



Ministry
of Justice

A proposal for a Remedial Order to amend the Human Rights Act 1998

July 2018

A proposal for a Remedial Order to amend the Human Rights Act 1998

Presented to Parliament pursuant to paragraph 3(1) of Schedule 2 to the
Human Rights Act 1998

July 2018



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ISBN 978-1-5286-0253-2

CCS0718083050 07/18

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the APS Group on behalf of the Controller of Her Majesty's Stationery Office

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Background to the proposed Remedial Order

Introduction

This paper presents a draft of a proposed Remedial Order to amend section 9 of the Human Rights Act 1998 (HRA) to allow an award of damages in a new set of circumstances. This is to implement the judgment of the European Court of Human Rights (ECtHR) in *Hammerton v UK* (application no. 6287/10). This section sets out the reasons for the proposed order – the “required information” of paragraph 3(1)(a) of Schedule 2 to the HRA.

The incompatibility

The domestic courts found that the applicant in *Hammerton v UK* had spent extra time in prison as a result of procedural errors during his committal proceedings, which were such that his rights under Article 6 of the European Convention on Human Rights (ECHR) as set out in the HRA (right to a fair trial) were breached. However, he was unable to obtain damages to compensate for the breach of Article 6 ECHR (that resulted in the extra time spent in prison) in the domestic courts because section 9(3) HRA does not allow damages to be awarded in proceedings under the HRA in respect of a judicial act done in good faith, except to compensate a person to the extent required by Article 5(5) ECHR (deprivation of liberty).

In 2016, the ECtHR found a breach of Article 6 ECHR and adopted the finding of the domestic court that the applicant had spent extra time in prison as a result. The ECtHR found that the applicant’s inability to receive damages in the domestic courts in the particular circumstances of his case led to a violation of Article 13 ECHR (right to an effective remedy). The ECtHR awarded a sum in damages which has been paid.

Reasons for amending the HRA

The UK is obliged under Article 46 ECHR to implement adverse ECtHR judgments against the UK. Legislative change is required to address the finding of a violation of Article 13 ECHR in *Hammerton* as it was the result of a statutory bar on the award of damages under the existing section 9(3) HRA. No legislative change is required to remedy the finding of a breach of Article 6 ECHR because that resulted from a failure to follow guidance.

The Government proposes to implement the judgment by amending section 9 HRA to make damages available in respect of breaches of Article 6 ECHR arising under similar circumstances to those in *Hammerton*. This is the most appropriate provision to amend, as it is from this provision that the incompatibility identified by the ECtHR stems, and where there is already a statutory right to damages in respect of a judicial act done in good faith in the context of breaches of Article 5 ECHR. This approach does not establish any new cause of action in respect of a judicial act, separate to the existing one in the HRA; we considered that doing so would risk creating legal uncertainty and potentially eroding the important principle of judicial immunity.

Reasons for proposing a Remedial Order

A Remedial Order is an order made under section 10 HRA that amends primary or subordinate legislation that has been found by domestic courts to be incompatible with the ECHR rights as set out in the HRA, or by the ECtHR to be incompatible with the ECHR.

We consider that the order-making power under section 10 HRA can be used to amend the HRA itself, given that the purpose of the power is to enable incompatibilities to be addressed.

Under section 10(2) HRA, the Government is required to have “compelling reasons” for making an amendment by way of a Remedial Order. As mentioned above we are required to implement the *Hammerton* judgment, and must do so via an amendment to primary legislation, due to the existing statutory bar on the award of damages under the HRA. We have considered the best way to do this taking into account likely timescales, the impact of any long delay and the nature of the breach identified by the ECtHR.

The breach of Article 13 ECHR identified by the ECtHR relates to the availability of damages under the HRA for a judicial act done in good faith, and the right to an effective remedy arising out of a specific breach of Article 6 ECHR. While we are not aware of any individuals who are currently affected by this incompatibility, we consider that the nature of the breach, and our obligation to implement the *Hammerton* judgment, contribute to there being compelling reasons for making the necessary legislative change swiftly.

The alternative approach to a Remedial Order would be to make the amendment by way of primary legislation. However, we consider that the current pressure on the legislative timetable means there is little prospect of finding suitable primary legislation to make an amendment in the near future.

For these reasons we consider that there are compelling reasons for making the amendments by way of Remedial Order. A Remedial Order is the most appropriate legislative vehicle for implementing this judgment promptly while allowing parliamentary scrutiny of the measures proposed.

The terms of the Remedial Order

The proposed Remedial Order would make a targeted amendment to the HRA which would have the effect that:

- in proceedings for contempt of court;
- where a person does not have legal representation, in breach of Article 6 ECHR; and
- the person is committed to prison and the breach of Article 6 results in the person spending more time in prison than they would otherwise have spent, or causes them to be committed to prison when they would not otherwise have been committed;

then a financial remedy would be available to the person to compensate for the breach of Article 6 that resulted in the person spending extra time in prison, or caused them to be committed to prison.

This would ensure that damages would be available to individuals in situations similar to that of Mr Hammerton and would therefore satisfy the requirements of the judgment in *Hammerton v UK*.

The current limitation in the HRA on the availability of damages in proceedings in respect of a judicial act done in good faith is there to preserve the principle of judicial immunity, while ensuring that there is an enforceable right to compensation for breaches of Article 5 as required by the ECHR. Judicial immunity is a key aspect of judicial independence. An independent and impartial judiciary is one of the cornerstones of a democracy and one of the practical ways in which this is given effect is by giving judges immunity from prosecution or civil proceedings for any acts they carry out in performance of their judicial function. Individuals involved in any kind of case before the courts need to be sure that the judge dealing with their case cannot be influenced by an outside party or by the judge's own personal interests, such as a fear of being sued for damages.

The *Hammerton* judgment now requires us to make provision for damages to be payable in proceedings in respect of certain breaches of Article 6. In addressing the judgment we want however to ensure that the principle of judicial immunity continues to be preserved, hence the approach taken in this Remedial Order.

Reasons for using the non-urgent procedure

The Government does not consider it necessary to make use of the urgent procedure under paragraph 4 of Schedule 2 to the HRA to remedy the incompatibility more swiftly. The importance of the right affected by the incompatibility and the potential impact on individuals have been considered against the need to allow the opportunity for parliamentary scrutiny of the proposed changes and to legislate in an open and transparent manner. We are not aware of any individuals who are currently affected by the incompatibility which this proposed Remedial Order seeks to remove, and do not anticipate any similar cases in the near future. We therefore consider that it is appropriate to allow the opportunity for parliamentary scrutiny of this proposal under the non-urgent procedure.

Remedial Order process

Schedule 2 to the HRA sets out the parliamentary process for Remedial Orders. Under the non-urgent procedure, a proposal for a draft order is laid before Parliament for 60 days during which time representations may be made. Following this the draft order, with any revisions the Government wishes to make in light of any representations received, must be laid for a further 60 days. It then needs to be approved by a resolution of each House of Parliament before it can be made.

Draft of the proposed Remedial Order

Draft Order laid before Parliament under paragraph 3(1)(a) of Schedule 2 to the Human Rights Act 1998 (c. 42) and subsequently under paragraph 2(a) of that Schedule, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2018 No.

HUMAN RIGHTS

The Human Rights Act 1998 (Remedial) Order 2018

Made - - - - *******
Coming into force - - *******

It appears to the Secretary of State, following a finding of the European Court of Human Rights in proceedings against the United Kingdom(1) that section 9 of the Human Rights Act 1998(2) is incompatible with an obligation of the United Kingdom arising from the Convention(3).

The Secretary of State considers that there are compelling reasons for proceeding by way of a remedial order(4) to make such amendments to section 9 of the Human Rights Act 1998 as the Secretary of State considers necessary to remove the incompatibility.

In accordance with paragraph 2(a) of Schedule 2 to the Human Rights Act 1998, a draft of this instrument was laid before Parliament and was approved by resolution of each House of Parliament, a document containing a draft of this instrument having previously been laid before Parliament in accordance with paragraph 3(1) of that Schedule.

Accordingly, the Secretary of State makes the following Order, in exercise of the powers conferred by section 10(2) of, and paragraph 1(1)(a) and (b), (2) and (3) of Schedule 2 to, the Human Rights Act 1998.

Citation and commencement

- 1.—(1) This Order may be cited as the Human Rights Act 1998 (Remedial) Order 2018.
- (2) This Order comes into force on the day after the day on which it is made.

(1) *Hammerton v United Kingdom* (Application no. 6287/10), 17 March 2016.
(2) 1998 c. 42. Section 9(5) has been amended by section 10(6) of, and paragraph 39 of Schedule 4 to, the Justice (Northern Ireland) Act 2002 (c. 26).
(3) See section 21(1) of the Human Rights Act 1998 for the meaning of “the Convention”.
(4) See section 21(1) of the Human Rights Act 1998 for the definition of “remedial order”.

Amendment of the Human Rights Act 1998

- 2.—(1) Section 9 of the Human Rights Act 1998 (judicial acts) is amended as follows.
- (2) In subsection (3) (damages generally not available for judicial acts done in good faith)—
- (a) after “otherwise than” insert—
- “—
- (a) ”;
- (b) after “Convention” insert—
- “, or
- (b) in the circumstances described in subsection (3A), to compensate a person in respect of a judicial act which is incompatible with Article 6 of the Convention”.
- (3) After subsection (3) insert—
- “(3A) The circumstances are where—
- (a) proceedings for contempt of court are brought against the person,
- (b) the person is deprived of legal representation at a hearing in the proceedings due to a judicial act that is incompatible with the person’s rights under Article 6 of the Convention,
- (c) the outcome of the proceedings is that the person is committed to prison, and
- (d) the person would not have been committed to prison, or would have spent less time there, if it were not for the incompatible judicial act.”
- (4) In subsection (5), after the definition of “judicial act” (but before the final “and”) insert—
- ““prison” includes any place in which a person committed for contempt of court may be detained;”.
- (5) The amendments made by this Article apply in relation to judicial acts occurring before (as well as to those occurring after) this Order comes into force.

Date

Name
Parliamentary Under Secretary of State
Ministry of Justice

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Human Rights Act 1998 (“HRA”) to address a finding of the European Court of Human Rights of a breach of Article 13 of the European Convention on Human Rights (“Convention”) in the case of *Hammerton v United Kingdom* (Application no. 6287/10).

Article 2 of the Order amends section 9 HRA. Section 9(3) HRA provides that in proceedings under the HRA in respect of a judicial act done in good faith, damages may not be awarded, other than to compensate a person to the extent required by Article 5(5) of the Convention.

Article 2 of the Order enables damages to be awarded under the HRA in respect of a judicial act done in good faith: (i) in proceedings for contempt of court; (ii) where a person does not have legal representation in breach of Article 6 of the Convention; and (iii) the person is committed to prison, and the breach of Article 6 of the Convention results in the person being committed to prison when they would not otherwise have been, or spending more time in prison than they would otherwise have spent, had the breach not been committed.

Article 2 of the Order also provides that the amendments to section 9 HRA apply to judicial acts that occurred before, as well as after, the date on which this Order comes into force.

An impact assessment has not been produced for this instrument as no impact on the private or voluntary sector is foreseen.

Explanatory memorandum to the proposed Remedial Order

EXPLANATORY MEMORANDUM TO

THE HUMAN RIGHTS ACT 1998 (REMEDIAL) ORDER 2018

2018 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Human Rights.

2. Purpose of the instrument

- 2.1 To implement the European Court of Human Rights (ECtHR) judgment in *Hammerton v United Kingdom* (application no. 6287/10) by creating a power under the Human Rights Act 1998 (HRA) for domestic courts to make awards of damages in future cases under similar circumstances to those in *Hammerton v UK*.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Human Rights

- 3.1 This Remedial Order is laid pursuant to the power in section 10 of the Human Rights Act 1998.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Secretary of State for Justice has made the following statement regarding Human Rights:

“In my view the provisions of the Human Rights Act 1998 (Remedial) Order 2018 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument is being laid in response to the ECtHR judgment in *Hammerton v UK* (application no. 6287/10) which concerned the availability of damages under section 9(3) HRA. Section 9(3) HRA does not allow damages to be awarded in proceedings under the HRA in respect of a judicial act done in good faith, except to the extent required by Article 5(5) of the European Convention on Human Rights (ECHR) (deprivation of liberty).
- 6.2 Section 10 HRA provides that if it appears to a Minister that, having regard to a finding of the ECtHR, a provision of legislation is incompatible with an obligation of the UK arising from the ECHR, and the Minister considers there are compelling reasons for doing so, the legislation may be amended by Remedial Order to remove the incompatibility.

7. Policy background

What is being done and why?

- 7.1 The courts found that the applicant in this case had spent extra time in prison as a result of procedural errors during his committal proceedings, which were such that his rights under Article 6 ECHR as set out in the HRA (right to a fair trial) were breached. However, he was unable to obtain damages in the domestic courts because section 9(3) HRA does not allow damages to be awarded in proceedings under the HRA in respect of a judicial act done in good faith, except to the extent required by Article 5(5) ECHR (deprivation of liberty). The ECtHR found that the applicant's inability to receive damages in the particular circumstances of his case had led to a breach of Article 13 ECHR (the right to an effective remedy).
- 7.2 The Remedial Order will have the effect that:
- in proceedings for contempt of court;
 - where a person does not have legal representation, in breach of Article 6 ECHR; and
 - the person is committed to prison and the breach of Article 6 results in the person spending more time in prison than they would otherwise have spent, or causes them to be committed to prison when they would not otherwise have been committed;
- then a financial remedy would be available to the person to compensate for the breach of Article 6 that resulted in the person spending extra time in prison, or caused them to be committed to prison.
- 7.3 The Remedial Order amends section 9 HRA, which currently provides that damages may not be awarded in respect of a judicial act done in good faith, otherwise than to compensate a person to the extent required by Article 5(5) ECHR.
- 7.4 Under section 10(2) HRA, the Government is required to have “compelling reasons” for making an amendment by way of a Remedial Order rather than primary legislation. The current pressure on the legislative timetable means there is little prospect of using primary legislation. While we are not aware of any individuals who are currently affected by this incompatibility, we consider that the nature of the incompatibility contributes to there being compelling reasons for making the necessary legislative change swiftly. Therefore, we consider that a Remedial Order using the non-urgent procedure is the most appropriate legislative

vehicle for implementing this judgment promptly while allowing parliamentary scrutiny of the measures proposed.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 The Government does not intend to consolidate the legislation.

10. Consultation outcome

10.1 The Government has not conducted a separate consultation exercise as it would not be proportionate to do so for a targeted amendment which is required to implement a court judgment.

11. Guidance

11.1 The Government will not be publishing guidance on this amendment.

12. Impact

12.1 There is no impact on business, charities or voluntary bodies.

12.2 There is no impact on the public sector.

12.3 We have assessed the likely number of future awards for damages under this amendment to be low and the financial impact too small to justify preparing a full Impact Assessment for this instrument.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The effect of this amendment will be monitored on an ongoing basis by the Ministry of Justice. Any declarations of incompatibility made by the domestic courts and judgments of the European Court of Human Rights on related matters will be included in the Government's annual reports to the Joint Committee on Human Rights.

15. Contact

15.1 Michael Johnstone at the Ministry of Justice, telephone: 020 3334 2813 or email: humanrights@justice.gov.uk, can be contacted with any queries regarding the instrument.

15.2 Dominic Lake at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Edward Argar, Parliamentary Under Secretary of State at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

ISBN 978-1-5286-0253-2

CCS0718083050