Response to the Independent Review of the Human Rights Act's Call for Evidence

Bindmans LLP

> *"…the [Human Rights] Bill is not meant to create a substitute written constitution for this country. It is simply to ensure that our law is kept in line with Strasbourg law so that cases are dealt with more swiftly, easily and effectively…*
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> *Although we have opposed aspects of the Bill, we now wish it well and hope that it will be implemented effectively, to the benefit of the citizenry as a whole..."*
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> The Rt Hon. Sir Nicholas Lyell MP, Shadow Home Secretary welcoming the passage of the Human Rights Bill into law, Hansard (HC Debates), 21 October 1998, Vol 317, Col 1361

A. Introduction

1. The Review Panel ('the Panel') tasked with undertaking the Independent Review ('the Review') of the HRA has issued a focussed Call for Evidence on:

> *"the relationship between domestic courts and the European Court of Human Rights…* [including] *any general views how the relationship is currently working, including any strengths and weakness of the current approach and any recommendations for change"*

and

> *"the impact of the HRA on the relationship between the judiciary, the executive and the legislature…* [including] *any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change."*

2. What follows is Bindmans LLP's response. Our firm specialises in human rights work and has done so for throughout 46-year history. It is part of our core identity, one of the things we are best known for and we are considered to be one of the leading firms in the field. Four departments of the firm (Public Law, Immigration, Actions Against the Police and State, and Crime) litigate civil claims, represent parties in inquests and inquiries and defend prosecutions in cases where human rights issues frequently arise. Others sometimes handle human rights cases claims arise in their specialisms (e.g.

Family and Media). Collectively, we handle such cases at all levels of the UK Court system and cases that progress to international courts, in particular the ECtHR (though ECtHR litigation has become far less necessary, thanks to the HRA). Most of our human rights work is for claimants, but we also regularly act for interested parties, including local authorities, and interveners. We also sometimes advise and represent public authorities with functions to which the HRA applies such as schools, regulators and other standard-setting bodies.

3. Other responses to the Call for Evidence, in particular those from the Law Society (to which we have contributed) and the Public Law Project (which we have read) offer a detailed analysis of the case law relevant to the questions the Panel has posed. We agree with the position taken by both organisations and have sought, as far as practical, not to duplicate here what they have said. Our response is intended to have a practical focus, drawing directly on our experience as advisers on the legality of public authority decision-making, as litigators and as professionals who seek to ensure human rights are respected as a vital component of the Rule of Law (e.g. we regularly train other lawyers on human rights issues, several of our solicitors are involved on a voluntary basis on relevant Law Society committees, others are on the boards of charities and NGOs with an human rights focus). All of the 12 case examples below are Bindmans' cases.

4. Our response, in summary, is that:

   (1) calls for reform of the HRA should be treated with considerable caution because it was crafted cooperatively and carefully by Parliament to honour the UK's ECHR commitments, there are serious practical difficulties with enforcing human rights in the ECtHR which make effective enforcement here all the more important and the HRA's enforcement machinery means many cases are never litigated in the first place (paragraphs 5 to 12 below)

   (2) the relationship between the ECtHR and UK courts is healthy - the ECtHR is, in most cases, cautious about interfering with the decisions of the UK Courts on human rights matters and has become much more so as a result of the HRA and the UK Courts are respectful of and appropriately guided by ECtHR jurisprudence but not hampered by it when discharging their functions (paragraphs 13 to 22);

   (3) the roles of the Courts, Government and Parliament are not imbalanced in any way by the HRA and the Courts have not been drawn unduly into matters of policy because it is on the statute book - in fact, they are extremely cautious when policy is made in an area where they have no special expertise or where there is a particular need for the decision to be made by the democratically elected legislature, i.e. Parliament (paragraphs 23 to 25);

(4) there is no good reason to amend or repeal section 3 or to otherwise dilute the interpretive obligation, which the Courts regulate on a careful, principled basis and nor are any other HRA remedies being used inappropriately (paragraphs 26 to 43); and

(5) the HRA has limited, but very important, extraterritorial effect which should not be abrogated (paragraphs 44 to 46).

B. Concerns regarding the Review

5. We welcome the Government's indication, confirmed in the Review's Terms of Reference, that repeal of the HRA and changes to the ECHR articles it makes enforceable are not under consideration.

6. Instead, the Review focuses on the HRA's enforcement machinery and the relationship between Parliament, the judiciary and public bodies that are subject to HRA obligations, particularly the executive. That machinery is vital to the effective operation of the HRA and it has worked well overall. Calls for reform should be treated with considerable caution for three main reasons.

The HRA was crafted cooperatively and carefully to honour the UK"s ECHR commitments

7. First, as the quote at the start of this response illustrates, the HRA is a measure of constitutional importance, fashioned by Parliament not to change the role of the judiciary, but to enable them, with Parliament's blessing, to give effect to pre-existing rights and freedoms. The Bill was considered by a Committee of the Whole House and the eventual Act was the product of cross-party cooperation. Its purpose was to complete the legal structure required by the European Convention on Human Rights ('ECHR'). Article 1 ECHR contains an undertaking by States parties to secure the Convention rights to everyone within their jurisdiction resting primary responsibility for securing the rights with national governments, parliaments, officials and domestic legal systems. Article 13 provides that there should be an effective remedy before a national authority for those alleging violation of their rights (a right not made enforceable by the HRA as the Act itself was intended to provide the remedies required). Article 35 requires that the Court may only entertain an individual application after all domestic remedies have been exhausted. This structure envisages that both securing rights and remedying breaches are the responsibility of States parties, and that the mechanism of allowing individual (or inter state) applications to the ECtHR secondary and a safety net.

8. Any reduction in the effectiveness of the HRA would therefore undermine the legislative purpose of 'bringing rights home' by providing an effective remedy for actual and serious potential violations. The perverse effect of such amendment would be to

increase the pressure of the Strasbourg Court to adjudicate on UK law in a greater number of cases. Besides being politically unattractive, that outcome presents serious practical problems, as discussed immediately below.

Difficulties with enforcing human rights in the ECtHR

9. The practical difficulties of enforcing ECHR rights prior to the HRA's enactment should not be underestimated. They remain for cases not satisfactorily resolved the UK Courts.

10. To start with, funding ECtHR litigation is problematic. To present an ECtHR case effectively can easily cost tens of thousands of pounds. Legal aid is not available to initiate a case. When granted (subject to the UK's own strict means eligibility rules) it is very limited covering little more than travel costs. The actual costs of litigating are never awarded by the ECtHR in successful cases, only a crudely assessed proportion of them. For most ordinary litigants, then, ECtHR applications are unaffordable and access on a properly represented basis to the ECtHR is dependent on specialist lawyers being willing to undertake the work at a loss or *pro bono.*

11. The other major practical issue is delay. ECtHR cases take years to resolve, even if expedited. The total number of pending applications was 64,100 in January 2021, 62,000 of which are awaiting a judicial determination.[1] Given this backlog, human rights can easily remain unremedied, at risk or systemically breached if national enforcement mechanisms are ineffective. Whilst the ECtHR has a prioritisation procedure, priority is relative. A case will often have been decided on appeal in the UK, even at Supreme Court level, before an application initiated in the ECtHR at the same time receives any judicial attention.

Example 1: *CN v United Kingdom* [2012] ECHR 1911

The European Court of Human Rights unanimously held that there had been a violation of Article 4. UK law had not adequately criminalised domestic servitude and forced labour so there was no practical and effective protection for our client, CN and other victims. CN was forced to live as a slave in the UK from 2003 to 2006. She fled and complained to the police 2007, who failed to effectively investigate what had been done to her. She complained to the ECtHR in early 2008. Here claim was dealt with unusually quickly, but still not determined for four years. The UK Government then took some months deciding how to respond to the judgment.

The HRA and its effective enforcement machinery means many cases are never litigated

12. Our experience is that, when rights and freedoms are clearly understood by public authority decision-makers and properly taken into account in sound decisions communicated along with the reasons for them, litigation is far less likely to occur. The effective enforcement machinery of the HRA has made an internal dialogue within public authorities about human rights considerations far more common than it was 20 years ago. When we are asked to advise such authorities on their decision-making on difficult issues, human rights issues often feature. However, all of this is spurred by the knowledge that human rights breaches can be litigated and so lead to judicial scrutiny with meaningful consequences, including human rights compatible interpretations of statues under section 2, declarations in respect of policies that encourage unlawful interpretations, damages where no other remedy suffices and scope for secondary legislation to be quashed.

Example 2: advice on HSE statutory enforcement powers

The Centre for Corporate Accountability instructed us to advise pro bono on a prioritization policy for Health and Safety Executive ('HSE') statutory investigations. We and leading Counsel identified that the policy interpreted the Health and Safety At Work Act 1974 in a way that risked Article 2 procedural duty breaches. The advice was subsequently published and sent to the HSE. It took advice in turn from Rabinder Singh QC, who agreed with us. The unlawful policy was then withdrawn.

Example 3: '***R' v (1) the Chief Constable of West Mercia Police and (2) the Chief Constable of Gwent Police*** **(proposed proceedings)**

The Claimant in this case was a vulnerable adult with autism, who has subjected to modern slavery at a farm in South Wales from August 2000 to February 2013. The claim arose out of the police forces' failures to properly investigate our client's disappearance and to respond to the credible reports they received in relation to his whereabouts. We argued that the police forces failed in their positive and general duties under Articles 3 and 4 to take reasonable steps to protect our client and put protective systems in place to prevent the inhumane treatment and slavery which our client was subjected to. He was awarded significant damages and written apologies from both police forces; in doing so they acknowledged the forces' failings in protecting our client and committed to implementing policies and training to prevent the same happening again in the future.

C. Theme One: how the relationship between domestic courts and the ECtHR is currently working, including any strengths and weakness of the current approach and any recommendations for change

General views

13. Our experience as practitioners is that the ECtHR is, in most cases, cautious about interfering with the decisions of the UK Courts on human rights matters and has become much more so as a result of the HRA, hence the dramatic fall not only in applications made against the UK after it became law, but also in the proportion that succeed. Partly that is out of respect for the quality of the UK legal system, but it is a manifestation of the principle of subsidiarity and its application to allow for a margin of appreciation. Where a State party has sought to give effect to the Convention rights, and where domestic courts have had an opportunity to consider and rule on domestic measures, the ECtHR will be slow to intervene.

> **Example 4: *Animal Defenders International v UK* [2013] ECHR 362**
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> We acted for Animal Defenders which wanted to run an advertisement which was themed 'My Mate's a Primate'. The Broadcasting Advertising Clearance Centre refused authorise it because the UK's Communications Act 2003 section 321(2) bans political and industrial dispute related adverts. It was deemed to fall within the prohibition on political advertising. Animal Defenders argued this breached their ECHR article 10 right to freedom of expression. The case failed in the UK Courts. The majority of the ECtHR stressed the significance of the legislation having been tested in this way in its ruling that the legislation was ECHR compatible, holding at paragraph 117 *"[t]he Court, for its part, attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process."*

14. For their part, in general the UK Courts are appropriately mindful of ECtHR rulings and willing to shift position in the light of them whist remaining fully conscious that it is their role to apply the law and Parliament's to reform it, when appropriate.

Example 5: *R (Purdy) v the Director of Public Prosecutions* [2009] UKHL 44

Our client, Mrs Purdy, suffered from primary progressive multiple sclerosis for which there was no known cure. If a time came when her continued existence was unbearable she wanted to travel to a country, such as Switzerland, where assisted suicide was lawful assisted by his husband. They both wanted assurance that the Suicide Act 1961 could be read in a HRA compatible way with the result that that he would not be prosecuted. The House of Lords gave a unanimous judgment in favour of Ms Purdy, holding that the House was free to depart from its earlier decision in *Pretty* and to follow the ECtHR decision in that case which had found the 1961 Act interfered with some end of life decisions. Ms Purdy's right to respect for private life included a right to determine how to spend the closing moments of her life, which is part of the act of living. Her wish to avoid an undignified and distressing end to her life should be respected. The Lords required the DPP to prepare an offence-specific policy identifying the factors the DPP would take into account when deciding to exercise his discretion whether or not to prosecute, as the Code for Crown Prosecutors offered virtually no guidance in this sensitive area. The ECHR requirement of accessibility and forseeability of the law was not met in the absence of an offence-specific policy.

Importantly, Lords Hope and Neuberger emphasised that it was not part of their function to change the law in order to decriminalise assisted suicide. This was a matter for parliament. However, they went on to say that their function as judges is to say what the law is and, if it was uncertain, to clarify it.

The section 2 HRA duty to take into account

15. The Call for Evidence asks:

> *"How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?"*

16. In short, the duty has been applied pragmatically by the UK Courts and there is no case for section 2 to be amended. The default approach has been settled for more than a decade: section 2 requires consideration of what the ECtHR has said, not slavish adherence to it. A 'clear and consistent line of authority' normally at Grand Chamber level, creates a strong presumption that the UK Courts will follow it, but even that is not determinative.[2]

17. In practice, debates about conflicting lines of ECtHR authority are uncommon. The vast majority of human rights cases involve Courts and Tribunals applying well established ECtHR and aligned domestic legal principles to interpretation of statutes, exercise of

discretionary powers and the facts of either form of case, as required by sections 2 and 6 HRA.

Example 6: *MA and others v Secretary of State for the Home Department*, unreported

Our clients were minor brothers of AA, a refugee in the UK. RA was his wife. They are all members of the Berti clan from Darfur, Sudan, and applied to be reunited with AA in the UK. The immigration rules make provision for spouse and minor children to be reunited with a refugee in the UK. The brothers did not meet the requirements but we applied for them to be granted entry clearance by discretion, outside the Rules but in human rights grounds, because RA, the spouse, could not relocate to the UK to join her husband if the children did not also come, because there was no other adult to care for them. The appeal was allowed on Article 8 ECHR grounds only. Had the tribunal not been able to apply ECtHR case law fully to the facts, the children and wife would have remained living in a camp in Darfur, in extremely poor conditions without electricity or safe drinking water, subjected to regular attacks.

Example 7: *NS and MLF v Secretary of State for the Home Department*, unreported

NS and MLF were husband and wife, Iranian nationals who at the time of their first application were in their late 70s. Both their adult children lived in the UK and were British citizens and they had travelled here regularly for decades to visit. However, their health had gradually deteriorated - NS had vascular dementia and MLF suffered from a number of physical health problems - and when this firm applied for them to be granted leave to remain outside the immigration rules on Article 8 ECHR grounds in 2014.. The application was made on the basis that they needed to remain in the UK to be supported by their children, one of whom, a GP lived nearby. Their application was refused and they appealed on human rights grounds only. Their appeal was allowed on Article 8 grounds and they were able to remain in the UK with their adult children and extended family.

Example 8: *Matthew Adams and others v Police Constable of Gloucestershire Police* (2013)

This was a claim for declaration and HRA damages taken forward when ADR was refused by the police force involved. The claimants were three coach loads of protestors who set out from Euston to travel to Fairford Military Aerodrome with the intention of protesting against the work in Iraq and the use of a British base by the

United States Airforce for the purposes of launching a bombing mission in Iraq. The Protestors were stopped by the police at Lechlade, told to leave the coaches and searched and then escorted back to London without being permitted to march. The Court found that the case engaged Articles 10 and 11 of the ECHR and has awarded significant damages to each of the lead Claimants. HHJ Mitchell's judgement contained a number of coruscating criticisms of the police's actions, for example, he found *"all of those who gave evidence expressed that they wished to cooperate so that the police could do their job and then they could be on the way to their protest at RAF Fairford. In my judgment that was undoubtedly the case".*

Margin of appreciation

18. The Call for Evidence then asks:

> *"When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?"*

19. It is important to distinguish between the margin of appreciation and the concept of deference applied in domestic law. The first is about the division of responsibility between the ECtHR and the domestic authorities, including the courts. The ECtHR allows states a margin of appreciation to take into account the differences in domestic legal systems and circumstances across different ECHR signatory states. Strictly speaking, this is no concern of domestic courts. Deference, however, is about the roles of the different branches of government in a State party. It is about relative institutional competence. Judges are prepared to interfere more in areas in which they are competent (e.g. civil and criminal justice) and less in areas of social policy.

Judicial dialogue

20. Next the Call for Evidence asks:

> *"Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?"*

21. We believe such dialogue tales place and works well. Example 5, *R (Purdy) v the Director of Public Prosecutions* [2009] UKHL 44 illustrates this in action. Similarly, Example 12

below, *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69 was taken forward as *Chong v UK* [2018] ECHR 802. The ECtHR took the opportunity to resolve a dispute within the judges of the UL courts about contractor authorities on the earliest date on which investigatory duties arose.

22. However, as things stand, this process depends on cases reaching the ECtHR and being determined which may be impractical or delayed or the reasons given above at paragraphs 9 to 11. We think there would be benefits to facilitating judicial dialogue through the advisory opinion mechanism in Protocol 16. Applications for such opinions are likely to be much quicker than the making of an individual application to the ECtHR because the domestic courts will have found and stated the relevant facts and arguments, and the documentation will have been assembled. It could also give the government access to the ECtHR which it would not otherwise have in cases where it lost in the domestic court. The government could restrict the power to seek opinions to, for example, the Court of Appeal and/or the Supreme Court.

D. Theme Two: how the roles of the courts, Government and Parliament are balanced in the operation of the HRA

General views

23. The Call for Evidence states:

> *"We would welcome any general views on how the roles of the courts, Government and Parliament are balanced in the operation of the HRA, including whether courts have been drawn unduly into matters of policy. We would particularly welcome views on any strengths and weakness of the current approach and any recommendations for change."*

24. Our view is that the roles of roles of the courts, Government and Parliament are not imbalanced in any way by the HRA. Parliament makes the law, including the HRA itself. The Courts apply it, including by holding the executive to account. None of this is unconventional and it long predates the HRA. We disagree that the Courts have been drawn unduly into matters of policy. In fact, they are extremely cautious when policy is made in an area where they have no special expertise or where there is a particular need for the decision to be made by the democratically elected legislature, i.e. Parliament.

Example 9: *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38

Mr Nicklinson suffered a severe stroke and became paralysed from the neck down. He described his life following the stroke as a living nightmare and sought a declaration from the Courts that it would be legal for a doctor to assist in his suicide or that the law on assisted suicide incompatible with Article 8 ECHR. The Supreme Court unanimously found they had the authority to consider the HRA-compatibility of the statute, but by a majority refused the declarations sought because, in their view, the question was one that Parliament was in a much better position than the courts to assess and determine. The same reasoning was restated and applied in *R (Newby) v The Secretary of State for Justice* [2019] EWHC 3118 (Admin)

25. However, the HRA, particularly section 3, allows the Courts to interpret legislation purposively and in its contemporary context, as was Parliament's intention.

Example 10: *Ghaidan v Godin-Mendoza* [2004] UKHL 30

Mr Mendoza lived with his partner Mr Wallwyn-James in a flat in west London, of which Mr Wallwyn-James had a statutory tenancy. On Mr Wallwyn-James's death, the landlord sought possession. Mr Mendoza claimed that he was entitled to succeed to the statutory tenancy under statutory provisions that applied to a 'spouse', a concept Mr Mendoza argued extended to a same-sex partner when read compatibly with Article 8 ECHR. The Lords broadly agreed on the principles to be applied in relying on section 3. All accepted that Parliament had intended to impose a broad duty to do everything possible to achieve compatibility through interpretation, with declarations of incompatibility being a remedy of last resort, to be made only rarely. Section 3 was not limited to cases where a statutory provision is ambiguous - it comes into play in any case where interpretation using normal principles would lead to breach of ECHR rights. Lord Nicholls explained that *"once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery."* Two clear limits were identified. wo limits. First, compatible interpretation is not possible where it is inconsistent with a fundamental feature of the scheme of the legislation in question. Secondly, compatible interpretation would be impossible where the legislation in issue had wide ramifications, raising policy issues ill-suited for determination by the courts or court procedures. Neither presented a bar in this case. The legislation could be interpreted to align the statute with ECHR obligations and was, entitling Mr Mendoza to the tenancy.

Sections 3 and 4 of the HRA

26. Next, the Call for Evidence poses a general question and then several specific one. First, it asks:

> *"Should any change be made to the framework established by sections 3 and 4 of the HRA?"*

27. No, there should not be changes. Sections 3 and 4 give proper enforceable effect to ECHR rights which was Parliament's intention in enacting the HRA. Changes would weaken human rights protection and create legal uncertainty.

Permissibility of interpretations contrary to Parliament's intention

28. The first specific *questions* about section 3 are:

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

29. Yes. Legislation has sometimes (though not often) been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it. For instance, that happened in Example 5 above, *Ghaidan v Godin-Mendoza* [2004] UKHL 30. As explained there, however, in enacting the HRA, Parliament had authorised modern day, ECHR compatible interpretation.

30. This predictable and predicted outcome of the HRA does not mean section 3 should be amended or repealed. It should not. That would have undesirable consequences.

31. First, all section 3 cases would, in future, lead to section 4 declarations of incompatibility. Unless Parliament chooses to remedy the identified incompatibility (whether through a remedial order or otherwise) it remains unaddressed unless and until a case is take to the ECtHR (notwithstanding the practical difficulties identified at paragraphs 10 and 11 above), succeeds and that prompts legislative change. The declaration of incompatibility means the individual themselves has no effective remedy for a human rights breach,[3] so the entire statutory scheme is undermined.

32. Secondly, this would have two possible outcomes, neither attractive. One would be an increase in ECtHR applications in cases like CS's (Example 1) where redress beyond a declaration is needed for just satisfaction. The alternative would be more declarations being made, highlighting human rights breaches, but leaving Parliament to deal with

them if and when it saw fit. The result would likely be yet more litigation given constraints on Parliamentary time.

Retrospective effect of amendments to, or repeal of, section 3

33. The Call for Evidence then asks:

> *"If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?"*

34. We do not believe section 3 should be amended or repealed. It would be a near impossible task to identify previous section 3 interpretations adopted by the courts over more than two decades and legislate restore the status quo ante. In any event, had Parliament wanted to legislate to that end, it could have done so in the past.

Declarations of incompatibility

35. Next, the Call for Evidence asks:

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

36. It is difficult to see how a change if this kind would work and, to the extent it did, the HRA's effectiveness would be blunted to some degree. Parliament's clear intention in enacting the HRA was that declarations of incompatibility should be a last resort and an ECHR compatible interpretation, driven by section 3 HRA, should be the norm. The then Lord Chancellor (Lord Irvine) and Home Secretary observed in the Lords Debates *"in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility*" (Hansard (HL Debates), 5 February 1998, Col 840 (3rd Reading)). Similarly, the Home Secretary stated in the corresponding Commons Debates that "*We expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention*" (Hansard (HC Debates), 16 February 1998, Col 778 (2nd Reading)). The thinking behind this was that section 3 provides an immediate and effective remedy for the individual. Take Example 7: *Ghaidan v Godin-Mendoza* [2004] UKHL 30. Were there no section 3 ECHR compatible interpretation open to the Court, Mr Mendoza's position would not change dispute success in his case. He would not succeed to the tenancy. Even were his case taken to the ECtHR, he would not secure a remedy as effective as that which the Court could, and did, grant.

37. In practice, declarations of incompatibility are rare and may demand a series of legislative and kinked policy steps, all of which take time, creating the risk of further human rights breaches and legal uncertainty in the meantime.

> **Example 11: *R (Miranda) v Secretary of State for the Home Department* [2016] EWCA Civ 6**
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> Schedule 7 of the Terrorism Act 2000 loosely defined 'terrorism' and allowed seizure of journalistic material at airports that related to it. This was challenged by Bindmans' client David Miranda who had material seized when traveling to meet his spouse. Allowing the judicial review, the Court of Appeal went on to hold that police powers under Schedule 7 are incompatible with Article 10 ECHR because they did not provide effective protection for the basic rights of journalists and those who work with them. The judgment also provided an important clarification of the definition of terrorism, overturning the High Court's ruling that acts of lawful political activity that unintentionally and inadvertently endanger life may constitute terrorism. The Court's judgment concerned Schedule 7 as it was at the time of the Miranda examination, which took place in August 2013. Since that time, Schedule 7 has been amended, as has the Schedule 7 Code of Practice for Examining and Review Officers. Paragraph 40 of the Code now states: 'examining officers should cease reviewing, and not copy, information which they have reasonable grounds for believing is subject to legal privilege, is excluded material or special procedure material, as defined in sections 10, 11 and 14 of the Police and Criminal Evidence Act 1984 (PACE)'. Section 11(1)(c) of the Police and Criminal Evidence Act 1984 includes journalistic material within the meaning of 'excluded material'.

Designated derogation orders

38. The Call for Evidence then asks:

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

39. We have not encountered this issue in practice. However, designated derogation orders should be open to challenge on conventional public law bases.

Dealing with subordinate legislation that is not ECHR compatible

40. The Call for Evidence then asks:

> *"Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?"*

41. The Public Law Project's research, discussed in its response to the Panel, indicates that quashing subordinate legislation on this basis is very unusual. That accords with our own experience. Generally conventional declarations are made, allowing the Government time to amend the legislative scheme and avoid a lacunae. Quashing Orders are far more commonly granted when subordinate legislation is challenge on conventional public law grounds, such as lack of vires. We believe there is no case for change, less still a compelling one.

Remedial Orders

42. The Call for Evidence then asks:

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

43. The process is non-mandatory and has been used a limited number of times, through increasingly more commonly. The primary disadvantage is that it involves using secondary legislation to amend statute, so almost inevitably there will be less Parliamentary scrutiny than when remedial changes are made through a Bill. However, this has the advantage of allowing for remedial action to be taken quicker, depending on Government will. Given remedial action is already slow, we consider this tool remains worthwhile.

Extraterritoriality

44. The Call for Evidence asks:

> *"In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?"*

45. The extraterritorial application of the HRA has been developed in a series of cases primarily involving the actions of British troops. The principles are now clear. The UK must either have effective control over people and territory, be exercising public powers

to a sufficient degree, or both for HRA obligations to apply, most significantly Article 2 and 3 ECHR investigative duties. The Government has already set out to limit the application of these principles with the Lords debates Overseas Operations (Service Personnel and Veterans) Bill. The Courts have already imposed limits, however, stressing that such obligations will only extend to what is practical and will not subsist indefinitely.

Example 12: *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69

Scots Guards were deployed to Selangor, then part of colonial Malaya, to help tackle insurgent activity. On arrival at Batang Kali village in December 1948, they surrounded it, questioned villagers at gunpoint and, the following morning, killed all but two of the unarmed male inhabitants. The killings were described as a military victory at the time and the official account that they were necessary and lawful was maintained for decades, despite six of the soldiers involved confessing to murder in 1970 and further evidence of culpability and emerging over the next 40 years. Our clients argued that Article 2 ECHR demanded an adequate investigation in the form of a public inquiry because new evidence had come to light reviving an investigatory duty. The Supreme Court disagreed, despite grave concerns about what had happened (Lord Kerr, described the case as *"shocking"* adding that the *"overwhelming preponderance of currently available evidence"* showed "*wholly innocent men were mercilessly murdered and the failure of the authorities of this state to conduct an effective inquiry into their deaths";* Lord Neuberger, commented *"the evidence which first came to light in late 1969 and early 1970 plainly suggested that the Killings were unlawful"*).

Notably, all three UK courts that dealt with the case found the Scots Guard's actions were caught by the principle of extraterritoriality, despite the Government arguing otherwise. However, the majority of the Supreme Court concluded that, because the killings had taken place before the ECHR right of individual petition, the Article 2 duties did not apply. Further, even if they had, the majority concluded that there should have been a challenge in 1970 when the confessions were made.

46. Our view is that the UK should be accountable for the exercise of significant power, and subject to the Rule of Law, wherever its actions and failures breach rights. The cases where investigatory duty breaches have been identified, notably in Iraq and Afghanistan, have often prompted inquiries and investigations that have led to accountability but also exoneration of troops of unfounded allegations of wrongdoing.

E. Conclusion

47. The HRA has largely fulfilled Sir Nicholas Lyell's expectations as well as those of his Conservative colleagues and opposite numbers in the Government that promoted the legislation: it has complemented our unwritten constitution, rather than subsiding anything and, on a daily basis, does much to ensure human rights cases are dealt with *"more swiftly, easily and effectively".* Shifting responsibility for remedies to Parliament, for example by repealing section 3, and other needless renovation attempts will undermine that, create serious risks of rights breaches before any remedial action is taken and promote legal uncertainty.

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[1] https://www.echr.coe.int/Documents/Stats_analysis_2020_ENG.pdf
[2] *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36 at [32] and [36].
[3] *Burden v UK* Application No 13378/05, Judgment, 12 December 2006