INDEPENDENT HUMAN RIGHTS ACT REVIEW: CALL FOR EVIDENCE

Humanists UK

Response from Humanists UK, February 2021

ABOUT HUMANISTS UK

At Humanists UK, we want a tolerant world where rational thinking and kindness prevail. We work to support lasting change for a better society, championing ideas for the one life we have. Our work helps people be happier and more fulfilled, and by bringing non-religious people together we help them develop their own views and an understanding of the world around them. Founded in 1896, we are trusted to promote humanism by over 100,000 members and supporters and over 100 members of the All Party Parliamentary Humanist Group. Through our ceremonies, pastoral support, education services, and campaigning work, we advance free thinking and freedom of choice so everyone can live in a fair and equal society.

We are leading experts in the religion or belief human rights strand. Our charitable objects include 'The promotion of equality and non-discrimination and the protection of human rights as defined in international instruments to which the United Kingdom is party, in each case in particular as relates to religion and belief'. Our commitment to human rights has seen us organise a coalition over the last year of more than 150 charities, trades unions, human rights organisations, and religion or belief groups in opposition to any weakening of the Human Rights Act or judicial review.

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OUR COMMITMENT TO HUMAN RIGHTS

We are firmly committed to the protection and promotion of human rights, as exemplified in documents such as the Universal Declaration of Human Rights and European Convention on Human Rights. These rights represent shared values rooted in our common humanity and our shared human needs, transcending particular cultural and religious traditions. This regard for human rights and the equal dignity of all human beings underpins many of our policies.

Humanist principles of justice and of valuing the dignity of each individual also lead us to support equality and oppose unwarranted discrimination. Humanists have been deeply involved in campaigning against discrimination – including LGBT discrimination, sexism, and racism – for decades. We also support the strengthening of children's rights, in particular their right to freedom of religion or belief, and to form their own beliefs free from coercion or parental control. Humanists have been in the forefront of developing modern ideas of human rights, and have been prominent human rights defenders.

We have extensive experience supporting individuals and intervening in the cases of others under the Human Rights Act 1998. Our success rate in such cases is very high, with notable victories including a series of reproductive rights cases in Northern Ireland, the recognition of humanist marriage in Northern Ireland, and a challenge against Department for Education guidance implying that religious education could exclude humanism. We have also been involved in various legal cases related to assisted dying.

We have recently organised a coalition of more than 150 charities, trades unions, human rights organisations, and religion or belief groups in opposition to any weakening of the Act or judicial review. Signatories include the Samaritans, the RNIB, Shelter, Save the Children, the Wildlife Trusts, the Joint Council on the Welfare of Immigrants, the End Violence Against Women Coalition, and many more besides. We are submitting the statement and all its signatories as an annex to this consultation response.[1]

SUMMARY OF OUR RESPONSE

The Human Rights Act 1998 (HRA) is a signature piece of rights protection in the UK. It has not only enabled ordinary citizens to enjoy and defend liberties that were once inaccessible, it also ushered in a general culture of respect and support for rights among public authorities.

It is therefore with some trepidation we note this review follows on from repeated threats over the last ten years to amend, review, or replace elements – or in some cases the entirety – of the HRA, and that such threats have often been motivated by hostility to the Act all the European Convention on Human Rights (ECHR). Given that a sustained public campaign of misinformation has been waged against the HRA and ECHR in recent history, we are anxious that this review should not pave the way for human rights standards to be diluted. We therefore strongly urge this panel to recognise that the HRA is a pillar of our democracy and to resist recommendations that would either weaken or undermine the basic freedoms it guarantees or the powers that are necessary for its protection.

[1] See also 'Protect Human Rights and Judicial Review': https://humanrightsact.org.uk /

In brief our views are as follows:

- The notion that Strasbourg exerts too much control and influence over the UK's domestic law is based on a misunderstanding of the relationship between our domestic courts and the European Court of Human Rights (ECtHR). Domestic courts are not bound by ECtHR jurisprudence. When the courts choose to follow the ECtHR they do so to ensure a minimum level of rights protections exist. For the most part, this does not inhibit them from adopting different (typically more beneficial, in fact) domestic interpretations;
- Although domestic courts are not strictly bound by ECtHR jurisprudence, there remain strong public policy reasons for the UK to closely follow its development: this ensures the uniformity of human rights, strengthens legal certainty and predictability, and enables our domestic jurisprudence to benefit from the extensive experience and expertise of Strasbourg;
- Assuming the main argument for amending section 2(1) of the HRA is the perceived limitations of the so-called mirror principle, recent case law has demonstrated the courts no longer adhere to such a strict interpretation of s2(1) and therefore the case for reforming the s2 is moot;
- Domestic courts and the ECtHR already benefit from an effective legal dialogue, with clear signs of upward influence as well as downward. In order to strengthen the bonds of our domestic and European judiciary, the UK must now match its legal cooperation with a political commitment to dialogue;
- Domestic courts should not refrain from finding a breach of Convention rights simply because an excessively wide interpretation of the margin of appreciation might nullify the breach;
- Although it is often alleged that the HRA has shifted power away from our elected representatives to the judiciary, these claims are unfounded. Courts exist as a necessary condition for the protection of human rights: if they lacked the power to enforce and uphold standards, the HRA would risk becoming a mere chimaera and fundamental freedoms could be rendered nugatory;
- We are opposed to any weakening of sections 3 and 4. However, we believe there is a compelling case to enable claimants to bring accelerated follow-up litigation, when public authorities act in such a way as to contradict the implications of a court's previous rulings. In this very specific and limited circumstance, we support a modest change to the HRA's framework;
- It is Parliament's overriding stated intention to produce human rights-compatible legislation. Therefore, even in cases where the courts' application of section 3 may give rise to a perceived conflict with Parliament's intention, in actuality the courts always give effect to Parliament's will. Even if this weren't the case, case law demonstrates that the courts have adopted considerable caution and restraint when using section 3, and therefore proposals to modify or abolish it are unnecessary;
- Section 3 has had a wider normative impact upon society, than merely in the context of litigation. It provides a framework for public authorities to self-regulate their conduct and adopt human rights-compatible interpretations, without the need for legal challenges. If section 3 were abolished, this important aspect of the HRA would risk becoming null and void;
- Assuming section 3 were regrettably changed, previous judicial interpretations should remain valid in order to give effect to the principle of non-regression. It is unclear how interpretations of section 3 in a non-judicial context would be affected by such a reform, and we urge the panel to consider this carefully before recommending any changes to the HRA's framework;

- Amending section 4 to become a primary remedy would be ill-advised given that it would come at the expense of section 3, and thereby shift more legal issues – possibly of an inchoate nature – to Parliament for resolution, and fail to result in a constructive dialogue given the courts' considerable reluctance to make declarations of incompatibility. Overall, making section 4 a primary remedy would undermine the HRA as an effective legal remedy, and drive ordinary citizens to Strasbourg;
- Currently, courts and tribunals do not apply secondary legislation which is incompatible with the HRA. This is a rational position and recognises the primacy of primary legislation within the UK's constitutional order;
- We are concerned that 'enhancing' Parliament's role within remedial orders would risk unduly delaying the resolution of human rights abuses, and therefore recommend against amending section 10 and schedule 2 of the Human Rights Act; and
- Despite its measurably positive impact upon society, we believe the HRA needs to be strengthened further to guarantee citizens' rights. In particular, we believe the definition of 'public authorities' should reflect the common law judicial review standard whereby organisations performing public functions are bound by the Convention's prohibitions on discrimination. In addition, we support the strengthening of rights by incorporating children's rights within the UK's domestic law.

RESPONSE TO CONSULTATION QUESTIONS – THEME ONE

General views on how the relationship is currently working between domestic courts and the European Court of Human Rights (ECtHR).

A popular misconception about the HRA is that it enables Strasbourg to exert too much control and influence over the UK's domestic law. Despite the ECtHR lacking a concept of [2] *stare decisis* or *ratio decidendi*, this myth that the duty of Section 2(1) of the HRA – to 'take into account' Strasbourg's rulings – has bound the courts to its decisions has proven remarkably persistent. Although it is important to acknowledge that the obligations of the UK are different on an international and domestic plane, this myth stems from a misunderstanding of the courts' discretion and interpretive toolkit. In general, we believe there are good public policy reasons for our domestic courts to closely mirror Strasbourg's decisions, not least on the occasions where the European Court has raised standards domestically. Nevertheless, in circumstances where domestic courts choose to closely follow the ECtHR this is to ensure a minimum level of rights protection exists. It does not fetter their discretion to provide different (typically more beneficial, in fact) interpretations. We therefore believe proposals to reform this balance are either unnecessary or at best symbolic.

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?

Historically, there are two schools of thought with regard to the duty to 'take into account' ECtHR jurisprudence. The first school, typically known as the *Ullah* principle or 'mirror principle', suggests that under the HRA the courts must slavishly follow the rulings of Strasbourg except when the ECtHR lacks a 'clear and constant' jurisprudence.[3] In other words, the content and scope of our domestic rights must mirror Strasbourg's interpretations, and our domestic courts cannot ordinarily provide a more expansive interpretation. The second school suggests that whilst domestic courts should not ordinarily depart from Strasbourg's rulings, they can choose to outpace Strasbourg when there are good reasons to do so.

In his seminal discussion on this topic, Professor Roger Masterman has persuasively demonstrated that whilst in the initial years of the HRA our judges adopted a cautious approach which favoured the mirror principle, in

practice they now emphasise the non-binding nature of Strasbourg's jurisprudence, and the so-called mirror principle has therefore cracked.

2012. Available at: https://academic.oup.com/hrlr/article/12/1/65/562107 [2] Lady Hale, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' HRLR, Vol 1, Issue 1,
Perhaps the most famous example of the ECtHR's non-binding nature is the issue of prisoner voting. In the case of *Hirst v UK (No.2) (2006)* and *MT & Greens v UK (2011),* the Government failed to repeal offending legislation despite a ruling from the ECtHR and thus UK's law was not affected.

[3] Articulations of this principle have ranged from limiting domestic discretion to situations where Strasbourg lacks a 'clear and constant' jurisprudence (*R (on the application of Ullah) v Special Adjudicator [2004] UKHL 26*) to more overt statements such as 'Strasbourg has spoken, the case is closed' (*Secretary of State for the Home Department (Respondent) v AF [2009] UKHL 28*) or to more nuanced notions such as the mirror requiring interpretations which are 'no less but certainly no more' than required to remain in line with Strasbourg (*R (Al-Skeini) v Secretary of State for Defence [2007] UKHL 26*).

In his assessment there are now at least thirteen circumstances where our domestic courts may choose to depart from the ECtHR:[2]

1. *Strasbourg's jurisprudence would compel a conclusion which could be 'fundamentally at odds' with the UK's separation of powers*[3]
2. *'Special circumstances' justify a departure*[4]
3. *There is a 'good reason' to depart from Strasbourg's jurisprudence*[5]
4. *It is 'reasonably foreseeable' that the ECtHR would come to a different conclusion than they did beforehand*[6]

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[2] R Masterman, 'The Mirror Crack'd', UK Constitutional Law Association (2013). Available at: https://ukconstitutionallaw.org/2013/02/13/roger-masterman-the-mirror-crackd/

[3] *R (Alconbury Developments Ltd) v SS for Environment, Transport and the Regions [2001] UKHL 23*

[4] *Ibid.*

[5] *R (Amin) v Secretary of States for the Home Department [2003] UKHL 51*

[6] *R (on the application of Gentle (FC) and another (FC)) (Appellants) v The Prime Minister and others [2008] UKHL 20*

5. *The question is one for domestic authorities to 'decide for themselves'*[789]
6. *The area is governed by common law and the court is minded to exercise its discretion to depart from Strasbourg's line of authority*[10]
7. *'Great weight' is attached to a legislative decision which determines the balance to be struck in a way which might be inconsistent with Strasbourg's authority*[11]
8. *Strasbourg's authority is past its use-by date*[12]
9. *Domestic court prefers to follow non-Strasbourg authority*[13]
10. *Strasbourg's jurisprudence is not 'particularly helpful'*[14]
11. *Strasbourg's authority is inconsistent with a fundamental substantive or procedural aspect of the UK's law*[15]
12. *Strasbourg's case-law overlooks or misunderstands some point of principle or argument*[16]
13. *The courts wish to engage in a 'dialogue' with the ECtHR on the basis of potentially wrong case law*[17]

Although the above list is not an exhaustive account of all the situations in which our domestic courts are able to outpace Strasbourg, it underscores the extent to which the courts are no longer – assuming they ever were before – bound by the ECtHR.

The rationale behind proposals to amend s2(1) is therefore unclear. Assuming that such an amendment would aim to clarify that domestic courts are not bound by Strasbourg's rulings, the above analysis demonstrates such an amendment is unnecessary. Moreover, it is worth noting that whilst the UK is free at a domestic level to depart from Strasbourg's rulings, we are nevertheless still bound under Article 46 of the ECHR on an international level. Given that a cardinal principle of interpretation under our common law is to interpret legislation in a manner compatible with the UK's international treaty obligations – since in the absence of explicit instruction otherwise, the common law assumes Parliament would not intentionally seek to create legislation incompatible with said obligations – it is unclear how any amendment would meaningfully work in practice.[18] For example, even if s2(1) was clarified to stress that it is optional for the courts to take into account Strasbourg's rulings, the nature of this provision would almost certainly be interpreted to achieve the same outcome as we have today. Hence, at best any amendment to s2(1) would be purely symbolic.

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[7] *P & Others [2008] UKHL 38*

[8] *R (Daly) v Secretary of State Home Department [2001] UKHL 26 R (Animal Defenders International) v Culture Secretary [2008] UKHL 15R (Quila) v Sec of State for the Home Department [2011] UKSC 45Rabone & Anor v Pennine Care Foundation NHS Trust [2012] UKSC 2*

[9] *R v Horncastle [2009] UKSC 14Manchester City Council v Pinnock [2010] UKSC 45Ibid.R (A) v Secretary of Statement for the Home Department [2004] UKHL 56*

Considering that there are several strong public policy arguments in favour of the UK to at least keep pace with Strasbourg's rulings, the case in favour of reform is weaker still. Firstly, continuing to adhere to ECtHR jurisprudence makes sense in the interests of preserving uniformity. Human rights are designed to provide universal and inalienable freedoms to everyone, irrespective of their location or nationality. Thus, as Humanists UK's patron Sir Stephen Sedley has rightly argued, 'if you are serious about the universality of human rights, the Convention cannot mean one thing in Britain and another thing, on indistinguishable facts, in Denmark or Russia.'[19] In other words, to preserve the consistency of the ECHR's standards, the UK should not depart from Strasbourg without a good reason.

Secondly, given that consistency promotes legal certainty and predictability, it follows that by detaching the UK from ordinarily following Strasbourg's rulings the UK would jeopardise confidence in the ability of citizens to predict the outcome of human rights cases. This is important, because in the event that domestic courts issue a declaration of incompatibility and Parliament refuses to act, the logical next step of a claimant is to appeal to the ECtHR. Yet, if UK courts and Strasbourg began adopting radically different interpretations of the law, citizens would be incapable of assessing the likely prospects of their case – exposing them to potentially significant financial and other costs and undermining confidence in the rule of law. Finally, it is worth noting that the ECtHR is a specialist court which exclusively deals with human rights issues. Although in recent years our domestic courts have developed a formidable reputation for their human rights jurisprudence, it remains the case that they deal with comparatively few human rights cases. By weakening the duty to take into account the ECtHR's judgments, the UK would risk stifling our domestic jurisprudence by limiting the courts' exposure to the ECtHR's expertise.

An example of this, in an area where we have extensive experience, is the issue of assisted dying. In 2002 Diane Pretty challenged the Suicide Act 1961 – which prohibited her husband from assisting her in travelling abroad for an assisted death – on the basis of it infringing her Article 8(1) (private and family life) rights under the ECHR. Yet the House of Lords (then the highest authority in the UK)

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[18][19] *Belhaj v Straw [2017] UKSC 3*

Stephen Sedley, *Law and the Whirligig of Time* , Hart Publishing 2018

refused to engage with her arguments on the basis that Article 8(1) was 'not engaged at all' and solely related to the manner in which someone conducts their life, rather than ends it.[20] The ECtHR reversed this finding, holding that Article 8 rights were engaged by end-of-life issues,[21] and prompted the House of Lords – when invited to reconsider the issue by Debbie Purdy in 2009 – to change its stance and rule that in the absence of clear and foreseeable prosecutorial guidelines the UK's blanket ban on assisted dying did breach Article 8(2) of the HRA.[22] In other words, in the absence of the ECtHR's expertise, British citizens travelling abroad for an assisted death would remain entirely unable to predict in what circumstances they would be likely to face prosecution, and the development of our law would lag behind Europe's. Whereas because of the ECtHR's role, there are now specific prosecutorial guidelines which provide some assistance to families.

In summary, we believe the duty to 'take into account' the ECtHR's jurisprudence is now far less restrictive than some would contend, and whilst the courts occasionally outpace Strasbourg there remain good public policy arguments to closely align domestic jurisprudence with the ECtHR's.

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?

A defining principle of the ECHR's framework is the notion of 'subsidiarity': the idea that the protection of fundamental rights lies first and foremost with domestic authorities instead of the ECtHR, and therefore the ECtHR should only intervene where domestic authorities fail in their task. The corollary of this is that so far as is possible the ECtHR will afford national authorities a measure of discretion to implement the ECHR in ways appropriate to their particular needs and resources. This in essence is the 'margin of appreciation' (MoA); a minimum level of human rights protections will exist in all contracting states, but a degree of freedom of choice will be given to states if they adopt measures to restrict or limit certain subject matters falling under the Convention. For example, in *Handyside v UK* the central issue was whether limiting the sale of a book aimed at teaching children about adolescence and topics including sex was a disproportionate infringement of someone's freedom of speech.[23] In discussing whether the UK's ban was *necessary* in a democratic society under Article 10(2), the ECtHR resolved that a uniform conception of morality at the European level was not necessary and national authorities were therefore better placed than an international court to evaluate the needs and conditions of the UK. Thus, domestic courts were given a margin of appreciation (discretion) to assess the 'necessity' of the UK's restriction.[24]

It is unclear from the question on what basis our domestic courts' treatment of issues falling within the margin of appreciation might change. Professor Mark Elliot has convincingly argued that there are two possible ways the margin of appreciation could be approached. One option would be to hold that the discretion provided by the ECtHR to domestic authorities in reality means providing discretion to the executive or legislature. Thus domestic courts should show decision-makers a

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[20][21] *R (Pretty) v Director of Public Prosecutions* *[2001] UKHL 61* *Pretty v UK 2346/02 [2002] ECHR 427*

[22][23] *R (Purdy) v Director of Public Prosecutions [2009] UKHL 45* *Handyside v UK 5493/72 [1976] ECHR 5*

[24] Stephen Sedley, *Law and the Whirligig of Time* , Hart Publishing 2018

high degree of deference when a subject matter falls within the European margin of appreciation. In other words, the international concept of appreciation is interlinked with the national concept of deference. The alternative, orthodox approach, is to view the margin of appreciation as a concept distinct from deference. In other words, if the ECtHR via the MoA affords a state a measure of discretion on a matter, it remains the responsibility of the domestic courts to assess the legality of the outcome.[25]

In our experience, domestic courts tend to emphasise the latter approach. For example in 2014, in *Nicklinson*[26] – which concerned the legality of banning assisted dying for people with an incurable illness who voluntarily wish to end their lives – it was well established by the European case law of *Haas v Switzerland*[27] and *Pretty v UK*[28] that each nation state has a wide margin of discretion when determining the legal prohibitions on assisted dying. Nevertheless, a majority of the UK Supreme Court held that the mere fact that assisted dying fell within the margin of appreciation was not in itself sufficient to determine that a declaration of incompatibility could not be issued under the HRA. After all, as Lord Mance insightfully held, a measure could be 'incompatible at the domestic

level' while simultaneously 'compatible at the international level'. And in any event, assisted dying is an obvious example of where UK courts may wish to exercise their ability to depart from Strasbourg's jurisprudence,[29] thus assimilating the margin of appreciation to deference would be especially misguided.

In our view, there is no reason for the courts to change their practice with regard to the MoA. Despite the European concept typically applying to contentious moral, social, economic, or political issues, this should not automatically prevent the courts from scrutinising the proportionality and appropriateness of potential human rights abuses. Indeed, in some cases, the independence of our judiciary means they are better placed to confront these issues, without fear of electoral punishment, than the legislature and executive. At any rate, the UK has long recognised that it is a function of our judiciary to adjudicate upon potential violations of the law and to serve as guardians of our fundamental liberties. Although we believe it was lamentable that a narrow majority of the Supreme Court chose to defer to Parliament in the case of *Nicklinson* , it is obvious that the analytic assessment which led to that outcome should not have been predetermined or fettered merely by virtue of the MoA. Thus, we recommend no changes are necessary.

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[25] Mark Elliott, 'Is the margin of appreciation something that domestic courts should be applying', Public Law for Everyone (2013). Available at: https://publiclawforeveryone.com/2013/02/25/is-the-margin-of - appreciation-something-that-domestic-courts-should-be-applying/; 'The right to die: deference, dialogue and the division of constitutional authority', Public Law for Everyone (2014). Available at: https:/ / publiclawforeveryone.com/2014/06/26/the-right-to-die-deference-dialogue-and-constitutional-authority/

[26][27] *R (Nicklinson)* v *Ministry of Justice [2014] UKSC 38*

Haas v Switzerland [2011] ECHR 2422

[28][29] *Pretty v UK 2346/02 [2002] ECHR 427*

See in particular the discussion of Lord Neuberger (71-75) in *R (Nicklinson)* v *Ministry of Justice [2014] UKSC 38*

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 the ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

Yes. Given the foregoing, we believe our domestic courts and the ECtHR already benefit from an effective legal dialogue, and that in order to strengthen the bonds between them legal co-operation must now be matched by a political commitment. As we have noted on several occasions, whilst we believe there are strong policy reasons to respect the ECtHR's judgments, the ECtHR only provides a baseline of rights and not a limit upon their interpretation. Thus, we believe it is wholly appropriate for our domestic courts to occasionally depart from Strasbourg's rulings. Several recent cases indicate that in addition to the ECtHR's downward influence, the decisions of our domestic authorities are starting to have a significant upward effect.[30] For example, in the case of *R v Horncastle* ,[31] the UK Supreme Court declined to follow what was arguably clear and consistent jurisprudence from the ECtHR that hearsay evidence is incompatible with Article 6 of the ECHR (right to a fair trial). Notably, when the ECtHR considered the same issue afresh in *Khawaja & Tahery v UK*,[32] the influence of *Horncastle*

was evident since the ECtHR refined its view, bringing Strasbourg's jurisprudence in line with our domestic courts' reasoning.

In our view, 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 as 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.

[30] See for example the case of *Re G,* where the UK Supreme Court adopted a more expansive understanding of Article 8 rights to determine that an absolute ban on unmarried couples' adoption was incompatible with the right to a private and family life and constituted unlawful discrimination; or *Limbuela* where the House of Lords extended the ambit of Article 3 (prohibition on degrading treatment) to determine that the effective destitution of asylum seekers as a result of denying them state social security assistance or a right to work was inhuman and degrading treatment.

[3132] *R v Horncastle [2009] UKSC 14*

Khawaja & Tahery v UK [2011] 54 EHRR 23

RESPONSE TO CONSULTATION QUESTIONS – THEME TWO

General views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether the courts have been drawn unduly into matters of policy.

At the heart of the HRA is the idea of a contract between the individual and the state – which protects the individual from abuses of power by enshrining within our law certain positive liberties for their enjoyment. Courts exist as a necessary condition for the protection of this contract. Without the power to enforce and uphold standards, the HRA would risk becoming a mere chimaera and fundamental freedoms could be rendered nugatory.

Although it is often alleged that the HRA has affected a shift in power away from our elected representatives to the judiciary, these claims are unfounded. In fact, on numerous occasions, the opposite has been shown to be the case, with the courts declining to rule on cases that may have an effect upon social policy regardless of whether there is a breach of the HRA or not. If anything, the judiciary is in our view too reluctant, in practice, to be

perceived as trespassing upon Parliament's domain. But this aside, we believe the HRA has struck a sensible balance between providing effective legal remedies and respecting Parliament's sovereignty.[10]

Although it would be naive not to acknowledge that questions concerning the limitation and scope of rights can be seen through a political lens, we believe it would be a mistake to conflate the courts' engagement with such issues as a sign of an increased willingness to be drawn into public policy debates. Some of the most important legal questions intertwine themselves with profound social, moral, and political debates – but the fact that a legal dispute may arise from a matter of political controversy does not amount to the courts engaging in the controversy. Therefore, we strongly disagree with the implicit assumption throughout the questions below that the HRA has facilitated the politicisation of our judiciary. If anything, the HRA has proven itself to be a remarkably successful mechanism for protecting rights without distorting public policy.

One area where we believe the balance between the courts, the Government, and Parliament has been incorrectly drawn is the issue of compliance with court rulings. We believe that if a reviewable act or decision has been found to violate a Convention right, and a compliance order has been issued, it should not be possible for an offending party to subsequently act in a way which contradicts said order, with no legal recourse for the claimant in the prior case other than starting a new claim afresh. Unfortunately, public authorities and the Government have recently developed a problematic culture of complying narrowly with court rulings, but deliberately ignoring their legal implications. In these circumstances, the Government is capable of effectively disregarding a court's ruling, because claimants are unable to challenge its conduct without bringing a new case again. Thus, the structural barriers of financing a fresh claim serve to disincentivise further challenges. And at any rate, even if successful, the offending conduct may not be corrected immediately, and there is every possibility the Government will only superficially correct its conduct again. This was the outcome of the 2015 High Court ruling in *R (Fox) v Secretary of State for Education*. The case concerned whether the Government had made an error of law by issuing a statement that asserted that its proposed GCSE Religious Studies subject content, which excluded humanism, would meet the statutory requirements for the entirety of religious education teaching at key stage 4.[34] In a clear judgment, Mr Justice Warby ruled that this assertion was wrong in law and ordered the Government to withdraw it.[35] Yet critically, when the Government complied, it also issued new guidance claiming that the original ruling was on 'a narrow, technical point' that 'does not affect how schools are teaching religious education'. Specifically, it claimed – in direct contradiction of the High Court's ruling[36] – that 'there is no obligation on any school to cover the teaching of non-religious world views (or any other particular aspect of the RE curriculum) in key stage 4 specifically'.[37] As the renowned academic Dr Satvinder Juss said at the time:

> 'This may well be the Government's policy, but it entirely contradicts the judgment. Quoting paragraph 78 of the [*Fox*] judgment in full illustrates this:
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> > "I have not overlooked Ms White's submission that the two years of Key stage 4 should not be considered in isolation, but within the context of the RE curriculum as a whole. I accept the point,

[10] In particular, we would like to draw attention to the evidence of our patron Sir Stephen Sedley who has forensically addressed this issue based on his own experience whilst sitting on the Court of Appeal. See Sir Stephen Sedley, 'Submission to the Independent Human Rights Act Review', Independent Human Rights Act Review (2021). Available at: https://www.gov.uk/guidance/independent-human-rights-act-review#call-for-evidence-responses

but it is obvious that GCSE is a vitally important stage in the development of a young person's character and understanding of the world. I do not consider it could be said that a complete or almost total failure to provide information about non-religious beliefs at this stage could be made up for by instruction given at earlier stages. Nor do I overlook Ms White's final point: that if it turns out that the schools attended by the Children adopt a GCSE specification as the entirety of RE provision at Key stage 4, and the Parents do not want this form of RE for their children, they have the unqualified right to have their Children excused from that education. This point fails on the ground identified above: it would deprive the Parents and Children of rights they enjoy, which the state is bound to deliver."

'It is surprising, to say the least, to see a Government attempt to maintain as policy something that cannot be the case while we are a party to the European Convention on

[34][35] See *Fox and others v Secretary of State for Education [2015) EWHC 3404 (Admin)*

Ibid para 31(2)

[36] *Ibid* para 78; S Juss, *Commentary on the Department for Education's Guidance for schools and awarding organisations about the Religious Studies GCSE* (2016), accessible at: https://humanism.org.uk/wp-content/uploads/2016-05-31-FINAL-Commentary-on-DfE-RE-guidance.pdf [37] *Guidance for schools and awarding organisations about the Religious Studies GCSE* , Department for Education (2015), accessible at: https://assets.publishing.service.gov.uk/government/uploads/system / uploads/attachment_data/file/488477/RS_guidance.pdf

Human Rights. This contradiction occurs throughout the guidance the Department produced…'[11]

At least in part, we believe a driving force behind the Government's disregard for the *Fox* ruling was the claimants' inability to easily challenge the conduct. Therefore we recommend a modest and appropriate reform to the HRA's framework to enable claimants to bring secondary follow-up actions on an accelerated timeframe, when the courts are convinced an offending party hasn't complied with an order or have deliberately contradicted the implications of a judgment in its response. For the avoidance of doubt, we do not believe this process should enable the courts to exceed their existing powers under s4. Instead, this proposal would be directed solely at ensuring claimants are able to hold authorities to account when an order has already been issued.

It is important to note that in its current form, the HRA does not allow the courts to strike down primary legislation. Only incompatible secondary legislation can be declared invalid under the courts' discretionary judicial

[11] Dr Satvinder Juss, *Commentary on the Department for Education's Guidance for schools and awarding organisations about the Religious Studies GCSE*, Humanists UK (2016). Available at: https://humanism.org.uk/wp-content/uploads/2016-05-31-FINAL-Commentary-on-DfE-RE-guidance.pdf

review remedies.[12] The introduction of this proposal would not affect this balance, and therefore would not unduly limit policymakers. Neither would the inclusion of this remedy alter the courts' fundamental relationship with Parliament, since Parliament would remain capable of overruling a court's decision if it disagreed. However, this modest proposal would resolve the structural barriers which enable human rights abuses to continue unencumbered. Thus, we recommend that the IHRAR explore the possibility of introducing such an ability for the courts when human rights have been violated.

a) Should any change be made to the framework established by sections 3 and 4 of the HRA? No. Amending the framework established by sections 3 and 4 of the HRA involves two fundamental trade-offs. Either the HRA can be strengthened to become a more effective legal remedy (section 3) at the expense of its value as a stimulus to political dialogue; or the Act can be bolstered to prompt more judicial agenda-setting for Parliament in lieu of directly addressing human rights violations. From the perspective of human rights victims, the legal pathway of section 3 is typically more desirable because it enables the courts to reinterpret offending legislation with immediate effect and in a cost-effective manner. For example, in a case concerning the legal recognition of humanist marriages in Northern Ireland, section 3 was a far more attractive remedy for the claimants – it meant they were able to secure a change in the law which promptly enabled a humanist couple to get married.[40] By contrast, the political route of section 4 (declarations of incompatibility), though usually producing eventual reform of the law, inevitably takes longer since Parliament and, to a lesser extent, Government has competing demands on its time. Thus, to the extent the HRA's framework is altered, the HRA will either become a greater or lesser means of adequately protecting rights, and alleged abuses of human rights will either depend more or less on Parliament's already limited time.

In our view, the arguments favouring changes to sections 3 and 4 of the HRA are strongly outweighed by the case against. Assuming the HRA is perceived as currently vesting too much power in the judiciary – which we would dispute – amendments to sections 3 and 4 would at best result in a marginal reduction of this power. In return, there is a serious risk that ordinary citizens would become less able to hold the Government and public authorities to account for abuses of human rights. We oppose any change to sections 3 and 4 beyond our specific proposal outlined above.

i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?

No. First and foremost, we strongly disagree with the implicit view articulated in this question that section 3 of the HRA creates a permissive environment for the courts to interpret legislation in a manner inconsistent with Parliament's will. Such a viewpoint adopts an incredibly dim view of the UK's constitutional tradition, and arguably misses the consistent historical assumptions that underpin the provision's existence – namely, the longstanding assumption that Parliament does not intend to enact legislation which is incompatible with our fundamental freedoms.[41]

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[12] *R (Public Law Project) v Lord Chancellor [2016] UKSC 29* ; See also *RR v Secretary of State for Work and Pensions [2019] UKSC 52* where it was held that a court can disapply subordinate legislation which would otherwise require acting incompatibly with the Human Rights Act 1998. [40]*Smyth, Re Judicial Review [2017] NIQB 55*

We recognise that section 3 exceeds the common law foundations it is built upon, by enabling the courts to reinterpret legislation even in the absence of ambiguous language. But it is important to be clear that in doing this the courts are still giving effect to Parliament's intention. It was after all Parliament's intention in passing the HRA for all legislation, whenever possible, to be interpreted in a compatible manner compatible. In other words, even if a seeming conflict may arise, in actuality the courts are merely giving effect to Parliament's will. In fact, since Parliament deliberately rejected the more restrictive model of 'reasonable interpretation' which exists in New Zealand, and instead modelled section 3 on the EU's 'Marleasing principle' – which was already routinely applied by UK judges at the time of deliberation[42] – it is clear that Parliament's overriding intention was that all legislation should be compatible with the Convention.

In our view, the consistent case history of the courts since the advent of section 3 demonstrates that rather than abusing or unduly leveraging the HRA's powers, on the few occasions the courts have utilised section 3 (and 4 for that matter) they have done so with considerable caution and restraint.

It is important to remember that prior to remedying human rights violations, the HRA's framework requires the courts to identify and determine if a violation has occurred at all. Moreover, given that the HRA contains qualified rights it is rarely the case that the courts identify violations on a black

[41][42] *R (Simms) v Secretary of State for the Home Department [1999] UKHL 33]* *Ghaidan v Godin Mendoza [2004] UKHL 30*

and white basis. For example, in the case of humanist marriages in Northern Ireland mentioned above, the claimant contended that the state's non-recognition violated her rights under Article 9 (freedom of religion or belief) taken with Article 14 (prohibition of discrimination). However, in order to succeed she not only had to demonstrate that discrimination arose, but also that it was manifestly without reasonable foundation. Putting this in context, one way in which the courts have demonstrated considerable caution under the HRA is by imposing a restriction on themselves to interpret the ambit of said rights in a strongly deferential manner.

Moreover, even in cases where the courts establish a violation of human rights, there is clear evidence of their reluctance to use section 3. In successive cases, judges have now affirmed the idea that section 3 cannot be used to change legislation in such a way as to amend its fundamental purpose.[13] Indeed, the examples of *R (Anderson) v Home Secretary* and *Re S* illustrate the courts' principled abstention from using their powers, as in *Anderson* the House of Lords refused to adopt an interpretation of sentencing laws that would have removed the Home Secretary's discretion to release a mandatory life sentence prisoner on licence; equally, in *Re S* the House of Lords overturned a Court of Appeal judgment for unduly reading in an interpretation which went against a fundamental feature of a local authority's care order under the Children Act 1989.

[13] See for example *Re S [2002] 2 AC 291* where it was held section 3 could not be used to give 'a meaning which departs substantially from a fundamental feature of an Act of Parliament; and *Ghadian v Godin Mendoza [2004] UKHL 3*0 where the court adopted a limitation of not going against the 'underlying thrust of the legislation being construed' or against 'the grain of the legislation'.

Even assuming the above wasn't true and that a convincing case could be made for section 3 resulting in interpretations beyond Parliament's will, we believe limiting section 3 – or even repealing it in its entirety – would be counterproductive. At Humanists UK we find that the ability to read in human rights-compatible language often allows us to challenge unfair and discriminatory practices that have impacted upon non-religious people in the fields of education, employment, and civil society. For example, we have been involved in multiple cases against local authorities where humanists have been refused membership of local statutory bodies responsible for overseeing religious education (RE) on the basis that humanism is not a 'religion'.[14] In these cases, the ability to argue that 'religion' must be interpreted to include analogous non-religious worldviews, such as humanism, has been vital in ensuring humanist representatives are not unlawfully discriminated against. If section 3 was diminished – or even abolished – the Human Rights Act would cease to provide an effective legal remedy in such cases. In fact, were section 4 to be the only remedy available, it is easy to foresee that Parliament would quickly become overburdened with cases and claimants would once again have to rely on escalating cases to the ECtHR to secure their rights: a problem the HRA was specifically designed to overcome.

Finally, it is worth noting that outside our judicial system, the HRA imposes duties on all public authorities.[15] Section 3 thereby has a normative impact on society without invoking the powers bestowed on the courts. Indeed, the mindset of section 3 has arguably permeated government and local decision-makers and engendered a fundamental respect for human rights at all levels of decision making. For example, when the Welsh Government announced in 2019 its intention to amend the law on RE to explicitly include non-religious worldviews, putting them on an equal footing with major religions, its White Paper explicitly stated that its reason for changing the law was 'to take account of the effect of the Human Rights Act 1998'.[16] The purpose of the amendment was to make explicit in education law what the Government already saw as a requirement flowing from section 3. In other words, the HRA successfully cultivated a culture where rights were protected by providing a lens through which the Government assessed its decision-making, without the need for litigation.

In sum, we do not believe the application of section 3 leads to legislation being interpreted in a manner inconsistent with Parliament's will. Parliament intended in 1998 that laws should be reinterpreted in line with human rights and that wording redolent of long-superseded prejudices should be freed from such restrictions. Circumscribing section 3 would make the HRA a less effective legal remedy, undermining the wider social effects it has upon local decision-makers, and scaling back rights protections to effectively pre-HRA levels.

We therefore recommend the IHRAR does not recommend any changes to section 3 of the HRA.

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[14] See for example 'Humanist parent in High Court challenge to exclusion from local religious education body' Humanists UK (2017). Available at: https://humanism.org.uk/2017/07/19/humanist-parent-in-high-court - challenge-to-exclusion-from-local-religious-education-body/; 'English council backs down after legal challenge to exclusion of humanist from RE body' Humanists UK (2019). Available at: /2019/08/02/english-council-backs-down-after-legal-challenge-to-exclude-humanist-from-re-body/ https://humanism.org.uk

[15] Section 6 Human Rights Act 1998

[16] Humanists UK, 'Welsh Government to change law on school RE to include humanism' (2019). Available at: https://humanism.org.uk/2019/01/28/welsh-government-to-change-law-on-school-re-to-include-humanism/

Such changes could represent a grave threat to citizens' ability to guarantee their rights under the Convention.

ii. If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/ repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts? No. Given the above, we are concerned that the judicial focus of this question gives an overly simplistic interpretation of how section 3 could be amended or repealed, by entirely overlooking its application outside of judicial contexts.

If the panel were regrettably minded to recommend altering s3, we recommend retaining all existing s3 court interpretations but making no new ones, to give effect to the longstanding principle of non-regression. This would therefore leave the remedy of relevant human rights abuses to Parliament or Strasbourg.

However, even if this were the case, it is worth noting that public authorities routinely give effect to s3 without the need of court rulings. Thus, unlike judicial interpretations which could benefit from non-regression, amending s3 would make these routine and informal interpretations subject to considerable uncertainty, and risk unnecessary human rights abuses. The mere fact this question fails to consider such a risk raises considerable questions about whether the Government understands the full implications of reforming s3, and we strongly advise against any rash changes to the HRA's framework without further examination.

iii. Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

It is unclear what is meant in your terms of reference by considering declarations of incompatibility as part of the initial process of interpretation. It seems to us that there are two possible meanings, and as such we consider both of them in turn.

The first, which seems more likely to us, is to mean a reversal of Lord Steyn's view in *R v A,* [17] namely should declarations of incompatibility no longer have to be 'avoided unless it is plainly impossible to do so'. Our answer to this focuses on whether the courts should become able to mark up the law's inconsistency in circumstances where they may currently rely on section 3 instead.

The second, which we know many others have taken to be the correct meaning, is to mean that courts would be able to signal matters to Parliament earlier during proceedings. For example, in the case of humanist marriage in England and Wales, it would mean our courts would have been able to mark up the law's inconsistency without reaching a final determination on whether the law definitively discriminated against the non-religious.

The first meaning

Advocates in favour of the above proposal are likely to argue that the availability of s4 should be enhanced to promote judicial-parliamentary dialogue. According to this perspective, the function of the courts should be to start conversations with the legislature about the content of a right, its scope, and applicability, though ultimately

[17] *R v A (No.2) [2001] UKHL 25;* see also Lord Hoffman's discussion of s4 in *Nasseri v Secretary of State for the Home Department [2007] EWHC 1548 (Admin)*

leave responsibility for determining these questions to elected lawmakers. This view, however, has several limitations.

First, it is well-known that Parliament, and indeed the Government, have a range of responsibilities which already limit their time for resolving human rights violations. Professor Jeff King has estimated that on average it currently takes 25 months for declarations of incompatibility to be resolved.[18] Thus, if more questions – possibly of an inchoate nature – were shifted to Parliament for resolution, more human rights abuses would logically go unresolved for longer. Secondly, as a means of democratic oversight, increasing reliance upon Parliament, or indeed the Government, for the resolution of human rights abuses is a poor substitute for the courts. The independence of the judiciary means that whereas elected politicians may feel uncomfortable defending the rights of unpopular claimants or adjudicating upon controversial issues, judges can act without fear of electoral punishment. Moreover, unlike Parliament, the courts' timetable cannot be programmed by the executive to circumvent accountability or oversight. Thus, the courts are often better placed to defend and remedy human rights abuses than Parliament. Finally, if s4 were expanded and Parliament and the Government became overloaded with punitive human rights violations, in the absence of an effective domestic remedy ordinary citizens would once again be driven to the ECtHR to defend their freedoms. This would be an undesirable outcome which would pose considerable costs to claimants and undermine the UK's modern reputation amongst the rest of the world for defending human rights.

In our view, the above proposal is unnecessary because it misses that a constructive dialogue can be accomplished without resorting to s4. For example, if a judicial review obtains permission – meaning it has an arguable chance of success – that mere fact should signal to Parliament a potential human rights violation exists. Alternatively, writing extra-judicially, Lady Justice Arden (as she was then) has persuasively argued that whilst declarations of incompatibility may be one source of dialogue, there is nothing to prevent the courts from examining a subject in 'greater detail than it would have done before… and [delivering] a special type of judgment' to assist Parliament's decision-making.[19] Indeed, the case of *Nicklinson* is a clear example of this, since whilst the Supreme Court declined to issue a declaration of incompatibility then and there, the judgments of Lord Wilson and Lady Hale went further than was strictly necessary by detailing a robust set of safeguards and eligibility criteria which might prove relevant if Parliament were minded to change the law. In fact, it was not the absence of a signal from the courts that was the problem in this instance, but rather Parliament's decision to ignore the Supreme Court's dialogue by introducing a Private Member's Bill in 2015 that expressly ignored the Supreme Court's advice,[50] and failing to grapple with the matter any further once that bill was defeated at second reading. Hence, we believe there are already sufficient avenues for a constructive dialogue within the HRA, and it is arguably Parliament which causes the problem rather than the HRA itself.

Setting this aside, the more fundamental problem of making s4 a primary remedy is the unstable nature upon which it would leave rights protections. When the House of Lords examined the boundaries of s3 and s4 in

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[18] Jeff King, 'Parliament's Role Following Declarations of Incompatibility under the Human Rights Act',

Parliaments and Human Rights (pp. 165-192) (2015). Available at: https://discovery.ucl.ac.uk/id/eprint/10072227 /

[19] Lady Justice Arden, 'Justice KT Desai Memorial Lecture 2017: Law of medicine and the individual: current issues What does patient autonomy mean for the courts? ' Judiciary UK (2017). Available at: https://www.judiciary.uk/wp-content/uploads/2017/12/arden-lj-medicine-and-the-law-oct-2017.pdf [50] Notably, the Private Members' Bill proposed a scheme for legal assisted dying which would have restricted the option of an assisted death to those with six or fewer months left to live. [51] *Ghaidan v Godin Mendoza [2004] UKHL 30*

Ghaidan, Lord Nicholls astutely observed that if both sections were principal remedies, the boundary between them would become inherently linguistic. In other words, the 'possibility' of reaching a Convention compatibility reading would become the perennial question for the court and, in Lord Nicholls' words, the protection of fundamental rights would become a mere 'semantic lottery'.[51] *Ghaidan* is an example of this, as in his dissenting opinion Lord Millet – who favoured the linguistic limitation the above proposal would presumably precipitate – was minded both to believe that the legislation that protected a married tenant could not be read to include a same-sex partner and further that it would be inappropriate for the courts to intervene by issuing a declaration of incompatibility. Put simply, making both sections 3 and 4 principal remedies would weaken the boundary between the courts' options and some of the most important human rights questions would turn on semantics. As Lord Walker has persuasively argued the fundamental purpose of the HRA was that it was 'intended to promote and protect human rights in a practical way, not to be an instrument by which the courts can chivvy Parliament into spring-cleaning the statute book, perhaps to the detriment of more important legislation'.[20] Thus, we do not believe expanding the scope of s4 at the expense of s3 is a sensible or desirable outcome.

The second meaning

Assuming the second meaning is what is intended, we are concerned that a problematic culture in which our courts already feel unable to make determinative statements of incompatibility will be further exacerbated. This may be because it is currently a remedy of last resort, but we worry it may also be for other reasons, in particular because they see how overloaded Parliament is already, and don't want to force it to further action.

Moreover, by overloading Parliament with numerous suggestions of reform where there may be putative breaches of human rights, rather than flagging as now a small number of proven cases of incompatibility, the HRA will be rendered ineffective as a domestic remedy, driving more cases to Strasbourg.

Finally, although we believe allegations that our courts are overly politicised are unfounded, if the purpose of reform is to limit the perceived activism of our courts, then it follows as a matter of logic that obligating our courts to highlight more issues for Parliament's attention will not resolve this problem but exacerbate it, since it will draw the courts into matters where by definition the law remains unclear, since a finding of incompatibility will have been preempted. The courts will indeed then, unlike now, be trespassing into areas of contentious political debate.

Overall, assuming that the thought behind suggestions of amending section 4 is to foster an enhanced dialogue between the courts, the Government, and Parliament, we see no reason for undermining the existing protection of human rights given that the same outcome can already be accomplished through less intrusive means. We therefore oppose amending section 4 of the HRA and urge the IHRAR to resist any potential reforms that could seriously impede the protection of fundamental human rights.

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

No response as this sits outside our expertise.

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?

[20] *R v Attorney General ex parte Rusbridger and another [2003] UKHL 38*

It is our understanding that per the Supreme Court's judgment in *RR* public authorities (including courts and tribunals) can, and in fact must, disapply secondary legislation that is incompatible with the HRA.[53] In our view, this is an entirely rational position given that the HRA is primary legislation and primary legislation has always taken precedence over subordinate legislation within the UK's constitutional order. Failing that, we note that section 6(2) of the HRA specifically entertains the possibility of public authorities failing to comply with the Convention as a result of *primary* legislation, and therefore support the ruling in *RR* since it would have been open to Parliament to extend this exception to secondary legislation as well. In other words, Parliament must not have wanted public authorities to act incompatibly due to secondary legislation. Although we understand that *RR* failed to give any specific guidance on how public authorities (such as courts and tribunals) should disapply incompatible secondary legislation, we note that under the courts' ordinary powers of judicial review secondary legislation can be quashed and therefore believe there is no need to amend how courts and tribunals deal with incompatible subordinate legislative provisions.

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?

No response as this sits outside our expertise.

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

No. Although in general we believe Henry VIII powers should be subject to enhanced oversight, with regards to section 10 we believe the existing HRA framework provides sufficient scrutiny. In particular, we are satisfied that: (i) the Joint Committee on Human Rights' ability to flag specific remedial orders for Parliament's attention, (ii) the requirement that both Houses of Parliament must approve remedial orders for them to come into effect, and (iii) the 120 day period in which orders must be laid before Parliament for consideration, all already provide sufficient parliamentary safeguards on the use of remedial order process.[54] Indeed, given that Parliament already has four months to consider remedial orders before they become effective, we are concerned that efforts to 'enhance' Parliament's role might in actuality result in unnecessary delays to the resolution of human rights abuses.

[53][54] *RR v Secondary of State for Work and Pensions [2019] UKSC 52*

UK Parliament, 'Remedial Orders' 2021. Available at: https://guidetoprocedure.parliament.uk/articles/Htt2atZR/remedial-orders

HOW THE HUMAN RIGHTS ACT SHOULD BE STRENGTHENED

Although the questions in this call for evidence are quite specific, we also want to use this review as an opportunity to highlight areas in which the HRA should be strengthened to improve the protection of fundamental rights. In this vein, we would like to draw attention to two areas where we believe the HRA is rife for reform: the definition of a public authority under Section 6, and recognition of children's rights.

In the last ten years, there has been a marked rise in the number of private and faith-based voluntary organisations involved in the delivery of local services. Although there is nothing wrong with this per se, provided

services continue to be provided in a neutral, inclusive, and non-discriminatory manner, we are concerned that some third parties' convictions prevent them from doing so.

Thus, in an era of increased privatisation the HRA's protections against discrimination are all the more important for services users. This said, it cannot be right that s6(3)(b) currently excludes such third parties from having to comply with the HRA's non-discrimination obligations.[55] In our view, there is no rational basis for the protection of fundamental rights depending upon a lottery as to whether services are contracted out or not. Indeed, this is especially concerning given that local authorities often employ religious – sometimes highly evangelical – organisations as service providers.[56] Therefore, we recommend the current definition of hybrid public authorities – by which we mean private actors who perform a public function – should be expanded along the same lines currently used in the context of judicial review,[57] so that where services provided by a third party would previously have been performed by a public authority the HRA still has direct effect.

Although the UK has incorporated most of its international obligations entitling citizens to civil and political rights, the protection of children's rights remain comparatively neglected. In particular, despite the UK signing the Convention on the Rights of the Child, the substantive protections under this treaty are unincorporated – and thus inaccessible – under domestic law. Given that children are one of the most vulnerable groups in society, and obviously one of the least capable of defending their interests, we believe the protection of their rights should be an integral part of our human rights framework. Thus, the courts should be empowered to legitimately protect them. We therefore encourage the panel to consider strengthening the HRA by working towards the realisation of children's rights in domestic law.

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[55][56] See Section 6(3)(b) of the Human Rights Act 1998; *YL v Birmingham City Council [2007] UKHL 27*

Such organisations thus remain free to discriminate on the basis of religion or belief and sometimes other protected characteristics, like sex or sexual orientation, against service users and employees – even when the services they are providing are being delivered under contract from the state.

[57] *R (Datafin plc) v Panel on Take-overs and Mergers [1987] Q.B. 815*

For more details, information, and evidence, contact Humanists UK:

Richy Thompson
Director of Public Affairs and Policy
[redacted]
humanists.uk

ANNEX: JOINT STATEMENT IN SUPPORT OF THE HUMAN RIGHTS ACT AND JUDICIAL REVIEW

The following 150+ organisations, including charities, trades unions, human rights bodies, and religion or belief groups, have joined a coalition we established in defence of the Human Rights Act and judicial review.[21]

They have all signed up to the following statement:

> 'While every system could be improved, and protecting rights and freedoms for all is a balancing act, our Human Rights Act is a proportionate and well-drafted protection for the fundamental liberties and responsibilities of everyone in this country.
>
> 'The Act guarantees the rights to free speech and expression, to life, to liberty, to security, to privacy, to assembly, and to freedom of religion or belief. It prohibits torture and guarantees fair trials and the rule of law.
>
> 'Judicial review is an indispensable mechanism for individuals to assert those rights and freedoms against the power of the state.'
>
> 'Any government that cares about freedom and justice should celebrate and protect these vital institutions and never demean or threaten them.'

[21] See 'Protect Human Rights and Judicial Review': https://humanrightsact.org.uk /


AFRICAN
RAINBOW
FAMILY
LGBTIQ EQUALITY


Pobl yn Gyntaf Cymru Gyfan
All Wales People First


ALLIANCE FOR CHOICE


ARC
Antenatal Results & Choices


the
aplastic
anaemia
trust


ARTICLE 12


Asy


ARTICLE 19


Article 39


Asylum Link Merseyside


AVA
Against Violence & Abuse


BAN
CONVERSION
THERAPY


Beyond Skin
BPAS
British Pregnancy Advisory Service


THE BIG
ISSUE
GROUP


birthrights
Protecting human rights in childbirth


BAJ
British Association of Journalists


HUMAN RIGHTS


BMSDemocracy
British Muslims for Secular Democracy


BPW UK


CAMPAIGN AGAINST ARMS TRADE


Campaign for Freedom of Information
CONFIDENTIAL


CWJ
Centre for Women's Justice


Children England
Charities working for children and families


Children in Scotland


Children's Rights Alliance for England


CRER
Coalition for Racial Equality and Rights


CAJ
Committee on the Administration of Justice
Promoting Justice / Protecting Rights

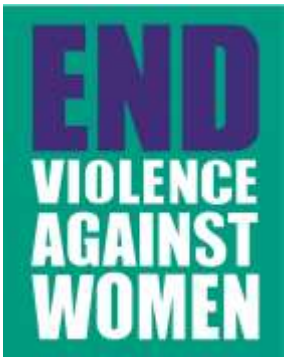

community
For a better working world


COMPASSION in world farming


coram clc
Children's Legal Centre

CHRONIC ILLNESS
INCLUSION PROJECT

CAMPAIGN FOR DIGNITY IN DYING.




ENGLISH
PEN


THE EQUALITY TRUST


EQUALLY
OURS


Fair Play
SOUTH WEST

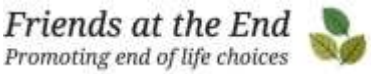

Fairness, Respect, Equality Shropshire


FAMILY RIGHTS GROUP
Keeping children safe in their families


Fawcett
Equality. It's about time.


FiLiA


FREEDOM
FROM
TORTURE
EMPOWERING
SURVIVORS,
REBUILDING
LIVES


Friends at the End
Promoting end of life choices


fft
Friends Families and Travellers


Friends of
the Earth


gires


Good Thinking


GREENPEACE


ALLIANCE
HEALTH AND SOCIAL CARE
ALLIANCE SCOTLAND
people at the centre


Helen Bamber
Foundation
working with survivors of human cruelty


FCSS
Hft's Family Carer Support Service


Howard League
for Penal Reform


Humanist
Society
Scotland


HUMAN
RIGHTS
CONSORTIUM


Human Rights
Consortium
Scotland


IKWRO
WOMEN'S RIGHTS ORGANISATION


Inclusion
London
Supporting London's Deaf and
Disabled People's Organisations


Inclusion
Scotland
Disabled People's Organisation


INQUEST
TRUTH, JUSTICE AND ACCOUNTABILITY


JCWI


The
JUDITH
Trust


JUSTRIGHT SCOTLAND


JUST FOR KIDS
LAW


LA
WRS
LATIN AMERICAN WOMEN'S RIGHTS SERVICE


Law
Centres
Network


LDE
Learning Disability England


Leonard
Cheshire


Lesbian
Immigration
Support
Group


CONSORTIUM
for stronger lgbt+ communities


LGBT
foundation


LOCUM DOCTORS
L
D A
ASSOCIATION
UNITED WE STAND


Manchester
MiSol
Migrant
Solidarity


Mary Ward
Legal Centre


maternity action
Ten years of fighting for better maternity rights


local
mencap
Liverpool & Sefton


Mermaids


METRO
Embrace Difference


migrants
organise


mrn
migrants'
rights network


MOSAIC
LGBT YOUTH CENTRE


Musicians'
Union
mu


TRANSFORMING
THE UK'S
RESPONSE
TO HIV
NAT


NATIONAL
CHILDREN'S
BUREAU

National Deaf Children's Society

NDTi
National Development Team for Inclusion

nsun National Survivor User Network

Network of Sikh Organisations
Unity is Strength

nia

Northern Ireland Council for Racial Equality

OneKind
Ending cruelty to Scotland's animals

ORG Open Rights Group

People First
a voice for people with learning difficulties

People First (Scotland)

Pesticide Action Network UK

Peter Tatchell Foundation
Speaking out for Human Rights

The PILS Project
Public Interest Litigation Support

Possability People

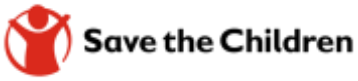
PRISON REFORM TRUST

RESTORATIVE
JUSTICE FOR ALL
INTERNATIONAL INSTITUTE


RIGHTS & SECURITY
INTERNATIONAL


RNIB
See differently


SAMARITANS


Save the Children


SCOTTISH
LEGAL ACTION
GROUP


ScottishPEN
defending the freedom of writers and readers


scottish
refugee
council


Scottish
Women's
Rights
Centre


securitywomen
Calling for women's inclusion in security sector reform


SHEILA
McKECHNIE
FOUNDATION
UNLEASHING
SOCIAL POWER


Shelter


Soroptimist
International
Great Britain & Ireland


SOS
STUDENTS
ORGANISING FOR
SUSTAINABILITY
UNITED KINGDOM


Southall
Black Sisters


sia
spinal injuries
association


Stonewall
Acceptance without exception


tai pawb
promoting equality in housing
hybu cydraddoldeb ym maes tai


Terrence
HIGGINS
TRUST


together
Scottish Alliance for
Children's Rights


townswomen's guilds


the Traveller
Movement


V O D G
Voluntary Organisations Disability Group


WELSH REFUGEE COUNCIL
CYNGOR FFOADURIAID CYMRU


WISH
A voice for women's mental health


WOMANKIND
WORLDWIDE EQUAL RESPECTED PROUD


WOMEN&GIRLS
NETWORK


WOMEN FOR REFUGEE WOMEN

Humanists UK

women's aid
until women & children are safe

wbg WOMEN'S BUDGET GROUP

women's resource centre

UK Lesbian & Gay Immigration Group

Z
ZERO
TOLERANCE

UNLOCK DEMOCRACY