of departure from ECtHR lines of authority with '*greater confidence and clarity*.'¹⁰³ Or, as Lord Kerr put it in *Commissioner for Police v DSD* (2018)¹⁰⁴ (**DSD**), there was a retreat from **Ullah**.

77. In developing this approach, the UK Courts started to set a more flexible balance between the aims of achieving broad consistency with ECtHR case law, departing from it where justified, and also making a contribution to leading it where that too was justified. It was an approach that was moving closer to achieving the various aims underpinning the HRA, and section 2, than was apparent in the first phase of development.

¹⁰³ Human Rights Centre, Durham Law School, Durham University, *Evidence to the Independent Human Rights Act Review*, at [14] & [17].

¹⁰⁴ *Commissioner for Police v DSD* [2018] UKSC 11 at [77]-[78].

(9) Section 2 of the HRA – Where are we now

- 78.** The UK Courts can fairly be said to have continued to develop a more confident and flexible approach to ECtHR case law.
- 79.** First, in *R (Haney) v Secretary of State for Justice* (2014)¹⁰⁵ (**R (Haney)**) Lord Hughes both qualified Lord Neuberger MR’s restatement of **Ullah** and the approach set out by Lord Mance in *R (Chester) v Secretary of State for Justice (Rev 1)* (2013)¹⁰⁶ (**R (Chester)**), that the UK Courts could depart from ECtHR case law when it was based on an oversight or misunderstanding of UK law. These were not to be taken as the final word. They were to be understood as guidelines. The proper approach to take to applying section 2 of the HRA was to understand ‘taking into account’ ECtHR case law as context specific.

R (Haney) – section 2 is ‘context specific’

“[21] The degree of constraint imposed or freedom allowed by the phrase ‘must take into account’ is context specific, and it would be unwise to treat Lord Neuberger MR’s reference to decisions ‘whose reasoning does not appear to overlook or misunderstand some argument or point of principle’ or Lord Mance JSC’s reference to ‘some egregious oversight or misunderstanding’ as more than attempts at general guidelines or to attach too much weight to his choice of the word ‘egregious’, compared with Lord Neuberger MR’s omission of such a qualification.”

- 80.** Following **R (Haney)**, the Supreme Court endorsed the more confident approach to departing from and developing Convention case law in circumstances where the ECtHR had not yet determined an issue.
- 81.** In *Keyu v Secretary of State for Foreign and Commonwealth Affairs* (2015)¹⁰⁷ (**Keyu**), Lord Neuberger PSC, Lady Hale and Lord Kerr expressed views concerning the approach to section 2, which show increased confidence in the UK Courts departing from ECtHR case law.

105 *R (Haney) v Secretary of State for Justice* [2014] UKSC 66; [2015] AC 1344 at [21].

106 Noted above at [64, boxes 2-3].

107 *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355.

- 82.** Lord Neuberger PSC, while he decided not to go further than that case law as it was clear and consistent, was clear that UK Courts were not required to follow it ‘*slavishly*.’ Where it was ‘*unclear, incoherent or unworkable*’ UK Courts could depart from ECtHR case law. He also, importantly, noted that, in that case, neither the claimants nor the Government, as defendant, had invited the court to go further than ECtHR case law. While, clearly not determinative, the position of the parties on whether to depart from, follow or go beyond ECtHR case law is thus an important factor that the court may take into consideration¹⁰⁸.
- 83.** Lord Kerr went further than Lord Neuberger PSC. He explained that where there was no ‘*clear guidance*’ from the ECtHR, then UK Courts were required by section 6 of the HRA to determine the issue themselves. They had to determine if there had been a breach of the Convention right raised in the dispute before them. They could not simply duck the issue because the ECtHR had not yet spoken or had not spoken clearly and consistently. In doing so though, the UK Courts had to proceed with ‘*caution*’¹⁰⁹.
- 84.** Lady Hale agreed¹¹⁰. She explained that where ECtHR case law had not provided a clear and consistent line of authority, UK Courts did not have to wait for it to reach that position. The UK Courts could develop its case law beyond that reached by the ECtHR.

Lady Hale in *Keyu*

[291] ... We do not have to wait until a case reaches Strasbourg before deciding what the answer should be. We have to do our best to work it out for ourselves as a matter of principle: Rabone v Pennine Care NHS Foundation Trust (INQUEST intervening) [2012] UKSC 2, [2012] 2 AC 72 is an example of this (an example which, as it happened, was swiftly followed by a Strasbourg decision which is wholly consistent with it: see Reynolds v United Kingdom (2012) 55 EHRR 55). There may be other situations in which the courts of this country have to try to work out for themselves where the answer lies, taking into account, not only the principles developed in Strasbourg, but also the legal, social and cultural traditions of the United Kingdom.’

108 *Keyu* at [90].

109 *Keyu* at [235].

110 *Keyu* at [291].

85. In **DSD**¹¹¹ Lord Kerr reiterated the position he had set out in **Keyu**. We return to this decision later in our report, as it raises other issues within the ToR. In respect of section 2, however, he explicitly rejected the position that because the ECtHR had not spoken on an issue, the UK Courts should also decline to do so. He thus, as was apparent from the three judgments in **Keyu**, rejected the ‘no more’ element of **Ullah**, particularly as it had been developed in **Al-Skeini** by Lord Brown. As he explained, it was the UK Courts’ duty to determine the content of domestic rights. That was what they were doing when they were considering the interpretation of the Convention rights that formed part of the HRA. They were not considering the correct interpretation of the Convention itself, rightly a matter for the ECtHR. This approach was consistent with that taken by the Supreme Court in *Surrey County Council v P* (2014), and in *Moohan v Lord Advocate* (2014)¹¹².
86. Lord Neuberger PSC in **DSD** adopted the approach that UK Courts could depart from ECtHR case law in wider circumstances than his previous restatement of **Ullah** in **Pinnock** might have suggested. After noting that UK Courts are not bound to follow ECtHR case law, ‘even where there is a clear and consistent approach’ he explained that UK Courts could properly come to a different view to that of the ECtHR if there was good reason for it doing so¹¹³. The essential point here is that the UK Courts could properly ‘not keep pace with’ the ECtHR when there was a valid justification for coming to a different conclusion. ECtHR case law thus helped the UK Courts reach their decision but did not determine that decision.
87. Lord Mance took a comparable approach, albeit he specifically stressed that UK Courts should not go beyond the ECtHR without good reason for doing so. There were, however, cases, where the UK Courts should move ahead of the ECtHR with ‘confidence’, particularly if the issue fell within the margin of appreciation. The UK Courts have recently developed rights in the margin of appreciation in a number of cases¹¹⁴.

Lord Mance in **DSD**

‘[153] here are however cases where the English courts can and should, as a matter of domestic law, go with confidence beyond existing Strasbourg authority: see eg Rabone v Pennine Care NHS Foundation Trust [2012] UKSC 2; [2012] 2 AC 72. If the existence or otherwise of a Convention right is unclear, then it may be appropriate for domestic courts to make up their minds whether the Convention rights should or should not be understood to embrace it...’

¹¹¹ *Commissioner for Police v DSD* [2018] UKSC 11; [2019] AC 196 at [73]-[79].

¹¹² *Surrey County Council v P* [2014] UKSC 19; [2014] AC 896 at [62]; *Moohan v Lord Advocate* [2014] UKSC 67; [2015] AC 901 at [105].

¹¹³ **DSD** at [91]. See, for instance, *Hafeez v Government of the United States of America* [2020] EWHC 155 (Admin); [2020] 1 WLR 1296 at [47], where the High Court noted that ‘although we must take account of any relevant decision of the European Court of Human Rights, we are not obliged to follow the decision if a reasoned analysis of the position leads us to a contrary conclusion’.

¹¹⁴ *Re Northern Ireland Human Rights Commission’s Application for Judicial Review* [2018] UKSC 27; [2018] HRLR 14; *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32; [2020] AC 1.

88. More recently, the Supreme Court in *R (Hallam) v Secretary of State for Justice* (2019)¹¹⁵ (***R (Hallam)***), when considering statutory compensation for a miscarriage of justice, declined to follow the approach of the ECtHR in respect of its interpretation of the scope of article 6 of the Convention, the right to a fair trial – here, in particular, the presumption of innocence. That right is one where the equivalent common law right is well-developed. The tenor of the judgments of Lords Mance, Wilson and Hughes, as well as that of Lord Reed who dissented, was that the UK Courts were not bound to follow ECtHR case law. Determining when to follow the ECtHR was, as in ***R (Haney)***, ‘*context specific*’¹¹⁶.
89. Furthermore, while it was desirable to maintain consistency between UK Courts and the ECtHR, the former were still required to reach their own decision on the correct interpretation of domestic law, i.e., the Convention rights contained in the HRA. As Lord Reed pointed out, simply following the ECtHR would mean UK Courts could not engage in a properly constructive dialogue with the ECtHR. They would not be able to influence development of its case law in those cases where dialogue was possible¹¹⁷.
90. The most recent summaries of the UK Courts’ approach are to be found in *R v Abdurahman* (2019) (***Abdurahman***) and *R (AB) v Secretary of State for Justice* (2021)¹¹⁸ (***R (AB)***).
91. In ***Abdurahman***, the Court of Appeal (Criminal Division) upheld the safety of the conviction of a defendant on terrorism offences arising from the incident on 21 July 2005, notwithstanding a finding by the ECtHR that there had been a violation of the defendant’s right to a fair trial by reason of the admission in evidence of a statement from the defendant in circumstances involving a breach of police procedures. Giving the judgment of the Court, Dame Victoria Sharp P summarised the UK Courts’ approach as one that would generally look to follow a clear and constant line of ECtHR case law. The degree to which it would do so was, however, ‘*context-specific*.’

115 *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2; [2020] AC 279.

116 ***R (Hallam)*** at [72] (Lord Mance); at [89] (Lord Wilson).

117 ***R (Hallam)*** at [72] (Lord Mance); [84]-[86], [90], [93]-[94] (Lord Wilson); [125]-[127] (Lord Hughes). See also [132]-[138] (Lord Lloyd-Jones). Contrast [172]-[175], [191] (Lord Reed); [205] (Lord Kerr).

118 *R v Abdurahman* [2019] EWCA Crim 2239; [2020] 4 WLR 6; *R (AB) v Secretary of State for Justice* [2021] UKSC 28.

Dame Victoria Sharp P in *Abdurahman*

[110] ...

(c) In assessing (i) whether there has been a breach of article 6, (ii) if so, what kind of breach and (iii) the nature and quality of the evidence, we are bound by section 2 of the 1998 Act to “take into account” any decision of the Strasbourg Court.

(d) In doing so, we should “usually” follow any “clear and constant line of decisions” of the Strasbourg Court. It might, however, be right to depart even from a “clear and constant” line of decisions if (i) it is inconsistent with some fundamental substantive or procedural aspect of our law or (ii) its reasoning appears to overlook or misunderstand some argument or point of principle: *Pinnock*, para 48.

(e) But this should be viewed as guidance rather than a straitjacket. The degree of constraint the Strasbourg jurisprudence imposes is context-specific. Even where the Grand Chamber has endorsed a line of authority, it is not necessary for the domestic court to conclude that it involved an “egregious” oversight or misunderstanding before declining to follow it: *R (Kaiyam) v Secretary of State for Justice* [2015] AC 1344, para 21; *R (Hallam) v Secretary of State for Justice* [2019] 2 WLR 440, paras 79, 82, 113.’

92. As it seems to the Panel, a move to a ‘context-specific’ approach to the requirement imposed by the phrase ‘must take into account’ does involve a noteworthy retreat from **Ullah** and may be viewed as a healthy and self-confident development, putting any thought of a straitjacket to one side. But there are limits to this retreat. Moreover, as *AM (Zimbabwe) v Secretary of State for the Home Department* (2020)¹¹⁹ recently demonstrated, the retreat is not necessarily consistent. In that case, while the Secretary of State did not invite the Supreme Court to depart from a Grand Chamber decision, the court noted that it would only do so ‘in highly unusual circumstances.’¹²⁰
93. The most recent summary of the approach is that given by Lord Reed in **R (AB)**, emphasising the enduring importance of the **Ullah** principle. It remains the starting point for an analysis of the UK Courts’ approach to section 2 and ECtHR case law: it remains the ‘general approach.’¹²¹
94. Lord Reed underlined how it was right that UK Courts, as explained in **Al-Skeini**, were not to go boldly beyond ECtHR case law and in doing so lay down new principles of Convention case law: they were not to create ‘free-standing rights’.

¹¹⁹ *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17; [2020] 2 WLR 1152.

¹²⁰ [2020] UKSC 17; [2020] 2 WLR 1152 at [34]. We are not here concerned with the merits of the decision, albeit we note the concern it has raised regarding NHS resource allocation.

¹²¹ *Re (AB)* at [54]-[59].

95. Lord Reed went on to highlight the problem that would arise if UK Courts did develop free-standing rights. If they were to do so, public authorities would have no right of appeal to the ECtHR (although it should be noted that any such legal principle established by UK Courts in this way would be subject to revision by the UK Parliament). If, conversely, the UK Courts declined to go further than the ECtHR case law, an appellant could always take the point to the ECtHR for it to determine the matter. That was not to say that the UK Courts could not, as was clear from **Rabone**, develop Convention case law incrementally where it could do so based on established ECtHR principles.

Lord Reed PSC in *AB*

'[59] ... it is not the function of our domestic courts to establish new principles of Convention law. But that is not to say that they are unable to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law. In situations which have not yet come before the European court, they can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law. Indeed, that is the exercise which the High Court and the Court of Appeal undertook in the present case. The application of the Convention by our domestic courts, in such circumstances, will be based on the principles established by the European court, even if some incremental development may be involved. That approach is discussed, for example, in Rabone v Pennine Care NHS Trust (INQUEST intervening) [2012] UKSC 2; [2012] 2 AC 72, paras 112 and 121, Surrey County Council v P [2014] UKSC 19; [2014] AC 896, para 62, Kennedy v Charity Commission [2014] UKSC 20; [2015] AC 455, paras 145-148, and Moohan v Lord Advocate (Advocate General for Scotland intervening) [2014] UKSC 67; [2015] AC 901, para 13.'

96. Finally, Lord Reed noted with approval Lord Neuberger PSC's restatement of **Ullah** in **Pinnock**. He did so without, however, referring to later developments, such as the emphasis on the 'context-specific' approach to interpretation developed by the Supreme Court in **R (Haney)** and **Hallam**, and the Court of Appeal in **Abdurahman**.

(10) Section 2 of the HRA – *Ullah*'s 'less-considered' second limb – the common law

- 97.** *Ullah*'s principal focus was the correct application of section 2 of the HRA in order to interpret Convention rights appropriately. As noted above¹²², it had a further aspect; a '*less-considered limb*' – the common law. The HRA did not codify common law rights protection. If it had done it would have replaced the common law with a single, statutory rights regime. Instead, the HRA supplemented, rather than replaced, the common law.
- 98.** In *Rabone*, Lord Brown referred to the continued existence, and vitality, of common law rights protection. He noted how *Ullah* acknowledged that the Courts could still, following the HRA's introduction, develop common law and could, in appropriate cases, do so beyond the level of rights protection provided by the Convention. If they were to do so, however, they must be clear that they were developing the common law and not purporting to interpret the Convention.

Lord Brown in *Rabone* – *Ullah*'s less-considered second limb

'[113] The other, less often considered, limb of the Ullah principle is that the court may in certain circumstances if it wishes decide a case against a public authority by developing the common law to provide for rights more generous than those conferred by the Convention; but that it should not grant such rights by purporting to extend the reach of the Convention beyond that recognised by, or reasonably envisaged within, existing Strasbourg jurisprudence.'

- 99.** The ability to develop rights protection beyond that provided by the Convention is consistent with the UK's obligations under the Convention, article 53 of which specifies that it does not impose any form of limit on the nature of rights protection conferred by Convention states domestically, i.e., through statute by Parliament or by the cautious, evolutionary and incremental development of the common law by the Courts¹²³.

122 Lord Brown in *Rabone* at [113].

123 Article 53 of the Convention, '*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.*' On the cautious approach of the common law see, for instance, Lord Bingham, *The Business of Judging*, Vol. 1 (OUP, 2000) at 25ff; Sir John Laws, *The Common Law Constitution* (CUP, 2014).

- 100.** Lord Brown’s reminder of the common law’s continued vitality leads us to a second point concerning the common law: its relationship with the HRA when considering potential rights infringements. On a number of occasions during **Ullah**’s second developmental period, the Supreme Court has commented, critically, that parties have defaulted to reliance on the HRA and Convention rights¹²⁴. They had not, as they ought to have done, looked first to see if a specific domestic statute or the common law provided an answer to the alleged rights infringement. This could be referred to as the **rights priority question**. It was considered, for instance, by Lord Reed in *Osborn v Parole Board* (2013) (**Osborn**).

Lord Reed in *Osborn*¹²⁵

‘[57] ... The Human Rights Act has however given domestic effect, for the purposes of the Act, to the guarantees described as Convention rights. It requires public authorities generally to act compatibly with those guarantees, and provides remedies to persons affected by their failure to do so. The Act also provides a number of additional tools enabling the courts and government to develop the law when necessary to fulfil those guarantees, and requires the courts to take account of the judgments of the European court. The importance of the Act is unquestionable. It does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate.’

- 101.** In **Osborn** Lord Reed outlined how Convention rights had not superseded either specific domestic statutes protecting rights or the common law.
- 102.** The Supreme Court has now made clear, on a number of further occasions, that when considering whether there has been a rights infringement, before turning to consider the HRA and whether a Convention right (as interpreted through section 2) applies, domestic statute and the common law are first to be considered. The order of priority in assessing rights is therefore: domestic statute; the common law; and, finally, Convention rights as interpreted through the application of section 2. This order of priority necessarily links with **Ullah**’s less-considered, second limb.

¹²⁴ *Osborn v Parole Board* [2013] UKSC 61; [2014] AC 1115 at [55]-[63].

¹²⁵ *Osborn v Parole Board* [2013] UKSC 61; [2014] AC 1115 at [57].

Lord Mance in *Kennedy v Charity Commission*¹²⁶

‘[46] ... [there] has too often been a tendency to see the law in areas touched on by the Convention solely in terms of the Convention rights [when] the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on the Convention rights, without surveying the wider common law scene.’

- 103.** Considering the common law before looking at Convention rights means UK Courts will need to consider whether, and if so how, the common law may justifiably be developed even if that development goes beyond the Convention. Necessarily any such common law development will be carried out cautiously through the proper application of the doctrine of precedent and judicial restraint. It will also, importantly, be subject to Parliamentary revision or correction as provided for by Parliamentary Sovereignty – revision or correction that is simpler in the case of common law development than with regard to developments in ECtHR case law¹²⁷. Most recently, the Courts have placed greater reliance on the common law as a means to provide rights protection¹²⁸.
- 104.** *Ullah*'s second limb ought not to be underestimated or underappreciated – both in terms of its focus on the possibility of developing the common law, and more recent developments that have emphasised the order of priority in which different forms of rights protection should be considered. We return to this when we consider options for reform.

126 *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455 at [46].

127 Chapter One at [42].

128 Examples of such cases where the common law was relied upon rather than the Convention rights set out in the HRA are: *Osborn v Parole Board* [2013] UKSC 61; [2014] AC 1115; *A v BBC* [2014] UKSC 25; [2015] AC 588; *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869.

(11) Section 2 of the HRA – Summary of where we are now

105. Where the UK Courts have reached concerning section 2's application can be summarised as follows.

Section 2 – where we are now

- There is an order of priority of assessing rights protection: domestic statute; the common law; and then, finally, Convention rights.
- **Ullah** remains the starting point for an analysis of the approach to section 2 and ECtHR case law.
- Free-standing Convention rights cannot be developed by UK Courts. However, UK Courts may go beyond the ECtHR where doing so was a natural development from the ECtHR's case law or the ECtHR has not (yet) specifically resolved the issue.
- UK Courts are more confident in departing from ECtHR case law. Guidance can be drawn from Pinnock and other authorities where UK Courts have declined to follow ECtHR case law and, more generally, may be seen as 'context-specific'¹²⁹.
- Specific instances where UK Courts have declined to follow the ECtHR are where: there is only one ECtHR decision on the issue; the ECtHR case law was criticised at the time it was made or is inconsistent with other ECtHR decisions; the ECtHR's decision is based on a misunderstanding of, or failed to take account of, UK law or constitutional principle¹³⁰.
- Common law rights protection can still be developed, and can be developed further than that provided by the Convention, subject (as always) to judicial restraint and Parliamentary Sovereignty.

129 No doubt was cast on the 'context-specific' approach in **Re (AB)**, although it was not specifically referred to, a matter readily explicable by the particular argument the Supreme Court was there addressing.

130 Also see [64], above.

(12) Views from Submissions to IHRAR concerning Section 2

- 106.** IHRAR received a large number of submissions concerning the operation of section 2 of the HRA. Throughout this report where we set out submissions, they are illustrative. All submissions have been considered. We set out submissions, both supportive of the *status quo* and of different types of reform, to illustrate the issues raised with IHRAR through its call for evidence, Roundtables and Roadshows.
- 107.** A significant majority of those views supported no change to section 2; a conclusion also reached by the Joint Committee on Human Rights in its recent report commenting on IHRAR¹³¹. Broadly put, they contend that during what we have called ***Ullah***'s first evolutionary phase, there were arguably problems with the UK Courts' approach. It was too rigid in following ECtHR case law. It was too reticent in departing from the ECtHR approach, and it was not robust enough in going beyond it. Those problems were, it was submitted, issues of the past. Following ***Pinnock***, the UK Courts' approach has stabilised and now took a more nuanced and flexible approach to ECtHR case law.
- 108.** Such views also noted that the current approach had led, as intended by the HRA, UK Courts not only to give proper effect to the Convention and remedies for rights breaches in domestic law, but that it also enabled them to play a proper role in the development of ECtHR case law. Section 2 was working well in practice and had properly helped the HRA achieve its aims.
- 109.** Given the position the UK Courts had now reached, it was argued, not only was no reform needed, but any reform that might be proposed ran the risk of harming the operation of the HRA as well as creating unforeseen adverse consequences.

131 Joint Committee on Human Rights, *The Government's Independent Review of the Human Rights Act*, Third Report of Session 2021-22, at [47] <<https://committees.parliament.uk/publications/6592/documents/71259/default/>>

Examples of submissions supportive of no change

Law Society Roundtable – City Law Firms (24 March 2021)

‘Section 2 in its current form provides a necessary link to the ECtHR in a modest way. It provides legal certainty and consistency across borders, whilst also allowing for divergence so not as to impinge on parliamentary sovereignty.’

Without section 2 in its current form, the inconsistency across jurisdictions would produce uncertainty and could lead to the UK being a less desirable place to do businesses. Section 2 assists in keeping the UK aligned with other Council of Europe members.

The duty to “take into account” ECtHR jurisprudence is a well-balanced formulation; it allows for judicial dialogue and divergence in certain cases where necessary.’

Annabel Bannister

‘There is no need to amend any of Section 2. In a Court case that I was tangentially involved with, a Judicial Review against a Local Authority, the ECtHR jurisprudence (a right to family life and the right to freedom of association) were both used effectively. The ECtHR adds an extra level of protection to citizens in this country, living under a Government who does not always consider the needs of the poor and disabled. All relationships and dialogue between domestic courts and ECtHR are adequate and this dialogue must be preserved.’

Professor Colm Ó Cinnéide

‘...the current relationship between UK courts and the Strasbourg Court, as framed by s. 2 HRA, would appear to work well – and to rest on a sound principled footing... This is an area where retention of the status quo would, frankly, seem like the obvious option. The situation might be difficult if the ‘[Ullah] principle’ was applied inflexibly by the UK courts – but this is not the case, and has not been the case for over a decade... [Amending s.2] risks generating legal uncertainty [and might] create odd inconsistencies between the extent to which Strasbourg jurisprudence is factored into the development of common law or retained EU law standards, and its influence over ‘Convention rights’ as incorporated under the HRA.’

Paul Harvey

There is now a settled approach to section 2 of the HRA and it is one that works well ... The Strasbourg Court appears to take no issue with the fact that its jurisprudence is not binding on the UK courts; if anything, the Court appears to welcome it for the critical perspective it sometimes brings. So it is the non-binding nature of section 2 which gives the UK courts, in particular Supreme Court, a great deal of influence over the direction of Strasbourg jurisprudence not only does section 2 institute a duty on the UK courts to take account of ECHR jurisprudence but also, by implication, it creates a duty on the Strasbourg Court to take account of the jurisprudence of the UK courts.

The Scottish Government

'The requirement to take ECtHR jurisprudence "into account", but not to be rigidly bound by its decisions, remains the correct approach, and is the model that simultaneously delivers both the greatest alignment and the greatest flexibility... Retention of section 2 of the HRA in its current form is also supported by an understanding of the intentions of the UK Parliament when it originally passed the legislation.'

Equalities and Human Rights Commission

'... section 2 of the HRA strikes an appropriate balance in the relationship between domestic courts and the European Court of Human Rights (ECtHR). The duty on domestic courts and tribunals to 'take into account' ECtHR case law is sufficiently flexible in that it enables courts to examine the specific case law in question, its clarity, pedigree and consistency, and to determine how closely to follow it. Any amendment to this duty could well result in an increase in the number of applicants seeking a determination from the ECtHR.'

- 111.** IHRAR, however, also received a number of submissions from differing perspectives aimed at improving section 2's operation. Those reform proposals can be grouped into seven broad headings: repeal section 2; state that ECtHR case law is not a mandatory consideration; restrict the type of ECtHR case law that can be taken into account; provide greater emphasis to the common law; require additional case law to be taken into account; provide clarity on how to take ECtHR case law into account; incorporate an interpretative provision requiring a wide range of international authority to be taken into account.

Selected criticisms and reform recommendations submitted to IHRAR

Professor Guglielmo Verdirame QC

'One option is altogether to repeal the duty to take into account Strasbourg precedents in section 2. This would give a clear signal to our courts that the interpretation of the rights guaranteed under the HRA is a matter for them. The risk with this solution is that, given the general and open-ended terms in which rights are formulated, courts may be left in a state of uncertainty as regards the relationship with both Strasbourg and UK precedents.'

Simon Carne

'... my suggestion is that the requirement to "take into account" might be modified so that it continues in its current form only in relation to decisions of the ECtHR which are not reliant on the living instrument doctrine. The duty should be reduced (or eliminated entirely) for all other cases.'

Lord Pannick QC

'I think it would be helpful to clarify section 2 to make clear that the domestic court or tribunal is not bound by a judgment of the ECtHR. The Supreme Court has rightly recognised that there is a valuable common law jurisprudence relevant to the application of Convention rights and that there are occasions when a dialogue between domestic courts and the ECtHR assists...

I would suggest a new section 2(1A):

"A court or tribunal determining such a question shall also take into account a common law decision, and may have regard to a decision of another international court or of a court of another jurisdiction, whenever made or given, so far as, in the opinion of the court or tribunal, such a decision is relevant to the proceedings in which that question has arisen."

Human Rights Consortium Scotland

'... we recommend that the panel recommend no change to Section 2 of the HRA. Instead, we recommend that the panel endorse the approach of the Scottish UNCRC Bill and First Minister's Advisory Group on Human Rights Leadership, to include an interpretive clause in the new Scotland human rights framework that will enable explicit links to the widest range of international interpretive human rights tools for all of those charged with its implementation and ongoing interpretation.'

Mishcon de Reya

'In the context of our uncodified domestic constitutional position, we can see real merit in amending "section 2 of the HRA" to clarify the "requirement to explain" which underpins "taking into account". The reasons for doing so are twofold:

There are examples within the case law ... where the courts arguably did not provide sufficient depth of reasoning for departing from ECtHR jurisprudence;

and

*It would provide Parliament with an opportunity to consider how it might wish to codify the explanation of Lord Phillips in *Horncastle* as to what 'take into account' requires'*

(13) The *Ullah* Legacy

- 113.** It is evident that the ***Ullah*** principle and the UK Courts' approach to it over the first twenty years of the HRA's existence has matured. An initial, rigid, approach that emphasised the need to follow, and not depart from, ECtHR case law has gradually given way to a more nuanced and flexible approach.
- 114.** ***Ullah*** now forms part of a broader approach to ECtHR case law that gives proper weight to context-specific factors, to the need not to follow the ECtHR and to go beyond it in appropriate cases. The approach now being taken strikes a good balance between the HRA's aims of securing '*broad consistency*' with ECtHR case law, giving effect to the Convention domestically, and securing an effective dialogue between the UK, its Courts, and the ECtHR.
- 115.** It follows that the strength of the concerns which might have been expressed as to the ***Ullah*** principle in its initial phase is much reduced; in terms of the ToR, the application of ***Ullah*** in practice over an extended period of time has allayed many of those concerns. Moreover, as a matter of realism, any discussion of ***Ullah*** must respect the reiterated support of high authority for the principle, most recently in **AB**. Nonetheless, in considering whether there is a need for any amendment of section 2 and, if so, what that amendment should be, it remains pertinent to learn lessons from the evolution of the ***Ullah*** principle with a view to informing our options, and recommendations, for reform. Concerns with the approach taken in ***Ullah*** can be summarised as follows.

(i) It is not justified by the wording or intention underpinning section 2

116. First, as Lord Irvine LC pointed out almost ten years ago¹³², the gloss set out in *Ullah* that UK Courts should generally follow a clear and constant line of ECtHR case law is not justified by the wording of section 2 itself. Its wording does not provide a basis for an approach that treats ECtHR case law as, while not strictly binding, only to be departed from in specific and limited circumstances or where the specific context justifies it. Such an approach furthermore does not appear to be justified by the tenor of the Parliamentary debates. With respect to the statements of judicial high authority supporting *Ullah*¹³³, we think there is force in this criticism.

(ii) It produces an unhelpful continued lack of clarity

117. Secondly, and even though many of the concerns regarding *Ullah* have been allayed (as noted above), a continued ambiguity in the UK Courts' approach to section 2 remains troubling. Notably, Lord Pannick QC commented in his submission to the *CfE*, '*conflicting caselaw on the extent to which domestic courts may depart from a judgment of the ECtHR*'¹³⁴. Courts need clarity. As do others, public authorities in particular, who have to ensure that they comply with Convention rights.

(iii) It is inconsistent with the primacy of domestic rights protection

118. The view that UK Courts should presumptively treat ECtHR case law as binding is inconsistent with the Convention. The Convention, and ECtHR case law itself, is clear that the primary line of rights protection is not the Convention itself¹³⁵. On the contrary, the Convention and its case law is a backstop. The primary line of rights protection is domestic law.

119. However unintended, *Ullah*, even as it has developed, may have given the impression that the Convention is the primary form of rights protection in the UK. This approach is inconsistent with the principle of subsidiarity.

132 Lord Irvine, *A British interpretation of Convention rights*, Public Law (2012) 237, at 240.

133 See, e.g. Lord Brown in *Rabone* at [111], Lord Reed PSC in *AB* at [58-59].

134 Lord Pannick QC, *Submission to the Independent Human Rights Review*, at 1.

135 *Handyside v United Kingdom* - 5493/72 [1976] ECHR 5, (1976) 1 EHRR 737 at [48]-[49].

The principle of subsidiarity and Protocol 15 to the Convention¹³⁶

This is the principle that the primary responsibility for securing effective rights protection lies on the States that are parties to the Convention. It is primarily for national Governments, Parliaments and Courts to provide rights and an effective framework for their enforcement within the State¹³⁷. The ECtHR's role is secondary to that.

An example of this principle in action is the fact that individuals who claim their human rights have been infringed must exhaust those remedies for such breaches available domestically, e.g., through the UK Courts, before they can make an application to the ECtHR. Linked to this is the fact that the ECtHR does not act as a court of appeal from the decisions of domestic courts. It also underpins the approach the ECtHR takes.

The UK Government and those of the other parties to the Convention reaffirmed their commitment to the principle of subsidiarity in the Brighton Declaration. They did so in terms that echoed the wording of section 2 of the HRA:

'The full implementation of the Convention at national level requires State Parties to take effective measures to prevent violations. All laws and policies should be formulated, and all State officials should discharge their responsibilities, in a way that gives full effect to the Convention. States Parties must also provide means by which remedies may be sought for alleged violations of the Convention. National courts and tribunals should take into account the Convention and the case law of the Court. Collectively, these measures should reduce the number of violations of the Convention. They would also reduce the number of well-founded applications presented to the Court, thereby helping to ease its workload...'

The Brighton Declaration led to the implementation of Protocol 15 of the Convention, which took effect on 1 August 2021. It emphasises the centrality of the principle of subsidiarity to the Convention by adding the following additional recital to its preamble:

'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.'

136 High Level Conference on the Future of the European Court of Human Rights (Brighton Declaration) <https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf>; Article 1 of Protocol 15 to the Convention <https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf>.

137 *Handyside v United Kingdom* - 5493/72 [1976] ECHR 5, (1976) 1 EHRR 737 at [48] *'... the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ... The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines.'*

- 120.** Treating ECtHR case law as presumptively to be followed jars with this fundamental feature of the Convention system of rights protection. It also does not assist UK Courts when approaching the margin of appreciation, which is inextricably linked with the principle of subsidiarity. On the other hand, as already observed it does contribute to a degree of certainty and predictability.

The margin of appreciation¹³⁸

The margin of appreciation is the space the Convention and the ECtHR provides for national authorities to implement their duty to give effect to rights protection. It was summarised as follows by Murray Hunt in his submission to the CfE:

*'... national authorities enjoy a margin of appreciation in deciding how best to discharge that primary responsibility to secure Convention rights, not in the sense of an open-ended discretion or exclusive area of competence to do whatever they like, but in the sense of a degree of latitude in deciding from a range of possible ways of giving effect to the Convention rights and freedoms, subject to the ultimate supervisory jurisdiction of the [ECtHR].'*¹³⁹

- 121.** Where national authorities, including the courts, fail to approach their responsibility under the Convention as being primary, they are not in the proper position to utilise the margin of appreciation. We return to this issue in Chapter Three. The **Ullah** principle by leading to the presumption that UK Courts would follow ECtHR case law, can be seen as undermining this aspect of the Convention system. That is one reason why Laws LJ suggested, in *R (Children's Alliance)*, that the '*Ullah principle ... be revisited*': it had led to human rights law not becoming and being '*seen to be, as sure a part of our domestic law as the law of negligence*'.¹⁴⁰

¹³⁸ This is discussed further in Chapter Three.

¹³⁹ M. Hunt, *Submission to the Independent Human Rights Review*, at 3.

¹⁴⁰ Laws LJ in *R (Children's Rights Alliance) v Secretary of State for Justice* [2013] EWCA Civ 34; [2013] 1 WLR 3667 at [64].

122. Matters do not end there. The margin of appreciation is afforded to the UK and the other parties to the Convention. It is to be shared between the three Branches of the State¹⁴¹. By focusing on ECtHR case law as presumptively to be followed through section 2, political and public ownership of rights law may be diminished. The idea, expressed by Lord Rodger in **AF**, that Strasbourg has spoken and that is the end of the matter, is unhelpful in this regard. Rather than rights brought home through the HRA serving to stimulate the development of a domestic rights regime amongst all the UK's institutions and the public, it presents rights as being imposed on the UK. It further portrays the Courts as the conduit through which that imposition is given effect. By contrast, a proper focus on subsidiarity and the primacy of domestic rights protection, which does not necessitate a presumption that a clear and constant line of ECtHR decisions should be followed, is conceptually sound and ought not to disturb the equilibrium reached between UK Courts and the ECtHR¹⁴². The high regard in which UK Courts are held in the ECtHR flows (for present purposes) from the careful consideration and analysis of the principles set out in ECtHR case law found in UK judgments; the ECtHR disclaims any suggestion that ECtHR case law is to be followed slavishly¹⁴³.

(iv) It is different from the approach taken by other comparable parties to the Convention

123. It is also apparent that the approach taken as a result of the **Ullah** principle is different from that taken by other parties to the Convention. We see this through, for instance, the approaches taken in Germany and Ireland. Both countries, like the UK, have a dualist constitution. In other words, the Convention did not automatically become part of German or Irish domestic law upon their accession to it, as was also the case with the UK. Unlike the UK, however, both countries have codified, written, constitutions and rights protection written into those constitutions.

141 *Handyside v United Kingdom* – 5493/72 [1976] ECHR 5, (1976) 1 EHRR 737 at [48] noting that the margin of appreciation ‘is given both to the domestic legislator (“prescribed by law”) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force’

142 As noted by the Delegation of judges of the ECtHR (President Robert Spano, Judge Siofra O’Leary, Judge elected in respect of Ireland and Judge Tim Eicke, Judge elected in respect of the United Kingdom) in a meeting with Panel members (Sir Peter Gross, Baroness Nuala O’Loan, Simon Davis), see *Summary of a Meeting between members of the Independent Human Rights Act Review and a delegation of Judges from the European Court of Human Rights Minutes* (20 May 2021) at 3, ‘There was a very good equilibrium between the European Court and the UK courts at the present time, although that did not mean that the two were always in agreement.’

143 As noted by Sir Nicolas Bratza, the past President of the ECtHR, in his Submission to the Call for Evidence, at [25], ‘the Strasbourg Court has been particularly respectful of decisions emanating from courts in the United Kingdom ... because of the universally accepted high quality of the analysis of the Convention issues in those judgments.’ Further the ECtHR has been ‘receptive’ to arguments by UK courts that it has misunderstood national law or given insufficient weight to national traditions or practices: at [26]. Also see *Summary of a Meeting between members of the Independent Human Rights Act Review and a delegation of Judges from the European Court of Human Rights Minutes* (20 May 2021) at 2-3.

- 124.** Taking Germany first, its Constitutional Court approaches rights protection through the German Basic Law (the Grundgesetz)¹⁴⁴. Where it deals therefore with the Convention and Convention rights, it does so by reference to the Basic Law and, in particular, article 1(2) of the Basic Law. That provision expressly requires the Basic Law to be applied consistently with the UN Universal Declaration of Human Rights. It has, however, been interpreted as applying more widely than the Universal Declaration such that article 1(2) also requires the Constitutional Court to apply the Basic Law consistently with other human rights instruments, such as the Convention and the International Covenant on Civil and Political Rights (IPCCR).
- 125.** As a consequence of article 1(2), when the Constitutional Court interprets the German Constitution, it does so in the light of the Convention, as that is required by the Constitution itself. In doing so, the German Constitution requires the court to take account of the Human Rights practice of other jurisdictions. When interpreting the Constitution in the light of the Convention, the court is not bound by ECtHR jurisprudence. It need only take it into account in reaching its decisions.
- 126.** The German Constitutional Court takes this approach as it would be inappropriate to treat the Convention as binding when it is not possible to know the ECtHR's future case law. It also does so because such an approach would be contrary to developing an effective dialogue between the Courts, which could result in changes in the ECtHR's case law. In this regard the Constitutional Court tries to ensure that its judgments are capable of fostering an understanding in the ECtHR of its approach. Moreover, there is seen to be no proper basis simply to adopt a decision of the ECtHR. It must be considered and translated, consistently with its spirit, into the German legal order. Such implementation requires consideration of the judgment in the light of the facts applicable to any specific case before the Constitutional Court. As a consequence of article 1(2) of the Basic Law, in interpreting the Constitution, the Court is not permitted to act as if it is bound by the Convention. However, it should also be noted that the Convention has, within Germany, the status of a Statute as it was ratified, as such, under article 59(2) of the Basic Law.

144 The following account of the position in Germany was outlined in the Panel's meeting with Justice Paulus of the German Constitutional Court. Any errors in setting it out are those of the Panel.

- 127.** In Ireland a similar approach to Germany's is taken¹⁴⁵. Rights protection is primarily provided within the Irish Constitution in articles 40-44. Resort to the Convention is secondary, and only became possible directly before Irish Courts in 2003 with the enactment of the European Convention on Human Rights Act. That Act, to a degree, substantively mirrors the HRA and was a consequence of the signing of the Northern Ireland Peace Agreement. The exact nature of the approach taken, which emphasises the primacy of domestic law and the concomitant subsidiarity of the Convention, was set out by the Irish Supreme Court in *Carmody v Minister for Justice Equality and Law Reform* (2009)¹⁴⁶ (**Carmody**).

The order of rights protection in *Carmody*

Where a citizen's constitutional rights are violated, statute law or some other rule of law may provide a remedy which vindicates such rights. Where a statute or a rule of law does not provide a remedy for the violation of such a right the citizen is entitled to rely on the provisions of the Constitution for a remedy in vindication of the right. That is what the appellant has done in this case in relying on the provisions of the Constitution, and the principles which flow from it, as affording him a remedy for the alleged breach of his rights. It hardly needs to be said that the provisions of the Act of 2003 cannot compromise in any way the interpretation or application of the Constitution, a principle which is acknowledged in the long title to the Act which states that the effect of the Act is "subject to the Constitution".

Accordingly the Court is satisfied that when a party makes a claim that an Act or any of its provisions is invalid for being repugnant to the Constitution and at the same time makes an application for a declaration of incompatibility of such Act or some of its provisions with the State's obligations under the Convention, the issue of constitutionality must first be decided.

If a Court concludes that the statutory provisions in issue are incompatible with the Constitution and such a finding will resolve the issues between the parties as regards all the statutory provisions impugned, then that is the remedy which the Constitution envisages the party should have. Any such declaration means that the provisions in envisages the party should have. Any such declaration means that the provisions in question are invalid and do not have the force of law. The question of a declaration [of incompatibility] pursuant to s. 5 [of the European Convention of Human Rights Act 2003] concerning such provisions cannot then arise. If, in such a case, a Court decides that the statutory provisions impugned are not inconsistent with the Constitution then it is open to the Court to consider the application for a declaration pursuant to s. 5 if the provisions of the section including the absence of any other legal remedy, are otherwise met.'

145 This account is drawn from IHRAR's Roundtable meeting with the Irish Judiciary and Academics; again any errors remain those of the Panel.

146 *Carmody v Minister for Justice Equality and Law Reform* [2009] IESC 71, [2010] 1 IR 635.

- 128.** In essence then, as in Germany, domestic law, and most importantly constitutional law, takes priority, i.e., is considered first in the court's analysis. Convention caselaw can influence the Irish courts in their interpretation of the scope of particular human rights, just as developments in other common law (e.g., Australia, Canada, New Zealand, the US) and civilian (e.g., France, Germany) jurisdictions can also be considered. If the constitutional analysis yielded a finding of no violation, an Irish court would then go on to consider whether there has been a breach of a Convention right.
- 129.** There are important differences between the UK and systems like Ireland and Germany, which have written constitutions. However, a broader analysis in which domestic law is considered first, and ECtHR case law second, in resolving human rights questions is one from which the UK could benefit. Such an approach if taken in the UK, and without losing the advantages of using the language of the Convention, could also enhance further the effectiveness of its dialogue with the ECtHR, and thus improve the implementation of the HRA's aim of leading to a greater contribution from the UK to the development of ECtHR case law. However, in the UK the development of any such broader analysis, giving prior consideration to domestic statutes and the common law before turning to Convention case law, would need to be carried out carefully. One particular benefit noted by the ECtHR in the Panel's meeting with it was the ease with which it could approach and interpret UK judgments – drafted in a manner that focused on the Convention and, in effect, spoke the language of the Convention¹⁴⁷. Care should be taken to ensure that benefit is not lost.
- 130.** Experience in both Germany and Ireland highlights the importance and priority of consideration of domestic rights over those provided by the Convention. It is consistent with the Convention forming a backstop to rights protection and with proper effect being given to the principle of subsidiarity. The UK's approach has not sufficiently and consistently allowed for this to the same extent.

(v) It risks undermining domestic statute and common law rights protection

- 131.** The approaches taken in both Germany and Ireland demonstrate that the primary focus of rights protection in those countries is their domestic law.

¹⁴⁷ Summary of a Meeting between members of the Independent Human Rights Act Review and a delegation of Judges from the European Court of Human Rights Minutes (20 May 2021) at 3, *'It was noted by the Judges that the Human Rights Act's language was a useful and advantageous conduit through which UK domestic court decisions reach the European Court. UK judges would already, in their judgments, have translated their rights discourse into the language of the Convention via the Human Rights Act.'*

- 132.** In the UK a comparable approach would focus on statute law and the common law, which have as Lord Reed outlined in his supplementary submission to the CfE, ‘... *protected human rights more consistently, and over a longer period of time, than perhaps any other legal system.*’¹⁴⁸ It would only then look to the Convention and ECtHR case law in the event that effective rights protection was not provided by domestic law.
- 133.** Though there remains a robust approach to rights protection in statute, such as the Equality Act 2010 or, more recently, the Modern Slavery Act 2015, to a degree the common law has been neglected. This neglect has manifested itself in a number of ways.
- 134.** While there has recently been a reaction against the Convention and HRA-first approach by the UK Supreme Court following on from **Osborn** and **Kennedy**, in, for instance, *A v BBC*¹⁴⁹ and *R (UNISON) v Lord Chancellor*¹⁵⁰, those assertions of the proper primacy of domestic law stand in tension with a Convention rights-first approach. When considering the balance between the *status quo* and reform, a benchmark is which course better supports the thinking as to the prominence of domestic law, expressed in decisions such as **Osborn, Kennedy** and those which followed.
- 135.** Primary reliance on the HRA and ECtHR case law poses another problem for the common law. The common law has been subject to constant, and cautious, evolution from the Middle Ages. It has also, and properly, remained subject to revision and correction by Parliament. This feature of the UK’s constitution, which Sir John Laws has illuminated¹⁵¹, is one that has four elements: evolution; experiment; history; and distillation¹⁵². It is not static. It evolves as society evolves, reflecting changing mores and social and political conditions. Beneficial developments are built upon in this way. Problematic developments are not and are either subject to further change by the Courts or Parliamentary correction. By promoting an approach that appears to give priority to Convention rights, which are then interpreted presumptively in line with ECtHR case law, the first limb of **Ullah** has risked undermining these elements of the common law method and thus weakening the development of the common law. This is the criticism that lay at the heart of Laws LJ’s critical comment concerning **Ullah**, noted above, in *R (Children’s Alliance)*.

148 Lord Reed PSC, *Postscript to Response to a Call for Evidence produced by the Independent Human Rights Act Review*, at 3.

149 [2014] UKSC 25; [2015] AC 588.

150 [2017] UKSC 51; [2020] AC 869. For completeness, if not relevant to the purpose for which *UNISON* is cited here, the Panel notes that this decision has not been without its critics, e.g., Sir Stephen Laws, *Second-Guessing Policy Choices – The rule of law after the Supreme Court’s UNISON judgment*, (2018, Policy Exchange) <<https://policyexchange.org.uk/wp-content/uploads/2018/03/Second-guessing-policy-choices-2.pdf>>. And see Sir Nicolas Bratza, *Submission to the Independent Human Rights Review*, at [18].

151 Sir John Laws, *The Common Law Constitution*, (CUP, 2014) at 7.

152 *Ibid.* preface, at xiii. See too Diplock LJ (as he then was) in *Hong Kong Fir v Kawasaki* [1962] 2 QB 26, at 71, ‘*The common law evolves not merely by breeding new principles but also, when they are fully grown, by burying their progenitors.*’

- 136.** One of the aims underpinning the HRA's introduction was that it should spur the development of a distinctive domestic rights jurisprudence, with the benefits that flow from, one properly based in the UK's rich cultural, political and legal traditions. Such a development is envisaged by the Convention itself which does not purport to '*construct a uniform code*'¹⁵³ for the 47 countries that are parties to it. The challenge is to build on the notable developments of this nature¹⁵⁴, which have taken place in recent years.
- 137.** Finally, it remains of real concern that the approach taken to section 2 may have contributed to a sense of antipathy to and lack of ownership of human rights law within the UK. Notwithstanding the strong support for the HRA and section 2, a theme emerging from the evidence, and particularly from the Roundtables and Roadshows, was a sense that there was a lack of public ownership of the HRA.
- 138.** Furthermore, a noted antipathy towards it from some parts of the media, public and politicians was commented upon. By giving priority to Convention rights over domestic statute and the common law, and primacy of interpretation of the Convention rights in the HRA, it is easy to portray Convention rights specifically, and human rights law generally, as something foreign to the UK's legal tradition and imposed from outside the UK.

(14) Approach to Options for Reform

- 139.** In considering any change to the UK Courts' approach to section 2, it is important to bear in mind the positive effects of ***Ullah***, while learning from its legacy.
- 140.** Should there be a strong case for recommending reform, care will be needed to limit the scope for the development of a significant gap between UK and ECtHR rights protection. Any such gap would undermine the HRA's aims and lead to an increasing number of applications, including successful applications, brought against the UK before the ECtHR. Any reform recommendation must be consistent with the principle of subsidiarity and, as discussed, should give greater prominence to domestic law without undermining the equilibrium established between UK Courts and the ECtHR or the sovereignty of Parliament.

153 Lord Reed PSC, *Postscript to Response to a Call for Evidence produced by the Independent Human Rights Act Review*, at 6.

154 For example, ***Re G***, and ***Hallam*** (all above).

- 141.** Any reform of section 2 ought to:
- guide Courts to take account of ECtHR case law effectively so that a significant gap does not arise between UK and ECtHR rights protection;
 - be consistent with the principle of subsidiarity and thus ensure that the domestic rights regime is the starting point of rights protection;
 - promote the development of a domestic rights regime, subject to Parliamentary Sovereignty; and
 - continue to recognise that there are circumstances in which UK Courts need to depart from ECtHR case law to allow a uniquely UK approach to be advocated and, if need be, tested at the international level.
- 142.** Potential options for reform are as follows. The options are not necessarily mutually exclusive.

(15) Rejected Options

- 143.** The Panel rejects the following options.

(i) Amend references in the HRA to Convention rights with references to ‘domestic human rights’ or ‘human rights’ or ‘United Kingdom rights’

- 144.** While there is an argument that it may have been beneficial for the HRA when originally drafted to have referred to ‘domestic human rights’, ‘human rights’ or ‘United Kingdom rights’ rather than Convention rights, it is difficult to see now what practical purpose this would achieve. The one aim that it could promote is a greater sense of public ownership of the rights in the HRA. The Panel is not, however, convinced that such a change would have that effect. It is likely to be viewed as an esoteric or purely cosmetic change and could, albeit inadvertently, lead to misunderstandings with the ECtHR. Moreover, it could (again inadvertently) generate uncertainty as to the content of the rights in question. Greater public ownership of rights can more properly be achieved through the implementation of other reform options set out in this report. We also note the options to repeal the HRA generally or to replace it with a Bill of Rights, which we commented on in the discussion earlier¹⁵⁵.

(ii) Repeal section 2

- 145.** The repeal of section 2 would result in there being no formal link between the HRA and the Convention. While the UK remains a party to the Convention, this option has nothing to commend it.

¹⁵⁵ See [18]-[22] above.

- 146.** First, there is a clear need¹⁵⁶ to ensure that UK Courts act broadly consistently with the Convention, itself one of the aims of the HRA's introduction. Repeal of section 2 would potentially increase the risk that the UK would be in breach of its international law obligations as a consequence of UK Court decisions inconsistent with the Convention¹⁵⁷. This would increase the likelihood of the development of a substantive gap between domestic rights and the Convention. It is further likely to generate costly and time-consuming litigation before the ECtHR for those who could afford it¹⁵⁸, with an attendant increase in adverse findings against the UK by the ECtHR. A repeal would raise the question for the Courts of what Parliament intended the effect of the repeal to be; and a repeal without more to explain its intended effect would only create uncertainty.
- 147.** Secondly, to provide that UK Courts do otherwise than '*take into account*' ECtHR case law would undermine the aim and integrity of the legislative scheme set out in the remainder of the HRA¹⁵⁹.
- 148.** Thirdly, if UK Courts were not to take account of ECtHR case law it would likely increase uncertainty in the law, to the detriment of public confidence in the judiciary.
- 149.** Fourthly, if section 2 were repealed it would not preclude UK Courts from taking into account ECtHR case law, unless that effect of the repeal were made clear by specifying that they were to take no account of it. It is an inherent feature of the judicial process that our Courts can and do take account of case law from other jurisdictions. That is part of the common law method.
- 150.** With these points in mind, the Panel concludes that abolition of section 2 cannot sensibly be contemplated.

(iii) Replace '*take into account*' with '*bound by*'

- 151.** One member of the Panel considered that, were Option Four, below, not to be adopted then this option should be recommended. This was on the basis that, while it was in itself a sub-optimal approach as it would result in UK Courts having to adhere strictly to ECtHR case law, it would introduce a greater degree of clarity and certainty in the law than section 2 and its application provides.

156 One Panel member put it that it was no more than clearly desirable rather than necessary.

157 Home Office, *Bringing Rights Back Home* at 1.14-1.16.

158 Geoff Hoon MP, Hansard, HoC, 3 June 1998, vol. 313, col. 390 in J. Cooper & A. Marshall-Williams at 43.

159 Lord Sales, *Strasbourg Jurisprudence and the Human Rights Act: a response to Lord Irvine* (2012) Public Law 253 at 259- 260.

152. The majority of the Panel agreed that this approach being rejected in 1998 was the right approach. It would go beyond what is required by the Convention itself. Not least, UK Courts would be bound by ECtHR case law when that Court is itself not so bound. It would put the UK at odds with the approach taken by other parties to the Convention. It would also be inconsistent with the principle of subsidiarity and cut-off the possibility of any development of a domestic Convention rights approach by UK Courts. They concluded that there is no justifiable basis for replacing the current wording of section 2 with a requirement that UK Courts are to be *'bound by'* such judgments.

(iv) Replace 'must take into account' with 'may take into account'

153. This approach was also rejected in 1998. It was suggested as an option in the *CfE* in order to facilitate UK Courts' ability to disregard ECtHR decisions that are a product of living tree or instrument interpretation¹⁶⁰.

Living tree or the living instrument interpretation

Living tree, or living instrument, interpretation of the Convention is the idea that it must be interpreted in the light of changing, social, ethical, political etc ideas. The Convention rights evolve as society evolves and are not therefore static or restricted to how they were understood in 1951 when the Convention came into force. As the ECtHR explained it in *Tyrer v UK* (1979-1980) 1 EHRR 1 at [31],

'The Convention is a living instrument which ... must be interpreted in the light of present-day conditions.'

This understanding of the Convention, and how its rights are interpreted is well-established and predates the enactment of the HRA. It is not uncontroversial¹⁶¹.

154. This option is rejected by the Panel for the reasons given in 1998¹⁶². It is further rejected because it is fanciful to suppose that, even if desirable to do so, the living tree element of the Convention could be stripped out, leaving the Convention to be interpreted in its *'original'* form (whatever that would now be taken to mean).

(v) Reject Ullah

155. Another option is to amend section 2 to specifically reject the approach articulated in ***Ullah*** and subsequently developed by UK Courts.

156. This would remove any suggestion that there was a presumption that a clear and constant line of ECtHR case law ought to be followed unless an exception applies.

¹⁶⁰ CARE, *Submission to the Independent Human Rights Review*, at 1.

¹⁶¹ For a discussion, see N. Barber et al, *Lord Sumption and the Limits of the Law*, (Bloomsbury, 2016).

¹⁶² Geoff Hoon MP, Hansard, HoC, 3 June 1998, vol. 313, col. 390 in J. Cooper & A. Marshall-Williams at 43.

- 157.** On its own though, this option would create increased uncertainty in the law. It would leave the status of the approach developed by UK Courts prior to its introduction uncertain. It would also leave the approach to ECtHR case law following its introduction uncertain.
- 158.** Whatever the attractions of this option had **Ullah** remained in its initial form, that time has passed. Introducing this option at this time, abandons the benefits from the modifications of the initial **Ullah** principle (discussed above).
- 159.** Additionally, this option might have the unintended effect of weakening the ability of UK Courts to influence the development of decisions in the ECtHR. The Brighton Declaration explains that one of the reasons why the ECtHR has developed an approach that is more willing to extend a margin of appreciation to Convention states is an increased willingness by those States to consider the Convention and its case-law in their assessment of rights questions. That domestic courts are able to demonstrate in their judgments an analysis of ECtHR case law, even where they disagree with it, enables the ECtHR to more robustly apply the principle of subsidiarity and the margin of appreciation – a point made to IHRAR by Sir Nicolas Bratza, the past President of the ECtHR, in his Submission to the Call for Evidence:
*“Nevertheless, I firmly believe that the perception that the [ECtHR] has recently shown itself to be more ready to extend the margin of appreciation when national courts have already diligently applied the Convention has helped to contribute to a new sense of stability between the national courts and [the ECtHR].”*¹⁶³

163 A point also made to IHRAR by Sir Nicolas Bratza, the past President of the ECtHR, in his *Submission to the Call for Evidence*, at [30], *“Nevertheless, I firmly believe that the perception that the [ECtHR] has recently shown itself to be more ready to extend the margin of appreciation when national courts have already diligently applied the Convention has helped to contribute to a new sense of stability between the national courts and [the ECtHR].”*

IHRAR meeting with the ECtHR – comments by the judges of the ECtHR

'By taking into account the case-law of the Court, the UK domestic courts were implementing the Convention at the national level, embedding it into the UK's legal system, strengthening the culture of human rights in the UK, and bringing the notion of shared responsibility to life.

It was noted by the Judges that the Human Rights Act's language was a useful and advantageous conduit through which UK domestic court decisions reach the European Court. UK judges would already, in their judgments, have translated their rights discourse into the language of the Convention via the Human Rights Act ...

In States in which the substantive embedding of the Convention had been largely successful, like the UK, the Court was in a position to take on a more "framework-oriented" role when reviewing domestic decision-making and to assess whether certain material elements allowed it to grant deference to national authorities. This was, by and large, limited to qualified rights and not to core or absolute rights. Of course, the Court reserved to itself the final say on Convention-compliance.'

- 160.** Regardless of misgivings as to ***Ullah*** in its earlier form, rejecting it now would risk undermining the current equilibrium the UK Courts have reached with the ECtHR, which affords the UK a robust margin of appreciation, due to the rigorous analysis of ECtHR case law that they currently undertake.

(vi) Amend section 2 to provide that UK Courts must do justice as between the parties

- 161.** It was suggested that one possible amendment to section 2 might be to provide that compliance with it was subject to an overarching duty placed on UK Courts to ensure that justice was done between the parties to any case¹⁶⁴.
- 162.** This amendment is rejected by the Panel because it would do no more than restate the constitutional function of the Courts.

¹⁶⁴ Metropolitan Police Service and the National Police Chiefs' Council, *Submission to the Independent Human Rights Act Review*, at [26].

(vii) Amend section 2 to remove reference to the European Commission on Human Rights

- 163.** It was suggested that one possible amendment to section 2 might be to delete section 2(b) and 2(c)¹⁶⁵. These subsections refer to opinions and decisions of the former European Commission on Human Rights, which was dissolved in 1998. The rationale for the amendment was said to be that those opinions and decisions are of diminishing value and importance now and, moreover, that significant decisions and opinions have already been incorporated into ECtHR case law.
- 164.** While we note the points in favour of this amendment, European Commission of Human Rights' opinions and decisions remain part of the broader framework of understanding the Convention. It therefore remains important for UK Courts to take them into account, in appropriate cases.

(16) Potential Reform Options

- 165.** The Panel considers the following to be potential reform options. It indicates here those which it does **not** recommend and which it does recommend.

(A) Options that are not recommended

(i) Option One: No change to the current position

- 166.** The first option is to leave section 2 as it is currently drafted and interpreted by the Courts. This approach is consistent with a significant range of views submitted to IHRAR, as noted earlier. Given the more nuanced and flexible approach taken to **Ullah** following **Pinnock**, and particularly the development in **R (Haney)** and **Hallam** that consideration of departing from ECtHR case law is context-specific, there is a good deal of force in this option. Equally, its viability is supported by the development of a greater emphasis in **Osborn** and **Kennedy** on domestic statute and the common law prior to a consideration of Convention rights.
- 167.** On the other hand, it remains the case that, after two decades, there does remain a degree of uncertainty in the approach to section 2. Moreover, even the more nuanced approach to be found in **Ullah**, as modified, is not without its difficulties, as noted above. Most importantly, it has inadvertently led to an insufficient emphasis on a neglect of domestic law.
- 168.** To do nothing, while a possible option, would leave matters in this unsatisfactory state and, in particular, would not lend impetus to the greater prominence given to domestic statute and common law in **Osborn** and **Kennedy**, with their consequential advantages for public ownership and support. The Panel does **not** recommend this option.

¹⁶⁵ Paul Harvey, *Submission to the Independent Human Rights Act Review*, at 8.

(ii) Option Two: Amend section 2 to declare in the HRA that UK Courts are not bound by ECtHR decisions

- 169.** This option is focused solely on declaratory statutory confirmation, to the effect that the section 2 duty on UK Courts to ‘*take into account*’ ECtHR decisions, does not mean ‘*bound by*’ or, put another way, ‘*required to agree with*’.
- 170.** The principal arguments against this option are, first, that it is meaningless because it adds nothing to section 2. It is nowhere suggested that section 2 entails UK Courts being bound by ECtHR decisions. A pointless amendment should not be made. Secondly, there is or might be the concern that such an amendment – while adding nothing – would risk being misconstrued by the ECtHR and potentially disturb the equilibrium between UK Courts and the ECtHR and the influence UK Courts (properly) enjoy in Strasbourg. Thirdly, consideration was given to amending section 2 to state that ECtHR case law was only ‘persuasive authority’. We were concerned, however, that this might lead to an argument that all ECtHR case law was persuasive, i.e., single judgments as well as those within a clear and constant line of authority, whereas at the present, as we have noted above, a more nuanced approach is taken. We concluded that such amended wording would simply give rise to further unsettling debate.
- 171.** The principal arguments in favour of this option are, first, that the amendment would not be pointless. As a matter of mindset and public acceptance or ownership of the HRA, a clear statutory statement to this effect – even if declaratory by nature – would have value. Any lingering misapprehensions as to ECtHR decisions *binding* UK Courts would be definitively laid to rest; this amendment would thus be conducive to clarity. Secondly, because the amendment *is* declaratory only, properly managed, it should do no damage to the mature, mutually beneficial, relationship between the UK Courts and the ECtHR. Thirdly, the amendment can be made simply and shortly, the more especially if Option Six is adopted, in which case this option can be given effect by means of the briefest of add-ons.
- 172.** Given, the strength of the arguments against it, the Panel does **not** recommend this option.

(iii) Option Three: Amend section 2 to introduce a requirement to consider case law from other jurisdictions

- 173.** Option Three would seek to codify a requirement that the UK Courts when considering the interpretation of domestic rights consider authorities from other common law jurisdictions and/or from, for instance, the Inter-American Court of Human Rights. As already indicated, it would appear to form part of the proposal advanced by Lord Pannick QC.

- 174.** This option would mirror, to a degree, the approach taken in Ireland and Germany. It would enable UK Courts to take a broader view of the development of human rights law than that set out in the Convention. It would thus facilitate a more considered and more distinctive domestic human rights regime. It would, however, do no more than codify what the Courts are in any event empowered to do, as is evident in Ireland. The UK Courts, just like the Irish Courts, apply the same approach to case law authorities from other jurisdictions. The former can and already do, just as the latter can and do, consider judgments from other common law jurisdictions (such as Australia, Canada and New Zealand), other civil law jurisdictions and international tribunals. Option Three would simply codify the UK Courts' current approach. It should be noted though, that applying this approach to consider in this way developments in those Commonwealth jurisdictions, could particularly benefit the future development of human rights case law in the UK, not least if the Panel's recommended Option Five is adopted.
- 175.** The difficulty is that introducing a statutory requirement to consider such case law could also be said to reduce the weight the Courts give to considering the Convention and its case law. By emphasising that Courts could consider other authorities, that could be seen to invite a dilution of the influence of ECtHR case law. Given that the UK is committed to remaining a party to the Convention, such a development gives rise to obvious difficulties. It may also raise the question, and thus create satellite litigation, over the relative status of authorities from different jurisdictions and courts. It is noteworthy that in Germany, its Constitution provides for the Constitutional Court to consider a number of different human rights conventions when evaluating constitutional rights. It has not yet determined whether, and if so, what hierarchy there is between them¹⁶⁶.
- 176.** The Panel does **not** recommend this option.
- (iv) Option Four: Provide Guidance on the non-exhaustive circumstances to be taken into account when considering whether to depart from ECtHR case law***
- 177.** Option Four would see the clarification and codification of the various exceptions to ***Ullah*** that have developed, i.e., the circumstances when ECtHR case law would not be followed.

¹⁶⁶ The Panel notes and has not overlooked the reported intention of the Scottish Government to ratify a number of international treaties in this area. Any such ratification is outside IHRAR's ToR and the Panel expresses no view on it.

- 178.** One member of the Panel considered that an approach along these lines was necessary to resolve a tension between, on the one hand, the inferred flexibility in the concept of ‘taking into account’ in section 2 of the HRA and, on the other, the context provided by the form of section 1 and Schedule 1 (including the references to derogations and reservations) and also by the assumption that it was a principal objective of the HRA to reduce the need for UK litigants to resort to an individual application to the ECtHR. That context, it was suggested, independently created a strong default presumption in favour of the UK Courts treating the domestic Convention rights as coterminous with those rights as they are understood to bind the UK in international law and have been or are likely to be interpreted in the ECtHR case law, and so in favour of section 2 being applied accordingly. Although the UK Courts had shown that there was indeed a need, on occasions, to depart from ECtHR case law and sometimes a willingness to do so, both principle and the practicalities required an express statutory provision confirming that. If, on this view, as suggested by the UK case law, there are factors that need to be balanced against the presumption created by the context provided by section 1 and Schedule 1 and the assumed objectives of the Act, and if that balance is to be fairly struck, then those factors, as well as the need for the balancing exercise itself, needed to be given a more transparent and secure foundation in the statutory scheme. Statutory guidance about the balance to be struck would ensure that domestic Convention rights would be interpreted by UK Courts with a greater degree of autonomy in the future. There would be a clearer set of principles for identifying matters that should fall within the UK’s margin of appreciation (see Chapter Three) and, with more autonomy, there would also be a firmer basis for a more genuine “dialogue” with the ECtHR (see Chapter Four). Parliament should be given the opportunity to decide whether the relevant factors needed to be confined to a ‘clarification and codification’ of the factors already identified by the case law.
- 179.** The majority of the Panel did not consider that any such a tension was demonstrated. They concluded that it was not supported by the parliamentary debates concerning sections 1, 2 or schedule 1, which in their view were intended to be applied consistently with each other to produce a degree of ‘*broad consistency*’ between the development of domestic Convention rights and ECtHR case law. Nor was it, in their view, apparent from the UK Courts’ case law as it had developed.
- 180.** Putting that debate to one side, the Panel as a whole considered that this reform option might provide useful clarity, by way of statutory guidance, as to the non-exhaustive circumstances to be taken into account when the UK Courts are considering whether to depart from ECtHR case law. In this way it could help to promote one of the objectives underpinning section 2: to enable UK Courts to depart from the approach taken by the ECtHR where appropriate.

- 181.** To this end, section 2 could be amended so as to specify that UK Courts should, first, give such weight to ECtHR case law as they consider appropriate. Secondly, the amendment could go on to provide that '*without prejudice to the generality of the first requirement concerning weight*', UK Courts could have regard to either a set of general principles or a non-exhaustive list of circumstances when considering whether to depart from ECtHR case law. Those circumstances, which are taken from the case law noted above and with which we agree¹⁶⁷, could include the following:
- Whether the approach of the ECtHR to Convention rights forms part of a clear and constant line of ECtHR case law.
 - Whether the ECtHR case law in question involved a Grand Chamber decision or decisions.
 - Whether there is only one ECtHR decision or a limited number of ECtHR decisions on the point in question.
 - Whether the ECtHR case law stems from an early period of its development and whether it was criticised at the time it was made.
 - Whether later ECtHR cases are inconsistent with a specific decision or whether the ECtHR was likely to depart from its own decision.
 - Whether the ECtHR case law is based on a misunderstanding of UK law or constitutional principles.
 - Whether the ECtHR case law in question involves a failure to take proper account of a fundamental principle of UK law or to properly consider UK law.
 - The context in which the issue arises.
- 182.** Such an amendment would allow for the development of further guidance by UK Courts on the weight to be attached to ECtHR case law. It would thus ensure that codification of the circumstances to which UK Courts could have regard when considering whether to depart from ECtHR case law did not simply and exclusively codify current exceptions – so seeking to avoid the amendment doing no more than 'fighting the last war'.
- 183.** There are difficulties and risks attached to this option. An immediate difficulty, noted by the majority of the Panel, is the encouragement of satellite litigation as to whether the case came within the factor in question. A second difficulty is that the nature of the factors in question may mean that the list is at too high a level of generality to provide useful guidance. Conversely, however, more specific guidance would generate an increased risk of satellite litigation. A particular risk is that the acceptability of this option hinges on the factors ultimately included in the list of circumstances; the devil is in the detail.

¹⁶⁷ See above at [56] and [83].

184. For all these reasons and while recognising the attractions of the provision of some guidance to the Courts, the Panel does **not** recommend this option.

(B) Recommended Option

(v) Option Five: Amend section 2 to clarify the priority of rights protection

- 185.** The Fifth option would promote greater clarity in the law by giving statutory effect to the position developed in **Osborn** and **Kennedy**. It would help to lay to rest any question as to what the right approach to be taken is and could, as a consequence, increase legal certainty and predictability. It would help ensure that UK Courts consistently approach rights issues through the right end of the telescope: starting from the domestic context before moving to the Convention, rather than has tended to be case under **Ullah**, starting from the Convention, as interpreted by the ECtHR case law.
- 186.** It would thus require UK Courts to consider whether rights issues could be resolved by reference to a specific domestic statute or the common law before considering Convention rights. It would also promote an approach seen in other countries that are parties to the Convention, i.e., that domestic law and rights are considered first and only then is the Convention considered.
- 187.** This option would have the benefit of fostering the proper development of a domestic rights regime both via statute and common law. It would give an impetus to the development of common law rights by the Courts applying the common law method in the light of sections 1, 2 and 6 of the HRA. As such, developments would clearly be common law developments; it would equally be clear that, as with any other aspect of the common law, they were subject to Parliamentary Sovereignty and the ability of Parliament to revise or correct any such developments. In this way, it would help to promote an increased cross-fertilisation of the common law and the Convention. The Convention could more effectively '*inform and enrich*' the common law this way¹⁶⁸. We also note the cautious, incremental approach of the common law method generally, and expect that its application in this area would avoid any possibility that the option could be misused to develop rights in a way that saw the Courts cross the boundaries of institutional competence.

168 As discussed in Law Society of England and Wales, *Submission to the Independent Human Rights Review*, at [7(d)], [8(H)], [20(f)] and [57].

- 188.** The common law could thus be assisted in developing positive rights (where existing doctrines leave room for such development) as well as further developing the negative rights that it has historically protected, subject to the safety valves of Parliamentary correction, together with the characteristic of judicial restraint¹⁶⁹ – so muting any risk that they would be open-ended and would foster a culture of judicial activism. The Parliamentary safety valve is here of fundamental importance. It not only may act as a corrective to judicial developments, but also provides the means through which political and public participation and accountability is secured. Judicial restraint is of equally vital importance. From a principled perspective, it underpins and is given expression by the common law method through which law develops incrementally and cautiously. It would, of course, remain the case that any review of the validity of legislation could only be done through the application of sections 3 and 4 of the HRA, and, if necessary, the making of a declaration of incompatibility – not through any common law development. It is not the Panel’s intention to support any development of common law constitutional review of primary legislation.
- 189.** Equally, and again from a principled perspective, restraint is the means by which the judiciary gives effect to the mutual respect which the Branches of the State pay to each other. It is moreover not for judges to leap ahead on current issues of social policy on which there is no public consensus: as Lord Bingham rightly pointed out, *‘the law advances in small steps, not by giant bounds.’*¹⁷⁰ Developing the common law consistently with these two features of the UK constitution would thus assist in enabling a line to be drawn between judicial development of the law and judicial legislation. The benefits of the former are well-established as a feature of our constitution, while the latter is to be discouraged.
- 190.** If adopted, this option has the potential to see statute, the common law and the HRA work more effectively in combination with each other. As importantly, it could help to foster greater political and public ownership and acceptance of human rights, by emphasising the shared endeavour involving all three Branches of the State under the constitutional principle of Parliamentary Sovereignty. In this way and whether or not individual cases are resolved differently, it could help to foster a greater settled acceptance of human rights protection.

169 Sir Peter Gross, *The Least Dangerous Branch – The Judiciary Today*, (Swansea University, 7 December 2020) at [29] and following.

170 Tom Bingham, *The Judge as Lawmaker: An English Perspective in The Business of Judging: Selected Essays and Speeches: 1985-1999* (OUP, 2000), 27, 31-32. At 31, Lord Bingham argued for judicial restraint (using the metaphor of different road signs, ‘from ‘No entry’ and ‘Stop’ to ‘Give way’ and ‘Slow’’) where ‘the question involves an issue of current social policy on which there is non consensus within the community’. He went on to quote Lord Reid: ‘When public opinion is sharply divided on any question – whether or not the division is on party lines – no Judge ought in my view to lean to one side or the other if that can possibly be avoided ... It is not for Judges to say what changes should be made on big issues.’ Also see, more recently, Lord Hodge, *Judicial Law-Making in a Changing Constitution*, (UK Supreme Court Yearbook, Volume 5, 2013-14), 67-69; Lord Hodge, *The scope of judicial law-making in the common law tradition* (Speech to the Max Planck Institute of Comparative and International Private Law, 28 October 2019, at [22] and [33]).

- 191.** Using **DSD** as an example, one reason the decision gave rise to such strength of feeling was because of the perceived impact on police operational flexibility of the duty to conduct inquiries into crimes reported to them that was imposed pursuant to the Convention, without (seemingly) any or sufficient regard to the far more limited and calibrated duty hitherto imposed on the police by the common law¹⁷¹. That said, given the strength of the factual case against the police on the facts of that case, a different outcome at common law cannot be assumed. However, a decision founded on common law method, principles and analysis, even if adverse, was more likely to be acceptable to the losing party than a similarly adverse decision reached by recourse to Convention principles alone – and without regard to the common law or to the flexibility that it contains for further qualification of its implications in future cases on different facts.
- 192.** At all events, by introducing an order of priority of rights protection and, thereby, giving greater prominence to the common law and its development, together with domestic legislation and UK case law generally, there is likely to be a shift in mindset, in culture and in the debate concerning human rights. Rather than being construed, whether rightly or wrongly, as an imposition from a court outside of the UK or a novelty introduced in 1998, human rights would properly be viewed as part of the UK's long and historic commitment to rights protection¹⁷², with the UK rightly noted by Lord Reed PSC as having protected rights domestically for perhaps longer than any other legal system¹⁷³. Pithy a turn of phrase though it was in 1998, '*bringing rights home*' may, with hindsight, have done unintended damage.
- 193.** Looked at in the round, under this option, a proper emphasis on the common law *might* result in UK Courts developing the common law further than the ECtHR has developed Convention rights. In principle, that is unobjectionable as the UK Courts will be interpreting and applying the common law and not the Convention itself. Such a development also follows from the aim, at the time the HRA was introduced, of developing a distinctive UK contribution to the development of the Convention. Inevitably this will mean that in some instances the UK Courts will decide disputes brought before them on issues that the ECtHR has not as yet decided. Concerns should be allayed by recognising that this is the traditional common law method, as always, subject to Parliamentary reversal. It should, in particular, be noted in this context that any such common law developments will proceed circumspectly, as is the case generally with the common law, and with appropriate judicial restraint, the nature of which has recently been restated by Lord Reed PSC in *Elgizouli v Secretary of State for the Home Department* (2020)¹⁷⁴.

171 See UK Police Services Roundtable, 13 April 2021.

172 The Panel notes (but does not share) the sceptical view that the courts have consistently protected rights and civil liberties historically, see, for instance, K. Ewing & C. Gearty, *The Struggle for Civil Liberties* (OUP, 2000).

173 Lord Reed PSC, *Postscript to Response to a Call for Evidence produced by the Independent Human Rights Act Review*, at 3.

174 *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10; [2020] 2 WLR 857.

Lord Reed PSC in *Elgizouli v Secretary of State for the Home Department* (2020)¹⁷⁵

'I fully accept that the common law is subject to judicial development, but such development builds incrementally on existing principles. That follows from two considerations. The first is that judicial decisions are normally backward-looking in the sense that they decide what the law was at the time which is relevant to the dispute between the parties. In order to preserve legal certainty, judicial development of the common law must therefore be based on established principles, building on them incrementally rather than making the more dramatic changes which are the prerogative of the legislature. Following that approach, new rules may be introduced, or existing rules may be reformulated or departed from, but the courts continue to apply principles which formed an established part of the law at the time of the events in question. The judges are then faithful to their oath to "do right to all manner of people after the laws and usages of this Realm". Secondly, that constraint on judicial law-making is also compatible with the pre-eminent constitutional role of Parliament in making new law, and with the procedural and institutional limitations which restrict the ability of litigation before the courts to act as an engine of law reform.'

- 194.** A noted example of the incremental development of the common law following the HRA's enactment has been the extension of the law of breach of confidence in cases such as *Venables v News Group Newspapers* (2001) and *Campbell v Mirror Group Newspapers Ltd* (2004)¹⁷⁶, which protected the right of privacy guaranteed by article 8 of the Convention.
- 195.** Pulling the threads together, a 'priority of rights' approach, would help promote the development of a domestic, 'British', rights framework, as Parliament intended. It would also help to promote greater public and political ownership of human rights. While fostering the further development of a distinctive UK contribution to ECtHR case law in accordance with the principle of subsidiarity, it would ensure that any gap or inconsistency between domestic rights law and ECtHR case law is minimised. It will ensure that an unacceptable gap between the two does not arise and that the equilibrium reached between UK Courts and the ECtHR (to the benefit of both) is maintained¹⁷⁷. This result is achieved by giving prior consideration to national law while continuing to take proper account of ECtHR case law.

¹⁷⁵ *Ibid* at [170].

¹⁷⁶ *Venables v News Group Newspapers* [2001] Fam. 430; *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 AC 45.

¹⁷⁷ See above, footnote 128.

196. Option Five would be given effect by an amendment to section 2 placing UK Courts under a duty, to first apply any relevant UK domestic statute and UK Courts' case law before then moving to apply ECtHR case law. This is a modified version of the proposal submitted by Lord Pannick QC, noted earlier. Lord Pannick QC's proposal contemplated UK Courts being required to take into account '*... a decision of another international court or of a court of another jurisdiction.*' By contrast, the Option Five amendment could more narrowly refer to amending section 2 to require UK Courts to first consider common law decisions and UK case law generally and then ECtHR case law.

(17) Recommended Reform Option

197. For the reasons set out above, IHRAR recommends that **Option Five** be adopted.

198. If **Option Five is** adopted, the Panel concludes that any risk of a detrimental effect on the operation of section 2 is outweighed by the benefits of the proposed reform. In particular **Option Five** will provide an effective nudge to the UK Courts to take proper account of domestic law as the primary means of rights protection and to resort to the Convention rights second. It will do so with greater emphasis on the effective implementation of the principle of subsidiarity. The greater prominence accorded to UK law will also be attractive in terms of public ownership and acceptability of the HRA. **Option Five** will therefore carry benefits domestically while not in any way risking damage to the relationship between UK Courts and the ECtHR.

199. Subject to drafting amendments and improvements, **Option Five** could be given effect by the following amendment to section 2(1). The draft is only indicative. It is not a fully settled amendment but is simply intended to illustrate our proposal. We recognise that it will need refinement and modification to secure the priority of rights and the approach to subsidiarity that we are proposing and also to produce a provision that fits the law of all parts of the UK. We hope, however, that the draft helps provide a clearer idea of our intentions.

Indicative draft amendment to section 2(1)

A court or tribunal determining a question which has arisen in connection with a Convention right must first apply relevant UK statutory provisions, common law and UK case law generally and then, if proceeding to consider the interpretation of a Convention right, must take into account ... [as per the original text of section 2(1)].

200. Given its nature, **Option Five** cannot sensibly be said to give rise to devolution concerns.

Chapter Three – the Margin of Appreciation

(1) Introduction

1. The second issue under Theme 1 of the ToR relates to section 2 of the HRA and continues looking at the relationship between UK Courts and the ECtHR. It concerns the margin of appreciation. The specific question posed, Question 1(b) in the ToR, asks IHRAR to consider:

‘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?’
2. The Panel has considered whether to maintain the UK Courts’ current approach to the margin of appreciation. It has also considered a number of recommendations to revise that approach. All but one of the Panel recommend the following reform option.

Recommended reform option¹

Other than the amendment recommended in Chapter Two, no change to section 2 in respect of the margin of appreciation. The UK Courts have, over the first twenty years of the HRA, developed and applied an approach that is principled and demonstrates proper consideration of their role and those of Parliament and the Government.

3. This option is intended to support the approach the UK Courts have properly taken to the margin of appreciation and margin of discretion². We strongly endorse the principle of judicial restraint as integral to this option.

¹ See Option Three: the Recommended Reform Option, below.

² Defined below.

4. Full details of the recommendations and other reform options that IHRAR has considered are set out in Parts 9 and 10 of this chapter.

(2) Defining the Margin of Appreciation

5. The concept of the margin of appreciation was introduced in the previous chapter.³ Its essence is simple. It is related to the principle of subsidiarity, and is a recognition that while human rights are universal at the level of principle, they are national in application⁴. It is a concept that ‘operates in the sphere of international adjudication’⁵ between the UK and the ECtHR. It has, as was made clear by Lady Hale in **Re G**, ‘no application in domestic law’⁶. When we refer to the ‘margin of appreciation’ we refer to it in its proper, international, sense. The margin of appreciation is enjoyed by the UK as a state; how it is exercised is a matter for the State, in accordance with its individual constitutional arrangements. The ECtHR has nothing to say on this division between the Branches of the State. It is that division which lies at the heart of much of the discussion to follow.

The margin of appreciation in its proper sense

The margin of appreciation refers to freedom within which Convention states, such as the UK, can secure rights protection⁷.

More straightforwardly, it could be referred to as the ‘measure of responsibility’⁸ that is allocated to Convention states to ensure that Convention rights are implemented effectively.

It recognises, consistently with the principle of subsidiarity⁹, that the primary forum for rights protection is Convention states through their governments, parliaments and judiciaries.

Where a question concerning the interpretation or application of a Convention right falls within the margin of appreciation, a Convention state (the UK) can decide for itself how to give effect to the right in a way that is consistent with its own social, political and cultural traditions. In doing so it remains subject to the ECtHR’s overarching supervisory authority, which exists to ensure that the approach taken by the Convention state remains consistent with the baseline set by the Convention¹⁰.

³ As summarised by Murray Hunt in his submission to the CfE, see Chapter Two at [118], footnote 138.

⁴ See, Lord Hoffmann, at [12] below.

⁵ See Professor Guglielmo Verdirame QC, Submission to the Independent Human Rights Act Review Panel, at [44].

⁶ **Re G** at [118].

⁷ *Handyside v United Kingdom* – 5493/72 [1976] ECHR 5, (1976) 1 EHRR 737 at [48]-[49].

⁸ B. Rainey, P. McCormick & C. Ovey, *Jacobs, White & Ovey – The European Convention on Human Rights*, (8th edn) (OUP, 2021) at 81.

⁹ As defined in Chapter Two at [117].

¹⁰ *Handyside v United Kingdom* – 5493/72 [1976] ECHR 5, (1976) 1 EHRR 737 at [48] and following.

As a consequence of the margin of appreciation, different Convention states may answer the same question concerning the application of Convention rights, and give effect to the principles concerning them developed by the ECtHR in its case law, differently¹¹.

The margin thus recognises that there is no requirement for a uniform interpretation of Convention rights across the Convention states.

6. The nature of the margin of appreciation was explained clearly by Lord Hope in *R (Kebilene) v DPP (2000)*¹² (**R (Kebilene)**).

R (Kebilene) and the margin of appreciation

'[The margin of appreciation] is an integral part of the supervisory jurisdiction which is exercised over state conduct by the [ECtHR]. By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues arising within their own countries...'

7. The margin of appreciation reflects on the one hand the fundamental nature of the Convention as an international treaty, which sets out generally applicable, high level and universal principles, responsibility for the interpretation of which the treaty assigns to the ECtHR.
8. On the other hand, it reflects another fundamental feature of the international treaty: that it is for national authorities, whether they are Parliaments, Governments, or Courts to analyse and apply, in ways reflective of their domestic traditions, those general principles. They are better placed to do so, as the ECtHR has properly recognised¹³. The margin of appreciation is not, properly so called, a concession¹⁴. It is the means through which the Convention's high-level principles are given concrete effect domestically, while also enabling the ECtHR to play a supervisory role when assessing, in cases brought before it, whether national authorities have given proper effect to the minimum standards set by those principles. Lord Reed powerfully expressed the crux of this point when explaining the role of national courts in the system created by the Convention:

11 **Re G** at [118].

12 *R (Kebilene) v DPP* [2000] 2 AC 326 at 380.

13 *Ireland v UK - 5310/71* [1978] ECHR 1; (1978) 2 EHRR 25 at [207].

14 Lord Hoffmann, *The Universality of Human Rights*, (JSB Lecture, 2009) at [43] <https://www.judiciary.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSBA_Annual_Lecture_Universality_of_Human_Rights.pdf>.

*'the Strasbourg court's aim is not to construct a code to be adopted by the 47 contracting states. It knows very well that there are important differences between the various societies and their legal systems. But the court is developing a body of high level principles which can be taken to be applicable across the different legal traditions. Bearing that in mind, in the Strasbourg law, as in our own, we need to identify the principles underlying the development of a line of authorities on a particular topic. We can then develop our law, when necessary, by finding the best way, faithful to our own legal tradition, of giving expression to those principles. If we do so, our domestic legal tradition can continue to develop.'*¹⁵

- 9.** Within the margin of appreciation, consistently with the principle of subsidiarity, the national authorities can and should be developing concrete protection for individual rights consistently with the Convention's principles. Lord Reed's focus here is on how the UK Courts can and should do this. It is at least as important to emphasise that such developments are also properly for Parliament. Section 19 of the HRA requires Government ministers to consider and state whether in their opinion legislation is compatible with Convention rights. Importantly as well, Parliament has the legislative power and responsibility to crystallise human rights principles into specific provisions of domestic law. Social reform has, over the years, benefited from effective legislative action, which has also been of major importance for acceptance by society (i.e., public ownership).

- 10.** Allocation of responsibility within a Convention state is also not determined by the Convention, as the ECtHR clarified in *Handyside v United Kingdom - 5493/72* (1976) when discussing article 10 of the Convention (the right to freedom of expression). It is allocated to the UK's national authorities:

*'... Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force...'*¹⁶

- 11.** Where an issue falls within the scope of the UK's margin of appreciation, responsibility for determining it is, accordingly, a matter to be determined by reference to the UK's constitutional arrangements, and specifically separation of powers.

15 Lord Reed, *The Common Law and the ECHR*, (Inner Temple, 11 November 2013) at [15]-[16].

16 *Handyside v United Kingdom - 5493/72* [1976] ECHR 5, (1976) 1 EHRR 737 at [48].

Separation of powers

The separation of powers refers to the distribution of power within the UK between its three institutions of governance, the Three Branches of State: Parliament, Government and the Judiciary. As an idea it can be traced back in modern times to the work of the English philosopher, John Locke¹⁷, and the French philosophers, Bodin and Montesquieu¹⁸. Characteristically, the separation of powers in the UK always tended to be more practical than rigidly theoretical.

The broad meaning of separation of powers is that different powers are allocated to the different Branches of State. For instance:

- Responsibility for law-making is allocated to Parliament.
- Responsibility for implementing public policy and the laws made by Parliament is allocated to Government.
- Responsibility for interpreting the law, vindicating rights, and for developing the common law¹⁹ is allocated to the Courts and Judiciary

12. Lord Hoffmann in **Re G** explained that responsibility for the margin of appreciation was a matter for determination by the UK's approach to separation of powers.

¹⁷ J. Locke, *Two Treatise of Government* (1690), (Cambridge, 1994) at 326.

¹⁸ J. Bodin, *Les Six livres de la République*, (1576) (Blackwell) (Tooley, translation) (1955), Book IV, part VI; (1606); C. Montesquieu, *De L'Esprit des Lois* (1748), (Cambridge, 1989), Book XI, 6.

¹⁹ A helpful summary of the range of responsibilities allocated to each Branch of the State is set out in M. Elliott & R. Thomas, *Public Law*, (4th edn) (OUP, 2020) at 104.

Re G and the margin of appreciation and separation of powers

In **Re G** Lord Hoffmann explained the relationship between the margin of appreciation and the UK's constitutional arrangements in this way:

'Other reasons for following Strasbourg are ordinary respect for the decision of a foreign court on the same point and the general desirability of a uniform interpretation of the Convention in all Member States. But none of these considerations can apply in a case in which Strasbourg has deliberately declined to lay down an interpretation for all Member States, as it does when it says that the question is within the margin of appreciation.

*In such a case, it is for the court in the United Kingdom to interpret articles 8 and 14 and to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom. The margin of appreciation is there for division between the three branches of government according to our principles of the separation of powers. There is no principle by which it is automatically appropriated by the legislative branch.'*²⁰.

13. Equally, it must at once be said, there is no principle that responsibility for such matters is automatically allocated to the Courts. Allocation is a matter for the UK's constitutional arrangements, which necessarily includes Parliamentary Sovereignty.

(3) Importance of the Margin of Appreciation

14. The importance of the margin of appreciation cannot be over-emphasised. As noted in Chapter Two, its importance has recently been reaffirmed by the Convention states in the Brighton Declaration, which arose from an initiative of the UK Government in April 2012²¹. The Declaration affirmed the principle of subsidiarity (that Convention states are the primary means to give effect to Convention rights) and that the ECtHR's role is to provide remedies for rights breaches that have not been remedied at national level. It also stressed the importance of the margin of appreciation.

²⁰ **Re G** at [36]-[37].

²¹ European Court of Human Rights, *Reform of the Court* <<https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=>>>.

Brighton Declaration – margin of appreciation²²

‘The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State’s margin of appreciation.’

15. The central importance of the margin of appreciation and its relationship with the principle of subsidiarity was given further emphasis by the Copenhagen Declaration in 2018²³. The Copenhagen Declaration was the result of a meeting between the representatives of the Convention states in Copenhagen, which continued the process of reform of the Convention previously considered in Brighton (and before that in Interlaken). It was adopted by all Convention states and was intended to further promote the principle of subsidiarity, the margin of appreciation and judicial dialogue.

Copenhagen Declaration – the margin is an inherent feature of subsidiarity²⁴

‘The jurisprudence of the Court makes clear that States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions.’

²² Also see Chapter Two, footnote 123.

²³ Copenhagen Declaration (12-13 April 2018) at [28]-[31] <<https://rm.coe.int/copenhagen-declaration/16807b915c>>.

²⁴ Copenhagen Declaration at [28(b)].

- 16.** The margin of appreciation is important for a number of related reasons. Together with the principle of subsidiarity, it promotes effective rights protection within Convention states by their national authorities: government, parliament and the judiciary. It does so by enabling the high-level principles articulated by the Convention as explained by ECtHR case law to be applied in each Convention state consistently with national standards, traditions and approaches. There is obviously good sense in a broad demarcation of this nature, allowing for national differences in the form and detail of implementation – and thereby serving, as previously discussed, to reinforce public ownership of rights. It has the potential to allay concerns as to any supposed foreign imposition, as well as securing compatibility with domestic legal structures, concepts and constitutional arrangements. As Lord Hoffmann, for instance, in a detailed critique, argued:
- 'If one accepts ... that human rights are universal in abstraction but national in application, it is not easy to see how in principle an international court was going to perform this function of deciding individual cases, still less why the Strasbourg court was thought a suitable body to do so.'*²⁵
- 17.** The determination of individual cases is primarily the responsibility of Convention states' Courts, and not the ECtHR. The primary application of the Convention's principles and the ECtHR's case law in cases that come before them is a matter for the UK Courts²⁶. Nor is the ECtHR an appeal court. Decisions of the UK Supreme Court cannot, for instance, be appealed to the ECtHR; the latter is not, as has often been noted, a *'fourth instance court'*²⁷. Effective use of the margin of appreciation enables UK Courts to apply those principles concretely, taking account of the UK's domestic situation, while it also enables the ECtHR to consider properly the extent to which there has been compliance with the Convention's minimum standards, as the Brighton Declaration and Protocol 15 to the Convention make clear. Depending on the extent to which the margin applies in any particular case, the nature of that review by the ECtHR will, however, vary (on which see below). The margin of appreciation reflects the fact that the principles set out in the Convention may be universal, but their application is domestic.

25 Lord Hoffmann (2009) at [23].

26 As explained by Lord Bingham in *Kay v Lambeth BC* [2006] UKHL 10, [2006] 2 AC 465 at [44], *'... The effective implementation of the Convention depends on constructive collaboration between the Strasbourg court and the national courts of member states. The Strasbourg court authoritatively expounds the interpretation of the rights embodied in the Convention and its protocols, as it must if the Convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply.'*

27 *Garcia Ruiz v Spain* – 30544/96 [1999] ECHR 2; (2001) 31 EHRR 589 at [28].

(4) Width of the Margin of Appreciation

- 18.** The margin of appreciation is not uniform. It differs depending on a number of factors, such as the Convention right in question in any particular case. Additionally, the margin of appreciation will develop over time as ECtHR case law develops. The ECtHR helpfully identified a number of those factors in *S & Marper v UK* (2008)²⁸.

Factors that influence the width of the margin of appreciation

In *S & Marper v UK* (2008)²⁹, the ECtHR identified the following factors that influence the width of the margin of appreciation:

- The nature of the Convention right.
- The importance of the Convention right to the individual.
- The nature of the interference with the Convention right.
- The reason why the State seeks to interfere with the Convention right

- 19.** The margin of appreciation cannot, however, be so wide as to be ‘all-embracing’³⁰. However wide the margin accorded to the State, the ECtHR retains overall supervisory capacity. That is, it cannot be relied upon to undermine the purpose of the Convention, which was to set out a framework of common principles that provided for a ‘collective guarantee of human rights’³¹. ECtHR case law has established a number of broad categories indicative of where a wide or narrow margin of appreciation will be afforded to Convention states.

28 *S & Marper v UK* (2008) 25 BHRC 577.

29 *S & Marper v UK* (2008) 25 BHRC 577 at [102].

30 *Hirst v The United Kingdom (No. 2)* – 74025/01 [2005] ECHR 681; (2006) 42 EHRR 41 at [82]; *Dickson v UK* – 44362/04 [2007] ECHR 1050; (2008) 46 EHRR 4.

31 R. Spano, *Universality or Diversity of Human Rights?: Strasbourg in the age of Subsidiarity*, (2014) 14(3) HRL Rev 487 at 493. That the Convention was intended to set the base line for Convention rights protection is made explicit within the Convention itself. Article 53 of the Convention makes this clear as it provides that ‘*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party*’.

Examples of differing margins of appreciation

A **narrow** margin of appreciation will be afforded to a Convention state where

- an important facet of an individual's existence or identity is at stake³².
- the authority of the judiciary is in issue³³.
- compliance with aspects of article 6 (the right to fair trial) are in issue³⁴.
- there is a significant consensus across Convention states³⁵.

A **wide** margin of appreciation will be afforded to a Convention state where:

- sensitive moral and/or ethical issues arise³⁶.
- respect for the protection of public morals is in issue³⁷.
- issues concerning family life arise³⁸.
- social, moral and economic issues arise³⁹.
- there is a need to balance competing Convention rights⁴⁰.
- national security is in issue⁴¹.
- there is no consensus amongst Convention states⁴².

³² *Evans v UK* – 6339/05 [2007] ECHR 264; (2008) 46 EHRR 34.

³³ *Sunday Times v UK* (1979) 2 EHRR 245.

³⁴ *Osman v UK* (1998) 29 EHRR 245.

³⁵ *Goodwin v UK* – 28957/95 [2002] ECHR 588; (2002) 35 EHRR 18 at [85].

³⁶ *Evans v UK* (2008) 46 EHRR 728.

³⁷ *Handyside v UK*, *ibid.*

³⁸ *Belgian Linguistics A 6* (1968) [1968] 1 EHRR 252; *Abdulaziz v UK A 94* (1985) 7 EHRR 741

³⁹ *James v UK* (1986) 8 EHRR 123; *Stec v UK* – 65731/01 [2006] ECHR 1162; *Re Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27; [2019] 1 All ER 173.

⁴⁰ *Evans v UK* (2008) 46 EHRR 728.

⁴¹ *Leander v Sweden* (1987) 9 EHRR 647.

⁴² *Hirst v The United Kingdom (No. 2)* – 74025/01 [2005] ECHR 681; (2006) 42 EHRR 41 at [82], though the absence of consensus cannot be taken to afford a Convention state complete discretion.

(5) The Margin of Discretion in Domestic Law

- 20.** Where there is a margin of appreciation it is for the UK Courts to decide the issue according to domestic law, to which we next turn.
- 21.** The margin of appreciation does not exist in domestic law. There is however a related, albeit independent, concept in UK domestic law. This concept refers to a doctrine of deference⁴³, a margin of discretionary judgment⁴⁴, a margin of discretion⁴⁵, or to a ‘domestic’ margin of appreciation⁴⁶. When we refer to this domestic concept, we use the term the ‘margin of discretion’. This reflects the separation of powers.

Margin of discretion

This concept exists in UK domestic law. It refers to the respect, and weight, that UK Courts give domestic decision-making by Government and Parliament when considering the application of Convention rights to such decisions.

In some cases, an issue concerning Convention rights ought properly, for instance, to be determined by Government or Parliament, constituting the democratically elected and accountable Branches of the State. As the UK Government put it in its submission to the CfE:

‘Judicial deference’, which pre-dates the HRA but has particular relevance in this context, describes the process by which the courts may restrict the extent of their judgment on particular matters, recognising that in certain circumstances it is more properly for the democratically elected legislature, or in some cases executive as the expert decision maker.’⁴⁷

Typically, matters of political judgement, social policy or national security would fall for Parliament or the Government to determine, with the Courts respecting their decision.

43 *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, where use of the term ‘deference’ was deprecated. For a discussion see, T. Hickman, *Public Law After the Human Rights Act* (Hart, 2010).

44 *In re Brewster* [2017] UKSC 8, [2017] 1 WLR 519 at [49].

45 *SRM Global Master Fund LP v HM Treasury* [2009] EWCA Civ 788; [2009] UKHRR 1219 at [59].

46 *Re Recovery of Medical Costs of Asbestos Diseases (Wales) Bill* [2015] UKSC 3; [2015] AC 1016, (Lord Mance) at [54]: ‘At the domestic level, the margin of appreciation is not applicable, and the domestic court is not under the same disadvantages of physical and cultural distance as an international court. The fact that a measure is within a national legislature’s margin of appreciation is not conclusive of proportionality when a national court is examining a measure at the national level.’

47 UK Government, *Submission to the Independent Human Rights Review Call for Evidence*, at [22].

There is a large literature on this topic which it is not necessary to review in detail. However, the key points arising from that literature are discussed in this chapter⁴⁸.

The margin of discretion can be seen as an example of what Lord Bingham referred to as the relative institutional competence of Government⁴⁹, Parliament and the Judiciary. It is also, plainly, linked to Lord Hoffmann's explanation that allocation of the margin of appreciation is a matter for the UK's constitutional arrangements, i.e., separation of powers.

It can also be seen as a means by which Courts respect decision-making by Government and Parliament that properly falls within their constitutional sphere of action⁵⁰. Whilst the justification for the proposition that deference (or a high degree of deference) is due to Parliament and/or the Government has been expressed in a variety of ways by judges, it is, as the quotation above indicates, typically based on the view that the decision is better taken by those bodies because of their superior expertise in the particular matter or greater democratic legitimacy. However, it is important to note that this does not result in the areas usually identified as being suitable for deference such, as national security, being wholly beyond the reach of judicial supervision or automatically entitled to a high degree of deference. The rationales of superior expertise or greater democratic legitimacy may be more or less compelling according to the circumstances of the case.

- 22.** As with the margin of appreciation, the margin of discretion between Parliament, Government, and the Courts and Judiciary varies. In some cases, it will lie within the competence of the Government⁵¹. In others it will lie within the competence of Parliament, as Lord Reed PSC has recently noted in *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* (2021). When considering the compatibility of the 'two child' limit on child tax credits with article 8 of the Convention (the right to family life), he concluded that:

48 The following references are relevant but are not intended to be representative or comprehensive: M. Hunt, *Sovereignty's Blight: Why Contemporary Public Law Needs a Doctrine of Due Deference*, in N. Bamforth and P. Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart, 2003); J. Jowell, *Judicial Deference: Servility, Civility or Institutional Capacity*, 2006 *Public Law* 262; T.R.S. Allan, *Human Rights and Judicial Review: A Critique of "Due Deference"*, [2006] *Cambridge Law Review* 671; G. Phillipson, *Deference, Discretion and Democracy in the Human Rights Act Era*, 2006 *Current Legal Problems* 40; A. Young, 'In Defence of Due Deference' (2009) 72 *MLR* 554; A. Kavanagh, *Defending Deference in Public Law and Constitutional Theory*, (2010) *Law Quarterly Review* 222.

49 *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 at [14].

50 *Axa General Insurance Ltd v Lord Advocate* [2011] ULSC 46; [2012] 1 AC 868 at [148], (Lord Reed), considering the question whether an Act of the Scottish Parliament was subject to common law review '... in *R v Secretary of State for the Environment, Ex p Nottinghamshire County Council* [1986] AC 240, Lord Scarman commented at p 247 that matters of political judgment were not for the judges. Law-making by a democratically elected legislature is the paradigm of a political activity, and the reasonableness of the resultant decisions is inevitably a matter of political judgment. In my opinion it would not be constitutionally appropriate for the courts to review such decisions on the ground of irrationality. Such review would fail to recognise that courts and legislatures each have their own particular role to play in our constitution, and that each must be careful to respect the sphere of action of the other.'

51 See Lord Brown's dissenting judgment in *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 at [91].

*'The assessment therefore, ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning. There are no legal standards by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies.'*⁵²

- 23.** Finally, in others, competence will lie with the UK Courts. Inevitably, the specific nature of the allocation of institutional competence will depend on the specific situation, as the nature of the margin of appreciation itself varies. But the existence of the margin of discretion, as Lord Justice Laws explained, ensures that a proper balance is maintained within the UK between the three Branches of the State:

*'... the margin of discretionary judgment enjoyed by the primary decision-maker, though variable, means that the court's role is kept in balance with that of the elected arms of government; and this serves to quieten constitutional anxieties that the Human Rights Act draws the judges onto ground they should not occupy.'*⁵³

52 *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428 at [208].

53 *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550; [2014] 1 WLR 998 at [42].

(6) UK Courts, the Margin of Appreciation and Margin of Discretion

24. The specific question IHRAR is asked is how UK Courts have approached issues falling within the margin of appreciation and is any change required to that approach. Two issues arise.
25. First, how UK Courts have developed rights law when an issue falls within the margin of appreciation. We discuss this question in the next chapter, when considering the approach UK Courts have taken to formal dialogue with the ECtHR⁵⁴. In summary, our view based on our earlier consideration of developments subsequent to **Ullah** is that the UK Courts have approached this issue with caution and restraint⁵⁵.
26. Secondly, it raises the question of how UK Courts have approached the allocation of responsibility for rights protection between the three Branches of the State. In other words, it questions how the UK Courts have approached the margin of discretion when considering matters that fall within the margin of appreciation. We focus on this question here.

⁵⁴ See Chapter Four.

⁵⁵ See the concurring view set out in Cambridge University's Centre for Public Law's *response to the Independent Human Rights Act review's Call for Evidence* at [28], 'Although there is evidence of our domestic courts sometimes providing greater protection of rights than the ECtHR, this is not a regular occurrence. Moreover, our courts are more likely to go beyond the ECtHR when this is in the direction of travel of decisions of the ECtHR. Indeed, if ECtHR case law is not already moving in this direction, then our courts may look to use the common law to provide additional protection of rights. In both contexts however it is evident that our courts operate with restraint and that they recognise that there can be good constitutional reasons for greater protection of rights to be provided by Parliament rather than the courts.'. Where resort is made to the common law, as we noted in Chapter Two, any developments are subject to revision by Parliament: see Chapter Two at [95]; Chapter One at [40].

27. As noted above, Convention states are to determine responsibility for the margin of appreciation amongst their national authorities, i.e., to determine the boundary set between the three Branches of the State in respect of the margin of discretion. The HRA does not make provision for a division of responsibility for that margin between the Branches of State. In consequence, it has fallen to Courts, when considering claims arising in respect of Convention rights, to determine whether responsibility for the matter falls to them, to Parliament or the Government⁵⁶. There is nothing unusual in this; it is the kind of task regularly undertaken by Courts when applying common law. Subject of course to Parliamentary Sovereignty, UK Courts determine the boundaries of the various responsibilities of the Three Branches in a number of areas – and have no option but to make such a determination when a dispute that requires them to be identified is before the Courts; save in the exceptionally limited sphere where a matter is not justiciable, a court is not at liberty to decline to adjudicate. To give one example, the Courts construe where the boundary set by Article IX of the Bill of Rights 1688/89 lies and the scope of parliamentary privilege⁵⁷. The same approach is taken to the question of where the balance is struck between the Three Branches within the margin of appreciation. As Lord Mance summarised the position in **DSD**, it is for the UK Courts to determine the margin of discretion:

*‘... where the European Court of Human Rights has left a matter to States’ margin of appreciation, then domestic courts have to decide what the domestic position is, what degree of involvement or intervention by a domestic court is appropriate, and what degree of institutional respect to attach to any relevant legislative choice in the particular area: see *In re G*, paras 30-38, per Lord Hoffmann, para 56, per Lord Hope and paras 128-130, per Lord Mance’.*

That the Courts must decide this question for themselves has recently been reiterated by the UK Supreme Court in, for instance, **Nicklinson** (discussed below), *R (Steinfeld) v Secretary of State for International Development* (2018)⁵⁸ and, *R (DA) v Secretary of State for Work and Pensions* (2019)⁵⁹.

28. When considering the degree to which institutional respect is due to the political Branches of State, the UK Courts have, as The Law Society of England and Wales pointed out in their submission to the *CfE*, taken a careful approach.

56 *Re McLaughlin’s Application for Judicial Review* [2018] UKSC 48; [2018] 1 WLR 4250 at [34], ‘In cases which do fall within the margin which Strasbourg will allow to member states, the domestic courts will then have to consider which among the domestic institutions is most competent and appropriate to strike the necessary balance between the individual and the public interest. In a discrimination case such as *In re G*, it may be the courts. In other cases, it may be the Government or Parliament.’

57 *R v Chaytor (Rev 2)* [2010] UKSC 52; [2011] 1 AC 684.

58 *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32; [2020] AC 1 at [28]-[29]; **Nicklinson** at [70].

59 *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21; [2019] 1 WLR 3289 at [149] and [167].

The UK Courts' approach to the margin of discretion

'It can be seen that the domestic courts are sensitive to the limits of their competencies and do frequently defer to the executive and legislature.'⁶⁰

While the language of deference is often used to describe the approach taken by UK Courts in this area, use of the term is said by some to be inapt⁶¹, as it is in essence a question of the UK Courts acting consistently with the fundamental principle of mutual respect between the three Branches of the State, which forms part of the UK's constitutional arrangements (discussed in Chapter One⁶²).

- 29.** When approaching a question of whether mutual respect requires 'deferring' to either Parliament or Government in respect of an issue raising Convention rights, the UK Courts have generally adopted a similar approach to the ECtHR when it approaches the margin of appreciation. That is to say, UK Courts consider similar factors to be relevant to assessing where to draw the boundary within the margin of discretion as the ECtHR considers to be relevant in respect of the margin of appreciation⁶³. Illustrative examples suggest that questions will fall within Parliament's, rather than the UK Courts', area of responsibility, where they are financial matters⁶⁴; economic and social matters⁶⁵, national security⁶⁶, and those arising from moral or political judgment⁶⁷. The latter point has been emphasised consistently by the House of Lords and UK Supreme Court over the last twenty years.

60 The Law Society of England and Wales, *Submission to the Independent Human Rights Review*, at [32].

61 See *Huang*, footnote 43 above.

62 Chapter One at [41], Chapter Two at [187].

63 A point made clearly to IHRAR by ALBA at [19].

64 *R (Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 6; [2015] 3 All ER 1.

65 *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542 | [2021] 1 WLR 1151.

66 *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39; [2014] AC 700 at [21].

67 *R (Countryside Alliance) v Attorney General* [2007] UKHL 52; [2008] 1 AC 719; *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428.

The UK Courts' approach to the margin of discretion

A v Secretary of State for the Home Department (2004)⁶⁸

'I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety. As will become apparent, I do not accept the full breadth of the Attorney General's argument on what is generally called the deference owed by the courts to the political authorities. It is perhaps preferable to approach this question as one of demarcation of functions or what Liberty in its written case called "relative institutional competence". The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.'

68 *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 at [29].

Re G (2008)⁶⁹

'It is, of course, now well settled that the best guide as to whether the courts should deal with the issue is whether it lies within the field of social or economic policy on the one hand or of the constitutional responsibility which resides especially with them on the other... Cases about discrimination [i.e., legal questions] in an area of social policy, which is what this case is, will always be appropriate for judicial scrutiny.'

R (Stott) v Secretary of State for Justice (2018)⁷⁰

'The questions that are more difficult are whether the longer wait before the prisoner is eligible to apply to the Parole Board is an appropriate means of achieving this aim and whether it is disproportionate in its impact. The starting point for a determination of these questions is that the ECtHR would allow a contracting state a margin of appreciation in assessing whether, and to what extent, differences in otherwise similar situations justify different treatment, and would allow a wide margin when it comes to questions of prisoner and penal policy, although closely scrutinising the situation where the complaint is in the ambit of article 5. This court must equally respect the policy choices of parliament in relation to sentencing.'

30. Perhaps the pre-eminent case study in the area of margin of discretion is provided by the tragic and daunting issue arising before the Courts in **Nicklinson**⁷¹.

⁶⁹ **Re G** at [48] (Lord Hope).

⁷⁰ **R (Stott) v Secretary of State for Justice** [2018] UKSC 59; [2020] AC 51 at [153].

⁷¹ See Chapter Two at [67].

***Nicklinson* - the basics**

The claim concerned the question whether section 2 of the Suicide Act 1961 (which Parliament had considered, and then amended in the Coroners and Justice Act 2009) was contrary to article 8 of the Convention (the right to a private life). Section 2 makes it a criminal offence to assist an individual to commit suicide. The question fell within the margin of appreciation.

The UK Supreme Court held, by a majority, that section 2 of the 1961 Act did not breach the article 8 Convention right. It further held, by a different majority, that it was institutionally competent to decide the issue whether section 2 infringed article 8. The Justices took the following approaches:

- Lords Neuberger, Mance and Wilson held that Parliament should first have the opportunity to consider the issue and then, if necessary, it was for the Court to consider whether to issue a declaration of incompatibility. At the time in question it was not appropriate for the Court to grant a declaration of incompatibility.
- Lady Hale and Lord Kerr held that it was for the Courts to determine the point and favoured granting a declaration of incompatibility without more ado.
- Lords Sumption, Clarke, Reed and Hughes held that, in principle, it was for Parliament not the Court to determine the issue, at least unless Parliament had refused to address the question at all.

- 31.** In coming to their various views in ***Nicklinson***, the Justices of the UK Supreme Court set out important guidance on the approach to be taken to determining where responsibility lay between the UK Courts and Judiciary and Parliament for rights protection where an issue fell within the margin of appreciation.

Lord Mance

'[164] At this point, however, questions of institutional competence arise at the domestic level. The interpretation and ambit of s.2 are on their face clear and general, and whether they should be read down or declared incompatible in the light of article 8 raises difficult and sensitive issues. Context is all, and these may well be issues with which a court is less well equipped and Parliament is better equipped to address than is the case with other, more familiar issues. On some issues, personal liberty and access to justice being prime examples, the judiciary can claim greater expertise than it can on some others. The same applies to the legislature – even though I fully accept, that, while the legislature is there to reflect the democratic will of the majority, the judiciary is there to protect minority interests, and to ensure the fair and equal treatment of all. Whether a statutory prohibition is proportionate is, in my view, a question in the answering of which it may well be appropriate to give very significant weight to the judgments and choices arrived at by the legislator, particularly when dealing with primary legislation.'

Lord Mance

[230] Doubtless, where there is only one rational choice the Courts must make it, but the converse is not true. Where there is more than one rational choice the question may or may not be for Parliament, depending on the nature of the issue. Is it essentially legislative in nature? Does it by its nature require a democratic mandate? The question whether relaxing or qualifying the current absolute prohibition on assisted suicide would involve unacceptable risks to vulnerable people is in my view a classic example of the kind of issue which should be decided by Parliament. There are, I think, three main reasons. The first is that, as I have suggested, the issue involves a choice between two fundamental but mutually inconsistent moral values, upon which there is at present no consensus in our society. Such choices are inherently legislative in nature. The decision cannot fail to be strongly influenced by the decision-makers' personal opinions about the moral case for assisted suicide. This is entirely appropriate if the decision-makers are those who represent the community at large. It is not appropriate for professional judges. The imposition of their personal opinions on matters of this kind would lack all constitutional legitimacy.

[231] Secondly, Parliament has made the relevant choice...

*[232] Third, the Parliamentary process is a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas. The legislature has access to a fuller range of expert judgment and experience than forensic litigation can possibly provide. It is better able to take account of the interests of groups not represented or not sufficiently represented before the court in resolving what is surely a classic "polycentric problem". But, perhaps critically in a case like this where firm factual conclusions are elusive, Parliament can legitimately act on an instinctive judgment about what the facts are likely to be in a case where the evidence is inconclusive or slight: see *R (Sinclair Collis Ltd) v Secretary of State for Health* [2012] QB 394, esp. at para 239 (Lord Neuberger), and *Bank Mellat v H.M. Treasury (No. 2)* [2013] 3 WLR 179, 222 at paras 93-94 (Lord Reed). Indeed, it can do so in a case where the truth is inherently unknowable, as Lord Bingham thought it was in *R (Countryside Alliance) v Attorney-General* at para 42.'*

Lord Reed

'[295] ... I entirely accept that ... even if ... [the ECtHR] ... would regard the issue before us as within the margin of appreciation which it accords to member states, it is within the jurisdiction accorded to this court under the Human Rights Act 1998 to decide whether the law is or is not compatible with the Convention ... If the question whether a provision of primary legislation is compatible with a Convention right arises ... the court evidently has jurisdiction to determine it.

[296] In that respect, amongst others, the Human Rights Act introduces a new element into our constitutional law, and entails some adjustment of the respective constitutional roles of the courts, the executive and the legislature. It does not however eliminate the differences between them: differences, for example, in relation to their composition, their expertise, their procedures, their accountability and their legitimacy. Accordingly, it does not alter the fact that certain issues are by their nature more suitable for determination by Government or Parliament than by the courts. In so far as issues of that character are relevant to an assessment of the compatibility of executive action or legislation with Convention rights, that is something which the courts can and do properly take into account. They do so by giving weight to the determination of those issues by the primary decision-maker. There is nothing new about this point. It has often been articulated in the past by referring to a discretionary area of judgment.

[297] The question whether section 2 of the Suicide Act 1961 is incompatible with the Convention turns on whether the interference with article 8 rights is justified on the grounds which have been discussed. That issue raises highly controversial questions of social policy and, in the view of many, moral and religious questions on which there is no consensus. The nature of the issue therefore requires Parliament to be allowed a wide margin of judgment: the considered assessment of an issue of that nature, by an institution which is representative of the citizens of this country and democratically accountable to them, should normally be respected. That is not to say that the courts lack jurisdiction to determine the question: on the contrary, as I have explained. But it means that the courts should attach very considerable weight to Parliament's assessment.'

Lady Hale

'[299] There is so much in the comprehensive judgment of Lord Neuberger with which I entirely agree. He has shown that, even if the Strasbourg court would regard the issue before us as within the margin of appreciation which it accords to member states, it is within the jurisdiction accorded to this court under the Human Rights Act 1998 to decide whether the law is or is not compatible with the Convention rights recognised by UK law: Re G (Adoption: Unmarried Couple) [2009] 1 AC 173. Hence both he and Lord Wilson accept that, in the right case and at the right time, it would be open to this court to make a declaration that section 2 of the Suicide Act 1961 is incompatible with the right to respect for private life protected by article 8 of the European Convention on Human Rights. Understandably, however, they would prefer that Parliament have an opportunity of investigating, debating and deciding upon the issue before a court decides whether or not to make such a declaration. Lord Mance is also prepared to contemplate that possibility, although he too thinks Parliament the preferable forum in which any decision should be made (paras 190-191)). Together with Lord Kerr and I, who would make a declaration now, this constitutes a majority who consider that the court both can and should do this in an appropriate case. Lord Clarke (para 293) and Lord Sumption (para 233) might intervene but only if Parliament chooses not to debate the issue; otherwise, they, and Lord Reed and Lord Hughes, consider that this is a matter for Parliament alone.

[300] Like everyone else, I consider that Parliament is much the preferable forum in which the issue should be decided. Indeed, under our constitutional arrangements, it is the only forum in which a solution can be found which will render our law compatible with the Convention rights. None of us consider that section 2 can be read and given effect, under section 3(1) of the Human Rights Act 1998, in such a way as to remove any incompatibility with the rights of those who seek the assistance of others in order to commit suicide. However, in common with Lord Kerr, I have reached the firm conclusion that our law is not compatible with the Convention rights. Having reached that conclusion, I see little to be gained, and much to be lost, by refraining from making a declaration of incompatibility. Parliament is then free to cure that incompatibility, either by a remedial order under section 10 of the Act or (more probably in a case of this importance and sensitivity) by Act of Parliament, or to do nothing. It may do nothing, either because it does not share our view that the present law is incompatible, or because, as a sovereign Parliament, it considers an incompatible law preferable to any alternative.'

Lord Kerr

[343] An essential element of the structure of the Human Rights Act 1998 is the call which Parliament has made on the courts to review the legislation which it passes in order to tell it whether the provisions contained in that legislation comply with ECHR. By responding to that call and sending the message to Parliament that a particular provision is incompatible with the Convention, the courts do not usurp the role of Parliament, much less offend the separation of powers. A declaration of incompatibility is merely an expression of the court's conclusion as to whether, as enacted, a particular item of legislation cannot be considered compatible with a Convention right. In other words, the courts say to Parliament, 'This particular piece of legislation is incompatible, now it is for you to decide what to do about it.' And under the scheme of the Human Rights Act it is open to Parliament to decide to do nothing.

[344] What the courts do in making a declaration of incompatibility is to remit the issue to Parliament for a political decision, informed by the court's view of the law. The remission of the issue to Parliament does not involve the court's making a moral choice which is properly within the province of the democratically elected legislature.

[345] Lastly in this regard, it is irrelevant to the compatibility of section 2(1) that Parliament has debated this issue a number of times without repealing that section. This is something that the court must determine on the basis of its own evaluation of the evidence. What Parliament has had to say is irrelevant to the court's decision, except in so far as it provides evidence which the court can independently evaluate.'

32. Self-evidently, **Nicklinson** requires careful and respectful study. While views may differ, it can be said to give rise to the following reflections:
- (a) First and notwithstanding their very different views and reasoning, there was overwhelming support amongst the Justices for Parliament being the preferable forum in which the issue should be decided.
 - (b) Secondly, while in one sense the three-way split in analysis is unfortunate and unsatisfying, the difference in perspectives and conclusions is testament to the careful and cautious approach taken by the UK Supreme Court to the assessment of matters falling within the margin of appreciation. In particular, it demonstrated the care with which the UK Supreme Court considered institutional competence in the margin of discretion, in the particular sphere of questions raising social, moral and ethical questions. The decision further evidences the UK Supreme Court's restraint when invited to go beyond the ECtHR in connection with matters arising within the margin of appreciation. Despite the painfully moving factual circumstances, a careful focus was maintained on institutional competence. By a decisive majority of 7-2, the Court held that it would not be appropriate to grant a declaration of incompatibility.

- (c) Thirdly, in its response to the *CfE*, the Society of Conservative Lawyers⁷² took issue with the ‘via media’ (middle way) approach favoured by Lord Neuberger PSC, namely that if Parliament did not do something to remedy the legal situation in good time, the Court might in future grant a declaration. Lord Neuberger’s approach was said ‘... to encourage a ‘first-come-first-served’ approach to the allocation question, and to depart from a proper analysis, grounded in the subject-matter at issue’⁷³. It can be said that there is logical force in this criticism, especially given the importance of a principled allocation of the margins of appreciation and discretion between the three Branches of the State in an area of such sensitivity; that said, the pragmatic attraction of the via media approach should not be lightly discounted⁷⁴.
- (d) Fourthly, for our part, we were respectfully troubled by the observation that in some cases difficult or unpopular issues were more easily dealt with by the judiciary⁷⁵. We see considerable risks in such an approach, most graphically demonstrated by the difficulties that *Roe v Wade*⁷⁶ has encountered in the United States – standing as a reminder of the need for our Courts to apply (as they generally do) the sure yardstick of comparative institutional competence and to not only exercise judicial restraint in contentious moral or ethical issues but also such areas as national security, diplomatic relations, resource allocation or where there is no social consensus.
- (e) Fifthly and finally, it must be kept in mind that even had the UK Supreme Court favoured the grant of a declaration of incompatibility, section 4 HRA would not have *obliged* Government and Parliament to act on it. Whatever the criticism of such a decision in terms of institutional competence and its ramifications for the political debate, Parliamentary Sovereignty would have been maintained (as will be discussed further when dealing in due course with sections 3 and 4 of the HRA).

72 Or, more precisely, ‘Certain Members of the Society of Conservative Lawyers’.

73 Society of Conservative Lawyers, *Submission to the Independent Human Acts Review Call for Evidence*, at 14.

74 The Society of Conservative Lawyer’s response is further noteworthy for its endorsement of the common law method, a matter to which we return later in this chapter.

75 *Nicklinson* at [104].

76 *Roe v Wade*, 410 U.S. 113 (1973).

- 33.** The UK Courts' approach to the margins of appreciation and discretion can be summarised as follows.

Summary of the approach to the margins of appreciation and discretion

The case law demonstrates that when acting within the margin of appreciation afforded to Convention states by the Convention and ECtHR, and when applying the domestic margin of discretion, UK Courts:

- Adopt a cautious and careful approach to developing Convention rights within the margin of appreciation (as discussed in Chapter Two).
- Are acutely aware of the importance of considering where institutional responsibility lies for issues falling within the margin of appreciation.
- Apply a range of factors to determine whether an issue lies within their institutional competence or that of Parliament and Government. Those factors are analogous to the factors the ECtHR takes into account in determining the width of the margin of appreciation.
- Have adopted an approach, along a sliding scale or spectrum, that seeks to ensure that they determine legal matters, with political matters, and those other matters that lie within Parliament and the Government's institutional competence, being left to the political Branches of the State.

(7) Views from Submissions to IHRAR concerning the Margin of Appreciation

- 34.** While not all submissions to the *CfE* or discussions at IHRAR's Roundtables or Roadshows dealt explicitly with the margin of appreciation, a range of views on the issue and on how the margin of discretion should operate were canvassed.
- 35.** There was a strong sense from the submissions to the *CfE* of support for no change to the UK Courts' current approach to the margin of appreciation; it was operating well. However, a number of points were raised, supporting the conclusion that the approach was in need of reform. There was no consensus on the nature of any proposed reform amongst those submissions supporting reform. The divergence of view amongst those who were critical of the UK Courts' current approach is best illustrated by the fact that, on the one hand, the Courts were criticised for taking too deferential an approach to Parliament when considering matters within the margin of appreciation. On the other hand, they were also criticised for straying into areas of social policy (for instance), which ought to be viewed as within Parliament's proper province.

Examples of submissions supportive of no change

Herbert Smith Freehills

'From our perspective ... no formal changes are required to the legislation and the question of what falls within or outside of the margin of appreciation cannot sensibly be addressed by amending UK legislation.'

Mind

'Mind does not consider any change is required in this area.'

Northern Ireland Human Rights Consortium

'... the approach taken by domestic courts in considering issues falling within the margin of appreciation is functioning appropriately and should remain unchanged.'

Queen's University Belfast Human Rights Centre

'We believe that domestic courts and tribunals have applied their discretion appropriately when dealing with issues which the ECtHR has confirmed are within a State's margin of appreciation... The courts have also exercised judicial restraint in this context...'

The Scottish Government

'... the Scottish Government does not believe that there is any case for changes in relation to the manner in which courts in the UK approach issues falling within the margin of appreciation which properly belongs to individual States Parties.'

- 36.** The Panel notes that the Joint Committee on Human Rights also concluded that no change was needed to the UK Courts' approach to the margin of appreciation.

Joint Committee on Human Rights⁷⁷

'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.

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.'

- 37.** Criticisms and reform proposals concerning UK Courts' approach to the margin of appreciation included the following: the suggestion that the Courts' approach to deciding cases within the margin of appreciation was too deferential to Parliament; the view that while the Courts had adopted an appropriate approach to the margin of appreciation, Parliament ought to be more robust in its engagement with human rights issues; proposals for legislative clarification of the principles that guide the Courts' approach to deciding cases within the margin of appreciation, including when the margin fell to be exercised by Parliament and when by (and not by) the UK Courts; proposals for the provision of enhanced judicial training; the idea that Courts should issue guideline cases where matters fell within the margin of appreciation.

⁷⁷ The JCHR's Report, Joint Committee on Human Rights, *The Government's Independent Review of the Human Rights Act*, (Third Report of Session 2021-22) at [64]-[65], has formed part of the evidence considered by IHRAR.

Selected criticisms and reform recommendations submitted to IHRAR

Bar Council of England and Wales Roundtable

‘Domestic courts give too much deference to parliament on the Margin of Appreciation; more than envisaged by the Convention.’

Garden Court Chambers

‘... if anything, Courts are too deferential to the role of Parliament and should be more robust. We consider that the test is put too high and that, where interference with human rights is found, the burden should be on the state to justify such interference rather than any justification being accepted unless it is manifestly without reasonable foundation.’

Cambridge University Centre for Public Law

‘[While concluding that no change was needed to the courts’ approach, if] change is needed, it may be best achieved through ensuring there is greater opportunity for Parliament to engage with these issues. For example, in addition to carrying out thematic studies, the Joint Committee on Human Rights (JCHR) could write reports on salient issues within the margin of appreciation, perhaps also initiating debate. More time could also be given to Private Member’s Bills which are designed to provide a UK specific response to an issue within a wide margin of appreciation in order for Parliament to discuss these issues.’

Care not Killing

‘... we believe that it is inappropriate for the UK courts to intervene in sensitive policy issues which are routinely considered to be matters of personal conscience by political parties. On matters which fall within the Margin of Appreciation (e.g. assisted suicide and euthanasia) the UK courts should not be able to find that UK law on such conscience issues is incompatible with the rights listed in Schedule 2 of the Human Rights Act.’

The Law Society of England and Wales – Human Rights Roundtable

‘Members of the Law Society were open to the idea of the provision of guiding principles on the use of the margin of appreciation especially if declaratory of existing decisions – but warned that it could lead to further dispute or disagreement on the meaning of the guiding principles.’

Professor Guglielmo Verdirame QC

‘At the domestic level [i.e., when considering the margin of discretion within the ambit of the UK’s margin of appreciation], the relevant principles are those that concern the scope of prerogative powers, or doctrines of judicial restraint and deference towards the executive in certain spheres (e.g. foreign relations). As regards the application of the HRA, the focus should be on these principles of our Constitution, and of course, parliamentary sovereignty, rather than the doctrine of the margin of State appreciation which was developed in a different context and is simply unsuitable.’

Policy Exchange

'... [Amend the HRA to specify] that no act of a public authority, and no legislation, could be held rights-incompatible if the ECtHR would be likely to hold that it fell within the UK's margin of appreciation... [and/or make further legislative] provision to the effect that domestic courts may find rights-incompatibility only when the Strasbourg case law in question does not clearly depart from the terms of the ECHR adopted by the member states. That is, in determining whether the ECtHR would be likely to find an act incompatible with convention rights, domestic courts would have to set aside cases in which this finding would turn on a glaring misinterpretation of the ECHR...'

Lord Carlile of Berriew

'I think this is a matter for the Higher Courts. Just as the [Court of Appeal (Criminal Division)] issues sentencing guideline cases from time to time to complement the product of the Sentencing Council, there is a good case for issues of real HR principle to be regarded and reported as guideline cases.'

(8) Approach to Options for Reform

- 38.** In considering any change to the UK Courts' approach to the margin of appreciation, it is important to bear in mind that its ambit is a matter for the ECtHR to determine. It is also important to bear in mind that, as we consider in the next chapter, the ECtHR's approach is influenced by effective judicial and Parliamentary dialogue with it. Any reform ought to seek to improve the ability of the UK to influence the ECtHR's approach to the UK's margin of appreciation. In terms of the margin of discretion, any reform ought to further mutual respect between Parliament and Government on the one hand, and the Courts on the other, so as to allow each Branch of the State to act effectively within its respective field of institutional competence in accordance with the UK's constitutional arrangements.

(9) Rejected Options

39. The Panel rejects the following options.

(i) Amend the HRA to reduce the level of ‘deference’ given by the Courts to Parliament

40. The first option for reform is to amend the HRA to reduce the level of deference provided by the UK Courts to Parliament and/or the Government. In respect of the latter a particular focus is on the test the Courts have applied when considering whether it is appropriate to set aside decisions concerning, for instance, social benefits. Here, the courts (ordinarily at least) will not interfere with such decisions except where it can be shown that the Government’s justification for its decision is *‘manifestly without reasonable foundation’*. This particular criticism was, as noted above, developed by Garden Court Chambers in its submission to the CfE. The examples highlighted concerned the rejection by the Courts of challenges to the so-called *‘bedroom tax’* and the cap on benefits in *R (Carmichael) v Secretary of State for Work and Pensions* (2016)⁷⁸ and *R (DA) v Secretary of State for Work and Pensions* (2019)⁷⁹.

41. We can see no basis for recommending reform in this area. Instead, we regard the test of *‘manifestly without reasonable foundation’* as a proper one and as further evidence of the Courts exercising a proper degree of restraint in their approach to matters where they are not the primary decision-maker⁸⁰. If anything, the need is to re-emphasise the appropriateness of the *‘manifestly without reasonable foundation’* test in its proper sphere of operation⁸¹.

(ii) Amend the HRA to specify that no act of a public authority, and no legislation, could be held rights-incompatible if the ECtHR would be likely to hold that it fell within the UK’s margin of appreciation

42. This recommendation was advanced by a number of submissions, of which that from Policy Exchange was probably the most prominent. It rests on the argument that the UK Courts, rather than being too deferential, have overstepped the boundary of institutional competence when deciding matters under the HRA.

⁷⁸ [2016] UKSC 58; [2016] 1 WLR 4550.

⁷⁹ *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21; [2019] 1 WLR 3289 at [65]-[66].

⁸⁰ See further, *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428, in particular [142] per Lord Reed on the approach to be taken, *‘... there is not a mechanical rule that the judgment of the domestic authorities will be respected unless it is “manifestly without reasonable foundation” ... its application to particular facts can be greatly affected by other principles which may also be relevant ... In the context of article 14, the fact that a difference in treatment is based on a “suspect” ground is particularly significant...’*.

⁸¹ We note with reservation the apparent blurring of the distinction between the *‘manifestly without reasonable foundation’* test and general considerations of proportionality in, for instance, *R (Akbar) v Secretary of State for Justice* [2021] EWCA Civ 898; [2021] 4 WLR 94 at [55]-[59].

43. At the outset, it is necessary to distinguish between an expression of concern as to a decision (or decisions) and apparently seeking to preclude UK Courts from ruling that an act of a public authority or legislation is incompatible with Convention rights if the matter falls within the UK margin of appreciation.
44. There is nothing remarkable with regard to concern as to individual decisions. From time to time, that is bound to happen – and, in a democracy, a degree of tension between the Branches of the State is not necessarily unhealthy. It is, indeed, inherent in a common law system. It does not at all follow from such concern that the legislative solution canvassed in the recommendation under consideration is an appropriate response.
45. The submissions of the Society of Conservative Lawyers in response to the CfE (already referred to) contains what are, on any view, reasonable concerns as to the UK Supreme Court decision in *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27 (**Re NIHRC**)⁸².

Re NIHRC (2018)

This case concerned a challenge to the refusal by the Court of Appeal in Northern Ireland to grant a declaration of incompatibility on the application of the Northern Ireland Human Rights Commission. A declaration was sought that the law concerning abortion in Northern Ireland was incompatible with articles 3 (inhuman or degrading treatment) and 8 (family life) of the Convention.

The UK Supreme Court held that it had no jurisdiction to consider the appeal. However, it went on to state that if it had jurisdiction, it would have granted a declaration of incompatibility as it considered the Northern Ireland law to be incompatible with article 8 of the Convention. On both points the court was divided and reached its decision by a majority.

46. The Society of Conservative Lawyers' concern focused on the decision of the majority on the substantive question, where the reasoning⁸³ could lead to Court intervention in areas of social policy '... because a different course has been taken from that in all or nearly all other [Convention] states'⁸⁴. The Society expressed a strong preference for the dissenting judgment of Lord Reed (with whom Lord Lloyd-Jones agreed), urging that such highly sensitive and contentious questions of moral judgment were pre-eminently matters to be settled by democratically elected and accountable institutions⁸⁵.

⁸² See too, the implicit concern in the UK Government's submission, as to *Re McLaughlin's Application for Judicial Review* [2018] UKSC 48; [2018] 1 WLR 4250.

⁸³ *Esp.*, at [120].

⁸⁴ Society of Conservative Lawyers, *Submission to the Independent Human Rights Act Review's Call for Evidence*, at 13.

⁸⁵ See, at [344] and [362].

- 47.** As already canvassed, such differences of view represent familiar ground. Tellingly, the Society of Conservative Lawyers did not propose legislative reform in this regard⁸⁶. Instead, the Society said this:

'The courts are expert in the development of the common law and the interpretation of statute. Centuries of evolution have produced the orthodox common law practice of reasoning in increments by analogy, and our constitutional order relies on the courts to interpret and apply the statutes enacted by Parliament ...

The proper role of the courts is defined to a great extent by the reach of the common law and by the canons of statutory interpretation. The stability and coherence afforded by the traditional methods of the courts is that they provide a much more resilient defence of rights from executive power in particular.

Our proposed [amendment to section 2] ... would not directly provide a solution to the courts' approach to cases falling within the margin of appreciation. What is required here is a shift in judicial attitude ... Where the common law 'runs out' and cannot be developed to meet the case by the orthodox, incremental method, the courts should take that as a strong indication that the proper forum for the question is a political, not a legal, one and should stay their hand.'

With the sole reservation that the great majority of judicial decisions suggest that no, or at least no significant 'shift in judicial attitude' is required, we agree. Judicial restraint is strongly entrenched in judicial decision-making⁸⁷.

- 48.** Policy Exchange, in its submission to the CfE⁸⁸, argued that the UK Supreme Court has adopted an approach to the interpretation of Convention rights, within the margin of appreciation, that goes beyond the ECtHR⁸⁹. It contends that, in doing so, the UK Supreme Court has, in essence, arrogated to itself the UK's margin of appreciation, which 'belongs to the UK not to UK courts'. The submission continued as follows:

'Parliament should consider amending the HRA to provide that domestic courts may not find an act of a public authority to be incompatible with a convention right (thus breaching section 6) or legislation to be rights-incompatible (triggering sections 3 and 4) unless such a finding can be founded on a clear and consistent line of Strasbourg case law. Such legislation might specify that no act of a public authority, and no legislation, could be held rights-incompatible if the ECtHR would be likely to hold that it fell within the UK's margin of appreciation...'

⁸⁶ The Society's propose reform to section 2 of the HRA does not, as the Society itself made clear, directly impact on this topic.

⁸⁷ See *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428 at [200] and following.

⁸⁸ Professor Ekins argued to similar effect at the Oxford-Cambridge Roadshow that the HRA's 'dynamic' character means that litigation about Convention rights might undermine or breach other, settled rights and principles, claiming that the litigation about assisted suicide is an example of the HRA "politicising" litigation (by "arming" political opponents of the Suicide Act 1961).

⁸⁹ Policy Exchange, *Submission to the Independent Human Rights Review*, at [16].

- 49.** The submission that the margin of appreciation belongs not only to the UK Courts is clearly correct; we set this out above and strongly agree. Equally, as we make plain throughout, we share the view on the importance of judicial restraint. That apart, (for the reasons we set out below in some detail) considering the wide-ranging consequences of the proposal, we do not agree with Policy Exchange's submission as to the route proposed to address these matters.
- 50.** First, the suggestion that where something falls within the margin of appreciation it cannot be for the Courts to determine involves the proposition that the margin of appreciation belongs only to Parliament and Government not the courts. One member of the Panel supported this approach, on the basis that such matters fell within the ambit of foreign relations and were thus a matter for the Executive, subject to parliamentary accountability, and not the UK Courts. The majority were not persuaded. Excluding the Courts from the margin of appreciation would amount to a striking change in the UK's constitutional arrangements, which entail sharing the margin between all three Branches of the State.
- 51.** Secondly, the suggestion does not take into account the practical reality that Courts do not choose the cases which come before them, and must adjudicate justly on those which do so far as the issues are capable of challenge. Such disputes may be at different points on the 'legal' or 'political' spectrum. Wherever they are on that spectrum, the proposal would limit the remedies available to the parties in the Courts if the matter fell within the UK's margin of appreciation, so prescribing the allocation of determinations as between the three Branches of the State.
- 52.** Thirdly, the proposal looked at as a whole (set out above), would impose a Strasbourg straitjacket. The state of UK rights law would now hinge exclusively on developments at the ECtHR, developments which may well be uncertain. A close analysis of the ECtHR case law and its anticipated direction in relation to the margin of appreciation would be a necessary preliminary issue when seeking to address the statutory bar to remedies. In so far as the proposal reduced the scope for relief in the UK Courts it would propel claimants to the ECtHR (contrary to the underlying aim of the HRA, of bringing rights home), without the matter receiving prior consideration from UK Courts⁹⁰. It would do nothing to enhance the standing or influence of UK Courts at the ECtHR.

90 As the proposal would seemingly not affect *common law* developments, it would be likely to skew litigation towards common law rights and remedies, perhaps going beyond the increased prominence which we have ourselves urged in Chapter Two.

- 53.** Fourthly, the preamble to IHRAR’s ToR requires us to weigh the benefits and risks of any proposed amendments to the HRA. In the majority of the Panel’s view, this proposal fails that test. That Parliamentary Sovereignty means that Parliament can legislate as it chooses, does not make it wise to do so. By (at the least) appearing to promote a curtailment of the powers of the Courts in favour of the other two Branches of the State, the proposal risks damage to the UK Justice System⁹¹. Moreover, no persuasive case has been advanced that UK Courts have been routinely or even frequently determining matters within the UK’s margin of appreciation that should best have been allocated to the other Branches of the State. To the contrary, as discussed above and in Chapter Two, the Courts have overall (if, inevitably, not always) demonstrated caution in drawing the line between matters that are for them to determine and matters best left to Parliament and Government as a matter of relative institutional competence.
- 54.** Fifthly, if there is cause for concern as to specific Court decisions, the remedies are apparent and do not call for statutory intervention of this nature. In keeping with the principle of mutual respect between the three Branches of the State, the promotion of appropriate judicial restraint furnishes an obvious route to follow. This plainly requires judicial leadership, but such an approach is not in any sense novel; looked at over time judicial restraint is the norm not the exception⁹². Matters, moreover, do not end there. The remedy lies in Parliament’s own hands to revise or correct any such case-law developments of which it disapproves. As, ex hypothesi, the Court decisions to which objection is taken fall within the UK’s margin of appreciation, Parliamentary reversal, revision or correction is straightforwardly available. That is the appropriate constitutional mechanism to adopt and is one that is well-established within the UK constitution.
- (iii) Amend the HRA to specify areas that fall outside the UK Courts’ institutional competence regarding the margin of appreciation or to set out factors that UK Courts should take into account where there is a tension between the margin of appreciation and the UK Courts’ approach to institutional competence***
- 55.** This option could in two different ways seek to clarify the UK Courts’ role concerning the operation of the margin of appreciation.

91 The importance of which was highlighted in the Law Society of England and Wales’ City Law Firms Roundtable. And see the important role that the UK’s legal services play in promoting economic growth: The CityUK Legal Services Report 2020 <<https://www.thecityuk.com/assets/2020/Reports/1e13ba3d56/Legal-excellence-internationally-renowned-UK-Legal-Services-2020.pdf>>.

92 See Chapter One at [41], Chapter Two at [186] and following.

- 56.** The first would specify in legislation particular areas that automatically fall outside the institutional competence of the Courts, such as issues that raise questions of social or ethical policy. Removing specific areas from the ambit of the HRA would, however, tend to do no more than increase applications against the UK to the ECtHR. It would thus frustrate the central aim of the HRA, and Convention itself: to have Convention rights determined in the UK. It would also ensure that any analysis carried out by the ECtHR of the UK's approach to the issue was not fully informed by the UK Courts' analysis of it, a factor which plays an important role in determining the ambit of the margin of appreciation. This version of the option thus has no positive benefit and serious drawbacks of the same nature as those found in the proposal for statutory reform rejected above. We **reject** this alternative.
- 57.** The second, which could take a similar approach to reform to Option Four in Chapter Two, would see section 2 amended so that it set out a number of factors, in addition to ECtHR case law, that should be taken into account by UK Courts where a tension arises between the scope and extent of the margin of appreciation, as set out in the ECtHR case law, and the traditional approach of UK Courts to institutional competence.
- 58.** This particular reform alternative was favoured by one panel member who would have recommended its adoption. It was said to address an imbalance resulting from the application of Convention rights under the HRA proceeding on the footing that the principal purpose of the Act is to minimise resort by UK litigants to the ECtHR. The premise would be that other factors, including the traditional approach to institutional competence, can only properly be balanced against that inferred objective – and accorded the appropriate weight – if they are given express articulation in the Act.
- 59.** It was further argued that without such legislative articulation of this approach, the default position necessarily suggested by the inferred objective of the HRA (and irrespective of whatever is said by section 2) is to subordinate the UK approach to legislative competence to the ECtHR's view of the margin of appreciation. The UK Courts, it was further suggested, have shown themselves willing and able to depart from that default position, but it would be better if they had a clearer legislative basis for doing so. Any such statutory articulation of the relevant factors would not need to be particularly detailed or specific. It could further, it was suggested, enable Parliament to make clear that it would be inappropriate for any UK Court to assess or 'question' the extent or quality of Parliament's consideration of any matter for the purposes of the HRA.

60. The majority of the Panel **rejected** this option. It is based, in their view, on a false premise: that the HRA’s principal aim was to reduce the number of claims brought against the UK before the ECtHR. The central aim of the HRA, as articulated by the Government of the day, was to give effect to Convention rights domestically⁹³. That would enable the other aims of the HRA to be achieved: the development of a UK rights culture; a UK contribution to ECtHR case law; and, a reduction in cases brought by individuals in the UK before the ECtHR. Any reduction in cases before the ECtHR would then flow from that. Nor did the majority conclude that an imbalance had arisen, as suggested. There was thus no basis to pursue this proposed reform.

(10) Potential Reform Options

61. The Panel considers the following to be potential reform options. It indicates here those which it does **not** recommend and which it does recommend.

(A) Options that are not recommended

(i) Option One: Amend the HRA to clarify the matters that fall outside the UK Courts’ institutional competence

62. A number of submissions suggested that there is scope for clarifying in the HRA the principles that govern the UK Courts’ approach to determining when matters fall outside their competence. While the Panel is a strong proponent of appropriate judicial restraint, we fear that this option would undermine it.
63. In principle this reform could be enacted through a reform to the HRA. Such an approach could codify the current principles that the UK Courts apply. It could, for instance, specify that they consider whether an issue is one that raises questions of national security, financial matters, questions of social policy, or moral or political issues. It could then indicate that where such matters arise, UK Courts are to consider whether, on the facts of the particular case and taking into account ECtHR case law, they fall within Parliament or the Government’s institutional competence or their own.

⁹³ Home Office, *Bringing Rights Back Home* at 1.19, ‘Our aim is a straightforward one. It is to make more directly accessible the rights which the British people already enjoy under the Convention. In other words, to bring those rights home.’

64. While such an approach could be adopted, in a similar fashion to Option Four in Chapter Two, it raises the same difficulties considered there, e.g., the risk, as suggested by the Law Society of England and Wales, concerning disagreement over the meaning of any statutory guiding principles, as noted above, on the one hand, and the fact that the principles may be specified at too high a level of generality to be properly beneficial⁹⁴, on the other. While again recognising the attractions of the provision of guidance to the Courts, the Panel does not recommend this option.

(ii) Option Two: Increased opportunity for Parliament to engage with issues

65. Consideration could be given to increasing Parliamentary engagement in issues that fall within the margin of appreciation. This option goes wider than the present question. We think there is force in it. However, we consider it further – and in a broader context – later in our Report. We therefore note it at this stage and the fact that we recommend its introduction more broadly in Chapter Five⁹⁵.

(B) Recommended Option

(iii) Option Three: No changes (other than those contained in Chapter Two, Option Five) to the current statutory position regarding the margin of appreciation

66. The final option is to leave section 2, in so far as the margin of appreciation is concerned, as it is currently drafted and interpreted by the Courts⁹⁶. As already foreshadowed, this approach has much to commend it. The UK Courts have developed a careful and cautious approach to determining issues that fall within the margin of appreciation. They have shown proper consideration for their role, and the respective roles of Parliament and Government. They have done so consistently over the first twenty years of the HRA. That is not to say that there have not been individual decisions that can be questioned. Inevitably in any areas individual decisions will and can be open to question. At the level of principle, however, the UK Courts have developed and applied a properly principled approach in this area, guided by judicial restraint. We cannot see any reasonable basis for departing from it.

(11) Recommended Reform Option

67. For the reasons set out above, the Panel recommends **Option Three**. No devolution concerns arise.

⁹⁴ See Chapter Two at [180-181]. See too, the evidence given by Lord Dyson to the JCHR on 12 October 2020: Joint Committee on Human Rights, Oral evidence: Judicial review and enforcing human rights, HC 871, Oral Evidence Transcript at 11 – 12, <<https://committees.parliament.uk/oralevidence/1034/pdf/>>.

⁹⁵ See Chapter Five, Option Six.

⁹⁶ On the Panel's recommendations to amend section 2 to clarify the order of priority of rights protection, see Chapter Two, Option Five.

Chapter Four – Judicial Dialogue

(1) Introduction

1. We now turn to the final question under Theme I of the ToR: judicial dialogue. Question 1(c) of the ToR is in these terms:

‘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 be strengthened and preserved?’

2. Question 1(c) concerns the relationship between UK Courts and the ECtHR. We noted in Chapter Two that one of the HRA’s aims when it was introduced was to enable UK Courts to play an important role in the development of ECtHR case law¹. Judicial dialogue is a principal means by which they can do so. It is recognised by the Convention states to be an integral part of the system of rights protection created by the Convention, as recently emphasised in the Copenhagen Declaration².

¹ See Chapter Two at [29]; and see, for instance Jack Straw MP, Hansard, HC, 16 February 1998, vol. 307, col. 770, in J. Cooper & A. Marshall-Williams at 4.

² See Chapter Three at [15].

The Copenhagen Declaration – Judicial dialogue – Integral to the Convention’s operation³

In April 2018, the Convention states, including the UK, issued the Copenhagen Declaration. It affirmed, amongst other things, the central importance of dialogue, both judicial and political, between the states and the ECtHR to the effective operation of the Convention.

‘For a system of shared responsibility to be effective, there must be good interaction between the national and European level. This implies, in keeping with the independence of the Court and the binding nature of its judgments, a constructive and continuous dialogue between the States Parties and the Court on their respective roles in the implementation and development of the Convention system, including the Court’s development of the rights and obligations set out in the Convention. Civil society should be involved in this dialogue. Such interaction may anchor the development of human rights more solidly in European democracies...

The Conference [therefore underlines] the need for dialogue, at both judicial and political levels, as a means of ensuring a stronger interaction between the national and European levels of the system.’

3. The Panel recommends the following reform option.

Recommended reform option⁴

To continue to enable judicial dialogue, both formal and informal, to develop organically.

4. This option is intended to enhance the already strong judicial dialogue that has developed beneficially since the HRA came into force. It also underlines the important role Parliament is capable of playing when considering legislation. The option would be reinforced were additional information on informal dialogue available on the websites of the UK’s Judiciaries.
5. Full details of the recommendation and other reform options that the Panel has considered are set out in Parts 10 - 12 of this chapter.

³ Copenhagen Declaration at [33] and [36].

⁴ See Option Five: the Recommended Reform Option, below.

(2) Defining Judicial Dialogue

6. Judicial dialogue, as the Joint Committee on Human Rights has noted⁵, can refer to both formal and informal communication between UK Courts and the ECtHR.

Formal judicial dialogue (formal dialogue)

Formal dialogue, primarily, takes place between UK Courts and the ECtHR through their judgments, particularly through analysis of Convention rights and ECtHR case law by UK Courts.

This can occur in cases where the UK is a respondent to proceedings before the ECtHR.

It can also arise where the UK is not a party to the proceedings, where it intervenes in proceedings that are brought against other Convention states, or where it intervenes in proceedings that seek a non-binding advisory opinion of the ECtHR under Protocol 16 of the Convention⁶.

Informal judicial dialogue (informal dialogue)

Informal dialogue takes place outside of Court judgments. It takes place through informal meetings between UK judges and judges of the ECtHR.

In such meetings they can informally exchange views, discuss matters of common interest and, particularly, inform each other of developments in domestic rights and Convention rights case law.

7. In this chapter, the Panel considers both forms of judicial dialogue.

⁵ Joint Committee on Human Rights, *The Government's Independent Review of the Human Rights Act*, (Third Report of Session 2021-22) at [66] <<https://committees.parliament.uk/publications/6592/documents/71259/default/>>.

⁶ *Summary of the meeting between members of the Independent Human Rights Act Review and a delegation of Judges from the European Court of Human Rights by videoconference* (20 May 2021) at 2-3.

(3) Judicial Dialogue – The Context

8. The UK has been a party to the Convention since 1951⁷. From 1959, when it was established, the ECtHR considered the UK's compliance with Convention rights in claims brought against the UK. It did so, generally, without the benefit of detailed analysis by UK Courts of the application of those rights in the UK⁸. The HRA was intended to enable the UK Courts to take a more active role in helping the ECtHR develop its case law on Convention rights. It was to do so by enabling UK judges to analyse Convention rights in a domestic context, and thus enable that analysis to be considered by the ECtHR when it considered its interpretation and development of those rights.

Judicial dialogue in Rights Brought Home – the 1997 Government White Paper⁹

In the Government White Paper, which preceded the introduction of the Human Rights Bill in Parliament, the HRA's aim of increasing judicial dialogue was explained in this way:

'The Convention is often described as a "living instrument" because it is interpreted by the European Court in the light of present day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention...'

9. This intention was elaborated in Parliament, as was an anticipated consequence: by taking a more active role in analysing ECtHR case law and enabling the ECtHR to assess that reasoning where cases were brought against the UK before it, there would be a reduction in adverse findings against the UK. Enabling UK Courts to take into account ECtHR case law, as section 2 required, would thus not only enable Convention rights to be given effect in the UK. It would also enable the UK Courts to contribute to the development of ECtHR case law through their judgments, while also reducing the possibility that the UK would be found by the ECtHR to have violated Convention rights.

⁷ See Chapter One at [16].

⁸ As noted in Liberty's *Submission to the Independent Human Rights Act Review Panel* at 9. There were exceptions to this as noted by M. Hunt (1998).

⁹ *Rights Brought Home: The Human Rights Bill* (CM 3782) (1997) at [2.5].

Jack Straw MP – on judicial dialogue when introducing the HRA to Parliament in 1998¹⁰

‘There will be another benefit [to introducing the HRA]: British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights across Europe. It is also now plain that the approach that the United Kingdom has so far adopted to the Convention has not stood the test of time [i.e., being a party to it but not giving domestic effect to the Convention rights]. The most obvious proof of that lies in the number of cases in which the European Court has found that there have been violations of Convention rights in the United Kingdom...’

- 10.** One particular benefit of enabling UK Courts to engage in a dialogue with the ECtHR was noted by Lord Bingham during the HRA’s passage through Parliament. He noted that if UK judges were able to analyse ECtHR case law when considering the application of Convention rights domestically (a form of dialogue initiated by the ECtHR) they would be able to explain to the ECtHR the UK national context effectively (a form of dialogue initiated by the UK). UK judgments would therefore be able to explain relevant social, cultural and legal issues that the ECtHR may not otherwise have fully appreciated if the matter came before it. They could, consequently, put the ECtHR in a better position to assess UK compliance with Convention rights.

Lord Bingham – the explanatory benefit of judicial dialogue¹¹

‘... when cases from this country reach Strasbourg ... the [ECtHR] will have the benefit of a considered judgment by a British judge on the point in issue. That will mean, I hope, that some of our more idiosyncratic national procedures and practices may be better understood.’

- 11.** The HRA’s introduction therefore anticipated that UK Courts would play a key role in achieving a number of aims through their judgments. Its focus was thus on formal dialogue. Those aims were to be effected through section 2 of the HRA.

10 Jack Straw MP, Hansard, HC, 16 February 1998, vol. 307, col. 770, in J. Cooper & A. Marshall-Williams at 4.

11 Lord Bingham, Hansard, HL, 3 November 1997, vol. 582, col 1245 cited in: Human Rights Lawyers Association, *Submission to the Independent Human Rights Act Review Panel* at 8.

Summary of judicial dialogue's aims

Judicial dialogue was intended to enable:

- UK judges to play an active role in the development of human rights case law in Europe, including the ECtHR;
- UK judges to take proper account of the Convention and ECtHR case law in its domestic decisions so as to enable breaches of those rights to be remedied in the UK, thus reducing the number of claims brought against the UK before the ECtHR and the number of adverse decisions made against the UK;
- the ECtHR to more fully understand the UK domestic context when assessing claims brought against the UK.

(4) Formal Dialogue – The UK Courts' approach

- 12.** Formal dialogue depends on the approach taken by UK Courts to ECtHR case law. Its success, or not, therefore rests on how they apply section 2 of the HRA. It is apparent to the Panel, and was the view strongly expressed in the submissions made to it¹², that the UK Courts have, using section 2, developed an effective formal dialogue with the ECtHR. In considering the proposed reform to section 2 in Chapter Two¹³, the Panel has carefully taken into account the need to ensure that it does nothing to jeopardise this effective formal dialogue.

Evidence submitted to IHRAR by David Harries

'It is clear from the past dozen years of HRA jurisprudence that our courts (the Supreme Court in particular) have been in a continual dialogue with the European Court of Human Rights, and indeed have been successful in effecting change, i.e. in making the latter Court change its mind.'

12 See, for instance, ALBA, *Submission to the Independent Human Rights Act Review Panel* at [22]; Garden Court Chambers, *Submission to the Independent Human Rights Act Review Panel* at [34] and following; Comment made at The Law Society of England and Wales (Human Rights) Roundtable (23 March 2021) at 3, and (Commercial Firms) Roundtable (24 March 2021) at 3.

13 See Chapter Two, recommended reform option.

13. In the Panel's view codifying **Osborn**, as recommended in Chapter Two, will not adversely affect the UK Court's formal dialogue with the ECtHR. On the contrary, by ensuring a consistent and structured approach to the application of domestic law, the common law and ECtHR case law, formal dialogue ought to be strengthened by further enhancing UK Courts' '*critical engagement*¹⁴' with, and analysis of, Convention rights. It will enable UK Courts to develop a more distinctly British contribution to their analysis, which could then properly feed into the ECtHR's considerations and case law¹⁵.
14. With that in mind, we turn to consider how the UK Courts have approached formal dialogue. In its submission to the *CfE*, ALBA identified three broad circumstances in which formal dialogue arises.

ALBA's summary of the three circumstances where formal dialogue arises¹⁶

ALBA identified three circumstances where formal dialogue arises:

- (1) *where domestic courts consider a key or determinative judgment of the ECtHR is wrong... ;*
- (2) *in relation to the margin of appreciation ...; and*
- (3) *where there is a lack of clarity or inconsistency in the ECtHR's [case law].'*

Additionally, the Panel would add a further circumstance where formal dialogue may arise:

- (4) where the UK Courts carefully take into account ECtHR case law.

(i) UK Courts consider ECtHR case law is wrongly decided

15. UK Courts have, on a number of occasions, declined to follow ECtHR case law when they have concluded that it has been wrongly decided or, specifically, has not fully understood the UK's approach. Such instances have been few. That does not mean, as one submission to the *CfE* put it, that there would appear to be little evidence of judicial dialogue¹⁷. What it means is that there have been a limited number of instances where the UK Courts have considered that this form of formal dialogue is necessary. Taken together with other types of formal dialogue, there is good evidence that UK Courts have taken a properly robust approach to formal dialogue.

14 The need for enhanced critical engagement is noted by the Society of Conservative Lawyers, *Submission to the Independent Human Rights Act Review Panel* at 11.

15 See *ibid* at 15.

16 ALBA, *Submission to the Independent Human Rights Act Review Panel* at [24].

17 Anonymous, *Submission to the Independent Human Rights Act Review Panel* at 33, 'I haven't seen much evidence of this 'judicial dialogue'.'

16. As a starting point, as Lord Mance put it in **R (Chester)**, where UK Courts have doubts about the approach taken by the ECtHR, they can and do decline to follow the ECtHR. In doing so they can be and are confident that a *'reasoned expression of a diverging national viewpoint will lead to a serious review of the position in Strasbourg'*¹⁸. In *R (Animal Defenders International) v Secretary of State For Culture, Media and Sport* (2008)¹⁹ (discussed below²⁰), where the House of Lords declined to follow the ECtHR in circumstances where the legislative provisions in question were enacted without a statement of compatibility having been made, the ultimate result was that the ECtHR reconsidered its approach and the position reached by the UK Courts was ultimately vindicated²¹.

***R (Animal Defenders International) v Secretary of State For Culture, Media and Sport* (2008)²²**

Sections 319 to 321 of the Communications Act 2003 prohibited political advertising. Animal Defenders International, which was a not-for-profit company the aim of which was to suppress animal cruelty lawfully, wished to launch a media campaign to *'public attention towards the use of primates by humans and the threat presented by such use to the survival of primates.'* The Broadcast Advertising Clearance Centre declined to clear the advertising campaign for transmission on the television. It did so as it would breach the prohibition on political advertising. It was common ground that the prohibition, contained in the 2003 Act, did interfere with the article 10 Convention right (freedom of expression).

The House of Lords held that the interference was not such as to breach that right. It therefore did not grant a declaration of incompatibility under section 4 of the HRA. The House of Lords' conclusion was subsequently vindicated by the ECtHR²³.

17. In other cases, by contrast, such as **Pinnock** which was the last in a line of House of Lords and Supreme Court decisions that had considered ECtHR decisions and, in turn, had been considered by the ECtHR, the ECtHR's position was ultimately confirmed²⁴. As Lady Hale noted in *Akerman-Livingstone v Aster Communities Ltd* (2015)²⁵,

18 [2013] UKSC 63; [2014] 1 AC 271 at [27].

19 *R (Animal Defenders International) v Secretary of State For Culture, Media and Sport* [2008] UKHL 15, [2008] AC 1312.

20 Also see Chapter Two at [47] and [71].

21 *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 at [20].

22 *R (Animal Defenders International) v Secretary of State For Culture, Media and Sport* [2008] UKHL 15, [2008] AC 1312.

23 *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21.

24 Also see *Ali v Birmingham City Council* [2010] UKSC 8; [2010] 2 AC 39 and *Poshteh v Kensington and Chelsea Royal London Borough Council* [2017] UKSC 36, [2017] AC 624, esp. at [32]-[37], where the Supreme Court declined to follow a decision of the ECtHR, which it concluded had failed to properly consider UK law. It chose to wait until the ECtHR had reconsidered the matter fully taking account of UK case law, and particularly its decision in *Ali*.

25 *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15; [2015] 1 AC 1399; also see the same point in *McDonald v McDonald* [2016] UKSC 28; [2017] AC 273 at [34], '*Pinnock represented the resolution of a protracted inter-judicial dialogue between the House of Lords and the Strasbourg court.*'

'The Supreme Court cases of Pinnock and Powell were the culmination of a long process of dialogue between the highest courts in the United Kingdom and the European Court of Human Rights in Strasbourg as to the extent to which the protection given to a person's "home" under article 8 of the European Convention applied to social housing which the occupier had no right to occupy in domestic law.'

18. These examples illustrate that, where necessary, a robust and effective dialogue between the UK Courts and the ECtHR has been and is properly utilised by the UK Courts. The ultimate result is that both the UK Courts and the ECtHR learn from and influence the other. The effectiveness of this type of formal dialogue is particularly well illustrated by the following two examples.
19. The first is *R v Horncastle* (2009)²⁶ (***Horncastle***), which concerned the approach to the admissibility of hearsay evidence in English and Welsh criminal proceedings. As ALBA rightly note in their submission to the CfE, as a result of ***Horncastle***:

*'The ECtHR adjusted its position to address the criticism expressed by the [UK Supreme Court]. This is a good example of how domestic courts can raise concerns about ECtHR jurisprudence relating to the UK and get Strasbourg to reconsider its position.'*²⁷

²⁶ *R v Horncastle* [2009] UKSC 14; [2010] 2 WLR 47

²⁷ ALBA, *Submission to the Independent Human Rights Act Review Panel* at [26].

Horncastle

The UK Supreme Court's approach

The UK Supreme Court considered the ECtHR's approach to the admissibility of hearsay evidence in criminal proceedings in England and Wales in *Al-Khawaja & Tahery v United Kingdom*²⁸.

It concluded that the ECtHR had failed to fully appreciate the nature of the English and Welsh criminal process. Consequently, while taking into account ECtHR case law as required by section 2 of the HRA, the Supreme Court declined to follow it.

Lord Phillips PSC, who gave the judgment of the Court, explained that it appeared that the ECtHR's approach to the issue had developed primarily from a consideration of cases emanating from civil law countries, i.e., from Convention states with significantly different legal traditions and approaches to that of the UK as a common law country.

As a consequence, he concluded²⁹, the ECtHR's approach to the issue had *'... developed without full consideration of the safeguards against an unfair trial that exist under the common law procedure.'*

He went on to conclude that he suspected that the ECtHR had not *'given detailed consideration to the English law of admissibility of evidence, and the changes made to that law... intended to ensure that English law complies with the requirements of article 6(1) and (3)(d).'*

The ECtHR's response to the UK Supreme Court

The UK Supreme Court's decision in ***Horncastle*** was considered by the ECtHR's Grand Chamber when the issue returned to it in *Al-Khawaja v UK* 26766/05 (2011)³⁰. The ECtHR reassessed its approach and concluded the UK's approach did not breach article 6 of the Convention.

In reaching his decision in the case, Judge Nicolas Bratza, noted the importance of the case as an example of formal dialogue between the two Courts,

'The present case affords, to my mind, a good example of the judicial dialogue between national courts and the European Court on the application of the Convention to which Lord Phillips was referring. The Horncastle case was decided by the Supreme Court after delivery of the judgment of the Chamber in the present case, to which I was a party, and it was, in part, in order to enable the criticisms of that judgment to be examined that the Panel of the Grand Chamber accepted the request of the respondent Government to refer the case to the Grand Chamber.'

²⁸ *Al-Khawaja & Tahery v United Kingdom* (2009) 49 EHRR 1.

²⁹ *Ibid* at [107].

³⁰ *Al-Khawaja v UK* 26766/05 [2011] ECHR 2127, (2012) 54 EHRR 23.

His views were shared by Judges Sajó and Karaka:

'We were invited by the Supreme Court of the United Kingdom (R v. Horncastle and others [2009] UKSC 14) to clarify the principles behind the exclusionary rule in cases where hearsay evidence is the sole or decisive evidence. Such requests, which reflect genuine concerns about, and apparent inconsistencies within, our case-law, deserve due consideration to enable a bona fide dialogue to take place.'

Subsequently, *Taxquet v Belgium - 926/05 (2010)*³¹ affirmed it was not the ECtHR's role to 'standardise' the 'variety of legal systems existing in Europe'³². It did so in the context of considering trial by jury.

It is apparent therefore that the ECtHR has accepted that there is no basis under the Convention for it to require a uniform approach to criminal justice systems across the Convention states.

- 20.** The second example concerns the ECtHR's approach to 'whole life sentences', which was considered by the Court of Appeal³³ (Criminal Division) in *R v McLoughlin (2014)*³⁴ (**McLoughlin**).

31 *Taxquet v Belgium - 926/05* [2010] ECHR 1806; [2011] Crim LR 236.

32 *Ibid* at [84].

33 In England and Wales.

34 *R v McLoughlin (also known as Attorney General's Reference (No.69 of 2013))* [2014] EWCA Crim 188; [2014] 1 WLR 3964.

McLoughlin

The Court of Appeal (Criminal Division) considered the approach taken by the ECtHR in *Vinter v United Kingdom* (66069/09) (2013) to whole life sentences³⁵.

In *Vinter*, the ECtHR had held that the imposition of whole life sentences for individuals convicted of murder breached article 3 of the Convention (the prohibition on ‘inhuman or degrading treatment or punishment’). It did so because it concluded that there was no possibility of the sentence being reduced.

Formal dialogue was thus initiated by the ECtHR.

The Court of Appeal (Criminal Division) in **McLoughlin** specifically considered the ECtHR’s decision in *Vinter*. It did so in the context of examining whether whole life sentences imposed under section 260 of the Criminal Justice Act 2003 were compatible with article 3 of the Convention. In doing so it, – as the ECtHR’s Grand Chamber would later note, ‘responded explicitly to the *Vinter* critique [of the ECtHR]’³⁶.

The Court of Appeal (Criminal Division) clarified the approach to such sentences, and the ability to review and reduce them.

Subsequently, the ECtHR’s Grand Chamber in *Hutchinson v The United Kingdom - 57592/08* (2017), when the issue returned to it, assessed the Court of Appeal’s analysis. The Grand Chamber accepted that the Court of Appeal had clarified the position in UK law and had resolved the matter that had led to its decision in *Vinter*. As the Grand Chamber explained it

*‘the McLoughlin decision has dispelled the lack of clarity identified in Vinter arising out of the discrepancy within the domestic system between the applicable law and the published official policy.’*³⁷

Formal dialogue had thus been the subject of effective consideration by the UK Courts and the ECtHR.

- 21.** These two examples illustrate that the UK Courts have been, and are willing, to depart from ECtHR case law where they consider it has misunderstood the position in the UK. That such examples are few does not reduce the importance of this aspect of formal dialogue. Rather it shows that instances where the ECtHR case law misunderstands UK law are few, and that when it does, the UK Courts quite properly – as the HRA intended – are willing to engage in a constructive critique of that case law.

³⁵ *Vinter v United Kingdom* (66069/09) [2013] ECHR 645; (2016) 63 EHRR 1.

³⁶ *Hutchinson v The United Kingdom - 57592/08 - Chamber Judgment* [2017] ECHR 65; 43 BHRC 667 at [39].

³⁷ *Ibid* at [70].

22. One weakness in this aspect of formal dialogue is that it could be said to be limited in its application. In **R (Chester)** Lord Mance expressed the view that this type of dialogue was limited to situations where ECtHR authority either did not form a clear and constant line of authority or, if a Grand Chamber decision, involved a significant error. As he put it:

*'In relation to authority consisting of one or more simple Chamber decisions, dialogue with Strasbourg by national courts, including the Supreme Court, has proved valuable in recent years. The process enables national courts to express their concerns and, in an appropriate case such as R v Horncastle, to refuse to follow Strasbourg case-law in the confidence that the reasoned expression of a diverging national viewpoint will lead to a serious review of the position in Strasbourg. But there are limits to this process, particularly where the matter has been already to a Grand Chamber once or, even more so, as in this case, twice. It would have then to involve some truly fundamental principle of our law or some most egregious oversight or misunderstanding before it could be appropriate for this Court to contemplate an outright refusal to follow Strasbourg authority at the Grand Chamber level.'*³⁸

23. However, a more nuanced view appears now to be taken – consistent with the more developed approach to the **Ullah** principle, which we discussed in Chapter Two. Lord Mance's observation was not the final word on the issue and ought to be considered as guidance rather than setting out a necessary pre-condition for UK Courts to enter into a formal dialogue with the ECtHR. The question whether to enter into formal dialogue should be viewed as 'context-specific', consistently with how the UK Courts now treat ECtHR case law when interpreting Convention rights³⁹.

(ii) Formal dialogue in the margin of appreciation

24. The second circumstance where the UK Courts have developed formal dialogue is where they consider issues that fall within the margin of appreciation.
25. We discussed this issue in Chapters Two and Three, when considering how the UK Courts have developed their approach to the **Ullah** principle. Examples where the Courts have shown a willingness to develop case law where a matter falls within the margin of appreciation are, for instance, **Re G**⁴⁰; and **Rabone**⁴¹; the last emphasising that the UK Courts through the incremental development of the common law outside the Convention can also play an important role in terms of formal dialogue.

³⁸ (*R*) *Chester v Secretary of State for Justice* [2013] UKSC 63, [2014] 1 AC 271 at [27].

³⁹ See **Abdurahman**, as noted in Chapter Two at [90] and following.

⁴⁰ See Chapter Two at [66].

⁴¹ See Chapter Two at [62] and following.

26. As Lord Reed PSC explained in his response to the *CfE* this is an area where UK Courts have gone further than the ECtHR could have gone. They may, conversely, develop the UK's approach so that it does not go as far as the ECtHR in its case law concerning other Convention states, as long as in doing so it remains within the margin of appreciation.

Lord Reed PSC on developments in the margin of appreciation

*'On some occasions, however, domestic judges have considered that they should interpret and apply Convention rights in a more expansive way than the ECtHR would interpret and apply the ECHR if it had to address the same question. This issue has arisen in contexts where the ECtHR allows a contracting state a margin of appreciation in the application of a Convention right, with the result that it would find no violation, but domestic judges have not accepted that they should allow an equivalent margin of appreciation or discretionary area of judgment to the relevant public authority. The leading example is the decision of the majority of the House of Lords in *Re G (Adoption: Unmarried Couple)*, which concerned legislation in Northern Ireland which prevented the adoption of children by unmarried couples, at a time when it was unclear whether such a ban would be held by the ECtHR to violate the ECHR. A similar approach was followed in some later judgments. In such cases, the domestic court has been prepared to find that a Convention right has been violated, although the ECtHR would not find that there was any breach of the ECHR.'*

The later judgments referred to in the extract from Lord Reed PSC's response were: **Nicklinson**; *Re Northern Ireland Human Rights Commission's Application for Judicial Review* (2018); and *R (Steinfeld) v Secretary of State for International Development* (2018)⁴².

27. Where the UK Courts adopt their own approach to matters within the margin of appreciation, in cases such as those referred to here, their judgments can form the basis of later consideration by the ECtHR as it develops its case law. The formal dialogue takes place through the UK Courts demonstrating their own distinctive approach to the issue at hand. The ECtHR can then take that into account, just as it can and does take into account the approaches taken by the courts of other Convention states. That the UK Courts have taken a more flexible approach to the **Ullah** principle latterly, as we discussed in Chapter Two⁴³, supports the conclusion that this aspect of formal dialogue is one that they are well-able to implement. That more flexible approach does, however – and again as we concluded in Section 12 of Chapter Two – maintain a cautious approach to developing rights protection in the margin of appreciation.

⁴² *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27; [2018] HRLR 14; *R (Steinfeld) v Secretary of State for International Development* [2018] UKSC 32; [2020] AC 1.

⁴³ See Chapter Two at [78] and following.

(iii) UK Courts consider that ECtHR case law lacks clarity or consistency

28. The third circumstance where the UK Courts can be seen to have entered into a formal dialogue with the ECtHR is where they have concluded that ECtHR case law is either unclear or lacking consistency. This type of dialogue seeks to promote the effective development of ECtHR case law. Two examples illustrate this type of formal dialogue.

R (Quila) v Secretary of State for the Home Department (2011)⁴⁴

The Secretary of State refused to grant an application for marriage visas on the grounds that when they arrived in the UK, the applicants and/or their spouses were under the age of 21. The minimum age to apply for such a visa was 21. It had been raised to that level, having previously been set at the age of 18, to act as a deterrent against forced marriages.

The UK Supreme Court considered whether the Secretary of State's decision breached the applicants' article 8 (right to family life) Convention right, as had been held to be the case by the Court of Appeal. The UK Supreme Court upheld that Court of Appeal's decision.

In considering the issue, the UK Supreme Court analysed ECtHR case law and concluded that it failed to set out a clear and constant approach.

*'Having duly taken account of the decision in the Abdulaziz case pursuant to section 2 of the Human Rights Act 1998, we should in my view decline to follow it. It is an old decision. There was dissent from it even at the time. More recent decisions of the Court of Human Rights, in particular the Boultif case 33 EHRR 1179 and the Tuquabo-Tekle case [2006] 1 FLR 798, are inconsistent with it. There is no "clear and consistent jurisprudence" of the Court of Human Rights which our courts ought to follow: see R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, para 26, per Lord Slynn of Hadley.'*⁴⁵

⁴⁴ *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621.

⁴⁵ *Ibid* at [43].

R (Haney) v Secretary of State for Justice (2014)⁴⁶

Four prisoners serving indeterminate life sentences appealed from decisions holding that their continued detention in prison, having served the minimum term of their sentences, was lawful. Their continued detention was said to breach their article 5 (right to liberty and security) Convention right.

The UK Supreme Court allowed, in part, the appeals. In considering the issue, it declined to follow a previous decision of the ECtHR: *James v UK* (2013)⁴⁷. It did so because the reasoning in that decision was not based on previous ECtHR authority, it was impractical to apply, and it appeared to be based on an ‘*over-expanded and inappropriate reading*’ of the text of article 5(1) of the Convention⁴⁸.

29. In both cases we can see the UK Courts setting out a careful analysis of the issue and their approach to the ECtHR case law. In doing so they provided a clear template for the ECtHR to reconsider its own case law and clarify the position, should the opportunity arise as it did in cases such as ***Horncastle, Rabone***, or *R (Animal Defenders International) v Secretary of State For Culture, Media and Sport* (2008).

(iv) UK Courts carefully take into account ECtHR case law

30. The three circumstances where formal dialogue occurs identified by ALBA are underpinned by a more general circumstance: the careful analysis of ECtHR case law where necessary by the UK Courts.

31. This can be illustrated by *Ndidi v The United Kingdom - 41215/14* (2017)⁴⁹ (***Ndidi***). The case concerned a challenge to an order for deportation based on an alleged breach of the article 8 Convention right to family life. The matter had been subjected to careful analysis by the UK Courts. As the ECtHR concluded:

*‘... there is no doubt that in the present case the First-tier Tribunal – and, in fact, all the domestic decision-makers – gave thorough and careful consideration to the proportionality test required by Article 8 of the Convention, including the relevant criteria set out in this Court’s case-law, and, having balanced the applicant’s Article 8 rights against the public interest in deportation, concluded that his deportation would not constitute a disproportionate interference with his right to respect for his family and private life.’*⁵⁰

⁴⁶ *R (Haney) v Secretary of State for Justice* [2014] UKSC 66; [2015] AC 1344.

⁴⁷ *James v United Kingdom* (25119/09) (2013) 56 E.H.R.R. 12.

⁴⁸ *Ibid* at [32]-[35].

⁴⁹ *Ndidi v The United Kingdom - 41215/14* [2017] ECHR 781.

⁵⁰ *Ibid* at [81].

- 32.** This aspect of formal dialogue does not relate to influencing the ECtHR to develop or refine its case law. Its focus is on the UK Courts demonstrating through their judgments UK compliance with the Convention. It is particularly important, even if generally unnoticed, as a means by which the UK is able to properly demonstrate to the ECtHR that it has carried out its primary role in securing Convention rights. Consequently, it is an important factor in promoting the proper application of the principle of subsidiarity. It enables the ECtHR to provide the UK with a wider margin of appreciation. As President Spano, Judge Eicke and Judge O’Leary of the ECtHR explained by reference to **Ndidi**:

‘In States in which the substantive embedding of the Convention had been largely successful, like the UK, the Court was in a position to take on a more “framework-oriented” role when reviewing domestic decision-making and to assess whether certain material elements allowed it to grant deference to national authorities. This was, by and large, limited to qualified rights and not to core or absolute rights. Of course, the Court reserved to itself the final say on Convention-compliance.

For example, in the case of Ndidi v UK (2017) the Court established the “strong reasons” principle with respect to Article 8 cases, “in Article 8 cases the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant’s personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so. . .”⁵¹

- 33.** By analysing and applying ECtHR case law in their decisions, through the application of section 2 of the HRA, UK Courts can generally ensure that their decisions fall within the ‘strong reasons’ approach to scrutiny of Convention compliance by national (UK) authorities. Such formal dialogue, not aimed at correcting perceived misunderstandings of UK law or seeking clarity from the ECtHR, ought not to be under-estimated. It shows one of the real benefits of the section 2 approach to analysis of ECtHR case law, which our recommendation in Chapter Two seeks to enhance. Such analyses by the UK Courts not only bring rights home in the sense that they enable Convention rights to be fully considered in the UK Courts, but they also do so by helping to demonstrate to the ECtHR that the UK has complied effectively with the requirements of the Convention.

⁵¹ Summary of the meeting between members of the Independent Human Rights Act Review and a delegation of Judges from the European Court of Human Rights by videoconference (20 May 2021) at 2.

34. The importance of the UK Courts' analytical approach to ECtHR case law, a consequence of the common law method in judgment writing, was further highlighted to IHRAR in their meeting with President Spano, Judge Eicke and Judge O'Leary:

*'Analysis of Strasbourg case-law by UK superior courts showed an in-depth understanding of and engagement with the Court's case-law.'*⁵²

Accordingly, formal dialogue goes beyond the situation where UK Courts are directly responding to ECtHR judgments, as was the case in **Horncastle**, where the UK is party to proceedings before the ECtHR, or where the UK is intervening in either proceedings before the ECtHR or where an advisory opinion is being sought by another Convention state under Protocol 16 to the Convention.

Formal dialogue goes beyond the situation where a UK is party to proceedings before the ECtHR

*'Another form of judicial dialogue outlined was the possibility to intervene in proceedings as a third party. The UK intervened relatively frequently in cases before the Court and this practice was further encouraged recently in the Copenhagen Declaration (2018). Such interventions were particularly seen in Grand Chamber cases, where the Court was dealing with major issues of principle. One example of this was the UK's intervention in M.N. and Others v Belgium (2020)⁵³, which concerned the Convention's extra-territorial jurisdiction. The Court welcomed this practice. Third party interventions were also possible under Protocol No. 16 to the Convention where a member State requested a non-binding advisory opinion. It was notable that in the first advisory opinion sought by the French Court of Cassation under Protocol No. 16 both the UK and Ireland intervened despite not having ratified the Protocol.'*⁵⁴

35. Formal dialogue also takes place *indirectly* where UK Court judgments are taken into account by the ECtHR in proceedings to which the UK is not a party. As President Spano, Judge Eicke and Judge O'Leary emphasised:

*'... the sophisticated analysis by the UK domestic courts of the Strasbourg case-law was relied upon in its [the ECtHR's] judgments against other States. The most recent example was the Grand Chamber case of S., V. and A. v. Denmark [GC], nos. 35553/12 and 2 others, 22 October 2018. Sometimes the reasoning in UK domestic judgments, like that of other superior courts, is discussed in depth by the judicial formation even if that is not expressly reflected or recorded in the final judgment.'*⁵⁵

52 Summary of the meeting between members of the Independent Human Rights Act Review and a delegation of Judges from the European Court of Human Rights by videoconference (20 May 2021) at 3. Also see President Spano and Judge Eicke's written evidence to the Joint Committee on Human Rights (17 February 2021) <<https://committees.parliament.uk/writtenevidence/22906/html/>>.

53 M.N. v Belgium - 3599/18 (2020).

54 Summary of the meeting between members of the Independent Human Rights Act Review and a delegation of Judges from the European Court of Human Rights by videoconference (20 May 2021) at 3.

55 Ibid at 3. Also see President Spano and Judge Eicke's written evidence to the Joint Committee on Human Rights (17 February 2021).

- 36.** In *S, V and A v Denmark - 35553/12* (2018)⁵⁶ (**S, V and A**), before the ECtHR's Grand Chamber, the issue was whether the detention of football supporters in Denmark had breached article 5 of the Convention (the right to liberty and security). Though the UK was not a party to the case, the Grand Chamber considered the UK Supreme Court's decision in *R (Hicks) v The Commissioner of Police for the Metropolis* (2017)⁵⁷. In *Hicks* the UK Supreme Court had declined to follow the decision of the ECtHR's Grand Chamber in *Osterdorf v Germany*⁵⁸. In doing so it set out a detailed analysis of the Grand Chamber's reasoning on the application of article 5(1) of the Convention. It held that the Grand Chamber judgment did not set out a conclusive approach. Relying on the UK Supreme Court's decision in *Hicks* the Grand Chamber in **S, V and A**, departed from the approach in *Osterdorf*, clarifying its approach in the light of the UK Supreme Court's analysis.
- 37.** This form of indirect formal dialogue can arise in two ways. Parties to proceedings before the ECtHR may rely upon UK Court judgments in support of their claims. Additionally, the ECtHR itself can raise the relevance of such judgments. As President Spano, Judge Eicke and Judge O'Leary explained, this possibility arises due to the nature of the ECtHR's Judiciary and registry and the approach taken by the UK Courts to their judgments:
- 'Apart from the Judges, the Court's Registry and Registry lawyers were also familiar with those decisions. Many may have done their postgraduate education in the UK. Some were UK-trained lawyers. Additionally, UK judgments, which were followed closely, were circulated by many European Court Judges amongst themselves, not least because of the analytical and persuasive way in which the UK judiciary discussed and dealt with questions of rights.'*⁵⁹
- 38.** The Panel notes that **Ndidi** and **S, V and A** demonstrate, as was put in the CfE, that formal dialogue operated as a '2 way conversation'⁶⁰ between the UK Courts and the ECtHR. That conclusion is plainly correct: formal dialogue is operating effectively between UK Courts and the ECtHR. We agree that there is, as a consequence, 'simply no evidence of any need to disturb the status quo.'⁶¹ It may be that the better view is that the evidence supports not taking any step to undermine the present approach. That is not the same as drawing the conclusion that improvements cannot be made; a point emphasised in its response to the CfE by ALBA⁶². We return to this below.

⁵⁶ *S, V. and A. v Denmark - 35553/12* (judgment : no article 5 - right to liberty and security : grand chamber) [2018] ECHR 856.

⁵⁷ *R (Hicks) v The Commissioner of Police for the Metropolis* [2017] UKSC 9; [2017] AC 256

⁵⁸ (no. 15598/08, 7 March 2013).

⁵⁹ *Summary of the meeting between members of the Independent Human Rights Act Review and a delegation of Judges from the European Court of Human Rights by videoconference* (20 May 2021) at 3.

⁶⁰ Doughty Street Chambers, *Submission to the Independent Human Rights Act Review Panel* at [1.12].

⁶¹ *Ibid.*

⁶² ALBA, *Submission to the Independent Human Rights Act Review Panel* at [34] and following.

(5) Formal Dialogue – The Role of Parliament

- 39.** There is one further example of formal dialogue that the Panel has considered. It goes beyond dialogue between UK Courts and the ECtHR. It concerns the important role Parliament properly plays in influencing the development of ECtHR case law, particularly in matters that fall within the margin of appreciation. It focuses specifically on the nature and quality of Parliamentary debate on matters concerning Convention rights. This issue can be illustrated by the prisoners' votes litigation.

Prisoners' votes litigation

Background

Historically, individuals convicted of criminal offences and sentenced to imprisonment were unable to vote in elections⁶³. By 2000 an individual who was convicted and in prison was disenfranchised, while individuals who were remanded in custody prior to trial were able to vote⁶⁴.

In *R (Pearson & Martinez) v The Secretary of State; Hirst v Attorney General* (2001)⁶⁵ (**R (Pearson)**) the High Court rejected challenges to disenfranchisement brought by three individuals, two of whom were serving discretionary life sentences. In doing so it refused to grant a declaration of incompatibility under section 4 of the HRA in respect of section 3 of the Representation of the People Act 1983. Section 3 provided the basis of disenfranchisement. The basis of the challenge was that section 3 was incompatible with the right to hold free elections guaranteed by article 3 of protocol 1 to the Convention⁶⁶.

While the High Court accepted that the right to vote formed part of the right to hold free elections, it concluded that the issue of prisoner voting was properly a matter for Parliament and not the Courts (**R (Pearson)** at [41]).

Hirst (No. 2)⁶⁷

The issue was subsequently subject to a challenge before the ECtHR. Its Grand Chamber held that section 3 of the 1983 Act was in breach of the right to vote. In reaching its decision the Grand Chamber accepted that the issue fell within the margin of appreciation, which in this case was a wide one. However, it concluded that the blanket prohibition on prisoner voting fell outside any acceptable margin of appreciation. It also, importantly, based its decision on the fact that there was no evidence that Parliament had considered the weighing of interests or proportionality in imposing a blanket ban. There had been no substantive debate on the issue by Parliament, and particularly on its justification in the light of '*modern-day penal policy and current human rights standards ...*'⁶⁸

63 See, for instance, section 2 of the Forfeiture Act 1870; section 41(5) of the Representation of the People Act 1918; section 4 of the Representation of the People Act 1969.

64 Sections 3 and 7A of the Representation of the People Act 1983.

65 *R (Pearson & Martinez) v The Secretary of State; Hirst v Attorney General* [2001] EWHC Admin 239.

66 The article provides that '*The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.*'

67 *Hirst v The United Kingdom (No. 2)* - 74025/01 [2005] ECHR 681; (2006) 42 EHRR 41 (**Hirst (No. 2)**).

68 **Hirst No. 2** at [76]-[82].

After *Hirst (No. 2)*

Following the ECtHR Grand Chamber's decision in ***Hirst (No. 2)***, disenfranchisement was subject to further challenges in the UK. In *Smith v Scott* (2007)⁶⁹ the prohibition on prisoner voting was challenged as it applied to voting in elections for the Scottish Parliament. The Registration Appeal Court in Scotland held that it was incompatible with the Convention right to vote and issued a declaration of incompatibility under section 4 of the HRA. In doing so it noted that the Government '*fully accepted the decision of the European Court of Human Rights in Hirst*⁷⁰. Further challenges were subsequently brought in Scotland and Northern Ireland to the prohibition on prisoner voting⁷¹. The issue was then subsequently reconsidered by the ECtHR in cases concerning other Convention states⁷² and the UK.

In *Greens & MT v The United Kingdom - 60041/08* (2011)⁷³, the ECtHR held that the UK remained in breach of the right to vote. It did so in respect of two prisoners in Scottish prisons who were unable to vote in European Parliamentary elections. The ECtHR went on to order the UK to implement its decision within six months of its judgment by bringing forward legislative changes consistent with the Convention, and to then enact the legislation in a time frame to be determined by the Council of Europe's Committee of Ministers.

The ECtHR next returned to the issue again in *Scoppola v Italy (No.3) - 126/05* (2012)⁷⁴, in which the UK intervened in proceedings. It, amongst other things, confirmed that the UK's blanket and automatic prohibition on prisoner voting was not permitted by the Convention. The UK's time to bring forward amending legislation was extended to November 2012.

Then in *McLean & Cole v UK - 12626/13 and 2522/12* (2013)⁷⁵, the ECtHR held that the article 3, protocol 1 right did not extend to local government elections, nor did it extend to referendums.

In *Shindler v UK - 19840/09* (2013)⁷⁶ a related issue was considered by the ECtHR: whether a restriction on the right to vote for non-resident citizens of the UK, who had not lived in the UK for fifteen years, breached the right to vote. It held the restriction was proportionate and did not therefore breach the right.

⁶⁹ *Smith v Scott* [2007] CSIH 9; 2007 SC 345.

⁷⁰ *Ibid* at [51].

⁷¹ *Traynor & Anor, Re Judicial Review* [2007] ScotCS CSOH 78; *R v Secretary of State, ex parte Toner and Walsh* [2007] NIQB 18.

⁷² *Frodl v Austria* [2010] ECHR 508; (2011) 52 EHRR 5.

⁷³ *Greens & MT v The United Kingdom - 60041/08* [2011] ECHR 686; (2011) 53 EHRR 21.

⁷⁴ *Scoppola v Italy (No.3) - 126/05* [2012] ECHR 868; (2013) 56 EHRR 19.

⁷⁵ *McLean & Cole v UK - 12626/13 and 2522/12* [2013] ECHR 1368; (2013) 57 EHRR SE8.

⁷⁶ *Shindler v UK - 19840/09* [2013] ECHR 423; (2014) 58 EHRR 5.

Thereafter, the issue of prisoner voting again returned to the UK Courts. In **R (Chester)** the UK Supreme Court refused to grant a declaration of incompatibility under section 4 of the HRA concerning the prohibition on prisoner voting in European Parliamentary elections. It declined to do so on the basis that such a declaration had already been issued in *Smith v Scott*, and a further declaration would serve no practical purpose.

In *Moohan v Lord Advocate* (2014)⁷⁷, the UK Supreme Court held that the right to vote did not apply to the Scottish Independence Referendum.

Two further cases, *Firth v UK - 47784/09 - (2014)* and *McHugh v UK - 51987/08 (2014)*⁷⁸, were considered by the ECtHR, but took the matter no further.

40. The question of prisoners' votes was thus considered on a number of occasions by both the UK Courts and the ECtHR. Initially, the approach of the UK Courts was that the issue was one for Parliament to determine. Following **Hirst (No. 2)** it was apparent, however, that the issue was one that not only fell within the scope of the right to vote, but also that the ECtHR was clear that the UK's approach was in breach of that right. Further consideration by both the UK Courts and ECtHR adopted that approach. The impasse would ultimately be resolved by a combination of administrative and legislative reform⁷⁹, with the Committee of Ministers indicating that the matter was closed in September 2018.

⁷⁷ *Moohan v Lord Advocate* [2014] UKSC 67; [2015] AC 901.

⁷⁸ *Firth v UK - 47784/09 - [2014] ECHR 874; McHugh v UK - 51987/08 [2014] ECHR 1289.*

⁷⁹ The nature of the reforms is summarised in *House of Commons, Briefing Paper, Prisoners' Voting rights – developments since May 2015* (19 November 2020) at 25.

41. From the Courts' perspective prisoners' votes demonstrates a clear case of formal dialogue. The UK Courts modified their approach in the light of the ECtHR's approach to the issue. They properly took into account ECtHR case law. From a political perspective, it can also be said that there was a clear instance of formal dialogue between the UK Government and the Committee of Ministers concerning the UK's implementation of the **Hirst (No. 2)** judgment. That dialogue ultimately saw the issue resolved in different ways in the UK. In England and Wales, it was resolved by administrative reforms⁸⁰, albeit the ECtHR had directed that legislative reform was required. In Scotland, reforming legislation was introduced⁸¹. This, of course, highlights the important role that formal dialogue between Government and the Committee of Ministers can have following an adverse judgment from the ECtHR. Perhaps even more significantly, the important role that Parliament can play prior to any such judgment needs to be stressed. The key issue in that respect turns on the relationship between the Parliament and the ECtHR. It centres on formal dialogue between the two, as was forcefully brought out by Murray Hunt's submission to the *CfE*.
42. The starting point for an understanding of the importance of Parliament's role in respect of formal dialogue, is the ECtHR emphasis in **Hirst (No. 2)** that the question of prisoner voting fell within the margin of appreciation. The UK therefore had a degree of leeway as to how it approached a prohibition on prisoner voting. It has been persuasively put to IHRAR in evidence submitted to it, that if the UK Government and Parliament had engaged in detailed debate on the issue, such debate could properly have been taken into account by the ECtHR in considering the UK's exercise of its margin of appreciation. The more detailed and considered the debate, the more the issue had been subject to scrutiny and analysis, the better the UK's position could have been when the issue was considered in **Hirst (No. 2)** or reconsidered by the ECtHR in later cases. The point is then illustrated by Murray Hunt in his submission to the *CfE*, where he contrasts the differing approaches taken by the ECtHR in two different cases.

⁸⁰ In essence the reforms were to provide for prisoners to be notified upon conviction that they were to lose their right to vote. Additionally, Prison Service guidance was to be revised to make clear that a limited number of convicted prisoners could vote, i.e., those on temporary licence and those on home detention curfew: see, HC Deb 2 November 2017, Vol. 630, c1007 cited in House of Commons' Briefing Paper at 25.

⁸¹ Scottish Elections (Franchise and Representation) Act 2020.

Murray Hunt's submission on *Hirst (No. 2)* and *Shindler v UK*⁸²

*'The importance of Convention rights being properly considered in both policy making and law making, and the relevance of that consideration to the state's ability to invoke the margin of appreciation if laws are challenged, is neatly demonstrated by contrasting the decisions of the European Court of Human Rights in *Hirst v UK* and *Shindler v UK*. Both cases concerned challenges to restrictions on the right to vote: in *Hirst*, the restriction was the ban on convicted prisoners voting, while in *Shindler* the restriction was the loss of non-resident citizens' right to vote after fifteen years of non-residence.*

*The right to vote occupies an important place in the ECHR, as it is the foundation of democracy, but it is a qualified right which is capable of limitation by proportionate restrictions and the European Court of Human Rights accords a wide margin of appreciation to States when deciding what is a proportionate restriction. In *Hirst*, as is well known, the Court held the ban on prisoner voting to be a disproportionate restriction on the right to vote: the position adopted by the legislature was to be accorded little weight because "there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. ... It cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote."⁸³*

*In *Shindler*, by contrast, the Court found the restriction on non-resident citizens' right to vote to be proportionate. The crucial difference between the two cases was that, whereas in *Hirst* there was no evidence that Parliament had reconsidered the longstanding ban on prisoners voting in the light of contemporary standards on the treatment of prisoners, in *Shindler* there was "extensive evidence ... to demonstrate that Parliament has sought to weigh the competing interests and to assess the proportionality of the fifteen year rule."⁸⁴ The question had been examined in detail by parliamentary committees, consulted on, and debated in Parliament on several occasions. The Court made clear that that review by Parliament is taken into consideration by the Court for the purpose of deciding whether a fair balance has been struck between competing interests.'*

⁸² M. Hunt, *Submission to the Independent Human Rights Act Review Panel* at [46]-[48].

⁸³ *Hirst v UK*, at para. 79 (Footnote from, and as in the, original text).

⁸⁴ *Shindler v UK*, at para. 117 (Footnote from, and as in the, original text).

43. The importance of parliamentary discussion to the margin of appreciation is brought to the fore when the ECtHR is considering, as it did in the prisoners' votes litigation, the proportionality of the approach taken by a Convention state. The ECtHR emphasised this point itself when it examined the UK's blanket ban on political advertising in *Animal Defenders International v United Kingdom* (2013)⁸⁵. In that case it emphasised the signal importance of parliamentary debate and discussion for assisting the ECtHR in determining the margin of appreciation available to the Convention state. In other words, the better the quality of parliamentary debate, the better the dialogue between the UK and the ECtHR, and the better the prospect that the UK will be accorded a margin of appreciation.

***Animal Defenders International v United Kingdom* (2013)⁸⁶**

'It emerges from that case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it (James and Others, § 36). The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation (for example, Hatton, at § 128; Murphy, at § 73; Hirst at §§ 78-80; Evans, at § 86; and Dickson, at § 83, all cited above).'

As President Spano of the ECtHR aptly put it, speaking extra-judicially about the Grand Chamber's decision in *Animal Defenders International v United Kingdom* (2013):

'It is clear from the rest of the majority judgment in Animal Defenders that the extensive examination by Parliament, taking into account the case law of the Strasbourg Court before the adoption of the Communications Act of 2003, the cross-party support for the Act as well as the in-depth analysis of the compatibility of the Act with the Convention, conducted by the domestic courts, were all crucial factors in the eventual findings by the majority of non-violation... The very recent judgment in Animal Defenders, as well as others, thus stand for the important proposition that when examining whether and to what extent the Court should grant a Member State a margin of appreciation, as to the latter's assessment of the necessity and proportionality of a restriction on human rights, the quality of decision-making, both at the legislative stage and before the courts, is crucial and may ultimately be decisive in borderline cases. It is important here to contrast the Grand Chamber judgment in Hirst (No 2), in the famous prisoner's voting rights case, with the situation in Animal Defenders, where the Court stated explicitly in Hirst that as to the 'weight to be attached to the position adopted

⁸⁵ *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21.

⁸⁶ *Ibid* at [108].

*by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament... ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote.*⁸⁷

- 44.** The Government's and Parliament's role in strengthening the UK's position in formal dialogue with the ECtHR should not be overlooked. It is, in the majority of the Panel's view, complementary to the UK Courts' formal dialogue with the ECtHR. Having regard to the reality of the ECtHR's current practice, Parliament and Government play an important role in demonstrating how the UK, as the primary forum for determining how to give effect to Convention rights has done so and, particularly, how it has done so consistently with the UK's constitutional, legal and cultural traditions. Such a careful political analysis of the issues assists in promoting greater understanding of the UK's approach to the Convention, and, as a consequence, helps the ECtHR confirm a wide margin of appreciation on such issues. Equally such detailed debate and analysis has an important role to play in respect of the relationship between the UK Courts, Parliament and Government. We return to that issue under Theme II.
- 45.** One member of the Panel was, however, of the view that it was constitutionally inappropriate for Parliamentary materials to be considered by Courts, whether domestic or international. In that respect, the entire Panel understands and agrees that the above discussion does not, in any way, suggest that it is appropriate for UK Courts to consider the content or quality of Parliamentary materials other than as currently permitted⁸⁸. The focus is on the ECtHR, which is – of course – not subject to UK constitutional arrangements and limits on the use of Parliamentary materials by Courts. As a practical matter, it is therefore appropriate for Parliament to keep in mind the fact that the ECtHR does take such materials into account when it considers the UK's margin of appreciation, at least unless and until it can be persuaded to take a different view as to the use of Parliamentary materials. The Panel observes that this difference of approach between the UK Courts and the ECtHR is itself likely to benefit from Judicial Dialogue.

87 R. Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, Human Rights Law Review, Vol. 14, Issue 3, (2014) 487 at 498-499.

88 On which see most recently Lord Reed in *R (SC, CB and 8 children) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2021] 3 WLR 428 at [163]-[185].

(6) Formal Dialogue – Summary of the UK’s Approach

46. The UK’s approach to formal dialogue can be summarised as follows.

Formal dialogue- where we are now

(1) An effective formal dialogue takes place through UK Courts:

- carrying out sophisticated analyses of Convention rights and ECtHR case law;
- declining to follow ECtHR case law;
- adopting their own approach to Convention rights interpretation where issues are within the margin of appreciation;
- identifying where ECtHR case law requires clarification or lacks consistency.

(2) It also takes place through the ECtHR:

- both directly and indirectly, taking into consideration UK Court judgments;
- taking into account UK Parliamentary consideration of issues that have been considered by the UK Courts and the ECtHR in their case law.

(7) Informal Judicial Dialogue

47. Informal dialogue, the aim of which is to promote greater understanding of legal issues rather than to influence specific Court judgments, between UK Courts and the ECtHR develops outside of consideration by UK Courts of ECtHR case law and vice versa.

Means by which informal judicial dialogue takes place⁸⁹

There are three main ways in which this form of dialogue currently takes place:

- Regular meetings between small groups of UK judges drawn from the UK Supreme Court and appeal Courts from England and Wales, Scotland and Northern Ireland and the judges of the ECtHR. These meetings take place approximately every eighteen months either in the UK or Strasbourg. In addition, regular informal meetings also take place through the attendance of UK judges at the ceremony to mark the opening of the legal year in Strasbourg (which includes attendance at a seminar on issues of mutual interest) and that of the President (or his representative) and the judge elected in respect of the UK at the ECtHR at the opening of the legal year ceremony in London⁹⁰. Further opportunities for informal meetings take place when UK judges sit as ad hoc judges of the ECtHR;
- The judge elected in respect of the UK (Judge Eicke) regularly visiting the UK and engaging in informal discussions with UK judges, while also assisting the ECtHR in understanding the UK's social, political and legal traditions;
- The UK Courts' membership of the Superior Courts Network (or SCN)⁹¹, established by the ECtHR in 2015 to help promote the exchange of information on its case law amongst the superior Courts of Convention states. The network has 41 members. From the UK, the Supreme Court, the Court of Appeal in England and Wales, the Court of Session and High Court of Justiciary in Scotland, and the Court of Appeal in Northern Ireland are members⁹².

⁸⁹ See *Summary of the meeting between members of the Independent Human Rights Act Review and a delegation of Judges from the European Court of Human Rights by videoconference* (20 May 2021) at 3.

⁹⁰ On the latter points see, Joint Committee on Human Rights, *The Government's Independent Review of the Human Rights Act*, (Third Report of Session 2021-22) at [67].

⁹¹ See European Court of Human Rights, Superior Courts Network <<https://www.echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/network&c=>>>. Further informal, judicial, dialogue can also take place through the UK's membership of the Council of Europe's Consultative Council of European Judges <<https://www.coe.int/en/web/ccje/country-profiles>>.

⁹² President Spano and Judge Eicke elaborated on how this aspect of informal dialogue worked from their perspective in their written evidence to the Joint Committee on Human Rights (17 February 2021), '... there is also extensive informal dialogue which takes place through various means... forum for informal dialogue is the Superior Courts Network ("SCN"). This network was established by the Court in 2015 and currently groups 93 superior courts from 40 out of the 47 Council of Europe Member States. In 2019 four jurisdictions joined from the United Kingdom: the UK Supreme Court, the Court of Sessions and Judiciary of Scotland, the Court of Appeal of England and Wales and the Court of Appeal of Northern Ireland. The SCN gives member courts privileged access to case-law information, including updates on important cases which is sent on the day of adoption of the judgment, as well as access to ad hoc case-law information through their own dedicated "focal point". In return, the superior courts provide the Strasbourg Court with information on the relevant domestic law for the purposes of any comparative law analysis required in any particular case notably by the Grand Chamber (in 2020, 4 such contributions were provided, with a maximum of 10 per year). This means that when looking at the comparative legal situation on a sensitive issue raised by a case (say the rights of transgender persons), the Court can rely on the domestic courts to provide it with the current legal position in the relevant jurisdiction. This information, which frequently is a more up-to-date and more accurate statement of the relevant domestic law than that which the Court can collate through its own efforts, then provides the Court with a more solid basis on which to assess whether there is any European consensus on a particular question. Beyond this case-specific collaboration, the UK has also become very active members of the SCN through its participation in a number of the topical webinars organised by the SCN (inter alia to replace the normal annual meeting of national focal points in Strasbourg). In July 2020, Lord Justice Peter Jackson (Court of Appeal, England and Wales) was one of the speakers in the webinar on COVID and court functioning and this month Lord Justice Warby spoke at the webinar on hate speech and vulnerable groups.'

48. From the perspective of the ECtHR, informal dialogue was ‘very well-developed’.⁹³ It is, as Sir Nicolas Bratza (former judge elected in respect of the UK to, and President of, the ECtHR) put it in his submission to the CfE, a longstanding means by which national Courts engage in an exchange of views with the ECtHR. In this way, differences in approaches can be, and have been, properly discussed informally.

Sir Nicolas Bratza on informal dialogue⁹⁴

‘... Comparatively rare as ... examples of a real-time debate between ... courts might have been [e.g., those discussed above], they reflected in my view a welcome development in the relationship between the courts, involving a genuine interchange of views as part of the shared responsibility of the two courts to uphold the rights guaranteed by the Convention. Such exchanges were not new, regular meetings having taken place over the years between judges of the UK and Strasbourg Courts...’

In other words, formal dialogue is a development built upon well-established informal judicial dialogue.

49. Informal dialogue between the UK Courts and the ECtHR is also recorded as working well from the UK perspective. In giving evidence to the Joint Committee on Human Rights, Lady Hale, former President of the UK Supreme Court, noted the well-developed nature of informal judicial dialogue from the UK perspective.

Lady Hale on informal dialogue⁹⁵

‘There have obviously been informal links of a variety of sorts. The Strasbourg court has a ceremony to open the legal year in January each year, and that is accompanied by a seminar where matters of mutual interest are discussed. The UK always sends a delegation to that. We also have bilateral meetings with representatives of the Strasbourg court and representatives of the courts throughout the UK, because obviously this is a UK matter, not just an England and Wales matter. We meet and discuss matters of common interest. These always generate friendly respect between the judges and give us food for thought.

I expect there are a few more informal exchanges as well, particularly between the UK judges and the UK judge on the Strasbourg court. I think there is plenty of dialogue and opportunity for informal dialogue at present. I am not sure whether there is a need for any more. All sorts of dialogue has been successful in producing a greater alignment of thinking between the Strasbourg court and the UK courts and, I think, UK authorities generally.’

⁹³ See *Summary of the meeting between members of the Independent Human Rights Act Review and a delegation of Judges from the European Court of Human Rights by videoconference* (20 May 2021) at 3.

⁹⁴ Sir Nicolas Bratza, *Submission to the Independent Human Rights Act Review Call for Evidence*, at [24].

⁹⁵ Lady Hale, *Oral Evidence to the Joint Committee on Human Rights, Inquiry into the Independent Human Rights Act Review*, (3 February 2021, written transcript of evidence) at 12 <<https://committees.parliament.uk/oralevidence/1661/pdf/>>.

50. Lord Reed, Baroness Hale’s successor as President of the UK Supreme Court, reiterated these views on the well-developed nature of informal dialogue. He went on to note two further ways in which informal dialogue takes place between the UK and Strasbourg.

Lord Reed PSC on informal dialogue⁹⁶

‘The perception of the Supreme Court is that there is an appropriate and effective degree of dialogue with the ECtHR, both formal and informal, regarding the application of Convention rights in the circumstances of the UK...

In addition to dialogue through the medium of judgments, there are also well established dialogues at an informal level between senior UK judges and the judges of the ECtHR. There is an annual meeting, held alternately in Strasbourg and in one of the three jurisdictions of the UK, at which recent developments in the case law of the ECtHR, and difficulties arising from its case law, are discussed. These annual discussions are supplemented by other meetings between senior members of the ECtHR and senior UK judges.

The Government’s nomination of domestic judges to sit on the ECtHR on an ad hoc basis is also valuable in promoting mutual understanding and respect. In addition, the UK judge on the ECtHR plays an important role in ensuring that the domestic legal systems, and the relevant social and political context, are understood.’

51. It is therefore apparent that informal means by which judicial dialogue are conducted are well-established, work well and are accepted as doing so, both by the UK Judiciary and by the ECtHR.
52. It is also apparent, however, that there is little public information available on the means by which this form of dialogue takes place. There is, for instance, no UK-based website that provides information on informal exchanges of information between UK judges and the ECtHR similar to the Superior Courts Networks’ website. Albeit that the value of such informal dialogue lies in its informality and that a degree of confidentiality is essential to underpin the process, there would appear to be room for the provision of additional information to increase public awareness of these important links. We have in mind regular information as to the fact of these exchanges⁹⁷, perhaps extending to seminar topics and materials; such information could be published on the websites of the UK Supreme Court and the UK judiciaries. We return to this topic in considering options for reform.

⁹⁶ Lord Reed PSC, *Response to a Call for Evidence produced by the Independent Human Rights Act Review*, at 6-7.

⁹⁷ Rather than the contents of private discussions. For informal dialogue to have value, participants must be at liberty to speak freely – otherwise the sessions would involve pro-forma statements for the public record.

(8) Informal Dialogue – Summary of the UK Courts’ Approach

53. The UK Courts’ approach to informal dialogue can be summarised as follows.

Informal dialogue – where we are now

Effective informal dialogue takes place in:

- regular bilateral meetings, both formal and informal, between the ECtHR and senior members of the UK Judiciary;
- regular meetings involving the UK judge to the ECtHR visiting members of the Judiciary across the UK;
- the UK Judiciary’s active involvement in the ECtHR’s Superior Courts Network;
- UK judges sitting as ad hoc judges of the ECtHR.

(9) Views from Submissions to IHRAR concerning Judicial Dialogue

54. Submissions to the *CfE* concerning judicial dialogue presented a wide range of reform options. Their focus was on enhancing judicial dialogue; on enabling UK Courts to conduct their dialogue with the ECtHR more effectively. There was additionally evidence that no change was needed to the UK Courts’ approach, the key point being the view that it is working well and should not be weakened.

Examples of submissions supportive of no change

Professor Brice Dickson (Queen’s University Belfast Roadshow)

‘Judicial dialogue between domestic courts and Strasbourg has been operating satisfactorily.’

Annabel Bannister

‘All relationships and dialogue between domestic courts and ECtHR are adequate and this dialogue must be preserved.’

Inclusion London

‘Despite many pointing to the Ullah principle to attempt to show a “mirror” effect between the European Court of Human Rights and UK courts, it can be seen that at least since 2009, the relationship between the ECtHR and the UK domestic courts has changed to one that can be most succinctly described as a “dialogue” principle.’

Liberty

‘Section 2 of the HRA has been carefully and deliberately constructed in a way which protects the independence of domestic courts. It gives primacy to the domestic adjudication of human rights principles by requiring UK courts to take account of ECtHR case law without being bound by it. In doing so it has led to a strong judicial dialogue between Strasbourg and domestic courts. We believe there is no case for weakening this relationship.’

Oxford Human Rights Hub

‘... the UK courts have used section 2 in a flexible manner that harmoniously promotes institutional dialogue with the ECtHR and enables the development of a distinctive UK human rights culture.’

Professor Paul Roberts (Nottingham University Roadshow⁹⁸)

‘... there is a very robust dialogue between domestic courts and the Strasbourg court and “we don’t need to be blinkered and closed off to conversation”, or “insular and nationalistic”. The dialogue e.g. in Horncastle is good for the common law.’

- 55.** That no change was necessary because judicial dialogue was working well was also the conclusion drawn by the Joint Committee on Human Rights.

98 Summary of oral contribution.

Joint Committee on Human Rights⁹⁹

'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 [of the ECtHR] 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.'

- 56.** That judicial dialogue is in a 'very healthy state' does not preclude reform that seeks to improve it; a point emphasised in evidence submitted by Mischon de Reya LLP, who submitted that:

'[Any amendment to section 2] should ... be informed by the desire to strengthen our commitment to judicial dialogue. In doing so, Parliament would ensure that the UK courts' reasoning is more likely to be considered and adopted by the ECtHR. This would strengthen the UK's position as a leader in the field of human rights...

... maintaining judicial dialogue with the ECtHR would only strengthen the UK's soft power and global influence [as a global leader in the field of human rights].'¹⁰⁰

- 57.** The submissions in support of reform, advocated by a number of respondents to the CfE, was strongly in favour of implementing measures to enhance judicial dialogue. Their proposals fell broadly into five categories: ratification of Protocol 16 to the Convention; reaffirmation of the Brighton Convention; increased judicial training; further promotion of informal judicial dialogue; encouraging UK Courts to provide detailed reasoning in their judgments of their approach to Convention rights. A number of other specific reforms were proposed by individual respondents.

⁹⁹ Joint Committee on Human Rights, *The Government's Independent Review of the Human Rights Act*, (Third Report of Session 2021-22) at [70].

¹⁰⁰ Mischon de Reya LLP, *Response to IHRAR's Call for Evidence*, at 1 and 3.

Selected criticisms and reform recommendations submitted to IHRAR

Constitutional and Administrative Law Bar Association (ALBA)

*'... the UK should ratify Protocol No 16. This would allow domestic courts to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR. This would greatly facilitate dialogue between the domestic courts and the ECtHR. The process of dialogue has been strengthened through Protocol No 16 since the first opinion was given in 2019. If the UK wishes to strengthen dialogue, it should make use of this process.'*¹⁰¹

Humanists UK

'... the Brighton Convention in 2012, which amended the preamble to the ECHR to formally recognise the principle of subsidiarity, was an important step towards fostering an effective relationship of dialogue between the courts and Strasbourg. This is because by stating the importance of subsidiarity within the preamble of the ECHR, the UK sent a significant political message that it respected the ECtHR's independence and was committed to securing rights on a domestic level and realising a fuller vision of subsidiarity. In our view, the UK should now reaffirm its commitment to this position and embolden the courts to have the confidence to challenge or support the ECtHR's jurisprudence as appropriate.'

Bates Wells

'... We see no case for change to section 2 HRA and no need to alter the current approach to judicial dialogue between UK courts and tribunals and the ECtHR. The only possible improvement in this area would be to increase judicial training in the lower courts and tribunals about the judicial dialogue approach and the application of s2 HRA in practice.'

Which?

'... the current approach does permit UK judges to raise concerns with the ECtHR, and we consider that this is an important mechanism through which judges from the respective courts can interact and address issues (via their judgments) when dealing with certain, often similar, circumstances. It could perhaps be strengthened and preserved by increasing informal bilateral and multilateral engagement with legal experts and judicial representatives in countries that are party to the Convention and that have a similar approach, such as Germany.'

¹⁰¹ ALBA also noted that judicial dialogue was hampered by the backlog of cases that await determination by the ECtHR. It recommended steps be taken to help reduce the backlog. The Panel notes this point and recommendation, Reform of the ECtHR is, however, outside IHRAR's ToR.

The Law Society of England and Wales

'... the best way to enhance judicial dialogue where it is anticipated that a case will proceed to the ECtHR is for domestic courts to provide full and detailed reasoning, including clear analysis of national law, procedures and context. In doing so, it is necessary to engage with the previous reasoning of the ECtHR, and when applying or disputing this, providing explanation to support their decision. Engaging with ECtHR reasoning in this way often results in a deeper analysis of ECtHR jurisprudence and greater clarity of the fundamental principles. However, no change – legislative or otherwise – is needed to achieve this, as domestic courts already engage in this type of analysis and provide detailed reasoning in their judgments.'

'It is also not only within the hands of the courts to enhance judicial dialogue. The legislature can support both the domestic courts and ECtHR in their reasoning by including comprehensive discussion of rights issues arising in legislation during parliamentary deliberations...'

Deighton Pierce Glynn

'If the Panel feels that dialogue needs strengthening, then this could be achieved by practical measures such as a centralised collation of domestic and ECtHR case law on key issues or increased judicial training and exchanges with the ECtHR judiciary.'

Lord Carlile of Berriew

'The dialogue is slow and the results patchy... UK judges in all the major international courts should hold at least the status of a High Court judge, and should be able to return to the UK in such status (as happened with Adrian Fulford when he was appointed to the ICC). This is clearly what was anticipated by HRA section 18.'

Bhatt Murphy

'One of the key difficulties in promoting and enhancing that dialogue is that where there is apparent disagreement between domestic and ECtHR judgments, the issue can only be resolved by new cases being brought which requires particular facts to be established and the issue to be litigated exhaustively causing considerable expense. It is suggested that there should be consideration to the Supreme Court having the power to issue advisory opinions, similar to the ECJ, in cases where there is a clear departure between domestic and Strasbourg decisions.'

(10) Approach to Options for Reform

- 58.** One Panel member supported an approach that would see the UK Courts' formal dialogue with the ECtHR operate on the basis that their ability to depart from ECtHR case law was put on a statutory footing, as outlined in Chapter Two, Option Four. This, it was suggested, would enable the UK Courts to interact with the ECtHR as Courts of autonomous and equal status. The majority of the Panel concluded that such an approach was unnecessary¹⁰², as there was – in their view – no case for suggesting that the UK Courts were not, and were not viewed to be, autonomous and of equal status to the ECtHR either in principle or in practice.
- 59.** The approach to proposals for reform taken is one that seeks to enhance the various forms of dialogue between the UK and the ECtHR, without prejudicing the already well-developed approaches presently taken.

(11) Rejected Options

- 60.** The Panel rejects the following potential reform options.
- (i) Accede to Protocol 16 to the Convention**
- 61.** Protocol 16 of the Convention enables Convention states to seek an advisory opinion from the ECtHR on specific issues concerning Convention rights.

Protocol 16 to the Convention

'Article 1

- (1) *Highest courts and tribunals of a High Contracting Party ... may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.*
- (2) *The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.*
- (3) *The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.'*

Not all Convention states have acceded to it. The UK has not acceded to it. If the UK acceded to it, it would enable the UK Supreme Court to seek an advisory opinion from the ECtHR in respect of an appeal before it.

- 62.** There may be some benefit in seeking an advisory opinion from the ECtHR where, for instance, its case law is unclear, or where an issue has not arisen before it previously. The difficulty, however, with seeking advisory opinions is that such a process would inevitably increase delay in the resolution of an appeal by the UK Supreme Court. The experience of delay (running into

¹⁰² In addition to the reasons given above, this suggestion was criticised in Chapter Two.

years) arising from preliminary references to the Court of Justice of the European Union looms large in our thinking. Any increase in seeking such opinions from the ECtHR may well pose problems for that Court, given its already significant case load¹⁰³ and its need to prioritise applications which raise concrete issues for decision. For practical reasons, therefore, we are not persuaded of the benefits of this option; in any event, any benefits are outweighed by the very considerable drawbacks both for parties to UK litigation and for the ECtHR itself. Accordingly, we **reject** this option.

(ii) Enable UK Courts to provide advisory decisions

- 63.** A further potential reform option is for the UK Courts to be enabled to provide advisory decisions. As a general rule UK Courts do not provide judgments on hypothetical or academic questions. There are limited exceptions to this, such as the ability for a judgment to be given on matters of general importance to the financial markets where there is no dispute between parties¹⁰⁴. Such decisions are not, however, advisory. They are normal judgments. They therefore have the force of precedent.
- 64.** An advisory decision would operate outside the doctrine of precedent. It would therefore raise questions whether and to what extent it ought properly to be applied. It would also address matters in the abstract. Its practical utility would therefore be limited where domestic Courts are concerned. Furthermore, as a matter of principle it is no part of a domestic court's function to provide advice as to the law or its interpretation. That is the function of the legal profession. For domestic Courts to provide advisory opinions would confuse their proper adjudicative role with that of the legal profession. Whatever the utility of advisory opinions provided by the ECtHR, its role and function cannot be equated to that of domestic Courts, including the UK Supreme Court.
- 65.** For these reasons, we **reject** this reform option.

103 ECtHR, *A Court that matters/Une Cour qui compte*, (17 March 2021), 'The current priority policy sets out seven categories of case ranging from the most urgent (category I) to the least important (category VII) ... there are currently 17,800 potentially well-founded applications under category IV which do not raise core rights and which on average take the Court between 5-6 years to process...' https://www.echr.coe.int/Documents/Court_that_matters_ENG.pdf.

104 Provided for in the Financial Markets Test Case Procedure under Practice Direction 63A to the Civil Procedure Rules (England and Wales).

(iii) The UK reaffirms its commitment to the principle of subsidiarity and to securing rights on a domestic level

66. As we noted above, one submission suggested that the UK should, having done so previously in the Brighton Declaration in 2012, now ‘reaffirm its commitment to this position and embolden the courts to have the confidence to challenge or support the ECtHR’s jurisprudence as appropriate.’¹⁰⁵
67. The UK has recently reaffirmed its commitment to the ECtHR, subsidiarity, the margin of appreciation and judicial dialogue in the Copenhagen Declaration. That reaffirmation, along with that of the other Convention states, was made in April 2018. Notwithstanding our strong support for the principle of subsidiarity, we can see no reason to, or benefit from, further reaffirming unilaterally in 2021, what was reaffirmed via a multilateral declaration three years previously. We **reject** this option.

(iv) UK judges at the ECtHR be given the status of a High Court judge

68. It was suggested that UK judges appointed to the ECtHR, and other international Courts, should be given the status of High Court judges. It is further suggested that that was anticipated by section 18 of the HRA; that section governs the appointment of serving judges to the ECtHR. In principle, there is a good deal to be said for this suggestion, given the additional ‘clout’ flowing from such enhanced status and the pointer it would give to the importance of the role. The matter is, however, not at all straightforward.
69. First, to get it out of the way, we are not persuaded that support for this suggestion can be derived from section 18 of the HRA. That section provides for the appointment of a variety of levels of UK judge to the ECtHR, not least County Court judges from Northern Ireland.
70. Secondly, even if we proceed on the assumption that the status of UK judicial appointments to the ECtHR is within our ToR, the status of such appointments to other international Courts is plainly not. The status question with regard to appointments to the ECtHR would in any event only come within our ToR if relevant to strengthening and preserving the dialogue with which this chapter is concerned. There is **a** case in that regard; however, practical issues need to be weighed against any such case, such as (i) whether it would have any effect on eligibility for appointment, and (ii) what effect the introduction of a role for the Council of Europe (responsible for the appointment of judges to the ECtHR) into the appointment process for English and Welsh High Court judges (or their equivalents in Scotland and Northern Ireland) or individuals who are afforded the status of High Court judges (or their equivalents), would have on the judicial appointment processes in the UK’s legal jurisdictions.

¹⁰⁵ See submission to the CfE noted from the Humanists UK, above.

71. Thirdly, it might be said that the absence of such status does not appear to have hampered the ability of the present incumbent¹⁰⁶, for instance, to develop a strong informal dialogue with the UK judiciaries.
72. It is apparent that there are potential complexities relating to the proposed reform. This leads us to conclude that the Panel, having flagged the suggestion, is not the right body to take it further. That being noted, given those complexities, we **reject** this option.

(12) Potential Reform Options

73. The Panel considers the following to be potential reform options. It indicates here those which it does **not** recommend and which it does recommend.

(A) Options that are not recommended

(i) Option One: Increase judicial training

74. In the period before the HRA was introduced the Judiciary were given specific training in respect of both the HRA and the Convention. While the HRA has been in force for twenty years, and the Judiciary ought therefore to be assumed to be properly familiar now with it, the Convention and ECtHR case law, there are always benefits to be obtained from training and professional development.
75. Increased training can act as a refresher on issues for those judges who do not deal with the HRA on a regular basis. It can ensure that judges are able to keep abreast of new developments, both domestic and from the ECtHR. Additionally, it can provide an opportunity for judges to consider the practical application of the HRA and Convention rights.
76. Given these advantages, we would invite those concerned with judicial training in the UK to review their coverage of training on the HRA, the Convention and the ECtHR. We do not think it is for the Panel to go further.

(ii) Option Two: Increased informal dialogue

77. Significant informal dialogue already takes place (as outlined above). It is possible¹⁰⁷ that the opportunities for such dialogue could be augmented by way of additional informal bilateral and multilateral meetings between the UK Judiciary and Judiciaries from other Convention states.

¹⁰⁶ Judge Eicke.

¹⁰⁷ We put it no higher, as judicial time is a scarce resource and a limiting factor.

78. The Panel has seen the particular benefit of obtaining the perspective from other states, both in terms of its Panel membership¹⁰⁸, and also through engagement with the Irish Judiciary and Germany’s Constitutional Court. If time permitted, the UK Judiciaries could benefit from such engagement, over and above their current level of international engagement. Again, having underlined the benefits of informal dialogue, we do not think it is for the Panel to go further or that a formal recommendation is necessary.

(iii) Option Three: the creation of a centralised database of domestic and ECtHR case law on key issues

79. There are a number of accessible databases of both UK judgments and those of the ECtHR. Both types of judgment can be found on BAILLI¹⁰⁹. The latter can also be found on HUDOC¹¹⁰, the ECtHR’s own database. The former does not provide a function to highlight key issues or leading judgments. The latter, while it provides a function to identify key cases, does not do so in an easily accessible manner. We also note the recent decision to establish an accessible database of Court judgments, to be managed by The National Archives¹¹¹. Consideration could be given by BAILLI and/or The National Archives to including, as part of their judgment database, a section providing easy access to key UK and ECtHR decisions on Convention rights.

80. There is likely to be a potential benefit, to the public, the legal profession, the UK Judiciary and that of the ECtHR, if a database were able to provide ready access to leading Court judgments on human rights questions. From the ECtHR’s perspective, such a database of UK Court judgments could enhance its ability to consider UK judgments. From the UK Judiciaries’ perspective, it could enhance their ability to access and consider ECtHR case law.

81. That said, both the ECtHR and UK Judiciaries, together with the legal profession, already have access to professional, subscription databases where they can readily access such material. This reduces considerably the potential benefit from this option, albeit there might be some benefit to interested members of the public. We are not therefore persuaded to recommend this option.

(iv) Option Four: Enhanced Parliamentary engagement in dialogue

82. It was apparent from the evidence submitted to IHRAR that in addition to judicial dialogue, there is an important role that Parliament is capable of playing in dialogue with the ECtHR.

108 The most welcome inclusion of Professor Cahill.

109 See <<https://www.bailli.org/eu/cases/ECHR/>>.

110 See <<https://www.echr.coe.int/Pages/home.aspx?p=home&c=>>>.

111 Ministry of Justice, Boost for open justice as court judgments get new home, (16 June 2021) <<https://www.gov.uk/government/news/boost-for-open-justice-as-court-judgments-get-new-home>>.

- 83.** Where Parliament has engaged in detailed discussion on the application of Convention rights when debating legislation, those discussions can play an important role in helping the ECtHR determine the appropriate width of the margin of appreciation to be afforded the UK on related issues. We conclude that the importance of this form of dialogue should not be underestimated¹¹². As is to be reiterated, Parliament has today – as it always has had within the UK’s constitution – a central role in protecting individuals’ rights.
- 84.** As we noted when considering options relating to the margin of appreciation in Chapter Three, this option goes wider than this particular issue and we return to it in Chapter Five, where it is a recommended option for reform¹¹³.

(B) Recommended Option

(v) Option Five: Continue to enable judicial dialogue to develop organically

- 85.** The overwhelming weight of the evidence presented to the Panel is strongly supportive of the view that formal and informal judicial dialogue have developed well. That is the view both domestically and of the ECtHR.
- 86.** Through their careful and structured analysis of ECtHR case law, facilitated by section 2 of the HRA, UK Courts have assisted in the reception of their judgments by the ECtHR. Such receptiveness has further been facilitated by UK Government bringing to the ECtHR’s attention UK Court judgments both in proceedings to which the UK is a party before the ECtHR and those proceedings, including for advisory opinions, where the UK has intervened. We conclude that this form of dialogue will be enhanced by implementation of our recommendation concerning section 2.
- 87.** Informal dialogue is also well-developed. Most recently, as President Spano of the ECtHR highlighted, this has been furthered by the UK’s active engagement in the ECtHR’s Superior Courts Network, and by the opportunities afforded by the UK Government and the ECtHR to UK judges to sit as ad hoc judges of the ECtHR.
- 88.** Given the strength of the various developments in this area, we conclude that judicial dialogue is working well and does not need to be reformed. We do note, however, that the websites of the Judiciaries of the UK could provide more information on the various forms of informal dialogue undertaken¹¹⁴. This could be done in order to raise public awareness of it and of its benefits.

112 Notwithstanding the real and strongly held UK constitutional objections to reliance on such materials.

113 See Chapter Five, Option Six.

114 Subject to the requirements of confidentiality, noted above.

- 89.** We go further. We have been struck by the high regard in which the UK Courts and Judiciary are held in Strasbourg and the beneficial influence this has, both domestically and for the ECtHR. The use made by the ECtHR of **S, V and A**¹¹⁵ (to which the UK was not a party) is but a striking example of this now mature relationship – mutual respect bringing mutual benefit. Judicial dialogue will be a most important element in developing that relationship and maintaining the equilibrium it has achieved. We therefore place great store on strengthening and preserving that dialogue, a matter we have kept well in mind throughout our deliberations. It is, finally, important that the respect enjoyed by the UK Courts and Judiciary in Strasbourg and the ECtHR’s gratifying receptiveness to UK judicial thinking, should be widely and better appreciated domestically; such considerations are linked to questions of public awareness, canvassed in Chapter One.

(13) Recommended Reform Option

- 90.** For the reasons set out above, the Panel recommends **Option Five**. We note that Option Four is a recommended reform option in Chapter Five. Given its nature, this option cannot sensibly be said to give rise to any devolution concerns.

115 See [36], above.

Chapter Five – Sections 3 and 4 of the HRA

(1) Introduction

1. We now turn to question 2(a) under Theme II of the ToR. It focuses on sections 3 and 4 of the HRA. Section 3 requires UK Courts, in so far as possible, to interpret legislation in a way that is compatible with Convention rights. It thus focuses on how the UK Courts carry out one of their fundamental roles under the UK constitution, consistently with separation of powers: statutory interpretation. It is a long-established feature of the UK's constitution that the definitive interpretation of legislation is a matter exclusively within the Courts' jurisdiction¹.

Section 3 of the HRA

'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*
 - (c) *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.'*

¹ *R v London Transport Executive, ex p Greater London Council* [1983] QB 484 at 490.

2. Where it is not possible to interpret legislation compatibly with Convention rights, section 4 provides for senior UK Courts to issue a declaration of incompatibility. This is a discretionary power. UK Courts have a choice whether or not to exercise the power.

Section 4 of the HRA

‘Declaration 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.*
- (5) *In this section “court” means—*
- (a) the Supreme Court;*
 - (b) the Judicial Committee of the Privy Council;*
 - (c) the Court Martial Appeal Court;*
 - (d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;*
 - (e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.*
 - (f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the Chancellor of the High Court or a puisne judge of the High Court.*
- (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.’*

3. A declaration does not alter the status or validity of any Act of Parliament or of any secondary legislation where the reason for its incompatibility with Convention rights stems from an Act of Parliament. A declaration of incompatibility thus respects the constitutional principle of Parliamentary Sovereignty. While it enables senior UK Courts to review legislation, it does not permit them to invalidate it. It thus provides a limited, statutory form, of constitutional review of legislation. It contains no encouragement for any potential common law development by UK Courts of legislative review. As Lord Neuberger PSC noted in *R (Miller) v Secretary of State for Exiting the European Union (Rev 3)* (2017)², ‘it is not open to judges to apply or develop the common law in a way which is inconsistent with the law as laid down in or under statutes, ie by Acts of Parliament.’

The constitutional principle of Parliamentary Sovereignty

Parliamentary Sovereignty is a fundamental principle of the UK’s uncodified constitution. It has, for present purposes, two central features: first that the UK Parliament can make or unmake any legislation; and secondly, that Acts of the UK Parliament cannot be challenged or set aside by any body, including the Government and the UK Courts³.

In considering sections 3 and 4 it is necessary to bear in mind section 19 of the HRA. It requires the Government to consider whether proposed legislation is compatible with Convention rights and issue a statement accordingly.

Section 19 of the HRA

‘Statements of compatibility.’

- (1) *A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—*
- (a) *make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or*
 - (b) *make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.*
- (2) *The statement must be in writing and be published in such manner as the Minister making it considers appropriate.’*

² *R (Miller) v Secretary of State for Exiting the European Union (Rev 3)* [2017] UKSC 5; [2018] AC 61 at [42].

³ *R (Miller) v Secretary of State for Exiting the European Union (Rev 3)* [2017] UKSC 5; [2018] AC 61 at [43] citing Dicey’s *The Law of the Constitution*.

4. There are three specific matters raised by question 2(a) of the ToR concerning sections 3 and 4. They are set out in these terms:
- ‘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?’*
5. This chapter therefore focuses firmly on the extent to which the UK Courts have given effect to Parliament’s intention concerning this aspect of the HRA. It also looks at how sections 3 and 4 strike the constitutional balance between the Courts and Parliament. In considering Parliament’s role, it also – as section 19 of the HRA necessitates – requires the Government’s role to be examined.
6. The Panel recommends the following reform options.

Recommended reform options⁴

Amend section 3 to clarify the order of priority of interpretation, coupled with increased transparency in the use of section 3, an enhanced role for Parliament in particular through the JCHR, and the introduction of a discretion to make ex gratia payments where a declaration of incompatibility is made. Otherwise no changes to sections 3 and 4.

⁴ See Options Three, Four, Five and Six of the Recommended Reform Options, below.

7. These options reflect the conclusions of the majority of the Panel that: notwithstanding the unusual rule of interpretation contained in section 3, there is no substantive case for its repeal or amendment other than by way of clarification or for altering either the balance between sections 3 and 4 achieved by the HRA or the standing (*locus standi*) requirements for either section 3 or section 4; that any damaging perceptions as to the operation of section 3 are best dispelled by increased data as to its usage; and that, as a matter both of perception and reality, Parliament could and should take a more robust role in rights protection, a role which could sensibly be reinforced via an enhanced role for the JCHR. Further options reflect the conclusions of the entire Panel: first, that there is a need to clarify, by way of amendment to section 3 the order of priority in which UK Courts apply the normal principles of interpretation and then the particular interpretative principle set out in section 3; secondly, the desirability of introducing a discretion to make *ex gratia* payments where a declaration of incompatibility is made.
8. Full details of the recommendations and other reform options that the Panel has considered are set out in Parts 16 – 18 of this chapter.

(2) Section 3 of the HRA – The Parliamentary Debates

9. Section 3 of the HRA was intended to be central to the HRA giving effect to Convention rights in UK domestic law, while ensuring that the constitutional principle of Parliamentary Sovereignty was retained⁵.
10. Section 3, as Lord Irvine LC explained, was the means by which the HRA's aim of ensuring that legislation was interpreted and given effect compatibly with Convention rights was to be achieved⁶: to '*bring rights home*'. It was also intended to avoid problems that the then Government perceived would arise if the Convention rights were directly incorporated into UK domestic law. For instance, if those rights were incorporated directly, questions might arise as to the continuing validity of legislation enacted prior to the HRA coming into force⁷.

⁵ Lord Irvine LC Hansard, HL, 19 January 1998, vol. 584, col. 1294 in J. Cooper & A. Marshall-Williams at 62.

⁶ Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 508 in J. Cooper & A. Marshall-Williams at 48.

⁷ Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 508 in J. Cooper & A. Marshall-Williams at 48.

11. Specifically, section 3, together with section 4 of the HRA, was intended to ensure that the HRA was not taken as undermining one aspect of Parliamentary Sovereignty, i.e., not permitting UK Courts to set aside legislation⁸, or as providing for the implied repeal of provisions in Acts of Parliament that were inconsistent with Convention rights⁹.
12. When UK Courts interpret legislation they do so in order to determine its legal meaning. They do so by applying a number of principles or rules of statutory construction¹⁰ in order to identify what Parliament intended by provision of the Act of Parliament in question.

Halsbury's Laws – the aim of statutory interpretation¹¹

'The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an enactment is to ascertain the intention of the legislature as expressed in the enactment, considering it as a whole and in its context, and acting on behalf of the people. The meaning of an enactment that corresponds to this intention is known as its legal meaning. The legal meaning may or may not correspond to the grammatical or literal meaning.'

13. Section 3 was intended to secure its underlying aims through introducing a new form of statutory interpretation into UK domestic law: one that meant UK Courts were to endeavour so far as possible to interpret legislation in a way that was compatible with Convention rights. As Lord Irvine LC explained the intention underpinning section 3 was that courts would *'strive to find an interpretation of legislation which [was] consistent with Convention rights as far as the language of the legislation allow[ed].'*¹²
14. This new interpretative approach was intended to give the Courts *'the strongest jurisdiction possible ... to interpret Acts of Parliament'*¹³ compatibly with Convention rights. It was anticipated that *'in almost all cases'* UK Courts would be able to interpret legislation compatibly with Convention rights¹⁴. The expectation was that in the clear majority of cases, in 99% of cases¹⁵, the Courts would be able to interpret legislation compatibly with Convention Rights¹⁶.

⁸ Also see Lord Irvine LC, Hansard, HL, 19 January 1998, vol. 584, col. 1294 in J. Cooper & A. Marshall-Williams at 63.

⁹ The doctrine of implied repeal is a consequence of Parliamentary Sovereignty and has long been recognised by the Courts. It operates where part of a new Act of Parliament is inconsistent with a previous Act of Parliament or a provision in a previous Act of Parliament. In such a situation, the Courts give effect to the most recent Act of Parliament in so far as it is inconsistent with the earlier Act of Parliament. See, for instance, *Ellen Street Estates v Minister of Health* [1934] 1 KB 590 at 597 (Maugham LJ).

¹⁰ The Courts will, for instance, seek to determine Parliament's intention by looking to the 'literal meaning' of the statutory provision, by looking at the mischief it was meant to cure, by presuming that Parliament did not intend to enact legislation in breach of international law obligations.

¹¹ Halsbury's Laws of England, *Statutes and Legislative Process*, (Vol. 96, 2018) at 697.

¹² Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 508 in J. Cooper & A. Marshall-Williams at 49.

¹³ Lord Irvine LC, Hansard, HL, 24 November 1997, vol. 583, col. 795 in J. Cooper & A. Marshall-Williams at 50.

¹⁴ Jack Straw MP, Hansard, HoC, 16 February 1998, vol. 307, col. 780 in J. Cooper & A. Marshall-Williams at 46.

¹⁵ Lord Irvine LC, HL Official Report, 5 February 1998, vol. 585, col. 840.

¹⁶ Lord Irvine LC, Hansard, HL, 24 November 1997, vol. 583, col. 795 in J. Cooper & A. Marshall-Williams at 50.

15. This approach was described during the parliamentary debates by Lord Cooke of Thorndon as meaning that UK Courts were no longer to search for, *'the true meaning' of a statutory provision*¹⁷. That view did not, however, properly characterise the position as it was set out by Lord Irvine LC for the then Government. Underpinning section 3 was the express assumption that since the UK had acceded to the Convention, Parliament had enacted legislation compatibly with Convention rights; further, that, following the HRA's enactment, Government ministers were additionally required to provide a statement that a Bill is, in their view, compatible with Convention rights¹⁸ under what would become section 19 of the HRA. In other words, Parliament's intention in respect of post-HRA legislation where a statement of compatibility was made under section 19 was assumed to be that the legislation in question was compatible with Convention rights. That, and the HRA as a whole, were to form part of the 'context' that UK Courts were to consider when determining the *'legal meaning' of post-HRA legislation when 'ascertaining the intention of the legislature [or as some put it 'the will of Parliament']*¹⁹.

Lord Irvine LC – interpreting legislation compatibly with Convention rights

*'Clause [section] 3 provides that legislation, whenever enacted, must as far as possible be read and given effect in a way which is compatible with the Convention rights. This will ensure that, if it is possible to interpret a statute in two ways – one compatible with the Convention and one not – the courts will always choose the interpretation which is compatible. In practice, this will prove a strong form of incorporation.'*²⁰

*'... we want the courts to construe statutes so that they bear a meaning that is consistent with the Convention whenever that is possible according to the language of the statutes but not when it is impossible to achieve that. More generally, we proceed on the basis that Parliament, at least post-ratification of the Convention, must be deemed to have intended its statutes to be compatible with the Convention to which the United Kingdom is bound, and that courts should hold that that deemed general intention has not been carried into effect only where it is impossible to construe a statute as having that effect. This seems to me to be a sensible principle and is consistent both with Parliament's presumed intention post-ratification and with ministerial statements of compatibility, when they come to be made under Clause [section] 19 of the Bill.'*²¹

17 Lord Cooke of Thorndon, Hansard, HL, 3 November 1997, vol. 582, col. 1272 in J. Cooper & A. Marshall-Williams at 46.

18 Or state that they were proceeding notwithstanding the fact they were unable to make a statement of compatibility.

19 Halsbury's Laws of England, *Statutes and Legislative Process*, (Vol. 96, 2018) at 697, as cited above.

20 Lord Irvine LC, Hansard, HL, 3 November 1997, vol. 582, col. 1230 in J. Cooper & A. Marshall-Williams at 46.

21 Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 535 in J. Cooper & A. Marshall-Williams at 50. Jack Straw MP qualified this statement by noting that it was more likely to be the case that legislation enacted after 1966, when the UK accepted the right of individual petition, that care was taken to draft legislation compatibly with Convention rights: Jack Straw MP, Hansard, HoC, 3 June 1998, vol. 313, col. 420 in J. Cooper & A. Marshall-Williams at 197.

- 16.** UK Courts were not however given a completely free hand. While section 3 was intended to require them to look for possible interpretations of legislation that were compatible with Convention rights they were only intended to do so ‘*so far as plain words of the legislation allow...*’²² or as Lord Irvine LC put it, ‘*whenever [such a possible interpretation] is possible according to language of the statutes...*’²³. As Jack Straw MP went on to explain in a *Pepper v Hart* statement in the House of Commons²⁴,

*‘I will say that it is not our intention that the courts, in applying clause 3, should contort the meaning of words to produce implausible or incredible meanings.’*²⁵

In setting out this intention, and its aims underpinning section 3, the then Government considered and did not accept a number of points raised during the parliamentary debates.

- 17.** First, it rejected a proposed amendment to section 3 that would have required UK Courts to look for reasonable rather than possible interpretations of legislation that were compatible with Convention rights. This alternative approach was rejected on the basis that if UK Courts were to look for reasonable interpretations it would require them to carry out an ‘*evaluative exercise*’ and would do so without any suggestion being put forward in Parliament as to what criteria the Courts were to apply in doing so²⁶.
- 18.** A suggestion that that section should also be amended to require the Courts to arrive at ‘*possible and reasonable*’²⁷ interpretations of legislation was also rejected. Jack Straw MP rejected it on the basis that a reference to ‘*reasonable*’ would introduce an element of subjectivity into the Courts’ interpretative approach and, in any event, the Courts would always say that any interpretation they arrived at was reasonable. The proposal was thus either harmful or otiose. And, in any event, should Parliament consider that the Courts had, in applying section 3, arrived at an unreasonable albeit possible interpretation of legislation, it remained the case that Parliament could always enact fresh legislation to correct that interpretation²⁸; section 3 preserved Parliamentary Sovereignty.
- 19.** Secondly, the then Government rejected a suggestion that greater prominence should be given to the power in section 4 of the HRA to issue declarations of incompatibility rather than having section 3 run the risk that in seeking a possible Convention rights compatible interpretation of legislation would ‘force courts into making artificial interpretations’²⁹.

22 Jack Straw MP, Hansard, HoC, 3 June 1998, vol. 313, col. 422 in J. Cooper & A. Marshall-Williams at 55.

23 Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 535 in J. Cooper & A. Marshall-Williams at 50.

24 I.e., a statement intended to be capable of being referred to in a UK Court when a question of the correct interpretation of section 3 was in issue.

25 Jack Straw MP, Hansard, HoC, 3 June 1998, vol. 313, col. 422 in J. Cooper & A. Marshall-Williams at 56.

26 Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 535 in J. Cooper & A. Marshall-Williams at 51.

27 Dominic Grieve QC MP, Hansard, HoC, 3 June 1998, vol. 313, col. 422 in J. Cooper & A. Marshall-Williams at 56.

28 Jack Straw MP, Hansard, HoC, 3 June 1998, vol. 313, col. 423 in J. Cooper & A. Marshall-Williams at 56.

29 Dominic Grieve QC MP, Hansard, HoC, 3 June 1998, vol. 313, col. 419 in J. Cooper & A. Marshall-Williams at 52-53.

Dominic Grieve QC MP – greater prominence should be given to declarations of incompatibility³⁰

‘Would it not be better for the courts to tell Parliament that primary or subordinate legislation was incompatible with the Convention than – might happen under the current wording – to do painful gymnastic exercises to make existing legislation fit Convention principles when it cannot?’

20. The Government did not take up Dominic Grieve QC MP’s suggestion. Giving greater prominence to what would become section 4 ran counter to two of the HRA’s main objectives. It would undermine its aim of securing greater compliance with Convention rights in UK domestic law. It would also lead to more applications having to be made by UK citizens to the ECtHR on the basis that the UK had allegedly breached their Convention rights.

Jack Straw MP on not giving priority to declarations of incompatibility over section 3

‘The Opposition want the courts to arrive somewhat earlier at the conclusion that the legislation is simply incompatible with the Convention. I cannot see what could be gained by that, bearing in mind our responsibilities under the Convention, apart from the prospect of more cases ending up in Strasbourg because fewer people would be satisfied with the interpretation of the United Kingdom courts.’³¹

21. Moreover, ensuring that the interpretative exercise required by section 3 was carried out first would help to ensure that the number of declarations of incompatibility made would be minimised. Adopting a declaration of incompatibility-first approach would *‘maximise rather than minimise declarations of incompatibility [and] would tend to bring the statute book into unnecessary disrepute’³²*.
22. Finally, the Government rejected a proposal that section 3 be amended to include provision for a domestic margin of appreciation. The proposal was that in interpreting legislation section 3 be amended to provide that courts were to have *‘due regard’* to *‘expressions of Parliamentary will’³³*. This was intended to provide the means to give the Courts pause for thought as to whether to *‘hold that Parliament [had] departed and derogated from Convention rights.’* The proposal was criticised as being *‘wrong in principle and dangerous in effect.’³⁴* It was not accepted by the Government.

³⁰ Dominic Grieve QC MP, Hansard, HoC, 3 June 1998, vol. 313, col. 419 in J. Cooper & A. Marshall-Williams at 53.

³¹ Jack Straw MP, Hansard, HoC, 3 June 1998, vol. 313, col. 422 in J. Cooper & A. Marshall-Williams at 55.

³² Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 535 in J. Cooper & A. Marshall-Williams at 50.

³³ Douglas Hogg MP, Hansard, HoC, 3 June 1998, vol. 313, col. 418 in J. Cooper & A. Marshall-Williams at 52.

³⁴ Paul Stinchcombe MP, Hansard, HoC, 3 June 1998, vol. 313, col. 418 in J. Cooper & A. Marshall-Williams at 52.

Summary of section 3's aims set out in the parliamentary debates

Section 3 was intended to:

- play a part in ensuring that the HRA was consistent with the constitutional principle of Parliamentary Sovereignty. Specifically, it did not enable them to challenge the validity of or disapply legislation.
- ensure that the HRA did not provide for the implied repeal of previous legislation that was inconsistent with Convention rights.
- provide a new and strong form of statutory interpretation, which required the courts to interpret legislation – and particularly legislation enacted after the UK accepted the right of individual petition to the ECtHR in 1966³⁵ – consistently with Convention rights where it was possible to do so consistently with the language of the legislation in question.

(3) Section 4 of the HRA – The Parliamentary Debates

- 23.** Section 4 was the necessary complement to section 3 of the HRA. It provided for the situation where UK Courts were unable to interpret legislation in a way that was consistent with Convention rights, for instance where Parliament had chosen to do so as the then Government recognised would remain possible following the HRA's enactment³⁶. In such a circumstance and 'as a last resort'³⁷ section 4 enabled them to make a declaration of incompatibility. As Lord Irvine LC explained:

*'The position under the Bill [the HRA] is that, where pre-existing legislation cannot be construed by the courts compatibly with the Convention, the intention of the Government is that the courts may make a declaration of incompatibility and then Parliament may make a remedial order.'*³⁸

35 See footnote 20, above. This point was made by Jack Straw MP when explaining the Government's view that following acceptance of the right of individual petition, the need for legislation to be compatible with Convention rights would have been all the more pertinent to legislators: Jack Straw MP, Hansard, HoC, 3 June 1998, vol. 313, col. 420 in J. Cooper & A. Marshall-Williams at 197, '... I think it would be impossible to say that all legislation, of whatever antiquity, was passed in a manner compatible with the Convention. It is, by definition, impossible to say that of legislation passed before the Convention was even a gleam in the eye of a former Conservative Lord Chancellor [David Maxwell-Fyfe, Lord Kilmuir LC, one of the prime movers behind the Convention]. It took some decades before the House, our courts and the parliamentary draftsman became sensitised to the need to ensure compatibility. It was not until the changes of 1966, allowing individual petition to the European Commission, that Governments began to take on board the need for compatibility in the ways in which they went about their daily business and in the drafting of the Bills.'

36 Jack Straw MP, Hansard, HoC, 3 June 1998, vol. 313, col. 422 in J. Cooper & A. Marshall-Williams at 55.

37 Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 535 in J. Cooper & A. Marshall-Williams at 49.

38 Lord Irvine LC, Hansard, HL, 3 November 1997, vol. 582, col. 1231 in J. Cooper & A. Marshall-Williams at 65.

The section 4 power was not intended to be used frequently. Rather it was intended to be confined to what were expected to be those ‘rare cases’³⁹ where Courts could not interpret legislation compatibly with Convention rights.

- 24.** Section 4, like section 3, was intended to preserve the constitutional principle of Parliamentary Sovereignty while enabling the HRA to give effect to Convention rights in UK domestic law. Section 4 was intended to strike ‘a careful compromise’ between the two⁴⁰. It was intended to secure the former by providing that a declaration of incompatibility was not to affect the validity of legislation. It was intended to secure the latter through the declaration alerting Parliament to the Courts’ view that legislation was incompatible with Convention rights.

Section 4 intended to preserve Parliamentary Sovereignty

‘A clause [section] 4 declaration has no operative or coercive effect and in particular does not prevent either party relying on, or the courts enforcing, the law in question unless and until changed by Parliament.’⁴¹

‘Clause [section] 4(6) expressly provides that a declaration does not affect the validity, continuing operation or enforcement of the relevant legislative provision. This is because we think that any decision to change primary legislation should be reserved for the consideration of Parliament. Again, the Government are upholding the sovereignty of Parliament and are not in any way breaching that principle.’⁴²

Section 4 intended to form part of the HRA’s scheme to give effect to Convention rights

‘By enabling the courts to make a declaration of incompatibility, the situation can be brought to the notice of Parliament and the deficiency subsequently rectified by Parliament ... I would expect a court, when making a declaration, to explain what the difficulty was and why it had been impossible to overcome it by constructive interpretation of clause 3... The purpose of a declaration is to draw attention to a legislative incompatibility with the Convention and to act as a trigger for a remedial order.’⁴³

A number of points concerning section 4 are evident from the parliamentary debates.

39 Lord Irvine LC, Hansard, HL, 19 January 1998, vol. 584, col. 1294 in J. Cooper & A. Marshall-Williams at 63.

40 Geoff Hoon MP, Hansard, HoC, 3 June 1998, vol. 313, col. 458 in J. Cooper & A. Marshall-Williams at 67.

41 Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 546 in J. Cooper & A. Marshall-Williams at 66.

42 Geoff Hoon MP, Hansard, HoC, 3 June 1998, vol. 313, col. 459 in J. Cooper & A. Marshall-Williams at 69.

43 Geoff Hoon MP, Hansard, HoC, 3 June 1998, vol. 313, col. 459 in J. Cooper & A. Marshall-Williams at 68.

- 25.** In the first instance, the fact that the power to issue a declaration of incompatibility was discretionary had two bases. First, it flowed from the general principle of UK law that declaratory relief was discretionary. Secondly, it recognised that in some circumstances the Courts might properly decide that notwithstanding legislation being incompatible with Convention rights it was not appropriate to issue a declaration. Lord Irvine LC identified two situations where a court might decline to exercise its discretion to issue a declaration: first, where there might be an alternative statutory appeal route available to the claimant; and, secondly, where there was another procedure that the claimant should exhaust before seeking such a declaration. Apart from these limited examples, it does not appear that Lord Irvine LC could envisage any others that would justify a refusal to make a declaration⁴⁴. Generally, there was an expectation that a declaration would be issued by the Courts where the power to do so was engaged.

Section 4 – a discretionary power

*'The courts may... not wish to make a declaration of incompatibility in all cases. It is possible that the facts of particular cases may suggest that legislation as it is applied in that case is incompatible with the Convention, but there may be reasons peculiar to the particular case why the legislation should not be declared incompatible on the occasion when the court would be free to do that ... I suggest that I certainly would expect courts generally to make declarations of incompatibility when they find an Act to be incompatible with the Convention. However, we do not wish to deny them a discretion not to do so because of the particular circumstances of any case.'*⁴⁵

- 26.** Secondly, it is evident that section 4 was intended to enable the Courts to provide to Parliament their view of legislative compatibility with the Convention. As Jack Straw MP explained, a declaration of incompatibility was intended to provide a *'clear signal to Government and Parliament that, in the court's view, a provision of legislation does not conform to the standards of the Convention.'*⁴⁶
- 27.** Section 4 did not require either the Government or Parliament to take any remedial action in response to a declaration. That a declaration was said to be a signal of the Court's view is suggestive of the fact that the Government or Parliament could, properly, come to its own view having considered the signal sent by the Court. That view might differ from the Court's.

⁴⁴ Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 546 in J. Cooper & A. Marshall-Williams at 66-67.

⁴⁵ Lord Irvine LC, Hansard, HL, 18 November 1997, vol. 583, col. 546 in J. Cooper & A. Marshall-Williams at 66-67.

⁴⁶ Jack Straw MP, Hansard, HoC, 16 February 1998, vol. 307, col. 780 in J. Cooper & A. Marshall-Williams at 65.

- 28.** Should the Government and/or Parliament come to a different view, then they could properly choose not to take any remedial action and leave the legislation held to be incompatible in place⁴⁷. In such a situation, the question of compatibility with the Convention would become, if an application was made to the ECtHR, a matter for that Court to determine. It would likely do so in the light of the Court judgment that led to the declaration being made and in the light of any Parliamentary consideration of the declaration⁴⁸. That said, there was an expectation that Government and Parliament would take remedial action in response to a declaration⁴⁹.

Summary of section 4's aims set out in the parliamentary debates

Section 4 was intended to:

- keep the HRA consistent with the constitutional principle of Parliamentary Sovereignty. As with section 3 of the HRA, it did not provide the Courts with a means to invalidate Acts of Parliament.
- be used rarely and as a last resort in those circumstances where the Courts were unable to interpret legislation compatibly with Convention rights.
- provide the Courts with a discretionary power. Where Courts found legislation to be incompatible with Convention rights, they were not bound to issue a declaration of incompatibility although they were generally expected to do so.
- enable Courts to indicate to the Government and Parliament, through a declaration of incompatibility, their view that legislation was incompatible with Convention rights and through their judgment to indicate how that incompatibility arose.
- help secure effective implementation of Convention rights through declarations of incompatibility and through the reasons Courts would give in explaining why they had issued such declarations.

47 On which point see Lord Irvine LC, *Hansard*, HL, 3 November 1997, vol. 582, col. 1231 in J. Cooper & A. Marshall-Williams at 65: a declaration was 'likely to prompt' remedial action. Hence it was not certain to do so.

48 See Chapter Four at [40] and following.

49 Geoff Hoon MP, *Hansard*, HoC, 3 June 1998, vol. 313, col. 459 in J. Cooper & A. Marshall-Williams at 68.

(4) Section 19 of the HRA – The Parliamentary Debates

- 29.** Section 19 of the HRA forms an integral part of the overall scheme for giving effect to Convention rights in UK domestic law. It was primarily intended to ensure that Government and Parliament gave proper consideration to whether legislation enacted after the HRA came into force was compatible with Convention rights.

Section 19's purpose

*'[Section] 19 is a further demonstration of our determination to improve compliance with Convention rights. It places a requirement on a Minister to publish a statement in relation to any Bill that he or she introduces. The statement will either be that the provisions of the legislation are compatible with Convention rights or that he or she cannot make such a statement, but the Government nevertheless wish to proceed with the Bill... In my judgment, it will greatly assist Parliament's consideration of Bills highlighting the potential implications of human rights.'*⁵⁰

- 30.** Section 19 was thus intended to improve Government and parliamentary scrutiny of legislation. Such statements were particularly expected to enhance the depth and quality of parliamentary debate and scrutiny of legislation, as Government ministers were expected to give their reasons as to why they either had or had not made a section 19 statement⁵¹. In this way it was to provide the basis for a presumption, noted above⁵², that post-HRA legislation was intended, and ought therefore, to be capable of being interpreted compatibly with Convention rights.
- 31.** Section 19 had a further role, one more specifically linked to sections 3 and 4 of the HRA. The expectation, where section 3 was concerned, was that the Courts would approach legislation enacted after the HRA came into force in respect of which a Government minister had issued a section 19 statement of compatibility, on the basis that Parliament had sought to ensure it was compatible with Convention rights. In other words, where Parliament had considered legislation following the HRA's enactment, there was to be an assumption by the Courts that it was compatible with Convention rights.

50 Jack Straw MP, Hansard, HoC, 16 February 1998, vol. 307, col. 780 in J. Cooper & A. Marshall-Williams at 196.

51 Lord Irvine LC, Hansard, HL, 27 November 1997, vol. 583, col. 1163-1164 in J. Cooper & A. Marshall-Williams at 198; Mike O'Brien MP, Hansard, HoC, 21 October 1998, vol. 317, col. 1350 in J. Cooper & A. Marshall-Williams at 200.

52 See Lord Irvine, above at [15].

Assumption that post-HRA legislation was intended to be compatible with Convention rights

*'... we are, of course, inviting the courts to work on the assumption that the House has applied itself to ensure that legislation is compatible for the Convention, except where a Minister comes to the House to say that there are overriding reasons why it is not, to give those reasons and to ask the House to agree to the legislation in any case.'*⁵³

- 32.** In so far as section 4 of the HRA was concerned, section 19 was intended to play a different role. Particularly, it was anticipated, albeit not mandated, that where a Government minister had issued a section 19 statement of compatibility in respect of legislation that the UK Courts had later held to be incompatible with Convention rights, remedial action would be taken by the Government.

Effect of a section 4 declaration where there was a prior section 19 statement of compatibility

*'... The design of the Bill is to give the courts as much space as possible to protect human rights, short of a power to set aside or ignore Acts of Parliament. In the very rare cases where the higher courts will find it impossible to read and give effect to any statute in a way which is compatible with Convention rights, they will be able to make a declaration of incompatibility. Then it is for Parliament to decide whether there should be remedial legislation. Parliament may, not must, and generally will, legislate. If a Minister's prior assessment of compatibility (under [section] 19) is subsequently found by declaration of incompatibility by the courts to have been mistaken, it is hard to see how a Minister could withhold remedial action.'*⁵⁴

53 Jack Straw MP, Hansard, HoC, 3 June 1998, vol. 313, col. 420 in J. Cooper & A. Marshall-Williams at 197.

54 Lord Irvine LC, Hansard, HL, 3 November 1997, vol. 582, col. 1228-1229 in J. Cooper & A. Marshall-Williams at 195.

33. Section 19's aims can be summarised as follows.

Summary of section 19's aims set out in the parliamentary debates

Section 19 was intended to:

- enhance Government and parliamentary scrutiny of the compatibility of proposed legislation with Convention rights.
- enable UK Courts to assume that legislation was intended to be compatible with Convention rights when interpreting it consistently with section 3 of the HRA.
- provide a prompt to Government Ministers to take remedial action where, following the making of a section 19 statement of compatibility, UK Courts had held legislation to be incompatible with Convention rights.

(5) The UK Courts' Approach to Section 3

34. The approach taken by UK Courts to section 3 has been a particular focus for criticism of the HRA. It was suggested, for instance, in the first decade after the HRA came into force, that it gives UK Courts '*enormous*' power⁵⁵ that enabled them to effectively rewrite legislation contrary to the constitutional principle of separation of powers and in doing so act as if they had the power to strike down or invalidate legislation⁵⁶. *If* understood in this way section 3 could be said to have enabled an expansion of judicial power that unless properly applied could upset the rule of law⁵⁷. Similar critical comment was made to IHRAR in, for instance Policy Exchange's response to the CfE⁵⁸.
35. Given this criticism, the potentially wide-ranging nature of the duty imposed on UK Courts under section 3, and its potential consequences for the rule of law, it is important to consider how the Courts have approached its interpretation and application. In doing so we consider the first two specific issues raised by question 2(a) of the ToR: whether the UK Courts have applied section 3 to interpret legislation in a manner in which Parliament did not intend it to be interpreted and, if so, should it be amended or repealed; and, if it should be amended, how should such an amendment be implemented.

55 T. Masterman & I. Leigh, *Making Rights Real: The Human Rights Act in its First Decade*, (Bloomsbury, 2008) at 88. Such critiques are not limited to the HRA's first decade, see more recently, R. Ekins, *Protecting the constitution: How and Why Parliament should Limit Judicial Power* (Policy Exchange, 2019)

56 T. Campbell noted in Masterman & Leigh at 91.

57 P. Sales & R. Ekins, *Rights-consistent interpretation and the Human Rights Act 1998*, L.Q.R. 2011, 127.

58 Policy Exchange, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [31] and following.

36. Before doing so it is important to note that there is no definitive record of the UK Courts’ use of section 3 to interpret legislation compatibly with Convention rights. JUSTICE, in its response to the *CfE*, provided IHRAR with some evidential analysis of its use⁵⁹. While that analysis was very helpful, it could not properly be said to be definitive, not least because it did not take account of cases decided before 2013. It is also likely only to have taken account of cases reported on Westlaw. Other cases may either have been reported elsewhere or not reported at all. We have therefore approached that analysis with caution. The absence of a definitive public record of the use of section 3, including a publicly accessible archive of such decisions, has, in our view, undermined transparency in the use of section 3 and impedes proper debate by Government, Parliament and – importantly – the public of the UK Courts’ collective approach to section 3. We return to this issue when considering our recommendations for reform.

(6) Section 3 – the UK Courts’ Initial Approach

- 37.** The UK Courts’ initial (and later) approach to section 3 is in some senses similar to the approach it took to section 2 in *Ullah* (discussed in Chapter Two).
- 38.** The initial authorities on section 3 appear to be consistent with the critical view that UK Courts were adopting an unjustifiably ‘activist’ approach. The first case where this occurred was *R v Offen* (2001)⁶⁰ (*Offen*). In *Offen*, the Court of Appeal in England and Wales interpreted section 2 of the Crime (Sentences) Act 1997, which introduced mandatory life sentences for individuals convicted of a second serious offence. The 1997 Act had been the focus of tension between the Government and the Judiciary during its enactment. Its section 2, an apparent (minor) concession by the Government to the Judiciary, permitted Courts not to impose such a sentence only where ‘*exceptional circumstances*’ were established. It was thus a limited discretionary exception.
- 39.** In *Offen*, the Court of Appeal interpreted section 2 in a way that has been described as resulting in it being substantially weakened⁶¹. It did so by interpreting section 2 so that life sentences were not to be imposed if the offender did not post a significant risk to the public. As the Court of Appeal put it:

59 JUSTICE, *Submission to the Independent Review of the Human Rights Act Call for Evidence – Annex*, which analysed 593 cases decided between January 2013 and December 2020 where section 3 had been used in the Courts’ reasoning when interpreting legislation.

60 *R v Offen* [2001] 1 WLR 253.

61 C. Gearty cited in R. Masterman & I. Leigh, *Making Rights Real: The Human Rights Act in its First Decade*, (Bloomsbury, 2008) at 198.

*'... section 2 will not contravene Convention rights if courts apply the section so that it does not result in offenders being sentenced to life imprisonment when they do not constitute a significant risk to the public. Whether there is significant risk will depend on the evidence which is before the court. If the offender is a significant risk, the court can impose a life sentence under section 2 without contravening the Convention. Either there will be no exceptional circumstances, or despite the exceptional circumstances the facts will justify imposing a life sentence.'*⁶²

This interpretation was said by Lord Woolf CJ to *'still give effect to the intention of Parliament.'* It would, however, simply do so *'in a more just, less arbitrary and more proportionate manner.'*⁶³

40. Whatever the merits of the Court of Appeal's decision, it can be questioned whether it gave proper effect to Parliament's intention and whether the use of section 3 amounted to judicial amendment of the statute rather than interpretation. As Gearty put it, *'however dressed up or explained away, the Offen case has effectively disembowelled a particularly savage legislative intervention, so that, even opponents of judicial activism find themselves applauding the result while diverting their eyes from how it was brought about.'*⁶⁴

41. There is, however, some support for the Court's approach and the view that it reached a legitimate possible interpretation of the section. In **Offen** Lord Woolf CJ noted that in *R v Buckland* (2000)⁶⁵ Lord Bingham CJ had previously explained the rationale behind section 2. Lord Bingham CJ stated that it was:

*'founded on an assumption that those who have been convicted of two qualifying serious offences present such a serious and continuing danger to the safety of the public that they should be liable to indefinite incarceration and, if released should be liable indefinitely to recall to prison. In any case where on all the evidence it appears that such a danger does or may exist, it is hard to see how the Court can consider itself justified in not imposing the statutory penalty, even if exceptional circumstances are found to exist. But if exceptional circumstances are found, and the evidence suggests that an offender does not present a serious and continuing danger to the safety of the public, the Court may be justified in imposing a lesser penalty.'*⁶⁶

42. Whatever the merits of the criticism levelled at **Offen**, it is at the least suggestive of the potentially expansive effect of the section 3 interpretative duty. **Offen** was however not the only early decision arousing controversy. It was followed in 2001 by what has been described as the highpoint of the UK Courts' misuse of section 3: *R v A (Complainant's Sexual History)* (2001)⁶⁷ (**R v A**).

62 **Offen** at [109].

63 **Offen** at [111].

64 Cited in R. Masterman & I. Leigh at 198, who go on to set out further criticism of the decision.

65 *R v Buckland* [2000] 1 WLR 1262

66 Cited in **Offen** at [4].

67 *R v A (Complainant's Sexual History)* [2001] UKHL 25; [2002] 1 AC 45.

Ekins & Gee – *R v A* – the highpoint of misuse⁶⁸

‘The highpoint of its [section 3’s] misuse may be R v A (No 2), where the House of Lords undercut entirely a recently enacted rape-shield provision, restoring the free judicial discretion to allow cross-examination of complainants in sexual offence cases which discretion Parliament had deliberately curtailed.’

- 43. *R v A*** concerned section 41 of the Youth Justice and Criminal Evidence Act 1999. It imposed limits on adducing evidence of or questioning as to a complainant’s sexual history in prosecutions for rape. The majority in the House of Lords were concerned that, read literally, it would breach article 6 of the Convention⁶⁹. Applying section 3 of the HRA, it was, however, capable of being interpreted and applied consistently with article 6. In reaching this decision, Lord Steyn’s approach to section 3 is instructive.

Lord Steyn – the approach to section 3 in *R v A*⁷⁰

‘... 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: R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326, per Lord Cooke of Thorndon, at p 373F; and my judgment, at p 366B. The White Paper made clear that the obligation goes far beyond the rule which enabled the courts to take the Convention into account in resolving any ambiguity in a legislative provision: see “Rights Brought Home: The Human Rights Bill” (1997) (Cm 3782), para 2.7. The draftsman of the Act had before him the slightly weaker model in section 6 of the New Zealand Bill of Rights Act 1990 but preferred stronger language. Parliament specifically rejected the 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. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it: compare, for example, articles 31 to 33 of the Vienna Convention on the Law of Treaties (1980) (Cmnd 7964). Section 3 qualifies this general principle because it requires a court to find an interpretation compatible with Convention rights if it is possible to do so. In the progress of the Bill through Parliament the Lord

⁶⁸ R. Ekins & G. Gee, *Submission to the Joint Committee on Human Rights – 20 years of the Human Rights Act* (2018) at [18] <<https://policyexchange.org.uk/wp-content/uploads/2018/10/JPP-submission-to-the-JCHR-inquiry-18-September-2018.pdf>>.

⁶⁹ See, for instance, *R v A* at [10] (Lord Slynn).

⁷⁰ *R v A* at [44]-[45].

Chancellor observed that “in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility” and the Home Secretary said “We expect that, in almost all cases, the courts will be able to interpret the legislation compatibility with the Convention”: Hansard (HL Debates), 5 February 1998, col 840 (3rd Reading) and Hansard (HC Debates), 16 February 1998, col 778 (2nd Reading). For reasons which I explained in a recent paper, this is at least relevant as an aid to the interpretation of section 3 against the executive: “Pepper v Hart: A re-examination” (2001) 21 Oxford Journal of Legal Studies 59. In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so. If a clear limitation on Convention rights is stated in terms, such an impossibility will arise: *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 132A-B per Lord Hoffmann. There is, however, no limitation of such a nature in the present case.

In my view section 3 requires the court to subordinate the niceties of the language of section 41(3)(c), and in particular the touchstone of coincidence, to broader considerations of relevance judged by logical and common sense criteria of time and circumstances. After all, it is realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material. It is therefore possible under section 3 to read section 41, and in particular section 41(3)(c), as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under section 41(3)(c). On the other hand, there will be cases where previous sexual experience between a complainant and an accused will be irrelevant, eg an isolated episode distant in time and circumstances. Where the line is to be drawn must be left to the judgment of trial judges. On this basis a declaration of incompatibility can be avoided. If this approach is adopted, section 41 will have achieved a major part of its objective but its excessive reach will have been attenuated in accordance with the will of Parliament as reflected in section 3 of the 1998 Act. That is the approach which I would adopt.’

- 44.** On one view, Lord Steyn’s approach appears to place substantial constraints on the use of section 4 declarations of incompatibility. It could be read as undermining Parliament’s intention for the HRA by effectively rendering section 4 redundant⁷¹. By giving section 3 such a potentially expansive scope almost all legislation would be subject to its interpretative approach no matter how strained the interpretation.

⁷¹ R. Masterman & I. Leigh at 97.

- 45.** It is also noteworthy that Lord Steyn's approach appears to go beyond Parliament's intention in another way. Jack Straw MP emphasised during the parliamentary debates that section 3 was not intended to be used to 'contort' the meaning of words. Strained interpretations of legislation were to be avoided⁷². Lord Steyn's approach could be said to support reliance on such strained interpretations.
- 46.** Lord Steyn's approach to the application of section 3 can be contrasted with that taken by Lord Hope in his dissenting speech in the same case. He rejected the conclusion that section 41 of the 1999 Act could be interpreted under section 3. In doing so he quite rightly noted that section 3 is no more than a rule of interpretation: it does not permit UK Courts to, in effect, legislate by way of amending legislation through use of section 3. He also rightly noted that the limits on what was possible were broader than that elaborated by Lord Steyn.

Lord Hope's nuanced approach to section 3 in *R v A*⁷³

*'I should like to add however that I would find it very difficult to accept that it was permissible under section 3 of the Human Rights Act 1998 to read in to section 41(3)(c) a provision to the effect that evidence or questioning which was required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible. The rule of construction which section 3 lays down is quite unlike any previous rule of statutory interpretation. There is no need to identify an ambiguity or absurdity. Compatibility with Convention rights is the sole guiding principle. That is the paramount object which the rule seeks to achieve. But the rule is only a rule of interpretation. It does not entitle the judges to act as legislators. As Lord Woolf CJ said in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, section 3 does not entitle the court to legislate; its task is still one of interpretation. The compatibility is to be achieved only so far as this is possible. Plainly this will not be possible if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible. It seems to me that the same result must follow if they do so by necessary implication, as this too is a means of identifying the plain intention of Parliament: see Lord Hoffmann's observations in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131F-G.*

In the present case it seems to me that the entire structure of section 41 contradicts the idea that it is possible to read into it a new provision which would entitle the court to give leave whenever it was of the opinion that this was required to ensure a fair trial. The whole point of the section, as was made clear during the debates in Parliament, was to address the mischief which was thought to have arisen due to the width of the discretion which had previously been given to the trial judge...'

72 See [16], above.

73 *R v A* at [109]-[110].

47. Lord Hope’s dissenting speech makes clear that the high-water mark left by Lord Steyn’s speech was not necessarily the right approach to section 3. Since **R v A**, as was the case with **Ullah**, the UK Courts’ early and arguably over-zealous approach has been subject to recalibration. That **R v A** is identified as the high-water mark of section 3’s application by UK Courts is itself telling. It was handed down in 2001, the year after the HRA came into force. That is twenty years ago now. If the UK Courts had routinely, or even sporadically, been misusing section 3, **R v A** would not now be viewed as the high-water mark of misuse. That it is still viewed that way is very strongly suggestive that section 3 has not been used improperly; as JUSTICE put it in their response to the CfE ‘... *there is no evidence that the application of these principles [those concerning the application of section 3] has resulted in interpretations which are inconsistent with Parliament’s intention.*’⁷⁴

Scottish Government – the UK Courts have applied the HRA appropriately⁷⁵

‘The Scottish Government does not believe that the courts “have been drawn unduly into matters of policy”. In adjudicating in human rights cases the UK courts have merely carried out their proper function, which is to interpret and apply the law, and to do so objectively and without fear or favour.’

48. It is also important to note that despite the criticism of both **Offen** and **R v A**, and particularly in respect of the latter the view that the House of Lords’ decision undercut Parliament’s deliberate policy choice and thus arguably went far beyond what was permissible under section 3, Government and Parliament did not legislate to reverse the effect of the decisions. In both cases, Parliament could properly have done so. Moreover, perhaps especially with regard to **R v A**, many hold the view that strong practical considerations going to the fairness of then current trials, lent support to the decision of the House of Lords. There would, it is said, have been obvious disadvantages in leaving matters to a section 4 declaration and resultant delay, while potential appeals built up. It has further been said that the decision in **R v A** served to render section 41 of the 1999 Act workable and to prevent it, despite its praiseworthy objective, resulting in (no doubt unintended) injustice.

⁷⁴ JUSTICE, *Submission to the Independent Review of the Human Rights Act Call for Evidence* at [37].

⁷⁵ Scottish Government, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [13].

(7) The UK Courts' later approach to section 3

- 49.** The approach adopted in **R v A** did not remain unrevised for long. It was subject to subsequent explanation by the House of Lords in three decisions, which substantially narrowed the approach articulated by Lord Steyn in **R v A**.
- 50.** First, in *Re S & Re W (Care Orders)* (2002) (**Re S & Re W (Care Orders)**)⁷⁶ the House of Lords had to consider whether the Court of Appeal's approach to section 3 of the HRA in interpreting the Children Act 1989 was permissible. The Court of Appeal had relied on section 3 in order to interpret provisions of the 1989 Act in a way that introduced, as Lord Nicholls put it, 'a range of rights and liabilities not sanctioned by Parliament.'⁷⁷ The House of Lords held that section 3 could not be used to do so.
- 51.** In giving the carefully reasoned leading speech, Lord Nicholls explained the approach to be taken to section 3. It highlighted three key points: first, section 3 did not permit UK Courts to amend legislation. It was an interpretative power; secondly, Lord Steyn's speech in **R v A** was not to be read as setting out a narrow approach to when it would be impossible to interpret legislation compatibly with Convention rights; thirdly and by way of example, interpretations that amount to a substantial departure from a fundamental feature of an Act of Parliament are likely to go beyond interpretation and thus be impermissible. An example of such an impermissible interpretation was one that, in terms of its practical consequences, the Court was not properly able to evaluate, i.e., areas that fell more properly within the institutional competence of the Government or Parliament. In such circumstances, by implication, a section 4 declaration of incompatibility was required.

76 *Re S & Re W (Care Orders)* [2002] UKHL 10; [2002] 2 AC 291.

77 *Re S & Re W (Care Orders)* at [35].

Lord Nicholls in *Re S & Re W (Care Orders)*⁷⁸

'But the reach of [section 3] is not unlimited. [It] is concerned with interpretation...The existence of this limit on the scope of section 3(1) has already been the subject of judicial confirmation, more than once: see, for instance, Lord Woolf CJ in Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] 3 WLR 183, 204, para 75 and Lord Hope of Craighead in R v Lambert [2001] 3 WLR 206, 233-235, paras 79-81.

In applying section 3 courts must be ever mindful of this outer limit. The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament.

Up to this point there is no difficulty. The area of real difficulty lies in identifying the limits of interpretation in a particular case. This is not a novel problem. If anything, the problem is more acute today than in past times. Nowadays courts are more 'liberal' in the interpretation of all manner of documents. The greater the latitude with which courts construe documents, the less readily defined is the boundary. What one person regards as sensible, if robust, interpretation, another regards as impermissibly creative. For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention compliant by legitimate use of the process of interpretation. The boundary line may be crossed even though a limitation on Convention rights is not stated in express terms. Lord Steyn's observations in R v A (No 2) [2002] 2 AC 45, 68D-E, para 44 are not to be read as meaning that a clear limitation on Convention rights in terms is the only circumstance in which an interpretation incompatible with Convention rights may arise.'

- 52.** Lord Nicholls went on to make clear that when applying section 3, UK Courts were to clearly explain that they were applying it and what led them to ascribe the interpretation they did to the particular legislative provision⁷⁹. That they are required to do so provides a firm basis for there to be a central record of judgments that rely upon section 3 to interpret legislation, as we discuss below in respect of Option Four of our recommended reform options.

⁷⁸ *Re S & Re W (Care Orders)* [2002] UKHL 10; [2002] 2 AC 291 at [38]-[40]

⁷⁹ *Re S & Re W (Care Orders)* [2002] UKHL 10; [2002] 2 AC 291 at [41].

53. Further limitations on section 3's scope were subsequently identified in *R (Anderson) v Secretary of State for the Home Department* (2002)⁸⁰ and *Bellinger v Bellinger* (2003)⁸¹. In the former, the House of Lords concluded that section 3 could not be relied upon where an interpretation of legislation compatible with Convention rights was contrary to a clear parliamentary intention as set out in the legislation.

***R (Anderson) v Secretary of State for the Home Department* (2002)⁸²**

The case concerned the question whether the Home Secretary's power to determine how long an individual convicted of murder could remain in prison for the purpose of punishment for the offence was compatible with the Convention. In particular, it focused on the question whether section 29 of the Crime (Sentences) Act 1997 was compatible with art. 6 of the Convention. The House of Lords did not consider that the provision could be interpreted compatibly with the Convention right. A declaration of incompatibility was issued.

Lord Steyn concluded that section 3 could not be utilised to provide an interpretation that was contrary to Parliament's intention as evidenced by the statute's express wording or by necessary implication. In doing so he expressly built on the approach taken by Lord Nicholls in ***Re S & Re W (Care Orders)***.

'Counsel for the appellant invited the House to use the interpretative obligation under section 3 to read into section 29 alleged Convention rights, viz to provide that the tariff set by the Home Secretary may not exceed the judicial recommendation. It is impossible to follow this course. It would not be interpretation but interpolation inconsistent with the plain legislative intent to entrust the decision to the Home Secretary, who was intended to be free to follow or reject judicial advice. Section 3(1) is not available where the suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute: In re S (Minors) (Care Order: Implementation of Care Plan) [2002] 2 WLR 720, 731-732, para 41 per Lord Nicholls of Birkenhead. It is therefore impossible to imply the suggested words into the statute or to secure the same result by a process of construction.'

54. In the latter case the House of Lords held that section 3 could not be relied upon to interpret legislation when the Convention rights compatible interpretation concerned an issue that had wider policy consequences going beyond the immediate legislation, i.e., the issue went beyond the institutional competence of the Courts.

⁸⁰ *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837.

⁸¹ *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467.

⁸² *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837 at [59].

Bellinger v Bellinger (2003)⁸³

Section 11(c) of the Matrimonial Causes Act 1973 provided that a marriage was void unless made between a 'male and a female'. The case concerned the question whether the Mrs Bellinger was 'female' for the purposes of the provision. Mrs Bellinger had been 'classified and registered as a male' at birth. By the time of her marriage to Mr Bellinger she had completed gender reassignment. The House of Lords issued a declaration of incompatibility as section 11 (c) was not compatible with Mrs Bellinger's art. 8 and 12 Convention rights. It was not possible to interpret the section compatibly with those rights. As Lord Nicholls put it,

'... Recognition of Mrs Bellinger as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 would necessitate giving the expressions 'male' and 'female' in that Act a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex.

This would represent a major change in the law, having far reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject.'

- 55.** In the latter case the House of Lords held that section 3 could not be relied Underpinning each of these limitations on the use of section 3 interpretative duty, the House of Lords was setting the boundary on its use at the line of institutional competence. Interpretations under section 3 were not possible where they involved the Courts engaging in matters properly within the institutional competence and responsibility of Parliament.

83 *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467 at [36]-[37].

(8) The UK Courts' Current Approach to Section 3 – *Ghaidan v Godin-Mendoza*

- 56.** The leading statement on the approach to be taken to the use of section 3 is now *Ghaidan v Godin-Mendoza* (2004)⁸⁴ (***Ghaidan***). It is an approach that has therefore been in place now for seventeen years. In rejecting the need for any amendment to section 3 (and hence also its repeal), Queen's University Belfast's Human Rights Centre submitted (in its response to the *CfE*) that this decision of the House of Lords ought to set at rest concerns regarding the approach taken in ***R v A***⁸⁵.
- 57.** ***Ghaidan*** concerned the interpretation of Schedule 1, paragraph 2(2) to the Rent Act 1977. Specifically, it concerned the question of who could succeed to a 'protected tenancy'. The Act provided that that an individual who had lived with the protected tenant as 'husband and wife' could succeed to the tenancy after the tenant's death. The issue was whether a homosexual partner of a protected tenant could succeed to the tenancy on such terms. The House of Lords had previously held, in *Fitzpatrick v Sterling Housing Association Ltd* (2001), that an individual in a same-sex relationship with the protected tenant did not come within the terms of the statutory provision. It therefore held that Parliament's intention in enacting the 1977 Act was to limit the meaning of 'husband and wife'.
- 58.** In ***Ghaidan*** the House of Lords considered whether its previous conclusion remained valid where the claim to succeed to the protected tenancy arose after the HRA came into force. Was it possible to interpret the 1977 Act compatibly with Convention rights? Had, therefore, Parliament's intention concerning the 1977 Act changed as a result of the HRA's enactment? The House of Lords, (Lord Millett dissenting) affirmed the right to succeed in such circumstances. It did so through applying section 3. Parliament's intention (or will) concerning the 1977 Act had therefore changed.
- 59.** This illustrates a wider point concerning the questions posed by the ToR. IHRAR is asked whether section 3 has been used to interpret legislation in ways contrary to Parliament's intention. The enactment of the HRA serves to underline Parliament's intention that *all* legislation is to be interpreted, so far as possible, compatibly with Convention rights. In applying the section 3 rule of interpretation courts are thus giving effect to Parliament's intention rather than acting contrary to it. That Parliament took such an approach to give effect to Convention rights in domestic law cannot be seen as unreasonable, in so far as any weaker rule of interpretation would have risked creating a gap between rights protection in UK Courts and in the ECtHR, together with increasing the use of section 4 declarations.

84 *Ghaidan v Godin-Mendoza* [2004] UKHL, [2004] 2 AC 557.

85 Queen's University Belfast, Human Rights Centre, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [25].

60. Before considering the specific guidance given by the House of Lords in **Ghaidan** on the use of section 3, it is important to note one feature of the appeal before the House of Lords. It is a not unusual feature where section 3 and section 4 of the HRA are concerned. In the course of his dissenting speech⁸⁶, Lord Millett noted that use of section 3 was not resisted by counsel for the Government (the First Secretary of State, who had intervened in the proceedings). The Government’s counsel, in fact, submitted that section 3 could be used or as Professor Tom Hickman QC put it ‘*urged the Court to adopt this course*’⁸⁷. In *R v A*, by way of contrast, Counsel for the Government submitted that section 3 could not be used to interpret the statutory provision compatibly with Convention rights⁸⁸.

Counsel for the Government in *Ghaidan*⁸⁹

‘The exercise of the section 3 power is subject only to the compatible interpretation being linguistically possible, consistently with the legislative scheme, and not crossing the boundary between judicial interpretation and the legislative function.

*The phrase “as his or her wife or husband” in paragraph 2(2) can legitimately be read so as to include same-sex couples. Although the words “wife” and “husband” are gender-specific in themselves, the phrase as a whole is not: see *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498 . The gender of each partner does not play an important role in the subject matter of the provisions. An interpretation of the phrase as including same-sex couples does not interfere with any of the fundamental provisions or the fundamental policy of the legislation. No declaration of incompatibility is required.’*

61. In circumstances where the UK Courts would otherwise find legislation not to be compatible with Convention rights reliance on section 3 by the Government is not unusual. Lady Hale in her evidence to the JCHR made that clear. On the contrary, it is usual for the Government to submit that UK Courts should interpret legislation compatibly with Convention rights using the section 3 interpretative power. It is also usual for UK Courts to accede to the Government’s view on the approach to be taken.

⁸⁶ *Ghaidan* at [70].

⁸⁷ Professor Tom Hickman QC, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [23].

⁸⁸ *R v A* at 50-51.

⁸⁹ Noted at *Ghaidan v Godin-Mendoza* [2004] UKHL, [2004] 2 AC 557 at 563.

Lady Hale – evidence to the JCHR⁹⁰

*‘Could I say something else about [**Ghaidan**], and indeed about most of the other interpretive cases? That was a case in which the Government intervened to argue very strongly that that was what we should do. We have three choices. 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.’*

- 62.** Lady Hale’s evidence to the JCHR is strongly suggestive of the conclusion that in the generality of cases where section 3 is used to interpret legislation compatibly with Convention rights, the Government of the day has concluded that it is possible to interpret it that way. It is only then in specific cases, such as **R v A** that the Government takes a different view. Yet it is important to bear in mind that even in those cases like **R v A** the Government has not sought to introduce legislation to correct the result of decisions where UK Courts have applied what, in its view, was a strained and impermissible interpretation. The proper approach, and one that was intended to be carried out by Parliament when it enacted the HRA, was for the Government and Parliament to exercise their institutional competence to take appropriate remedial action where they concluded UK Courts had erred, i.e., ensure that Parliament exercised its sovereignty by legislating to reverse the effect of the UK Court’s decision. If there is a need to rebalance the constitutional settlement then what may be needed is a more robust approach by Government and Parliament in asserting their institutional competence, which the HRA was at pains to maintain.
- 63.** Turning to the extensive guidance given in **Ghaidan**, Lord Nicholls, Lord Steyn, Lord Millett (dissenting on the outcome of the appeal) and Lord Rodger articulated the general principles applicable to the exercise of the section 3 interpretative duty⁹¹.

⁹⁰ Lady Hale, *Transcript of Oral Evidence to the JCHR* (3 February 2021) at Q27 <<https://committees.parliament.uk/oralevidence/1661/html/>>.

⁹¹ **Ghaidan** at [26]-[33] (Lord Nicholls), [38]-[42] (Lord Steyn); [56] and following (Lord Millett).

Ghaidan – Principles governing the exercise of section 3

- Section 3 is to be applied to interpret all legislation whether its terms are ambiguous or not, both pre- and post-HRA, so that it is compatible with Convention rights where it was ‘possible’ to do so. This may alter the meaning that Parliament intended that legislation to have when enacting it. Parliament, in enacting the HRA, intended courts to be able to do this⁹².
- Use of section 3 is obligatory and significant where the natural and ordinary meaning of legislation, interpreted according to normal principles is incompatible with the Convention. As Lord Millett put it:

‘... the obligation arises (or at least has significance) only where the legislation in its natural and ordinary meaning, that is to say as construed in accordance with normal principles, is incompatible with the Convention. Ordinary principles of statutory construction include a presumption that Parliament does not intend to legislate in a way which would put the United Kingdom in breach of its international obligations. This presumption will often be sufficient to enable the court to interpret the statute in a way will make it compatible with the Convention without recourse to section 3. It is only where this is not the case that section 3 comes into play. When it does, it obliges the court to give an abnormal construction to the statutory language and one which cannot be achieved by resort to standard principles and presumptions.’⁹³

- Care needed to be taken in applying section 3, as it could lead the Courts to go beyond their constitutional role and ‘trespass upon the prerogative of Parliament’. It provided an interpretative power. It did not permit courts to amend legislation⁹⁴.
- Section 3 may require Courts to ‘read-in words’, i.e., imply words, into legislation but only in so far as to make it compliant with Convention rights. Any words implied into legislation when ‘reading in’ must ‘go with the grain of the legislation’, i.e., consistent with ‘the fundamental features of the legislative scheme’. Words cannot be implied to provide an interpretation of legislation where that interpretation is contrary to ‘express statutory words or is by implication necessarily contradicted by the statute’. Nor can words be implied to enable Courts to take decisions beyond their institutional competence⁹⁵.
- Section 3 also enables Courts to ‘read down’ legislation, that is to give it a narrow interpretation where that is compatible with Convention rights⁹⁶.

92 Lord Nicholls at [26], [29]-[32]; Lord Steyn at [40]-[41]; Lord Millett at [68]. A point recently reiterated by the Supreme Court in *REFERENCES (Bills) by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child and European Charter of Local Self-Government (Incorporation) (Scotland) [2021] UKSC 42* at [26] citing **Ghaidan** at [30] and [32], where it was noted that section 3 was intended to provide for UK Courts to interpret legislation in ways contrary to the intention of the Parliament that enacted them so far as giving them a Convention compliant interpretation was possible.

93 Lord Nicholls at [26]; Lord Millett at [59], [60].

94 Lord Millett at [61]-[62], [66]-[67]; Lord Rodger at [121].

95 Lord Nicholls at [32], [33]; Lord Millett at [67]-[68], [75]; Lord Rodger at [121].

96 Lord Millett at [67].

64. The principles articulated in **Ghaidan** provide clear and sensible guidance to UK Courts to apply section 3's interpretative duty. Since they were set out it is difficult to identify cases where UK Courts have strayed beyond Parliament's intention in enacting section 3; to reiterate, a point illustrated by the fact that **R v A**, which pre-dated **Ghaidan**, is identified as the high point of the UK Courts' suggested misuse of section 3. That is not to say that the decision in **Ghaidan** itself was not uncontroversial as an exercise of the section 3 power. As a matter of linguistic interpretation, it can plainly be questioned. It must, however, be recognised that, considered in practical terms, **Ghaidan** correctly anticipated the direction in which society was moving. It was, moreover, a decision supported by the Government at the time. And, as noted earlier, in so far as those decisions were viewed as going too far, Parliament could have legislated to reverse them; that it did not is more than suggestive of the conclusion that Parliament has not itself over the last twenty years considered that there was a systematic problem with the UK Courts' exercise of the duty imposed on them by section 3⁹⁷.

(9) To what Extent has Section 3 been Used to go beyond Parliament's Intention?

65. The ToR ask IHRA to consider the extent to which UK Courts have used section 3 to go beyond Parliament's intention.
66. First, as discussed above, as rightly made clear in **Ghaidan** by Lord Steyn, in enacting section 3, Parliament's intention was that legislation was to be interpreted as far as possible compatibly with Convention rights; in other words, when exercising the section 3 interpretative power, the Courts are giving effect to the intention of Parliament, contained in the HRA.

Cambridge University, Centre of Public Law – the will of Parliament after section 3⁹⁸

'However, it is important to recognise that this stronger form of interpretation is itself an expression of the will of Parliament in the HRA. Section 3(1) requires the courts to adopt a Convention-compliant interpretation to legislation, even if this appears to differ from what Parliament appeared to have in mind when enacting it, to ensure it complies with a further intention of Parliament that legislation be read, so far as possible, in a manner compatible with Convention rights.'

97 A point emphasised by Oxford Public Lawyers, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [24].

98 Cambridge University, Centre of Public Law, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [54]. Also see, JUSTICE, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at 44.

- 67.** As a starting point then, it was and remains Parliament’s intention that all legislation whenever enacted is interpreted in this way. Whatever the intention of Parliament may have been when a specific piece of legislation was enacted before the HRA came into force, whether it was the Rent Act 1977 or the Offences against the Person Act 1861, that intention was superseded by the intention of Parliament in enacting the HRA. The same is true for legislation enacted after the HRA came into force; as the Scottish Government point out, there is a ‘*logical inconsistency*’ in the first part of question 2(a) in so far as it suggests that UK Courts by interpreting post-HRA legislation compatibly with Convention rights could act contrary to Parliament’s intention⁹⁹. It is not apparent to the Panel that UK Courts have failed to act consistently with Parliament’s intention in enacting the HRA and applying section 3 and where necessary section 4. On the contrary, as the evidence submitted by JUSTICE shows, section 3 has been used by UK Courts in 24 cases to interpret legislation compatibly with Convention rights¹⁰⁰.
- 68.** Looked at a different way, the first part of Question 2(a) of the ToR question asks IHRAR to consider the extent to which UK Courts have used section 3 to go beyond Parliament’s intention in enacting section 3. To what extent have they misused section 3 to interpret legislation in a way that cannot be said to be properly ‘possible’. We have already noted in this respect the controversy concerning **Offen** and **R v A**. In **Offen**, the section 3 interpretation, as noted above, could be read (as some critics have read it) as amounting to the Courts undoing a defeat they suffered in the legislative passage of the statute.
- 69.** In **R v A**, the Court’s approach to interpreting the exclusion of past sexual history, could, as with **Offen**, be said to have effectively rewritten the legislation contrary to Parliament’s intention, albeit, especially in **R v A**, consistently with fairness and good sense¹⁰¹. It could also be suggested that in both cases the better and more justified approach would have been for the Courts to make a section 4 declaration of incompatibility and ensure, as a consequence, that Parliament was able to consider the issue in the light of such a declaration (albeit that practical difficulties would have resulted, especially in **R v A**, had this course been chosen).
- 70.** Both of those decisions were, however, decided shortly after the HRA was enacted and before UK Courts had developed their approach to section 3. Both pre-date the considered guidance set out in **Ghaidan**. In so far as they are properly viewed as problematic cases where the Courts ought properly to have issued a declaration of incompatibility, they do not support the view that section 3 needs amending or repealing.

99 Scottish Government, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [128]. One member of the Panel did not accept this characterisation of the position.

100 JUSTICE, *Submission to the Independent Review of the Human Rights Act Call for Evidence – Annex* at 1 – 14.

101 Notwithstanding the praiseworthy objective of the statute in question.

71. **Ghaidan** could also be seen as an example where the majority of the House of Lords relied on section 3 to rewrite the Rent Act 1977. Such a conclusion could be supported by reference to Lord Millett’s dissenting speech, which raises the following points.
72. First, his speech suggests that the majority relied on section 3 in circumstances where a fundamental feature of the legislation was that Parliament meant to confine the definition of marriage to ‘*open relationships between persons of the opposite sex*’¹⁰².
73. Secondly, it also suggests that as the issue at hand was before Parliament in the context of the then Civil Partnerships Bill, reliance on section 3 would interfere with the parliamentary process¹⁰³. Consistently with the approach taken in *Bellinger v Bellinger* (2003) it could be said that that point ought to have led the House of Lords in **Ghaidan** not to rely upon section 3 but to issue a declaration of incompatibility.
74. Thirdly, Lord Millett’s speech could be said to suggest that the majority impermissibly entered into the realm of social policy that was better left to Parliament, and which had been acknowledged as a limitation on the use of section 3 in *Bellinger*; alternatively, as Lord Nicholls put it in **Ghaidan**, it was a matter properly for legislative deliberation.
75. It needs, though, to be acknowledged that the (majority) of the House of Lords in **Ghaidan** correctly anticipated the developments in social policy which have since happened. It also needs to be recalled, as noted above, that no doubt anticipating those very developments, the Government instructed its Counsel before the House of Lords to support, and do so strongly, the use of section 3. Given these considerations, it cannot properly be said that even if Lord Millett’s dissenting speech was more consistent with the principles set out in **Ghaidan** itself than the approach taken by the majority, the decision supports a general conclusion that section 3 needs to be repealed or amended.

102 Lord Millett at [78].

103 Lord Millett at [98]-[99].

- 76.** Shortly after *Ghaidan* was decided, the House of Lords delivered another decision that arguably saw it go beyond the bounds of what ought to have been possible under section 3. It did so in *Sheldrake v Director of Public Prosecutions* (2004)¹⁰⁴ (***Sheldrake***). That case concerned whether reverse burdens of proof in criminal proceedings, i.e., provisions imposing the burden of proof on the defendant, under section 5(2) of the Road Traffic Act 1988 and section 11(2) of the Terrorism Act 2000 were compatible with Convention rights. It was argued that imposing a legal burden of proof on defendants under the two Acts was contrary to the article 6 Convention right, and specifically the presumption of innocence. It was further argued that, applying section 3, both reverse burdens should be interpreted as evidential and not legal burdens¹⁰⁵. The House of Lords held that the provision under the 2000 Act was to be read as an evidential burden.
- 77.** In this case, Lord Bingham summarised the approach taken by the majority in ***Ghaidan***, while noting that ultimately the test applicable to section 3's application was whether it was '*possible*' to read legislation in a way that was compatible with Convention rights.

104 *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264.

105 The legal burden of proof is the duty placed on a party to litigation to prove a fact. The evidential burden is the duty placed on a party to litigation to raise a sufficient evidential base in order to justify further consideration of the issue in question by the court. The evidential burden and the legal burden of proof sometimes rest on the same party but may rest on different parties.

Lord Bingham – on the test applicable to section 3¹⁰⁶

'[28] The interpretative obligation of the courts under section 3 of the 1998 Act was the subject of illuminating discussion in Ghaidan v Godin-Mendoza [2004] 3 WLR 113. The majority opinions of Lord Nicholls, Lord Steyn and Lord Rodger in that case (with which Lady Hale agreed) do not lend themselves easily to a brief summary. But they leave no room for doubt on four important points. First, the interpretative obligation under section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a Convention-compliant interpretation under section 3 is the primary remedial measure and a declaration of incompatibility under section 4 an exceptional course. Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a Convention-compliant interpretation is not possible, such limit being illustrated by R (Anderson) v Secretary of State for the Home Department [2002] UKHL 46, [2003] 1 AC 837 and Bellinger v Bellinger [2003] UKHL 21, [2003] 2 AC 467. In explaining why a Convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation (paras 33, 49, 110-113, 116). All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: "So far as it is possible to do so ...". While the House declined to try to formulate precise rules (para 50), it was thought that cases in which section 3 could not be used would in practice be fairly easy to identify.'

- 78.** In **Sheldrake** it could be argued that the issue raised required legislative deliberation. While the primary focus of the Court's consideration was the validity of the reverse burden of proof and its relationship with the presumption of innocence – questions very much within the area of the Judiciary's institutional competence – a rights-consistent interpretation under section 3 would have had resource implications for Government in so far as it could require additional work to be done by the police and/or Serious Fraud Office. Such questions of financial allocation might be said to point towards a section 4 declaration of incompatibility to enable Parliament to consider what, if any steps, it wanted or needed to take. It might therefore be said that the House of Lords ought properly to have placed more weight on the guidance set out in **Ghaidan** than Lord Bingham's final comment in his summary of the UK Courts' approach suggests.

¹⁰⁶ *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43; [2005] 1 AC 264 at [28].

- 79.** Whatever the view taken of the merits of these four decisions, since they were decided UK Courts have not generally been seen to have taken the ‘*initial gung ho*’¹⁰⁷ approach to the use of section 3 as illustrated by **R v A**. There is no real suggestion that the 23 decisions where section 3 was relied upon, noted by JUSTICE in its response to the *CfE*, evidence a general misuse of the section 3 interpretative duty by UK Courts, such as was arguably evidenced by the strained interpretations that can be attributed to the pre-**Ghaidan** authorities. On the contrary, as the evidence submitted by the Law Society of Northern Ireland bears out and the recent Court of Appeal in England and Wales’ decision in *WB v W DC* (2018)¹⁰⁸ illustrates, there is little to no evidence to support the position that UK Courts are misusing section 3.
- 80.** In *WB v W DC* (2018), the Court of Appeal refused to apply section 3 to interpret legislation (the Housing Act 1996) in a way that was clearly contrary to Parliament’s intention. To do so in that case would have gone against the ‘grain of the legislation.’¹⁰⁹ It could also have been said to go against the fundamental nature of the legislative scheme contained in the 1996 Act.

Law Society of Northern Ireland – no evidence of general misuse of section 3¹¹⁰

‘Fifteen years after the commencement of the HRA, legal academic Christopher Crawford provided a useful analysis of cases from the UK superior courts where section 3 has been applied. This provides an insight into the level of friction in the relationship between Parliament and the court’s interpretation under Section 3.

Of the 59 cases listed by Crawford, there were 34 in which the relevant provision was not amended after being ‘read down’ under Section 3. In a further 6 cases, an amendment was made that had no correlation to or impact upon the section 3 interpretation. This means that in 40 of the 59 cases, the section 3 interpretation was accepted by Parliament, effectively proving that there was no interference with Parliament’s intention. In another 7 of the cases, the court considered the repealed or soon-to-be repealed legislation and found that the repealed Bill or Act was consistent with the interpretation ultimately reached by the court. This means that Parliament had already decided to amend the legislation in the direction of improved rights protections, independently of the courts. Thus, in 47 of the 59 cases, there was no conflict between parliamentary intention and the courts’ interpretation under Section 3. In fact, Crawford’s findings showed only 1 case in which Parliament implicitly rejected the court’s interpretation.’

107 As noted by Professor Colm Ó Cinnéide, *Submission to the Independent Review of the Human Rights Act Call for Evidence* at [18].

108 *WB v W DC* [2018] EWCA Civ 928 | [2019] QB 625. As noted by the Equality and Human Rights Commission, *Submission to the Independent Review of the Human Rights Act Call for Evidence* at [54], as evidence of the post-Ghaidan cautious approach to the use of section 3.

109 *WB v W DC* [2018] EWCA Civ 928 | [2019] QB 625 at [23].

110 Law Society of Northern Ireland, *Submission to the Independent Review of the Human Rights Act Call for Evidence* at 7. The article cited is C. Crawford, *Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998*, (2014) 25 King’s Law Journal 34.

(10) Summary of the Panel’s Consideration of the UK Courts’ Approach to Section 3

- 81.** In the light of the foregoing discussion, it is apparent that the UK Courts initially adopted an approach that could fairly be criticised, notwithstanding the pragmatic strengths of the decisions in question. That early approach was, however, replaced by the more considered guidance on the use of section 3 set out in **Ghaidan**. Since that case was decided in 2004, and certainly since **Sheldrake**, decided in the same year, there has been no real evidence to suggest the UK Courts have adopted an approach that arguably misuses section 3 and the intention underpinning it. On the contrary, judicial restraint could properly be said have been exercised in the use of section 3; not least demonstrated by the number of times it has been used to interpret legislation. That is not to say, as has been pointed out cogently to IHRAR, that section 3 has not given the UK Courts an interpretative power going considerably beyond the rules previously available. While all but one of the Panel reject, therefore, the proposition in the first part of Question 2(a) of ToR, that section 3 should be repealed or amended, it does not follow that improvements (including by way of clarificatory amendment) cannot be made.
- 82.** One member of the Panel considered that there was a need to amend section 3 to confine its operation in such a way as to require Government and Parliament to reassume accountability for the process of ensuring that legislation was compatible with Convention rights. That, for instance, it was (as noted above) not unusual for Government to prefer to rely on section 3 of the HRA as a means to interpret legislation in situations where it was apparent that it would otherwise be faced with a declaration of incompatibility under section 4, suggested to that Panel member that section 3 was disruptive of the boundaries of institutional competence. It enabled Government and Parliament to place responsibility for securing the legislation is Convention rights compatible primarily in the hands of the Courts. It thus reduced democratic accountability. The majority of the Panel did not accept that the evidence supported the view that either Government or Parliament had effectively delegated responsibility in this way to the UK Courts, nor that section 3 in its current form promoted such an approach.

(11) Section 4 of the HRA

83. We turn now to consider section 4 of the HRA, in respect of which Question 2(a) raises a narrow question: whether it would be better for UK Courts to consider whether to grant a declaration of incompatibility as part of the initial interpretative process rather than as a last resort. In this way, the question suggests that Parliament's role could be enhanced – thus rebalancing a suggested imbalance between the Courts and Parliament that section 3 and 4 might be said to have created. We approach the question on the basis that it is concerned with an assessment whether the current relationship between sections 3 and 4 results in too broad a use of the former, so distorting the interpretative process. In considering these points we look at the approach taken to section 4 by UK Courts. We have already discussed the approach taken to section 3 and concluded that, in general, UK Courts have not used it inappropriately.

(i) The UK Courts' approach to section 4

84. The UK Courts general approach to the use of section 4 was definitively set out by Lord Steyn in *Ghaidan*. He stated that

*'What is necessary, however, is to emphasise that interpretation under section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional course.'*¹¹¹

Lord Neuberger PSC reiterated the point in ***R (Nicklinson)*** when he observed that judges '*should be very cautious before being prepared to hold that [they] should exercise [their] jurisdiction under section 4 of the 1998 Act.*'¹¹²

85. Such an approach is evidently consistent with the intention that underpinned the enactment of sections 3 and 4. Policy Exchange, however, raised the concern that, notwithstanding such circumspection, use of section 4 has gone beyond this and has become a tool by which UK Courts engage in a wide-ranging review of legislation.

¹¹¹ *Ghaidan* at [51].

¹¹² *R (Nicklinson)* at [103].

Policy Exchange – section 4 has been used as a means to ‘review the statute book’¹¹³

‘Whatever Parliament’s intentions in 1998, the HRA is now a scheme for abstract review of the merits of legislation. In R (Rusbridger) v Attorney General [2004] 1 AC 357, at [21] the House of Lords noted the absence of any victim requirement in section 3 (and section 4) of the HRA. This has, over time, permitted the entirely proper victim requirements that are set out in section 7 to be uncoupled from proceedings which have as their object a direct attack on legislation: see Re Close and others [2020] NICA 20 (07 April 2020).

This has reached a stage of development where Lord Sales can say in Re McGuinness [2020] UKSC 6 at [88] that “Claims under the HRA for declarations of incompatibility in respect of statutory provisions are a familiar feature of the legal landscape ... The debate about whether a declaration of incompatibility should be granted is an exercise in review of the statute book against human rights standards”.

Section 4 of the HRA was not intended to create (but, as Lord Sales illuminates, has become) “an exercise in review of the statute book”. Section 11(b) of the HRA ought to have made it clear that the only claims based on the Convention are those that can be made under sections 7 to 9 of that Act, but section 4 has been judicially detached from its section 7 moorings and is subject only to the general (relaxed) standing requirement for judicial review.’

- 86.** It is clearly correct that section 4 was not intended to provide the means by which UK Courts could engage in a free and wide-ranging review of the statute book. It is also clearly correct that declarations of incompatibility are an established part of the landscape; section 4 has been in force for twenty years and, as seen below, has been used on a number of occasions. What is not apparent, however, is that it is used as a means for the Courts to engage freely in the abstract review of legislation. The better interpretation of Lord Sales’ remark in *Re McGuinness* (2020) is that section 4 permits UK Courts to review specific statutes in specific cases brought before the Court – not the statute book as a whole. While there is no express requirement that only individual who is a victim of a breach of Convention rights under section 7 of the HRA, it does not at all follow that courts can review legislation in the abstract under section 4.
- 87.** In *Human Rights Commission for Judicial Review (Northern Ireland: Abortion) (Rev 1)* (2018)¹¹⁴, the Supreme Court refused to grant a declaration of incompatibility on the basis that the appellant had no standing to bring the appeal. In the course of that judgment, Lord Mance considered the basis on which a claim for a declaration could be brought.

¹¹³ Policy Exchange, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [43]-[45].

¹¹⁴ *Human Rights Commission for Judicial Review (Northern Ireland: Abortion) (Rev 1)* [2018] UKSC 27; [2019] 1 ALL ER 173.

Lord Mance on standing to bring a claim seeking a declaration of incompatibility¹¹⁵

‘True it is that ss.3 and 4 of the HRA are not made expressly subject to the “victimhood” requirement which affects ss.6 and 7: R. (Rusbridger) v Attorney General [2004] 1 AC 357, at [21], per Lord Steyn; though they must undoubtedly be subject to the usual rules regarding standing in public law proceedings. However, a capacity to commence general proceedings to establish the interpretation or incompatibility of primary legislation is a much more far-reaching power than one to take steps as or in aid of an actual or potential victim of an identifiable unlawful act. Further, Parliament’s natural understanding would have reflected what has been and is the general or a normal position in practice, namely that ss.3 and 4 would be and are resorted to in aid of or as a last resort by a person pursuing a claim or defence under ss.7 and 8: see Lancashire County Council v Taylor [2005] EWCA Civ 284; [2005] 1 W.L.R. 2668, at [28], reciting counsel’s submission, and [37]–[44], concluding that, to exercise the court’s discretion to grant a declaration to someone who had not been and could not be “personally adversely affected” would be to ignore s.7. This being the normal position, it is easy to understand why there is nothing in s.7 to confer (the apparently unlimited) capacity which the Commission now suggests that it has to pursue general proceedings to establish the interpretation or incompatibility of primary legislation under ss.3 and/or 4 of the HRA, in circumstances when its capacity in the less fundamental context of an unlawful act under ss.6 and 7 is expressly and carefully restricted.’”

- 88.** That an individual seeking a declaration need not show they are a victim (within section 7) is appropriate when the nature of both section 3 and section 4 are considered, and contrasted to section 7 of the HRA. Section 7 provides the basis for individuals to bring proceedings where it is alleged they are victims of action carried out by public authorities that breach their Convention rights. A section 7 claim is the basis on which such an individual can seek damages under section 8 of the HRA as compensation for such a breach. Section 7 and 8 therefore form the basis on which individuals can seek specific remedies for a breach of their Convention rights: they are remedial sections of the HRA.
- 89.** On any view, sections 3 and 4 fulfil different purposes. Section 3, as an interpretative provision, working in tandem with section 6 of the HRA (which imposes the duty on public authorities not to act in a way that is incompatible with Convention rights) can provide an individual relief through interpreting legislation in a way that is compatible with Convention rights. Section 4 provides a signal to Parliament of incompatibility, albeit this does not provide a remedy to the individual bringing the claim¹¹⁶.

¹¹⁵ *Human Rights Commission for Judicial Review (Northern Ireland: Abortion) (Rev 1)* [2018] UKSC 27; [2019] 1 ALL ER 173 at [62].

¹¹⁶ On which see, Professor Jason Varuhas, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [62].

90. As section 4 does not provide a remedy for individuals harmed by breaches of Convention rights, it makes no logical sense to require that they demonstrate they are a victim¹¹⁷. What is appropriate, and is the case, is that they demonstrate that they have proper standing to bring their claim to obtain a Convention rights compatible interpretation of legislation or, if that is not possible, a declaration of incompatibility. Such standing is required by the UK Courts as was made clear by Lord Mance in *Human Rights Commission for Judicial Review (Northern Ireland: Abortion) (Rev 1)* (2018).

91. In *Re Close* (2020), the Court of Appeal in Northern Ireland applied the approach set out by Lord Mance. In that case Morgan LCJ (NI) held that *Human Rights Commission for Judicial Review (Northern Ireland: Abortion) (Rev 1)* (2018) established that:

*‘There are three relevant conclusions which are apparent from this paragraph. First, the victimhood requirement for the issue of proceedings under section 7 of the HRA does not apply in a claim under section 4 but the claimant must establish standing. Secondly, a claim under section 4 should be a claim of last resort and should only generally be pursued where a claim under section 7 is not available. Thirdly, a claimant will need to establish that they are a person adversely affected if they are to establish standing in a section 4 claim. As Lady Hale stated at [17] of *Re NIHRC, R (Steinfeld and another) v Secretary of State for International Development* [2018] UKSC 32 is an example of such a case.’¹¹⁸*

That an individual must, as was found to be the case in *Re Close* (2020), establish that they have standing to bring their claim because they are adversely affected by a legislative provision ensures that neither section 3 nor section 4 can ‘slip their moorings’. It ensures that UK Courts cannot use either section 3 or section 4 to engage in an abstract review of legislation or of the statute book as a whole.

92. That UK Courts have not engaged in a wide-ranging exercise of abstract legislative review is particularly made clear by the fact that they have clearly taken the cautious approach urged on them by Lord Neuberger PSC consistently with Lord Steyn’s admonition in ***Ghaidan*** and Parliament’s intention. According to Ministry of Justice figures issued in 2020, UK Courts have issued declarations of incompatibility in only 43 cases since 2000¹¹⁹ and, of those, ten declarations were overturned on appeal. We set out a summary of those cases in **Annex X**.

117 Ibid.

118 *Re Close* [2020] NICA 20 at [22].

119 Ministry of Justice, *Responding to Human Rights Judgments* (2019-2020) at 29 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944858/responding-to-human-rights-judgments-2020-print.pdf>;

Ministry of Justice – Declarations of Incompatibility¹²⁰

‘Since the HRA came into force on 2 October 2000 until the end of July 2020, 43 declarations of incompatibility have been made. Of these:

- *9 have been overturned on appeal (and there is no scope for further appeal) ...*
- *5 related to provisions that had already been amended by primary legislation at the time of the declaration...*
- *8 have been addressed by Remedial Order ...*
- *15 have been addressed by primary or secondary legislation (other than by Remedial Order)...*
- *1 has been addressed by various measures ...*
- *1 has been overturned on appeal but there is scope for further appeal...*
- *2 the Government has proposed to address by Remedial Order ...*
- *2 are under consideration ...’*

93. Of the 33 declarations that remained unappealed, five of them concerned statutory provisions that had already been amended prior to the declaration being issued. As a consequence, only 28 declarations have been made in respect of legislation in force at the time it was made. As Professor Kavanagh points out, that is on average 1.5 declarations of incompatibility per year¹²¹. While it is not possible to state with certainty whether the number of declarations has been consistent with Lord Irvine LC’s statement during the parliamentary debates that he would expect declarations to be made in only 1% of cases¹²², these figures strongly suggest that UK Courts have treated section 4 as a matter of last resort. That they have also, in three cases¹²³, declined to issue declarations where legislation was found to be incompatible with Convention rights further supports the conclusion that UK Courts have treated the use of the section 4 power with particular circumspection.

¹²⁰ Ministry of Justice, *Responding to Human Rights Judgments (2019-2020)* at 30.

¹²¹ Professor Aileen Kavanagh, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [56].

¹²² See [14] above.

¹²³ **R (Chester)**; *Human Rights Commission for Judicial Review (Northern Ireland: Abortion) (Rev 1)* [2018] UKSC 27; [2019] 1 ALL ER 173; *Re Close’s Application for Judicial Review* [2020] NICA 20.

- 94.** The Panel notes that in respect of section 4 declarations, it was clear from the parliamentary debates that section 4 was to act as a signal to Government and Parliament of incompatibility with Convention rights. Signals are to be observed and considered. They are not, in this context intended to be determinative. It is not the case, to borrow from Lord Rodger, that the UK Courts have spoken and that is the end of the matter¹²⁴. It is and ought to be the case that the UK Courts have spoken and now Government and Parliament must consider in detail what they have said and whether they agree with it or whether there are good reasons to disagree and leave the law unamended. There may well be good reasons for not endorsing the UK Courts' approach, not least because the issue is within the UK's margin of appreciation and Parliament takes a different view or considers that the better approach would be for the UK to defend, if necessary, its legislation before the ECtHR. Section 4 provides a signal for consideration. It ought to be treated as such.
- 95.** It should also be noted that in declining to issue declarations in circumstances where they could have done, UK Courts have gone beyond the reasons that Lord Irvine LC suggested they might rely upon during the parliamentary debates. In doing so they have focused on reasons for declining to issue declarations, where doing so would either go beyond their jurisdiction – because the claimant had no standing to seek a declaration – or because the issue was one that was within the institutional competence of another Branch of the State.

124 See Chapter Two at [44].

Reasons for declining to issue a declaration of incompatibility

While the area remains relatively under-developed, it seems that UK Courts will decline to issue a declaration where:

- the Court had no power to issue a declaration due to a lack of standing (*locus standi*) by the applicant¹²⁵.
- doing so would be futile because a declaration has already been issued in respect of the legislation under challenge¹²⁶, and hence the political Branches of the State were already alert to the issue.
- doing so would be futile because the legislation under challenge has already been superseded by further legislation¹²⁷, i.e., the matter had already been remedied by the political Branches of the State.
- to enable Parliament to consider the issue, which it was about to debate¹²⁸, i.e., the matter was properly for the political Branches of the State.

96. This UK Courts' cautious approach is further evidenced comparatively. Evidence published in 2015 showed the number of declarations of incompatibility made by UK Courts bears interesting comparison with comparable approaches in other countries. As Professor King noted, by 2012 the UK courts had issued 19 declarations of incompatibility in comparison to: 62 instances where the Canadian Courts had struck down legislation; 91 instances where the French Courts had struck down legislation; and, 111 instances where the German Courts had struck down legislation¹²⁹. Even taking account of differences in the nature of Government, Parliament and the Judiciary between the UK, Canada, France, and Germany, the difference in approach is marked. UK Courts do appear treat the use of section 4 declarations of incompatibility, as Lord Steyn put it in **Ghaidan**, as '*an exceptional course*¹³⁰ of action.

¹²⁵ *Human Rights Commission for Judicial Review (Northern Ireland: Abortion) (Rev 1)* [2018] UKSC 27; [2019] 1 ALL ER 173.

¹²⁶ **R (Chester)** concerning prisoners' votes given the prior declaration in *Smith v Scott* [2007] CSIH 9; 2007 SC 345.

¹²⁷ This approach was taken in *Re Close's Application for Judicial Review* [2020] NICA 20, but not in early post-HRA cases such as *R (Wilkinson) v Inland Revenue Commissioners* [2003] EWCA Civ 814; [2003] 1 WLR 2683;

¹²⁸ *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467 at [53]. And also see *R (Nicklinson) v Ministry of Justice* [2006] UKSC 38, [2015] AC 657 at [113].

¹²⁹ J. King, *Parliament's Role following Declarations of Incompatibility under the Human Rights Act*, in H. Hooper, M. Hunt, P. Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) cited in Professor Jeff King, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [31]-[32].

¹³⁰ **Ghaidan** at [51].

- 97.** It should also be acknowledged that, in addition to the number of cases brought relying on section 4, and those that result in a declaration of incompatibility, and the effect they have on the legislation challenged and affected parties, section 4 has a further potential practical effect. Through creating a means by which legislation can be reviewed, the possibility of resort to section 4 could be a means of achieving political delay to Government policy or defensive drafting. The Government in its submission to IHRAR did not, however, raise that issue or any concern that the practical effect of section 4 was to stymie effective Government policymaking or had resulted in defensive drafting¹³¹. One member of the Panel considered that this issue needed to be taken into account in assessing section 4's operation and impact. While the majority did not object to consideration of this issue, it concluded that there was no available evidence to support this theory in practice.
- 98.** The majority of the Panel would therefore conclude that the UK Courts have exercised their discretion to issue declarations of incompatibility as Parliament intended as a last resort. As we have concluded that the UK Courts have utilised the power to issue declarations of incompatibility appropriately, the question then turns to whether use of the power could, nevertheless, be improved by amending section 4 to require UK Courts to consider the question whilst carrying out the interpretative exercise under section 3.

(ii) Greater use of section 4

- 99.** There is little to support the proposition that a change in approach to section 4 would or should be adopted, not least because – as discussed above – there is no real support for the proposition that UK Courts have generally misused the section 3 interpretative duty. However, there is good evidence to support greater parliamentary engagement. We return to greater parliamentary engagement below, and particularly in our recommendations.
- 100.** Separately from our conclusions on the operation of section 3 there are a number of reasons why the suggestion that UK Courts should consider issuing a declaration of incompatibility during the section 3 interpretative stage should be rejected.

(A) No support for the general proposition that UK Courts ought to be making more declarations of incompatibility

- 101.** There is no real basis to support a change of approach to section 4. There is no support for the position that the use of section 3 has distorted the use of section 4, and thus reduced its use improperly. Nor is there an argument that early consideration of whether to grant a declaration of incompatibility would increase the number of declarations properly made.

131 Also see Chapter Seven at [17].

- 102.** Legislation enacted after 2000 in nearly all cases (sections 319 to 321 of the Communications Act 2003 being an exception¹³²) will have been intended to be compatible with Convention rights and to be interpreted so as to be compatible with them¹³³. There is no realistic scope to argue that any change in approach would properly result in more declarations of incompatibility being made in respect of such legislation.
- 103.** Legislation enacted after 1951, and particularly 1966, will be presumed to have been enacted so as to be consistent with the UK's international obligations under the Convention, i.e., to be compatible with Convention rights¹³⁴. If – consistently with the approach taken following **Osborn** and **Kennedy** (discussed in Chapter Two) – UK Courts properly consider the common law, they ought to resolve ambiguities in post-1966 legislation in favour of compliance with Convention rights consistently with the UK's international law obligations, which would thus reduce the need to resort to sections 3 or 4 in any event. There is no realistic scope for a significant increase in declarations should reform be enacted. We return to this below when considering options for reform.
- 104.** Moreover, bringing forward consideration of whether to grant a declaration would not seem to provide the cure for any supposed over-use of section 3. In order to determine whether to grant a declaration of incompatibility it is logically necessary to first determine if it is possible to interpret legislation compatibly with Convention rights. Having UK Courts consider section 4 at the same time as section 3 would still inevitably require them to carry out the section 3 exercise first in order to answer the section 4 question.

(B) Practical problems from increasing the number of declarations of incompatibility

- 105.** If consideration whether to grant a declaration was moved to the section 3 interpretative stage and more declarations were issued that would pose practical problems for Parliament.

132 See Chapter Four at [16].

133 On which point also see, Oxford Public Lawyers, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [25].

134 See footnote 35, above.

JCHR – Adverse consequences for Parliament if the number of declarations increased¹³⁵

'... 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.'

- 106.** The practical problems the JCHR highlights could well result in – as noted by the Law Society of England and Wales – an impairment in rights protection¹³⁶.

(C) Inverting the current approach raises principled problems

- 107.** There is, however, a more principled problem with this suggested reform. The current inter-linked relationship between sections 3 and 4 is a logical one. It requires UK Courts to first consider if legislation is compatible with Convention rights and then, if not, consider if legislation that on the fact of it is not compatible can possibly interpreted so as to be compatible. Only then if it is not possible to read and give effect to legislation in such a way does the discretion to issue a declaration of incompatibility arise. This approach is consistent with the general presumption that the UK Parliament legislates compatibly with the Convention, consistently with its international law obligations.
- 108.** Requiring UK Courts to consider as part of the section 3 interpretative exercise that the UK Parliament enacted legislation in breach of those international law obligations would run counter to the long-established rule of construction that Parliament is generally taken to intend to legislate consistently with such obligations. It is doubtful whether that is a wise or constitutionally appropriate approach; at the least it is one that runs the risk of leading to an increase in institutional conflict, and reducing mutual respect, between Parliament and the UK Courts. In that way it would, as was made clear in the parliamentary debates, lead to the statute book being brought into disrepute, as well as bringing the UK Parliament and the Courts into disrepute.

135 JCHR, *The Government's Independent Review of the Human Rights Act*, (Third Report of Session 2021–22) at [127].

136 The Law Society of England and Wales, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [64].

(12) Section 4 – Summary

- 109.** Section 4 provides UK Courts with a discretionary power to grant a declaration of incompatibility in the limited circumstance that UK Courts are unable to interpret legislation compatibility with Convention rights. It is a discretion of last resort, and properly so. Moving consideration of whether to grant a declaration to the section 3 interpretative stage raises significant practical and principled problems. Even if those could be overcome, its utility is doubtful.
- 110.** There is, however, a broader issue underlying the ToR question concerning section 4: Parliament's role in rights protection. There are better solutions to that problem than those suggested by the ToR questions.

(13) The Constitutional Balance – Sections 3 and 4

- 111.** Underpinning this question of the ToR is an inquiry whether sections 3 and 4 create an imbalance in the constitutional settlement. In enacting the HRA, and sections 3 and 4, the constitutional balance did see a limited shift in the traditional approach to the UK Courts' role. That shift in balance did not, however, weaken Parliament. As noted above, in the parliamentary debates, the HRA was carefully drafted to ensure that Parliamentary Sovereignty was not weakened. Sections 3 and 4 in no way challenge that aspect of Parliamentary Sovereignty concerned with the UK Parliament's ability to enact legislation. They in fact give concrete form to that aspect of Parliamentary Sovereignty, not least by only providing for what has been described as a 'weak'¹³⁷ form of constitutional review of legislation and by acting as a '*deliberate rejection of the American model of constitutionalism with its perceived excesses of judicial power.*'¹³⁸ In other words, there was a deliberate rejection of the approach taken in the US that Courts should have the power to disapply statutes, and that where they do the Legislature can do nothing to alter the position.
- 112.** An important consequence, which is not necessarily emphasised as it should be, flows from the fact that sections 3 and 4 give effect to Parliamentary Sovereignty¹³⁹. Irrespective of the way in which UK Courts interpret legislation consistently with section 3 of the HRA or issue a declaration of incompatibility under section 4, the UK Parliament can always over-rule them. Section 4 provides a signal to Parliament only. It neither mandates Parliament to act nor does it, as was suggested at the Oxford and Cambridge Roadshow, create a moral duty on Parliament to act¹⁴⁰.

137 Professor Jeff King, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [26].

138 S. Gardbaum (2001) at 710.

139 Together Scotland (Scottish Alliance for Children's Rights) *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at 4.

140 See the comments of Professor Timothy Endicott at the Oxford and Cambridge Roadshow.

- 113.** If and whether Parliament acts to remedy what the UK Courts have concluded, in their view, is a legislative incompatibility with Convention rights, is legally and constitutionally a matter for Parliament. The same point arises in respect of section 3. At any point that Parliament concludes that the UK Courts have over-stepped the bounds of their institutional competence by interpreting legislation in a way that abuses the section 3 duty, it remains legally and constitutionally solely a matter for Parliament whether, and if so how, it responds, e.g., by enacting legislation to rectify the situation. Two points arise.
- 114.** The first is that in respect of section 3 Parliament has not sought to rectify legislatively any interpretation given to legislation by UK Courts. In respect of section 4, Parliament has acted – wherever that was necessary – to remedy an incompatibility identified by a declaration of incompatibility, with the possible exception of the prisoners’ voting rights issue¹⁴¹. In respect of both section 3 and section 4, there is no evidence to suggest that Parliament has considered the UK Courts to have erred in reaching their decisions either on section 3 interpretations or section 4 declarations.

Oxford Public Lawyers – No evidence of parliamentary dissatisfaction with the use of section 3

‘If ... Parliament believes that what is posited in the ToR has occurred, then it can already amend reinterpreted legislation accordingly. There is no evidence that this has been regarded by Parliament as a problem post 1998.’

- 115.** The absence of parliamentary action in response to section 3 interpretations and its acceptance of the need to take remedial action where a declaration of incompatibility is made might suggest that there is no real problem, and that suggestions that the HRA has upset the constitutional balance are ill-founded. The UK Courts’ role and duties may have expanded, but that expansion has not come at the expense of Parliament or its powers and responsibilities. This leads to the second point.

141 See Chapter Four at [40].

- 116.** As we noted above, there is no mechanism to inform either the Government or Parliament where UK Courts interpret legislation under the section 3 power. This is in contrast to section 4, which was expressly intended to signal to Parliament a problem with rights compatibility. Parliament, within the UK constitution, has the primary responsibility for rights protection, and the UK Courts have the responsibility of giving effect to those protections, provided by legislation or the common law, in individual cases¹⁴². Given Parliament's primary responsibility in this area¹⁴³, it is sensible and appropriate for there to be a mechanism through which Parliament is informed of the UK Courts' use of section 3, so that it can consider if it needs to take any remedial action where it concludes the courts have erred in their approach.
- 117.** In this sense, what is needed is not a rebalancing of the constitution, but rather the introduction of a mechanism to enable Parliament to carry out its constitutional role, which the HRA deliberately left intact, more robustly. Sections 3 and 4 introduced a '*strong*'¹⁴⁴ power for UK Courts. Parliament's role has not been overborne by that power. But what is needed is for Parliament to exercise its scrutiny role robustly. In that way, a more effective and more collaborative form of rights protection¹⁴⁵ can be achieved, one that rightly emphasises both Parliament's leading role and the UK Courts' enhanced role. The solution to the problem is then not to alter the operation of sections 3 and 4, but rather to put Parliament in the best possible position to scrutinise judgments that involve section 3 interpretations and section 4 declarations of incompatibility and determine whether, and if so how, it may need to legislate in the light of those decisions. We make recommendations for reform to enable that to take place below. If implemented those recommendations will ensure that the constitutional balance is capable of being more effectively exercised in the future.

142 As Lord Hope put it in *AXA General Insurance Ltd v The Lord Advocate* [2011] UKSC 46; [2012] 1 AC 868 at [49], the Courts are responsible for protecting the rights of individuals, with Parliament responsible for determining matters at a general level. As the rule of law requires laws to be of general application, that division of responsibility is entirely appropriate. Should, however, as noted here, the UK Courts err in interpreting legislation when seeking to protect the rights of individuals, the effect of that decision will be of general application and is thus a matter for Parliament to consider.

143 Which the HRA supports by excluding Parliament from the duty to act compatibly with Convention rights, as noted above. Also see Birmingham Rights Observatory, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [1.1]-[1.5].

144 See Lord Irvine LC, above at [15].

145 See Professor Aileen Kavanagh, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [60] and following. Durham Law School, Human Rights Centre, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at 11.

(14) Views from Submissions to IHRAR concerning Sections 3 and 4

- 118.** There was a broad and strongly argued view from the evidence that there was no basis on which to amend section 3 or 4 of the HRA. There was a strongly held view that the evidence supported the conclusion that UK Courts had not abused the use of section 3 and that section 4 had been used sparingly as Parliament had intended.
- 119.** The view was also clearly expressed that where UK Courts had interpreted legislation as required by section 3, it always remained a matter for Parliament to legislate and remedy the effect of any court judgment. Equally, it always remained the case that the Government and Parliament, as intended, might properly choose not to act on a declaration of incompatibility and, in other words, prefer its view of the compatibility of legislation to that of the UK Courts. Both sections 3 and 4 properly respected Parliamentary Sovereignty.

Examples of submissions supportive of no change

The Bar Council of England and Wales – Roundtable Minutes

‘Liberty’s analysis of cases suggests Section 3 is rarely used in practice, so there is no problem to be solved through any amendment to it.’

The Bar of Northern Ireland

‘The Bar does not believe that there is any need for reform in relation to declarations of incompatibility. There is nothing undemocratic in judges deciding whether Convention rights have been respected or declaring legislation to be incompatible given that the actual operation of the legislation is unaffected and it is for the legislature to change the law; this clearly does not usurp the role of Parliament.’

Durham Law School, Human Rights Centre

‘... Repealing or amending the current system could lead individuals to persuade the courts to adopt more strained interpretations or engage in judicial activism through the common law to protect their freedom.’

... Since section 3 HRA is effective in giving effect to parliamentary intent, there is no need to repeal or amend section 3.’

Professor Guglielmo Verdirame QC

'[In respect of mending section 4 so that declarations of incompatibility were considered as part of the initial process of interpretation rather than as a matter of last resort.] This strikes me as a very bad idea. It would: a) encourage abstract review of legislation; and b) transform the function of adjudication from an exercise where the focus is the interpretation and application of the law, to one where the focus would become the 'judging' of the law.'

JUSTICE

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

The repeal or weakening of section 3 would therefore replace a settled, well understood interpretive tool that is, in general, used with restraint and deference to the institutional competence of the other branches of Government, with the principle of legality the development and use of which would be uncertain...

From a practical perspective, it is difficult to see how declarations of incompatibility could be considered prior to the question of whether courts are able to interpret the legislation in a Convention-compliant way. An enhanced use of declarations of incompatibility would therefore necessitate an amendment or removal of section 3, ... More frequent use of declarations of incompatibility would raise concerns about the availability of remedies.'

Law Society of England and Wales - City firms Roundtable Minutes

'The HRA is good for global business, it provides certainty and consistency sought by companies investing in the UK, and UK companies operating abroad.

The fallout from amendments to the HRA could provide uncertainty and act as a deterrent for business to invest in the UK...

The current balance between sections 3 and 4 provide access to a swift remedy for people when they feel their rights have been curtailed by legislation. Post-Brexit, section 3 is the only route for companies who no longer have access to EU protections. Companies don't want to wait for a ECtHR judgement if possible, so an immediate remedy via section 3 is desirable.'

Professor David Mead

'...the vast weight of the evidence is not of s.3 being misused, and it is hard to think of an egregious case ... In short, the paucity of cases in which it could even be suggested that there might have been (not 'was') judicial overreach speaks in fact to the health of the system and scheme, not a pathological malaise.'

Lord Carlile of Berriew

'[In respect of amending or repealing section 3] ... I would counsel against change. Sometimes Parliament has been surprised by what it has done, but it remains Sovereign and always has the power to amend legislation or change policy within the framework guaranteed by the Convention.'

Pat Finucane Centre

'... To amend or repeal section 3 would go against the core and fundamental aim of the HRA to allow all law to be interpreted, as far as possible, in a way that is compatible with our basic human rights protections. There is no evidence of a problem that requires to be changed, amended, repealed or fixed.

... Regarding declarations of incompatibility provided for in section 4 of the HRA, we are only aware of three cases that have been issued in Northern Ireland. We do not see any need to change the current process as it would only delay relief for the claimant and require a parliamentary process for amending the offending legislation. The number of incompatibility decisions could possibly increase, thus further increasing legal uncertainty in key areas of law. Is there a need to fix something that is not broken?'

- 120.** A number of arguments were put forward in favour of reform of both sections 3 and 4. There were three main types of proposal. First, some proposals argued for the repeal or, at the least, reform of section 3. They did so on the basis that the interpretative approach it contains unbalanced the relationship between the Courts, Parliament and Government. Reform recommendations included those focused on narrowing down the interpretative obligation. Secondly, proposals both supported and opposed reform of section 4 to provide that it was considered as part of UK Courts' interpretative exercise. Thirdly, a number of specific reforms were suggested to, for instance, improve Parliament's role and particularly that of the JCHR, to ensure greater awareness of the use of section 3, and to provide for *ex gratia* payments where declarations of incompatibility were made.

Selected criticisms and reform recommendations submitted to IHRAR

Bonavero Institute of Human Rights, Oxford University

'Professor Stephen Gardbaum has proposed ameliorating the HRA remedial framework by providing for a system of ex gratia executive remedies...

Professor Dixon, has suggested that another solution may be to build in the possibility for individualised relief to the design of section 4 of the HRA itself.

Professor Dixon's approach might be met by an amendment to section 4(6) of the HRA to read as follows:

A declaration under this section ("a declaration of incompatibility") does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given, except as it applies to the particular parties before the court.

...'

Professor David Mead

'... Since a s.3 interpretation binds as an authoritative pronouncement on what any Act or section means or says, irrespective of what Parliament thinks it said or intended to say, it is critical that transparency around the use of s.3 is looked at.

Under s.5, whenever a court is considering making a declaration of incompatibility, the Crown is entitled to notice. Amending s.5 to cover cases whenever a court (and of course this could in theory be Crown or County Court) is considering utilising s.3 to interpret legislation would go some way, though a further possibility might be to notify the Speaker...'

Professor Guglielmo Verdirame QC

'One option is to amend section 3 with a view to giving effect to what Lord Nicholls regarded as a "tenable interpretation" (at para. 28 in the passage cited above) even under the current wording - i.e. to limit the operation of Section 3 to cases where there is ambiguity in the legislation... A better solution may be to replace the word "possible" with "reasonable". In Ghaidan, their Lordships appeared to accept that the use of this term would have narrowed down the scope for remedial interpretation under section 3.'

Cambridge University, Centre of Public Law

'[Having recommended no change to either section 3 or 4] ... Parliament could do more to enhance its role in the protection of rights. This could be achieved through pre-legislative scrutiny of legislation protecting rights as well as post-legislative scrutiny of the operation of such legislation. Enhancing the role of the JCHR with more resources would have the benefit of enhancing rights protection and pre-empting any challenge in the courts. The use of primary legislation in response to a declaration of incompatibility

is also the preferable approach, especially as the number of declarations is relatively limited'

Jason Varuhas

'... the "So far as it is possible to do so" formulation should be amended or removed, and that some limitations should be explicitly provided for in the terms of the legislation to reinforce the proper interpretive role of the courts... .'

Lord Carlile of Berriew

'... [amending section 4 so that declarations of incompatibility were considered as part of the initial process of interpretation rather than as a matter of last resort] would be a useful change. The sooner incompatibility is determined, the sooner it is resolved, to the benefit of all.'

Lord Pannick QC

'I am concerned that the expansive role conferred on the courts by section 3(1) – going well beyond any normal process of interpretation – is wrong in principle because it requires the judge to perform a remedial function when legislation does not, on its proper construction, conform to Convention rights. Such a remedial role is inappropriate under our constitution because rewriting legislation is the function of Parliament, not the courts. And it is unnecessary because section 4(1) provides an effective means by which Ministers and Parliament can and do amend legislation when an inconsistency with Convention rights is identified by the courts.

I therefore suggest that consideration should be given to amending section 3(1) so that it states:

“Primary legislation and subordinate legislation shall be interpreted, so far as possible, in a way which is compatible with the Convention rights.”

...'

Policy Exchange

'Parliament should amend or repeal section 3. There is a strong case simply for repealing section 3. This would minimise some of the worst excesses the HRA has enabled and would help stabilise the statute book and thus vindicate the rule of law. Courts would remain free to read statutes on the premise that it was unlikely that Parliament intended the legislation it was enacting to violate convention rights. For, convention rights would remain statutory rights and thus would form part of the context against which Parliament legislated and the HRA would remain an Act that (partly) incorporated the ECHR, such that ambiguities in other legislation would be likely to be resolved in ways that would avoid placing the UK in breach of its international obligations. In contrast to section 3, this process of inference would be much less likely to be distorted or rendered artificial by a de facto assumption that rights-compatibility trumps legislative intent.

If Parliament chooses to amend rather than to repeal section 3, the object of amendment should be to forbid courts from departing from, or misconceiving, the intention of the enacting Parliament. As matters stand, section 3 in some cases amounts to a Henry VIII clause, authorising courts to make amendments to other statutes, amendments that in contrast to Remedial Orders made by ministers under section 10 are unlikely ever to be considered or approved by Parliament. Section 3 should be replaced with a rebuttable presumption about legislative intent (similar to the state of affairs that would arise if section 3 were simply repealed or indeed had never been enacted).

...

Parliament should amend section 4 to make clearer that a declaration sets out the court's opinion on rights-incompatibility. This change would help to avoid declarations being misunderstood as settling finally whether legislation is inconsistent with convention rights or will certainly be found by the ECtHR to breach the ECHR. That is, the proposed change would signal more clearly that the court's evaluation of rights-compatibility may be open to challenge if, for example, one takes a different view about the act's proportionality. Ministers and Parliament might still often choose to change the law in response to a section 4 declaration, but this would more clearly be for them to decide, thus helping put to rest the misapprehension – or assertion – that there is an emerging constitutional convention that Parliament is somehow obliged to amend legislation that has been denounced.

...'

Professor Tom Hickman QC

'... one change that would be welcome to the framework of rights protection created by s.3 and s.4 of the HRA. This is that there should be a wider number of courts and tribunals that are able to issue declarations of incompatibility. In situations where courts or tribunals consider that legislation is not compatible with Convention rights, but they cannot read the legislation compatibly, the UK is in breach of its international obligations and it is not desirable for this fact not to be drawn to the attention of the Government by means of a declaration of incompatibility. However, any such change would need to consider ways of ensuring that the prospect of such a declaration being granted do not result in the costs and complexity of the proceedings expanding significantly, which would simply deter persons from relying on the HRA at all. At the very least, it is difficult to understand why tribunals such as the UT, the EAT, the Special Immigration Appeals Commission and the Investigatory Powers Tribunal, all of which are presided over by High Court Judges, cannot grant such declarations.

... There is also, however, a strong case for giving courts the power to disapply or invalidate Acts of Parliament just as they can do in relation to Acts of the devolved legislatures and they have been able to do in relation to EU law...'

Society of Conservative Lawyers

'... our first proposal is the insertion of the word "reasonably" so that s. 3(1) begins "So far as it is reasonably possible to do so..."

... [Insert a new Section 3(1A) to provide guidance to the courts on how to determine whether an interpretation of legislation is a 'possible' one].'

(15) Approach to Options for Reform

- 121.** In considering any change to sections 3 and/or 4, the Panel considers the following to be important considerations:
- sections 3 and/or 4 ought to operate consistently with the approach taken to the reform of section 2;
 - reform should be consistent with the principle of subsidiarity;
 - reform should introduce greater legal certainty;
 - reform should improve the potential for scrutiny of UK Courts' case law arising under sections 3 and/or 4 by the political Branches of the State;
 - reform should not raise concerns relating to the Northern Ireland Peace Agreement or devolution generally.

(16) Rejected Options

122. The Panel rejects the following potential reform options.

(i) Repeal of section 3

- 123.** In its submission to the *CfE*, Policy Exchange recommended the repeal of section 3 of the HRA¹⁴⁶. That would, it was submitted, return the UK to the common law position prior to its enactment (given appropriate legislative drafting to reintroduce the position as it was prior to the HRA's enactment¹⁴⁷). The UK would remain a party to the Convention and subject to its international law obligations. Parliament would thus regain its primary role in securing rights protection. UK Courts would retain their common law approach under which there is a rebuttable presumption that legislation is enacted consistently with the UK's international law obligations. The rebuttable presumption would only apply to ambiguous legislation. This approach would, it is submitted, stop UK Courts '*departing from, or misconceiving, the intention of Parliament*'. It would prevent section 3 operating as a 'Henry VIII' clause enabling courts to amend legislation.
- 124.** We reject this proposal. First, it is premised on a misconception, that the HRA has in some way removed from Parliament its primary role in rights protection. The HRA has patently not done so. It is careful to retain Parliamentary Sovereignty. Parliament continues to have the power, and the responsibility, to make or unmake any law it chooses. Examples of where Parliament has continued to lead in this area can be seen in the Equalities Act 2010 and the Modern Slavery Act 2015. If the complaint is that Parliament has not been as robust as it might in carrying out its primary responsibility for rights protection that cannot properly be said to lie in the hands of the HRA or UK Courts.
- 125.** Secondly, we do not see how it can properly be said that section 3 is a Henry VIII clause. Such clauses, as we discuss elsewhere, provide the Government with a power to amend primary legislation through secondary legislation. Section 3 does not provide UK Courts with a power to do so. Section 3, enacted by Parliament, made clear that Parliament's intention or will was that all legislation be interpreted compatibly with Convention rights, where that is possible. UK Courts are not effecting amendment under section 3. They are giving effect to Parliament's will and doing so by determining, as they do in all cases, the legal meaning of legislation.
- 126.** Thirdly, the weight of evidence before the Panel supported the view that UK Courts have not, contrary to the submission, misused section 3 to misconceive Parliament's intention in enacting legislation.

146 Policy Exchange, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [52] and following, as noted above.

147 See section 16(1)(a) of the Interpretation Act 1978.

- 127.** Fourthly, repeal would significantly weaken the overall scheme of the HRA by removing one of the key means by which Convention rights are to be given their full effect in UK domestic law.
- 128.** Finally and importantly, such a repeal would raise real concern as to adversely affecting devolution and the Northern Ireland Peace Agreement.
- 129.** The second part of Question 2(a) asks IHRAR to consider how the repeal or amendment of section 3 should take effect. In the Panel's view, were section 3 to be repealed (contrary to its firm view) it should plainly be prospective rather than retrospective, the latter being a recipe for uncertainty and potential unfairness. Elaboration is unnecessary.

(ii) Amend section 3 to provide that UK Courts give effect to Convention rights in so far as that is consistent with the intention of the Parliament that enacted the legislation subject to interpretation

- 130.** This proposal would, in essence, have the same effect as the repeal of section 3. We reject it for the same reasons as we reject section 3's repeal.

(iii) Amend section 3 so that it requires legislation 'to be interpreted, so far as possible, in a way which is compatible with the Convention rights.'

- 131.** This proposal is based on the premise that section 3 goes beyond the normal rules of statutory interpretation, as it requires courts to carry out a remedial function. It is said to be wrong in principle for courts under the UK constitution to rewrite, i.e., amend legislation. The thrust of this proposal is to replace the wording in section 3, '*... legislation ... must be read and given effect*' with the wording '*... legislation... to be interpreted...*'

- 132.** A potential difficulty arises if this amendment were to be put into effect. Lord Rodger in ***Ghaidan*** sought to highlight the importance of section 3 creating two separate, albeit related, obligations¹⁴⁸. The first obligation is to interpret legislation in a way that is compatible with Convention rights. The second is to give effect to that interpretation. As he put it, a public authority is required to both interpret legislation compatibly with Convention rights and give effect to that interpretation. It cannot interpret legislation compatibility and then put it into effect in a way that is, in practice, incompatible with Convention rights. This amendment would appear to remove that important second obligation, albeit it must be doubted that courts would, in practice, interpret the section differently. In any event, one possible answer is that the requirement to give effect to the interpretation that is compatible with Convention rights is also provided for by section 6 of the HRA, which requires public authorities not to act in ways that are incompatible Convention rights. Given section 6, we do not believe that the point noted by Lord Rodger would, of itself, present a basis for rejecting this option.
- 133.** We do, however, reject this option for two reasons. First, the amendment proposed is, with respect, too subtle in practice to achieve the desired change. Substituting ‘*interpreted*’ for ‘*read and given effect*’ may be thought both unlikely to achieve substantive change and to risk generating a degree of uncertainty. On any view, assuming the interpretative duty in section 3 to go beyond the normal process of interpretation, it is improbable that this wording would resolve that issue.
- 134.** Secondly, as we make clear above, section 3 does not involve the Courts in rewriting legislation. It is not a Henry VIII power, a point clearly underscored by the repeated statements of UK Courts that section 3 does not empower the Courts to amend legislation but only to interpret it. Statutory interpretation is unquestionably a matter for the Courts under the UK’s constitutional arrangements, as noted at the start of this Chapter¹⁴⁹.

148 ***Ghaidan*** at [107], ‘so far as possible, legislation must be “read and given effect” compatibly with Convention rights. The use of the two expressions, “read” and “given effect”, is not to be glossed over as an example of the kind of cautious tautologous drafting that used to be typical of much of the statute book. That would be to ignore the lean elegance which characterises the style of the draftsman of the 1998 Act. Rather, section 3(1) contains not one, but two, obligations: legislation is to be read in a way which is compatible with Convention rights, but it is also to be given effect in a way which is compatible with those rights. Although the obligations are complementary, they are distinct. So there may be a breach of one but not of the other. For instance, suppose that legislation within the ambit of a particular Convention right requires a local authority to provide a service to residents in its area. The proper interpretation of the duty in the legislation may be straightforward. But, even if the local authority interprets the provision correctly and provides the appropriate service, if it provides the service only to those residents who support the governing political party, the local authority will be in breach of article 14 in relation to the other article concerned and, in terms of section 3(1), will have failed to give effect to the legislation in a way which is compatible with Convention rights. So, even though the heading of section 3 is “Interpretation of legislation”, the content of the section actually goes beyond interpretation to cover the way that legislation is given effect.’

149 See [1], above.

(iv) Amend section 3 to replace ‘possible’ with ‘tenable’ or ‘reasonable’

- 135.** A number of submissions to the CfE suggested that section 3 be amended to narrow its scope of application by replacing the requirement to search for possible Convention rights compatible interpretations of legislation with ‘tenable’ or ‘reasonable’ Convention rights compatible interpretations. They are predicated therefore on the assumption that section 3 is in need of reform. As we have not found there to be a good case that section 3 is operating improperly and hence to found a case for reform, we reject this option.
- 136.** In any event and importantly, though there may be considerable sympathy with the motivation for this proposal given the unusual width of the section 3 rule of interpretation, the replacement of ‘possible’ with ‘tenable’ or ‘reasonable’ or with ‘reasonably possible’ now, after twenty years of operation, would run the risk of introducing a degree of uncertainty into the law while the significance of the new rule of interpretation was absorbed.
- 137.** Equally, the potential narrowing of the scope of section 3 by such amendments would tend to reduce the ability of UK Courts to give effect to Convention rights, so undermining the overall scheme of Convention rights protection provided for in the HRA. On this ground too, this option ought properly to be rejected for the same reasons which prevailed during the parliamentary debates in 1998. Additionally, it would pose significant difficulties in respect of devolution, not least maintenance of the Northern Ireland Peace Agreement. In the absence of any case or cogent case of section 3 currently being used inappropriately, the risks of this proposed course appear to the Panel to outweigh any likely benefits.

(v) Amend section 3 so that it only applies where legislation is ambiguous

- 138.** This proposed amendment would restrict the operation of section 3. In particular it would limit its operation to the approach established prior to the HRA’s enactment (the pre-HRA approach). Alternatively, this option could be implemented more narrowly so that the common law approach applied to legislation enacted after the HRA came into force, confining section 3’s interpretative approach to legislation enacted prior to the HRA came into force. It would follow that in respect of post-HRA legislation, UK Courts would only be able to issue declarations of incompatibility.

- 139.** Such an approach, supported by one member of the Panel, on its narrow version, limits the application of the **Ghaidan** principles to legislation enacted prior to the HRA's enactment, as only that was enacted without it being clear that Parliament had 'squarely addressed' the question of compatibility with Convention rights or necessarily intended the legislation to be compatible. Furthermore, it could not be appropriate to give priority to the HRA, an earlier Act, over the unambiguous intentions of later legislation; it was said to be contrary to Parliamentary Sovereignty to do so. Moving post-HRA legislation to section 4 in this way was, additionally, consistent with the overall package of recommendations in this report, providing for increased priority for the common law and Scots case law and transparency and a more effective and principled way of achieving the objectives of Option Four and Five, below, in the case of post-HRA legislation.
- 140.** The merit of either the wide or narrow version of this option are also said to be that they would meet two related criticisms of the approach set out in section 3. Those criticisms, supported by one member of the Panel, are that it is not possible to arrive at a meaning for a statutory provision that is somehow independent of what Parliament intended. The second, related, criticism is that it is not possible for legislation to be capable of having a 'grain', 'fundamental features' or 'an overall scheme' which can exist independently of the cumulative effect of what the legislation provides for in detail and which can provide a guide to how that detail can be construed to achieve something different from what was intended.
- 141.** The majority was not convinced that such an amendment, either in its narrow or wide version, would improve the operation of section 3 – albeit the narrow version plainly carried considerably more attraction. There is no basis in the underlying intention of section 3 to indicate that such a differentiated approach was anticipated or intended. On the contrary, the intention was for section 3 to apply, as it was set out, to *all* legislation. While the effect of its application was more likely in respect of pre-HRA legislation, the same interpretative approach was intended. Moreover, that it was intended to apply to post-HRA legislation cannot be said to infringe Parliamentary Sovereignty. That remains intact: Parliament can at any time choose to enact legislation on the basis that it is outside the ambit of section 3. Through the HRA, Parliament in 1998 did not purport to bind its successors. Finally, in terms of priority and transparency, the majority of the Panel considered these matters to be dealt with more effectively through the recommended options, set out below.
- 142.** Furthermore, implicit in this option is the suggestion that section 3 requires UK Courts to search for a meaning independent of Parliament's intention, whereas, on a proper analysis, it requires them to give effect to Parliament's intention in the HRA. Moreover, in the majority of the Panel's view it is quite possible for there to be, and to be identified, 'the grain' of legislation, i.e., the scheme or purpose of the legislation as a line beyond which interpretation should not go.

143. The majority were also concerned that this option would reduce the current level of Convention rights protection provided for by the HRA, for the same reasons as those discussed under the immediately preceding option above. As such it likewise runs the risk of upsetting the current devolution settlement, and the Northern Ireland Peace Agreement. For these reasons, the majority were not at all attracted to the wider version of this option. Although seeing some force in the narrow version, they concluded that it too ought to be rejected.

(vi) Amend section 3 to introduce guidance on when an interpretation is a 'possible one'

144. The Society of Conservative Lawyers propose the amendment of section 3 to provide guidance to UK Courts on how they should approach the application of its interpretative duty. They propose the insertion of new sections 3(1A), 3 (1B) and 3.

Society of Conservative Lawyers – reform proposal – an amended section 3

Section 3: Interpretation of legislation

(1) So far as it is reasonably 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.

(1A) Nothing in this section detracts from the principle that if there is nothing to modify, alter or qualify the language which primary and secondary legislation contains, the words and sentences must be construed in their ordinary and natural meaning.

(1B) In considering whether an interpretation of primary or secondary legislation, at which a court might have arrived by the application of interpretative criteria apart from the effect of this section, is compatible with Convention rights, the court shall inter alia take into account the following facts and matters:

- (a) the fact that there is not normally available to a court as much information on the context, or the implications of possible policies, as is available to Parliament and to ministers;*
- (b) the consideration that Parliament has the primary role in balancing conflicting rights and interests;*
- (c) the consideration that citizens have responsibilities as well as rights;*
- (d) the principle of the common law that any activity is normally permissible unless there is a specific basis for it being held to be unlawful;*
- (e) the decisions of courts elsewhere in the common law world.*

(2) [NO CHANGES]

(3) *Decisions purporting to interpret by reference to this Section as amended that were made prior to the coming into force of this amendment are to be taken to have given their interpretations as if they were in accordance with this amendment.'*

- 145.** While we can see an argument for setting out statutory guidance whether in the form set out by the Society of Conservative Lawyers or, alternatively, by codifying the approach set out in **Ghaidan** as applied by the UK Courts, we are not persuaded that such a proposal should be adopted. As UK Courts have applied **Ghaidan** and its principles without any apparent difficulties since they were set out (along the lines concisely summarised by Lord Bingham in **Sheldrake**), we do not see the need for codification or that it would produce real benefits. In any event, codification would give rise to the familiar difficulties canvassed elsewhere in this report.
- 146.** In addition to matters already discussed, it is not apparent that there is any need to qualify possible interpretation with 'reasonable' possibility as suggested by the proposed amendment to section 3(1). That section 3 was not intended to permit unreasonable interpretations was made clear during the parliamentary debates¹⁵⁰. It is also apparent from the case law that that is the approach UK Courts have taken: they must ensure interpretations do not go against the 'grain' of the legislation. We do not see what adding the express qualification would achieve over and above what is already the position.
- 147.** We are also unconvinced that there is any real benefit in providing the amendments in the proposed sections 3(1A) and (1B). The guidance in section 3(1B) in particular goes no further than matters which, where relevant, UK Courts would consider in any event. It is unclear how these amendments would make the use of section 3 more predictable, or the law more stable, as is suggested in support of them.
- 148.** Should it be thought necessary to increase stability in the law, we believe that can be better achieved by the continued careful and measured application of the **Ghaidan** guidelines, not least by UK Courts exercising judicial restraint and taking full account of the boundaries of institutional competence when considering section 3's application – also by Parliament taking greater notice of section 3 interpretations and, where necessary taking appropriate remedial legislative action.

150 See [17], above.

(vii) Amend section 4 to permit UK Courts to invalidate or set aside legislation

- 149.** It was suggested, as noted above, that there is a strong case for permitting UK Courts to set aside or invalidate legislation, subject to a parliamentary override in order to preserve Parliamentary Sovereignty.
- 150.** We note that it was believed at the time the HRA was enacted that if such a power had been provided for in it, the legislation would not have been enacted¹⁵¹. If there is a case for such a reform it has not been made out to the Panel. We particularly consider, notwithstanding the suggestion that it be made subject to a parliamentary override, that such a reform could call into question the continued existence of the UK's uncodified constitution and the principle of Parliamentary Sovereignty. It would also raise increasing questions concerning the politicisation of the Judiciary, which would be detrimental to the operation of the Constitution. We are wholly unpersuaded and add only that nothing about the operation of sections 3 and 4 of the HRA support such a reform.
- 151.** We consider the careful, balanced approach taken to Parliamentary Sovereignty in the HRA was appropriate at the time of its enactment. That remains the case today.

(viii) Amend section 4 to disapply the effect of legislation to individual litigants where it is found to be incompatible

- 152.** It was suggested that one way to improve the operation of section 4 would be to amend it so as to provide that when a declaration of incompatibility is made, the legislation in question ceases to have effect in respect of the individual who challenged it before the Courts. The legislation would continue in force otherwise. This was proposed as a means to provide a successful litigant in such cases with relief from the consequences of incompatibility with Convention rights.
- 153.** The short answer is that this proposed amendment is unworkable in practice and is to be rejected. It is not at all apparent on what basis could it properly be said that a valid law should not apply to a specific individual litigant. Whether legislation that was incompatible with Convention rights applied to an individual or not would be simply a matter of who brought (or, presumably, was joined to the) proceedings. Law ought to be generally valid and enforceable. This amendment diverges from that fundamental principle and does so capriciously. It does so simply on the basis of who brings (or joins in) litigation. In a country committed to the rule of law such an approach is untenable.

151 Lord Irvine, *Human Rights, Constitutional Law and the Development of the English Legal System*, (Hart) (2003) at 98.

154. Additionally, the proposed amendment would perversely encourage repetitious litigation. Having seen one litigant obtain the benefit of a declaration and disapplication of the law, it would seem inevitable that further individuals would bring proceedings in order to obtain the benefit of the statutory disapplication of the offending legislation.

(ix) Section 19 and a declaration of qualified compatibility

155. In his response to the *CfE* Professor Guglielmo Verdirame QC raised the concern that section 19 is binary in nature. It only provides for a Government Minister to give a statement that in their view a Bill is compatible with Convention rights or a statement that they are unable to make such a statement but nevertheless that Parliament is to proceed with the Bill. In some situations, he suggested, it might be beneficial for the Minister to provide a statement of ‘*qualified compatibility*.’

Recommendation to reform section 19¹⁵²

Professor Guglielmo Verdirame QC

‘... One option for reform would be to drop section 19 altogether...’

A different option is to add a third type of statement to section 19: a statement of ‘qualified compatibility’. Such a statement would be made by ministers in circumstances where they cannot certify compatibility on the balance of argument based on the case-law at the time, but are still of the principled view that the legislation would be compatible with fundamental rights...’

156. In principle, such a reform could have the advantage of specifically alerting Parliament to the issue and the Government’s reasons for providing the statement of qualified compatibility. It would thus help to focus parliamentary debate, and JCHR consideration of the Bill. This enhanced scrutiny would then help to inform any consideration by UK Courts of the legislation should they be called upon to consider its interpretation under section 3 or the need to issue a declaration of incompatibility. It would also help to provide additional material for the ECtHR to consider if the legislation’s compatibility with Convention rights was questioned before it.

152 See further Professor Guglielmo Verdirame QC, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [65] and following.

157. That being said, it appears to the Panel that a Government wishing to proceed with a Bill when it was unable to make a statement of compatibility and where it believed, nonetheless, that the Bill was still compatible with fundamental rights, can already do so satisfactorily. An analogous situation arose in respect of the Communications Act 2003, which was the subject of litigation in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* (2008)¹⁵³. There, the Government minister was unable to make a statement of compatibility, yet proceeded with the Bill. Government took the view that the Bill would, if challenged, be held compatible with Convention rights. As is noted in the 2003 Act's Explanatory Memorandum:

*'... It is because of the ban [on political advertising] that [section 321 of the 2003 Act] (in conjunction with section 319(2)(g)) would impose on political advertising that, in the light of the decision of the European Court of Human Rights in the case of Vgt Verein gegen Tierfabriken v Switzerland, the Minister in charge of the Bill was unable to make a statement of compatibility under section 19(1)(a) of the Human Rights Act 1998. The fact that the Minister made a statement under section 19(1)(b) of that Act does not, however, mean that the Government believes the ban would necessarily be found to be incompatible if the ban were to be challenged in the United Kingdom courts or to be considered by the European Court of Human Rights.'*¹⁵⁴

158. Accordingly, it appears to the Panel that the intended benefit of this proposed reform option can already be achieved under the present approach in section 19. A Government minister can quite properly set out their reasons to Parliament why they wish to proceed with a Bill where they are unable to make a statement of compatibility¹⁵⁵, without introducing an additional burden on them as this option would. Such reasons can encompass, as they did in respect of the 2003 Act, a principled view that should there be a legal challenge it would, likely, fail. Taken in tandem with the absence of a statement of compatibility, there already is a sufficient basis for enhanced parliamentary scrutiny and debate. Given this we **reject** this option.

153 *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] AC 1312. See Chapter Four at [16].

154 Communications Act 2003, Explanatory Memorandum at [680].

155 Communications Bill 2002, Explanatory Memorandum at [631]-[634], where the Government Minister set out the reasons why a statement of compatibility in respect of the, then, Bill, could not be made <<https://publications.parliament.uk/pa/cm200203/cmbills/006/en/03006x-m.htm>>. And also see the Explanatory Memorandum to the House of Lords Reform Bill 2012 at [249]. That Bill was also not accompanied by a statement of compatibility. The Government, however, explained that it wished Parliament to proceed with the Bill, notwithstanding its incompatibility with the Convention right to free elections <<https://publications.parliament.uk/pa/bills/cbill/2012-2013/0052/en/13052en.htm>>.

(x) Reform section 19 of the HRA to assist the use of section 3

- 159.** Section 19 plays an important role both in helping to ensure that Government and Parliament consider the application of Convention rights to new legislation. In that respect, there can be no doubt that it has had a major, transformational and beneficial effect on the practice of Government and Parliament in taking account of human rights issues when preparing and passing legislation. Section 19 also additionally plays an important role both for UK Courts, in considering section 3 and section 4, and the ECtHR, as an aspect of formal dialogue, discussed in Chapter Four¹⁵⁶.
- 160.** There may be scope for improving the section 19 process by adopting an approach used in Scotland under section 31 of the Scotland Act 1998¹⁵⁷. It provides for the Scottish Parliament's Presiding Officer to certify, once a Bill can no longer be amended, that it is within the Scottish Parliament's legislative competence. An analogous approach would be to amend the HRA to require the Speaker of the House of Commons and Lord Speaker of the House of Lords to certify, if appropriate, UK parliamentary legislation as being compatible with Convention rights.
- 161.** We are doubtful that this option would produce any substantive benefit. On the contrary, we are concerned that it would, in practice, amount to no more than a formality. The substantive benefit of a statement of compatibility stems from the fact that it requires the Government to consider a Bill's compatibility with Convention rights and to provide a focus for parliamentary discussion on the issue. It is not clear that a similar statement from either the Speaker of the House of Commons or the Lords would be beneficial in this way. Moreover, it is difficult to see what benefit it may have to UK Courts or to the ECtHR in any consideration of an Act of Parliament. For these reasons we **reject** this option.

(xi) Amend section 4 to provide for declarations to be considered as part of the section 3 interpretative exercise

- 162.** We **reject** this option, which formed part of Question 2(a) of the ToR, for the reasons set out above¹⁵⁸.

156 See, particularly, Chapter Four at [39] and following.

157 See Scottish Judiciary Roundtable Minutes.

158 See above at [98] and following.

(xii) Amend section 4 so that it only declares the effects of legislation in the case before the court to be incompatible with Convention rights rather than the legislation itself

- 163.** Section 4 introduced into UK law a form of judicial review of legislation. It was a lesser form of review than that provided in other jurisdictions where Supreme or Constitutional Courts can review and disapply legislation that is incompatible with Constitutional rights. It does, however, mark an in-road in one respect to the constitutional principle of Parliamentary Sovereignty as, while it deliberately does not permit UK Courts to disapply primary legislation, it permits them to review its compatibility with Convention rights, i.e., it permits (primary) legislation to be questioned even if not set aside¹⁵⁹. On some views, such as those of one member of the Panel, this development ought to be rejected for that very reason, i.e., that it is straightforwardly incompatible with the principle of Parliamentary Sovereignty and, as a consequence, it necessarily disrupts the constitutional balance. That Panel member also considered it provided an incentive to use litigation as ‘politics by other means’. The majority of the Panel did not accept these views.
- 164.** That disruption, it is said, is further added to by creating an imperative for the Government and Parliament to enact remedial legislation when a UK Court issues a declaration of incompatibility. While not a legal imperative, as the HRA does not mandate such remedial steps, it could be said to be a moral one. That declarations of incompatibility have invariably (apart from the prisoners’ votes litigation) resulted in remedial action might suggest, perhaps, that a constitutional convention has arisen requiring Government and Parliament to accept the UK Courts’ determination of the question of Convention rights compatibility. As such, that a section 4 declaration of incompatibility does not mandate remedial action, and thus preserves Parliamentary Sovereignty, could be said to be no more than theoretical.
- 165.** Section 4 is also said to be inconsistent with Parliamentary Sovereignty in another way. By enabling UK Courts to review and declare legislation incompatible with Convention rights it is said to suggest or imply a limit on Parliament’s power to enact legislation.

159 See Lord Reed (with whom Lord Hodge, Lord Lloyd-Jones, Lord Sales and Lord Stephens agreed) in *REFERENCES (Bills) by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child and European Charter of Local Self-Government (Incorporation) (Scotland)* [2021] UKSC 42 at [50], ‘The ordinary principle is that the courts cannot question or impugn an Act of Parliament. As Lord Hope observed in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868, para 49, “[a] sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty”. Parliament can itself qualify its own sovereignty, as it did when it conferred on the courts the power to make declarations of incompatibility with rights guaranteed by the ECHR, under section 4 of the Human Rights Act.’

- 166.** The harm identified by these points was that section 4 limits Government and parliamentary freedom of manoeuvre and accountability in a way that crosses the boundaries of institutional competence and undermines political accountability. In practice, Government and Parliament will be subjected to the political damage of a judgment identifying them as having infringed human rights normally only in circumstances where the infringement is most likely to have been the result of an inadvertent error in accurately predicting the extent to which principles encapsulated in Convention rights apply.
- 167.** On the above basis, it was proposed by one Panel member that section 4 be amended so that the declaration of incompatibility focused not on the legislation itself but on the effect that the legislation had in the case in question. Hence it should be amended so that a UK Court will be able to declare the effect of legislation in the case in question to be incompatible with Convention rights. That declaratory power could then be complemented by the introduction of a power to provide compensation to the individual who has suffered from the effects of the legislation. While such compensation should be by way of an *ex gratia* payment it would be understood that such payments were to be accepted as a regular means of redress.
- 168.** The majority of the Panel were unable to accept this analysis or the proposed amendment. It is correct to say, as noted above, that section 4 represents an in-road into Parliamentary Sovereignty to and only to the extent of enabling courts to review legislation for Convention rights compatibility. We do not see that as problematic. It is not, because it does two things: first, it makes clear that UK Courts do not have any greater power to review legislation, i.e., it presents a limit on any potential future, unwarranted and unprincipled development of common law constitutional review of legislation; and, secondly, it is a precise and narrowly confined power. It is simply the means to alert Government and Parliament to the Court's view that legislation is incompatible.
- 169.** Moreover, the majority of the Panel do not accept that a section 4 declaration of incompatibility limits Government or Parliament freedom to manoeuvre or undermines political accountability. Parliament, particularly, is under no legal duty to enact legislation compatibly with Convention rights. Section 6 of the HRA makes that point clearly by excluding Parliament from the bodies which must not act in ways that are incompatible with such rights. Parliamentary Sovereignty remains untrammelled in that respect. It is also not apparent that is a limit that arises from the HRA generally, or a section 4 declaration of incompatibility specifically, on Government or Parliament's freedom to manoeuvre. It was clear from the prisoners' votes litigation, which did not result in remedial legislation but reform to administrative arrangements, that Government and Parliament can, and are willing and able, in an appropriate case to exercise their political judgment on an issue.

- 170.** Finally, as to the terms of the proposed amendment itself, namely, that section 4 should be amended, so that declarations of incompatibility are focused not on the legislation itself but on the effect that the legislation had, the majority of the Panel cannot agree. The short answer is that the precise scope of declarations will necessarily be case specific. It is unnecessary to elaborate further. We return to *ex gratia* payments below.
- 171.** For these reasons the majority of the Panel are not persuaded and reject this reform option.

(17) Potential Reform Options

- 172.** The Panel considers the following to be potential reform options. It indicates here those which it does not recommend and which it does recommend.

(A) Options that are not recommended

(i) Option One: Amend section 5 to require notice to be given to the Crown when section 3 is to be used

- 173.** The Crown is entitled to notice when a declaration of incompatibility is being sought under section 5 of the HRA¹⁶⁰. It was suggested that section 5 be amended to require such notice to also be given where a UK Court was to be asked to interpret legislation under section 3.
- 174.** If Option Five below is adopted as we recommend, it will go some significant way to putting both the Government and Parliament on notice of the use of section 3 to effect a change in the interpretation of legislation. We consider this to be the better approach, additionally because where both section 3 and section 4 are in issue, notice will in any event be given to the Crown. We therefore **do not** recommend this option.
- 175.** It was also suggested that section 5 could be amended to provide for notice to be given to Speakers of the House of Commons and Lords. Although it is convenient to deal with that suggestion here, we **reject** it. We do not see how it could be constitutionally appropriate for the Speakers to intervene in litigation concerning the content or interpretation of enacted legislation.

¹⁶⁰ Section 5(1) of the HRA, 'Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.'

(ii) Option Two: Permit a broader range of courts and tribunals to issue a declaration of incompatibility

- 176.** Only the higher Courts in the UK may issue declarations of incompatibility. A number of tribunals that can properly be viewed as higher Courts are however not permitted to grant them. For instance, the Upper Tribunal, the Employment Appeals Tribunal¹⁶¹, the Special Immigration Appeals Commission are all '*superior courts of record*' as is, for instance, the High Court in England and Wales¹⁶². While the Investigatory Powers Tribunal and Competition Appeal Tribunal are not superior courts of record, they can be viewed as analogous to one.
- 177.** Permitting these Tribunals to issue declarations of incompatibility has some attraction in principle. They have the same status as the higher Courts, that already can issue such declarations. They are presided over by judges drawn from the higher Courts. Providing for such tribunals to issue declarations where they are presided over by judges of higher Courts would have the advantage of enabling declarations to be made within proceedings in those tribunals. It has the potential to save cost and delay in proceedings, not least where it enables a declaration to be made at an earlier stage in proceedings than an appeal to an appellate Court.
- 178.** From a practical perspective, such a reform could also eliminate the possibility that parties would need to bring parallel proceedings (proceedings before the High Court in addition to their proceedings before the Employment Appeal Tribunal) in order to seek a declaration of incompatibility or, if possible, to wait until the proceedings were subject to an appeal before an appellate court having the jurisdiction to issue a declaration. Such a reform would help to reduce both litigation cost and time for the state and for litigants.
- 179.** Notwithstanding these points, we would be concerned about declarations of incompatibility emanating from an increasing number of tribunals. Moreover, any such proposal would need the endorsement of the Lord Chief Justice, Lord President, and Lord Chief Justice of Northern Ireland (as applicable) and Senior President of Tribunal before it was proceeded with. While **not** recommending this option, we accept that it is one that could be further considered following wider consideration.

161 See, for instance *Steer v Stormsure Ltd* [2020] 12 WLUK 427, noted in **Annex X**, where the EAT would have granted a declaration of incompatibility if it had the power to do so.

162 Tribunals, Courts and Enforcement Act 2007, s.3(5); The Employment Tribunals Act 1996, s.20(3); Special Immigration Appeals Commission 1997, s.1(3).

(B) Recommended Options

(iii) Option Three: No change to the substantive content of sections 3 and/or 4 of the HRA

- 180.** The first option is for there to be no substantive change to sections 3 and/or 4 of the HRA.
- 181.** No change was strongly supported by a wide range of respondents to the *CfE*. It was the most widely held view at IHRAR's Roundtables and Roadshows. It was supported for a wide range of reasons, e.g., that the current approach properly protected rights, that it minimised claims having to be made to the ECtHR, and as pointed out at the Law Society of England and Wales – City firms' Roundtable, it was highly desirable for business as it provided an easily accessible route for them to access rights protection. The careful balance struck by the HRA between sections 3 and 4 ought not to be disturbed.
- 182.** No change is also supported for the reasons discussed earlier in this Chapter. IHRAR has furnished a valuable platform for the case to be ventilated calling for the repeal or amendment of sections 3 and 4. That case has been carefully considered on its merits. The Panel's conclusion, however, is that, notwithstanding the degree of feeling sometimes injected into the debate, there is no substantive case that UK Courts have misused section 3 or 4, certainly once there had been an opportunity for the application of the HRA to settle down in practice. There is a telling gulf between the extent of the mischief suggested by some and the reality of the application of sections 3 and 4. Nor is there a substantive case for increasing the use of section 4 declarations of incompatibility through having UK Courts consider the question whether to grant such a declaration during the point when they are carrying out their section 3 interpretative duty. No change, accompanied by judicial restraint, comprises a compelling option. Legitimate (and readily understood) concern as to the true operation of section 3 is best addressed by other means, including clarificatory amendment (set out below)¹⁶³.

(iv) Option Four: Amend section 3 to clarify the priority of interpretation

- 183.** *Ghaidan* makes clear that section 3 did not displace the normal principles of statutory interpretation. It was only to be used where it was not possible to interpret legislation in a way that was compatible with Convention rights through the application of normal principles¹⁶⁴. In Chapter Two we recommended putting the order of priority in which UK Courts should approach resort to the Convention rights, i.e., by looking first to domestic statute and the common law before turning to Convention rights¹⁶⁵.

163 Although, note the points made at [97], above.

164 See [64], above.

165 Chapter Two, Option Two.

- 184.** We believe that there is merit in taking an analogous approach to the use of section 3. It would clarify that there are two rules of interpretation applicable where human rights are in issue. The first approach is the normal approach, i.e., the Courts will look to the normal means of statutory interpretation, including looking to interpret legislation compatibly with Convention rights when ambiguous. The second, which only applies after it is not possible to interpret legislation compatibly with Convention rights under the first approach, is to apply the requirements of section 3. While this is currently the position, legislative amendment to give effect to it will not only make it more transparent but also provide a strong steer to the UK Courts to approach the interpretative exercise in this way, so assisting to confine the use of section 3's interpretative approach only to those cases that genuinely need to resort to it.
- 185.** We therefore recommend this option be adopted on its own merits but also, importantly, as part of a package with Chapter Two, Option Two. Taken together the two options would help to ameliorate the general point raised in Chapter Two concerning the adverse effect that section 1 has had. They would help to promote the aim contained in the Brighton and Copenhagen declarations that the Convention system should be subsidiary to the safeguarding of human rights at domestic level.
- 186.** As we did in Chapter Two, we illustrate this option by a draft amendment to section 3 of the HRA. As in Chapter Two, the draft is only indicative and we recognise that it will need refinement and modification. It is not a fully settled amendment but is simply intended to illustrate our proposal. We hope, however, that the draft helps provide a clearer idea of our intentions.

Indicative draft amendment to section 3

- (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) *In interpreting primary legislation and subordinate legislation, a court or tribunal must apply the existing rules of interpretation other than that contained in subsection (1) to such interpretation.*
- (3) *Where it is not possible to interpret the primary legislation or subordinate legislation in a way that is compatible with the Convention rights applying such rules of interpretation as are referred to in subsection (2), a court must then go on to read the legislation in a way that is compatible with the Convention rights, so far as it is possible to do so.*
- (4) *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*
 - (c) *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.*

(v) Option Five: Greater transparency concerning the use of section 3 through a judgments database

- 187.** Given the relative priority between sections 3 and 4, it might have been expected that steps would have been taken to systematically maintain a record of when the UK Courts both relied on section 3 to interpret legislation compatibly with Convention rights **and** when they exercised the power to issue a declaration of incompatibility. In that way Government and Parliament would have had a clear evidential basis for assessing the impact of both sections.

- 188.** It is therefore surprising that, as pointed out to IHRAR in a number of responses to the *CfE*, the use of section 3 has not been subject to any systemic record-keeping or analysis. This is in contrast to section 4, where Government and Parliament publish regular updates on the number of declarations of incompatibility issued and its and Parliaments' response to them¹⁶⁶, albeit there is no official database of declarations of incompatibility¹⁶⁷.

No systematic evidence of use of section 3

Professor David Mead

*'... While there are far more cases every year on which s.3 could operate, given that there is no restriction on it being the High Court or above, we simply do not know in how many cases s.3 has been used to read and give effect to legislation in a Convention compatible manner. Data here is scarce and sparse, and certainly not authoritative and reliable: Christopher Crawford tells us there were 59 such uses up to January 2013 ("Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998 (2014) 25 King's Law Journal 34). There is no publicly available data at all since then... Since a s.3 interpretation binds as an authoritative pronouncement on what any Act or section means or says, irrespective of what Parliament thinks it said or intended to say, it is critical that transparency around the use of s.3 is looked at.'*¹⁶⁸

- 189.** One significant and particular problem that stems from the lack of such section 3 records was pointed out in Professor Tom Hickman QC's submission to the *CfE*. The absence of effective records means that no systematic and ongoing analysis can be undertaken to demonstrate whether 'any serious problem' is developing in respect of the use of section 3. The absence of transparency and analysis by, for instance, the JCHR, can both lead to inaccurate narratives concerning the use of section 3 and to a failure to properly identify where genuine problems arise, which do or might call for remedy by the exercise of Parliamentary Sovereignty.

166 See, for instance, Ministry of Justice, *Responding to Human Rights Judgments (2017-2018)* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756346/responding-human-rights-judgments-2017-18.pdf> and (2019-2020) (above). Also see, for instance, JCHR, *Thirty-First Report (2007-2008)* <<https://publications.parliament.uk/pa/jt200708/jtselect/jtrights/173/17302.htm>>; *Seventh Report - Human Rights Judgments (2015)* <<https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/13002.htm>>.

167 Ministry of Justice, *Responding to Human Rights Judgments (2019-2020)* at 5.

168 Professor David Mead, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at [24]. Also see, for instance, those submissions where the respondents carried out their own examination of judgments where section 3 had been relied upon in UK Courts, an exercise that would have been unnecessary if there were authoritative published records, e.g., JUSTICE, *Submission to the Independent Review of the Human Rights Act Call for Evidence*, at FN 87.

- 190.** Increased transparency could, for instance, enable the Government and Parliament to more easily ascertain if UK Courts, contrary to the **Ghaidan** principles, are interpreting legislation under section 3 in ways that do not go with the ‘grain’ of the legislation. It would therefore enable Government and Parliament to introduce and enact remedial legislation to clarify their intention in such cases. The Panel notes that, it always remains open to Parliament, to clarify its intentions in legislation so as to provide a clear guide to the Courts concerning what, for instance, is ‘fundamental’ to an Act, which would then be taken into account by UK Courts applying the principles articulated in **Ghaidan**.
- 191.** Given the relationship between sections 3 and 4, and the significance of the former, the Panel considers it of real importance that effective, authoritative records of section 3 judgments are kept and made available to the public as they are for those judgments where a declaration of incompatibility is made. We recommend that the Courts, Government and Parliament, particularly through the JCHR, work together to put in place a system, i.e., a **database**, for identifying superior court¹⁶⁹ judgments across the UK that rely upon section 3 of the HRA to interpret legislation compatibility with Convention rights. In doing so they could build on Lord Nicholls’ statement in **Re S & Re W (Care Orders)**, noted above, concerning the steps UK Courts need to take to record the fact and nature of their use of section 3¹⁷⁰, i.e., UK Courts ought to indicate clearly in their judgments if the application of section 3 was *the* reason for their decision. Only such judgments should be placed on the database. This would not only increase transparency in and of itself but would also assist effective management of the judgment database. One model for the approach to gathering judgments for such a database is that implemented on the recommendation of the *Neuberger Committee on Super-injunctions*, namely, that Courts in England and Wales provide details of judgments where such injunctions were granted to the Ministry of Justice – which now publishes details concerning them on a regular basis¹⁷¹.
- 192.** The collection of such section 3 judgment data would ensure that sufficient detail is recorded so as to keep under review whether there is any need for Parliament to enact remedial legislation following any use of section 3 by UK Courts. We note that, consistently with the approach we set out in Option Four, only judgments where section 3 is used to interpret legislation **and** it has *or* could have made a difference to the Court’s interpretation, should be included in the database. Moreover, if Option Four is adopted it ought to be easier for courts to identify relevant judgments for inclusion in the database.

169 That is judgments of superior courts of record and their equivalents, i.e., the High Court of England and Wales and of Northern Ireland, the Court of Session in Scotland, the Upper Tribunal, and above. Judgments of the Employment Appeal Tribunal, Competition Appeal Tribunal and Investigatory Powers Tribunal should also be included. Limiting judgments to these Courts and Tribunals would against the exercise becoming overwhelming and unmanageable.

170 **Re S & Re W (Care Orders)** at [41].

171 *Report of the Committee on Super-injunctions* (2011) <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-20052011.pdf>>; CPR PD 40F; Ministry of Justice, *Statistics on Privacy Injunctions* <<https://www.gov.uk/government/collections/statistics-on-privacy-injunctions>>.

193. To reiterate, given the unusual nature of the section 3 rule of interpretation, it is hardly surprising that there are constitutional concerns as to the use made of it. Those concerns are best addressed, acted upon, or dispelled, on the basis of facts and evidence as to its use. On the material available to the Panel, there is (as already suggested) no case for change (other than that set out above). Accurate data as to the use made of section 3 should serve to defuse concerns and will over time reveal whether, conversely, there is indeed a mischief calling for a statutory remedy.

(vi) Option Six: An enhanced role for Parliament

194. This was an issue raised forcefully with IHRAR, not least by Murray Hunt in his response to the *CfE*¹⁷².

195. We consider there to be very considerable force in the idea that Parliament's role could be enhanced. A significant reason behind the suggested constitutional imbalance between the three Branches of the State stems, in our view, from the perception that sections 3 and 4 have weakened the UK Parliament in carrying out its role as the primary means of securing rights protection in the UK. That is so despite the HRA going to great lengths to preserve Parliamentary Sovereignty and, as we have noted, sections 3 and 4 giving expression to Parliamentary Sovereignty.

196. Such perceptions, contrasting in our view with the reality, need to be addressed; they impede the settled acceptance needed for the HRA to flourish. We have already outlined one way in which Parliament, and Government, can more properly be equipped to carry out their roles: the creation of a database of section 3 judgments. That will enable Parliament to scrutinise more effectively what the UK Courts are doing, and if or where necessary take remedial action. Another means of facilitating Parliament taking a properly more robust approach to rights protection would be through considering how the role of the JCHR could be enhanced.

172 Murray Hunt, *Submission to the Independent Review of the Human Rights Act Call for Evidence*.

- 197.** The main areas of the JCHR's work are: scrutiny of proposed legislation, with a particular focus on Ministerial Human Rights Memoranda i.e., the memoranda which set out the basis on which a Minister has made a statement under HRA, section 19 that a Bill is human rights compliant¹⁷³; scrutiny of remedial orders made under HRA, section 10 and Schedule 2; specific inquiries into human rights issues. A central focus of its work is legislative scrutiny, which not only concerns Bills but equally remedial orders brought forward by the Government following declarations of incompatibility. As such, the JCHR plays a major role in the incorporation of a human rights culture, resting on all three Branches of the State, which the HRA's introduction was intended to bring about. It does so because through this aspect of its work it helps ensure that: i) the Government considers effectively human rights issues when preparing legislation; and ii) is able to contribute high quality input into parliamentary scrutiny of, and debate, concerning legislation as it is enacted. It further plays a role in post-legislative scrutiny¹⁷⁴.
- 198.** It can therefore be said that the JCHR's legislative scrutiny role sees it carry out three distinct functions, which Professor Kavanagh identifies as underpinning its role generally: (i) enhancing the protection of human rights within the parliamentary process; (ii) increasing Government accountability to Parliament; and (iii) improving parliamentary debate and deliberation concerning legislation¹⁷⁵. It also plays a key post-legislative role in the scrutiny of the remedial order-making process, under section 10 of the HRA, which we consider in Chapter Nine.
- 199.** Professor Kavanagh notes a further aspect of the JCHR's scrutiny role concerns court judgments where a section 4 declaration has been made, and the Government's response to them. In this way it acts as a fulcrum between UK Courts, Government and Parliament, so helping ensure Government is made aware of such judgments, while '*pressing*' it on how it intends to respond to the issues raised. Moreover, the JCHR has, in the past, provided detailed reform recommendations to Government on the question of how parliamentary engagement in this area could be improved¹⁷⁶. In respect of Parliament, the JCHR alerts it to such judgments and may, for instance, bring them to the attention of specific specialist Select Committees having an interest in the particular area of law to which a judgment relates.

173 This arises under para. 152B(2)(a) of the JCHR terms of reference, to consider '*matters relating to human rights in the United Kingdom (but excluding consideration of individual cases)*'. For an example of pre-legislative scrutiny see, JCHR, *Legislative Scrutiny: Immigration and Social Security Co-ordination (EU Withdrawal) Bill*, (Eighteenth Report of Session 2017-19) <<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/569/569.pdf>>.

174 A detailed discussion of its role is set out in A. Kavanagh, *The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog*, in M. Hunt et al, *Parliament and Human Rights – Redressing the Democratic Deficit*, (Bloomsbury, 2017).

175 Professor Aileen Kavanagh, *ibid* at 120.

176 Joint Committee on Human Rights, *Enhancing Parliament's role in relation to human rights judgments* (Fifteenth Report of Session 2009-10) <<https://publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/85.pdf>>.

- 200.** It was submitted to IHRAR that the JCHR's role could be enhanced. We agree that doing so could help to produce a more robust approach by Parliament to rights protection generally, and section 3 interpretations of legislation specifically. We would therefore recommend that consideration is given by Parliament as to how the JCHR's terms of reference may be expanded to enhance its scrutiny role of section 3 judgments, and how parliamentary consideration of such judgments and JCHR reports concerning them, could also properly be improved. Consideration of section 3 judgments should be as robust as scrutiny of section 4 declarations of incompatibility. It would help to ensure that mis-perceptions of the use of section 3 could be dispelled. It would also more effectively enable Government and Parliament to consider the practical implications of section 3 judgments at an early opportunity and (if necessary) take steps to ameliorate or reverse them.
- 201.** A linked recommendation is for Government to take a more robust approach to the scrutiny of section 3 judgments, perhaps through the introduction of an arrangement analogous to that which currently operates in respect of the remedial order-making process. There Government and the JCHR enter a dialogue over the content of draft remedial orders. The Government submits a copy of the draft remedial order to the JCHR, which issues a report on it; Government then takes account of that report before finalising the remedial order¹⁷⁷. A similar approach could be adopted by Government and the JCHR where section 3 judgments are concerned.
- 202.** Under this option, we propose an enhanced role for Parliament by expanding the JCHR's role and, through Parliament and the Government, taking a more robust approach to the exercise of Parliament's continuing role as the primary means through which rights are protected.

(vii) Option Seven: introducing an ex gratia payment mechanism where a declaration of incompatibility is made

- 203.** A declaration of incompatibility is not a remedy, nor is it accepted to be an effective remedy by the ECtHR¹⁷⁸. It does not provide individuals whose Convention rights have been breached with redress for that breach. It is no more than a signal to Government and Parliament alerting them to a UK Court's conclusion that the legislation is incompatible with Convention rights.

¹⁷⁷ See Chapter Nine, on the remedial order-making process.

¹⁷⁸ *Burden & Burden v The UK* - 13378/05 [2006] ECHR 1064, (2007) 44 EHRR 51.

- 204.** There is an argument for introducing a system of *ex gratia* payments, payable by the Government, where a declaration of incompatibility is issued. This would introduce a form of individual relief, albeit not a remedy. Such an approach is taken in Ireland under its European Court of Human Rights Act 2003¹⁷⁹. It was not apparent from the Irish Judiciary and Academics Roundtable to what extent *ex gratia* payments were made¹⁸⁰; although we anticipate that it is likely to have been used three times as there have been three declarations of incompatibility (one of which was set aside on appeal) in Ireland under section 5 of the (Irish) 2003 Act¹⁸¹. Due to the ability to seek remedies outside the (Irish) 2003 Act, and hence compensation beyond the level of an *ex gratia* payment under the Act, it is likely that such payments are not often made. It is likely that *ex gratia* payments would, if introduced in the UK, have a greater role to play than they do in Ireland for two reasons. First, there is no mechanism in UK law equivalent to that in Irish law that enables Courts to set award damages where it breaches constitutional rights. Secondly, and as a consequence, there is likely to be, as has been the case, greater use of declarations of incompatibility.
- 205.** We believe there is a benefit in introducing such a discretion as it would enable the Government to, in appropriate cases and in its absolute discretion, provide a degree of relief to reflect the fact that an individual had been adversely affected by legislation that was incompatible with Convention rights. Care would need to be taken to determine the basis on which it operated and the level at which any payments should be set. In that latter respect, it is likely to be appropriate to approach payment levels by reference to damages awards by the ECtHR as that would reflect the remedy available if the incompatible legislation were to be subject to an adverse ruling by that Court. In practical terms, there is obvious attraction in such a mechanism being available domestically, thus reducing the time and cost of a matter of this nature needing to proceed to the ECtHR simply because of the absence of such a procedure domestically.

(18) Recommended Reform Options

- 206.** For the reasons set out above, the Panel recommends **Options Three, Four, Five, Six and Seven**. None of these reform options could properly be said to weaken the HRA, on the contrary if implemented they would improve its operation. As such we have concluded that they do not pose any risk to devolution.

¹⁷⁹ European Court of Human Rights Act 2003 (Ireland), section 5(4).

¹⁸⁰ Irish Judiciary and Academics Roundtable (8 June 2021) minutes at 6-7. It appears from media reports that one *ex gratia* payment has been made, see R. Mac Cormaic, *Compensation paid to Lydia Foy over gender recognition failures*, *Irish Times* (2 November 2014) <https://www.irishtimes.com/news/crime-and-law/compensation-paid-to-lydia-foy-over-gender-recognition-failures-1.1985515>.

¹⁸¹ *Foy v An t-Ard Chláraitheoir* [2007] IEHC 470; *Donegan v Dublin City Council*; *Dublin City Council v Gallagher* [2012] IESC 18 (this is made up of two separate High Court cases: *Donegan v Dublin City Council* [2008] IEHC 288 and *Dublin City Council v Gallagher* [2018] IEHC 354); *AB v The Clinical Director of St. Loman's Hospital* [2017] IEHC 360, which was set aside on appeal.

Chapter Six – Designated Derogation Orders under Section 14 of the HRA

(1) Introduction

1. We now turn to question 2(b) under Theme II of the ToR. It is in these terms:
‘What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?’
2. It concerns the approach UK Courts can take when Convention rights have been disapplied, i.e. derogated from, under sections 1(2), 14 and 16 of the HRA, by the Government. This occurs when, further to article 15 of the Convention, the UK has derogated from its international obligations under the Convention. Article 15 provides that Convention states may disapply Convention rights in limited circumstances, specifically: *‘in time of war or other public emergency threatening the life of the nation’*.
3. As always, the context must be firmly grasped. Here, the context is that, as the Government of the day sees it, war or other public emergency threatens the life of the nation. Self-evidently, this is a matter for Parliament and Government. The margin of discretion will be at its widest; deference is obviously due from the Courts to Parliament and Government. But the Courts are still able to step in, if for example the Government of the day has dramatically over-reacted, with grave consequences for the liberty of individuals.
4. Against this background, the Panel recommends the following reform options.

Recommended reform options¹

Amend the HRA to enable UK Courts to make suspended quashing orders where a challenge to a designated derogation order succeeds. Otherwise no change to section 14.

5. This option is intended to acknowledge the extreme pressures on Government and Parliament in such a crisis, together with the urgency of the situation, while nonetheless, as a democracy where the Rule of Law applies, preserving the justiciability of UK Court challenge – but with enough flexibility in the available remedies to accommodate the orderly remedying of defects in the measures taken by Government in the public interest.
6. Full details of the recommendation and other reform options that the Panel has considered are set out in Parts 7 – 9 of this chapter.

(2) Derogations under article 15 of the Convention

7. The Convention enables Convention states to limit the application of the majority of Convention rights in two circumstances.
8. First, when a state accedes to the Convention it may place a limitation on the application of Convention rights to a specific law that is in force at that time in the state. This is known as entering a '*reservation*' to the Convention. It is permitted under article 57 of the Convention. When the UK acceded to the Convention in 1951 it did so without entering any reservations². No more need be said of this circumstance.
9. The second form of limitation involves derogation from Convention rights under article 15. This permits a Convention state to disapply the application of the majority of Convention rights for a limited period of time during a public emergency. A number of Convention rights cannot, however, be derogated from, e.g., the right to life (article 2 of the Convention) cannot be disapplied except in respect of deaths caused by a lawful act of war, nor can the prohibition of slavery (article 4(1) of the Convention)³.

¹ See Options One and Two of the Recommended Reform Options, below.

² The UK did, however, enter a reservation in respect of the right to education when it acceded to the First Protocol to the Convention on 20 March 1952: see schedule 3, part II to the HRA for details.

³ As provided by article 15(2) of the Convention.

Article 15 of the Convention

Derogation in time of emergency

- (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 obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
- (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 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 therefor. 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.

10. A condition that threatens the life of the nation refers to an '*exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed*'⁴. Any measures that the State intends to take must be no more than strictly necessary to meet the emergency. Whether or not the derogation is justified is primarily the responsibility of the Convention state to determine, subject to the ECtHR's supervisory jurisdiction by reference to the margin of appreciation. Derogations must also not place the Convention state in breach of any obligations it may also have under other international treaties.

⁴ *Lawless v Ireland* (No. 3)- 332/57 [1961] ECHR 2; (1979) 1 EHRR 15 at [28].

Article 15 derogations subject to ECtHR supervision

'The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.

*Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, inter alia, the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation (see the *Brannigan and McBride v. the United Kingdom* judgment of 26 May 1993, Series A no. 258-B, pp. 49-50, para. 43).'⁵*

11. The UK has only derogated from the Convention twice in the last thirty years. The first of those decisions was taken in order to enable the detention of individuals by the police in Northern Ireland for longer than four days. This article 15 derogation was made in 1989 following the ECtHR's decision in *Brogan v UK* (1988)⁶. In that decision the ECtHR held that detention for longer than four days, under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984, breached article 5 of the Convention (the right to liberty). The article 15 derogation thus disapplied article 5 in respect of that provision of the 1984 Act. The validity of the derogation was itself challenged before the ECtHR in *Brannigan & McBride v UK* (1993)⁷. The ECtHR upheld its validity. In doing so, the ECtHR explained then in carrying out its supervisory role when assessing the validity of article 15 derogations it must;

*'... give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.'*⁸

The derogation was withdrawn by the UK in 2001 following the enactment of the Terrorism Act 2000⁹.

⁵ *Aksoy v Turkey* - 21987/93 - Chamber Judgment [1996] ECHR 68; (1997) 23 EHRR 553 at [68].

⁶ *Brogan v UK* 11209/84; 11234/84; 11266/84 [1988] ECHR 2; [1988] 11 EHRR 117.

⁷ *Brannigan & McBride v UK* - 14553/89 14554/89 - Chamber Judgment [1993] ECHR 21; (1994) 17 EHRR 539.

⁸ *Ibid* at [43].

⁹ See Derogation contained in a letter from the Permanent Representative of the United Kingdom, dated 23 December 1988, registered at the Secretariat General on 23 December 1988 and withdrawn by a Notification from the Permanent Representation of the United Kingdom, dated 19 February 2001, deposited with the Secretary General on 19 February 2001 <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005?module=declarations-by-treaty&nu mSte=005&codeNature=0>>.

- 12.** The second article 15 derogation concerned the power to detain individuals for an indefinite period for national security reasons under Part IV of the Anti-Terrorism, Crime and Security Act 2001. The 2001 Act was introduced in the wake of the terrorist attacks on the United States that took place on 11 September 2001¹⁰. It remained in place until March 2005. The derogation was, again, from article 5 of the Convention. It applied to the power in the 2001 Act to arrest and detain foreign nationals, who were to be deported from the UK where their deportation was not for the time being possible. The derogation was held to be invalid by the ECtHR in *A v UK* (2009)¹¹.
- 13.** There is one further purported derogation that needs to be noted. In *BP v Surrey County Council* (2020)¹², an article 15 derogation was made by the Court of Protection. It was made during the early stages of the COVID-19 pandemic. It concerned an application to discharge an 83-year-old individual who had been diagnosed with Alzheimer’s disease from a care home. In his judgment, the High Court judge stated:

*‘It strikes me as redundant of any contrary argument that we are facing “a public emergency” which is “threatening the life of the nation”, to use the phraseology of Article 15. That is not a sentence that I or any other judge of my generation would ever have anticipated writing. The striking enormity of it has caused me to reflect, at considerable length, before committing it to print. Article 5 protects the fundamental human right both to liberty and, it must be emphasised, to security. It requires powerful reasons to justify any derogation. Those reasons must be confirmed on solid and compelling evidence before any court finds them to be established. The spread of this insidious viral pandemic particularly, though not uniquely, threatening to the elderly with underlying comorbidity, establishes a solid foundation upon which a derogation becomes not merely justified but essential. Ms Harvey referred me to the relevant case law concerning the procedure for derogation. In particular, my attention was drawn to *Lawless v Ireland* 332/57; *Greek case* 176/56. I am clear that on a proper construction of these authorities, it is not essential to signal in advance a notification of derogation to the Council of Europe. In any event it would simply not be practical to do so. I will send notification of my decision. It also requires to be stated, in the clearest of terms, that this derogation is to cover a limited period and has been necessary in consequence of an unprecedented pandemic public health crisis. In reaching the conclusion that I have, I bear in mind that fundamental rights and freedoms require to be protected as vigilantly in times of crisis as in less challenging circumstances.’*

10 Derogation contained in a Note Verbale from the Permanent Representation of the United Kingdom, dated 18 December 2001, registered by the Secretariat General on 18 December 2001 – and withdrawn by a Note verbale from the Permanent Representation of the United Kingdom dated 16 March 2005, registered at the Secretariat General on 16 March 2005 <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005?module=declarations-by-treaty&numSte=005&codeNature=Q>>.

11 *A v UK* – 3455/05 [2009] ECHR 301; (2009) 49 EHRR 29; see further below.

12 [2020] EWCOP 17.

14. The Panel is unable to see any valid basis on which the Court was entitled to make an article 15 derogation. The decision whether to make an article 15 derogation is a matter for Government, as it concerns the conduct of the UK's international relations. Furthermore, notifying the Council of Europe is a matter for Government; a Court has no power to do so. The Council of Europe appears not to have recorded the purported derogation¹³. No designated derogation order under section 14 of the HRA has been made by the Government to give domestic effect to it. We draw this matter to the attention of the Judiciary and the Government.

(3) Designated Derogations under Section 14 of the HRA

15. Article 15 derogations operate in international law. They do not have domestic effect. As a consequence, they do not disapply the provisions of the HRA. To give effect to article 15 derogations in domestic law, and hence disapply the application of the particular Convention right in question, it is necessary for the government to issue 'designated derogation orders' under section 14 of the HRA. They are valid for five years, subject to the possibility of extending their validity for a further five years¹⁴. Designated derogations must also be subject to review by a Government minister¹⁵.

Human Rights Act – Sections 1, 14, 16 and 17

Section 1

The Convention Rights.

(1) *In this Act “the Convention rights” means the rights and fundamental freedoms set out in—*

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) Article 1 of the Thirteenth Protocol,

as read with Articles 16 to 18 of the Convention.

(2) *Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).*

13 See Full List of Reservations and Declarations concerning the European Convention on Human Rights <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005?module=declarations-by-treaty&numSte=005&codeNature=0>>.

14 Section 16(1) and (2) of the HRA. Also see *Rights Brought Home: The Human Rights Bill* (CM 3782) (1997) at [4.11].

15 Section 17 of the HRA.

Section 14

Derogations.

- (1) *In this Act “designated derogation” means—*
... any derogation by the United Kingdom from an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State
- (2) *...*
- (3) *If a designated derogation is amended or replaced it ceases to be a designated derogation.*
- (4) *But subsection (3) does not prevent the Secretary of State from exercising his power under subsection (1) to make a fresh designation order in respect of the Article concerned.*
- (5) *The Secretary of State must by order make such amendments to Schedule 3 as he considers appropriate to reflect—*
(a) any designation order; or
(b) the effect of subsection (3).
- (6) *A designation order may be made in anticipation of the making by the United Kingdom of a proposed derogation.*

Section 16

Period for which designated derogations have effect.

- (1) *If it has not already been withdrawn by the United Kingdom, a designated derogation ceases to have effect for the purposes of this Act— ...*
at the end of the period of five years beginning with the date on which the order designating it was made.
- (2) *At any time before the period—*
(a) fixed by subsection (1), or
(b) extended by an order under this subsection,
comes to an end, the Secretary of State may by order extend it by a further period of five years.
- (3) *An order under section 14(1) ceases to have effect at the end of the period for consideration, unless a resolution has been passed by each House approving the order.*

- (4) *Subsection (3) does not affect—*
- (a) *(anything done in reliance on the order; or*
 - (b) *the power to make a fresh order under section 14(1).*
- (5) *In subsection (3) “period for consideration” means the period of forty days beginning with the day on which the order was made.*
- (6) *In calculating the period for consideration, no account is to be taken of any time during which—*
- (a) *Parliament is dissolved or prorogued; or*
 - (b) *both Houses are adjourned for more than four days.*
- (7) *If a designated derogation is withdrawn by the United Kingdom, the Secretary of State must by order make such amendments to this Act as he considers are required to reflect that withdrawal.*

Section 17

Periodic review of designated reservations.

- (1) *The appropriate Minister must review the designated reservation referred to in section 15(1)(a)—*
- (a) *before the end of the period of five years beginning with the date on which section 1(2) came into force; and*
 - (b) *if that designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).*
- (2) *The appropriate Minister must review each of the other designated reservations (if any)—*
- (a) *before the end of the period of five years beginning with the date on which the order designating the reservation first came into force; and*
 - (b) *if the designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).*
- (3) *The Minister conducting a review under this section must prepare a report on the result of the review and lay a copy of it before each House of Parliament.*

- 16.** Only one designated derogation has been made since the HRA came into force¹⁶. The Government gave effect to the article 15 derogation in respect of the Anti-Terrorism, Crime and Security Act 2001 in November 2001. It did so through The Human Rights Act 1998 (Designated Derogation) Order 2001¹⁷. The designated derogation order was made prospectively, i.e., in advance of the UK making its article 15 derogation. The article 15 derogation was itself made in December 2001. Both the article 15 derogation¹⁸ and the designated derogation order¹⁹ were withdrawn in March 2005.

(4) The UK Courts' Approach to Designated Derogations

- 17.** The 1984 Act derogation contained in the HRA was not the subject of litigation in the UK. The article 15 derogation had, as noted above, been upheld by the ECtHR before the HRA came into force. The 2001 Act designated derogation order was, however, subject to litigation in both the UK and, subsequently, before the ECtHR. There has therefore only been one example of the UK Courts considering designated derogations. The Panel notes in this regard that caution is always needed when considered a single example. Generalisation in such circumstances must always be treated with circumspection. It is with that caveat in mind that we have considered *A v Secretary of State for the Home Department* (2004)²⁰ (**Belmarsh**)²¹. It is a decision that has been described as 'perhaps the most important since the Human Rights Act came into force...'²².

16 The UK's article 15 derogation in respect of the 1984 Act was in place before the HRA came into force. The HRA itself gave effect to it in domestic law, by Schedule 3, part 1 thereof. It was withdrawn in 2001, at the same time as the article 15 derogation was itself withdrawn, by The Human Rights Act (Amendment) Order 2001 (SI 2001/1216).

17 SI 2001/3644.

18 See footnote 10, above.

19 The Human Rights Act 1998 (Amendment) Order 2005, SI 2005/1071).

20 *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.

21 Often referred to as the **Belmarsh** case.

22 J. Wadham et al, *Blackstone's Guide to the Human Rights Act 1998*, (7th edn, 2015) at 327.

Belmarsh

Nine individuals were detained in Belmarsh High Security Prison pursuant to section 23 of the Anti-terrorism, Crime and Security Act 2001 (the 2001 Act) in December 2001 and February 2002. Each of the nine was a non-UK national. None were charged with committing any criminal offence. Each of them challenged the basis of their detention on the ground that it breached their article 5 (right to liberty) and article 14 (right to non-discrimination) Convention rights, as given domestic effect under the HRA. They further argued that the UK was not entitled to derogate from its obligations under the Convention or, alternatively, that if it was entitled to derogate from them, the derogation was itself inconsistent with the Convention. They further sought a declaration of incompatibility regarding section 23 of the 2001 Act.

The House of Lords held that section 23 of the 2001 Act was in breach of articles 5 and 14 of the Convention. A declaration of incompatibility was issued under section 4 of the HRA. Furthermore, the 2001 Act designated derogation order made under section 14 of the HRA was quashed.

18. Before looking at the judgment itself, there was one peculiarity about the 2001 Act that should be noted. Ordinarily, UK Courts have no jurisdiction to determine whether an article 15 derogation is lawful or not. That is a matter for the ECtHR. Section 30 of the 2001 Act, however, made specific provision for the validity of both an article 15 derogation and a designated derogation order made under section 14 of the HRA to be challenged in legal proceedings in the UK. Specifically, it provided that they could be ‘*questioned in legal proceedings*’²³ before the Special Immigration Appeals Commission (SIAC). Without section 30 of the 2001 Act, it is likely that any challenge in the UK Courts to section 23 of the 2001 Act could only have been made in the form of a challenge to the designated derogation order made under section 14 of the HRA, the possible grounds for which would or might have been more limited.

23 Section 30 of the 2001 Act: ‘30(1) In this section “derogation matter” means—
 (a) a derogation by the United Kingdom from Article 5(1) of the Convention on Human Rights which relates to the detention of a person where there is an intention to remove or deport him from the United Kingdom, or
 (b) the designation under section 14(1) of the Human Rights Act 1998 (c. 42) of a derogation within paragraph (a) above.
 (2) A derogation matter may be questioned in legal proceedings only before the Special Immigration Appeals Commission; and the Commission—
 (a) is the appropriate tribunal for the purpose of section 7 of the Human Rights Act 1998 in relation to proceedings all or part of which call a derogation matter into question; and
 (b) may hear proceedings which could, but for this subsection, be brought in the High Court or the Court of Session.’

Lord Rodger on article 15 of the Convention and section 14 of the HRA²⁴

In **Belmarsh**, Lord Rodger explained the situation concerning article 15, section 14 of the HRA and section 30 of the 2001 Act.

‘Article 15 is not one of the articles that are reproduced in our domestic law by section 1(1) and (2) of the Human Rights Act 1998. So nothing in that Act would permit a domestic court to adjudicate on any alleged breach of it. But a derogation is given effect in domestic law by the making of a designation order under section 14(1). Under section 1(1) and (2) the order operates to restrict the effect of the Convention right in question in our domestic law. Section 30(2) and (5) of the 2001 Act provide that any derogation from article 5(1), relating to the detention of a person where there is an intention to remove or deport him from the United Kingdom, or the designation of that derogation in terms of section 14(1) of the 1998 Act, may be questioned in legal proceedings before SIAC and in an appeal from their decision. Parliament thereby conferred on those detained under the 2001 Act this special right to challenge the derogation from their article 5(1) Convention rights. If the right is to be meaningful, the judges must be intended to do more than simply rubber-stamp the decisions taken by ministers and Parliament.’²⁵

19. The basis of the article 15 derogation was that there was a public emergency in the UK. It was said to have arisen from the 11 September 2001 attacks on the United States. It was further based on the existence of a terrorist threat to the UK, particularly from non-UK nationals²⁶. The detainees argued that the derogation was unlawful as there was no public emergency threatening the life of the UK²⁷. Specifically:

The detainees’ arguments

‘... they argued that there had been no public emergency threatening the life of the British nation, for three main reasons: if the emergency was not ... actual, it must be shown to be imminent, which could not be shown here; the emergency must be of a temporary nature, which again could not be shown here; and the practice of other states, none of which had derogated from the European Convention, strongly suggested that there was no public emergency calling for derogation. All these points call for some explanation.’²⁸

²⁴ But see further Lord Scott and Lady Hale, below.

²⁵ **Belmarsh** at [164].

²⁶ See Lord Bingham in **Belmarsh** at [11].

²⁷ **Belmarsh** at [16].

²⁸ **Belmarsh** at [20].

20. If the detainees' submissions were correct there was no basis on which an article 15 derogation could properly be made. Necessarily, if that was then correct, the designated derogation order made under section 14 of the HRA was otiose and would have to be quashed. The Attorney General argued, on behalf of the Government, that there was a valid emergency for the purposes of the article 15 derogation.

The Attorney General's response on behalf of the Government

*'The Attorney General, representing the Home Secretary, answered these points. He submitted that an emergency could properly be regarded as imminent if an atrocity was credibly threatened by a body such as Al-Qaeda which had demonstrated its capacity and will to carry out such a threat, where the atrocity might be committed without warning at any time. The Government, responsible as it was and is for the safety of the British people, need not wait for disaster to strike before taking necessary steps to prevent it striking. As to the requirement that the emergency be temporary, the Attorney General did not suggest that an emergency could ever become the normal state of affairs, but he did resist the imposition of any artificial temporal limit to an emergency of the present kind, and pointed out that the emergency which had been held to justify derogation in Northern Ireland in 1988 had been accepted as continuing for a considerable number of years: see *Marshall v United Kingdom (Application No 41571/98)*, para 18 above. Little help, it was suggested, could be gained by looking at the practice of other states. It was for each national government, as the guardian of its own people's safety, to make its own judgment on the basis of the facts known to it. In so far as any difference of practice as between the United Kingdom and other Council of Europe members called for justification, it could be found in this country's prominent role as an enemy of Al-Qaeda and an ally of the United States. The Attorney General also made two more fundamental submissions. First, he submitted that there was no error of law in SIAC's approach to this issue and accordingly, since an appeal against its decision lay only on a point of law, there was no ground upon which any appellate court was entitled to disturb its conclusion. Secondly, he submitted that the judgment on this question was pre-eminently one within the discretionary area of judgment reserved to the Secretary of State and his colleagues, exercising their judgment with the benefit of official advice, and to Parliament.'*²⁹

29 *Belmarsh* at [25].

- 21.** The majority of the House of Lords³⁰ rejected the detainees' submissions as to the '*public emergency threatening the life of the nation*' but, by a different majority³¹, allowed their appeals on proportionality and discrimination grounds (essentially) because section 23 dealt only with non-nationals. Section 23 was declared incompatible with articles 5 and 14 of the Convention and the designated derogation order was quashed. The House of Lords considered two specific questions concerning the validity of the article 15 derogation: first, whether there was a relevant public emergency that threatened the life of the nation (the threshold test); and, secondly, if so, whether the measures adopted in response to it were strictly necessary/proportionate (the exigencies of the situation test)³².
- 22.** In answering the threshold test the majority placed significant weight on the Government's and Parliament's assessment that there was a public emergency. Lord Bingham in particular noted that the issue was one that involved consideration of relative institutional competence by the Courts. As a broadly political question, the issue of whether there was a public emergency was one that fell more readily within Government and Parliament's competence.

Lord Bingham on the threshold test

'... I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety. As will become apparent, I do not accept the full breadth of the Attorney General's argument on what is generally called the deference owed by the courts to the political authorities. It is perhaps preferable to approach this question as one of demarcation of functions or what Liberty in its written case called "relative institutional competence". The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater

30 Lord Hoffmann dissenting.

31 Lord Walker dissenting.

32 *Belmarsh* at [30], 'Article 15 requires that any measures taken by a member state in derogation of its obligations under the Convention should not go beyond what is "strictly required by the exigencies of the situation." Thus the Convention imposes a test of strict necessity or, in Convention terminology, proportionality.'; and see [44].

the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions. The present question seems to me to be very much at the political end of the spectrum: see Secretary of State for the Home Department v Rehman [2001] UKHL 47, [2003] 1 AC 153, para 62, per Lord Hoffmann. The appellants recognised this by acknowledging that the Home Secretary's decision on the present question was less readily open to challenge than his decision (as they argued) on some other questions. This reflects the unintrusive approach of the European Court to such a question. I conclude that the appellants have shown no ground strong enough to warrant displacing the Secretary of State's decision on this important threshold question.³³

23. In approaching the exigencies of the situation test, the majority concluded that the measures adopted had to be subject to strict scrutiny by the Courts. Whether the measures adopted were necessary to meet the needs of the public emergency was a legal question³⁴.

Lord Hope on assessing the exigencies of the situation test

'... in my opinion it is nevertheless open to the judiciary to examine the nature of the situation that has been identified by government as constituting the emergency, and to scrutinise the submission by the Attorney General that for the appellants to be deprived of their fundamental right to liberty does not exceed what is "strictly required" by the situation which it has identified. The use of the word "strictly" invites close scrutiny of the action that has been taken. Where the rights of the individual are in issue the nature of the emergency must first be identified, and then compared with the effects on the individual of depriving him of those rights. In my opinion it is the proper function of the judiciary to subject the government's reasoning on these matters in this case to very close analysis. One cannot say what the exigencies of the situation require without having clearly in mind what it is that constitutes the emergency.'³⁵

24. In considering the exigencies of the situation test, Lord Bingham dealt with a particular challenge from the Attorney General that this too was a matter for Parliament and the executive. As Lord Bingham summarised it, the Attorney General;

33 **Belmarsh** at [29]. And see Lord Hope at [116], 'I am content therefore to accept that the questions whether there is an emergency and whether it threatens the life of the nation are pre-eminently for the executive and for Parliament. The judgment that has to be formed on these issues lies outside the expertise of the courts, including SIAC in the exercise of the jurisdiction that has been given to it by Part 4 of the 2001 Act.'

34 Agreement that the question was legal does not necessarily entail agreement with the majority decision on the facts. There is some irony in the fact that difficulties concerning deportation, which flowed from the decision in *Chahal v United Kingdom* (1996) 23 EHRR 413, led to the **Belmarsh** problem and the upshot of the House of Lords decision in **Belmarsh** included the Control Orders regime.

35 *Ibid* at [116].

'[37]... submitted that as it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public. These were matters of a political character calling for an exercise of political and not judicial judgment. Just as the European Court allowed a generous margin of appreciation to member states, recognising that they were better placed to understand and address local problems, so should national courts recognise, for the same reason, that matters of the kind in issue here fall within the discretionary area of judgment properly belonging to the democratic organs of the state. It was not for the courts to usurp authority properly belonging elsewhere. The Attorney General drew attention to the dangers identified by Richard Ekins in "Judicial Supremacy and the Rule of Law" (2003) 119 LQR 127. This is an important submission, properly made, and it calls for careful consideration.'

- 25.** Lord Bingham rejected the characterisation that the Courts were, specifically by applying a proportionality review, usurping the authority of Parliament. As he concluded

'[42] It follows from this analysis that the appellants are in my opinion entitled to invite the courts to review, on proportionality grounds, the Derogation Order and the compatibility with the Convention of section 23 and the courts are not effectively precluded by any doctrine of deference from scrutinising the issues raised. It also follows that I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction which he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true, as pointed out in para 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic. It is particularly inappropriate in a case such as the present in which Parliament has expressly legislated in section 6 of the 1998 Act to render unlawful any act of a public authority, including a court, incompatible with a Convention right, has required courts (in section 2) to take account of relevant Strasbourg jurisprudence, has (in section 3) required courts, so far as possible, to give effect to Convention rights and has conferred a right of appeal on derogation issues. The effect is not, of course, to override the sovereign legislative authority of the Queen in Parliament, since if primary legislation is declared to be incompatible the validity of the legislation is unaffected (section 4(6)) and the remedy lies with the appropriate minister (section 10), who is answerable to Parliament. The 1998 Act gives the courts a very specific, wholly democratic, mandate. As Professor Jowell has put it

"The courts are charged by Parliament with delineating the boundaries of a rights-based democracy" ("Judicial Deference: servility, civility or institutional capacity?" [2003] PL 592, 597)".

See also Clayton, "Judicial deference and 'democratic dialogue': the legitimacy of judicial intervention under the Human Rights Act 1998" [2004] PL 33.'

26. It ought to be noted that while he formed part of the majority (on both issues), Lord Scott queried the utility of section 14 of the HRA and its power to make designated derogation orders. In his view the section was unnecessary, except as a means to highlight that legislation was to be enacted that was inconsistent with Convention rights.
27. As he noted, Parliament could always legislate in a manner inconsistent with such rights. Such a step did not depend upon there being a designated derogation order in place (or for that matter an article 15 derogation in place)³⁶. Were the Government and Parliament to conclude that, in a public emergency, it needed to legislate in such a manner the former could make an article 15 derogation and the latter enact primary legislation to the necessary effect. In such circumstances, a designated derogation order would be unnecessary. This might suggest that section 14 could properly be omitted from the HRA.
28. Notwithstanding Lord Scott's query about the utility of designated derogation orders, the majority concluded that the measures adopted had to be subject to strict scrutiny by the Courts. In doing so, they concluded that the measures adopted did not rationally address the threat to security³⁷, comprised a disproportionate response and were not strictly required by the exigencies of the situation. Furthermore, they were discriminatory in circumstances where there was no derogation from article 14 ECHR. The basis of the discrimination was that the measures only applied to foreign nationals. The designated derogation order was thus quashed. As a consequence, the article 5 Convention right, as given effect in domestic law by the HRA, remained in effect. The House of Lords went on to issue a declaration of incompatibility regarding section 23 of the 2001 Act.
29. It should be noted, however, that the House of Lord's decision did not affect the status of the article 15 derogation itself. It remained in place until it was withdrawn by the Government. Thus, the upshot of **Belmarsh** was to produce the situation where, in domestic law, section 23 of the 2001 Act was incompatible with Convention rights as they continued to be given effect via the HRA, while in international law the Convention rights had been disapplied via the article 15 derogation. In its response to the House of Lords' judgment, the Government accepted the Court's decision and subsequently introduced legislation intended to meet the House of Lords' conclusion that the 2001 Act did not satisfy the exigences of the situation test³⁸. It withdrew the article 15 derogation in March 2005.

³⁶ Ibid at [146]-[150].

³⁷ Both because it did not apply to nationals and permitted non-nationals to leave the country.

³⁸ Charles Clarke MP, Home Secretary, Hansard, HC, 26 January 2005, vol.30, col. 306; Hansard, HC, 22 February 2005, vol. 31, col. 151.

- 30.** The House of Lords’ approach to both the threshold and scrutiny tests was later affirmed by the ECtHR in *A v UK* – 3455/05 (2009)³⁹. The ECtHR held that the measures adopted in the 2001 Act were outwith the scope of the article 15 derogation and were in breach of article 5 of the Convention. In reaching its decision, the ECtHR did, however, emphasise that the general approach taken in the UK to assessing whether the 2001 Act was compliant with the Convention was correct.

The ECtHR’s assessment of the UK’s approach to the article 15 derogation

*‘The Court [i.e., the ECtHR] is intended to be subsidiary to the national systems safeguarding human rights. It is, therefore, appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought before the Court, it should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries (see *Burden*, cited above, § 42). It is thus of importance that the arguments put by the Government before the national courts should be on the same lines as those put before this Court. In particular, it is not open to a Government to put to the Court arguments which are inconsistent with the position they adopted before the national courts (see, mutatis mutandis, *Pine Valley Developments Ltd and Others v. Ireland*, judgment of 29 November 1991, § 47, Series A no. 222; *Kolompar v. Belgium*, judgment of 24 September 1992, §§ 31-32, Series A no. 235-C).⁴⁰’*

- 31.** It is important to note an issue raised with IHRAR by a number of responses to the *CfE*⁴¹. The House of Lords was able to consider the validity of the article 15 derogation, as noted earlier, because section 30 of the 2001 Act specified that that was possible. It was, however, observed by Lord Scott in his judgment that there was nothing in the wording of the HRA to specify that a Court when considering the validity of a designated derogation order was constrained to do so by reference to the validity of the article 15 derogation to which it gave domestic effect.

39 *A v UK* – 3455/05 [2009] ECHR 301; (2009) 49 EHRR 29 at [175]-[181] and [182]-[190].

40 *Ibid* at [154].

41 See, for instance, Professor Tom Hickman QC, *Submission to the Independent Human Rights Act Review Panel* at [39] and following’ Human Rights Centre, School of Law, Queen’s University Belfast, *Submission to the Independent Human Rights Act Review Panel* at [34].

Lord Scott – on assessing the designated derogation order by reference to the article 15 derogation⁴²

'The main issue that has been debated before your Lordships is whether the Order was validly made by the Secretary of State or should be quashed. It seems to have been assumed that the Order could only be upheld if it could be justified as an exercise of the article 15 power of derogation. The Attorney General expressly accepted that that must be so and did not seek to uphold the Order on the ground that whatever its status if tested by reference to article 15 it was a valid exercise by the Secretary of State of the order-making power conferred by section 14 of the 1998 Act. I have found this another puzzle because article 15 is not one of the specified articles incorporated into domestic law by the 1998 Act and is not referred to in section 14.

In the preamble to the Order the Secretary of State purported to be exercising his section 14 powers but in the Schedule to the Order, in which the proposed notification of the derogation from article 5(1) is set out, the derogation is described as an exercise of "the right of derogation conferred by article 15(1) of the Convention"... I have difficulty in understanding how the scope of the authority conferred by section 14 to make a designated derogation order can be regarded as limited by the terms of article 15 of the ECHR. But since the Attorney General was content to argue the case on the footing that the Order did have to be justified under article 15 I will set aside my doubts and consider the case on that footing.'

- 32.** As Lord Scott made clear, the House of Lords approached the question of the designated derogation order's validity on the basis of a concession by the Government. That concession was that it could only be upheld if it was consistent with the exercise of the article 15 derogation power. The House of Lords did not express a view on whether that concession was properly given or not. Nor does it bind Government generally. It is therefore questionable whether a future designated derogation order would be approached on the same basis by Government or by the Courts.
- 33.** Lord Scott's view can be contrasted with that of Lady Hale. It is apparent in her judgment that to assess the validity of a designated derogation order it is necessary for the Court to assess whether it is permitted by the Convention. That can only be done by the Court assessing whether the article 15 derogation was itself, in the UK Court's view, valid⁴³.

42 *Belmarsh* at [151]-[152].

43 *Belmarsh* at [225].

Lady Hale – on the assessment of the article 15 derogation⁴⁴

‘The rights defined in the Convention have become rights in United Kingdom law by virtue of the Human Rights Act; but section 1(2) provides that the rights defined in the Convention articles shall have effect subject to any ‘designated derogation’. This means a derogation designated in an order made by the Secretary of State under section 14, in this case the Human Rights Act 1998 (Designated Derogation) Order 2001. Such an order would not be within his powers if it provided for a derogation which was not allowed by the Convention. Section 30(2) and (5) of the 2001 Act allow the detainees to challenge this derogation from their article 5(1) rights in proceedings before SIAC and in an appeal from SIAC’s decision. Thus it is that we have power to consider the validity of the Derogation Order made by the Secretary of State and to quash it if it is invalid. If the Derogation Order is invalid, it follows that detention powers under the 2001 Act are incompatible with the Convention rights as defined in the Human Rights Act and that we have power to declare it so. It will then be for Parliament to decide what to do about it.’

- 34.** At best what can be said, as pointed out by Professor Hickman QC in his evidence to the *CfE*, is that there ‘... remains ... a degree of uncertainty about whether domestic courts have power to quash a designation order for incompatibility with Article 15 ECHR’⁴⁵; a point previously made by the Joint Committee on Human Rights (JCHR).

⁴⁴ Ibid.

⁴⁵ Professor Tom Hickman QC, *Submission to the Independent Human Rights Act Review Panel* at [41].

Joint Committee on Human Rights – basis of Court scrutiny uncertain⁴⁶

‘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.

*The precise legal basis for any challenge in court to the lawfulness of a derogation is therefore uncertain under the HRA. The power to detain foreign nationals in the Anti-Terrorism, Crime and Security Act 2001 and the accompanying derogation order were judicially reviewed in *A v Secretary of State for the Home Department [Belmarsh]*. However, the 2001 Act itself contained a provision expressly providing for a “derogation matter” to be questioned in legal proceedings before the Special Immigration Appeals Commission and on appeal from the Commission^[92] and for at least some members of the House of Lords in that case this was the basis of the courts’ jurisdiction to entertain a challenge to the lawfulness of the derogation.’*

35. This leads to the immediate question posed to IHRAR in respect of designated derogation orders: the remedies available to the Courts when considering challenges to such orders.
36. The first point to note is that the UK Courts are only able to assess the validity of article 15 derogations in order to assess the validity of a designation derogation order. They have no remedies available to them where article 15 derogations as such are concerned. Article 15 derogations operate at the international level only. Where designated derogation orders (under section 14) are concerned, the most obvious remedies available to the Courts are those available generally when a Court is considering the validity of subordinate legislation, i.e., when considering judicial review. Most obviously, as was the case in **Belmarsh** the remedy available will be a quashing order. In principle, as JUSTICE notes in its response to the CfE Courts have two other possible remedies available to them:

‘In theory the courts could also use section 3 to read down a derogation order, however, given the nature of the order it is unlikely that this would be possible. In addition ... courts often make a declaration disapplying the incompatible subordinate legislation in the particular claimant’s case. Again, this is unlikely; if the requirements of Article 15 are not met they will not be met for anyone.’⁴⁷

⁴⁶ Joint Committee on Human Rights in its Thirteenth Report (7 October 2008) at [97]-[98] <<https://publications.parliament.uk/pa/jt200708/jtselect/jtrights/172/17202.htm>>

⁴⁷ JUSTICE, *Submission to the Independent Human Rights Act Review Panel* at [67].

(5) Summary of the UK Court’s Approach

37. The approach to designated derogations in the light of **Belmarsh** can be summarised in the following way.

Summary of the UK Courts’ approach to designated derogations

- Article 15 derogations do not form part of domestic law.
- The UK Courts are able to assess their validity where there is specific legislation authorising them to do so, as was the case in **Belmarsh**, through section 30 of the 2001 Act, and possibly otherwise, depending on the views taken in **Belmarsh**. However, in so far as the UK Courts are entitled to assess the validity of an article 15 derogation, it is only for the purposes of assessing validity of a designated derogation order.
- Designated derogation orders are delegated legislation. They are therefore susceptible to judicial review.
- The remedy (currently) most likely to be used by the Courts in respect of a designated derogation order is a quashing order.

(6) Views from Submissions to IHRAR concerning Designated Derogations

38. While the weight of Submissions to the CfE either did not deal with designated derogation orders or took the view that no change was needed, there were a number of cogently argued submissions favouring reform. We turn to examples of both viewpoints.

Examples of submissions supportive of no change

Amnesty International

'Such derogations should be subject to full judicial review powers, including the capacity for such orders to be found unlawful and to be quashed. Derogations are, thankfully, extremely rare and are immensely serious matters when they occur. Their lawfulness is limited in terms of their legitimate scope, in the sense of which Articles of the ECHR can be derogated from, and in terms of their justification, in the sense of the circumstances in which a derogation can be considered legitimate and the duration for which they can be so considered. They must, therefore, be subject to full judicial scrutiny and there is no argument from either principle or practice to support the removal or curtailment of such scrutiny.'

Attendee at JUSTICE Roundtable Meeting

'Derogation orders should not be treated differently from other subordinate legislation. There is a constitutional distinction between subordinate and primary legislation. The two should not be conflated.'

Attendee at Law Society of Scotland Roundtable

'In respect of derogation orders ... There is no real evidence that the approach to them does not work.'

Faculty of Advocates

'We consider the existing provisions of the HRA are adequate and no changes are required.'

Herbert Smith Freehills

'The decision to make a derogation order under section 14 is an act by the Secretary of State. It is not primary legislation. On that basis it should be subject to the same challenges as other executive acts on conventional judicial review grounds.'

Labour Campaign for Human Rights

‘No change required.’

Muslim Engagement and Development (MEND)

‘14 remains a remedy of last resort. As such, the use of such remedies remains a rarity. Indeed, there are protections in place to ensure against any inappropriate use of remedies. Hence, considering the limited use of derogation orders and challenges to them, MEND regards the remedies available remain both essential and entirely appropriate...’

MEND can see no evidence of Section 14(1) operating in a problematic manner to date and considers the remedies available under this section to be measured, appropriate, and a necessary check on power.’

Northern Ireland Human Rights Consortium

‘The Government is not obliged to consult Parliament before it decides to derogate from a Convention right, but once made it must be laid before Parliament where it will cease to have effect after 40 days unless approved by a resolution from both House of Commons and House of Lords. 65 The JCHR has noted that Parliament’s ability to scrutinise derogations is “therefore fairly limited”. Arguably, allowing more effective remedies to domestic courts when challenging derogation orders adds an additional check and balance on the Government where parliament lacks the necessary opportunity and scope to scrutinise these orders.’

The NIHRC [Northern Ireland Human Rights Consortium] advises that the no changes are necessary with respect to section 14 of the HRA governing derogation orders.’

Scottish Human Rights Commission

‘There should be no change to the powers available to courts in considering designated derogation orders. It is essential that we have effective judicial oversight of this executive power.’

39. The thrust of the submissions in favour of ‘no change’ can be summarised succinctly: first, such orders were a form of subordinate legislation and as such the general approach taken by Courts to such legislation should apply; secondly, there was a need to ensure that the Courts could properly scrutinise such orders as it was a proper form of oversight of Government, particularly where, as here, there would be limited parliamentary scrutiny; and thirdly, there was no evidence to suggest that a change was necessary.
40. In contrast to the submissions in favour of no change, a number of submissions highlighted perceived weaknesses with the current position, some of which went beyond the question of remedies available to the Court.

Selected criticisms and reform recommendations submitted to IHRAR

Professor Tom Hickman QC

'... the HRA should be amended to put beyond any doubt that domestic courts must consider and determine the validity of derogations under Article 15, ECHR.'

Lord Carlile of Berriew

'This is a sensitive issue, as derogation clearly is the responsibility of the Government and Parliament. By definition a derogation is just that, rendering inapplicable certain parts of the Convention. I would favour as the remedy a Judicial review on the basis of Wednesbury type principles (irrationality) re-stated in statutory form for this specific matter.'

Michael Hall

'As such an order is delegated legislation the courts have the right to strike it down on an application for judicial review if it is Wednesbury unreasonable. However, this power will of course be exercised sparingly, as it is very rare for a derogation to be made and it would not be done lightly. The Act could be amended to state that any derogation from the convention can only be made by an Act of Parliament, and if that was done the courts would have to accept that they could only make a declaration of incompatibility. It may be that the primary legislation prevents the removal of the incompatibility by the quashing of the delegated legislation. If so, the court can make a declaration of incompatibility (section 4(4)).'

JUSTICE

'... we do believe that there is further scope for Parliamentary involvement in any proposed derogations from the Convention and the making of any future designated derogation orders. Currently a designated derogation order can be made without being laid in draft. Once made it must be laid before Parliament and will cease to have effect after 40 days unless approved by a resolution of each House. We agree with the suggestions of the Joint Committee on Human Rights ("JCHR") that the Government should undertake to consult the JCHR in advance of any proposed derogation, including providing a detailed memorandum explaining how the Article 15 criteria are met as well as providing Parliament with sufficient time to consider any proposed derogation.'⁴⁸

48 The JCHR raised this suggestion in Joint Committee on Human Rights, Ninth Report of Session 2019-21. 'The Overseas Operations (Service Personnel and Veterans) Bill, (HL Paper 155, HC 665) at [152], 'We call on Government to make an undertaking to consult with the Committee in advance of any proposed derogation under the ECHR. They should provide Parliament with sufficient time to consider any proposed derogation in advance of the UK derogating from its international obligations. We also expect to receive from the Secretary of Defence, a detailed Memorandum explaining how the Article 15 ECHR criteria are met in the case of any proposed or actual derogation.' <<https://committees.parliament.uk/publications/3191/documents/39059/default/>>.

Cambridge University, Centre for Public Law

*'One change which the Review might contemplate is the introduction of a bar on a court quashing a DDO, after determining that the DDO is invalid. In **Belmarsh**, Lord Scott expressed doubts about whether non-compliance with Article 15 required a DDO to be quashed. In our view, quashing a DDO (which is not primary legislation) would be an appropriate step for courts to take at this point. If it were felt that a different balance should be struck based on the applicable public emergency and exigencies of the situation, the derogation could be included in primary legislation, with the subsequent greater political scrutiny by Parliament, which the courts would be unable to quash. In such circumstances, courts would only be able to declare the legislation incompatible with Convention rights, without affecting the validity of the legislation. The claimant/s would then take their case to the ECtHR, which would be likely to find that the derogation was invalid due to inconsistency with Article 15 (particularly as the domestic courts will have already found this to be the case).*

... A further change which might be contemplated is the introduction of a requirement for a court to consider suspending or staying the operation of any order quashing a DDO. This might be thought necessary in circumstances of a genuine emergency threatening the life of the nation, but where measures have been taken which are more than strictly required, making the derogation invalid.'

Policy Exchange

'Parliament should consider amending section 6(3) of the HRA to provide that making a designated derogation order is not an act of a public authority for the purposes of the HRA. Alternatively, Parliament should specify that designated derogation orders fall within an expanded definition of primary legislation, and so cannot be quashed for rights-incompatibility but can only be declared rights-incompatible per section 4.

Having said this, the most likely ground of challenge to a designated derogation order is not that the order itself breaches convention rights, or that in making the order the minister acts in breach, but rather that the order should be quashed in judicial review proceedings, perhaps on the grounds that it turns on an error of law, and in particular about the meaning of Article 15 itself. Section 14 could be amended to specify that it is for the minister alone, accountable to Parliament, to decide whether the test in Article 15 is satisfied. That is, Parliament could enact an ouster clause specifying that no court would have authority to question a designated derogation order. This would, of course, be highly controversial, but would be consistent with the constitutional orthodoxy that whether or not to derogate from the ECHR is for the Government, representing the UK in the international realm, freely to decide. It should not be open to domestic courts, for example, to conclude that derogation is only lawful if the war in question is a war that threatens the life of the nation, as Lord Sumption intimated at one point.'

(7) Rejected Options

41. The Panel rejects the following reform options.
- (i) Amend the HRA to provide that designated derogation orders have the same status as primary legislation or to remove from the Courts the power to quash a designated derogation order, while providing them with a power to make a declaration of incompatibility***
42. These two proposals are to the same effect. They would reduce the remedies available to the Court when assessing designated derogation orders. Courts would be limited to making declarations of incompatibility, thus leaving a Convention rights incompatible designated derogation order in place.
43. The central advantage of these options would be to leave in place an incompatible derogation from Convention rights where there is a public emergency. It would, however, make clear to Government and Parliament that in the Court's judgment, the measures were either unjustified because there was no valid emergency, or they went beyond what was necessary to meet the emergency. It would be for the political Branches of the State to determine whether and, if so, how to amend any such order in the light of the Court's assessment. This option, however, raises a number of serious concerns.
44. First, its objective can be achieved in another way. It can be achieved through providing the Courts with the power to suspend the effect of any quashing order. It thus goes further than is necessary to achieve the objective of leaving an unjustified designated derogation order in place while Government and Parliament consider what changes to effect in order to meet the Court's concerns. We make recommendations concerning suspended quashing orders in Chapter Seven.
45. Secondly, it creates a hybrid form of subordinate legislation, which is deemed to be equivalent to primary legislation. While not unknown⁴⁹, such an approach involving the suspension of Convention rights in times of emergency, when reliance upon them may be particularly important or subject to particular challenge, lacks merit. Should Government and Parliament wish legislation to have the status of primary legislation as a matter of constitutional propriety that should be achieved by enacting primary legislation. It ought not to be acceptable for Government, by order subject to the approval process for secondary legislation, to introduce de facto primary legislation.

⁴⁹ For, instance, section 1 of the Provisional Collection of Taxes Act 1968 and section 22(3) of the Civil Contingencies Act 2004.

46. Thirdly, and as submitted by JUSTICE it would leave individuals subject to the effects of the designated derogation order without an effective remedy. This option, it will be recollected, does not give the Court power to make a suspended quashing order; it precludes the Court from quashing the designated derogation order. Accordingly, as JUSTICE puts it and we agree:

*'The effect of a designated derogation order is to disable the courts from invoking sections 3, 4 or 6 of the HRA in relation to the right that has been derogated from. Therefore, when the court quashes the order the rights take effect as normal, meaning that the relevant statutory provision will be in breach of the Convention rights and a declaration of incompatibility will have to be issued, in relation to the relevant primary legislation, as was the case in A v Secretary of State for the Home Department [**Belmarsh**]. If the courts were unable to quash a designated derogation order, it would remain in force. This would enable the executive to proceed with whatever action it was that required the designated derogation order (for example the indefinite detention), without breaching domestic law. Given the need for a derogation order in the first place, this would result in a serious breach of Convention rights but leave those whose rights have been breached without recourse to the domestic courts.'*⁵⁰

Aside from other considerations, such a state of affairs would encourage aggrieved individuals to pursue their complaints before the ECtHR.

47. For these reasons we **reject** this option.

(ii) Amend the HRA to omit section 14 so that all designated derogations are made by Act of Parliament

48. This option would mean that designated derogations are provided for in primary legislation rather than subordinate legislation made under the HRA. It arises particularly from Lord Scott's judgment in **Belmarsh**. Lord Scott raised the question whether section 14 was necessary⁵¹. He could not see the purpose that it served, other than to flag the point that legislation was to be enacted that was inconsistent with Convention rights. As he noted, Parliament could always legislate in a manner inconsistent with such rights. Such a step did not depend upon there being a designated designation order in place or for that matter an article 15 derogation in place. This might suggest that section 14 could properly be omitted from the HRA⁵².
49. If this option were adopted and section 14 were omitted from the HRA, it would result in – as Lord Scott made clear – each Act of Parliament that derogated in domestic law from Convention rights needing either to include a provision equivalent to section 14 of the HRA or one analogous to section 30 of the 2001 Act. If that were not done the derogation would simply be set out in the Act of Parliament, subject to section 3 and 4 of the HRA. We rejected that option above.

⁵⁰ JUSTICE, *Submission to the Independent Human Rights Act Review Panel* at [69].

⁵¹ **Belmarsh** at [146]-[150].

⁵² This would entail a consequential amendment omitting section 1(2) of the HRA.

- 50.** One member of the Panel strongly favoured the option of omitting section 14 and leaving Parliament to enact an equivalent of section 14 of the HRA or section 30 of the 2001 Act each time Convention rights were derogated from. Such an amendment would also entail the omission of reference to derogations in section 1 of the HRA. This, latter, amendment was also said to have the benefit of reinforcing the idea that Convention rights in the HRA and the UK's international obligations under the Convention need not always be coterminous. If adopted, these amendments would place the onus on Government and Parliament to ensure that legislation was enacted when an emergency situation occurred making appropriate provision for any derogation and the means to challenge it. That would place the onus on the political Branches of the State to fully confront the issue, and the derogation from Convention rights. At present it could be argued that they do not, necessarily, need to confront and debate the issue properly as a derogation can be made and a challenge brought by it under section 14. Such a section 14 challenge thereby leaves the UK Courts to be the primary forum to fully consider the issue. This option would, then, rebalance the Constitution by placing consideration of derogations primarily in the political arena. As importantly, it would ensure that Parliament was in the best position to act as a check on Government.
- 51.** While the majority of the Panel could see force in these points, they were concerned that it assumes an emergency situation would necessitate primary legislation as a means to derogate from Convention rights. It is possible that a derogation could arise from regulations made under the Civil Contingencies Act 2004, which would have the same effect as an Act of Parliament⁵³. In such a case, there may be little realistic scope for Parliamentary scrutiny. Omission of section 14, without any guarantee that Parliament would in any future situation make equivalent provision for it or for an equivalent to section 30 of the 2001 Act, would weaken domestic protection of Convention rights. It would leave individuals without a means to challenge derogations before the UK Courts, which in a time of emergency are likely to be, more than ordinarily, a more speedy and cost-effective means of seeking redress than any proceedings before the ECtHR. Furthermore, this option would weaken domestic rights protection where the case for section 14 undermining the constitutional balance is undemonstrated (not least, given that it has not yet been relied upon). Moreover, there is limited attraction in repealing an existing provision while emphasising the importance of enacting equivalent legislation on each occasion the need arose.
- 52.** Accordingly, the repeal of section 14 is difficult to justify and the majority of the Panel **rejects** this option. That said, there was a strongly held view by the Panel as a whole that in any future emergency Parliament undoubtedly ought to consider carefully the question of any derogation from Convention rights and the most appropriate means for it to be challenged judicially in any relevant legislation enacted at that time.

53 Section 22(3) of the Civil Contingencies Act 2004.

(iii) Amend the HRA to provide that only a government minister can decide whether the test applicable to article 15 of the Convention is satisfied and remove the court's jurisdiction to review designated derogation orders on the ground that the test under article 15 was not satisfied

- 53.** This option would remove from the Courts the ability to test the validity of an article 15 derogation as part of their assessment of the validity of the designated derogation order. They would, on the contrary, have to consider the article 15 derogation as validly made when carrying out their assessment of the designated derogation order. It seems inevitable that were Government to make an article 15 derogation it would certify that the derogation was validly made. In effect this option is intended to remove consideration of the validity of a designated derogation from the Courts, as is made clear by the argument in favour of it set out in Policy Exchange's response to the CfE. As they put it,

*'... the most likely ground of challenge to a designated derogation order is not that the order itself breaches convention rights, or that in making the order the minister acts in breach, but rather that the order should be quashed in judicial review proceedings, perhaps on the grounds that it turns on an error of law, and in particular about the meaning of Article 15 itself. Section 14 could be amended to specify that it is for the minister alone, accountable to Parliament, to decide whether the test in Article 15 is satisfied. That is, Parliament could enact an ouster clause specifying that no court would have authority to question a designated derogation order.'*⁵⁴

They go on to note that such an option would be 'highly controversial' but 'consistent with constitutional orthodoxy that *whether or not to derogate from the ECHR is for the Government, representing the UK in the international realm, freely to decide*'.

- 54.** This option is fraught with difficulty. First, it is misplaced. The Court's consideration of the article 15 derogation is for limited domestic purposes only, as noted above: it has no effect on the status in the international plain of that derogation. It does not impinge at all on its validity or the Government's constitutional role in representing the UK in the international realm. ***Belmarsh*** held the designated derogation order had to be quashed. It had no effect on the article 15 derogation, which remained in force following the Court's judgment until the Government chose to withdraw it. This option thus misconstrues the effect of the Court's assessment of article 15 derogations.

⁵⁴ Policy Exchange, *Submission to the Independent Human Rights Act Review Panel* at [65].

- 55.** Secondly, it seeks to render the Government's decision to certify an article 15 derogation as valid and the validity of a designated derogation order in effect non-justiciable before UK Courts. It makes the Government judge in its own cause. It is also designed to enable Government to set aside the effect of Convention rights domestically with no domestic remedy: no matter how obviously unwarranted the derogation, it would be unchallengeable in UK Courts. To challenge their validity individuals would have to bring proceedings before the ECtHR. Such an eventuality is contrary to the intention of the HRA to enable Convention rights to be given effect domestically.
- 56.** Thirdly, it is likely to work contrary to the UK's interests. As was stressed to IHRAR during its Roundtable with the Security Services⁵⁵, there is real benefit to be derived from UK courts assessing (alleged) Convention rights breaches⁵⁶. UK Courts, as was the case in *Belmarsh*, are able to take account of closed materials, that is evidence that is not made public for security reasons and not made available to parties other than the Government during proceedings. The ECtHR cannot take account of such material. UK Courts are therefore able to consider a broader range of material in assessing the validity of designated derogations than the ECtHR could consider if a challenge to such an order could only be considered before it. UK Court judgments can therefore set out a detailed assessment of the matter dealing with issues on which the ECtHR cannot. The ECtHR can and does, however, benefit from the detailed primary assessment of such matters by the UK Courts, including their assessment of the closed material. In this way, the ECtHR has strong material before it on which to determine if the UK ought to be afforded a wide margin of appreciation in respect of both any article 15 derogation and any designated derogation. This reform option would remove that material from the ECtHR and thus increase the possibility of adverse findings from the ECtHR whereas otherwise such an adverse finding might not properly be made.

55 Also see Chapter Eight.

56 Security Services Roundtable (31 March 2021), 'At the present time, where the two approaches are aligned, it means that the Agencies can utilise closed material proceedings (CMPs) before domestic courts and tribunals, such as the Investigatory Powers Tribunal (IPT) or SIAC. This means they are able to deploy national security material in domestic proceedings before domestic tribunals that the ECtHR has accepted are Convention-compliant e.g., the IPT. As a result, where the UK has to defend such proceedings where they end up before the ECtHR, they are able to rely upon findings of fact made by the domestic courts and tribunals based on national security material deployed in a CMP. A similar point can be made in respect of SIAC. In the Abu Qatada case, SIAC dealt with national security material. That meant that the ECtHR did not have to see national security material. It was, however, able to give weight to SIAC's findings of fact. If there was a discrepancy between the Convention and the HRA's approach to extra-territoriality, and an individual did not have any other effective remedy before the UK courts, it could result in the UK having to consider deploying factual material before the ECtHR. This would be problematic as national security material could not be deployed in a CMP before the ECtHR. It is also difficult to see how a process could be established for national security material to be made available to the ECtHR i.e., to restrict it to UK officials at the court or to bring it within the scope of the Official Secrets Act. This would arguably result in the UK not being able to deploy that material and thus would undermine its ability properly to defend proceedings before the ECtHR.' Also see Chapter Eight.

- 57.** Fourthly, it might well not achieve its designed objective. As seen in ***Belmarsh***, the Government succeeded decisively on the central article 15 question: was Government entitled to conclude that there a relevant emergency? The Government however failed on the *domestic* (not international) question going to the proportionality of its response to the emergency. Thus, this option carries with it all the disadvantages already outlined and may in any event prove ineffective. The benefit/risk test for reform to the HRA is not satisfied.
- 58.** For these reasons, we **reject** this option.
- (iv) Place the application of *Wednesbury* principles on a statutory footing**
- 59.** This option would codify the approach that UK Courts to carrying out judicial review of subordinate legislation. This option has the attraction of furnishing a context specific focus on the application of the *Wednesbury* test⁵⁷ in a national emergency.
- 60.** That said, we are not persuaded that the UK Courts need to be given statutory guidance on how to approach the assessment of the validity of designated derogation orders in accordance with *Wednesbury*. There is equally a danger that any codification of the common law in this area may have unforeseen adverse consequences.
- 61.** We **reject** this option.
- (v) Provide for increased involvement of the JCHR in advance of any designated derogation order being made**
- 62.** While we are generally attracted to an enhanced role for the JCHR⁵⁸, the idea of such advance consultation in circumstances of a national emergency strike us as likely to be impractical. While Government would no doubt strive to consult, in so far as that was possible, in an emergency there is a need for speed and decisive action. Mandating formal or quasi-formal consultation may well simply build detrimental delay into decision-making. We therefore **reject** this option.

57 The principles that developed from the decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223.

58 See, for instance, Chapter Three.

(vi) Amend the HRA to require Government ministers to review the need to derogate under article 15 before the UK engages in overseas military engagements

63. This option arises from consideration by the Government to include provision in the Overseas Operations (Service Personnel and Veterans) Act 2021 that would have required a Government minister to consider whether there was a need to derogate from the Convention under article 15 before the UK engaged in overseas military operations⁵⁹. The Government chose not to proceed with that provision. The JCHR in its scrutiny of the provision while the Act was being debated in Parliament concluded that it was highly doubtful whether such a provision would provide any real benefit⁶⁰. We agree that such a requirement is otiose. We **reject** this option.

(8) Potential Reform Options

64. The Panel considers the following to be potential reform options. We reiterate the caution that, so far, there has been only one instance of the use of the section 14 power subsequent to the HRA's enactment. Unlike in other Chapters there are no options that we view to be potential but not recommended options.

Recommended Options

(i) Option One: No change

65. The first option is for there to be no change to section 14 of the HRA and the remedies available to the Court where designated derogation orders are made. There is a good degree of support for this option in the evidence provided to IHRAR. Moreover, given the caution just expressed, it could, as noted above, be premature to consider whether and if reform is needed.
66. There is, however, a reasonable argument against this option. As already noted, it is arguable that the Courts in **Belmarsh** were only able to consider the validity of the article 15 derogation when reviewing the validity of the designated derogation order because section 30 of the 2001 Act empowered them to do so. Equally, as Lord Scott noted, the designated derogation order was to be considered by reference to the validity of the article 15 derogation as a matter of concession by the Government.

59 See clause 12 of The Overseas Operations (Service Personnel and Veterans) Bill (Bill 107, 51/1), which would have inserted a new section 14A into the HRA.

60 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 at [130].

67. In the absence of any future equivalent to section 30 of the 2001 Act, there is therefore an argument that when assessing a derogated derogation order, the Courts would not be entitled to consider the validity of the underlying article 15 derogation and, absent a similar concession to that made by the Government in **Belmarsh**, the Court would have to proceed to on the basis that the article 15 derogation was valid.
68. Conversely, UK Courts might take the view that they could assess the designated derogation order by reference to their own assessment of the validity of the article 15 derogation on the basis suggested by Lady Hale in **Belmarsh**: in essence, that a designated derogation order could only validly be made if there was a valid underlying article 15 derogation. The preponderance of the Panel’s view was that this was the right approach when the UK Courts consider a challenge to a designated derogation order, although we note that Lord Bingham was able to arrive at the same result without adopting the approach taken by Lady Hale⁶¹. As the section 14 power only permits the designation of derogation orders, if there is no valid derogation then there is nothing that can properly be designated under that section. Thus, to determine whether the designated derogation order is valid, a UK Court must necessarily reach its own conclusion as to the validity of the article 15 derogation. The power to consider the latter’s validity is inherent in the power to test the validity of the designated derogation order.
69. That analysis provides the basis for the Court to exercise appropriate scrutiny of the making of designated derogation orders without the need for a specific statutory authorisation, such as that provided for in section 30 of the 2001 Act. It supports no change to section 14, as the Court could carry out the same analysis, and have available to it the same remedies, as was the case in **Belmarsh**. Wait and see is sometimes sound policy.
70. Granted that the matter is finely balanced and to a degree uncertain, the Panel nonetheless considers no change to be a potential option at this time.
- (ii) Option Two: amend section 14 to provide for Courts to make suspended quashing orders**
71. This reform option is a specific instance of a wider question, whether the Courts should be able to make suspended quashing orders generally in judicial review proceedings and, specifically, where the HRA deals with subordinate legislation. The first issue was considered by the IRAL⁶² and is now being considered by Parliament in clause 1 of the Judicial Review and Courts Bill 2021. The second issue we deal with in Chapter Seven, where we recommend, consistently with the approach taken in that clause, the application of suspended quashing orders where HRA challenges are brought in respect of subordinate legislation.

61 See Lord Bingham in **Belmarsh** at [42].

62 Independent Review of Administrative Law at, for instance, at [3.47] and following. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf>

- 72.** In addition to the reasons supportive of the introduction of such a power in Chapter Seven, there are powerful reasons for its introduction in respect of designated derogation orders. It recognises the particular sensitivity and public safety concerns surrounding a national emergency. It does not have the acute downside of ousting the Court’s jurisdiction to conduct a proper review of a designated derogation order, nor does it render the making of such orders non-justiciable. The Court’s armoury of remedies is expanded to permit justice to be done in the circumstances of the case. In this way, the Court can take into account what might be compelling demands for speedy action, permitting Government and Parliament reasonable time to remedy any defects in the measures taken.
- 73.** Of course, in a case where Government action is manifestly unjustified, the Court is not bound to suspend the quashing order and would doubtless not do so. While any decision not to quash an invalid designated derogation order carries with it the risks that the aggrieved individual, thus deprived of a remedy giving immediate relief, will proceed to the ECtHR, it substantially reduces the opportunities for doing so. In any event, it ensures that the matter would come before the ECtHR with the benefit of a judgment of the UK Court.
- 74.** We accordingly **recommend** this option as the only departure from ‘no change’.

(9) Recommended Reform Options

- 75.** For the reasons set out above, the Panel recommends **Options One and Two**. Given its nature, **Option Two** cannot sensibly be said to give rise to any devolution concerns.

Chapter Seven – Subordinate Legislation

(1) Introduction

1. We now turn to the third question under Theme II of the ToR: question 2(c). It is in these terms:
‘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?’
2. This question focuses on the interrelationship between sections 3 and 6 of the HRA. Where subordinate legislation is incompatible with Convention rights, the remedies differ from those available to UK Courts where an Act of Parliament is incompatible.

Subordinate legislation

Subordinate legislation, which is sometimes referred to as secondary or delegated legislation, is legislation that is made under power provided by an Act of Parliament. It can cover a range of instruments, such as: Orders in Council, orders, rules, regulations, schemes, warrants, or byelaws¹.

3. Where an Act of Parliament is incompatible with Convention rights, UK Courts, as discussed in Chapter Five, may issue a declaration of incompatibility. UK Courts have no such similar power where subordinate legislation is concerned. On the contrary, they have a broader discretionary power, which enables them to set aside (quash) such legislation. The question, in the context of Theme II of the ToR, is particularly focused on whether the current approach established by the HRA has created an imbalance in the constitution.
4. The Panel recommends the following reform options.

¹ See, for instance, the definition of subordinate legislation in section 21 of the Interpretation Act 1981.

Recommended reform options²

The introduction of an additional power to suspend quashing orders or make them prospective only, in this sphere as with judicial review generally, and the introduction of a judgments database for judgments where subordinate legislation has been disapplied or quashed.

5. These options are intended to ensure that the suspended and prospective only quashing order powers intended to be introduced into judicial review generally for England and Wales, which flow from the report of the Independent Review on Administrative Law (IRAL)³, should likewise apply to the HRA, which is UK-wide in application. The introduction of a judgments database is intended to enhance Government and parliamentary scrutiny of Court judgments in this area. Full details of the recommendations and other reform options that the Panel has considered are set out in Parts 6 – 8 of this chapter.

(2) The Approach to Subordinate Legislation – The Parliamentary Context

6. Issues concerning subordinate legislation were not covered in as much detail in the parliamentary debates as other issues that the Panel has considered.
7. The starting point for consideration of this issue is section 6 of the HRA, which provides that no public authority may act in a way that is incompatible with Convention rights.

² See Options Three and Four of the Recommended Reform Options, below.

³ *Independent Review of Administrative Law Report* (March 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf>; clause 1 of the Judicial Review and Courts Bill 2021.

Section 6 of the HRA

‘6 – **Acts of public authorities.**

- (1) *It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*
- (2) *Subsection (1) does not apply to an act if—*
- (a) *as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*
 - (b) *in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.*
- (3) *In this section “public authority” includes—*
- (a) *a court or tribunal, and*
 - (b) *any person certain of whose functions are functions of a public nature,*
- but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.*
- (4) ...
- (5) *In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.*
- (6) *“An act” includes a failure to act but does not include a failure to—*
- (a) *introduce in, or lay before, Parliament a proposal for legislation; or*
 - (b) *(make any primary legislation or remedial order.’*

8. Public authorities include, for instance, the Government, police, and the Courts. Each of the three were identified in the parliamentary debates as obvious examples of such authorities and would thus come within the scope of section 64. As Jack Straw MP explained,

‘Under the Convention, the Government is answerable in Strasbourg for any acts or omissions of the state about which an individual has a complaint under the Convention. The Government has a direct responsibility for core bodies, such as central Government and the police, but they also have a responsibility for other bodies in so far as the actions of such authorities impinge on private individuals.’⁵

⁴ Jack Straw MP, Home Secretary, Hansard, 16 February 1998, vol. 307, col. 775 cited in J. Cooper & A. Marshall-Williams at 82; Lord Irvine LC, Hansard, 24 November 1997, vol. 583, col. 796 in J. Cooper & A. Marshall-Williams at 90.

⁵ Jack Straw MP, Home Secretary, Hansard, 16 February 1998, vol. 307, col. 775 cited in J. Cooper & A. Marshall-Williams at 82.

Against this background together with the objective of enabling Convention rights to be given effect in the UK, it was the HRA's aim that breaches of such rights by public authorities should be capable of being determined by UK Courts.

Jack Straw MP – bringing rights home and public authorities

*'The principle of bringing rights home suggests that liability in domestic proceedings should lie with bodies in respect of whose actions the United Kingdom Government were answerable in Strasbourg. The idea was that if someone could get a remedy in Strasbourg, he or she should be able to get a remedy at home. That point was crucial for the Bill's construction.'*⁶

9. Having established the general principle that where the UK Government would be liable for Convention breaches before the ECtHR, there should be an effective domestic remedy before the UK Courts, it followed that where those breaches arise from subordinate legislation an effective domestic remedy should be available. More specifically, where Government ministers would come within the scope of this principle such a domestic remedy ought to be available, a point further stressed by Lord Irvine LC,

*'Clause [later section] 6(1) of the Bill, by making it unlawful for a public authority to act in a manner inconsistent with Convention rights, will make it unlawful for a Minister to exercise a power to make subordinate legislation which is incompatible with the Convention.'*⁷

The effective domestic remedy for such a breach by a Government minister was set out in what became section 8 of the HRA. That takes us to specific consideration of the power to quash subordinate legislation where it is incompatible with Convention rights.

Section 8 of the HRA

'8 Judicial Remedies

(1) In relation to any act (or proposed act) of a public authority which the courts finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just or appropriate.

...'

⁶ Jack Straw MP, Home Secretary, Hansard, 17 June 1998, vol. 314, col. 406 cited in J. Cooper & A. Marshall-Williams at 83.

⁷ Lord Irvine LC, Hansard, 18 November 1997, vol. 583, col. 544 in J. Cooper & A. Marshall-Williams at 95.

10. Having established the general principle that where the UK Government UK Courts have a number of remedies available to them when considering the lawfulness of subordinate legislation. These remedies are long-established and are well-known to be available where UK Courts engage in judicial review. One such remedy would be to quash, i.e., set aside, subordinate legislation that was held to be ultra vires (outside the power) of the Government minister responsible for issuing it. During the parliamentary debates, the Government made it clear that these remedies, ordinarily available where a Court was engaging in judicial review, would be available where a UK Court was considering the prohibition on public authorities acting incompatibly with Convention rights.

Jack Straw – the Courts’ powers to strike down subordinate legislation

‘[The] courts already have power to strike down subordinate legislation, and they do so with regularity. If they feel that a statutory instrument has been introduced in a way that is ultra vires the primary legislation, they can do so. When we discussed the matter in detail in the Cabinet Ministerial Sub-Committee on Incorporation of the European Convention on Human Rights, it seemed to us that, as that power was already there, it would be very odd not to continue to allow courts to strike down subordinate legislation if it was incompatible with the Bill.

In a sense, that does not affect the sovereignty of Parliament, because it is open to Ministers to try to put the subordinate legislation right by simply introducing further regulations. That happens quite often, as any Minister who has held office in the Department of Social Security can testify.’⁸

11. In other words, the approach to subordinate legislation that was incompatible with Convention rights was treated as, in effect, a sub-set of the general approach to the judicial review of subordinate legislation. This perhaps over-simplifies the matter as there is an argument that the power arising under the HRA differs from the general judicial review power or, at the least, the rules concerning the invalidity of subordinate legislation under the HRA are more open-textured than under the general law. That said, the Government took the view that the power to quash subordinate legislation where it was incompatible with the HRA was thus simply a further exercise of the UK Courts’ existing power to do so where such legislation was ultra vires via judicial review, albeit the basis on which it was quashed was novel and was, as Lord Irvine LC put it, *‘unlawful action under the Convention’*⁹. The same point had previously been made in *Rights Brought Home*, the Government White Paper that preceded the Bill. As it put it:

⁸ Jack Straw MP, Home Secretary, Hansard, 24 June 1998, vol. 314, col. 1129 cited in J. Cooper & A. Marshall-Williams at 155.

⁹ Lord Irvine LC, Hansard, 24 November 1997, vol. 583, col. 807 in J. Cooper & A. Marshall-Williams at 95-96, *‘It is of the first importance to distinguish between judicial review and unlawful action under the Convention. They are two different things. So far as I am aware, the Bill does not affect the ordinary law of judicial review. What it does do, however, is make it unlawful for a public authority to act in a way that is incompatible with one or more of the Convention rights. That is set out in clause 6(1)’*.

*'The courts will, however, be able to strike down or set aside secondary legislation which is incompatible with the Convention, unless the terms of the parent statute make this impossible. The courts can already strike down or set aside secondary legislation when they consider it to be outside the powers conferred by the statute under which it is made, and it is right that they should be able to do so when it is incompatible with the Convention rights and could have been framed differently.'*¹⁰

It should be noted that one implication of this was that UK Courts, which were public authorities for the purposes of what was to be section 6(1) of the HRA, could not give effect to subordinate legislation that was incompatible with Convention rights. If they were to do so they would also be acting unlawfully contrary to section 6(1).

- 12.** The one exception to this general approach was where subordinate legislation was incompatible with Convention rights because the incompatibility was a necessary consequence of the Act of Parliament under which it was made. In such a situation, in order to preserve Parliamentary Sovereignty, UK Courts were not permitted to quash it. Instead, they were to be limited to issuing a declaration of incompatibility as they would otherwise do in respect of Acts of Parliament that were incompatible with Convention rights¹¹.

10 Home Office, *Rights Brought Home: The Human Rights Bill*, at 2.15 (CM 3782) (HMSO, October 1997); also see Faculty of Advocates, *Submission to the Independent Human Rights Act Review Panel*, at 10, which endorsed this statement of principle.

11 Jack Straw MP, Home Secretary, Hansard, 24 June 1998, vol. 314, col. 1129 cited in J. Cooper & A. Marshall-Williams at 155.

Section 4(3) and (4) – Declaration of incompatibility where subordinate legislation is incompatible with Convention rights due to an Act of Parliament

‘Section 4 Declaration 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.’*

13. The position reached in the parliamentary debates was therefore straightforward. UK Courts were to review the compatibility of subordinate legislation with Convention rights. Where it was incompatible with those rights, they could quash it. In doing so that would mean they would be considering whether the Government minister responsible for the subordinate legislation had exercised a power to make the legislation in a way that was in breach of the obligation imposed on Government by section 6(1) of the HRA. In substance, this was no different to the position in respect of subordinate legislation generally, subject to judicial review on well-established public law grounds.

(3) The UK Courts' Approach to Subordinate Legislation under the HRA

- 14.** The first point to make is that, on the evidence presented to IHRAR, there have been relatively few examples where challenges to subordinate legislation under the HRA have succeeded. Rather than, as some have suggested, UK Courts and tribunals adopting an expansive or activist approach to challenges to subordinate legislation¹², the overall picture is one of caution and respect for the differing institutional competences of Government and the Courts. The evidence set out by the Public Law Project, which drew upon and endorsed research work carried out by Tomlinson, Graham and Sinclair, was – so far as it goes – striking¹³. Since 2014 only fourteen successful challenges to subordinate legislation based on the HRA were recorded in the UK Supreme Court and the Courts of England and Wales¹⁴. Of those fourteen, the Courts only quashed or otherwise disapplied provisions in the legislation in four instances¹⁵.

12 R. Ekins, *Protecting the Constitution*, (Policy Exchange, 2019) at 21 <<https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf>>.

13 Public Law Project, *Submission to the Independent Human Rights Act Review Panel*, at 19 and Bindmans, *Submission to the Independent Human Rights Act Review Panel*, at [41], both citing Tomlinson, Graham and Sinclair, *Does judicial review of delegated legislation under the Human Rights Act 1998 unduly interfere with executive lawmaking?*, (UK Constitutional Law Association Blog, 22 February 2021) <<https://ukconstitutionalallaw.org/2021/02/22/joe-tomlinson-lewis-graham-and-alexandra-sinclair-does-judicial-review-of-delegated-legislation-under-the-human-rights-act-1998-unduly-interfere-with-executive-law-making/>>. The research was further endorsed by a number of other submissions to the CfE, e.g., Durham University, at [38], it noting that its own dataset only identified one such successful challenge (*R (Elmes) v Secretary of State for Communities and Local Government* [2018] EWHC 2055 (Admin); [2018] EWHC 2055 (Admin) | [2019] 1 WLR 1686); Equality and Human Rights Commission, *Submission to the Independent Human Rights Act Review Panel*, at 23; Murray Hunt, *Submission to the Independent Human Rights Act Review Panel*, at 71; Muslim Engagement and Development, *Submission to the Independent Human Rights Act Review Panel*, at 7.

14 *R (Connor) v Secretary of State for Work and Pensions* [2020] EWHC 1999 (Admin); *R (TD) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618; *OA v Secretary of State for Education* [2020] EWHC 276 (Admin); *R (TP) v Secretary of State for Work and Pensions* [2020] EWCA Civ 37; [2020] PTSR 1785; *R (British Medical Association) v Secretary of State for Health and Social Care* [2020] EWHC 64 (Admin); [2020] Pens. LR 10; *Langford v Secretary of State for Defence* [2019] EWCA Civ 1271; [2020] 1 WLR 537; *Re Gallagher's Application for Judicial Review* [2019] UKSC 3; [2020] A.C. 185; *R (Elmes) v Essex CC* [2018] EWHC 2055 (Admin); [2019] 1 WLR 1686; *R (QSA) v Secretary of State for the Home Department* [2018] EWHC 407 (Admin); [2018] 1 WLR 4279; *R (RF) v Secretary of State for Work and Pensions* [2017] EWHC 3375 (Admin); [2018] PTSR 1147; *R (Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 WLR 4550; *R (Hurley) v Secretary of State for Work and Pensions* [2015] EWHC 3382 (Admin); [2016] PTSR 636; *R (Tigere) v Secretary of State for Business, Energy and Industrial Strategy* [2015] UKSC 57; [2015] 1 WLR 3820; [2016] 1 All ER 191; *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; [2015] AC 49. The Panel thank Tomlinson et al for providing them with their list of judgments.

15 See Tomlinson et al, 'Finally, even when the courts do find delegated legislation incompatible with HRA, it does not necessarily mean that it is inevitably "struck down." Instead, there is a nuanced "endgame" after the judgment, which often gives the government space to implement the decision. The quashing of statutory instruments is an important power but it is a discretionary power that is rarely used. Of the 14 cases in which human rights challenges to delegated legislation succeeded, the court quashed or otherwise disapplied the offending provisions in just four of them. Usually, the court simply declares that the offending legislation violates human rights, either in abstract or with respect to the specific claimant in the case. Such a declaration does not affect its continuing validity. Judges are evidently aware that a quashing order can have significant and disruptive effects, and that it is often desirable for government to have space to respond to an adverse decision.'

- 15.** Even accepting that the figures presented may not be definitive as they exclude Scotland, Northern Ireland and the UK Tribunals¹⁶, the picture is stark: two recorded challenges succeeded on average a year from 2014, against a background where each year the number of new statutory instruments numbers in the thousands: on average there were 3,000 a year¹⁷. Contrary evidence on the numbers of cases was not provided to IHRAR by respondents to the *CfE*¹⁸. From a quantitative perspective, this does not suggest an activist approach by the Courts. On the contrary, as was suggested to IHRAR, its effect was one that was ‘marginal’¹⁹. The question then becomes whether UK Courts have, within the narrow base of case numbers, taken an approach that supports the criticism that they have misused the HRA in their approach to subordinate legislation²⁰.
- 16.** It is, however, suggested by one Panel Member that there may be a broader question, not addressed by the number of cases where the Courts have quashed subordinate legislation. A necessary limitation of the evidence presented above is that it focuses on litigation, i.e., where subordinate legislation is challenged. It does not, however, touch upon what might be happening outside the courtroom. This is not to raise a criticism of the research. It is simply to acknowledge that a possible effect of the fact that subordinate legislation may be quashed for incompatibility with Convention rights may impact on the decision-making processes of public authorities, either in making subordinate legislation or in giving effect to it and to Convention rights.
- 17.** Moreover, the research does not demonstrate what, if any, adverse impact there may be outside the courtroom. It may be the case (it is said by the same Panel Member) that the risk posed by the duty to disapply subordinate legislation incompatible with Convention rights creates serious difficulties for both Government – albeit in its response to the *CfE* it did not raise the issue – and public authorities generally. It may, for instance, result in overly cautious legislative drafting to minimise the prospect of politically motivated challenges to subordinate legislation. Thus, it may hinder effective policymaking. Equally, it may result in ambiguous drafting, which would reduce predictability and certainty in the law. In either way the effect would be detrimental to good governance.

16 The figure was reached by the researchers ‘[combing] legal databases for all final decisions handed down by the High Court and Court of Appeal of England and Wales, as well as the UK Supreme Court, between 2014 and 2020 in which the lawfulness of delegated legislation was challenged.’

17 House of Commons, Library Briefing Paper, *Acts and Statutory Instruments: the volume of UK legislation 1850 to 2019*, (CBP 7438) (4 November 2019) at 8, ‘This then rose to an annual average of 3,200 in the 1990s, 4,200 in the 2000s, and fell to around 3,000 a year on average during the 2010s (to June 2019).’ <<http://researchbriefings.files.parliament.uk/documents/CBP-7438/CBP-7438.pdf>>. And see JUSTICE, *Submission to the Independent Human Rights Act Review Panel*, at 36.

18 Quantitative evidence was not, for instance, set out in Policy Exchange, *Submission to the Independent Human Rights Act Review Panel*.

19 Human Rights Centre, Durham Law School, Durham University, *Submission to the Independent Human Rights Act Review Panel* at [38] put it, the impact of quashing orders on subordinate legislation has been ‘marginal’. Also see Bindmans, *Submission to the Independent Human Rights Act Review Panel*, at [41].

20 R. Ekins, *Protecting the Constitution*, (Policy Exchange, 2019) at 8 and 21.

18. IHRAR received no detailed evidence on such suggested downsides of the current approach to subordinate legislation, although it was suggested by one member of the Panel that an overly cautious approach to legislative drafting could be inferred from the manner in which legislation was drafted during the initial Covid-19 lockdown²¹. IHRAR did, however, receive evidence of the benefits that the HRA had produced for individual members of the public²². We note that any future consideration of this issue would benefit from detailed evidence on the effect that arises in respect of this issue, if there is one, outside the courtroom. There is, otherwise, a danger here of being drawn into speculation.

(i) Approach to disapplying when subordinate legislation incompatible

19. UK Courts are, initially, required by section 3(1) of the HRA to interpret subordinate legislation, in so far possible, consistently with Convention rights. Where they are unable to do so, were they to give effect to incompatible subordinate legislation (apart from that which was incompatible as a consequence of an Act of Parliament), they would be acting unlawfully due to the effect of section 6(1) of the HRA. It is contrary to the rule of law for a Court to act unlawfully. As Lord Bingham put it,

*'I cannot accept that it can ever be proper for a court, whose purpose is to uphold, vindicate and apply the law, to act in a manner which a statute (here, section 6 of the Human Rights Act 1998) declares to be unlawful.'*²³

20. This matter was considered further in **Re G**²⁴.

21 S. Laws, *Legislating for the relaxation of the lockdown*, at [39]-40], (Policy Exchange) (2021) <<https://policyexchange.org.uk/wp-content/uploads/Legislating-for-the-relaxation-of-the-lockdown.pdf>>. It was also said that such inferences could be drawn from the approach of legislation concerning the 'burden of proof', following **Sheldrake**. That may, however, raise the question whether the initial drafting, that stood in need of later clarification, was the product of defensive drafting.

22 The benefits of the HRA generally on public authority decision-making, particularly where it involved dealing with members of the public, was highlighted in IHRAR's roundtables, e.g., during the Equalities Groups (29 April 2021) and the individual case studies discussed during the Liberty / The British Institute of Human Rights roundtable (23 June 2021).

23 *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68; [2004] 2 AC 72 at [30] cited with approval by Lady Hale in *RR v Secretary of State for Work and Pensions* [2019] UKSC 52; [2019] 1 WLR 6430 at [32].

24 See Chapter Two at [66].

Re G - UK Courts to disapply incompatible subordinate legislation

In **Re G** the House of Lords affirmed the approach to be taken to subordinate legislation that was incompatible with Convention rights. As Lady Hale put it, ‘Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right, unless required to do so by a provision in primary legislation: section 6(2). A court is a public authority for this purpose: section 6(3) ... Where a provision of subordinate legislation is incompatible with the Convention rights,... : section 3 applies but section 4 does not. The courts are free simply to disregard subordinate legislation which cannot be interpreted or given effect in a way which is compatible with the Convention rights. Indeed, in my view this cannot be a matter of discretion. Section 6(1) requires the court to act compatibly with the Convention rights if it is free to do so.’²⁵

21. The approach in **Re G** was recently affirmed and clarified in *RR v Secretary of State for Work and Pensions* (2019)²⁶ (**RR**). That case arose out of litigation concerning the Government’s removal of the spare room subsidy, which is also known as ‘the bedroom tax’. As Lady Hale (with whom the other four Justices agreed) concluded:

‘... . There is nothing unconstitutional about a public authority, court or tribunal disapplying a provision of subordinate legislation which would otherwise result in their acting incompatibly with a Convention right, where this is necessary in order to comply with the HRA. Subordinate legislation is subordinate to the requirements of an Act of Parliament. The HRA is an Act of Parliament and its requirements are clear.’²⁷

22. The point being made here is simple. Courts may disapply subordinate legislation where it is, for instance, outside the power provided in the Act of Parliament under which it was purported to have been made. In such a situation, following a successful judicial review of the subordinate legislation, the Court may issue an order quashing (or as it is properly referred to in Scotland ‘reducing’), i.e., setting aside the subordinate legislation. In doing so it is, consistently with the Rule of Law, giving effect to Parliament’s intention in the Act of Parliament by ensuring that Government makes subordinate legislation within the power granted to it under that Act of Parliament.

²⁵ **Re G** at [116].

²⁶ *RR v Secretary of State for Work and Pensions* [2019] UKSC 52; [2019] 1 WLR 6430. Also see *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] WLR 3250

²⁷ **RR** at [27]. Lady Hale was referring to section 6 of the HRA as the basis upon which a public authority, including a Court or Tribunal, was required to disapply subordinate legislation that was incompatible with Convention rights, see **RR** at [29] and also see **Re G** cited at footnote 25, above.

23. The parallel situation applies in respect of the HRA. As an Act of Parliament, it requires that Government ministers cannot, except where required to do so by another Act of Parliament, make subordinate legislation that is incompatible with Convention rights. Otherwise, the HRA, as an Act of Parliament, takes precedence as appears from Lady Hale’s judgment, cited above. Depending on the circumstances, the Court will or may disapply or set aside the legislation. In that way the Court both ensures it acts consistently with the duty imposed on it under section 6(1) of the HRA, and also guards against giving effect to subordinate legislation made by the Government in breach of its section 6(1) duty. In this way UK Courts give effect to the HRA as an Act of Parliament.

(ii) Approach to establishing whether there is an incompatibility with Convention rights

24. The quantitative evidence submitted to IHRAR is suggestive of the conclusion that UK Courts exercise judicial restraint in approaching challenges to subordinate legislation on Convention rights grounds. A number of respondents to the CfE made the same point.

JUSTICE Roundtable minutes – UK Courts show self-restraint²⁸

*‘The courts have set an extremely high threshold for quashing subordinate legislation because it is in principle incompatible with the HRA, and are showing self-restraint (for example in *MM (Lebanon) v Secretary of State for the Home Department*).’²⁹*

²⁸ JUSTICE Roundtable Minutes (19 April 2021) at 2.

²⁹ *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10; [2017] 1 WLR 771.

- 25.** It has been said, however, that that is not the case and that UK Courts misuse the HRA. *R (Tigere) v Secretary of State for Business, Innovation and Skills* (2015)³⁰ (**Tigere**) is a case in point. It has been criticised as an example of misuse of the HRA³¹. It was, however, given a good degree of support in submissions to the *CfE*³². The claim concerned the requirement, contained in the Education (Student Support) Regulations 2011³³, that an applicant for a student loan had to have been lawfully ordinarily resident in the UK for three years before their academic course commenced. Additionally, the applicant had to be ‘settled’ in the UK at the time their course commenced. The applicant had, from 2012, discretionary leave to remain in the UK, having come to the UK in 2001 with her parents. From 2018 she would have become eligible for indefinite leave to remain. Due to only having discretionary leave to remain, the applicant was ineligible for the student loan: discretionary leave did not come within the definition of ‘settled’. The applicant challenged the approach on the basis that it was incompatible with her right to education (article 2 of Protocol 1 to the Convention) and not to be discriminated against (article 14 of the Convention).
- 26.** In considering the challenge, the Supreme Court held that the first criterion was compatible with the applicant’s Convention rights: it was clearly lawful and justifiable for a State to limit the loan scheme to those who had been lawfully in the UK for three years³⁴. There was, however, a problem with the second criterion: settled status. It was held to be incompatible with Convention rights: it was disproportionate in its effect, i.e., it went further than was necessary to meet the objectives underpinning the subordinate legislation. Those objectives were, for instance, to limit benefits to those who were integrated into UK society and who would be expected to remain in the UK and contribute to it after their education concluded³⁵.

30 *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 WLR 3820.

31 R. Ekins, *Protecting the Constitution*, (Policy Exchange, 2019) at 21.

32 It was noted as an important example of Convention rights being relied upon to protect the rights of children and young people, see, Article 39, *Submission to the Independent Human Rights Act Review Panel*, at 2. On a different point, see reliance upon the decision in J. Finnis & S. Murray, *Immigration, Strasbourg and Judicial Overreach* (Policy Exchange, 2021) at 95, which was submitted to IHRAR as their response to the *CfE*. And see Scottish Human Rights Commission, *Submission to the Independent Human Rights Act Review Panel*, at [122], noting the judgment as an example of the Courts leaving it to the Government to cure an incompatibility with Convention rights.

33 See Regulation 4(2) and schedule 2, paragraph 1.

34 **Tigere** at [56].

35 **Tigere** at [53].

- 27.** In reaching its decision, the majority in the Supreme Court, which did not quash the rule in question, made clear that in considering whether the subordinate legislation was compatible with Convention rights proper weight had to be given to the approach taken by the Government minister responsible, as primary decision-maker, for the subordinate legislation³⁶. This was particularly the case where the question of resource allocation was concerned, that being an issue that fell within the specific competence of the political Branches of the State, i.e., both Government and Parliament. As such, the majority recognised the differing institutional competences of the Branches of the State in assessing the compatibility of the legislation with Convention rights. Here, however, there was no evidence that the Government minister had considered the particular issue concerning the settled status criterion.

***Tigere* – UK Courts to take full account of the policy choice of the primary decision-maker**

*‘... As the appellant points out, education (unlike other social welfare benefits) is given special protection by A2P1 and is a right constitutive of a democratic society. Nevertheless, we are concerned with the distribution of finite resources at some cost to the taxpayer, and the court must treat the judgments of the Secretary of State, as primary decision-maker, with appropriate respect. That respect is, of course, heightened where there is evidence that the decision maker has addressed his mind to the particular issue before us (see, for example, *Belfast City Council v Miss Behavin’ Ltd* [2007] 1 WLR 1420), or that the issue has received active consideration in Parliament: see *R (SG) v Secretary of State for Work and Pensions*. Both are lacking in this case: there is no evidence that the Secretary of State addressed his mind to the educational rights of students with DLR/LTTR when making these Regulations, which were laid before Parliament subject to the negative resolution procedure.’³⁷*

36 We note that this issue did not engage the Reservation that the UK entered into in respect of the right to education provided by article 2 of the 1st Protocol to the Convention. The reservation concerned the State’s duty to respect the right of parents to ensure that education is in conformity with their religious and philosophical convictions. The reservation, which forms part of schedule 3 to the HRA, limited the UK’s acceptance of that right in so far as it was compatible with the provision of efficient instruction and training while avoiding unreasonable public expenditure. Those issues did not arise in this case.

37 *Tigere* at [32] (Lady Hale). See also [58] “there is little sign in the evidence lodged by the Department that this cohort was expressly considered” and [67-68] (Lord Hughes).

28. It could be said on this basis that the majority did not go beyond their institutional competence and that it demonstrated a ‘*nuanced approach*’³⁸ to the challenge to the legislation, not least as they granted a declaration that the application of the settlement criteria to the appellant was incompatible with her Convention rights. In granting the declaration the majority left it to the Government to determine how to remedy the issue³⁹. However, the judgment of the minority (Lords Reed and Sumption) suggests the contrary. They explained that greater deference to the Government as the primary decision-maker was required than had been afforded by the majority. As they put it,

*‘... it was noted in Bank Mellat at para 75 (Lord Reed) that courts must accord a measure of discretion to the primary decision-maker, and therefore exercise corresponding self-restraint, if there is to be any prospect of legislative and executive choices being respected. As the present case illustrates, it will almost always be possible for the courts to conclude that a more precisely tailored bright line rule might have been devised than the one selected by the body to which the choice has been democratically entrusted and which, unlike the courts, is politically accountable for that choice. But, in the words of Dickson CJ in R v Edwards Books and Art Ltd [1986] 2 SCR 713, pp 781-782, the courts are not called on to substitute judicial opinions for legislative or executive ones as to the place at which to draw a precise line. In a case concerned with the allocation of public expenditure in order to fulfil objectives of social and economic policy, the degree of respect paid by the court to the judgment of the legislature or executive, and the consequent width of the discretion afforded to the primary decision-maker, must be substantial. That is reflected in the test of whether the policy choice is manifestly without reasonable foundation.’*⁴⁰

They went on to note that that approach was consistent with ECtHR case law⁴¹.

29. Though much pressed on the Panel, ***Tigere*** is perhaps best summarised as demonstrating a difference in approach between the majority and the minority concerning how to give effect to the comparative institutional competence of the different Branches of the State – and that there is much force in the minority’s approach. At all events, it is not apparent to the majority of the Panel that this case and the difference in approach between the majority and minority, dividing three to two, suggests a general trend showing misuse by UK Courts of the power to quash subordinate legislation – not least, as noted above, it did not do so in this case. On the contrary, it is evidence that UK Courts are carefully weighing such issues.

38 Doughty Street Chambers, *Submission to the Independent Human Rights Act Review Panel*, at [2.31].

39 ***Tigere*** at [49] (Lady Hale, with whom Lord Kerr agreed); at [68] (Lord Hughes).

40 ***Tigere*** at [93].

41 ***Tigere*** at [94].

30. Considerations of comparative institutional competence also underpin the UK Courts' approach to subordinate legislation more generally. Where it relates to matters concerning economic and social policy, for instance welfare benefits, the manifestly without reasonable foundation test is applied. That sets a higher threshold test to successfully challenge the legislation⁴². The UK Courts' restrained approach to challenges to subordinate legislation may be further highlighted. Subordinate legislation is unlikely to be quashed (or declared to be invalid) if it can operate compatibly with Convention rights in a significant number of instances. That it may operate incompatibly for some individuals will not be enough to justify a Court quashing it. As Lady Hale put it in *R (Bibi) v Secretary of State for the Home Department (Rev 1)* (2015), when considering whether an aspect of the Immigration Rules that required a foreign spouse or partner of a British citizen (or individual settled in the UK) to pass an English language competence test breached article 8 and 14 of the Convention,

*'I would not strike down the Rule or declare it invalid. It will not be an unjustified interference with article 8 rights in all cases. It is capable of being operated in a manner which is compatible with the convention rights. Hence the appellants must be denied the remedy they seek.'*⁴³

Or as Lord Hodge put it,

*'... I think that there may be a number of cases in which the operation of the rule in terms of the current guidance will not strike a fair balance. But there may also be cases in which it will. The court would not be entitled to strike down the rule unless satisfied that it was incapable of being operated in a proportionate way and so was inherently unjustified in all or nearly all cases...'*⁴⁴

This is a high threshold. The Supreme Court went on to conclude that the subordinate legislation (the Immigration Rules) should not be quashed. However, it did conclude that guidance issued by the Government on the question of how to implement the legislation might need to be amended, albeit it declined to issue a declaration to that effect. In other words, it both declined to quash the legislation and declined to direct that the Government take steps to clarify or revise its guidance.

31. From a qualitative perspective, the evidence considered by the Panel supports the view – expressed by a wide range of respondents to the *CfE* – that UK Courts generally apply an appropriate degree of restraint in assessing whether subordinate legislation is compliant with Convention rights. In doing so they give proper weight to the views of the primary decision-maker, and give effect to the different institutional competence of the political Branches of the State.

⁴² See, for instance, *R (Joint Council for Welfare Immigrants) v Secretary of State* [2020] EWCA Civ 542; [2021] 1 WLR 1151.

⁴³ *R (Bibi) v Secretary of State for the Home Department (Rev 1)* [2015] UKSC 68; [2015] 1 WLR 5055 at [60]. Also see *R (Joint Council for Welfare Immigrants) v Secretary of State* [2020] EWCA Civ 542; [2021] 1 WLR 1151 at [116]-120.

⁴⁴ *R (Bibi) v Secretary of State for the Home Department (Rev 1)* [2015] UKSC 68; [2015] 1 WLR 5055 at [69].

(iii) Approach where subordinate legislation is found to be incompatible

32. The UK Courts' approach to the question whether to quash subordinate legislation that is held to be incompatible is also nuanced, demonstrating judicial restraint.
33. UK Courts can '*disregard*' by declining to apply a provision subordinate legislation that is not mandated by primary legislation and which was incompatible with Convention rights. Such an approach is predicated on the fact that for the Court to do otherwise, and apply the offending provision to the specific case before it, would be for it to act unlawfully contrary to section 6 of the HRA. In addition, Courts have also granted awards of damages further to sections 6 and 8 of the HRA⁴⁵.
34. As JUSTICE noted in its response to the *CfE*, UK Courts have used the power to quash subordinate legislation infrequently. Their preferred approach has been to do no more than disregard the specific provision in the subordinate legislation that is incompatible with Convention rights, i.e., declining to apply that provision to the specific individual before them. Alternatively, they have issued a declaration that, as applied to specific individuals, the provision's effect is incompatible with Convention rights.

⁴⁵ For a critical discussion, however, perhaps suggesting that the Courts enter the policy arena, see, Lui & Wong, *Subordinating subordinate legislation under the Human Rights Act 1998*, L.Q.R. 2020, 136 (Jul), 354.

JUSTICE – a nuanced approach to use of the power to quash subordinate legislation⁴⁶

‘... the courts’ [make] infrequent use of their power to quash subordinate legislation. They recognise that there can be subordinate legislation which does not generally infringe Convention rights but does so in its specific application to a certain individual. In these circumstances the courts recognise it would be inappropriate to quash the subordinate legislation due to the broader policy impacts on an otherwise lawful scheme that a quashing order may have. Instead they make a formal or informal declaration that the application of the legislation to the claimant is unlawful.

For example, in Tigere v Secretary of State for Business, Innovation and Skills Lady Hale stated:

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

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

35. In some cases the Courts will disregard, i.e., decline to apply, a specific provision of subordinate legislation to the individual litigant before it, while leaving the disregarded provision in force more generally, i.e., it continues to apply to people whose rights are not infringed by it. This can be illustrated by *Francis v Secretary of State for Work and Pensions* (2005)⁴⁷. In that case, the Court of Appeal disregarded a discriminatory provision concerning maternity grants in the Social Fund Maternity and Funeral Expenses (General) Regulations 1987 and then granted a declaration that the applicant be entitled to maternity grant. It was also the approach adopted in **Re G**, noted above. This approach was, however, questioned by Flaux LJ (as he then was) in 2018 on the grounds that it was beyond the institutional competence of the Courts. In *Secretary of State for Work and Pensions v Carmichael* (2018)⁴⁸ he expressed the view that the approach of simply disregarding a provision that was incompatible with Convention rights was one that saw UK Courts

⁴⁶ JUSTICE, *Submission to the Independent Human Rights Act Review Panel*, at [74] citing **Tigere** at [49] and *Re Gallagher’s Application for Judicial Review* [2019] UKSC 3.

⁴⁷ *Francis v Secretary of State for Work and Pensions* [2005] EWCA Civ 1303; [2006] 1 WLR 3202 at [31].

⁴⁸ *Secretary of State for Work and Pensions v Carmichael* [2018] EWCA Civ 548; [2018] 1 WLR 3429.

*'... impermissibly trespassing into the legislative arena, which is for Parliament, particularly where political issues arise as to the deployment of limited public fiscal resources. In those circumstances, it is for Parliament, not the court or tribunal to determine what form legislation should take in order to be compliant with Convention rights.'*⁴⁹

- 36.** Rather than take this approach, he concluded that UK Courts, when they held subordinate legislation to be incompatible with Convention rights, ought to declare it to be invalid and subsequently award damages. That approach, he went on to conclude, was what Parliament intended in enacting the right to damages in section 8(2)⁵⁰.
- 37.** The matter has now been clarified by the Supreme Court. In **RR** the Supreme Court endorsed the disregard option⁵¹. It did so on the basis, as referred to above, that Courts are required to act compatibly with Convention rights under section 6 of the HRA. As Oxford University's Public Lawyers' response to the *CfE* put it,

*'What emerges from RR is the basic starting point for determining the consequences of a finding that a secondary legislative provision violates Convention rights: pursuant to s.6, tribunals and other public authorities are required to "disregard" offending secondary legislation in the course of decision-making where it is "possible to do so". This starting point is founded on an important point of principle. Rights, in order to be meaningful, must be capable of being enforced. RR provides a method by which courts, tribunals and public authorities can avoid the multiplication of rights abuses. It also avoids placing unreasonable obstacles, in the form of the need to bring multiple proceedings, in the way of individuals who seek to enforce their rights.'*⁵²

49 *Secretary of State for Work and Pensions v Carmichael* [2018] EWCA Civ 548; [2018] 1 WLR 3429 at [63].

50 *Secretary of State for Work and Pensions v Carmichael* [2018] EWCA Civ 548; [2018] 1 W.L.R. 3429 at [67].

51 **RR** at [27]-[32].

52 Oxford University's Public Lawyers, *Submission to the Independent Human Rights Act Review Panel*, at [49]. As they further note at [50], this approach was well-established before **RR**, which simply affirmed it. In support of that proposition they cite: *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47, [2015] 1 WLR 3250; *Francis v Secretary of State for Work and Pensions* [2005] EWCA Civ 1303, [2006] 1 WLR 3202; *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2013] PTSR 117; *In Re G: Adoption (Unmarried Couple)* (n 66); *JT v First-tier Tribunal* [2018] EWCA Civ 1735, [2019] 1 WLR 1313.'

38. In considering whether to exercise the disregard option, Lady Hale confirmed in **RR** that Courts ought to do so when it is ‘*clear how the statutory scheme can be applied without the offending provision*’⁵³. Where it was not clear, then the matter was one for Government or Parliament. That approach was, for instance, clearly taken by the Supreme Court previously in *Mathieson v Secretary of State for Work and Pensions* (2015)⁵⁴, where the Court disregarded a rights non-compliant provision in the individual case, but properly left it to the Government and Parliament to amend the secondary legislation generally. As such, the UK Courts adopt an approach where they seek to give as much effect to the approach of the primary decision-maker consistently with giving effect to the duty imposed on them to act compatibly with Convention rights and to ensure that subordinate legislation where, and to the extent that it is, incompatible with those rights, is disregarded. That rarely results in subordinate legislation being quashed.

39. Where it is clear how the statutory scheme can be applied without the offending provision UK Courts have acted in one way. As Lady Hale put it in **RR**:

‘... the courts have consistently held that, where it is possible to do so, a provision of subordinate legislation which results in a breach of a Convention right must be disregarded. There may be cases where it is not possible to do so, because it is not clear how the statutory scheme can be applied without the offending provision. But that was not the case in Francis, where the maternity grant could be paid to the holder of a residence order who qualified for it in all other respects; nor was it the case in In re G, where the unmarried couple could be allowed to apply to adopt (in reaching my Opinion, I satisfied myself that this would not cause problems elsewhere in the statutory scheme); nor was it the case in Burnip and Gorry, where housing benefit could simply be calculated without making the deduction for under-occupation; nor was it the case in Mathieson, where DLA could simply continue to be paid during the whole period of hospitalisation; nor was it the case in JT, where criminal injuries compensation could be paid without regard to the “same roof” rule; and nor is it the case here, where the situation is on all fours with Burnip and Gorry. There is no legislative choice to be exercised. As Dan Squires QC, for the Equality and Human Rights Commission, put it, where discrimination has been found, a legislator may choose between levelling up and levelling down, but a decision-maker can only level up: if claimant A is entitled to housing benefit of £X and claimant B is only entitled to housing benefit of £X-Y, and the difference in treatment is unjustifiably discriminatory, the decision-maker must find that claimant B is also entitled to benefit of £X.’⁵⁵

53 RR at [30]. Cf, however, concerns as to policy decisions by Courts and the consequences for public expenditure: see, *Liu and Wong, op cit* (cited above)

54 Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47; [2015] WLR 3250 at [49].

55 RR at 30.

- 40.** On one view this approach could be construed as judicial amendment of legislation. Levelling up or levelling down suggests that the Court's decision alters the nature of the legislation and the choice made by the primary decision-maker⁵⁶. It could thus be said to imply that the Courts' have entered into the arena of policy. However, another view would suggest that the Courts are not entering into the arena of policy: there is no policy choice to be considered and determined by them. They are simply giving effect to the consequences that flow from Parliament's policy choice in legislating as it did in the HRA.
- 41.** The UK Courts' approach to subordinate legislation can be summarised as follows.

Summary of UK Courts' approach to subordinate legislation

- UK Courts have rarely quashed subordinate legislation on the basis that it is not compatible with Convention rights. They will not quash such legislation unless it is incompatible in all or nearly cases where it applies.
- UK Courts, as a starting point, ought to disregard subordinate legislation that is incompatible with Convention rights. However, they have been at pains to limit the impact of the disregard option. As such, they may use their discretion under section 8 of the HRA to provide a remedy that is 'just and appropriate' in the circumstances, i.e., a declaration, disapplication of the subordinate legislation or a provision in it in a specific way to enable the provision to continue to apply in other cases where that would not be incompatible with Convention rights.

56 See Lui & Wong, *ibid*, on the question of amendment.

(4) Views from Submissions to IHRAR concerning Subordinate Legislation

- 42.** The overwhelming tenor of the responses submitted to the CfE adopted the position that there was no case for change: the current approach to subordinate legislation was consistent with the general approach to judicial review of secondary legislation and there was no evidence of an overly active approach by UK Courts. On the contrary, it was thought that UK Courts generally took a *'highly deferential'* if not too deferential approach to the Government when scrutinising subordinate legislation.

Examples of submissions supportive of no change

ALBA

'... ALBA does not consider that any substantive change is required... [It] is entirely consistent both with democratic principle, and with the UK's pre-existing constitutional arrangements ...'

Amnesty International

'There is also little justification for changing the current status of secondary legislation with regards to the HRA, from the point of view of the extent to which the HRA is in practice affecting such legislation. Claims from some, that secondary legislation is being regularly undone by the HRA, have been shown to have no basis in fact. In applying the HRA the UK courts have shown themselves to be highly deferential to the Executive's law-making powers through secondary legislation.'

Article 39 - Fighting for Children's' Rights in Institutional Settings

'The HRA review asks about the role of courts and tribunals in dealing with provisions of subordinate legislation that are incompatible with the HRA Convention rights. Currently the remedy for secondary legislation found to be unlawful is that it can be quashed or disapplied - this is not confined to the HRA and is an essential part of the courts' role to ensure that government acts lawfully.'

Bindmans

'The Public Law Project's research, discussed in its response to the Panel, indicates that quashing subordinate legislation on this basis is very unusual. That accords with our own experience. Generally conventional declarations are made, allowing the Government time to amend the legislative scheme and avoid a lacuna. Quashing Orders are far more commonly granted when subordinate legislation is challenge on conventional public law grounds, such as lack of vires. We believe there is no case for change, less still a compelling one.'

Cambridge University, Centre for Public Law

'There is no need to change the remedies available for subordinate legislation which breaches Convention rights. Any change would upset the separation of powers, as well as potentially threatening the devolution settlement should courts have the power to strike down legislation of the devolved legislatures which contravene Convention rights but be unable to strike down subordinate legislation.'

... no change is required to the current framework, as this reflects the constitutional status of subordinate as opposed to primary legislation.'

Committee on the Administration of Justice

'We are not aware of any problems arising in this area. In principle, we think it is an important safeguard, contained in the GFA, that courts have the power to strike down legislation of the Northern Ireland Assembly if it is incompatible with the ECHR. It would also be important, as the Agreement states, for the same power to exist in relation to any Bill of Rights for Northern Ireland. The Agreement was, in many ways, a promise to create a rights-based society and the enforceable requirement that all legislation in the new Assembly be compatible with human rights was an important part of that.'

Paul Harvey

'I cannot improve on the recent analysis of Joe Tomlinson, Lewis Graham and Alexandra Sinclair on whether a judicial review of delegated legislation under the HRA unduly interferes with executive law making. This is a substantial evidence based review of this question. They do not see any case for change and I respectfully adopt their views.'

Professor Leach, Professor Amos and Dr Bates

'In a recent judgment [RR v Secretary of State for Work & Pensions (2019)⁵⁷] the Supreme Court has clarified the remedies that can be afforded by courts and tribunals considering subordinate legislation which is incompatible with the Convention rights. This is in line with core principles of UK constitutional law and no change is necessary.'

57 RR v Secretary of State for Work & Pensions [2019] UKSC 52, [2019] 1 WLR 6430.

The Law Society of England and Wales

'We ... consider that the ability of courts and tribunals to quash or set aside provisions of secondary legislation is appropriate and used conservatively, so we do not believe there is a need for amendment.'

Queens University Belfast, Human Rights Centre

'We are not aware of any problems having arisen as a result of how the courts and tribunals of Northern Ireland have dealt with provisions of subordinate legislation that are incompatible with Convention rights. This is so even as regards the handling of Acts of the Northern Ireland Assembly, which are still subordinate legislation for the purposes of the HRA.'

Scottish Government

'... It would ... be particularly offensive to constitutional norms and the rule of law were any change to be contemplated which would accord subordinate legislation in general the special status currently reserved to UK primary legislation (and "constrained" statutory instruments). To do so would be to put not just the UK Parliament but the UK Government above the law. That outcome is one which the Review Panel's recommendations should explicitly reject.'

- 43.** Notwithstanding the weight of evidence in support of no change, a small number of submissions to the CfE argued the case for change. The recommendations ranged from legislative reform to preventing subordinate legislation being quashed by UK Courts to increased Government and parliamentary scrutiny of such legislation. It was also implied, conversely, that UK Courts should be less deferential in their approach and should, accordingly, more readily issue quashing orders.

Selected criticisms and reform recommendations submitted to IHRAR

JUSTICE Roundtable minutes

‘There is a broad definition of subordinate legislation in section 21. There is a need to be specific about the meaning.’

Policy Exchange

‘The HRA should be amended to prevent secondary legislation from being quashed or undermined in its application on the grounds of rights-incompatibility. If secondary legislation falls outside the scope of the empowering Act, it will of course be ultra vires and rights-compatibility will be relevant to the question of scope. But save insofar as it informs inference about the scope of primary legislation, the HRA should not be a ground on which to quash or disapply secondary legislation, the validity of which is important to the rule of law.’

Section 21(1) should be amended, substituting a new definition of ‘legislation’ for the existing definition of ‘primary legislation’. The point would be to widen the category of legislation the validity of which cannot be challenged under the HRA...

But it would be preferable if section 6(2)(b) were amended by reference to the existing categories of subordinate legislation to give protection to public authorities who, for example, are acting in faithful discharge of a duty imposed by an Act of the Scottish Parliament, or Northern Ireland Assembly. Plainly, it should be possible to challenge the vires of such subordinate legislation but it does not appear right in principle to castigate public authorities for acting in accordance with legislation of this stature which enjoys the working presumption of validity...

In the event that courts conclude that secondary legislation is rights-incompatible, or requires or permits an act that is rights-incompatible, the HRA should permit courts only to make a section 4 declaration of incompatibility and should not permit courts to quash the secondary legislation in question. This legislative change would also set aside the Supreme Court’s judgment in 2019, which made clear that rights-incompatible secondary legislation was invalid ab initio and thus did not require court proceedings to find or declare invalidity. Relatedly, section 6 should be amended to specify that ministers and others exercising secondary lawmaking powers do not breach the HRA in making secondary *legislation that a court may find, and declare, to be rights-incompatible.*’

Murray Hunt

'No change is ... required from the current approach by courts and tribunals to incompatible subordinate legislation. However, Parliament could, if it wished, devise ways of ensuring that there is better parliamentary scrutiny of the ECHR compatibility of subordinate legislation.'

The Law Society of Scotland

*'... The only change which we suggest would be to require the Minister making the subordinate legislation to certify whether or not it was compatible with Convention rights as under section [18] of the UN Convention on the Rights of the Child (Incorporation) (Scotland) Bill.'*⁵⁸

Which?

'In our view, there have not been any problems with this issue from the perspective of consumers, or individuals generally. It also seems to us that given the recent concerns around increasing use of so called 'Henry VIII' powers in putting forward secondary legislation, it is particularly important that the current safeguards in the HRA remain in this respect.'

Young Legal Aid Lawyers

'In YLAL's view, domestic courts and tribunals are too cautious and rarely exercise their powers to quash HRA incompatible subordinate legislation. Instead, they prefer to make declarations about unlawful application of regulations to an individual's case.'

⁵⁸ See <<https://www.parliament.scot/-/media/files/legislation/bills/current-bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill/stage-3/bill-as-passed.pdf>>

(5) Approach to Options for Reform

- 44.** In considering this issue the Panel has taken into account the following factors.
- 45.** UK Courts can, as a matter of longstanding constitutional principle, engage in the judicial review of subordinate legislation, the purpose of which is to ensure that public authorities, including Government ministers, act lawfully within the powers conferred on them by Parliament. That said, taken together, sections 3(2)(c), 6(2)(b) and 10(3) of the HRA, preserve Parliament’s ability to enact an Act of Parliament that requires subordinate legislation to make provision that is incompatible with Convention rights. Where the incompatibility is specifically mandated by an Act of Parliament, the Courts have no power, under the HRA, to quash subordinate legislation. While one panel member considered the nature and role of section 6(2)(b) to be problematic where it was applied to change the effect of the legislation without either quashing or amending it in a way that was compatible with a ‘blue pencil test’, the majority’s view was that its application is clear and unproblematic.
- 46.** Any reform of the UK Courts’ approach ought to be consistent with the constitutional balance and take proper account of the differing institutional competences of the three Branches of the State.

(6) Rejected Options

- 47.** The Panel rejects the following reform options.
- (i) No change***
- 48.** While there is a strong argument for no change given the weight of the evidence, supporting the proposition that the UK Courts’ approach to subordinate legislation has neither been quantitatively or qualitatively problematic, there is a case for improving the operation of the HRA in this area. Moreover, there is a good argument that, in the light of the Government’s intended reforms to judicial review, the HRA should be similarly amended to maintain consistency in the role of the UK Courts when reviewing subordinate legislation generally. We deal with these issues below.
- (ii) UK Courts adopt a more vigorous approach to finding subordinate legislation incompatible with Convention rights and to quashing such legislation***
- 49.** While there was some criticism that the UK’s Courts (and tribunals) were too cautious in their approach to quashing incompatible subordinate legislation, we do not accept that it would be appropriate to suggest that they take a different tack.

- 50.** A less nuanced approach has little to commend it. UK Courts (and tribunals) ought to continue to consider each case on its merits and adopt the most appropriate remedial measure, where they can properly conclude that the legislation is incompatible with Convention rights. They ought to continue to use the full gamut of measures available to them, and should the Panel's recommendations be accepted, those further measures we recommend. We are further concerned that this recommendation carries with it the risk, that if adopted, it may (in this instance) improperly lead the UK Courts into areas more appropriately within the institutional competence of the Government and Parliament, i.e., that it may draw them further into consideration of political, social and economic issues, for instance, that properly lie within the province of the political Branches of the State as primary decision-maker.
- 51.** We **reject** this option.
- (iii) Amend the definition of subordinate legislation in section 21 of the HRA**
- 52.** Section 21 of the HRA provides a broad definition of the meaning of subordinate legislation.

Section 21 of the HRA – the definition of subordinate legislation

'21 Interpretation, etc

...

subordinate legislation" means any—

(a) Order in Council other than one—

(i) made in exercise of Her Majesty's Royal Prerogative;

(ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or

(iii) amending an Act of a kind mentioned in the definition of primary legislation;

- (a) *Act of the Scottish Parliament;*
 - (i) *Measure of the National Assembly for Wales;*
 - (ii) *Act of the National Assembly for Wales;*
- (b) *Act of the Parliament of Northern Ireland;*
- (c) *Measure of the Assembly established under section 1 of the M4 Northern Ireland Assembly Act 1973;*
- (d) *Act of the Northern Ireland Assembly;*
- (e) *order, rules, regulations, scheme, warrant, byelaw or other instrument made under primary legislation (except to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation);*
- (f) *order, rules, regulations, scheme, warrant, byelaw or other instrument made under legislation mentioned in paragraph (b), (c), (d) or (e) or made under an Order in Council applying only to Northern Ireland;*
- (g) *order, rules, regulations, scheme, warrant, byelaw or other instrument made by a member of the Scottish Executive Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Assembly Government, a Northern Ireland Minister or a Northern Ireland department in exercise of prerogative or other executive functions of Her Majesty which are exercisable by such a person on behalf of Her Majesty;...'*

53. The definition set out in section 21 is clear and compendious. It is detailed rather than a general, broad definition. We see no basis on which the definition could benefit from being any more detailed. We particularly cannot see how a more technically detailed definition would improve the manner in which litigants and UK Courts approached the question whether subordinate legislation was compatible with Convention rights.

54. We **reject** this option.

(iv) Amend the HRA to prevent subordinate legislation from being quashed

- 55.** This option has a number of aspects. First, it involves amending the HRA to prevent subordinate legislation from being quashed or disapplied on the ground that it is incompatible with Convention rights. Secondly, it further seeks to amend the HRA to provide that UK Courts be limited to making a declaration of incompatibility if subordinate legislation is found to be incompatible with Convention rights. Thirdly, it seeks to amend section 6 of the HRA to specify that ministers and others making subordinate legislation do not breach the HRA in doing so where it is ultimately held to be incompatible with Convention rights. Fourthly, it involves broadening the definition of primary legislation. This option was put forward in these terms by Policy Exchange. Its submission thus rests on points of principle, which we summarise as follows.
- 56.** First, that it is wrong in principle for UK Courts to be able to do anything other than make declarations of incompatibility in respect of delegated legislation⁵⁹. This would treat subordinate legislation, where the HRA was concerned, as generally equivalent to primary legislation. We rejected this option in Chapter Five.
- 57.** Secondly, that it is necessary for the rule of law that UK Courts should not be able to quash subordinate legislation on HRA grounds. We do not follow this argument. If it is objectionable to the rule of law for subordinate legislation to be quashed on the basis that it is incompatible with Convention rights, why is it not incompatible with the rule of law for such legislation to be quashed on ordinary, well-settled judicial review grounds? It would be curious if in the human rights sphere *alone* delegated legislation could not be quashed on well-established judicial review grounds. It would also lead to the odd situation where subordinate legislation could be quashed on the basis of their incompatibility with common law rights but not on the basis of incompatibility with statutory rights set out in the HRA⁶⁰.
- 58.** Thirdly, that this reform is necessary to protect public authorities from being ‘castigated’ for acting in accordance with subordinate legislation, at the time presumed to be compatible with Convention rights but later determined by a Court to be incompatible. We do not accept that public authorities are necessarily ‘castigated’ in this way, albeit we understand the political and personal sensitivities involved⁶¹.
- 59.** Additionally, there are a number of principled reasons why this option should be rejected.

59 As Professor King put it, ‘*The proposal that subordinate legislation should be treated like primary legislation under the 1998 Act is constitutionally tone-deaf. It misunderstands the nature of delegated legislation and overlooks the chorus of agreement on the accountability deficiencies of the current regime.*’; see Professor Jeff King, *Submission to the Independent Human Rights Act Review Panel*, at [3] and [41]-[51].

60 See *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869.

61 A reminder of the desirability of measured language in judgments, as an instance of mutual institutional respect.

- 60.** First, it is premised on a need to protect subordinate legislation from being subject to review and quashing by UK Courts. The HRA already provides a mechanism through which Parliament can achieve that end. Where the incompatibility with Convention rights is required by an Act of Parliament, UK Courts may only make a declaration of incompatibility under section 4(3) of the HRA. The current position thus furnishes Parliament with the means to provide specific and targeted exemptions from the UK Courts’ general ability to quash incompatible subordinate legislation.
- 61.** Secondly, this option would, as noted by the Scottish Government in its response to the *CfE*, be ‘*offensive to constitutional norms and the rule of law*.’⁶² Treating subordinate legislation, generally, on a par with Acts of Parliament would be contrary to our constitutional tradition. Though the point should not be overstated, this could act as a potential incentive to Government to use the breadth of subordinate legislation (as defined in section 21 of the HRA) as a means to side-step the detailed scrutiny of Parliament. It could do so by relying increasingly on subordinate legislation as the means to enact legislation under broad powers provided by an Act of Parliament in order to side-step the detailed scrutiny required of such an Act by Parliament during the legislative process⁶³. Reform ought not to provide a basis for the potential incentivisation of conduct that might undermine Convention rights compliance.
- 62.** Thirdly, it poses a potential problem for devolution generally, as pointed out by Cambridge University’s Centre for Public Law⁶⁴.

Cambridge University, Centre for Public Law – devolution problems if subordinate legislation could not be quashed⁶⁵

‘... It would ... upset the current devolution settlement if subordinate legislation which contravened Convention rights could not be quashed when primary legislation of the devolved legislatures which contravenes Convention rights can be quashed as beyond the scope of power of the devolved legislatures.’⁶⁶

62 Scottish Government, *Submission to the Independent Human Rights Act Review Panel*, at [164]. Also see Cambridge University, Centre for Public Law, *Submission to the Independent Human Rights Act Review Panel*, at [97], ‘*To change the position could upset the current constitutional balance in the UK*.’

63 On which see, ALBA, *Submission to the Independent Human Rights Act Review Panel*, at [80].

64 Also see, Committee on the Administration of Justice, *Submission to the Independent Human Rights Act Review Panel*, at 19.

65 Cambridge University, Centre for Public Law, *Submission to the Independent Human Rights Act Review Panel*, at, *Submission to the Independent Human Rights Act Review Panel*, at [92].

66 Citing ‘*Scotland Act 1998, section 29(2)(d); Government of Wales Act 2006, section 108A(2)(e) and Northern Ireland Act 1998, section 6(2)(c)*.’

- 63.** Fourthly, subordinate legislation is, due to the volume and speed with which it is considered by Parliament, rarely subject to the same degree of governmental and parliamentary scrutiny, where Convention rights are concerned, as that applied to Acts of Parliament in respect of Convention rights compliance⁶⁷. As matters stand, there is no duty on Government ministers, for instance, to make a statement of compatibility under section 19 of the HRA, albeit there is a practice that they do so⁶⁸. Neither do the JCHR nor the Joint Committee on Statutory Instruments routinely carry out detailed Convention rights-compatibility assessments of subordinate legislation⁶⁹. Therefore, the UK Courts' ability to quash subordinate legislation where it is incompatible with Convention rights is an important means by which the State can give effect to Convention rights domestically.
- 64.** One member of the Panel would have concluded that this option was a potential reform option, as it would promote greater predictability and certainty in the law and would ensure that UK Courts did not enter into the policy arena that is the proper province of the political Branches of the State. However, for the various reasons set out above, the majority of the Panel **reject** this option.

(7) Potential Reform Options

- 65.** The Panel considers the following to be potential reform options. It indicates here those which it does **not** recommend and which it does recommend.

(A) Options that are not recommended

(i) Option One: Require statements of compatibility for statutory instruments

- 66.** The first potential reform option aims to improve governmental scrutiny of subordinate legislation. It would amend section 19 of the HRA to require Government ministers to consider, and then issue a statement concerning the compatibility of subordinate legislation, in an analogous manner to that which they are required to adopt for parliamentary Bills. A similar approach is intended to be taken in Scotland under section 18 of its United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill⁷⁰.

67 The Law Society of England and Wales, *Submission to the Independent Human Rights Act Review Panel*, at [82]; Public Law Project, *Submission to the Independent Human Rights Act Review Panel*, at [55].

68 See further Option One of the Potential Reform Options, below.

69 On which see Murray Hunt, *Submission to the Independent Human Rights Act Review Panel*, at [73]-[75].

70 The Bill was subject to a challenge before the Supreme Court: see, *REFERENCES (Bills) by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child and European Charter of Local Self-Government (Incorporation) (Scotland)* [2021] UKSC 42.

United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill

'Section 18 Statements of compatibility in relation to legislation

- (1) *A member of the Scottish Parliament introducing a Public Bill in the Parliament must, on or before introduction of the Bill, make a statement in writing about the extent to which, in the member's view, the provisions of the Bill would be compatible with the UNCRC requirements.*
- (2) *The Scottish Ministers must make a statement in writing about the extent to which, in their view, the provisions of a relevant instrument are or (as the case may be) would be compatible with the UNCRC requirements.*
- (3) *In subsection (2), a "relevant instrument" means a Scottish statutory instrument made by the Scottish Ministers other than one which brings a provision of an Act of the Scottish Parliament or an Act of Parliament into force.'*

- 67.** Such a reform could, in principle, enhance the prospect of effective governmental scrutiny of draft subordinate legislation. It could also provide a means to enhance parliamentary scrutiny of such legislation⁷¹. At the present time, the first detailed scrutiny of subordinate legislation for compatibility with Convention rights, as noted by the Law Society of England and Wales, is ordinarily carried out by UK Courts⁷².
- 68.** In principle, this reform option could increase the prospect that Government ministers turned their mind to specific issues concerning Convention rights, thus avoiding the position outlined in *R (Bibi) v Secretary of State for the Home Department (Rev 1)* (2015), where the Minister was noted not to have turned his mind to a specific issue⁷³. Consequently, it may result in UK Courts being in a position to give greater weight to governmental decision-making because, unlike in *R (Bibi)* the Government minister will have considered the matter. This is not to suggest a different and expanded legal significance for the section 19 statement itself, the purpose of which remains to facilitate parliamentary debate and scrutiny. It is to suggest that by requiring Government ministers to consider Convention rights in respect of subordinate legislation there is likely to be greater and routine Government consideration of such issues.
- 69.** We see the main drawback of this potential reform being that it may not result in a genuine practical benefit. The current *Government Legal Profession SI Drafting Guidance* already provides that:

⁷¹ See, further on enhanced scrutiny, Murray Hunt, *Submission to the Independent Human Rights Act Review Panel*, at [73]-[75].

⁷² For instance, the Law Society of England and Wales, *Submission to the Independent Human Rights Act Review Panel*, at [82], 'Often when such [subordinate] legislation is examined by the courts it is the first time it will have received rigorous scrutiny.'

⁷³ As in *Tigere*, noted above.

'Departments are expected to provide Parliament with a statement of compatibility with Convention rights similar to that required for Bills under section 19 of the Human Rights Act 1998 for all affirmative resolution instruments and for negative resolution instruments which amend primary legislation... The statement is, where necessary, referred to in the Explanatory Memorandum, and the template contains a paragraph for this purpose.'

The relevant part of the Explanatory Memorandum template is as follows:

'5. European Convention on Human Rights

5.1. The [Name of Minister] has made the following statement regarding Human Rights:

"In [my/our] view the provisions of the [Title of instrument] are compatible with the Convention rights." OR [Free text]. (delete Section 5.2)

5.2. As the instrument [is subject to negative resolution procedure and does not amend primary legislation OR is not subject to parliamentary procedure], no statement is required. (delete Section 5.1).'

- 70.** Given the current requirement, set out in the *SI Drafting Guidance*, a statutory extension of section 19 to subordinate legislation might be viewed as providing little additional benefit, not least where so few successful challenges to subordinate legislation on Convention rights grounds succeed. That said, giving legislative force to the requirement could underscore the importance of the exercise. On balance, we were not convinced that an extension would add materially to the current position. However, we leave this as a potential although not recommended reform option.

(ii) Option Two: Enhance parliamentary scrutiny of statutory instruments

- 71.** Concerns were raised with IHRAR about the degree of parliamentary scrutiny of subordinate legislation. The Equalities and Human Rights Commission, for instance, noted that the amount of such scrutiny was '*minimal*'⁷⁴.
- 72.** One way to improve parliamentary scrutiny of subordinate legislation would be for either the JCHR or Joint Committee on Statutory Instruments to scrutinise subordinate legislation, which takes the form of a statutory instrument, for Convention rights compliance. That, however, may be resource intensive for those Committees and they and the parliamentary authorities would need to consider how best this reform option could be implemented. We see it as providing a good basis for enhanced parliamentary engagement and scrutiny. If implemented, it could help (along with the extension of section 19 statements of compatibility) to minimise the prospect of subordinate legislation incompatible with Convention rights.

74 Equality and Human Rights Commission, *Submission to the Independent Human Rights Act Review Panel*, at [71].

- 73.** As the Joint Committee on Statutory Instruments already scrutinises all statutory instruments, this reform *may* not impose too great an additional burden. Given its particular expertise, however, the JCHR is likely to be the more appropriate scrutiny body. If this option is adopted, consideration would need to be given to the practicalities of implementation, including the availability of resources. Again though, given the small number of successful challenges to subordinate legislation such a reform may also provide little practical benefit.
- 74.** On balance we do not recommend this option.

(B) Recommended Options

(iii) Option Three: Amend the HRA to enable UK Courts to issue suspended and prospective quashing orders

- 75.** The UK Courts' approach to subordinate legislation under the HRA was intended to be consistent with their approach to the judicial review of subordinate legislation generally. We see no argument to support diverging from that approach. That, however, has an important consequence, foreshadowed to IHRAR during the Law Society of Scotland Roundtable. There it was suggested that consideration could be given to section 102 of the Scotland Act, and particularly the power it gave Scottish Courts to issue suspended quashing orders⁷⁵. It was noted at that Roundtable *'to be a useful tool to have even if not used.'*⁷⁶

Section 102 of the Scotland Act – suspended quashing orders

'Section 102 Powers of courts or tribunals to vary retrospective decisions.'

- (1) *This section applies where any court or tribunal decides that—*
- (a) *an Act of the Scottish Parliament or any provision of such an Act is not within the legislative competence of the Parliament, or*
 - (b) *a member of the Scottish Government does not have the power to make, confirm or approve a provision of subordinate legislation that he has purported to make, confirm or approve, or*
 - (c) *any other purported exercise of a function by a member of the Scottish Government was outside devolved competence.*
- (2) *The court or tribunal may make an order—*

⁷⁵ Also see section 81 of the Northern Ireland Act 1998; and, section 153 of the Government of Wales Act 2006.

⁷⁶ Law Society of Scotland Roundtable Minutes (29 March 2021) at 2-3.

(a) removing or limiting any retrospective effect of the decision, or

(b) suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected.

(1) *In deciding whether to make an order under this section, the court or tribunal shall (among other things) have regard to the extent to which persons who are not parties to the proceedings would otherwise be adversely affected...*

76. The utility of the approach in section 102 was also noted in IHRAR's Roundtable meeting with the Lord President of the Court of Session's and Judicial Working Group.

Lord President and Judicial Working Group Roundtable minutes – utility of section 102 of the Scotland Act 1998

'Section 102 Powers of courts or tribunals to vary retrospective decisions.

*'Section 102 of the Scotland Act 1998 is useful. It enables a court to remove or limit the retrospective effect or suspend the effect of its decision when it finds that an Act of the Scottish Parliament is outside its competence or acts of the executive are ultra vires. The more options available to a court in terms of remedies, the better. An example where the UK Supreme Court used that power to suspend Scottish legislation in order to enable the Scottish Parliament sufficient time to correct the defect in legislation, and to do so in a way that was compatible with ECHR rights is *Salvesen and Riddell v The Lord Advocate (Scotland)* [2013] UKSC 22. Use of s.102 provided the Scottish Parliament with the time to remedy the issue in the case.'*

77. In *Salvesen and Riddell v The Lord Advocate (Scotland)* (2013)⁷⁷, the Supreme Court held that section 72(10) of the Agricultural Holdings (Scotland) Act 2003 was incompatible with article 1 to protocol 1 of the Convention (the right to property). It also held the section to be outside the Scottish Parliament's legislative competence. It went on to suspend the order quashing the provision for a period of twelve months. It did so due, for instance, to the length of time the provision had been in force and due to the impact that a quashing order would have on the rights of other parties. In doing so, the Supreme Court noted that it was accepted by the ECtHR that such quashing orders, which gave the political Branches of the State time to remedy such a problem, were permissible,

⁷⁷ *Salvesen and Riddell v The Lord Advocate (Scotland)* [2013] UKSC 22; 2013 SC (UKSC) 236.

'In Marckx v Belgium (1979) 2 EHRR 330 , para 58, the Strasbourg court declared that the principle of legal certainty was necessarily inherent in the law of the Convention as in Community law, and it dispensed the Belgian state from re-opening legal acts or situations that antedated the delivery of its judgment. It followed the same approach in Walden v Liechtenstein (application no 33916/96) (unreported) 16 March 2000 . The court said that it had also been accepted that, in view of the principle of legal certainty, a constitutional court may set a time-limit for the legislator to enact new legislation with the effect that an unconstitutional provision remains applicable for a transitional period. As was noted in Cadder v HM Advocate [2010] UKSC 43, 2011 SC (UKSC) 13 , para 58, section 102 of the Scotland Act gives effect to that principle...'⁷⁸

- 78.** As such the Panel does not consider that such an approach, if applied by way of an amendment to the HRA, could properly be said to be improper or to give rise to any concerns regarding the efficacy of rights protection provided by the HRA. On the contrary, it would ensure that it was consistent with an approach already accepted as appropriate by the ECtHR. Indeed, careful use of such a power could protect both legal certainty and the effective implementation of Convention rights.
- 79.** The UK Government has, following the work of IRAL, accepted that Courts in England and Wales should be given the power to grant suspended quashing orders where they are engaged in judicial review of subordinate legislation⁷⁹. The UK Supreme Court will, as a consequence in English and Welsh appeals, also have such a power⁸⁰. The proposal to introduce this reform is, (at the time of writing) contained in clause 1 of the Judicial Review and Courts Bill 2021.

⁷⁸ *Salvesen and Riddell v The Lord Advocate (Scotland)* [2013] UKSC 22; 2013 SC (UKSC) 236 at [56].

⁷⁹ *Independent Review of Administrative Law Report* (March 2021) at 3.49 and following; Ministry of Justice, *Judicial Review Reform Consultation – Response* (July 2021) at 18-22 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004881/jr-reform-government-response.pdf>.

⁸⁰ The UK Supreme Court has all the powers of the Court from which an appeal is made: section 40(5) of the Constitutional Reform Act 2005.

Section 1 of the Judicial Review and Courts Bill 2021 – suspended quashing orders

1 Quashing orders

(1) After section 29 of the Senior Courts Act 1981 insert—

“29A Further provision in connection with quashing orders

(1) A quashing order may include provision—

(a) for the quashing not to take effect until a date specified in the order, or

(b) removing or limiting any retrospective effect of the quashing.

(2) Provision included in a quashing order under subsection (1) may be made subject to conditions.

(3) If a quashing order includes provision under subsection (1)(a), the impugned act is (subject to any conditions under subsection (2)) upheld until the quashing takes effect.

(4) If a quashing order includes provision under subsection (1)(b), the impugned act is (subject to any conditions under subsection (2)) upheld in any respect in which the provision under subsection (1)(b) prevents it from being quashed.

(5) Where (and to the extent that) an impugned act is upheld by virtue of subsection (3) or (4), it is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect.

(6) Provision under subsection (1)(a) does not limit any retrospective effect of a quashing order once the quashing takes effect (including in relation to the period between the making of the order and the taking effect of the quashing); and subsections (3) and (5) are to be read accordingly.

(7) Section 29(2) does not prevent the court from varying a date specified under subsection (1)(a).

(8) *In deciding whether to exercise a power in subsection (1), the court must have regard to—*

- (a) *the nature and circumstances of the relevant defect;*
- (b) *any detriment to good administration that would result from exercising or failing to exercise the power;*
- (c) *(the interests or expectations of persons who would benefit from the quashing of the impugned act;*
- (d) *the interests or expectations of persons who have relied on the impugned act;*
- (e) *so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;*
- (f) *any other matter that appears to the court to be relevant.*

(9) *If—*

- (a) *the court is to make a quashing order, and*
 - (b) *it appears to the court that an order including provision under subsection (1) would, as a matter of substance, offer adequate redress in relation to the relevant defect,*
- the court must exercise the powers in that subsection accordingly unless it sees good reason not to do so.*

(10) *In applying the test in subsection (9)(b), the court is to take into account, in particular, anything within subsection (8)(e).*

(11) *In this section—*

“impugned act” means the thing (or purported thing) being quashed by the quashing order;

“relevant defect” means the defect, failure or other matter on the ground of which the court is making the quashing order.”

...’

- 80.** As a matter of principle, given the reform to judicial review, UK Courts ought to be provided with the same power to issue suspended quashing orders where subordinate legislation is found to be incompatible with Convention rights. This will maintain consistency with judicial review generally. It will also provide the Government and, if necessary, Parliament time to rectify the defect in the legislation. It will thus promote effective public administration by prompting rectification while, as the Government noted in its response to recommendations by IRAL, giving it time to consider properly how best to do so⁸¹.
- 81.** We also note a further benefit of providing UK Courts with the power to make suspended quashing orders. We noted earlier Flaux LJ's concern in *Secretary of State for Work and Pensions v Carmichael* (2018) that disregarding a provision in subordinate legislation crossed the boundary of institutional competence. Introducing a suspensive power should enable the Courts to leave it to the Government and Parliament to remedy a defect in subordinate legislation – thus enabling the political Branches of the State to consider political issues that arise in respect of the legislation, while providing for it to be quashed either in whole or in part at a defined point in the future. In that way, the subordinate legislation can, before the quashing order comes into force, be revised as a whole by the Government, if so minded. Accordingly, suspended quashing orders will bolster the constitutional balance.
- 82.** The Panel would anticipate that there is likely to be an inverse relationship between the strength of an individual's interest (*locus standi*) in challenging subordinate legislation on Convention rights grounds and the likelihood that the Court will exercise its discretion to either withhold a remedy or make a suspending or prospective quashing order. Should clause 1 of the Judicial Review and Courts Bill 2021 be enacted, it will be a matter for UK Courts to exercise their judicial judgement when taking account of the criteria it sets out. Those criteria will therefore guide the Courts' discretion when considering the remedy to grant when they find subordinate legislation to be incompatible with Convention rights.

⁸¹ Ministry of Justice, *Judicial Review Reform Consultation – Response* (July 2021) at [72].

- 83.** Clause 1 of the Judicial Review and Courts Bill 2021 contains the further provision giving the Courts power to direct that a quashing order is to only be prospective in effect. As such the subordinate legislation will remain valid until the point in time when the quashing order comes into effect. A similar power also is set out in section 102 of the Scotland Act 1998⁸², as noted above. Again, in order to maintain consistency with the general approach to judicial review of subordinate legislation, the Panel considers that this reform ought to be applied to the HRA. This is because the HRA has UK-wide effect. The amendments to be introduced by the Judicial Review and Courts Bill 2021 only apply to England and Wales. UK Courts ought therefore to be given a similar power where it reviews subordinate legislation for compatibility with Convention rights. Furthermore, the suspensive power to be introduced by the 2021 Bill should also be extended to apply to situations where UK Courts would otherwise have to disapply subordinate legislation as a consequence of the operation of section 6 of the HRA.
- 84.** If this Option is adopted, the Government will also need to consider the factors that are to guide the discretion to issue suspended and/or prospective quashing orders. The Panel considers that those factors set out in the proposed new section 29A(8) of the Senior Courts Act 1981, in clause 1 of the Judicial Review and Courts Bill 2021, are, however, likely to be capable of application effectively if applied to Convention rights review of subordinate legislation.
- 85.** For the above reasons, to maintain constitutional consistency, and given the benefits acknowledged by IRAL and the Government of this approach, we **recommend** that this legislative reform be introduced.

(iv) Option Four: A judgments database for judgments where subordinate legislation is disapplied

- 86.** In Chapter Five we recommend the introduction of a judgments database for judgments where UK Courts interpret legislation under section 3 of the HRA. Its aim is to increase transparency and scrutiny of such decisions. We consider there to be a real benefit in taking the same approach to judgments where UK Courts and Tribunals⁸³ disapply or quash subordinate legislation. Accordingly, we recommend the judgments database, recommended in Chapter Five, Option Five, if adopted, be expanded to apply to such judgments.

82 And those in section 81 of the Northern Ireland Act 1998; and, section 153 of the Government of Wales Act 2006.

83 As set out in in Chapter 5, footnote 169.

(8) Recommended Reform Options

- 87.** For the reasons set out above, the Panel recommends **Options Three and Four**. For a number of reasons, Options Three and Four cannot be said to raise any devolution concerns. First, their aim is to increase Government and parliamentary scrutiny of subordinate legislation, and thus are intended to increase compliance with Convention rights. Secondly, Option Three is intended to maintain consistency between quashing orders under the HRA with the approach under judicial review generally. Thirdly, Option Three mirrors legislation in place in Scotland, Wales and Northern Ireland which, as noted by the Supreme Court, introduces powers recognised by the ECtHR as inherent in Convention case law.

Chapter Eight - Extra-Territorial And Temporal Scope

(1) Introduction

1. We turn to the question 2(d) under Theme II of the ToR. It concerns the extra-territorial effect of the HRA. Specifically, it is as follows:

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

The question is qualified by an acknowledgment that if there is a case for change it may require changes going outside IHRAR's ToR:

'It is acknowledged that if the extraterritorial scope of the HRA were to be restricted, other legislative changes beyond the HRA may be required in order to maintain compliance with the UK's obligations under the Convention. As such changes would fall outside the scope of the Review, the panel is not asked to make specific legislative recommendations on this issue, but only to consider the implications of the current position and whether there is a case for change.'

2. This chapter also considers the HRA's temporal scope. That is the extent to which it applies to acts of public authorities before and after it came into force. This issue is not the focus of a specific question within the ToR. However, the issue was repeatedly raised with IHRAR and cannot sensibly be ignored. Moreover, it overlaps to a degree with the issue of extra-territorial jurisdiction. Further still, an examination of the HRA's temporal scope is implicit in the ToR, if and to the extent that it concerns the general issue identified in Theme II of the ToR: namely, whether there is a risk of over-judicialisation of public administration through UK Courts being unduly drawn into questions of policy.

3. Both the HRA's extra-territorial and temporal scope require consideration of the Convention's territorial and temporal scope. The former cannot be properly appreciated without an exploration of the latter. For that reason, this chapter starts by specifically setting out the development of the way in which the ECtHR has interpreted these aspects of the Convention. At the outset it should be noted, as was emphasised to IHRAR by Lord Reed in his evidence submitted to the CfE, that both the HRA's extra-territorial and temporal scope are areas where the HRA has had '*considerable impact*' on the relationship between the Judiciary and the Government in '*particularly sensitive areas of policy and state action*'.¹ Moreover, due to ECtHR case law developments, these areas have expanded in areas where it is '*doubtful*' Parliament in 1998 when enacting the HRA intended it to go. This is an area where concerns on the part of UK Courts to ensure that there is no real gap between ECtHR case law and domestic case law bring the application of section 2 of the HRA and the ***Ullah*** principle into stark relief.
4. The Panel recommends the following reform option.

Recommended reform option²

The current position of the HRA's extra-territorial application is unsatisfactory, reflecting the troubling expansion of the Convention's application. The territorial scope of the Convention ought to be addressed by a national conversation advocated to IHRAR during the Armed Forces Roundtable, together with Governmental discussions in the Council of Europe, augmented by judicial dialogue between UK Courts and the ECtHR.

Equally, the temporal application of the HRA is now uncertain and unsatisfactory. Clarity is needed. The temporal scope of the Convention ought to be addressed at a political level by the UK and the other Convention states.

Future domestic developments, both legislative and judicial, will be informed by the progress and outcome of the national conversation and the inter-Governmental dialogue.

¹ Lord Reed, *Submission to the Independent Human Rights Act Review Panel* at 12.

² See Option Two of the Recommended Reform Options, below.

5. This option speaks for itself. The expansion of the Convention’s extra-territorial and temporal scope in the ECtHR’s case law is troubling. A unilateral solution, for instance by legislative amendment of the HRA, would not resolve the position under the Convention, which would remain binding on the UK internationally and would risk damaging vital UK interests (particularly in the Military and Intelligence spheres) in cases before the ECtHR. The matter cries out for a national conversation, as suggested to IHRAR during the Armed Forces Roundtable, together with inter-Governmental negotiations, augmented by judicial dialogue between UK Courts and the ECtHR. The temporal application of the HRA likewise and for similar reasons lacks clarity. This issue is of particular concern in the context of Northern Ireland. Future domestic developments, both legislative and judicial, cannot go on hold indefinitely; it would be wrong to speculate now as to their shape but they will doubtless be informed by the progress and outcome of the national conversation and the inter-Governmental dialogue.
6. Full details of the recommendation and other reform options that the Panel has considered are set out in Parts 11 – 13 of this chapter.

(2) The Convention’s Extra-Territorial Scope – *Bankovic* and *Soering*

7. Article 1 of the Convention sets out its territorial scope. It provides that Convention states are required to give effect to Convention rights ‘*within their jurisdiction*’.

Article 1 of the Convention

‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’

8. Article 1 has both direct and indirect extra-territorial application. The starting point for an assessment of the direct extra-territorial scope is the ECtHR Grand Chamber’s decision in *Bankovic v Belgium* (2001)³ (***Bankovic***).

Bankovic

In ***Bankovic*** the ECtHR considered whether it had jurisdiction over an application brought by relatives of individuals killed by a NATO airstrike on the Radio Televizije Srbije in Belgrade during the Kosovan conflict in 1999. It held that the application was inadmissible. The act in question was not within the extra-territorial scope of the Convention.

³ *Bankovic v Belgium* - 52207/99 [2001] ECHR 890; (2001) 11 BHRC 435

9. In **Bankovic** the ECtHR considered the scope of the Convention's jurisdiction. Its starting point was that the Convention was primarily intended to be territorial in application. That was consistent with the Convention's drafting process. Article 1 was initially drafted to limit the Convention's application to individuals '*residing within*' a Convention state's territory. While that initial draft was revised so that it referred to individuals within a Convention state's jurisdiction, the revision was only intended to ensure that it was not interpreted restrictively and was not intended to indicate a shift away from a territorial focus for the Convention⁴.
10. While the Convention was to be interpreted as a '*living instrument*'⁵, which meant that the initial drafting intention was not decisive in determining article 1's meaning, the drafting records (*travaux préparatoires*) provided '*clear, confirmatory*' evidence that article 1 was to have the same scope as that provided for in international law generally. This conclusion was given additional support by the fact that the Convention states had not demonstrated an understanding of the Convention since its ratification as extending beyond their territory⁶. The starting point then for determining the limits of the Convention's application was a Convention state's territorial limits.
11. The ECtHR did, however, in **Bankovic**, identify a number of limited exceptions to the national territory-based jurisdiction of the Convention. The Convention would apply extra-territorially in a number of instances recognised by customary international law. As it put it:
- 'Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State'*⁷

4 **Bankovic** at [19]-[21].

5 See Chapter two at [151].

6 See article 32 of the Vienna Convention; **Bankovic** at [59]-[66].

7 **Bankovic** at [73].

12. The most significant exception to the national territory-based application of article 1, was however where a Convention state exercised ‘*effective control*’ over the territory of another state⁸. Again, given the background to the drafting of the Convention, the rationale underpinning this exception is patent. This exception was first recognised in *Loizidou v Turkey* (1995)⁹. In that case, which arose out of Turkey’s occupation of the north of Cyprus, Turkey’s objection to ECHR jurisdiction over that part of the Island of Cyprus was rejected on the basis that, in the case of the north of Cyprus, Turkey did exercise ‘*effective control of an area outside its national territory*’, i.e., it had effective control over an area outside the national territorial limits of Turkey¹⁰. This aspect of the Convention’s extra-territorial jurisdiction would therefore have been apparent to the Government and Parliament when it enacted the HRA in 1998.
13. **Bankovic** also identified a limiting factor to the Convention’s territorial scope: the Convention’s ‘legal space’ or ‘*espace juridique*’. This limitation provided that article 1 could *only* apply, both in terms of its territorial scope and the exceptions to that, to Convention states. It would not therefore apply where a Convention state exercised effective control over the national territory of a non-Convention state. There was to be no legal vacuum within the territories of the Convention states, but the Convention was not a Convention to be applied throughout the world. The Convention’s ‘legal space’ was thus the territory of its Convention states.

The Convention’s ‘legal space’¹¹

‘... , the Convention is a multi-lateral treaty operating, subject to Article 56 of the Convention, in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The FRY [Former Republic of Yugoslavia] clearly does not fall within this legal space. **The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.** Accordingly, the desirability of avoiding a gap or vacuum in human rights’ protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.’

8 **Bankovic** at [71]

9 *Loizidou v Turkey (Preliminary Objections)* - 15318/89 [1995] ECHR 10.

10 **Bankovic** at [71], ‘... the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting state is exceptional: it has done so when the respondent state, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.’

11 **Bankovic** at [80].

14. The Convention's indirect extra-territorial application was considered in *Soering v United Kingdom* (1989)¹². The case concerned the extradition of Mr Soering, a German national, from the UK to the USA. Mr Soering's extradition was sought as he had been charged with murder in the USA. If convicted, he would be subject to the death penalty. The issue was whether extradition in such circumstances would breach Mr Soering's article 3 Convention right (the right not to be subject to inhuman or degrading treatment or punishment) and article 6(3)(c) right (fair trial in criminal proceedings). As noted by the UK Government in its response to the *CfE*, such considerations have also arisen in further cases¹³. It further notes that this form of application of the Convention can pose problems for Convention states, as it is often difficult for them to assess whether or not there is likely to be a potential breach of the Convention if an individual is subject to extradition.
15. While the Panel notes the UK Government's concerns regarding this aspect of the Convention's extra-territorial scope, it does not strictly speaking fall within para 2(d) of the ToR. That said, this is a matter that falls best within the discussion on section 2 HRA (above)¹⁴.
16. The approach to the Convention's territorial and extra-territorial scope set out in ***Bankovic*** can be summarised as follows.

Summary of the ECtHR's approach to territorial scope in *Bankovic*

- The Convention's legal space was limited to the territory of Convention states.
- Its application to specific Convention states was primarily limited to their national territory.
- In limited circumstances, the Convention did however apply outside a Convention state's national territory. This extra-territorial application arose where:
 - Specific situations where customary international law and treaty provisions recognise the extra-territorial exercise of jurisdiction by a Convention state.
 - A Convention state had *effective control* over an area outside their national territory. Given the Convention's legal space, such effective control would have had to be over the national territory of another Convention state.

¹² *Soering v United Kingdom* [1989] ECHR 14; (1989) 11 EHRR 439.

¹³ UK Government, *Submission to the Independent Human Rights Act Review Panel*, at [77]-[78].

¹⁴ See Chapter Two.

(3) The Convention’s Extra-Territorial Scope – After *Bankovic*

17. **Bankovic** set out a carefully considered approach to the Convention’s territorial and limited extra-territorial scope. Subsequently, however, that scope has been notably expanded by the ECtHR.
18. First, the ECtHR has not followed the **Bankovic** limitation confining the Convention’s extra-territorial scope to the Convention’s legal space. For example, in *Ocalan v Turkey* (2005)¹⁵, it held that the Convention’s extra-territorial jurisdiction applied to actions alleged to have been taken by Turkish agents in Kenya. In *Women on Waves v Portugal* (2009)¹⁶, the Convention’s extra-territorial scope was held to apply on a ship that was in international waters.
19. Secondly, the ECtHR adopted a broader approach to establishing extra-territorial jurisdiction than the two bases identified in **Bankovic**. In *Issa v Turkey* (2004)¹⁷, which concerned action taken by Turkish armed forces in northern Iraq, it explained that extra-territorial jurisdiction could arise where a Convention state did not exercise effective control over the national territory of another country. Such jurisdiction could also arise as a result of a Convention state acting through individuals who are ‘under its authority and control’ in the national territory of another country. As the ECtHR explained it,
- ‘... a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully ... Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory ...’*¹⁸
20. In *Al-Skeini v The United Kingdom* (2011)¹⁹ (**Al-Skeini v The UK**) the ECtHR’s Grand Chamber authoritatively reviewed and restated its interpretation of the Convention’s territorial and extra-territorial scope.

15 *Ocalan v Turkey* - 46221/99 [2005] ECHR 282; (2005) 41 EHRR 45.

16 *Women on Waves v Portugal* - 31276/05 [2011] ECHR 1693.

17 *Issa v Turkey* - 31821/96 [2004] ECHR 629; (2005) 41 EHRR 27.

18 *Issa v Turkey* - 31821/96 [2004] ECHR 629; (2005) 41 EHRR 27 at [71].

19 *Al-Skeini v The United Kingdom* - 55721/07 [2011] ECHR 1093; [2011] ECHR 1093.

Al-Skeini v The UK

The application arose out of events that took place in Al-Basrah in Iraq in 2003. At that time the UK was an occupying power in Iraq. The application specifically concerned the deaths of six Iraqi citizens, whose deaths were alleged to have been caused by actions taken by members of the UK armed forces.

The issues before the ECtHR had previously been considered by the House of Lords in *R (Al-Skeini) v Secretary of State for Defence* (2007)²⁰ (***Al-Skeini***), which is discussed below.

The ECtHR's Grand Chamber held that the actions of the UK's armed forces fell within the scope of article 1 of the Convention. They did so because the UK exercised authority or control over the six Iraqi citizens through the conduct of its armed forces.

21. In reaching its decision, the ECtHR's Grand Chamber affirmed the approach taken in ***Bankovic***, that the Convention's application was primarily territorial. Only exceptionally would its application go beyond that limit²¹. It then went on to identify two forms of exception and explain the meaning of the Convention's legal space.
22. The first exception (*the state agent authority or control exception*), which provided extra-territorial jurisdiction, arises where a Convention state through one of its agents exercises authority or control over an individual who was in an area outside its national territory. Where such authority or control was exercised, article 1 of the Convention required a Convention state to secure such Convention rights for that individual that were '*relevant to their situation*'. The application of those rights could then be '*divided and tailored*', e.g., if an individual were held in detention, articles 2, 3 and 5 could be said to apply in so far as they were relevant to the detention.

Al-Skeini v The UK - the state agent authority or control exception²²

'It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be "divided and tailored".'

²⁰ *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 AC 153 at [106]. Also discussed in Chapter Two.

²¹ ***Al-Skeini v The UK*** at [131], '*A State's jurisdictional competence under Article 1 is primarily territorial ... Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases ...*'

²² ***Al-Skeini v The UK*** at [137].

23. This first exception was identified as covering a range of situations²³. It applied to the acts of Convention state’s diplomatic and consular agents, as noted in **Bankovic**, where they exercised control over individuals outside the Convention state’s national territory. It also applied where the Convention state exercised all or some public powers (such as judicial or executive functions) normally exercised by the Government of the area outside its national territory and did so through the ‘*consent, invitation or acquiescence*’ of the authorities of that area and their exercise was not attributable to the other State. Finally, it applied where a Convention state’s agents, e.g., its armed forces, through the use of force bring an individual who is outside the state’s territorial jurisdiction under its control. The key to determining control over an individual under this instance of the state agent and control exception was physical control and power of the individual, as had been the case in *Al-Saadoon & Mufdhi v The United Kingdom* (2010)²⁴.

***Al-Saadoon & Mufdhi v The United Kingdom* (2010)**²⁵

This case raised the question whether two Iraqi citizens who were detained by UK forces in Iraq were within the extra-territorial jurisdiction of the Convention. The ECtHR concluded that as they were detained in military prisons in Iraq, which were under the sole control of the UK armed forces, they were within the Convention’s extra-territorial scope.

As the Grand Chamber explained in ***Al-Skeini v The UK***, what was decisive in this case in determining extra-territorial jurisdiction was not the UK armed forces’ exclusive control over the military prisons, but their power and control over the individuals²⁶.

24. In *Hassan v The United Kingdom* (2014)²⁷ (***Hassan***), the Grand Chamber went on to clarify that the effective control exception applied irrespective of whether control was obtained by a Convention state during or after active combat operations. It is noteworthy that in both this case and in ***Al-Skeini v The UK***, the fact that the armed forces were subject to international humanitarian law (IHL) was not a relevant factor in determining whether the UK armed forces exercised control over the individuals concerned²⁸. ***Hassan*** also provided further guidance on the interpretation of article 5 of the Convention and its relationship with IHL. Previously in *Al-Jedda v the UK* (2011)²⁹, the ECtHR’s Grand Chamber held that extra-territorial military detention during an armed conflict could amount to a breach of article 5 of the Convention if it could not be brought within one of the justifications for such detention in that article. In ***Hassan***, as the UK Government notes in its submission to the CFE,

23 ***Al-Skeini v The UK*** at [136].

24 *Al-Saadoon & Mufdhi v The United Kingdom* - 61498/08 [2010] ECHR 282.

25 *Al-Saadoon & Mufdhi v The United Kingdom* - 61498/08 [2010] ECHR 282.

26 ***Al-Skeini v The UK*** at [136].

27 *Hassan v The United Kingdom* - 29750/09 - Grand Chamber Judgment [2014] ECHR 936; (2014) 38 BHRC 358 at [76]-[77].

28 ***Hassan*** at [77].

29 *Al-Jedda v the UK* - 27021/08 [2011] ECHR 1092; (2011) 53 EHRR 23.

*‘... the Grand Chamber of the ECtHR, whilst rejecting the UK’s argument that during the active hostilities phase of an international armed conflict, the conduct of the State party will be subject to the requirements of international humanitarian law and not the ECHR, held that international humanitarian law was relevant to the interpretation of the Convention and Article 5 should be interpreted so as to accommodate it as the *lex specialis*, which provides the relevant safeguards against abuse.’³⁰*

- 25.** It is also apparent from ***Hassan***³¹, that if a Convention state wishes to fall outside the scope of the Convention’s extra-territorial scope during military operations in another country, it ought to do so by expressly derogating from the Convention. In ***Hassan***, that would have required the UK to derogate from article 5 of the Convention (the right to liberty and security). In concluding that a Convention state seeking to limit the application of the Convention in such circumstances would have to do so explicitly, i.e., through an article 15 derogation, the ECtHR seems to have assumed that the need to do so ought to have been apparent to Convention states. However, given ***Bankovic***, states might reasonably have anticipated that the Convention would not apply to their actions outside of the territory of other Convention states³². Hence, they might have assumed that there was no need to derogate from the Convention where military operations took place in, as in ***Al-Skeini v The UK***, outside Europe as they could have reasonably assumed the Convention’s extra-territorial scope did not apply to Iraq³³. In short, the need for derogation would only have been evident after the ECtHR altered its approach to the Convention’s legal space in ***Al-Skeini v The UK*** and articulated the view that the Convention could apply anywhere in the world.
- 26.** The second exception to the Convention’s primary territorial limit was that identified in ***Bankovic***. This arises where a Convention state has effective control over an area within the national territory of another country (*the effective control over an area exception*). Where this exception applies, unlike the state agent authority or control exception, *all* the Convention rights apply³⁴. Whether this exception applies is a question of fact. It is primarily determined by reference to a Convention state’s military presence in the area in question³⁵.

30 UK Government, *Submission to the Independent Human Rights Act Review Panel*, at [73]-[74].

31 ***Hassan*** at [76]-[77].

32 Peter, Lord Ricketts, *Hard Choices, What Britain Does Next*, (Atlantic Books, 2021) at 83 and following.

33 ***Hassan*** at [96]-[107].

34 ***Al-Skeini v The UK*** at [138].

35 ***Al-Skeini v The UK*** at [139].

***Al-Skeini v The UK* – the effective control over an area exception³⁶**

This exception arises when

‘... as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State’s own armed forces, or through a subordinate local administration...’

27. Finally, in respect of the concept of the Convention’s legal space, the ECtHR’s Grand Chamber explained, that it did not limit the application of article 1 (of the Convention) to Convention states’ national territory. The concept was intended to ensure that there would be no lacunae in the Convention’s application where one Convention state had, for instance, taken control of territory within another Convention state during armed conflict. However, it did not follow (even though it might be thought that ***Bankovic*** had suggested that it did) that the Convention’s application was limited so excluding its application outside the territory of the Convention states.

***Al-Skeini v The UK* – jurisdiction and the Convention’s legal space³⁷**

‘The Convention is a constitutional instrument of European public order ... It does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States ...’

The Court has emphasised that, where the territory of one Convention State is occupied by the armed forces of another, the occupying State should in principle be held accountable under the Convention for breaches of human rights within the occupied territory, because to hold otherwise would be to deprive the population of that territory of the rights and freedoms hitherto enjoyed and would result in a “vacuum” of protection within the “Convention legal space” ... However, the importance of establishing the occupying State’s jurisdiction in such cases does not imply, a contrario, that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe Member States. The Court has not in its case-law applied any such restriction ...’

³⁶ *Al-Skeini v The UK* at [138].

³⁷ *Al-Skeini v The UK* at [141]-[142].

- 28.** This development is questionable. The Convention is a regional human rights instrument. It was part of the Post-War movement, as Dr Bates put it, to ‘safeguard Europe from Tyranny and Oppression’. The Convention was, originally at least, conceived to form part of a ‘system of collective security’ for European democracies³⁸, not least through the central role that article 33 of the Convention was intended to play. That article enables Convention states to refer alleged breaches of the Convention by other Convention states to the ECtHR, i.e., it was a means through which Convention states would take on a responsibility to guard against other Convention states moving towards totalitarian government. Originally at least, there was nothing to suggest that the Convention had been intended to have a broader legal space than that set out in **Bankovic**; if so, for example, it might have been expected to provide a mechanism for non-Convention states to also refer alleged breaches by Convention states to the ECtHR but there is no such provision.
- 29.** The Convention was also drafted against a background assumption that an International Bill of Rights, to complement the Universal Declaration of Human Rights, was unlikely to be completed within a short period of time. Given these points, it could reasonably be doubted that the Convention was intended to apply beyond the legal space, as set out in **Bankovic**.
- 30.** In *Jaloud v The Netherlands* (2014)³⁹ (**Jaloud**), the ECtHR’s Grand Chamber provided further guidance on the approach to be taken to the state agent authority or control exception to territorial scope. The case concerned the question whether a Mr Jaloud was under the jurisdiction of Dutch military when he was shot and killed as he passed through a military checkpoint in Iraq, and thus whether the Netherlands was required to carry out an effective investigation into his death under article 2 of the Convention. The checkpoint was operated by the Dutch military. The ECtHR held that the Dutch military had assumed jurisdiction over Mr Jaloud because it asserted authority over those individuals who passed through the checkpoint⁴⁰.

38 E. Bates, *The Evolution of the European Convention on Human Rights*, (OUP, 2010) at 53.

39 *Jaloud v The Netherlands* - 47708/08 - Grand Chamber Judgment [2014] ECHR 1292; (2015) 60 EHRR 29.

40 **Jaloud** at [152], ‘The Court now turns to the circumstances surrounding the death of Mr Azhar Sabah Jaloud. It notes that Mr Azhar Sabah Jaloud met his death when a vehicle in which he was a passenger was fired upon while passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer. The checkpoint had been set up in the execution of SFIR’s mission, under United Nations Security Council Resolution 1483 (see paragraph 93 above), to restore conditions of stability and security conducive to the creation of an effective administration in the country. The Court is satisfied that the respondent Party exercised its “jurisdiction” within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint. That being the case, the Court finds that the death of Mr Azhar Sabah Jaloud occurred within the “jurisdiction” of the Netherlands, as that expression is to be construed within the meaning of Article 1 of the Convention.’

- 31.** The UK Government intervened in the proceedings, arguing that the ECtHR should not develop its case law concerning the Convention’s territorial scope through the application of living tree interpretation⁴¹. The ECtHR’s Grand Chamber implicitly rejected the UK’s submission on this point. The implicit rejection could be said to flow from the fact that it went on to develop further the first exception in **Jaloud** by clarifying that it was not an essential feature of control for a Convention state to have the status of an occupying power (in this case the UK could have been said to have effective control over the area under the second exception⁴²), nor was such a state relieved of jurisdiction on the basis that it was executing orders given to it by another state⁴³. That it did not deal with the submissions explicitly, however, might be said to leave open the question of the application of living tree interpretation to the Convention’s territorial scope for future cases or, perhaps more appropriately, for discussions between the Convention states with a view to a potential clarificatory Protocol concerning territorial jurisdiction.
- 32.** The ECtHR’s approach to territorial and extra-territorial jurisdiction as it was reconsidered in **Al-Skeini v The UK** and extended in **Hassan** can be summarised as follows.

41 **Jaloud** at [121].

42 As noted by Cambridge University, Centre for Public Law, Submission to the Independent Human Rights Act Review Panel, at FN 112.

43 **Jaloud** at [141]-[142].

Summary of the ECtHR's approach to territorial scope in *Al-Skeini v The UK, Hassan and Jaloud*

- The Convention's legal space territorial scope was **not** limited to the territory of Convention states. It could apply, in principle, anywhere in the world.
- Its application to specific Convention states was, as in *Bankovic*, primarily limited to their national territory.
- In two broad circumstances, the Convention could apply outside a Convention state's national territory. This extra-territorial application arose where:
 - More broadly than in *Bankovic*, a Convention state through its agents had control or authority outside its national territory over an individual. In order to have control it was not necessary for the Convention state to be an occupying power. A Convention state acting on behalf of another state could still exercise control over an individual.
 - As in *Bankovic*, a Convention state had *effective control or authority* over an area outside their national territory (and no longer limited to the territory of Convention States).
- The Convention's extra-territorial scope applies during active military combat operations as it does after they have concluded. This would be subject to later developments, as noted below.
- Where a Convention state does not want the Convention to apply extra-territorially, it must derogate from the Convention under article 15.

(4) The Convention's Temporal Jurisdiction

- 33.** Before turning to outline the way in which the ECtHR's approach to the Convention's extra-territorial jurisdiction has developed following *Al-Skeini v The UK, Hassan* and *Jaloud*, its approach to its temporal jurisdiction needs to be considered. The reason for this is that recent developments concerning extra-territorial jurisdiction have related to article 2 of the Convention and, particularly, the procedural obligation it imposes on Convention states. The ECtHR has explained that those developments are consistent with its approach to the Convention's temporal jurisdiction⁴⁴. We return to this below.

⁴⁴ *Güzelyurtlu v Cyprus & Turkey - 36925/07 (Judgment : Preliminary objection dismissed: Grand Chamber)* [2019] ECHR 100 at [189].

34. The Convention is a treaty entered into by the Convention states. The general approach to the temporal jurisdiction of treaties is set out in section 28 of the Vienna Convention on the Law of Treaties (1969). It makes clear that treaty obligations are prospective, i.e. they only apply from the point in time when a state becomes bound by the treaty.

Vienna Convention on the Law of Treaties, section 28

‘An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.’

This approach has been consistently applied to the Convention by both the European Commission on Human Rights⁴⁵ and by the ECtHR.

The Convention’s temporal jurisdiction is prospective

The view of the European Commission on Human Rights in 1959,

‘Under a generally recognised rule of international law, the Convention only governs for each Contracting Party those facts which are subsequent to the date of its entry into force with regard to the Party in question.’⁴⁶

The view of the ECtHR’s Grand Chamber in 2006,

‘The Court recalls that, in accordance with the general rules of international law... , the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention with respect to that Party ...’⁴⁷

35. From the UK’s perspective, the Convention applies to it as from 5 September 1953; the date on which it ratified the Convention. As a general rule it does not apply to matters that took place before that date. As the ECtHR explained it in *Blecic v Croatia* (2006)⁴⁸ (**Blecic**):

‘... while it is true that from the ratification date onwards all of the State’s acts and omissions must conform to the Convention ..., the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to that date ... Any other approach would undermine both the principle of non-retroactivity in the law of treaties and the fundamental distinction between violation and reparation that underlies the law of State responsibility.’

⁴⁵ The European Commission on Human Rights existed from 1954 until 1998. It was a body of the Council of Europe and not, as its name might be mistakenly thought to suggest, part of the European Union. Before individuals were given the right of to bring proceedings before the ECtHR (the right of individual petition) they had to first raise their claim with the European Commission on Human Rights, which would determine whether their claim could go before the ECtHR.

⁴⁶ *Neilsen v Denmark* (App. 343/57) (1959) at 9 <[⁴⁷ *Blecic v Croatia* - 59532/00 \[2006\] ECHR 207; \(2006\) 43 EHRR 48 \(Grand Chamber\) at \[70\].](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-158874%22]}>.</p></div><div data-bbox=)

⁴⁸ *Blecic v Croatia* - 59532/00 [2006] ECHR 207; (2006) 43 EHRR 48 (Grand Chamber) at [81]-[82]; affirmed in *Šilih v Slovenia* - 71463/01 [2009] ECHR 571; (2009) 49 EHRR 37 at [139]-[147].

In order to establish the Court's temporal jurisdiction it is therefore essential to identify, in each specific case, the exact time of the alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated.'

The general rule is, however, subject to a number of exceptions; one of which is relevant to the development of the ECtHR's approach to the Convention's extra-territorial jurisdiction.

- 36.** First, where an event that commenced prior to the date on which the Convention came into force for a specific Convention state forms part of a continuing alleged violation of Convention rights it is within the temporal jurisdiction⁴⁹.

The first exception – where there is a continuing situation

An example of the first exception to the general rule on temporal jurisdiction is *Varnava v Turkey* (2009)⁵⁰. In that case an individual was a missing person. The Turkish authorities had failed to conduct an investigation into the disappearance. It was argued that as the person went missing prior to Turkish accession to the Convention, the matter was outside its temporal jurisdiction.

The ECtHR's Grand Chamber concluded the failure to investigate came within the Convention's temporal jurisdiction because the disappearance was a continuing event as the missing person's whereabouts remained unknown after Turkey's accession.

- 37.** The second exception arises where there has been an alleged violation of Convention rights after the Convention came into force. Events that occurred before it came into force can be taken into account by the ECtHR if they necessary to enable the alleged violation to be understood properly. As the ECtHR noted in *Witkowska-Tobola v Poland* (2007)⁵¹ at [31]:

*'... the Court's jurisdiction *ratione temporis* covers the period following the date of ratification, the facts that occurred before that date being considered only inasmuch as they have created a situation extending beyond that date or **are relevant for the understanding of the situation obtaining afterwards ...**'*

⁴⁹ Noted in *De Becker v Belgium* (App. 214/5) at 8, 'The Commission recognised: - in regard to its competence *ratione temporis* that the Applicant had found himself placed in a continuing situation which had no doubt originated before the entry into force of the Convention in respect of Belgium (14th June 1955), but which had continued after that date, since the forfeitures in question had been imposed "for life"...'; **Blecic** at [74].

⁵⁰ *Varnava v Turkey* - 16064/90 [2009] ECHR 1313 at [148].

⁵¹ *Witkowska-Tobola v Poland* - Application no. 11208/02 (2007) at [31] <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-83933%22%5D%7D>>.

38. It is, however, the third exception that is particularly relevant to the ECtHR’s approach to its extra-territorial jurisdiction as well as the UK Courts’ approach to the HRA. It concerns the application of the article 2 procedural duty under the Convention.

The article 2 procedural duty

Article 2 of the Convention sets out the right to life. That is a substantive obligation placed on Convention states, which requires them to both refrain from unlawful killing and to take action to protect life.

Article 2 has also been held by the ECtHR to include a procedural obligation. This requires Convention states to carry out an effective and prompt investigation where individuals have died as a result of actions of its agents. As the ECtHR explained in *McCann v The UK* (1995),

‘The Court confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State’s general duty under Article 1 (art. 2+1) of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.’⁵²

The article 2 procedural duty has also been held to be separate from and independent of the article 2 substantive duty⁵³.

39. The third exception to the general approach to the Convention’s temporal jurisdiction arises where matters that occurred prior to the Convention coming into force in respect of a Convention state may come within the scope of the article 2 procedural duty to investigate. This exception was established by the ECtHR in *Šilih v Slovenia* (2009)⁵⁴ (**Šilih**). It established a three-stage test to determine whether this exception applied. The test from **Šilih** is most succinctly summarised in the ECtHR’s Grand Chamber decision in *Janoweic v Russia* (2013)⁵⁵ (**Janoweic**).

⁵² *McCann v The United Kingdom* - 18984/91 - Grand Chamber Judgment [1995] ECHR 31; (1995) 21 EHRR 97 at [161].

⁵³ See, for instance, *Aliyeva v Azerbaijan* - 35587/08 - Chamber Judgment [2014] ECHR 854 at [58].

⁵⁴ *Šilih v Slovenia* - 71463/01 [2009] ECHR 571; (2009) 49 EHRR 37 at [162]-[163].

⁵⁵ *Janoweic v Russia* - 55508/07 29520/09 - Grand Chamber Judgment [2013] ECHR 1003; (2014) 58 EHRR 30; also see *Aliyeva v Azerbaijan* - 35587/08 - Chamber Judgment [2014] ECHR 854 at [58]-[60].

Janoweic – the three-stage test for the article 2 procedural exception to temporal jurisdiction

In *Janoweic*, the ECtHR’s Grand Chamber considered the Katyn massacre in 1940, where Polish soldiers and officials were killed and buried in the Katyn forest. The killings were self-evidently outside the temporal jurisdiction of the Convention applying its general approach. They took place before the Convention was drafted never mind ratified. However, the issue in the proceedings was the application, or not, of the article 2 procedural duty to investigate the killings. In considering article 2, the Grand Chamber summarised the approach to be taken to its temporal scope, as it had been set out in *Šilih*, as follows⁵⁶:

‘The criteria laid down in paragraphs 162 and 163 of the Šilih judgment ... can be summarised in the following manner. Firstly, where the death occurred before the critical date, the Court’s temporal jurisdiction will extend only to the procedural acts or omissions in the period subsequent to that date. Secondly, the procedural obligation will come into effect only if there was a “genuine connection” between the death as the triggering event and the entry into force of the Convention. Thirdly, a connection which is not “genuine” may nonetheless be sufficient to establish the Court’s jurisdiction if it is needed to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective way. The Court will examine each of these elements in turn...

The Court reiterates at the outset that the procedural obligation to investigate under Article 2 is not a procedure of redress in respect of an alleged violation of the right to life that may have occurred before the critical date. The alleged violation of the procedural obligation consists in the lack of an effective investigation; the procedural obligation has its own distinct scope of application and operates independently from the substantive limb of Article 2... Accordingly, the Court’s temporal jurisdiction extends to those procedural acts and omissions which took place or ought to have taken place in the period after the entry into force of the Convention in respect of the respondent Government.’

The ECtHR would go on to clarify in *Chong v United Kingdom* (2018)⁵⁷ (**Chong**) that for those countries where there is a difference between the date on which the Convention came into force and the date on which right of individual petition to the ECtHR commenced, the critical date is the latter. For the UK therefore, the critical date is not the date on which the UK ratified the Convention and it came into force, i.e., 3 September 1953. It is the date on which the UK accepted the right of individual petition, which was 14 January 1966⁵⁸.

⁵⁶ *Janoweic* at [141]-[142].

⁵⁷ *Chong v United Kingdom* - 29753/16 (*Inadmissible - First Section*) [2018] ECHR 802.

⁵⁸ See Chapter One at [16].

For there to be a *'genuine connection'* between the event that occurred before the Convention came into force and the critical date there had to be a reasonably short period of time. That period was, generally, not to exceed ten years, although in exceptional circumstances (which were substantively undefined), it was said that it might exceed that length of time⁵⁹. Additionally, for there to be a *'genuine connection'* a significant proportion of any investigation into the loss of life had to have taken place after the Convention came into force⁶⁰. Any such investigation had to be undertaken within the *'framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party.'*⁶¹ Inquiries therefore carried out to establish *'historical truth'* were thus not capable of satisfying the *'genuine connection'* test.

The *'convention values'* test was, however, freestanding. It did not require there to be a *'genuine connection'* between the pre-Convention event and the Convention coming into force. It could only be relied in *'extraordinary situations'*, such as those which *'negated ... the very foundations of the Convention'*. Examples of where that would arise were cases of

*'... serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments...'*⁶²

40. The ECtHR's approach to the Convention's temporal jurisdiction can be summarised as follows.

59 *Janoweic* at [145]-[146].

60 *Janoweic* at [147].

61 *Janoweic* at [143].

62 *Janoweic* at [150]-[151].

Summary of the ECtHR's approach to the Convention's temporal jurisdiction

- The Convention's temporal jurisdiction is, generally, prospective. Its obligations therefore only apply to Convention states from the date on which the Convention is in force.
- There are three exceptions to this general rule. Where an exception applies the temporal jurisdiction will apply to matters that occurred before the Convention came into force.
- The first exception applies where an event began before the Convention is in force and continues after it enters into force. The Convention applies to the whole of that continuing event.
- The second exception applies where events that took place before the Convention came into force need to be taken into account in order to enable an alleged violation of the Convention, which took place after it came into force, to be understood properly.
- The third exception arises where:
 - a death has occurred before the Convention came into force and the article 2 procedural duty applies to a Convention state's acts or omissions concerning that duty that arose after either the date on which the Convention came into force or the Convention state accepted the right of individual petition (the critical date); and (more problematically)
 - there is a genuine connection between the death and the critical date; or
 - if there is no genuine connection, it is necessary in extraordinary circumstances to carry out the procedural duty in order to give effect to the guarantees and underlying values of the Convention.

(5) The Convention's Extra-Territorial Scope – after *Al-Skeini v The UK, Hassan and Jaloud*

41. The focus of the ECtHR's development of the Convention's extra-territorial jurisdiction following ***Al-Skeini v the UK, Hassan*** and ***Jaloud*** has been on the article 2 procedural duty.

42. In *Güzelyurtlu v Cyprus & Turkey* (2019)⁶³ (***Güzelyurtlu***), the ECtHR's Grand Chamber considered the Convention's extra-territorial jurisdiction where a family who had moved from the 'Turkish Republic of Northern Cyprus' (i.e., the Turkish-controlled north of Cyprus) to live in Larnaca in Cyprus. The claim arose from the deaths of Elmas, Zerrin and Eylül Güzelyurtlu. They were killed in Cyprus. The alleged killers were, subsequently, believed to be in the Turkish-controlled north of Cyprus. As such the Cypriot authorities were unable to investigate the killing effectively, nor could they execute arrest warrants there. Given that the Cypriot authorities could not investigate, the issue was whether Turkey was under a duty to investigate the killing despite it occurring outside the territory it controlled. The Grand Chamber held that the article 2 procedural duty did arise in this case, i.e., there was extra-territorial jurisdiction.
43. In determining whether the article 2 procedural duty supported a finding that extra-territorial jurisdiction arose, the ECtHR adopted an approach analogous to one it had taken to the development of its approach to the Convention's temporal jurisdiction.
44. First, it noted, by reference to ***Šilih*** and ***Janowiec***, that the article 2 procedural duty was independent of its substantive duty⁶⁴. As such, it was a duty that could apply where a death occurred outside the national territory of a Convention state; as it could apply to matters that occurred before its temporal jurisdiction arose⁶⁵.
45. Secondly, to establish extra-territorial jurisdiction based on the article 2 procedural duty it was necessary to establish a jurisdictional link between the Convention state and the applicant, in this case the victims' relatives. A jurisdictional link would arise where the Convention state commenced its own criminal investigation into a death that occurred outside its national territory. This approach is analogous to that taken to establishing whether there is a 'genuine connection' when establishing the Convention's temporal scope. Extra-territorial jurisdiction also arose in this case due to Turkey having *de facto* control over the north of Cyprus. It thus also satisfied the '*effective control*' basis of the Convention's extra-territorial jurisdiction⁶⁶.

63 *Güzelyurtlu v Cyprus & Turkey* - 36925/07 (Judgment: Preliminary objection dismissed: Grand Chamber) [2019] ECHR 100.

64 See further below.

65 ***Güzelyurtlu*** at [189].

66 ***Güzelyurtlu*** at [196].

- 46.** Additionally, the ECtHR stated that extra-territorial jurisdiction could arise under the article 2 procedural duty where there was no criminal investigation to establish a jurisdictional link. While it did not specify that establishing jurisdiction in such a case required there to be an extraordinary situation, as is the case for temporal jurisdiction, it made clear that ‘*special features*’ were needed. It did not, however, provide any guidance on what those special features might be, other than to note that the deceased’s nationality was not a special feature⁶⁷.
- 47.** The ECtHR’s Grand Chamber considered the question of ‘special features’ that could establish the jurisdictional link again in *Hanan v Germany* (2021)⁶⁸ (**Hanan**), a case brought by the father of two Afghan children who were killed as a result of an airstrike, authorised by German military authorities forming part of the International Security Assistance Force in Afghanistan. In considering whether the article 2 procedural duty applied, the Grand Chamber explained that a jurisdictional link based on special features may arise in a number of circumstances. Where it did so, the article 2 procedural duty was confirmed to apply ‘*in extra-territorial situations outside the legal space of the Convention.*’ *It was also stated to apply ‘in respect of events occurring during the active phase of an armed conflict.’*⁶⁹ It went on to identify a number of special features that, on the facts of that case, established a jurisdictional link.

67 *Güzelyurtlu* at [183] and [190].

68 *Hanan v Germany* - 4871/16 (*Judgment : Remainder inadmissible: Grand Chamber*) [2021] ECHR 131.

69 *Hanan* at [136].

Special features established a jurisdictional link applied in *Hanan*

The ECtHR's Grand Chamber identified the following special features that established a jurisdictional link in *Hanan*⁷⁰, which gave rise to the extra-territorial jurisdiction of the Convention regarding the article 2 procedural duty, which arose notwithstanding the fact that the article 2 substantive duty did not arise:

- the Convention state is obliged by customary IHL to carry out an investigation. For instance, as noted in *Hanan* 'the duty under customary international humanitarian law ... that States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects'⁷¹.
- the national territorial authorities that would ordinarily have jurisdiction are unable, for legal reasons, to institute legal proceedings themselves.
- the Convention state's authorities are under a domestic law duty to conduct a criminal investigation (and had not done so. If they had done so the jurisdictional link would already have been triggered).
- the criminal offences that would be subject to the breach of customary IHL and/or domestic law would have been serious in nature.
- the majority of Convention states are under domestic law duties to investigate alleged war crimes or wrongful deaths by their armed forces.

That there were practical limits to Germany's ability to carry out an article 2 procedural investigation did not exclude the application of the duty. The practical limits were, however, relevant to an assessment of the nature and scope of any investigation carried out under article 2⁷².

⁷⁰ *Hanan* at [137]-[141].

⁷¹ *Hanan* at [83]. In considering the application the extra-territorial jurisdiction of the Convention, the ECtHR has also variously taken into account the International Covenant on Civil and Political Rights, and its duty to investigate human rights abuses (article 6), see for instance *Al-Skeini v The UK* at [90]-[92]; the First, Second, Third and Fourth Geneva Conventions, not least in respect of: the duty to investigate war crimes; the duty to investigate the deaths of prisoners of war; the duty to investigate the death or serious injury to internees, see for instance *Al-Skeini v The UK* at [90]-[91]; the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, see *Hanan* at [86].

⁷² *Hassan* at [145].

- 48.** In *Georgia v Russia (No. 2)* (2021)⁷³, the ECtHR's case law evolved further. It explained that while the substantive obligations under the Convention did not apply to active military obligations because there is no effective control during active conflict, where a jurisdictional link arose, the article 2 procedural duty to investigate may still arise.
- 49.** The ECtHR's approach to the extra-territorial application of the article 2 procedural duty can be summarised as follows.

Summary of the ECtHR's approach to the Convention's territorial jurisdiction in respect of the article 2 procedural duty

- The ECtHR case law has developed the application of the Convention's extra-territorial jurisdiction in respect of the article 2 procedural duty in a manner analogous to the approach it has taken to the temporal application of that duty.
- The article 2 procedural duty has extra-territorial effect, including outside the Convention's legal space, where there is a jurisdictional link between the Convention state and the area outside its national territory where a death occurred.
- A jurisdictional link can arise where the Convention state starts a criminal investigation into the death or if no such investigation has commenced there are special features that create the link.
- The article 2 procedural duty can also arise where the Convention state had effective control over the area where the death took place or where it had state agent control over the individual killed.

(6) Extra-Territorial and Temporal Jurisdiction of the HRA – the Parliamentary Context

- 50.** At the time the HRA was enacted the ECtHR's approach to both the Convention's extra-territorial and temporal jurisdiction was generally undeveloped⁷⁴.

73 *Georgia v Russia (No. 2)* - 38263/08 (Judgment: Preliminary objections dismissed: Grand Chamber) [2021] ECHR 58 at [126] and [328].

74 Although see [12] regarding *Loizidou v Turkey* (1995).

51. There is very little, if any, discussion of the extra-territorial jurisdiction of the HRA in the parliamentary debates. There is a suggestion in the Bar Council of England and Wales' response to the *CfE* that the Government implicitly accepted the extra-territorial jurisdiction of the HRA in rejecting an amendment to the HRA during those debates that would have excluded the armed forces from the definition of 'public body'⁷⁵. Whether or not that is correct, Lord Bingham in *Al-Skeini*⁷⁶ when considering the question of extra-territorial scope, noted that neither in the Rights Brought Home White Paper nor in the parliamentary debates was the question of extra-territorial scope 'squarely addressed'. What material there was did not therefore support or help resist the application of the general presumption of statutory interpretation that, unless the contrary intention was apparent, legislation was not intended to have extra-territorial effect⁷⁷.
52. There was also little discussion of the HRA's temporal scope. What there was, however, did make clear that it was, other than in one respect, not intended to have retrospective effect. During the debates concerning what became section 22 of the HRA, Lord Williams of Mostyn, the Parliamentary Under-Secretary of State, explained that the HRA was only to apply to acts committed after it came into force, except in one defined situation. As he put it,
- 'Clause 22 makes express provision for the circumstances in which another provision of the Bill – Clause 7(1)(b) – may apply to acts committed before it comes into force, and that implies that, in the absence of express provision to the contrary, the Bill should not have retrospective effect.'*⁷⁸
53. This provision is in the following terms.

Section 22(4) of the HRA

'Section 22 Short title, commencement, application and extent.'

(4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.'

Clause 7(1)(b) was enacted as section 7(1)(b). It provides that

'Section 7 Proceedings

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

...

*(b) rely on the Convention right or rights concerned in any legal proceedings,
but only if he is (or would be) a victim of the unlawful act.'*

⁷⁵ The Bar Council of England and Wales, *Submission to the Independent Human Rights Act Review Panel* at [121]-[122].

⁷⁶ *Al-Skeini* at [23]. Also see Lord Rodger at [43].

⁷⁷ *Al-Skeini* at [11].

⁷⁸ Lord Williams of Mostyn, Hansard, HoL, 27 November 1997, Vol. 583, col. 1104, in J. Cooper & A. Marshall-Williams, at 207.

(7) The HRA's Territorial Jurisdiction – the Courts' Approach

54. The starting point for the UK Courts' treatment of the HRA's territorial scope is ***Al-Skeini***⁷⁹. The specific issue in the case was whether the article 2 procedural duty required there to be an investigation into deaths said to have been caused by members of the UK armed forces in Iraq, i.e., its applications to individuals other than UK nationals or members of the UK armed forces. It was not apparent from the HRA whether it, and particularly section 6 as it applied to public authorities, was intended to apply outside the UK, i.e., to apply Convention rights through the HRA to individuals outside the UK's domestic territory. The House of Lords (Lord Bingham dissenting) held that the HRA had extra-territorial effect.

55. The reasoning, set out by Lord Rodger, was that the HRA, and particularly its sections 6 and 7, were to provide the means by which individuals could enforce their Convention rights domestically. If the HRA were not to have extra-territorial effect, this aim, which was Parliament's '*central purpose*' in enacting it, would be frustrated. Without the HRA having such an application, individuals would only be able to enforce the extra-territorial application of their Convention rights consistently with ***Bankovic*** before the ECtHR⁸⁰. Interpreting the HRA otherwise would,

*'offend against the most elementary canons of statutory construction which indicate that, in case of doubt, the Act should be read so as to promote, not so as to defeat or impair, its central purpose. If anything, this approach is even more desirable in interpreting human rights legislation.'*⁸¹

We note that Lord Rodger's reasoning operates on the basis that Parliament did not intend there to be any exceptions to the HRA's '*central purpose*'.

56. Having held that the HRA's territorial, and extra-territorial jurisdiction, was to be determined by reference to the Convention's territorial jurisdiction, the House of Lords in ***Al-Skeini*** went on to apply ***Bankovic*** to decide the question whether Iraqi citizens allegedly killed by UK armed forces were within the UK's jurisdiction for the purposes of the HRA. The House of Lords concluded they did not. By accepting that the territorial application of the HRA depended upon the territorial jurisdiction of the Convention, the House of Lords necessarily accepted that, should the ECtHR revise its approach to the latter, then the HRA's territorial jurisdiction would correspondingly alter. That came to pass in ***Al-Skeini v The UK***, where the ECtHR, by going beyond its approach in ***Bankovic***, not only altered the nature of the Convention's territorial jurisdiction, but also that of the HRA.

⁷⁹ Although note, ***R (Quark Fishing Ltd) v SSFCA (No 2)*** [2005] UKHL 57, [2006] 1 AC 529 at [35]-[37], which held that the HRA did not apply to the UK's overseas territories in contrast to the Convention under its article 56.

⁸⁰ ***Al-Skeini*** at [56]-[60].

⁸¹ ***Al-Skeini*** at [56].

57. Lord Bingham, in his dissent in ***Al-Skeini***, took a different approach to the HRA’s territorial application. In particular, he took the view that given the extent to which UK armed forces had been involved in action overseas from 1953 to 1997 and the possibility that they would be post-1998, Parliament could not be taken, in the absence of express provision as to extra-territorial application, to have intended to rebut the statutory presumption against such a finding⁸². He further noted the danger of basing a conclusion that Parliament intended the HRA to have extra-territorial effect on the assumption that the ECtHR had only developed the scope of its territorial effect to a limited extent in the absence of any guarantee that it would not develop it further; a conclusion that in the light of post-***Bankovic*** developments might be said to be prescient⁸³.
58. Lord Bingham concluded by noting that restricting the HRA’s territorial scope did not leave UK armed forces outside the scope of any legal jurisdiction. As he put it, in a powerful passage, they remained subject to a variety of legal instruments, which it could be said were, unlike the ECtHR, specifically designed for armed conflict.

Lord Bingham’s dissenting judgment on the HRA’s extra-territorial jurisdiction⁸⁴

‘... I would accordingly hold that the HRA has no extra-territorial application. A claim under the Act will not lie against the Secretary of State based on acts or omissions of British forces outside the United Kingdom. This does not mean that members of the British armed forces serving abroad are free to murder, rape and pillage with impunity. They are triable and punishable for any crimes they commit under the three service discipline Acts already mentioned, no matter where the crime is committed or who the victim may be. They are triable for genocide, crimes against humanity and war crimes under the International Criminal Court Act 2001.’

59. While questions concerning the extra-territorial application of Convention rights was considered by UK Courts again in, for instance, *R (Gentle) v the Prime Minister* (2008)⁸⁵, *R (Al-Saadoon) v Secretary of State for Defence* (2009)⁸⁶ and *R (Smith) v Oxfordshire Assistant Deputy Coroner* (2010)⁸⁷, the next significant development was *Smith v Ministry of Defence* (2013)⁸⁸ (***Smith***). Consideration here related to the application of Convention rights through the HRA to members of the UK armed forces serving overseas.

82 *Al-Skeini* at [24].

83 *Al-Skeini* at [25].

84 *Al-Skeini* at [26].

85 *R (Gentle) v the Prime Minister* [2008] UKHL 20; [2008] 1 AC 1356.

86 *R (Al-Saadoon) v Secretary of State for Defence* [2009] EWCA Civ 7; [2010] QB 486.

87 *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29; [2011] 1 AC 1.

88 *Smith v Ministry of Defence* [2013] UKSC 41; [2014] AC 52.

Smith

The claim arose from the deaths of three members, and serious injuries to two members, of the UK armed forces in Iraq. There were two situations to which the claims related: first, deaths and injuries caused by ‘friendly fire’, known as the Challenger claims; and secondly, deaths caused by IED devices whilst soldiers were outside UK bases in Iraq. This was known as the Snatch Land Rover claim.

The Challenger claims were pleaded in negligence on the ground that the army provided its soldiers with inadequate equipment and training. The Snatch Land Rover claim was based on article 2 of the Convention. It was said that the armed forces failed to discharge its substantive obligation under that article by failing to take necessary measures to prevent harm. A further claim in negligence was also brought in respect of one of the soldiers on whose behalf an article 2 claim was made.

The Supreme Court held that the negligence claims should not be struck out on the basis of combat immunity and the Snatch Land Rover claim, i.e., the article 2 claim, should not be struck out. Lord Hope gave the leading decision on those issues.

In respect of a further issue, whether the soldiers were within the UK’s jurisdiction, the Court held unanimously following **Al-Skeini** that they were. Only this issue is within IHRAR’s ToR⁸⁹.

60. On the question of territorial jurisdiction, the Supreme Court concluded that **Bankovic** was no longer authoritative. **Al-Skeini v The UK** was now determinative of the approach to be taken to the Convention’s extra-territorial jurisdiction. Applying it, the UK armed forces in Iraq were within the scope of article 2⁹⁰. The consequence of this was noted by Lloyd-Jones LJ (as he then was) in *Al-Saadoon v The Secretary of State for Defence* (2016)⁹¹.

⁸⁹ On the issues outside the ToR and the problems identified with them see Lord Mance’s powerful dissenting judgment, **Smith** at [102] and following. Also see R. Ekins, T. Morgan and T. Tugendhat, *Clearing the Fog of Law*, (Policy Exchange, 2015). We note that the other issues could, in principle, come within the scope of the ToR if the HRA was or was ever a factor in any decision not to use the power in section 2 of the Crown Proceedings (Armed Forces) Act 1987 to revive section 10 of the Crown Proceedings Act 1947, i.e., exclusions from liability in tort in cases involving the armed forces.

⁹⁰ **Al-Skeini** at [27]-[55].

⁹¹ *Al-Saadoon v The Secretary of State for Defence* [2016] EWCA Civ 811; [2017] 2 WLR 219. This decision also provided guidance on when application of **Al-Skeini v The UK**. See further the comments on **Smith and Al-Skeini** in Centre for Military Justice, *Submission to the Independent Human Rights Act Review Panel*, at [7]-[22].

Lloyd-Jones LJ on the effect of *Al-Skeini* on territorial jurisdiction⁹²

'... the combined effect of the exceptional cases of extra-territorial jurisdiction accepted by the Grand Chamber in Al-Skeini represents a potentially massive expansion of the scope of application of the Convention, the full implications of which remain to be worked out. It is already apparent that the Convention has, as a result, entered a field which was already regulated by international humanitarian law. In Hassan v United Kingdom a Grand Chamber has had to consider the compatibility of these two systems of law and the implications of their co-existence for substantive Convention rights under Article 5 ECHR. Whether in future Al-Skeini may come to be considered a false step in the development of the law remains to be seen. For present purposes it is sufficient to state that it is an authoritative decision of a Grand Chamber of the Strasbourg court on the scope of the application of the Convention which has been accepted as such by the Supreme Court in [Smith]...'

61. The UK's approach to the extra-territorial application of the HRA can be summarised as follows.

Summary of the UK Courts' approach to the HRA's territorial jurisdiction

- The HRA's territorial and extra-territorial jurisdiction is to be determined by the ECtHR's interpretation of the Convention's territorial jurisdiction. This approach is to be taken in order to give effect to the HRA's primary purpose of giving effect to Convention rights in domestic law.

62. The consequence of accepting that the ECtHR's case law determines the scope of the HRA's extra-territorial jurisdiction, however, marks a significant expansion of the HRA's scope, contrasted from that applicable at the time it was enacted. Its expansion in this way has posed a number of significant problems for UK armed forces and for the police services. As was pointed out at the Armed Forces Roundtable:

*'It can be difficult to carry out Article 2 compliant investigations in an armed conflict. The practical realities of war are often overlooked, and Article 2 does not seem to have been developed with a military application in mind. The recent ECtHR judgments of Hanan v Germany and Georgia v Russia No.2 have complicated the picture in relation to the extra-territorial jurisdiction of Article 2.'*⁹³

⁹² *Al-Saadoon v The Secretary of State for Defence* [2016] EWCA Civ 811; [2017] 2 WLR 219 at [33].

⁹³ UK Armed Forces and the Ministry of Defence Roundtable Minutes (23 April 2021) at 2 – 3.

By complicating the picture, i.e., making the application of the article 2 procedural duty uncertain, the Armed Forces further noted the difficulty that raises for their compliance with the rule of law. As generally, here more so given the acute nature of the Armed Forces role and responsibilities, there is a need for clarity and certainty in the law and its application, which is lacking, in order to promote an effective principle-based approach to legal compliance. Similar practical problems were also highlighted by the UK police services in respect of their officers who have to take part in overseas investigations⁹⁴.

- 63.** Although the principle set out in **Hassan** has assisted in respect of the relationship between article 5 of the Convention and IHL (reflecting another example of successful dialogue between UK Courts and the ECtHR), the position remains uncertain and clarity is again needed:

*'In 2017, in Mohammed & Others v Ministry of Defence [2017] UKSC 1; [2017] UKSC 2, the Supreme Court followed Hassan and extended its principle - that international humanitarian law can modify the Convention rights - to non-international armed conflicts and pursuant to a UN Security Council Resolution. The Supreme Court held that, despite the absence of any ground for detention in Article 5, there was power to detain under UNSCRs in a non-international armed conflict in excess of 96 hours where necessary "for imperative reasons of security". This is a further example of dialogue with the ECtHR and will likely continue, and it remains to be seen whether the ECtHR court will follow the Supreme Court's reasoning extending the principles of Hassan to non-international armed conflicts.'*⁹⁵

(8) The HRA's Temporal Jurisdiction – the Courts' Approach

- 64.** The UK Courts have taken two approaches to the HRA's temporal jurisdiction. The first followed the approach indicated in the parliamentary debates. The second followed the approach taken in **Šilih** and **Janoweic**.

⁹⁴ UK Police Services Roundtable Minutes (13 April 2021) at 2.

⁹⁵ UK Government, *Submission to the Independent Human Rights Act Review Panel*, at [75].

65. The initial approach was articulated by the House of Lords in *Re McKerr (Northern Ireland)* (2004)⁹⁶ (**Re McKerr**). It made clear that the HRA, including the article 2 procedural duty, was not intended to have retrospective effect. As Lord Hoffmann put it, rejecting the view that the article 2 duty did apply retrospectively, if it had such effect that HRA would in make it necessary *‘in principle ... to investigate the deaths by state action of the Princes in the Tower.’*⁹⁷ That was the position domestically under the HRA irrespective of the position as it applied to the UK in international law under the Convention. The article 2 procedural duty only arose therefore if the event triggering it arose after the HRA came into effect. In that case, the event said to trigger the article 2 procedural duty (the death of Mr McKerr’s father) arose before the HRA came into effect.

The position in *Re McKerr*

The approach taken in **Re McKerr** was succinctly summarised by Lord Neuberger PSC in **Keyu**⁹⁸

‘... It is clear from section 22(4) that the 1998 Act was not intended to have retrospective effect. And the contention is supported by opinions given by all five members the House of Lords in In re McKerr [2004] UKHL 12, [2004] 1 WLR 807, a case concerned with the duty to hold an inquiry or inquest into a suspicious death: see paras 20-23, 48, 67, 79-81 and 88-89 per Lord Nicholls, Lord Steyn, Lord Hoffmann, Lord Rodger and Lord Brown respectively. This, Lord Hoffmann explained that the House of Lords had “decided on a number of occasions that the [1998] Act was not retrospective”, and that accordingly there was, at least domestically, no “ancillary right to an investigation of [a] death [of] a person who died before the Act came into force”.’

66. Additionally, the Supreme Court took a different, and it might be suggested more logical, approach to the article 2 procedural duty than that taken by the ECtHR. In *R (Gentle) v Prime Minister* (2008)⁹⁹ Lord Bingham expressed the view that the article 2 procedural duty was dependent upon there being an applicable substantive right under the Convention. In the absence of the substantive right, the procedural duty could not arise. As he put it,

*‘It is the procedural obligation under article 2 that the appellants seek to invoke in this case. But it is clear (see para 3 of Middleton, quoted above, Jordan v United Kingdom (2001) 37 EHRR 52, para 105; Edwards v. United Kingdom (2002) 35 EHRR 487, para 69; In re McKerr [2004] UKHL 12, [2004] 1 WLR 807, paras 18-22) that the procedural obligation under article 2 is parasitic upon the existence of the substantive right, and cannot exist independently.’*¹⁰⁰

⁹⁶ *Re McKerr (Northern Ireland)* [2004] UKHL 12; [2004] WLR 807.

⁹⁷ **Re McKerr** at [69].

⁹⁸ **Keyu** at [93].

⁹⁹ *R (Gentle) v Prime Minister* [2008] UKHL 20; [2008] 1 AC 1356.

¹⁰⁰ *R (Gentle) v Prime Minister* [2008] UKHL 20; [2008] 1 AC 1356 at [6].

The underpinning rationale set out by Lord Bingham was that the procedural right was implied into article 2 to ensure that the substantive right could be given proper effect. As noted above, in **Šilih** and **Janoweic** the ECtHR decided that the article 2 procedural duty is an independent, freestanding, duty. There is considerable force in the position outlined by Lord Bingham. It can fairly be questioned what work there is for the procedural duty independently of the substantive obligation, other than to provide a means for giving the Convention retrospective effect.

67. The original position was reconsidered by the Supreme Court in the light of the ECtHR's decision in **Šilih**. In *Re McCaughey* (2011)¹⁰¹ (**Re McCaughey**), the approach in **Re McKerr** was endorsed. Where a death, which triggered the article 2 procedural duty, occurred before the HRA came into force, neither the substantive obligation under article 2 (the right to life) nor the procedural duty arose. That was because the HRA did not have retrospective effect. However, in that case an inquest into the deaths of Martin McCaughey and Dessie Grew was to be held after the HRA came into force. That inquest did therefore come within the HRA's temporal jurisdiction. Consequently, it would have to comply with the requirements of the, freestanding and independent, article 2 procedural duty.

Lord Hope on the application of the article 2 procedural duty in *Re McCaughey*¹⁰²

*'... The first is whether article 2 of the European Convention on Human Rights as interpreted in *McCann v United Kingdom* (1995) 21 EHRR 97, para 161 gives rise to a procedural obligation on the state to carry out an effective public investigation into the circumstances of a death where agents of the state are, or may be, in some way implicated, even though because the death occurred before 2 October 2000 the substantive obligation does not apply to it in domestic law. The second is whether, if there is no such obligation in domestic law but the state nevertheless decides to carry out an investigation into a pre-commencement death of that kind, the investigation which it carries out must meet the procedural requirements of article 2 as explained in *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182.*

¹⁰¹ *Re McCaughey* (Northern Ireland Human Rights Commission intervening) [2011] UKSC 20, [2012] 1 AC 725.

¹⁰² *Re McCaughey* at [65] and [75]-76].

... As to the first question, I see no reason to disagree with the way it was answered in *McKerr*. One must distinguish between rights arising under the Convention and rights created by the Act by reference to the Convention. The effect of section 22(4) of the Act is that the rights created by the Act came into existence for the first time on 2 October 2000: Lord Nicholls in *McKerr*, para 25. The right to an investigation under the Act in domestic law is confined to deaths which, having occurred after the commencement of the Act, may be found to be unlawful under the Act: Lord Rodger in *McKerr*, para 81. The “trigger” that gives rise to the procedural obligation under the Convention is prevented from operating in domestic law in the case of a pre-commencement death by the bar that has been applied by section 22(4). I agree with Lord Rodger (see para 161, below) that, if it were otherwise, a time limit to identify which deaths trigger the duty in domestic law, and which do not, would have had to have been written into the Act. There is none, and I do not think that we should be deflected from holding fast to that position by the way the Strasbourg court has attempted to work out the limits of its own temporal jurisdiction for its own purposes in para 163 of *Šilih*. The concept of a temporal connection with a pre-commencement event, so as to bring the event itself within the scope of domestic law, is entirely alien to the system that the Act lays down.

As I see it, however, the second question can and does admit of a different answer. We are told by Strasbourg that the procedural obligation, as now understood, has a life of its own as it is detachable from the substantive obligation. Furthermore, there is no need for a trigger to bring the obligation into operation in this case, as it has been decided that an inquest is going to be held into these deaths. The objection that this would be giving retrospective operation to section 6 of the 1998 Act does not arise. The question whether the inquests must satisfy the procedural requirements of article 2 otherwise they will be unlawful in terms of that section is being directed to something that has yet to take place. The answer to it is not to be found in *McKerr*, as the House treated the procedural and the substantive obligations in that case as inseparable.’

68. While reaching the same conclusion as Lord Hope (and the other members of the majority) Lord Phillips PSC went further. He indicated that *Šilih* may require the UK Courts to overrule the conclusion reached in *Re McKerr*. Lord Kerr and Lord Dyson both took the view that the consequence of the ECtHR’s decision in *Šilih* was that the House of Lords’ conclusion in *Re McKerr* was no longer valid¹⁰³. Whether it did remain good law, however, did not need to be decided.

¹⁰³ *Re McCaughey* at [61]-[63] (Lord Phillips PSC); at [216]-[219] (Lord Kerr); at [110]-[114] and [132]-[137] (Lord Dyson). And see *Keyu* at [95]-[97], where Lord Neuberger PSC summarises their approach.

69. Lord Rodger did, however, provide a powerful dissent in **Re McCaughey**. He first noted that the article 2 procedural duty was a recent development of the ECtHR, stemming from *McCann v UK* in 1995. He then doubted the approach taken in **Šilih** (the ECtHR's reasoning in that case was also generally criticised by the majority as well). Finally, he made clear that the temporal scope of the HRA could not depend upon the view taken of the scope of specific articles of the Convention. Parliament, he noted, had taken the policy decision that the HRA should not be retrospective in its effect save as provided by section 22(4) HRA. If it had taken the view that it was to have such an effect it would have drafted section 22(4) differently, not least to include a time-limit on any retrospective application. Moreover, he took the view that even if **Šilih** had been decided prior to 1998, that Parliament would not have afforded the HRA retrospective effect¹⁰⁴. From a principled perspective, there is much force in Lord Rodger's dissent.

Lord Rodger's dissenting judgment in *Re McCaughey*¹⁰⁵

*'This court is concerned with what Parliament chose to enact, rather than with what it might have chosen to enact. Since the only transitional provision in the HRA is section 22(4), the inevitable inference is that, with this exception, all the provisions, including section 6(1) and the Convention rights in Schedule 1, were intended to apply only to events occurring on or after 2 October 2000. So there was to be no article 2 Convention right to an inquiry into a death that occurred before the Act commenced. If – as the House of Lords held in *McKerr* – that is indeed the correct interpretation of the temporal application of the HRA when it was passed, it is both incoherent and impossible to suggest that its temporal application can have been altered by the poorly reasoned and unstable decision of the Strasbourg court on the Convention in *Šilih* more than ten years later.'*

The ECtHR has, as noted above, affirmed and built upon its judgment in **Šilih**, such that it now forms part of a clear and constant line of decisions¹⁰⁶.

70. The most recent consideration of the HRA's temporal jurisdiction was set out by the Supreme Court in **Keyu**, which formed the basis of the application to the ECtHR, and its decision in, **Chong**, noted above¹⁰⁷. The case concerned whether the UK was under a duty to hold a public inquiry into the deaths, caused by UK armed forces, of 26 individuals in Malaysia in 1948. The Supreme Court reviewed the approach to the Convention's and HRA's temporal jurisdiction in the light of **Šilih** and **Janoweic**.

¹⁰⁴ *Re McCaughey* at [157]-[162].

¹⁰⁵ *Re McCaughey* at [160].

¹⁰⁶ See Chapter Two.

¹⁰⁷ See footnote 57.

71. The Supreme Court accepted that the ECtHR case law made clear that the Convention’s temporal jurisdiction was ordinarily prospective, but that there were exceptions to that general rule¹⁰⁸. The exceptions were those articulated in **Šilih** and **Janoweic**, albeit there was a disagreement on what date was relevant to determine the ‘critical date’ for the purposes of establishing whether there was a ‘genuine connection’ between a death that occurred prior to the Convention coming into force and the date on which it came into force¹⁰⁹. That later question was answered by the ECtHR in **Chong**, as noted above. The main exception to the general rule was that developed in **Šilih** and **Janoweic**: the application of the freestanding and independent article 2 procedural duty.
72. The question of whether **Re McKerr** remained good law, and thus the approach to the HRA’s temporal jurisdiction, did not need to be decided in **Keyu**, however¹¹⁰. Having reviewed **Re McKerr** and **Re McCaughey**, Lord Neuberger PSC while noting that if the Supreme Court aligned the approach under the HRA to that taken by the ECtHR it would ensure that the two would march in step, did not decide the issue. He did not do so as: the matter was not directly in issue; there were differences in approach in the two previous decisions; and there was no clear and consistent view on how to decide the point by the members of the Court in **Keyu**¹¹¹.
73. Lord Kerr considered three alternative approaches to the question of the HRA’s retrospective application¹¹². First, he agreed with Lord Neuberger PSC that it was unnecessary for the Court to decide whether **Re McKerr** remained good law. He did, however, explain that his concerns about **Re McKerr** in **Re McCaughey** did not relate to its approach to the HRA’s temporal jurisdiction, *‘It was because the detachable nature of the procedural duty under article 2 was clearly recognised for the first time in Šilih that the decision in McKerr could no longer be followed. It was not because it was considered that the pronouncements in that case about the non-retroactive effect of the HRA were wrong. What Šilih showed was that the assertion in McKerr that all the obligations arising under article 2 were to be treated as parts of a single whole could no longer stand. Of course, it was theoretically open to this court in McCaughey to refuse to follow the finding in Šilih that the procedural duty under article 2 to investigate suspicious deaths was detachable, but, absent such a decision, the need to revise McKerr (without rejecting it in its entirety) was clear.’*¹¹³

108 **Keyu** at [68].

109 **Keyu** at [81]-[89] (Lord Neuberger PSC); at [211]-[228] (Lord Kerr); at [299] (Lady Hale).

110 **Keyu** at [97]-[98].

111 **Keyu** at [97].

112 **Keyu** at [243]-[258].

113 **Keyu** at [248].

- 74.** Lord Kerr went on to reject an approach treating the temporal jurisdiction of the Convention and the HRA as coterminous¹¹⁴. Just because the ECtHR did not have temporal jurisdiction under the Convention did not mean the UK Courts under the HRA would not have such jurisdiction. That being said, he acknowledged that any retrospective temporal jurisdiction that arose under the HRA could not be open-ended, in the same way the ECtHR recognised that the Convention's retrospective temporal jurisdiction under the article 2 procedural duty could not be open-ended. It was, however, an open question what the time limit on retrospective jurisdiction under the HRA should properly be, i.e., whether it should generally be ten years as under the Convention or 25 years. That Lord Kerr was unable to arrive at a conclusion on this final point might well be said to point towards the nature and scope of any retrospective temporal jurisdiction of the HRA being a policy matter properly for Parliament - as indicated by Lord Rodger in his dissenting judgment in **Re McCaughey**¹¹⁵. It might also raise the question of the appropriateness of the approach taken by the ECtHR in choosing ten years as its general cut-off point for there to be a genuine connection that established the Convention's retrospective effect¹¹⁶. There is no apparent principled basis for a ten-year period. On the contrary, the length of time applicable to such a cut-off point is one that appears to be inherently a matter of policy and one that ought to be determined by the Convention itself, i.e., by the Convention states. That the Convention's drafters did not provide such a cut-off point is again suggestive that the development in **Šilih** and **Janoweic** is difficult to justify.
- 75.** Finally, Lord Kerr rejected an approach that would have founded the HRA's retrospective temporal jurisdiction on the basis that there was a need to give effect to the article 2 procedural duty in domestic law in order to give effect to the guarantees and underlying values of the Convention¹¹⁷.
- 76.** The current position concerning the HRA's temporal scope can thus be summarised as follows.

114 *Keyu* at [252].

115 *Re McCaughey* at [161].

116 See [39], above.

117 *Keyu* at [256]-[258].

Summary of the Courts' approach to the HRA's temporal scope

The HRA's temporal scope is prospective only, except as provided for by its section 22(4). **Re McKerr** on this point remains good law.

Following **Šilih** and **Janoweic**, the article 2 procedural duty is a freestanding and independent duty.

Where a public authority is holding or ought to have commenced holding an inquiry into a death that occurred before the HRA came into force, that must comply with the article 2 procedural duty even where the death occurred prior to the HRA coming into force.

It remains an open question whether, in the light of **Šilih** and **Janoweic**, the UK Courts could or should overrule **Re McKerr** and hold the HRA has the same temporal jurisdiction as the Convention. Lord Rodger's reasoning in **Al-Skeini** on the HRA's extra-territorial jurisdiction may well need to be considered in this regard.

77. The effect of the post-**Re McKerr** developments was noted by Lord Reed in his submission to the CfE. As he put it, by adopting 'a similar approach in relation to violations of Convention rights which preceded the HRA' as that taken by the ECtHR to the Convention, the UK Courts have been drawn:

*'into reviewing difficult and sensitive decisions of the Government, coroners and the police, with significant resource implications, regarding the investigation of allegations of historic violations of Convention rights. This effect has been particularly noticeable in relation to Northern Ireland: see eg McQuillan and McGuigan & McKenna. However, the point mentioned in para 26 above also applies in this context.'*¹¹⁸

In paragraph 26 of his submission, Lord Reed made this point,

'... it should be borne in mind that if the territorial effect of the HRA were to be restricted so as to prevent domestic courts from making decisions of the nature discussed, litigants would remain able to take their cases to the ECtHR instead.'

78. *Re McQuillan* (2019)¹¹⁹ concerned an application for judicial review of a decision by the Police Service of Northern Ireland (the PSNI), and particularly its Legacy Investigation Branch (LIB). The decision challenged was that of the LIB to conduct a further investigation into the death in June 1972 of Ms McQuillan's sister, Mrs Jean Smyth-Campbell. It was submitted that the investigation would be in breach of the article 2 procedural duty as it was not to be carried out with the required level of independence to satisfy the requirements of the duty that arose under article 2.

¹¹⁸ Lord Reed, *Submission to the Independent Human Rights Act Review Panel* at 12.

¹¹⁹ *Re McQuillan* [2019] NICA 13.

- 79.** *Re McGuigan & McKenna* (2019)¹²⁰ concerned an application for judicial review of a decision by the PSNI that there was no evidence to justify investigating allegations that the use of torture in Northern Ireland was authorised by the UK Government in 1971.

(9) Views from Submissions to IHRAR

- 80.** Not all respondents to the *CfE* commented on the HRA's extra-territorial application. Of those who did there was again a strong view that no change was necessary, and to the extent that there was a need for clarification of the approach to be taken that could be achieved through case law development. There was a general concern that any reform that limited the HRA's extra-territorial jurisdiction would result in the creation of an unsatisfactory gap between the application of Convention rights by the UK Courts and the ECtHR. Any such development would result in more cases being brought against the UK before the ECtHR.

120 *Re McQuillan* [2019] NICA 13; *Re McGuigan & McKenna* [2019] NICA 46.

Examples of submissions supportive of no change

Equalities and Human Rights Commission

'... Any domestic attempt to alter the HRA's extra-territorial application would create inconsistency between the scope of HRA and the Convention, and remedies for overseas violations would need to be sought from the ECtHR. It could also set an unwelcome precedent, leading other countries in the Council of Europe to follow suit, including those with a weaker human rights record than the UK.'

The Law Society of England and Wales

*'As domestic legislation, the HRA primarily applies to acts within the UK. There are limited circumstances in which it is applicable to acts of public authorities taking place outside the territory of the UK, primarily in the context of overseas military operations. This is by virtue of ECtHR case law (including judgments against the UK) which has clarified the circumstances in which extraterritorial application of the ECHR is valid. The application of this jurisprudence domestically was confirmed by the Supreme Court in the 2013 case *Smith and Others v Ministry of Defence*. The Law Society does not believe there is a convincing case for changing the current position ...*

... The exceptions established are rightly restricted and their limits have been clarified. Only in circumstances where the UK is exercising control of an area that is akin to that exercised domestically would it be obligated to secure the full range of the Convention rights, otherwise the ability to divide and tailor the rights protected ensures that it does not face an unrealistic burden. Through decades of case law the ECtHR has provided careful and principled analysis, arriving at a well-balanced position that accommodates the competing interests of upholding human rights protections without stretching the Convention beyond its limits.'

Northern Ireland Human Rights Commission

'The extraterritorial application of UK legislation is not unusual, particularly pertaining to human rights. The Domestic Abuse Bill, currently being considered by the HOL, will apply extra-territorially in relation to domestic abuse offences committed by UK citizens abroad to ensure compliance with their obligations under the Istanbul Convention. The UK already has extra-territorial jurisdiction covering offences concerning forced marriage and sexual offences where the victim is under 18. Removing or rescinding the extra-territorial application of the HRA with respect to military personnel overseas would lower the standard of accountability for human rights breaches for the state below the standard for private citizens.'

The NIHRC advises that the HRA should apply to public authorities in overseas territories.'

Public Law Project

'... the UK should be held to account for its actions in circumstances where it truly does have effective control over another area is necessary if the state is to fully respect human rights and comply with the rule of law. The state should not be treated as unaccountable and free to act with impunity simply because its actions fall outside of its territorial borders.'

Professor Leach, Professor Amos and Dr Bates

'The HRA applies to acts of public authorities taking place outside of UK territory in a limited range of circumstances carefully developed by UK courts in dialogue with the ECtHR. Maintenance of the current position is crucial to the UK complying with its obligations in international law and maintaining the authority and reputation of its armed forces and other public authorities operating abroad. There is no case for change.'

Rights and Security International

'... Court-recognised justifications for extending human rights obligations extraterritorially are logical, based on the public authority's influence over the individual or territory, and have the valuable function of encouraging a State to act in a rights-compliant manner in all instances, ensuring protection for individuals as a result...

The extraterritorial application of the ECHR (and thus the HRA) is not unprecedented. For example, the Human Rights Committee has interpreted the 'jurisdiction' of the International Covenant on Civil and Political Rights ('ICCPR'), to which the UK is a party, as arising where a State exercises either 'power' or 'effective control' – confirming that a State should not be able to perpetrate rights-violating acts abroad with impunity, including when the same acts would be prohibited domestically. To conclude otherwise would not only undermine the universality and essence of the rights protected by international human rights law, but may also create structural incentives for States' in outsourcing their practices.

Thus, for the UK to modify the HRA so as to restrict or exclude its extraterritorial application would be inconsistent with core principles of international human rights and other international law, as well as the country's specific commitments under the ECHR. Such an approach would position the UK inconsistently with its other European partners, which are also parties to the ECHR, as well as international partners bound by the ICCPR.'

- 81.** In contrast to the views that supported 'no change', a number of reform proposals were put forward by some respondents to the *CfE*. Some of these suggested that while no reform should be made to the HRA itself, other reforms could be made, such as the active development of case law by the UK Courts to facilitate a more coherent and less arbitrary approach to extra-territorial jurisdiction by the ECtHR. Of those suggesting reform to the HRA, views differed from reform to narrow its territorial jurisdiction to reforms to widen it.

Selected criticisms and reform recommendations submitted to IHRAR

ALBA

'... ALBA submits that there is no principled basis for restricting the territorial scope of the UK's obligations under the HRA. That does not however mean there is no case for change. The ECtHR's approach to extraterritorial jurisdiction has at times been inconsistent and arbitrary... ALBA considers that there is an opportunity for domestic courts to go beyond the ECtHR, addressing the above limitations, articulating a coherent doctrine of extraterritorial jurisdiction and improving the ECtHR's approach through judicial dialogue.'

Centre for Military Justice

'... In our view, there is no case for amending the HRA. However, proposals for a system of independent judicial oversight of detention decisions during overseas operations should be explored.'

Employment Lawyers Association

'... it would be helpful for the applicability of the HRA to employment contexts outside of the territory of the UK to be clarified to bring certainty both to employees and employers. It is suggested this is achieved by way of guidance rather than statute, in order to avoid conflicting with the evolving case law on extraterritoriality emerging from Strasbourg. For example, the government could release a statement indicating in which circumstances, in its view, the HRA applies to public authorities acting abroad in an employment context. The guidance or statement should clarify the scope of public authorities' duties abroad, which could include an analysis of what "authority and control" means in the employment context. For example, it could mean that the HRA applies to public authorities' acts taking place outside the territory of the UK, where those acts relate to an employee or worker of the public authority (as defined in UK law). That would mean, for example, that employees working for public authorities abroad would have their Article 8 rights not to have their emails arbitrarily monitored respected. In ELA's view, while there is no current case for change in the statute, clarification on this issue in an employment context would be welcomed.

As an alternative, amendments could be made to the statute to clarify that the HRA applies to public authorities acting abroad generally (and/or specifically in the employment context). Nonetheless, provision should be made to ensure that the case law can continue to develop in line with the Strasbourg case law.'

Liberty

‘There is a strong case for the ECtHR to re-evaluate its position on jurisdiction. While the Strasbourg and domestic case law has denied states a completely free hand to engage in abuses of Convention rights beyond their borders, it is unduly restrictive. By relying on the concepts of spatial and personal control the case law has left a protection vacuum in situations where states use kinetic force but do not have territorial control.’

UK Armed Forces and Ministry of Defence Roundtable Minutes

‘... Looking forward, a debate will be needed on how AI, automation, robotics, and other future tech affects the moral and legal obligations of the Armed Forces. There is an opportunity for the UK to be world leaders in understanding these challenges and to lead the public and academic debate on these issues.’

Policy Exchange

‘... Parliament should legislate to address (reverse) the judicial expansion of the territorial scope of the HRA. The Act’s extra-territorial application is unjustified and clearly constitutes a departure from Parliament’s lawmaking intention in 1998. In this way, convention rights have been extended abroad, following the deployment of UK forces, including in contexts where their only relevant control over claimants is the ability to exercise military force. This extension abroad is anomalous and unprincipled, giving rise to major practical problems for effective overseas operations. It subjects UK forces to an unsuitable legal regime, effectively displacing the law of armed conflict, and equips opponents of UK foreign policy to challenge the operations of UK forces in the field in London courtrooms. Some HRA claims have also been brought by UK forces, or the families of fallen soldiers. Amending the HRA to limit, or to end altogether, its extra-territorial application is necessary to avoid implicating courts in adjudicating disputes for which their processes are ill-suited and which may compromise national security.’

Professor Guglielmo Verdirame QC

‘... the ECtHR jurisprudence seems to have abandoned the cautious position in Bankovic but in a manner that is far from well-reasoned and has created great uncertainty. There is a strong rule of law case for bringing clarity to the domestic legal position by legislating on this issue, and doing so on the basis of the sounder analysis of the law developed by the ECtHR in Bankovic and applied by the House of Lords in Al-Skeini (but subsequently qualified or overruled by the ECtHR in its decision on Al-Skeini).’

Professor Tom Hickman QC

'... There are justified concerns about the ordinary court process to determine complaints under the HRA concerning military activities abroad ... There is ... a case for establishing a separate tribunal to determine HRA complaints against the armed services and designating that tribunal as the appropriate tribunal for the purposes of s.7, HRA.'

Young Legal Aid Lawyers

'... there is a strong case for reforming the HRA to broaden its territorial reach. The Government has a policy of treating Article 2 and 3 as applying extraterritorially. However, the Government regularly settles these types of claim to avoid 'unhelpful' case law on this point. YLAL considers that other rights set out in schedule 1 HRA need to apply extraterritorially. For example, Article 4 which prohibits trafficking and forced labour does not currently extend beyond the UK which has created a lacuna in protections for victims of trafficking and modern slavery.'

82. Limited evidence was received in the CfE concerning the HRA's temporal scope. Policy Exchange provided a detailed submission on the issue¹²¹, contending that the UK Courts had misinterpreted the HRA's temporal and territorial application: Parliament had intended its temporal scope to be purely prospective, as from the date it came into force, and to apply to the UK domestic territory or at the most to what limited extra-territorial jurisdiction was foreseeable in 1998; the UK Courts had wrongly interpreted both. The basis of that misinterpretation was a misplaced desire to ensure there was as small a gap between the HRA's application and that of the ECtHR. In doing so they had wrongly applied the same approach taken to giving content to Convention rights domestically. Parliament had not intended the scope of the HRA to vary depending on the ECtHR's case law. It can be seen that Policy Exchange's submissions echo Lord Bingham's concerns in ***Al-Skeini***¹²² and Lord Rodger's concerns in ***Re McCaughey***¹²³.
83. Policy Exchange's recommendation, in the light of its submission, was for the HRA to be amended to clarify that, other than the express exception in section 22(4), it was only to apply to matters that occurred after 2 October 2000, when the HRA came into force.

¹²¹ Policy Exchange, *Submission to the Independent Human Rights Act Review Panel*, at [22].

¹²² See [57], above.

¹²³ See [69], above.

Policy Exchange reform recommendation – temporal application of the HRA¹²⁴

‘The Act should be amended to restore this limited temporal scope, which is now observed in the breach in relation to deaths taking place before 2 October 2000. Domestic courts have extended the temporal reach of the HRA, making it in effect retrospective, and this should now be undone by legislation. Parliament should specify that the HRA does not apply to acts or omissions taking place before the HRA came into force, which includes acts taking place after 2 October 2000 concerning or in respect of acts or omissions before that date. Parliament might usefully specify that in particular proceedings cannot be brought alleging breaches of Article 2 in relation to deaths taking place before 2 October 2000 or breaches of Article 3 in relation to acts taking place before 2 October 2000.’

- 84.** In contrast to the approach taken by Policy Exchange, the view was strongly expressed at the Law Society and Bar of Northern Ireland Roundtable, that the HRA’s application to matters occurring before the HRA came into force was beneficial. As noted in the Roundtable minutes,
- ‘Retrospective HRA application is a necessity if NI wanted to be a ‘progressive society’. There is no perceived ‘line in the sand’ as crimes committed in the past cannot be ringfenced in peoples’ minds.’¹²⁵*
- 85.** While not expressing a view on whether or not the HRA ought to be retrospective in application, the point was also made at the Police Roundtable that clarity from the Supreme Court on the application of the HRA in respect of ‘Troubles Legacy Investigations’ would be welcomed¹²⁶.

(10) Approach to Options for Reform

- 86.** In considering the issue of the HRA’s extra-territorial application, and its temporal application, the Panel has taken into account the following factors.
- 87.** The UK is to remain a party to the Convention¹²⁷. It will therefore continue to be bound in international law to the extra-territorial and temporal jurisdiction of the Convention as determined by the ECtHR.
- 88.** The HRA was intended to enable Convention rights to be given domestic effect in the UK, including before UK Courts.

¹²⁴ Policy Exchange, *Submission to the Independent Human Rights Act Review Panel*, at [67]; and see R. Ekins et al, *Protecting Those Who Serve* (Policy Exchange, 2019), 35-36, for suggestions on how such a reform could be effected <<https://policyexchange.org.uk/wp-content/uploads/2019/06/Protecting-Those-Who-Serve.pdf>>.

¹²⁵ Law Society and Bar of Northern Ireland Roundtable Minutes (25 March 2021) at 4.

¹²⁶ Police Services Roundtable Minutes (13 April 2021) at 4. Guidance was anticipated from the two cases noted at footnote 120, above.

¹²⁷ IHRAR ToR, *‘The HRA is underpinned by the UK’s international obligations under the Convention, and the UK remains committed to upholding those obligations.’*

- 89.** Were limits to be applied to the HRA’s territorial application, i.e., to limit it to the UK’s national territory, the UK would remain subject to other forms of IHL, such as the Geneva Conventions¹²⁸.
- 90.** Convention rights are embedded in the decision-making processes of the UK Armed Forces¹²⁹ and Intelligence Services¹³⁰. They also inherently guide decision-making by the police services across the UK¹³¹. There was, however, an identified need for clarity in respect of the application of Convention rights, especially in the military context¹³² and in respect of overseas police operations¹³³, particularly in respect of articles, 2, 3 and 5 of the Convention (as noted above).
- 91.** The Convention provides a mechanism, in article 15, that enables Convention states to derogate from their obligations under it in time of war. Such derogations can be given domestic effect through a designated derogation order under section 14 of the HRA¹³⁴ or independently by means of primary legislation. The Panel notes that in 2016 the UK Government issued a Written Ministerial Statement that provided that:

*‘before embarking on significant future military operations, this government intends derogating from the European Convention on Human Rights, where this is appropriate in the precise circumstances of the operation in question. Any derogation would need to be justified and could only be made from certain Articles of the Convention.’*¹³⁵

128 *Al-Skeini* at [26].

129 UK Armed Forces and the Ministry of Defence Roundtable Minutes.

130 UK Intelligence Agencies and relevant Government Departments Roundtable Minutes (31 March 2021).

131 UK Police Services Roundtable Minutes.

132 UK Armed Forces and the Ministry of Defence Roundtable Minutes at 3, *‘The legitimacy of the UK Armed Forces is underpinned by adherence to the rule of law. Clarity of the law, especially in the specific operational context of the military, is crucial to maintaining such adherence and therefore legitimacy.’*

133 UK Police Services Roundtable Minutes, *‘Hannan v Germany shows a slow advancement of positive Article 2 duties. Officers can be stationed overseas and engaged on casework involving offences committed by, and/or against, British nationals. Any extension to the territorial application of the HRA and, in particular, the positive duty to take reasonable steps to avert harm caused by criminals could have a significant impact, especially in dangerous locations. Even in a domestic context, the positive Article 2 ‘threat to life’ responsibilities can have an operational impact.’*

134 See Chapter Six.

135 Sir Michael Fallon MP, Secretary of State for Defence, Written Ministerial Statement UIN HCWS168 (16 October 2016 <<https://questions-statements.parliament.uk/written-statements/detail/2016-10-10/HCWS168>>; cited in UK Government, *Submission to the Independent Human Rights Act Review Panel*, at [76].

Further consideration was given to this during the parliamentary debates concerning what is now the Overseas Operations (Service Personnel and Veterans) Act 2021. The Government had originally intended to put this approach on a statutory footing by way of an amendment to the HRA¹³⁶. The Bill was amended in the House of Lords, resulting in the removal of those provisions. Nonetheless, the Panel anticipates that consideration will, and should, be given to the making of an appropriate derogation where UK armed forces are engaged in future military operations, in so far as the criteria set out in article 15 of the Convention are met¹³⁷.

(11) Rejected Options

92. The Panel rejects the following reform options.

(i) No change

93. There is an argument that no change is a viable reform option. The current position in respect of both extra-territorial and temporal jurisdiction is evolving. It is doing so in the light of changing social and political circumstances across the Convention states. The UK Courts could play an important role in helping, through judicial dialogue, the ECtHR refine its approach to both issues. They could, for instance, help the development of a clearer, principle-based approach, to both issues. On this basis, no change would enable the Courts to refine this area effectively in time.

94. However, the Panel does not believe that no change can properly be supported. On the contrary, there are good reasons, set out below, which justify its rejection.

(ii) UK Courts should go beyond the ECtHR case law

95. The Panel has generally promoted greater use of the common law to develop rights protection. It has also noted the impressive judicial dialogue that exists between the UK Courts and the ECtHR, as well as the ability – in appropriate cases – for UK Courts to go beyond ECtHR case law. In principle, therefore, UK Courts could properly develop their approach to the extra-territorial effect of the HRA¹³⁸. In that way they could help to develop a ‘*coherent doctrine of extraterritorial jurisdiction*’¹³⁹ for the HRA and the Convention.

136 See clause 12 of the Overseas Operations (Service Personnel and Veterans) Bill, as originally presented to Parliament. It would have inserted a new section 14A into the HRA, which would have required the Secretary of State for Defence to keep under consideration whether there was a need to derogate from the Convention where UK armed forces were engaged in overseas operations.

137 It is argued by some that consideration might also be given to section 2 of the Crown Proceedings (Armed Forces) Act 1987 to revive section 10 of the Crown Proceedings Act 1947.

138 Such further guidance and clarification may arise from the Supreme Court appeals in *Re McGuigan & McKenna* [2019] NICA 46.

139 ALBA, *Submission to the Independent Human Rights Act Review Panel*, noted above.

96. In this instance we reject this proposal. This is not an area for common law development. Essentially, we are concerned here with Convention rights. The strictures in **Ullah**, discussed in Chapter Two, against developing free-standing Convention rights going beyond ECtHR caselaw apply with force in this context¹⁴⁰. This area is one where the development of a coherent approach to the HRA and Convention's extra-territorial scope is properly a matter for Parliament and the Government, in discussion with the Governments of other Council of Europe states.

(iii) Legislate to limit the HRA's territorial jurisdiction

97. The dissenting speech of Lord Bingham in **Al-Skeini** provides a powerful case in support of the proposition that the UK Courts have arguably erred in their approach to the HRA's extra-territorial jurisdiction. It provides strong support for the position articulated by Policy Exchange in its submission to the CfE on these issues¹⁴¹, noted above, i.e., legislation to limit the HRA's territorial application to UK domestic territory.

98. The Panel also notes that Lord Faulks supported this approach during the parliamentary debates on what became the Overseas Operations (Service Personnel and Veterans) Act 2021¹⁴². He did so by proposing that the, then, Bill be amended to specify that no claim could be brought in the UK Courts under the HRA in respect of overseas operations. In other words, it would, in so far as the Armed Forces were concerned, but not the police services, ensure that the HRA only had domestic territorial effect¹⁴³. The amendment was not adopted. In support of his amendment, Lord Faulks identified the following points in favour of such a legislative reform. First, it was supported by Lord Bingham's analysis in **Al-Skeini**, noted above. He further underlined how the approach taken in **Al-Skeini v The UK** was contrary to the approach, and therefore contrary to the likely understanding of the Labour Government, which introduced the HRA, and that its extra-territorial application had been doubted by the UK Courts subsequently. As he noted,

140 Chapter Two at [105].

141 And which were also developed by Professor Ekins in written evidence to Parliament, including his proposed draft amendment to the HRA, (25 February 2019) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-committee/statute-of-limitations-veterans-protection/written/97128.html>>.

142 Lord Faulks, Hansard, HL Deb, 11 March 2021, c1848 <[https://hansard.parliament.uk/lords/2021-03-11/debates/9D68F2AD-CE5F-41E6-8F50-9BDAC0A91C37/OverseasOperations\(ServicePersonnelAndVeterans\)Bill](https://hansard.parliament.uk/lords/2021-03-11/debates/9D68F2AD-CE5F-41E6-8F50-9BDAC0A91C37/OverseasOperations(ServicePersonnelAndVeterans)Bill) >

143 See House of Lords' Marshalled Amendments, amendment no. 27, '(1A) Whether or not the Secretary of State makes a derogation under Article 15(1) of the Convention, no claim shall be brought in the courts of England and Wales under this Act in relation to, or arising out of, such overseas operations.' <<https://bills.parliament.uk/publications/40695/documents/39>>.

‘Enthusiasm for the al-Skeini decision is not universal among the judiciary here. Mr Justice Leggatt, as he then was—he is now Lord Leggatt in the Supreme Court—said in 2014, in the Serdar Mohammed case, with masterly judicial understatement, that it was “not obvious why Afghan citizens should be able to assert European Convention rights on Afghan territory.” But he felt bound by al-Skeini.’¹⁴⁴

Moreover, he reminded the House of Lords that Jack Straw MP, in evidence to the House of Commons Defence Select Committee in 2013 had stated that, in so far as he recalled, it had not been the Labour Government’s intention for the HRA to have an extra-territorial application and that if it had been he would have expected there to have been serious opposition to the idea in both Houses of Parliament and from all sides¹⁴⁵. He further noted that its extra-territorial application following **Al-Skeini v The UK** was no doubt responsible for a number of vexatious claims against the Armed Forces and for bringing the HRA, as a consequence, into disrepute. Given that there was no obligation under the Convention to give effect to it in domestic law, and that the UK had not done so for the 40-year period up to 1998, there was no reason why – in this respect – Parliament could not disapply the Convention’s extra-territorial effect domestically.

- 99.** There is indeed a cogent case for arguing that the Convention has entered a sphere never intended for it; given the unpredictability of its expansion, the scope of the HRA ought not to remain coupled with it. All that said, legislative reform of this type raises three significant issues.
- 100. First,** were the HRA’s territorial scope limited to the UK’s national territory, that would not mean that the UK Armed Forces would no longer have to comply with human rights law generally. As noted above, they would remain subject to IHL. The UK would also, subject to any article 15 derogation from Convention rights in time of war or public emergency, remain subject to the Convention and its extra-territorial jurisdiction (as it developed). Legislating to limit the scope of the HRA’s territorial application would not alter that position. UK Armed Forces and Intelligence Services would continue to factor in both Convention compliance and compliance with IHL. Thus, this reform would not produce greater clarity for the UK Armed Forces, Intelligence Services or the police. Its primary effect would therefore not be on the need to give effect to the UK’s international law obligations, which would remain unchanged, but on the ability of individuals to seek relief in the UK Courts for alleged breaches of Convention rights extra-territorially.

144 Lord Faulks, Hansard, HL Deb, 11 March 2021, c1850 citing *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) at [116] *‘The starting point of SM’s case, and that of the PIL claimants, under the Human Rights Act is that Article 5 of the Convention applies to the detention of individuals by UK armed forces in Afghanistan. In the absence of authority, I would have regarded that contention as problematic. I find it far from obvious why a citizen of Afghanistan, a sovereign state which has not adopted the Convention, should have rights under the Convention in relation to events taking place in Afghan territory.’*

145 Jack Straw MP cited in Lord Faulks, Hansard, HL Deb, 11 March 2021, c1849, *‘Jack Straw told the House of Commons Defence Select Committee in 2013 that “to the very best of my recollection it was never anticipated that the Human Rights Act would operate in such a way as directly to affect the activities of UK forces ... abroad” and that, if so, “there would have been a very high level of opposition to its passage, on both sides, and in both Houses.”’*

101. *Secondly*, and of the first importance, that such issues, which would primarily concern the UK Armed Forces and Intelligence Services, could not be considered in claims before UK Courts would also mean that the ECtHR would not have the benefit of the detailed analysis of factual and legal issues by UK Courts. It would also mean that, where a claim involved the need to consider closed material the Intelligence Services, for instance, would not be able to rely on it in proceedings before the ECtHR: procedures that protect closed material are only available in UK Courts; they are not available before the ECtHR¹⁴⁶. This would leave the UK worse off. There is no attraction in supporting an option which damages UK interests. As the UK Government put it in its submission to the *CfE*,

‘... ensuring the same territorial application means that the domestic courts can consider a case first, including using domestic closed material procedures, if appropriate, with the ECtHR able to consider the open judgment in any subsequent proceedings, enabling such claims to be fully heard whilst protecting national security. If it was not possible to bring a claim before the domestic courts, then applicants may apply directly to the ECtHR. In these circumstances, the ECtHR would not have the assistance of an open judgment and may not be able to evaluate the case properly without access to sensitive material, which would likely present difficulties given the limits on the use of such material before the ECtHR.’¹⁴⁷

102. *Thirdly*, adopting this option would also be problematic in practice, even if it is a principled approach. As foreshadowed, it would not produce clarity for UK institutions most directly affected. Moreover, if adopted, it would entail that the HRA would not give full effect to Convention rights, as they have been developed by the ECtHR. It would introduce a significant gap in rights protection. Consequently, it would reduce the potential for UK Courts to make a positive contribution, through judicial dialogue with the ECtHR, to the development of ECtHR case law on these issues. It would also result in more cases going to the ECtHR where territorial and temporal matters were in issue. Thus, it would frustrate the fundamental aim of the HRA, to give domestic effect to Convention rights.

103. The Panel considers that each of these points weighs strongly against this reform option in respect of the HRA’s extra-territorial application, such that we **reject** it.

¹⁴⁶ Chapter Six at [56].

¹⁴⁷ UK Government, *Submission to the Independent Human Rights Act Review Panel*, at [72].

(iv) Legislate to limit the HRA’s temporal jurisdiction

- 104.** The dissenting judgment of Lord Rodger in **Re McCaughey** provides a powerful case in support of the proposition that the UK Courts have arguably erred in their approach to the HRA’s temporal jurisdiction. It also provides strong support for the position articulated by Policy Exchange in its submission to the *CfE* on these issues¹⁴⁸, noted above, i.e., legislation to limit the HRA’s temporal application so that it is prospective only from the date the HRA came into force (except as provided for by section 22(4)). There are, however, significant considerations telling against such legislative reform.
- 105. *First*,** limiting the temporal scope so that the HRA only applies prospectively from the date it came into force, subject to the exception in section 22(4) has a potential impact on the power or duties of authorities, particularly in Northern Ireland, to investigate issues in relation to conflict there arising prior to the enactment of the HRA.
- 106. *Secondly*,** and as noted above, adopting this option would also be problematic in practice, even if it is a principled approach. If adopted, it would entail – as would legislation to limit the HRA’s territorial scope – that the HRA would not give full effect to Convention rights, as they have been developed by the ECtHR. It would introduce a significant gap in rights protection, with the consequences already discussed, including reducing the potential for UK Courts to make a positive contribution, through judicial dialogue with the ECtHR, to the development of ECtHR case law on these issues.
- 107.** The Panel considers that the points set out above weigh strongly against this reform option in respect of the HRA’s temporal application, such that we **reject** it.

148 And which were also developed by Professor Ekins in written evidence to Parliament, including his proposed draft amendment to the HRA, (25 February 2019) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-committee/statute-of-limitations-veterans-protection/written/97128.html>>.

108. For completeness, the Panel also notes relatedly, the insertion of a new section 7A into the HRA by the Overseas Operations (Service Personnel and Veterans) Act 2021. It amends the time limit for bringing claims under the HRA. In particular, it amends the discretion provided to UK Courts to disapply the one-year time limit for bringing such claims. In exercising the discretion, in respect of ‘overseas operations’ of the UK armed forces, UK Courts are, under section 7A(2), required to take account of, for instance, the operational context of the matter subject to the claim and the likely effect of proceedings on the mental health of members and veterans of the Armed Services. The amendment also provides that ‘*claims cannot proceed more than six years after the act complained of occurred, or more than one year after the date of knowledge ... if that one-year period expires more than six years after the date of the act.*’ Overseas operations are those that take place outside UK national territory¹⁴⁹. It is too early to say what impact this amendment will have on rights protection under the HRA. It is not for IHRAR to comment on the political considerations leading to the introduction of the section.

(v) The Government clarify through Guidance the HRA’s extra-territorial application to public authorities in the context of employment

109. It is unclear to the Panel to what extent Government issuing Guidance, setting out its view, of the HRA’s application could assist in providing certainty on the question of the HRA’s extra-territorial application in the context of employment contracts. The proper application and scope of the HRA, and Convention, is for the Parliament and/or the Courts to determine. The Panel is concerned that any such guidance by Government would simply beg the question and result in increased litigation.

(12) Potential Reform Options

110. The Panel considers the following to be potential reform options. It indicates here the option which it does **not** recommend and the one which it does recommend.

(A) Option that is not recommended

(i) Option One: The introduction of a specialist tribunal

111. Professor Hickman QC developed the proposal to introduce a specialist Armed Forces Tribunal to deal with complaints raised against UK armed forces in respect of operations they carried out overseas¹⁵⁰.

¹⁴⁹ Section 7A(7) of the HRA “‘Overseas operations’ means any operations outside the British Islands, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which members of Her Majesty’s forces come under attack or face the threat of attack or violent resistance.’

¹⁵⁰ Professor Tom Hickman QC at the UCL Roadshow (27 May 2021) and which he kindly further developed in his Supplementary Note of Evidence to the CFE (22 June 2021).

- 112.** Four reasons were put forward in support of this proposal. First, that the UK’s domestic judges are unfamiliar with the military context of overseas war zones and did not have the resources available to them to gain such an understanding. A specialist tribunal could, by contrast, be structured to provide the necessary expertise. Secondly, such a tribunal could be given inquisitorial powers in contrast to the UK Courts’ adversarial procedures. Thirdly, and relatedly, an inquisitorial power would enable a new tribunal to secure and evaluate evidence more effectively than is currently possible for Courts. Fourthly, a new tribunal would be more accessible to complainants. Accessibility could, for instance, be improved by the tribunal operating under a no-cost shifting rule in contrast to the approach in the Courts where, ordinarily, the unsuccessful party is responsible for the successful party’s costs¹⁵¹.
- 113.** Evidence in response to this proposal was provided to IHRAR by the Secretary of State for Defence, Mr Ben Wallace MP¹⁵². The response was made in the light of discussions with ‘*national security legal colleagues across Whitehall.*’ The Government did not agree that a new specialist tribunal was necessary. Its view was that domestic UK judges did understand the military context, that the introduction of inquisitorial powers would not improve evidence-gathering and evaluation over that provided for at present, and that it was not aware of evidence to support the view that there was currently a lack of access to UK Courts. Furthermore, a new specialist tribunal would have resource and cost implications to the State and may, depending on the extent to which the military were to provide members of the Judiciary for a new tribunal, raise concerns as to its compatibility with article 6 of the Convention. The real issue was not access to a Court process, but rather the implications of the ECtHR’s evolving case law in the military context.
- 114.** The Panel understands the benefit of the introduction of specialist tribunals in certain areas, such as the Investigatory Powers Tribunal. While we understand the vigour of the Government’s response to the proposal and accept that UK Courts are well able to deal with this issue effectively, we consider that it is a reform option that merits further and serious consideration. The introduction of such a specialist tribunal could, particularly, draw upon specialist expertise in the way that is common in, and well-understood to be beneficial, in the First-tier and Upper Tribunals. It could also benefit, as suggested, from the introduction of inquisitorial powers going beyond the powers available to UK Courts. Finally, and more broadly, consideration of this option could form part of a wider discussion of how best to deal with extra-territorial jurisdiction, which we set out in Option Two below.
- 115.** While the Panel does not recommend this option, it considers that it could be the subject of detailed further consideration by Government.

151 Professor Tom Hickman QC, Supplementary Note of Evidence to the *CfE* (22 June 2021) at [2]-[13] and further letter, dated 20 July 2021.

152 Ben Wallace MP, letter to Sir Peter Gross, dated 9 July 2021.

(B) Recommended Option

(ii) Option Two: Public debate and Governmental engagement with the Convention states on reform of the Convention

- 116.** The UK played a leading role in the creation of the Convention. More recently, it has played an equally leading role in the clarification of the importance of the margin of appreciation and judicial dialogue through initiating the process that led to the Brighton Declaration and introduction of Protocol 15 of the Convention¹⁵³. Our view is that, with great respect, the expansion of the Convention’s extra-territorial and temporal scope in the ECtHR case law, is troublesome.
- 117.** There is a strong argument that its development is inconsistent with the Vienna Convention. There is an equally strong argument that the application of the living instrument principle to these issues was unjustified. While the living instrument principle can well be applied to the substantive Convention rights, it is arguably inapt as a means to interpret the scope of the Convention itself as agreed by the Convention states. Additionally, the expansion lacks both predictability and clarity, a point that was particularly stressed by the dissenting judgment in **Hanan**, which concluded that the way in which the Convention’s extra-territorial jurisdiction had been developed in that case by the majority had stretched ‘*the detachable nature of the procedural obligation to investigate beyond breaking point, by abandoning any connection with an underlying substantive Convention obligation under Article 2.*’
- 118.** The dissenting judges concluded that the majority’s approach ‘*by unnecessarily duplicating obligations already existing or emerging under the Statute of the International Criminal Court and/or customary law*’ had ‘*excessively broaden[ed] the scope of application of the Convention*’. That broadening arose from the judgment resulting in Convention states being responsible for investigating matters for which they were not responsible, and which did not fall within the substantive scope of article 1 of the Convention. The upshot of the majority’s approach was to render unclear ‘*the potential limits (if any) of the procedural obligation under Article 2, ... in terms of the underlying act or omission causing loss of life*’¹⁵⁴.
- 119.** Such criticisms echo those already articulated concerning the developments in this area by UK Courts. The House of Lords and Supreme Court have both criticised the reasoning¹⁵⁵, for instance, set out in **Šilih**, which forms the basis of the Convention’s temporal jurisdiction and its approach to the application of the article 2 procedural duty in extra-territorial situations.

153 See Chapter Four.

154 **Hanan**, dissenting judgment of Judges Grozev, Ranzoni and Eicke at [8]-[18].

155 For instance, **Re McCaughey** at [46] (Lord Phillips PSC); at [73] (Lord Hope); **Keyu** at [289] (Lady Hale).

- 120.** This lack of clarity and certainty in the law in this area was highlighted as particularly troubling in the Armed Forces and Ministry of Defence Roundtable. As there noted:

'The Article 5 'right to liberty' has come into conflict with the principle that IHL is the 'lex specialis' for armed conflicts. Strasbourg judgments do not necessarily provide clear guidance on what States are permitted to do in a military context, in circumstances where the jurisprudence does not follow a consistent trail of thought from one judgment to another. Al Jeddah gave rise to significant concern; Hassan provided some ground for optimism...

Article 2 creates an obligation to investigate allegations of an unlawful killing and to have effective investigations. It can be difficult to carry out Article 2 compliant investigations in an armed conflict. The practical realities of war are often overlooked, and Article 2 does not seem to have been developed with a military application in mind. The recent ECtHR judgments of Hanan v Germany and Georgia v Russia No.2 have complicated the picture in relation to the extra-territorial jurisdiction of Article 2.¹⁵⁶

- 121.** Pronounced concerns, apparent from the point made above during the Armed Forces and Ministry of Defence Roundtable, were raised with IHRAR about the overlap between the development of the Convention's extra-territorial jurisdiction and IHL. While the latter provides for the targeting of combatants based on status, the former applies necessity and proportionality tests¹⁵⁷. The difference flows from the fact that the latter is specifically designed to apply to armed conflict, whereas the Convention was not, as demonstrated (*inter alia*) by the clear expectation in the Convention that states would derogate from it in times of war. Moreover, while it is one thing for there to be no lacuna in the Convention's legal space applied as a regional human rights instrument between Convention states, within the territory of Convention states, it is entirely another matter for it to be applied worldwide – in and to areas that are outside its regional scope and which fall under other and more appropriate human rights instruments, such as the Geneva Conventions.
- 122.** The clear view of the Panel is that there is a problem. The key question is how to remedy it. The Panel is equally clear that it ought not to be left unremedied and that it is, primarily at least, for Government and Parliament to grip the matter. As it seems to the Panel, the solution in respect of the extra-territorial scope of the Convention is most appropriately to be found in the framework specifically designed for questions of this nature, i.e., IHL. A unilateral solution, however, for instance, legislating domestically to exclude the HRA's extra-territorial scope and its temporal reach, would simply fail to achieve this. The UK would remain bound by the Convention in international law and the gap thus opened between the UK Courts and the ECtHR would create a very real risk of damaging vital UK interests in the Military and Intelligence spheres.

¹⁵⁶ UK Armed Forces and the Ministry of Defence Roundtable Minutes at 3.

¹⁵⁷ UK Armed Forces and the Ministry of Defence Roundtable Minutes at 3.

- 123.** To begin with and resonating with the concern expressed at the outset¹⁵⁸ concerning public ownership of rights, this is a matter calling for a national conversation, as advocated to IHRAR during the Armed Forces Roundtable¹⁵⁹. In particular General Sir Nick Carter, the Chief of the Defence Staff stressed to IHRAR the need for and benefit of a wide public debate about the legal obligations of the armed forces in the context of future operational challenges and technological advances. Consideration of the Convention's extra-territorial jurisdiction could form part of that wider debate. As was suggested at that Roundtable, there is a real opportunity for the UK to 'be world leaders' in this area particularly in the context of future development. The UK could, through developing effective public, academic, political and military debate, foster a greater understanding of the application of human rights, the evolution of the Geneva Conventions and IHL for the 21st century and the challenges it poses. Such a debate could inform both any legislative reform of the HRA in this area and, likewise, any clarificatory reform of the Convention, to which we next turn.
- 124.** The Panel considers that, ideally, the resolution of the specific concerns about the HRA's extra-territorial and temporal application would be dealt with through a careful, clarificatory, reform of the Convention, so underlining that it would not be beneficial for the UK to act unilaterally. Such a reform could be achieved through the UK initiating with the other Convention states a process, the aim of which would be to develop a new Protocol to the Convention, setting out a clear, logically coherent, well thought out approach to its territorial and temporal scope, together with the Convention's relationship with IHL¹⁶⁰.
- 125.** We consider that such an approach is right in principle. We do not consider that development and reform in this area should be left solely to the Courts or led by them. The nature and scope of the Convention's territorial (including the nature of its legal space) and temporal application are matters that form the framework within which Convention rights are applied. They are matters that are properly for determination by the Convention states through discussion and co-operation at the political level. Their clarification ought to be considered and determined by the politically accountable Governments of those states.

158 See Chapter One.

159 UK Armed Forces and the Ministry of Defence Roundtable Minutes at [2].

160 UK Armed Forces and the Ministry of Defence Roundtable Minutes at 2 - 3. See, for instance, *Hassan* on the relationship between the Convention (article 5) and IHL.

- 126.** If this process were to result in a change to the Convention, it would then be for Parliament to consider what, if any, legislative reform of the HRA was needed in the light of it¹⁶¹. The approach to be taken to such legislative reform would necessarily depend upon the outcome of the Convention reform process. It could, for instance, limit the extra-territorial scope and temporal scope of the HRA. So too, judicial developments in this area, (of course a matter for the Courts) including possibly revisiting the powerful dissenting judgments in the UK Courts and at the ECtHR noted above, would be influenced by the outcome of the Convention reform process. In summary, the uncertainty as to the territorial and temporal application of the Convention and, hence, the HRA, needs to be addressed, optimally at the international level between Convention states. Future domestic developments, both legislative and judicial, will be informed by the progress and outcome of the national conversation and the Convention reform process. On any view, the matter ought not to be left unaddressed indefinitely.
- 127.** Finally, to be clear, we do not exclude the Courts from the process of achieving reform in this area. Putting to one side any decisions currently pending before the Supreme Court, the scope for continued dialogue between UK Courts and the ECtHR is apparent. But judicial dialogue here should augment political negotiation and public discussion, rather than taking the lead role.
- 128.** We **recommend** this option.
- 129.** The temporal scope of the HRA is of particular concern in respect of Northern Ireland, but its application there falls outside the scope of the inter-Governmental discussions recommended earlier.

(13) Potential Reform Option

- 130.** The Panel considers **Option Two** to be the only proper reform option. It is an option that raises no concerns regarding devolution.

161 We note that IHRAR is not asked to make any specific legislation recommendations on this issue in its ToR. However, we do note that current Government proposals for the permanent extinction of all rights to article 2 compliant investigations into deaths that occurred during the Troubles in Northern Ireland, all rights to Inquests and to civil actions in respect of such deaths ought to be considered in the light of this reform option: see Secretary of State for Northern Ireland, Addressing the Legacy of Northern Ireland's Past, (July 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002140/CP_498_Addressing_the_Legacy_of_Northern_Ireland_s_Past.pdf>.

Chapter Nine – Remedial Orders

(1) Introduction

1. We now turn to the final question under Theme II of the ToR: question 2(e). It raises the following issue:
‘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?’.
2. This question concerns the mechanism that the HRA provides to amend legislation, including the HRA itself¹, that has been held by the UK Courts not to comply with Convention rights. The mechanism confers on Government a ‘Henry VIII power’²: the use of subordinate legislation to amend or repeal primary legislation – inevitably, this is a controversial feature. On the other hand, remedial orders may serve to remedy incompatibility more swiftly than if recourse were limited to the passing of primary legislation. Remedial orders comprise a discretionary measure. As noted in Chapter Five, in which the Panel considered sections 3 and 4 of the HRA, neither Government nor Parliament is *bound* to amend legislation that has been held incompatible with Convention rights.
3. The Panel recommends the following reform options.

Recommended reform options³

Amend section 10 of the HRA to clarify that remedial orders cannot be used to amend the HRA itself and improve parliamentary scrutiny of remedial orders.

4. Put shortly, these recommendations suggest principled improvement to the remedial orders mechanism and potentially better use of the JCHR powers of scrutiny.

¹ As it has been understood but see further below.

² Whether or not strictly characterised as such; see below.

³ See Options One and Two of the Recommended Reform Options, below.

5. Full details of the recommendation and other reform options that the Panel has considered are set out in Parts 6 – 8 of this chapter.

(2) The Remedial Order-making Power

6. The power to make a remedial order is contained in section 10 of, and Schedule 2 to, the HRA. Where primary legislation is concerned, it provides a basis for the Government to bring forward, by order, amendments to the legislation to remove the incompatibility. It may only do so, however, where there are '*compelling reasons*' for proceeding in this way, i.e., for not remedying the issue through primary legislation⁴. Where secondary legislation is concerned, section 10 provides an equivalent power to amend primary legislation where that is necessary in order to enable an incompatibility in the secondary legislation to be remedied⁵. Schedule 2 provides more detail about the scope of the power in section 10 and sets out the parliamentary procedure applicable in the case of such orders.
7. The power is exercisable by a Government minister in two circumstances. First, it is available where the UK Courts have made a declaration of incompatibility under section 4 of the HRA and either there are no further means to appeal from that decision, i.e., the UK Supreme Court has upheld the declaration, or there is to be no appeal from the decision granting the declaration. Secondly, where it appears to a Government minister, following a decision of the ECtHR, that UK legislation is incompatible with the Convention. The power enables the Government to introduce secondary legislation, i.e., the remedial order, to amend the primary legislation that is inconsistent with Convention rights. Remedial orders are subject to parliamentary approval, either in draft or after being made.

⁴ Section 10(2) of the HRA.

⁵ It thus provides remedial measures where section 3(2)(c) of the HRA.

Section 10 of the HRA

‘Power to take remedial action.’

(1) *This section applies if—*

(a) *a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies—*

(i) *all persons who may appeal have stated in writing that they do not intend to do so;*

(ii) *the time for bringing an appeal has expired and no appeal has been brought within that time; or*

(iii) *an appeal brought within that time has been determined or abandoned; or*

(b) *it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.*

(2) *If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.*

(3) *If, in the case of subordinate legislation, a Minister of the Crown considers—*

(a) *that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and*

(b) *that there are compelling reasons for proceeding under this section, he may by order make such amendments to the primary legislation as he considers necessary.*

- (4) This section also applies where the provision in question is in subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility with a Convention right and the Minister proposes to proceed under paragraph 2(b) of Schedule 26.*
- (5) If the legislation is an Order in Council, the power conferred by subsection (2) or (3) is exercisable by Her Majesty in Council.*
- (6) In this section “legislation” does not include a Measure of the Church Assembly or of the General Synod of the Church of England.*
- (7) Schedule 2 makes further provision about remedial orders.’*

Schedule 2 to the HRA

Remedial Orders

Orders

- 1(1) A remedial order may—*
 - (a) contain such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate;*
 - (b) be made so as to have effect from a date earlier than that on which it is made;*
 - (c) make provision for the delegation of specific functions;*
 - (d) make different provision for different cases.*
- (2) The power conferred by sub-paragraph (1)(a) includes—*
 - (a) power to amend primary legislation (including primary legislation other than that which contains the incompatible provision); and*
 - (b) power to amend or revoke subordinate legislation (including subordinate legislation other than that which contains the incompatible provision).*
- (3) A remedial order may be made so as to have the same extent as the legislation which it affects.*
- (4) No person is to be guilty of an offence solely as a result of the retrospective effect of a remedial order.*

6 Paragraph 2(b) of schedule 2 provides that a remedial order may be made where it is declared that, because of the urgency of the matter, ‘it is necessary to make the order without a draft being’ approved by a resolution of each House of Parliament at the end of a period of 60 days after the draft was laid. The need for the use of this power is likely to be reduced if the recommendation in Chapter Seven to introduce a power to suspend quashing orders is accepted.

Procedure

2 No remedial order may be made unless—

- (a) a draft of the order has been approved by a resolution of each House of Parliament made after the end of the period of 60 days beginning with the day on which the draft was laid; or
- (b) it is declared in the order that it appears to the person making it that, because of the urgency of the matter, it is necessary to make the order without a draft being so approved.

Orders laid in draft

3(1) No draft may be laid under paragraph 2(a) unless—

- (a) the person proposing to make the order has laid before Parliament a document which contains a draft of the proposed order and the required information; and
- (b) the period of 60 days, beginning with the day on which the document required by this sub-paragraph was laid, has ended.

(2) If representations have been made during that period, the draft laid under paragraph 2(a) must be accompanied by a statement containing—

- (a) a summary of the representations; and
- (b) if, as a result of the representations, the proposed order has been changed, details of the changes.

Urgent cases

- 4(1) *If a remedial order (“the original order”) is made without being approved in draft, the person making it must lay it before Parliament, accompanied by the required information, after it is made.*
- (2) *If representations have been made during the period of 60 days beginning with the day on which the original order was made, the person making it must (after the end of that period) lay before Parliament a statement containing—*
- (a) a summary of the representations; and*
 - (b) if, as a result of the representations, he considers it appropriate to make changes to the original order, details of the changes.*
- (3) *If sub-paragraph (2)(b) applies, the person making the statement must—*
- (a) make a further remedial order replacing the original order; and*
 - (b) lay the replacement order before Parliament.*
- (4) *If, at the end of the period of 120 days beginning with the day on which the original order was made, a resolution has not been passed by each House approving the original or replacement order, the order ceases to have effect (but without that affecting anything previously done under either order or the power to make a fresh remedial order).*

Definitions

5 *In this Schedule—*

“representations” means representations about a remedial order (or proposed remedial order) made to the person making (or proposing to make) it and includes any relevant Parliamentary report or resolution; and

“required information” means—

- (a) an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and*
- (b) a statement of the reasons for proceeding under section 10 and for making an order in those terms.*

Calculating periods

6 *In calculating any period for the purposes of this Schedule, no account is to be taken of any time during which—*

(a) Parliament is dissolved or prorogued; or

(b) both Houses are adjourned for more than four days.

(1) *This paragraph applies in relation to—*

(a) any remedial order made, and any draft of such an order proposed to be made,—

(i) by the Scottish Ministers; or

(ii) within devolved competence (within the meaning of the Scotland Act 1998) by Her Majesty in Council; and

(b) any document or statement to be laid in connection with such an order (or proposed order).

(2) *This Schedule has effect in relation to any such order (or proposed order), document or statement subject to the following modifications.*

(3) *Any reference to Parliament, each House of Parliament or both Houses of Parliament shall be construed as a reference to the Scottish Parliament.*

(4) *Paragraph 6 does not apply and instead, in calculating any period for the purposes of this Schedule, no account is to be taken of any time during which the Scottish Parliament is dissolved or is in recess for more than four days.*

8. Section 10 provides alternative means by which remedial orders are subjected to parliamentary procedure: a general procedure; and, an urgent procedure. The central difference between the two is that the urgent procedure enables the Minister to make the remedial order without a draft of it having received parliamentary approval, with the order ceasing to have any further effect if not approved by Parliament by the end of 120 days of being made.

9. Since the HRA came into force 11 remedial orders have been made⁷. Of those instances, only three orders have been made under the urgent procedure: the Mental Health Act 1983 (Remedial) Order 2001 (SI 2001/3712); the Naval Discipline Act 1957 (Remedial) Order 2004 (SI 2004/66); and, the Terrorism Act 2000 (Remedial) Order 2011 (SI 2011/631). That said, there has been an increased use of remedial orders over the last five years, as Professor King indicated in his response to the *CfE*⁸.

(3) Remedial Orders – the Parliamentary Context

10. The provisions about remedial orders in the Bill for the HRA were originally formed of clauses 10, 11 and 12. The content of clauses 11 and 12 became HRA schedule 2.
11. The remedial order making power in what became section 10 was intended to provide the Government with the ability to remedy the consequences of a declaration of incompatibility promptly⁹ and particularly where there was no available legislative means to do so quickly via primary legislation¹⁰. There was considerable discussion in the parliamentary debates about the nature of the remedial power. Specifically, concerns focused on it providing the Government with a Henry VIII power to amend primary legislation¹¹.

Henry VIII power¹²

The term ‘Henry VIII power’ takes its name from the Statute of Proclamations 1539. It refers to a power, exercisable by the Government, to amend or repeal Acts of Parliament by secondary legislation. They arise where an Act of Parliament provides the Government with this type of power.

7 Mental Health Act 1983 (Remedial) Order 2001 2001/3712; Naval Discipline Act 1957 (Remedial) Order 2004/66; Marriage Act 1949 (Remedial) Order 2007/438; Terrorism Act 2000 (Remedial) Order 2011/631; Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2011/1158; Sexual Offences Act 2003 (Remedial) Order 2012/1883; Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018/1413; British Nationality Act 1981 (Remedial) Order 2019/1164; Fatal Accidents Act 1976 (Remedial) Order 2020/1023; Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2020/1085; Human Rights Act 1998 (Remedial) Order 2020/1160. See further 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*, at 30 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944857/responding-to-human-rights-judgments-2020.pdf>.

8 Professor Jeff King, *Submission to the Independent Human Rights Act Review Panel* at 2 and 13.

9 Lord Irvine LC, Hansard, 3 November 1997, vol. 582, col. 1231 in J. Cooper & A. Marshall-Williams at 148.

10 Jack Straw MP, Home Secretary, Hansard, 24 June 1998, vol. 314, col. 1137 cited in J. Cooper & A. Marshall-Williams at 156–157; and see Mike O'Brien MP, Parliamentary Under-Secretary of State, Hansard, 21 October 1998, vol. 317, col. 1330 cited in J. Cooper & A. Marshall-Williams at 161.

11 See Lord Simon of Glaisdale & Baroness Williams of Crosby, Hansard, 27 November 1997, vol. 583, col. 1141 cited in J. Cooper & A. Marshall-Williams at 210–211.

12 For background see Lord Judge, *Ceding Power to the Executive; the Resurrection of Henry VIII* (2016) <https://www.regulation.org.uk/library/2016_Henry_VIII_powers-Lord_Judge.pdf>.

- 12.** The Government, agreeing with the House of Lords Delegated Powers and Deregulation Committee, said that the power would only be exercised in ‘*strictly limited circumstances*’¹³, and that it would be used only rarely. Not only was it expected that declarations of incompatibility would be rare, but that the need for compelling reasons to justify the use of the remedial order making power instead of primary legislation, would also make its use rare. The requirement that there be such reasons was specifically added to section 10 by the Government to emphasise that it was a mechanism to be used sparingly, and not as a matter of ‘*routine*’¹⁴. As the then Government noted during the parliamentary debates, the requirement of compelling reasons was intended to set a ‘*very high test*’ for reliance on section 10¹⁵. However, the then Government declined to give an undertaking in the House of Commons that it would only be used in ‘*cases of real emergency*’ and that the primary means of amending legislation incompatible with Convention rights would be by primary legislation¹⁶.
- 13.** It was also clear that the Government intended the remedial power to be one that would be exercised as a matter of discretion by the Government. There was to be no statutory duty on the Government to exercise the power or to take other steps in the light of a declaration of incompatibility.

Lord Irvine on the use of the remedial order making power¹⁷

‘As I have made clear, we expect that the Government and Parliament will in all cases almost certainly be prompted to change the law following a declaration. However, we think that it is preferable, in order to underpin parliamentary sovereignty, to leave this on a discretionary basis. The decision whether to seek a remedial order is a matter for government to decide on a case-by-case basis. It would be wrong for a declaration automatically to lead to a remedial order. It would in effect be tantamount to giving the courts power to strike down Acts of Parliament if there were an obligation in all cases to bring remedial orders forward. . .’

13 Lord Williams of Mostyn, Parliamentary Under-Secretary of State, Hansard, 27 November 1997, vol. 583, col. 1143 cited in J. Cooper & A. Marshall-Williams at 211.

14 Mike O’Brien MP, Parliamentary Under-Secretary of State, Hansard, 21 October 1998, vol. 317, col. 1330 cited in J. Cooper & A. Marshall-Williams at 160.

15 Jack Straw MP, Home Secretary, Hansard, 24 June 1998, vol. 314, col. 1138 cited in J. Cooper & A. Marshall-Williams at 157.

16 Douglas Hogg MP raised the issue of exceptionality, which was rejected by Jack Straw MP, Home Secretary, Hansard 16 February 1998, vol. 307, col. 773 in J. Cooper & A. Marshall-Williams at 149.

17 Lord Irvine LC, Hansard, 27 November 1997, vol. 583, col. 1139 in J. Cooper & A. Marshall-Williams at 149-150.

- 14.** If the Government chose not to take remedial action, it was open to them to seek the House of Common’s endorsement for their approach. Equally, in such a case Her Majesty’s Opposition or other parliamentarians would be able to ensure any failure to remedy was considered by Parliament¹⁸. This limitation on the nature of the remedial power and its exercise was consistent with the approach to the protection of Parliamentary Sovereignty adopted more generally in the HRA. It was also reinforced by the provisions of section 6(6)¹⁹. That provision is intended to preserve Parliamentary Sovereignty in relation to the operation of section 6²⁰.
- 15.** During the parliamentary debates, the Government did reject one suggested means to provide for enhanced parliamentary involvement in the remedial order making process. It was suggested by the Lords Delegated Powers and Deregulation Committee, that if Parliament disagreed with the terms of the remedial order, it should be able to amend those terms. The Government rejected that proposal on two main grounds. First, that it was unnecessary. If Parliament disagreed with the terms of the remedial order, it need only withhold its approval. In such circumstances the Government would have to bring forward a new, amended, order for parliamentary approval. Secondly, such a power to amend a statutory instrument would depart from the usual approach to the making of secondary legislation, which does not permit amendments to be made to it. Remedial orders were no different from such legislation²¹, and there was no justification in permitting them, exceptionally, to be capable of amendment during the parliamentary process²².
- 16.** The Government did accept, however, that the process for making remedial orders needed to be subject to greater parliamentary scrutiny than was originally envisaged²³. Enhanced scrutiny was to be facilitated by the requirement that the Government provide an explanatory statement, along with the draft remedial order, when it was laid before Parliament under the ordinary procedure, and with an order made under the urgent procedure. Such statements were to ‘*facilitate consideration of remedial orders by Parliament*’ by ensuring that, for instance, information concerning the legal proceedings that gave rise to the declaration of incompatibility were before Parliament²⁴. They were to facilitate an informed debate in Parliament²⁵.

18 Jack Straw MP, Home Secretary, Hansard, 24 June 1998, vol. 314, col. 1120 cited in J. Cooper & A. Marshall-Williams at 150-153.

19 Section 6(1) and (6) of the HRA provide that ‘(1) *It is unlawful for a public authority to act in a way which is incompatible with a Convention right.* . .

(6) ‘*An act*’ includes a failure to act but does not include a failure to—
 (a) *introduce in, or lay before, Parliament a proposal for legislation; or*
 (b) *make any primary legislation or remedial order*’.

20 Lord Irvine LC, Hansard, 24 November 1997, vol. 583, col. 814 in J. Cooper & A. Marshall-Williams at 107.

21 For an explanation of the procedure for making statutory instruments see, The National Archives, Statutory Instrument Practice (2017) <https://www.legislation.gov.uk/pdfs/StatutoryInstrumentPractice_5th_Edition.pdf>.

22 Lord Irvine LC, Hansard, 29 January 1998, vol. 585, col. 407 cited in J. Cooper & A. Marshall-Williams at 215.

23 Lord Irvine LC, Hansard, 29 January 1998, vol. 585, col. 396 cited in J. Cooper & A. Marshall-Williams at 161.

24 Lord Irvine LC, Hansard, 29 January 1998, vol. 585, col. 407 cited in J. Cooper & A. Marshall-Williams at 214-215.

25 Ibid at 215.

- 17.** These amendments were considered to be sufficient to provide for effective parliamentary scrutiny of remedial orders. One specific proposal concerning parliamentary scrutiny, put forward by Baroness Williams, was however rejected. This was the proposal that the HRA ought to provide for a statutory requirement that remedial orders be subject to scrutiny by a parliamentary committee on human rights²⁶. While the Government welcomed the then anticipated creation of what is now the JCHR²⁷, it did not want to: a) anticipate what Parliament may decide its functions should be; and b) make provision for such a Committee in statute as such a course of action would not be normal practice and there was no basis to depart from such practice in this case²⁸. Lord Irvine LC did, however, concede that the Government's approach on this issue could be revisited in the future²⁹.
- 18.** The Government also ruled out the possibility of creating a statutory Standing Advisory Committee on Human Rights, analogous to the statutory Social Security Advisory Committee, to advise a relevant Secretary of State on human rights issues. It did so on the basis that the HRA was not intended to create further independent sources of advice for the Government but was rather intended to enable individuals to assert their Convention rights directly in the UK³⁰.

26 Ibid at 215.

27 Also see Lord Irvine LC, Hansard, 3 November 1997, vol. 582, col. 1233 cited in J. Cooper & A. Marshall-Williams at 250.

28 Lord Irvine LC, Hansard, 29 January 1998, vol. 585, col. 407 cited in J. Cooper & A. Marshall-Williams at 215.

29 Ibid at 216.

30 Lord Williams of Mostyn, Parliamentary Under-Secretary of State, Hansard, 27 November 1997, vol. 583, col. 1153 cited in J. Cooper & A. Marshall-Williams at 253.

(4) Parliamentary Engagement in Remedial Orders and the JCHR

19. The current nature of parliamentary scrutiny is usefully summarised by the JCHR.

Approach to parliamentary scrutiny of remedial orders³¹

'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.

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.'

20. Parliamentary scrutiny of draft remedial orders can therefore be seen to consist of: (i) scrutinising a draft remedial order and the Government's representations regarding it, i.e., why it is necessary, how it cures the defect identified in a declaration of incompatibility; and (ii) scrutinising the JCHR's reports and the Government's response to the JCHR. Where the urgent procedure is used, such matters will be carried out following the remedial order coming into force. This process applies across the board, as the JCHR is required by the Standing Orders that establish it to scrutinise all such draft remedial orders and remedial orders.

³¹ Joint Committee on Human Rights, *The Government's Independent Review of the Human Rights Act*, at 68-69. Also see, Joint Committee on Human Rights, *Fourth Report - Draft Fatal Accidents Act 1976 (Remedial) Order 2020: Second Report* (May 2020).

The JCHR's remit

The JCHR's remit is set out in **Standing Order 152B(2) of the House of Commons Standing Orders 2002**³².

It provides that:

'The committee shall consider—

- (a) matters relating to human rights in the United Kingdom (but excluding consideration of individual cases);*
- (b) proposals for remedial orders, draft remedial orders and remedial orders made under Section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and*
- (c) in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order No. 151 (Statutory Instruments (Joint Committee)).'*

21. Specifically, the procedure for making a remedial order was designed to enable Parliament to make an informed decision whether to approve a draft remedial order or one made urgently. To this end, information must be provided by the Minister proposing a draft remedial order (or making a fast track order) covering³³:

- (a) 'an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and*
- (b) a statement of the reasons for proceeding under section 10 and for making an order in those terms.'*

Any representations made by the JCHR, e.g., its reports on the proposed order, also inform parliamentary scrutiny and not least how the Government responded to any suggested amendments to the remedial order proposed by the JCHR.

22. This process, and particularly JCHR scrutiny, provides Parliament with a good foundation on which to consider the necessity of making such an order, as well as the terms of the order. Such deliberations take place through the process for affirmative approval by each House of Parliament. The question for the Panel is whether remedial orders are necessary, and if so, how to improve the process generally and particularly parliamentary engagement with it.

³² Also see House of Lords Standing Order No. 72(c).

³³ That is the 'required information' specified in schedule 2, para. 5 to the HRA.

(5) Views from Submissions concerning Remedial Orders

- 23.** Support for the current approach to remedial orders under section 10 of, and Schedule 2 to, the HRA was more muted than support for no change in respect of other questions in the ToR. A number of responses to the CfE supporting no change did so while noting that the existence of the power to amend Acts of Parliament by way of a Henry VIII power was generally to be deprecated. The better, more constitutionally appropriate way to amend Acts of Parliament was through another Act of Parliament. Support for remedial orders stemmed from the practical need for there to be a mechanism to provide for swift reform where an Act of Parliament had been held not to comply with Convention rights. We set out here support for ‘no change’.

Examples of submissions supportive of no change

Bindmans

‘The process is non-mandatory and has been used a limited number of times, through increasingly more commonly. The primary disadvantage is that it involves using secondary legislation to amend statute, so almost inevitably there will be less Parliamentary scrutiny than when remedial changes are made through a Bill. However, this has the advantage of allowing for remedial action to be taken quicker, depending on Government will. Given remedial action is already slow, we consider this tool remains worthwhile.’

Committee on the Administration of Justice

‘We are, generally speaking, cautious when it comes to the use of secondary legislation in important matters. It is usually desirable that full parliamentary scrutiny is afforded to laws passed in the area of human rights. However, given that there is a safeguard, in that the draft Order must be approved by both houses of Parliament, we do not think that there is any pressing reason for change.’

Joint Committee on Human Rights

‘There is . . . little to no appetite for a more stringent parliamentary process in respect of remedial orders.’

Lord Pannick QC

'I understand, and share, the general concern about the conferral and use of Henry VIII powers which allow Ministers to amend primary legislation. But this is not a context in which such a concern applies:

- (1) The Minister's powers are confined to a case where a court has made a section 4 declaration of incompatibility (or there has been a judgment by the ECtHR).*
- (2) Section 10(2) - unlike most Henry VIII powers - restricts the Minister's powers: the Minister can only act where he or she "considers that there are compelling reasons for proceeding under this section" and then only to the extent that he or she "considers necessary to remove the incompatibility". By contrast with many other Henry VIII powers, the Minister may not act where he or she considers it "convenient" or "appropriate" to do so.*
- (3) A remedial order requires approval by a resolution of each House: Schedule 2, paragraph 2.*

In my view, it would be very unfortunate if the remedial powers of Ministers were to be reduced. Ministers should retain broad powers to act where the court has made a declaration of incompatibility. The exercise of the powers is subject to control by Parliament, as an affirmative resolution of each House is required.'

National AIDS Trust

'The remedial order process should not be modified as Parliament already plays a paramount role in amending legislation which has been found incompatible with the ECHR.'

Police Action Lawyers Group

'There is a fine balance between the role of Parliament, the executive and the courts. We do not consider that the role of Parliament requires enhancement. There is no evidence to suggest that the current system is flawed. We are of the view that the current process is in line with the fundamental principles of our democratic society and should not be amended.'

Public Law Project

'On balance, our view is that legislative changes are not required at this point; rather, we call upon the government to take its consideration of human rights judgments seriously, and to remedy outstanding human rights declarations so as to ensure that gaps in human rights protection are filled without delay.'

Public Law Solicitors' Association

'PULSA does not consider that the current approach under the HRA "over-judicialises" public administration or draws domestic courts unduly into questions of policy.'

Redress

'The remedial order process should not be modified to limit the availability of a fast-track route to remedying incompatibilities.'

The Bar of Northern Ireland

'No [the remedial order making power should not be amended]- The Remedial Order process as set out in section 10 and Schedule 2 already strikes an appropriate balance between the need to remedy the incompatibilities quickly without further delay and the need to allow parliamentary scrutiny of the measures proposed.'

The Law Society of Scotland Roundtable

'There is no case for changes to the remedial order process.'

- 24.** Just as the support for 'no change' was more muted in respect of remedial orders, support for reform was stronger and more varied that in respect of other questions in the ToR. Reform proposals ranged from focusing on practical issues, such as requiring timetables for parliamentary consideration of remedial orders, to the principled, such as the repeal of section 10 and Schedule 2. We set out here a representative selection of the reform proposals.

Selected criticisms and reform recommendations submitted to IHRAR

Article 39

‘... As well as not being an obligation on government, it is also important to note that often the action [to bring forward remedial orders] that is taken can be very slow. ... and with legislation remaining in force, the human rights violations continue.’

Bates Wells

‘... one improvement to the remedial order process under s10 of the HRA would be to speed it up, to enhance clarity for claimants where an incompatibility with the ECHR has been found.’

Cambridge University, Centre for Public Law

‘... in a manner similar to the role of the sifting committees, the JCHR could, in the first 60-day period, make a recommendation as to whether the Convention breach in question is suited to resolution by a Remedial Order or is better suited to primary legislation.’

... remedial orders could require a stronger affirmative resolution procedure than that currently found in Schedule 2 of the HRA, empowering both Houses to suggest and debate amendments, as opposed to merely making representations to the Minister.’

... in a manner similar to the powers of European Scrutiny Select Committee in the House of Commons under section 13A of the European Union (Withdrawal) Act 2018, it could be possible to empower the JCHR to raise an issue before the House if a Remedial Order has sufficient important constitutional consequences. It could also be possible for the JCHR to ask for the Remedial Order to be debated on the floor of the House, with a consequent duty on a Minister of the Crown to ensure that such a debate takes place within a reasonable period. This would ensure that there was time for debate in the House.’

... we would recommend that limits be placed on the scope of remedial orders, similar to other Henry VIII clauses. Remedial orders should not be able to modify the Human Rights Act 2018, the Equality Act 2010 or the legislation establishing devolution.’

Professor Colm Ó Cinnéide

‘Greater parliamentary scrutiny of remedial orders would be welcome, and should be encouraged. ... In my view, a key issue is the allocation of parliamentary time in the Commons and Lords to debate such orders.’

Professor Jeff King

'The Joint Committee on Human Rights and the Government should further develop and give effect to express principles to govern what remedial approach the Government will take following a section 4 declaration of incompatibility. Such an approach at a minimum should require the Government to specify within a reasonable timeframe after the judgment whether it intends to proceed by way of primary legislation or remedial order. The principles guiding the choice should depend in part on whether the response entails legislative complexity and balancing, or a basic compliance with a straightforward requirement set out in the judgment. For both remedial directions, general service standards should be adopted so that responses are issued in a predictable fashion. It does not appear evident that more than one year is required to respond by way of remedial order or that more than eighteen months is required to respond with primary legislation. Exceptional circumstances could be detailed.'

JUSTICE Roundtable

'Remedial orders should not be able to amend the Human Rights Act. Henry VIII powers should be narrowly construed, and should not be used to affect the carefully balanced position of the HRA.'

JUSTICE

'... We agree with the JCHR that 'As a matter of general constitutional principle, it is desirable for amendments to primary legislation to be made by way of a Bill.', as this allows for greater Parliamentary scrutiny.'

... an amendment to the HRA to stop the 60-day statutory period in which proposed remedial orders lie before Parliament in draft from running when either House is adjourned for more than four days; and

... amendment of paragraph 2(a) of Schedule 2 to the HRA to allow a draft remedial order to be approved at any time after being laid before Parliament, at the same time amending the Standing Orders of the House of Commons to ensure that no resolution for approval could be moved in that House until the JCHR had reported.'

Queen's University, Belfast, Human Rights Centre

'... We consider that the remedial order process should enhance the role of Parliament by creating a presumption that such amendments will be made by Bills rather than by secondary legislation. The government should be placed under a statutory obligation to demonstrate why it is impracticable to proceed by way of a Bill, given that, when required, Parliament is able to pass an Act very quickly. . . .'³⁴

34 The submission went on to note that it would not want to be seen to provide a basis for weakening the HRA by setting out proposals to enhance its operation.

Professor Jason Varuhas

'In my view [section 10 and schedule 2] should be repealed. Remedial orders allow Ministers to amend legislation without having to pass amendments through the ordinary legislative process. These are in effect Henry VIII powers and are automatically constitutionally suspect. But they are particularly inappropriate where the subject-matter of the amendments relate to very basic aspects of our constitutional framework – namely, human rights. Matters relating to such basic matters should always be dealt with through the ordinary legislative process. . . The remedial orders scheme sends the wrong signal about the role of Parliament in relation to human rights matters. It suggests that human rights are principally for the courts, and where a court finds a breach the only role for Parliament is to rubber stamp an order promulgated by a Minister to give effect to the court's view. . .

Policy Exchange

'Section 10 of the HRA is a Henry VIII clause of sweeping effect. It is subject, rightly, to parliamentary control, but it would be better, in terms of constitutional principle, if the Government had rather less power to amend primary legislation by order. In 2001, the Joint Committee on Human Rights affirmed various principles relevant to when a Remedial Order should be made under section 10 or when instead a Bill should be introduced to amend the primary legislation that had been declared rights-incompatible. Those principles are not scrupulously observed and there is good reason to consider amendment to require legislative change to be secured by way of primary legislation. It would also be advisable to specify that section 10 may not be used to amend the HRA itself.'

(6) Rejected Options

25. The Panel rejects the following reform options.
 - (i) **No change**
26. Generally, no change is a viable option in respect of the majority of the questions posed in the ToR. However, where remedial orders are concerned that is not the case. For the reasons set out below, we reject this is an option.

(ii) Repeal section 10 and Schedule 2

27. The principled objection to the remedial order making power is that it is, as Professor Jason Varuhas (see above), put it, ‘constitutionally suspect’. It is a form of Henry VIII power that enables the Government to amend Acts of Parliament without having to go through the more detailed formal scrutiny involved in the legislative process for the primary legislation that is being amended. Rather than amendment through a fresh Act of Parliament the remedial order making power enables, through secondary legislation, fundamental issues concerning human rights to be amended with less parliamentary debate and scrutiny.
28. We agree with the principle that Henry VIII powers should generally be avoided as a means to amend Acts of Parliament; a point made by the JCHR in its assessment of the remedial order making power in 2001³⁵. In this case, however, as rightly pointed out by Lord Pannick QC in his response to the CfE (noted above), the remedial order making power, if properly characterised as a Henry VIII power, is much circumscribed. Its use is restricted to situations where there has been a declaration of incompatibility. It can only be used where there are ‘compelling reasons’ to do so. Thus, it sets out a strong presumption that legislation should be amended following a declaration of incompatibility by an Act of Parliament. Finally, it is subject to approval by positive resolution by both Houses of Parliament, as well as to detailed scrutiny from the JCHR.
29. Additionally, we do not agree with the suggestion that Parliament’s role in considering whether to approve a remedial order is, as Professor Varuhas characterises it, a ‘*rubber stamp*’ exercise. The JCHR’s scrutiny of draft remedial orders is detailed and often critical, resulting in amendments to the draft order³⁶. Equally, while parliamentary scrutiny of remedial orders is not as detailed as the debate and scrutiny engendered by the process by which Acts of Parliament are made, the process for positive approval of remedial orders provides Parliament with the opportunity to scrutinise and, if necessary, reject remedial orders.
30. It should also be noted that the remedial order provides an important mechanism for protecting rights where a declaration of incompatibility has been made. Where Government has concluded that it will act to reform the law in the light of such a declaration, a fast-track procedure is beneficial. The remedial order provides the means to do so, thus curing the rights violation more quickly than might otherwise be the case.
31. For these reasons we **reject** this option.

35 JCHR, *Making of Remedial Orders*, (7th Report) (19 December 2001), at [32] <<https://publications.parliament.uk/pa/jt200102/jtselect/jtrights/58/5803.htm#a11>>.

36 See above.

(iii) Create a statutory presumption that amendments should be made by Act of Parliament not remedial orders

- 32.** It was suggested that two forms of amendment could be made to enhance Parliament’s role. First, that there ought to be a statutory presumption that legislation should be amended by Act of Parliament. Secondly, that Government should be placed under a statutory obligation to demonstrate why it is impracticable to proceed by way of Act of Parliament, when it is, in practice, able to secure the speedy passage of remedial legislation through Parliament.
- 33.** The first proposition is, in principle, right. It is Acts of Parliament that ought properly to be the primary means by which legislation incompatible with Convention rights is amended. However, such a statutory presumption already exists in section 10. It is the requirement that section 10 can only be used where there is a ‘compelling reason’ to rely on it that constitutes that statutory presumption. Its effect is to require Government to proceed by way of bringing forward a Bill except where there is such a reason. As the parliamentary debates referred to above made clear, the remedial order making power was a device that was not intended to be used as a matter of ‘routine’³⁷.
- 34.** Secondly, Government ministers are already required to give a ‘*statement of the reasons for proceeding under section 10* and for making an order in [the terms set out]’³⁸. We therefore cannot see what this proposal would add to the present statutory duty.
- 35.** As the remedial order making power already, in our view, provides for the requirements set out in this proposed amendment, it is an option we **reject**.

(iv) Provide the power for both Houses to suggest and debate amendments to remedial orders

- 36.** One possible enhancement of the parliamentary procedure for considering remedial orders could be to enable amendments to remedial orders to be put forward and debated. This possibility was canvassed during the parliamentary debates of the remedial order making power. It was rejected then on the basis that it was unnecessary and that it went against the general approach to parliamentary procedure applicable to subordinate legislation.
- 37.** We consider that the same objections to this proposal arise now as they did in 1998. We **reject** this option for the same reasons.

37 See footnote 14, above.

38 Schedule 2, para. 3(1)(a), 4(1)(a) and (5).

(v) Provide the JCHR with a power to ask for a remedial order to be debated on the floor of the House

- 38.** Finally, we have considered whether the JCHR should be empowered to raise an issue before the House of Commons or Lords concerning remedial orders. This power could apply generally or be confined to situations where a remedial order raises important constitutional consequences. It could be provided that where it does so, a Government Minister would then be under a duty to ensure that time for debate was scheduled.
- 39.** This proposal is modelled on the power given to the European Scrutiny Select Committee in the House of Commons or House of Lords under section 13A of the European Union (Withdrawal) Act 2018.

Section 13A(1) and (2) of the European Union (Withdrawal) Act 2018³⁹

'... where the European Scrutiny Select Committee of the House of Commons ("the ESC") publishes a report in respect of any EU legislation made, or which may be made, during the implementation period and the report—

(a) states that, in the opinion of the ESC, the EU legislation raises a matter of vital national interest to the United Kingdom,

(b) confirms that the ESC has taken such evidence as it considers appropriate as to the effect of the EU legislation and has consulted any Departmental Select Committee of the House of Commons which the ESC considers also has an interest in the EU legislation, and

(c) sets out the wording of a motion to be moved in the House of Commons in accordance with subsection (2).

(2) A Minister of the Crown must, within the period of 14 Commons sitting days beginning with the day on which the report is published, make arrangements for the motion mentioned in subsection (1)(c) to be debated and voted on by the House of Commons.'

39 Sections 13(3) and (4) are in similar terms in respect of the House of Lords.

- 40.** Such a reform could enable Parliament to scrutinise remedial orders to a greater degree. We are concerned, however, that the provision of a statutory power and duty on Ministers to require debates goes beyond what is necessary to secure effective parliamentary scrutiny. We would expect Government ministers to ensure that sufficient time was scheduled to consider remedial orders without the need for such a power and complementary duty. Equally, we would expect the JCHR to raise issues of concern when it reports during the remedial order making process. Accordingly, we are not convinced that this proposal is necessary or would prove beneficial.
- 41.** We are also not convinced that there is a proper parallel between the remedial order making process and the situation that arises under the European Union (Withdrawal) Act 2018. The European Scrutiny Select Committees have a wide-ranging role to consider legislation, as does the JCHR. The former’s power to raise issues arises in respect of that wide-ranging power. The present recommendation is not that the JCHR be given a power analogous to this power when it issues one of its general reports on human rights issues. It is that it be given such a power in the different situation where it has reported on a remedial order. In such a circumstance, its report will already be before Government and Parliament and will form part of the material that will be considered by both, not least when the remedial order proceeds through Parliament.
- 42.** We are also sympathetic to the view that the proliferation of statutory duties regulating the content and arrangement of parliamentary proceedings would be an undesirable development, and, rather like attempts in the past to regulate policy priorities by legislation, ultimately self-defeating the wider it spreads. We think the provision in the 2018 Act should be treated as a special ‘one-off’. We therefore consider the power to be unnecessary. There is no additional need to ensure that the JCHR’s reports on remedial orders are properly considered by Parliament.
- 43.** We **reject** this option.

(7) Potential Reform Options

44. The Panel considers the following to be potential reform options. Unlike in other Chapters there are no options that we view to be potential but not recommended options.

Recommended Options

(i) Option One: clarify that remedial orders cannot be used to amend the HRA

45. The first potential reform option focuses on the ability to rely on the remedial order process to amend the HRA itself. There was no discussion of this possible use of the process in the parliamentary debates. It is a power that has only been used once. In 2020, the Government used the remedial order making power to amend section 9 of the HRA⁴⁰ (the 2020 remedial order). Originally that section did not permit damages for breaches of the HRA to be awarded where they arose from judicial acts done in good faith. The 2020 remedial order amended the HRA to enable damages to be awarded for such acts where an act, (i.e., court order) was held to be incompatible with article 6 ECHR and that breach resulted in an individual being *'(i) detained when they would not otherwise have been, or (ii) subjected to a longer period of detention than had the breach not been committed'*⁴¹.
46. This amendment was considered by the Government to be necessary following *Hammerton v UK - 6287/10* (2017)⁴². That judgment held there to be a breach of article 13 ECHR (the right to an effective remedy) where Mr Hammerton was not afforded a remedy for a breach of his Convention rights. He had been committed to prison for contempt of court, in circumstances where it was later held that he ought not to have been. Damages were not available to him under the HRA as the committal order was a judicial act made in good faith, for which HRA damages were not available under HRA, section 9(3). The ECtHR held that the exemption applicable to damages awards in such circumstances, while it served a legitimate purpose (preserving judicial immunity from suit), was disproportionate. Hence the Government concluded that to render HRA section 9 ECHR compliant, it needed to be amended.
47. This use of the remedial order making power has been cogently criticised as being both ultra vires and unconstitutional⁴³.

⁴⁰ Human Rights Act 1998 (Remedial) Order (SI 2020/1160).

⁴¹ See Remedial Order, explanatory memorandum.

⁴² *Hammerton v UK - 6287/10 (Judgment (Merits and Just Satisfaction): Court (First Section))* [2016] ECHR 272; [2017] 1 FLR 835.

⁴³ R. Craig, *Why Remedial Orders Altering Post-HRA Acts of Parliament Are Ultra Vires*, U.K. Const. L. Blog (21st Dec. 2017); R. Ekins, *Against Executive Amendment of the Human Rights Act 1998* (2020) at 6 <<https://policyexchange.org.uk/wp-content/uploads/Against-Executive-Amendment-of-the-Human-Rights-Act-1998.pdf>>.

Professor Richard Ekins' argument against the use of remedial orders to amend the HRA⁴⁴

Properly understood, section 10 does not authorise ministers to amend the HRA itself. This statutory power, which is a so-called Henry VIII clause, should be interpreted only to apply to legislation other than the HRA, which is the empowering statute. The alternative interpretation cannot be squared with the firm practice of construing Henry VIII clauses narrowly and puts the integrity and coherence of the scheme of the HRA in doubt. The Government's understanding of the scope of section 10 of the HRA, to which the JCHR ought to have objected, would enable ministers to transform the Act and to disrupt the careful provision Parliament made for how and to what extent the ECHR is to be incorporated into UK law.

The draft order is very likely ultra vires. It is also of doubtful constitutional propriety. Even if lawful, amending the HRA itself would be an unusual and unexpected use of the section 10 power. If section 9(3) is to be amended, the Government should introduce a Bill to this effect, which would then be open to amendment. Neither the Government nor Parliament should simply assume that section 9(3) must be amended or repealed. . . .'

- 48.** As a matter of principle, the use of Henry VIII powers ought to be construed narrowly and strictly. Reliance on the remedial power to amend the HRA itself appears to go wider than that principle⁴⁵.

Henry VIII powers ought to be construed narrowly and strictly

In *McKiernon v Secretary of State for Social Security* (1989)⁴⁶, the Court of Appeal made clear that;

'a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach'.

That approach to the ambit of Henry VIII powers was subsequently approved by Lord Bingham in *R v Secretary of State for Social Security, Ex p Britnell* (1991)⁴⁷ where he stated that;

' . . . a power to modify the provisions of a statute should be narrowly and strictly construed, and that view is indeed a correct one'.

⁴⁴ R. Ekins, *Against Executive Amendment of the Human Rights Act 1998* (2020) at 6.

⁴⁵ Professor Ekins' argument on this is set out, *ibid*, at 16ff.

⁴⁶ *McKiernon v Secretary of State for Social Security*, (unreported), 26 October 1989; Court of Appeal (Civil Division) Transcript No. 1017 of 1989, *The Times*, November 1989 (CA).

⁴⁷ *R v Secretary of State for Social Security, Ex p Britnell* [1991] 1 WLR 198 at 204.

49. We agree with this criticism of the use of the remedial order making power⁴⁸. Furthermore, we consider it inappropriate to use the remedial order making power to amend the HRA in the light of its status as an Act with a wide-ranging impact across the statute book and implications for the constitutional relationship between different Branches of the State. The fact that the amendment itself in this case was about the fundamental issue and constitutional principle of the independence of the Judiciary is illustrative of our concern. Moreover, given the need of any amendment of the HRA to take proper account of devolution issues, and particularly the Northern Ireland Peace Agreement, we further consider it to be wrong in principle for the HRA to be amendable by any means other than Act of Parliament. The HRA ought, as a matter of principle, only to be capable of amendment by Act of Parliament.
50. Accordingly, we recommend that section 10 of the HRA be amended to provide that it cannot be utilised to amend the HRA itself and that the HRA can only be amended by way of primary legislation. We accordingly recommend this option.

(ii) Option Two: Improve parliamentary scrutiny of remedial orders

51. A number of responses to the CfE raised suggestions to improve parliamentary scrutiny of the remedial order process. In its response to the CfE, Policy Exchange recommended that the principles relevant to making remedial orders set out by the JCHR in its Seventh Report of 2001, on *Making of Remedial Orders*⁴⁹, ought to be observed more scrupulously. Professor King also submitted that those principles be further developed. The JCHR, however, neither in its response to the CfE nor its report concerning IHRAR referred to there being any concerns about the remedial order process. To the contrary, it took the view that there was '*little to no appetite for a more stringent parliamentary process in respect of remedial orders.*'⁵⁰
52. The JCHR in its 2001 Report set out two sets of principles to guide Government and Parliament's approach to the remedial order process. The first dealt with the question whether to use the remedial order making power or an Act of Parliament to remedy the situation where legislation is not compatible with Convention rights. The second concerns the steps that ought to be taken to ensure a timely response was made to a decision of the UK Courts or ECtHR that legislation was not compatible with Convention rights.
53. In so far as the principles concerning use of the remedial order making power itself, they are as follows.

48 Also see, for instance, the responses to the CfE from: Policy Exchange (noted above); JUSTICE ('We therefore recommend that section 10 is amended to expressly exclude the possibility of ministers using remedial orders to amend the HRA itself'); Queen's University, Belfast, Human Rights Centre ('We also agree with the suggestion that the HRA itself should not be amendable by way of a remedial order . . .').

49 JCHR, *Making of Remedial Orders*, *ibid.*

50 JCHR, *Submission to the Independent Human Rights Act Review Panel* (Letter to the Chair of IHRAR, dated 3 March 2021) at 5.

JCHR principles applicable to the use of the remedial order making power⁵¹

‘As a matter of general constitutional principle, it is desirable for amendments to primary legislation to be made by way of a Bill. This is likely to maximize the opportunities for Members of each House to scrutinize the proposed amendments in detail. It would allow amendments to be made to the terms of the proposed amendments to the law during their parliamentary passage. (The procedure under section 10 of and Schedule 2 to the Human Rights Act 1998 does not allow for Parliament directly to amend either a draft remedial order or a remedial order—only to suggest amendments.) In many cases it may be easy to remove an incompatibility by means of a short Bill which could be drafted quickly and passed speedily through both Houses. Such a Bill may often be politically uncontroversial. Proceeding by way of a Bill may result in the incompatibility being removed far more quickly than would be possible using the non-urgent remedial order procedure, which (as we point out in our Sixth Report) could allow eleven months or so to elapse between the making of the declaration of incompatibility and the coming into effect of the necessary amendment to the law. Sometimes there may be good reasons for proceeding by Bill even where the matter is more complex. For example, if it is necessary to establish a regime of inspection, regulation, appeal or compensation in order to remove the incompatibility, or to authorize significant expenditure, in order to provide adequate and continuing safeguards for Convention rights, it might be preferable (constitutionally and practically) for those arrangements to be set out in a Bill rather than effected by way of subordinate legislation.

33. *On the other hand, we accept that other factors sometimes militate in favour of using the Remedial Order procedure. We make no attempt to enumerate these exhaustively, but they include the following—*

- *Where the amendment relates to a body of legislation which is under review with a view to major legislative reform in (say) two or three years time, it might be difficult or considered inappropriate to find time in the legislative timetable for an earlier Bill covering just part of the field to be dealt with later by the larger Bill. (For example, the Remedial Order on which we reported in our Sixth Report dealt with a small area of mental health law, the whole of which is due to be the subject of major reform in a Bill intended to be introduced to Parliament in 2003 or so.)*

⁵¹ Ibid at [32]-[34].

- *The legislative timetable might be fully occupied by other important, or even emergency, legislation. (For example, had it been decided to remedy the incompatibility with the Mental Health Act 1983, sections 72 and 73, by way of a Bill, its passage might well have been significantly delayed by the priority which would probably have been given to the Anti-terrorism, Crime and Security Bill and—perhaps—the Proceeds of Crime Bill as part of a package of anti-terrorism measures.)*
- *The need to remedy incompatibilities with Convention rights should be given a high priority. If waiting for a slot in the legislative timetable might cause significant delay (for example, for one of the reasons outlined above), and the Remedial Order procedure would be likely to cause less delay, we take the view that the Minister would be entitled to consider that there were compelling reasons for proceeding by means of a Remedial Order.*
- *The need to avoid undue delay is particularly pressing when the incompatibility affects, or might affect, the life, liberty, safety, or physical or mental integrity of the individual. In such cases, we consider that there would be compelling reasons for using the Remedial Order procedure in order to secure even a small acceleration in the speed with which an incompatibility could be removed.*

34. Ultimately, the Minister's judgment must balance these (and other) relevant factors in the light of the situation giving rise to the particular incompatibility.'

54. In so far as the second set of principles were concerned, they are also as follows.

Joint Committee on Human Rights recommendations on time limits⁵²

‘Judgments of the European Court of Human Rights

1. The responsible Minister should inform the Joint Committee on Human Rights, as a matter of course, of any judgment of the European Court of Human Rights in cases brought against the UK, and provide it with a copy of the judgment. This should be done within a month of the judgment being delivered. Where the Court holds that the United Kingdom has violated a person’s Convention rights, the Government should inform the Committee as soon as possible, and in any case within three months of the date of the judgment, of any steps it has taken or intends to take to ensure that similar violations do not occur in the future (paragraph 26).

Declarations of incompatibility by the UK Courts

2. A Minister should inform the Joint Committee on Human Rights of a declaration of incompatibility relating to his or her responsibilities as soon as it has been made, within 14 days of the court’s decision. It would be helpful to the Committee if the Minister could provide at the same time the full text of the declaration in question, together with a copy of the judgment of the court (paragraph 28).

Decisions not to appeal declarations

3. Where the Minister has decided not to appeal against the making of the declaration of incompatibility, he or she should inform the Committee of the reasons for that decision. These might simply take the form of a statement that the Minister accepts the correctness of the judgment of the court concerned (paragraph 29).

Final judgment of incompatibility

4. Once the judgment which includes a declaration of incompatibility has become final, the responsible Minister should, within a calendar month, inform the Committee of the result of any appeal, and provide a copy of the full text of any declaration of incompatibility made or upheld on appeal, together with a copy of the judgment of the appellate body. Where possible, the Minister should inform the Committee of his or her preliminary view of the appropriate way to proceed in remedying the incompatibility, giving reasons (paragraph 30).

⁵² JCHR, *Making of Remedial Orders*, ibid at Annex C.

Final decisions on how to remedy incompatibility

5. Final decisions about how to remedy incompatibilities should be made no later than six months after the end of legal proceedings (paragraph 34).

Choice of urgent or non-urgent procedure for remedial orders

6. The decisive factor in deciding whether to adopt the urgent or non-urgent procedure for a Remedial Order should be the current and foreseeable impact of the incompatibility it remedies on anyone who might be affected by it (paragraph 36).'

- 55.** The Panel is generally wary of codifying general principles in legislation. That said, we can see the force of the considerations identified by the JCHR in 2001. A more regular application of both sets of the JCHR's 2001 principles is likely to promote a more effective, consistent, approach to Government consideration of whether to use the remedial order making power or whether legislative amendment should more properly come by way of Act of Parliament. It would also enable more effective and structured parliamentary, and particularly JCHR, scrutiny of the approach taken by Government. Technical amendments to the remedial order making process may also improve its operation. There are a number of ways in which these various reforms could be implemented: statutory amendment to the HRA; amendment to the House of Commons and House of Lords' Standing Orders, not least those concerning the remit of the JCHR; amendment to the Cabinet Manual, which '*sets out the internal rules and procedures under which the Government operates*'⁵³; or even by renewed JCHR exhortation.
- 56.** We consider each of these routes to be viable for effecting the desired reform and would do so without introducing a more stringent parliamentary procedure. However, it is noteworthy that these principles date back to 2001 and that the JCHR did not itself raise any concerns with the remedial order making process. We believe a non-statutory approach to these principles is likely to be preferable. That said, at this stage we consider the most appropriate approach to reform is to invite the JCHR to revisit its 2001 principles and in particular, consider if they need to be updated or expanded (and consider the technical reform suggestions identified above). The JCHR should also, in our view, consider the best way of ensuring that proper account of them is taken in future. Its conclusions on this issue could then be considered in due course by Government and Parliament. On that basis, we **recommend** this option.

53 The Cabinet Manual (2011) at iii. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf>.

(8) Recommended Reform Options

- 57.** For the reasons set out above, the Panel recommends **Options One and Two**. Given their nature, these options cannot sensibly be said to give rise to any devolution concerns. So far as **Option One** is concerned it can, to the contrary, be said to guard against any unintended impact on devolution matters.

Annex I

Acronyms

Please find below a list of the acronyms used in the report, sorted in alphabetical order.

Acronym	Term
CfE	Call for Evidence
ECA	European Communities Act 1972
ECtHR	European Court of Human Rights
ETJ	extra-territorial application of jurisdiction
HRA	Human Rights Act
IHL	International Humanitarian Law
IHRAR	The Independent Human Rights Act Review
IRAL	Independent Review of Administrative Law
JCHR	Joint Committee on Human Rights
the Convention	The European Convention on Human Rights
the Panel	the IHRAR Panel
ToR	Terms of Reference
WMS	Written Ministerial Statement

Annex II

WRITTEN MINISTERIAL STATEMENT

7th December 2020

MINISTRY OF JUSTICE

Independent Human Rights Act Review

The Lord Chancellor and Secretary of State for Justice (Robert Buckland QC):

I am today announcing the creation of the Independent Human Rights Act Review. This review extends from our Manifesto commitment and will take the form of an independent advisory panel which will provide the Government with options for updating the Human Rights Act (HRA). As Lord Chancellor, I am committed to upholding the UK's stature on human rights. The UK contribution to human rights law is immense and founded in the common law tradition. We will continue to champion human rights both at home and abroad, and we remain committed to the European Convention on Human Rights.

The HRA has been in force for 20 years, and therefore it is timely to undertake a review into its operation. The UK's constitutional framework has always evolved incrementally over time, and it will continue evolving. We need to make sure that our human rights framework, as with the rest of our legal framework, develops and is refined to ensure it continues to meet the needs of the society it serves. The review will examine two key areas outlined in detail in the Terms of Reference, which will be deposited in the libraries of each House. Broadly, the panel will consider the following themes:

- i) The relationship between domestic courts and the European Court of Human Rights (ECtHR)
- ii) The impact of the HRA on the relationship between the judiciary, the executive and the legislature

The examination of the Act will consider the approach taken by domestic courts to jurisprudence of the ECtHR, and whether the HRA currently strikes the correct balance between the roles of the courts, Government and Parliament.

As part of its work, the Review will also examine the circumstances in which the HRA applies to acts of public authorities taking place outside the territory of the UK, with consideration of the implications of the current position, and whether there is a case for change. The Review is limited to consideration of the HRA, which is a protected enactment under the devolution settlements.

It is my intention that the panel shall consider these questions independently, thoroughly, and put forward options for reform to be considered by myself. The panel will report back in Summer 2021 and their report will be published, as will the Government's response.

The following people will become members of the panel. They have been selected on the basis of their wealth of experience, coming from senior legal and academic backgrounds. They have the breadth and depth of expertise required to consider the issues highlighted within the Terms of Reference effectively. The panel members are:

- Sir Peter Gross – *Panel Chair*
- Simon Davis
- Baroness O'Loan
- Sir Stephen Laws QC (Hons)
- Professor Tom Mullen

- Professor Maria Cahill
- Lisa Giovannetti QC
- Alan Bates

Annex III



Independent Human Rights Act Review: Terms of Reference

Context

The UK contribution to human rights law is immense, founded in the common law tradition, continued with the drafting of the European Convention on Human Rights (the Convention) and, more recently, the enactment of the Human Rights Act (HRA). The HRA has now been in force for 20 years. It is timely to review its operation.

The Review is important, both of itself and because of the impact the HRA has had on relations between the judiciary, the legislature and the executive. The HRA is underpinned by the UK's international obligations under the Convention, and the UK remains committed to upholding those obligations. However, over the past 20 years a significant body of HRA case law has developed. There is a perception that, under the HRA, courts have increasingly been presented with questions of "policy" as well as law. Now is the right time to consider how the HRA is working in practice and whether any change is needed.

Scope

The Review will focus on two overarching themes regarding the framework of the HRA and will be UK wide. In reflecting on those themes, the panel should consider how the framework is operating currently, how the HRA could best be amended (if amendment is called for) to address any issues identified, and the benefits and risks of such amendments.

The panel will issue their report to the Lord Chancellor, outlining identified options for consideration. The Government will publish the panel's report and the Government's response; the Lord Chancellor will work with interested Departments to do so. We expect the panel to report to the Lord Chancellor in Summer 2021.

The Review is limited to consideration of the HRA, which is a protected enactment under the devolution settlements. Issues falling outside the domestic HRA framework, including consideration of potential changes to the operation of the Convention or European Court of Human Rights, are not within the scope of this Review.

i. 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?

ii. **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:

- a) 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?
- b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?
- c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?



- d) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?¹
- e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

¹ It is acknowledged that if the extraterritorial scope of the HRA were to be restricted, other legislative changes beyond the HRA may be required in order to maintain compliance with the UK's obligations under the Convention. As such changes would fall outside the scope of the Review, the panel is not asked to make specific legislative recommendations on this issue, but only to consider the implications of the current position and whether there is a case for change.

Annex IV

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)



Human Rights Act 1998

1998 CHAPTER 42

An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes. [9th November 1998]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Extent Information

E1 For the extent of this Act outside the U.K., see s. 22(6)(7)

Modifications etc. (not altering text)

- C1** Act: certain functions of the Secretary of State transferred to the Lord Chancellor (26.11.2001) by [S.I. 2001/3500](#), arts. 3, 4, [Sch. 1 para. 5](#)
- C2** Act (except ss. 5, 10, 18, 19 and Sch. 4): functions of the Lord Chancellor transferred to the Secretary of State, and all property, rights and liabilities to which the Lord Chancellor is entitled or subject to in connection with any such function transferred to the Secretary of State for Constitutional Affairs (19.8.2003) by [S.I. 2003/1887](#), art. 4, [Sch. 1](#)
- C3** Act modified (30.1.2020) by [Direct Payments to Farmers \(Legislative Continuity\) Act 2020](#) (c. 2), [ss. 2\(8\), 9\(3\)](#)
- C4** Act modified (31.12.2020) by [European Union \(Withdrawal\) Act 2018](#) (c. 16), s. 25(4), [Sch. 8 para. 30](#) (with s. 19, [Sch. 8 para. 37](#)); [S.I. 2020/1622](#), reg. 3(n)

Introduction

1 The Convention Rights.

- (1) In this Act “the Convention rights” means the rights and fundamental freedoms set out in—

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

- (a) Articles 2 to 12 and 14 of the Convention,
 - (b) Articles 1 to 3 of the First Protocol, and
 - (c) [^{F1}Article 1 of the Thirteenth Protocol],
- as read with Articles 16 to 18 of the Convention.
- (2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).
- (3) The Articles are set out in Schedule 1.
- (4) The [^{F2}Secretary of State] may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.
- (5) In subsection (4) “protocol” means a protocol to the Convention—
- (a) which the United Kingdom has ratified; or
 - (b) which the United Kingdom has signed with a view to ratification.
- (6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

Textual Amendments

- F1** Words in s. 1(1)(c) substituted (22.6.2004) by [The Human Rights Act 1998 \(Amendment\) Order 2004 \(S. I. 2004/1574\)](#), [art. 2\(1\)](#)
- F2** Words in s. 1 substituted (19.8.2003) by [The Secretary of State for Constitutional Affairs Order 2003 \(S. I. 2003/1887\)](#), [art. 9](#), [Sch. 2 para. 10\(1\)](#)

2 Interpretation of Convention rights.

- (1) 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,
 - (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
 - (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
 - (d) decision of the Committee of Ministers taken under Article 46 of the Convention,
- 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.
- (2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.
- (3) In this section “rules” means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section—
- (a) by ^{F3}. . . [^{F4}the Lord Chancellor or] the Secretary of State, in relation to any proceedings outside Scotland;
 - (b) by the Secretary of State, in relation to proceedings in Scotland; or

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

- (c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland—
- (i) which deals with transferred matters; and
 - (ii) for which no rules made under paragraph (a) are in force.

Textual Amendments

- F3** Words in s. 2(3)(a) repealed (19.8.2003) by [The Secretary of State for Constitutional Affairs Order 2003 \(S. I. 2003/1887\)](#), art. 9, **Sch. 2 para. 10(2)**
- F4** Words in s. 2(3)(a) inserted (12.1.2006) by [The Transfer of Functions \(Lord Chancellor and Secretary of State\) Order 2005 \(S.I. 2005/3429\)](#), art. 8, **Sch. para. 3**

Modifications etc. (not altering text)

- C5** [S. 2\(3\)\(a\)](#): functions of the Secretary of State to be exercisable concurrently with the Lord Chancellor (12.1.2006) by [The Transfer of Functions \(Lord Chancellor and Secretary of State\) Order 2005 \(S.I. 2005/3429\)](#), **art. 3(2)** (with arts. 4, 5)

Legislation

3 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
 - (c) 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.

4 Declaration 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.
- (5) In this section “court” means—

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

- [^{F5}(a) the Supreme Court;]
 - (b) the Judicial Committee of the Privy Council;
 - (c) the [^{F6}Court Martial Appeal Court] ;
 - (d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;
 - (e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.
 - [^{F7}(f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the [^{F8}Chancellor of the High Court] or a puisne judge of the High Court.]
- (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.

Textual Amendments

- F5** S. 4(5)(a) substituted (1.10.2009) by *Constitutional Reform Act 2005* (c. 4), ss. 40, 148, **Sch. 9 para. 66(2)**; S.I. 2009/1604, **art. 2(d)**
- F6** Words in s. 4(5)(c) substituted (28.3.2009 for certain purposes and 31.10.2009 otherwise) by *Armed Forces Act 2006* (c. 52), ss. 378, 383, **Sch. 16 para. 156**; S.I. 2009/812, **art. 3** (with transitional provisions in S.I. 2009/1059); S.I. 2009/1167, **art. 4**
- F7** S. 4(5)(f) inserted (1.10.2007) by *Mental Capacity Act 2005* (c. 9), ss. 67(1), 68(1)-(3), **Sch. 6 para. 43** (with ss. 27, 28, 29, 62); S.I. 2007/1897, **art. 2(1)(c)(d)**
- F8** Words in s. 4(5)(f) substituted (1.10.2013) by *Crime and Courts Act 2013* (c. 22), s. 61(3), **Sch. 14 para. 5(5)**; S.I. 2013/2200, **art. 3(g)**

5 Right of Crown to intervene.

- (1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.
- (2) In any case to which subsection (1) applies—
- (a) a Minister of the Crown (or a person nominated by him),
 - (b) a member of the Scottish Executive,
 - (c) a Northern Ireland Minister,
 - (d) a Northern Ireland department,
- is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.
- (3) Notice under subsection (2) may be given at any time during the proceedings.
- (4) A person who has been made a party to criminal proceedings (other than in Scotland) as the result of a notice under subsection (2) may, with leave, appeal to the [^{F9}Supreme Court] against any declaration of incompatibility made in the proceedings.
- (5) In subsection (4)—
- “criminal proceedings” includes all proceedings before the [^{F10}Court Martial Appeal Court]; and

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

“leave” means leave granted by the court making the declaration of incompatibility or by the ^{F11}Supreme Court]

Textual Amendments

- F9** Words in s. 5(4) substituted (1.10.2009) by [Constitutional Reform Act 2005 \(c. 4\), ss. 40, 148, Sch. 9 para. 66\(3\)](#); S.I. 2009/1604, [art. 2\(d\)](#)
- F10** Words in s. 5(5) substituted (28.3.2009 for certain purposes and 31.10.2009 otherwise) by [Armed Forces Act 2006 \(c. 52\), ss. 378, 383, Sch. 16 para. 157](#); S.I. 2009/812, [art. 3](#) (with transitional provisions in S.I. 2009/1059); S.I. 2009/1167, [art. 4](#)
- F11** Words in s. 5(5) substituted (1.10.2009) by [Constitutional Reform Act 2005 \(c. 4\), ss. 40, 148, Sch. 9 para. 66\(3\)](#); S.I. 2009/1604, [art. 2\(d\)](#)

Modifications etc. (not altering text)

- C6** [S. 5\(2\)](#) functions made exercisable concurrently or jointly with the Welsh Ministers by 2006 c. 32, Sch. 3A para. 1 (as inserted (1.4.2018) by [Wales Act 2017 \(c. 4\), s. 71\(4\), Sch. 4 para. 1](#) (with [Sch. 7 paras. 1, 6](#)); S.I. 2017/1179, [reg. 3\(p\)](#))

Public authorities

6 Acts of public authorities.

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if—
 - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
 - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
- (3) In this section “public authority” includes—
 - (a) a court or tribunal, and
 - (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
- (4) ^{F12}
- (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.
- (6) “An act” includes a failure to act but does not include a failure to—
 - (a) introduce in, or lay before, Parliament a proposal for legislation; or
 - (b) make any primary legislation or remedial order.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

Textual Amendments

F12 S. 6(4) repealed (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40, 146, 148, Sch. 9 para. 66(4), **Sch. 18 Pt. 5**; S.I. 2009/1604, **art. 2(d)(f)**

Modifications etc. (not altering text)

- C7** S. 6 excluded (5.3.2015) by Infrastructure Act 2015 (c. 7), **ss. 8(3)(b)**, 57(1); S.I. 2015/481, reg. 2(a)
- C8** S. 6(1) applied (2.10.2000) by 1999 c. 33, **ss. 65(2)**, 170(4); S.I. 2000/2444, **art. 2, Sch. 1** (subject to transitional provisions in arts. 3, 4, Sch. 2)
- C9** S. 6(3)(b) modified (1.12.2008 with exception in art. 2(2) of commencing S.I.) by Health and Social Care Act 2008 (c. 14), **ss. 145(1)-(4)**, 170 (with s. 145(5)); S.I. 2008/2994, **art. 2(1)**
- C10** S. 6(3)(b) applied (1.4.2015) by Care Act 2014 (c. 23), **s. 73(2)(3)127**; S.I. 2015/993, **art. 2(r)** (with transitional provisions in S.I. 2015/995)

7 Proceedings.

- (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
 - (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
 - (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.
- (2) In subsection (1)(a) “appropriate court or tribunal” means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.
- (3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.
- (4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.
- (5) Proceedings under subsection (1)(a) must be brought before the end of—
 - (a) the period of one year beginning with the date on which the act complained of took place; or
 - (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,
 but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.
- (6) In subsection (1)(b) “legal proceedings” includes—
 - (a) proceedings brought by or at the instigation of a public authority; and
 - (b) an appeal against the decision of a court or tribunal.
- (7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.
- (8) Nothing in this Act creates a criminal offence.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

- (9) In this section “rules” means—
- (a) in relation to proceedings before a court or tribunal outside Scotland, rules made by ^{F13} . . . [^{F14}the Lord Chancellor or] the Secretary of State for the purposes of this section or rules of court,
 - (b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,
 - (c) in relation to proceedings before a tribunal in Northern Ireland—
 - (i) which deals with transferred matters; and
 - (ii) for which no rules made under paragraph (a) are in force,
 rules made by a Northern Ireland department for those purposes,
- and includes provision made by order under section 1 of the ^{M1}Courts and Legal Services Act 1990.
- (10) In making rules, regard must be had to section 9.
- (11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to—
- (a) the relief or remedies which the tribunal may grant; or
 - (b) the grounds on which it may grant any of them.
- (12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.
- (13) “The Minister” includes the Northern Ireland department concerned.

Textual Amendments

- F13** Words in s. 7(9)(a) repealed (19.8.2003) by [The Secretary of State for Constitutional Affairs Order 2003 \(S. I. 2003/1887\)](#), art. 9, **Sch. 2 para. 10(2)**
- F14** Words in s. 7(9)(a) inserted (12.1.2006) by [The Transfer of Functions \(Lord Chancellor and Secretary of State\) Order 2005 \(S.I. 2005/3429\)](#), art. 8, **Sch. para. 3**,

Modifications etc. (not altering text)

- C11** S. 7 amended (2.10.2000) by [Regulation of Investigatory Powers Act 2000 \(c. 23\)](#), ss. **65(2)(a)**, 83 (with s. 82(3); [S.I. 2000/2543](#), art. 3
- C12** S. 7: referred to (11.3.2005) by [Prevention of Terrorism Act 2005 \(c. 2\)](#), {s. 11(2)}
- C13** S. 7(9)(a): functions of the Secretary of State to be exercisable concurrently with the Lord Chancellor (12.1.2006) by [The Transfer of Functions \(Lord Chancellor and Secretary of State\) Order 2005 \(S.I. 2005/3429\)](#), art. **3(2)** (with arts. 4, 5)
- C14** S. 7(11): functions of the Secretary of State to be exercisable concurrently with the Lord Chancellor (12.1.2006) by [The Transfer of Functions \(Lord Chancellor and Secretary of State\) Order 2005 \(S.I. 2005/3429\)](#), art. **3(2)** (with arts. 4, 5)

Marginal Citations

- M1** 1990 c. 41.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

[^{F15}7A **Limitation: overseas armed forces proceedings**

- (1) A court or tribunal exercising its discretion under section 7(5)(b) in respect of overseas armed forces proceedings must do so—
 - (a) in accordance with subsection (2), and
 - (b) subject to the rule in subsection (4).
- (2) The court or tribunal must have particular regard to—
 - (a) the effect of the delay in bringing proceedings on the cogency of evidence adduced or likely to be adduced by the parties, with particular reference to—
 - (i) the likely impact of the operational context on the ability of individuals who are (or, at the time of the events to which the proceedings relate, were) members of Her Majesty's forces to remember relevant events or actions fully or accurately, and
 - (ii) the extent of dependence on the memories of such individuals, taking into account the effect of the operational context on the ability of such individuals to record, or to retain records of, relevant events or actions;
 - (b) the likely impact of the proceedings on the mental health of any witness or potential witness who is (or, at the time of the events to which the proceedings relate, was) a member of Her Majesty's forces.
- (3) In subsection (2) references to “the operational context” are to the fact that the events to which the proceedings relate took place in the context of overseas operations, and include references to the exceptional demands and stresses to which members of Her Majesty's forces are subject.
- (4) The rule referred to in subsection (1)(b) is that overseas armed forces proceedings must be brought before the later of—
 - (a) the end of the period of 6 years beginning with the date on which the act complained of took place;
 - (b) the end of the period of 12 months beginning with the date of knowledge.
- (5) In subsection (4), the “date of knowledge” means the date on which the person bringing the proceedings first knew, or first ought to have known, both—
 - (a) of the act complained of, and
 - (b) that it was an act of the Ministry of Defence or the Secretary of State for Defence.
- (6) “Overseas armed forces proceedings” means proceedings—
 - (a) against the Ministry of Defence or the Secretary of State for Defence, and
 - (b) in connection with overseas operations.
- (7) “Overseas operations” means any operations outside the British Islands, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which members of Her Majesty's forces come under attack or face the threat of attack or violent resistance.
- (8) In this section the reference to the British Islands includes the territorial sea adjacent to the United Kingdom and the territorial sea adjacent to any of the Channel Islands or the Isle of Man.
- (9) In this section “Her Majesty's forces” has the same meaning as in the Armed Forces Act 2006 (see section 374 of that Act).]

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

Textual Amendments

F15 S. 7A inserted (30.6.2021) by [Overseas Operations \(Service Personnel and Veterans\) Act 2021 \(c. 23\)](#), ss. [11\(2\)](#), [14\(2\)](#); S.I. 2021/678, reg. 2

8 Judicial remedies.

- (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
- (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
- (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—
 - (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
 - (b) the consequences of any decision (of that or any other court) in respect of that act,
 the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
- (4) In determining—
 - (a) whether to award damages, or
 - (b) the amount of an award,
 the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.
- (5) A public authority against which damages are awarded is to be treated—
 - (a) in Scotland, for the purposes of section 3 of the ^{M2}Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;
 - (b) for the purposes of the ^{M3}Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.
- (6) In this section—

“court” includes a tribunal;

“damages” means damages for an unlawful act of a public authority; and

“unlawful” means unlawful under section 6(1).

Marginal Citations

M2 1940 c. 42.
M3 1978 c. 47.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

9 Judicial acts.

- (1) Proceedings under section 7(1)(a) in respect of a judicial act may be brought only—
- (a) by exercising a right of appeal;
 - (b) on an application (in Scotland a petition) for judicial review; or
 - (c) in such other forum as may be prescribed by rules.

- (2) That does not affect any rule of law which prevents a court from being the subject of judicial review.

[^{F16}(3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than—

- (a) to compensate a person to the extent required by Article 5(5) of the Convention, or
- (b) to compensate a person for a judicial act that is incompatible with Article 6 of the Convention in circumstances where the person is detained and, but for the incompatibility, the person would not have been detained or would not have been detained for so long.]

- (4) An award of damages permitted by subsection (3) is to be made against the Crown; but no award may be made unless the appropriate person, if not a party to the proceedings, is joined.

- (5) In this section—

“appropriate person” means the Minister responsible for the court concerned, or a person or government department nominated by him;

“court” includes a tribunal;

“judge” includes a member of a tribunal, a justice of the peace [^{F17}(or, in Northern Ireland, a lay magistrate)] and a clerk or other officer entitled to exercise the jurisdiction of a court;

“judicial act” means a judicial act of a court and includes an act done on the instructions, or on behalf, of a judge; and

“rules” has the same meaning as in section 7(9).

Textual Amendments

F16 S. 9(3) substituted (21.10.2020) by *The Human Rights Act 1998 (Remedial) Order 2020* (S.I. 2020/1160), arts. 1(2), 2(1) (with art. 2(2))

F17 Words in definition s. 9(5) inserted (N.I.)(1.4.2005) by 2002 c. 26, s. 10(6), Sch. 4 para. 39; S.R. 2005/109, art. 2 Sch.

Remedial action

10 Power to take remedial action.

- (1) This section applies if—
- (a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies—
 - (i) all persons who may appeal have stated in writing that they do not intend to do so;

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

- (ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or
 - (iii) an appeal brought within that time has been determined or abandoned; or
 - (b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.
- (2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.
- (3) If, in the case of subordinate legislation, a Minister of the Crown considers—
- (a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and
 - (b) that there are compelling reasons for proceeding under this section,
- he may by order make such amendments to the primary legislation as he considers necessary.
- (4) This section also applies where the provision in question is in subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility with a Convention right and the Minister proposes to proceed under paragraph 2(b) of Schedule 2.
- (5) If the legislation is an Order in Council, the power conferred by subsection (2) or (3) is exercisable by Her Majesty in Council.
- (6) In this section “legislation” does not include a Measure of the Church Assembly or of the General Synod of the Church of England.
- (7) Schedule 2 makes further provision about remedial orders.

Other rights and proceedings

11 Safeguard for existing human rights.

A person’s reliance on a Convention right does not restrict—

- (a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or
- (b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9.

12 Freedom of expression.

- (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
- (2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

- (a) that the applicant has taken all practicable steps to notify the respondent; or
 - (b) that there are compelling reasons why the respondent should not be notified.
- (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
- (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
- (a) the extent to which—
 - (i) the material has, or is about to, become available to the public; or
 - (ii) it is, or would be, in the public interest for the material to be published;
 - (b) any relevant privacy code.
- (5) In this section—
- “court” includes a tribunal; and
 - “relief” includes any remedy or order (other than in criminal proceedings).

13 Freedom of thought, conscience and religion.

- (1) If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.
- (2) In this section “court” includes a tribunal.

Derogations and reservations

14 Derogations.

- (1) In this Act “designated derogation” means—
- ^{F18}.....
any derogation by the United Kingdom from an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the [^{F19}Secretary of State]
- ^{F20}(2)
- (3) If a designated derogation is amended or replaced it ceases to be a designated derogation.
- (4) But subsection (3) does not prevent the [^{F21}Secretary of State] from exercising his power under subsection (1) ^{F22}. . . to make a fresh designation order in respect of the Article concerned.
- (5) The [^{F23}Secretary of State] must by order make such amendments to Schedule 3 as he considers appropriate to reflect—
- (a) any designation order; or
 - (b) the effect of subsection (3).

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

- (6) A designation order may be made in anticipation of the making by the United Kingdom of a proposed derogation.

Textual Amendments

- F18** S. 14(1): from “(a)” to “(b)” repealed (1.4.2001) by S.I. 2001/1216, art. 2(a)
- F19** Words in s. 14 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, Sch. 2 para. 10(1)
- F20** S. 14(2) repealed (1.4.2001) by S.I. 2001/1216, art. 2(b)
- F21** Words in s. 14 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, Sch. 2 para. 10(1)
- F22** S. 14(4): “(b)” repealed (1.4.2001) by S.I. 2001/1216, art. 2(c)
- F23** Words in s. 14 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, Sch. 2 para. 10(1)

15 Reservations.

- (1) In this Act “designated reservation” means—
- (a) the United Kingdom’s reservation to Article 2 of the First Protocol to the Convention; and
 - (b) any other reservation by the United Kingdom to an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the [^{F24}Secretary of State] .
- (2) The text of the reservation referred to in subsection (1)(a) is set out in Part II of Schedule 3.
- (3) If a designated reservation is withdrawn wholly or in part it ceases to be a designated reservation.
- (4) But subsection (3) does not prevent the [^{F25}Secretary of State] from exercising his power under subsection (1)(b) to make a fresh designation order in respect of the Article concerned.
- (5) [^{F26}Secretary of State] must by order make such amendments to this Act as he considers appropriate to reflect—
- (a) any designation order; or
 - (b) the effect of subsection (3).

Textual Amendments

- F24** Words in s. 15 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, Sch. 2 para. 10(1)
- F25** Words in s. 15 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, Sch. 2 para. 10(1)
- F26** Words in s. 15 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, Sch. 2 para. 10(1)

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

16 Period for which designated derogations have effect.

- (1) If it has not already been withdrawn by the United Kingdom, a designated derogation ceases to have effect for the purposes of this Act—
^{F27}
. . . , at the end of the period of five years beginning with the date on which the order designating it was made.
- (2) At any time before the period—
(a) fixed by subsection (1) ^{F28} . . . , or
(b) extended by an order under this subsection,
comes to an end, the [^{F29}Secretary of State] may by order extend it by a further period of five years.
- (3) An order under section 14(1) ^{F30} . . . ceases to have effect at the end of the period for consideration, unless a resolution has been passed by each House approving the order.
- (4) Subsection (3) does not affect—
(a) anything done in reliance on the order; or
(b) the power to make a fresh order under section 14(1) ^{F30}
- (5) In subsection (3) “period for consideration” means the period of forty days beginning with the day on which the order was made.
- (6) In calculating the period for consideration, no account is to be taken of any time during which—
(a) Parliament is dissolved or prorogued; or
(b) both Houses are adjourned for more than four days.
- (7) If a designated derogation is withdrawn by the United Kingdom, the [^{F31}Secretary of State] must by order make such amendments to this Act as he considers are required to reflect that withdrawal.

Textual Amendments

- F27** S. 16(1): words from “(a)” to “any other derogation” repealed (1.4.2001) by S.I. 2001/1216, art. 3(a)
- F28** Words in s. 16(2)(a) repealed (1.4.2001) by S.I. 2001/1216, art. 3(b)
- F29** Words in s. 16 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, Sch. 2 para. 10(1)
- F30** S. 16(3)(4)(b): “(b)” repealed (1.4.2001) by S.I. 2001/1216, art. 3(c)(d)
- F31** Words in s. 16 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, Sch. 2 para. 10(1)

17 Periodic review of designated reservations.

- (1) The appropriate Minister must review the designated reservation referred to in section 15(1)(a)—
(a) before the end of the period of five years beginning with the date on which section 1(2) came into force; and
(b) if that designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

- (2) The appropriate Minister must review each of the other designated reservations (if any)—
 - (a) before the end of the period of five years beginning with the date on which the order designating the reservation first came into force; and
 - (b) if the designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).
- (3) The Minister conducting a review under this section must prepare a report on the result of the review and lay a copy of it before each House of Parliament.

Judges of the European Court of Human Rights

18 Appointment to European Court of Human Rights.

- (1) In this section “judicial office” means the office of—
 - (a) Lord Justice of Appeal, Justice of the High Court or Circuit judge, in England and Wales;
 - (b) judge of the Court of Session or sheriff, in Scotland;
 - (c) Lord Justice of Appeal, judge of the High Court or county court judge, in Northern Ireland.
- (2) The holder of a judicial office may become a judge of the European Court of Human Rights (“the Court”) without being required to relinquish his office.
- (3) But he is not required to perform the duties of his judicial office while he is a judge of the Court.
- (4) In respect of any period during which he is a judge of the Court—
 - (a) a Lord Justice of Appeal or Justice of the High Court is not to count as a judge of the relevant court for the purposes of section 2(1) or 4(1) of the [^{F32}Senior Courts Act 1981](maximum number of judges) nor as a judge of the [^{F33}Senior Courts] for the purposes of section 12(1) to (6) of that Act (salaries etc.);
 - (b) a judge of the Court of Session is not to count as a judge of that court for the purposes of section 1(1) of the ^{M4}Court of Session Act 1988 (maximum number of judges) or of section 9(1)(c) of the ^{M5}Administration of Justice Act 1973 (“the 1973 Act”) (salaries etc.);
 - (c) a Lord Justice of Appeal or judge of the High Court in Northern Ireland is not to count as a judge of the relevant court for the purposes of section 2(1) or 3(1) of the ^{M6}Judicature (Northern Ireland) Act 1978 (maximum number of judges) nor as a judge of the [^{F34}Court of Judicature] of Northern Ireland for the purposes of section 9(1)(d) of the 1973 Act (salaries etc.);
 - (d) a Circuit judge is not to count as such for the purposes of section 18 of the ^{M7}Courts Act 1971 (salaries etc.);
 - (e) a sheriff is not to count as such for the purposes of section 14 of the ^{M8}Sheriff Courts (Scotland) Act 1907 (salaries etc.);
 - (f) a county court judge of Northern Ireland is not to count as such for the purposes of section 106 of the ^{M9}County Courts Act Northern Ireland) 1959 (salaries etc.).

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

- (5) If a sheriff principal is appointed a judge of the Court, section 11(1) of the ^{M10}Sheriff Courts (Scotland) Act 1971 (temporary appointment of sheriff principal) applies, while he holds that appointment, as if his office is vacant.
- (6) Schedule 4 makes provision about judicial pensions in relation to the holder of a judicial office who serves as a judge of the Court.
- (7) The Lord Chancellor or the Secretary of State may by order make such transitional provision (including, in particular, provision for a temporary increase in the maximum number of judges) as he considers appropriate in relation to any holder of a judicial office who has completed his service as a judge of the Court.
- [^{F35}(7A) The following paragraphs apply to the making of an order under subsection (7) in relation to any holder of a judicial office listed in subsection (1)(a)—
- (a) before deciding what transitional provision it is appropriate to make, the person making the order must consult the Lord Chief Justice of England and Wales;
 - (b) before making the order, that person must consult the Lord Chief Justice of England and Wales.
- (7B) The following paragraphs apply to the making of an order under subsection (7) in relation to any holder of a judicial office listed in subsection (1)(c)—
- (a) before deciding what transitional provision it is appropriate to make, the person making the order must consult the Lord Chief Justice of Northern Ireland;
 - (b) before making the order, that person must consult the Lord Chief Justice of Northern Ireland.
- (7C) The Lord Chief Justice of England and Wales may nominate a judicial office holder (within the meaning of section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under this section.
- (7D) The Lord Chief Justice of Northern Ireland may nominate any of the following to exercise his functions under this section—
- (a) the holder of one of the offices listed in Schedule 1 to the Justice (Northern Ireland) Act 2002;
 - (b) a Lord Justice of Appeal (as defined in section 88 of that Act).]

Textual Amendments

- F32** Words in s. 18(4)(a) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 59, 148, [Sch. 11 para. 4](#); S.I. 2009/1604, [art. 2\(d\)](#)
- F33** Words in s. 18(4)(a) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 59, 148, [Sch. 11 para. 4](#); S.I. 2009/1604, [art. 2\(d\)](#)
- F34** Words in s. 18(4)(c) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 59, 148, [Sch. 11 para. 6](#); S.I. 2009/1604, [art. 2\(d\)](#)
- F35** S. 18(7A)-(7D) inserted (3.4.2006) by Constitutional Reform Act 2005 (c. 4), ss. 15, 148, [Sch. 4 para. 278](#); S.I. 2006/1014, [art. 2](#), Sch. 1 para. 11(v)

Marginal Citations

- M4** 1988 c. 36.
M5 1973 c. 15.
M6 1978 c. 23.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

- M7** 1971 c. 23.
- M8** 1907 c. 51.
- M9** 1959 c. 25 (N.I.).
- M10** 1971 c. 58.

Parliamentary procedure

19 Statements of compatibility.

- (1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—
 - (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or
 - (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.
- (2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

Supplemental

20 Orders etc. under this Act.

- (1) Any power of a Minister of the Crown to make an order under this Act is exercisable by statutory instrument.
- (2) The power of ^{F36} . . . [^{F37}the Lord Chancellor or] the Secretary of State to make rules (other than rules of court) under section 2(3) or 7(9) is exercisable by statutory instrument.
- (3) Any statutory instrument made under section 14, 15 or 16(7) must be laid before Parliament.
- (4) No order may be made by ^{F38} . . . [^{F39}the Lord Chancellor or] the Secretary of State under section 1(4), 7(11) or 16(2) unless a draft of the order has been laid before, and approved by, each House of Parliament.
- (5) Any statutory instrument made under section 18(7) or Schedule 4, or to which subsection (2) applies, shall be subject to annulment in pursuance of a resolution of either House of Parliament.
- (6) The power of a Northern Ireland department to make—
 - (a) rules under section 2(3)(c) or 7(9)(c), or
 - (b) an order under section 7(11),
 is exercisable by statutory rule for the purposes of the ^{M11}Statutory Rules (Northern Ireland) Order 1979.
- (7) Any rules made under section 2(3)(c) or 7(9)(c) shall be subject to negative resolution; and section 41(6) of the ^{M12}Interpretation Act Northern Ireland) 1954 (meaning of “subject to negative resolution”) shall apply as if the power to make the rules were conferred by an Act of the Northern Ireland Assembly.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

- (8) No order may be made by a Northern Ireland department under section 7(11) unless a draft of the order has been laid before, and approved by, the Northern Ireland Assembly.

Textual Amendments

- F36** Words in s. 20(2) repealed (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(2)**
- F37** Words in s. 20(2) inserted (12.1.2006) by The Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005 (S.I. 2005/3429), art. 8, **Sch. para. 3**
- F38** Words in s. 20(4) repealed (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(2)**
- F39** Words in s. 20(4) inserted (12.1.2006) by The Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005 (S.I. 2005/3429), art. 8, **Sch. para. 3**

Marginal Citations

- M11** S.I. 1979/1573 (N.I. 12).
M12 1954 c. 33 (N.I.).

21 Interpretation, etc.

(1) In this Act—

“amend” includes repeal and apply (with or without modifications);

“the appropriate Minister” means the Minister of the Crown having charge of the appropriate authorised government department (within the meaning of the ^{M13}Crown Proceedings Act 1947);

“the Commission” means the European Commission of Human Rights;

“the Convention” means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 as it has effect for the time being in relation to the United Kingdom;

“declaration of incompatibility” means a declaration under section 4;

“Minister of the Crown” has the same meaning as in the Ministers of the ^{M14}Crown Act 1975;

“Northern Ireland Minister” includes the First Minister and the deputy First Minister in Northern Ireland;

“primary legislation” means any—

- (a) public general Act;
- (b) local and personal Act;
- (c) private Act;
- (d) Measure of the Church Assembly;
- (e) Measure of the General Synod of the Church of England;
- (f) Order in Council—
 - (i) made in exercise of Her Majesty’s Royal Prerogative;
 - (ii) made under section 38(1)(a) of the ^{M15}Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or
 - (iii) amending an Act of a kind mentioned in paragraph (a), (b) or (c);

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

and includes an order or other instrument made under primary legislation (otherwise than by the [^{F40}Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Assembly Government,] a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland department) to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation;

“the First Protocol” means the protocol to the Convention agreed at Paris on 20th March 1952;

^{F41}

“the Eleventh Protocol” means the protocol to the Convention (restructuring the control machinery established by the Convention) agreed at Strasbourg on 11th May 1994;

[^{F42}“the Thirteenth Protocol” means the protocol to the Convention (concerning the abolition of the death penalty in all circumstances) agreed at Vilnius on 3rd May 2002;]

“remedial order” means an order under section 10;

“subordinate legislation” means any—

- (a) Order in Council other than one—
 - (i) made in exercise of Her Majesty’s Royal Prerogative;
 - (ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or
 - (iii) amending an Act of a kind mentioned in the definition of primary legislation;
- (b) Act of the Scottish Parliament;
- (ba) [^{F43}Measure of the National Assembly for Wales;
- (bb) Act of the National Assembly for Wales;]
- (c) Act of the Parliament of Northern Ireland;
- (d) Measure of the Assembly established under section 1 of the ^{M16}Northern Ireland Assembly Act 1973;
- (e) Act of the Northern Ireland Assembly;
- (f) order, rules, regulations, scheme, warrant, byelaw or other instrument made under primary legislation (except to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation);
- (g) order, rules, regulations, scheme, warrant, byelaw or other instrument made under legislation mentioned in paragraph (b), (c), (d) or (e) or made under an Order in Council applying only to Northern Ireland;
- (h) order, rules, regulations, scheme, warrant, byelaw or other instrument made by a member of the Scottish Executive [^{F44}, Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Assembly Government,] a Northern Ireland Minister or a Northern Ireland department in exercise of prerogative or other executive functions of Her Majesty which are exercisable by such a person on behalf of Her Majesty;

“transferred matters” has the same meaning as in the Northern Ireland Act 1998; and

“tribunal” means any tribunal in which legal proceedings may be brought.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

- (2) The references in paragraphs (b) and (c) of section 2(1) to Articles are to Articles of the Convention as they had effect immediately before the coming into force of the Eleventh Protocol.
- (3) The reference in paragraph (d) of section 2(1) to Article 46 includes a reference to Articles 32 and 54 of the Convention as they had effect immediately before the coming into force of the Eleventh Protocol.
- (4) The references in section 2(1) to a report or decision of the Commission or a decision of the Committee of Ministers include references to a report or decision made as provided by paragraphs 3, 4 and 6 of Article 5 of the Eleventh Protocol (transitional provisions).

^{F45}(5)

Extent Information

E2 For the extent of s. 21 outside the U.K. see s. 22(7)

Textual Amendments

- F40** Words in the definition of "primary legislation" in s. 21(1) substituted by [Government of Wales Act 2006 \(c. 32\)](#), s. 160(1), [Sch. 10 para.56\(2\)](#) (with [Sch. 11 para. 22](#)) the amending provision coming into force immediately after "the 2007 election" (held on 3.5.2007) subject to s. 161(4)(5) of the amending Act, which provides for certain provisions to come into force for specified purposes immediately after the end of "the initial period" (which ended with the day of the first appointment of a First Minister on 25.5.2007) - see ss. 46, 161(1)(4)(5) of the amending Act.
- F41** S. 21(1): definition of "the Sixth Protocol" omitted (22.6.2004) by virtue of [The Human Rights Act 1998 \(Amendment\) Order 2004 \(S.I. 2004/1574\)](#), [art. 2\(2\)](#)
- F42** S. 21(1): definition of "the Thirteenth Protocol" inserted (22.6.2004) by virtue of [The Human Rights Act 1998 \(Amendment\) Order 2004 \(S.I. 2004/1574\)](#), [art. 2\(2\)](#)
- F43** Words in the definition of "subordinate legislation" in s. 21(1) substituted by [Government of Wales Act 2006 \(c. 32\)](#), s. 160(1), [Sch. 10 para.56\(3\)](#) (with [Sch. 11 para. 22](#)) the amending provision coming into force immediately after "the 2007 election" (held on 3.5.2007) subject to s. 161(4)(5) of the amending Act, which provides for certain provisions to come into force for specified purposes immediately after the end of "the initial period" (which ended with the day of the first appointment of a First Minister on 25.5.2007) - see ss. 46, 161(1)(4)(5) of the amending Act.
- F44** Words in the definition of "subordinate legislation" in s. 21(1) substituted by [Government of Wales Act 2006 \(c. 32\)](#), s. 160(1), [Sch. 10 para.56\(4\)](#) (with [Sch. 11 para. 22](#)) the amending provision coming into force immediately after "the 2007 election" (held on 3.5.2007) subject to s. 161(4)(5) of the amending Act, which provides for certain provisions to come into force for specified purposes immediately after the end of "the initial period" (which ended with the day of the first appointment of a First Minister on 25.5.2007) - see ss. 46, 161(1)(4)(5) of the amending Act.
- F45** S. 21(5) repealed (28.3.2009 for specified purposes and 31.10.2009 otherwise) by [Armed Forces Act 2006 \(c. 52\)](#), ss. 378, 383, [Sch. 17](#); [S.I. 2009/812](#), [art. 3](#) (with transitional provisions in [S.I. 2009/1059](#)); [S.I. 2009/1167](#), [art. 4](#)

Commencement Information

I1 S. 21 wholly in force at 2.10.2000; s. 21(5) in force at Royal Assent, see s. 22(2)(3); s. 21 in force so far as not already in force (2.10.2000) by [S.I. 2000/1851](#), [art. 2](#)

Marginal Citations

- M13** 1947 c. 44.
M14 1975 c. 26.
M15 1973 c. 36.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

M16 1973 c. 17.

22 Short title, commencement, application and extent.

- (1) This Act may be cited as the Human Rights Act 1998.
- (2) Sections 18, 20 and 21(5) and this section come into force on the passing of this Act.
- (3) The other provisions of this Act come into force on such day as the Secretary of State may by order appoint; and different days may be appointed for different purposes.
- (4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.

[^{F46}(4A) Section 7A (limitation: overseas armed forces proceedings) applies to proceedings brought under section 7(1)(a) on or after the date on which section 7A comes into force, whenever the act in question took place.]

- (5) This Act binds the Crown.
- (6) This Act extends to Northern Ireland.

^{F47}(7)

Subordinate Legislation Made

- P1** S. 22(3) power partly exercised: 24.11.1998 appointed for specified provisions by [S.I. 1998/2882, art. 2](#)
S. 22(3) power fully exercised: 2.10.2000 appointed for remaining provisions by [S.I. 2000/1851, art. 2](#)

Textual Amendments

- F46** S. 22(4A) inserted (30.6.2021) by [Overseas Operations \(Service Personnel and Veterans\) Act 2021 \(c. 23\), ss. 11\(3\), 14\(2\)](#); S.I. 2021/678, reg. 2
- F47** S. 22(7) repealed (28.3.2009 for certain purposes and 31.10.2009 otherwise) by [Armed Forces Act 2006 \(c. 52\), ss. 378, 383, Sch. 17](#); S.I. 2009/812, [art. 3](#) (with transitional provisions in S.I. 2009/1059); S.I. 2009/1167, [art. 4](#)

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

SCHEDULES

SCHEDULE 1

Section 1(3).

THE ARTICLES

PART I

THE CONVENTION

RIGHTS AND FREEDOMS

ARTICLE 2

RIGHT TO LIFE

- 1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- 2 Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
- (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3

PROHIBITION OF TORTURE

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4

PROHIBITION OF SLAVERY AND FORCED LABOUR

- 1 No one shall be held in slavery or servitude.
- 2 No one shall be required to perform forced or compulsory labour.
- 3 For the purpose of this Article the term "forced or compulsory labour" shall not include:
- (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

- (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) any work or service which forms part of normal civic obligations.

ARTICLE 5

RIGHT TO LIBERTY AND SECURITY

- 1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
- (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- 2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
- 3 Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- 4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
- 5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

ARTICLE 6

RIGHT TO A FAIR TRIAL

- 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 3 Everyone charged with a criminal offence has the following minimum rights:
- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7

NO PUNISHMENT WITHOUT LAW

- 1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
- 2 This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9

FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

- 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

FREEDOM OF EXPRESSION

- 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11

FREEDOM OF ASSEMBLY AND ASSOCIATION

- 1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- 2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

ARTICLE 12

RIGHT TO MARRY

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ARTICLE 14

PROHIBITION OF DISCRIMINATION

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ARTICLE 16

RESTRICTIONS ON POLITICAL ACTIVITY OF ALIENS

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17

PROHIBITION OF ABUSE OF RIGHTS

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18

LIMITATION ON USE OF RESTRICTIONS ON RIGHTS

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

PART II

THE FIRST PROTOCOL

ARTICLE 1

PROTECTION OF PROPERTY

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

ARTICLE 2

RIGHT TO EDUCATION

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

ARTICLE 3

RIGHT TO FREE ELECTIONS

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

^{F48} PART 3

ARTICLE 1 OF THE THIRTEENTH PROTOCOL

ABOLITION OF THE DEATH PENALTY

Textual Amendments

F48 Sch. 1 Pt. 3 substituted (22.6.2004) by [The Human Rights Act 1998 \(Amendment\) Order 2004 \(S.I. 2004/1574\)](#), [art. 2\(3\)](#)

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.]

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

PART III

THE SIXTH PROTOCOL

ARTICLE 1

ABOLITION OF THE DEATH PENALTY

ARTICLE 2

DEATH PENALTY IN TIME OF WAR

SCHEDULE 2

Section 10.

REMEDIAL ORDERS

Orders

- 1 (1) A remedial order may—
 - (a) contain such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate;
 - (b) be made so as to have effect from a date earlier than that on which it is made;
 - (c) make provision for the delegation of specific functions;
 - (d) make different provision for different cases.
- (2) The power conferred by sub-paragraph (1)(a) includes—
 - (a) power to amend primary legislation (including primary legislation other than that which contains the incompatible provision); and
 - (b) power to amend or revoke subordinate legislation (including subordinate legislation other than that which contains the incompatible provision).
- (3) A remedial order may be made so as to have the same extent as the legislation which it affects.
- (4) No person is to be guilty of an offence solely as a result of the retrospective effect of a remedial order.

Procedure

- 2 No remedial order may be made unless—
 - (a) a draft of the order has been approved by a resolution of each House of Parliament made after the end of the period of 60 days beginning with the day on which the draft was laid; or
 - (b) it is declared in the order that it appears to the person making it that, because of the urgency of the matter, it is necessary to make the order without a draft being so approved.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

Orders laid in draft

- 3 (1) No draft may be laid under paragraph 2(a) unless—
- (a) the person proposing to make the order has laid before Parliament a document which contains a draft of the proposed order and the required information; and
 - (b) the period of 60 days, beginning with the day on which the document required by this sub-paragraph was laid, has ended.
- (2) If representations have been made during that period, the draft laid under paragraph 2(a) must be accompanied by a statement containing—
- (a) a summary of the representations; and
 - (b) if, as a result of the representations, the proposed order has been changed, details of the changes.

Urgent cases

- 4 (1) If a remedial order (“the original order”) is made without being approved in draft, the person making it must lay it before Parliament, accompanied by the required information, after it is made.
- (2) If representations have been made during the period of 60 days beginning with the day on which the original order was made, the person making it must (after the end of that period) lay before Parliament a statement containing—
- (a) a summary of the representations; and
 - (b) if, as a result of the representations, he considers it appropriate to make changes to the original order, details of the changes.
- (3) If sub-paragraph (2)(b) applies, the person making the statement must—
- (a) make a further remedial order replacing the original order; and
 - (b) lay the replacement order before Parliament.
- (4) If, at the end of the period of 120 days beginning with the day on which the original order was made, a resolution has not been passed by each House approving the original or replacement order, the order ceases to have effect (but without that affecting anything previously done under either order or the power to make a fresh remedial order).

Definitions

- 5 In this Schedule—
- “representations” means representations about a remedial order (or proposed remedial order) made to the person making (or proposing to make) it and includes any relevant Parliamentary report or resolution; and
- “required information” means—
- (a) an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and
 - (b) a statement of the reasons for proceeding under section 10 and for making an order in those terms.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

Calculating periods

- 6 In calculating any period for the purposes of this Schedule, no account is to be taken of any time during which—
- (a) Parliament is dissolved or prorogued; or
 - (b) both Houses are adjourned for more than four days.
- [^{F527} (1) This paragraph applies in relation to—
- (a) any remedial order made, and any draft of such an order proposed to be made,—
 - (i) by the Scottish Ministers; or
 - (ii) within devolved competence (within the meaning of the Scotland Act 1998) by Her Majesty in Council; and
 - (b) any document or statement to be laid in connection with such an order (or proposed order).
- (2) This Schedule has effect in relation to any such order (or proposed order), document or statement subject to the following modifications.
- (3) Any reference to Parliament, each House of Parliament or both Houses of Parliament shall be construed as a reference to the Scottish Parliament.
- (4) Paragraph 6 does not apply and instead, in calculating any period for the purposes of this Schedule, no account is to be taken of any time during which the Scottish Parliament is dissolved or is in recess for more than four days.]

Textual Amendments

F52 Sch. 2 para. 7 inserted (27.7.2000) by S.I. 2000/2040, art. 2, Sch. Pt. I para. 21 (with art. 3)

SCHEDULE 3

Sections 14 and 15.

DEROGATION AND RESERVATION

^{F53F53} **PART I**

DEROGATION

Textual Amendments

F53 Sch. 3 Pt. I repealed (8.4.2005) by The Human Rights Act 1998 (Amendment) Order 2005 (S.I. 2005/1071), art. 2

United Kingdom's derogation from Article 5(1)

.....

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

.....

PART II

RESERVATION

At the time of signing the present (First) Protocol, I declare that, in view of certain provisions of the Education Acts in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.

Dated 20 March 1952

Made by the United Kingdom Permanent Representative to the Council of Europe.

SCHEDULE 4

Section 18(6).

JUDICIAL PENSIONS

Duty to make orders about pensions

- 1 (1) The appropriate Minister must by order make provision with respect to pensions payable to or in respect of any holder of a judicial office who serves as an ECHR judge.
- (2) A pensions order must include such provision as the Minister making it considers is necessary to secure that—
 - (a) an ECHR judge who was, immediately before his appointment as an ECHR judge, a member of a judicial pension scheme is entitled to remain as a member of that scheme;
 - (b) the terms on which he remains a member of the scheme are those which would have been applicable had he not been appointed as an ECHR judge; and
 - (c) entitlement to benefits payable in accordance with the scheme continues to be determined as if, while serving as an ECHR judge, his salary was that which would (but for section 18(4)) have been payable to him in respect of his continuing service as the holder of his judicial office.

Contributions

- 2 A pensions order may, in particular, make provision—
 - (a) for any contributions which are payable by a person who remains a member of a scheme as a result of the order, and which would otherwise be payable by deduction from his salary, to be made otherwise than by deduction from his salary as an ECHR judge; and
 - (b) for such contributions to be collected in such manner as may be determined by the administrators of the scheme.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998. (See end of Document for details)

Amendments of other enactments

- 3 A pensions order may amend any provision of, or made under, a pensions Act in such manner and to such extent as the Minister making the order considers necessary or expedient to ensure the proper administration of any scheme to which it relates.

Definitions

- 4 In this Schedule—
- “appropriate Minister” means—
- (a) in relation to any judicial office whose jurisdiction is exercisable exclusively in relation to Scotland, the Secretary of State; and
 - (b) otherwise, the Lord Chancellor;
- “ECHR judge” means the holder of a judicial office who is serving as a judge of the Court;
- “judicial pension scheme” means a scheme established by and in accordance with a pensions Act;
- “pensions Act” means—
- (a) the ^{M17}County Courts Act Northern Ireland) 1959;
 - (b) the ^{M18}Sheriffs’ Pensions (Scotland) Act 1961;
 - (c) the ^{M19}Judicial Pensions Act 1981; or
 - (d) the ^{M20}Judicial Pensions and Retirement Act 1993;
 - (e) [^{F54}the Public Service Pensions Act 2013;] and
- “pensions order” means an order made under paragraph 1.

Textual Amendments

F54 Words in Sch. 4 para. 4 inserted (1.4.2014) by [Public Service Pensions Act 2013 \(c. 25\), s. 41\(2\), Sch. 8 para. 26](#) (with Sch. 11 para. 8); S.I. 2014/839, art. 4(2)(k)

Marginal Citations

M17 1959 c. 25 (N.I.).
M18 1961 c. 42.
M19 1981 c. 20.
M20 1993 c. 8.

Annex V

Call for Evidence – Methodology

Please find a link to the Call for Evidence document on the IHRAR webpage¹.

As part of the evidence gathering process, the Panel conducted a Call for Evidence, inviting written responses to a number of questions based on the Review's Terms of Reference. Information on how this was carried out is included below.

An index of Call for Evidence responses can be found in Annex VI.

Call for Evidence questions and the Terms of Reference

The questions set out in the Call for Evidence document were intended to mirror the questions in the Terms of Reference as closely as possible. They were drafted in neutral terms to be non-tendentious.

As well as the questions in the Terms of Reference, respondents were also asked for general comment on;

- how the relationship between UK Courts and Strasbourg is currently working, including any strengths and weakness of the current approach.
- how the roles of the Courts, Government and Parliament are balanced in the operation of the Human Rights Act 1998 (including whether Courts have been drawn unduly into matters of policy), and any strengths and weakness of the current approach.

How it was advertised and who was contacted

IHRAR's Call for Evidence was published on its website and was also advertised via the Ministry of Justice's social media accounts.

The Panel sought responses representing a diverse range of views and perspectives from across all four nations of the UK. The IHRAR Secretariat contacted organisations and individuals to inform of (or invite a response to) IHRAR's Call for Evidence. This included a number of individuals whom Sir Peter Gross had contacted at IHRAR's launch, and who had expressed an interest in being kept informed of the Review's progress. The Secretariat reached out to a wide range of organisations that broadly fall into the following four categories:

- Government departments and state agencies (including the devolved administrations)

¹ See <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962423/Call-for-Evidence.pdf>

- NGOs, charities, think-tanks and campaign groups
- Parliamentary committees and independent public bodies
- Professional legal bodies

The following list of organisations and individuals were contacted:

Access to Justice Foundation

Age UK

Amnesty

Anglican Church

Article 19

Bar Council (England & Wales)

Bar Council of Northern Ireland

Baroness Hamwee

Baroness Ludford

Baroness Taylor

Blueprint for All

Board of Deputies of British Jews

British Institute of Human Rights

Catholic Church

Centre for Social Justice

Centre for Women's Justice

Christian Legal Centre

Coalition of Race Equality organisations

Constitution Committee

Counsel General for Wales

Crown Solicitor for Northern Ireland

Dame Sara Thornton (Independent Anti-Slavery Commissioner)

David Lammy MP

Disability Rights UK

EachOther

Equality and Human Rights Commission

Equality Trust

Equally Yours

Fair Play for Women

Friends, Families and Travellers

Government Communications Headquarters

Harriet Harman MP

Head of the Government Legal Service in Northern Ireland

Hindu Forum of Britain

Howard League

Human Rights Commission in Scotland

Human Rights Commission in Wales
Human Rights Consortium Scotland
Human Rights Lawyers Association
Human Rights Watch
Humanists UK
John Larkin QC
Joint Committee on Human Rights
Joint Council for the Welfare of Immigrants
Joseph Rowntree Foundation
Judicial Power Project
Just Fair
Justice
Justice Select Committee
Law Commission
Law Society of England and Wales
Law Society of Northern Ireland
Law Society of Scotland
Legal Education Foundation
LGBT Consortium
LGBT Foundation
Liberty
Lord Anderson QC KBE
Lord Carlile QC CBE
Lord Carloway QC PC
Lord Chief Justice of England and Wales
Lord Garnier QC
Lord Judge PC
Lord Pannick QC
Lord Phillips KG PC
Lord Reed PC FRSE
Lord Thomas PC
Mencap
MI5
MI6
Mind
National Police Chiefs Council
National Secular Society
Network of Sikh Organisations
Northern Ireland Executive
Northern Ireland Human Rights Commission
Nick Thomas-Symonds MP FRHistS

Prison Reform Trust
Prof. Brice Dickson
Prof. David Ormerod QC
Prof. Elwen Evans QC
Public Administration and Constitutional Affairs Select Committee
Redress
Refugee Action
Reprieve
Right to Education Initiative
Scope UK
Scottish Government
Scottish Human Rights Commission
Sir Bob Neill MP
Sir Declan Morgan
Sir Geoffrey Vos PC QC
Sir Iain MacLeod KCMG
Stonewall
The Armed Forces
The Bar Human Rights Committee
The Gender Trust
The Local Government Association
The United Nations Association – UK
Trade Unions Congress
Welsh Government
Woman’s Place UK

Length of submission period and length of submissions

IHRAR launched the public Call for Evidence on 13 January 2021, which closed on the 3 March 2021, lasting for a period of 7 weeks. In the interests of succinctness, respondents were asked to limit responses to 25 pages or 12,500 words,

Policy on publication, exceptions, late submissions

In the interests of openness and transparency, responses to the Call for Evidence were published on the IHRAR website, with the respondent identified. Respondents were informed that they were able to request non-publication or anonymisation of their response in exceptional circumstances. In total, two respondents requested anonymisation of their response².

² One of these submissions was not published as it was not relevant to the questions posed in the Call for Evidence paper.

The Panel did exempt some material which was submitted for publication. The IHRAR website stated that:

“The Independent Human Rights Act Review Panel reserves the right not to publish submissions on this website. It may decide not to publish submissions where it concludes their publication is likely to be abusive, defamatory, likely to incite the commission of an offence or otherwise potentially unlawful.”

In total, 11 responses were excluded from publication. This was because they were not relevant to the questions posed in the Call for Evidence.

Requests to submit evidence after the end of the Call for Evidence period were reviewed by the Panel on a case-by-case basis, and respondents were asked to provide details of extenuating circumstances. The Panel accepted ten submissions that were received after the deadline of the Call for Evidence.

Approach to follow up notes after meetings

In the course of several meetings held by the Panel, participants agreed to send follow up notes putting into writing points that were discussed. These are also published on the IHRAR website.

Annex VI

Index of and links to Call for Evidence Responses

INDIVIDUALS

1. Individuals A-L¹

- 1.1 Adrian Wade
- 1.2 Annabel Bannister
- 1.3 Anonymous
- 1.4 Ben Boulton
- 1.5 Chris Purnell
- 1.6 Colm O’Cinneide
- 1.7 David Davies
- 1.8 David Feldman
- 1.9 David Harries
- 1.10 Dr Frederick Cowell
- 1.11 Dr Jeff King
- 1.12 Emma Overton
- 1.13 Frances Webber
- 1.14 Gemma Davies & Paul Arnell
- 1.15 Geoff Fox
- 1.16 Guglielmo Verdirame QC
- 1.17 Jason Varuhas
 - 1.17.1 Jason Varuhas Annex
- 1.18 John Finnis and Simon Murray
- 1.19 John Lowrie
- 1.20 John Salmon
- 1.21 Kim Weeks
- 1.22 Lord Carlile of Berriew
- 1.23 Lord Pannick

¹ See <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/983211/individuals-a-l.zip>.

2. Individuals M-Z²

- 2.1 Michael Devaney
- 2.2 Michael Hall
- 2.3 Murray Hunt
- 2.4 Nicolas Bratza
 - 2.4.1 Nicolas Bratza - Supplementary Note
- 2.5 Pat Wallwork
- 2.6 Paul Harvey
- 2.7 Peter Blackwood
- 2.8 Professor Aileen Kavanagh
- 2.9 Professor David Mead
- 2.10 Professor Nicola Barker
- 2.11 Professor Philip Leach, Professor Merris Amos & Dr Ed Bates
- 2.12 Professor Robert Blackburn
- 2.13 Rita Blomme
- 2.14 Robert Thompson
- 2.15 Rt Hon Sir Declan Morgan
- 2.16 Samuel White & Jacques Harmann
- 2.17 Simon Carne
- 2.18 Simon Parsons
- 2.19 Sir Stephen Sedley
- 2.20 Tom Hickman QC
- 2.21 Yuan Yi Zhu

ORGANISATIONS

3. Organisations A-D³

- 3.1 ADF International
- 3.2 Advice on Individual Rights Centre
- 3.3 Amnesty International
- 3.4 Article 39

² See <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/990398/individuals-m-z.zip>.

³ See <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/980132/ihrar-organisations-a-d.zip>.

- 3.5 Bail for Immigration Detainees'
- 3.6 Baker McKenzie
- 3.7 Bates Wells
- 3.8 Bhatt Murphy
- 3.9 Bindmans LLP
- 3.10 Birmingham University Law School COVID-19 Review Observatory
- 3.11 Bonavero Institute of Human Rights
- 3.12 British Association for Adoption and Fostering
- 3.13 British Association of Social Workers
- 3.14 British Association of Social Workers Survey
- 3.15 British Institute of Human Rights
- 3.16 Cambridge Centre for Public Law
- 3.17 Cambridge Women's Aid Submission
- 3.18 Campaign for Freedom of Information in Scotland
- 3.19 Care Not Killing
- 3.20 CARE
- 3.21 Centre for Military Justice
- 3.22 Centre for Women's Justice
- 3.23 Challenging Behaviour Foundation
- 3.24 Child Poverty Action Group
- 3.25 Clean Air in London
- 3.26 Committee on the Administration of Justice
- 3.27 Constitutional and Administrative Law Bar Association
- 3.28 Court of Protection Practitioners Association
- 3.29 Deaf Scotland
- 3.30 Deighton Pierce Glynn
- 3.31 Dimensions
- 3.32 Doughty Street Chambers
- 3.33 Durham Law School Human Rights Centre

4. Organisations E-K⁴

- 4.1 Employment Lawyers Association
- 4.2 End Violence Against Women
- 4.3 Equalities and Human Rights Commission
- 4.4 Equality Network and Scottish Trans Alliance
- 4.5 Equally Ours
- 4.6 Faculty of Advocates
- 4.7 Family Law Bar Association
- 4.8 Fawcett Society
- 4.9 Garden Court Chambers
- 4.10 Herbert Smith Freehills
- 4.11 Hodge Jones & Allen
- 4.12 Howard League for Penal Reform
- 4.13 Human Rights Consortium Scotland
- 4.14 Human Rights in Action
- 4.15 Human Rights Lawyers Association
- 4.16 Humanists UK
- 4.17 Immigration Law Practitioners' Association
- 4.18 Inclusion London
- 4.19 Independent Advisory Panel on Deaths in Custody
- 4.20 INQUEST
- 4.21 Intrusive Footpaths Campaign
- 4.22 Irwin Mitchell LLP
- 4.23 Jimmy Reid Foundation
- 4.24 Joint Committee on Human Rights
- 4.25 JUSTICE
 - 4.25.1 JUSTICE - Annex
- 4.26 JustRight Scotland
- 4.27 Kalayaan

⁴ See <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/980133/ihrar-organisations-e-k.zip>.

5. Organisations L-Q⁵

- 5.1 Labour Campaign for Human Rights
- 5.2 Law Centres Network
- 5.3 Law Society of NI
- 5.4 Law Works
- 5.5 Leigh Day
- 5.6 Liberal Democrats
- 5.7 Liberty
- 5.8 Matrix Chambers
- 5.9 Mencap
- 5.10 Micschon de Reya LLP
 - 5.10.1 Micschon de Reya LLP Methodology
- 5.11 Mind
- 5.12 Muslim Engagement and Development
- 5.13 My Death, My Decision
- 5.14 National AIDS Trust
- 5.15 National Police Chiefs' Council and Metropolitan Police
- 5.16 Northern Ireland Human Rights Commission
- 5.17 Northern Ireland Human Rights Consortium
- 5.18 Northern Ireland Women's European Platform
- 5.19 Oxford Human Rights Hub
- 5.20 Oxford Public Lawyers
- 5.21 Pat Finucane Centre
- 5.22 Police Action Lawyers Group
- 5.23 Policy Exchange - Judicial Powers Project
- 5.24 Prison Reform Trust
- 5.25 Public Interest Litigation Support
- 5.26 Public Law Project
- 5.27 Public Law Solicitors' Association
- 5.28 Queens University Belfast - Human Rights Centre

⁵ See <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/980135/ihrar-organisations-l-q.zip>.

6. Organisations R-Z⁶

- 6.1 REDRESS
- 6.2 Relatives & Residents Association
- 6.3 Rene Cassin
- 6.4 Rights and Security International
- 6.5 Scottish Care Alliance
- 6.6 Scottish Commission for people with Learning Disabilities
- 6.7 Scottish Equalities and Human Rights Committee
- 6.8 Scottish Government
- 6.9 Scottish Human Rights Commission
- 6.10 Scottish Youth Parliament
- 6.11 SDLP
- 6.12 Sinn Fein
- 6.13 Society of Conservative Lawyers
- 6.14 Society of Labour Lawyers
- 6.15 Southall Black Sisters
- 6.16 Stonewall
- 6.17 Supreme Courts of Scotland
- 6.18 The Angelou Centre
- 6.19 The Bar Council
- 6.20 The Bar of Northern Ireland
- 6.21 The Baring Foundation
- 6.22 The Law Society of England and Wales
- 6.23 The Law Society of Scotland
- 6.24 The Legal Education Foundation
- 6.25 The Lived Experience Leadership Group
- 6.26 Together (Scottish Alliance for Children's Rights)
- 6.27 TUC
- 6.28 UK Government
- 6.29 UK Supreme Court
- 6.30 UK Supreme Court - Postscript
- 6.31 UNISON

6 See <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/983208/organisations-r-z.zip>.

6.32 University of Essex Administrative Justice Institute and the Human Rights Centre

6.33 Which

6.34 Women's Aid Federation of England

6.35 Wrigleys Solicitors

6.36 Young Legal Aid Lawyers

The total number of responses was 167.

Annex VII

Engagement – Methodology and Record of Programme

The Panel carried out an extensive programme of engagement. This included:

- A series of meetings with interested parties, carried out by Sir Peter Gross
- Roundtable meetings with relevant organisations
- Public ‘Roadshow’ events, hosted by universities across the UK
- Meetings with international parties

Given the restrictions in place due to the COVID-19 pandemic, almost all meetings and events took place virtually.

Roundtable meetings were intended to facilitate a dialogue between Panel members and a diverse range of organisations.

A series of public ‘Roadshow’ events were held across different nations and regions of the UK, in which the Panel had the opportunity to engage with members of the public, respond to their questions, and listen to their points of view. These were kindly run by universities, and IHRAR Panellists were joined by university academics who hosted the events.

Though the scope of IHRAR is limited to the UK, the Panel were interested in gaining a comparative insight into how the European Convention on Human Rights is applied in the domestic laws of other countries. The Panel therefore had a small number of meetings with international parties. The Panel also met the President and two judges of the European Court of Human Rights.

In the interests of transparency, minutes from the Roundtables, as well as links to recordings of the Roadshows, were published on the IHRAR website (and are also included in Annex IX).

Meetings

7 December 2020

Lord Reed PC FRSE
Lord Burnett of Maldon CJ PC
Lord Judge of Draycote PC
Lord Phillips of Worth Matravers KG PC
Lord Anderson of Ipswich KBE QC
Harriet Harman MP
Sir Declan Morgan PC QC
Sir Geoffrey Vos MR

8 December 2020

Lord Thomas of Cwmgiedd PC
Nick Thomas-Symonds FRHistS MP
David Greene and Paola Uccellari (Law Society of England & Wales)
Sir Bob Neill MP
Sir Iain MacLeod KCMG
Amanda Pinto (Bar Council)
Lord Pannick QC
Lord Garnier Kt PC QC
Lord Carlile CBE QC FRSA
Lord Carloway QC PC

10 December 2020

Baroness Taylor of Bolton

11 December 2020

David Lammy MP

15 December 2020

Professor Elwen Evans QC

18 December 2020

Baroness Ludford and Baroness Hamwee
Martin Hewitt PM (National Police Chiefs' Council) and Steve Wilson (Derbyshire Police)
Amanda Millar and Michael Clancy (Law Society of Scotland)

7 January 2021

Rowan White, David Lavery CB, Peter O'Brien (Law Society of Northern Ireland), Bernard Brady QC, David Mulholland (Bar of Northern Ireland)

12 January 2021

Ken Murphy, Sinead Lucey and Gary Lee from (Law Society of Ireland)

15 January 2021

Jeremy Fleming KCMG CB (GCHQ)

21 January 2021

Ken McCallum (MI5)

Lord Faulks QC

22 January 2021

Dame Cressida Dick DBE QPM and Steven Bramley (Metropolitan Police)

27 January 2021

Murray Hunt (Bingham Centre for the Rule of Law)

28 January 2021

John Larkin QC

Baroness Falkner of Margravine, Naomi Fawcett and Melanie Field (Equality & Human Rights Commission)

1 February 2021

General Sir Nick Carter GCB CBE DSO ADC (MOD)

8 February 2021

Jeremy Miles MS and Jane Hutt MS (Welsh Government)

11 February 2021

Derek Sweeting QC (Bar Council)

Richard Moore CMG (MI6)

24 February 2020

Lord Anderson of Ipswich KBE QC

Dame Lynne Owens DCB CBE QPM (National Crime Agency)

25 February 2021

Sir Philip Barton KCMG OBE and Sir Iain MacLeod KCMG (FCDO)

15 March 2021

Lord Reed PSC PC FRSE

Lord Judge of Draycote PC

18 March 2021

Sir Declan Morgan PC QC

19 March 2021

Ambassador Adrian O'Neill (Embassy of Ireland)
Antonia Romeo (MoJ)

23 March 2021

Lord Carlile CBE QC FRSA
Lord Pannick QC

24 March 2021

Crossbench Peers

20 April 2021

Lord Phillips of Worth Matravers KG PC

21 April 2021

Lord Woolf CH PC FBA FMedSci
Ambassador O'Neill, Irish Embassy

27 April 2021

Lord Faulks QC

29 April 2021

Lord Brown PC

5 May 2021

Lord Simon

18 May 2021

Sir Nicolas Bratza

6 July 2021

I. Stephanie Boyce, Paola Uccellari, Ellie Cumbo, Hugo Forshaw (Law Society of England & Wales)
Lord Burnett of Maldon CJ PC

22 July 2021

Lord Reed PSC PC FRSE

19 October 2021

Derek Sweeting QC (Bar Council)

Roundtables

23 March, Law Society of England & Wales (Human Rights firms)

Sir Peter Gross, Simon Davis, Alan Bates, Prof. Tom Mullen, Gethin Thomas, Joe Rice (Secretariat), Oliver Burrows (Secretariat), Millie Rae (Secretariat), John Wadham, Sean Humber, Faith Salih, Sue Willman, Angela Jackman, John Halford, Stephen Grosz QC, Simon Creighton, Alice Hardy, Paul Wilson, Ellie Cumbo, Haze Blake.

24 March, Law Society of England & Wales (City firms)

Sir Peter Gross, Alan Bates, Sir Stephen Laws, Professor Tom Mullen, Dr John Sorabji, Gethin Thomas, Oliver Burrows (Secretariat), Noah Thorold (Secretariat), Millie Rae (Secretariat), Laura Carlisle, Jessica Gladstone, Harry Balfour-Lynn, Soppie Kemp, Alison Saunders, Alexandra Agnew, Miles Geffin, Neil O'May, Kim Harrison, Hazel Blake, Ellie Cumbo, Libby McVeigh.

25 March, Law Society & Bar of Northern Ireland

Sir Peter Gross, Dr John Sorabji, Gethin Thomas, Baroness O'Loan, Prof. Tom Mullen, Simon Davis, Noah Thorold (Secretariat), Iain Miller (Secretariat), Kate Stevenson (Secretariat), Millie Rae (Secretariat), Bernard Brady QC, David Mulholland, Judith McGimpsey, Rowan White, Peter O'Brien, Shania Kirk, Les Allamby, Dr Evelyn Collins CBE, Brice Dickson, Brian Gormally, John Larkin QC, Kevin Hanratty, Maria McCloskey, Olivia O'Kane, Patricia Coyle, Monye Anyadike-Danes QC, Barry MacDonald QC, Paul McLaughlin QC, Terence McCleave BL.

29 March, Law Society of Scotland

Sir Peter Gross, Dr John Sorabji, Prof. Tom Mullen, Sir Stephen Laws, Simon Davis, Kate Stevenson (Secretariat), Millie Rae (Secretariat), Amanda Millar, Jennifer O'Neill, Paul Cackette, Adrian Ward, Alison McNab, Andrew Alexander, Dr Ed Bates, Charles Livingstone, Charles Mullin, Elaine Motion, Fiona Larg, Helen McGinty, Jamie Dunne, Jan Todd, Jennifer Paton, Jim McLean, Jim Stephenson, Katherine Nisbet, Lisa Law, Lynn Welsh, Aileen McHarg, Michael Clancy, Rob Marrs, Sheekha Saha, Susan Carter, Fiona Killen.

31 March, Security Services (MI5, MI6, GCHQ, HO, FCDO, AGO, NCA, MOD)

Sir Peter Gross, Dr John Sorabji, Sir Stephen Laws, Lisa Giovannetti QC, Baroness O'Loan, Iain Miller (Secretariat), Oliver Burrows (Secretariat), Millie Rae (Secretariat), Jeremy Fleming, Sir Iain MacLeod, Paul McKell, Isabel Letwin, Christopher Leach, Helen Thompstone, Shezhad Charania, Tony D, Samantha Ede, Douglas Wilson, Ghizala M.

13 April, Police (Met Police, NCA, NPCC, Police Scotland, PSNI)

Sir Peter Gross, Dr John Sorabji, Sir Stephen Laws, Baroness O’Loan, Simon Davis, Iain Miller (Secretariat), Kate Stevenson (Secretariat), Millie Rae (Secretariat), Dame Cressida Dick, Louisa Rolfe, Martin Hewitt, Steve Wilson, Steven Bramley, Michael Stamp, Dame Lynne Owens, Helen Thompstone, Kenny MacDonald, Duncan Campbell, Mark Hamilton, Richard Ross.

19 April, Justice and the Independent Anti-Slavery Commissioner

Sir Peter Gross, Dr John Sorabji, Simon Davis, Lisa Giovannetti QC, Sir Stephen Laws, Kate Stevenson (Secretariat), Millie Rae (Secretariat), Stephanie Needleman (Justice), Catherine O’Regan (Bonavero Institute), Claire Hall (Child Poverty Action Group), Jo Hickman (Public Law Project), George Peretz QC (Monckton Chambers), Catherine Callaghan QC, Dame Sara Thornton (Independent Anti-Slavery Commissioner), Jonathan Moffett QC.

22 April, Lord President’s Working Group

Sir Peter Gross, Dr John Sorabji, Prof. Tom Mullen, Prof. Maria Cahill, Sir Stephen Laws, Kate Stevenson (Secretariat), Millie Rae (Secretariat), The Lord President, The Lord Justice Clerk, Lady Carmichael, Lady Poole, Sinead Campbell (Official).

23 April, Ministry of Defence

Sir Peter Gross, Dr John Sorabji, Lisa Giovannetti, Sir Stephen Laws, Baroness O’Loan, Gethin Thomas, Iain Miller (Secretariat), Millie Rae (Secretariat), General Sir Nick Carter, Paul Wyatt, Damian Parmenter, Isabel Letwin, Major-General Alex Taylor, Edward Holder, Brigadier Keith Eble, Jennifer Chamberlain, Junior MOD Official 1, Junior MOD Official 2.

26 April, Bar Council

Sir Peter Gross, Dr John Sorabji, Prof. Maria Cahill, Simon Davis Alan Bates. Noah Thorold. (Secretariat). Millie Rae (Secretariat). Derek Sweeting QC (Chair of the Bar). Schona Jolly QC, Sam Fowles, Maya Lester QC, Joanna Kane, Jessica Simor QC, Jamie Burton QC, Dan Stillitz QC, Tim Ward QC, Piran Dhillon-Starkings, Eleanore Hughs, Nikita Feifel.

27 April, EHRC/Human Rights Groups

Sir Peter Gross, Dr John Sorabji, Alan Bates, Prof Maria Cahill, Lisa Giovannetti QC, Oliver Burrows (Secretariat), Millie Rae (Secretariat), Charles Hamilton (Equality and Human Rights Commission), Naomi Lumsdaine (Equality and Human Rights Commission), Barbara Bolton, (Scottish Human Rights Commission), Les Allamby (Northern Ireland Human Rights Commission), Louise Whitfield (Liberty), Tansy Hutchinson (Equally Ours), Rachel Logan (Amnesty International UK), Alison Pickup (Public Law Project), Jennifer Ang (JustRight Scotland), Brian Gormally (Committee on the Administration of Justice).

29 April, Equalities Groups

Sir Peter Gross, Dr John Sorabji, Prof. Maria Cahill, Lisa Giovannetti QC, Alan Bates, Gethin Thomas, Oliver Burrows (Secretariat) Millie Rae (Secretariat) Jennifer Twite (Just For Kids Law), Harriet Wistrich (Centre for Women's Justice), Alice Livermore (MIND), Ele Hicks (Diverse Cymru), Nicole Treanor (Stonewall), Naomi McAuliffe (Amnesty International Scotland), Claire McCann (Equality NI), Kahiye Alim (London Refugee Communities Organisations Advocacy Forum).

23 June, Liberty/BIHR

Sir Peter Gross, Dr John Sorabji, Simon Davis, Lisa Giovannetti, Prof. Maria Cahill, Rachel Jones, Iain Miller (Secretariat), Kate Stevenson (Secretariat), Millie Rae (Secretariat), Carlyn Miller (Liberty/BIHR), Sanchita Hosali (Liberty/BIHR), Eilidh Turnbull (Liberty/BIHR), Charlie Whelton (Liberty/BIHR), Sam Grant (Liberty/BIHR), Ian (Member of the Public), Sarah (Member of the Public), Kirsten (Member of the Public), Angela (Member of the Public), Craig (Member of the Public), Fazeela (Member of the Public), Diane (Member of the Public), Joe (Member of the Public), M (Member of the Public), Liam (Member of the Public).

Roadshows

4 May, Durham University

Prof. Helen Fenwick, Prof. Roger Masterman, Dr Dimitrios Kagiros, Dr Elizabeth O'Loughlin – University hosts

Sir Peter Gross, Simon Davis, Alan Bates, Baroness O'Loan – IHRAR Panellists

Dr John Sorabji, IHRAR Secretariat – Other attendees

6 May, University of Nottingham

Prof. Stephen Bailey, Prof. Dominic McGoldrick, Prof. Paul Roberts, Agnes Flues – University hosts

Sir Peter Gross, Simon Davis, Prof. Maria Cahill, Lisa Giovannetti QC – IHRAR Panellists

Dr John Sorabji, IHRAR Secretariat – Other attendees

10 May, Swansea University

Prof. Elwen Evans QC, Prof. Simon Hoffman, Dr Tom Hannant, Associate Prof. Alison Perry – University hosts

Sir Peter Gross, Sir Stephen Laws, Alan Bates, Prof. Maria Cahill – IHRAR Panellists

Dr John Sorabji, IHRAR Secretariat – Other attendees

13 May, Queen's University, Belfast

Prof. Richard English, Prof. Brice Dickson, Dr Cheryl Lawther- University hosts

Sir Peter Gross, Prof. Tom Mullen, Baroness O'Loan, Lisa Giovannetti QC - IHRAR Panellists

Dr John Sorabji, IHRAR Secretariat - Other attendees

18 May, University of Glasgow

Prof. Jane Mair, Prof. Nicole Busby, Prof. Jim Murdoch - University hosts

Sir Peter Gross, Prof. Tom Mullen, Lisa Giovannetti QC, Alan Bates - IHRAR Panellists

Dr John Sorabji, IHRAR Secretariat - Other attendees

27 May, University College London

Prof. David Ormerod CBE QC, Prof. Colm O'Cinneide, Prof. Tom Hickman QC - University hosts

Sir Peter Gross, Simon Davis, Prof. Maria Cahill, Sir Stephen Laws - IHRAR Panellists

Dr John Sorabji, IHRAR Secretariat - Other attendees

2 June, Oxford & Cambridge

Prof. Mark Elliott (Cambridge), Dr Steve Martin (Cambridge), Prof. Alison Young (Cambridge), Dr Nick Friedman (Cambridge), Prof. Richard Ekins (Oxford), Prof. Kate O'Regan (Oxford), Dr Paul Yowell (Oxford), Prof. Timothy Endicott (Oxford), Prof. Anne Davies (Oxford) - University hosts

Sir Peter Gross, Prof. Maria Cahill, Sir Stephen Laws, Simon Davis - IHRAR Panellists

Dr John Sorabji, IHRAR Secretariat - Other attendees

International Meetings

21 April 2021, Embassy of Ireland

Sir Peter Gross, Ambassador Adrian O'Neill, Martin McDermott (Counsellor), Adrian O'Neill, Kate Stevenson (Secretariat).

20 May 2021, European Court of Human Rights

Sir Peter Gross, Baroness Nuala O’Loan, Simon Davis, Dr John Sorabji, Kate Stevenson (Secretariat), Ambassador Neil Holland (United Kingdom Permanent Representative to the Council of Europe), Rob Linham OBE (United Kingdom Deputy Permanent Representative to the Council of Europe), President Robert Spano, Judge Síofra O’Leary (Judge elected in respect of Ireland), Judge Tim Eicke (Judge elected in respect of the United Kingdom), Rachael Kondak (Registry member).

4 June 2021, Federal Constitutional Court (Germany)

Sir Peter Gross, Dr John Sorabji, Lisa Giovannetti QC, Alan Bates, Kate Stevenson (Secretariat), Justice Prof. Dr Paulus, Nina Prötzel (Legal Officer for Matters Relating to the European Court of Human Rights, Federal Constitutional Court).

8 June, Roundtable with parties from the Republic of Ireland

Sir Peter Gross, Dr John Sorabji, Prof. Maria Cahill, Prof. Tom Mullen, Sir Stephen Laws, Kate Stevenson (Secretariat), Chief Justice Frank Clarke, The Hon. Mr. Justice Donal O’Donnell, Professor Eoin Carolan, Professor Conor O’Mahony, Paul Brady, Martin McDermott.

Panel meeting dates

2020

4 December

11 December

2021

15 January

12 February

12 March

16 April

14 May

11 June

9 July

23 July

5 August

11 August

2 September

21 September

8 October

22 October

Annex VIII



**The Independent Human Rights Act Review Round Table
with
The Bar Council**

Date: 26th April 2021 – 17:00-19:00

Attendees:

IHRAR Panel & Officials	Bar Council
Sir Peter Gross	Derek Sweeting QC (Chair of the Bar)
Professor Maria Cahill	Schona Jolly QC
Simon Davis	Sam Fowles
Alan Bates	Maya Lester QC
<i>Legal Support: John Sorabji</i>	Joanne Kane
<i>Secretariat Support: Millie Rae</i>	Jessica Simor QC
<i>Secretariat Support: Noah Thorold</i>	Jamie Burton QC
	Dan Stillitz QC
	Tim Ward QC
	<i>Support: Piran Dhillon-Starkings</i>
	<i>Support: Eleanore Hughes</i>
	<i>Support: Nikita Feifel</i>

Introduction

The IHRAR Chair opened with brief remarks welcoming the Bar Council interaction with the IHRAR so far and thanking them for their response to the Call for Evidence (CfE). The Chair said that the review had no presumption of reform, was looking at the questions in the ToR in an open way and the Panel had no conclusions or interim conclusions. The Chair welcomed comments and discussion covering the whole Terms of Reference, and the Panel evinced their interest in the Bar Council’s suggestion of taking other jurisdictions’ judgments into account in the Call for Evidence response.

The Chair of the Bar welcomed the IHRAR Panel and said that a variety of experts from across the Bar were present, including both some involved in the drafting of the Bar Council’s response, and others who were not involved.

The discussion was then opened to the floor where attendees contributed on a variety of topics.

The discussion has been grouped below by topic area, with the key points for each topic listed.

General

On this topic, the following points were made by participants from the Bar Council:

- Across the Bar there is generally little appetite for reform of the HRA, as demonstrated in the Bar Council’s and many other responses to the Call for Evidence.
- One participant noted that when working in an area you can get used to the framework and rarely ask questions about whether it is right.



- There is a broad constitutional purpose of the HRA, which is that people's fundamental rights should not change depending on the colour of one's passport. Though this is achieved differently in different jurisdictions, in the UK the HRA is the primary domestic route and is critical allowing individuals to assert their rights.
- One participant mentioned the particular importance of the HRA in housing and homelessness cases, with Article 8 defences dealt with at first instance. Individuals are able to enforce their rights quickly, efficiently and cheaply by direct appeal to rights through the HRA.
- Many HRA-related cases are against the government. There is circumspection with the process of the IHRAR because of its political background, whatever the independence of the Panel.
- The HRA forms a straightforward constitutional protection of rights. There is nowhere else in domestic law where they are clearly written out in one place in a way that is simple and easy for the public to understand.
- No Bill of Rights alternative would be as elegant as the HRA.
- There can be a tendency in the UK to talk about Strasbourg as "them and us" – but in fact Strasbourg is us. The Convention was drafted by British lawyers and is built on UK jurisprudence.

Theme 1 - The relationship between domestic courts and the European Court of Human Rights

On this topic, the following points were made by participants from the Bar Council:

- Amending the wording in Section 2 would be cosmetic but may add a political impetus for courts to not follow Strasbourg in cases where they otherwise could. There are already cases where courts have not followed the Strasbourg reasoning and a tweak to Section 2 is not required for this.
- Courts already take into account a wide variety of jurisprudence, but Strasbourg is different because it is backed up by international law obligations stemming from the Convention.
- For all the merits of the Common Law, it did not adequately protect all the rights in the Convention – this is evidenced by the UK's frequent losses in Strasbourg pre-HRA.
- The lack of a written constitution in the UK means that the Common Law has less clarity and accessibility than constitutions in other countries, and it makes sense for it to be second order in a way that is different from other countries that have constitutions.
- Considering the Common Law and Strasbourg jurisprudence as totally different is wrong and they are now intertwined. There is however a question about the outlook of Common Lawyers in an adversarial system, where the outlook and way of operating is different from the dominant Civil Law strain of law in Strasbourg. However, UK judges can be trusted to use intuition to identify genuine points of inconsistency.
- Introducing the HRA has prompted a clearer articulation of common law rights than previously – for instance on apparent bias. The HRA has provided intellectual challenge to Common Law rights and is in this way complementary to it.
- The Common Law does not go as far as the Convention in certain articles – for instance on positive obligations around inquests in Article 2.
- The *Smith and Grady* case shows how the Common Law can be too cautious to provide adequate protection.
- If Section 2 was weakened, it would mean more people going to Strasbourg to enforce their rights and undermine public understanding of the HRA. Having Strasbourg battling with domestic courts would not be to the benefit of judicial dialogue.
- One participant argued that dialogue could be improved by means of ratification and use of Protocol 16.

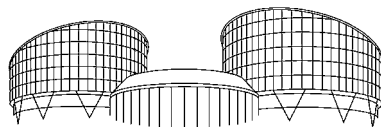


- Domestic courts give too much deference to parliament on the Margin of Appreciation; more than envisaged by the Convention.
- The Convention should be a lowest common denominator rights protection, and the Common Law can go beyond it already. Putting a requirement to follow the Common Law on a statutory footing would be necessary only for political reasons, as courts can already do this.
- Where the Convention sets a higher standard, it would be difficult to look at foreign Common Law cases. These cases are already often raised, but formally elevating them, by way of amendment to the HRA so that it made provision for the courts to take account of such judgments, would be problematic and lead to confusion and a reduction in legal certainty.
- Through dialogue we are able to have an impact on the ECtHR; and this can be done without a need to amend the HRA. There is a collective wisdom in 47 views feeding into the ECtHR.

Theme 2 - The impact of the HRA on the relationship between the judiciary, the executive and the legislature

On this topic, the following points were made by participants from the Bar Council:

- A case was raised of the old prison health service employing a doctor who had been struck off. The NHS subsequently became responsible for prison healthcare out of a Convention obligation implemented through the HRA, which was not there in the Common Law.
- It should be assumed that parliament should always seek to act in line with international law. The HRA implemented the Convention appropriately in a dualist system, but without undermining parliament by giving judges the power to overturn primary legislation.
- The international obligation in the Convention is what justifies the stronger interpretive obligation in the HRA.
- Before the HRA, the Common Law did protect many rights, but in a less systematic and structured way: whilst an important source, it therefore was failing to do something that parliament deemed was required.
- Liberty's analysis of cases suggests Section 3 is rarely used in practice, so there is no problem to be solved through any amendment to it.
- The HRA provides judicial protection in what can be a tug-of-war with the Executive.



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

#7057781
26/08/21

**Summary of the meeting between members of the Independent Human Rights Act Review¹
and a delegation of Judges from the European Court of Human Rights²
by videoconference on 20 May 2021**

Sir Peter Gross, Chair, presented the nature and role of the Independent Human Rights Act Review (“IHRAR”) and introduced the Panel members present for the meeting with the European Court of Human Rights (“the European Court”). The President of the European Court, Robert Spano, presented the delegation of Judges from the Court, Judge Síofra O’Leary, Judge elected in respect of Ireland and Judge Tim Eicke, Judge elected in respect of the United Kingdom (“the UK”).

The Panel Members were particularly interested in hearing the Judges’ views on three themes: the margin of appreciation, subsidiarity and shared responsibility; the quality and nature of judicial dialogue; and the perspective of another common law jurisdiction (Ireland) and its relationship with the Convention at the domestic level. The Panel members underlined the importance of the common law as a starting point for national Judges (in the UK) in resolving human rights complaints. Finally, the Panel members underlined their wish to maintain a channel of communication including before and after the publication of their report.

The answers given by the European Court Judges were structured around three main themes as set out below.

I. The notion of subsidiarity and shared responsibility under the European system of human rights protection

The Judges emphasised that the domestic authorities were the primary actors under the Convention system, as provided for under Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention” or “the Convention”). By virtue of Article 1, States Parties undertook to secure to everyone within their jurisdiction the rights and freedoms enshrined in the Convention. This Article laid the framework for the principles of subsidiarity and shared responsibility.

Those concepts had been reinforced over the last decade during a period of political reform of the Convention system called the “Interlaken reform process”³ (so-called after the first Inter-Governmental conference held in Interlaken, Switzerland in 2010). The UK government had been very active during this reform period stressing the importance of those concepts and the margin of appreciation, which was reflected in the Brighton Declaration (2012)⁴ adopted by the 47 States Parties

¹ Sir Peter Gross (Chair), Baroness Nuala O’Loan, Simon Davis (Panel Members) and Dr John Sorabji (Legal Adviser) and Kate Stevenson (Panel Secretariat), who were accompanied by Ambassador Neil Holland, United Kingdom Permanent Representative to the Council of Europe and Rob Linham OBE, United Kingdom Deputy Permanent Representative to the Council of Europe.

² President Robert Spano, Judge Síofra O’Leary, Judge elected in respect of Ireland and Judge Tim Eicke, Judge elected in respect of the United Kingdom, accompanied by Rachael Kondak (Registry member).

³ <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/reform&c=>

⁴ https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf

to the European Convention on Human Rights (“the Convention”) during the UK’s Chairmanship of the Committee of Ministers of the Council of Europe. The Brighton Declaration specifically affirmed the strong commitment of the States Parties to implement the Convention at the national level. It was noted that Protocol No. 15 to the Convention, which was the product of the Brighton Conference and Brighton Declaration, would enter into force on 1 August this year thereby adding an explicit reference to the principle of subsidiarity and the doctrine of the margin of appreciation to the Preamble of the Convention.

By taking into account the case-law of the Court, the UK domestic courts were implementing the Convention at the national level, embedding it into the UK’s legal system, strengthening the culture of human rights in the UK, and bringing the notion of shared responsibility to life.

It was noted by the Judges that the Human Rights Act’s language was a useful and advantageous conduit through which UK domestic court decisions reach the European Court. UK judges would already, in their judgments, have translated their rights discourse into the language of the Convention via the Human Rights Act. Domestic judges from other States, by way of contrast, might employ more the language of their civil or common law systems or that of their respective constitutions. The latter might provide the same or more extensive protection but the framing and language was different. As such it might be easier for the Judge elected in respect of the UK to translate the UK’s position in a judicial formation where no other common law judge would be present.

The Judges went on to stress that the European Convention provided a framework of “minimum standards”. It was the role of the States Parties to identify and afford redress for possible infringements of human rights in each particular case. In so doing they enjoyed a margin of appreciation, subject to the supervisory jurisdiction of the Court.

In States in which the substantive embedding of the Convention had been largely successful, like the UK, the Court was in a position to take on a more “framework-oriented” role when reviewing domestic decision-making and to assess whether certain material elements allowed it to grant deference to national authorities. This was, by and large, limited to qualified rights and not to core or absolute rights. Of course, the Court reserved to itself the final say on Convention-compliance.

For example, in the case of [Ndidi v UK \(2017\)](#) the Court established the “strong reasons” principle with respect to Article 8 cases, *“in Article 8 cases the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant’s personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so...”*.

II. Judicial dialogue between national superior courts and the European Court of Human Right

The high quality of the dialogue between the UK superior courts and the Court was stressed by the Judges.

Formal judicial dialogue was characterised as a conversation through judgments, which usually resulted in the issue in question being resolved over time. This type of dialogue could be understood as a process which evolved and any one snapshot was not necessarily reflective of the quality or effectiveness of that dialogue. Examples were cited example, for example in the Horncastle litigation ([R v Horncastle](#) [2009] UKSC 14, [2010] 2 WLR 47 and [Al-Khawaja v UK 26766/05](#) [2011] ECHR 2127, (2012) 54 EHRR 23) and in the life sentences’ litigation ([Vinter v United Kingdom](#) (66069/09) [2013] ECHR 645; (2016) 63 E.H.R.R. 1; *Attorney General’s Reference (No.69 of 2013)* [2014] EWCA Crim 188; [2014] 1 W.L.R. 3964; [Hutchinson v The United Kingdom](#) - 57592/08 – Grand Chamber Judgment [2017] ECHR 65; 43 B.H.R.C. 667).

From the European Court's perspective, the UK courts engaged with the Convention critically and analytically which was seen as positive.

It was noted that the view expressed by Lord Rodger in [Secretary of State for the Home Department v AF](#) [2009] UKHL 28; [2009] 3 WLR 74 (*Argentoratum locutum, iudicium finitum - Strasbourg has spoken, the case is closed*) may be explained by the very specific chronology and context and was, in any event, only one view expressed in that case. The other Law Lords engaged with the rights issues more critically.

Analysis of Strasbourg case-law by UK superior courts showed an in-depth understanding of and engagement with the Court's case-law.

Indeed, the sophisticated analysis by the UK domestic courts of the Strasbourg case-law was relied upon in its judgments against other States. The most recent example was the Grand Chamber case of [S., V. and A. v. Denmark](#) [GC], nos. 35553/12 and 2 others, 22 October 2018. Sometimes the reasoning in UK domestic judgments, like that of other superior courts, is discussed in depth by the judicial formation even if that is not expressly reflected or recorded in the final judgment.

Apart from the Judges, the Court's Registry and Registry lawyers were also familiar with those decisions. Many may have done their postgraduate education in the UK. Some were UK-trained lawyers. Additionally, UK judgments, which were followed closely, were circulated by many European Court Judges amongst themselves, not least because of the analytical and persuasive way in which the UK judiciary discussed and dealt with questions of rights.

The fact that there were now so few violations found against the UK pointed to the UK courts successfully applying the Convention at the domestic level. In considering the operation of the Human Rights Act, it was worth considering that any future divergence between that Act and the Convention might result in more cases being brought before the Court from the UK. Moreover, any potential "decoupling" between the Human Rights Act and the European Convention might also have the effect of reducing the quality of the judicial dialogue between the UK superior courts and the European Court and the benefits that have flowed therefrom. There was a very good equilibrium between the European Court and the UK courts at the present time, although that did not mean that the two were always in agreement.

Another form of judicial dialogue outlined was the possibility to intervene in proceedings as a third party. The UK intervened relatively frequently in cases before the Court and this practice was further encouraged recently in the Copenhagen Declaration (2018). Such interventions were particularly seen in Grand Chamber cases, where the Court was dealing with major issues of principle. One example of this was the UK's intervention in [M.N. and Others v Belgium \(2020\)](#), which concerned the Convention's extra-territorial jurisdiction. The Court welcomed this practice. Third party interventions were also possible under Protocol No. 16 to the Convention where a member State requested a non-binding advisory opinion. It was notable that in the first advisory opinion sought by the French Court of Cassation under Protocol No. 16 both the UK and Ireland intervened despite not having ratified the Protocol.

In addition to formal dialogue between judges through their judgments, there was a very well-developed informal dialogue which took place through various means. Firstly, there were regular bilateral meetings between small groups of UK judges (from the three domestic UK jurisdictions and the Supreme Court) and judges from the Court. These were held every 18 months or so alternately in Strasbourg or in the UK. The last visit took place in Strasbourg in February 2020 and a visit of family law judges was tentatively planned for November 2021. Secondly, Judge Eicke, frequently visited the UK and engaged in informal dialogue with the judiciary in England and Wales as well as in Scotland and Northern Ireland. Another forum for informal dialogue was the Superior Courts Network ("SCN") of which four UK superior courts were members, namely the UK Supreme Court, the Supreme Courts of Scotland, the Court of Appeal of England and Wales and the Court of Appeal of Northern Ireland.

III. A comparative view of the Convention system from the perspective of another common law jurisdiction

The UK and Ireland were both similar in that they were common law jurisdictions which had incorporated the Convention via legislation drafted also in a similar manner. However, one fundamental difference was the fact that Ireland was a common law jurisdiction providing constitutional protection for fundamental rights. Irish judges and the Irish Parliament were quite familiar and comfortable with invalidating unconstitutional legislation or seeing it invalidated in a system in which the separation of powers is nevertheless respectfully observed. The Convention was incorporated even later in Ireland than it had been in the UK, with the adoption in 2003 of the European Convention on Human Rights Act. Its purpose was to comply with and accommodate the Good Friday Agreement and ensure an equivalent protection of fundamental rights throughout the island of Ireland. The IHRAR call for evidence submission from Queen's University Belfast provided a very good overview of this background and its consequences.

Given the constitutional protection of fundamental rights in Ireland, even before the incorporation of the Convention, for several decades rights had been invoked in areas where there was considerable, on occasion long-lasting, public disagreement over the correct course of action for the State to take. Prior to the 2003 Act, and indeed prior to the Convention, the Constitution already provided the courts with the power and indeed the duty to vindicate rights where appropriate. Where individuals considered that the level of protection afforded by the Constitution and the Irish courts fell short they brought their cases to Strasbourg.

Cases from Ireland to the European Court had at times involved consideration of fundamental and controversial issues. There had, in general and over time, been little backlash in relation to those cases as long as the Court was considered to have respected the requirement of exhaustion and engaged as carefully and sensitively as possible with them. In [A, B and C v Ireland](#) - 25579/05 [2010] ECHR 2032, for example, which concerned the constitutional ban on abortion and the absence of a regulatory framework to accommodate the exceptions to this ban developed by the Irish courts, the European Court engaged carefully with both the margin of appreciation and subsidiarity, despite Ireland being, at the relevant time an "outlier" amongst Convention States such that the European consensus might not have assisted it. The European Court's judgments in such cases could feed into public dialogue in Ireland, which had in recent years been supplemented by the organisation of citizens' assemblies.

Looking at how the Irish courts approached rights, they might consider depending on a given case: common law rights; constitutional rights; EU law and EU fundamental rights; and Convention rights. In many cases the courts would first consider the common law, then constitutional rights, and only then Convention rights. There was no sense in Ireland of the Convention having replaced either the common law or the Constitution. The Irish courts engaged in depth and detail, and when necessary critically, with the Strasbourg Court's case-law.



The Independent Human Rights Act Review Round Table

with

Equalities Groups Organisations

Date: 29th April 2021 – 16:00-18:00

Attendees

IHRAR Panel & Officials	Human Rights Groups Attendees
Sir Peter Gross	Jennifer Twite - Just For Kids Law
Alan Bates	Harriet Wistrich - Centre for Women's Justice
Maria Cahill	Alice Livermore - Mind
Lisa Giovannetti	Ele Hicks - Diverse Cymru
John Sorabji	Nicole Treanor - Stonewall
Gethin Thomas	Naomi McAuliffe - Amnesty International Scotland
Oliver Burrows	Claire McCann - Equality NI
	Kahiye Alim - Chair of the London Refugee Communities Orgs Advocacy Forum

Operation of the Human Rights Act

On the topic of the operation of the Human Rights Act (HRA), the following points were made by attendees:

- The HRA is invaluable in providing a route to an immediate remedy when full scale reform is not possible. In the following case, s3 HRA was applied so that the Mental Health Act was interpreted in a way that meant the individual's same sex partner was recognised as their nearest relative: [SSG, R \(on the application of\) v Liverpool City Council & Anor \[2002\] EWHC 4000 \(Admin\) \(22 October 2002\) \(bailii.org\)](#).
- It has proved even more valuable during the pandemic. The HRA has been vital when securing the rights of individuals in mental health inpatient wards. In particular, there are lots of examples of advocates using the language of ECHR Articles 2,3, 5 to help patients detained under the Mental Health Act to secure respect for their rights on the wards. During the pandemic, there have been reports of examples of Article 8 in particular being used to informally challenge blanket policies not to allow visitors/advocates to inpatient psychiatric wards. The HRA has thus proven to be an important means by which, without recourse to litigation, rights could be given effect.
- Prior to the HRA, victims of crime or abuse could only rely on the common law. The advent of the HRA increased mechanisms for people to enforce their rights. For instance, it has increased avenues for access to justice of victims of crime and ensures the police are held accountable for breaching the rights of victims. The investigative obligations enforced by the HRA are a key example. Under the common law, police are not held accountable for negligence: see the House of Lords in *Hill*. The HRA increased accountability and enforcement and opened up avenues for justice that did not exist under the common law i.e., through *Osman* and latterly *DSD*. *DSD* created a framework through which the law on the prevention of crime can be implemented effectively. Specifically, it provided an avenue (where previously this had been barred in the common law of negligence) for challenging failures in the investigation (and prosecution) of serious crimes of violence including rape (meeting the Article 3 ECHR threshold).



- The HRA is being used as a model in Scotland for the further incorporation of international rights agreements. Any changes to how the HRA incorporates the European Convention on Human Rights (ECHR) could therefore have unforeseen consequences.
- The manner in which the ECHR is incorporated into domestic legislation through the HRA is not a perfect process that cannot be improved; however, it is the best the UK has as a result of its uncodified constitution. Enhanced protection for human rights could be achieved also by other means, including, for example, incorporation of other international human rights treaties such as the Convention on the Rights of the Child (UNCRC).
- The HRA is a powerful tool in holding parliamentarians and government to account when passing legislation. Non-Governmental Organisations and charities can point to it early in the legislative process when they perceive legislation may not be compatible or may be later be challenged.
- The Independent Human Rights Act Review (IHRAR) will need to consider carefully any reforms against the commitments made in the Northern Ireland Protocol committing the UK government to no diminution of rights protections.

Civic Education

On the topic of civic education, the following points were made by attendees:

- Many people in the UK do not know their rights or how to go about claiming them. There are also examples where public bodies are not aware of their own duties and responsibilities. Greater education and communication of the UK's rights protections would be a useful outcome from IHRAR. There was a need to convey to the public that the rights in the HRA were their rights and not just the rights of those who were unpopular or vilified in the media.
- Constitutional rights are taught at schools in some other member states of the Council of Europe, such as Germany and Ireland; this should be replicated in the UK.
- Civic education was difficult, however, as members of the public could not be forced to be interested in rights education. It was also difficult to see how an adverse media narrative could be tackled.
- Wales is taking a more proactive approach to rights education, especially in schools. It has also sought to implement aspects of the UNCRC.
- If, however, there was to be greater rights education in schools there would be a need to de-politicise it.

Public Narrative

On the topic of the public narrative on human rights, the following points were made by attendees:

- In public discourse, including from politicians, the HRA is often misrepresented, and the narrative is often one-sided or inaccurate. Many high-profile figures in the media and political sphere contribute to these misconceptions.
- Positive outcomes as a result of the HRA are often ignored or under-reported; its importance in cases such as the bedroom tax or universal credit are overlooked. Cases that result in positive and popular decisions are not framed as a success of the HRA.
- The HRA often acts as a shortcut for protections already enshrined in existing legislation or the common law. This needs to be more effectively communicated as there are many cases where the HRA is blamed for unpopular decisions that would have been made anyway.



- As it stands the HRA often acts as a magnet for unjust criticism. There have been ‘decades of criticism’ of the HRA.
- Responses to the IHRAR’s call for evidence were often defensive in nature due to the context of the last 10 years. There has been a consistent line of attack on the HRA which include threats to amend, repeal or replace it. Other factors include the governments approach to exiting the European Union; the Overseas Operations Bill; the Covert Human Intelligence Sources Bill; the Police, Crime, Sentencing and Courts Bill; and the Internal Markets Bill, all of which have contributed to a defensive mindset when suggestions are made that domestic rights protections need amending.

Ownership of Rights

On the topic of ownership of rights, the following points were made by attendees:

- The HRA functions in conjunction with the Scotland Act 1998. Courts are given greater powers to strike down rights incompatible legislation under the latter Act, and yet the tensions regarding legislative sovereignty do not exist to the same extent as they do in England.
- The perception of the HRA in Scotland is experienced alongside devolution, providing for a more positive narrative amongst the Scottish public. There is a greater acknowledgement that rights are for everyone.
- The HRA and individual rights “need to be seen as ours”, as the constitutions and rights protections often are in other nations.
- The HRA and rights protections are far more politicised in England than elsewhere in the UK. If greater ownership and education could be provided, it may help to change the public’s perceptions on how it operates as a safeguard for everyone in the UK, not just people for whom it is an immediate concern.
- Northern Ireland is seeking to implement a Bill of Rights building on the rights associated with the ECHR. The Northern Ireland process is distinct as it is based on the Belfast (Good Friday) Agreement. The ongoing process in relation to a Bill of Rights for Northern Ireland is based on the commitment in the Belfast (Good Friday) Agreement that any Bill of Rights would supplement the rights in the ECHR. It is currently being progressed pursuant to commitments in New Decade, New Approach, which was the foundation for the restoration of devolution in Northern Ireland in January 2020 – a process that was led by the Secretary of State for NI and the Irish Tánaiste and Minister for Foreign Affairs and agreed across all parties.

Theme Two of the Terms of Reference

On the topic of theme one of the IHRAR’s terms of reference, the following points were made by attendees:

- Section 3 is vital as it is not a good use of parliamentary time to enact change when there is a simple interpretation that can be made by the courts that ensures compatibility with the Convention.
- It is sometimes a difficult exercise to understand what the intent of parliament was when enacting legislation for specific groups, therefore providing the courts with an interpretive tool is imperative.
- The value of Section 3 can be seen in *Ghaidan v Godin-Mendoza*. The Court’s section 3 interpretation provided justice and marked a progressive approach to the rights of same sex couples.
- *Smith and Grady v United Kingdom* is another useful example of Section 3’s value, one that marked further progress for LGBT rights in the UK.



- Section 4 is valuable but can still be a lengthy process. In *R(P,G and W) v SSHD* [2019] UKSC 3 (<https://www.supremecourt.uk/cases/uksc-2017-0121.html>), the Supreme Court made a declaration of incompatibility, and it was only in November 2020 that the relevant changes to the law actually came into force. Just for Kids Law first took on the case in early 2015. was brought in January 2015 and only received a remedy in January 2020. It was a case with which the individual was dealing for 3 years before it was brought, therefore taking nearly a decade in total to produce an outcome.
- The following case is an example of the HRA being used as a tool to enforce children’s rights under the UNCRC. It is an example of a case settling early and with agreement from the government department, but only once proceedings had been issued: <https://justforkidslaw.org/news/just-kids-law-welcomes-government-u-turn-exempt-children-extended-custody-time-limits>.
- *Commissioner of Police of the Metropolis v DSD* was another case that relied on ECHR jurisprudence.

The Independent Human Rights Act Review

Meeting with the Justice Paulus (German Constitutional Court)

Date: 4 June 2021

Attendees

IHRAR Panel and UK Officials	German Constitutional Court
Sir Peter Gross	Justice Professor Dr Paulus
Lisa Giovannetti QC	Nina Prötzel (Legal Officer for Matters Relating to the European Court of Human Rights, Federal Constitutional Court)
Alan Bates	
Dr John Sorabji	
Kate Stevenson	

[References have been added retrospectively]

Sir Peter Gross first introduced the nature and role of IHRAR.

Theme One of IHRAR's ToR was the key issue for discussion. The approach taken in Germany to the role and place, within the German legal system, of the European Convention on Human Rights (the Convention) was of particular interest to IHRAR. It was, however, important to note that the UK, unlike Germany, did not have a codified constitution or a Basic Law. The UK did, however, have the common law. IHRAR was looking to see if more could be made to rely on the common law in respect of rights protection.

It was also noteworthy that there was an apparent feeling amongst some parts of the public in the UK that the Convention was not 'owned' by them. IHRAR wondered if the German approach to the Convention might be helpful in that respect.

Justice Professor Dr Paulus went on to outline the following issues.

The first point to note is that the justices of the UKSC and those of the German Constitutional Court have a good relationship. We have, for instance, discussed our respective approaches to the Convention and the European Court of Human Rights (ECtHR).

It is also worth noting that the common law has been enshrined in the Convention from its inception. We have learned from it and thus we have learned from the common law. This is particularly the case in respect of articles 5 (the right to liberty and security) and 6 (the right to a fair trial) of the Convention. These two articles have been of particular importance when applied to the German Criminal Procedure Code and in the respective judicial practice.

The second point to note is that the Constitutional Court, as such, has an extra-ordinary jurisdiction. It is narrower than that of the UKSC, and only covers constitutional law. As a consequence, its use of the Convention is sometimes different from that taken, for example, by the German Federal Supreme Court or the Federal Administrative Court. Federal Supreme Courts do not always specify the rights that they are relying on, e.g., constitutional rights, Convention rights, or EU fundamental rights.¹

The Constitutional Court's first point of reference, by contrast, is the German Basic Law and it primarily refers to the German Basic Law (the Grundgesetz).² Where it deals with the Convention, it does so by reference to the Basic Law, in particular due to art. 1(2) of the Basic Law³. That provision requires the Basic Law to be applied consistently with universal human rights, at the time enshrined in the UN Universal Declaration of Human Rights. It has, however, been interpreted as applying more widely such that art. 1(2) also requires the Constitutional Court to apply the Basic Law consistently with other Human Rights instruments, such as the Convention and the International Covenant on Civil and Political Rights (ICCPR). Even though the German legal order shows a great openness towards international law, the German legislator may derogate from international treaties through legislation. However, it must specify that it is doing so in the legislative act or the materials thereto.⁴ It is rare for the legislator to do so, although one example where it did was the Double Taxation Case⁵.

As a consequence of art. 1(2), when the Constitutional Court interprets the German Constitution, it does so in the light of the Convention, as that is required by the Constitution itself. In doing so, the Court also takes account of the human rights practice of other jurisdictions. As a corollary to the Court's taking into account the Convention jurisprudence, the Constitutional Court regularly cites relevant ECtHR judgments in its own decisions.

The Constitutional Court does, however, also interpret the Constitution in the light of other human rights conventions. The Constitutional Court has not, as yet, determined which international rights conventions fall within the scope of art. 1(2), nor has it determined if so, then what hierarchy there is between such conventions. What is clear, though, is that for a convention to fall within art. 1(2), it must be comparable in universality and authority to the Universal Declaration or the ICCPR.

¹ Albeit, recently, the Second Senate of the Federal Constitutional Court has also adopted such a "mixed approach", see BVerfG, Beschluss des Zweiten Senats vom 27. April 2021 - 2 BvR 206/14 -, paras. 67, 70, 81, 110, http://www.bverfg.de/e/rs20210427_2bvr020614.html, English press release No. 45/2021 of 1 June 2021, para. 4.

² EU fundamental rights might be referred to where legal issues fully determined by EU law are at issue, see, for example, BVerfG, Order of the Second Senate of 1 December 2020 - 2 BvR 1845/18 -, available in English at http://www.bverfg.de/e/rs20201201_2bvr184518en.html.

³ The provision reads "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.", translated by: Professor Christian Tomuschat, Professor David P. Currie, Professor Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag, available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019.

⁴ BVerfG, Order of the Second Senate of 26 March 1987 - 2 BvR 589/79 -, para. 39 – Presumption of Innocence, available in German at <https://www.servat.unibe.ch/dfr/bv074358.html>.

⁵ BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvL 1/12 – Treaty Override, English version available at http://www.bverfg.de/e/ls20151215_2bv1000112en.html.

In addition to its application via art. 1(2) of the Basic Law, the Convention also has the status of a statute in Germany as it has been ratified with the legislator's consent in accordance with art. 59 of the Basic Law⁶. Due to art. 1(2), in practice, the Convention is of a higher authority than it would be by virtue of its status as a federal statute.

When the Constitutional Court is interpreting the Constitution in the light of the Convention jurisprudence and if it is not possible to interpret German constitutional human rights protection consistently with Convention jurisprudence, then the court can part company with the Convention. In other words, the court is not bound by Convention jurisprudence. It need only take it into account (along with other international rights conventions), i.e. give (Constitution-based) reasons for an eventual divergence – which is hard to do, though. There are a number of reasons behind this approach.

First, it would be inappropriate to treat Convention jurisprudence in isolated cases as final when it is not possible to know the ECtHR's future jurisprudence on the matter. Different considerations apply when faced with consistent Grand Chamber jurisprudence, in particular in the so-called pilot-judgment cases.⁷

Secondly, such an approach would be contrary to developing an effective dialogue between the courts, which could result in changes to the ECtHR's jurisprudence. In fact, the dialogue between the Constitutional Court and the ECtHR is a good one. An example of this, analogous to the UKSC's dialogue with the ECtHR over prisoners' votes, was the Preventive Detention case.⁸ Its latest judgment in a long line of German Preventive Detention cases⁹ demonstrates that the ECtHR takes account of the Constitutional Court's decisions. In this regard, the Constitutional Court tries to ensure that its judgments are capable of fostering their understandability within the ECtHR.

Thirdly, the Constitutional Court can, after giving judgment, re-consider issues heard before it where, for instance, the matter has been decided by the ECtHR in the meantime. It can only do so, however, if it has the power to change its judgment through (re-)interpretation and application of the Constitution.¹⁰ In some cases, it will either not have the power (competence) to do so or it will

⁶ The first sentence of that provision reads: "Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law.", translated by: Professor Christian Tomuschat, Professor David P. Currie, Professor Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag, available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019.

⁷ ECtHR (GC), *Broniowski v. Poland*, judgment of 22 April 2004, no. 31443/96, paras. 188 et seqq.; ECtHR (GC), *Rumpf v. Germany*, judgment of 2 September 2010, no. 46344/06.

⁸ BVerfG, Judgment of the Second Senate of 4 May 2011 - 2 BvR 2365/09 -, Preventive Detention. This judgment is available in English at http://www.bverfg.de/e/rs20110504_2bvr236509en.html. Note: The Federal Constitutional Court and the European Court of Human Rights translate the German *Sicherungsverwahrung* as preventive detention, while others would rather speak of security detention.

⁹ ECtHR (GC), *Ilseher v. Germany*, judgment of 4 December 2018, nos. 10211/12 and 27505/14, §§ 194, 224.

¹⁰ Some examples are the Preventive Detention case, see above, or a change with regard to custody rights of fathers, BVerfG, Order of the First Senate of 21 July 2010 - 1 BvR 420/09 -, available in English at http://www.bverfg.de/e/rs20100721_1bvr042009en.html, which was decided after ECtHR, *Zaunegger v. Germany*, judgment of 3 December 2009, no. 22028/04.

be a matter for the legislator to deal with the issue. The Constitutional Court thus takes care to act consistently with the separation of powers as guaranteed under the Basic Law.

Essentially, the Constitutional Court will not implement an ECtHR decision without further consideration. There is no proper basis to adopt such a decision. The ECtHR's jurisprudence must be considered and translated, consistently with its spirit, into the German legal order. Such implementation requires consideration of the ECtHR jurisprudence in the light of the facts applicable to any specific case. The Constitution does not permit the Court to act as if the Convention were superior to the Constitution; this is a consequence of art. 1(2) of the Basic Law.

It should also be noted that there is no doctrine of Parliamentary Sovereignty in Germany as there is in the UK. The Constitutional Court can, in certain circumstances, mandate the legislator to change the law. It cannot, however, do so merely on Convention grounds. It may only do so where there is a constitutional basis for such action. In this way, the Constitutional Court can go beyond the approach permitted under the Human Rights Act 1998, which provides for mere declarations of incompatibility to be issued rather than the possibility to change or void legislation.

If it is not possible to interpret a constitutional right compatibly with the Convention then it remains in place. It is for the constitutional legislator to change the Constitution. If the ECtHR finds Germany to have violated the Convention, then it is a matter for the constitutional legislator to decide whether to change the Constitution or to remain in violation of the Convention. The Constitutional Court has no role to play in this respect. Its primary role is to enforce the Constitution, not the Convention.

Where the Federal Courts are concerned, if they do not follow decisions of the ECtHR, their decisions are likely to be challenged before the Constitutional Court. Consequently, Federal Courts have to give reasons why they do not follow the ECtHR. They are thus, as the UK courts do – albeit not to the same developed extent – adopting an approach where they distinguish ECtHR jurisprudence from the case before them. Generally, the ordinary courts as well as the Federal courts try to ensure that they follow ECtHR jurisprudence.

Where the ECtHR finds a human rights violation in Germany, it is for the competent executive branch (either the Federation or a Land) to execute the judgment (cf. Art. 46 ECHR). Thus, if the ECtHR awards just satisfaction because internal reparation proves impossible (cf. Art. 41 ECHR), the executive branch has to pay damages (within the respective budget approved by the legislator). The legal basis for the executive branch doing so is that the Convention has the status of a statute in Germany; hence the Convention is directly applicable in German law. Should just satisfaction awarded by the ECtHR not be paid, the person in whose favour the ECtHR judgment was given can sue in the regular (civil) courts.¹¹

In one sense then the ECtHR can, in practice, operate as an appellate court. While the ECtHR applies Convention law and the German courts apply German law, if the ECtHR finds that the approach of the German courts was wrong, then as the Convention forms part of German law, the ECtHR

¹¹ Cf. § 40 sec. 2 sentence 1 VwGO (German Code of Administrative Procedure); BGH (Federal Supreme Court), Judgment of 24 March 2011, IX ZR 180/10, para. 17.

decision provides the lawful basis for the executive to pay damages. Theoretically, the domestic court judgment remains in effect, but the law¹² provides for the re-opening of cases under specific circumstances [This information was added, as agreed beforehand].

The IHRAR Panel, following the meeting, and drawing from the points made by Justice Professor Dr Paulus summarise the position as follows.

Germany has a strong enforcement mechanism for Convention rights because it has effectively incorporated the Convention into domestic law and treats it as very much part of domestic law. The German ordinary courts regard Convention rights as part of their domestic law in a very real and powerful way, so that individuals regularly rely directly on a breach of their Convention rights when claiming damages and other remedies in German ordinary courts and can do so even if the treatment that is said to have violated Convention rights is prima facie authorised by domestic legislation. This seems likely to be the reason why there are few cases decided against Germany in Strasbourg.

The Constitutional Court effectively takes a ‘living instrument’ approach to interpreting the Basic Law and is influenced by the Convention: the Court seeks to ‘do what we can’ to ensure compatibility. Likewise, the ordinary courts follow ECtHR jurisprudence when interpreting Convention rights. So German constitutional law and ordinary domestic law in practice lean strongly towards maintaining compatibility with the Convention rights as interpreted by Strasbourg. This is arguably a more ‘pro-compatibility’ approach than in the UK.

If there were a *conflict* between the Basic Law and a Convention right as interpreted by the ECtHR, then the German courts would follow the Basic Law given that this is a higher law within its domestic legal system. In some cases, the application of the Convention has led to tensions with the interpretation and application of the Basic Law by domestic courts, including the Federal Constitutional Court. Until now, such conflicts have been rare and have been resolved amicably.

¹² Section 359 No 6 of the German Code of Criminal Procedure, applicable to criminal law cases, reads: “The reopening of proceedings concluded by a final judgment shall be admissible for the convicted person’s benefit [...] 6. if the European Court of Human Rights has held that there has been a violation of the European Convention on the Protection of Human Rights and Fundamental Freedoms or of its Protocols and the judgment was based on that violation.”, Original translation by Brian Duffett and Monika Ebinger, updated by Kathleen Müller-Rostin and Iyamide Mahdi, translation completely revised and regularly updated by Ute Reusch, available at https://www.gesetze-im-internet.de/englisch_stpo/index.html. Similarly, Section 580 No. 8 of the Code of Civil Procedure reads: “An action for retrial of the case may be brought: 8. Where the European Court of Human Rights has established that the European Convention for the Protection of Human Rights and Fundamental Freedoms or its protocols have been violated, and where the judgment is based on this violation.”, Translation provided by Samson-Übersetzungen GmbH, Dr. Carmen von Schöning, available at https://www.gesetze-im-internet.de/englisch_zpo/index.html. In other areas of law, the relevant legislation usually refers to Section 580 No. 8 of the Code of Civil Procedure.



The Independent Human Rights Act Review Round Table

with

Human Rights Organisations

Date: 27th April 2021 – 16:00-18:00

Attendees

IHRAR Panel & Officials	Human Rights Groups Attendees
Sir Peter Gross	Charles Hamilton - Equality and Human Rights Commission
Alan Bates	Naomi Lumsdaine - Equality and Human Rights Commission
Maria Cahill	Barbara Bolton - Scottish Human Rights Commission
Lisa Giovannetti	Les Allamby - Northern Ireland Human Rights Commission
John Sorabji	Louise Whitfield - Liberty
Oliver Burrows	Tansy Hutchinson - Equally Ours
	Rachel Logan - Amnesty International UK
	Alison Pickup - Public Law Project
	Jennifer Ang - JustRight Scotland
	Brian Gormally - Committee on the Administration of Justice

Operation of the Human Rights Act

On the topic of the operation of the Human Rights Act (HRA), the following points were made by attendees:

- The HRA is working well, both in terms of its practical application and its technical operation. The Act is carefully constructed and maintains a good balance between parliamentary sovereignty and the ability for individuals to enforce their rights.
- Human rights are the hidden foundations of our lives and laws. The ECHR, as a treaty, is the most secure protection of rights we have.
- The HRA has succeeded in its primary goal of bringing rights home. Section 3 and remedial orders are a very powerful means to scrutinise and challenge the executive.
- The HRA is very well thought out, and its clarity and certainty is essential. Any change in direction by the UK government, even minor amendments to its operation, could undermine the guidance and information that has built up over 20 years. If changes were to be made, it could hamper this understanding that has been slowly and carefully fostered by human rights organisations and civil society.
- A single approach to human rights across multiple jurisdictions is of significant benefit to civil society and charities, as it enables them to draw on human rights jurisprudence from other Convention States. Any divergence from Strasbourg would hinder their ability to do so, and thus pose difficulties for the work they conduct.
- Cases that go to court are the thin end of the wedge, the HRA is embedded into the work of all public authorities and its impact has only improved over time. It has fostered an everyday human rights culture in the work conducted by all public authorities.
- The HRA is successful in its day-to-day operation, both in the courts and outside, for the most part without controversy. It is embedded in the work of all public authorities, and it often acts to stop cases before they go to court. Criticisms often focus on those rare high-profile cases, ignoring the fundamental support it provides on regular basis.



- The HRA has been used to challenge delegated legislation in ordinary situations and is not confined to the high-profile controversial cases that make it to the media. Attendees agreed to share these examples.
- The HRA has been carefully incorporated into the devolution settlements. Any changes to its framework need to consider its wider impact on the devolved nations.
- The main issues with the HRA are outside the Independent Human Rights Act Review's (IHRAR) remit. There needs to be better access to justice and legal aid.

Civic Education

On the topic of civic education, the following points were made by attendees:

- The public need a greater understanding of their fundamental rights, how the UK's human rights framework works, and how their rights are enforced.
- There needs to be an effort to convince individuals who have no immediate concerns regarding human rights, that protections enshrined in the HRA are vital. This work should reach out to those both hostile and apathetic to human rights policy.
- There needs to be more readily available information on rights and how they are enforced to improve understanding and shift the negative public narrative on human rights.
- There should be an improved role for schools, civil society and the media in order to improve awareness and understanding of the HRA and human rights protections more generally.
- There is a key role for government in ensuring public authorities are educated on the workings of the HRA.
- Northern Ireland has developed a significant public wide human rights based discourse. This has been built up following the peace process and work through civic society organizations and was achieved with little resource. A rights-based approach to civil society, policing, public authorities and education are invaluable. Other countries party to the Convention are taught individual rights at a young age.

Public Narrative

On the topic of the public narrative on human rights, the following points were made by attendees:

- Polls and surveys conducted by human rights organisations show consistent support for human rights and show little appetite for reform. However, this needs to be reinforced with a public narrative from Government and the media, many of whom provide unhelpful contributions to the debate.
- The review should provide an opportunity to end the consistent attempts to substantially amend the HRA, or to repeal it entirely. Conversations of this nature have gone on for too long without sufficient cause. Many criticisms from high-profile figures are inaccurate or misrepresent the true nature of the HRA.
- The impact of high-profile criticisms has international implications. Many countries pay close attention to the UK's attitudes and actions on human rights. The impact of any reforms to the HRA should pay due regard to the message it sends internationally.
- Government should be shaping the debate more positively and acknowledge the significant progress that has been made with Strasbourg.



- The pandemic has highlighted the necessity of the HRA. The fact that coronavirus regulations can be challenged on human rights grounds may go unnoticed. Many of these regulations have not been given sufficient time to be scrutinised by parliament, so the ability of the judiciary to scrutinise them is vital.
- Consistent statements of support from government would have a significant effect on the public narrative. The IHRAR should use the opportunity of their report to government to remind them of their obligations with regards to human rights, and to encourage a more positive discourse on rights.
- Attendees committed to providing surveys and polls highlighting the increased support for human rights protections amongst the public.

Ownership of Rights

On the topic of ownership of rights, the following points were made by attendees:

- The UK Government should seek to inspire pride in the ownership of human rights. British lawyers were vital in drafting the European Convention on Human Rights and our contributions were enormous. Magna Carta is the most well-known rights document, and it took a long time to get into the public mind. Changing a young statute, as the HRA is, would be unlikely to improve public ownership of rights, and would more likely add to the confusion.
- There is very broad support for human rights in Scotland, including the HRA. This has been expressed in cross-party actions, as well as motions in parliament. This forging of ownership and support should be expressed by every major political party in the UK.
- Building on the success of the HRA, Scotland has unanimously passed legislation incorporating the UN Convention on the Rights of the Child into domestic law and the Scottish Government has accepted recommendations from a National Taskforce for Human Rights Leadership to incorporate a number of other international human rights treaties. A more proactive approach to human rights policy provides greater ownership of rights for the individual.
- The HRA underpins much UK law, which is why it often goes unnoticed. It acts as a safety net, which may be why there is less attachment to it than is shown in countries with a written constitution setting out their individual rights.
- It would be a beneficial step to provide more ownership of the rights protected in the HRA. However, the Government should be cautioned against referendums on rights. Majority views on minority rights is a dangerous route to pursue.



The Independent Human Rights Act Review Round Table

with

JUSTICE

Date: 19th April 2021 – 17:00-19:00

Attendees

IHRAR Panel & Officials	Non-IHRAR Attendees
Sir Peter Gross	Stephanie Needleman – Lawyer, JUSTICE
Sir Stephen Laws	Catherine O’Regan – Director, Bonavero Institute
Simon Davis	Claire Hall – Lawyer, Child Poverty Action Group
Lisa Giovanetti QC	Jo Hickman – Director, Public Law Project
John Sorabji	George Peretz QC – Monckton Chambers
Kate Stevenson	Catherine Callaghan QC – Blackstone Chambers
	Dame Sara Thornton – Independent Anti-Slavery Commissioner
	Jonathan Moffett QC – 11 King’s Bench Walk

The following points were made by attendees:

- The starting point for the Review is that the substantive content of convention rights and/or withdrawal from Strasbourg are out of scope. However, the Panel needs to be conscious of attempts to undermine the HRA /relationship with Strasbourg ‘by the back door’.
- There is little evidence that things are not working satisfactorily. The courts are now looking at the common law first, at least following the UKSC decision in *Osborn*.
- S3 doesn’t just apply to courts but to everybody. In considering the HRA’s operational impact it is important to bear in mind that it was intended to create a HR culture, where public authorities paid attention to human rights in borderline cases.
- On the question of predictability, it was noted that ossifying laws might draw attention to factors that are not relevant in individual cases. The current regime allows for departure from Strasbourg.
- With regards to section 19 – if there is a way to increase parliamentary scrutiny then that is a good thing. However, explanatory memoranda are already produced and there is a risk of potential conflation of the intentions of parliament and of ministers.
- The Terms of Reference place much emphasis on sections 3 and 4. It may be noted that Government is generally reluctant to argue for Declarations of Incompatibility (DOIs), and has not been asking the court for more DOIs.
- Section 3 is often relevant to problems or scenarios that were not thought of when the legislation was enacted (e.g *Ghaidan v Godin-Mendoza* [2004] UKHL 30).
- Courts may prefer the s3 route rather than s4 because s3 offers a remedy to the parties in the individual case, and judges want to be able to grant a remedy.
- Increased use of s4 would mean that more cases would be taken to Strasbourg, and it is far from clear that this is something government would welcome.
- In tribunals, it is not just lawyers using the Act but individual claimants. It is immensely important for claimants to be able to get direct remedies through s3 which would not necessarily be available otherwise.



- Tribunals do not have DOIs available. There are cases where an individual does not get justice because the tribunal recognises a violation of rights but cannot do anything about it. Tribunals can however disapply secondary legislation.
- Public authorities need to have as much information as possible to help them make HRA compliant decisions.
- It is difficult to know if Parliament disagrees with a court interpretation of legislation when the courts use the s.3 HRA interpretative power if it does not consider such interpretations. It is an important obligation, placed on the government, to take steps to correct decisions made by courts under s.3 HRA where it does not agree with them e.g., through corrective legislation. It should not simply be assumed that s.3 HRA has a ‘chilling’ effect on how public authorities conduct themselves.
- There should be an emphasis on training with a view to influencing decision-making in public policy. The way in which decisions are made can have significant impacts for policy, strategy and operations as well as the individual decisions in question.
- A piece of research has found that since 2013 there have only been 24 cases¹ in which section 3 was used to interpret legislation that would otherwise have been incompatible with Convention rights.
- Although there are relatively few section 3 cases, the impact for individuals is significant because their effect is very different from that of a s4 decision. There are many examples of cases with a big impact on the public.
- Derogation orders should not be treated differently from other subordinate legislation. There is a constitutional distinction between subordinate and primary legislation. The two should not be conflated.
- The lack of Parliamentary scrutiny of subordinate legislation encourages government decision-making to be channelled through it. Around 80% of SIs are passed under negative process.
- Remedial orders should not be able to amend the Human Rights Act. Henry VIII powers should be narrowly construed, and should not be used to affect the carefully balanced position of the HRA.
- There have only been 14 successful challenges to subordinate legislation.
- There is a broad definition of subordinate legislation in section 21. There is a need to be specific about the meaning.
- The courts have set an extremely high threshold for quashing subordinate legislation because it is in principle incompatible with the HRA, and are showing self-restraint (for example in *MM (Lebanon) v Secretary of State for the Home Department*).

Extra Extraterritorial Jurisdiction

- The courts have recognised practical difficulties that could arise on the battlefield (seen in *Smith v Ministry of Defence*.) The judgment was cautious, recognising the difficulty of decision making on the battlefield and the dynamic conditions there.
- There is a risk of international criminal court investigations if amendments are made to the territorial scope of the HRA.

¹ Further research has identified another case, bringing this number to 25.



The Independent Human Rights Act Review Round Table

with

The Law Society of Northern Ireland
The Bar of Northern Ireland

Date: 25th March 2021 – 15:30-17:30

Attendees

IHRAR Panel & Officials	Participants (from the Law Society of Northern Ireland and Bar of Northern Ireland, academics and representatives of organisations with an interest in human rights)
Sir Peter Gross	Bernard Brady QC
Baroness Nuala O'Loan	David Mulholland
Simon Davis	Judith McGimpsey
Professor Tom Mullen	Rowan White
John Sorabji	Peter O'Brien
Gethin Thomas	Shania Kirk
Kate Stevenson	Les Allamby
Noah Thorold	Dr Evelyn Collins CBE
Millie Rae	Brice Dickson
Iain Miller	Brian Gormally
	John Larkin QC
	Kevin Hanratty
	Maria McCloskey
	Olivia O'Kane
	Patricia Coyle
	Monye Anyadike-Danes QC
	Barry MacDonald QC
	Paul McLaughlin QC
	Terence McCleave BL

Human Rights in NI

Participants set out the context of human rights and the Human Rights Act (HRA) with regards to Northern Ireland (NI). **A full note has been sent to the IHRAR Secretariat.** In summary the points raised were:

- There is an unease at the perceived intention of UK Government in commissioning a Review into the HRA.
- Human rights and equality were central to the 1998 Good Friday Agreement (GFA) with a section devoted to the issue reflecting its importance as part of securing a durable peace process. The GFA encompasses the machinery as well as the substantive rights of the Convention.
- The 1998 Agreement envisaged a 'Convention plus' approach. NI has no 'Bill of Rights' but an ad-hoc committee is currently considering one. The NI Act is the nearest thing NI has to a 'constitution'.
- The NI Protocol presents further complexities, given the commitment to non-diminution of rights, safeguards and equality of opportunity provisions. NI also has to maintain parity with the specific EU



directives on employment, self-employment, social security freedom from discrimination etc. This is the political reality for NI.

- a significant dilution of human rights protections will impact on the delicate ecology of the Agreement. There is a need to benchmark any proposals in the review alongside the GFA and the 'no diminution commitment'.
- The HRA is also valued amongst the police service of NI, who have done training work on the HRA.
- The Politics of NI mean that the HRA and the ability to enforce it effectively is an important practical and constitutional measure for the people of NI.

Further points on these were made by other attendees:

- There is a perception of a negative attitude in Government towards Human Rights and Human Rights Lawyers, both in the NI context and generally.
- NI is not mentioned in the ToR and the impact on the NI BoR committee (mentioned above) is not referenced either.

Theme One of the Terms of Reference

On the topic of the first theme in the Terms of Reference (ToR), the following points were made by participants:

- Examples of UK Courts moving away from Strasbourg jurisprudence (*Al-Khawaja*) show that Section 2 is not binding and the only way to further reduce its power is to not take into account Strasbourg jurisprudence at all. This would be nonsensical.
- On Margin of Appreciation, *Nicklinson* shows that the Convention sets a minimum standard where domestic courts have room to go further. Judicial dialogue works well here and shows flexibility and respect from ECtHR. If HRA was replaced with a British Bill of Rights, then this dialogue and a favourable outcome for the UK would not have happened.
- Participant responses in general therefore set out how an effective relationship exists between UK Courts and ECtHR, which is balanced, two-way, respectful and appropriate.

Further points were added by attendees:

- The Convention cannot be incorporated into law just as text, it has to be a living instrument that moves with the times and this is reflected by taking into account jurisprudence.
- If loosening any relationship with regards to Section 2 (i.e doing less than 'take into account', which means not taking into account) then this would breach the Good Friday Agreement which pledges to incorporate the Convention into Northern Irish Law.
- A Review process would be needed to make any changes to the HRA under the Good Friday Agreement. This is para 7 of Good Friday Agreement (**a short note on this has been circulated**).
- Although the Convention is not part of the IHRAR remit, the Panel can say something about how genuine judicial dialogue could be fostered by 'advisory opinions'.
- 'Outlier cases' do not present a problem for Section 2, where only the 'fixed stream' of cases are 'taken into account' but outliers (ie Russia spectacles case) are ignored.
- Courts in NI have found no difficulties when interpreting S2.
- Judges sitting domestically on Human Rights issues should ask the 'most appropriate' solution, and must consider other courts' opinions (including ECtHR). Parliament cannot prevent Judges doing this without falling foul of the rule of law.
- There should be more trust in the Judiciary to be able to identify and rationally deal with 'outlier cases' as explained above. This is true of the Judiciary in many areas, they are not irrational actors.



- The material that courts can look at is endless, and the extent to which Parliamentary debate assists in construing a statute should come with a health warning.

Theme Two of the Terms of Reference

On the topic of the second theme in the ToR, the following points were made by participants:

- In NI, this question is set within the context of the 2017-2020 Stormont lockdown, a period where questions were asked over how far senior Civil Servants and the Judiciary should / could make decisions whilst there was no legislature.
- In reality, Sections 3 and 4 are working well in NI. Section 3 is being used consistently and in conjunction with Parliament, while Section 4 allows the necessary scrutiny of legislation, whilst not undermining the democratic position of Parliament.
- Similarly, the processes of judicial review and of quashing derogations do not need amending, and represent a balance of power that allows legal challenge to parliamentary decisions. Furthermore, there are no changes needed to Secondary Legislation processes.

Further points were added by attendees:

- The HRA is intended to entrench a set of rights within the UK's constitution. This is deliberately different to most other jurisdictions (as there is no written constitution or Bill of Rights).
- The HRA is now embedded into all jurisprudence in NI and to alter it would be a backward step.
- The HRA does not subordinate our constitution to the Convention, but 'brings rights home'. This was legislation passed by our parliament so even though it utilises the same Convention text, the legislation is the UK's and therefore poses no risk of a perceived 'loss of sovereignty'.
- The main criticism of Section 3 is that it attaches itself to the Convention, which is not static. This undermines the idea of consistent law/legislation.
- There is a constitutional balance to be struck, where judicial interpretation of policy does not overreach. The UK courts get this right as the ECtHR can often be expansive on interpretation of rights (ie spare room subsidy, two child policy) but UK courts still work well in dialogue with them – there is no tension in this regard.
- The balance of power between the three arms of the constitution will always be politically contentious, but currently the system is working well.
- Any desire to diverge from ECtHR in UK Law must be considered with the consequence that more cases go to Strasbourg. If HRA 'brought rights home', then changes could easily 'send rights away' again.
- Expansive obligations under Section 3 are not just designed to protect individuals, but can have benefits for the state too. By allowing Courts to interpret legislation compatibly with the Convention, there is a reduced risk that a remedy will need to be sought in the long run.

Extra-Territorial Jurisdiction (ETJ) and Temporal Scope

On the topic of ETJ (in theme 2 of the ToR), the following points were made by members of the Participants:

- The general principle of law is often seen that once it is declared it 'twas ever thus' however, there has been criticism of this approach. NI legacy in this context is complex and potentially divisive. The key question being, is it right to apply the HRA to deaths that occurred in NI before the HRA was passed?



- In its simplest form, it would seem strange to apply lower standards to the past than to things happening now.
- On ETJ, the basic principles of Human Rights are signed up to by states in all circumstances in respect of acts under their control, so there is no just reason to restrict warzones from this.
- Retrospective HRA application is a necessity if NI wanted to be a 'progressive society'. There is no perceived 'line in the sand' as crimes committed in the past cannot be ringfenced in peoples' minds.
- The above view was (perhaps surprisingly) reflected amongst some senior military figures too, who saw the benefits in terms of military discipline.



The Independent Human Rights Act Review Round Table

with

The Law Society of England and Wales (Roundtable 1)

Date: 23rd March 2021 – 15:30-17:30

Attendees

IHRAR Panel & Officials	Law Society Members and Officials
Sir Peter Gross	John Wadham
Alan Bates	Sean Humber
Simon Davis	Faith Salih
Professor Tom Mullen	Sue Willman
Gethin Thomas	Angela Jackman
Oliver Burrows	John Halford
Joseph Rice	Stephen Grosz QC
Millie Rae	Simon Creighton
	Alice Hardy
	Paul Wilson
	Ellie Cumbo
	Hazel Blake

This roundtable was facilitated and attended by the Law Society. However, the views expressed by attendees were their own and do not necessarily represent the views of the Law Society.

Civic Education

On the topic of public education, the following points were made by members of the Law Society:

- There is now scope for better education through virtual means. This dynamic should be used to better educate people on the protections and workings of the Human Rights Act (HRA).
- Non-Governmental Organisations now provide legal training to better share better information on the HRA to correct negative public perception. A good outcome of the review would be a wider understanding for the public of the workings of the HRA.
- There was no attraction in adding a reference to citizens' duties/responsibilities.

Common Law

On the topic of the common law, the following points were made by members of the Law Society:

- Common law protections often go further than the European Court of Human Rights (ECtHR).
- The starting point for most lawyers and counsel is the common law; the HRA is often used to add on to existing claims under the common law. There is therefore no need to entrench, through an amendment to the HRA, a duty to first pay due regard to the common law before looking at ECtHR jurisprudence.



- Courts are not bound by ECtHR jurisprudence; they have a duty to take it into account. Courts have been sensible when applying this duty.

Impact of the HRA

On the general impact of the HRA, the following points were made by members of the Law Society:

- The ToR making clear that the Government is not seeking to water down commitment to Convention rights is welcome, however there is concern that some of the implicit suggestions set out in the ToR could result in a backdoor watering down of rights.
- If changes were made to the HRA, there could be an adverse impact on the less publicised examples of the benefits of the HRA. For example, a human rights approach has been applied by public authorities, such that many potential breaches are dealt with before they reach trial.
- Court cases are therefore the tip of the iceberg. A major impact of the HRA is the influence it has on the decision-making processes and actions of public authorities. There is a culture of respect for human rights embedded into the actions of public authorities.
- It would be useful to put a number to the cases that are settled prior to any trial to understand the wider impact of the HRA, however, this is complicated as comprehensive data is not collected on settled cases.

Judicial Dialogue

On the topic of judicial dialogue, the following points were made by members of the Law Society:

- The UK judges and experts in the ECtHR take with them experience of UK common law. The importance that the ECtHR places on the UK's common law traditions should not be underestimated. The UK's contributions have been significant.
- There is some difficulty when understanding ECtHR jurisprudence, due to the need for a compromise to agree on a principal judgment.

Theme One of the Terms of Reference

On the topic of the first theme in the Terms of Reference (ToR), the following points were made by members of the Law Society:

- Keeping section 2 of the HRA is necessary to avoid a greater number of applications to the ECtHR.
- There are many benefits from the HRA constituting a living instrument.
- The Coronavirus pandemic highlights the need for the HRA as a living instrument. It needs to be able to adapt quickly, without the need for Government enacting legislation on every aspect of life.
- Advances in technological and digital rights also provide examples of the need for the HRA to remain a living instrument. The cross-fertilisation of the common law and HRA enables protections against the misuse of private information.
- The HRA has had a significant impact on procedural matters, as well as on moral issues. The debate is often side-tracked into these moral questions, when the procedural issues are perhaps the most significant.
- Domestic courts have been extremely careful when assessing the margin of appreciation provided to member states of the European Convention on Human Rights (Convention).



- If domestic remedies are diluted, it will increase the extent to which the ECtHR will be prepared to intervene. If there is an insufficient remedy, ECtHR will intervene.
- Members of the Law Society were open to the idea of the provision of guiding principles on the use of the margin of appreciation especially if declaratory of existing decisions - but warned that it could lead to further dispute or disagreement on the meaning of the guiding principles.

Theme Two of the Terms of Reference

On the topic of the second theme of the ToR, the following points were made by members of the Law Society:

- Sections 3 and 4 work well together. There is no need to amend or repeal section 3. It has been carefully applied and any changes to its nuanced approach would risk unbalancing the HRA.
- Domestic courts have been sensible in practice and have not gone against the intention of parliament when interpreting legislation compatibly with the ECHR. It is understood that there is an issue in this regard in theory, but it is not the case in practice. Courts are very restrained with respect to section 3.
- Section 4 should continue to be regarded as a last resort, and its relationship with section 3 should not be inverted.
- To prevent any misunderstandings on the intent of parliamentary legislation, a duty to provide a more detailed section 19 statement or explanatory memoranda could be useful.
- Section 3 as the primary lens of interpreting legislation allows for a more forensic approach on a case by case basis.
- Section 14 is useful as a symbol of the severity of a government seeking to derogate from its commitments to the ECHR. Removing section 14 would change the nature of the HRA and remove the significance of derogating from the ECHR.
- It is not necessary to change the process of dealing with provisions of subordinate legislation that do not comply with Convention rights. Even when courts do act, they are careful to restrict the scope of their remedies. It would be perverse to limit the Courts' powers in respect of subordinate legislation only in relation to the HRA. There was an overlap with IRAL which needed to be considered.
- Previous reviews and consultations on the extra-territorial scope of the HRA have always been framed from the Government's point of view, who have not been impartial. The HRA's territorial scope does not threaten the safety of armed forces, but rather protects them. The vast majority of cases have been with regard to equipment failure.
- The Government has sought to gain legal immunity in relation to combat, but they are not above the law and there is a need for judicial oversight. Removing the extra-territorial scope of the HRA would be novel and dangerous.
- Should any changes be made to restrict the extra-territorial scope of the HRA, the UK could be in breach of its obligations to provide domestic remedies and cases would go straight to the ECtHR.



The Independent Human Rights Act Review Round Table

with

The Law Society of England and Wales (Roundtable 2)

Date: 24th March 2021 – 15:30-17:30

Attendees

IHRAR Panel & Officials	Law Society Members and Officials
Sir Peter Gross	Laura Carlisle
Alan Bates	Jessica Gladstone
Sir Stephen Laws	Harry Balfour-Lynn
Professor Tom Mullen	Sophie Kemp
John Sorabji	Alison Saunders
Gethin Thomas	Alexandra Agnew
Oliver Burrows	Miles Geffin
Noah Thorold	Neil O'May
Millie Rae	Kim Harrison
	Hazel Blake
	Ellie Cumbo
	Libby McVeigh

This roundtable was facilitated and attended by the Law Society. However, the views expressed by attendees were their own and do not necessarily represent the views of the Law Society.

Civil Education

On the topic of civil education, the following points were made by members of the Law Society:

- There needs to more education around what the Human Rights Act (HRA) actually does and how it operates to challenge misconceptions. Media representations of human rights are unhelpful, as is the Government’s rhetoric.
- The more sensationalist cases skew public opinion and detract from the wider benefits of the HRA.
- UK courts and the judiciary should take the lead in helping inform public opinion. A body of casework shared online would help in this endeavour.
- The IHRAR provides an opportunity to change the narrative in the public discourse on the impact of the HRA.
- Coronavirus has helped people realise their individual rights and how they are protected, perceptions are slowly changing in this light.

Impact of the HRA

On the general impact of the HRA and the suggested priorities of global business, the following points were made by members of the Law Society:

- While the HRA is not perfect, there is not sufficient evidence pointing to a need for amendment. The HRA strikes a carefully constructed compromise between competing interests, such that amendment risks upsetting the fine balance.



- The HRA is good for global business, it provides certainty and consistency sought by companies investing in the UK, and UK companies operating abroad.
- The fallout from amendments to the HRA could provide uncertainty and act as a deterrent for business to invest in the UK.
- Whilst the UK has always been an attractive place to do business, even before the HRA was introduced, changes to the current status quo could risk providing instability and could be seen as a signal of a change in direction from the UK Government.
- The growth of a human rights culture has occurred since the introduction of the HRA, which has enhanced the UK's reputation as an attractive place to do business. Many businesses now have a business and human rights department, and many advisors on human rights weren't there 25 years ago. The landscape has changed in the last 25 years. Any step back or inconsistency would not be beneficial for the UK.
- In a survey from the Bingham Centre and Hogan Lovells in 2014 on the priorities of where to conduct business, 88% of senior executives of multi-national companies stated that a strong commitment to the rule of law was either "essential" or "very important" in relation to foreign investment. The HRA contributes to this image of respect for the rule of law. Human rights and adherence to the international legal standards are sticking points for most multi-national companies.
- The willingness of the Supreme Court to consider human rights abuses by corporations in overseas jurisdictions has a positive impact on the image of the UK's adherence to rule of law and responsibility on human rights. The Law Society committed to share the Bingham Centre/Hogan Lovell Survey on attitudes of business leaders towards the importance of rights protections in a jurisdiction.

Common Law

On the topic of the common law, the following points were made by members of the Law Society:

- One participant remarked that there is not enough emphasis on common law, and it is a shame to see the common law not given the weight it had previously. It would be useful and important for the common law to be expressed more prominently and forcefully in judgements that engage the HRA.
- The more domestic courts express the importance of common law, the more influence we have.
- It is still open for domestic courts to follow UK statutory and common law – cases such as adoption law in NI or *Animal Defenders International v United Kingdom* show the relevance of national context in deciding cases under the HRA.
- The Strasbourg jurisprudence could be used to bring about changes in the common law.

Judicial Dialogue

On the topic of judicial dialogue, the following points were made by members of the Law Society:

- *R v Horncastle* is the best example where dialogue between domestic courts and the ECtHR took place, highlighting the flexibility of the current approach.
- The Law Society committed to sharing a note by Kingsley Napley relating to the Convention and the Common Law in the area of criminal law.



Theme One of the Terms of Reference

On the topic of the first theme in the Terms of Reference (ToR), the following points were made by members of the Law Society:

- Consistency across jurisdictions is important for businesses. Deviation from the European Court of Human Rights (ECtHR) jurisprudence could produce uncertainty.
- Section 2 could include a requirement for Courts to explain why they have chosen to take into account the ECtHR jurisprudence.
- Section 2 in its current form provides a necessary link to the ECtHR in a modest way. It provides legal certainty and consistency across borders, whilst also allowing for divergence so not as to impinge on parliamentary sovereignty.
- Without section 2 in its current form, the inconsistency across jurisdictions would produce uncertainty and could lead to the UK being a less desirable place to do businesses. Section 2 assists in keeping the UK aligned with other Council of Europe members.
- The duty to “take into account” ECtHR jurisprudence is a well-balanced formulation; it allows for judicial dialogue and divergence in certain cases where necessary.
- Whilst it is the case that courts could still pay regard to ECtHR jurisprudence if section 2 was repealed, its removal might act as a signal that they should not do so.
- Support was expressed for the decision in *Ullah* and for the evidence given by Baroness Hale to the JCHR: the HRA balance was right and there was no good reason for amending it.

Theme Two of the Terms of Reference

On the topic of the second theme of the ToR, the following points were made by members of the Law Society:

- There is a delicate and sensible balance between parliament and the courts. It provides supervisory powers to the courts. The duty to make section 19 statements when introducing legislation shows clearly the intention behind the HRA was to make all legislation compatible with the European Convention on Human Rights (ECHR).
- Sections 3 and 4 do not act as a Henry VIII power provided to the courts; parliament is not bound to act on a declaration of incompatibility; such declarations only act as a signal to parliament that the courts believe there to be incompatibility with the ECHR. There are examples where parliament has decided not to follow the same line of reasoning as the courts.
- The judiciary do not exceed their constitutional role. The Independent Review of Administrative Law concluded that government and parliament should be confident that the courts will trust and respect their powers and decisions.
- The current balance between sections 3 and 4 provide access to a swift remedy for people when they feel their rights have been curtailed by legislation. Post-Brexit, section 3 is the only route for companies who no longer have access to EU protections. Companies don't want to wait for a ECtHR judgement if possible, so an immediate remedy via section 3 is desirable.
- Parliament often takes too long to respond to section 4 declarations, so there should be an option for the courts to write to parliament or the Joint Committee on Human Rights to ensure a swift resolution.
- The extra-territorial jurisdiction of the HRA contributes to the UK's image as a country that has respect for the rule of law.



- The ECtHR has made modest contributions to the extra-territorial application of human rights; in any event, the wider international frameworks on human rights would still apply if we chose to deviate from the Convention.
- One of the aims of the HRA was to avoid cases going the ECtHR (thereby to bring rights home), if the UK adopts a different approach to other signatories of the Convention, more cases would go to the ECtHR, which would go against the initial intention of the HRA.
- The Law Society committed to sharing the ECtHR decision in *Georgia v Russia (II)* to emphasise their points relating to the extra-territorial jurisdiction of human rights.



The Independent Human Rights Act Review Round Table

with

The Law Society of Scotland

Date: 29th March 2021 – 14:30-16:00

Attendees

IHRAR Panel & Officials	Law Society Members (and other attendees)
Sir Peter Gross	Amanda Millar
Sir Stephen Laws	Jennifer O'Neill
Simon Davis	Paul Cackette
Professor Tom Mullen	Adrian Ward
John Sorabji	Alison McNab
Kate Stevenson	Andrew Alexander
	Dr Ed Bates
	Charles Livingstone
	Charles Mullin
	Elaine Motion
	Fiona Larg
	Helen McGinty
	Jamie Dunne
	Jan Todd
	Jennifer Paton
	Jim McLean
	Jim Stephenson
	Katherine Nisbet
	Lisa Law
	Lynn Welsh
	Aileen McHarg
	Michael Clancy
	Rob Marrs
	Sheekha Saha
	Susan Carter
	Fiona Killen

Theme One of the Terms of Reference

On the topic of the first theme in the Terms of Reference (ToR), the following points were made by members of the Law Society:

- Domestic courts should regard Strasbourg jurisprudence as setting a minimum floor of protection. This was important to secure legal certainty and to minimise the risk of successful challenges before the ECtHR. However, Strasbourg jurisprudence should be a 'floor not a ceiling', and domestic courts should be able to go beyond Strasbourg jurisprudence, for example in cases where there is a wide margin of appreciation, or no existing precedents. Domestic courts should be allowed to have a dialogic function, and there is need for flexibility in both respects. The decision in Ullah led to an approach that was too rigid. It treated Strasbourg jurisprudence as binding, as a floor and a ceiling.



- In last 10 years there has been a relaxation of the floor and ceiling approach to Section 2, and courts have greater confidence in departing, and are more willing to enter into dialogue. Some may argue that it has swung too far, but it will inevitably settle down in time.
- Potential options for reform include signing up to Protocol 15 of the Brighton Declaration (emphasising subsidiarity and the doctrine of margin of appreciation), or legislating so that the power to depart from Strasbourg jurisprudence could be confined to Supreme Court itself. The UK could also sign up to Protocol 16 (which allows domestic courts to seek advisory opinions from the ECtHR), however this would be undesirable as it could create more delays in cases.
- Nevertheless, changes introduce new areas of uncertainty at a point where we have familiarity.
- A schedule to the HRA could be added, requiring courts to list cases where Strasbourg jurisprudence is not to be followed.
- Across the board, the inclination is to look at domestic remedies and principles first, before looking at whether the Convention is engaged. Indeed, some judges already decide cases on Common Law grounds even when they have been argued on Convention jurisprudence - on which see Lord Reed's approach to look to domestic remedies first. Also see the approach of the High Court of Justiciary, which looks to common law fairness first and does so strongly in the criminal context.
- Domestic courts feel more comfortable departing from Strasbourg jurisprudence in areas of law that already have a strong foundation in the Common Law (e.g the right to fair trial and the right to property). There is a willingness to go beyond Strasbourg because there is a strong domestic tradition.
- In terms of devolution, there is a delicate interaction between the HRA and the Scotland Act 1998. The extent to which Devolution questions are engaged would depend on the amendments being proposed. Human Rights is a protected enactment and changes to the HRA's scope may affect Ministers' competence and what Scottish Parliament can do. In assessing potential amendments, the Panel would need to be very careful about whether amendments were 'hemming in' Scottish Ministers or allowing them more freedom. If allowing more freedom, devolution issues may not be engaged to the same extent. Amendment raises complicated devolution questions, particularly in terms of how to handle interactions between the reserved powers and devolved competences. The position raised (by Policy Exchange) in respect of devolution re Northern Ireland and the HRA was straightforwardly wrong.

Theme Two of the Terms of Reference

- The onus is on those proposing a change to make a case for change.
- Judges deciding between the use of sections 3 and 4 will be sensitive to the context of the cases being presided over. If they feel that a section 4 remedy will not provide justice to the individuals in a case, they will be more reluctant to use it. Use of section 4 alone could run the risk of injustice in particular cases.
- If section 4 was amended to provide a suspensive power, that could lead to more section 4 orders. This could cause problems, such as those seen in *Salvesen v Riddell* (reconciling rights on landlords and tenants). That was an extremely challenging case for the Supreme Court involving policy issues, and the court decided to suspend the effect of its decision for 12 months in order to give the Scottish Parliament an opportunity to remedy the human rights breach. The court recognised that balancing the two rights would have been fiendishly difficult.
- If there was a suggestion that s.4 would provide a suspensive power, such as is the case with section 102 of the Scotland Act, in respect of primary legislation that would be problematic. Section 102 (which applies to both primary and secondary legislation in Scotland) might, however, be a useful



tool to have even if not used. It provides that where a court concludes that Scottish legislation is outside its competence, it can make an order: (a) removing or limiting any retrospective effect of the decision, or (b) suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected.

- Section 102 extends to subordinate legislation and to executive decision making, as well as applying to Acts of the Scottish Parliament. It is supplemented by the rectifying power in section 107, which can be operated retrospectively by virtue of section 114(3).
- A v SoS was a case where the courts went too far. Ghaidan, however, shows how difficult it can be to reconcile the use of sections 3 and 4 HRA, not least because it was a split decision. Courts appear to be aware of where limits lie in determining rights and applying Section 3, so there is no strong case for change.
- Section 3 should not be amended retrospectively as this would create significant legal uncertainty.
- There might be a case for Ministers, rather than Parliament, to be notified a court is proposing to use section 3, in the same way as this operates in relation to the use of section 4. That would be problematic given the number of section 3 cases if the notification requirement applied to all courts. We currently have no data on how frequently section 3 is used. Nevertheless, there is no evidence that the current system is 'breaking down'.
- Courts already look at parliamentary materials to work out Parliament's intention. Contentious legislation is already thoroughly debated (particularly in the in House of Lords). It is therefore difficult to put additional formalities on Parliament.
- Explanatory memoranda for legislation already include statements about Human Rights compliance. Explanatory Memoranda had the benefit of provoking more in-depth thought and discussion in Parliament, and ensuring that Ministers were mindful of compliance for subordinate legislation. It might be possible to amend HRA section 6 to require a section 19 certificate for secondary legislation. If there was such a requirement, it would force Ministers to think again about ECHR compliance. That might be a reason for such a reform/development.
- Ministers could be required to make a pre-legislative statement – not just confirming that legislation doesn't infringe on rights, but also where legislation contributes to advancement of rights and promoting positive obligations.
- The process of making a section 19 statement is very important. Ensuring that legislation proposals are compliant ultimately means that they are of a higher quality
- Further points were made about the Scottish Human Rights Taskforce, which wants courts to play a more active role, to engage in a debate with the public sector through, for instance, the use of structural interdicts (injunctions).
- In respect of derogation orders, Dominic Grieve's view is correct on this. There is no real evidence that the approach to them does not work.
- The Scottish HR Taskforce considered that there ought to be a positive obligation for Ministers to specify how legislation advances human rights. This would make the HRA work more effectively.
- There is no case for changes to the remedial order process.



The Independent Human Rights Act Review Round Table
with
Liberty / The British Institute of Human Rights (BIHR)

Date: 23rd June 2021 – 17:00 – 19:00

Attendees:

IHRAR Panel & Officials	Liberty / BIHR	Members of the public
Sir Peter Gross	Carlyn Miller	Ian
Simon Davies	Sanchita Hosali	Sarah
Lisa Giovannetti	Eilidh Turnbull	Kirsten
Maria Cahill	Charlie Whelton	Angela
John Sorabji	Sam Grant	Craig
Rachel Jones		Fazeela
Millie Rae		Diane
Iain Miller		Joe
Kate Stevenson		M
		Liam

Context

Representatives from Liberty and the British Institute of Human Rights (BIHR) approached the Independent Human Rights Act Review (IHRAR) Panel with a proposal for a joint Roundtable event. The event would involve members of the public, selected by the two organisations, that had directly interacted with the Human Rights Act (HRA). The purpose of this event was to demonstrate the experiences of members of the public when interacting with the HRA, and to provide further context for the IHRAR Panel to consider. Given the attendees would not be legal experts, the Roundtable would not focus on the technical details of the IHRAR Terms of Reference (ToR), but if there were comments on the specifics of ToR the IHRAR Panel would be happy to engage.

Introduction

Sir Peter Gross opened by thanking Liberty and BIHR for their assistance in organising the Roundtable event. He then gave an overview of IHRAR covering its purpose, aims and progress so far.

Liberty and BIHR representatives provided opening remarks and an outline of the structure of the Roundtable. They then provided an overview of the themes that would be presented. The overall focus of these cases would be on section 6 of the HRA and the power that this provided the general public when challenging decisions of public bodies. The cases would also focus on how the framework of the HRA enabled them to successfully bring forward cases and subsequently influence legislation.

The discussion then moved to members of the public in attendance. These attendees would speak individually in groups of five, with the IHRAR Panel responding and asking questions once each group had spoken.



Group 1

For detailed readouts of each case presented, please refer to the accompanying documents entitled 'Liberty Case Summaries' and 'BIHR Case Summaries'.

The following points were made once attendees each had an opportunity to speak about their specific cases.

- It is apparent that the key concerns of litigants are not about litigation itself, but the manner and framework within which services are provided. The HRA and European Convention on Human Rights (ECHR) have proven useful when assessing issues that require policy to be corrected, but there is a feeling that accessing the courts, via support such as legal aid, is increasingly difficult.

NB – The issues regarding legal aid are outside of the IHRAR ToR.

- The HRA can be seen as a 'living breathing working law' but a lack of awareness of fundamental rights amongst the general public means it does not 'work' for everyone. There are various approaches which could raise awareness of human rights amongst those that need to utilise the HRA or are discharging rights. These include:
 - Compulsory HRA training for practitioners in relevant fields
 - Utilising materials such as Liberty's 'Human Rights in Brief' to inform those in relevant positions (ie Special Educational Needs Coordinators)
 - Involve people with lived experiences in policy making
 - Human rights champions in relevant departments (ie Department for Health and Social Care)
- Increasing awareness is important to reinforce the principle that human rights are for everybody. They are often discussed in a binary way where specific people benefit from human rights, but actually they should be seen as all encompassing.
- The current system is inflexible and makes it hard to access and enforce basic rights. There are no clear rules set for accountability and enforcement of rights for public bodies. The Collaborative Assessment and Management of Suicidality (CAMS) framework was pointed to as one such system which lacks accountability as is therefore not fit for purpose.
- Public bodies understand that they will often not face consequences for breaching human rights and that families find it difficult to get to the point of challenge as the legislation on human rights is inaccessible to members of the public.
- The Police Force are the only public body that have compulsory human rights training for staff. This means the majority of public bodies potentially have staff that would not be aware of whether the HRA / ECHR was being adhered to in their places of work.

Group 2

For detailed readouts of each case presented, please refer to the accompanying document entitled 'Liberty Case Summaries' and 'BIHR Case Summaries'.

The following points were made once attendees had each had an opportunity to speak about their specific cases.



- There is potentially an issue in the UK that fundamental rights are protected by an international treaty, rather than in most other countries where a Bill of Rights exists. This could engender a feeling that the rights enforced by the ECHR are somehow 'foreign' to UK citizens.
- It could be useful for public authorities to have a space to reflect on whether they truly do uphold the values they say they do in practise. If continual reflection was a part of processes for reviewing impact or effectiveness of an institution, this might help issues to be picked up quicker and lessons learned to be articulated and implemented sooner.
- Ideas regarding learning and development opportunities on human rights to increase awareness of these issues only work if the funding is available. In the social care system for example, this resource simply does not exist.
- The process of accessing and exercising fundamental rights can completely consume the life of the individual trying to exercise these rights. The process is so time consuming that it becomes all-encompassing and so access to rights becomes inaccessible to most.
- Legal aid is hard to obtain, especially where subject matter is in the margins of what is deemed a 'commonplace issue'.
- The remedial order process is very slow and had a tangible impact on the case of one of the attendees where they felt they received the declaration of incompatibility from the Supreme Court, but had to wait a significant amount of time before the law was actually changed.
- The law and the HRA itself works but the fact that they are inaccessible is the key issue. Legal aid is a critical example of how access to remedies is inaccessible to members of the public.

Conclusion

Liberty and BIHR closed with comments regarding human rights in the UK, stating that there is some way to go before human rights are accessible to all. It was noted that the Roundtable today demonstrated how much impact the HRA was having on a daily basis, to a diverse range of people.

Sir Peter concluded, thanking all those in attendance for their powerful stories and stating that they will be further reflected on after the Roundtable had come to a close.



The Independent Human Rights Act Review Round Table

with

The Lord President and Judicial Working Group

Date: 22nd April 2021 – 16:00-18:00

Attendees

IHRAR Panel & Officials	Judicial Members
Sir Peter Gross	The Lord President
Sir Stephen Laws	The Lord Justice Clerk
Professor Maria Cahill	Lady Carmichael
Professor Tom Mullen	Lady Poole
John Sorabji	Sinead Campbell (official)
Kate Stevenson	

Theme One of the Terms of Reference

On the topic of the first theme in the Terms of Reference (ToR), the following points were made by members of the Scottish Judicial Working Group:

- The Convention had caused a ‘bumpy ride’ in the criminal system when introduced, caused partly by the way that the Scotland Act was drafted. Fair trial arguments were being converted into devolution issues, meaning that procedural issues were being ‘promoted’ to devolution / rights issues. The Scotland Act 2012, s.36(4) which amended the Scotland Act 1998, schedule 6, part 1, provided that the Lord Advocate was not a public authority for the purposes of the office’s prosecutorial functions. This vastly reduced the number of Convention rights cases in criminal proceedings. The aforementioned challenges are now issues of the past, with parties once more arguing cases based on common law fairness when challenging decisions taken in criminal prosecutions.
- The UKSC decision in *R (Osborn) v Parole Board* [2013] UKSC 61 also changed the courts’ approach to Strasbourg jurisprudence. Lord Reed emphasised that common law and domestic statutes should be the first ‘port of call’.
- Cases are still argued on Convention rights grounds, when there are good common law grounds. Nevertheless, considering cases on Convention rights grounds has had the benefit of making people examine issues from a new perspective. The HRA has been beneficial for judges as it has prompted them to look at the jurisprudence to see if it needs to be developed. There is a greater willingness now to consider whether change is required where a matter might otherwise be viewed as sanctified by usage.
- In *Starrs v Ruxton* [2000] JC 208 there was a successful challenge to the use of temporary sheriffs. As a general rule, Scotland does not have a fee-paid judiciary in the court system (except for emergency situations). This follows a trend across Europe.
- In *Cadder v HM Advocate* [2011] (UKSC) 13, judges in London had tried to anticipate Strasbourg jurisprudence, although they never got a decision. Furthermore, the Crown could not take the case to Strasbourg because they were not victims. This was a case where, perhaps, the UKSC did not appreciate the impact it would have in practice.
- Another significant UKSC decision (*The Christian Institute v The Lord Advocate (Scotland)* [2016] UKSC 51) concerned whether the “Named Person” legislation (the Children and Young People



(Scotland) Act 2014) was compliant with the Convention. Following this decision, it appears the Scottish Government has abandoned the proposed legislation.

- The Human Rights Act (HRA) has been a force for good. It has also been a source of disruption and prompted challenges. For better or worse, the HRA is now part of our legal framework.
- In Scotland there is a good relationship between the Courts and the Scottish Parliament.
- The margin of appreciation feels stable at the moment, particularly with regards to cases involving social and political rights. The courts have been more cautious about the development of socio-economic rights.
- Generally, judges and practitioners feel more comfortable in dealing with the margin of appreciation. Judges do not feel like sands are 'shifting underneath them' and are not experiencing difficulties. The Scottish government is planning to incorporate into Scottish law a number of International Conventions, including the United Nations Convention on the Rights of the Child. That will make a difference to the approach that the Scottish judiciary will need to take to such issues.

Theme Two of the Terms of Reference

On the topic of the second theme in the Terms of Reference (ToR), the following points were made by members of the Judicial Working Group:

- Scottish Courts have not strained the interpretation of legislation. No Scottish Court has ever struck down a whole Act of the Scottish Parliament (although in principle they do have the power to do so), although particular provisions have been found not to be law.
- With regard to section 19(1) HRA statements of ECHR compatibility, a similar approach is taken under Section 31 of the Scotland Act 1998. The latter provision, however, allows for such statements to be made during the passage of a Bill through the Scottish Parliament, first by the Minister introducing it, and secondly by the Presiding Officer. These do not cover future amendments. The Policy Memorandum accompanying Scottish Bills usually contains a section covering compatibility with Convention rights. An extra statement of compliance is not likely to be helpful. Furthermore, lawmakers cannot envisage all future scenarios, therefore a note cannot cover all potential issues.
- In well-founded challenges, the Scottish government has at times issued amending legislation which has resulted in resolution of the case without the need for judicial determination.
- Both rules of standing and the discretion as to remedies are limits on public law challenges (including human rights). In appropriate cases the court may exercise its discretion to refuse remedies even where a challenge has been successful. The discretion to withhold remedies is exercised on equitable principles and will take into account all of the circumstances, which may include the subject matter, grounds of challenge, consequences of any order, and the nature of the petitioner's interest.
- Section 102 of the Scotland Act 1998 is useful. It enables a court to remove or limit the retrospective effect or suspend the effect of its decision when it finds that an Act of the Scottish Parliament is outside its competence or acts of the executive are ultra vires. The more options available to a court in terms of remedies, the better. An example where the UK Supreme Court used that power to suspend Scottish legislation in order to enable the Scottish Parliament sufficient time to correct the defect in legislation, and to do so in a way that was compatible with ECHR rights is *Salvesen and Riddell v The Lord Advocate (Scotland)* [2013] UKSC 22. Use of the s.102 provided the Scottish Parliament with the time to remedy the issue in the case.





The Independent Human Rights Act Review Round Table
with
UK Armed Forces and the Ministry of Defence

Date: 23rd April 2021 – 15:00-17:00

Attendees:

IHRAR Panel & Officials	Armed Forces / MOD
Sir Peter Gross	General Sir Nick Carter
Baroness Nuala O'Loan	Paul Wyatt
Lisa Giovannetti	Damian Parmenter
Sir Stephen Laws	Isabel Letwin
John Sorabji	Major-General Alex Taylor
Gethin Thomas	Edward Holder
Millie Rae	Brigadier Keith Eble
Iain Miller	Jennifer Chamberlain
	Junior MOD Official 1
	Junior MOD Official 2

Context

Given the specific expertise of those attending, it was agreed that the majority of the discussion would cover Theme 2 of the Independent Human Rights Act Review (IHRAR) Terms of Reference (ToR), specifically question d.):

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

This was not restrictive. If attendees wanted to raise points on other sections of the ToR, then this was encouraged.

Introduction

The IHRAR Chair opened with brief remarks welcoming the Armed Force and Ministry of Defence (MOD) representatives.

*Attendees had then prepared overviews for each of their areas of specialism. Each overview was followed by further discussion between Armed Forces / MOD attendees and IHRAR Panel members. The discussions have been grouped below by topic area, with the key points for each topic listed. **An action is listed in bold.***

Overview

- It is a fundamental aim of the UK Armed Forces to comply with their legal and moral obligations. This underpinning has been echoed in the Integrated Review, which requires the Armed Forces to take an active role in 'supporting open societies and defending human rights'.



- Human rights and IHL obligations are central to the UK's response to its adversaries, who are increasing their military activities in ways that sit below the threshold of traditional State-on-State 'warfare'. This approach will also see the Armed Forces encouraging and engaging in public debate, given the rapidly changing face of warfare and related technological advances.
- The UK's adversaries will use the scrutiny of our Armed Forces which comes with the rise of social media and an increase in litigation, to their advantage. Our adversaries are adept at using disinformation effectively to target the perceived weakness that the UK Armed Forces are held accountable to legal standards.
- This continually evolving context has required the UK Armed Forces to develop and so various improvements have been identified as priority areas, such as:
 - More preparation and training for soldiers on how to operate in accordance with human rights law, most notably in the detention space.
 - Data capture and record keeping, allowing for greater insight into operational behaviours.
 - Understanding the legal context beyond simply the 'rules of engagement'.
 - The investigations process; understanding the operational and time constraints on investigators.
 - Providing adequate support to service personnel who are being investigated.

Future warfare

- Looking forward, a debate will be needed on how AI, automation, robotics, and other future tech affects the moral and legal obligations of the Armed Forces. There is an opportunity for the UK to be world leaders in understanding these challenges and to lead the public and academic debate on these issues.
- Law should evolve in tandem with the developing nature of warfare. In the context of future warfare, the UK Government has to develop policy with proper regard to the European Convention on Human Rights (the Convention).
- The traditional 'battlefield' is changing as modern-day adversaries seek to utilise threats above and below the threshold of war in international law and when using 'sub-threshold threats' they seek to operate in a 'grey zone' to pursue their national interests. In some ways this can be seen as good statecraft and perfectly legitimate operational techniques. There are, however, a vast area of new techniques and domains (for example space and cyber) which are being exploited because of the relatively underdeveloped understandings of operational norms in these contexts. This means more aggressive forms of statecraft are used with minimal repercussions. The Integrated Review has identified these underdeveloped areas and has begun to resource the UK Government's response to them.
- Battlefields where 'future tech', such as automated weaponry, is widely prevalent are still a thing of the future. Automation is largely only used in a very narrow context relating to self-defence. This does not, however, mean that we can be complacent to what our adversaries may be developing for the future, and we must be alive to the threat of being outmanoeuvred if our understanding of future technologies is not sufficiently developed.

Extraterritorial application of HRA

- The real issue for the MOD is its application to military activities abroad, i.e. extraterritorial jurisdiction. These are issues which emanate from the interpretation of the Convention rather than from the Human Rights Act (HRA); it is unclear how amending the HRA could have any impact on the development of Convention jurisprudence by the Strasbourg court.



- The Article 5 'right to liberty' has come into conflict with the principle that IHL is the '*lex specialis*' for armed conflicts. Strasbourg judgments do not necessarily provide clear guidance on what States are permitted to do in a military context, in circumstances where the jurisprudence does not follow a consistent trail of thought from one judgment to another. *Al Jeddah* gave rise to significant concern; *Hassan* provided some ground for optimism.
- By contrast, the domestic developments in human rights law do allow for a more rigorous consideration of arguments and principles before the UK courts, as was the case in *Serdar Mohammed*.
- Article 2 creates an obligation to investigate allegations of an unlawful killing and to have effective investigations. It can be difficult to carry out Article 2 compliant investigations in an armed conflict. The practical realities of war are often overlooked, and Article 2 does not seem to have been developed with a military application in mind. The recent ECtHR judgments of *Hanan v Germany* and *Georgia v Russia No.2* have complicated the picture in relation to the extra-territorial jurisdiction of Article 2.
- *Smith* extended the jurisdiction in relation to the duty to protect service personnel outside the UK's territory under Article 2. The concerns with the effect of *Smith* were clearly articulated in the dissenting judgment.

Operational impact

- The legitimacy of the UK Armed Forces is underpinned by adherence to the rule of law. Clarity of the law, especially in the specific operational context of the military, is crucial to maintaining such adherence and therefore legitimacy.
- On Article 2:
 - In the context of the use of force, there is a stark contrast between the Convention and IHL (for example the Geneva Conventions). IHL allows for targeting of combatants based on status, in stark contrast with the necessity/proportionality tests under the Convention.
 - It was noted that IHL had not kept pace with the development of armed conflict and in particular, it had not developed in its applicability to non-international armed conflict and non-state actors. Convention states often do not want to protect the rights of non-state actors, and so resist any development of IHL.
 - Procedural obligations are uncertain given cases such as *Hanan* and *Georgia v Russia No.2*.
 - The military are well versed in the application of legal principles and are aware that their activity can and will be reviewed retrospectively.
- On Articles 3 and 5:
 - Clarity of the law is essential to comply with Article 5 obligations. For example, clarity over the 'power to detain' is essential when planning for detention in warzones. How and for how long to detain captured persons are key questions that have not always been clear in relation to Article 5 obligations.
 - In situations where there are large numbers of detainees straining military resources to their capacity, detainees may be moved to local facilities. These movements must be Article 3 and 5 compliant. The military are therefore put in harm's way as their resources for detention are stretched whilst they grapple with a 'Hobson's choice'; where transfer to local facilities is the only viable option but where there are questions as to whether transfer would be Convention compliant.
- A better 'no-fault' compensation scheme for injured armed forces personnel and the families of those killed in combat, is something that the MOD has looked at previously and consulted upon. Under the proposals considered, if eligible to apply under the compensation scheme,



Service personnel would have been barred by statute from bringing a negligence claim against the MOD.

- **MOD attendees offered to send material on this to the IHRAR Panel.**

Overseas Operations Bill¹

- Part 1 of the OOB focuses on criminal prosecutions and introduces a new triple lock that ensures the unique context of overseas operations is considered when decisions are being made about whether to prosecute for alleged historical criminal offences. The measures apply once five years have passed from the date of an alleged offence, and do not apply to allegations of sexual offences, torture, crimes against humanity, genocide, or war crimes.
- Part 2 introduces limitation periods for personal injury and death claims and claims brought under the Human Rights Act, in connection with overseas operations. This includes an amendment to the HRA regarding a date of knowledge provision for a relevant claim under the Act. HRA claims will have to be brought either within six years from the date of the incident, or within one year of the date of knowledge of the incident, (whichever is later).

Further discussions and questions

- Inter-operability with other nations must be considered – for example, there are differences between states in the application of rights protection legislation.
- The UK is used to this complexity attaching to coalition operations and has operated in many contexts and scenarios in which the UK is required to comply with Convention rights while other states do not necessarily work to the same rules.

¹ The Overseas Operations Bill received Royal Assent on 29 April, 2021 and is now known as the Overseas Operations Act 2021.



The Independent Human Rights Act Review Round Table
with
UK Police Services

Date: 13th April 2021 – 15:30-17:30

Attendees:

IHRAR Panel & Officials	Police Services
Sir Peter Gross	Dame Cressida Dick
Baroness Nuala O'Loan	Louisa Rolfe
Simon Davis	Martin Hewitt
Sir Stephen Laws	Steve Wilson
John Sorabji	Steven Bramley
Millie Rae	Michael Stamp
Iain Miller	Dame Lynne Owens
Kate Stevenson	Helen Thompstone
	Kenny MacDonald
	Duncan Campbell
	Mark Hamilton
	Richard Ross

Context

Given the specific interests of those attending, it was agreed that the majority of the discussion would cover Theme 1 of the Independent Human Rights Act Review (IHRAR) Terms of Reference (ToR):

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

This was not restrictive. If attendees wanted to raise points on other sections of the ToR, then this was encouraged.

Introduction

The IHRAR Chair opened with brief remarks welcoming the Police Services interaction with the IHRAR so far, including the National Police Chiefs Council (NPCC) / Metropolitan Police Service (MPS) joint response to the Call for Evidence (CfE). The discussion was then opened to the floor where attendees contributed on a variety of topics.

The discussion has been grouped below by topic area, with the key points for each topic listed.

Actions are listed in bold.

General

- Policing in the UK follows a human rights based approach, where decisions and dilemmas in the Police Service are guided by reference to the Human Rights Act (HRA). The HRA has therefore changed policing for the better. While no chilling effect on policing has yet been



demonstrated, it has in some situations constrained the police's discretion in terms of decision-making.

- There is still work to be done in clarifying the provisions made under the HRA into something that is straightforward and translatable to officers on the front line.

The impact of Strasbourg jurisprudence on UK policing

- The concept of 'bringing rights home' has led to too much precedence being given to European Court of Human Rights (ECtHR) jurisprudence and not enough consideration of the domestic context. This jurisprudence is based on cases from a variety of contexts across the States signed up to the European Convention of Human Rights (the Convention). These contexts often do not align with that of the UK. The Strasbourg Court does not always take proper account of the domestic context by looking at domestic case law. *Horncastle* was a case where it did, but this is not always the case.
- The IHRAR would benefit from having the data to show how increased litigation resulting from ECtHR judgments has impacted the Police Service. **Attendees offered to provide further data on this.**
- There is a tendency in cases brought under the Human Rights Act that involve the MPS to cite and rely on a wide range of sometimes confusing precedents. Often, the question whether Convention case law should be followed in the instant case is not probed by the court, and the common law is left out of account even where it is applicable in the circumstances. Recognising the ability for UK Courts to take account of the common law, as per Lord Pannick's proposals to the IHRAR CfE, would mean s.2 HRA can deliver what it was originally designed to achieve, which is to 'take into account' Strasbourg jurisprudence but not rely upon it solely.
- In an international context, the difference between adversarial and inquisitorial legal systems further calls into question the application of ECtHR jurisprudence to the UK context. Strasbourg produces case law which derives from a range of legal systems. There is less read across from inquisitorial systems in other Convention States than from adversarial systems to law in the UK.
- It may be beneficial to introduce a new section into the HRA, analogous to section 12 in respect of the public interest in freedom of expression, making provision for the courts to take account of the public interest in the effective operation of the criminal justice system, when considering cases concerning policing.

DSD

- Lord Hughes' statement regarding *Commissioner of Police of the Metropolis v DSD and another* (DSD) sets out that the judgment is likely to increase the numbers of reinvestigations. DSD has had significant implications for the Police Service because of this, as the practicalities of resourcing lines of enquiry, weighing up evidence, and operating multiple competing claims at one time all require significant investment.
- This increased level of scrutiny has therefore affected the Police Service negatively. There is support for Lord Pannick's submission to the IHRAR CfE, which suggests reminding courts, through amending the HRA, that ECtHR jurisprudence is not binding, and UK Courts should have regard to Common Law decisions. If this was clearer at the time, cases such as DSD may have had a different outcome.



- Another consequence of DSD is that investigations have to be carried out in instances where the prosecution thresholds for offences are never likely to be met, but resources are still utilised to achieve the unachievable. **Attendees offered to provide a further note on the Article 3 implications of DSD.**
- The Police Service is often not able to reveal the impact that DSD, or other cases, have on it. The need to remain separate and impartial from party politics often prevents them directly raising these issues. More recently, police have had more of a voice in the development of policy. Any influence is always tempered with the understanding that Police Service should not overreach into policy development, and this is a good thing.

Other Cases

- *Zenati v Commissioner of Police of the Metropolis and another (Zenati)* provides another example of ECtHR jurisprudence having a negative impact on UK policing. The resulting judgment placed greater pressure on the MPS to investigate where the liberty of the subject is in issue, even though the ECtHR case law cited by the court arose from inquisitorial criminal justice systems and very different circumstances and contexts from the UK case.
- *Hannan v Germany* shows a slow advancement of positive Article 2 duties. Officers can be stationed overseas and engaged on casework involving offences committed by, and/or against, British nationals. Any extension to the territorial application of the HRA and, in particular, the positive duty to take reasonable steps to take steps to avert harm caused by criminals could have a significant impact, especially in dangerous locations. Even in a domestic context, the positive Article 2 'threat to life' responsibilities can have an operational impact. **Attendees agreed to a detailed note on Article 2 implications in this context.**
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Covid-19 Regulations

- Covid-19 regulations brought in this year, that the police were required to enforce, have created major practical difficulties and a crisis of legitimacy for Police Services across the UK. The regulations have brought about the most significant changes to the relationship between the public and the police since World War 2.
- The HRA was not drafted with the Covid-19 regulations in mind, and so the balance between enforcing the regulations and upholding substantive rights is an extremely difficult one to manage generally, specifically for front line police officers.
- Similarly, the HRA was not drafted with an anticipation that the police would be responsible for enforcing health regulations, which in normal circumstances are not regarded as 'criminal'.
- Commanders are well versed in balancing substantive rights, such as Article 10 and Article 11. However, the width of interpretation in the regulations means that those who might wish to wilfully misrepresent police behaviour have scope to do so. The result has been an atmosphere of distrust in policing amongst some areas of society. There is a sense of confusion amongst police officers as to how rights are balanced against regulations.
- Legislation on the Covid-19 regulations has been rapidly changing. This has created inconsistency, leading to criticisms of those left to do the enforcing, namely, the police. The 4 'E's' (engage, explain, encourage, enforce) were developed to assist police officers balancing rights and regulations and are believed to have been a very effective for officers in carrying out this balancing exercise. An ethics panel was also setup to specifically look at these dilemmas. The key question that needs clarifying is 'what is law, and what is guidance'?



- The polarisation of thought on such issues has placed the police in the middle of a much broader ideological debate. The protest environment illustrates the difficulty, given that the exercise of the right to protest has been illegal at various points during the pandemic.

Policing in Northern Ireland

- The Human Rights Act is a fundamental tenet of policing in Northern Ireland (NI) and is an enabler for the Police Service of Northern Ireland (PSNI), providing a structure for decision-making that was previously absent.
- There are numerous legacy cases in NI relating to 'The Troubles', largely dating to the 70s and 80s. PSNI explained that there would be a case before the UK Supreme Court (UKSC) in June this year in relation to the PSNI's rights and obligations in respect of Troubles Legacy Investigations. Clarity from the UKSC would be most welcome.
- Human rights law is continually changing and, given that human rights are so fundamental to policing and wider structures in NI, a more consistent approach that provides certainty would help policing. Any perception of breaching human rights is particularly sensitive in NI, so PSNI need clarity as to the parameters if they are to have the support of their community.
- *The IHRAR Chair clarified that 'temporal scope of the HRA' was not in scope of the IHRAR ToRs, but was still interested in the points raised to provide context.*

Policing in Scotland

- Policing in Scotland is devolved however, Police Scotland are a part of the NPCC. Human rights are central to their operations, demonstrated in the Oath of the Office of Constable, listed in the [Police and Fire Reform \(Scotland\) Act 2012, s10](#).
- *Cadder v HM Advocate* [2010] UKSC 43, 2011 S.C. (Cadder) enabled reforms to be made via Scottish legislation to improve policing. This was in the context of the UKSC holding that the approach taken to questioning suspects in criminal proceedings was not compliant with art. 6 ECHR.
- The HRA is very much embedded into policing and the wider operation of Scottish law. The Scottish Government strongly support the HRA and the devolved powers of policing. The Scotland Act itself requires Ministers to act in a way that is compliant with the Convention.
- Police Scotland face less civil litigation than other Police Services across the UK, perhaps due to the different legal system of Scotland. *Starrs v Ruxton* was the first case where the Convention had an impact on a case in the Criminal Justice sphere in Scotland. It concerned the fact that temporary sheriffs, due to their appointment process, were not art. 6 compliant judges. The case law since then has developed and there is no desire to amend s.2 amongst those from Police Scotland - as the 'take account' provision was now tolerably clear.
- The Scottish government is clear in its support for the HRA and their responsibility for policing.

The Independent Human Rights Act Review

Roundtable with parties from the Republic of Ireland

Date: 8 June 2021

Attendees

IHRAR Panel and Officials	Attendees
Sir Peter Gross	Chief Justice Frank Clarke
Sir Stephen Laws	The Hon. Mr. Justice Donal O'Donnell
Professor Maria Cahill	Professor Eoin Carolan
Alan Bates	Professor Conor O'Mahony
Dr John Sorabji	Paul Brady
Kate Stevenson	Martin McDermott

Sir Peter Gross first introduced the nature and role of IHRAR and thanked everyone for kindly agreeing to take part. He raised the general question of how Ireland appeared to have so successfully managed its relationship with the European Convention on Human Rights (the Convention)?

Justice Donal O'Donnell, began by noting three caveats to his comments: first, that there were obvious constraints on judges discussing the development of the law; secondly, there were constraints on judges discussing legal developments in another jurisdiction; and, thirdly, there would naturally be limits on the level of detail and understanding of UK developments, which participants would have. There is perhaps a fourth caveat: things in one jurisdiction may often appear neater and better organised to the outside viewer than to lawyers and others within that jurisdiction.

There are, however, a number of answers to the question. In the first instance, in *Carmody v Minister for Justice Equality and Law Reform* [2009] IESC 71, [2010] 1 IR 635, the Irish Supreme Court set out the approach to be taken by Irish courts to human rights issues; the 2003 ECHR Act, which gave effect to the Convention only applied if no other remedy was available. As a consequence, and crucially, the Court held that before the Convention could be looked at, it was necessary for Irish courts to first consider rights protection set out in the Constitution. This was a logical reading of the Act but was a significant departure. The general approach to any challenge prior to 2003 was to reach the Constitutional issue last because of the significant consequences of a finding of unconstitutionality for parties not before the court. It might have been thought that this approach would require Convention issues to be addressed before arguments based on the Constitution. Because however the statute was held to require that the Constitution has to be considered prior to the Convention, the effect was that a lot of the analysis concerning rights protection will be dealt with in respect of constitutional rights, (since there is a significant overlap in the rights protected under both instruments) and the Constitution also tends to provide broader protection

and stronger remedies than those available in respect of the Convention under the 2003 Act. For instance, if a breach of constitutional rights is found to have taken place, the Irish courts may strike down legislation, whereas under the 2003 Act they only have the power to make a declaration of incompatibility.

The Irish courts would, however, be likely to look to the Convention where constitutional rights were not well-developed. For instance, there were cases *Keena v Mahon* [2009] IESC 64, [2010] 1 IR 336 where the Convention was relied upon given the greater development of its jurisprudence concerning freedom of expression and journalistic privilege in particular (*Goodwin*). Other areas where there was greater resort to the Convention were where Convention caselaw was very developed, such as art. 2 of the Convention i.e., where positive obligations had been developed.

It was also noted that the history of Irish constitutionalism was historically also that of UK constitutionalism. While it is famously said that the UK has no written constitution, and has moreover a flexible constitution a central feature of which is the unlimited power of parliament, the idea of a parliament with limited powers where moreover the limits on those powers were enforced by court action if necessary, was a part of the law of the United Kingdom or at least the British Empire since that was the legal basis of the establishment of colonial and Dominion legislatures. Specifically in terms of Ireland the question of self-government was a legal issue bound up with the nature of the United Kingdom. The questions of the Act of Union, Repeal of the Union, The Home Rule Bills of the late 19th and early 20th centuries and the question of Dominion Status etc, which convulsed Ireland and to some extent the UK generally were questions of Constitutional Law and formed the backdrop to the development of Irish thinking about constitutions in the 20th century. It might be said that a number of 'happy accidents' had led to the current position in Ireland.

By 1922, both the UK and Ireland, for different reasons, came to view entrenched rights as beneficial (an idea which can be traced by to the Irish Home Rule Bills of the 1890s). The Irish side saw a developed constitution protective of rights was an important signifier of status as a nation. The British saw the entrenchment of rights, in particular property and freedom of conscience as important protections for the unionist minority in the new Irish Free State. By 1937 there was also in Ireland a desire to move away from unpalatable aspects of the Treaty, which led to a new Constitution which tended however to maintain and expand on the rights protection aspects of the 1922 Constitution and retained judicial review. When in the 1960s, the Courts became more active in reviewing and striking down legislation much of the legislation challenged was Victorian legislation that had been adopted and continued upon Independence. Thus the Courts' decisions sometimes appeared modernising and reforming, in and the counter majoritarian aspect of judicial review, which makes it controversial was not so apparent. This all went to establish a degree of public acceptance of the Constitution and judicial review as part of the furniture of the State.

Secondly, Ireland has a relatively easy format for carrying out constitutional amendments. James Madison said that Constitution should only be capable of amendment in rare and significant circumstances but that is not the experience in Ireland. The fact is that Ireland particularly in recent times has seen a large number of amendments to the Constitution proposed and many accepted. Sometimes these are technical or required by international obligations but sometimes they are matters of considerable public controversy. The process has enabled a constitution which faithfully

reflected the social attitudes of Ireland in the late 1930s to be amended to reflect current views. To some extent referenda do not reflect political allegiance and there are examples of proposals being rejected which were supported by the larger political parties. The fact also that in theory decisions on the interpretation of the Constitution can be addressed and perhaps reversed by constitutional amendment means that the decisions of the courts are subject to the possibility of popular endorsement or override. Also more recently the practice of holding Constitutional conventions with randomly selected members of the public who then engage in detailed scrutiny of provisions of the Constitution and possible amendments probably increases engagement with and acceptance of the Constitution, and judicial review. As a result, there is a significant (but by no means universal or constant) element of popular buy-in to constitutional review, as the constitution itself is subject to continuing approval by the public.

It might be suggested that the UK has not perhaps had the same degree of public buy-in to human rights as the Convention was acceded to in 1951 by the UK government alone as an international agreement (as indeed Ireland did) and the HRA was enacted by Parliament in 1998. In neither case was there significant public buy-in as there can be said to be in Ireland in respect of its constitution and constitutional rights - through its review and referendum processes.

Chief Justice Clarke

The Chief Justice suggested that there may be a further difference in approach between Ireland and the UK. That was that lawyers in Ireland have since 1922 made significant use of authorities from other jurisdictions when considering rights cases. This stemmed from the adoption of pre-independence UK legislation that was not inconsistent with the Irish constitution, which required consideration of UK judgments. It was furthered in the 1960s through considerable citation of and reliance on US judgments on rights issues. This outward-looking tradition resulted in a very receptive approach to ECtHR judgments.

It was also the case that the Convention, as a persuasive authority, was used as a means to interpret the Irish Constitution. As a consequence, arguments relying on ECtHR case law are often deployed first when the Constitution is being interpreted.

Ireland had also developed human right case law before the European Convention on Human Rights Act 2003 was enacted. This developed from the 1960s through the development of constitutional rights jurisprudence. Due to these developments, it is only necessary to look to the Convention and its case law where constitutional rights are not well-developed.

The general approach to rights adjudication for lawyers, is to look to the Constitution first. To use the Convention to help interpret the Constitution. And only then use the Convention itself where the Constitution is not able to help.

Sir Stephen Laws

Do you get to the same result irrespective of whether you approach issues under the Constitution or the Convention, other than where remedies are concerned?

Chief Justice Clarke

Most of the time the result is the same. There are areas where the Constitution and Convention lead to different results, but they are a significant minority.

If the Convention gives a right, it is likely that the Constitution will also do so and will do so with a more effective remedy. If the Constitution does not give a right, then the Convention may do so, but the remedy will be the same unless you want to strike down the legislation in which case it is not as effective.

Stephen Laws

Can statutory instruments be struck down in Ireland, as they can in the UK under the HRA?

Justice Donal O'Donnell

Irish courts have not yet addressed this question. Courts in Ireland are not public authorities under the 2003 Act, as they are in the UK under section 6 HRA. SIs can be struck down in any event by the strike down power under the Constitution. They can also be set aside on judicial review grounds e.g. if ultra vires. As such it is difficult to see when you would bring a Convention based claim in Ireland to invalidate an SI. If such an approach were taken it would, however, be unremarkable in broad constitutional terms as setting aside SIs is already a feature of the legal system, as indeed is the invalidation of primary legislation.

Looking at judicial dialogue with the ECtHR, it tends to take a very structured approach to rights analysis. In Ireland, the courts do not tend to take such a similarly structured assessment using just the same language and approach as the ECtHR. This is because the Irish courts use their own Constitution and language to approach rights questions. This can sometimes make it perhaps difficult for the ECtHR to see if Irish courts have provided an effective remedy to a rights violation but that is a consequence of the primacy of the Constitutional remedy.

On a different note, the ECtHR's approach in some cases of considering whether there is a Europe-wide consensus on any specific rights issue can be problematic.

Chief Justice Clarke

It is noteworthy that when carrying out rights analysis Irish courts also look at rights jurisprudence from other common law countries (e.g., the US, NZ), as well as from some civilian jurisdictions, to help interpret the Constitution. Such jurisprudence forms persuasive authority. Reference to other common law jurisprudence may, however, complicate the ECtHR's analysis of Irish judgments.

Maria Cahill

The Irish constitutional order adopts a more fulsome approach to taking account of ECtHR jurisprudence than may be the case in the UK. There is an understanding that ECtHR case law is always persuasive authority. There is no controversy over the question whether it is binding or not. Where a right has been subject to systematic examination at common law, that analysis is what commends the decision to you. Where there is no such analysis, then you will look to where there has been such a detailed analysis, which may be the ECtHR or it may be another common law jurisdiction. There are a number of areas where the common law analysis of rights protection is fully developed e.g., criminal procedure. In such cases, that analysis will be adopted.

Conor O'Mahony

There is an overlap between the Constitution and the Convention in a lot of cases. As a result, there has been no real development of convention adjudication. There are, however, areas, where the overlap is not so pronounced, such as where the Convention has developed positive obligations or procedural obligations, which can then be relied upon in Ireland. Such obligations and arguments around them do not fit into the Constitution. Given separation of powers, the courts are slower to engage in criticism of any failures to act consistently with such obligations.

The Irish courts have also been slow to warm up to using the 2003 Act. The 2003 Act imposes obligations that lawyers can use where no other remedy exists. The general tendency remains, however, to go to the Constitution first. This is the reason why the Convention and its case law are not used in Ireland as much as they are in the UK. There continues to be a greater incentive for lawyers to resort to the Constitution than the Convention, which provides another reason why there has been limited use of the 2003 Act.

Tom Mullen

There seems to be a high degree of acceptance by the Government and the public of courts adjudicating rights issues. It also seems that there is no real controversy about the courts overstepping their role.

Justice Donal O'Donnell

Yes, that's correct although a little over-simplified. There is an undercurrent that that debate is present in Ireland at the present, particularly where there is an unpopular court judgment. It is at that point that criticism is made.

One reason for the difference in approaches in respect of that debate in the UK and Ireland might be that the UK is still in the first generation of rights law, whereas due to its longer historic development, Ireland has seen it move through different phases of development to, now, what might be seen as fourth generation rights law. Public support has developed over time, and there is now a degree of public engagement in rights and the adjudicative process. In this there is an echo of Learned Hand's famous *dictum* on liberty resting in hearts and minds rather than in paper constitutions¹. In Ireland there is, however, no 'cult of constitutionalism' as there might be said to be by some commentators in the US. People are not familiar with the major decisions of the courts in the same way. However when courts make a decision that is unpopular in some quarters (as was the case with one case that concerned the power to hold inquiries), what is being said by the court is 'this is, as far as we know, what was agreed to in the Constitution. You the public can change the Constitution if you disagree'. In the event a proposal to reverse that decision was rejected in a referendum and to that extent the decision becomes 'baked in' to the Constitution by popular decision. This facilitates greater public engagement with the issue and takes a little of the sting out of rights controversy.

Paul Brady

¹ Learned Hand, *The Spirit of Liberty*, (1944) <<http://www.learnedhand.org/?p=4>>.

Ireland is more relaxed about recourse by courts to Convention rights because we are used to courts dealing with rights' claims under the Constitution and so questions of legitimacy are not as acute.. In addition, the Irish courts have developed a balanced jurisprudence based on self-restraint when exercising the power to judicially review legislation. That has assisted in limiting tension over the issue of judicial review of legislation. In particular, and in contrast to the approach in certain other constitutional courts elsewhere in the world, the Irish courts have exercised self-restraint when dealing with financial, social and moral issues, which has placed the onus back upon Parliament to consider them effectively. With respect to the positive obligations which arise under the Convention, the onus on giving effect to those is on each Member State – and it is for the law of each state then to deal with how that is to be done. It is generally understood to be better for Parliament than for the courts to implement positive obligations as they tend to require resource and policy decisions. As a result, it is correct that there is less traction under the 2003 Act to enforce positive obligations. But that is perhaps a necessary consequence of the fact that it incorporates the Convention at a sub-constitutional level and so the separation of powers rules under the Constitution must continue to be respected.

A second reason why there is a more relaxed approach to Irish courts dealing with right claims under the Convention is that the Constitution takes the lead in most litigation. In contrast to a claim made under the Constitution, the 2003 Act is generally not very useful as a means of obtaining a concrete remedy for a claimant. A breach of a constitutional right can lead to a finding of invalidity in relation to a piece of primary or secondary legislation. By contrast, under the 2003 Act it will merely be a declaration of incompatibility.

There is, however, an increasing tendency for rights issues to be looked at through the prism of ECtHR case law. This is especially the case where a particular association of lawyers in a certain area of law might be particularly interested in Convention case law on their topic. This can, however, backfire if too much ECtHR case law is cited in argument before the court when the issue is one that is properly focused on the Constitution. The courts have been careful to ensure that constitutional case law is not side-lined by arguing solely through the medium of the Convention case law.

Sir Stephen Laws

There is a reference to the courts taking 'judicial notice' of ECtHR decisions in the 2003 Act? Does this have a specific meaning, or does it refer to the general meaning of 'taking judicial notice'?

The 2003 Act also provides for *ex gratia* payments to be made when a declaration of incompatibility is made. Is there a risk that this can be litigated?

Chief Justice Clarke

Judicial Notice simply means the absence of a need to prove. The provision in the 2003 Act does not make a real difference to what would already happen in respect of taking judicial notice of a matter. ECtHR judgments were persuasive authorities any way, thus the provision in practice does not add anything.

It was not apparent that any litigation had arisen over *ex gratia* payments.

Justice Donal O'Donnell

It was unlikely that questions over *ex gratia* payments would come before the courts; there has been no such litigation thus far. The discretion to make such awards is, in any event, dwarfed by the right to damages for breaches of constitutional rights, where damages awards are generous.

Sir Stephen Laws

What is the measure of damages for a breach of constitutional rights?

Chief Justice Clarke

Damages includes compensatory damages, but often such cases do not involve pecuniary loss. General damages are awarded for non-pecuniary loss, and the trend is to be more generous than where damages are awarded by the ECtHR.

The Irish government would, understandably, prefer rights issues to be resolved in Ireland rather than before the ECtHR. Where the courts are at fault in breaching rights, such as article 6 delays, no compensation is awarded. There is an attempt to establish a scheme to award ECtHR damages for court delay, however.

Eoin Carolan

There is a further point on 'buy-in'.

In the UK, the declaration of incompatibility provides an incentive for reform. In Ireland the declaration does not provide anything of value to litigants. Litigants only pursue a declaration in Ireland if they are bringing a case for political reasons. This can be seen to underpin the use of declarations in the UK too, where they are sought for political reasons i.e., the declaration power promotes political litigation. This then feeds into politicians' perspectives regarding the courts, and whether they are over-stepping constitutional boundaries.

When there is a political campaign group that is bringing litigation seeking declarations of incompatibility, this effects the public's perception of the courts and can lead to the view that the courts are acting politically. This is particularly the case where the public do not see that there is a specific victim on whose behalf the litigation is being pursued.

The courts do, however, have a strong attachment to the rules on standing to bring litigation. They particularly do not like claims being brought on hypothetical fact. There needs to be a real dispute, and a real litigant who is affected by the alleged breach. This has helped to limit the growth of political litigation.

Maria Cahill

The HRA has tried to minimise disagreement concerning rights; to civilise disagreement with the ECtHR. In Ireland judges are restrained in their approach and will decline to engage in political debates.

There is, however, a legitimate case for there being public and political disagreement and discussion about rights and their content. The Irish system tolerates vigorous debate, so the human rights

infrastructure does become controversial. In the UK, because of the approach that tries to minimise debate, there is an impetus that underpins the growth of a greater critique of the infrastructure i.e., of the HRA.

Conor O'Mahony

In Ireland there is also, to some extent, the conflation of the Convention with the EU, as there is in the UK. This is more of a problem in the UK, given adverse views of the EU, particularly post-Brexit. Ireland is less Euro-sceptic, thus there is less criticism arising from this.

Justice Donal O'Donnell

To a large degree Maria Cahill's points are valid ones. The evolutive approach of the ECtHR can potentially lead courts into contestable areas. That potentially creates problems. If the ECtHR has taken an adverse decision against the Irish Constitution, that would lead to public controversy. Although it should be noted that the ECtHR has been notably less activist recently.

It is very important that the Irish public have to confront major rights decisions. There is no reason to believe that lawyers are better at deciding political issues than other members of society. It is useful to compare the ways in which the US and Ireland treated the issue of abortion. In Ireland, the issue was determined by the public.

Chief Justice Clarke

The issue of abortion was a potential flashpoint with the ECtHR. However, the public were part of the process at all stages of the issue in terms of the case on the Constitutional issue before the Irish courts, the ECtHR decision, and a number of referendums. Public engagement created buy-in.

Eoin Carolan

The Irish courts are reluctant users of rights and particularly the Convention and its case law, not least due to use of the Constitution. Because of the latter the former is not relied on very much, except in specific areas such as article 8 of the Convention.

The ancillary nature of the Convention stems from the more robust approach to constitutional rights.

Chief Justice Clarke

Referendums are better when they are about a concrete proposal, so that the debate can be about a specific text, its meaning and its potential. This helps public understanding and buy-in as it focuses the public more effectively than where a referendum is on a broad idea, which they are asked if they broadly favour or not.

Maria Cahill

Engagement with a specific text legitimises later court interpretations of the referendum text, as that interpretation is part of the public debate.



The Independent Human Rights Act Review Round Table
with
UK Intelligence Agencies and relevant Government Departments

Date: 31st March 2021 – 14:30-16:30

Attendees:

IHRAR Panel & Officials	Government Departments
Sir Peter Gross	Jeremy Fleming
Baroness Nuala O'Loan	Sir Iain Macleod
Lisa Giovannetti	Paul McKell
Sir Stephen Laws	Isabel Letwin
John Sorabji	Shezhad Charania
Oliver Burrows	Christopher Leach
Millie Rae	Helen Thompstone
Iain Miller	Tony D
	Samantha Ede
	Douglas Wilson
	Ghizala M

Context

Given the specific expertise of those attending, it was agreed that the majority of the discussion would cover Theme 2 of the Independent Human Rights Act Review Terms of Reference (ToR), specifically question d.):

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

This was not restrictive. If attendees wanted to raise points on other sections of the ToR, then this was encouraged.

Introduction

Transparency amongst the UK Intelligence Agencies (the Agencies) is key. In the UK they are able to provide much more public detail than in many other jurisdictions. This has meant the Agencies have been able to willingly engage with this Roundtable session and the Independent Human Rights Act Review (IHRAR) generally.

The discussion was then opened to the floor where attendees contributed on a variety of topics. These have been grouped below with the key points for each topic listed.

General

- The European Convention on Human Rights (the Convention) substantive rights most relevant to the Agencies are Articles 2, 3, 5 and 8. Article 8 (the right to respect for private and family life, home and correspondence) is an ever-present consideration in their activities.



- Two of the key pieces of legislation relevant to the work of the national security community are the Human Rights Act 1998 (HRA) and the Investigatory Powers Act 2016 (IPA). In respect of the HRA, it reflected a central aspect of the legal and ethical framework within which they operate.
- When applying the Convention, the Agencies take a broad interpretation of the Convention rights. This helps to reduce the need to recalibrate their approach to exercising their powers where the European Court of Human Rights (ECtHR) expands the scope of such rights. There may be real practical difficulties in responding with immediate changes of practice (e.g. when computer software has to be reprogrammed). As a result, although the Agencies are not generally affected by the ECtHR expanding the scope of Convention rights, expansion in some particular areas, such as the scope of extra-territorial jurisdiction or the application of article 8 could have an impact on their operations.
- Applying the Convention can raise practical operational issues for the Agencies and relevant Government Departments. It can also pose practical issues where they seek to engage with external partners/agencies, i.e., from other jurisdictions that are not themselves subject to the Convention.

Impact of a broader extra-territorial application of the HRA

- The Agencies and the UK Government Departments present (the Departments) strictly operate within the rule of law. The key to ensuring this is having an effective legal framework that provides clarity.
- Certainty is the starting point and core need for the Departments. Fundamental issues surrounding a lack of certainty come from the Convention, not the HRA. Changes to the HRA therefore may not help deliver certainty. Lack of legal certainty in respect of the Convention arises in two ways:
- First, it is sometimes difficult to determine the correct interpretation of ECtHR judgments. They are not all drafted with the detail and clarity common to judgments of UK courts.
- Secondly, the ECtHR does not always develop a clear and consistent line of jurisprudence. It has not, for instance, developed such an approach to its jurisprudence on extra-territorial jurisdiction. It is thus both difficult to determine its scope and how it might develop in future.
- The ECtHR's case law on lethal force is a case in point. Decisions such as *Hanan v Germany* and *Georgia v Russia (II)* have not left the issue of the Convention's extra-territorial jurisdictional application clear. Uncertainty in this area does not provide an effective framework for the Agencies and Departments to operate within. It also requires them to follow the development of the case law carefully to try to determine the direction of travel of the Convention's extra-territorial jurisdiction.
- These issues that arise in respect of the development of extra-territorial jurisdiction under the Convention are issues that arise at the Convention level. They are not issues that are arising domestically under the HRA. It is difficult to see how amending the HRA could have any impact on the development of Convention jurisprudence in this area. Equally, it is difficult to see how



such amendments can cure the broader issue of a lack of clarity and certainty in ECtHR jurisprudence.

- There is a risk that attempts to create certainty (e.g. to set out how the UK courts are to approach the application of Convention rights or its extra-territorial scope) would in fact create further litigation and uncertainty. Consideration needs to be given to the extent to which amendments to the HRA that are not accompanied by amendments to the Convention would create a gap between the HRA and the Convention, which would result in more claims going before the ECtHR in a way that would be unhelpful.
- While questions of policy are not for attendees to advise on and are indeed outside their authority, it would be advisable for those proposing amendments to the HRA to consider the extent of potential new uncertainty which could arise through amending the HRA alone without matching amendments to the Convention. Any recommendation that the IHRAR were to make that could bring greater certainty to the issue of extra-territorial jurisdiction would be very much welcomed, albeit any solution lies, ultimately at the Strasbourg level.

Differential approaches to extra-territorial jurisdiction, the ECtHR and the HRA

- If the HRA were to be amended such that there was a difference in approach to extra-territorial jurisdiction between it and the ECtHR, this could pose problems.
- At the present time, where the two approaches are aligned, it means that the Agencies can utilise closed material proceedings (CMPs) before domestic courts and tribunals, such as the Investigatory Powers Tribunal (IPT) or SIAC. This means they are able to deploy national security material in domestic proceedings before domestic tribunals that the ECtHR has accepted are Convention-compliant e.g., the IPT. As a result, where the UK has to defend such proceedings where they end up before the ECtHR, they are able to rely upon findings of fact made by the domestic courts and tribunals based on national security material deployed in a CMP. A similar point can be made in respect of SIAC. In the Abu Qatada case, SIAC dealt with national security material. That meant that the ECtHR did not have to see national security material. It was, however, able to give weight to SIAC's findings of fact.
- If there was a discrepancy between the Convention and the HRA's approach to extra-territoriality, and an individual did not have any other effective remedy before the UK courts, it could result in the UK having to consider deploying factual material before the ECtHR. This would be problematic as national security material could not be deployed in a CMP before the ECtHR. It is also difficult to see how a process could be established for national security material to be made available to the ECtHR i.e., to restrict it to UK officials at the court or to bring it within the scope of the Official Secrets Act. This would arguably result in the UK not being able to deploy that material and thus would undermine its ability properly to defend proceedings before the ECtHR.
- Amending the HRA in any way that reduced the UK domestic courts' ability to hear proceedings that raised Convention rights issues or questions concerning extra-territoriality would also potentially raise a broader concern. At the present time, the ECtHR can consider the reasoning and analysis in a domestic judgment in proceedings that ultimately result in action being taken before it. The ECtHR thus has the benefit of that domestic judgment. The Wang-Yam case demonstrates the benefits of domestic consideration for national security,



and the difficulty of sensitive material being presented to the ECtHR. It would be useful for the IHRAR to review the decision.

Giving effect to Article 2 & 3 extra-territoriality

- It is inherently difficult to carry out Article 2 compliant investigations in an armed conflict. The practical realities of war are often overlooked, and Article 2 does not seem to have been developed with a military application in mind.
- It is not clear whether an amendment to the HRA (or new statute), which provided guidance on how to ensure that an investigation was Article 2-compliant, could be of any benefit.
- In the context of whether new powers are needed to provide for Article 2 investigations, it is suggested that the existing frameworks are sufficiently flexible.

Bulk powers, international cooperation and managing risk

- There is a difficulty in aligning bulk powers concerning data with the precise terms of Article 8 of the Convention, mainly relating to the proportionality of intrusion into privacy at the point of collection. This creates a difficulty in explaining to the Council of Europe, especially where other countries do not have the power and capability to operate in 'bulk'. The perception that bulk powers apply to entire populations is incorrect.
- International cooperation has real benefits for all and is built on deep trust (i.e. Five Eyes partnership). These relationships include conversations on how legal frameworks intersect, something that is inherently difficult to disentangle.
- Risk is complex. The Agencies and Departments put forward carefully analysed reasoning of the risks involved in certain operations (including proportionality issues), which Ministers review. However, with ECtHR case law continually changing, it is difficult to anticipate where the boundaries of this risk will be case by case.
- The margin of appreciation could therefore be utilised to enhance the 'UK context' of decision making, where the ECtHR is seen more as a 'safety net'. This goes to the substance of the Convention generally, with implications beyond the issue of extra-territorial jurisdiction.

UK Courts and ECtHR Jurisprudence – Judicial Dialogue

- It is difficult to see how changes to the HRA could significantly allay concerns as to a lack of clarity in respect of the Convention.
- There could be more scope for dialogue to further explain UK thinking on extra territoriality. The ECtHR has already stated that there are circumstances where extra-territorial jurisdiction does not apply.



- There is a case for a more united international dialogue with the ECtHR where the legal implications and frameworks are actively discussed between states with similar issues – could this commonality of position be better conveyed to the ECtHR?
- The Brighton Declaration shows States' commitment to the Convention and, when analysing jurisprudence since the declaration in 2012, a shift towards a clearer direction for Convention application.
- What Hanan shows is that states are looking at the issues, engaging in dialogue, and intervening as 3rd parties (which is positive).

Margin of Appreciation, Protocols and amendments to the Convention

- It is not clear how altering the current approach to the margin of appreciation under the HRA could deal effectively with any of the issues concerning the development of extra-territorial jurisdiction by the ECtHR. The issues that affect the Departments arising from the development of extra-territorial jurisdiction can only ultimately be resolved at the Strasbourg level.
- In some cases the government has been expected to act on Convention jurisprudence that is not yet binding because, for instance, there is 3 months to refer a case to the Grand Chamber, or where the judgment is not final or is subject to the control of the Committee of Ministers.
- Protocol 15 (principle of subsidiarity and the doctrine of the margin of appreciation) has not yet been ratified by Italy, but this has not stopped the ECtHR approaching cases with the protocol in mind¹. The issue here would be to secure Italy's ratification. Again, this is not, however, an issue for the HRA itself.

Boundary between Convention jurisprudence and International Humanitarian Law

- International Humanitarian Law (IHL) is the '*lex specialis*' for armed conflicts. The Convention comes into conflict with this principle, particularly in respect of the application of Article 5 (right to liberty). The court's judgments do not provide clear guidance on what States are permitted to do in a military context.
- The most problematic area on a practical level in respect of military operations is the interaction between IHL and the Convention. Some Convention jurisprudence (for example *Al-Jedda v UK*) is not readily reconcilable with military operations in armed conflicts. The Convention was not designed with armed conflicts in mind. See, for instance, Lord Sumption in the *Mohammed* case when, for example, he indicated that Article 5 does not take account of detention in the course of an armed conflict.

¹ Since the meeting, it has been confirmed that Italy will, on Wednesday, 21 April 2021, ratify Protocol 15 to the ECHR and consequently, Protocol 15 will enter into force on 1 August 2021.

Annex IX

Implications for the Crown Dependencies & Overseas Territories

The Crown Dependencies and the Overseas Territories

The Crown Dependencies (CDs) are the Bailiwick of Jersey, the Bailiwick of Guernsey and the Isle of Man. They are not part of the UK but are self-governing dependencies of the Crown. This means they have their own directly elected legislative assemblies, administrative, fiscal and legal systems, including courts¹.

There are fourteen British Overseas Territories (OTs), each of which has a historical link to the UK although are constitutionally separate from it. They are largely autonomous, with their own elected governments and legislative bodies. They do, however, maintain strong constitutional relationships with the UK, which remains responsible for their overall good governance, defence and external affairs².

Please see the attached white paper for further information on the OTs.

International Treaties

The CDs and OTs are not recognised internationally as sovereign States in their own right but as *'territories for which the United Kingdom is responsible'*. As such neither the CDs nor the OTs have the authority to become party to an international treaty, convention or agreement in their own right. The long-standing practice of the UK when it ratifies, accedes to, or accepts a treaty, convention or agreement is to do so on behalf of the United Kingdom of Great Britain and Northern Ireland and any of the CDs or OTs that wish the treaty to apply to them. Once ratified by the UK Government, it is the responsibility of the CDs and OTs to implement any international treaty within their own jurisdictions.

Through a process known as 'entrustment', a CD or OT can also, where appropriate and authorised by the UK through the issuing of a Letter of Entrustment, negotiate and sign specific international agreements themselves.

¹ See the gov.uk website for more information on the CDs <<https://www.gov.uk/government/publications/crown-dependencies-jersey-guernsey-and-the-isle-of-man>>.

² Further information can be found in, Foreign & Commonwealth Office, The Overseas Territories Security, Success and Sustainability, (June 2012) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32952/ot-wp-0612.pdf>.

The European Convention on Human Rights and the Human Rights Act

The Convention explicitly allows states to choose how the Convention applies to territories for whose international relations they are responsible, by making a declaration on the territorial application under article 56.³ The UK has extended the Convention to all of the CDs and most of the OTs. The Convention has not been extended to the British Antarctic Territory, the British Indian Ocean Territory or the Pitcairn Islands.

The HRA does not apply to the CDs or OTs. Rights protections for the OTs are primarily enshrined in their respective written constitutions, which in most cases were drafted with the Convention, and the HRA, very much in mind. The HRA has influenced human rights legislation in the CDs, which have introduced Human Rights Acts that are comparable with the HRA⁴.

3 European Convention on Human Rights <https://www.echr.coe.int/documents/convention_eng.pdf>, p.30.

4 The Human Rights (Jersey) Law 2000 and see Human rights and the law in Jersey <<https://www.gov.je/government/departments/justicehomeaffairs/about/pages/humanrights.aspx>>; The Human Rights (Bailiwick Of Guernsey) Law 2000; and see Human Rights in Guernsey <<https://www.gov.gg/humanrights>>; Human Rights Act 2001 (Isle of Man) and see Isle of Man Human Rights <<https://www.gov.im/about-the-government/departments/cabinet-office/human-rights/>>.

Annex X

Declarations of incompatibility

(i) Breakdown of cases by subject where declarations of incompatibility have been made

Issue	Case	Relevant ECHR Provision	Provision declared incompatible	Government/Parliament Response
Civil Partnership	<i>R (Steinfeld and Keiden) v Secretary of State for the International Development</i> [2018] UKSC 32; [2020] AC 1	Arts. 8 & 14 ECHR	Civil Partnership Act 2004, ss.1 & 3	Remedial legislation: Civil Partnership (Opposite-sex Couples) Regulations 2019/1458
Criminal Justice	<i>McR's Application for Judicial Review</i> [2002] NIQB 58; [2003] NI 1	Art. 8 ECHR	Offences against the Person Act 1861, s.	Remedial legislation: Sexual Offences act 2003, ss.139, 140
Criminal Justice	<i>R (Clift) v Secretary of State for the Home Department</i> [2006] UKHL 54; [2007] AC 484	Arts. 5 and 14 ECHR	Criminal Justice Act 1991, ss.46(1) & 50(2)	Remedial Legislation: Criminal Justice Act 2003, and also Criminal Justice and Immigration Act 2008
Criminal Justice	<i>R (F) v Secretary of State for the Home Department</i> [2010] UKSC 17; [2011] 1 AC 331	Art. 8 ECHR	Sexual Offences Act 2003 s.82	Remedial Legislation: Sexual Offences Act 2003 (Remedial) Order 2012
Criminal Justice	<i>R (T) v Chief Constable of Greater Manchester</i> [2014] UKSC 35; [2015] A.C. 49	Art. 8 ECHR	Police Act 1997, s.113A & 113B; Exceptions Order to the Rehabilitation of Offenders Act 1974	No remedial action needed as amendments had already been made prior to the declaration being made
Criminal Justice	<i>Gallagher for Judicial Review (NI)</i> [2019] UKSC 3	Art. 8 ECHR	Criminal records disclosure schemes made under the Police Act 1997 and the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975	Remedy still under consideration

Issue	Case	Relevant ECHR Provision	Provision declared incompatible	Government/Parliament Response
Criminal Justice (Sentencing)	<i>R (Anderson) v Secretary of State for the Home Department</i> [2002] UKHL 46; [2003] AC 837	Art. 6 ECHR	Crime (Sentences) Act 1997, s.29	Remedial Legislation: Criminal Justice Act 2003, ss.303(b)(i), 332, sch. 37, Pt 8 etc.
Damages	<i>Smith v Lancashire Teaching Hospitals NHS Foundation Trust</i> [2017] EWCA Civ 1916; [2018] Q.B. 804	Arts. 8 & 14 ECHR	Fatal Accidents Act 1976, s.1A	Remedial legislation: Fatal Accidents Act 1976 (Remedial) Order 2020.
Gender recognition	<i>Bellinger v Bellinger</i> [2003] UKHL 21; [2003] 2 AC 467	Arts. 8 & 12 ECHR	Matrimonial Clauses Act 1973, s.11(c)	Remedial legislation: Gender Recognition Act 2004
Housing	<i>Westminster City Council v Morris</i> [2005] EWCA Civ 1184; [2006] 1 WLR 505	Art. 14 ECHR	Housing Act 1996, s.185(4)	Remedial legislation: Housing and Regeneration Act 2008, s.314
Housing	<i>R (Gabaj) v First Secretary of State</i> (28 March 2006, Admin., unreported)	Art. 14 ECHR	Housing Act 1996, s.185(4)	Remedial legislation: Housing and Regeneration Act 2008, s.314
Human Fertilisation	<i>Blood & Tarbuck v Secretary of State for Health</i> (unreported, 28 February 2002, Sullivan J)	Arts. 8 read with art. 14 ECHR	Human Fertilisation and Embryology Act 1990, s.28(6)(b)	Remedial legislation: Human Fertilisation and Embryology (Deceased Fathers) Act 2003
Human Fertilisation	<i>Z (A Child) (No 2)</i> [2016] EWHC 1191 (Fam); [2017] Fam 25	Arts. 8 & 14 ECHR	Human Fertilisation and Embryology Act 2008, s.54	Remedial legislation: Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018
Immigration & Asylum	<i>International Transport Roth v Secretary of State for the Home Department</i> [2002] EWCA Civ 158; [2003] QB 728	Art. 6 and art. 1 of Protocol 1 ECHR	Immigration and Asylum Act 1997, Pt II	Remedial legislation: Nationality, Immigration and Asylum Act 2002, s.125
Immigration & Asylum	<i>R (Baiai) v Secretary of State for the Home Department</i> [2008] UKHL 53; [2009] 1 AC 287	Art. 12 ECHR	Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s.19(1); Immigration (Procedure for Marriage) Regulations 2005, regulations 7 & 8	Remedial legislation: Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (Remedial) Order 2011

Issue	Case	Relevant ECHR Provision	Provision declared incompatible	Government/Parliament Response
Immigration & Asylum	R (Johnson) v Secretary of State for the Home Department [2016] UKSC 56; [2017] A.C. 36	Arts. 8 & 14 ECHR	Immigration Act 2014 Sch.9 para.70	The British Nationality Act 1981 (Remedial) Order 2019
Immigration & Asylum	R (Bangs) v Secretary of State for the Home Department (4 July 2017, Admin. CO/1793/2017, unreported)	Arts. 8 & 14 ECHR (by consent)	Immigration Act 2014 Sch.9 para.70	The British Nationality Act 1981 (Remedial) Order 2019
Jobseekers Allowance	R (Reilly (No 2)) v Secretary of State for Work and Pensions [2016] EWCA Civ 413; [2017] Q.B. 657	Art. 6 and art. 1 Protocol 1 ECHR	Jobseekers Back to Work Schemes) Act 2013	Remedial legislation: Draft remedial order: Jobseekers (Back to Work Schemes) Act 2013 (Remedial) Order 2019.
Mental Health	R (H) v Mental Health Tribunal [2001] EWCA Civ 415; [2002] QB 1	Arts. 5(1) and (4) ECHR	Mental Health Act 1983, ss.72 and 73	Remedial legislation: Mental Health Act 1983 (Remedial) Order 2001.
Mental Health	D v Secretary of State for the Home Department [2002] EWHC 2805 (Admin); [2003] 1 WLR 1315	Art. 5(4) ECHR	Mental Health Act 1983, s. 74	Remedial legislation: Criminal Justice Act 2003, s.295
Mental Health	R (M) v Secretary of State for Health [2003] EWHC 1094 (Admin); [2003] UKHRR 746	Art. 8 ECHR	Mental Health 1983, ss.28 & 29	Remedial legislation: Mental Health Act 2007, ss.23-26
Nationality	R (Johnson) v Secretary of State for the Home Department [2016] UKSC 56; [2017] A.C. 365	Arts. 8 & 14 ECHR	Immigration Act 2014 Sch.9 para.70	Remedial legislation: British Nationality Act 1981 (Remedial) Order 2019
Nationality	R (Bangs) v Secretary of State for the Home Department (4 July 2017, Admin. CO/1793/2017, unreported)	Arts. 8 & 14 ECHR	Immigration Act 2014 Sch.9 para.70	Remedial legislation: British Nationality Act 1981 (Remedial) Order 2019
Nationality	K (A Child) v Secretary of State for the Home Department [2018] EWHC 1834 (Admin); [2018] 1 WLR 6000	Arts. 8 & 14 ECHR	British Nationality Act 1981 s.50(9A)	None as yet.

Issue	Case	Relevant ECHR Provision	Provision declared incompatible	Government/Parliament Response
Prisoners' Votes	Smith v Scott [2007] CSH 9; 2007 SC 345	Art. 3 Protocol 1 ECHR	Representation of the People Act 1983, s.3(1)	Remedial legislation: Scottish Elections (Franchise and Representation) Act 2020
Safeguarding Schemes	R (Wright) v Secretary of State for Health [2009] UKHL 3; [2009] 1 AC 739	Arts. 6 & 8 ECHR	Care Standards Act 2000 s.82(4) (b)	Remedial legislation: by Safeguarding Vulnerable Groups Act 2006
Safeguarding Schemes	R (Royal College of Nursing) v Secretary of State for the Home Department [2010] EWHC 2761 (Admin); [2011] 2 F.L.R. 1399	Art.6 ECHR	Safeguarding scheme established under the Safeguarding Vulnerable Groups Act 2006	None necessary as a new scheme was in place by the time judgment was given.
Social Security	R (Hooper) v Secretary of State for Work and Pensions [2003] EWCA Civ 875; [2003] 1 WLR 2623	Arts. 8, 14 and art. 1 Protocol 1 ECHR	Social Security & Benefit Act 1992 ss.36-37	No remedial action necessary as provision had been amended as from April 2001 by Welfare Reform & Pensions Act 1999, s.54(1).
Social Security	McLaughlin, Re Judicial Review (Northern Ireland) (Rev 1) [2018] UKSC 48; [2018] 1 WL.R 4250	Arts. 8 & 14 ECHR	Social Security Contributions and Benefits (Northern Ireland) Act 1992, s.39A	Draft remedial order is being progressed, to deal also with <i>Jackson</i> (see below). ¹
Social security	R. (on the application of Jackson) v Secretary of State for Work and Pensions [2020] EWHC 183 (Admin); [2020] 1 WLR 1441	Art. 8, 14 and Art. 1/ Protocol 1 ECHR	Section 30(4)(a), read with section 30(1), of the Pensions Act 2014	Draft remedial order is understood to be being progressed, to also deal concurrently with <i>In re McLaughlin</i> [2018] UKSC 48; [2018] 1 WLR 4250. The remedial order is not yet in force. ²

¹ See The draft Bereavement Benefits (Remedial) Order 2021 and draft Explanatory Memorandum <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1002576/draft-bereavement-benefits-remedial-order-2021.pdf; <https://www.gov.uk/government/publications/bereavement-benefits-proposal-for-implementation-of-the-mclaughlin-2018-and-jackson-2020-judgments/draft-explanatory-memorandum-draft-bereavement-benefits-remedial-order-2021>>.

² See: *JG v Secretary of State for Work and Pensions* (BB) [2021] UKUT 194 (AAC).

Issue	Case	Relevant ECHR Provision	Provision declared incompatible	Government/Parliament Response
State Immunity	<i>Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs</i> [2017] UKSC 62; [2017] 3 WLR 957	Art. 6 ECHR	State Immunity Act 1978, ss. 4(2)(b) and 16(1)(a)	Remedy being considered. Draft remedial order due to be published shortly. ³
Taxation	<i>R (Wilkinson) v Inland Revenue Commissioners</i> [2003] EWCA Civ 814; [2003] 1 WLR 2683	Art. 1 Protocol 1 and art. 14 ECHR	Income and Corporation Taxes Act 1988, s.262	None needed as provision no longer in force at time of judgment due to effect of Finance Act 1999, ss.34(1), 139 and sch.20
Terrorism	<i>A v Secretary of State for the Home Department</i> [2004] UKHL 56; [2005] 2 AC 68	Art. 5 and 14 ECHR	Anti-Terrorism, Crime & Security Act 2001, s.23	Remedial legislation: Prevention of Terrorism Act 2005
Terrorism	<i>R (Miranda) v Secretary of State for the Home Department</i> [2016] EWCA Civ 6; [2016] 1 WLR 1505	Art. 10 ECHR	Terrorism Act 2000, schedule 7	None necessary as provision had been amended by the time of the judgment.

³ See Statement made by Nigel Adams MP, Minister for Asia, 'In 2017, the Supreme Court judgment in the case of *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62 held that certain provisions of the State Immunity Act 1978 were incompatible with Articles 6 and 14 of the European Convention of Human Rights. The incompatibility related to employment claims brought by individuals employed by diplomatic missions in London. The government has considered the Supreme Court's judgment and decided to address the incompatibility by way of a remedial order under section 10 and schedule 2 of the Human Rights Act 1998. The Foreign, Commonwealth and Development Office will lay the draft remedial order before Parliament in due course.' <<https://questions-statements.parliament.uk/written-statements/detail/2021-02-23/hcws788>>.

(ii) Breakdown of cases by subject where declarations of incompatibility have been made and overturned

Issue	Case	Relevant ECHR Provision	Provision initially declared to be incompatible	Reason for overturning
Consumer credit	<i>Wilson v Secretary of State for Trade and Industry</i> [2003] UKHL 40; [2004] 1 AC 816.	Art. 6(1) ECHR	Consumer Credit Act 1974, s. 127(3)	(i) There was no power to make a declaration, as HRA s.4 did not apply where cause of action arose and rights determined prior to HRA coming into force; (ii) the enforcement provision in s.127(3) of the 1974 Act
Criminal Justice (Sexual offences, sentencing, release)	<i>R (Uttley) v Secretary of State for the Home Department</i> [2004] UKHL 38; [2004] 1 WLR 2278.	Art. 7 ECHR	Criminal Justice Act 1991, prisoner release scheme	Change in law under 1991 Act did not create a retrospective punishment.
Criminal Justice (determinate sentences, decision on lawfulness of further detention, release on licence)	<i>R (Black) v Secretary of State for Justice</i> [2009] UKHL 1; [2009] 1 AC 949.	Art. 5(4) ECHR	Criminal Justice Act 1991, s.35	Art. 5(4) not engaged.
Immigration and Asylum	<i>Nasseri v Secretary of State for the Home Department</i> [2009] UKHL 23; [2010] 1 AC 1	Art. 3 ECHR	Asylum and Immigration (Treatment of Claimants, etc) Act 2004, para.3(2)(b), Part 2, Schedule 3	The presumption established by the provision did not bar consideration if Convention rights would be infringed by removal from the UK.
Immigration & Asylum	<i>R (Joint Council For The Welfare of Immigrants) v Secretary of State for the Home Department</i> [2020] EWCA Civ 542; [2020] 4 All E.R. 1027	Arts.8 & 14 ECHR	Immigration Act 2014, ss.20-37.	The scheme imposed by the provisions was proportionate and justified.

Issue	Case	Relevant ECHR Provision	Provision initially declared to be incompatible	Reason for overturning
Mental Health (detention)	<i>MH v Secretary of State for Health</i> [2005] UKHL 60; [2006] 1 AC 441.	Art. 5(4) ECHR	Mental Health Act 1983, ss. 2 and 29(4)	Neither section incompatible as: art. 5(4) did not require s. 2 to provide for the ability to bring legal proceedings in every case; and s29(4) could be operated compatibly with art. 5(4) ECHR.
Terrorism	<i>Secretary of State for the Home Department v MB</i> [2007] UKHL 46; [2008] 1 AC 440.	Art 6 ECHR	Prevention of Terrorism Act 2005, s. 3.	The issue concerned non-derogating control orders. They only potentially engaged the civil limb of art. 6, which in most cases could be satisfied by procedural safeguards. Hence not incompatible.
Tort	<i>Matthews v Ministry of Defence</i> [2003] UKHL 4; [2003] 1 AC 1163.	Art. 6(1) ECHR	Crown Proceedings Act 1947, s.10	No civil right in issue to engage art. 6 ECHR
Town & Country planning	<i>R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions</i> [2001] UKHL 23, [2003] 2 AC 295	Art. 6(1) ECHR	Town and Country Planning Act 1990, ss. 77, 78, 79, paras.3, 4 of Schedule 6 Transport and Works Act 1992, ss. 1, 3 & 23(4) Highways Act 1980, ss. 14(3)(a), 16(5)(a), 18(3)(a), 125 & paras. 1, 7, 8, Part 1, Schedule 1 Acquisition of Land Act 1981, s.2(3) & para.4, Schedule 1.	Not incompatible with art. 6(1)

(iii) Breakdown of cases by subject where declarations of incompatibility could have been made but the court chose not to exercise its discretion to make one⁴

Issue	Case	Relevant ECHR Provision	Provision which could have been declared incompatible	Reason why not declared incompatible
Abortion rights	<i>Human Rights Commission for Judicial Review (Northern Ireland: Abortion) (Rev 1)</i> [2018] UKSC 27; [2019] 1 ALL ER 173	Arts. 3, 8 ECHR	Offences against the Person Act 1861, ss.58 & 59	The majority held that the court had no standing to grant a declaration of incompatibility. A different majority held that they would have granted a declaration. NB: whether to grant a declaration is now being considered by the High Court in Northern Ireland in separate proceedings. Given the majority, on whether to grant a declaration in the UKSC, it is might reasonably be expected that the declaration will be granted: see <i>Re Ewart's Application for Judicial Review</i> [2019] NIQB

⁴ See also two cases which do not strictly fall within this category, but are broadly relevant: (i) *Steer v Stormsure Ltd* [2020] 12 WLUK 427, in which the EAT would have made a declaration of incompatibility in respect of the Employment rights Act 1996 section 103A, but did not have the power to do so. The EAT granted permission to the Court of Appeal to consider whether to make a declaration of incompatibility; (ii) *Re JR111's Application for Judicial Review* [2021] NIQB 48, in which the Court held that the requirement under the Gender Recognition Act 2004 for an applicant for a gender recognition certificate to prove that they were suffering from, or had had, the 'disorder' variously referred to as gender dysphoria, breached the applicant's rights under ECHR art. 8. Scofield J observed (at [156]) that how best the incompatibility could be addressed 'and whether or not removal of the identified incompatibility can be achieved consistently with the limits of the Court's function under section 3 of the HRA, and without straying into impermissible judicial legislation, is a matter on which I propose to hear the parties further.' It does not appear that the Court has yet issued its decision as to the appropriate remedy employing section 3, or issuing a section 4 declaration.

Issue	Case	Relevant ECHR Provision	Provision which could have been declared incompatible	Reason why not declared incompatible
Diplomatic immunity	<i>A Local Authority v AG</i> [2020] EWFC 18; [2020] Fam. 311 ⁵	Arts. 1 & 3	The Vienna Convention on Diplomatic Relations 1961 art.31(1) incorporated into domestic law by the Diplomatic Privileges Act 1964 Sch.1	The Claimant had failed to give the requisite 21-day period of notice to the Crown, prescribed by FPR 29.5. In any event, a declaration would likely be no more than symbolic given that the British government would not be in a position unilaterally to amend the terms of the Convention.
Prisoner voting	<i>R (Chester) v Secretary of State for Justice (Rev 1)</i> [2013] UKSC 63; [2014] 1 AC 271	Article 3 of Protocol No 1	European Parliamentary Elections Act 2002, s.8	(i) It would have been futile. A declaration on this issue had previously been made in <i>Smith v Scott</i> [2007] CSIH 9; 2007 SC 345; (ii) Parliament was already considering the issue.
Prohibition on same-sex marriage	<i>Re Close's Application for Judicial Review</i> [2020] NICA 20	Arts. 8, 12, & 14 ECHR	Marriage (Northern Ireland) Order 2003, art.6(6) (e).	It would have been futile. The legislation had already been superseded by further legislation.

⁵ However, see *A Local Authority v AG* (No.2) [2020] EWHC 1346 (Fam), in which Mostyn J granted the Local Authority Claimant permission to pursue an application for a declaration of incompatibility, even though the Defendant had contended that the application was academic, given that the foreign government had formally recalled the father who was a foreign diplomat.

Annex XI

IHRAR Secretariat

Throughout the Review period, the IHRAR Panel were supported in their work by a Secretariat provided by the Ministry of Justice. Over the course of IHRAR, the officials who served in the Secretariat were Andrew Waldren, Oliver Burrows, Tessa Gilder-Smith, Kate Stevenson, Claire Cooper, Millie Rae, Noah Thorold, Iain Miller and Joseph Rice.

