INDEPENDENT HUMAN RIGHTS ACT REVIEW

Submission by

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Introduction

1. I am grateful for the opportunity to make a submission in response to the Independent Review's consultation paper. Having taught, researched and written on constitutional law, civil liberties and human rights (among other subjects) for over 40 years, served as the first Legal Adviser to the parliamentary Joint Select Committee on Human Rights (JCHR) from 2000 to 2004 and as an international Judge of the Constitutional Court of Bosnia and Herzegovina, directly applying the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in that State's internal legal order, I have observed the first 20 years of operation of the Human Rights Act 1998 (the HRA, or the Act) with great interest.
2. I have had the advantage of reading, and endorse the detailed analysis and conclusions in, two other submissions: first, that by Dr Kirsty Hughes, Dr Stevie Martin, Dr Stephanie Palmer, Dr Martin Steinfeld, and Professor Alison Young, of the Centre for Public Law, University of Cambridge; secondly, that by Professor Merris Amos, Dr Ed Bates, Dr Alice Donald and Professor Philip Leach. In my view, little change is needed in the way the Act operates. The provisions of the Act are intelligently thought out, offering a distinctive, original approach to giving effect to the ECHR in national legal systems and successfully accommodating its rights within a constitutional structure deeply imbued with the ideas of representative democracy and parliamentary sovereignty.
3. This submission is therefore restricted to making a few additional points in relation to some of the questions posed in the consultation document.

Theme One: Relationships between UK courts and the European Court of Human Rights

4. I do not wish to add anything to what is contained in the submissions of Dr Hughes, Dr Martin, Dr Palmer, Dr Steinfeld and Professor Young, and of Professor Amos, Dr Bates, Dr Donald and Professor Leach.

Theme Two: Relationship between the judiciary, the executive and Parliament

5. I offer two reflections, complementing the submissions of Dr Hughes, Dr Martin, Dr Palmer, Dr Steinfeld and Professor Young, and of Professor Amos, Dr Bates, Dr Donald and Professor Leach. First, I should like to put the tension between some politicians and the judiciary over the Human Rights Act 1998 in a wider perspective. Secondly, I shall consider the procedures relating to remedial orders, once again putting them in a wider context.
6. **Tension between Parliament, Ministers and the judiciary in context.** Concern sometimes expressed that the judiciary is using the Act in a way that undermines parliamentary sovereignty are misconceived. Ultimate control over statute law remains with the Queen in Parliament.[2] A related but different concern is that the use of section 3 of the Act to give Convention-compliant readings and effect to statutory provisions may defeat "the intention of Parliament". This is based on (a) a misunderstanding of parliamentary

[2] I outlined my understanding of this in 'The Human Rights Act 1998 and Constitutional Principles' (1999) 19(2) *Legal Studies* 165-206.

"intention", which operates (if at all) at the level of the goal that legislation was expected and hoped to achieve rather than the detailed effect of individual provisions or groups of provisions on specific, often unanticipated facts, and (b) reluctance to treat the "intention of Parliament" expressed in section 3 of the Act as having the general application that we would happily give to, for example, a provision in the Interpretation Act 1980.

7. Complaints by certain politicians that the judiciary is overstepping the proper boundaries of its role in relation to government policy and public administration are rather different. They are neither new nor limited to the operation of the Human Rights Act 1998. The executive has been irritated by judges' activities in this area for about 500 years, since the friction between Chief Justice Coke and King James I of England and VI of Scotland, and perhaps longer. Whilst it is difficult to have an objective, historically balanced view of events through which one is living, it may be that these tensions have become more persistent and less episodic in the past 50 or 60 years, a period that has seen considerable development of the law and procedure of judicial review of governmental action. The Human Rights Act 1998 might have given focus to that tension, but it is not the sole, or even the main, reason for them. This has been widely discussed inside and outside Parliament.[3]

8. Most fundamentally, Ministers dislike being called to account in non-political fora for decisions and actions taken in pursuit of political objectives. They tend to assert that judges do not understand the issues (viewed from the standpoint

[3] For just one particularly measured discussion, see the House of Lords debate on a motion moved by Lord Rodgers of Quarry Bank "to call attention to the relationship between the judiciary, the legislature and the executive, and to judicial participation in public controversy", Lords Hansard, Vol. 648, col. 876 *et seq.*, 21 May 2003.

of Government policy) and that Ministers should be held politically accountable by the two Houses of Parliament in the course of the constitutional convention of ministerial responsibility, not to courts. This claim is sometimes more successful than at other times. Over 110 years ago, in *Dyson v. Attorney General*, a challenge to the issue by the Revenue of notices requiring a landowner to make a return setting out particulars of his property on pain of a penalty, when the legislation authorising a tax on that property had not yet been enacted by Parliament. The Attorney General argued, *inter alia*, that an action for a declaration did not lie against him to decide difficult legal issues of that kind relating to different Government departments. The Court of Appeal held that it had jurisdiction to make a declaration in a suit against the Attorney General. Farwell L.J. commented, "If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression."[4]

9. Courts have the task of assessing the lawfulness of the behaviour of public bodies, which often involves them in examining issues which Ministers view as political, even though the issues addressed in litigation are legal. As the late Sir John Laws observed, when operating in areas of public life which are subjects of political controversy the courts and politicians have to operate alongside one another while being driven by different moralities; Sir John described the judicial morality as based principally on rights, justice and reason and seeking justifications in principles and rules developed in the past for application to the

[4] [1911] K.B. 410, 424.

present, while he described the political morality as predominantly forward-looking and utilitarian, justifying decisions and actions by reference to the likelihood of future social benefits resulting from them. Each, he pointed out, is a legitimate philosophy, but they are different, and this makes it hard for the two institutions, executive and judiciary, to communicate constructively.[5]

10. This lack of mutual appreciation has probably been made more significant in recent years by changes in the demography of the House of Commons and the Bench. Unlike the times when it was common for Attorneys General to be offered High Court judgeships and the judges of the apex court sat as a Committee of the House of Lords, opportunities for judges to have contact with members of the political elite are now limited. Politicians, too, have less contact with lawyers since the number of practising barristers and solicitors sitting as M.P.s declined.[6] In these circumstances it is sometimes difficult to find people to interpret the words and activities to each group to the other.

11. Techniques for accommodating the two different professional mindsets to each other include the development by the judiciary of the idea (itself not uncontroversial) that judges should respect a discretionary area of judgment allowed to Ministers under certain circumstances; it is not clear that Ministers are inclined to extend a similar courtesy to judges.

12. Tension in these areas is inevitable in a state which espouses both the rule of law and democracy. Managing the friction requires tact and judgment, but

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[5] John Laws, *The Constitutional Balance* (Oxford: Hart, 2021), ch.3.

[6] See Ross Cranston, 'Lawyers, MPs and judges', and David Howarth, 'Lawyers in the House of Commons', both in Feldman (ed), *Law in Politics, Politics in Law* (Oxford: Hart, 2013), chs 2 and 3 respectively. Sir Ross Cranston was the most recent Law Officer to be appointed to the High Court bench; Professor Howarth was M.P. for Cambridge, 2005-10.

friction cannot be eliminated without surrendering either democracy or the rule of law. Kept within the bounds of practicality, it should be welcomed as a sign of vigorous health in the system, not treated as pathological. Mutual respect should be encouraged, but one should not seek consensus on all matters between different institutions with different roles and constitutional justifications. To quote Lord Bingham once again, "…there is a natural, inescapable, and not undesirable tension, greater at some times than at others, between those whose mission it is to govern and those whose mission and sworn duty it is to do right be all manner of people, without fear or favour, affection or ill will, according to the laws and usages of the realm."[7]

13. **Remedial orders.** The consultation paper asks whether the remedial order process should be modified, for example by enhancing the role of Parliament. Having been involved in the process by which Parliament scrutinised several proposals for draft remedial orders, draft remedial orders and remedial orders, I am in a position to say that there is, if anything, too much parliamentary involvement, at least in relation to non-urgent remedial orders. To understand this, it is helpful to think about the legislative history of the Human Rights Act 1998.

14. When the Bill was introduced to the House of Lords in 1997, the provisions of clause 10 (now section 10 of the Act) were relatively simple, and there were no provisions such as those now found in Schedule 2 to the Act. The Bill would have made it straightforward to make remedial orders. Indeed, the then Government's original intention was that remedial orders should be a quick,

[7] Bingham, *Lives of the Law*, above, p. 156.

straightforward means of amending legislation in response either to judgments of the European Court of Human Rights holding the legislation to have violated a Convention right or to declarations of incompatibility made by courts in the UK in respect of legislation. It was to be no more difficult to make a remedial order, protecting people's Convention rights, than to make a designated derogation order limiting those rights in exceptional circumstances.

15. But opposition Peers drew attention to the fact that a remedial order amending primary legislation would be an example of a "Henry VIII" provision, which as a matter of constitutional propriety should be subject to special parliamentary scrutiny.[8] The Government opposed special procedural constraints, but in Committee the Bill was amended to include, in clause 12, a two-track process for making remedial orders. The normal procedure would be for a draft of the Order to be laid before and approved by resolution of each House within 60 sitting days. A more peremptory procedure would apply if it were to be declared in the order that it appeared to the Minister making it or to Her Majesty in Council that, because of the urgency of the matter, it was necessary to make the order without a draft having been approved by each House. In the latter case, the order would have to be laid before each House, and would cease to have effect after 40 days unless in the interim each house had approved it by affirmative resolution.

16. By the time the Bill went to the Commons, peers who did not regard this as sufficient protection against abuse had forced further amendments. Clause 12

[8] See for further details Feldman, 'Extending the role of the courts: the Human Rights Act 1998', in Philip Norton (ed), *A Century of Constitutional Reform* (Wiley-Blackwell/Parliamentary History, 2011) at 77-79.

now required the Minister laying a remedial order or draft to provide with it an explanation of the incompatibility sought to be removed, and justifying the terms of the order. During its Committee Stage in the Commons, additional hurdles and delays were placed in the way of making remedial orders. In particular, there would have to be a 60-day period for consideration of a proposal for a draft non-urgent order laid before Parliament. If, during that time, representations about it were made, any draft remedial order then laid before each House would have to be accompanied by a statement containing a summary of the representations and any changes made to the draft as a result. Only if, within 60 sitting days, each House were to approve the new draft by affirmative resolution would the Minister be allowed to make the order. In relation to an order made under the urgent procedure, there would have to be a period of 60 sitting days for consideration, and, if any representations were made during that period, the Minister would have to lay a statement summarising the representations and giving details of any changes the Minister thought it appropriate to make as a result. If there were such changes, the Minister would then be required to make a further order replacing the original order and lay it before Parliament. The order would cease to have effect unless, within 120 days of the original order's making, each House approved the order by affirmative resolution.

17. This is essentially the form in which the provisions received Royal Assent, with the now-complex procedural arrangements being moved from clauses 11 and 12 to what became Schedule 2 to the Act. The quick and simple procedure originally envisaged had become instead a process characterised by

bureaucratic complexity and delay (except in the case of urgent orders). The delay could be exacerbated by the fact that the periods for consideration after laying were defined as not including any time during which Parliament is dissolved or both Houses are adjourned for more than four days. In respect of a proposal for a draft remedial order laid shortly before an Easter recess, for example, might easily lead to a process stretching into and through the long summer recess and into the autumn or even winter, depending on how long it takes the responsible Minister to consider and respond to representations about the proposal and then the draft order.

18. It is not surprising, therefore, that few remedial orders have been made: 20 to date, of which nine are Scottish Statutory Instruments and only 11 were of general application across the UK;[9] three of the 11 have been made using the urgent procedure rather than the time-consuming non-urgent process, in one case because the liberty of the subject was affected, in another because of a threat to the operation of all naval courts-martial, and in the third because stop-and-search powers were involved, again affecting the liberty of the subject. In the majority of cases, however, rather than use the ordinary procedure, it is easier and quicker, and involves less effective scrutiny, to make provision to amend the law by Bill, especially if there is a Bill already before Parliament for which the long title is conveniently capable of being interpreted as covering the subject-matter of the proposed remediation.

19. It is instructive to contrast the regime for making remedial orders with the regime that applies to making designated derogation orders, which may give

[9] Westlaw search, 2nd March 2021.

effect to additional and sometimes burdensome additional restriction on Convention rights in emergencies. In the event, only two such orders have been made, one removing the 1988 derogation relating to detention without charge in relation to terrorism in Northern Ireland, the second introducing a new derogation (later held both by the House of Lords and the European Court of Human Rights to have been unlawful and ineffective) allowing detention without trial in certain immigration-related counter-terrorism cases. At present, no designated derogation is in place. If, however, a Minister were to decide that one is necessary, it could be made very quickly. Under section 20(1), an order must be made by statutory instrument, and by section 20(3) a designated derogation order made pursuant to section 14 must be laid before Parliament. No special requirements apply, and an order may even be made in anticipation of the act of derogation and of informing the Council of Europe of the derogation (section 14(6)).

20. It is an odd feature of the UK's notions of constitutional propriety that a remedial order protecting rights usually involves a long and complex process before it can be made, because of its form as a measure amending primary legislation, while a designated derogation order taking away rights may be made extremely quickly (as was the 2001 order derogating from Article 5 of the ECHR in respect of people subject to immigration control who were suspected of involvement with terrorists). The parliamentary Joint Committee on Human Rights in 2001 reviewed the process after it had examined the first proposal for a draft remedial order laid by a Minister to amend the Mental Health Act 1983 and recommended to the Minister that she should withdraw

the proposal and instead make an order by the urgent process as the liberty of the subject was affected. The Minister accepted this suggestion.[10] In its Seventh Report of 2001-02, *Making of Remedial Orders*,[11] the Committee reviewed the procedure for making remedial orders in the light of its experience, and made a number of recommendations for streamlining the procedure relating to non-urgent orders, including reducing periods for consideration, and to that end in Annex B set out proposed amendments to Schedule 2 to the Act and to Standing Orders of the House of Commons. In its First Report of 2001-02, the House of Commons Procedure Committee endorsed those recommendations, and urged the Government and the House to take the necessary steps to implement them.[12] As yet, the procedure remains unamended.

21. From this, I suggest that two conclusions flow. First, there is no lack of opportunity for parliamentary scrutiny of remedial orders, either of the ordinary or urgent kind. In respect of urgent orders, the Joint Committee on Human Rights is required by its orders of reference to consider and report to the two Houses on each one laid in time to inform the debate that the Houses must have if the orders are to remain in force. In relation to the ordinary procedure, the opportunities for examination, consideration and debate are very extensive – far more extensive than in the case of most Bills – and drag on over a substantial period of time. Secondly, there is therefore no problem about parliamentary scrutiny. If there is a problem, it is (as the Joint Committee on

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[10] See JCHR Sixth Report of 2001-02, *Mental Health Act 1983 (Remedial) Order 2001*, HL Paper 57, HC 472.

[11] HL Paper 58, HC 473.

[12] House of Commons Procedure Committee, *Making Remedial Orders: Recommendations by the Joint Committee on Human Rights*, HC 626, para. 8.

Human Rights identified more than 19 years ago) that the procedures, especially for ordinary, non-urgent orders, are too complex, laborious and long-drawn-out. The recommendations made by the Joint Committee in December 2001 should be implemented.