



Ministry
of Justice

Response to the Joint Committee on Human Rights fifteenth report of session 2017–19: Proposal for a draft Human Rights Act 1998 (Remedial) Order 2019

October 2019



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**Response to the Joint Committee on Human Rights
fifteenth report of session 2017–19: Proposal for a draft
Human Rights Act 1998 (Remedial) Order 2019**

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

October 2019



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Background to the draft Remedial Order

Introduction

On 16 July 2018, the Government announced its intention to amend section 9 of the Human Rights Act 1998 (HRA) by Remedial Order to allow an award of damages in a new set of circumstances, in order to implement the judgment of the European Court of Human Rights (ECtHR) in *Hammerton v UK* (application no. 6287/10).

A document containing a draft of the proposed Remedial Order was laid before Parliament in accordance with paragraph 3(1) of Schedule 2 to the HRA, setting out the reasons for the proposal – the “required information” of paragraph 3(1)(a) of Schedule 2 to the HRA. The Joint Committee on Human Rights (the Committee) held an inquiry into the proposal and published its report on 21 November 2018. This paper constitutes the Government’s response to that report.

This section summarises the representations made about the draft of the proposed Remedial Order and the drafting changes made as a result, as required under paragraph 3(2) 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 (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) (deprivation of liberty).

In 2016, the ECtHR found a breach of Article 6 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 (right to an effective remedy). The ECtHR awarded a sum in damages which has been paid.

Having regard to this finding of the ECtHR, Ministers decided to exercise their power under section 10 of, and Schedule 2 to, the HRA to amend section 9 HRA by Remedial Order to remove the incompatibility with Article 13. A draft of a proposed Remedial Order was laid

which would enable damages to be awarded under the HRA in respect of a judicial act done in good faith which is incompatible with Article 6 where: (i) proceedings for contempt of court are brought against a person; (ii) the person is deprived of legal representation at a hearing in the proceedings due to that judicial act; and (iii) the person is committed to prison and would not have been committed, or would have spent less time in prison, were it not for that judicial act.

Summary of representations

We are grateful to the Committee for their consideration of the draft of the proposed Remedial Order and their conclusions and recommendations, which we have considered carefully.

Introduction

1. The Committee welcomes the Government's action in proposing the draft Remedial Order to amend the Human Rights Act 1998 to remedy its incompatibility with the right to an effective remedy under Article 13 of the ECHR. (Paragraph 5)

Procedural requirements

2. Overall, we are satisfied that there are compelling reasons to proceed by Remedial Order and that this is a valid use of the remedial power. (Paragraph 31)

3. More specifically, Committee considers that the non-urgent procedure strikes a reasonable balance between the competing considerations of the need to avoid undue delay in remedying the incompatibility with human rights standards and the need to afford a proper opportunity for parliamentary scrutiny of changes to primary legislation. However, in its response to this Report, it would be useful for the Government to explain why it does not consider other individuals to be affected by the incompatibility and does not anticipate other similar cases in the near future. This is of particular interest given separate information received that other similar cases are being brought to the ECtHR in relation to the non-availability of adequate effective remedies for breaches of rights under the ECHR (Article 13 ECHR), including by other types of judicial acts made in good faith. (Paragraph 32)

We are pleased to note that the Committee is satisfied that there are compelling reasons to proceed by Remedial Order, that this is a valid use of the power to make a Remedial Order, and that the non-urgent procedure is appropriate in this case. The question of similar cases is addressed below together with the following conclusions and recommendation.

Does the proposed Order address the incompatibility & does the proposed Order omit additional provisions which it should have contained

4. Article 13 requires that the UK to ensure that an effective remedy is available domestically for a violation of a Convention right. This proposed draft Order seeks to remedy the incompatibility of s. 9(3) HRA with Article 13 ECHR. Whilst it may be that the bar on the payment of damages in s. 9(3) HRA might only very rarely result in a person being deprived of an effective remedy in the UK for a breach of a Convention right, it remains unacceptable to allow such a situation to persist. (Paragraph 47)

5. It seems likely that situations will arise, albeit rarely, where s. 9(3) HRA, even if amended as proposed, would deprive an individual of an effective remedy for a breach of a Convention right. It is difficult to understand why the Ministry of Justice has omitted to make provision in this Order to remedy this incompatibility fully. For example, this could have been achieved by providing that damages may be payable in respect of a violation of a Convention right arising from a judicial act done in good faith where there is no other remedy available that would be effective for the purposes of Article 13 ECHR and where a judge has considered it just and appropriate to award damages. (Paragraph 48)

6. We recommend that the Minister consider whether alternative drafting could give better effect to removing the incompatibility in s. 9(3) HRA with Article 13 ECHR. (Paragraph 49)

As the Committee accepts, the HRA performs a special role in ensuring that an effective remedy is available domestically for a human rights breach, without needing recourse to the ECtHR. The HRA gives individuals the ability to bring proceedings to enforce their Convention rights or rely on those rights in other proceedings, and gives courts and tribunals the ability to grant any relief or remedy within their powers as they consider just and appropriate. The award of damages is often not necessary to afford just satisfaction for breaches of Convention rights. As the Committee notes: ‘In the majority of cases in which there is a judicial act, done in good faith, which leads to a violation of an individual’s Convention rights, this can readily be remedied by an appeal and other forms of relief (e.g. release from custody, declaratory relief). Therefore it will only be on very rare occasions when the statutory bar in section 9(3) will constitute a barrier to an effective remedy under Article 13 ECHR.’

We remain of the view that the scope of the proposed draft Remedial Order was sufficient to address the incompatibility identified by the ECtHR in *Hammerton*. Having said that, we have taken into careful consideration the Committee’s point that whilst rare, section 9(3) could lead to a similar breach of Article 13 ECHR in circumstances other than contempt proceedings. Consequently, we are of the view that there is some justification for an extension to the scope of the Remedial Order that takes this into account. We have, therefore, redrafted the Remedial Order to amend section 9(3) HRA to cover any circumstances in which a judicial act done in good faith which is incompatible with Article 6

has led to imprisonment or other detention, although this amended scope goes wider than we consider necessary to address the incompatibility identified.

7. We share the Ministry of Justice’s concern to ensure the utmost respect for the principle of judicial independence, and therefore to maintain judicial immunity where this is required. We are not convinced that judicial immunity requires UK judges to be deprived of the ability to award damages against the State in the very rare circumstances where no other remedy would be effective for the purposes of Article 13 ECHR in order to remedy a human rights violation. (Paragraph 57)

*8. We do not share the Ministry of Justice’s very restrictive reading as to the incompatibility of s. 9(3) HRA with Article 13 ECHR that arises from the judgment of *Hammerton v UK*. Nor do we consider that the remedial power requires an amendment to be restricted to the specific facts of a case. Indeed, where the use of a remedial power is restricted so that it fails to remedy the incompatibility identified except in relation to the very specific facts of a given case, this would seem to omit provisions that the Remedial Order should have contained in order to adequately remedy the incompatibility. As such this proposed draft Order risks offending the Committee criterion “Does the proposed order remedy the incompatibility with Convention rights ... and does the proposed order omit additional provisions which it should have contained?”. (Paragraph 60)*

9. We think it is more logical to remedy this incompatibility in a way which enables judges to award damages in those rare cases where no other remedy would be effective for the purposes of Article 13 ECHR. This would ensure that an effective remedy would be available in domestic courts without needing recourse to the ECtHR in Strasbourg. (Paragraph 61)

10. We recommend that the Minister reconsider the drafting in the proposed draft Remedial Order to allow domestic UK judges to award damages in the rare cases where there is no other effective remedy available for a violation of human rights caused by a judicial act. We recommend that the Government, having reconsidered the drafting in light of this, then lay a draft Remedial Order before both Houses. (Paragraph 62)

We appreciate the Committee’s recognition of the importance of the principle of judicial independence and the need to protect judicial immunity. As the Parliamentary Under-Secretary of State for Justice wrote in his letter to the Chair of the Committee, 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.

Parliament legislated under section 9(3) HRA to exclude the availability of damages for a judicial act done in good faith, otherwise than to compensate a person to the extent required by Article 5(5). Parliament intended that the HRA should both preserve the important constitutional principle of judicial immunity and satisfy the requirement under Article 5(5) ECHR for an enforceable right to damages for those who have been victims of arrest or detention in contravention of the provisions of Article 5.

We remain of the view that any widening of the circumstances in which a remedy in damages is available in respect of a judicial act done in good faith should be approached with caution because of the risk of erosion of the principle of judicial immunity, and therefore judicial independence. For example, whilst it is true, as the Committee notes (paragraph 55), that judges will not be personally liable for any award of damages resulting from the effect of this Remedial Order, a wide power to award damages in respect of judicial acts is likely to have an impact on judicial decision-making.

Due consideration should also be given to the jurisprudence of the ECtHR as the final interpreter of the ECHR. In *Hammerton*, the ECtHR did not hold that all judicial acts leading to a violation of Convention rights will result in a right to damages. Rather, in the specific facts of the case, the particular prejudice that required redress in the form of damages was the ‘lengthened deprivation of liberty’ caused by the absence of legal representation:

‘[T]he domestic remedies available to the applicant in relation to his complaint under Article 6 were not fully “effective” for the purposes of Article 13, since they were not capable of affording adequate redress for the prejudice suffered by him in the form of the lengthened deprivation of liberty caused by the absence of legal representation in his case.’ (paragraph 152 of the ECtHR judgment)

Conclusion: the terms of the draft Remedial Order

Having considered the arguments and recommendations of the Committee, alongside the principles of judicial immunity and judicial independence, we have decided it would be appropriate to redraft the Remedial Order to widen the scope for an award of damages beyond the specific circumstances which led to the violation found in *Hammerton* – that is, where someone is deprived of legal representation in contempt proceedings – to cover other circumstances in which a person is subject to detention resulting from a breach of Article 6.

The draft Remedial Order that we have laid before Parliament is set out in the following section of this document. It amends section 9(3) HRA to enable damages to be awarded under the HRA in respect of a judicial act done in good faith which is incompatible with Article 6, where a person is detained and would not have been detained for so long, or at all, were it not for the incompatibility.

In our view, this approach, which specifically provides for a person to be compensated for the time in which they are subject to detention resulting from the incompatibility, is an appropriate measure to implement the *Hammerton* judgment while respecting the important constitutional principle of judicial immunity and the constraints provided by section 9(3) of the HRA.

Draft Remedial Order

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

DRAFT STATUTORY INSTRUMENTS

2019 No.

HUMAN RIGHTS

The Human Rights Act 1998 (Remedial) Order 2019

Made - - - - *****

Coming into force in accordance with article 1

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

The Secretary of State considers that there are compelling reasons for proceeding by way of a remedial order^(d) 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 2019.
- (2) This Order comes into force on the day after the day on which it is made.

(a) *Hammerton v United Kingdom* (Application no. 6287/10), 17 March 2016.

(b) 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).

(c) See section 21(1) of the Human Rights Act 1998 for the meaning of “the Convention”.

(d) 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) In section 9 of the Human Rights Act 1998 (judicial acts), for subsection (3), substitute—

“(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.”.

(2) The amendment made by paragraph (1) applies 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 where the judicial act is incompatible with Article 6, and the breach of Article 6 causes the person to be (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.

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

EXPLANATORY MEMORANDUM TO THE HUMAN RIGHTS ACT 1998 (REMEDIAL) ORDER 2019 2019 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 address 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 an award of damages in respect of a judicial act done in good faith in a new set of circumstances.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Human Rights

- 3.1 A document containing a draft of a proposed Remedial Order and the required information has been laid before Parliament in accordance with paragraph 3(1) of Schedule 2 to the HRA, and representations have been received from the Joint Committee on Human Rights. This Remedial Order is accompanied by a statement containing a summary of the representations and the drafting changes made as a result, laid in accordance with paragraph 3(2) of that Schedule.

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 Chris Philp, Parliamentary Under Secretary of State at the Ministry of Justice has made the following statement regarding Human Rights:
“In my view the provisions of the Human Rights Act 1998 (Remedial) Order 2019 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 violation of Article 13 ECHR (the right to an effective remedy).
- 7.2 Having regard to this judgment, it appears to Ministers that section 9 HRA is incompatible with Article 13. The Remedial Order removes this incompatibility by amending section 9(3) to allow courts to award damages in a new set of circumstances: in respect of a judicial act done in good faith which is incompatible with Article 6 (right to a fair trial) and which results in someone spending longer in detention than they otherwise would have done, or spending time in detention when they otherwise would not have done, were it not for the incompatibility.
- 7.3 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. We also 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 Alice Adamson, Deputy Director for Global Strategy and Rights at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Chris Philp, Parliamentary Under Secretary of State at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

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