The Independent Human Rights Act Review

Response to Call for Evidence

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About the author

Murray Hunt was Legal Adviser to the Joint Committee on Human Rights from March 2004 to May 2017. Prior to that he was a practising barrister at Matrix specialising in public law and human rights (called to the Bar in 1992). He is currently Director of the Bingham Centre for the Rule of Law and a Visiting Professor in Human Rights Law at the University of Oxford where he gives an annual series of seminars on the role of parliaments in the ECHR's system for the protection of human rights. He leads a long term research project on Parliaments, the Rule of Law and Human Rights which aims to stimulate research into how to strengthen protection for the Rule of Law and human rights by embedding them better in democratic institutions. The project initiated an international process which has led to a set of draft UN Principles on Parliaments and Human Rights drafted by the UN Office of the High Commissioner for Human Rights, which will soon be considered by the UN General Assembly. Murray is the author of books and articles on the democratic legitimacy of legal frameworks for human rights protection, including *Using Human Rights Law in English Courts* (1997) which demonstrated the emergence of a common law interpretive obligation on domestic courts to interpret domestic law compatibly with international human rights law, and *Parliaments and Human Rights: Redressing the Democratic Deficit* (2015) which argues for enhancing the role of parliaments in systems for protecting human rights in order to counter widespread perceptions that current arrangements suffer from a democratic deficit. He is the UK's alternate member of the Council of Europe's Venice Commission for Democracy through Law. In 2016 he was on the UK's national shortlist of 3 candidates submitted to the Council of Europe as candidates to become the UK Judge on the European Court of Human Rights. In 2018 he served as expert adviser to the Equalities and Human Rights Committee of the Scottish Parliament in its inquiry into Human Rights and the Scottish Parliament and from 2019-21 he was an Independent Member of the Scottish National Taskforce for Human Rights Leadership. He is also a Bencher of the Middle Temple.

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Executive Summary

This response to IHRAR's Call for Evidence is submitted by the author in his personal capacity as a former Legal Adviser to the Joint Committee on Human Rights. It focuses on those parts of the Call for Evidence which are most relevant to Parliament's particular role under the current framework, drawing on experience, from a parliamentary perspective, of how that framework has actually operated in practice since it was brought into force in 2000.

The HRA, or aspects of it, remain the subject of heated political contestation and the Review is a welcome opportunity for a genuinely independent, dispassionate and forensic assessment of claims which are frequently made about the effect of the Act, on the basis of rigorous evaluation of the evidence of how it has actually been operating in practice. The Review is also an opportunity to consider other ways of addressing concerns about a democratic deficit in the UK's institutional arrangements for protecting human rights , for example by enhancing the role of Parliament in relation to human rights in ways which do not require any amendment of the HRA.

The response welcomes the explicit acknowledgment in the Review's Terms of Reference that "the judiciary, the executive and the legislature each have important roles in protecting human rights in the UK." This embrace of the concept of "shared responsibility" for the protection of human rights is the key to resolving long-running political battles about the democratic legitimacy of the HRA and to building the political consensus which must underpin the UK's institutional arrangements for human rights protection if they are to be sustainable in the long term. Responsibility for protecting human rights is shared between the three branches of government at the national level (the executive, the legislature and the judiciary), and is also shared between those authorities at the national level and the equivalent supranational institutions in the Council of Europe (the Committee of Ministers, the Parliamentary Assembly and the European Court of Human Rights), each of which also have important and distinctive roles to play in the European system of human rights protection.

Acceptance of the premise of shared responsibility is also the key to understanding the foundational ECHR concepts of subsidiarity and the margin of appreciation. The ECHR system, including the Court of Human Rights, is subsidiary to the national system of human rights protection, not in the sense that it is inferior or subordinate to the national system, but in the sense that the national authorities (the government, Parliament and courts) have the primary responsibility for securing for everyone within their jurisdiction the Convention rights and freedoms and for providing an effective remedy when those rights are violated. The national authorities enjoy a margin of appreciation in deciding how best to discharge that primary responsibility to secure Convention rights, not in the sense of an open-ended discretion or exclusive area of competence to do whatever they like, but in the sense of a degree of latitude in deciding from a range of possible ways of giving effect to the Convention rights and freedoms, subject to the ultimate supervisory jurisdiction of the Strasbourg Court.

A proper understanding of these two related concepts of subsidiarity and the margin of appreciation, viewed through the lens of shared responsibility for protecting human rights, helps to answer the two central questions that the Review rightly poses: whether the HRA provides the right framework for the relationship between domestic courts and the European Court of Human Rights, and whether it strikes the right balance between the respective roles that each branch legitimately has to play in a democratic system for the protection of human rights.

On the Review's Theme One, the relationship between domestic courts and the European Court of Human Rights, the response points out that the current statutory requirement in s. 2(1) HRA that courts and tribunals must take into account relevant Convention case-law is an expression of the principle of subsidiarity: it represents the attempt by the Government and Parliament, in the legal framework, to ensure that courts take seriously their share of the UK's primary responsibility for securing Convention rights in cases before them. Section 2 gives effect to the UK's obligation to recognise the principle of res interpretata – the principle that when interpreting Convention rights

courts must have regard to relevant Convention case-law – and its operation in practice by the courts has generated 20 years of considered jurisprudence by UK courts which is not only respected by the Strasbourg Court but which has also influenced its own interpretation of the Convention.

The response concludes on Theme One that, not only is there no need for any amendment of section 2 HRA, but any dilution of the current requirement would weaken the recognition of the principle of subsidiarity in the UK's legal framework, and would therefore weaken the UK's ability to invoke the margin of appreciation when defending cases before the European Court of Human Rights. It would invite closer scrutiny by that Court to ensure that Convention case-law has been properly considered by all branches at the national level. The only change the response recommends is to strengthen the dialogue between the judicial and political branches, building on the developing practice of senior UK judges appearing before parliamentary committees by instituting regular appearances by the UK judge on the European Court of Human Rights before Parliament's Joint Committee on Human Rights.

On the Review's Theme Two, the impact of the HRA on the relationship between the judiciary, the executive and the legislature, the response puts forward the general view that the great strength of the scheme of the HRA, which has been reinforced by the way in which it has operated in practice, is that it contains provisions which explicitly share responsibility for protecting human rights between the executive, the courts and the legislature. In addition to ss. 3 and 4, it points out the importance of s. 19 HRA, requiring ministerial statements of Convention compatibility to accompany all Government Bills, and explains how, in practice, life has been breathed into this apparently formal requirement in such a way as to embed conscientious consideration of Convention rights in both the executive's policy making process and Parliament's scrutiny of Government Bills. Both are examples of subsidiarity in action, and therefore vital to the UK's ability to invoke the margin of appreciation when laws and policies are legally challenged for compatibility with the ECHR, both before domestic courts and in Strasbourg.

The response considers whether, from Parliament's perspective, there is any case for changing the framework established by ss. 3 and 4 HRA. It points out that, far from being an excrescence on the previous balanced relationship between the three branches of government, s. 3 was in fact a statutory acceleration of a common law development of an interpretive obligation in relation to human rights law. A clear statutory basis for such an obligation is preferable, especially in conjunction with the imaginative statutory device of a declaration of incompatibility. The response considers what evidence there is of parliamentary discontent with the ss.3 /4 framework and concludes that the provisions are an important part of the HRA's overall scheme giving shared responsibility for human right protection to all three branches and that there is no case for changing them.

The response considers whether any change is required to the way in which courts and tribunals deal with provisions of subordinate legislation that are incompatible with Convention rights, including whether domestic courts should be able to quash designated derogation orders. It concludes that the courts' ability to quash incompatible subordinate legislation, including designated derogation orders, is not only entirely consistent with the UK's constitutional tradition of judicial control of unlawfulness, it is also in keeping with the principle of subsidiarity, particularly bearing in mind the very limited information provided to Parliament about the Government's assessment of the ECHR compatibility of such legislation and the extremely limited parliamentary scrutiny of such compatibility. It concludes that no change is therefore required from the current approach by courts and tribunals to incompatible subordinate legislation. However, Parliament could, if it wished, devise ways of ensuring that there is better parliamentary scrutiny of the ECHR compatibility of subordinate legislation including derogation orders.

The response considers whether the remedial order process in section 10 of and Schedule 2 to the HRA should be modified, but concludes that remedial orders in fact receive extensive and detailed parliamentary scrutiny, in some respects more rigorous than that received by primary legislation, and there is therefore no need to modify the process. Other ways of enhancing Parliament's role following court judgments on human rights could be considered, such as vesting a power of legislative initiative

in the Joint Committee on Human Rights to bring forward legislative proposals to remedy an incompatibility if the Government has not brought forward remedial measures within a certain amount of time.

Finally, the response considers the extent to which the HRA itself has made its own contribution to international human rights law, both in Europe and globally. The evidence shows that, in a world that increasingly recognises the need for greater democratic legitimation of human rights, the UK genuinely enjoys an international reputation as a world leader in how to institutionalise a shared responsibility for human rights across all three branches of government.

It concludes that, as the UK renews its commitment to demonstrate global leadership on human rights and democracy, it should be wary of doing anything to risk that hard-earned international reputation by changing its own legal human rights framework in the absence of any compelling evidence of the necessity for doing so. Rather, it should be looking for opportunities to build on the UK's international reputation for imaginative democratic protection of human rights by finding ways to further enhance the role of Parliament in that system which do not require any amendment of the internationally admired HRA.

Introduction

1) The Independent Human Rights Act Review ("IHRAR") has been established to review the operation of the Human Rights Act 1998 ("the HRA") and to consider whether, in the light of all the evidence about how it has operated in practice, any part of the framework should be amended or repealed.

2) This response is confined to how the HRA has operated in practice **from the perspective of Parliament**. It is submitted in a personal capacity drawing on the author's experience as Legal Adviser to Parliament's Joint Committee on Human Rights from 2004 to 2017.

3) The response therefore focuses in particular on those questions in the Call for Evidence which ask for evidence of how aspects of the legal framework have affected the relationship between the judiciary, the legislature and the executive. It attempts to marshall some of the most relevant evidence of how the Act has actually worked in practice from the vantage point of a small role in that practice at the intersection of the three branches.

A welcome opportunity

4) The IHRAR is a welcome step in the life of the HRA. The HRA is a subject which continues to excites political controversy, which is not always conducive to dispassionate assessment of the evidence of how the Act has actually operated in practice. Yet the Act has never been subjected to post-legislative review.

5) Post-legislative review of legislation was a positive constitutional development which enjoyed a brief flourishing in the first part of the 21st century before falling out of fashion more recently. Post-legislative review of the HRA by a parliamentary committee would have required the Government to produce a memorandum containing its own assessment of the evidence of how the Act has operated in practice and whether it has achieved its objectives. That would have been useful as it would have provided a clear statement of the Government's position capable of rigorous independent scrutiny by both the parliamentary committee and the various interested parties feeding into that scrutiny.

6) However, post-legislative review by a genuinely independent panel of experts is one of the ways of achieving the objectives of post-legislative review endorsed by the Law Commission in its 2006 Report on Post-Legislative Review. Such an independent expert review is a welcome opportunity for a genuinely independent, dispassionate and forensic assessment of claims which are frequently made about the Act, on the basis of rigorous evaluation of the evidence of how it has actually been operating in practice.

Shared responsibility for protecting human rights

7) The Review's Terms of Reference proceed from an important premise: that "the judiciary, the executive and the legislature each have important roles in protecting human rights in the UK." It is worth pausing to reflect on the significance of this premise, and its implications for the questions at the heart of the Review.

8) At the same time as we have seen, in the UK as in many other countries, a growing and genuinely-held concern that the institutional arrangements for the protection of human rights suffer from a "democratic deficit", there are signs of an emerging consensus[1] that human rights require legal protection and that all branches of the state have a shared responsibility for

[1] For the evidence that demonstrates this emerging consensus, both in the UK and internationally, see chapter 1 of M. Hunt, H. Hooper and P. Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit*.

protecting those legally protected human rights. Responsibility for protecting human rights is recognised to be shared between the three branches of government at the national level (the executive, the legislature and the judiciary), and is also shared between those authorities at the national level and the equivalent supranational institutions in the Council of Europe (the Committee of Ministers, the Parliamentary Assembly and the European Court of Human Rights), each of which also have an important role in the European system of human rights protection.

9) The emergence of this consensus about shared responsibility for legally protected human rights is significant: it represents a significant maturing of debates about human rights and democracy, beyond old positions which saw them as in fundamental opposition, beyond increasingly sterile debates between legal constitutionalists on the one hand and political constitutionalists on the other, and beyond beguiling but ultimately false choices between courts and the democratic branches as the best guarantors of human rights.

10) It follows from the premise of shared responsibility that there are rarely clear dividing lines between a purely legal question that is exclusively for the courts and a purely political question that is exclusively for the political branches. If a recognsied human right is in play, all the branches have a role in deciding how that right should be protected and what counts as a justified interference with that right. It is not a case of dividing up and allocating exclusive areas of competence, but of mediating the boundaries of the respective roles through each branch devising ways in which it acknowledges the limits of its own role and expresses its respect for the roles of the other branches.

11) This embrace of the concept of "shared responsibility" for the protection of human rights is therefore the key to resolving long-running political battles about the democratic legitimacy of the HRA and to building the political consensus which must underpin the UK's institutional arrangements for human rights protection and fulfilment if they are to be sustainable in the long term.

12) The central question for the Review, therefore, is whether the HRA provides the right framework for balancing the respective roles of the different branches in discharging their shared responsibility for human rights, or has an imbalance arisen which requires some amendment of the framework?

Subsidiarity and the margin of appreciation

13) Acceptance of the premise of shared responsibility is also the key to understanding the foundational ECHR concepts of subsidiarity and the margin of appreciation. Understanding of the nature of these crucial aspects of the ECHR system has significantly matured in recent years, partly as a result of the ongoing ECHR reform process in which the UK has taken a leading role.

14) The ECHR system, including the Court of Human Rights, is subsidiary to the national system of human rights protection, not in the sense that it is inferior or subordinate to the national system, but in the sense that the national authorities (the government, Parliament and courts) have the primary responsibility for securing for everyone within their jurisdiction the Convention rights and freedoms and for providing an effective remedy when those rights are violated.

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

16) A proper understanding of these two related concepts of subsidiarity and the margin of appreciation, viewed through the lens of shared responsibility for protecting human rights, helps to answer the two central questions that the Review rightly poses: whether the HRA provides the

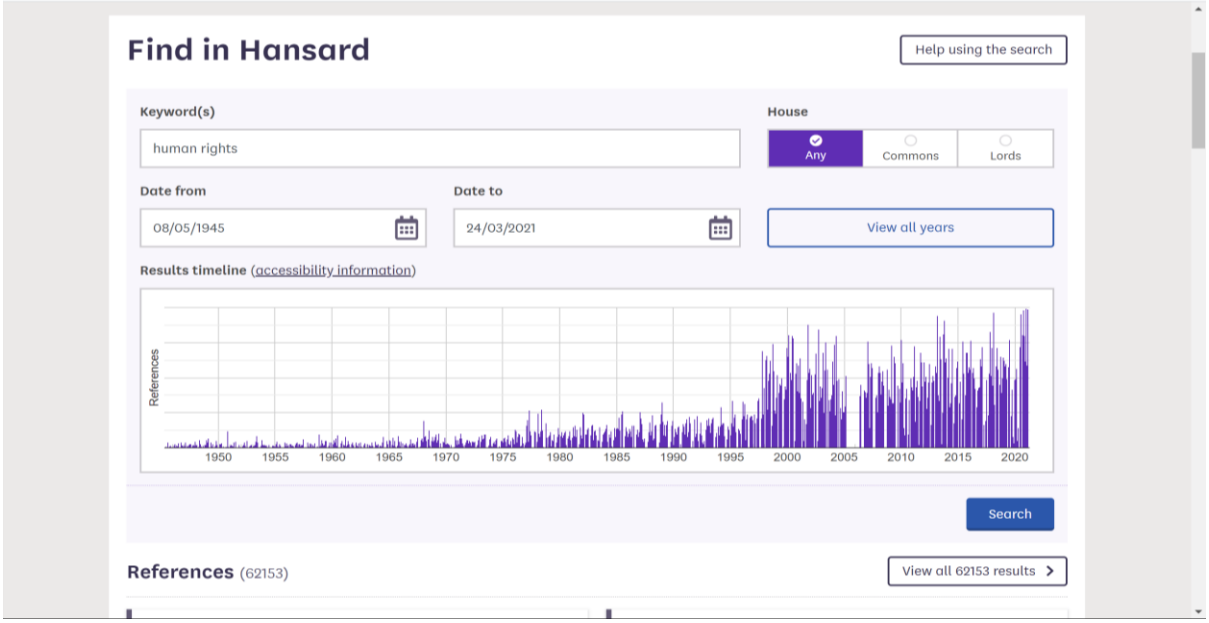
right framework for the relationship between domestic courts and the European Court of Human Rights, and whether it strikes the right balance between the respective roles that each branch legitimately has to play in a democratic system for the protection of human rights.

Has Parliament's role been diminished by the HRA?

17) Some of the Review's questions ask whether the HRA should be amended "in order to enhance Parliament's role".

18) It is often assumed in political discussion about the HRA that one of its consequences is that Parliament has been marginalised or even diminished by the Act. One of the purposes of this response is to demonstrate the centrality of Parliament in the HRA's overall scheme of human rights protection. It is a fact often overlooked in public debate about the Act.

19) The graphic below from the Hansard website shows at a glance the increase in the number of references to "human rights" in parliamentary debates and proceedings in both Houses from the end of the Second World War until today.



20) Without qualitative analysis of those references, there is a limit of course to how useful such a chart can be in any discussion of the extent to which Parliament has been empowered rather than disempowered in relation to human rights by the HRA. But one of the striking things about the graph is not only how much parliamentary consideration of human rights has increased since the passage of the HRA in 1998 compared to before, but how that increased reference to human rights in Parliament has been sustained at a much higher rate since that date.

21) Human rights are now much more discussed in Parliament than they were before the HRA was enacted. It is a background fact which the Review may wish to keep in mind. Greater parliamentary discussion and debate about human rights is likely on balance to be a good thing, leading to greater literacy about human rights amongst politicians and a better understanding of the rights themselves and the key concepts that go with them.

Theme One: relationship between UK courts and Strasbourg

A subsidiarity-serving provision

23) The main relevance of s.2 HRA from the perspective of Parliament is the important role it plays in the scheme that Parliament has put in place to give effect to the principle of subsidiarity, properly understood, as set out above.

24) According to the principle of subsidiarity, States have the primary responsibility to secure the rights and freedoms in the Convention to everyone in their jurisdiction. This is a matter of obligation, and responsibility for discharging it is shared between national governments, parliaments and courts.

25) The HRA is one of the most significant ways in which Parliament discharges that responsibility, by providing mechanisms for the legal enforcement of Convention rights in UK courts, including remedies for breach of those rights. Requiring courts to take account of Convention case-law, in so far as it is relevant to the issues before the Court, is part of securing the rights and freedoms at the national level. If Parliament had not required courts to take into account Convention case-law it would have failed in its own responsibility to create a legal framework for human rights protection that provides effective legal remedies for violations of Convention rights.

26) The current statutory requirement in s. 2(1) HRA that courts and tribunals must take into account relevant Convention case-law is therefore an expression of the principle of subsidiarity: it represents the attempt by the Government and Parliament, in the legal framework, to ensure that courts take seriously their share of the UK's primary responsibility for securing Convention rights in cases before them. Section 2 gives effect to the UK's obligation to recognise the principle of res interpretata – the principle that when interpreting Convention rights courts must have regard to relevant Convention case-law – and its operation in practice by the courts has generated 20 years of considered jurisprudence by UK courts which is not only respected by the Strasbourg Court but which has also influenced its own interpretation of the Convention.

Effect of weakening s. 2 on the UK's margin of appreciation

27) Requiring UK courts to take into account Convention case-law is in the interests of both the Government and Parliament, as it strengthens any margin of appreciation argument available to national authorities if laws are challenged before the European Court of Human Rights.

28) If UK courts were not taking Convention case-law into account, that would invite closer supervision by the Strasbourg Court to ensure that Convention principles are being respected. By demonstrating over time their familiarity with ECHR concepts and principles, UK courts have earned the respect of the Strasbourg Court which will therefore be more prepared to defer to a national court's determination. Diluting or removing the requirement that courts take ECHR case law into account will only lead to more intrusive supervisory review by Strasbourg.

29) Not only is there no need for any amendment of section 2 HRA, but any dilution of the current requirement would weaken the recognition of the principle of subsidiarity in the UK's legal framework, and would therefore weaken the UK's ability to invoke the margin of appreciation when defending cases before the European Court of Human Rights. It would invite closer scrutiny by that Court to ensure that Convention case-law has been properly considered by all branches at the national level. The only change that might be worth considering is not to amend s. 2 of the Act but to strengthen the dialogue between the judicial and political branches, building on the developing practice of senior UK judges appearing before parliamentary committees by instituting regular appearances by

the UK judge on the European Court of Human Rights before Parliament's Joint Committee on Human Rights.

Theme Two: Impact on relationship between judiciary, executive and legislature

30) The central question for IHRAR in this part of its review is how the HRA balances the respective roles of the judiciary, the executive and the legislature protecting human rights.

31) Specifically, the Call for Evidence asks whether the current approach

- risks "over-judicialising" public administration and
- draws domestic courts unduly into questions of policy.

32) This response offers a perspective on these questions when viewed from within the legislative branch.

The importance of s. 19 HRA to shared responsibility

33) One of the most significant parts of the HRA framework which underpins the balance between the respective roles of the different branches is s. 19. Consideration of how this provision has operated in practice is not explicitly within the scope of the Review, but it provides a crucial piece of context for understanding fully the balance struck by other provisions such as ss. 3 and 4 HRA and to the ways in which the HRA shares responsibility for protecting human rights between the branches. It is therefore worth taking a moment to consider the significance of s. 19, and how it has operated in practice, in the overall scheme of the HRA.

Ministerial statements of compatibility

34) Section 19 HRA requires that, for every Government Bill, the Minister in charge make a statement that, in his or her view, the Bill's provisions are compatible with the Convention rights.[2] The statement must be signed personally by the Minister, and it is given great prominence, appearing on the front page of every Government Bill introduced. A provision which appears on the face of it to impose a formal certification requirement has in fact operated in practice in a way which gives real substance both to the executive's and the legislature's share of responsibility for protecting Convention rights.

35) The procedures which have been developed within Government to give effect to s. 19 are described in detail in the Cabinet Office Guide to Making Legislation which provides guidance to bill teams about the procedures to follow at each stage of preparing primary legislation and taking it through Parliament.

36) Before a Government Bill is introduced, a "Legal Issues Memorandum" must be prepared for Parliamentary Business and Legislation Committee ("PBL Committee"), the Cabinet Committee responsible for the Government's legislative programme, including departmental legal advisers'

[2] Section 19(1)(a) HRA 1998. The HRA also provides for the alternative, in s. 19(1)(b): if the Minister is not able to provide that personal assurance, he or she must state that, nevertheless, the Government wishes the House to Proceed with the Bill. In practice, s. 19(1)(b) statements have been extremely rare, and mainly used when a Government Bill is introduced to the second House following a non-Government amendment to the Bill in the first House which the Government considers to be incompatible with the Convention rights (for example a s.19(1)(b) statement was made by the minister on the Civil Partnership Bill on its introduction to the Commons following an amendment in the Lords which the Government considered to be incompatible with the ECHR).

analysis of the Bill's compatibility with the ECHR.[3] PBL Committee will expect the department to have considered the Bill's compatibility with the ECHR and to "set out the justification for any provisions that may potentially be considered to touch on Convention rights" in the Legal Issues Memorandum.[4]

37) However the Guidance also makes clear that this assessment of a Bill's ECHR compatibility is not a technical exercise to be left to departmental legal advisers at the end of the policy formation process, but should be considered by all officials throughout the policy-making process, with the help of lawyers where necessary:

> "Consideration of the impact of legislation on Convention rights is an integral part of the policy-making process, not a last-minute compliance exercise."[5]
>
> It should be standard practice, when preparing a policy initiative, for officials to consider the impact of the proposed policy on people's Convention rights. Officials therefore need awareness of the Convention rights, and of key concepts such as proportionality. Such consideration must not be left to legal advisers (though they should be involved throughout) or to a last minute 'compliance' exercise." [6]

ECHR Memoranda accompanying Bills

38) The Guidance also explains the information that the Government should provide to Parliament about its analysis of a Bill's ECHR compatibility. This has evolved significantly over the lifetime of the HRA as a result of the work of the Joint Committee on Human Rights, which since its establishment in 2000 has scrutinised legislation for ECHR compatibility and reported to both Houses of Parliament on any significant ECHR issues raised by a Bill.[7] As the Guidance makes clear, "The JCHR … is likely to examine closely the arguments put forward by the department justifying interference with a Convention right. It will also look at whether there are sufficient safeguards to ensure a proper guarantee of human rights in practice."[8]

39) When the Act first came into force in 2000 the Government gave a commitment to give an assessment of the most significant human rights issues thought to arise in each Bill. That assessment was summarised in a new standing section of the Explanatory Notes accompanying each Bill headed "Compatibility with the European Convention on Human Rights". The quality and degree of detail of the information included in the Explanatory Notes accompanying Bills was extremely variable and the JCHR pressed the Government to provide it with a much more detailed ECHR Memorandum, based on the Legal Issues Memorandum prepared for PBL Committee, minus any material protected by the Government's legal professional privilege (the Committee always respected the Government's right to legal professional privilege and never asserted that it was entitled to see the Government's legal advice in its entirety).

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[3] *Guide to Making Legislation*, para. 3.11.
[4] Para. 8.1.
[5] *Guide to Making Legislation*, chapter 12, "The European Convention on Human Rights", Key Points, p. 113.
[6] Para. 12.6.
[7] For the JCHR's approach to legislative scrutiny see Joint Committee on Human Rights, *The Committee's Future Working Practices*, Twenty-third Report of Session 2005-06 (HL 241, HC 1577), paras 18-51. For more up to date accounts of the Committee's legislative scrutiny work, see M. Hunt, *The Joint Committee on Human Rights* in A. Horne, G. Drewry and D. Oliver, *Parliament and the Law* (2013, Hart Publishing), pp. 227-233; A. Horne, in A. Horne and G. Drewry, *Parliament and the Law* (2nd ed., 2018, Hart Publishing).
[8] Para. 12.30.

40) After initial resistance, the Government eventually agreed,[9] so that the current position is that for any Bill which raises significant ECHR compatibility issues, the Government publishes a separate ECHR Memorandum which sets out in detail the Government's analysis of the ECHR compatibility of any provisions in the Bill which engage Convention rights.[10] The Memorandum is published alongside the Bill and is publicly accessible on both the department's Bill webapges as one of the Bill's overarching documents and on the relevant Bill page of the "Bills before Parliament" website as one of the Bill documents.

41) Such ECHR Memoranda therefore provide a detailed public record of the Government's assessment of which provisions in a Bill affect Convention rights and why the provisions are compatible with those rights. So when the Police, Crime, Sentencing and Courts Bill was published recently, including some controversial provisions on public protest, it was accompanied by a lengthy ECHR Memorandum setting out in detail the Government's analysis of its ECHR compatibility. Even the Coronavirus Bill, which was emergency legislation introduced in great haste, was also accompanied by a detailed ECHR Memorandum setting out the Government's ECHR assessment.

Embedding the ECHR in the executive and the legislature

42) One of the great strengths of the current HRA framework is that its overall scheme has facilitated the sharing of responsibility for the protection of human rights between the executive, the judiciary and Parliament. The machinery which has been established to give practical effect to the HRA has resulted in much greater engagement with human rights by both the executive when making policy and the legislature when scrutinising legislation giving effect to that policy.

43) Far from judicialising the policy-making process, this has brought human rights considerations into the heart of policy making in a way which makes it less likely that policies will be designed in a way which has not properly considered, and therefore risks being incompatible with, ECHR rights. ECHR expertise has been built up in the Government Legal Department, non-lawyer policy makers have become literate in ECHR concepts and mechanisms have been devised to ensure that Convention rights are a central consideration when making law and policy.

44) And, far from marginalising Parliament or diminishing its role, the HRA has given it an important new role in scrutinising legislation for compatibility with Convention rights, making it less likely that laws will be passed which have overlooked their implications for Convention rights and risk breaching them.

45) The willingness of Government departments to produce detailed ECHR Memoranda accompanying Bills, and the generally high quality of those memoranda, strongly suggests that the Civil Service does not consider that the HRA has "over-judicialised" policy making. Rather, the rigorous human rights scrutiny which all Bills receive from Parliament's JCHR has helped to embed detailed and careful consideration of human rights into the policy making process. That, in turn, not only makes it less likely that Bills will accidentally infringe ECHR rights, it also makes it more likely that any balances struck by the law in question will be respected by the courts, as being within the margin of appreciation.

46) The importance of Convention rights being properly considered in both policy making and law making, and the relevance of that consideration to the state's ability to invoke the margin of

[9] For a more detailed account of the shift from inadequate explanations of ECHR compatibility in Explanatory Notes to more detailed and better quality ECHR Memoranda, see M. Hunt, above, n. 6, at 230-233.
[10] As the *Guide to Making Legislation* makes clear, at para. 11.120, a separate ECHR Memorandum is only required "where significant ECHR issues arise". If the department considers that the Bill's provisions do not engage Convention rights, or that any ECHR issues are not significant, this can be dealt with in the Bill's Explanatory Notes, so the requirement to prepare an ECHR Memorandum is not disproportionate.

appreciation if laws are challenged, is neatly demonstrated by contrasting the decisions of the European Court of Human Rights in *Hirst v UK* and *Shindler v UK*. Both cases concerned challenges to restrictions on the right to vote: in *Hirst*, the restriction was the ban on convicted prisoners voting, while in *Shindler* the restriction was the loss of non-resident citizens' right to vote after fifteen years of non-residence.

47) The right to vote occupies an important place in the ECHR, as it is the foundation of democracy, but it is a qualified right which is capable of limitation by proportionate restrictions and the European Court of Human Rights accords a wide margin of appreciation to States when deciding what is a proportionate restriction. In *Hirst*, as is well known, the Court held the ban on prisoner voting to be a disproportionate restriction on the right to vote: the position adopted by the legislature was to be accorded little weight because "there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. … It cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote."[11]

48) In *Shindler*, by contrast, the Court found the restriction on non-resident citizens' right to vote to be proportionate. The crucial difference between the two cases was that, whereas in *Hirst* there was no evidence that Parliament had reconsidered the longstanding ban on prisoners voting in the light of contemporary standards on the treatment of prisoners, in *Shindler* there was "extensive evidence … to demonstrate that Parliament has sought to weigh the competing interests and to assess the proportionality of the fifteen year rule."[12] The question had been examined in detail by parliamentary committees, consulted on, and debated in Parliament on several occasions. The Court made clear that that review by Parliament is taken into consideration by the Court for the purpose of deciding whether a fair balance has been struck between competing interests.

Should the s.3/s.4 HRA framework be changed?

49) The Review's Call for Evidence asks whether any change should be made to the framework established by ss. 3 and 4 of the HRA.

The common law interpretive obligation

50) When considering whether ss. 3 and 4 have unbalanced the respective roles of the courts, Government and Parliament, it is important to recall the legal context into which those provisions were born. Section 3 was a statutory acceleration of a common law trend – towards the recognition of a strong interpretive obligation on courts to interpret national law, whether statutes or common law, compatibly with international human rights law.[13] The courts were moving steadily in this direction anyway by the time the Human Rights Act was enacted in 1998, by developing the common law presumption that Parliament always intends to legislate compatibly with its international obligations into a presumption of particular force when the international law in question was human rights law such as the ECHR.

51) The statutory interpretive obligation in s. 3 HRA was therefore grafted on to an already recognised common law interpretive obligation, which has not only continued to apply in

[11] *Hirst v UK*, at para. 79.
[12] *Shindler v UK*, at para. 117.
[13] See M. Hunt, *Using Human Rights Law in English Courts* (1997, Hart Publishing), esp. chapters 1 and 8.

relation to other unincorporated human rights instruments, such as the UN Convention on the Rights of the Child, but has also arguably grown stronger since the enactment of s. 3.[14]

52) By enacting ss. 3 and 4 HRA Parliament was therefore bringing greater legal clarity to what was already in 1998 a rapidly evolving common law interpretive obligation in relation to human rights. It provided a clear statutory basis for the courts applying such an interpretive approach to rights protection in relation to ECHR rights, thereby giving that judicial development greater democratic legitimacy. And by including the qualification "so far as it is possible to do so", it made clear that there were limits to how far the courts could take the interpretive obligation consistently with the nature of their constitutional function as judges, not legislators. By introducing the new device of the declaration of incompatibility in s. 4, to be used where a compatible interpretation is not possible, the Act greatly improved the increasingly uncertain position at common law. The two sections together created a coherent scheme which preserved Parliament's constitutional responsibility to make changes to the law which go beyond the judicial function of interpretation.

Have the courts taken s. 3 too far?

53) The Review's Call for evidence asks if there are instances where the courts have used the interpretive obligation in s. 3 HRA to interpret legislation in a manner inconsistent with the intention of the UK Parliament in enacting it.

54) During 13 years as the JCHR's Legal Adviser the author can think of only one occasion on which the Committee felt that the courts had adopted an ECHR compatible interpretation of legislation under s. 3 when a declaration of incompatibility would have been preferable. That was in relation to the decision of the House of Lords in *AF*, which concerned the compatibility of certain aspects of the control orders regime with the right to a fair hearing.[15] The House of Lords in *AF* held, in the light of the recent judgment of the Court of Human rights in *A v UK,* that basic fairness requires that people who are subjected to control orders are given sufficient information about the allegations against them to give effective instructions to those representing them. The House of Lords did not, however, declare the relevant provisions incompatible with Article 6 ECHR under s. 4 HRA, preferring to read words in to the statutory scheme, pursuant to the s. 3 interpretive obligation, in order to render the law compatible.

55) The Joint Committee, which had repeatedly asked the Government to amend the Prevention of Terrorism Act 2005 and the Civil Procedure Rules to make it clear on the face of the legislation that the absolute requirement of non-disclosure in the legal famework is in fact qualified by the right of the controlled person to a fair hearing, made clear its view that a declaration of incompatibility would have been preferable. It said:[16]

> 82. As a result of the decision of the House of Lords in AF v Home Secretary, the relevant statutory provisions in the Prevention of Terrorism Act 2005, and procedural rules in Part 76 of the Civil Procedure Rules, now say one thing but mean another. They say, on their face, that there is an absolute requirement of non-disclosure of material the disclosure of which would be contrary to the public interest and that the overriding objective of the civil procedure rules, namely doing justice, is subject to the requirement not to disclose material contrary to the public interest. They mean, after AF, effectively the opposite: that the interests of justice

[14] See eg *Osborne v Parole Board*

[15] *AF v Secretary of State for the Home Department* [2009] UKHL 28.

[16] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010* (2010, HL Paper 64. HC 395), para. 82

> trump the public interest in non-disclosure. The statute and the rules do not require the Secretary of State to provide a statement of the gist of any closed material on which fairness requires the controlled person have an opportunity to comment. After AF, that duty must be read into the legislation.

56) The concern of the Committee here, however, was not that the court had gone against the intention of Parliament when it enacted the provision, but the legal uncertainty that was caused by the legal framework saying one thing but having to be read as meaning another because of the judgment of the House of Lords in *AF*. It was preferable, in the Committee's view, for Parliament to be given the opportunity to amend the framework in light of the judgment in the way the Committee had long been recommending, to make absolutely clear on the face of the legislation the safeguards that apply, rather than them having to be read in by courts in the light of the decisions of the European Court of Human Rights and the House of Lords.

57) Apart from this one case, the author does not recall any other occasion between 2004 and 2017 on which the Committee was of the view that the courts had taken the s. 3 interpretive obligation too far.

58) Nor does there appear to have been any clamour more generally in Parliament about its intentions in legislation having been frustrated by the courts' use of the s. 3 interpretive obligation. A case which is frequently referred to by critics of s. 3 HRA is *Ghaidan v Godin-Mendoza*,[17] in which the House of Lords held that the word "spouse" in the Rent Act had to be and could be interpreted as including same sex couples in order to avoid incompatibility with the right not to be discriminated against in the enjoyment of private life under Articles 8 and 14 ECHR. A search of Hansard throws up only one reference to the *Ghaidan v Godin-Mendoza* decision, in a speech by the promoter of a Private Member's Bill, the Human Rights Act 1998 (Repeal land Substitution) Bill in 2013.

59) In practice, s. 3 was not infrequently relied on by the Government itself as a reason for not providing more explicit safeguards in Bills. It was not uncommon for the JCHR to ask the Government why it was not including more specific safeguards in a Bill and for the Government's response to be that it was not necessary because the courts will interpret it compatibly pursuant to the interpretive obligation in s. 3. Indeed this approach is reflected in the *Guide to Making Legislation* which advises

> "Legislative provisions should contain appropriate safeguards and limitations to ensure compliance with the Convention rights; but these should not repeat the more general safeguards already guaranteed by the Human Rights Act and the Convention rights."[18]

60) In short, viewed from a parliamentary perspective, there does not seem to be a real problem with s. 3 that needs to be dealt with and there is therefore no case for it being either repealed or amended.

Should there be more declarations of incompatibility?

61) The Review's Call for Evidence also asks whether declarations of incompatibility should 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?"

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[17] [2004] UKHL 30.

[18] *Guide to Making Legislation*, chapter 12, p. 113.

62) It is a little difficult to discern the meaning of considering a declaration of compatibility "as part of the initial process of interpretation." The clear scheme of ss. 3 and 4 is that courts should first strive to interpret provisions in primary and subordinate legislation in a way which is compatible with Convention rights, and only resort to a declaration of incompatibility if such an interpretation is not possible. A declaration of incompatibility, in other words, is an alternative to an interpretive approach where the latter is not possible. The question therefore seems to be another way of asking whether the interpretive obligation in s. 3 should be repealed.

63) Repealing s. 3 and leaving only the option of a declaration of incompatibility would not be desirable. It would limit the courts' interpretive function in relation to Convention rights, which would weaken the UK's application of the principle of subsidiarity. It would also inevitably result in a significant increase in the number of such declarations, which, given that they do not constitute an effective remedy, would weaken the HRA's substantive protection of Convention rights. There is no evidence of any appetite on Parliament's part to consider more frequently how incompatibilities with Convention rights should be addressed, rather than trust the courts to resolve them interpretively where it is possible for them to do so consistently with the nature of their judicial, as opposed to legislative, function.

Judicial approach to incompatible subordinate legislation

64) The Review's Call for Evidence asks whether any change is required to the way in which, under the current framework, courts and tribunals have dealt with provisions of subordinate legislation that are incompatible with Convention rights.[19]

65) The interpretive obligation in s. 3 HRA applies to subordinate legislation as well as primary legislation, and courts and tribunals are therefore required to read and give effect to subordinate legislation in a way which is compatible with Convention rights "so far as it is possible to do so".

66) If it is not possible to read a provision of subordinate legislation compatibly with Convention rights courts and tribunals do one of two things.

67) At the level of the High Court or above, the court may make a declaration of incompatibility if satisfied that the primary legislation in question prevents removal of the incompatibility.

68) Or, if the parent Act does not prevent removal of the incompatibility, the court or tribunal may find the provision in the subordinate legislation to be *ultra vires* (beyond the powers of) the parent Act, because the maker of subordinate legislation is required to act compatibly with the Convention rights and so does not have the power to make subordinate legislation that is incompatible with Convention rights. It does not automatically follow from a finding of *ultra vires* that the relevant provision in the subordinate legislation is quashed: that might be the remedy given by the court, but it could equally be the subject of a declaration, leaving it to the minister to decide how to change the subordinate legislation in a way which removes the incompatibility.

69) Some commentators argue that treating subordinate legislation that is incompatible with Convention rights as *ultra vires* and therefore capable of being quashed by courts is inimical to both democracy and the Rule of Law because it allows the courts to strike down democratically agreed laws when they cannot do the same with primary legislation, and that possibility causes great legal uncertainty.

[19] Theme Two question c). Question b), concerning the remedies that should be available in relation to a particular type of subordinate legislation – designated derogation orders – is addressed below.

70) Viewed from the perspective of Parliament, however, there seems very little if anything to be concerned about in the way in which courts and tribunals treat incompatible subordinate legislation.

71) First, instances of subordinate legislation being quashed for being incompatible with Convention rights are few and far between compared to the volume of such legislation. The Public Law Project recently found only 14 examples of subordinate legislation being successfully challenged on HRA grounds in the High Court and above between 2014 and 2020, out of a total of literally thousands of pieces of subordinate legislation made during that period.

72) Second, with the exception of the narrow category of remedial orders (see further below), subordinate legislation does not get routinely scrutinised for ECHR compatibility by Parliament.

73) Section 19 HRA does not apply to subordinate legislation, so there is no legal requirement that the minister introducing subordinate legislation must formally certify their satisfaction that the legislation is compatible with Convention rights. Instead, it is regarded as "good practice" that a minister inviting Parliament to approve a draft statutory instrument or a statutory instrument subject to affirmative resolution "should volunteer his or her view regarding its compatibility with the Convention rights", and should always do so in relation to secondary legislation which amends primary legislation.[20] The minister's view is set out in the Explanatory Memorandum accompanying such Statutory Instruments, but such statements fall far short of the detail that is contained in the ECHR Memoranda which now routinely accompany Government Bills. There is no equivalent practice that the Explanatory Memoranda accompanying negative resolution procedure instruments should even contain such minimal information about the instrument's ECHR compatibility.

74) Nor does the JCHR systematically scrutinise delegated legislation. It might occasionally scrutinise a particular piece of delegated legislation (eg. its reports on the retrospective changes to the Immigration Rules affecting highly skilled migrants in 2007[21]) but this is the exception not the rule. Nor do the other parliamentary committees which scrutinise subordinate legislation, the Joint Committee on Statutory Instruments ("JCSI") and the House of Lords Secondary Legislation Committee systematically scrutinise subordinate legislation for ECHR compatibility.

75) The fact that subordinate legislation is neither routinely accompanied by a detailed Government assessment of its ECHR compatibility nor routinely scrutinised for such compatibility by Parliament makes judicial scrutiny of such legislation all the more important. When courts scrutinise such legislation for ECHR compatibility it is often the first time such independent scrutiny has taken place outside of the executive branch. Any argument that the courts should respect the democratic branches' assessment of the legislation's ECHR compatibility is correspondingly weakened and it is entirely appropriate, and in keeping with the UK's constitutional traditions, that courts have the power to quash provisions of subordinate legislation that are incompatible with Convention rights.

76) **No change is therefore required from the current approach by courts and tribunals to incompatible subordinate legislation. However, Parliament could, if it wished, devise ways of ensuring that there is better parliamentary scrutiny of the ECHR compatibility of subordinate legislation**. For example, it could require the equivalent of a s. 19 statement in relation to subordinate legislation and its committees could request the equivalent of a Human Rights Memorandum in relation to SIs which engage ECHR rights. The JCHR would not have

[20] Statutory Instrument Practice, 5th edition (2017), paras 2.12.1-2.12.2.

[21] Joint Committee on Human Rights, *Highly Skilled Migrants: Changes to the Immigration Rules*, Twentieth Report of Session 2006-07 (HL Paper 173, HC 993).

capacity to conduct such systematic scrutiny, but the committees which scrutinise subordinate legislation perhaps could, with the benefit of appropriate legal expertise in human rights law.

77) Over time, if such enhanced parliamentary scrutiny of the human rights compatibility of subordinate legislation proved effective in identifying and dealing with potential ECHR compatibility problems, courts would be likely to be more deferential towards delegated legislation which is challenged for being incompatible with ECHR rights. Under current arrangements, however, such deference is usually not warranted.

Remedies in relation to designated derogation orders

78) The Review asks what remedies should be available to domestic courts when considering challenges to designated derogation orders made under s. 14(1) HRA?[22]

79) This question is really a specific instance of the general question asked about whether any change is required to the approach under the current framework whereby courts might quash provisions of subordinate legislation that are incompatible with Convention rights.

80) A designated derogation order is subordinate legislation made by the Secretary of State under s. 14(1) HRA designating, for the purposes of the Act, any derogation by the UK from the Convention.

81) If such subordinate legislation is found by the courts to be *ultra vires*, it can be quashed – in other words, invalidated, leaving it with no legal effect. Indeed this was the fate of the one designated derogation order that has ever been made under s. 14(1) HRA, the Human Rights Act 1998 (Designated Derogation) Order 2001[23] which was quashed by the House of Lords in 2004 in the *Belmarsh* case.[24]

82) Critics of the HRA have argued that courts should not have the power to quash derogations from Convention rights, and that legislation should prevent that possibility. This would require the HRA to be amended, for example by providing that only a declaration of incompatibility can be given if a court determines that a designated derogation order is incompatible with the Convention.

83) There are four main reasons why courts should continue to have the power to quash designated derogation orders.

84) First, it is in keeping with the UK's longstanding constitutional tradition of judicial control of illegality. A designated derogation order is subordinate legislation, and if the strict conditions for derogation from Convention rights in Article 15 ECHR are not satisfied, the order is *ultra vires*.

85) Second, by their very nature it is highly likely that designated derogation orders will not receive adequate parliamentary scrutiny when they are made, which will be in the midst of what the Government considers to be a public emergency threatening the life of the nation. Indeed this is demonstrated by the one example of a designated derogation order made to date, in the immediate aftermath of 9/11. The derogation order in respect of the derogating provisions in the Anti-Terrorism, Crime and Security Act 2001 was to enable the detention of foreign nationals who were suspected terrorists but could not be deported. The derogation order received very little parliamentary scrutiny. It was laid before Parliament on 12 November 2001 and came into

[22] Theme Two question b).
[23] SI 2001 No. 3644.
[24] *A v Secretary of State for the Home Department* [2004] UKHL 56.

effect the following day. The JCHR reported[25] on 14 November and doubted whether the derogating measures were strictly required by the exigencies of the situation as required by Article 15 ECHR, but the Committee had not had time to reach a fully informed and considered view.

86) The derogating provisions were subsequently found to be incompatible with the Convention by both the Judicial Committee of the House of Lords and the European Court of Human Rights because, although both courts accepted that there was a public emergency threatening the life of the nation, the measures taken were disproportionate in that they discriminated unjustifiably between nationals and non-nationals when the threat from terrorism came from both. The House of Lords quashed the designated derogation order and gave a declaration of incompatibility in relation to the derogating provisions in the derogating statute. Significantly, the main ground on which the derogation order was quashed by the House of Lords had not been raised during Parliament's hurried scrutiny of the designated derogation order.

87) There have been no further designated derogation orders since the one that was quashed by the House of Lords and found to be incompatible with the Convention by the European Court of Human Rights. When the Government announced, however, in October 2016, that it intended to derogate from the ECHR before embarking on significant future military operations overseas, the JCHR wrote to the Secretary of State asking for a detailed memorandum explaining the reasons why a derogation from the ECHR is considered necessary, including the evidence which the Government says demonstrates the problem to which derogation is the solution. The Secretary of State for Defence replied to the Committee saying that many of the Committee's questions could not be answered because the Government had only announced an intention to derogate, not an actual derogation, and was reluctant to engage in hypothetical debate.

88) The Committee therefore launched an inquiry into the Government's proposed derogation in December 2016. The Committee pointed out that the circumstances in which the Government would bring forward an actual derogation, in the context of a proposed significant military operation overseas, would not be conducive to the sort of careful and detailed scrutiny that Parliament would want to carry out of the Government's reasons for derogating. Submissions were invited on a number of issues, including what evidence supports the Government's claims about the necessity of derogating, whether the substantive requirements of Article 15 ECHR are likely to be satisfied in the circumstances in which the Government intends to derogate, and whether there were any alternatives to derogating which would achieve the Government's objective. The inquiry was discontinued when Parliament was dissolved for the 2017 General Election, and has not been resumed.

89) This recent episode shows the great difficulty of ensuring that Parliament has the opportunity to scrutinise properly the justifications for proposed derogations from Convention rights, from the difficulty in obtaining the information it requires from the Government to be able to scrutinise the proposed derogation effectively through to having the time to conduct such scrutiny and to reach its own considered view about whether the derogation is justified. The fact that adequate parliamentary scrutiny is very unlikely makes it all the more important that courts have the power to quash such orders.

90) Third, while a designated derogation order is subordinate legislation, it is highly likely that the operative provisions which actually derogate from Convention rights will be contained in primary legislation, which cannot be invalidated under the scheme of the HRA. Indeed this was the case in relation to the *Belmarsh* case itself, in which a declaration of incompatibility was

[25] Joint Committee on Human Rights, Second Report of Session 2001-02, *Anti-Terrorism, Crime and Security Bill*, paras 19-30.

made in relation to the relevant provisions in the derogating Act, leaving it to Parliament to decide whether and how to respond to the court's decision that the legislation was incompatible.

91) Fourth and finally, it is in keeping with the principle of subsidiarity that the validity of any derogation from the ECHR under Article 15 should be determined by UK courts first before that question is considered by the European Court of Human Rights. The UK's primary responsibility for securing Convention rights means that UK courts should be able to invalidate an unlawful derogation, and not require those whose Convention rights are breached by such an unlawful derogation to take their case to Strasbourg with all the expense and delay involved.

92) No change is therefore required from the present position whereby courts may quash designated derogation orders which are unlawful because the strict conditions for derogation have not been satisfied. However, consideration could again be given to ways of enhancing parliamentary scrutiny of designated derogation orders, for example by ensuring that a detailed memorandum accompanies the derogation order explaining why the Government considers the derogation to meet the strict conditions in Article 15 ECHR, and laying in draft the designated derogation order required by the HRA if the circumstances of the derogation permit, to give Parliament greater opportunity to scrutinise and debate the proposed derogation before it comes into effect.

Enhancing Parliament's role after court judgments on human rights

Should the remedial order process be modified?

93) The Review's Call for Evidence asks whether the remedial order process, as set out in s. 10 and Schedule 2 to the HRA, should be modified, for example by enhancing the role of Parliament?[26]

94) The question appears to presuppose that Parliament's role is diminished by the remedial order process and is in need of enhancement. During the passage of the HRA, concerns were expressed about the Act's provision for remedial orders on the grounds that these are extensive executive law-making powers including the power to amend primary legislation. It remains a commonly held view today that use of the remedial order procedure to change the law following a court judgment finding an incompatibility with ECHR rights diminishes Parliament's role and is therefore democratically suspect.

95) In fact, the way in which the remedial order process has operated in practice means that, unusually for delegated legislation, such orders receive extremely thorough and expert scrutiny by Parliament, in some respects exceeding the scrutiny that provisions in primary legislation might receive.

96) Parliament has, in the Standing Orders of each House, given the task of scrutinising remedial orders to the JCHR.[27] The JCHR's consideration of remedial orders includes whether there are "compelling reasons" for proceeding by way of remedial order rather than by ordinary legislation, and the Committee has developed detailed criteria to help it judge whether it is an appropriate exercise of the power to remove the incompatibility by way of remedial order.

97) A combination of the provisions in Schedule 2 of the HRA, the rules contained in the Standing Orders of both Houses and the practices developed by the JCHR means that remedial orders are

[26] Theme Two question e).
[27] Standing Orders of the House of Commons – Public Business 2019, SO No. 152B(2)(b) and (c); Standing Orders of the House of Lords relating to Public Business 2021, SO No. 73(1)(c).

subjected to rigorous and detailed expert scrutiny and cannot come into force until the product of that scrutiny has been properly considered by the proposer of the remedial order.

98) A non-urgent remedial order must be laid first as a proposal, which the JCHR subjects to detailed scrutiny, including, if appropriate, by issuing a public call for evidence about the proposal. The JCHR examines the proposal against a number of criteria, including whether the proposed draft order will remedy the incompatibility identified in the court judgment, and reports on the proposal, often recommending that the proposed draft be amended in specific ways to meet any concerns the Committee may have about the proposed draft. The Government is then required to respond to the JCHR's Report when it publishes the draft remedial order, which has often been changed to meet concerns expressed by the JCHR. The Committee then scrutinises the draft order itself, reporting again on it before each House has the opportunity to debate it.

99) The practical operation of the remedial order process has demonstrated its value, including the very significant role it accords to Parliament. The Government has often agreed to amend remedial orders in the light of recommendations made by the Committee.

100) One perhaps unanticipated advantage has been that the dispassionate and expert scrutiny of a remedial order by the JCHR can lead to more reflective democratic deliberation about the issues raised by a court judgment in a sensitive area than the politically charged debate that more typically characterises the passage of primary legislation. In 2010, for example, the Supreme Court declared s. 82 of the Sexual Offences Act 2003 incompatible with the right to respect for private life to the extent that it provided for indefinite notification requirements without any opportunity for independent review.[28] Both the Prime Minister and the Home Secretary made their displeasure with the Supreme Court known in Parliament in no uncertain terms, with the Prime Minister stating publicly that he would do "the minimum necessary" to comply with the judgment.

101) The proposal for a remedial order brought forward by the Government was indeed so minimalist that the Committee reached the view that it failed to comply with the judgment: it provided for a review of notification requirements but by the police, not a court. The Committee reported that the remedial order was deficient because by failing to provide for independent review it failed to remedy the incompatibility identified by the Supreme Court. Notwithstanding the political reaction to the Supreme Court's judgment, the Government accepted the Committee's recommendation and brought forward an amended remedial order which provided for access to an independent court to challenge the continued need for the notification requirements.

102) There is therefore no need to modify the remedial order process in s. 10 of and Schedule 2 to the HRA: the evidence of its actual operation shows that remedial orders receive extensive, rigorous and expert parliamentary scrutiny, more extensive in some respects than primary legislation, which often results in their improvement during the process. Parliament's role therefore does not need enhancing in this respect.

103) However, enhancing the role of Parliament generally following court judgments finding violations of human rights would indeed be desirable and there are many ways of doing this, some of which are set out in the JCHR's 2010 Report on *Enhancing the Role of Parliament in relation to Court Judgments on Human Rights*. These would be desirable in order to increase democratic engagement with what should happen following such court judgments. The Review might wish to consider, for example, whether a relevant part of Parliament, such as the JCHR, ought to have the power to initiate legislation which would remedy an ECHR incompatibility where the Government has failed to bring forward remedial legislation within a specified time.

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[28] *R (F) v Secretary of State for the Home Department* [2010] UKSC 17.

This would obviously be a matter for Parliament itself to consider but the Review might wish to consider whether such a power of legislative initiative would be desirable. It would enhance Parliament's role in the response to court judgments finding a violation of human rights and it would provide an incentive to the Government to find a solution to a problem identified by the courts within a reasonable amount of time.

The HRA's international reputation

The HRA's contribution to international human rights law

104) The Review's Terms of Reference rightly acknowledge that "the UK's contribution to human rights law is immense." As is well known, the UK was instrumental in the drafting of the ECHR, with many of the rights derived from rights long recognised in the common law tradition, and in the promotion of the ECHR, with the UK the first country to ratify the Convention in 1951.

105) Less well known is the more recent contribution to international human rights law made by the HRA itself and the machinery and practices which have grown up to give effect to the careful balance it strikes between the roles of the judiciary, the executive and the legislature.

106) When considering whether and, if so, to what extent the HRA has led to the "over-judicialisation of public administration", or drawn the courts unduly into questions of policy, the Review may wish to consider evidence of the international reputation of the UK's legal framework and its operational arrangements for protecting human rights under that framework.

107) A quick survey of such evidence reveals that it is far from the case that the UK's arrangements under the HRA are regarded internationally as undemocratic or as leading to the courts being drawn too much into deciding essentially political questions.

108) On the contrary, the evidence shows that, in a world that increasingly recognises the need for greater democratic legitimation of human rights, the UK genuinely enjoys an international reputation as a world leader in how to institutionalise a shared responsibility for human rights across all three branches of government, with various aspects of its legal framework, human rights machinery and operational practices held up as examples of international best practice.

Europe

109) The Council of Europe has repeatedly referred to the UK and the operation of its HRA as providing examples of best practice to be emulated by other European states in a number of respects, including:

- the human rights information provided by the Government to Parliament accompanying Bills;
- the effective parliamentary scrutiny of legislation for ECHR compatibility; and
- the parliamentary monitoring and scrutiny of the Government's response to court judgments finding that a law or policy is incompatible with human rights.

Examples of such recognition abound in Reports of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, and the influence of the UK's institutional and operational arrangements for giving real practical effect to the principles of shared responsibility and subsidiarity can also be seen in Recommendations from the Committee of Ministers.

110) The scheme of the HRA and the way in which it has been put into practice has also enabled the UK to take a leading role in the ongoing process of reforming the ECHR system, particularly by strengthening the principle of subsidiarity, properly understood as imposing the primary responsibility for national implementation on member states, and clarifying the nature of the margin of appreciation as, in essence, a due deference doctrine in which judicial respect for the balancing of competing interests is earned partly by the quality of the policy-making and legislative process.

111) Reviewing all the declarations that that reform process has produced, from Interlaken through to Copenhagen, the influence of the UK can be clearly seen, especially in the sections

concerning national implementation, shared responsibility, subsidiarity and the margin of appreciation. Indeed, as the JCHR documents in its Report on Protocol 15 to the European Convention on Human Rights, the amendments to the Convention made by that Protocol, including the addition of references to the principle of subsidiarity and the doctrine of the margin of appreciation to the Preamble of the ECHR, were the culmination of the UK Government's contribution to the ongoing process of reform, including the Brighton Declaration in 2012 during the UK's chairmanship of the Council of Europe. That UK influence on the European process of reform was largely possible because the UK was able to draw on and point to the way in which it was itself successfully implementing the ECHR domestically by way of the HRA.

Globally

112) The international reputation and influence of the UK's domestic human rights arrangements under the HRA as exemplars of democratic best practice in human rights protection are not confined to Europe. In 2018, the UN Human Rights Council noted a set of Draft Principles on Parliaments and Human Rights drawn up by the UN Office of the High Commissioner for Human Rights ("UNOHCHR").

113) The Draft Principles are based on the premise that parliaments have a crucial role both in ensuring governments' fulfilment of their primary responsibility for the protection of human rights and in providing democratic legitimacy to human rights norms. To that end, they set out principles and guidelines on the functions and composition of parliamentary human rights committees. The Draft Principles are the culmination of a lengthy international process which began at a conference held at the Westminster Parliament in 2012 at which the desirability of such international principles were discussed and a first draft considered, drawing extensively on the work of the Joint Committee on Human Rights in the UK Parliament.

114) The Draft Principles are likely to be considered by the UN General Assembly later this year, and may eventually become, for national parliaments, as significant as the Paris Principles have become for National Human Rights Institutions.

Conclusion

115) This evidence from outside the UK shows that, far from being seen internationally as an undemocratic system which marginalises democratic lawmakers and policy makers, the UK's legal and institutional arrangements for human rights protection have in fact been at the forefront of an international movement to democratise the protection of human rights.

116) They have inspired that movement by demonstrating how to devise the institutional means to involve the democratic branches much more directly in discussion, debate and decision-making about human rights, instead of leaving everything to courts, which risks undermining the democratic legitimacy of human rights protection in the long run.

117) That international leadership on the democratic protection of human rights has only been possible because of the careful institutional balance struck in the HRA's framework, and given life by effective operational machinery such as the Joint Committee on Human Rights.

118) As the UK renews its commitment to demonstrate global leadership on human rights and democracy,[29] - being a force for good in the world by standing up for both democracy and human rights - it should be wary of doing anything to risk that hard-earned international

[29] *Global Britain in a competitive age – The Integrated Review of Security, Defence, Development and Foreign Policy* (March 2021) para. 18.

reputation by changing its own legal human rights framework in the absence of any compelling evidence of the necessity for doing so. Rather, it should be looking for opportunities to build on the UK's international reputation for imaginative democratic protection of human rights by finding ways to further enhance the role of Parliament in that system which do not require any amendment of the internationally admired HRA.